UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-17736

JOHN GILMORE,

Plaintiff-Appellant,

vs.

ALBERTO R. GONZALES, *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

PETITION FOR PANEL REHEARING OR, ALTERNATIVELY, REHEARING *EN BANC*

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John Gilmore ("Gilmore") respectfully requests rehearing by the panel or the *en banc* Court, both to protect Gilmore's due process rights denied him when the Court decided this matter on the merits without giving him any opportunity to amend his pleading, and to prevent future case conflicts created by this Court's published Opinion. This Court's decision conflicts with *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) and *Tur v. FAA*, 104 F.3d 290 (9th Cir. 1997), and it creates an unworkable standard in this Circuit for review of agency actions. If not corrected, this decision will result in denial of the due process rights of other litigants presenting constitutional challenges to agency actions.

I.
INTRODUCTION

In the United States today, interstate travel is essentially impossible without showing identification or being prepared to do so. A driver's license is required to drive. Most common carriers – air, train and ship – prohibit travel to those who refuse to show identification. Perhaps government-imposed restrictions on any one form of travel may not infringe a citizen's right to travel. Cumulatively, however, a citizen who refuses to present identification is effectively unable to freely travel from one part of this country to another. When identification is demanded, the alternative of a more extensive search is not uniformly offered to those who refuse; the right to travel is denied.

These are the facts Gilmore would have established if given the opportunity. According to this Court's analysis in its Opinion, these facts could have made a difference. Despite Gilmore's repeated

requests, he was not given an opportunity to amend his pleading or to offer evidence to support his claims. Instead, the Court resolved the case on the basis of Gilmore's original 2002 pleading by converting that Complaint to a Petition for Review of an administrative order and summarily denying that Petition. Although unclear, Gilmore may be precluded from ever challenging the security directive at issue here.

This Court erred, depriving Gilmore of his due process rights, when it converted Gilmore's Complaint into a Petition for Review and immediately resolved this matter on the merits. Gilmore should have been given leave to amend his pleading and correct its deficiencies. (Section II.A., *infra.*)

The Court also erred in concluding that jurisdiction over this matter lies exclusively in the Court of Appeals. The distinction between facial and as-applied challenges to agency actions is a misapplication of this Court's precedents, and will result in a deprivation of due process rights in this and countless other cases. Litigants whose rights are violated due to agency action but cannot present those claims to the agency – as occurred here – must be permitted to present those claims to a district court for the fact-finding inherent in such challenges. (Section II.B., *infra.*)

Finally, Gilmore contends that an executive branch agency should not be permitted to impose secret regulations that infringe the fundamental right to travel, nor refuse those who challenge the regulations the right to see and test them. Gilmore should have been permitted to amend to establish that many forms of travel – not just air travel – are denied to those who refuse to present identification, and that the TSA and common carriers are not, as the government claims,

always offering a more extensive search as an alternative to presenting identification. Based on this Court's Opinion, both facts would have made a difference in the Court's decision. (Section II.C., *infra*.)

II.
ARGUMENT

A. The Court's Desire to Resolve this Matter, at the Sacrifice of Gilmore's Due Process Rights, Was Not in the Interests of Justice.

This Court did not serve justice when it converted Gilmore's Complaint into a Petition for Review and resolved this matter on the merits without giving Gilmore an opportunity to amend his pleading and submit evidence to support it.[1] The result is a skewed application of 28 U.S.C. § 1631 ("Section 1631"), which will adversely affect other cases throughout this Circuit. Section 1631 was designed to guarantee litigants a forum for their claim, in the event they inadvertently file in the wrong court. It should not have been used to strike Gilmore's claims on a pleading, avoiding consideration of the complete record Gilmore would have produced. As this Court explained:

> Congress enacted section 1631 for the express purpose of eliminating the "unnecessary risk that a litigant may find himself without a remedy because of a lawyer's error or a technicality of procedure."

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[1] In his Opposition below, his Reply Brief in this Court and at oral argument Gilmore requested leave to amend his pleading. (Consolidated Opposition at 20 (ER 42); Reply Brief at 29; Oral Argument at 34:15.)

International Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292, 1297 (9th Cir. 1991). "The purpose of the transfer statute 'is to aid litigants who were confused about the proper forum for review. ...'" *Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) (citation omitted). Thus, this Court has transferred matters under Section 1631 to ensure that petitioners have a forum that otherwise might not be available due to, for example, limitations periods. *E.g., id.; accord Cruz-Aguilera v. I.N.S.*, 245 F.3d 1070, 1074 (9th Cir. 2001).

In transferring, this Court relied on *Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1046 (9th Cir. 2001). Op. at 1149. But the Court in *Castro-Cortez* anticipated the problems that have manifested themselves here, concluding that vesting direct jurisdiction in this Court for a matter in which no administrative record existed would raise grave due process issues. The Court explained that "[t]he contention that this procedure comports with fundamental notions of due process is difficult for us to comprehend." *Id.* at 1049-1050. The Court avoided the due process question there by narrowly interpreting the applicable statute and protecting the petitioner's rights.

This Court may believe that Gilmore cannot prevail on the merits. But Gilmore's case should not have been decided in this procedural posture. Gilmore never had an opportunity to amend, despite his repeated requests to do so. (Footnote 1, *supra.*) "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foxman v. Davis*, 371 U.S. 178, 182

(1962) (citation omitted.) The strong presumption that litigants are entitled to amend their pleadings if it is possible they can state a claim applies equally to petitions for review, and should have applied here. (Section II.C., *infra*.) This Court failed to act in the interests of justice when it addressed these important constitutional questions on the merits, on the bare allegations of Gilmore's original pleading.

B. Interpreting Section 46110 to Deny Gilmore the Right to Present Evidence, Prior to Appellate Court Review, to Support his Constitutional Challenges Is Contrary to This Court's Precedents and Resulted in a Deprivation of Gilmore's Due Process Rights.

This Court misapplied Circuit precedent when it held that the district court had no jurisdiction over Gilmore's claims. Section 46110 should not have been interpreted to deny Gilmore the ability to introduce evidence to support his claims. This Court's interpretation of *Mace* and *Tur*, and the analysis that led the Court to apply the rule of *Tur* to this case, will result in a skewed application of this jurisdictional rule in future litigation.

1. This Circuit's Distinction Between *Mace* and *Tur*.

Two decisions should have led the Court to a different result – *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) and *Tur v. FAA*, 104 F.3d 290 (9th Cir. 1997). These decisions arrived at different conclusions, based on distinguishable case characteristics, on whether a district court has jurisdiction to entertain challenges to an administrative order under 49 U.S.C. § 46110(a) ("Section 46110").

In *Mace*, this Court concluded that a district court can exercise federal question jurisdiction over an administrative agency decision,

even when Section 46110 "appears to vest jurisdiction exclusively in the appellate courts." 34 F.3d at 856. The Court explained that "although Mace's claims stem from the revocation of his certificate, they constitute a broad challenge to the allegedly unconstitutional actions of the FAA, NTSB, and DOT. Finally, ... his complaint is not based on the merits of any particular revocation order." *Id.* at 858. *Mace* held that the district court was the proper place to resolve plaintiff's challenges, because the agency was not competent to address the constitutional claims. *Id.* at 859. In *Mace*, the plaintiff challenged an overarching policy by the agency – and whether it was constitutional – and he did not challenge any fact-finding by the agency to which the court should defer.[2] *Id.* at 859.

In contrast, *Tur* centered on the FAA acting in its quasi-judicial capacity. Tur asked the district court to review an order revoking Tur's airman certificate, which followed investigation by the FAA and a hearing before an Administrative Law Judge ("ALJ"). 104 F.3d at 291. Tur asked to "re-litigate the merits of the previous administrative proceedings" and an order setting aside the findings and order of the ALJ. *Id.* This Court rejected Tur's request:

> Tur's suit, if allowed to proceed, would result in new adjudication over the evidence and testimony adduced in the October 1991 hearing, the credibility determinations made by the ALJ, and, ultimately, the findings made by the ALJ.

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[2] Similarly, in *Crist v. Leippe*, 138 F.3d 801 (9th Cir. 1998), the Court held that the district court had jurisdiction over the constitutional challenge presented.

Id. at 292.

The Court in *Tur* distinguished *Mace* by explaining that *Mace* was not directed at the merits or adjudicated facts of a previous proceeding. "Instead, the plaintiffs in *Mace* presented us with a facial challenge to the constitutionality of certain agency actions." *Id.* (citation omitted). The court explained that "Tur's suit presents an impermissible collateral challenge to the merits of his previous adjudication. Section 46110 does not permit such suits." *Id.*

2. This Court Misapplied *Tur* to Gilmore.

In its Opinion, the Court applied *Mace* and *Tur* as follows:

> Although the Security Directive is an "order" within the meaning of 49 U.S.C. § 46110(a), the district court maintains jurisdiction to hear broad constitutional challenges to Defendants' actions. That is, the district court is divested of jurisdiction only if the claims are "inescapably intertwined with a review of the procedures and merits surrounding the ... order." *Mace*, 34 F.3d at 858. Gilmore's due process vagueness challenge is "inescapably intertwined" with a review of the order because it squarely attacks the orders issued by the TSA with respect to airport security. Moreover, Gilmore's other claims are as-applied challenges as opposed to broad facial challenges. Given that they arise out of the particular facts of Gilmore's encounter with Southwest Airlines, these claims must be brought before the courts of appeals. *See Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997) (distinguishing between a "facial challenge to agency action" and a "specific individual claim"); *Mace*, 34 F.3d at 859.

Op. at 1149 n.9.

This makes no sense. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), on which this Court relied in *Mace* to hold

that "broad constitutional challenges" may be presented to the district court, the Supreme Court explained why district courts must have jurisdiction to address challenges to agency actions:

> [I]t is unlikely that a court of appeals would be in a position to provide meaningful review of the types of claims raised in this litigation. ... Not only would a court of appeals ... most likely not have an adequate record ... but it also would lack the factfinding and record-developing capabilities of a federal district court. ... [***S]tatutes that provide for only a single level of judicial review in the court of appeals "are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrate record – circumstances that are not present ... where district court factfinding is essential given the inadequate administrative record.***"

Id. at 497 (citations omitted; emphasis added).

The question here should have been whether the TSA has considered the matters at issue – including the specific deprivation of constitutional rights alleged by Gilmore – and rendered a decision on those matters. In other words, the focus should have been on whether Gilmore was collaterally attacking an adverse decision from the TSA about himself, or whether, as occurred in *Mace*, he was attacking the TSA's application of an order that applies to every person, which he contends deprived him of his constitutional rights.

The Court's attention must be on the nature of the agency order at issue. *State of Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1986 (D. Or. 2002), *aff'd sub nom. Gonzales v. Oregon*, -- U.S. --, 126 S. Ct. 904 (2006) is illustrative. That court evaluated application of 21

U.S.C. § 877, which vests exclusive jurisdiction to review Attorney General directives in the Courts of Appeals:

> Section 877 applies in situations where the Attorney General makes a quasi-judicial determination that resolves disputed facts in a specific case after some level of administrative proceedings. ... Section 877 may also, at least theoretically, apply where the Attorney General undertakes formal rulemaking, which he did not do in this case. Those types of proceedings "under this subchapter" produce administrative records susceptible to review by an appellate court.

Id. at 1085-1086 (citations, footnote omitted). The court distinguished the facts of its case, however, in which the Attorney General,

> essentially kept his own counsel, did not provide notice or an opportunity for comment, did not take any evidence, did not decide disputed facts, and more importantly, did not produce an administrative record. Instead, the only record with respect to the Ashcroft directive is the one currently being created in this court.

Id. at 1086. Relying on *McNary*, the district court concluded that it had jurisdiction over the "broad statutory, procedural, and constitutional challenges" to the directive. *Id.* Otherwise, no record would be created in any forum for the Court of Appeals to review.

Tur applies only where an administrative agency has performed fact-finding in connection with its investigation. The language of that decision, and its focus on deference to the agency in its fact finding function, establishes the limited application of the *Tur* rule. *Id.* at 291-292. The Court was concerned with collateral attacks on agency decisions serving in their quasi-judicial capacity. No such issue is presented here. *Mace* should have controlled.

3. The Facial Versus As-Applied Distinction Is Misleading.

The distinction between facial and as-applied challenges is misleading and not a determinative factor the Court should have relied upon. The existence of facts specific to Gilmore, necessary to establish standing, does not preclude district court review.

This Court is less than an ideal place for fact-finding. Yet, the Court's facial/as-applied distinction, and its holding that facial challenges may be presented to the district court while as-applied challenges may only be presented to the Court of Appeals, will result in this Court either engaging in fact-finding itself or issuing decisions without regard to the facts of the particular case, resolving cases in a vacuum.

The Court's ruling that Gilmore's claims are "as-applied challenges as opposed to broad facial challenges" because "they arise out of the particular facts of Gilmore's encounter with Southwest Airlines" (Op. at 1149 n.9) would effectively gut *Mace*'s holding. In *Mace*, plaintiff had standing to bring his constitutional challenges because implementation of the order affected him – his claims also arose out of the particular facts of his case. 34 F.3d at 856. The test is not whether plaintiff will offer some facts unique to his case. Rather, the question is whether the agency already has resolved the challenge presented (and had authority to do so). Gilmore's claims challenge the government's policy and practice, which infringed upon his right

to travel, and which the TSA never has resolved.[3] They belong in the district court. The "particular facts" Gilmore pleaded regarding Southwest were necessary to establish standing. Pleading facts sufficient to establish standing simply is not the same as pleading the sort of particular facts that convert a constitutional challenge from facial into as-applied.

4. This Court's Misapplication of *Tur* Denies Gilmore a Forum for Redress.

In holding that facial challenges to a regulation belong in the district court, whereas as-applied challenges belong in the Court of Appeals, the Court is vesting itself with the fact-finding function that belongs either in an administrative or district court proceeding. Therefore, this Court should have accepted evidence proffered by Gilmore to support his claims. If the result of imposing jurisdiction in the Court of Appeals is that petitioners are deprived of the right to

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[3] Although the TSA has not permitted Gilmore or the public to review the security directive or any applicable record generated by the TSA Gilmore feels confident in declaring that the record makes no mention of him. Thus, the record contains no facts relevant to Gilmore's claims, and it is impossible for those claims to be "inescapably intertwined with a review of the procedures and merits surrounding the ... order." Op. at 1149 n.9, citing *Mace*, 34 F.3d at 858. Moreover, the Court acknowledged that Gilmore's claims "implicate the rights of millions of travelers who are affected by the policy." Op. at 1150. As such, Gilmore's claims are facial in nature.

introduce evidence to support their claims, the result is a skewed and unworkable application of *Tur* and *Mace*.[4]

This Court's interpretation of Section 46110 deprived Gilmore of his due process rights. It is a basic principle of constitutional law that the government may not deprive someone of his constitutional rights without affording him a hearing to challenge that deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971). If Gilmore can substantiate his claim of the deprivation of a constitutional right, he is entitled to a forum in which to assert that claim. Without correction by this Court, Gilmore may forever be denied a realistic opportunity to test on the merits his claim that the nation's identification-to-travel-policy, taken as a whole, violates the fundamental right to travel.

C. Gilmore Could Have Remedied the Deficiencies Identified by the Court's Opinion Had He Been Given the Opportunity.

Even if this Court concludes that it had jurisdiction under Section 46110, Gilmore nonetheless should have been given the opportunity to amend. It is not unusual to permit a party to amend a petition for review in this Court, or to permit amendment in conjunction with transferring a case under Section 1631. Indeed, Federal Rule of Civil Procedure 15 establishes a presumption favoring

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[4] This Court had alternatives. 28 U.S.C. § 2347(b) authorizes transfer of a matter to a district court to create a record if the agency did not create one. This Court should invoke this rule where, as here, "genuine issues of material fact remain." *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129-1130 (9th Cir. 2001), citing *Castro-Cortez*, 239 F.3d 1037.

amendment, and leave to amend must be given if any chance exists that Plaintiff will be able to state a claim. *Foxman*, 371 U.S. at 182. This same presumption applies to petitions for the review of administrative orders. *See Anglo Canadian Shipping Co. v. United States*, 238 F.2d 18, 19 (9th Cir. 1956) (Rules 15 and 21 apply equally to Court of Appeals); *California Credit Union League v. City of Anaheim*, 190 F.3d 997, 999 (9th Cir. 1999) (Court of Appeals can join parties using Rule 21); *accord Mullaney v. Anderson*, 342 U.S. 415, 417 (1952); *Rockwell v. Department of Transportation*, 789 F.2d 908, 911 (10th Cir. 1986); *Alaska Airlines Inc. v. Civil Aeronautics Board*, 545 F.2d 194, 198 (D.C. Cir. 1976). No prejudice whatever would have resulted if Gilmore had been permitted to amend his original pleading.

Nor does it matter that Gilmore's requested amendment would have been in conjunction with a transfer of jurisdiction. In *McCann v. United States*, 12 Cl. Ct. 286, 289 (1987), for example, the court ordered that Plaintiff be allowed to amend its complaint on retransfer of the case to the District Court. The court found that it is in the "clear interest of justice" to allow Plaintiff to amend his complaint and pursue his claims for deprivation of administrative due process in the proper court. *Id.* (quoting *Goewey v. United States*, 222 Ct. Cl. 104, 108, 612 F.2d 539, 541 (1979)).

Gilmore's amendments would not have been futile. Gilmore could have remedied the two deficiencies in his pleading key to this Court's analysis. ***First***, the Court held that Gilmore failed to establish his standing to challenge the identification requirement inherent in other forms of travel because his pleading inadequately alleged that

Gilmore had been affected by such requirements. Op. at 1152, 1154. The Court held, therefore, that Gilmore had standing only to challenge the identification requirement related to air travel. *Id.* Having narrowed Gilmore's claims in that way, the Court then held that Gilmore's right to travel was not unconstitutionally infringed because he had other forms of travel available to him. Op. at 1155. Relying on Circuit precedent, the Court explained that "burdens on a single mode of transportation do not implicate the right to interstate travel." *Id.* (citation omitted).

This Court could not have rejected Gilmore's claims without narrowing his challenge to airline travel. Yet, the Court reached this conclusion only by ignoring Gilmore's allegation that other forms of travel also require passengers to provide identification (Op. at 1152), and also ignoring Gilmore's repeated request that he be granted leave to amend (footnote 1, *supra*). If permitted, Gilmore would have presented evidence that the identification requirement inheres in multiple forms of interstate travel and has affected his ability to travel. This Court's decision deprived Gilmore of his due process rights by precluding him from presenting this argument and evidence.

Second, this Court permitted restrictions on Gilmore's ability to travel by air in part because the Court found that a more extensive search was an alternative offered under federal guidelines. Op. at 1155-1156; *see also id.* at 1158-1159 & n.12. Yet, Gilmore's pleading contended that the airports and airlines do not, as the government claims, uniformly offer a more extensive search as an alternative to providing identification. Reply Brief at 4-5. Southwest Airlines did not – Gilmore was turned away because he refused to

provide identification, and he was not offered the opportunity to submit to a more extensive search. Op. at 1143. Gilmore is prepared to present evidence that his experience with Southwest Airlines is common with airlines across the country.[5] The Court's reliance on secret evidence – an unpublished order regulating the behavior of millions of passengers – without giving Gilmore any ability to view and test the application of that order violated Gilmore's due process rights.

This Court relied on the government's claim that a more extensive search alternative *always* exists in reaching its decision. Op. at 1155, 1158-1159. If the government erred in its claim that the search alternative is available to all travelers, as Gilmore would have been able to establish, the premise of the Court's Opinion also is wrong.

III.
CONCLUSION

If this Court's Opinion is permitted to stand, it will unfairly and unnecessarily destroy the due process rights of Gilmore and all others who would challenge the application to them of an FAA or TSA order they contend is unconstitutional. Gilmore, and others like him, must

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[5] This Court's Opinion acknowledges but ignores Gilmore's reference to official signs in all airports that read "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN," and completely ignores the TSA website stating the same (discussed in Gilmore's pleading (ER 5 ¶ 23), reiterated in the party's briefs, and now attached in the Addendum to this Petition for Rehearing).

be given a forum to bring their constitutional challenges, where, as, here, the challenge cannot be presented to the relevant agency. Consequently, Gilmore respectfully requests that this Court withdraw its Opinion and issue an Opinion that protects Gilmore's rights in one of the following ways:

1. Remand this matter to the district court, where Gilmore can amend his pleading to remedy the deficiencies identified by this Court and offer evidence to substantiate his claims, under the doctrine adopted by this Court in *Mace*;

2. Retain jurisdiction over this matter, but withdraw its Opinion rejecting Gilmore's claims, and instead permit Gilmore to amend his petition and present all of his arguments and evidence to substantiate his claims (including, if necessary, a remand to the district court for the limited purpose of creating a factual record for this Court to review); or,

3. Withdraw its order denying the pleading the Court had converted from a Complaint into a Petition for Review, and affirm the district court's decision dismissing the complaint, ***but without prejudice***, on the grounds of lack of jurisdiction and standing, to make clear that Gilmore is entitled to pursue his claims in another proceeding, after having remedied the deficiencies identified by this Court.

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Alternatively, Gilmore respectfully requests that this matter be heard by the Court *en banc*, to ensure that the rule adopted by the Court in this case does not destroy the due process rights of Gilmore and other litigants, who otherwise are deprived of any forum in which to present their challenges to FAA or TSA action.

RESPECTFULLY SUBMITTED this 10th day of March, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 40-1, the attached petition is proportionally spaced, has a typeface of 14 points or more and contains 4,199 words (which does not exceed the applicable 4,200 word limit).

DATED: March 10, 2006

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By: _____

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CERTIFICATE OF SERVICE

I certify that on March 10, 2006, an original and fifty (50) copies of Appellant John Gilmore's Petition for Panel Rehearing or, alternately, Rehearing *En Banc* were hand delivered 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 Federal Express for next day delivery, to:

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ADDENDUM

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Travelers & Consumers

Printable Version

Prepare For Takeoff

Access Requirements

Boarding Pass and Photo ID Required To Get to Your Gate

At most airports, a boarding pass and ID are now required to pass through the security checkpoint. TSA is consolidating passenger screening to the passenger security checkpoints in an on-going commitment to enhance security and improve customer service. Tickets and ticket confirmations (such as a travel agent or airline itineraries) will no longer be accepted at these checkpoints.

Proper Identification

If you have a paper ticket for a domestic flight, passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card). For an international flight, you will need to present a valid passport, visa, or any other required documentation. Passengers without proper ID may be denied boarding.

For e-tickets, you will need to show your photo identification and e-ticket receipt to receive your boarding pass.

There are four ways to obtain a boarding pass:

- Go to your airline's ticket counter at the airport
- Use curbside check-in
- Use your airline's self-service ticket kiosk in the airport lobby
- Print the boarding pass from your airline's website

Note: Persons with parental, official, medical business or similar reasons may be able to access the checkpoint, but should check with their airline for required documentation.

*** CURRENT THROUGH P.L. 109-175, APPROVED 2/27/06 ***
*** WITH A GAP OF 109-171 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 99. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1631

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title [28 USCS § 610] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

*** CURRENT THROUGH P.L. 109-175, APPROVED 2/27/06 ***
*** WITH A GAP OF 109-171 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 2347

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter [28 USCS §§ 2341 et seq.] are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall--
(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--
(1) the additional evidence is material; and
(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order,

and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

*** CURRENT THROUGH P.L. 109-175, APPROVED 2/27/06 ***
*** WITH A GAP OF 109-171 ***

TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART IV. ENFORCEMENT AND PENALTIES
CHAPTER 461. INVESTIGATIONS AND PROCEEDINGS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

49 USCS § 46110

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [49 USCS § 41307 or 41509(f)], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part [49 USCS §§ 40101 et seq.], part B [49 USCS §§ 47101 et seq.], or subsection (l) or (s) of section 114 [49 USCS § 114] 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, as provided in section 2112 of title 28.

(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 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.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

*** CURRENT THROUGH CHANGES RECEIVED JANUARY, 2006 ***

FEDERAL RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

USCS Fed Rules Civ Proc R 15

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has

received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.