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19 FRANK TERRERI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

20 FRANK TERRERI,
21 Plaintiff,
22 vs.

23 MICHAEL CHERTOFF, Secretary
24 of the Department of Homeland
25 Security, in his official capacity;
26 RANDY BEARDSWORTH, Acting
27 Under Secretary for Border and
28 Transportation Security, in his
official capacity; MICHAEL J.
GARCIA, Assistant Secretary of the
Department of Homeland Security
for Immigration and Customs
Enforcement, in his official capacity;
THOMAS D. QUINN, Director,
Federal Air Marshal Service, in his
official capacity,

Defendants.

) Case No.:
) COMPLAINT FOR INJUNCTIVE
) AND DECLARATORY RELIEF
) [U.S. Const. Amend. I &
) Amend V; Declaratory Judgment Act,
) 28 U.S.C. §§ 2201, 2202]

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JURISDICTION AND VENUE

1. Plaintiff Frank Terreri, a Federal Air Marshal, claims that speech-restrictive regulations implemented and enforced against Federal Air Marshals by the United States government violate his rights to free expression and to petition the government as guaranteed by the First Amendment to the United States Constitution, and his right to equal protection as guaranteed by the Due Process Clause of Fifth Amendment of the United States Constitution. These claims, having been created by the Constitution, “arise under” federal law for purposes of establishing subject matter jurisdiction in this Court. U.S. Const., Art. III; 28 U.S.C. §§ 1331, 1343.

2. Mr. Terreri resides within the Central District of California and a substantial part of the speech-related activities he would undertake, including the use of his home computer, would occur within that district were it not for the speech-restrictive regulations at issue in this case. In addition, the federal office out of which Mr. Terreri works is located within the Central District of California. Thus, both Mr. Terreri’s intended activity and the government restrictions on that activity find their focal point in the Central District of California. Accordingly, a substantial part of the events or omissions giving rise to Plaintiff’s claim have occurred or would occur within the Central District of California, establishing venue in this district pursuant to 28 U.S.C. § 1391(b)(2).

INTRODUCTION

3. In response to the events of September 11, 2001, Congress enacted, and the President signed into law, the Aviation and Transportation Security Act of 2001. That statute created the Transportation Security Administration (“TSA”) and vested that agency with broad authority over air traffic safety, including jurisdiction over the newly-styled Federal Air Marshal

1 Service ("FAMS"), a more extensive and comprehensive version of the sky
2 marshal program previously administered by the Federal Aviation
3 Administration. On November 26, 2003, administrative authority over FAMS
4 was transferred into the then recently created Department of Homeland Security
5 ("DHS") as one of the investigative divisions of Immigration and Customs
6 Enforcement ("ICE"), an agency of DHS within the office of Border and
7 Transportation Security ("BTS").

8
9 4. The Special Agents employed by FAMS are known as Federal Air
10 Marshals. Their primary responsibility is to ensure the security of United States
11 commercial aircraft throughout the world. This responsibility requires that
12 Federal Air Marshals travel undercover on United States commercial aircraft
13 flying into or out of airports located within this country and abroad.

14 5. According to the official ICE website, the goal of FAMS "is to
15 promote confidence in the nation's civil aviation system through the effective
16 deployment of Federal Air Marshals, to detect, deter and defeat hostile acts
17 targeting U.S. air carriers, airports, passengers and crews." U.S. Immigration
18 and Customs Enforcement, Commercial Aviation, Terrorism, and Air Marshals,
19 *available at* <http://www.ice.gov/graphics/fams/history.htm>.

20 6. Federal Air Marshals are undercover agents who "blend in with
21 other passengers. Aboard aircraft, the identity of [Federal Air Marshals] are
22 known only to the flight crew and other armed law enforcement officers. The
23 identity of [Federal Air Marshals] are also known to ground security
24 coordinators, other airline employees, and at times, checkpoint screening
25 security personnel." *Id.*

26 7. As employees of FAMS, all Federal Air Marshals are subject to the
27 restrictions detailed in a directive initially promulgated by the TSA and that is
28 now enforced by ICE and DHS. See Transportation and Safety Administration,

1 FAMS Policy Directive, ADM 3700, Employee Responsibilities and Conduct,
2 (August 9, 2002) (“ADM 3700”). That directive prohibits Federal Air Marshals
3 from using “speech, writing, or other expression to criticize or ridicule FAMS
4 ... policy or other employees,” from creating or participating in “unofficial
5 Internet websites concerning the FAMS,” and from making “any public
6 statements concerning the FAMS,” including addresses to public gatherings,
7 appearances on radio or television, preparation of articles for publication, and
8 correspondence with any newspaper or periodical. Finally, and more generally,
9 under the directive, Federal Air Marshals may not “release or divulge
10 investigative information or *any other matters* pertaining to the FAMS.” ADM
11 3700 § 17 (emphasis supplied).
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13 8. Consistent with the plain language of ADM 3700, the speech
14 restrictions created by the broadly-worded § 17 are not limited to classified or
15 sensitive information. See ADM 3700, § 18 (prohibiting the disclosure of
16 classified or sensitive information). Rather, the § 17 restrictions apply to *all*
17 information “concerning the FAMS” or “pertaining to the FAMS.” Thus ADM
18 3700 embraces information that is part of the public record and otherwise
19 subject to public discourse and debate, including information that has been
20 disclosed to the public by FAMS administrators.

21 9. ADM 3700 continues to be enforced by DHS and FAMS
22 administrators. See, e.g., United States Department of Homeland Security,
23 Office of Inspector General, Review of Alleged Actions by Transportation
24 Security Administration to Discipline Federal Air Marshals for Talking to the
25 Press, Congress, or the Public, OIG-05-01, November 2004, *available at*
26 http://www.dhs.gov/interweb/assetlibrary/OIG-05-01_Nov04.pdf.
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THE PLAINTIFF

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10. Plaintiff Frank Terreri is a Federal Air Marshal and has been so employed since January 13, 2002. He joined FAMS out of a sense of patriotic duty and in specific response to the attacks of September 11, 2001. He is stationed at the FAMS field office located in Irvine, California. Previously Mr. Terreri worked successfully, and with an unblemished employment record, as a Deportation Officer with the Immigration and Naturalization Service (“INS”), as a Border Patrol Agent with INS, and as a New York State Correctional Officer. Mr. Terreri served honorably in the United States Army from March 1985 through March 1989, receiving the Army Achievement Medal, the Army Commendation Medal, and the Army Good Conduct Medal.

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11. Mr. Terreri is currently serving his second term as President of the Federal Law Enforcement Officers Association (“FLEOA”) – Federal Air Marshal Agency (“FAM”), a position he has held since July 23, 2003. FLEOA is a private, professional association, that represents over 23,000 federal agents from over 50 different federal law enforcement agencies, including approximately 1,400 Federal Air Marshals who are members of FLEOA-FAM. (The actual number of active Federal Air Marshals is classified.) FLEOA officers, all of whom are engaged in federal law enforcement, perform their FLEOA duties during their personal time and without the use of government funds or resources.

12. Among other things, FLEOA functions as a public voice for the federal law enforcement community, addressing matters of public concern to Congress, to the Executive Branch, and to the public at large. In this capacity, FLEOA speaks out on matters pertaining to the welfare of the federal law enforcement community as well as on matters pertaining to law enforcement that may affect the welfare of the communities that its members protect and

1 serve. See <http://www.fleoa.org/> (FLEOA website). As the FLEOA-FAM
2 Agency President, one of Mr. Terreri's responsibilities, therefore, is to provide
3 this public voice for Federal Air Marshals, and particularly so with respect to
4 the welfare of the marshals and the safety of the passengers those marshals are
5 pledged to preserve.

6 THE DEFENDANTS

7 13. Defendant Michael Chertoff is the Secretary of the Department of
8 Homeland Security ("DHS"). He has held that position since February 15,
9 2005. As Secretary of DHS, Mr. Chertoff is responsible for overseeing the
10 operation of the entire department, including all of its sub-agencies,
11 components, and divisions. He is, therefore, ultimately responsible for the
12 enforcement of Directive 3700. Defendant Chertoff is sued in his official
13 capacity.
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15 14. Defendant Randy Beardsworth is the Acting Under Secretary for
16 Border and Transportation Security ("BTS"), a sub-agency of DHS that
17 oversees all aspects of border security, including the office of Immigration and
18 Customs Enforcement ("ICE") and its five investigative units. Defendant
19 Beardsworth is sued in his official capacity.

20 15. Defendant Michael J. Garcia is the Assistant Secretary of DHS for
21 ICE. He has held that position since November 2003. He has direct authority
22 over the five investigative units of ICE, including FAMS. Defendant Garcia is
23 sued in his official capacity.

24 16. Defendant Thomas D. Quinn is the Director of FAMS. He has
25 held that position since January 2002. He has direct authority over all aspects
26 of FAMS operations, including the enforcement of the speech-restrictive
27 regulations found in Directive 3700. Defendant Quinn is sued in his official
28 capacity.

STATEMENT OF FACTS

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2 17. On a number of occasions, FAMS administrators, with the support
3 and approval of ICE and DHS, have revealed information regarding the
4 deployment of Federal Air Marshals that is now part of a larger public discourse
5 on both FAMS and its administrators. FAMS administrators have also
6 permitted certain Federal Air Marshals to disclose similar information to the
7 media and the public.

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9 18. Beginning on November 5, 2003, WSVN – TV, a FOX News
10 outlet located in Miami/Fort Lauderdale, Florida, aired a three-part feature on
11 Federal Air Marshals with the apparent approval and participation of FAMS
12 administrators. The broadcast included a tour of FAMS training facilities, an
13 opportunity to watch Federal Air Marshals practicing their take-down
14 techniques, and a simulation of how marshals react to airline hijackings. As to
15 the latter, the broadcast revealed how the marshals deploy to a position of
16 dominance, the systematic steps they take to control the situation, the exact
17 instructions they use during such situations, and how they contact the pilot and
18 use the crew during an emergency. In short, this step-by-step video discloses
19 the specific methodologies employed by Federal Air Marshals to react to and
20 defeat hijacking attempts. It remains available on the world wide web.

21 19. On February 5 & 6, 2004, NBC Nightly News, with the full
22 cooperation of FAMS, which itself was acting with the approval of DHS, aired
23 a two-piece segment entitled, “A Day in the Life of a Federal Air Marshal.”
24 This segment revealed what was essentially a blueprint of the operational
25 procedures used by the Federal Air Marshals when on a mission. It described
26 the number of marshals that fly on each mission, the professional dress and
27 grooming code with which every marshal must comply, the public manner in
28 which marshals must present their credentials to airport and airline personnel,

1 the fact that the airline personnel know the identity of the marshals, the manner
2 in which the marshals board an aircraft in full view of waiting passengers, the
3 location where marshals sit while traveling on the aircraft, the things marshals
4 look for in making threat assessments, the type and the model of the weapon
5 carried by marshals, and the specific manner in which marshals respond to
6 hijacking situations.

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8 20. On June 28, 2004, Time Magazine ran an essay entitled, "My Life
9 as an Air Cop." The essay provides an account of the experiences of a Time
10 reporter who was allowed by FAMS administrators to participate in the top
11 secret training program for prospective Federal Air Marshals. The account
12 reveals the methods through which marshals deploy in an emergency, the type
13 of weapon and ammunition they use, and specific elements of the profile used
14 by marshals to recognize suspected terrorists.

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16 21. On July 8, 2004, ABC's Nightline presented a segment on Federal
17 Air Marshals entitled, "Secret Agents of the Skies." The segment was prepared
18 with the cooperation of FAMS Director Thomas D. Quinn. It featured four
19 anonymous Federal Air Marshals who provided a glimpse into their daily
20 routines. Based on information received from these marshals and from Director
21 Quinn, the Nightline report disclosed FAMS operational procedures, including
22 the marshals' boarding technique, the standard-issue weapon carried, how the
23 marshals interact and rely on airline personnel, the locations on aircraft where
24 marshals search for weapons and bombs, and the types of aircraft and the
25 location of cities that are given priority when FAMS missions are assigned.

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27 22. On October 18, 2004, People Magazine published an article
28 entitled, "A Day in the Life of an Air Marshal." The article was prepared with
the cooperation of FAMS administrators. A brief follow-up to that article is

1 currently available for viewing on the official ICE website. See
2 <http://www.ice.gov/graphics/fams/Becky.htm>. The original version provided a
3 first-person narrative of a Federal Air Marshal identified simply as “Becky.”
4 In describing her daily routine, Becky identifies the specific type of weapon she
5 uses as a marshal, as well as her preferred take down technique – “a kick to the
6 outside thigh, six to eight inches below the hip bone.” She explains that once
7 she arrives at the airport, she identifies herself to the crew, searches the plane
8 for bombs and weapons, and then sits down to observe the passengers board to
9 determine if they pose a potential threat. She further describes the types of
10 “aberrations” that she looks for as she surveys the passengers.
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12 23. On February 17, 2005, CNN’s “Paula Zahn Now” ran a segment
13 on Federal Air Marshals that included an interview with a Federal Air Marshal,
14 apparently with the approval of FAMS administrators, as well as an interview
15 FAMS Director Thomas D. Quinn. This report reiterated some of the
16 previously disclosed information on FAMS operational procedures, including
17 those pertaining to aircraft boarding, threat assessment, and the standard-issue
18 weapon used by Federal Air Marshals. It also disclosed the type of
19 communication equipment used by Federal Air Marshals, including the fact the
20 primary communication device used by the marshals does not have the
21 capability of communicating with the ground once the aircraft has taken off.
22 See CNN Transcripts, Paula Zahn Now, *available at*
23 <http://transcripts.cnn.com/TRANSCRIPTS/0502/17/pzn.01.html>.

24 24. The FAMS-endorsed publication of the information described in
25 Paragraphs 18-23 involves matters of significant public concern, namely, the
26 safety of commercial air transportation in the United States, and the extent to
27 which it has been compromised by policies and disclosures endorsed by FAMS
28 administrators. The debate on these policies and on the wisdom of divulging

1 this information to the public has been aired in the national media and through
2 the world wide web. See, e.g., Michelle Malkin, Another Fine Air Marshals'
3 Mess, February 23, 2005, *available at*
4 <http://michellemalkin.com/archives/001579.htm>; Brock N. Meeks, Critics: NBC
5 Compromised Air Marshal Safety, March 4, 2004, *available at*
6 <http://www.msnbc.msn.com/id/4450717/>; Brock N. Meeks, More Questions on
7 NBC Air Marshal Report, April 20, 2004, *available at*
8 <http://www.msnbc.msn.com/id/4789128/>. It has also been given voice by
9 members of Congress, see, e.g., Letter from Congresswoman Carolyn B.
10 Maloney to the Hon. Clark Kent Ervin, Inspector General, Department of
11 Homeland Security, April 19, 2004, *available at*
12 <http://www.house.gov/maloney/press/108th/20040420DHSOIG.htm>.
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14 25. The policies adopted by FAMS and the disclosures approved by
15 FAMS administrators have led to a formal inquiry by the House Committee on
16 the Judiciary, which exercises oversight responsibility over FAMS.

17 CAUSES OF ACTION

18 FIRST CLAIM FOR RELIEF

19 (First Amendment to the United States Constitution:

20 Freedom of Speech and of the Press)

21 26. Paragraphs 1-25 of this Complaint are incorporated herein by
22 reference.

23 27. Plaintiff Frank Terreri has never disclosed classified or sensitive
24 information regarding FAMS to the public nor to any person who is not entitled
25 by federal regulations to receive such information. Nor does Mr. Terreri have
26 any intention of ever doing so.

27 28. Were it not for the proscriptions imposed by ADM 3700, however,
28 Mr. Terreri, in his capacity as a citizen of the United States and in his capacity

1 as President of FLEOA-FAM, would engage in the following protected speech
2 activities with respect to matters of legitimate public concern:

- 3 a. He would create and participate in an unofficial Internet website
4 concerning or pertaining to FAMS and airline security;
- 5 b. He would compose and publish letters and articles concerning or
6 pertaining to FAMS and airline security;
- 7 c. He would, without compromising his identity as a Federal Air
8 Marshal, engage in public commentary, including appearances on
9 radio and television, concerning or pertaining to FAMS and airline
10 safety; and
- 11 d. He would communicate, both in writing and orally, with members
12 of Congress, appropriate congressional committees, and the
13 appropriate agencies of the Executive Branch on matters
14 concerning or pertaining to FAMS and airline security.

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16 29. All of the foregoing speech activities fall within the “category of
17 citizen comment on matters of public concern” protected by the First
18 Amendment to the United States Constitution. United States v. National
19 Treasury Employees Union, 513 U.S. 454, 466 (1995). And none of them
20 involves Mr. Terreri’s “personal status in the workplace.” *Id.* These speech
21 activities are, therefore, presumptively protected by the First Amendment. *Id.*
22 Moreover, given the “sweep” of ADM 3700, the Defendants here cannot meet
23 the “heavy” burden of justification required by the First Amendment in order to
24 validate these overly broad and otherwise unconstitutional proscriptions of
25 ADM 3700. *Id.*

26 SECOND CLAIM FOR RELIEF

27 (First Amendment to the United States Constitution:

28 Right to Petition the Government)

1 30. Paragraphs 1-29 of this Complaint are incorporated herein by
2 reference.

3 31. ADM 3700, as interpreted by FAMS administrators, prohibits all
4 Federal Air Marshals, including Plaintiff Frank Terrori, from communicating
5 with Congress on matters concerning or pertaining to FAMS without the
6 express permission of FAMS administrators. Were it not for this interpretation
7 of ADM 3700, Mr. Terrori would communicate with members of Congress and
8 with committees of Congress having oversight responsibility over FAMS on
9 matters of public concern relating to FAMS and airline security.
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11 32. This particular regulation of Mr. Terrori's speech activities,
12 therefore, violates not only the guarantees of free speech and press, but the First
13 Amendment right "to petition the Government for a redress of grievances."
14 U.S. Const. Amend I.

15 33. The Defendants here have no legitimate interest in foreclosing this
16 line of communication between Federal Air Marshals and Congress,
17 particularly with respect to those committees of Congress that have legislative
18 oversight responsibility over FAMS. The enforcement of this regulation,
19 therefore, violates Plaintiff's right to petition the government for a redress of
20 grievances.
21

22 THIRD CLAIM FOR RELIEF

23 (Fifth Amendment Due Process Clause:

24 The Equality Principle Implicit in Due Process)

25 34. Paragraphs 1-33 of this Complaint are incorporated herein by
26 reference.

27 35. FAMS administrators have selectively permitted some Federal Air
28 Marshals to disclose to the media information concerning or pertaining to
FAMS. These disclosures have triggered a public debate on matters of public

1 concern relating to airline safety and the competence of FAMS administrators.
2 Other Federal Air Marshals, including Mr. Terreri, are not permitted to join this
3 public debate.

4 36. The discriminatory application of ADM 3700 violates the equality
5 principle implicit in the Due Process Clause of the Fifth Amendment.
6 Moreover, since the discrimination at issue involves the exercise of a
7 fundamental right of free speech – the right of freedom of expression – any
8 justification for this government action must be subjected to the strictest of
9 scrutiny. The government, therefore, has the burden of establishing both a
10 compelling government interest, and that ADM 3700 as written and enforced is
11 narrowly tailored to advance that interest.
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13 37. Under the circumstances of this case, and given the very broad
14 wording of § 17 of ADM 3700, the government cannot meet that burden.

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1 PRAYER FOR RELIEF
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4 WHEREFORE, Plaintiff prays for judgment as stated below:

- 5 1. A declaration that § 17 of ADM 3700 is unconstitutional on its
6 face and cannot be enforced as currently written;
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8 2. A permanent injunction forbidding Defendants from enforcing the
9 provisions of § 17 of ADM 3700;
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11 2. For costs of suit and attorneys' fees; and
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13 3. For such other and further relief as the Court may deem just,
proper, and appropriate.

14 Dated: April 21, 2005

15 By: 
16 ALLAN IDES

17 PETER ELIASBERG
18 ACLU FOUNDATION OF SOUTHERN
19 CALIFORNIA

20 PAUL HOFFMAN
21 SCHONBRUN, DeSIMONE, SEPLOW,
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