No. 06-

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United State Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government may enforce against the general public a law that it refuses to disclose publicly.

RULE 14.1(B) STATEMENT

Petitioner, who was Plaintiff below, is John Gilmore.

Respondents, who were Defendants below, are Alberto R. Gonzales, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration; Kip Hawley, in his official capacity as Director of the Transportation Security Administration; and Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security. NOTE – WE NEED TO CONFIRM CURRENT STATUS OF DEFENDANTS AND UPDATE AS NECESSARY BEFORE WE FILE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

[Click Here and Type]

Constitutional Provisions:

[Click Here and Type]

Statutes:

[Click Here and Type]

Other Authority:

[Click Here and Type]

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Gilmore respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Gilmore v. Gonzales, et al.*, No. 04-15736.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 435 F.3d 1125. App. __-__. The relevant order of the District Court, App. __, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on January 26, 2006. App. 1a. A timely petition for rehearing was denied on April 5, 2006. App. __. Justice Kennedy extended the time for filing a petition for a writ of certiorari until August 4, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The relevant statutes and regulatory provisions—49 U.S.C. 114, 40119, 44902 and 49 C.F.R. 1520.5, 1520.303(a) and 1520.305—are reproduced at App. __-__.

STATEMENT OF THE CASE

This case challenges the government's enactment of a law affecting tens of millions of people every year without publishing that law. The Court of Appeals for the Ninth Circuit summarily rejected Gilmore's claim that the government may not enforce any law it refuses to disclose

publicly. App. __ n.8. Yet, Gilmore's claim strikes at the heart of the democratic principles on which this country was founded, including the basic principle that certain government information must be publicly available because people cannot understand or challenge that which they cannot see. Certainly, some government information must be secret. But no "information" is at issue here. This case involves a generally-applicable law. This country's courts *never* have permitted the government to enforce against the general public a law the government refused to disclose publicly, and this Court should not permit it here, even in the name of national security. This Court may not have another opportunity to review this tremendously important issue, given the secrecy of this law and the inherent difficulty in challenging it. Review of this case therefore is necessary to ensure that TSA and other agencies are not permitted to misuse the authority given them by Congress, and hide laws of general applicability under the guise of confidential information.

A. Factual Background

On July 4, 2002, Gilmore attempted to fly from Oakland, California to Baltimore. App. __. Gilmore initially attempted to use a ticket he already had purchased from Southwest Airlines ("Southwest"). When he refused to produce identification in response to a request from a Southwest employee, he was advised that he could travel, notwithstanding his refusal to produce identification, if he agreed to submit to an extensive search at the screening area. App. __. This Southwest employee was uncertain regarding the source of this rule, but posited that it was an "FAA security requirement." App. __. However, at the gate, a Southwest employee told him that he could not fly without producing identification. App. __. Another Southwest employee advised him that the rule requiring identification was a government law, but a third Southwest employee stated instead that it was an airline policy.

App. __. Gilmore refused to produce his identification, and ultimately left the airport. App. __.

Gilmore tried again to fly that day. He went to San Francisco International Airport and attempted to purchase from United Airlines ("United") a ticket to Washington, D.C. App. __. When Gilmore again refused to present identification, a number of United employees told him that he would not be permitted to fly, and one United employee told him that the identification requirement could not be circumvented. App. __. Gilmore asked for a copy of the law or regulation requiring him to produce identification, but he was refused. None of the United employees would identify the source of the identification requirement. App. __. Ultimately, a Ground Security Chief advised Gilmore that he could fly without presenting identification, but only if he agreed to be a "selectee" and undergo a more intensive search than the normal passenger search. App. __. Gilmore refused, and did not make his scheduled trip to Washington, D.C. App. __.

B. Procedural History

Gilmore filed his Complaint for Injunctive and Declaratory Relief on July 18, 2002.[1] The government responded with a Motion to Dismiss claiming, among other things, that the district court had no jurisdiction to hear Gilmore's claims. The government contended that 49 U.S.C. 46110(a) vested

[1] It alleged seven causes of action, asserting that the government's promulgation and enforcement of the law requiring identification in order to fly commercially violated his due process rights, his Fourth Amendment rights, and his rights to travel, assemble anonymously, and petition the government. It also asserted claims under the Equal Protection clause of the Fifth Amendment and the Freedom of Information Act ("FOIA"). Gilmore sought two declarations, including a declaration "that the Government Defendants have no power to enforce regulations that have not been published, pursuant to the first and Fifth Amendment and 5 U.S.C. 552a," and injunctions to enforce this relief.

jurisdiction exclusively in the Courts of Appeals to resolve any issues related to the TSA order at issue here.[2] The government also challenged Gilmore's claims on the merits, arguing that issuance of this order, and the government's refusal to publish it, were authorized by Congress and not constitutionally infirm.

The district court granted the Motion to Dismiss. Among other things, the court accepted the government's challenge to its jurisdiction, concluding that "[b]ecause this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security, this Court does not have jurisdiction to hear the challenge." App. __ (5:25-26). The court also noted, however, that the government had not provided a copy of "this unpublished statute or regulation, if it exists," and that consequently "the Court is unable to conduct any meaningful inquiry as to the merits of plaintiff's vagueness argument." *Id.* The court also rejected Gilmore's claims on the merits. App. __-__.

Gilmore appealed to the U.S. Court of Appeals for the Ninth Circuit. On January 26, 2006, the Ninth Circuit affirmed the district court. Although the Court concluded that 49 U.S.C. 46110(a) vests jurisdiction over Gilmore's claims in the Courts of Appeals, it invoked 28 U.S.C. 1631 to transfer the case, and treated Gilmore's Complaint as a petition filed directly in that court. App. __. The Court rejected each of Gilmore's claims on the merits. App. __, __, __, __, __. In a two-line footnote, the court dispatched Gilmore's challenge to the secrecy of the TSA order:

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[2] Section 46110(a) provides, in relevant part: "[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under . . . subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."

> We also determine that the Security Directive constitutes SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i), and therefore did not have to be disclosed to Gilmore.

App. __ n.8.

REASONS FOR GRANTING THE WRIT

This Court should grant review and make clear that the government cannot enforce a secret law against the general public. The government contends that the law requiring identification in order to fly commercially constitutes "sensitive security information," which the government may withhold from the public. But agencies are not entitled to embed a law of general applicability in material that might otherwise be confidential, and declare that the law also is confidential. This manipulation of the authority afforded by Congress should not be permitted under any circumstances. This law controls the conduct of more than a million Americans every week, compelling them to comply with its terms or be denied the right to fly commercially. Given the breadth of its application, it is a tremendously important law. The Ninth Circuit's summary disposition of this issue, and its failure to recognize the fundamental difference between generally applicable laws—which must be published—and "sensitive security information"—which may be withheld from the public—should not be permitted to stand. Moreover, because it is secret, the regulation is inherently difficult to challenge, and this Court may not have another opportunity to review this issue, and evaluate whether the TSA is entitled to enforce a regulation that it refuses to disclose publicly. This Court therefore should grant review to make clear that even in times of heightened security, secret law has no place in our constitutional system of government.

REVIEW OF THIS CASE IS VITAL TO ESTABLISH THAT CONGRESS DID NOT GIVE THE TSA—OR ANY OTHER AGENCY—AUTHORITY TO ENFORCE SECRET LAWS

This case presents a single issue which, given this country's strong tradition condemning "secret law," should readily have been resolved in Gilmore's favor: Can the TSA enforce a regulation against the general public if its terms are classified as "sensitive security information" and hence not available to the public?[3] As discussed below, proper interpretation of the relevant statutes and the due process clause both support Gilmore's claim that the answer is "no." The government may not enforce any law that it refuses to publicly disclose.

A. Congress Did Not Authorize the TSA to Classify this Regulation as "Sensitive Security Information" and Thereby Exempt it from Public Disclosure.

1. Congress Authorized Secrecy in "Information," Not Laws.

In this case, it is undisputed that there is no published statute, regulation, rule, or order that requires a traveler to present government-issued identification before entering the gate area of an airport or boarding a plane. In fact, not until this case reached the Ninth Circuit was the government willing to admit that such a rule even existed, even though the

[3] This case is not about the disclosure of national security information, the criteria the government uses to select individuals for its no-fly or selectee lists, the information the TSA has developed in its attempts to protect air carriers, or the internal deliberations of the TSA. Rather, Gilmore simply asks this Court to ensure that the TSA—and other agencies—are prohibited from enforcing laws against the general public while simultaneously keeping those laws secret.

existence of such a rule and its contents is not classified information. See 49 C.F.R. 1520.3(a) (SSI is not classified information).[4] Yet, no statute or regulation allows the government to enforce *laws* that it refuses to disclose publicly.

a. Relevant Statutes

Three statutes are the purported source of TSA's claimed right to enforce against the public the unpublished and secret rule requiring identification in order to travel by air.

1. Congress enacted the Homeland Security Act of 2002, House of Representatives Bill No. 5005 ("H.R. 5005") in response to the terrorist attacks of September 11, 2001. 49 U.S.C. 114(s) was added as an amendment to the bill when it was passed by the House, less than a week before it passed the Senate; H.R. 5005 was signed into law by the President on November 25, 2002. Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 1601(b) (as passed by House of Representatives on Nov. 19, 2002). Given the political climate and the horrific events to which this bill responded, Congress apparently felt tremendous pressure to pass the legislation quickly.[5] Section 114(s)—on which the government primarily relies here—contains language virtually identical to 49 U.S.C.

[4] The government "refuse[d] to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says" when it appeared in the district court. App. ___ [dct ord]. See also Tr. of Oral Arg. in Ninth Circuit, at __ (Dec. 8, 2005), *available at* ___ (government attorney admitted that it would not "confirm or deny . . . the existence" of such order to the district court).

[5] For example, Senator Dorgan stated, "Frankly, the way this legislation has been created, it was not under normal circumstances, where you have committee exploration in some detail and some depth of all of these provisions. What has happened is at the eleventh hour a piece of legislation is written and it is placed on desks. It has a rubber band around it. It is four-hundred-and-some pages long and I know of very few Members of the Senate who would have read all of it at this point." 148 Cong. Rec. 148 at S11172 (2002).

40119, discussed below (enacted in 1974). It permits the Under Secretary of Transportation for Security—now known as the Administrator of the TSA, 49 C.F.R. 1500.3—to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if . . . disclosing the information would . . . be detrimental to the security of transportation." The legislative history contains no discussion of Congress' intent in passing section 114(s), or its understanding of the impact this section might have. Nothing in the legislative history for section 114 suggests or implies that Congress intended to grant the TSA the authority to withhold generally-applicable laws from the public.

2. Congress enacted the Air Transportation Security Act in 1974 in response to a string of hijackings in the early 1970s. The Act is divided into two Titles: Title I, the "Antihijacking Act of 1974," and Title II, the "Air Transportation Act of 1974." Pub. L. No. 93-366, 88 Stat. 409 (codified as amended in scattered sections of 49 U.S.C.). 49 U.S.C. 40119(b) and 44902(b)—on which the government relies here—are in Title II, which addresses "prevention, deterrence and punishment for criminal offenses against the air transportation system." Howard W. Cannon, Comm. on Commerce, Amending the Federal Aviation Act of 1958 to Provide a More Effective Program to Prevent Air Piracy, S. Rep. No. 93-13, at 2 (1973).

Section 40119(b), among other things, permits the Secretary of Transportation to "conduct research (including behavioral research)," to design a system to protect against acts of terrorism. 49 U.S.C. 40119(a). It also authorizes the Secretary of Transportation to "prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety." *Id.* § 40119(b). The legislative history for the Air Transportation Security Act contains little discussion of this section. It was mentioned in a

single report, Report No. 93-885 of the Committee for Interstate Commerce to Accompany H.R. 3858, March 7, 1974. There, the Committee opined that the biggest impediment to resolving issues related to hijackings was the lack of cooperation among agencies, airline carriers and other entities in addressing the problems. According to this Report, the statute was designed to encourage "improved coordination of efforts to combat hijacking." *Id.* The statute was intended to protect trade secrets and confidential business information. Thus, here too, nothing about this statute suggests that the "information" Congress permitted to be confidential encompasses rules or laws of general applicability.

3. Congress enacted the Federal Aviation Act in 1958, in response to the relatively new phenomenon of airline hijackings. Section 44902, on which the government relies here, was adopted in 1961, when the Act was amended by Senate Bill No. 2268 ("S.B. 2268"). Section 44902, among other things, permits air carriers to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." *Id.* § 44902(b). During debates regarding S.B. 2268, Representative Monroney, Chair of the Committee on Commerce, stated that the "primary purpose" of the bill was to "discourage the hijacking of aircraft and the interference with flight crews in the performance of their duties by imposing severe criminal penalties for such acts." 107 CONG. REC. 15241 (August 9, 1961).

b. Relevant Regulations

Pursuant to the authority given it by 49 U.S.C. 114, the TSA issued regulations governing "sensitive security information" ("SSI"). Three regulations are primarily relevant here, as the source of the TSA's claimed right to refuse to disclose SSI.

1. 49 C.F.R. 1520.5 provides, in part, that SSI is "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would . . . (3) Be detrimental to the security of transportation." *Id.* § 1520.5(a). Section 1520.5 further defines "[i]nformation constituting SSI" as including "[a]ny Security Directive or order (i) issued by TSA under 49 C.F.R. 1542.303, 1544.305, or other authority." *Id.* § 1520.5(b)(2)(i).[6]

2. 49 C.F.R. 1542.303(a) and 1544.305 permit TSA to "issue[] a Security Directive setting forth mandatory measures" "[w]hen TSA determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation." Section 1542.303 authorizes issuance of security directives to airport operators, and section 1544.305 authorizes issuance of security directives to aircraft operators.[7]

c. These Statutes and Regulations Permit Secret "Information," Not Laws

Congress gave TSA the authority to pass regulations and suppress only "*information obtained or developed in the conduct of security or research and development activities*." 49 U.S.C. 114(s)(1)(C) (emphasis added). A law, regulation, or order is not "information," nor do we speak of it as being "obtained or developed in . . . security or research and development activities." Rather, a law, regulation, or order is enacted, passed, promulgated, or issued. And "information" does not, by any definition, encompass a directive requiring the

[6] In July 2002, when Gilmore attempted to travel, 49 CFR 1520.7 contained substantially the same definitions. App. __-__. The CFR was amended, and Section 1520.7 became Section 1520.5, in 2004. 69 F.R. 28066 (2004).

[7] In its abbreviated holding on this issue, the Ninth Circuit concluded that the TSA "order" at issue here qualified as SSI under this section of the C.F.R. App. __ n.8.

public to act in a certain way. It is "the communication or reception of knowledge or intelligence"; "knowledge obtained from investigation, study, or instruction"; "intelligence, news"; and, "facts, data." Merriam-Webster Online Dictionary, available at http://www.m-w.com/dictionary/information (last visited _____). Neither the language nor the legislative history of these statutes suggests that they confer on TSA the right to enact and enforce secret laws.

The CFR, and the history of this regulation, also reflect an interpretation of "information" that would preclude defining generally-applicable laws as SSI. For example, the "Supplementary Information" inviting comments about 49 CFR 1520 (which defines SSI), described SSI protections as encompassing "[i]nformation that could help someone determine how to defeat security systems . . . include[ing] information about security programs, vulnerability assessments, technical specifications of certain screening equipment and objects used to test screening equipment, and other information." 14 CFR 191, "Protection of Sensitive Security Information." The law of general applicability at issue here—purportedly requiring passengers to produce identification before they may fly commercially—simply does not fall into this definition of sensitive information, the protection of which is essential for safe air travel. Thus, in its rulemaking—even if not in its actual practice—the TSA also has recognized the limited scope of the "information" it may classify as SSI.[8]

[8] For this reason, the deference typically afforded agency actions under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not apply here. The government's interpretation of "information" as encompassing a law of general applicability is not a permissible construction of 49 U.S.C. 114 or 40119.

2. The Federal Register Act, FOIA and the Code of Federal Regulations Mandate that All Generally-Applicable Laws Be Published.

The growth of the administrative state gave rise to thousands of new "laws" promulgated by unelected officials that people were nonetheless bound to follow. See Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97, 103-104 (1988). To temper the risk inherent in these unpublished laws, Congress adopted the Federal Register Act, 49 Stat. 500, in 1935 (currently codified at 44 U.S.C. 1501-1510). The Federal Register Act mandates that certain presidential proclamations, orders, and similar documents be published in the newly-created Federal Register. As relevant here, it provided:

> (a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; . . . .

Id. at 501 Sec. 5; accord *id.* at 503 Sec. 11 (requiring publication of all documents that "have general applicability and legal effect"). Congress followed quickly on the heels of this Statute to amend the Federal Register Act and add Section 11, creating the *Code of Federal Regulations*, which codified all existing and future regulations. Relyea, *The Coming of Secret Law*, at 105 (citing 50 Stat. 304). The Federal Register Act prohibits enforcement of any document which should have been published but was not, absent actual notice of the

document's terms. 49 Stat. at 502 Sec. 7.[9] The current statute contains virtually identical terms, having the same import although adjusted for the passage of time. 44 U.S.C. 1505(a) (current version of Sec. 5); 44 U.S.C. 1510 (current version of Sec. 11).

Years later, when existing statutes were not enough to insure public access to agency materials, Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, a "broadly conceived" statute, *EPA* v. *Mink*, 410 U.S. 73, 80 (1973), which embodied "'a general philosophy of full agency disclosure,'" *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 89-913, at 3 (1965)). FOIA compels agencies to publish rules, opinions, orders, records and proceedings in the Federal Register. 5. U.S.C. 552(a)(1)(D), 552(a)(2)(A). In particular, FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). Thus, FOIA requires publication of "substantive rules of general applicability adopted as authorized by law, and

[9] No "actual notice" has been given here because the government has never published the document that requires air travelers to produce identification in order to travel. Compare *Appalachian Power Co.* v. *E.P.A.*, 566 F.2d 451, 457 (4th Cir. 1977) (petitioners did not have "actual notice" of EPA Development Document, notwithstanding that it was available to the public, because petitioners had not received a copy; "[a]vailability of a document is not the equivalent of actual notice of which parts of it are expected to be complied with by those affected"), with *United States* v. *Aarons*, 310 F.2d 341, 343 (2d Cir. 1962) (defendants had actual notice because a copy of the order at issue was published in the "Local Notice to Mariners" and sent via certified mail to representative of defendants). Cf. *Jones* v. *Flowers*, 547 U.S. __, 126 S.Ct. 1708, 1717-1718 (2006) (although someone may have general knowledge of applicable law, government is not excused from giving notice in manner mandated by due process). In any event, Gilmore had "notice" of multiple versions of the TSA order from different sources; he had and still has no way to discern which of those versions accurately stated the terms of the TSA order.

statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D). See also *id.* § 552(2) (requiring publication of "final opinions," statements of policy and "administrative staff manuals and instructions to staff that affect a member of the public," among other things).[10]

Congress did not specify what it intended by requiring publication of documents having "general applicability" (although Gilmore contends that the phrase is readily understood and applies here under its plain language). The Code of Federal Regulations answers this question:

> Document having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public . . . .

1 C.F.R. 1.1.

With the Federal Register Act and FOIA, Congress acted to prevent the promulgation of secret laws. It drew a simple but significant line between agency actions that are intended to affect the general public, and those that only operate internally—the former must be published, while the latter may be exempt. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975) (discussing cases distinguishing "between

[10] Gilmore's Complaint asserted a claim under FOIA. However, Gilmore did not pursue that claim because 49 U.S.C. 114(s) and 40119(b) state that information encompassed by those provisions is exempt from FOIA's disclosure requirements. Gilmore is not directly relying on FOIA here; rather, he asserts that FOIA, and its rule that all laws of general applicability must be publicly disclosed, should inform this Court's decision in interpretating the statutes and regulations governing SSI.

predecisional communications, which are privileged, . . . and communications made after the decision and designed to explain it, which are not") (citations, footnotes omitted); *Sterling Drug Inc.* v. *F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971) ("[t]hese are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public"). As this Court explained in *Sears, Roebuck*, FOIA "represents a strong congressional aversion to 'secret [agency] law, . . .; and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" 421 U.S. at 153 (citations omitted; insertion in original). Indeed:

> [FOIA's] indexing and reading-room rules indicate that the primary objective is the elimination of "secret law." Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct.

U.S. Dep't of Justice, 489 U.S. at 772 n.20 (citation omitted); accord *Tax Analysts* v. *I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("[a] strong theme of our [deliberative process] opinions has been that an agency will not be permitted to develop a body of 'secret law'") (citations, quotation marks omitted); *NTEU* v. *U.S. Customs Srvc.*, 802 F.2d 525 (D.C. Cir. 1986) (FOIA "[e]xemption (b)(2) emphatically does not authorize the promulgation of 'secret law' governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete").

Thus, courts generally have agreed that all generally applicable laws—regardless of how they are characterized—must be published. *E.g.*, *Aarons*, 310 F.2d at 345-346 (order closing portion of harbor while submarine launched "prescribed 'a course of conduct' for 'the general public' or

'the persons of a locality'" and therefore "publication was required"); *Cox v. Dep't of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) (portions of agency manual "clarifying substantive or procedural law must be disclosed" under FOIA); *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (training manual describing agency's implementation of statute must be disclosed under FOIA).

Despite this uniform authority, the government urges this Court to permit the government to hide a generally-applicable law in the midst of a "security directive." But Congress did not *sub silentio* supersede the Federal Register Act and FOIA when it enacted 49 U.S.C. 114 and 40119. It permitted agencies to establish regulations for the secrecy of "information," but nothing more. There can be no question that the TSA document at issue here—whatever it is called—is generally applicable to the public. It prescribes a course of conduct for and imposes an obligation on all airline travelers, compelling them to produce identification in order to travel. This TSA document should have been published. The Ninth Circuit should have ordered that those portions of the TSA document that constitute "secret law" must be publicly disclosed. Cf. *Cuneo* v. *Schlesinger*, 484 F.2d 1086, 1090-1091 (D.C. Cir. 1973) (ordering disclosure of portions of manual that "either create or determine the extent of the substantive rights and liabilities of a person affected by those portions").

3. The Doctrine of Constitutional Avoidance Justifies an Interpretation of Section 114(s) Which Establishes that it Does Not Apply to Generally-Applicable Laws.

Interpretation of 49 U.S.C. 114 and 40119 to preclude classifying generally applicable laws as SSI also is mandated by the doctrine of constitutional avoidance. A "cardinal principle of statutory interpretation," is that the "Court will first ascertain whether a construction of the statute is fairly

possible" to avoid constitutional question. *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) (quotation marks omitted). Accord *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In order to apply this doctrine, this Court need not decide whether construing 49 U.S.C. 114(s)(1)(C) to permit TSA to create secret law would, in fact, render the statute unconstitutional (although, Gilmore submits that it would). Rather, such interpretation only must "raise[] a serious doubt as to [the statute's] constitutionality." *Zadvydas*, 533 U.S. at 689. In such instances, if a reasonable alternative interpretation of the statute exists, the Court must adopt it. To avoid the serious constitutional questions addressed below, the Court should interpret section 114(s)(1)(C)—as Gilmore contends Congress intended it—to reject the government's attempt to enact and enforce "secret law."

B. The Due Process Clause Forbids the Enforcement of Secret Law.

There is no statement that better embodies the system of government established by the Founders than that it is a government of laws, not of men. Indeed, "a government of laws, and not of men" is the "very essence of civil liberty." *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803). That "very essence" cannot endure, however, in a society in which the laws are hidden from the people.

The enforcement of a secret law against an individual—particularly when it touches on fundamental rights—is thus repugnant to our legal tradition. As one noted commentator has succinctly explained, a "fundamental principle is that secret law is an abomination." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 779 (1967). Indeed, the revulsion to secret laws runs so deep in our legal tradition that Gilmore knows of no instance in the history of

the Republic in which a court has upheld the enforcement of a secret law against an individual—except this case.

1. This Country Has an Inviolable Tradition of Publishing All Laws that Affect the General Public.

a. The Tradition of Publishing Generally Applicable Laws Was Established in the Common Law Hundreds of Years Before this Country's Founding, and It Was Mandated by the First Congress.

a. Years before the Founding Era, it already was well-established that secret law was inimical to a free society. Blackstone emphasized that laws must be "*prescribed*" because "a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be *properly a law*." Blackstone, *Of the Nature of Laws in General*, in COMMENTARIES (second emphasis added). Rather, "[i]t is requisite that this resolution be notified to the people who are to obey it . . . in the most public and perspicuous manner." *Ibid.* To be avoided at all costs, warned Blackstone, was the practice of the Roman emperor Caligula, who "wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people." *Ibid.* To Blackstone, a secret law was no law at all.

The development of English law, and England's consistent early practice of committing laws to writing, available to the public, establish that this tradition has deep, well-established roots in the common law. Indeed, the first significant work known, the "English Laws" comprised a small series of books apparently prepared nearly nine hundred years ago, in 1115; the "Laws of Henry I" followed in approximately 1118. Jenks, A SHORT HISTORY OF ENGLISH LAW 18 (1922). Jenks traces the ancient development of law in England, and the many works published to catalogue those laws. *Id.* at 18-25.

Included among these ancient laws are the Assises—formal regulations—"made by the King for the direction of his officials." *Id.* at 23. Jenks explains that although "in theory, they did not profess to affect the conduct of the ordinary citizen," in practice they had a "substantial effect in that direction" "because the royal officials, in their dealings with private persons, acted upon them, and took good care that they should control the course of business." *Id.* Of these Assises, dating between 1166 and 1184, Jenks declares that "it is hardly possible to exaggerate the importance for this period." *Id.* at 22-23.

Jenks describes as "[t]he second great triumph" of the early English development of law "the establishment of a new set of royal tribunals, with a definite legal procedure"—the writ. *Id.* at 39. Through the Assises, England had begun to catalogue substantive law, applicable to the public. *Id.* at 40-41. But this was not enough. Until the establishment of the writ procedure, "the definition of offences had been left to the 'doomsmen' of the court, in whose memory was supposed to lie a store of immemorial wisdom. There were no written records; nothing to which the aggrieved party could turn, to see whether the court would give him a remedy." *Id.* at 44. Jenks explains that with a writ, however, "[n]ow, he knew that if he could get his complaint described in a royal message, he could hardly be met by the defence that such complaint 'disclosed no cause of action.'" *Id.* Jenks declared that "it was a great step gained to have it declared, or at least implied, that, if the facts were as alleged, the plaintiff had a good ground of complaint; and this result was achieved when it was clear that any one could have, as of course, a writ of Debt, or Trespass, or the like." *Id.* at 45. This procedure was well-entrenched "before the end of the twelfth century." *Id.*

Ultimately, the writs "'original,' *i.e.* writs destined to commence legal proceedings," "were collected into a Register, of which more or less correct copies were in circulation,"

which "really became a dictionary of the Common Law." *Id.* In that same time period—approximately 1215—the *Magna Carta*, the historic compilation of English law, was published. See *Treasures in Full—Magna Carta*, available at http://www.bl.uk/treasures/magnacarta/translation.html (last visited ___). Thus, by 1250, with the adoption of the *Magna Carta* and the making and circulation of the writs, publication of the English common law had begun. *Id.* Over the next hundred years, these laws were codified in statutes designed to structure life in the middle ages. Jenks, A SHORT HISTORY OF ENGLISH LAW 130 (statute enacted in 1330 to govern estate law); 145 (clause in the statute of 1315 governs defamation law); 149 ("the great Statute of Treasons" was codified in 1352). Finally, during the hundred years before the United States was founded, written law flourished in England, with statutes, judicial decisions and executive orders being published and updated regularly. *Id.* at 186-189.

b. As shown, for more than five hundred years *before* this country was founded, the firmly-grounded tradition of the English common law was to publish the laws that affected the general public. The reason is simple. As Jeremy Bentham recognized, secrecy undermines the very purpose of a society's laws: "That a law may be obeyed, it is necessary that it should be known." Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 157 (Bowring ed. 1843). Bentham "considered that every practicable means should be adopted for bringing before the eyes of the citizen the laws he is called on to obey." Burton, *Introduction to the Study of Bentham's Works*, in 1 WORKS OF JEREMY BENTHAM 58. "If your laws of procedure favour the impunity of crimes; if they afford means of eluding justice, of evading taxes, of cheating creditors, it is well that they remain unknown. But what other system of legislation besides this will gain by being unknown?" *Id.* at 158.

To ensure that the laws were published and available to citizens, the first Congress ordered the Secretary of State to "'cause every [enacted] law, order, resolution, and vote to be published in at least three of the public newspapers printed within the United States.'" Relyea, *The Coming of Secret Law*, at 98 (quoting 1 Stat. 68). Ten years later, Congress modified that mandate and requested that the Secretary of State publish its enactments in "at least . . . one of the public newspapers printed within each state" or more, if necessary to insure that the public was informed. *Id.* at 99. Similarly, in 1795, Congress authorized the Secretary to State to arrange for the publication of 5,000 sets of statutes passed since 1789, and the same number for each successive sitting of Congress. *Ibid.* "All except 500 of these sets were to be distributed to the states and territories 'to be deposited in such fixed and convenient place in each county'" that would be the "'most conducive to the general information of the people.'" *Ibid.* (quoting 1 Stat. 443). From the very beginning, then, Congress established official, routine publication and distribution of the laws.

b. This Country's Founders Believed that Secret Law Destroys the Basic Principles of Representative Government.

Beyond history and the practical necessity of a government telling its people what it expects of them, the Founders recognized that openness plays a vital role in our system of government. "Secrecy in government is fundamentally anti-democratic . . . ." *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring). Secret law not only transgresses basic norms of fairness, but it also is flatly inconsistent with the very form of government established by the Constitution. "The general availability of government information is the fundamental basis upon which popular sovereignty and the consent of the governed rest." Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO.

WASH. L. REV. 1, 7 (1957). Governmental openness is key to the preservation of democratic government because "[w]ithout publicity, all other checks [on government] are insufficient. . . ." 1 Bentham, *Rationale of Judicial Evidence* 524 (1827). Openness and publicity "appeared to [Bentham] the strongest shield against temptations, the strongest incentive for maintaining responsibility." Kraus, *Democratic Community and Publicity*, in II NOMOS, COMMUNITY 248 (Friedrich ed. 1959) (citing Bentham, *Essay on Political Tactics in Political Assemblies*).

Thus, it is no surprise that the Founders viewed openness as an absolute requirement of the system of government they sought to establish. As James Madison recognized, echoing Bentham, "the right of freely examining public characters and measures, and of free communication thereon, is *the only effective guardian of every other right*." 6 WRITINGS OF JAMES MADISON 398 (1906) (emphasis added). Accord FULLER, THE MORALITY OF LAW 149 (1964) ("from the first," our Founders "assumed as a matter of course that laws ought to be published"); Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 139-40 (2006) ("open government is among the basic principles on which this nation was founded"); Relyea, *The Coming of Secret Law*, at 97 ("[p]ublication of the law . . . constitutes a foundation stone of the self-government edifice").

Ultimately, secrecy stands in the way of what the Founders considered to be the most important check on governmental power: a knowledgeable citizenry. An "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Perhaps "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." *New York*

Times Co. v. *United States*, 403 U.S. 713, 724 (1971) (Stewart, J., concurring). In a system in which "information is kept secret, public deliberation cannot occur [and] the risks of self-interested and factional tyranny increase dramatically." Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894 (1986). See also Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WISC. L. REV. 385, 398 (1984) ("[p]ublic laws . . . restrain official arbitrariness that otherwise might interfere with individual decisionmaking"). "An unlimited power to withhold information could be used in a way that would destroy government by consent, the separation of powers, checks and balances, and the creative and disciplinary role of free inquiry." Parks, *Open Government Principle*, at 10. Secret law thus is contrary to the very underpinning of our constitutional form of government.[11]

2. By Ensuring that the Government Does Not Act Arbitrarily, the Due Process Clause Forbids the Enforcement of Secret Law.

At bottom, "due process" is "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurato* v. *California*, 110 U.S. 516, 521 (1884). It often derives its content from historical practice: "The

[11] The uniform authority forbidding secret lawmaking by agencies discussed above (Section A.2., *supra*), flows naturally—indeed, inevitably—from our historic condemnation of secret law. Agencies, too, affect American lives in countless ways. As Justice Breyer recently explained in his work ACTIVE LIBERTY (2005), the modern administrative state requires us to "reconcile democratic control of government with the technical nature of modern life." *Id.* at 102. A balance must be achieved between democracy and administrative efficiency. *Id.* "If we delegate too much decision-making authority to experts, administration and democracy conflict." *Id.* At a minimum, however, this balance mandates that agencies publicly disclose all laws of general applicability, to ensure that the public has this key information, necessary to evaluating the agency's actions and its reach.

safeguards of 'due process of law' . . . summarize the history of freedom of English-speaking peoples running back to the Magna Carta and reflected in the constitutional development of our people." *Malinski* v. *New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring). Thus, a governmental practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," violates due process. *Snyder* v. *Massachusetts*, 291 U.S. 97, 104 (1934). See also *Hurato*, 110 U.S. at 535 (due process identified with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"); *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937) (due process violated if "neither liberty nor justice would exist" should practice continue). As established above, open and published laws are a basic building block of our constitutional form of government, "rooted in the traditions and conscience of our people." *Snyder*, 291 U.S. at 104.

Due process also embodies norms of fairness. Accordingly, "[e]ngrained in our concept of due process is the requirement of notice" as to what the law is. *Lambert* v. *California*, 355 U.S. 225, 228 (1957). We expect all citizens to conform their behavior to the law's dictates, but "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him . . . ." Fuller, MORALITY OF LAW, at 39. "The internal morality of the law demands that there be rules [and] that they be made known . . . ." *Id.* at 157.

Thus, implicit in the many decisions from this Court and courts throughout this nation prohibiting the enforcement of vague laws is the fundamental principle that the public is entitled to know the terms of the laws being enforced against it. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *City of Jacksonville*, 405 U.S. 162 (1972) (citing *Lanzetta* v. *New*

Jersey, 306 U.S. 451, 453 (1939)). Thus, as this Court has explained, "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999). Indeed, as this Court has explained, the enforcement of laws which do not adequately convey their terms "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'" *Screws v. United States*, 325 U.S. 91, 96 (1945) (citation omitted).

These same principles, requiring notice to the public before laws can be enforced, apply with greater force to secret laws. This Court has insisted, throughout its history, on the promulgation of laws that sufficiently and specifically define the conduct mandated or prohibited by the government. Notice and vagueness principles forbid the enforcement of laws that do not meet this standard. Secret law should receive no better treatment. If the government is required to adequately describe the conduct it demands of its citizens, it also should be required to disclose that description to the public.

3. This Court's Recognition that under the First Amendment Trials Presumptively Are Open Should Inform the Court's Interpretation of Gilmore's Due Process Claim Here.

Consistent with the requirement that laws themselves must be published is the long-standing practice that trials be open to the public, which was documented by this Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 n.9 (1980) ("[t]he principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials") (quotation marks omitted). As one early American source recognized, "justice may not be done in a corner nor in any covert manner." 1677 Concessions and Agreements of West New Jersey, in SOURCES OF OUR

LIBERTIES 188 (R. Perry ed. 1959). This openness provides the essential "check" on government that the founders intended.

As Justice Brennan explained in the analogous context presented in *Richmond Newspapers*, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." 448 U.S. at 587 (Brennan, J., concurring in the judgment) (emphasis in original; citations omitted). Moreover:

> Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open . . . but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 587-588 (citations, footnotes omitted; emphasis added). Put simply, the First Amendment cannot be read "in isolation" but instead must be seen "as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions." Breyer, ACTIVE LIBERTY 39.

This Court adopted Justice Brennan's reasoning in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), explaining that by protecting the free discussion of governmental affairs, "the First Amendment serves to ensure that the individual citizen can effectively participate in and

contribute to our republican system of self-government." "Thus"—as the Court explained—"to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-605.; accord Meiklejohn, *Free Speech and its Relation to Self-Government* 26 (1948) ("[j]ust so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed"). More recently, Justice Breyer explained that the First Amendment is best understood as "facilitat[ing] a conversation among ordinary citizens that will encourage their informed participation in the electoral process" and in this way helping "to maintain a form of government open to participation . . . by 'all the citizens, without exception.'" ACTIVE LIBERTY at 46-47 (footnote omitted).

These same principles should inform this Court's decision in evaluating the due process issues presented here. As this Court explained in *De Jonge v. Oregon*, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." 299 U.S. 353, 364 (1937) (citation omitted). The principles affirmed in *Richmond Newspapers* and its progeny underlie the due process clause, "[f]or the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *Id.* (citations omitted). Due process—along with other constitutional principles recognized in this Court's decisions—mandates that laws be public, so that citizens may

perform their vital role in this democracy and exercise oversight over those they have placed in positions of power.

4. The Public Is Entitled to Know the Actual Terms of this Law, Which Affects Tens of Millions of People Each Year.

These same due process principles also make clear that the government must be forthcoming with the public about the laws it is enforcing. Yet, for the past eight years, the TSA has held itself above the law, by misrepresenting the terms of the law to the public it serves. Although Gilmore has been refused access to the law at issue here, requiring airlines to screen passengers before they may board an aircraft, the record demonstrates that the government has not been honest about that law. Public statements about this law declare that identification must be produced in order to board an aircraft. The signs at every airport, which are described as "A Notice From the Federal Aviation Administration," declare: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." App. __ [Op. at 1143]. And as recently as March 2006, TSA explained on its website:

> If you have a paper ticket for a domestic flight, passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card). . . .
>
> For e-tickets, you will need to show your photo identification and e-ticket receipt to receive your boarding pass.

App. __ [App. A to Petition for Rehearing.] Similarly, the government has stated that "as part of its security rules, TSA

requires airlines to ask passengers for identification at check-in." *Protection of Sensitive Security Information*, 69 Fed. Reg. 28066, 28070-28071 (May 18, 2004).

Yet, the government's brief declares that passengers need not produce identification if they are willing to subject themselves to a more extensive search. App. __ [GOV'T BRIEF AT 16.]; see also *id.* at __ [33], __ [34], __ [35], __ [41], __ [42], __ [43], __ [44], __ [46] (referring repeatedly to TSA's purported "identification-or-search requirement"). Moreover—and significantly—the Court of Appeal relied heavily on these government claims in rejecting Gilmore's claims. App. __, __ [Op. at 1155-1156, 1158-1159 & n.12].

The government will claim that its secrecy—or obfuscation—about this law is insignificant and fully justified by the weighty interests underlying the program. Certainly, airline security is a weighty interest. But it cannot benefit the government to hide or misrepresent the text of a law being enforced against tens of millions of people each year. A law is best enforced if those who are subject to the law know its terms, and can modify their behavior accordingly. *Cox*, 576 F.2d at 1309 ("[f]ar from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law"). Nor can the government establish that administrative efficiency justifies its decision to lie to the public. The trifling inconvenience that may result if a few more people ask for a more extensive search in lieu of providing identification must be weighed against this nation's strong commitment to the rule of law. The government cannot be permitted to insist on a secret law, or to misrepresent the requirements of a law, simply because it believes its agents will be inconvenienced if it discloses the terms of the law.

5. The Due Process Clause Ensures that Citizens Have Access to the Laws Necessary to Protect Their Rights of Petition.

More concretely, with secret law, the government also throws an obstacle in the path of those, like Gilmore, who seek to vindicate their rights.[12] Here, for example, the government's refusal to publish its identification requirement deprives Gilmore and other would-be travelers of their ability to challenge the constitutionality of the rule, even though its application might abridge other established rights. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights"; "[s]ecrecy is not congenial to truth-seeking." *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 170, 171 (1951) (Frankfurter, J., concurring). Yet despite the weighty interests of Gilmore in vindicating his rights, throughout this litigation, the government has not explained—either because it will not or cannot—how it would endanger national security to identify the text of the law, regulation, rule, or order that requires passengers to show government-issued identification before boarding an airplane. This case is not about the information the government has developed in evaluating ways to protect airline travelers, nor is it about application of this law to any particular passenger(s). It is about a law that affects tens of millions of people throughout the nation each year. ADD CURRENT STATISTICS OF NUMBER OF TRAVELERS ANNUALLY. Because "[i]t is not enough to know that the men applying the standard are honorable and devoted men"—"[t]his is a government of *laws*, not of *men*"—courts must cast a skeptical eye on weakly-

[12] Gilmore believes that the government's identification requirement infringes his right to travel, see *United States v. Guest*, 383 U.S. 745, 758 (1966) ("freedom to travel through the United States has long been recognized as a basic right under the Constitution"), his Fourth Amendment right to be free from unreasonable searches and seizures, and his right to assemble and to petition the government.

supported claims of secrecy. *McGrath*, 341 U.S. at 177 (Douglas, J., concurring) (emphasis in original).

One commentator succinctly described the reason we must stand firm now, and not allow encroachments on our liberty that at the time might appear minor: "If we are not on guard to protect our freedoms in this novel situation, today's temporary sacrifices could become tomorrow's routine—and the next generation's way of life. If that happens, we have, perhaps unwittingly, changed the fundamental nature of our country." Cross, *Politics, Freedom and the Press*, THE COURIER-JOURNAL, 7/16/06. The government should not be permitted to deny access to *any* law of general applicability. It should not be permitted to deny access to the law at issue here, which affects tens of millions of airline travelers every year. For this additional reason, this Court should accept review of this case and ensure that all branches of the government are required to abide by this nation's time-honored commitment to the rule of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Respectfully submitted,

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