NO. 05-16079

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH LEONARD NEUFELD;
KENNETH AUGUSTINE;
ROBERT J. FOTI,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

APPELLEES' REPLACEMENT ANSWERING 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

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November 13, 2006

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STATEMENT OF JURISDICTION

Plaintiffs/Appellants Robert-John:Foti, Joe Neufeld and Ken Augustine ("Appellants") timely appeal the district court's February 2, 2004 judgment in favor of the Defendants. (CR 35, 41.)[1/] The February 2, 2004, judgment was entered February 3, 2004, and Appellants filed a timely motion for reconsideration of the judgment on February 17, 2005. The district court denied the motion for reconsideration on May 9, 2005. Appellants filed a timely notice of appeal on May 25, 2005. *See* Fed. R. App. P. 4(a); *Historical Research v. Cabral*, 80 F.3d 377, 379 (9th Cir. 1996) (filing of a timely motion for reconsideration tolls time for filing notice of appeal). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the district court's judgment in favor of the United States Marshals Service and the Federal Protective Service must be affirmed because Appellants have not demonstrated an applicable waiver of sovereign immunity.

II. Whether the district court's judgment in favor of the individual defendants must be affirmed because they each are entitled to qualified immunity.

[1/] CR refers to the Clerk's Record. ER refers to the Plaintiff/Appellant's Excerpts of Record. AOB refers to the Appellants' Opening Brief. ARB refers to Plaintiff/Appellant's Replacement Brief.

STATEMENT OF THE CASE

Appellants are Robert-John:Foti, Joe Neufeld and Ken Augustine. (ER 30 at 1.[2/]) They filed a complaint on June 25, 2004 and a First Amended Complaint on November 9, 2004 alleging their rights under the United States Constitution and certain federal criminal codes were violated when they were detained and otherwise prevented from entering the Federal Building at 450 Golden Gate Avenue in San Francisco. (ER 30 at 3-4.) Generally, Appellants assert that the United States Constitution prohibits the government from requiring them to show government-issued identification as a condition of entering a federal building with a courthouse. (AOB at 2.) Appellants named as defendants the United States Marshals Service ("USMS"), the Federal Protective Services ("FPS"), unknown officers of the USMS and FPS and U.S. Deputy Marshal McHugh. (ER 8, 30 at 1.)

The district court dismissed the First Amended Complaint. (ER 11.) As for the USMS and the FPS, the district court found that plaintiffs failed to exhaust

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[2/] ER 30 is the first page of Appellant's 30-page First Amended Complaint, document number 14 in the Clerk's Record. Appellants' Excerpts of Record is not paginated; accordingly, for ease of reference, the entire First Amended Complaint is referred to herein as ER 30 and page references are given according to the pagination in the document. Similarly, the district court's order granting defendants' motion to dismiss (CR 35) begins on page 11 of the Excerpts and is referred to herein in its entirety as ER 11 with page references.

available administrative remedies and therefore could not bring their lawsuit pursuant to the Federal Tort Claims Act ("FTCA"). (ER 11 at 6-8.) The district court also concluded Appellants failed to identify an applicable waiver of sovereign immunity. (*See* ER 11 at 7.) As to the individual defendants, the district court found that the complaint failed to allege facts which would establish that any of Appellants' constitutional rights were violated. (ER 11 at 10.) The district court also found that the USMS and other federal officers properly exercised their authority under federal regulations to require identification of persons entering federal buildings that contain courthouses. (ER 11 at 12-13.)

Appellants moved the district court for reconsideration of the judgment on February 17, 2005. (ER 9.) Appellants argued that the district court committed manifest errors of law and that the judgment resulted in manifest injustice. (*See* ER 28.) The district court denied the motion for reconsideration finding that Appellants were merely seeking to reargue points made in opposition to the motion to dismiss. (ER 28-29.) Foti, Neufeld and Augustine appeal.

Between September 14, 2005, and December 2, 2005, this appeal was fully briefed by Appellants appearing in proper persona. On June 1, 2006, this court appointed pro bono counsel and ordered that replacement briefs be filed.

STATEMENT OF THE FACTS

I. THE USMS AND THE FPS ARE CHARGED WITH PROVIDING PROTECTION FOR THE FEDERAL COURTHOUSE AT 450 GOLDEN GATE AVENUE

The Constitution provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." U.S. Const., Art. IV, sec. 3. Congress has authorized the USMS to "provide for the security . . . of the United States District Courts," and to "provide for the personal protection of federal jurists, court officers, witnesses and other[s] . . . ." 28 U.S.C. § 566(a), (e)(1)(A). Similarly, Congress has authorized the Department of Homeland Security (of which FPS is a component agency) to "prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property" in consultation with General Services Administration ("GSA"). 40 U.S.C. § 1315(c)(1); *see also* 41 C.F.R. Part 102-74, Subpart C (regulations governing conduct on and admission to federal property).

Included in such regulations is the requirement that the agencies must "[e]nsure, when property or *a portion thereof* is closed to the public, that admission to the property, or the affected portion, is restricted to authorized persons who must register upon entry to the property and *must, when requested,*

display Government or other identifying credentials to Federal police officers or other authorized individuals when entering, leaving or while on the property." 41 C.F.R. § 102.74-375(c) (emphases added).

Pursuant to these authorities, the USMS and the FPS, through federal officers including defendant McHugh, enforced the provisions of 41 C.F.R. § 102.74-375(c).

II. APPELLANTS SEEK TO ENTER FEDERAL COURTHOUSES WITHOUT PRESENTING IDENTIFICATION

Plaintiffs are Robert-John:Foti, Joe Neufeld and Ken Augustine. (ER 30.) They filed a complaint on June 25, 2004 and a First Amended Complaint on November 9, 2004 alleging their rights under the United States Constitution and certain federal criminal codes were violated when they were detained and otherwise prevented from entering the Federal Building at 450 Golden Gate Avenue in San Francisco. (ER 7, 8, 30 at 2-4.) Generally, plaintiffs assert that the requirement to show government-issued identification as a condition of entering a federal building containing a courthouse violates the United States Constitution. (*See* ER 30 at 4-5.)

Appellants allege that on May 4, 2004, Foti, Neufeld, Augustine, and a fourth person (Peter Clark Dougherty) wrote a letter to the USMS asking for an

"administrative hearing" regarding the policy of requiring that everyone entering the building show a form of state-issued identification. (ER 30, Attachment 1.) Appellants claim they received no response to the letter. Appellants allege that then, on seven occasions, they either were precluded from entering the Federal Building or required to enter with escorts in order to attend hearings or visit the clerk's office as follows:

On May 20, 2004, Neufeld attempted to enter the Federal Building to file a lawsuit. (ER 30, Attachment 2.) Neufeld initially was refused admittance to the building because he had no identification, but one of the court security officers eventually escorted him to the clerk's office. (ER 30, Attachment 2.) Neufeld then filed the complaint in *Neufeld v. United States Postal Service*, C-02-2434 WHA. (ER 30, Attachment 2.)

The next day, Foti, Neufeld, and Augustine attempted to enter the Federal Building to attend a hearing in *Foti v. County of San Mateo*, C-00-4783 SI, a civil case in which only Foti was a party. (ER 30, at 3.) None of the Appellants produced identification and the security officers refused to allow them to enter the building. (ER 30, at 3.) Foti claims that defendant Officer McHugh placed his arm in a "wristlock control hold." (ER 30, at 8.) Foti further asserts Officer McHugh forced him out of the building and into the street, and compelled him to

remain there, surrounded by other officers. (ER 30, at 8.) Foti later was accompanied by a clerk and permitted to enter the building to attend his hearing. Neufeld and Augustine were not, on that occasion, permitted to enter. (ER 30, at 9.)

On June 25, 2004, Foti filed the original complaint in this action, *Foti v. McHugh*, No. C-04-2567 PJH. (ER 6.) According to the First Amended Complaint, Foti was refused admittance when he attempted to enter the Federal Building to file the papers because he would not produce identification. (ER 30, at 11.) Appellants allege that on this occasion, Foti was not escorted to the clerk's office, and that his papers were filed instead by a person with identification. (ER 30, at 11.)

On July 9, 2004, Foti and Augustine again attempted to enter the Federal Building without identification. (ER 30, at 10.) On this occasion, Appellants alleged they were attempting to attend a hearing but did not specify the case. They were denied admission because they failed to produce identification. (ER 30, at 10- 11.)

Appellants allege that on September 10, 2004, Foti attempted to enter to Federal Building to obtain subpoenas for discovery in case No. C-00-4783 SI. (ER 30, at 11.) He was denied access to the building because he had no

identification (or refused to produce identification). (ER 30, at 11.)

Appellants allege that on September 24, 2004, Foti again attempted to enter the Federal Building to attend a hearing in case No. C-00-4783 SI. He was denied access to the building because he had no identification (or refused to produce identification). (ER 30, at 11.) Plaintiffs claim that no one would escort Foti to the courtroom. (ER 30, at 11.)

Appellants allege that on November 4, 2004, Foti and Augustine attempted to enter the Federal Building to attend a hearing in case No. C-00-4783 SI. (ER 30, at 12.) Foti was a party to the lawsuit and Augustine was there only to observe. (ER 30, at 12.) They both were denied access to the building because they would not produce identification. (ER 30, at 12.) Appellants allege that on this occasion, no one would escort Foti and Augustine to the courtroom. (ER 30, at 12.)

III. APPELLANTS SUED TWO AGENCIES AND AN UNSPECIFIED NUMBER OF INDIVIDUAL OFFICERS INVOLVED WITH ENFORCING THE RULES REGARDING ENTRY INTO FEDERAL BUILDINGS

Appellants filed a First Amended Complaint on November 9, 2004. (*See* ER 8; ER 30.) They named as defendants the USMS, the FPS, unknown officers of the USMS and FPS and U.S. Deputy Marshal McHugh. (ER 30 at 1.) As a jurisdictional basis for the lawsuit, Appellants cited 28 U.S.C. §§ 1331, 1332 and

1343, 42 U.S.C. § 1986 (for violations of 42 U.S.C. § 1983), various amendments to the United States Constitution and *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971). (ER 30 at 2.) Appellants also stated "this court has pendent jurisdiction for any State law claims." (ER 30 at 2.)

Appellants alleged forty-six causes of action, asserting similar claims as to each of the seven incidents described above.[3/] (ER 30.) Appellants alleged common law tort claims for assault and battery, false arrest and imprisonment, and kidnaping; claims of violations of 18 U.S.C. § 1509 (obstruction of justice); and claims of violations of their First, Fourth, Fifth, Thirteenth, and Fourteenth Amendment rights. (ER 30 at 29.) The First Amended Complaint essentially asserts Appellants were subjected to the following: 1) denial of freedom of association and denial of the right to petition for redress of grievances, in violation of the First Amendment; 2) false arrest and imprisonment and unlawful search, in violation of the Fourth Amendment; 3) denial of due process, in violation of the Fifth and Fourteenth Amendments; and 4) involuntary servitude, in violation of the Thirteenth Amendment.

[3/] As noted by the district court, it was not clear whether Appellants were claiming violations of their rights in connection with an incident on June 25, or July 25, or both. (ER 11 at 4, n. 3.) On appeal, Appellants appear to argue it was the June 25, 2004 incident that is at issue. ARB at 7.

IV. THE DISTRICT COURT DISMISSED APPELLANTS' COMPLAINT

The District Court granted Defendants' motion to dismiss the First Amended Complaint. The district court first concluded that the claims against the USMS and the FPS must be dismissed. (ER 11 at 6-8.) The district court concluded it had no jurisdiction over the tort claims against the agencies because Appellants did not first exhaust their administrative remedies before filing the lawsuit. (ER 11 at 6.) Further, the district court concluded the constitutional claims against the agencies must be dismissed because Appellants could identify no waiver of sovereign immunity permitting the filing of a lawsuit against the federal government for constitutional claims. (ER 11 at 7-8.) The district court further concluded that Appellants were not authorized under the obstruction of justice statute to bring a lawsuit against the federal government for damages or injunctive relief. (ER 11 at 8.)

The district court also dismissed the claims against the individual defendants. The district court analyzed whether the individuals were entitled to qualified immunity under the two-part test established in *Saucier v. Katz*, 533 U.S. 194, 202 (2001). (ER 11 at 9.) The district court concluded that Appellants failed to meet their burden under the first prong, of alleging to establish that their constitutional rights were violated. (ER 11 at 10-11.)

As for the Fifth and Fourteenth Amendment claims, the district court pointed out that Appellants "[did] not allege that Officer McHugh and the "unnamed officers" prevented them from filing a lawsuit or from presenting their grievances to the court." (ER 11 at 10.) The court further pointed out that Appellants only complained that they could not physically attend a hearing in a case in which one of them is a party. (ER 11 at 10.) Under the facts alleged, the district court concluded, Appellants were not denied court access nor have they alleged facts that establish that Officer McHugh or the "unnamed defendants" deprived them of life, liberty, or property without process of law. (ER 11 at 11.) The court therefore concluded the officers were entitled to qualified immunity with respect to these claims.

As for the First Amendment claims, the district court noted that Foti is the only one of the three Appellants who was also a plaintiff in the action pending before Judge Illston and therefore he was not prevented from "associating" with others who were there to petition for redress from grievances. (ER 11 at 11.) Further, the district court concluded Neufeld and Augustine cannot claim that they were prevented from petitioning for redress from grievances in connection with Foti's trips to the courthouse to attend hearings in his own case, as they were not there in any capacity as litigants. (ER 11 at 11.) Further, the district court

concluded that with respect to the claim of denial of court access; none of the Appellants were able to establish that they were prevented from associating to petition the court for redress, as they were able to petition the court just as effectively on paper. (ER 11 at 11.)

With respect to the claim under the Thirteenth Amendment, the district court concluded that the requirement that Appellants be accompanied by an escort into the courts did not amount to involuntary servitude in violation of the Thirteenth Amendment. (ER 11 at 12.)

The district court noted that Appellants' argument that the government officers violated their "Fourth Amendment rights by restricting their freedom of movement, by not allowing them to proceed into the Federal Building, by surrounding them on the street and holding them there for a significant amount of time, and by demanding that they provide state-issued identification without a reasonable suspicion of crime." (ER 11 at 10.) The district court rejected these arguments, stating Appellants "Do not state a claim of constitutional violation in any of their . . . causes of action." (ER 11 at 10.) The district court noted (1) Appellants' "access to the Federal Building was restricted because they chose not to cooperate with the security requirements established by the Department of Homeland Security" (CR 20- 21) and (2) Appellants have not "alleged facts that

establish that Officer McHugh or the "unnamed defendants" deprived them of life, liberty, or property without process of law." (ER 11 at 11.)

The district court went on to address the Appellants' contention that the Government cannot legitimately impose a requirement that individuals entering federal property show state-issued identification. In this regard, the district court concluded that the allegations by Appellants did not establish that the security measures established and implemented by the Administrative Office of the Courts, the USMS and FPS were improper. (ER 11 at 12.) Instead, the district court concluded, "security officers can legitimately require that anyone entering the Federal Building show identification." (ER 11 at 13.)

SUMMARY OF ARGUMENT

The dismissal of each of Appellants' claims should be affirmed.

The claims against the agencies simply are not viable. Appellants have not exhausted their administrative remedies with respect to non-constitutional claims. Appellants also cannot point to an applicable waiver of sovereign immunity with respect to their constitutional claims against the federal government agencies. Appellant's argument that this Court should consider for the first time on appeal the Administrative Procedure Act is untimely and, in any event, lacks merit– the APA is not a general waiver of immunity for alleged violations by an agency of

the U.S. Constitution. Accordingly, the claims against the agencies were properly dismissed.

Similarly, the claims against the individual defendants were properly dismissed. The district court properly found that Appellants cannot satisfy the first prong of the *Saucier* analysis because the officers did not violate any of their constitutional rights. The security measures in place at the courts did not preclude Appellants from having access to the courts and reasonably placed only a minimal imposition on the general public. Moreover, even if, *arguendo*, this Court were to conclude that the requirement to show identification was unconstitutional, this right was not clearly established at the time that Appellants were required to show identification. Accordingly, Appellants cannot demonstrate they have met the second prong of the *Saucier* analysis.

For these reasons, the district court's judgment should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews de novo the district court's order granting a motion to dismiss for lack of subject matter jurisdiction. *See Skokomish Indian Tribe v. United States,* 332 F.3d 551, 556 (9th Cir. 2003).

II. THE DISTRICT COURT PROPERLY CONCLUDED IT HAD NO JURISDICTION OVER THE CLAIMS AGAINST THE USMS AND THE FPS BECAUSE APPELLANTS HAVE NOT DEMONSTRATED AN APPLICABLE WAIVER OF SOVEREIGN IMMUNITY

"It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). The court must strictly construe in favor of the government the scope of any waiver of sovereign immunity. *Dept of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Any claim for which sovereign immunity has not been waived must be dismissed for lack of jurisdiction. *Gilbert*, 756 F.2d at 1458.

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), contains a limited waiver of the United States' sovereign immunity. *See Vickers v. United States*, 228 F.3d 944, 948 (9th Cir. 2000). As a jurisdictional prerequisite to bringing suit under the FTCA, a plaintiff must first file an administrative claim with the offending agency, and the claim must be denied before filing in federal court. *Blair v. IRS*, 304 F.3d 861, 864-65 (9th Cir. 2002); *Brads v. United States*, 211 F.3d 499, 50203 (9th Cir. 2000).

Here, Appellants make no claim that they filed an administrative claim with any agency. Indeed, they do not address the district court's ruling on this issue at

all. Accordingly, Appellants may not rely on the limited waiver of immunity in the FTCA. For this reason, the district court properly dismissed the state-law tort claims against the agency defendants.

Further, the United States has not waived its immunity for constitutional claims. *Clemente v. United States*, 766 F.2d 1358, 1362-64 (9th Cir. 1985) (*Bivens* does not waive government's immunity). This is true for claims involving both injunctive relief and damages. *See United States v. Rural Elec. Convenience Coop. Co.*, 922 F.2d 429, 434 (7th Cir. 1991) (jurisdictional bar of sovereign operates when a suit threatens to impose liability for money or property damages or some form of coercive injunctive relief upon United States). Accordingly, the district court also properly dismissed these constitutional claims against the agency defendants.

In their replacement brief in this appeal, Appellants argue for the first time that this court should exercise its discretion to consider whether the Administrative Procedure Act, 5 U.S.C. § 702 (the "APA") provides a sufficient waiver of sovereign immunity to support a claim against one or more of the defendant agencies. ARB at 13. Appellants contend that the record sufficiently demonstrates their constitutional rights have been compromised in violation of the APA. This contention is untimely and otherwise meritless.

Generally speaking, this court will not consider an argument raised for the first time on appeal. *Balser v. United States Department of Justice, Office of U.S. Trustee*, 327 F.3d 903, 908 (9th Cir. 2003). Further, because "plaintiff is the absolute master of the jurisdiction [the district court] invokes," the court of appeals will not sustain jurisdiction on appeal on a theory plaintiff has not asserted below. *See, id.*

Similarly, this Court should not address Appellants' new argument on its merits because Appellants have failed sufficiently to identify the agency action at issue. For example, it is unclear whether Appellants challenge the promulgation of agency rules requiring identification, or the alleged failure by the agency to issue waivers on one or more of the occasions alleged in the complaint, or the decision to detain Appellants on one or more occasion, or any of the other events described in the First Amended Complaint. Because Appellants have not identified the conduct at issue with respect to this claim, they cannot demonstrate how the district court's decision was in error.[4/] The absence of a clear record on

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[4/] In addition, identification of the action being challenged is important to determine whether the action is sufficiently "final" such that the APA applies. For example, "the action should mark the consummation of the agency's decision making process; and the action should be one by which rights or obligations have been determined or from which legal consequences flow." *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir.1999), *citing Bennett v. Spear*, 520 U.S. 154, 177 (1997).

this issue is sufficient to reject the argument. *Montana Wilderness Ass'n., Inc., v. United States Forest Serv.*, 376 F.3d 1181 (9th Cir. 2003).

III. THE DISTRICT COURT PROPERLY CONCLUDED THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

The defense of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, defendants can have a reasonable, but mistaken, belief about the facts or about what the law requires in any given situation. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Malley*, 475 U.S. at 341).

As noted by the district court, "'[t]he entitlement is an immunity from suit rather than a mere defense to liability; [and] . . . it is effectively lost if a case is erroneously permitted to go to trial.' *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)." ER 11 at 9. Thus, insofar as possible, a ruling on the issue of qualified immunity should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. *Saucier*, 533 U.S. at 200.

Under the two-part analysis set forth in *Saucier*, the court must first examine whether the officers violated the plaintiffs' constitutional rights on the facts alleged, and second, if there was a violation, must determine whether the constitutional right or rights were clearly established. *Saucier*, 533 U.S. at 201. If a plaintiff's allegations do not state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell*, 472 U.S. at 526; *see also Butler v. San Diego Dist. M's Office*, 370 F.3d 956, 964 (9th Cir. 2004).

Here, the district court properly concluded the individual defendants are entitled to qualified immunity because Appellants failed to state a claim that their constitutional rights were violated.

On appeal, Appellants devote significant portions of their replacement brief arguing the regulation requiring identification prevents them from being heard in district court. ARP at 24-26. This simply is not the case. Even construing the complaint in a light most favorable to the Appellants, they are not precluded from entering the courthouse with appropriate notice to the court and an escort. Additionally, no case precludes the government from ensuring that persons entering a necessarily secure area can be identified. *See United States v. Christian*, 356 F.3d 1103, 1106 (9th Cir. 2004) ("While failure to identify oneself cannot, on its own, justify an arrest, nothing in our case law prohibits officers from

asking for, or even demanding, a suspect's identification.") *See also*, *United States v. Smith,*425 F.3d 527 (2nd Cir. 2005) (government does not violate First or Sixth Amendments to the U.S. Constitution by enforcing rule requiring presentation of identification for entry into federal courthouse).

There is no constitutional right to enter federal buildings without presenting identification, let alone a clearly established one. Determining a person's identity is an important aspect of police authority. *Cf. Christian*, 356 F.3d at 1106. Appellants have failed to show otherwise.[5/]

For these reasons, the district court properly concluded Appellants failed to demonstrate the individual defendants violated their clearly established constitutional rights and the defendants therefore were entitled to qualified immunity. *See, Saucier*, 533 U.S. at 202.

Finally, the district court also properly concluded that 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. *See* CR 11 at 11-12. Appellants have simply alleged no facts establishing that they were precluded

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[5/] Appellants also emphasize that on at least one occasion, an officer is alleged to have used a wristlock hold. *See* ARB at 21-23, 40-42. Appellants, however, do not explain the relevance of this allegation. For example, Appellants do not argue that the hold is, in and of itself, unconstitutional. Nor to Appellants argue that the hold was used under circumstances that establish the officer used excessive force. Accordingly, Appellant's reliance on that fact is unavailing.

from access to the courthouse. In addition, Appellants have presented no facts to establish that the U.S. Marshals Service or FPS should be precluded from enforcing the agencies' rules. Accordingly, the district court's order and judgment should be affirmed.

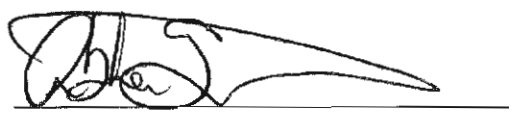
CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court dismissing the First Amended Complaint.

Respectfully submitted,

KEVIN V. RYAN
United States Attorney

Dated: November 13, 2006



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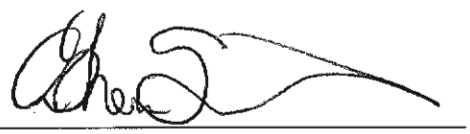
Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Respondent states that based on a survey of the attorneys in this office, there are no cases involving similar factual and/or legal issues to those in the instant case.

KEVIN V. RYAN
United States Attorney



Dated: November 13, 2006

ABRAHAM A. SIMMONS
Assistant United States Attorney
Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32-1, I certify that the Brief For Respondent:

(1) was prepared using 14-point Times New Roman type;

(2) is monospaced;

(3) has 10.5 or fewer characters per inch; and

(4) contains 5444 words and 697 lines of text.

KEVIN V. RYAN
United States Attorney

Dated: November 13, 2006

ABRAHAM A. SIMMONS
Assistant United States Attorney
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing two copies of the following:

APPELLEE'S REPLACEMENT ANSWERING BRIEF

to be served this date upon the party in this action by placing two true copies thereof in a sealed envelope, and served by *First Class Mail* to the party addressed as follows:

Alice L. Jensen, Esq. Tyler A. Baker, Esq. Evan R. Bennett, Esq. FENWICK & WEST, LLP 275 Battery Street, 15th Fl. San Francisco, CA 94111 PH: 415.875.2300 FX: 415.281.1350	James P. Harrison, Esq. THE FIRST AMENDMENT PROJECT 1736 Franklin Street, 9th Fl. Oakland, CA 94612 PH: 510.208.7744 FX: 510.208.4562

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 13, 2006 at San Francisco, California.

LILY HO-VUONG
Legal Assistant