

1 JAMES P. HARRISON  
Alaska State Bar No. 9811059  
2 980 9th Street, 16<sup>th</sup> Floor  
3 Sacramento, CA 95814  
Telephone: (916) 492-9778  
4 Fax: (916) 492-8762

5 DAVID GREENE  
6 First Amendment Project  
1736 Franklin St., 9<sup>th</sup> Floor  
7 Oakland, CA 94612  
8 Telephone: (510) 208-7744

9 Co-Counsel for Plaintiffs

10 UNITED STATES DISTRICT COURT  
11 FOR THE DISTRICT OF ALASKA

12  
13 DR. JOHN DAVIS; SARAH )  
HUNTLEY; CHARLES BECKLEY, )  
14 WILLIAM BECK )

15 Plaintiffs,

16 v.

17 TRANSPORTATION SECURITY )  
ADMINISTRATION )

18  
19 and )

20 DEPARTMENT OF HOMELAND )  
SECURITY )

21 Defendants. )  
22 )  
23 )

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF FOR  
VIOLATION OF THE PRIVACY ACT  
5 U.S.C. §552a et seq.**

24 **INTRODUCTION**

25 1. Dr. John Davis, Sarah Huntley, Charles Beckley, and William Beck  
26 (collectively referred to as “Plaintiffs”) bring this action under the Privacy Act, 5 U.S.C.  
27 §552a et seq., to enjoin the Department of Homeland Security (“DHS”) and the  
28 Transportation Security Administration (“TSA”) (collectively referred to as  
29 “Defendants”) from continuing to improperly withhold agency records concerning

COMPLAINT

1 Plaintiffs. The accompanying Motion for a Preliminary Injunction asks the Court to  
2 enjoin Defendants from destroying the System of Records containing the requested  
3 records during the pendency of these proceedings.

4 2. TSA is testing a program called “Secure Flight” which has the stated  
5 mission of preventing terrorists from boarding domestic commercial flights by comparing  
6 Passenger Name Records (“PNRs”) provided by air carriers to “no fly” lists or other  
7 watchlists. TSA ordered all major domestic air carriers to provide all of their historic  
8 PNRs for the month of June, 2004, and noticed a System of Records as defined by the  
9 Privacy Act, to test Secure Flight. The notice provided a mechanism for individuals to  
10 request their personal information contained within this System of Records. Despite  
11 Defendants’ assurances to Congress that commercially provided data, outside of the  
12 PNRs, would not be included within this System of Records, data procured from  
13 commercial data aggregators has been included in this System of Records. This  
14 expansion of scope necessitated an amendment to the notice.

15 3. Plaintiffs believe that the creation of identity based national security  
16 systems unwisely weakens long standing individual rights and the protections against  
17 Governmental abuse of power these rights provide. Plaintiffs also question the  
18 effectiveness of such security systems.

19 4. Plaintiffs filed Privacy Act requests for their own records, including  
20 commercially provided data, contained in the System of Records. Plaintiffs Davis and  
21 Beckley repeatedly traveled domestically by air carrier throughout the United States  
22 during the month of June, 2004. Plaintiff Davis consistently experiences difficulty  
23 traveling by air because his name resembles one belonging to someone on the No-Fly or  
24 Watch lists. Plaintiffs Huntley and Beck are travel agents whose information may be  
25 contained within hundreds of PNRs relating to the tickets they booked for their clients  
26 during the month of June, 2004. Each Plaintiffs’ information is suspected of being  
27 contained in the commercially obtained data.

28 5. Defendant TSA responded to Plaintiffs’ requests indicating no documents  
29 responsive to the requests were located. On the same day as responding to Plaintiffs’

1 Privacy Act requests, Defendants amended their Privacy Act notice stating that  
2 commercially provided data had indeed been included in the System of Records and that  
3 records had been, and would be, destroyed.

4 6. Plaintiffs immediately appealed Defendant TSA's determination of their  
5 Privacy Act requests. In doing so, Plaintiffs emphatically objected to the destruction of  
6 records subject to ongoing Privacy Act requests, appeals, or litigation, and cited DHS's  
7 own regulations relating to the preservation of records.

8 7. A month after filing their appeals, Defendant TSA requested that Plaintiffs  
9 tell them which airlines they flew and when so that "an adequate search of the records"  
10 could be performed.

11 8. Despite their repeated requests, Plaintiffs have not been notified by  
12 Defendants that the destruction of these records has been halted.

13 9. Plaintiffs seek access to their agency records and for the cessation of the  
14 destruction of these records pending these proceedings.

#### 15 **JURISDICTION**

16 10. This Court has jurisdiction over this action and personal jurisdiction over  
17 this action pursuant to 5 U.S.C. §552a (g)(1), 5 U.S.C. §701 -706, and 28 U.S.C. §1331.

#### 18 **VENUE**

19 11. Venue lies in this district under 5 U.S.C. §552a (g)(5) and 28 U.S.C.  
20 §1391. Independently, venue is proper in the District Alaska in that Plaintiffs Beck,  
21 Huntley, and Davis reside in Alaska and Plaintiff Beckley principle place of business is  
22 Alaska and the events that bring rise to this action took place in that state as well.

#### 23 **PARTIES**

24 12. Plaintiff Dr. John Davis is a United States Citizen and the School  
25 Superintendent for the Bering Strait School District. He resides in Unalakleet, Alaska.  
26 Plaintiff Dr. John Davis is a frequent user of domestic commercial airline services. Air  
27 travel is the only viable form of transportation from where Plaintiff Dr. John Davis lives  
28 and works to other parts of the United States.

29 13. Plaintiff Sarah ("Sally") Huntley is a United States Citizen and co-owner

1 of Alaska Travel Source, a travel agency which makes for its clients domestic  
2 commercial flight reservations for destinations throughout the United States. Sally  
3 Huntley resides in Anchorage, Alaska. Alaska Travel Source is physically located in  
4 Anchorage, Alaska.

5 14. Plaintiff Charles Beckley is a United States Citizen, resides in Montana, is  
6 recently retired from the position of Coordinator of Technology for the Bering Strait  
7 School District, and presently provides contracture on sight technical support to remote  
8 school districts throughout the state of Alaska. Plaintiff Charles Beckley is a frequent  
9 user of domestic commercial airline services. Air travel is the only viable form of  
10 transportation from where Plaintiff Charles Beckley lives to where he works.

11 15. Plaintiff William Beck is a United States Citizen and co-owner of Alaska  
12 Travel Source, a travel agency which makes for its clients domestic commercial flight  
13 reservations for destinations throughout the United States. William Beck resides in  
14 Anchorage, Alaska. Alaska Travel Source is physically located in Anchorage, Alaska.

15 16. Defendants TSA and DHS are federal agencies within the meaning of 5  
16 U.S.C. §552a (a)(1). Defendant TSA is a sub-agency and part of DHS. Established in  
17 2001, TSA is the sub-agency responsible for conducting the Secure Flight program.

18 17. Defendant DHS is the agency ultimately responsible for the conduct of the  
19 TSA and, in turn, the Secure Flight program.

## 20 **FACTS**

### 21 **A. Aviation Security and the Government's Development of Passenger** 22 **Prescreening Programs**

23 18. Following the terrorist attacks of September 11, 2001, the President signed  
24 the Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71. The ATSA  
25 created the TSA within the Department of Transportation and, *inter alia*, transferred to  
26 TSA the duties and responsibilities set forth in Chapter 449 of Title 49, United States  
27 Code, relating to civil aviation security. Those duties and responsibilities include  
28 "screening of all passengers." 49 U.S.C. § 44901 (2004).

29 19. On November 25, 2002, the President signed the Homeland Security Act

1 (“HSA”), Pub. L. No. 107-296. The HSA created the Department of Homeland Security  
2 (“DHS”) and, *inter alia*, transferred the functions of TSA to DHS. 6 U.S.C. § 203  
3 (2004). As part of its responsibilities relating to the screening of airline passengers, TSA  
4 began developing in early 2002 the Computer Assisted Passenger Prescreening System  
5 (“CAPPS II”). In a press release titled “TSA’s CAPPS II Gives Equal Weight to Privacy,  
6 Security,” and issued on March 11, 2003, TSA described CAPPS II as “an enhanced  
7 system to confirm the identities of passengers and to identify foreign terrorists or persons  
8 with terrorist connections before they can board U.S. aircraft.” From the beginning of  
9 CAPPS II’s development, controversy surrounded the implications the system would  
10 have for personal privacy, and the issue received a great deal of attention from the news  
11 media and Congress.<sup>1</sup>

12 20. In June 2004, Plaintiffs brought an action in this Court (Case No. A04-  
13 0107 (JWS)) claiming their Due Process rights were violated by Defendants’ lack of  
14 notice and secretive implementation of CAPPS II. In July 2004, TSA abandoned its  
15 plans to implement CAPPS II, largely due to privacy concerns. *See Mimi Hall and*  
16

---

17 <sup>1</sup> *See, e.g.*, Byron Okada and Diane Smith, *Travelers Face New Screening at Airports*, Fort Worth Star  
18 Telegram, Dec. 1, 2002, at 1; Leslie Miller, *Feds Testing Air Passengers Check System*, Associated Press,  
19 Feb. 27, 2003; Joe Sharkey, *A Safer Sky or Welcome to Flight 1984?*, New York Times, March 11, 2003, at  
20 C9; Press Release, Office of Senator Ron Wyden, Wyden Wins Commerce Committee Approval to  
21 Require Oversight of CAPPS II Airline Passenger Screening System (Mar. 13, 2003); Editorial, *Safe Skies*,  
22 Washington Post, Mar. 21, 2003, at A12; Audrey Hudson, *Hill Assumes Oversight Role on Airline  
23 Screening*, Washington Times, May 10, 2003, at A02; Margie Boule, *“No-Fly List” Problems May  
24 Multiply With New System*, The Oregonian, June 19, 2003, at E01; Sara Kehaulani Goo, *TSA May Try to  
25 Force Airlines to Share Data*, Washington Post, Sept. 27, 2003, at A11; Jeffrey Leib, *Passengers Will Have  
26 to Give More Info*, Denver Post, Sept. 28, 2003, at A03; Alexandra Marks, *Passenger Tracking at Airports  
27 on Hold*, Christian Science Monitor, Oct. 21, 2003, at 02; Sean Holstege, *Air Security Grounded:  
28 Government Struggles to Launch Screening System*, Oakland Tribune (CA), Oct. 26, 2003; David  
29 Armstrong, *The Color of Safety*, San Francisco Chronicle, Nov. 6, 2003, at B1; Shaun Waterman, *U.S., EU  
Reach Passenger Data Deal*, United Press International, Dec. 16, 2003; Paul Marks, *Screening System Stirs  
Concerns of Misuse*, Hartford Courant, Jan. 17, 2004, at A1; Jon Hilkevitch, *GAO Report Critical of  
Profiling System for Airline Safety*, Chicago Tribune, Feb. 13, 2004, at C1; Press Release, Office of Senator  
Patrick Leahy, Reaction of Senator Leahy to GAO’s Report on Flaws in the CAPPS II Program (Feb. 13,  
2004); Anastasia Ustinova, *Airport Screen Plan Has Tough Day on the Hill*, Philadelphia Inquirer, Mar. 18,  
2004, at A10; Editorial, *Airport Screening System More Minus Than Plus*, Atlanta Journal Constitution,  
Mar. 25, 2004, at 14A; Press Release, Senate Governmental Affairs Committee, Senators Collins,  
Lieberman Ask TSA: What Other Airlines Have Been Contacted and Asked for Passenger Information?  
(Apr. 14, 2004); Ricardo Alonso-Zaldivar, *Facing Privacy Questions About Privacy Issues, the  
Government Will Try to Redesign a Computer System to Identify Suspected Terrorists*, Los Angeles Times,  
July 17, 2004, at A20; Editorial, *Protecting Privacy*, Baltimore Sun, July 18, 2004, at 4C.

1 Barbara DeLollis, *Plan to Collect Flier Data Canceled*, USA Today, July 15, 2004, at  
2 1A. Plaintiffs' case was dismissed as there was no longer a live controversy over CAPPS  
3 II.

4 21. Shortly after canceling CAPPS II, Defendants announced plans for a  
5 scaled back version of the program entitled "Secure Flight." On September 24, 2004,  
6 Defendant TSA printed in the Federal Register (Docket No. TSA-2004-19160) a notice  
7 of an emergency clearance request for reports, forms, and recordkeeping requirements for  
8 the Secure Flight Test Phase. A true and correct copy of the notice is attached as Exhibit

9 1. The notice was summarized by TSA as follows:

10 TSA has submitted a request for emergency processing of a new public  
11 information collection to the Office of Management and Budget (OMB) for  
12 review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104-  
13 13, 44 U.S.C. 3501, *et seq.*). This notice announces that the Information  
14 Collection Request (ICR) abstracted below has been forwarded to the OMB for  
15 review and comment. The purpose of the ICR is to facilitate testing of the TSA's  
16 Secure Flight program, which will prescreen airline passengers using information  
17 maintained by the Federal Government about individuals known or suspected to be  
18 engaged in terrorist activity and certain other information related to passenger  
19 itineraries – specifically, passenger name record (PNR) data. On a limited basis,  
20 TSA will also test the use of commercial data to identify instances in which  
21 passenger information is incorrect or inaccurate. TSA does not assume that the  
22 result of comparison of passenger information to commercial data is  
23 determinative of information accuracy or to the intent of the person who provided  
24 the passenger information.

25 In order to test the Secure Flight program, TSA is proposing to issue an  
26 order to all domestic aircraft operators directing them to submit a limited set of  
27 historical passenger name records to TSA. The ICR describes the nature of the  
28 information collection and its expected burden.

29 ... TSA will separately test the use of commercial data to determine if use  
of such data is effective in identifying passenger information that is incorrect or  
inaccurate. This test will involve commercial data aggregators who provide  
services to the banking, home mortgage and credit industries. These procedures  
will be governed by strict privacy and data security protections. TSA will not  
store the commercially available data that would be stored by commercial data  
aggregators.

30 22. Also on September 24, 2004, Defendant TSA printed in the Federal  
31 Register a notice to establish a system of records and a request for comments. A true and  
32 correct copy of the notice to establish system of records is attached as Exhibit 2. The

1 summary stated that TSA is establishing one new system of records under the Privacy  
2 Act of 1974, known as "Secure Flight Test Records." Comments on this notice were due  
3 by October 25, 2004.

4 23. Also on September 24, 2004, Defendant TSA printed in the Federal  
5 Register a Privacy Impact Assessment for the Secure Flight Test Phase. A true and  
6 correct copy of the Privacy Impact Assessment is attached as Exhibit 3. Addressing  
7 concerns of the government's use of commercial data, TSA stated:

8 TSA recognizes that this may raise privacy and civil liberties concerns. TSA's  
9 testing of commercial data use will therefore involve the following:

- 10 (a) TSA will only test the use of commercial data.  
11 (b) TSA does not assume that the result of comparison of passenger information  
12 to commercial data is determinative of information accuracy or to the intent of  
13 the person who provided the passenger information.  
14 (c) Such testing of commercial data will be governed by stringent data security  
15 and privacy protections including contractual prohibitions on commercial  
16 entities' maintenance or use of airline-provided PNR information for any  
17 purpose other than testing under TSA parameters; strict firewalls between the  
18 government and commercial data; real-time auditing procedures to determine  
19 when data within the Secure Flights system has been accessed and by whom;  
20 strict rules prohibiting the accessing or use of commercially held data by the  
21 TSA;  
22 (d) Assessment of test results prior to any operational use of commercial data in  
23 TSA's programs and determination that its use is effective in identifying  
24 incorrect or inaccurate information does not result in disparate treatment of  
25 any class of individuals, and that data security protections and privacy  
26 protections are robust and effective.

27 24. Additionally, the Privacy Impact Assessment for the Secure Flight Test  
28 Phase contained instructions on how individuals can access information contained in the  
29 PNR subject to the Secure Flight test phase:

During the test phase individuals may request information about themselves  
contained in the PNR subject to Secure Flight test phase by sending a written  
request to the TSA. To the greatest extent possible and consistent with national  
security and homeland security requirements, access will be granted. If an  
individual wishes to contest or amend the records received in this manner, he or  
she may do so by sending that request to TSA. The request should conform to  
DHS requirements for contesting or amending Privacy Act records, and should be  
sent to TSA Privacy Officer, Transportation Security Administration (TSA-9),  
601601 South 12<sup>th</sup> Street, Arlington, VA 22202.

1           25.     On November 15, 2004, TSA printed in the Federal Register a Notice of  
2 Final Order for Secure Flight Test Phase; Response to Public Comments on Proposed  
3 Order and Secure Flight Test Records. A true and correct copy of the Notice of Final  
4 Order is attached as Exhibit 4. All 72 domestic aircraft operators were ordered to submit  
5 by November 23, 2004, their historical PNRs for the month of June, 2004.

6           **B. Plaintiffs' Request For Their Records**

7           26.     On May 8, 2005, Plaintiffs Dr. John Davis, Sarah Huntley, Charles  
8 Beckley, and William Beck, individually and through their mutual attorney, submitted  
9 requests for their PNR information contained in the System of Records to test Secure  
10 Flight to TSA's Privacy Officer, Lisa Dean. True and correct copies of the four PNR  
11 requests are attached as Exhibit 5.

12           27.     Also on May 8, 2005, Plaintiffs Dr. John Davis, Sarah Huntley, Charles  
13 Beckley, and William Beck, individually and through their mutual attorney, submitted  
14 Privacy Act requests for all of their records contained in the System of Records to test  
15 Secure Flight. True and correct copies of the four Privacy Act requests are attached as  
16 Exhibit 6. Plaintiffs sought the disclosure of the following records:

17           Dear Transportation Security Administration,

18           This letter constitutes a request under the, 5 U.S.C. §552a. I request  
19 copies of all information relating to myself contained in the system of records  
20 established to test the Secure Flight Program. My request is for all information  
21 contained in each and every category of records in the system as listed in the  
22 notice to establish the system of records [Docket No. TSA-2004-19160]. These  
23 categories include information obtained by U.S. aircraft operators, other Federal  
24 agencies, including Federal law enforcement and intelligence agencies, and  
25 commercial data providers. I have also made an independent request, specifically  
26 asking for my PNR data, contained within this System of Records, to TSA's  
27 Privacy Officer, Lisa Dean. Should TSA provide less than a complete copy of all  
28 records relating to myself contained in this system of records, I request a detailed  
29 explanation as to the reasons for denying or not fully complying with my request.

26           28.     On May 23, 2005, TSA acknowledged receipt of Plaintiffs' Privacy Act  
27 requests and invoked a 10 day extension to the 20 day time in which to respond. A true  
28 and correct copy of acknowledgment of request receipt is attached as Exhibit 7

29           29.     On June 10, 2005, Plaintiffs' attorney responded to TSA's

1 acknowledgment of request receipt letter of May 23, 2005, by pointing out that the  
2 requests were Privacy Act requests, not Freedom of Information Act requests as indicated  
3 by TSA. Plaintiffs' attorney reiterated that the Privacy Act requests sought the disclosure  
4 of all of his clients' information contained in the System of Records to test Secure Flight  
5 established under the Privacy Act of 1974. A true and correct copy of Plaintiffs'  
6 attorney's response to TSA's acknowledgment of request receipt is attached as Exhibit 8.

7 **C. TSA's Inclusion of Commercial Data in the System of Records**

8 30. About this time, it became public knowledge that TSA was including  
9 commercial data, procured from commercial data aggregators, within the System of  
10 Records used to test Secure Flight. On June 20, 2005, the American Civil Liberties Union  
11 issued a press release, a true and correct copy is attached as Exhibit 9, beginning as  
12 follows:

13 WASHINGTON – The Department of Homeland Security's Transportation  
14 Security Administration is set to disclose this week in the Federal Register that  
15 the agency has collected and stored personal data about airline travelers despite a  
16 Congressional ban and promises by the agency that it would not do so. The  
17 American Civil Liberties Union today said the secret collection of personal data  
18 from private companies shows a complete disregard for the privacy of Americans,  
19 and said it shows that the Secure Flight program should not be launched because  
20 testing of commercial data using more limited amount of data failed. ...

21 31. On June 21, 2005, an article entitled "TSA gathered personal data on  
22 airline passengers" by Leslie Miller of the Associated Press appeared in the Seattle  
23 Times, a true and correct copy is attached as Exhibit 10, as follows:

24 WASHINGTON - The federal agency in charge of aviation security  
25 collected extensive personal information about airline passengers even though  
26 Congress forbade it and officials said they wouldn't do it, according to documents  
27 The Associated Press obtained yesterday.

28 The Transportation Security Administration bought and is storing details  
29 about U.S. citizens who flew on commercial airlines in June 2004 as part of a test  
of terrorist-screening program called Secure Flight, the documents indicate.

"TSA is losing the public's trust," said Tim Sparapani, a privacy lawyer  
with the American Civil Liberties Union. "They have a repeated, consistent  
problem with doing one thing and then saying they did another."

The TSA and several airlines were embarrassed last year when it was  
revealed that airlines gave personal information on 12 million passengers to the  
government without the travelers' permission or knowledge. An inspector

1 general's report found TSA misled the public about its role in acquiring the data.

2 Class action lawsuits have been brought against airlines and government  
3 contractors for sharing their passenger's information. As a result, airlines agreed  
4 to turn over passenger data for testing only after the government ordered them to  
5 do so in November.

6 According to the documents, which will be published in the Federal  
7 Register this week, the TSA gave the data, known as passenger-name-records, to  
8 its contractor, Virginia-based EagleForce Associates.

9 Such records can include a variety of information, including name,  
10 address, phone number and credit-card information.

11 EagleForce compared the passenger-name records with commercial data  
12 from three contractors that included first, last, and middle names, home address  
13 and phone number, birth date, name suffix, second surname, spouse first name,  
14 gender, second address, third address, ZIP code and latitude and longitude of  
15 address.

16 EagleForce then produced CD-ROMs containing the information – except  
17 for latitude and longitude and spouses first name – “and provided those CD-  
18 ROMS to TSA for use in the watchlist match testing,” the documents said. TSA  
19 now stores that data.

20 According to previous official notices, TSA had said it would not store  
21 commercial data about airline passengers.

22 The Privacy Act of 1974 prohibits the government from keeping a secret  
23 database. It also requires agencies to make official statements on the impact of  
24 their record keeping on privacy.

25 The TSA revealed its use of commercial data in a revised Privacy Act  
26 statement to be published tomorrow in the Federal Register.

27 “This is like creating an FBI file, not just some simple check, and then  
28 they're storing the data,” said Sparapani, the ACLU attorney.

29 TSA spokesman Mark Hatfield said the program was being developed  
30 with a commitment to privacy, and that it was routine to change Privacy Act  
31 statements during testing.

32 “Secure Flight is being built on an airtight privacy platform, and the  
33 GAO[Government Accountability Office] and Congress are providing close  
34 oversight every step of the way,” Hatfield said. The TSA said it is protecting the  
35 data from theft and carefully restricting access to it.

36 Congress said no money could be spent to test such an identity-  
37 verification system “until TSA has developed measures to determine the impact  
38 of such verification on aviation security and the Government Accountability  
39 Office has reported on its evaluation of the measures.” That language was part of  
40 the Homeland Security Department spending bill, which became law Oct. 18.

41 **D. TSA's Response to Plaintiffs' Requests, Amendment of Notice, and**  
42 **Plaintiffs' Administrative Appeal**

43 32. On June 22, 2005, Defendant TSA responded to all four of Plaintiffs'

1 Privacy Act request and all four of Plaintiffs' requests for PNR information at once by  
2 stating "[a] search within the Transportation Security Administration (TSA) was  
3 conducted and no documents responsive to your request were located." Defendants'  
4 response was received by Plaintiffs' attorney by mail on June 28, 2005. A true and  
5 correct copy of TSA's response to Plaintiffs' requests is attached as Exhibit 11.

6 33. Also on June 22, 2005, Defendant TSA filed in the Federal Register a  
7 notice to supplement and amend existing system of records and privacy impact  
8 assessment to include a broader use of commercially obtained data. A true and correct  
9 copy of the notice is attached as Exhibit 12. The following is the Summary of  
10 Amendments to the Secure Flight Test Records System and the PIA:

11 TSA is amending the scope of the system of records notice and the PIA to clarify  
12 and describe with greater particularity the categories of records and categories of  
13 individuals covered by the Secure Flight Test Records system. The categories of  
14 records include PNRs enhanced with certain elements of commercial data that  
15 were provided to TSA for purposes of testing the Secure Flight Program and  
16 include commercial data purchased and held by a TSA contractor, EagleForce  
17 Associates Inc. (EagleForce), for purposes of the commercial data test. In  
18 addition, the categories of individuals covered by the system include individuals  
19 identified in commercial data purchased and held by EagleForce. Finally, TSA is  
20 clarifying that part of the Secure Flight test includes testing whether watch list  
21 matching could be more effective if the Government were to use certain limited  
22 additional data elements derived from commercial data to enhance the PNRs.

23 34. In the June 22, 2005, notice TSA identified in their commercial data  
24 providers as Insight, Acxiom and Qsent and stated that EagleForce requested and  
25 received the following data elements:

26 First name; last name; middle name; home address; home phone number; date of  
27 birth; name suffix; second surname; spouse first name; gender; second address;  
28 third address; plus four portion of Zip code; address type (residence, business, or  
29 mailing address); latitude of address; and longitude of address. In some cases the  
commercial data aggregators provided information that EagleForce did not  
request, such as social security numbers, due to the was commercial data  
aggregators packaged their product. Although EagleForce loaded the commercial  
data provided by the commercial data aggregators into a database, EagleForce has  
not queried or used any of the data elements that the commercial data aggregators  
provided over and above the specific data elements that EagleForce had  
specifically requested.

30 35. Defendant TSA also stated in their June 22, 2005, notice that "TSA has

1 destroyed certain copies of the original PNRs provided by the air carriers. In addition,  
2 TSA, in accordance with applicable law, plans the destruction of the remaining PNRs and  
3 commercial data... .”

4 36. On June 29, 2005, the day after Plaintiffs received by mail TSA’s response  
5 to their Privacy Act and PNR requests, Plaintiffs appealed TSA’s determination that no  
6 documents responsive to Plaintiffs’ requests exist. A true and correct copy of the  
7 collective appeals is attached as Exhibit 13. Included in the appeals was a caution to  
8 TSA not to destroy any part of the System of Records as appeals for data contained in it  
9 were now pending. Confirmation that the destruction of any data contained in the System  
10 of Records had ceased was requested.

11 37. Department of Homeland Security’s own Privacy Act Procedures §5.28  
12 states that “[r]ecords will not be disposed of while they are the subject pending request,  
13 appeal, or lawsuit under the Act.” A true and correct copy of 6CFR, Chapter I, Part 5 is  
14 attached as Exhibit 14.

15 38. On July 22, 2005, the Government Accountability Office (“GAO”) issues  
16 a report to the public and Congressional Committees specifically addressing TSA’s  
17 inclusion of commercial data within the System of Records used to test Secure Flight and  
18 TSA’s failure to comply with the requirements under the Privacy Act. A true and correct  
19 copy of the July 22, 2005, GAO report is attached as Exhibit 15.

20 39. Also on July 22, 2005, the Chairman Collins and Ranking Minority  
21 Member Lieberman of the Committee on Homeland Security and Governmental Affairs  
22 wrote to Michael Chertoff, Secretary of the U.S. Department of Homeland Security  
23 regarding the GAO report. In it they wrote in part:

24  
25 GAO stated that TSA failed to comply fully with the Privacy Act when it  
26 “collected and stored commercial data records even though TSA stated in its  
27 privacy notices that it would not do so.” The GAO further described how a TSA  
28 contractor obtained more than 100 million records from commercial data  
29 aggregators, and supplemented passenger name records (PNR) obtained from  
airlines with personal information contained in the commercial data, though TSA  
“did not identify [in its privacy notices] its plans to supplement PNR data with  
commercial data.” The GAO also noted that TSA’s initial privacy notices “did

1 not fully inform the public of: (1) the subjects of the data collection, (2) the types  
2 of personal data to be collected, (3) the full purpose of collecting the data, (4)  
3 policies and practices regarding storage and maintenance of the data, and (5) how  
those subject to having data collected could access and amend their data.”

4 As the GAO explains in its letter report, the Privacy Act, which is based on  
5 internationally recognized fair information practices, is intended to allow citizens  
6 “to learn how their personal information is collected, maintained, used and  
7 disseminated by the federal government.” We understand that, in response to  
8 GAO’s assertions, TSA took corrective actions to inform the public of its actual  
test protocols through updated Privacy Act Notices. However, that action does  
not excuse TSA’s failure to meet basic Privacy Act requirements in carrying out  
this program.

9 A true and correct copy of the July 22, 2005, letter by Chairman Collins and Ranking  
10 Minority Member Lieberman to Michael Chertoff, Secretary of the U.S. Department of  
11 Homeland Security is attached as Exhibit 16.

12 40. On July 29, 2005, Plaintiffs’ counsel wrote TSA querying the status of his  
13 clients’ appeals and again cautioned Defendants not to destroy the subject records. A  
14 true and correct copy of Plaintiffs’ counsel’s correspondence of July 29, 2005, to TSA is  
15 attached as Exhibit 17.

16 41. On August 2, 2005, an article entitled “Transportation agency in data flap  
17 with Alaskans” appeared on GovExec.com, a true and correct copy is attached as Exhibit  
18 18, as follows:

19 A government effort to stop terrorists from boarding aircraft may have bungled a  
20 mandatory process designed to protect passenger travel records and personal data.

21 The Transportation Security Administration (TSA) has been charged with  
22 developing a system to identify suspected terrorists by thoroughly screening  
23 airline passengers. But it may have destroyed some personal travel records and  
24 data despite being required by law to disclose the information to individuals who  
request it, according to correspondence exchanged between a lawyer and a  
member of the agency.

25 The screening system dubbed Secure Flight is scheduled to become operational  
26 by early 2006, according to a recent Government Accountability Office (GAO)  
27 report.

28 In early May, Jim Harrison, an independent attorney for four Alaskans, asked  
29 TSA to disclose the kind of information the agency had compiled about his  
clients. All of them had traveled during June 2004.

1 "In Alaska, air travel is not a luxury, it's a necessity," Harrison said. "What it  
2 comes down to is that you have to take your identification and ask the federal  
3 government whether you can travel, and they either give you the thumbs up or the  
thumbs down with a system whose parameters are unknown."

4 In a reply to Harrison dated June 22, a TSA official said the agency could not find  
5 any records on the individuals. TSA on the same day published a notice in the  
6 *Federal Register* saying it would update its rules to release the passenger name  
7 records to individuals who had requested them under federal privacy law -- but  
that it had decided to destroy "certain copies of the original [records] provided by  
the air carriers."

8 The notice also said TSA planned to destroy the other records as it finishes its  
9 testing. The notice added that federal rules allow the agency to destroy the  
10 records. Prior TSA notices said that the agency wanted to do so because the  
11 records were being used only for tests and that the agency did not intend to track  
individuals' travel plans.

12 To test its system, TSA obtained commercial airlines' passenger name records for  
13 domestic travel during June 2004. It ran those names against a terrorism watch list  
and the travelers' personal data compiled by three commercial data aggregators.  
14 GAO in July said that practice violated privacy law because TSA had not  
adequately disclosed the extent of its activities.

15 Under the law, Americans can discover what kind of information the government  
16 is collecting about them, what is done with it and have a chance to correct errors.  
Government agencies must inform citizens of any changes of plans for using their  
17 personal information. GAO's report said the agency failed to fulfill those  
18 obligations.

19 In his letter to TSA, Harrison said the agency must retain the records. In an  
20 interview, he said his clients still want the data. "Can an agency just destroy the  
records and say 'sorry,' they don't have them anymore?" he asked.

21 TSA did not respond to a call for comment.

22 42. On August 5, 2005, TSA called, and wrote Plaintiffs' counsel a letter,  
23 requesting TSA be told what airlines Plaintiffs flew and when in order to conduct "an  
24 adequate search of the records." A true and correct copy of TSA's correspondence of  
25 August 5, 2005, to Plaintiffs' counsel is attached as Exhibit 19.

26 43. Plaintiffs' counsel immediately provided TSA with the requested  
27 information and again, for a third time, requested to be informed that the subject System  
28 of Records would not be destroyed during the pendency of his clients' requests. A true  
29

1 and correct copy of Plaintiffs' counsel's correspondence of August 5, 2005, to TSA is  
2 attached as Exhibit 20.

3 44. On August 15, 2005, an article entitled "Data Dumped in Secure Flight  
4 Test" appeared on Wired.com. A true and correct copy is attached as Exhibit 21. The  
5 article led with "[t]he federal government has destroyed 3 million of the 15 million  
6 records it collected on individuals last year to test its new airline passenger-screening  
7 program."

### 8 **PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES**

9 45. Plaintiffs made administrative appeals by registered mail on June 29,  
10 2005, seeking not only the release of their records but also the cessation of the destruction  
11 of the System of Records containing their records.

12 46. To date, there has been no communicated determination by TSA of  
13 Plaintiffs' appeals.

14 47. Defendants have exceeded their time to make a determination of  
15 Plaintiffs' appeals. 5 U.S.C. §552a (d)(3) places on agencies a 30 working day time  
16 limitation to respond to Privacy Act appeals. Additionally, pursuant to Title 6, Chapter 1,  
17 Part 5, Subpart B -- Privacy Act, Sec. 5.20, Defendants processes all Privacy Act requests  
18 for access to records under the Freedom of Information Act (5 U.S.C. 552) "which gives  
19 requests the benefit of both statutes." (See Exhibit 14). FOIA requires an agency to  
20 "make a determination with respect to any appeal within 20 days after the receipt of such  
21 an appeal." 5 U.S.C. §552 (a)(6)(A)(ii). Defendants have failed to do so.

22 48. Defendants have also made no communication to Plaintiffs regarding the  
23 cessation of the destruction of the System of Records at issue.

### 24 **FIRST CAUSE OF ACTION**

#### 25 **Violation of Privacy Act for Failure to Allow Access to Records**

26 49. Plaintiffs repeat and reallege the allegations contained in paragraphs 1  
27 through 48 above, inclusive.

28 50. Plaintiffs Davis, Huntley, Beckley, and Beck have a legal right under the  
29 Privacy Act to gain access to their records contained in the System of Records used to

1 test Secure Flight by Defendants TSA and DHS.

2 51. Defendants TSA and DHS's failure to timely make available to Plaintiffs  
3 Davis, Huntley, Beckley, and Beck access to their records violates the Privacy Act, 5  
4 U.S.C. §552a(d)(1), and applicable regulations promulgated thereunder.

5 **SECOND CAUSE OF ACTION**

6 **Violation of Privacy Act for Destruction of Records Subject to Request**

7 52. Plaintiffs repeat and reallege the allegations contained in paragraphs 1  
8 through 51 above, inclusive.

9 53. Plaintiffs Davis, Huntley, Beckley, and Beck have a legal right under the  
10 Privacy Act to gain access to their records contained in the System of Records used to  
11 test Secure Flight by Defendants TSA and DHS.

12 54. Defendants TSA and DHS's destruction of Plaintiffs Davis, Huntley,  
13 Beckley, and Beck requested records without first providing them with copies violates  
14 the Privacy Act, 5 U.S.C. §552a(d)(1), and applicable regulations promulgated  
15 thereunder.

16 55. Defendants TSA and DHS's destruction of Plaintiffs Davis, Huntley,  
17 Beckley, and Beck requested records violates Defendants' own procedures for the  
18 preservation of records.

19  
20 **WHEREFORE**, Plaintiffs request the Court award them the following relief:

21 1. Order Defendants TSA and DHS to immediately disclose what records  
22 contained in the System of Records to test Secure Flight were destroyed, by whom, and  
23 when.

24 2. Declare Defendants TSA and DHS violated the Privacy Act ;

25 3. Declare Defendants TSA and DHS violated their own rules to comply  
26 with

27 the Privacy Act ;

28 4. Order Defendants TSA and DHS to immediately disclose the requested  
29 records in their entireties and make copies available to Plaintiffs;

**COMPLAINT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

- 5. Award Plaintiffs their reasonable costs and attorneys' fees;
- 6. Grant such other relief as the Court may deem just and proper.

DATED this 18<sup>nd</sup> day of August, 2005.

Respectfully submitted,

By: \_\_\_\_\_  
James P. Harrison  
SBN 9811059 AK,  
980 9<sup>th</sup> St., 16<sup>th</sup> Floor  
Sacramento, CA 95814  
Tel: 916-492-9778  
Fax: 916-492-8762

DAVID GREENE  
First Amendment Project  
1736 Franklin St., 9<sup>th</sup> Floor  
Oakland, CA 94612  
Telephone: (510) 208-7744

Co-Counsel for Plaintiffs Davis, Huntley,  
Beckley and Beck