Appeal No. 05-16079
PRO BONO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT-JOHN:FOTI; JOSEPH LEONARD NEUFELD;
KENNETH AUGUSTINE

Plaintiffs-Appellants,

vs.

McHUGH, Officer; UNITED STATES MARSHALS SERVICE;
FEDERAL PROTECTIVE SERVICES,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT NO. C-04-2567 PJH
The Honorable Patricia J. Hamilton, District Judge

December 11, 2006

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TABLE OF CONTENTS

Page(s)

I. Sovereign Immunity 1

A. The Claims Subject to the Federal Torts Claims Act Should Not Have Been Dismissed with Prejudice 1

B. The Administrative Procedure Act Provides a Waiver of Sovereign Immunity for Claims for Injunctive Relief Based on Constitutional Violations 1

1. This Court Can and Should Consider Whether the APA Provides the Necessary Waiver in this Case 1

2. *United States v. Rural Electric* Is Irrelevant to the APA Issue Before the Court 6

II. Qualified Immunity 7

A. Qualified Immunity Does Not Apply to Plaintiffs' Claims for Injunctive Relief. 8

B. The Individual Defendants Do Not Have Qualified Immunity for Damage Claims for the Physical Restraint of Plaintiff Foti. 8

III. Constitutional Issues 9

A. Defendants Fail to Refute Plaintiffs' First Amendment Right to Access the Courts 10

B. The Opposition Fails to Address the Infringement of Plaintiffs' Fifth Amendment Due Process Rights 13

C. Defendants Fail to Address the Violation of Plaintiffs' Fourth Amendment Rights 14

TABLE OF CONTENTS
(continued)

Page(s)

1. The Identification Requirement as a Fourth Amendment Search or Seizure 14

2. The Physical Detention of Foti as a Fourth Amendment Violation 17

IV. The District Court Erred in Failing to Reach the Merits 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Balser v. Department of Justice,
327 F.3d 903 (9th Cir. 2003) 3

Beller v. Middendorf,
632 F.2d 788 (9th Cir. 1980) 2

California Dept. of Educ. v. Bennett,
843 F.2d 333 (9th Cir. 1988) 3

Gilmore v. Gonzales,
435 F.3d 1125 (9th Cir. 2006) 18, 19

Los Angeles Police Protective League v. Gates,
995 F.2d 1469 (9th Cir. 1993) 8

Presbyterian Church v. United States,
870 F.2d 518 (1989) 2, 4, 8

Saucier v. Katz,
533 U.S. 194 (2001) 9

Tennessee v. Lane,
541 U.S. 509 (2004) 10

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 17

United States v. Christian,
356 F.3d 1103 (9th Cir. 2004) 15, 16

United States v. Patrin,
575 F.2d 708 (9th Cir. 1978) 3

United States v. Rural Elec. Convenience Co-op. Co.,
922 F.2d 429 (7th Cir. 1991) 6, 7

United States v. Smith,
426 F.3d 567 (2d Cir. 2005), *cert. denied*, 126 S. Ct.
1410 (2006) 14, 15

STATUTES

5 U.S.C. § 500, *et seq.* 1

I. Sovereign Immunity

A. The Claims Subject to the Federal Torts Claims Act Should Not Have Been Dismissed with Prejudice.

Defendants dedicate almost a page of argument to a point that Plaintiffs expressly conceded – that the Federal Torts Claims Act ("FTCA") does not act as a waiver of sovereign immunity in this case, because Plaintiffs have not exhausted their administrative remedies under the FTCA for their common law tort claims. *See* Plaintiffs' Replacement Opening Brief at 13 n.5. However, Defendants failed to address or oppose Plaintiffs' argument that the district court should not have dismissed the tort claims with prejudice, because Plaintiffs should be allowed to refile those claims if they exhaust their administrative remedies. *Id.* Regardless of any other rulings, this Court therefore should reverse and remand with instructions to dismiss those claims without prejudice.

B. The Administrative Procedure Act Provides a Waiver of Sovereign Immunity for Claims for Injunctive Relief Based on Constitutional Violations.

1. This Court Can and Should Consider Whether the APA Provides the Necessary Waiver in this Case.

Plaintiffs argue that Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq.*, waives sovereign immunity for Plaintiffs' claims for injunctive relief based on the constitutional violations alleged in this case. This Court has explicitly held that the statute "waives sovereign immunity not only for suits brought under § 702 itself, ***but for constitutional claims brought under the***

general federal-question jurisdiction statute." *Presbyterian Church v. United States,* 870 F.2d 518, 525 n.9 (1989) (emphasis added); *accord Beller v. Middendorf,* 632 F.2d 788, 797 (9th Cir. 1980) (Kennedy, J.); *see generally* Plaintiffs' Replacement Opening Brief at Section II(A). Having no answer to this argument, Defendants argue that the Court should not address the issue.

First, Defendants note that this Court ordinarily will not consider a theory that the plaintiff did not assert below. While this is correct as a broad statement of law, it does not apply here for several reasons.

Defendants completely ignore the fact that the important issues in this case are presented by *pro se* plaintiffs. It is well-established that the pleadings in such cases should be treated with more liberality than in a case litigated by experienced attorneys. Plaintiffs' Replacement Opening Brief at Section I. The law of sovereign immunity is a particularly arcane and difficult area of law for lay plaintiffs. *Id.* It is particularly unseemly for the Government to rely on technicalities to avoid the review of the serious constitutional issues raised in this case.

Apart from the fact that the Amended Complaint was drafted by *pro se* plaintiffs, this case falls squarely within an established exception to the rule against considering issues raised for the first time on appeal – namely, when the issue presented is purely one of law and either does not depend on the factual record

developed or the pertinent record has been fully developed.[1] *See, e.g., California Dept. of Educ. v. Bennett,* 843 F.2d 333, 339 (9th Cir. 1988). The rationale for this exception is that the party against whom the issue is raised on appeal is not prejudiced by it, because the issue has no effect on how that party would have tried their case. *United States v. Patrin,* 575 F.2d 708, 712 (9th Cir. 1978).

Here, the issue of whether Section 702 of the APA provides the necessary waiver in this case is purely one of law that does not at all depend on the factual record developed. Indeed, this case is before this Court on an appeal from a grant of a motion to dismiss that prevented a record from being made. That the question is being raised on appeal for the first time does not prejudice the Government, as it has no effect on how the Government defended this case.

Defendants' reliance on *Balser v. Department of Justice,* 327 F.3d 903, 908 (9th Cir. 2003) for the proposition that this Court should not consider Plaintiffs' sovereign immunity argument is misplaced. *See* Defendants' Replacement Answering Brief at 17. In that case, the appellants argued for the first time on appeal that the Federal Torts Claim Act ("FTCA") provided them relief, and requested that this Court reverse the district court and allow an amendment asserting that theory. *Balser,* 327 F.3d at 908. This Court did not need to decide

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[1] Two other exceptions are (1) when the case is exceptional and appellate review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; or (2) when a new issue arises while an appeal is pending, due to a change in the law. *Id.*

whether it could entertain the FTCA claim for the first time on appeal, because "the dispositive fact" was that "such an amendment would be futile," as appellants' entire theory was founded on a government agent's alleged negligence in carrying out duties that were, as a matter of law, subject to the FTCA discretionary function exception. *Id.* at 908-09. Here, no such futility exists. Because the issue is purely one of law and does not depend on the factual record developed, this Court should exercise its discretion to decide whether Section 702 of the APA is an explicit waiver of sovereign immunity for Plaintiffs' claims for injunctive relief against the United States and its agencies.

Defendants also argue that the Court should not consider the APA because Plaintiffs "have failed sufficiently to identify the agency action at issue." Defendants' Replacement Answering Brief at 17. As discussed in Plaintiffs' Replacement Opening Brief, however, this Court has expressly rejected the Government's "attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13) [of the APA]," holding that the argument "offends the plain meaning of the [1976 amendment to § 702 of the APA]." *Presbyterian Church,* 870 F.2d at 525 n.8; *see* Plaintiffs' Replacement Opening Brief at Section II(A). Accordingly, the Court need not address whether the Government's actions in the present matter constituted "agency action." In any event, Defendants argument that the action being

challenged has not been sufficiently identified is disingenuous. The Amended Complaint clearly challenges the rules requiring identification to enter the courthouse, at least in the absence of an established procedure for admitting individuals who do not have such identification.

Finally, Defendants vaguely argue that "[Plaintiffs' contention] that the record sufficiently demonstrates their constitutional rights have been compromised in violation of the APA . . . [is] meritless." Defendants' Replacement Answering Brief at 16. To the extent that Defendants' argument is that the constitutional violations do not violate the APA, Defendants misunderstand the relevance of the APA. As discussed above, Plaintiffs do not and need not argue that their constitutional rights have been compromised *in violation of the APA* – only that Section 702 of the APA acts as a waiver of sovereign immunity for their claims for injunctive relief based on the alleged constitutional violations. To the extent that Defendants' argument is that Plaintiffs' constitutional claims fail as a matter of law, Defendants' argument begs the question. For purposes of the sovereign immunity waiver analysis, it is irrelevant whether the record "sufficiently demonstrates" that Plaintiffs' constitutional rights have been violated; it is only relevant that Plaintiffs have *alleged* in their Amended Complaint that their constitutional rights have been violated, and that they are seeking injunctive relief.

As discussed below, Plaintiffs have sufficiently alleged multiple constitutional violations.

2. *United States v. Rural Electric* Is Irrelevant to the APA Issue Before the Court.

On the substantive issue of whether Plaintiffs' claims fall within a waiver of sovereign immunity, Defendants' rely on *United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 434 (7th Cir. 1991), for the broad proposition that the doctrine of sovereign immunity bars suits for injunctive relief against the Government. Defendants' Replacement Answering Brief at 16. That reliance is misplaced for several reasons.

Rural Electric is procedurally complex but clearly distinguishable. The case involved an effort by the United States to obtain an injunction against a state court case that potentially threatened a contractual security interest of the United States. Neither the United States nor any of its agencies were named parties in the state court action. No constitutional issues were involved, and no claim was made that the APA provided a waiver. The focus of the Seventh Circuit's decision was whether a case that might implicate a security interest of the United States is a suit against the United States that implicates sovereign immunity at all, an issue that is obviously not involved here.

In contrast, in the present case, there is no dispute that Plaintiffs have sued the United States and that a waiver of sovereign immunity is required. The

question is whether that suit falls within the waiver of sovereign immunity provided by the APA. The majority opinion in *Rural Electric* on which Defendants rely simply does not address the issue before this Court. However, Judge Easterbrook, in his concurrence-in-part in *Rural Electric*, recognized that Section 702 waives sovereign immunity in injunctive actions, an assertion that was in no way refuted by the majority opinion. *See id.* at 442 (Easterbrook, J., concurring in part, and dissenting in part).

II. Qualified Immunity

In their Replacement Opening Brief, Plaintiffs argued that (1) qualified immunity does not bar actions for injunctive relief, and that (2) the officers are not entitled to qualified immunity for Appellant Foti's claim for damages for violating his Fourth Amendment rights when he was forcibly ejected from the courthouse and surrounded by officers. Plaintiffs' Replacement Opening Brief at Section III. Defendants fail to address or analyze these arguments. Instead, they argue – in the teeth of the allegations of the Amended Complaint – that the identification requirement does not prevent Plaintiffs from being heard in district court, an argument that is wholly inapplicable to Plaintiffs' qualified immunity arguments. *See* Defendants' Replacement Answering Brief at 18-21.

A. Qualified Immunity Does Not Apply to Plaintiffs' Claims for Injunctive Relief

As discussed more fully in Section III(A) of Plaintiffs' Replacement Opening Brief, this Court has repeatedly held that "[q]ualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief." *Presbyterian Church,* 870 F.2d at 527 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982)); *accord Los Angeles Police Protective League v. Gates,* 995 F.2d 1469, 1472 (9th Cir. 1993). Accordingly, the district court erred in dismissing Plaintiffs' claims against the officers for injunctive relief based on all of the alleged constitutional violations.

B. The Individual Defendants Do Not Have Qualified Immunity for Damage Claims for the Physical Restraint of Plaintiff Foti

As discussed more fully in Sections III(B) and IV(D)(2) of Plaintiffs' Replacement Opening Brief, the officers are not entitled to qualified immunity from Foti's claims for damages arising from the violation of his clearly established Fourth Amendment rights when the officers placed him in a "wristlock control hold," forced him out of the building and into the street without his shoes, and then restricted his freedom of movement by surrounding him on the street and holding him for approximately 20 minutes. Plaintiffs' Replacement Opening Brief at 22-

23; 38-41.[2] In a footnote, Defendants acknowledge this treatment of Foti, but purport not to understand "the relevance of the allegation." Defendants' Replacement Answering Brief at n.5. Plaintiffs assert that Foti's claim for damages for this Fourth Amendment violation is clear, that a citizen's right to be free from such treatment by governmental officials was clearly established, and that the District Court clearly erred in dismissing the claim on the pleadings. *See Saucier,* 533 U.S. at 201.

III. Constitutional Issues

Defendants' Answering Brief either ignores or mischaracterizes the important First, Fourth, and Fifth Amendment issues raised in the Amended Complaint and in Plaintiffs' Replacement Opening Brief. Rather than accepting the factual allegations in the Amended Complaint, as required in an appeal from a dismissal on the pleadings, Defendants assert that the facts pleaded by Plaintiffs are *incorrect*. Similarly, rather than addressing the legal theories and supporting

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[2] Plaintiffs claim that the demand for identification to enter the courthouse also violates their Fourth Amendment rights. Plaintiffs' Replacement Opening Brief at Section IV(D)(1). However, Plaintiffs are not seeking *damages* from the officers for those violations, because they concede that, under the second prong of the *Saucier* test, the contours of the right to enter a courthouse without presenting identification were not so clearly established that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 201-03 (2001). Of course, the concession that the right was not "clearly established" for the purpose of a qualified immunity analysis does nothing to inform the question as to whether Plaintiffs' constitutional rights were, in fact, violated.

authorities set out in Plaintiffs' Replacement Opening Brief, the Answering Brief ignores those controlling cases and asserts that there is no legal support for *different* legal theories on which Plaintiffs do not rely.

As clearly alleged in the Amended Complaint, Plaintiffs were denied access to the courthouse because of the inflexible requirement of presenting a government issued identification card, which Plaintiffs do not possess as a matter of strongly held principle. This principle includes their fundamental understanding that the law absolutely defends, protects and guarantees rights which any requirement to possess photo identification to function in the United States violates, as they are not suspected of any criminal activity. As a result, Plaintiff Foti was unable to attend an oral argument in a summary judgment case in which he was a party. In addition to denying Foti access to the courthouse, the guards on one occasion manhandled Foti, forced him outside the courthouse building, and detained him for approximately 20 minutes. Plaintiffs' Replacement Opening Brief demonstrated that there is a constitutional right of access to the courts. Plaintiffs do not dispute that the Government has a strong interest in maintaining security in the courthouse, but Plaintiffs do strongly dispute that the current inflexible rule is necessary to achieve that goal. By improperly dismissing the case on the pleadings, the District Court prevented Plaintiffs from developing the factual record necessary for a proper analysis of this important issue.

A. Defendants Fail to Refute Plaintiffs' First Amendment Right to Access the Courts.

Surprisingly, Defendants do not address *Tennessee v. Lane*, 541 U.S. 509 (2004), in which the Supreme Court recognized a fundamental constitutional right to physical access to the courthouse. Defendants' Answering Brief actually underscores the District Court's error in dismissing this case on the pleadings.

Defendants not only fail to respond to Plaintiffs' legal authorities; they primarily attempt to defend the dismissal with assertions of fact that are completely at odds with the Amended Complaint. For example, Defendants broadly assert that "Appellants have simply alleged no facts establishing that they were precluded from access to the courthouse." Defendants' Replacement Answering Brief at 21. More specifically, they assert that Plaintiffs were "not precluded from entering the courthouse with appropriate notice to the court and an escort." *Id.* at 19. Both assertions are factually incorrect and impossible to square with the Amended Complaint.

Based on the Amended Complaint, Plaintiffs plainly were precluded from entering on several occasions, and there was no procedure for obtaining an escort, or at least none was made known or available to Plaintiffs. The proper procedure for the kind of factually based argument made by Defendants is, of course, summary judgment, not a dismissal on the pleadings.

As detailed in the Amended Complaint, anticipating that they might be

denied entrance to the courthouse without identification, Plaintiffs faxed a letter to the United States Marshals Service on May 4, 2004. The letter provided notice and requested an "administrative hearing" regarding the identification requirement. They received no response to this letter. ER at 2; Plaintiffs' Replacement Opening Brief at 6. On June 24, 2004, Plaintiffs requested an escort to enter the courthouse, but the clerks and marshals refused to accompany them. ER 14 at 11; Plaintiffs' Replacement Opening Brief at 7. Similarly, on July 9, 2004, Plaintiffs were precluded from entering the courthouse to attend Plaintiff Foti's hearing in an underlying case because the clerks and marshals each informed them that it was the other entity's responsibility to provide an escort and neither would accompany them. ER 14 at 10-11; Plaintiffs' Replacement Opening Brief at 7. Again on September, 24, 2004, Plaintiff Foti was denied access to a hearing before Judge Illston because courthouse personnel refused to escort him. ER at 11-12; Plaintiffs' Replacement Opening Brief at 7. At no time did either the clerks or marshals who refused to provide an escort inform Plaintiffs that advance notice was required or that there were any procedures they did not properly follow.

Significantly, Defendants do not attempt to rely on or defend the District Court's cavalier assertion that cases can be tried on papers alone. ER 35. On some of the occasions when Foti was denied access he was trying to file pleadings. *Id.* at 11. While a summary judgment motion could be submitted on the papers alone,

Foti was precluded from attending an in-person hearing in his case.

B. The Opposition Fails to Address the Infringement of Plaintiffs' Fifth Amendment Due Process Rights.

Defendants devote only one sentence to Plaintiffs' Fifth Amendment claim and similarly mischaracterize it: "no due process right precludes the Department of Homeland Security from issuing rules to ensure the safe and orderly access to the courts of the entire public." Defendants' Replacement Answering Brief at 20.

The Opening Brief makes clear that the Fifth Amendment due process right implicated is Plaintiff Foti's right to be heard on a case-dispositive motion, not whether the Government may issue rules to secure the courthouse. Plaintiffs' Replacement Opening Brief at 25 ("Procedural due process under the Fifth Amendment requires that Plaintiff Foti be allowed into the court to plead his case"). Plaintiffs explicitly conceded in their opening brief that the government has a legitimate security interest in protecting the courts. *Id.* at 35. Defendants simply fail to address the fact that by physically excluding Plaintiffs from the courthouse, they violated Plaintiff Foti's due process right to represent himself at a dispositive hearing. Moreover, opposing counsel was allowed to present oral argument *ex parte* at the summary judgment hearing while Plaintiffs were attempting but failing to gain entry to the courthouse in order to participate in the hearing.

C. Defendants Fail to Address the Violation of Plaintiffs' Fourth Amendment Rights.

Plaintiffs' Replacement Opening Brief clearly states two distinct Fourth Amendment violations against unreasonable search and seizure: (1) the demand for identification to enter a public building; and (2) Plaintiffs' forcible removal from the courthouse and restriction from leaving the area. Plaintiffs' Replacement Opening Brief at 38-42. Defendants fail to address either violation, other than summarily dismissing in a footnote the significance of placing Plaintiff Foti in wristlock hold. Defendants' Replacement Answering Brief at 20 n.5.

1. The Identification Requirement as a Fourth Amendment Search or Seizure

Defendants fail to refute the violation of Plaintiffs' Fourth Amendment rights against unreasonable searches created by an identification requirement to enter a public building. Defendants fail to address any of the cases cited in Plaintiffs' Replacement Opening Brief holding that conditioning access to a public place on the showing of identification is unconstitutional under the Fourth Amendment. *See* Plaintiffs' Replacement Opening Brief at 38-40. Instead, Defendants cite *United States v. Smith*, 426 F.3d 567 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1410 (2006), a Second Circuit case which held that a criminal defendant's First and Sixth Amendment rights to a public trial were not violated by the imposition of a photo identification requirement for "unknown building

visitors."[3] *Smith* is distinguishable from the present case. Although *Smith* also involved a photo identification requirement to enter a courthouse, the constitutional right implicated was a criminal defendant's Sixth Amendment right to a public trial.[4] In this case, Foti is a civil litigant who asserts First and Fifth Amendment rights to access the courts to litigate his own case.

More importantly, despite determining that Smith's constitutional rights were not violated, the Second Circuit noted its "concerns about unilateral steps – even commonsensical and fully justified ones – by the executive branch that restrict court access." *Id.* at 576. The Second Circuit particularly noted that "special concerns arise when security measure that seem obvious or commonplace in some settings are transferred to the door of [federal courthouses]." *Id.* The court stated:

> "It is especially important that the judiciary maintain control of *security measures that may affect those having business before the courts, because of the danger that litigants could be excluded from the courtroom* and procedurally penalized for their absence through no fault of their own and without the knowledge of the court." *Id.* (emphasis added).

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[3] As described in the Amended Complaint, Plaintiff Foti was known to Defendant McHugh and courthouse security staff. ER 14 at 2, 10-12.

[4] The Second Circuit did not reach the question of whether Smith could bring a First Amendment open trial claim because the court's holding that "the partial closure of Smith's trial was justified under *Waller* also resolves his First Amendment claim." 426 F.3d at 575.

This is exactly what happened to Plaintiff Foti when he was excluded from his hearing.

The only other case Defendants cite, *United States v. Christian*, 356 F.3d 1103 (9th Cir. 2004), is inapplicable. By Defendants' own admission, "nothing in our case law prohibits officers from asking for, or even demanding, a *suspect's* identification." Defendants' Replacement Answering Brief at 19-20 (emphasis added). The distinction between a criminal suspect and a civil litigant or member of the public is crucial.

In *Christian,* police officers investigating a complaint of a particular man brandishing a gun stopped a suspect in an apartment building and demanded his identification to determine whether he was the man reported. The suspect, ultimately identified as defendant Christian, gave three differing accounts of his identity and led police officers to several different photo identifications, each with his picture and a different name on it. The court concluded that police officers' detention and demand of identification from a criminal suspect during a *Terry* stop were reasonable. 356 F.3d at 1106. In examining whether a demand for identification by police constitutes a Fourth Amendment violation, the court held that it is within the scope of a police officer's authority to requests identification *from a suspect when he or she has reasonable suspicion of criminal activity. Id.*

In this case, Defendants had no suspicion that Plaintiffs were involved in any criminal activity. Accordingly, this citation is inapposite.

2. The Physical Detention of Foti as a Fourth Amendment Violation

Defendants further fail to address the violation of Plaintiffs' Fourth Amendment rights against unreasonable seizures when Officer McHugh "took [Foti's] arm putting it in a wristlock control hold," forced him outside onto the street without his shoes and then surrounded him with other officers to prevent him from leaving for approximately 20 minutes. ER 14 at 8; Plaintiffs' Replacement Opening Brief at 41. The only mention of this conduct is in a footnote where Defendants claim that Plaintiffs "do not explain the relevance of this allegation." Defendants' Replacement Answering Brief, n.5. However, the Amended Complaint alleges Officer McHugh restrained Foti's freedom to walk away when he grabbed his wrist and further seized him by surrounding him on the street with other officers for twenty minutes so he could not leave. ER at 9. Plaintiffs' Replacement Opening Brief makes clear "whenever a law enforcement officer 'accosts an individual and restrains his freedom to walk away, he has 'seized' that person, and the Fourth Amendment requires that the seizure be 'reasonable.'" Plaintiffs' Replacement Opening Brief at 41, *citing United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Clearly this conduct is relevant to the analysis of whether Foti's Fourth Amendment rights were violated.

IV. The District Court Erred in Failing to Reach the Merits

Plaintiffs concede that The Department of Homeland Security has the authority to enact "necessary" measures to protect courthouse security. Plaintiffs do not contend that they are or should be free from reasonable measures to protect courthouse security, but those measures must accommodate the rights of litigants and citizens to access the courthouse. By dismissing the Amended Complaint on the pleadings, the district court precluded a determination of whether an identification requirement is, in fact, necessary to protecting key resources and critical infrastructure.

First, the Government has made no showing that presenting government-issued photo identification provides any additional security to submitting to examination of one's person by metal detector and one's belongings by magnometer. Because fake identification cards are readily available and because the identification presented by an entrant is not authenticated or cross-checked against a list of people who should be precluded from entering, the requirement that an entrant show such identification does not make the courthouse safer. At least, there is a serious fact question on the issue.

Second, in any event there is at least a less restrictive alternative to excluding from the courthouse litigants and members of the public who do not possess identification. The Ninth Circuit has upheld additional security screening

of individuals without identification as a reasonable option that does not violate an individual's Fourth Amendment rights. *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006). Had the District Court below allowed the case to progress to the merits phase, Plaintiffs would have demonstrated that they would willingly have submitted to the additional screening approved in *Gilmore*, and that a secondary search in fact provides a greater measure of security at little to no cost.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the District Court's February 2, 2005 Order Granting Defendants' Motion to Dismiss First Amended Complaint, remand the case and reinstate the First Amended Complaint.

Respectfully submitted,

Dated: December 11, 2006

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Plaintiff-Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,153 words (based on the word processing system used to prepare the brief).

Dated: December 11, 2006

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CERTIFICATE OF SERVICE

I declare I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Embarcadero Center West, 275 Battery Street, Suite 1600, San Francisco, California 94111. On December 11, 2006, I served the following document(s), in the manner indicated below:

APPELLANTS' REPLY BRIEF

on the parties in the subject action by placing a true and correct copy thereof as indicated below, addressed as follows:

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(X) **BY U.S. MAIL:** I am familiar with our business practices for collecting and processing of mail for the United States Postal Service. Mail placed by me within the office for collection for the United States Postal Service would normally be deposited with the United States Postal Services that day in the ordinary course of business. The envelope(s) bearing the address(es) above was sealed and placed for collection and mailing on the date below following our ordinary business practices.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on December 11, 2006 at San Francisco, California.

Carmelita Procida

Carmelita Procida

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