

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

AHMED SHQEIRAT, MOHAMED	)	Civil No. 0:07-cv-01513 ADM-AJB
IBRAHIM, DIDMAR FAJA, OMAR	)	
SHAHIN, MAHMOUD SULAIMAN,	)	
and MARWAN SADEDDIN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>BRIEF <i>AMICUS CURIAE</i> IN</b>
	)	<b>SUPPORT OF DISMISSAL</b>
U.S. AIRWAYS GROUP, INC., U.S.	)	
AIRWAYS, INC., JOHN DOES, and	)	
METROPOLITAN AIRPORTS	)	
COMMISSION,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

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**INTRODUCTION**

As is by now well known, Plaintiffs are a group of individuals who called attention to themselves and their Muslim identity, then proceeded to engage in a variety of suspicious behaviors, both before and after boarding their flight from Minneapolis to Phoenix. This included, at a minimum, switching seats, distributing themselves throughout the plane and requesting seatbelt extensions. After observant passengers brought their odd behavior to the attention of airline officials and security personnel, the plaintiffs were removed from the flight.

Far from admitting that their behavior was suspicious, Plaintiffs responded by filing a 38-page, 17-count complaint against virtually everyone they could name, and

many they couldn't. It is doubtful that any of these claims are legitimate. But one claim is not only illegitimate, but dangerous. Buried in the Plaintiffs' long list of grievances are claims against a handful of private citizens. These citizens whom Plaintiffs refer to as "John Does," are not police officers, TSA officials, or other agents of the state. Nor are they airline employees, pilots, or flight attendants. They are mere passengers: men, women, and children whose only fault was to share a plane with the Plaintiffs, and to report their suspicious behavior to the authorities. They are not so different from most people stepping on a plane out of Minneapolis St. Paul International: they have mortgages to pay, health care bills to cover, college tuition to save, children to provide for. These citizens did not discriminate, intimidate, nor harass. These citizens, mindful as is anyone who runs the gauntlet of airport security in the wake of 9/11, saw unusual behavior and did what all responsible citizens should do—they reported it to the authorities. These citizens attempted to protect themselves, their loved ones, and their fellow passengers. For this, they are dragged into federal court and threatened with humiliation, expense, and liability. This harassment is nothing less than legal terrorism—an attempt to change public behavior by threatening to impoverish and destroy at random the lives of those whom plaintiffs see as their enemies.<sup>1</sup> These claims should not be entertained.

Transportation security, not to mention every citizen who steps on an airplane,

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<sup>1</sup> Indeed, given the extensive media coverage of this lawsuit and the time, expense, potential liability and embarrassment likely to be suffered by "John Doe" passengers, those passengers would be well within their rights to file their own claim for intentional

depends upon the watchful eyes of private passengers. The Plaintiffs should not attempt—nor should this court permit them—to hijack federal courts to make an essentially political statement. It is the Plaintiffs, not their fellow passengers, who seek to intimidate and harass. Their claims against their fellow passengers on Flight 300 have no place in federal court.

**STATEMENT OF INTEREST OF THE *AMICUS***

The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm that protects the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as amicus curiae. Accordingly, the Becket Fund has been heavily involved in civil rights litigation on behalf of a wide variety of religious worshippers, ministers, and institutions, including Muslims, Christians, Jews, Hindus, Buddhists, Sikhs, and many others.

We have never before in our history opposed anyone else's claim of religious freedom. Nevertheless, we are appalled at the tactics employed in this case.

It is most certainly the right of individual citizens and, indeed, their duty—especially in wartime—to report their suspicions to the authorities. What actions those authorities take after receiving such calls may be fair game for litigation. The ability of the citizenry to make such calls in the first place is not. Plaintiffs' tactics of threatening suit against ordinary citizens is so far beyond the pale that we must oppose it to defend

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infliction of emotional distress.

the good name of religious liberty itself. Accordingly, the Becket Fund respectfully submits this brief amicus curiae.

### **ARGUMENT**

#### **I. The Case Against the John Does Should Be Dismissed Because No Law Could or Should Be Construed to Punish Them for Reporting a Possible Terrorist Attack to Airline Authorities.**

Claims of this sort—and the Plaintiffs’ claims in particular—should not be permitted to go forward at all. The Plaintiffs’ claims against the John Does<sup>2</sup> have no legal basis. The Plaintiffs have not identified any wrongdoing on the part of the John Does and have not even bothered to ensure this court has jurisdiction over them. Including them in the complaint would be inappropriate under any circumstances, *see* F.R.C.P. 11(b)(1)-(2), but is especially inappropriate here, where sharp-eyed passengers provide an indispensable layer of defense against terrorism. If these claims are allowed to go forward, even the routine processes of discovery can become a tool of harassment, embarrassment, and intimidation. The Court should dismiss the lawsuit against the John Doe passengers, not only for their own good, but for the good of every traveler in the nation.

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<sup>2</sup> Plaintiffs also sue several “John Doe” airline employees; this brief takes no position on those claims. For the sake of brevity, we use “John Does” to refer to only the unknown passengers mentioned in paragraphs 21-22 of the First Amended Complaint,

## II. The Case Against the John Does Should Be Dismissed Because Federal and State Law Protect Citizens Who Report Possible Terrorist Activity.

Last week, Congress acted to protect the John Does in this case and others like them.<sup>3</sup> The Implementing Recommendations of the 9/11 Commission Act of 2007, which will be sent to the President for signature this week,<sup>4</sup> states that airline passengers who make good-faith reports of suspicious activity “shall be immune from civil liability under Federal, State, and local law for such report[s].” H.R. 110-259 § 1206. This lawsuit was the impetus for that provision.<sup>5</sup> The moment it is signed into law it will provide a basis for dismissing the complaint against the Does.

Plaintiffs have not even attempted to allege any facts demonstrating that the Does’ reports were malicious or otherwise knowingly false, much less met the rigorous standard this statute and other law and public policy collectively establish. Indeed, even the Plaintiffs’ one garden-variety, conclusory allegation on this point lacked force. At one point, Plaintiffs alleged only—and without any supporting factual claims—that the John Does “may” have acted with improper intent. Dkt.5 ¶21. Now they have abandoned even this mild allegation in their second amended complaint. Dkt.41-2 ¶¶22-23.

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not the John Doe airline employees.

<sup>3</sup> The uncertainty surrounding the new federal law and timing of its passage affected the timing of this amicus brief. *Amicus* would prefer to wait until the bill is signed by the President, but is mindful of Plaintiffs’ upcoming response filing date.

<sup>4</sup> See Major Congressional Actions, H.R. 1, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00001:@@X> (noting conference report has passed both houses and been cleared for the White House).

<sup>5</sup> See, e.g., *Speak and Be Sued*, WALL. ST. J., Jul. 23, 2007, at A14 (identifying this case as the purpose of the John Doe protection legislation); see also § 1206(e) (making law retroactive to October 2006).

Moreover, *amicus* respectfully submits that conclusory allegations can never be deemed sufficient to state such a claim. Nor can mere, ordinary “red light/green light” factual allegations. Congress did not pass the new law to create a right of action for bad-faith reporting. Existing criminal laws cover that territory well enough, and the availability of such criminal complaints are Plaintiffs’ ordinary remedy in the first instance. Congress acted to give additional protection to the John Does in this case and others like them. It crafted remedial legislation designed to confer broad protection for informants to police and transportation security officers. This new law should therefore be read broadly, and together with existing law and public policy to acknowledge a nearly conclusive presumption of good faith on the part of the passengers. To allow conclusory accusations or unsupported factual allegations to circumvent this law would thwart the express will of Congress and render the new law dead on arrival.

The John Does here were correct in reporting their suspicions. Plaintiffs have admitted to behavior that would appear suspicious to a reasonable observer, and Defendants’ filings contain evidence of further troubling behavior. *See, e.g.* Dkt. 11-13 (police report detailing various suspicious behaviors).

Regardless of those specific allegations, however, the John Does were manifestly justified in reporting their suspicions. Actual hijackings or bombings are not the only terrorist crimes for which the public must be vigilant. So-called “dry runs” are criminal conspiracies and predicates for further terrorist activity. It is vital that law enforcement discover them. Suppose Richard Reid had only pretended to light dummy fuses on his

shoes, containing only simulated explosives. Should the passengers who called for help be answerable in federal court?

Furthermore, passengers cannot and should not be expected to know what security professionals would consider suspicious and what is merely beyond their personal experience. They should be encouraged to report anything they find troubling and let the authorities determine whether to take action. An analogy may help: the air jets over airline passengers' heads not infrequently spew harmless mist that inexperienced travelers often mistake for smoke. Nevertheless, it is in everyone's interest that all passengers, both the naive and the sophisticated, report everything that looks to them like possible smoke in the cabin and let the crew sort out the harmful from the innocuous. Imagine the danger that would result if ordinary passengers were dissuaded from their vigilance by being held liable to their fellow passengers, say for negligent infliction of emotional distress, if they guessed wrong.

The same considerations apply with even greater force to facts arousing suspicion of terrorism, which, unlike mist from air jets, are often not obvious to many people but observable only by a few. For this reason, Courts should enforce an all-but-conclusive presumption of good faith on the part of airline passengers, surmountable only by criminal conviction or guilty plea to filing a false report.

Indeed, even in the context of criminal prosecutions—which are far greater intrusions into one's life than missing a plane—informants' identities may be legally protected. Thus, federal law recognizes the right of law enforcement officials to keep

their sources confidential.<sup>6</sup> “The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.”<sup>7</sup>

Again, this privilege is so important that it applies even in many criminal prosecutions, and even where it may conflict with the defendant’s right to a fair trial. But here, no Fifth Amendment protections are at stake—plaintiffs seek not a fair criminal trial, but only civil retribution against those who made the reports. The Does simply reported what they saw and heard and trusted authorities to evaluate the significance of those things.<sup>8</sup> It is therefore all the more important to recognize a robust informants’ privilege in this case.

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<sup>6</sup> *Roviaro v. United States*, 353 U.S. 53 (1957); *Carpenter v. Lock*, 257 F.3d 775 (8<sup>th</sup> Cir. 2001); *U.S. v. Fairchild*, 122 F.3d 605 (8<sup>th</sup> Cir. 1997); *U.S. v. Kime*, 99 F.3d 870 (8<sup>th</sup> Cir. 1996); *U.S. v. Mandujano*, 2003 WL 22076571 (D. Minn. 2003).

<sup>7</sup> *Roviaro*, 353 U.S. at 59.

<sup>8</sup> Likewise, Minnesota’s informants’ privilege protects people like the John Does. *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. App. 1994); accord *Iverson v. Shogren*, 2004 WL 885769 (Minn.App. April 27, 2004). Minnesota’s privilege for police informants “serve[s] the public interest, despite the risk that some reports might be defamatory,” and is applied so long as the report was made for a proper purpose and with probable cause. *Smits*, 525 N.W.2d at 557. The allegations in this case, even read in the light most favorable to the Plaintiffs, establish both proper purpose and probable cause. The imams engaged in a number of suspicious behaviors when entering the plane, such as seat-switching, distributing themselves throughout the plane, and requesting apparently unnecessary seatbelt extensions, which can be used as makeshift weapons. See Dkt. 5 ¶¶ 28-30, 43-48. It is perfectly reasonable—even admirable—for a bystander witnessing such activity to suspect something was amiss and notify airport security. *Amicus* mentions both federal and state privileges because the John Does have not been accused

The new federal law, read together with the informants' privilege and public policy, thus sets a standard that Plaintiffs have not and cannot hope to meet. Their complaint against the Does must therefore be dismissed.

**III. The Case Against the John Does Should Be Dismissed *Sua Sponte* Because the Plaintiffs Failed to Properly State a Claim or Establish Jurisdiction.**

Even before the passage of federal legislation, this Court had ample reason to dismiss this frivolous case against the John Does. Federal courts routinely dismiss claims *sua sponte* under F.R.C.P. 12(b)(6) for failure to state a claim.<sup>9</sup> *Sua sponte* dismissal is appropriate here: the Plaintiffs failed to accuse the John Does of doing anything wrong. In the 38-page, 17-count complaint, ***not a single count*** alleges any wrongdoing by the John Doe passengers.<sup>10</sup> When the Plaintiffs do mention the John Does (¶¶ 21-22), it is to say that they will amend the complaint when they divine what the John Does did wrong. In other words, by the Plaintiffs' own account, they do not know who the John Does are, what they've done, or what legal claim they might have against them. All they do know is that they want to sue them. This fails to meet even the modest requirements of notice pleading. See F.R.C.P. 8(a).

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of any wrongdoing, so it is not yet clear whether Plaintiffs plan to sue them under federal law, Minnesota law, or both.

<sup>9</sup> See, e.g., *Enowmbitang v. Seagate Technology, Inc.*, 148 F.3d 970 (8<sup>th</sup> Cir. 1998) (upholding *sua sponte* grant of summary judgment for failure to state a claim); *Christiansen v. Clarke*, 147 F.3d 655 (8<sup>th</sup> Cir. 1998) (upholding *sua sponte* dismissal without leave to amend).

<sup>10</sup> Dkt. 5 at 16-37. The same is true of Plaintiffs' pending Second Amended Complaint. Dkt. 41-2 at 22-47.

Of course, lack of any discernable claim against the John Does is more than enough reason to dismiss them from the case. But the Court has another reason to do so—it has no jurisdiction. Even claims against “John Doe” defendants need to allege sufficient facts to establish diversity or federal question jurisdiction.<sup>11</sup> Plaintiffs have established neither. Nowhere do they claim to be diverse from the John Doe defendants, or allege that John Does injured them to the tune of \$75,001. Nor do they allege that the John Does violated any federal law (or indeed, any law at all). Plaintiffs’ only reason for dragging the John Does into federal court is that they might want to sue them someday, for something. Plaintiffs’ speculations and wishes do not suffice to confer jurisdiction on this Court.

Congress has acted to protect the John Does in this case and all passengers like them. This Court should follow the express will of Congress by dismissing all claims against John Doe passengers.

**IV. The Case Against the John Does Should Be Dismissed Because It Is Prohibited by Minnesota’s Anti-SLAPP Statute.**

Even if the case against the John Does were not barred by federal law (it is), or the Court had jurisdiction over the John Does (it doesn’t), the Court should still dismiss the case because it violates Minnesota’s anti-SLAPP statute. Minnesota protects private

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<sup>11</sup> See, e.g., *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1<sup>st</sup> Cir. 2007) (dismissing claims against John Does where plaintiffs failed to allege wrongdoing under federal law); *Pecherski v. General Motors Corp.*, 636 F.2d 1156 (8<sup>th</sup> Cir. 1981) (no diversity jurisdiction over case involving Jane Doe of uncertain residence); see also *Central Associated Carriers v. Nickelberry*, 995 F.Supp. 1031 (W.D.Mo. 1998) (declining to exercise diversity jurisdiction over John Doe defendant).

citizens like the John Does from petty threats and intimidation for talking to their government. In Minnesota, “[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability.” M.S.A. 554.03. The John Does are immune from suit under this provision—they engaged in “lawful...speech” to law enforcement authorities “aimed...at procuring favorable government action” (here, investigation of a possible security threat), and the claims against them are “materially related” to that speech. The statute therefore bars the state claims, which should be dismissed.<sup>12</sup>

### **CONCLUSION**

Plaintiffs’ unpleaded claims against unidentified fellow passengers should be dismissed in order to protect them as well as future informants from harassment.

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<sup>12</sup> M.S.A. 554.02, 554.03. Minnesota law also requires that violations of its anti-SLAPP law be dealt with before a suit proceeds. M.S.A. 554.02(2). This is all the more reason to dismiss the suit immediately.

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