UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15736

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. CV-02-03444-SI
Honorable Susan Illston, United States District Court Judge

Brief of *Amici Curiae* American Civil Liberties Union Foundation and American Civil Liberties Union of Washington in Support of Plaintiff-Appellant, John Gilmore, Urging Reversal

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Pursuant to Federal Rule of Appellate Procedure Rule 29, *amici curiae* American Civil Liberties Union Foundation and American Civil Liberties Union of Washington (together, "ACLU") file this brief in support of Plaintiff-Appellant John Gilmore. This brief urges that the Court vacate the district court's jurisdictional decision relating to Mr. Gilmore's challenge to the No-Fly List and CAPPS passenger pre-screening program. All parties to this case have consented to the filing of this brief.

I. INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation is a nationwide, non-profit, nonpartisan organization with more than 400,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution, and the ACLU of Washington is one of its regional affiliates. For more than eight decades, the ACLU has steadfastly adhered to the position that our nation's commitment to civil liberties is both most precious and most perilous in periods of national crisis. In support of that position, the ACLU has appeared before the federal courts as direct counsel and as *amicus curiae* on numerous occasions. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). Among the most fundamental of liberties is the right to challenge in court government actions alleged to deprive individuals of constitutional rights.

The present case raises many issues, but the ACLU's brief is limited to a jurisdictional question: namely, whether 49 U.S.C. § 46110 divests district courts of jurisdiction to adjudicate constitutional challenges to the No-Fly List or CAPPS passenger pre-screening program. In addition to its general interest in ensuring access to courts, the ACLU has a specific interest in the proper interpretation of § 46110 in this context. In an ACLU case pending within this Circuit, the government has asserted that § 46110 prevents district courts from reviewing the constitutionality of the government's current implementation of the No-Fly List, an issue ordinarily within their jurisdiction. This Court's decision in the instant matter may have a direct effect on the ACLU's ability to pursue this case and similar cases.

In *Green v. TSA*, No. 04-0763 (W.D. Wash., filed Apr. 6, 2004), the ACLU and ACLU of Washington represent plaintiffs in a constitutional challenge to the manner in which the federal government operates its controversial "No-Fly List" or other watchlists used to identify airline passengers as suspected terrorists without providing a means to clear one's name. The Government has argued in that case that the district court lacks jurisdiction to take any action, and that the matter should instead be brought before a Court of Appeals. However, with no factual development and no record to review, the Court of Appeals would be ill-suited to

act as a court of original jurisdiction. Again, Congress did not intend this result, nor is it required by the language of § 46110.

In cases like *Green*, the government's jurisdictional argument places an unrealistic obstacle in the path of plaintiffs seeking to vindicate rights in district court. Congress did not intend for § 46110 to insulate unlawful actions from constitutional challenge or public scrutiny. The proper resolution of the jurisdictional issue raised in this case is, therefore, a matter of critical importance to the ACLU and its members.

II. STATEMENT OF THE CASE

This case raises one of the most fundamental issues that a court can be asked to decide—the authority of the federal district courts to review allegedly unconstitutional actions committed by a federal agency.

On July 18, 2002, appellant John Gilmore filed in federal district court a constitutional challenge to the federal government's requirement that passengers show identification prior to boarding a flight. Mr. Gilmore further alleged that the No-Fly List and CAPPS passenger pre-screening program were unlawful and in violation of constitutional guarantees. The No-Fly List is a list of passengers deemed to pose a threat to aviation security and who are prohibited from boarding aircrafts and/or subject to heightened scrutiny at airports. The government directs airline personnel to match a passenger's name against a list of names contained in

a watchlist to determine whether the passenger will be prohibited from boarding or subject to heightened scrutiny or interrogation. The CAPPS program is the Computer Assisted Passenger Pre-Screening System used to identify passengers who will be subject to heightened scrutiny at airports based on their travel profiles.

On November 13, 2002, appellees federal defendants (hereinafter "defendants") filed a motion to dismiss all of Mr. Gilmore's claims. First, with respect to the challenges to the No-Fly List and CAPPS program, defendants argued that Mr. Gilmore lacked standing to raise those claims. Second, with respect to the challenge to the identification requirement, they posited that the district court lacked jurisdiction under 49 U.S.C. § 46110 to review those claims; notably, the defendants did *not* argue that § 46110 revokes jurisdiction over the challenges to the No-Fly List and CAPPS program. (Fed. Defs.' Mot. to Dismiss at 11; Reply in Support of Fed. Defs.' Mot. to Dismiss at 4-6.) Third, again with respect to the identification-requirement challenge, the defendants maintained that Mr. Gilmore failed to state a claim upon which relief could be granted.

Conflating the government's arguments, the district court on March 23, 2004, granted defendants' motion to dismiss Mr. Gilmore's challenges to the No-Fly List and CAPPS program based on two apparently alternate holdings: lack of standing or lack of jurisdiction. It then granted the motion to dismiss his challenge

to the identification requirement for failure to state a claim and for lack of jurisdiction.

It is the district court's alternate holding on jurisdiction over the No-Fly List and CAPPS program to which the ACLU directs their attention. The district court appears to have concluded that, even if Mr. Gilmore had established standing to challenge the No-Fly List and CAPPS program, the court lacked jurisdiction under § 46110 to review those programs. Having ruled on standing, the district court's ruling on the applicability of § 46110 to review the No-Fly List or CAPPS program, an issue not even briefed by the government, was entirely unnecessary. Moreover, the court's interpretation of § 46110 was erroneous.

Contrary to the district court's conclusion, the text of § 46110 and accompanying case law preserve district court jurisdiction over constitutional challenges such as the ones against the No-Fly List and the CAPPS program. Were the district court's holding permitted to stand, it would effectively insulate all conduct by the Transportation Security Administration ("TSA") from judicial review. Such a holding directly contravenes congressional intent and fundamental notions of due process. To the extent that the district court concluded that § 46110 revokes district court jurisdiction over constitutional challenges to agency action, the ACLU respectfully request that this Court vacate the judgment.

III. ARGUMENT

The federal defendants cannot invoke 49 U.S.C. § 46110 to immunize themselves from accountability in the district courts. That provision does not divest district courts of the power to review unconstitutional conduct by government agencies such as the TSA. 49 U.S.C. § 46110 permits direct review by the Court of Appeals and precludes district court review over aviation agency decisions only in certain limited circumstances.[1] Those circumstances are absent

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[1] 49 U.S.C. § 46110 provides, in relevant part:

> **(a) Filing and venue.**— . . . [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration ...) . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.
>
> **(b) Judicial procedures.**--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued. . . .
>
> **(c) Authority of court.**--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by

with respect to constitutional challenges to the No-Fly List and CAPPS program. First, there is no administrative "order" at issue within the meaning of § 46110 because (a) decisions relating to the No-Fly List or CAPPS program were not made pursuant to an agency proceeding; (b) even if there were an agency proceeding, there is no record of that proceeding with findings of the facts relied upon by the agency in rendering the decision; and (c) aggrieved parties have no opportunity to raise their claims at the agency level. The absence of an administrative proceeding with a fully developed record on the issues raised by a litigant deprives the Court of Appeals of the factual tools necessary to render judgment on the litigant's claims. Because there is no order with respect to the No-Fly List or CAPPS program, this Court has no occasion to determine the precise contours of § 46110's applicability. Second, even assuming there were an identified order in this case, § 46110 would not apply because it does not deprive district courts of jurisdiction to decide constitutional claims.

> staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.
>
> **(d) Requirement for prior objection.**--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

A. There Is No Administrative "Order" Relating to the No-Fly List or CAPPS Program.

The plain text of § 46110 demonstrates that this provision, relied upon by the district court in finding that it lacked jurisdiction, applies only to "orders" issued by an aviation agency. Courts interpret the term "order" to be limited to agency decisions accompanied by an adequate administrative record reflecting an administrative proceeding and findings of fact. *Morris v. Helms*, 681 F.2d 1162, 1163-64 (9th Cir. 1982) (analyzing predecessor statute to conclude that it precludes district court review only when there is a proper "order" within meaning of that statute).

In its trial court briefs, the government failed to identify any "order" relating to the No-Fly List or CAPPS program. Nonetheless, the district court appeared to assume the existence of such an order based on Mr. Gilmore's description of "certain orders and directives issued by the FAA and the Transportation Security Administration" in the course of his complaint. *Gilmore v. Ashcroft*, 02-3444, slip op. at 4 (N.D. Cal. Mar. 23, 2004). In fact, Mr. Gilmore referred in his complaint to only one order or directive, Security Directive 96-05. (Compl. at ¶¶ 17, 22, 33, 37-38.) As described by Mr. Gilmore, Security Directive 96-05 imposes a requirement that passengers show identification prior to boarding a flight. (*Id.*) It does not establish the No-Fly List or CAPPS program, much less the

constitutionality of those programs, and thus does not constitute an order that would preclude district court review over those programs.

Although the term "order" may encompass agency adjudications, administrative rules, or security directives, it does not follow that all agency adjudications, rules, or security directives necessarily constitute "orders." Rather, to determine whether such action constitutes an order, courts must examine the procedures and record surrounding the decision. A decision constitutes an "order" only if it results from an agency proceeding with a reviewable administrative record. *Sierra Club v. Skinner*, 885 F.2d 591, 592-93 (9th Cir. 1989). There is not a single case wherein § 46110 was held to deprive the district courts of jurisdiction to review an aviation agency decision in the absence of an adequate administrative record. *Compare San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) (applying predecessor statute to permit Court of Appeals review of an agency decision where the administrative record was sufficient to permit the Court of Appeals to evaluate the claims raised); *to Southern Calif. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672 (9th Cir. 1989) (confirming that predecessor to § 46110 does not apply where the administrative record is insufficient to provide an adequate basis for the Court of Appeals to review plaintiffs' claims). Moreover, an agency decision constitutes an "order" precluding district court review only if an agency proceeding provided the affected party with an opportunity to present his

claims. *Morris*, 681 F.2d at 1163-64. Thus, case law firmly establishes that § 46110 precludes district court jurisdiction over agency decisions only where the plaintiff had an opportunity to raise his claims at the agency level, the agency considered those claims in an administrative proceeding, and the agency issued an order based on a fully developed record.

Repeated references in the text of § 46110 support this position and demonstrate that Congress never intended for the provision to apply where there were neither findings of fact, nor administrative proceedings in which the aggrieved party had an opportunity to present her claims. Subsection (b) states, in relevant part, "The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued . . . ." Subsection (c) states, "Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive." 49 U.S.C. § 46110(c). Subsection (d) provides, "In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d). These statements demonstrate that Congress did not intend for § 46110 to apply where

there is no administrative proceeding or record as in the instant case regarding the No-Fly List and CAPPS program.

At no time during the course of Mr. Gilmore's litigation did defendants identify the existence of an administrative proceeding or record relating to the No-Fly List or CAPPS program, much less file a record with the court as contemplated under § 46110(b). Further, given the public's ignorance of any such order, if one does in fact exist, Mr. Gilmore could not have had an opportunity to challenge it or develop a record at the agency level before the purported order was issued. In the absence of such a record or proceeding, any agency decision establishing the No-Fly List or CAPPS program fails to qualify as an "order" for the purpose of precluding district court jurisdiction under § 46110. Consequently, neither this Court nor the District Court has occasion to define the contours of § 46110, given that it is not properly invoked in the present matter. This Court should vacate the district court's judgment on this ground.

B. Even If An "Order" Existed, Jurisdiction in the District Court Was Proper Because Mr. Gilmore Raises Constitutional Claims.

Even if federal defendants did, at this late date, produce the phantom order establishing the No-Fly List or CAPPS program pursuant to an administrative proceeding with a complete factual record, such an order would not suffice to preclude district court review of constitutional challenges to those programs.

Case law establishes that under § 46110, a plaintiff may bring a claim against an agency in district court, even if the claim arguably stems from a properly entered administrative "order," where the litigant previously did not have the opportunity to raise those arguments in an agency proceeding.[2] *See, e.g.*, *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 189-92 (2d Cir. 2001) (holding that the existence of an administrative order does not preclude district court review of negligence claim stemming from the events implicated in the order because the aggrieved party did not have the opportunity to present the negligence claim in the agency proceeding below). As discussed earlier, Mr. Gilmore had no opportunity to raise his constitutional challenges to the No-Fly List and CAPPS program before the government issued any order relating to those programs.

The rationale for this rule is that, in the absence of agency consideration of the litigant's claim, there is no administrative record on the issue for the Court of Appeals to review. *Crist v. Leippe*, 138 F.3d 801, 804-05 (9th Cir. 1998) (holding that when an agency order did not address a party's claims, review by the district court is proper because additional record development may be necessary). This position is consistent with judicial interpretations of provisions conferring exclusive jurisdiction in courts of appeal in other contexts. For example, in the

[2] As discussed above, some courts hold that if the litigant did not previously have the opportunity to present her claims, then the agency decision does not constitute an "order" within the meaning of § 46110 at all.

immigration context, this Court has held that when a limited Court of Appeals review scheme would not produce an adequate administrative record to allow meaningful judicial review over a litigant's claims, district court jurisdiction over such claims must be preserved. *See Proyecto San Pablo v. INS*, 189 F.3d 1130, 1137 (9th Cir. 1999).

Both the FAA and the TSA lack the statutory authority and expertise to adjudicate constitutional challenges. *See, e.g., Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994) (reasoning that issues regarding institutional competence dictate that the district court, rather than the agency, is the appropriate forum to review constitutional claims); 2 Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 14.2 (2002) ("An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so."). Consequently, the government cannot argue that either of those agencies previously evaluated the litigant's constitutional claims.

In any case, § 46110 does not preclude district court jurisdiction over constitutional challenges to agency decisions. In *Mace*, 34 F.3d at 859-60, the Ninth Circuit held that § 46110 preserves district court jurisdiction to review constitutional claims. In response to alleged violations of safety regulations, the FAA issued an emergency order revoking Mace's aircraft mechanic's certificate. *Id.* at 856. Subsequently, Mace filed suit in district court alleging that the FAA's

use of emergency orders violated his constitutional rights to due process and a jury trial. *Id.* This Court held that § 46110 preserved district court jurisdiction over Mace's constitutional challenges, reasoning, "any examination of the constitutionality of the FAA's revocation power should logically take place in the district courts, as such an examination is neither peculiarly within the agency's special expertise nor an integral part of its institutional competence." *Id.* at 858-60 (quotations omitted).

Similarly, in *Crist*, after the FAA suspended Crist's commercial pilot certificate, Crist filed suit against the FAA in district court. 138 F.3d at 802-03. He claimed that widespread spoliation of evidence in investigations such as that conducted in his own case violates the constitutional rights of FAA certificate-holders. *Id.* at 803. The Ninth Circuit posed the relevant inquiry as follows: "Does the appeal broadly challenge the constitutionality of the FAA's action—in which case the district court could have jurisdiction—or is the appeal 'inescapably intertwined' with a review of the procedures and merits surrounding the FAA's order?" *Id.* Concluding that Crist's claim posed a broad constitutional challenge to the agency's procedural practices, the Court held § 46110 to be inapplicable. *Id.* at 804. Under *Mace* and *Crist*, § 46110 preserves district court jurisdiction over constitutional challenges to the No-Fly List and CAPPS program. Because Mr. Gilmore raised broad constitutional claims, and because those claims were not

considered when the government rendered any purported order involving the No-Fly List and CAPPS program, § 46110 did not apply to divest the district court of jurisdiction.

C. The Government's Interpretation of the Statute Would Hinder Litigants' Ability to Prove Constitutional Violations and Burden the Courts of Appeals With the Unfamiliar Task of Supervising Discovery.

Not only would revocation of district court jurisdiction in the present circumstances contradict the text of § 46110 and the case law interpreting that provision, but it would also lead to impracticable results. Under the district court's interpretation, district courts would play no role in adjudicating alleged constitutional violations committed by federal aviation agencies. The agency would be responsible for developing a factual record surrounding the alleged violation and adjudicating the dispute in the first instance. Neither the FAA nor the TSA, however, provides a mechanism for individuals to raise these constitutional challenges. Litigants have no opportunity to develop facts that would be critical to resolving such challenges, such as the harm they suffered as a result of being identified on a government watchlist or the futility of efforts to have their names removed from the watchlists.

As a result, the actual fact-finding necessary to adjudicate constitutional claims against the FAA or the TSA would be performed by the courts of appeal.

Courts of Appeal would become embroiled in factual disputes surrounding agency procedures alleged to violate individuals' constitutional rights.

This is a position the Courts of Appeal have expressly rejected. In the absence of a fully developed administrative record, this Court likely will refuse to review any constitutional challenge to the TSA's actions. In *Greenwood v. FAA*, 28 F.3d 971, 978 (9th Cir. 1994), the Court declined to review a constitutional challenge to the FAA's decision because the administrative record was not sufficiently developed. It stated:

> We do not address [plaintiff's equal protection claim] because it is not properly developed for review by this court. Our jurisdiction to review agency orders under [predecessor to § 46110] depends on the adequacy of the administrative record because the review must be sufficiently informed to permit a fair evaluation of the claim. . . . A sufficient administrative record is one that permits an informed judicial evaluation of the issues raised. A limited agency record may preclude review of substantive claims.

Id. (quotations omitted); *see also Southern Calif. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d at 676 (declining to review plaintiffs' claim because the administrative record did not provide adequate basis to evaluate the claim); *Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 367 n.1 (9th Cir. 1996) (explaining that Court of Appeals review under § 46110 is only proper if there is a sufficient administrative record to permit an evaluation of the claims raised); *San Diego Sports Ctr., Inc.*, 887 F.2d at 968-69; *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993). Thus, it

is not at all clear that the Courts of Appeal would be willing to review the challenged action. In the absence of district court jurisdiction, there may be no forum in which a party could raise a constitutional challenge to the TSA's actions. As a result, the TSA would be insulated completely from any judicial accountability, either at the district court or the Court of Appeals level.

Where the plaintiff's case requires discovery and trial, it should commence in the district court. Then, if necessary, it can be reviewed by the Court of Appeals with the benefit of a well-developed record and factual findings.

IV. CONCLUSION

Were the district court's conclusion permitted to stand, the federal government could effectively immunize the TSA's conduct from judicial accountability. A litigant challenging the constitutionality of the No-Fly List or CAPPS program, or any policy or procedure thereof, would have no adequate forum in which she could gather the facts necessary to present her constitutional claims. There is no access to such a forum at the agency level; neither the TSA nor the FAA offers any mechanism whereby a party may challenge the constitutionality of their programs. Under the government's extraordinary theory, Courts of Appeal would then be forced into a position of reviewing a non-existent administrative proceeding and relying on a non-existent administrative record with no findings of fact. This was not Congress's intent in enacting 49 U.S.C. § 46110,

and the federal government cannot be permitted to insulate itself unilaterally from public accountability for its actions. For these reasons, the ACLU respectfully requests that this Court vacate the district court's judgment regarding its jurisdiction to hear constitutional challenges to the No-Fly List and CAPPS program.

DATED: August 23, 2004

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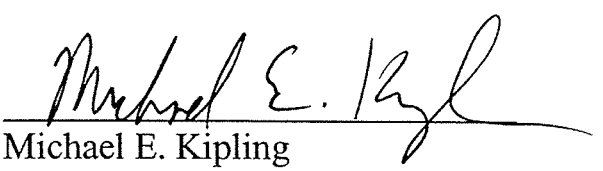
By: 
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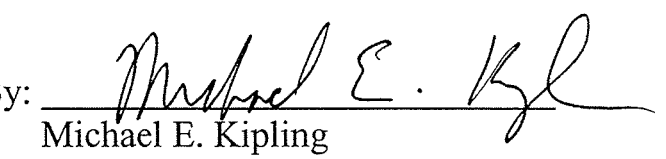
By: 

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CERTIFICATE OF SERVICE

I certify that on August 23, 2004, an original and fifteen (15) copies of Brief of *Amici Curiae* American Civil Liberties Union Foundation and American Civil Liberties Union of Washington in Support of Plaintiff-Appellant, John Gilmore, Urging Reversal were sent, via First Class U.S. Mail, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies were sent, via First Class U. S. mail, postage prepaid to:

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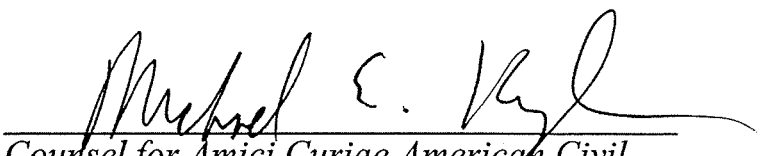

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