

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**1:10-cv-24106-Cooke**

<b>Jonathan Corbett,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
	)	
<b>United States of America,</b>	)	
	)	
<b>Defendant.</b>	)	
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**DEFENDANT’S MEMORANDUM IN OPPOSITION  
TO PLAINTIFF’S MOTION FOR TEMPORARY  
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

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## **INTRODUCTION**

The Transportation Security Administration ("TSA") was created by Congress after the September 11, 2001 attacks and tasked with responsibility for protecting air travelers against the continuing and ever-evolving threat by terrorists to blow up airplanes. To that end, TSA and its parent agency, the Department of Homeland Security ("DHS"), have strived to maximize protection and security for the millions of air travelers daily while minimizing, to the extent possible, passenger inconvenience and impacts on privacy interests. Threats to air travel have not waned since September 11; instead, terrorists have continued to focus on air travel, studied the transportation security system, and looked for gaps or exceptions to exploit.

During the past year alone there have been several attempts to bring down airplanes, utilizing methods specifically geared to evade detection devices then in effect: the attempted Christmas Day 2009 bombing by Umar Farook Abdulmutallab and the more recent placement of explosives devices inside printers which were carried at points on both passenger and cargo airplanes. Responding to this increased threat of explosive devices that are not caught by traditional metal detectors, TSA with the support of Congress deployed Advanced Imaging Technology ("AIT") machines as part of its screening procedure for passengers attempting to board airplanes and also enhanced its pat-down procedures for persons who decline to undergo AIT or metal detector screening.

Plaintiff Jonathan Corbett has filed a pro se complaint claiming that the new procedures violate the Fourth Amendment and seeking a broad, permanent injunction precluding TSA from utilizing AIT and the revised pat-down procedures in general and on plaintiff as an individual. Plaintiff seeks a mandatory injunction giving him an ad-hoc opt-out from these vital security technologies and procedures because he expects at some point to encounter them at the airport and

speculates that would be "emotionally traumatizing." Plaintiff's request for preliminary relief should be denied, because he cannot establish any of the four prerequisites for obtaining a preliminary injunction.

First, plaintiff cannot show a likelihood of success on the merits. Under 49 U.S.C. § 46110, exclusive jurisdiction lies with the court of appeals Circuit over challenges to aviation-related security orders of TSA. This challenge should therefore be dismissed or transferred to the court of appeals under 28 U.S.C. § 1406(a). Even if the district courts had jurisdiction, the screening procedures meet Fourth Amendment requirements. TSA's screening procedures are reasonable, they are a necessary response to a very real, continuing, and evolving threat to aviation security, and employ numerous safeguards to maximize privacy.

Second, plaintiff has not shown that he will suffer any injury, much less that irreparable harm is imminent and likely. There is no constitutional right to travel by a specific mode of transportation; Plaintiff has the option of traveling by car, bus, or train. He can also choose to fly from an airport that does not yet have AIT. Plaintiff also cannot show that he will be subjected to either an AIT scan or a pat-down. Only 68 airports around the country have the AIT machines, the majority of security lanes still have metal detectors, and only three percent of the traveling public ultimately receive a pat-down. Indeed, contrary to plaintiff's alarmist claims, 99% of passengers sent through AIT screening consent to that screening.

In contrast, the potential harm to the government and the public interest from allowing passengers to opt out entirely from the most effective means to date of protecting the lives of millions of air passengers cannot be overstated. As the courts have noted, the interest of the United States in protecting the public from almost certain future terrorist attacks and saving lives is

compelling. The threat remains very real and was highlighted several weeks ago, in November 2010, by the statements of Al Qaeda in the Arabian Peninsula, which has taken credit for the Christmas Day and cargo bombing attempts, that it will continue to find ways to evade air security and bring down airplanes. Inspire Magazine (Exhibit B) at 7. Plaintiff's motion for a preliminary injunction should be denied.

### **BACKGROUND**

“For more than two decades al Qaeda and other terrorists have sought to do harm to this country and have focused on aviation and airplanes.” Declaration of John S. Pistole (Pistole Dec.)(Exhibit A) ¶ 9. To combat that threat, Congress has charged the Administrator for TSA with overall responsibility for civil aviation security, and has conferred on him authority to carry out that responsibility. 49 U.S.C. § 114(d). Together with the Director of the Federal Bureau of Investigation, the Administrator must assess current and potential threats to the domestic air transportation system,” and “decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system.” Id. § 44904(a). The Administrator must take “necessary actions to improve domestic air transportation,” id. § 44904(c), which he can carry out under his authority to “prescribe regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy,” id. § 44903(b). Federal law also requires “the screening of all passengers and property . . . before boarding,” id. § 44901(a), in order to ensure that no passenger is “carrying unlawfully a dangerous weapon, explosive, or other destructive substance,” id. § 44902(a).

Passenger compliance with screening procedures is a mandatory precondition for boarding and flying. Airlines must “refuse to transport” a passenger who does not consent to a search of his

person or baggage, 49 U.S.C. § 44902(a), and are authorized to “refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety,” id. § 44902(b).

As set forth in detail in the Declaration of the TSA Administrator, as well as infra, TSA has determined that metal detectors are no longer sufficient to detect and deter the evolving threats posed by terrorists who wish to cause harm to aviation. Indeed, Congress has required the Secretary of DHS to “give a high priority to developing, testing, improving and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property.” 49 U.S.C. § 44925(a). In June 2008, the Senate Appropriations Committee acknowledged the importance of AIT as part of TSA’s screening technology, S. Rep. No. 110-396 at 60 (2008), directed TSA to continue to allocate resources for AIT, and encouraged TSA to expand the technology to additional airports. Id. The Secretary also was directed to develop a strategic plan for deploying explosive detection equipment at airport screening checkpoints, including walk-through explosive detection portals, shoe scanners, and backscatter x-ray scanners. 49 U.S.C. § 44925(b).

The declaration of the TSA Administrator sets forth the history of terrorist threats to aviation security (¶¶ 8-17) and TSA’s security program (¶¶ 19-21), adoption and implementation of AIT, (including a detailed description of AIT technologies being used and the protocols TSA has adopted to ensure the privacy of the traveling public (¶¶ 22-42)), and the revised standard pat-down procedures (including a discussion of when pat-downs are used and a description of the new methods implemented on October 29, 2010 (¶¶ 43-53)). These measures are vital and necessary to protect the traveling public from the real and substantial threat from non-metallic explosive attacks by terrorists.

## **ARGUMENT**

### **I. PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION**

“A preliminary injunction is an ‘extraordinary and drastic remedy.’” Citizens for Police Accountability Political Committee v. Browning, 572 F.3d 1213, 1217 (11th Cir. 2009) (citation omitted). The plaintiff must “clearly establish[] the ‘burden of persuasion,’” as to each of the following prerequisites: “(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest.” Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003). Because “[t]he chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated,” Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1284 (11th Cir. 1990), mandatory injunctions, such as that requested by plaintiff that would alter rather than preserve the status quo, are “particularly disfavored,” Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976). Plaintiff has not established, much less “clearly established,” any of the four prerequisites to obtaining a preliminary injunction.

#### **A. Plaintiff has not shown a Likelihood of Success on Merits**

##### **1. *Jurisdiction is proper only in the Court of Appeals***

Plaintiff’s complaint challenging the legality of TSA’s screening procedures must be dismissed because 49 U.S.C. § 46110, part of the Federal Aviation Act, vests exclusive jurisdiction over aviation-related security challenges in a court of appeals. Section 46110(a) provides that:

a person disclosing a substantial interest in an order issued by [The Department of Transportation, TSA, or the FAA]<sup>1</sup> in whole or in part under this part, part B, or subsection (l) or (s) of section 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 court of appeals has “exclusive jurisdiction to affirm, amend, modify or set aside any part of [such an] order.” 49 U.S.C. § 46110(c).<sup>2</sup> Accordingly, only circuit courts may consider challenges to final orders issued by FAA or TSA concerning, *inter alia*, air commerce and safety.<sup>3</sup> See Gilmore, 435 F.3d at 1133 (finding that district court lacked jurisdiction to review TSA directive requiring passengers to present identification or be subject to search); Green, 981 F.2d at 516 (“Because the courts of appeals have exclusive jurisdiction over cases challenging final orders of the [FAA] . . . the district court lacked subject matter jurisdiction over this action.”).<sup>4</sup> Only two

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<sup>1</sup>When the provision was enacted, the head of TSA was the Under Secretary of Transportation for Security. See, e.g., 49 U.S.C. § 114(b)(1). In 2002, TSA was transferred from the Department of Transportation to “DHS.” See 6 U.S.C. §§ 203(2), 551(d). Statutory references to the Under Secretary of Transportation for Security are deemed to refer to TSA and its Administrator. See 6 U.S.C. §§ 552(d), 557. Accordingly, courts have universally recognized that section 46110 applies to orders issued by TSA. See, e.g., Gilmore v. Gonzales, 435 F.3d 1125, 1132-34 (9th Cir. 2006); In re Sept. 11 Litigation, 236 F.R.D. 164, 174 (S.D.N.Y. 2006) (calling the question “without dispute”).

<sup>2</sup> The term “order,” is not limited to the product of notice-and-comment rulemaking, but instead courts “have emphasized that the term ‘order’ in this provision should be read ‘expansively.’” City of Dania Beach, Fla. v. FAA, 485 F.3d 1181, 1187 (D.C. Cir. 2007); see Aviators for Safe & Fairer Regulation v. FAA, 221 F.3d 222, 225 (1st Cir. 2000); Green v. Brantley, 981 F.2d 514, 519 (11<sup>th</sup> Cir. 1993).

<sup>3</sup> The phrase “this part” in § 46110(a) refers to Part A (“Air Commerce and Safety”) of Subtitle VII of Title 49 (“Aviation Programs”). See 49 U.S.C. §§ 44101-46507.

<sup>4</sup> When Green was decided, the provisions at issue were codified at 49 U.S.C. App. § 1486 rather than 49 U.S.C. § 46110. “The statutes do not materially differ.” Ass’n of Citizens to Protect & Pres. the Env’t. v. FAA, 287 F. App’x 764, 766 n.3 (11th Cir. 2008).

elements are required for an order to fall within the ambit of § 46110: it must be “final,” and “the agency record must be adequate enough to support judicial review.” Green, 981 F.2d at 519.<sup>5</sup> An order is final if it “impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process.” Id. Both elements are met here.

This jurisdictional restriction also applies to any claims that are “inescapably intertwined” with a review of a final order. See Green, 981 F.2d at 521 (finding Bivens claims “inescapably intertwined with a review of the procedures and merits surrounding [an] FAA[] order” and justiciable only in a court of appeals); Merritt v. Shuttle, Inc., 187 F.3d 263, 270-71 (2d Cir. 1999). This includes constitutional claims like that of plaintiff. See Green, 981 F.2d at 521 (due process and First Amendment challenges to FAA decision); Gaunce v. deVincentis, 708 F.2d 1290, 1293 (7th Cir. 1983) (due process challenge to FAA procedures); Thomson v. Stone, No. 05cv70825, 2006 WL 770449, at \*6 (E.D. Mich. Mar. 27, 2006) (Fourth Amendment challenge to TSA screening procedures); Green v. TSA, 351 F. Supp. 2d 1119, 1127 (W.D. Wash. 2005) (Fourth Amendment challenge to searches stemming from alleged inclusion on No-Fly List).<sup>6</sup> The Eleventh Circuit has made clear that raising such claims in a district court “constitutes an impermissible collateral

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<sup>5</sup> One challenge to the new screening procedures has already been filed directly in the court of appeals pursuant to § 46110. EPIC v. Napolitano, Case No. 10-1157 (D.C. Circuit). The court denied EPIC’s motion to enjoin implementation of AIT scanners during pendency of the case. Exhibit C.

<sup>6</sup> In an earlier Ninth Circuit case, the court found that a district court may retain jurisdiction over broad constitutional challenges to practices of the agencies identified in § 46110 (then § 1486). Mace v. Skinner, 34 F.3d 854, 858 (9th Cir. 1994)). In so doing, however, the Court expressly disagreed with the Seventh Circuit’s opinion in Gaunce, on which the Eleventh Circuit relied in Green. As such, Mace is not persuasive authority in this circuit. Moreover, in Gilmore, the Ninth Circuit clarified that even as to constitutional challenges, a district court is divested of jurisdiction if the challenge is inescapably intertwined with a review of the procedures and merits of an agency order, see Gilmore, 435 F.3d at 1133 n.9, as is the case here.



challenge to the agency order, and the district court lacks subject matter jurisdiction.” Green, 981 F.2d at 521; see also Doe v. FAA, 432 F.3d 1259, 1263 (11th Cir. 2005) (finding district court lacked jurisdiction over constitutional claims that fell “within the ambit of the administrative scheme”).

TSA regulations mandate that passengers submit to screening before entering a “sterile area” of an airport. 40 C.F.R. § 1540.105. This regulation is implemented through TSA’s Standard Operating Procedures (SOP). The SOP discussing TSA’s use of AIT and the revised pat-down procedures was recently modified on September 17, 2010 and implemented on October 29, 2010. See Pistole Dec. ¶ 25. The SOP is a final, reviewable order by TSA.<sup>7</sup> See Thomson, 2006 WL at \*6 (screening procedures are final orders); Green v. TSA, 351 F. Supp. 2d at 1127 (TSA security directive is a final order); Gilmore, 435 F.3d at 1133 (TSA security directive is a final order). This order governs mandatory screening at U.S. airports.

Plaintiff directly challenges this order, as he alleges that the AIT scanners and pat-down are illegal. See Compl. ¶¶ 12-13; Dec. in Support of TRO ¶ 8. Alternatively, at the very least, plaintiff’s claims are “inescapably intertwined” with a review of TSA’s orders because adjudicating plaintiff’s complaint “would necessarily require a review of the statutes, regulations, policies, procedures and programs established by the TSA to screen all individuals.” Thomson, 2006 WL 770449, at \*6. Plaintiff cannot avoid the exclusive forum Congress designated for review of challenges to final orders of TSA and thus his complaint cannot succeed in this forum. His complaint should be dismissed or transferred to the court of appeals. See 28 U.S.C. § 1406(a).

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<sup>7</sup> The SOP as well as other documents created and reviewed by TSA in connection with the order constitute a sufficient administrative record for review; indeed, even a single letter can suffice. See Green, 981 F.2d at 519.

## **2. *TSA's Use of AIT and Pat-Downs Are Constitutional***

Under the Fourth Amendment, “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’ ” Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). “In the criminal context, reasonableness usually requires a showing of probable cause.” Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 828 (2002); see also id. at 837 (reasonableness under the Fourth Amendment does not require employment of least intrusive means). Courts have recognized, however, that the probable-cause standard does not apply in “determining the reasonableness of administrative searches where the ‘Government seeks to prevent the development of hazardous conditions.’ ” Id. (quoting Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667-68 (1989)). See also Earls, 536 U.S. at 829; United States v. Hartwell, 436 F.3d 174, 178-797 (3d Cir. 2006).

“Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ – for example searches now routine at airports and at entrances to courts and other official buildings.” Chandler v. Miller, 520 U.S. 305, 323 (1997) (citing Von Raab, 489 U.S. at 674-76 & n.3); see also Cassidy v. Chertoff, 471 F.3d 67, 82-84 (2d Cir. 2006) (Sotomayor, J.) (upholding random searches of ferry passenger vehicles and carry-on baggage); Macwade v. Kelly, 460 F.3d 260 (2d Cir. 2006) (“Where, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need.”).

Suspicionless checkpoint searches are permissible under the Fourth Amendment when a court finds a reasonable balance between “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with

individual liberty.” Illinois v. Lidster, 540 U.S. 419, 427 (2004). See also Von Raab, 489 U.S. at 674 (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)( “When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.”)).

Preventing terrorist attacks and maintaining the safety of the more than 700 million passengers annually is of paramount importance. See United States v. Aukai, 497 F.3d 955, 956, 958-59 (9th Cir. 2007) (en banc); Hartwell, 436 F.3d at 178; United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984). Airport checkpoints advance the public interest inasmuch as “absent a search, there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane.” Singleton v. Comm’r of Internal Revenue, 606 F.2d 50, 52 (3d Cir. 1979). "It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destructions for air terrorism is horrifically enormous." United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005). Thus, despite plaintiff’s self-serving claim that he is a patriotic American with no criminal record, “as yet there is no foolproof method of confining the search to the few who are potential hijackers.” Id.<sup>8</sup> Pursuant to this standard, the threat in this case is immediate and the risk

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<sup>8</sup> The Executive Branch has the discretion, “for purposes of Fourth Amendment analysis,” of determining which reasonable law enforcement techniques should be used given its “unique understanding of, and a responsibility for, limited public resources.” Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 453-54 (1990). Such expert TSA determinations - based on an explicit Congressional delegation of legislative authority (49 U.S.C. § 44903(c)) - are obviously entitled to

to the public safety is substantial and real. Indeed, as the recent bombing attempt on December 25, 2009, demonstrates, TSA cannot effectively detect these kinds of terrorist threats absent the use of AIT and the revised pat-down procedures to search travelers for non-metallic explosives. Pistole Dec. ¶ 24; see also id. ¶ 16 (non-metallic explosives is foremost threat to passenger airlines).

Given this threat from non-metallic explosives, TSA has determined that the best defense against these and other terrorist threats remains a risk-based, layered security approach that utilizes a range of measures, including advanced imaging technology and pat-downs to enhance and supplement the efforts of law enforcement, intelligence, terrorist watch list checks, and international collaboration. Id. ¶ 17. The fact that not every passenger is subject to either AIT or a standard pat-down does not invalidate these means of screening. Cassidy, 471 F.3d at 86 (“Supreme Court has been skeptical” of Fourth Amendment challenges suggesting “that a security policy’s randomness or insufficient thoroughness contributes to its constitutional deficiencies.”). A major purpose of the screenings is to deter an act of terrorism. Pistole Dec. ¶¶ 20, 33. In this context, utilizing AIT as part of TSA’s screening arsenal is a common-sense approach to preventing terrorism, because the screenings “provide a gauntlet, random as it is, that persons bent on mischief must traverse.” United States v. Green, 293 F.3d 855, 862 (5th Cir. 2002). Accord MacWade, 460 F.3d at 274; Marquez, 410 F.3d at 617. The use of standard pat-downs as a secondary screening tool also is an effective

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significant deference by this Court. See generally United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (Chevron deference appropriate where agency implements Congressional delegation of authority); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (deference appropriate where Congress delegated authority to agency to “elucidate a specific provision of the statute by regulation”); Gregory v. First Title of America, 555 F.3d 1300, 1302 (11th Cir. 2009).

means of discovering (and therefore deterring) the introduction of dangerous substances and devices that could be concealed.

Although TSA does not need to employ “the least intrusive means,” MacWade, 460 F.3d at 273 (citing Earls, 536 U.S. at 837), the procedures involved in searching individuals who pass through airport security checkpoints is minimally intrusive. Contrary to plaintiff’s claims, the procedures TSA has adopted in deploying the AIT and conducting pat-downs in limited circumstances are well-tailored to protect personal privacy, escalating in invasiveness only after either an individual refuses to be scanned by AIT or metal detectors, or a lower level of screening discloses a reason to conduct a more probing search. Pistole Dec. ¶ 43. With respect to AIT, TSA has adopted rigorous privacy safeguards to protect the traveling public. For example, the AIT machines do not produce photographs. Id. ¶ 37. Rather, the AIT back scatter imaging systems deployed at airports are required to apply a filter that displays body contours and outlines rather than a detailed image of a person's anatomy. Id. For the millimeter wave AIT, imaging software is required to blur the face on the resulting image. Id. Further, all images generated by the AIT are viewed in a walled-off location. Id. ¶ 38. The transportation security officer (TSO) assisting the passenger never views the image, and the TSO viewing the image never sees the passenger. Id. Moreover, the AIT imaging technology used in airports is not capable of storing images and therefore cannot export, print, or transmit images. Id. And, TSOs in the viewing room are prohibited from bringing into the room electronic devices such as cameras, cell phones, or other recording devices. Id.

In addition, TSA provides notice to the public of the use of the AIT machines prior to the passenger entering the machine and advises the individual that they may decline AIT screening and

be screened by a pat-down instead. Pistole Dec. ¶ 39. If a passenger opts out of screening via an AIT machine, or sets off an alarm of one of the AIT machines or a metal detector, that passenger will undergo a pat-down to resolve the alarm. Id. ¶ 43. There are a very small percentage of pat-downs that are performed at random so that TSA can be unpredictable as a further deterrent to terrorists. Id. Only a small percentage of all passengers ultimately receive pat-downs (fewer than 3%) and a smaller percentage receive pat-downs because they have refused AIT screening. Id. The pat-downs assist TSA in finding possible explosives, chemical weapons, and other dangerous items that otherwise might go undetected. Id. If a passenger goes through AIT and does not alarm, in almost all instances, that person would not be subject to a pat-down. Id.

TSA has adjusted the standard pat-down because it was necessary to detect secreted items on the body, such as that used by the bomber on December 25, 2009, and to find what the AIT machine is designed to detect. Id. ¶ 46, 49. Although the prior pat-down procedures used only the back of the hand, the new procedures involve some use of the front of the hand to search for concealed items and also involve an inspection of areas higher on the thigh and in the groin area. Id. ¶ 48. To ensure that the pat-downs are as minimally invasive as possible while also ensuring effectiveness, pat-downs are conducted by same gender TSOs, and all passengers have the right to request private screening with a witness of their choice. Id. ¶ 51. Contrary to recent press reports, the pat-down methods used to search women's breasts have not been in effect since 2004 and have not been revised recently. Id. ¶ 48.

In addition to being tailored to protect personal privacy, other factors make airport screening procedures minimally intrusive in comparison to other kinds of searches and in light of the evolving threat utilizing the groin area and potentially other body areas to secrete explosives. See Hartwell,

436 F.3d at 180. Since every air passenger is subjected to a search, there is virtually no “stigma attached to being subjected to search at a known, designated airport search point.” See Skipwith, 482 F.2d at 1275. Moreover, the possibility for abuse is minimized by the public nature of the search. Id. at 1276 (searches at screening checkpoints “are made under supervision and not far from the scrutiny of the traveling public.”).

Finally, the entire procedure is rendered less offensive, if not less intrusive, because air passengers are on notice that they will be searched. Hartwell, 482 F.3d at 180-8 (quoting Singleton, 606 F.2d at 52 (approving a search where passengers “were given advance notice that the search was to be conducted, and could elect not to be searched by deciding not to board the aircraft”)). Air passengers choose to fly, and screening procedures of this kind have existed in every airport in the country since the 1970s. Herzbrun, 723 F.2d at 776 (“those presenting themselves at a security checkpoint thereby consent automatically to a search and may not revoke that consent if the authorities elect to conduct a search.”) (citing Skipwith, 482 F.2d at 1281). The events since September 11, 2001 have only increased the necessity for such screening, as the traveling public is well aware. Hartwell, 436 F.3d at 181. Indeed, even plaintiff concedes that he must be searched before boarding an airplane. Pl.’s Mot. at 3.

In balancing the intrusion on privacy interests and the efficacy of any screening program, the Fourth Amendment is satisfied where the balance between intrusiveness, the importance of the Government's interest and the efficacy of the screenings is reasonable. The security screenings at issue here readily satisfy this standard. They are minimally intrusive in light of the evolving threat posed by non-metallic explosives, advance the extraordinarily important government interest of

protecting the Nation from further terrorist attacks, and are reasonably calculated to deter such attacks. The Fourth Amendment requires nothing more.<sup>9</sup>

**B. Plaintiff has not shown a Likelihood of Irreparable Harm**

Plaintiff has also failed to meet his burden to show irreparable harm is “likely” in the absence of an injunction. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 377 (2008). Plaintiff’s claim that he will experience “extreme emotional distress” if certain TSA screening procedures are applied to him is wholly insufficient to establish irreparable harm.<sup>10</sup>

Plaintiff is not entitled to a preliminary injunction if he can avoid the irreparable harm. Cf. Molloy v. Metro. Transp. Auth., 94 F.3d 808, 813 (2d Cir. 1996) (holding that movants did not show risk of irreparable injury when they had alternatives, even when alternatives were less convenient). Plaintiff has several options available to him if he desires to avoid the screening, and therefore does

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<sup>9</sup> Plaintiff also is not likely to succeed on the merits of his claims because he has failed to show he faces an injury-in-fact as needed to have standing to bring this suit given he has not shown that he faces “a real and immediate threat of future harm.” Elend v. Basham, 471 F.3d 1199, 1207 (11th Cir. 2006). “Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be ‘certainly impending’ to constitute injury in fact.” Whitmore v. Arkansas, 495 U.S. 149, 158 (1990). While “probabilistic harm is enough injury in fact to confer standing,” Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1163 (11th Cir. 2008), “a ‘perhaps’ or ‘maybe’ chance” of injury is insufficient. Bowen v. First Family Financial Services, Inc., 233 F.3d 1331, 1340 (11th Cir. 2000). As explained in the Pistole Dec. ¶¶ 27, 42, AIT scanners are deployed in only a fraction of airports and airport lanes. Plaintiff has shown, at most, that he will “perhaps” be subject to AIT screening. Plaintiff’s challenge to the pat-down method is even more tenuous as the likelihood of receiving a pat-down is very small. Id. ¶ 43. Nor has plaintiff ever been subject to the AIT scanners or the revised pat-down. Gilmore, 435 F.3d at 1135 (holding that plaintiff lacked standing to challenge procedures on a mode of transportation when he had never experienced them). Without an injury that is both likely and imminent, plaintiff does not have standing.

<sup>10</sup> “[I]nvasion[] of privacy” can in some circumstances constitute an irreparable injury. General Contractors, 896 F.2d at 1285. However, plaintiff faces no such injury. As explained in Part I.A.2, TSA’s screening procedures do not invade plaintiff’s privacy. Moreover, it is not likely that plaintiff will face the screening procedures. Finally, this Circuit has only applied this rule to cases involving the privacy interests associated with a right to an abortion. See Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981)



not require an injunction to prevent his alleged emotional distress. First, he can choose to fly from an airport that does not use AIT scanners. Plaintiff admits that one of his upcoming flights is from an airport that does not use AIT scanners. Pl.’s Dec. at ¶ 10. Alternatively, plaintiff can choose not to fly at all. There is no constitutional right to travel by a particular means. See Town of Southold v. Town of E. Hampton, 477 F.3d 38, 54 (2d Cir. 2007) (“[T]ravelers do not have a constitutional right to the most convenient form of travel . . . .”); Gilmore, 435 F.3d at 1136-37 (there is no right to air travel, even when that is the most convenient means); City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982) (same). Plaintiff retains the option of traveling by automobile, train, or bus, and he has asserted no objection to the security procedures used on those alternatives.<sup>11</sup> Plaintiff cannot seek a preliminary injunction to avoid an allegedly irreparable harm to which he plans to expose himself voluntarily.

Even if Plaintiff chooses to travel via airports that use AIT machines and/or the pat-down, he has not demonstrated that he is *likely* to be screened via either in the immediate future. See Winter, 129 S. Ct. at 377. Not all airports use AIT scanners, and, within those airports that do, not all security lanes utilize AIT scanners. Pistole Dec. ¶ 27.<sup>12</sup> In fact, plaintiff has not alleged that he has gone through an AIT scanner, despite the fact that they have been in use for several months and the fact that he is a “frequent flyer,” id. ¶ 6, who has flown “no less than 25 flights in the past year,”

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<sup>11</sup> Any additional expense plaintiff will experience by his choice of another method of travel (and plaintiff has alleged no such costs) does not give rise to an irreparable injury. See Sampson v. Murray, 415 U.S. 61, 90 (1974) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”); United States v. Jefferson Cnty, 720 F.2d 1511, 1520 (11th Cir. 1983).

<sup>12</sup>In fact, in two major airports near plaintiff’s residence that use AIT machines (Miami and Fort Lauderdale-Hollywood), there are only enough AIT machines to cover far fewer than half of the security lanes. Pistole Dec. 27. Nationwide, less than 8 percent of passengers are screened using AIT machines. Id. at 43.

Pl.’s Mot. at 3. Moreover, the odds are also strongly against plaintiff receiving a pat-down, as fewer than three percent of travelers receive one, unless he voluntarily opts for a pat-down after being sent through an AIT lane. Id. ¶ 43. Thus, it is neither likely nor imminent that plaintiff will be subject to the AIT scanner or a pat-down. He alleges irreparable harm solely on these two screening procedures.<sup>13</sup> Further, rather than experiencing “extreme emotional distress,” 99% of people directed to a lane using AIT scanners as the primary screening tool *chose* to be screened by the AIT scanners. Id. ¶ 42.

Because plaintiff’s alleged emotional distress is not likely to occur, is speculative at best, and is the product of his own choice, it does not qualify as an “irreparable injury.” Having failed to establish an imminent irreparable injury, plaintiff is not entitled to a preliminary injunction.

### **C. Harm to the Government and the Public Interest**

The declaration of the TSA Administrator highlights both the harm to the government and the public interest at stake here. Plaintiff has not shown that any injury that he may suffer outweighs the harm to the United States, and therefore the requested injunction should be denied. See Winter, 129 S. Ct. at 381 (holding that district court abused its discretion by issuing injunction that was “credibly alleged to pose a serious threat to national security”).

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<sup>13</sup> Plaintiff does not know whether he would, in fact, be distressed if he went through an AIT scanner. He does not allege that he has ever been screened by the AIT scanners or the revised pat-down method. Instead, he bases his belief that he will be irreparably distressed on his misunderstanding of the screening procedures, which apparently is based on secondhand accounts in media reports. “Case law holds that contentions which are based on mere speculation and conjecture are consequently impermissible.” Cincinnati Ins. Co. v. Metro. Props., Inc., 806 F.2d 1541 (11th Cir. 1986) (citations omitted); 11A Wright & Miller, Federal Prac. & Proc. § 2948.1 (2d ed. 1995) (noting that to obtain a preliminary injunction “there must be more than an unfounded fear on the part of the applicant”).

Here, the interests of the United States in protecting the public are compelling. It is beyond question that the United States has an interest in “preventing terrorism,” e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010), and in saving lives, e.g., Burk v. Augusta-Richmond County, 365 F.3d 1247, 1267 (11th Cir. 2004) (“It is axiomatic that a government has a compelling interest in providing for the safety of its citizens.”). In fact, “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” Haig v. Agee, 453 U.S. 280, 307 (1981).

TSA has concluded that its screening procedures are needed to protect passenger flights from terrorist attacks, and that plaintiff’s requested injunction would impede the government’s efforts to keep Americans safe. The fact that in the present motion plaintiff seeks to exempt only himself from the screening does not mitigate the harm to the government’s interest in national security. The success in the screening process depends on its universal application. Individualized ad-hoc exemptions are incompatible with this system. Cf. United States v. Lee, 455 U.S. 252, 259 (1982). Not all terrorists will be identified by TSA before they attempt to board the aircraft, which is why mandatory screening of all is needed. Pistole Dec. ¶ 19 (“[E]ven the best intelligence does not identify in advance every individual who would seek to do Americans and the United States harm.”). While plaintiff assures us that he means no harm to any airplane, a would-be terrorist would make the same assurances. Ad-hoc exemptions for specific individuals from the application of general screening rules would present an intolerable risk to aviation security. Id. ¶ 53. Even though plaintiff is not *likely* to go through an AIT machine or pat-down, the fact that it remains *possible* acts as a deterrent to terrorists, and this deterrent effect would be lost if people could opt-out of the latest screening procedures. In addition, the administrative burdens of exempting single individuals, such

as plaintiff and others who would challenge AIT, from screening procedures in existence at hundreds of locations throughout the nation are overwhelming.

The judgment that the screening procedures in place are necessary to improve our ability to prevent episodes like the Christmas Day bombing attempt was made by specialists who deal with threats to our nation's aviation security on a daily basis. This judgment "is entitled to significant weight" and "must often be based on informed judgment rather than concrete evidence." Humanitarian Law Project, 130 S. Ct. at 2728. In light of the fact that "neither the Members of [the Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people," Boumediene v. Bush, 553 U.S. 723, 797 (2008), courts extend "heightened deference to the judgments of the political branches with respect to matters of national security." Zadvydas v. Davis, 533 U.S. 678, 696 (2001). Plaintiff's requested injunction would interfere with the comprehensive system for aviation security developed by TSA with Congressional support to fulfill TSA's statutory duties to protect passenger flights pursuant to its expertise. 49 U.S.C. § 114(d)(1) & (e); see Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs." (collecting cases)). It is not enough for plaintiff to "simply disagree with the considered judgment of Congress and the Executive" about the most effective responses to the threat of terrorism. See Humanitarian Law Project, 130 S. Ct. at 2728.

AIT machines and the revised patdown method guard against a very real threat. Just over a month ago, al-Qaeda in the Arabian Peninsula (AQAP), a terrorist organization with which the Christmas Day bomber was affiliated, attempted to hide non-metallic explosive devices on cargo planes. Terrorists are relentless in their pursuit of killing innocent persons, and despite the efforts

by TSA and other agencies, the threat to the public remains great. In its on-line magazine, Inspire, AQAP boldly exclaims that it is continuing its attempt to exploit any vulnerability in airport security. Ex. B at 7 (“[W]e have been experimenting with ways to bring down airplanes. We have researched the various security systems employed by airports. We looked into X-Ray scanners, full body scanners, sniffing dogs and other aspects of security.”). It also vowed that its efforts would not cease: “We have struck against your aircrafts twice within one year and we will continue directing our blows towards your interests and the interests of your allies.” Id. at 4; see also id. at 15 (“We will continue with similar operations and we do not mind at all in this stage if they are intercepted”). Any perceived unpleasantness plaintiff fears he may experience as a result of airport screening pales in comparison with the paramount need to protect our nation’s air travel from this threat.

### **Conclusion**

For the foregoing reasons, plaintiff’s motion for a temporary restraining order and/or preliminary injunction should be denied.

Dated: December 6, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-24106-Civ-Cooke

Jonathan Corbett,	)
	)
Plaintiff,	)
	)
v.	)
	)
United States of America,	)
	)
Defendant.	)
_____	)

**Certificate of Service**

I hereby certify that on December 6, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Carlotta P. Wells  
Carlotta P. Wells

**SERVICE LIST**  
**Corbett versus United States**  
**Case No. 10-24106-Civ-Cooke**  
**United States District Court, Southern District of Florida**

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