Appeal No. 05-16079
PRO BONO

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

On Appeal From the United States District Court for the
Northern District of California
Hon. Patricia J. Hamilton, District Judge
Case No. C-04-2567 PJH

PLAINTIFFS-APPELLANTS' REPLACEMENT OPENING BRIEF

September 29, 2006

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[1] This Court appointed Fenwick & West LLP *pro bono* counsel for Plaintiffs-Appellants Kenneth Augustine, Robert-John:Foti and Joseph Neufeld on June 1, 2006. Fenwick obtained signed engagement letters from Messrs. Augustine and Foti on June 9, 2006. The First Amendment Project, as *pro bono* co-counsel, obtained signed engagement letters from Messrs. Augustine and Foti on August 24, 2006. Despite repeated efforts, neither Fenwick nor the First Amendment Project has been unable to obtain a signed engagement letter from Mr. Neufeld. Accordingly, this brief is filed on behalf of Messrs. Foti and Augustine only.

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JURISDICTIONAL STATEMENT

This is an action arising under the First, Fourth and Fifth Amendments to the United States Constitution. Jurisdiction in the district court was proper pursuant to 28 U.S.C. § 1331, and jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1291. The United States District Court of the Northern District of California granted Defendants' Motion to Dismiss the First Amended Complaint and entered judgment dismissing Plaintiffs' case on February 2, 2005. Subsequently, the district court denied Plaintiffs' Motion for Reconsideration on May 9, 2005. Plaintiffs-Appellants filed a timely notice of appeal on May 24, 2005. Fed. R. App. P. 4(a)(1).

On September 14, 2005, Plaintiffs-Appellants filed their Informal Brief in connection with this appeal. On November 22, 2005, Defendants-Appellees filed their Answering Brief on December 2, 2005, Plaintiffs-Appellants filed their Informal Reply Brief. Thereafter, on June 1, 2006, this Court appointed Fenwick & West LLP *pro bono* counsel for Plaintiffs-Appellants, and ordered that this replacement brief be filed by September 29, 2006.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Plaintiffs' constitutional claims against the agencies of the United States are barred by sovereign immunity.

2. Whether the district court erred in holding that Plaintiffs' claims for injunctive relief against the individual officer-defendants are barred by qualified immunity.

3. Whether the district court erred in holding that Plaintiffs' claim for damages against the individual officer-defendants are barred by qualified immunity.

4. Whether the district court erred in dismissing on the pleadings Plaintiffs' claims of Constitutional violations. Specifically, whether there are possible factual issues concerning the constitutional validity of an inflexible identification requirement to enter a federal courthouse, both with respect to the contribution of the requirement to security and the availability of less restrictive alternatives.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs-Appellants Robert-John:Foti and Kenneth Augustine (collectively "Plaintiffs") appeal the district court's dismissal of the First Amended Complaint for lack of jurisdiction on the pleadings without oral argument. Defendants are Officer McHugh, and the United States Marshals Service ("USMS") and Federal Protective Service ("FPS") (collectively "Defendants"), who denied Plaintiffs entry into the federal courthouse in San Francisco on six separate occasions because they do not possess government-issued photo identification and choose not to obtain it as a matter of principle. This exclusion from the courthouse resulted in Plaintiff Foti, who was proceeding *pro se* in the underlying case, to be unrepresented at a case dispositive summary judgment hearing.

Plaintiffs' appeal raises the issues of whether the district court erred in holding: 1) that Plaintiffs' claims against the federal entities are barred by sovereign immunity; 2) that Plaintiffs' claims against the individual Defendants for injunctive relief are barred qualified immunity; and 3) that Plaintiffs' claims against the individual Defendants for damages are barred under qualified immunity. Additionally, this appeal raises the issue of whether the district court erred in dismissing Plaintiffs' constitutional claims on the pleadings without reaching the merits of whether an inflexible identification requirement to enter a federal courthouse violates Plaintiffs' rights when there are less restrictive alternatives that provide equal or greater security at minimal cost and inconvenience to courthouse security personnel.

B. Factual and Procedural Background

1. The Homeland Security Act and Powers and Duties of Courthouse Security Officers

In the aftermath of the September 11th terrorist attacks, Congress passed the Homeland Security Act of 2002 which authorizes government agencies to enact and enforce regulations under the broad umbrella of national security. Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2d. Sess. Nov. 25, 2002) ("Homeland Security Act"). 40 U.S.C. §1315(c)(1) provides the Secretary of Homeland Security (the "Secretary") with the authority to enact any regulations necessary for the protection and administration of government property and that

these regulations be posted in a conspicuous place on the property. 40 U.S.C. § 1315(c)(1). The Secretary may delegate authority for the protection of specific buildings to federal agencies where necessary for the protection of the building. 40 U.S.C.A. § 1315(d)(1). Pursuant to this statutory authority, entrants to the San Francisco division of the United States District Court for the Northern District of California at 450 Golden Gate, San Francisco are required to present government identification prior to entering the courthouse. *Id.*

The United States Marshals Service has the authority to enforce security policies at federal buildings and is responsible for obeying, executing, and enforcing all orders of the U.S. District Court, the U.S. Court of Appeals, and the Court of International Trade. 28 U.S.C. § 566(a). Individual marshals are bound, as officers of the court, to execute process issued to them. *See, e.g., Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34 (1985); 3 U.S. Op. Atty. Gen. 496 (1840).

Pursuant to the HAS, the functions of the Federal Protective Service of the General Services Administration ("FPS") were transferred to the Department of Homeland Security on March 1, 2003. 6 U.S.C. § 542. The statute provides that the Secretary of Homeland Security "shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government... and the persons on the property" and allows the Secretary to designate officers from the

FPS for duty in connection with this responsibility. 40 U.S.C. § 1315(a), (b)(1). According to the Department of Homeland Security's website, "FPS is responsible for policing, securing, and ensuring a safe environment in which federal agencies can conduct their business. FPS officers serve as a visible uniformed presence at more than 8,800 owned and leased federal facilities nationwide that house more than one million federal employees and visitors on a daily basis."[2]

2. Plaintiffs' Were Denied Access To The Federal Courthouse On Six Separate Occasions.

Anyone wishing to enter the Federal Building is required to place their belongings on a conveyor belt running through an x-ray machine, walk through a metal detector, and present government-issued photo identification to officers of the Federal Protective Services or U.S. Marshals Service. *Excerpts of Record* ("ER") 14 at 2. Plaintiffs were prevented from entering the courthouse on six different occasions and forcibly ejected on two occasions because they were unable to present the required identification.

Prior to May 2004, Plaintiff Foti was a *pro se* plaintiff in another civil suit in the Northern District of California, *Foti v. County of San Mateo*, C 00-4783 SI ("Foti v. San Mateo"). Because of his role as plaintiff in that case, Mr. Foti was required to be present at the district court in San Francisco for a pre-trial hearing

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[2] *See* http://www.dhs.gov/dhspublic/display?content=5546

on May 21, 2004. ER 14 at 3. Plaintiff Augustine and Joe Neufeld accompanied him to observe the hearing. *Id.* As a result of their prior experiences being denied access to the courthouse, they anticipated that courthouse security officers might decline to grant them entry without government-issued photo identification. *Id.* at Exhs. A, B. In an attempt to resolve these issues in advance of Plaintiff Foti's hearing, Plaintiffs, Mr. Neufeld and a fourth individual, Peter Clark Dougherty, wrote and faxed a letter to the United States Marshals Service on May 4, 2004 requesting an "administrative hearing" regarding the policy of requiring all entrants to show government-issued identification in order to enter the courthouse. *Id.* They received no response to this letter. ER 35 at 2.

On May 21, 2004, Plaintiffs and Mr. Neufeld attempted to enter the courthouse to attend a hearing in *Foti v. San Mateo*. *Id.* At around 8:40 a.m., Plaintiffs and Mr. Neufeld placed their belongings on the conveyor belt and passed through the metal detector. ER 14 at 3. Nothing in their belongings or on their persons indicated that they posed a security risk. *Id.* When Plaintiffs were unable to present identification, Defendant McHugh grabbed Plaintiff Foti's arm in a "wristlock control hold" and forced him out of the building and onto the street outside. ER 35 at 3. Other officers surrounded Plaintiff Foti and prevented him from leaving. *Id.* Plaintiff Augustine and Mr. Neufeld were also denied access to

the courtroom. *Id.* Plaintiff Foti was eventually allowed into the courthouse with a clerk escort. *Id.*

On June 25, 2004, Plaintiff Foti again attempted to enter the courthouse to file the complaint in the present action. ER 14 at 11. He was refused admittance for failure to present identification and the clerks and marshals refused to escort him to the clerk's office. *Id.* Foti was thus forced to ask an acquaintance who possessed identification to file the complaint for him. *Id.*

Plaintiffs were denied access to the courtroom on four additional occasions because they do not own identification and therefore cannot comply with the photo identification requirement. On July 9, 2004, Plaintiffs requested an escort to attend Plaintiff Foti's hearing in *Foti v. San Mateo*. *Id.* at 10-11. The clerk's office and Marshals Service each informed Plaintiffs that it was the other entity's responsibility to escort them. *Id.* Ultimately, Plaintiffs were denied entry because they could not obtain an escort from either the clerk's office or Marshals Service. On September 10, 2004, Foti requested entry to secure subpoenas for discovery in *Foti v. San Mateo*, but was denied access. *Id.* at 11. On September 24, 2004, Foti was denied access to a hearing before Judge Illston in *Foti v. San Mateo* because the clerks and marshals refused to escort him. *Id.* at 11-12. Finally, on November 4, 2004, Plaintiffs requested entry to the courthouse for the summary judgment hearing in *Foti v. San Mateo*. *Id.* at 12. Plaintiffs allege that Marshal Adele "came

from behind his station, put his hands on both of us in order to push us from the courthouse." *Id.* Plaintiff Foti, who was proceeding *pro se*, was unrepresented at the summary judgment hearing and learned of the outcome after the hearing from opposing counsel. *Id.*

Apart from the Plaintiffs' inability to present the required identification, there is no indication in the record that they presented any security risk.

3. Procedural History in the Present Action

Plaintiffs filed the Complaint in this action on June 25, 2004. ER 1. Plaintiffs filed a *pro se* First Amended Complaint to include subsequent events on November 9, 2004. ER 14. The First Amended Complaint alleged common law tort claims for assault and battery, false arrest and imprisonment, and kidnapping; 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 14. The First Amended Complaint also included a request for injunctive relief. ER 14 at 1. On November 10, 2004, the district court entered a minute order interpreting Plaintiffs' request as a motion for injunctive relief and setting briefing schedules for both the request for injunctive relief as well as Defendants' Motion to Dismiss. ER 16. The Court ordered that "There will be no hearing" on either motion. *Id.*

On November 24, 2004, Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint (ER 24),[3] which Plaintiffs opposed on December 8, 2004. ER 31. Defendants filed their Reply on December 15, 2004. ER 33. On February 2, 2005, the court issued an order granting Defendants' Motion to Dismiss the First Amended Complaint. ER 35. Two weeks later, on February 17, 2005, Plaintiffs filed a Motion for Reconsideration (ER 37), which the court denied on May 9, 2005. ER 40.

Plaintiffs timely filed a Notice of Appeal to this Court on May 25, 2005. Plaintiffs filed an "Appellant's or Petitioner's Informal Brief" on September 14, 2005, which Defendants answered on November 22, 2005. On December 2, 2005, Plaintiffs filed their Informal Reply Brief. On June 1, 2006, this Court appointed Fenwick & West LLP *pro bono* counsel to represent Plaintiffs in this the appeal and ordered counsel to appear at oral argument. James Harrison, staff attorney for the First Amendment Project, was added as counsel for Plaintiffs on September 6, 2006. This brief replaces Plaintiffs' *pro se* "Appellant's or Petitioner's Informal Brief."

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[3] Plaintiffs had filed an Opposition to Defendants' Motion to Dismiss the original complaint. This motion was superceded by Plaintiffs' First Amended Complaint. In this original opposition, Plaintiffs had asked for sanctions based upon Defendants' incomplete and therefore misleading quotations. ER 8.

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' complaint on the pleadings for lack of subject matter jurisdiction without reaching the merits of their First, Fourth and Fifth Amendment claims. The court below incorrectly held that Plaintiffs' constitutional claims against the governmental agencies were barred by sovereign immunity and their claims against the individual defendants for injunctive relief and damages were barred by qualified immunity. In addition, the court erred by failing to reach the merits of whether an inflexible identification requirement to enter the federal courthouse violated Plaintiffs' First Amendment rights to access the courts, their Fourth Amendment rights against unreasonable seizure, and their Fifth Amendment due process rights. Specifically, the court failed to balance the government's security interest in protecting the courthouse against Plaintiffs' right to enter to litigate and witness the underlying case. Further, the court erred in not reaching the merits of whether an identification requirement increases security and whether a less restrictive alternative would have protected Plaintiffs' constitutional rights.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss *de novo*. *See Presbyterian Church v. United States,* 870 F.2d 518, 521 (9th Cir. 1989). In

conducting its review, this Court must take all allegations made as true, and not consider matters outside the pleadings. *Id.* at n.4.

ARGUMENT

I. Courts Are Required To Give Wide Latitude To *Pro Se* Litigants.

The Supreme Court has unanimously held that a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers," and can only be dismissed for failure to state a claim if it appears "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988) (where plaintiff appears *pro se*, "the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt"). Moreover, the Supreme Court has held that a decision on the merits of a complaint implicating constitutional issues should normally be postponed until the facts have been ascertained. *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938). This Court similarly has held that deciding important issues presented in *pro se* complaints on the pleadings is an example of "'judicial haste which in the long run makes waste.'" *Sherman v. Yakahi* 549 F.2d 1287, 1290 n.5 (9th Cir. 1977) (quoting *Estelle v. Gamble*, 429 U.S. 97, 112- 113 (1976) (Stevens, J., dissenting)). Moreover, because laypersons' pleadings are often inartful, the

opportunity to be heard is particularly important for *pro se* litigants. *See Huminski v. Corsones*, 396 F.3d 53, 83-84 (2d Cir. 2003) ("You cannot 'foster an appearance of fairness and thereby boost[ing] community trust in the administration of justice...unless any member of the public – not only members of the public selected by the courts themselves – may come and bear witness to what happens beyond the courthouse door") (internal citations and quotations omitted).[4]

When judged by the standards of experienced lawyers, Plaintiffs' *pro se* "Layman's Complaint On Biven's Action" is hardly a model of sophisticated pleading, but it fairly presents facts that raise important constitutional issues. The district court erred in dismissing it with prejudice before essential facts could be determined.

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[4] Indeed, Plaintiffs' distrust in the administration of justice after they were denied access is evident in their subsequent pleadings. ER 37 at 3 (the Court's order "demonstrate[es] discrimination against us non-lawyer Plaintiffs for the purpose of either wearing us out or causing us to expend unnecessary additional work and expense in appealing").

II. The District Court Erred in Holding that Plaintiffs' Constitutional Claims Against The United States Marshals Service and the Federal Protective Service are Barred by Sovereign Immunity.[5]

A. The Administrative Procedure Act Is An Explicit Waiver Of Sovereign Immunity In Civil Actions Against The United States And Its Agencies For Non-Monetary Relief.

This Court has held that where, as here, a plaintiff alleges that the conduct of a government official has violated the plaintiff's constitutional rights, the Administrative Procedure Act, 5 U.S.C. § 702 (the "APA"), provides the necessary waiver of sovereign immunity.[6] *Presbyterian Church*, 870 F.2d at 525 n.9 ("§ 702 waives sovereign immunity not only for suits brought under § 702 itself, but for constitutional claims brought under the general federal-question jurisdiction statute."); *accord Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980) (Kennedy, J.).

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[5] Plaintiffs do not contest the district court's finding that they failed to exhaust their administrative remedies under the Federal Torts Claim Act for their common law tort claims, or the dismissal of their obstruction of justice claim. However, the district court should not have dismissed the tort claims with prejudice, because Plaintiffs should be able to refile those claims if they exhaust their administrative remedies. *Id.*

[6] The district court dismissed Plaintiffs' constitutional claims for lack of subject matter jurisdiction because of Plaintiffs' failure to point to a "specific and unequivocal waiver of sovereign immunity." ER 35 at 6-7. While the complaint did not specifically assert the APA as a basis for jurisdiction, this Court has the power and discretion to consider an issue raised for the first time on appeal. *See Blue v. Widnall*, 162 F.3d 541, 545 n.3 (9th Cir. 1998) (exercising discretion). This Court should exercise that power here, because the issue is purely one of law, the pertinent record has been developed, and because the Plaintiffs proceeded *pro se*. See *id.*

Section 702 of the APA, provides, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. ***An action in a court of the United States seeking relief other than money damages*** and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority ***shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.***

5 U.S.C. § 702 (emphasis added). In 1976, Congress amended Section 702 of the APA to add the second sentence. *Presbyterian Church,* 870 F.2d at 524.

In *Presbyterian Church* this Court concluded that both the plain meaning of, and the congressional intent behind, the 1976 amendment compelled the conclusion that Section 702 "waives sovereign immunity in all actions seeking relief from official misconduct except for money damages." *Id.* at 525. In that case, plaintiff churches had brought suit against the United States and several of its agencies and individual officers, claiming that their First and Fourth Amendment rights were violated when the agents entered into the churches wearing "body bugs" and recorded church services, as part of an investigation of a "sanctuary movement" that allegedly aided and abetted illegal immigrants. *Id.* at 520. In reversing the district court's ruling that sovereign immunity barred all relief against the United States and its agencies, this Court focused on the newly added language and concluded that "[o]n its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which government agencies are accountable." *Id.* at 525.

The Court also rejected the government's "attempt to restrict the waiver of sovereign immunity to actions challenging 'agency action' as technically defined in § 551(13)" holding that the argument "offends the plain meaning of the amendment."[7] The Court also found support for its reading of Section 702 in the legislative history. *Id.* at 524-26 (citing H. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6125, 6129) ("Congress stated that 'the time [has] now come to eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity.") (emphasis in original).

The district court below did not address whether the APA acted as a waiver of sovereign immunity for Plaintiffs' constitutional claims, and instead erroneously relied 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.[8] ER 35 at 6-7. *Rural Electric,* however, is inapposite. In that case, the Seventh Circuit was addressing whether a lawsuit involving contract claims and which implicated a government

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[7] In light of this conclusion, the Court found it unnecessary to address whether the government's surveillance constituted "agency action" within the meaning of § 551(13). *See id.* at 525 n.8. Similarly, this Court need not address whether the government's actions in the present matter constitute "agency actions" as technically defined in § 551(13).

[8] Appellees also rely on this sole citation in their Answering Brief at 15-16.

security interest (but where the United States or one of its agencies is not a named party), is a suit against the United States, and therefore should be barred by the doctrine of sovereign immunity. The court was not, as here, addressing whether the government has, through the APA, explicitly waived injunctive relief for alleged constitutional violations. *See Rural Electric,* 922 F.2d at 434. In fact, Judge Easterbrook, in his concurrence-in-part, 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). In any event, *Rural Electric* is not controlling and, read as the district court did and as Defendants now advocate, is contrary to the law of this circuit.

As in *Presbyterian Church,* Plaintiffs' constitutional claims, to the extent that they seek injunctive relief against the USMS and FPS, fall squarely into the expanded reach of Section 702's waiver of sovereign immunity – even though they have not brought a claim under the APA. *See* 870 F.2d at 525 n.9.

B. 28 U.S.C. § 1331 Provides Subject Matter Jurisdiction For Plaintiffs' Constitutional Claims.

The Supreme Court has held that while the APA can act as a waiver of sovereign immunity, it does not provide subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105-06 (1977). However, that requirement is easily met in this case by 28 U.S.C. § 1331, which confers jurisdiction on federal courts to

review constitutional claims for injunctive relief. *Presbyterian Church*, 870 F.2d at 524 ("The churches properly invoke federal jurisdiction under 28 U.S.C. § 1331 because their claims arise out of the Constitution.").

In the instant matter, Plaintiffs claim violations of their First, Fourth, and Fifth Amendment rights – all actions falling under the purview of § 1331.[9] Because these claims were brought pursuant to 28 U.S.C. § 1331, and because 5 U.S.C. § 702 provides the requisite waiver of sovereign immunity, the district court had jurisdiction to hear Plaintiffs' constitutional claims for injunctive relief against the USMS and FPS.

III. Plaintiffs' Claims Are Not Barred by Qualified Immunity.

A. The Officers Are Not Entitled to Qualified Immunity for Plaintiffs' Claims for Injunctive Relief.

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). In *Hoohuli v. Ariyoshi*, this Court explained the rationale for not extending the qualified immunity defense to equitable claims. 741 F.2d 1169 (9th Cir. 1983) Relying on *Wood v. Strickland,* 420 U.S. 308 (1975),

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[9] Plaintiffs specifically asserted 28 U.S.C. § 1331 as a ground for the district court's jurisdiction. *See* ER 14 at 2.

and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Hoohuli* recognized that the doctrine of qualified immunity is justified in suits seeking *damages* because (1) the threat of personal financial liability would deter executive officers from taking the kind of quick, decisive and responsive action that society needs, and (2) that in the absence of such immunity, "[a]ll but the most fearless, or foolish, would be reluctant to participate in public service." *Id.*at 1176. In the context of *equitable relief*, however, the Court held that these concerns do not apply. *Id.*

In its decision below, instead of recognizing these well-settled principles, the district court erroneously relied upon *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949), to support its conclusion that the injunctive relief sought by Plaintiffs against the officers is in substance a suit against the government – not the officers – and the doctrine of sovereign immunity applies to bar Plaintiffs' claims.[10] ER 35 at 7. As demonstrated above, the APA provides a waiver of sovereign immunity in this case. In addition, the district court misread *Larson.*

In *Larson*, plaintiff corporation brought a *contract* claim against Robert Littlejohn, the then-head of the War Assets Administration, seeking an injunction

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[10] Because the district court concluded that Plaintiffs' claims for injunctive relief were actually claims against the government, it addressed this issue in its section on sovereign immunity. The district court's opinion does not otherwise address the issue of qualified immunity for injunctive relief.

prohibiting him from selling or delivering to any third parties a certain quantity of coal that plaintiff alleged it was owed under a contract with the War Assets Administration. 37 U.S. at 684. While the Supreme Court concluded that Larson's claim was in fact a suit against the sovereign and therefore barred by sovereign immunity, it specifically noted that "[t]here may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign," and that one such type of suit "is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Id.* at 689-90. In so doing, the Court reaffirmed the principle that:

> [I]n case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. [Citing cases.] And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.

Id. at 690-91 (quoting *Philadelphia Co. v. Stimson,* 223 U.S. 605, 620 (1912)). Thus, *Larson* does nothing to support the district court's decision and, in fact, compels the conclusion that district court erred in dismissing Plaintiffs' constitutional claims against the officers, at least to the extent that they seek injunctive relief.

B. The Officers Are Not Entitled to Qualified Immunity for Appellant Foti's Claim for Damages for Violating His Fourth Amendment Rights.

In determining whether government employees are entitled to qualified immunity for damages claims, courts employ a two-part test. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001). The court must first determine whether, taken in the light most favorable to the plaintiff, the officers violated plaintiff's constitutional rights. If so, the court must then determine whether those rights were clearly established. *Id.*

To determine whether a right is clearly established, the court must take into account the specific context of the case. *Id.* In so doing, the court must inquire as to "whether it would be clear to [an objectively] reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. The unlawfulness of the conduct is clear if the contours of the right have been sufficiently defined. *Anderson v. Creighton,* 483 U.S. 635 (1987). However, "[t]his is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* at 640.

Where, as here, the complaint states a claim that an officer violated the plaintiff's constitutional rights, but does nothing to suggest that the officer acted reasonably, the plaintiff's claims should not be dismissed on a 12(b)(6) motion.

See Posr v. Court Officer Shield #207, 180 F.3d 409, 412-13 (2d Cir. 1999). In *Posr,* the plaintiff was attempting to enter a courthouse with a bicycle pump. *Id.* The officer posted at the entrance to the courthouse informed plaintiff that he could not bring the pump inside the courthouse, and that the officer would not check the pump for him. *Id.* After exchanging words, the plaintiff moved towards the exit, and told the officer, "One day you're gonna get yours." *Id.* Another officer then arrested plaintiff for disorderly conduct, and briefly handcuffed him before ejecting him from the courthouse. The district court granted the officers' motion to dismiss, finding that there was probable cause to arrest plaintiff, and even if there was not, the officers were entitled to qualified immunity. *Id.* at 414. On appeal, the Second Circuit reversed, concluding that, accepting plaintiff's allegations *as pleaded,* plaintiff could prove a set of facts that entitled him to relief on his Fourth Amendment claim, and that the complaint did nothing to suggest that the officer's actions were reasonable. *Id.* at 416 ("on a motion to dismiss, a court is not permitted to embellish the complaint to the plaintiff's disadvantage.").

In the present matter, the district court inexplicably failed to analyze whether Plaintiff Foti's constitutional rights were violated under the Fourth Amendment 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 a significant

amount of time.[11] *See* ER 35 at 9-13; ER 14. As discussed more fully below in Section IV(D), and as taken in the light most favorable to Plaintiffs, *see Saucier,* 533 U.S. at 201, these actions violated Foti's Fourth Amendment rights.

Because Mr. Foti's Fourth Amendment rights were violated, the district court should have considered whether those rights were clearly established. *See Saucier,* 533 U.S. at 201. Such a determination requires an inquiry into whether an objectively reasonable officer could have believed that, in light of clearly established law and the information the searching officers possessed, that it was reasonable to place him in a "wristlock control hold," forcibly eject him out of the building and into the street without his shoes, and then restrict his freedom of movement by surrounding him on the street and holding him for a significant amount of time. *Id.* at 202; *Anderson,* 483 U.S. at 641. The district court, however, made no such determination, as it failed to analyze whether the officers were entitled to qualified immunity on those claims. *See* ER 35 at 9-13. Indeed, it is difficult to image how the district court could have concluded – based solely on the allegations in the complaint – that the officers were justified in their actions.

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[11] In its opinion, the district court explicitly recognized that Plaintiffs alleged "variations on four constitutional claims," including, "2) that the officers violated plaintiffs' Fourth Amendment rights by restricting their freedom of movement . . . [and] by surrounding them on the street and holding them there for a significant amount of time . . . ," but failed to analyze whether the officers were entitled to qualified immunity on those claims. *See id.*

The complaint does not allege that Mr. Foti tried to get past the officers and into the courtroom, nor does it state that Mr. Foti was out of control, such that he had to be restrained in a wristlock hold.[12] Moreover, nothing in the complaint suggests that the officers were justified in taking him on the street without his shoes on, and then "surrounding" him and preventing him from leaving. ER 14 at 7-8. As in *Posr,* based solely on the allegations of the complaint, "it was improper for the district court to conclude, *at this stage of the litigation*, that it was reasonable for the officers to believe that [their actions were justified]." 180 F.3d at 416 (emphasis in original). Accordingly, the district court's determination that the officers were entitled to qualified immunity for the *Bivens* action, insofar as it relates to Plaintiff Foti's Fourth Amendment claims, should be reversed.

IV. The District Court Erred In Dismissing Plaintiffs' Constitutional Claims On The Pleadings.

A. By Imposing An Inflexible Requirement To Present Government-issued Identification, Which Plaintiffs Could Not Meet, The Defendants Infringed Plaintiffs' Constitutional Right Of Access To The Courts.

By refusing Plaintiffs entry into the courthouse because they could not present government-issued photo identification, Defendants infringed on Plaintiffs' constitutional right to access the courts. Requiring identification for entry into the

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[12] Of course, that Foti protested "rather loudly" *after* officer McHugh placed him in the wristlock hold does nothing to establish the reasonableness of the officers' decision to physically restrain him. *See* ER 14 at 7. It is hardly surprising that a citizen would protest under these circumstances.

courthouse raises two related, but distinct right of access issues for Plaintiffs. First, Plaintiff Foti has a constitutional right to access to effectively litigate his underlying case. Second, Plaintiff Augustine has a constitutional right as a member of the public to access the courthouse.

1. As A Litigant With Business Before The Court, Plaintiff Foti Has A Fundamental Constitutional Right To Access The Courts.

The Supreme Court has established that access to the courthouse is a fundamental constitutional right. *Tennessee v. Lane*, 541 U.S. 509, 510 (2004). In *Lane*, the Court recognized the right of access to the courts as a "basic constitutional guarantees . . . infringements of which are subject to heightened judicial scrutiny." *Id.*; *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In *Lane*, the Court held that restricting physical access to the courthouse denied disabled individuals "the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause. *Lane*, 541 U.S. at 515.[13] *Lane* involved the Americans with Disabilities Act's "duty to accommodate," but the Supreme Court's discussion of the constitutional right of

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[13] Although the Court analyzed Lane's rights under the Due Process Clause of the Fourteenth Amendment, Plaintiff's rights in the present case issue from the parallel language in the Fifth Amendment governing federal actions. The analysis is equally applicable.

access to the Courts was necessary to the decision.[14] The Court found that under a "well-established due process principle ... within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts" "by removing obstacles to their full participation in judicial proceedings." *Id.* at 511-512, 523; *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Lewis v. Casey*, 518 U.S. 343 (1996). From this principle flow a number of affirmative obligations, which subsequent cases "make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right to access to the courts." *Lane*, 541 U.S. at 512. In the present case, Plaintiff Foti was unable to exercise his fundamental right to litigate his case because of Defendants' inflexible application of the identification requirement.

Procedural due process under the Fifth Amendment requires that Plaintiff Foti be allowed into court to plead his case. While *Lane* and this case involve physical access to the courts, the right of access has been protected in a variety of

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[14] Congress enacted the ADA to address discrimination against persons with disabilities by "invoke[ing] the sweep of congressional authority, including the power to enforce the fourteenth amendment." 42 U.S.C. § 12101(b)(4). The *Lane* Court noted that the evidence before Congress in enacting the ADA "established that physical barriers in government buildings, including courthouses and courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." 541 U.S. at 515. Accordingly, a right of access to the courts was a necessary premise to the decision in *Lane*.

other contexts. In *Boddie*, at 401 U.S. at 385, the Supreme Court struck down a filing fee in a divorce case as an impermissible hurdle preventing indigent litigants from accessing the courts, noting "this hurdle is an effective barrier to [plaintiff's] access to the courts. The loss of access to the courts. . . is a right of substantial magnitude when only through the courts may redress or relief be obtained." *Id.* at 381. Similarly in this case, the requirement that entrants show government-issued identification is an effective barrier to Plaintiffs' access to the courts, as they do not possess such identification and have chosen not to obtain it as a matter of principle. Since Plaintiff Foti may only litigate his underlying claim and obtain relief through the courts, the loss of access is of substantial magnitude. In *Boddie*, the Supreme Court held that a valid requirement on its face "may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id* at 380. In the present case, the requirement that entrants show picture identification offends due process by foreclosing litigants who do not possess such documentation from the opportunity to be heard.

In addition to physical access for the disabled and financial access for the indigent, the right of access has been recognized in several other contexts. For instance, the importance of the right of petitioning through the courts has been recognized in a major doctrine of antitrust law. The Noerr-Pennington doctrine provides that, with the exception of "sham" litigation, petitioning through the

courts is protected from antitrust liability even though the purpose and effect might be to restrain competition. Because of the paramount importance of access to the courts, the Supreme Court has interpreted the Sherman Act to avoid this clash with the Constitution. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49 (1993); *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 128 (1961) ("[t]he right of petition is one of the freedoms protected by the Bill of Rights"); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1988).

The Supreme Court has also recognized *pro se* prisoners' right to access the courts under the Petition Clause of the First Amendment guaranteeing citizens "the right to petition the Government for redress of grievances." U.S. Const. amend. I, cl. 6; *Ex parte Hull*, 312 U.S. 546, 549 (1941); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (access for habeas relief), *Bounds v. Smith*, 430 U.S. 817, 818-19 (1977). The Courts have interpreted *pro se* prisoners' First Amendment rights to include the opportunity to use prison libraries in order to prepare pleadings necessary for meaningful access to the courts. While Plaintiffs' right to access in the present case involves physical access to the courthouse, these cases underscore the importance of the broad right to access protecting interests that do not literally involve physical access in *Lane* and here.

2. The District Court Erred In Holding That Plaintiffs' Right To Access The Courts Were Not Violated Because They Could Litigate Through Pleadings.

The district court below summarily dismissed Plaintiffs' claims that their right to access were violated when they were denied entry into the courthouse for a dispositive hearing because "parties routinely appear in court through the presentation of papers." ER 35 at 10. While Plaintiffs do not dispute that "a motion may be determined without oral argument" under Northern District of California Local Rule 7-1(b), the district court in Plaintiff Foti's underlying case did not take the matter under submission without oral argument from either side. Instead, opposing counsel appeared and argued the government's side of the case *ex parte* while Plaintiff Foti was attempting to gain entry into the courthouse. The procedural due process harm and unfairness under these circumstances is obvious.

Because he is a *pro se* litigant, Mr. Foti was unrepresented at this case dispositive hearing. Such a result is particularly damaging for a *pro se* plaintiff who likely does not understand the nuances of legal pleading. As discussed above, the law is clear that courts should apply a relaxed standard in evaluating *pro se* pleadings. The Court wrongfully held that plaintiffs "can petition the court just as effectively on paper." ER 35 at 11.

3. As A Member Of The Public, Plaintiff Augustine Has A Right To Access The Courthouse.

Plaintiff Augustine has a First Amendment right as a member of the public to access the courts and observe courtroom proceedings. Mr. Augustine is not only a friend of Plaintiff Foti's, but also a member of the public interested in the substance of Mr. Foti's underlying case who wanted to be present to observe the proceedings and support Mr. Foti's position.

The courts have long recognized the public's First Amendment right to access the courthouse. *See Gannett Co., v. DePasquale*, 443 U.S. 368, 398 n.15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public"). "While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case." *Id.; see also Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (noting that "historically both civil and criminal trials have been presumptively open"); *Gannett*, 443 U.S. at 387 (noting that, "in some civil cases the public interest in access…may be as strong as, or stronger than, in most criminal cases").

The Supreme Court has recognized that the public's right access to the courts is predicated on the "common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (quoting

Mills v. Alabama, 384 U.S. 214, 218 (1966)); *Richmond Newspapers*, 448 U.S. at 555 (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). "By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 603. Plaintiff Augustine attempted to enter the courthouse to observe Plaintiff Foti's hearing. Defendants' forcible removal of Mr. Augustine from the courthouse for failing to produce identification violated his First Amendment rights. Moreover, the ability to "court watch" anonymously, to feel the pulse of public officers without retaliation, is chilled by the identification requirement.

This right of the public to have access to the courts is often examined in the context of a criminal defendant's right to an open trial under the Sixth Amendment. *Globe Newspaper*, 457 U.S. 596 (the general public has a constitutional right of access to criminal trials); *Richmond Newspapers,* 448 U.S. 555 (same); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1984) (*voir dire* must be open to the public because "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness"). However, the Ninth Circuit has found that "[a]lthough it might be argued that civil proceedings present considerations different than those in criminal

prosecutions, case authority provides no enlightenment or support for this distinction." *E.E.O.C. v. Erection Co.*, 900 F.2d 168, 169, 172 (9th Cir. 1990) (unsealing consent decree because "it is important for people to be able to assess the conduct of public institutions").[15] Indeed, exceedingly important issues touching the lives of citizens are often involved in civil litigation. Plaintiff Foti was attempting to raise such an issue – the right of the State to require licenses for the non-commercial use of the highways – in the underlying case from which he was denied access.

In the context of criminal trials, courts have traditionally balanced the public's First Amendment right to observe courtroom proceedings against the accused's sixth amendment right to a fair trial. *See Seattle Times Co. v. District Court,* 845 F.2d 1513, 1517 (9th Cir. 1988) ("The right of access is not absolute and must be balanced against the defendant's Sixth Amendment right to a fair trial"); *Sacramento Bee v. District Court*, 656 F.2d 477, 482 (9th Cir. 1981). However, that issue is not present in this case, because as a civil litigant Plaintiff Foti affirmatively wanted his case to be open to the public and Mr. Augustine. *See*

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[15] The Third and Sixth Circuits have also held that the constitutional right of access to the courts is equally applicable to civil trials. *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) ("the public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open"); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), ("The historical support for access to criminal trials applies in equal measure to civil trials").

United States v. Doe, 63 F.3d 121, 128 (2d Cir. 1995) (quoting *Waller v. Georgia*, 467 U.S. 39, 47 n.6) ("One of the reasons often advanced for closing a trial – avoiding tainting of the jury by pretrial publicity – is largely absent when a defendant makes an informed decision to object to the closing of the proceeding").

B. Requiring Citizens To Present Government-Issued Identification Impairs Constitutionally Protected Rights.

As discussed above, the denial of access to the courts presents important constitutional issues. The fact that the access was denied through an identification requirement that itself raises constitutional questions makes the district court's failure to reach the merits even more significant. In a variety of different contexts, the courts have recognized that coercing citizens to identify themselves raises significant constitutional issues. There is no law that requires one to procure and carry identification simply to exist as a citizen in the United States. *Stone v. Powell,* 428 U.S. 465, 531, (1976) (Brennan, J., dissenting) ("It is no crime in a free society not to have 'identification papers' on one's person…"); *Lawson v. Kolender*, 658 F.2d 1362, 1366, (9th 1981 Cir.), *aff'd*, 461 U.S. 352 (1982) (citing *Brown v. Texas* 443 U.S. 47, 53 (1979)). ("[A] person could not be required to furnish identification if not reasonably suspected of any criminal conduct"). In fact, the statute governing homeland security specifically states: "Nothing in this chapter shall be construed to authorize the development of a national identification system or card." 6 U.S.C. § 554.

Conditioning the exercise of a protected right on the presentation of identification raises additional constitutional concerns, as the courts have recognized in several contexts.[16]

C. By Dismissing The Complaint On The Pleadings, The District Court Failed To Establish Any Legitimate Security Purpose In Requiring Identification For Entry.

Although there is a constitutionally established right to access the courts, Plaintiffs recognize that this right is not unfettered. Plaintiffs concede that security is a compelling interest, especially in the current environment of terrorist threats. However, the legitimacy of the purpose does not immunize any measure allegedly adopted to serve that purpose. The district court engaged in no fact finding sufficient to conclude that the identification requirement provides any significant

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[16] For instance, conditioning the First Amendment rights to speech and assembly on compliance with identification requirements has been found unconstitutional. *Thomas v. Collins, Sheriff*, 323 U.S. 516 (1945) (striking down requirement to register before delivering a public speech). Conditioning the right to vote on the presentation of identification has been recently rejected. *Common Cause/Georgia League of Women Voters of GA. Billups,* 439 F. Supp. 2d 1294, 1349 (N.D. Ga. 2006) ("the Court finds that the 2006 Photo ID Act imposes 'severe' restrictions on the right to vote"). Vagrancy statutes requiring one to identify oneself have been found to violate basic right to personal liberty protected by the Constitution. *Lawson*, 658 F.2d at 1368; *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1971). The Fourth Amendment protects against unreasonable government demands for identification unless there is some degree of "reasonable suspicion" that a particular individual committed a crime. *See Hiible v. Sixth Judicial District*, 542 U.S. 177, 185 (2004); *Lawson*, 658 F.2d at 1368 ("the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest.").

measure of security in addition to the requirement that all persons and their possessions pass through magnetometers. The district court also failed to consider whether there were less restrictive alternatives, that at minimal cost and inconvenience, could provide equal or superior security while preserving the right of Plaintiffs and those similarly situated to access the courthouse.

As discussed in Section IV. A. 3. above, the Supreme Court has recognized [a] presumption of openness "may only be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller v. Georgia*, 467 U.S. 39, 45 (1984).[17] Where the government seeks to deny the public's right of access to the courts by closing a hearing, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Press-Enterprise Co.* at 510. In determining whether the right of open access should be abridged in favor of other constitutional rights, "the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45.

In this case, the district court failed to reach the merits of whether the government's interest in securing the courthouse is sufficiently compelling to

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[17] Although the Supreme Court frequently analyzes the abridgement of a right to access in the criminal context, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46; *see also* Section IV.A.3., *supra*.

outweigh Plaintiffs' right to access the courts, especially when there are less restrictive alternatives.

1. Although Protecting The Courthouse Is A Compelling Governmental Interest, Requiring Individuals To Present Government-Issued Identification Is Not A "Necessary Measure" To Accomplish This Goal.

The Homeland Security Act task the Undersecretary of Information and Infrastructure with coordinating with other executive agencies in effecting *necessary measures* in the protection of key resources and critical infrastructure. 6 U.S.C. § 121(d)(4) & (d)(5). The HSA does not define what constitutes a "necessary measure." The district court erred by not allowing Plaintiffs' case to reach the merits phase so a determination could be made whether an identification requirement to enter the courthouse constitutes a "necessary measure" to achieve the government's security interest. While Plaintiffs acknowledge that the magnetometer and metal detector serve the legitimate purpose of screening a person and his or her possessions for weapons, the government has made no showing that the additional identification requirement is a "necessary measure" to achieve that security purpose.

In fact, not only is the cursory display of identification not "necessary," it does provide any significant additional security. The identification presented by a courthouse entrant is not cross-checked against any list of people to whom access should be denied, like the Transportation Security Administration's "No Fly" list

for airline passengers. Nor is the identification authenticated in any way.[18] As evidenced by the fact that all of the September 11th suicide bombers used legitimate identification to board airplanes, the mere fact of possessing a government-issued identification does not effectively increase safety. Indeed, Plaintiffs would have demonstrated that fake identification documents are readily available. Anyone planning a serious attack on the courts would almost certainly have no difficulty in obtaining documents that would pass the very cursory review used at the courthouse entrance.

Even assuming, *arguendo*, that having identification increases security because it confirms the holder's identity, Plaintiffs were not unknown to the courthouse security staff. The Complaint details several instances where Plaintiffs encountered the officers named as defendants and were refused entry. ER 14 at 2, 10-12. Based on the allegations in the complaint, Plaintiffs were prevented from entering the courthouse simply because they could not provide identification, not because Defendants perceived them as security threat.

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[18] Realistic looking fake identification is easily obtained through the internet or near any college campus.

2. The District Court Failed To Consider Whether There Were Less Restrictive Alternatives Than Total Exclusion From The Courthouse.

In order to pass constitutional muster, not only must a closure serve a compelling governmental interest, it must also be "narrowly tailored to serve that interest." *Press-Enterprise*, 464 U.S. at 510. Because the district court dismissed the underlying case on the pleadings without reaching its merits, Plaintiffs were precluded from litigating whether the identification requirement was sufficiently "narrowly tailored," and whether they were entitled to a less restrictive alternative than total exclusion from the courthouse. In *Gilmore v. Gonzales*, 435 F.3d 1125, 1138 (9th Cir. 2006), the Ninth Circuit upheld the less restrictive alternative of additional security screening[19] in lieu of presenting identification as a reasonable option that did not violate Gilmore's Fourth Amendment rights. In the present case, Plaintiffs did not have the option to submit to additional security screening in lieu of presenting identification. Instead, they were physically ejected from the courthouse.

Moreover, the option of additional screening would in fact provide *greater* security than the display of identification at little to no cost. Since the population

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[19] The additional security screening in *Gilmore* included walking through a magnetometer screening device, being subjected to a handheld magnetometer scan, having a light body patdown, removing shoes, and having luggage hand searched and put through a CAT-scan machine. 435 F.3d at 1138.

of individuals who do not have identification is relatively small, a secondary screening with a handheld magnetometer and a hand search of belongings would not create a disproportionate burden on the Marshals Service or Federal Protective Service staff. Any argument that a less restrictive alternative is not available at the courthouse is belied by the fact that the officers provided Plaintiffs with an escort. It would have been far quicker and more efficient simply to conduct a supplementary physical search to conform that Plaintiffs had no weapons. ER 35 at 3.

D. The District Court Failed To Address Plaintiffs' Fourth Amendment Allegations.

Plaintiffs raised two distinct Fourth Amendment claims against unreasonable searches and seizures. First, Plaintiffs allege that the demand for identification to enter a public building violates this right. ER 14 at 16. Second, Plaintiffs allege that their forcible removal from the courthouse violates this right. *Id.*

1. The Identification Requirement.

Plaintiffs allege that the request for identification violates their Fourth Amendment rights. ER 14 at 16. While the Supreme Court has not addressed specifically the validity of identification checkpoints to enter a public place, identification checkpoints whose only purpose is to reduce crime have repeatedly failed Fourth Amendment protections against unreasonable searches and seizures. A recent review of this area of federal law by the Tennessee Supreme Court found

that conditioning access to a public place upon the showing of identification is unconstitutional under the Fourth Amendment. *Tennessee v. Hayes*, 188 S.W. 3d. 505 (2006).

In determining whether the identification requirement was constitutional, the *Hayes* court adopted "the balancing approach set forth in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)." 188 S.W. 3d at 513. The Supreme Court's *Brown* test weighs three significant factors: "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown*, 443 U.S. at 50-51. The *Hayes* court found that the state had failed to "establish a causal connection" between the identification requirement and public safety. In this case, the district court failed to reach the underlying merits of whether the government could establish that the identification requirement "advances the public interest" as required by *Brown*.

Plaintiffs recognize that the Ninth Circuit rejected this position in the context of an airport identification requirement in *Gilmore v. Gonzales*, 435 F.3d 1125, holding that a request for identification in this context did not implicate the Fourth Amendment prohibition against unreasonable seizures. However, *Gilmore* was wrongly decided and distinguishable from this case in several respects.

First, in *Gilmore*, the Ninth Circuit held that Mr. Gilmore's fundamental right to travel was not violated by the airlines' request for identification because

there are alternative means of travel. In this case however, Plaintiffs do not have any alternative means to exercise their fundamental right to access the courts.

Second, in *Gilmore*, the Ninth Circuit held that Mr. Gilmore's Fourth Amendment rights were not violated because he was free to leave the airport after his unsuccessful attempt to board a plane without identification. *Id.* at 1138 (plaintiff "was not threatened with arrest or some other form of punishment; rather he was simply told that unless he complied with the policy, he would not be permitted to board the plane. There was no penalty for noncompliance."). In contrast, Plaintiff Foti's penalty for noncompliance was being placed in a wristlock control hold, physically removed from the courthouse without his shoes and surrounded by officers to prevent him from leaving the area. ER 14 at 8; ER 35 at 4.

Finally, in contrast to *Gilmore*, courthouse security officers do not compare a person's identification with a predetermined list of known security threats as the Transportation Security Administration does to ensure aviation security.

2. Plaintiffs' Ejection From the Courthouse.

"An individual is seized within the meaning of the fourth amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. "*United States v. $25,000 in U.S. Currency*, 853 F.2d 1501, 1504 (9th Cir. 1988) (internal quotation marks omitted).

The Fourth Amendment "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968). 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.'" *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (quoting *Terry*, 392 U.S. at 16).

Plaintiffs' Complaint states that after being refused admittance to the courthouse on May 21, 2004, Officer McHugh "took [Foti's] arm putting it in a wristlock control hold" and forced him outside on to the street without his shoes, which were still in the x-ray machine. ER 14 at 8. Officer McHugh then forced Foti to stay on the street "by surrounding him with other officers." *Id.* The complaint alleges that this incident "lasted approximately 20 minutes for Plaintiff Foti." *Id.* at 9. In view of all the circumstances surrounding the incident, Plaintiff Foti reasonably believed that he was not free to leave, and pled as much in the First

Amended Complaint.[20] As discussed in Section III. B. above, the Court failed to address this claim in its analysis.

Regardless of validity of Plaintiffs' claim that the identification requirement violates the Fourth Amendment, the additional element of Defendants grabbing, surrounding, and restraining Mr. Foti makes the Fourth Amendment applicable. Taking all facts to be true and accepting all inferences in Plaintiffs' favor, Plaintiff's Fourth Amendment claim was erroneously dismissed. *United States v. LSL Biotechnologies*, 379 F.3d 672, 698 (9th Cir. 2004) ("Both the district court and this Court are required to 'presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party'") (quoting *Conley*, 355 U.S. at 45-56).

CONCLUSION

For the foregoing reasons, Plaintiffs Foti and Augustine respectfully request that this Court reverse the district court's February 2, 2005 Order

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[20] Opening briefs are to be read "liberally" so as to avoid the purported waiver of any issues presented by the appeal. *Holley v. Crank*, 400 F.3d 667, 670 (9th Cir. 2005). *See also Mamouzian v. Ashcroft*, 390 F.3d 1129, 1136 (9th Cir. 2004) (Although appellant's brief was not "perfectly written," the issue was not waived. "We will not ignore the ultimate objective of [appellant's] appeal . . . by parsing her brief's language in a hyper technical manner.")

Granting Defendants' Motion to Dismiss First Amended Complaint, remand the case and reinstate the First Amended Complaint.

Dated: September 29, 2006

FENWICK & WEST LLP

By: _____
Alice L. Jensen

Attorneys for Plaintiffs-Appellants
ROBERT-JOHN:FOTI
KENNETH AUGUSTINE

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending before this Court.

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 Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,117 words (based on the word processing system used to prepare the brief).

Dated: September 29, 2006

FENWICK & WEST LLP

By: _____
Alice L. Jensen

Attorneys for Plaintiffs-Appellants
ROBERT-JOHN:FOTI;
KENNETH AUGUSTINE

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, San Francisco, California 94111. I served the following document(s), in the manner indicated below:

PLAINTIFFS-APPELLANTS' REPLACEMENT OPENING BRIEF

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

Kevin V. Ryan, Esq.
United States Attorney
Joann Swanson, Esq.
Chief, Civil Division
Abraham A. Simmons, Esq.
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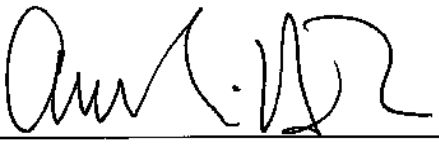
(X) **BY FACSIMILE:** I sent a copy of such document via facsimile transmission to the office of the parties stated above and the transmission was without error. A copy of the facsimile transmission report is attached hereto.

(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 September 29, 2006 at San Francisco, California.



Aurelia Nolen