No. 04-15736

In the United States Court of Appeals for the Ninth Circuit

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

Brief of *Amicus Curiae* Electronic Privacy Information Center in Support of Plaintiff-Appellant, John Gilmore, Urging Reversal.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE,	)	
Plaintiff-Appellant,	)	No. 04-15736
v.	)	
JOHN ASHCROFT, et al.,	)	
Defendants-Appellees.	)	

MOTION OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER FOR LEAVE TO FILE ACCOMPANYING *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure Rule 29(b), *amicus curiae* Electronic Privacy Information Center ("EPIC") requests leave to file the accompanying *amicus brief* in support of Plaintiff-Appellant John Gilmore. This brief urges reversal of the district court's decision. All parties to this case have consented to the filing of this brief.

EPIC is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amicus curiae* in numerous privacy cases, including *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451 (2004), *Doe v. Chao*, 124 S. Ct.

1204 (2004), *Smith v. Doe*, 538 U.S. 84 (2003), *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003), *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150 (2002), and *Reno v. Condon*, 528 U.S. 141 (2000).

In this case, EPIC argues that secret laws mandating compulsory identification raise important constitutional questions. Furthermore, because of the unique role of identity, such laws require meaningful judicial review.
EPIC also argues that the compulsory identification at issue in this case is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. EPIC, therefore, respectfully requests that this Court grant it leave to file the accompanying *amicus curiae* brief.

Dated: August 9, 2004

Respectfully submitted,

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STATEMENT OF *AMICUS CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amicus curiae* in numerous privacy cases, including *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451 (2004), *Doe v. Chao*, 124 S. Ct. 1204 (2004), *Smith v. Doe*, 538 U.S. 84 (2003), *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003), *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150 (2002), and *Reno v. Condon*, 528 U.S. 141 (2000).[1]

SUMMARY OF ARGUMENT

Secret rules that mandate compulsory identification require meaningful judicial review. The constitutional system of checks and balances does not permit the Executive Branch of government to act beyond the accountability of the Judiciary. Courts should not decline to review law related to compelled identification based only on agencies' refusal to provide relevant regulations, particularly when the law might not be secret. Courts should not accept the government's assertion that a statute precludes judicial review without even a cursory inquiry into the statute's applicability. Even if government materials may

[1] IPIOP Law Clerks Clifford Y. Chen and Amanda S. Reid assisted in the preparation of this brief.

be properly withheld from the general public, courts should review constitutional claims using established procedures for preserving secrecy. Because the district court improperly declined to review the basis for the government action in this case, the Defendant agencies' secret law evaded the meaningful judicial review mandated by the Constitution.

As the Supreme Court made clear this term, the compelled disclosure of one's identity raises profound constitutional concerns. The identification requirement at issue in this case is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Compelled identification stemming from secret law violates due process safeguards because it is inherently vague and provides no means for ordinary people or reviewing courts to meaningfully determine which procedures are legal or proper. Because Defendants refuse to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it said, it remains unclear what would constitute adequate identification since related orders or regulations remain undisclosed and unavailable. Allowing vague and secret law to evade meaningful judicial review permits abuses of discretion and is impermissible.

ARGUMENT

Unpublished, secret laws undermine the very essence of our self-government. Central to the American form of government has been a long-standing commitment to public trials and to openness in government decision-making.[2] "Publication of the law militates against the plea of ignorance, provides a practical refutation of such a defense, and otherwise constitutes a foundation stone of the self-government edifice." Harold C. Relyea, *The Coming of Secret Law*, 5 Gov't Info. Q. 97, 97 (1988). As Relyea, a Specialist in American National Government with the Congressional Research Service of the Library of Congress, concludes: "[s]ecret law surely constitutes a dangerous deception of the American people. It undermines their sovereignty; it threatens their freedom. A manifestation of authoritarian rule that can result in tyranny, secret law cloaks itself in the *raison d'etat* of *national security*[.]" *Id*. at 112 (emphasis in original).

In this case, the district court chose not to review the unpublished rule at issue in this case. The agency that promulgated the regulation—if the regulation exists—is acting without judicial accountability. "Unreviewability doctrine is not often important in either federal or state administrative law but, when it is important, it is very, very important." Charles H. Koch, Jr., *Unreviewability in State Administrative Law*, 19 J. NAALJ 59, 59 (1999). Professor Charles Koch

[2] *See, e.g., The Federalist No. 49* (James Madison).

explains that unreviewability doctrine "determines whether an agency decision will receive any judicial scrutiny at all. Therefore, it raises a threshold question for each challenge to agency action." *Id*. Review preclusion generally occurs when a statute withdraws jurisdiction from a court to review the matter.[3] It is rarely joined with secrecy as to the government's action. Here, the facts present this exceptional case in which the government simply conceals the basis of a decision from judicial review. The Defendants neither confirm nor deny "whether a written order or directive requiring identification exists, or it if does, who issued it or what it says." *Gilmore v. Ashcroft*, No. C 02-3444 SI, 2004 U.S. Dist. LEXIS 4869, at *10 (N.D. Cal. Mar. 19, 2004). "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (1965).

Review preclusion coupled with secret rulemaking undermines the very basis of democratic government. This Court should remand this case to the lower court for further proceedings to determine whether the government acted lawfully when it required Mr. Gilmore to present identification.

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[3] The Administrative Procedures Act, §§ 701(a)(1) and (2), outline two categories of review preclusion. Section 701(a)(1) applies when statutes preclude judicial review and Section 701(a) (2) applies when agency action is committed to agency discretion by law. Administrative Procedures Act, 5 U.S.C. § 701(a) (2004).

I. Secret Law Mandating Compulsory Identification Raises Important Constitutional Concerns Requiring Meaningful Judicial Review.

As the Supreme Court recently made clear, compelled identification raises far-reaching constitutional issues. Identity disclosure creates special concerns because of the power to link citizens to vast stockpiles of data, even where such linkage does not serve any societal or governmental interest. *Hiibel v. Sixth Judicial District of Nevada*, 124 S. Ct. 2451, 2464 (2004) ("A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases.") (Stevens, J., dissenting). Even with reasonable suspicion of wrongdoing, the Court permitted in *Hiibel* only a "narrow scope" of identification pursuant to a public law that was itself narrowly construed. *Id.* at 2461.

The Court clearly saw that any state-imposed identification requirement deserved scrutiny, for "[o]ne's identity is, by definition, unique; yet it is, in another sense, a universal characteristic." *Id*. An individual's simple wish to withhold his identity carries tremendous weight, even against important governmental interests. *Id*. at 2462 ("[T]he broad constitutional right to remain silent . . . does not admit even of the narrow exception defined by the Nevada statute.") (Stevens, J. dissenting).

Mr. Gilmore was under no suspicion of wrongdoing and possessed a similarly strong belief that he should not have to disclose his identity. Given the

Supreme Court's demonstrated concern with identification requirements that are debated and published, narrowly tailored, and serve compelling governmental interests, an identification requirement developed secretly, with unknown breadth and unknown utility, raises clear constitutional issues that deserve meaningful judicial review.

II. Secret Law Compelling Identification Improperly Evades Meaningful Judicial Review.

Despite the important constitutional questions at hand, the district court declined to conduct a review of compelled identification at airports, citing lack of jurisdiction under 49 U.S.C. § 46110(a) and an inability to conduct "meaningful inquiry" into Mr. Gilmore's argument because the Defendants refused to provide (or confirm the existence of) any relevant unpublished or secret regulations. The court erred in granting the motion to dismiss. The district court should have determined whether 49 U.S.C. § 46110(a) actually applied and whether the relevant law was properly withheld. Even if materials were properly withheld, the court should have allowed litigation to proceed under established procedures for protecting secret information during judicial proceedings.

In this case it is unclear "who issued [the directive requiring identification] or what it says." *Gilmore*, No. C 02-3444 SI, 2004 U.S. Dist. LEXIS 4869, at *10. A law that no citizen can review, but must comply with, is antithetical to democracy.

A. Despite the Refusal of Defendant Agencies to Provide Relevant Regulations to the District Court, the Compelled Identification Requirement was Not Truly Secret and Should Have Been Available for Review to a Federal Court.

Although Defendants refused to provide the court with copies of the relevant unpublished statutes or regulations, they do not appear to have wholly maintained the secrecy of these regulations. Indeed, the information "obtained or developed" in ensuring transportation safety may not be jeopardized in this case for the simple reason that the relevant regulations were widely available to airport personnel and therefore not truly secret. *See* 49 U.S.C. §§ 114, 40119 (2004). In such case, the regulations should have been made available to the district court for consideration, and the court should not have granted the motion to dismiss without inquiring further into the status of the regulations.

In *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), plaintiffs sought to overturn a grant of summary judgment based on their inability to obtain unredacted internal regulations of the Central Intelligence Agency ("CIA") relevant to their contract and procedural due process claims. This Court overturned summary judgment based in part on the government's failure to assert a state secrets privilege. Even if the regulations were to remain undisclosed to the *Doe* court, the Court determined that a cause of action might still exist because key aspects of the plaintiffs' relationship with the CIA might not "truly be secret." *Id*. at 1154. The Court

reasoned that there might not be a basis for concluding that national security would be jeopardized, or the evidentiary inquiry could have been narrowly tailored.

As in *Doe v. Tenet*, where the secrecy of plaintiffs' relationship was questioned based on "public knowledge" of CIA practices and a letter sent to plaintiffs admitting a relationship, in this case the compelled identification requirement at airports is not truly secret. Airline ticket clerks, for instance, are apparently aware of at least some elements of the regulation. Their supervisors, who likely lack special security clearances, appear to hold similar or even broader knowledge.[4] Indeed, regulations imposing behavioral requirements on the public cannot be entirely secret, for such secrecy would preclude the government's ability to enforce the regulations. These regulations are not secret, but rather are vague and communicated largely by word of mouth.

The government's need to enforce the identification regulations suggests that the regulations are not in fact secret. Therefore, the text of the regulations should have been made available to the court. The court should have inquired into greater detail as to whether it could have made some sort of adjudication, rather than granting the motion to dismiss.

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[4] According to the U.S. Department of Labor's Bureau of Labor Statistics, there were over 106,000 workers in these jobs in 2002. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2004-05 Edition, *Reservation and Transportation Ticket Agents and Travel Clerks*, *available at* http://www.bls.gov/oco/ocos135.htm (last visited Aug. 5, 2004).

B. The District Court Should Have Employed Established Procedures for Protecting Government Secrets to Allow the Litigation to Proceed.

There is no evidence in this case that the government has clamed the identification regulations at issue are state secrets. Even if the regulations in question, which dictate behavior required of the public, are properly secret, they nonetheless deserve review for their impact on significant constitutional questions. This Court has acknowledged that the "national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights." *Doe v. Tenet*, 329 F.3d at 1155. Accordingly, it is dangerous to "precipitously close the courthouse doors to colorable claims of the denial of constitutional rights." *Id.*

There exist a variety of procedures for courts to assess claims of state secret privilege without jeopardizing governmental secrets. A court could undertake *in camera* review of evidence, use secret proceedings, or provide for sealed records and protective orders for sensitive materials.[5] This Court has noted that where "the government is seeking complete dismissal of the action for national security reasons, a court should consider these possibilities before determining that there is no way both to adjudicate the case and to protect state secrets." *Id*. at 1152-53.

[5] In criminal cases, for instance, the Classified Information Procedures Act, 18 U.S.C. § 3 (2004), provides specific procedures for judicial handling of secret information.

Such review is particularly important where serious constitutional claims are involved. In *Webster v. Doe*, 486 U.S. 592 (1988), the Supreme Court allowed a constitutional challenge to the CIA's denial of a security clearance to proceed despite the secrets involved. The Court rejected the government's request to dismiss the case solely because of the secrecy involved, but recognized that special litigation procedures would be necessary.

Like the plaintiff in *Webster*, Mr. Gilmore raises a number of important constitutional claims, and the refusal of agencies to provide or acknowledge the relevant regulations should not be the sole basis for dismissal. Such judicial deference allows agencies to promulgate rules that too easily evade meaningful judicial review.

The district court dismissed Mr. Gilmore's claims based in part on its acquiescence to Defendants' refusal to provide key information related to identification requirements. While the agencies have not formally alleged that the relevant materials in their possession are secret, their refusal to acknowledge even the existence of orders or directives requiring identification strongly suggests an interest in keeping key information from the public, and judicial, eye. To the extent that dismissal was based simply on an implication of secrecy, it was improper. Even where secret information forms the basis of a claim, a state secrets privilege must be properly asserted. In *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.

1998), this Court noted that the state secrets privilege allowed the government to deny discovery of military secrets and that application of this privilege completely removed the evidence from the case, allowing dismissal if no nonprivileged evidence is available. *Id*. at 1165-66. *See also Totten v. United States*, 92 U.S. 105 (1875). While courts grant a great deal of deference to an assertion of the state secrets privilege, they still require such an assertion to be formally made, to be properly asserted, and not to be overbroad. *Kasza,* 133 F.3d at 1169. No such assertion has been made by Defendants here, and dismissal of Mr. Gilmore's claims based on an implication of secrecy of key evidence is improper.

III. The District Court Misconstrued 49 U.S.C. § 46110(a) and Failed to Determine Whether it Had Subject Matter Jurisdiction Over an Agency's Unpublished Regulation or Order.

Despite the existence of important constitutional questions, the district court claimed lack of jurisdiction because Mr. Gilmore's claim "squarely attacks the orders or regulations issued by the TSA and/or FAA with respect to airport security," pursuant to 49 U.S.C. § 46110(a). By failing to conduct even a cursory inquiry into the nature of the regulations in question, it was impossible to determine if the statute was applicable. The statute only applies to "orders" issued by the Secretary of Transportation, including those issued by the Federal Aviation Administration ("FAA") and Transportation Security Administration ("TSA").

"Orders" are not regulations here. An agency's issuance of orders requires different procedures and creates findings of fact that differ from those produced by promulgated regulations. *See, e.g., Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994) (finding that the district court had subject matter jurisdiction because complaint was not based on the merits of a "particular revocation order" and constituted "a broad challenge to allegedly unconstitutional FAA practices"); *Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997) (finding that FAA revocation of plaintiff's "airman certificate" was an "order" within the meaning of 49 U.S.C. § 46110(a)); *American Petroleum Inst. v. Halaby*, 307 F.2d 363, 365 (5th Cir. 1962) ("provisions clearly differentiate between the making of a regulation and the issuance of an order"). Particularly important is the availability of a factual record for the court to review. *See Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (remanding case to district court in part because "claim may not be based on the merits of the appealed order and additional record development may be necessary"); *see also Halaby*, 307 F.2d at 365 (suggesting a "remedy by original action in a federal district court in which an adequate record can be made" for regulations promulgated through rule-making process specified by the Administrative Procedure Act, 5 U.S.C. § 1003, where "[t]here were no formal findings of fact and no adjudication").

In addition, this Court has determined that important constitutional challenges to agency action belong in the district courts, even where an agency has adjudicated the matter. *See Mace*, 34 F.3d at 859 ("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'").

Furthermore, the statute is limited to orders issued by the Secretary of Transportation, including those issued by the FAA and TSA. It is not at all clear that the FAA and TSA were the sole agencies promulgating the relevant rule or rules. Administrators of other agencies were named as defendants in this case, including the Attorney General, Office of Homeland Security, and Federal Bureau of Investigation. Section 46110, which authorizes direct review of regulations to the Court of Appeals, does not apply to these agencies.

Without conducting even a protected inquiry into which agency, or agencies, promulgated regulations compelling identification, the district court prematurely determined that it lacked jurisdiction based on a statute with relatively narrow scope. The district court erred by allowing potentially suspect regulations to evade the meaningful judicial review central to the judiciary's functions.

IV. The Secret, Unpublished, Unconfirmed, Compelled Identification Requirement is Void for Vagueness and a Violation of Due Process.

A fundamental part of due process is knowing in advance what actions are expected or proscribed. Vague laws are inimical to due process. A statute is void for vagueness if individuals are not fairly apprised in advance of the specific conduct that has been prohibited. The due process doctrine of vagueness incorporates both notions of fair notice or warning, and reasonably clear guidelines to prevent arbitrary and discriminatory enforcement. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). A secret rule inherently violates due process, as its requirements are not merely vague — they are unknown.

A. The Unpublished Regulation That Compels Disclosure of Identification is Unconstitutionally Vague Since the Public Can Only Guess at its Meaning and Application.

The "unpublished statute or regulation" at issue in *Gilmore* squarely falls within the category of a vague law. According to the Supreme Court, an ordinance is void for vagueness if it either "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or if it "encourages arbitrary and erratic arrests and convictions." *Papachristou*, 405 U.S. at 162 (citations omitted). *See also Grayned v. City of Rockford*, 408 U.S. 104,

108-09 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").

The compelled identification at issue in the instant case is not merely unclear, it is unreviewable and virtually unknown. The due process concerns for vague laws are far greater in this case because the contours of the law are secret. As the Supreme Court has stated, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). Without access to inspect and review the "unpublished statute or regulation," Mr. Gilmore can only guess at its meaning and application. Further, it is impossible to determine whether the state actor acted properly and in accordance with the regulation or exceeded its legal authority. If Mr. Gilmore had been improperly detained, the district court's failure to review the government's asserted authority would be a grave abdication of judicial responsibility.

B. The Unconfirmed and Unpublished Agency Regulation Compelling Identification with Which the General Public is Expected to Comply Violates Constitutional Due Process.

In the instant case, Mr. Gilmore only learned of the identification requirement from a Southwest Airlines ticket counter clerk. This clerk was unsure of the origin of the requirement, "but speculated that the Federal Aviation Administration (FAA) might have promulgated the identification rule." This is an exceedingly poor method of communicating laws — laws which, if not followed, effectively deny travel via commercial airline.

The Southwest ticket clerk is likely correct, and the identification rule may have been issued by the FAA. Pursuant to 49 U.S.C. §§ 114(s) and 40119(b), the TSA and FAA may develop regulations "prohibiting the disclosure of information obtained or developed in carrying out security" if disclosing the information would "be detrimental to the security of transportation." *Gordon v. FBI*, No. C 03-01779 CRB, 2004 U.S. Dist. LEXIS 10935, at *4 (N.D. Cal. June 15, 2004). The FAA (and now the TSA) has had the authority to withhold information on the grounds that its disclosure would be detrimental to the safety of people traveling in air transportation since 1974. *See Public Citizen, Inc. v. FAA*, 988 F.2d 186, 193 (D.C. Cir. 1993). The law has been amended several times, most recently in 2002 when the Homeland Security Act broadened agency authority from air transportation to general transportation. *See Chowdhury v. Northwest Airlines*

Corp., No. C 02-02665 CRB, 2004 U.S. Dist. LEXIS 12477, at *6, n.1 (N.D. Cal. Apr. 2, 2004).

In *Public Citizen,* the D.C. Circuit concluded that Congress intended for the FAA to have the authority to promulgate security-sensitive rules in secret pursuant to 49 U.S.C. app. § 1357(d)(2), which has been subsequently amended and re-codified at 49 U.S.C. § 40119 (b)(1). 988 F.2d at 188-89. The FAA issued a notice of proposed rulemaking for prescribing minimum training requirements for new employees and minimum staffing levels. *Id*. However, the notice emphasized that the FAA could not provide more specific guidance to the public about the rules. The FAA withheld the security-sensitive instructions, which were tailored to the particular needs of each airport and air carrier. These instructions were withheld on the grounds that providing more detailed guidance on minimum staffing and training requirements would disclose too much detail and undermine the integrity of airport security procedures. Petitioners' argument that the FAA's decision to promulgate detailed standards in secret rules violated the notice-and-comment requirements of the Administrative Procedures Act and the Freedom of Information Act's publication requirement was unpersuasive to the court.

The type of agency rule at issue in *Public Citizen* is different from that in *Gilmore*, and this difference highlights a critical flaw in the rule in this case. At the core, the difference between the agency rules in these two cases turns on who is

directly regulated by the rule. Is the agency creating rules for its own procedures and governance, or is it creating rules with which we all must abide?

In *Public Citizen* the agency rules were internal policies and were not rules with which airline passengers were expected to comply. Conversely, in this case, some unknown agency, likely the FAA or TSA, has promulgated a rule with which we must all comply. This is the fundamental distinction that raises due process concerns. An agency may, in some circumstances, promulgate rules that structure agency action and then withhold disclosure if the information would be detrimental to transportation safety. However, an agency may not, consistent with due process, promulgate rules that coerce actions by the public without publishing such rules. The lack of notice and fair warning, together with the potential for arbitrary enforcement make the agency rule at issue here a violation of due process.

C. The Secret, Unpublished, Unconfirmed, Compelled Identification Regulation Undermines Government Accountability and the Balance of Power Between the Branches of Government.

Although it is clear that there exist certain identification requirements associated with airline travel, the government's role in promulgating or enforcing these requirements is completely opaque. As the district court noted, no agency was willing to confirm the regulation. Additionally it is unclear if the requirements were promulgated by regulation or by statute. The compelled identification requirement, whatever its source, substantially regulates the behavior of a large

segment of the traveling public; therefore, the government's evasiveness greatly hinders the ability of individuals to hold responsible parties accountable for the effects of this regulation.

Governmental obfuscation of responsibility prevents affected individuals from properly identifying the entities from which to seek redress. If the compelled identification requirement is indeed an agency regulation, it is not possible to pursue administrative remedies for the simple reason that no agency has been willing to assume responsibility for the requirement. It also becomes difficult to determine whether a particular court has jurisdiction over the issue, as there is insufficient evidence to ascertain the applicability of relevant statutes.

The TSA and FAA cite 49 U.S.C. §46110(a) as the basis for denying the district court subject matter jurisdiction to review the claims, but provide no evidence to support that assertion beyond a bald statement that §46110(a) applies to the present case. Yet the statutory provision, in vesting exclusive jurisdiction in the Courts of Appeals for challenges to orders by the Secretary of Transportation, assumes a record exists for the appellate court to review. *See, e.g., Crist v. Leippe*, 138 F.3d at 804-05 (finding that "section 46110 does not preclude jurisdiction in the district court to consider its merits" when agency "did not come close to developing a record permitting informed judicial evaluation of his challenge"). The government avoids accountability for its actions by refusing to provide even

the most basic information about applicable orders or regulations. By asserting that a statute of dubious applicability removes the ability of affected individuals to pursue relief in the district courts, the government makes it impossible to achieve the administrative relief §46110(a) presupposes.

The courts have a clear role in providing meaningful judicial review of executive action, and simple assertions of legality and due process by agencies are insufficient. The Supreme Court has said recently that meaningful judicial review is required even when the country is engaged in ongoing international conflict and the government has a clear interest in detaining individuals who pose an immediate threat to national security. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Courts are not to play a "heavily circumscribed role" in such circumstances, for "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 124 S. Ct. at 2647, 2650.

By promulgating identification requirements that raise historically important constitutional concerns and withholding such requirements from independent scrutiny, the government has attempted to evade the review envisioned by the Constitution when individual liberties are at stake. Just as the Court in *Hamdi* rejected the notion that courts should forgo examination of individual cases where the legality of the broader detention scheme has been established, the court in this

case cannot accept the validity of secret requirements based on bald assertions of their legality, for acceptance in both cases condenses power into a single branch of government.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the district court for further proceedings to determine whether the government acted lawfully when it required Mr. Gilmore to present identification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(2)(C) and Ninth Circuit Rule 32-1, the undersigned attorney for the *Amicus Curiae* certifies that this brief is proportionally spaced, had a typeface of 14 points or more, and contains 6,849 words, and therefore complies with the word limitation imposed upon *amicus curiae* briefs by Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(i). This brief was prepared using Microsoft Word v. X.

Respectfully submitted,

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I hereby certify that on this 9th day of August, 2004, two copies of the forgoing *amicus curiae* brief were served on the following by First Class U.S. mail:

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