

No. 04-15736

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Gilmore

Appellant,

v.

John Ashcroft, *et al.*,

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 District Court Judge

Brief of *Amicus Curiae* The Center for Constitutional Rights and
PrivacyActivism in Support of Appellant, John Gilmore

DEBORAH PIERCE
LINDA ACKERMAN
PRIVACYACTIVISM
4026 18th Street
San Francisco, CA 94114
(415)225-1730

RACHEL MEEROPOL
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF INTEREST.....	1
ARGUMENT.....	2
CONCLUSION.....	10
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES

<u>Aptheker v. Secretary of State</u> 378 U.S. 500 (1964)	9
<u>Attorney General of New York v. Soto-Lopez</u> , 476 U.S. 898 (1986)	3
<u>Edwards v. California</u> , 314 U.S. 160 (1941)	3
<u>Crandall v. Nevada</u> , 73 U.S. (6 Wall.) 35 (1867)	4
<u>DOT v. Pub. Citizen</u> , 124 S. Ct. 2204 (2004)	6
<u>Griswold v. Conn.</u> , 381 U.S. 479 (1965)	10
<u>Holt v. Sarver</u> , 309 F. Supp. 362 (E.D. Ark. 1970)	7
<u>Houston v. Federal Aviation Admin.</u> , 679 F.2d 1184 (5th Cir. 1982)	5
<u>Kansas v. United States</u> , 16 F.3d 436 (D.C. Cir. 1994)	5
<u>Kent v. Dulles</u> , 357 U.S. 116 (1958)	3
<u>McIntyre v. Ohio Elections Comm'n</u> , 514 U.S. 334 (1995)	10
<u>Miller v. Reed</u> , 176 F.3d 1202 (9th Cir. 1999)	3-4
<u>Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.</u> , 466 F.2d 552 (9th Cir. 1972)	5, 9
<u>Rasul v. Bush</u> , 124 Sup. Ct. 2686 (2004)	1
<u>Regan v. Wald</u> , 468 U.S. 222 (1984)	3
<u>Rhodes v. Chapman</u> , 452 U.S. 337 (1981)	7
<u>Saenz v. Roe</u> , 526 U.S. 489 (1973)	3-4
<u>United States v. Albarado</u> , 495 F.2d 799 (2d Cir. 1974)	5, 10
<u>United States v. Guest</u> , 383 U.S. 745 (1966)	4
<u>United States v. Kroll</u> , 481 F.2d 884 (8th Cir. 1973)	5, 10
<u>United States v. Lopez</u> , 328 F. Supp. 1077 (E.D.N.Y. 1971)	10
<u>Zobel v Williams</u> , 457 U.S. 55 (1982)	3

I. Introduction

This brief of Amici Curiae is submitted in support of John Gilmore's appeal to the United States Court of Appeals for the Tenth Circuit to reverse the decision of the United States District Court for the Northern District of California dismissing Mr. Gilmore's claims.

II. Statement of Interest

Proposed Amici Curiae are two non-profit organizations that support John Gilmore's right to travel.

The Center for Constitutional Rights is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has litigated numerous landmark civil liberties cases, including a recent victory before the Supreme Court in Rasul v. Bush, 124 Sup. Ct. 2686 (2004). The Center is also involved in freedom to travel issues through its representation of hundreds of individuals who face civil fines for allegedly breaking the U.S. embargo of Cuba.

PrivacyActivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights. Through public education, activism, and legal work, it strives to make complex issues of

privacy law, policy, and technology accessible to all. Because PrivacyActivism feels that the ruling in this case has not adequately taken into account the impact of proliferating identification requirements on privacy concerns inherent in the right to travel anonymously, it believes the District Court ruling should be reversed.

Proposed Amici believe the attached brief is desirable in this case because the issues presented by the case are complex and the matters asserted in the attached brief are relevant to the disposition of this case. All parties have consented to the filing of this brief.

III. Argument

Mr. Gilmore has alleged that the existence of secret I.D. requirements have prevented him from exercising his fundamental right to travel, and that he was thereby unable to visit his family, engage in business, and petition the government in Washington. The lower court erred in finding that Mr. Gilmore had not stated a claim based on the right to travel. Amici urge that this court reverse and remand as related to this claim for the following reasons.

The right to travel between states is fundamental and grounded in the U.S. Constitution; Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 901 (1986) (“Freedom to travel throughout the United States has long

been recognized as a basic right under the Constitution.”). The Supreme Court has located the right variously in the Privileges and Immunities Clause of Article IV (Zobel v Williams, 457 U.S. 55, 71 (1982)); the Commerce Clause (Edwards v. California, 314 U.S. 160, 173-74 (1941)); the Privileges and Immunities Clause of the 14th Amendment (Id. at 177-78); and the Due Process Clause of the Fifth Amendment (Regan v. Wald, 468 U.S. 222, 240 (1984)).

Wherever located textually, however, the U.S. Supreme Court and the Ninth Circuit agree that interstate travel is a fundamental right. Kent v. Dulles, 357 U.S. 116, 126 (1958) (“[T]hat right [to travel] was emerging at least as early as the Magna Carta . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”); see also, Saenz v. Roe, 526 U.S. 489, (1973) (“[T]he right [to travel] is so important that it is assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.”) (citation omitted); Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999).

The right to travel is violated when travel is concretely and practically disrupted by “statutes, rules and regulations which unreasonably burden or restrict this movement.” Saenz, 526 U.S. at 499. Accordingly, the Supreme

Court has ruled against such impediments as a state law charging a one-dollar tax on those who pass through the state (Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)) and rules making it difficult for African-Americans to travel freely in and out of a state (United States v. Guest, 383 U.S. 745 (1966)).

In dismissing Mr. Gilmore's case, the District Court relied on a line of cases holding that "the Constitution does not guarantee the right to travel by any particular form of transportation." Gilmore v. Ashcroft, No. C 02-3444 SI, 2004 U.S. Dist. Lexis 4869, at * 19 (N.D. Cal. Mar. 19, 2004), citing Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999) (denying right to travel claim in case in which plaintiff was denied a driver's license because his religion prevented him from giving his social security number to the DMV). In Miller, The court held that the plaintiff was still in possession of his right to travel *because there were other forms of transportation available to him*. Id. He could, without giving his social security number, buy a ticket for a common carrier, hire a licensed driver, or get a ride with an associate. Id. This case and others like it merely stand for the proposition that a burden on a single form of transportation does not rise to the level of constitutional violation if other forms of transportation are reasonably available. See, e.g., Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc., 466 F.2d

552, 554 (9th Cir. 1972) (“A rich man can choose to drive a limousine; a poor man may have to walk.”); Kansas v. United States, 16 F.3d 436, 442 (D.C. Cir. 1994) (it is not unconstitutional to burden airline travel to Love Field when Dallas-Fort Worth airport is available nearby); Houston v. Federal Aviation Admin., 679 F.2d 1184, 1198 (5th Cir. 1982) (not unconstitutional to burden airline travel to National Airport when Dulles is nearby). Each of these cases involve situations in which it is relatively easy for travelers to access other forms of transportation.

In this day and age, however, there are many circumstances in which there is nothing comparable to airline travel. See, United States v. Albarado, 495 F.2d 799, 807 (2d Cir. 1974) (“While it may be argued there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation.”); United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973) (“It might be suggested that a prospective airline passenger will not actually be deprived of his right to travel because there are alternative means of travel available. We do not find this argument persuasive since, in many situations, flying may be the only practical means of transportation.”) (internal citation omitted).

For this reason, Mr. Gilmore's case presents a factual situation that is distinguishable from the cases relied upon by the District Court. Not only are alternate modes of transportation an inadequate substitute for long-distance air travel, but all those alternative modes are also burdened in the same way as air travel: they require passengers to present identification. Even where the courts have allowed the burdening of air travel, they have justified it by the availability of other, equivalent, unburdened forms of transportation. When all other forms of transportations are identically burdened – even if not by the same legislative act – the existence of those other options cannot save the challenged regulation from Constitutional infirmity.

Government regulations do not occur in a vacuum, but in a mosaic of other regulations and circumstances that give the law its ultimate effect. For this reason, the Supreme Court will often decline to consider government actions without considering the context or the totality of circumstances in which those regulations operate, to determine their true impact. See, e.g., DOT v. Pub. Citizen, 124 S. Ct. 2204, 2215 (2004) (“[a]n agency is required to evaluate the cumulative impact of its action . . . when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”); Rhodes

v. Chapman, 452 U.S. 337, 364 (1981) (inhumane treatment of prisoners may arise from the “cumulative impact” of many small conditions, none of which would be inhumane when considered alone); Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970) (“One cannot consider separately a trusty system . . . barracks . . . isolation cells, or an absence of a meaningful program of rehabilitation. All of those things exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates . . .”). Similarly, the government cannot pass a mosaic of regulations that work together to burden all travel, while escaping constitutional scrutiny merely because no single regulation covers the entire field.

The chart appended to this brief as Appendix A shows the degree to which Mr. Gilmore’s right to travel *by any means* of transportation (public or private) is burdened by I.D. requirements. The information in this chart was collected by the staff of PrivacyActivism, as set out in Appendix B. As the chart shows, today many systems of public transportation and habitation require identification information and/or conduct searches of persons and their possessions. These regulations and policies operate in an environment where there is no probable cause or reasonable suspicion to stop the person.

Rather, they are an inconsistent and illogical response to a generalized fear of "terrorism" and a perceived need to do "something" about it.

As the chart shows, collection of personal information is widespread, although inconsistent. The only national rail system, Amtrak, does have a policy of checking I.D.s, but appears to apply that policy sporadically. Buses and trains in larger cities will also not allow a passenger to purchase a ticket without showing a valid photo I.D., whereas buses and trains in smaller cities (sometimes from the same company) tend to not check I.D. very thoroughly, if at all.

Individuals who attempt to avoid this issue by driving themselves will run into difficulty with hotels along the way. Most national hotel chains do not have one policy for all of their hotels. Instead, security procedures are left up to individual managers. Information about I.D. requirements and searches is almost always left off of the "FAQ" pages on web sites, leaving passengers and hotel guests in the dark about these policies. Many hotels and transportation systems that currently do not collect identification information or conduct searches reserve the right to do so at future times.

The inescapable conclusion to be drawn from the study set out in Appendix A is that the right to travel anonymously within the United States has been severely burdened. For this reason, and as pleaded in the

complaint, Mr. Gilmore cannot rely on alternate forms of transportation to alleviate the burden of the airplane identification requirement.

In dismissing Mr. Gilmore's claim, the District Court also cites precedent for the proposition that fees and tariffs on interstate travel do not place a burden on travel sufficient to rise to the level of a constitutional violation. Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552, 554 (9th Cir. 1972) ("Of course, higher air tariffs will limit travel of those who cannot pay the price . . . but it is not unconstitutional.") Monarch Travel, however, must be distinguished from cases in which the right to travel is conditioned upon sacrifice of another fundamental right, rather than a mere monetary sacrifice. In Aptheker v. Secretary of State, for example, the Supreme Court held that the right to travel is unconstitutionally burdened if an individual is required to give up another fundamental right in order to be allowed to travel. 378 U.S. 500 (1964) (holding that it was unconstitutional to prevent plaintiff from traveling unless he gave up his First Amendment right to membership in the Communist Party).

Similarly, Mr. Gilmore does not claim that he has had to pay too much money to travel, but rather that he has been completely deprived of his fundamental right to travel unless he agrees to surrender another fundamental right – the right to privacy and anonymity. Cf. Griswold v.

Conn., 381 U.S. 479, 484-85 (1965) (recognizing the penumbral rights to privacy and repose); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (recognizing First Amendment right to speak anonymously). The government asserts that Mr. Gilmore is free to board any flight – as long as he gives up his right to privacy, but “force[ing] one to choose between that necessity [of travel] and the exercise of a constitutional right is coercion in the constitutional sense.” United States v. Albarado, 495 F.2d 799, 807 (2d Cir. 1974); See also, United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973) (“Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion.”); United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971) (“Nor can the government properly argue that it can condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights.”). While money may be a reasonable price to pay to travel, the loss of a fundamental constitutional right is not.

IV. Conclusion

For the above reasons, Amici request that the Ninth Circuit reverse the District Court’s dismissal of Mr. Gilmore’s freedom to travel claim.

Dated: New York, New York
August 19, 2004

Respectfully submitted,

By: _____
Rachel Meeropol, Esq.

CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, N.Y. 10012
Tel. (212) 614-6432
Fax (212) 614-6499

On Brief: Michael Grinthal
(law student)

Deborah S. Pierce
Linda Ackerman
PRIVACYACTIVISM
San Francisco, CA

Certificate of Compliance

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that there are 2,211 words in this brief as measured by the word-processing system used to prepare it.

By: _____
Rachel Meeropol
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, N.Y. 10012
Tel. (212) 614-6432
Fax (212) 614-6499

APPENDIX A:
Survey of Current Policies and Practices Concerning Identification and Search Requirements on Public Transportation and at Major Hotels

	ID Required	Search	Data Storage	Comment
Commuter & National Railroads:				
<ul style="list-style-type: none"> ▪ Amtrak 	State-issued photo ID required of all passengers 18 years and over to buy ticket or check baggage			A recent traveler on the Celera Express between South Station (Boston) and Penn Station (NYC) was not asked for an ID to purchase a ticket in either direction.
<ul style="list-style-type: none"> ▪ TriRail (Miami, Ft. Lauderdale, Palm Beach) 	ID required to buy senior or handicapped discount fare card.	No	No	
<ul style="list-style-type: none"> ▪ CalTrain (San Francisco Bay Area) 	No ID needed.			There is nothing on the web site about ID checks or searches.
<ul style="list-style-type: none"> ▪ Long Island RR 				It was not possible to obtain information about ID requirements for the LIRR either by phone or from the MTA web site.

Interstate Bus Lines:				
<ul style="list-style-type: none"> ▪ Greyhound (national) 	In larger cities ID is required to purchase a ticket as well as to board the bus. In smaller cities, IDs are often not required	No	No	There is nothing on their web site about their ID policies.
<ul style="list-style-type: none"> ▪ Peter Pan (northeastern U.S.) 	Photo ID required to buy ticket	Unaccompanied baggage searched; accompanied baggage searched only if someone "looks suspicious."	Buyer's name and address entered into database	

	ID Required	Search	Data Storage	Comments
--	-------------	--------	--------------	----------

Ferries:				
<ul style="list-style-type: none"> ▪ Cape May (N.J.)-Lewes (Del.) Ferry 	State-issued photo ID required to buy ticket and to board ferry.	Random vehicle searches.	Name and ID number are recorded.	For cars, only one passenger's ID is checked.
<ul style="list-style-type: none"> ▪ Maine State Ferries 	Currently not checking ID to buy ticket or board; passenger IDs may be randomly checked while on board.	Random vehicle searches.	No	Policy may be subject to seasonal changes; surveillance cameras are being installed on board ferries.
<ul style="list-style-type: none"> ▪ Woods Hole, Martha's Vineyard and Nantucket Steamship Authority 	Random ID checks and passenger screening may be conducted.	Vehicles must be screened to board; random baggage checks may be conducted	Not known	The Authority is In the process of becoming compliant with the Maritime Transportation Security Act of 2002.
<ul style="list-style-type: none"> ▪ Seattle Ferry System 	No	No random searches of passengers, but there are random searches of vehicles.		If the threat level goes up, they may institute random searches of people.
<ul style="list-style-type: none"> ▪ San Francisco Bay Area Ferry System 	No		N/A	
<ul style="list-style-type: none"> ▪ PATH Port Authority Trans Hudson 	In general, no ID required (buses)	No	No	"We live in different times now."
<ul style="list-style-type: none"> ▪ Ferries – 1-800-53 FERRY 	No IDs required to ride the ferries	No	N/A	

Subway Systems:				
<ul style="list-style-type: none"> ▪ MARTA (Atlanta) 	ID required to buy senior or handicapped discount fare card, or to buy fare card by check.	No	No	
<ul style="list-style-type: none"> ▪ Metro (Washington, D.C.) 	ID required with purchase of SmartCard, to register card against loss.	No	Name and contact information of SmartCard buyers is stored.	The Cincinnati Post reported on August 7, 2004, that the Capitol (Federal) Police were boarding Metro Transit buses and checking passenger IDs. Metro Transit could not confirm this but did say that District Police officers with sniffing dogs had been boarding buses in the downtown area.

	ID Required	Search	Data Storage	Comments
▪ MTA (New York)				It was not possible to obtain information about ID requirements for the NYC subway system either by phone or from the MTA web site
▪ MBTA (Boston)	No.	Yes		Policy of random searches of passengers' briefcases, backpacks, etc., begun in August 2004 during the Democratic National Convention will continue.
▪ BART (San Francisco Bay Area)	No	Only if people look suspicious	N/A	An "eyes and ears" campaign to promote public safety is ongoing.
• SEPTA (Philadelphia)				Currently IDs are not checked, but only one person is authorized to give out any information about their policies. He has been elusive so far.
• Los Angeles Metro	No	Only if people look suspicious	N/A	Metro police randomly check to make sure that passengers have valid tickets.
• CTA (Chicago)	No	No		They do as the Dept. of Homeland Security instructs, even though they are not regulated by DHS. If DHS tells them to check IDs, they will.

Hotels:				
▪ Holiday Inn (San Francisco Civic Center)	Photo ID required for check-in.	No	IDs of walk-in customers without reservations are photocopied and copies are stored for 10 years.	Requirement to show ID at check-in is not consistently applied.
▪ Four Seasons (San Francisco)	No ID required unless checking in on same day reservation made.	No	No	

	ID Required	Search	Data Storage	Comments
▪ Ritz Carlton (San Francisco)	No ID requirement in general, but will check ID if reservation is in a different name; ID required for walk-in without reservation.	No	ID copied and stored for four years for walk-in without reservation.	
▪ Best Western (San Francisco Civic Center)	Policy is to ask for ID but this is done only if someone "looks suspicious"; if suspicious will check ID and credit card.	No	No	ID policy is not generally enforced because "we don't want to irritate people."
▪ Ceasar's Palace (Las Vegas)	ID required. The customer representative stated that they only do visual inspections of ID. Someone who recently stayed there said that the person behind the counter wanted to photocopy his ID and was told that it is company policy to do so. When he balked, the hotel backed down.			There is nothing on the web site about ID checks or searches.
▪ Hyatt	Yes. They want an ID card and a credit card. No ID, no check in.	No	They do not make copies of any ID documents.	
▪ Motel 6	ID card only. They don't need a credit card.	No	The only time they photocopy IDs is if someone wants to make a credit card payment over the phone. If that is the case, they keep the photocopy of the ID along with a copy of the credit card documents (indefinitely).	
▪ Days Inn	ID card and credit card are needed. If the guest does not have a credit card, the hotel takes a photocopy of their ID.	No	Store until guest leaves.	The customer service representative didn't know what would happen in the case of a guest who does not wish to have their ID documents copied.

	ID Required	Search	Data Storage	Comments
<ul style="list-style-type: none"> ▪ Marriot Hotel/Residence Inn 	Some hotels photocopy the ID. Customer service representative was evasive when asked about options if a guest fails to show ID. ID checks are all local, so it is up to the individual behind the desk to decide whether or not to check the ID	No	Declined to state	Nothing is on the web site about searches or ID checks. The stated reason is that policies are all local. A random check of specific hotel web sites failed to turn up any information on ID checks or searches.

APPENDIX B

Affidavit of PrivacyActivism

PrivacyActivism is a 501(c)(3) non-profit corporation based in San Francisco, California. Linda Ackerman and Deborah Pierce are staff counsel and executive director respectively of PrivacyActivism. PrivacyActivism can be found on the web at www.privacyactivism.org.

During the weeks of July 12 through August 6, Linda Ackerman and I contacted a variety of public transportation systems and hotels for the purpose of determining how possible it is to travel anonymously throughout the United States. We collected this information not as individuals, but as part of our work at PrivacyActivism.

We contacted interstate bus lines bus lines such as Greyhound; commuter railroads such as TriRail in Florida; railway systems like AMTRAK; subway systems like the DC Metro, San Francisco BART, MBTA in Boston; ferries such as the Seattle ferries; and finally, a variety of hotels. We contacted all of the above (for a complete list, see the appendix in the xxxxx brief) by phone as well as checking the information that was listed on the web sites of each of the entities. For some, we were unable to collect the information for a variety of reasons.

We found that the trend is to collect information, and for those that aren't collecting identifying information currently, keeping options open for the future.

Signed,

Deborah S. Pierce
Executive Director
PrivacyActivism
San Francisco

August 11, 2004