UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Jonathan Corbett, Plaintiff v. United States of America, Defendant	**10-CV-24106 (Cooke/Bandstra)** **REPLY TO DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

SUMMARY

Plaintiff Jonathan Corbett ("CORBETT") filed suit against the United States of America ("DEFENDANT") over new illegal search procedures (the "PROCEDURES") being conducted by the Transportation Security Administration ("TSA"), an agency of the DEFENDANT. Additionally, a motion for a Temporary Restraining Order and/or Preliminary Injunction (the "MOTION") was filed, which DEFENDANT has opposed. This filing is a reply to said opposition.

GENERAL REPLY

I. Stipulations

CORBETT intends to keep the issue at hand as simple and discrete as possible: that the particular methods of search recently used by the TSA are unconstitutional under the 4th Amendment to the United States Constitution. DEFENDANT has brought up many points which are not at issue in this case in its opposition to the MOTION, and in a good faith effort to eliminate extraneous issues, CORBETT stipulates that:

1. There is a compelling government interest in securing life and property against potential attack from terrorism.
2. There is a real and present risk of terrorism on passenger planes within the United States.
3. The government is entitled to conduct limited administrative searches of passengers attempting to board passenger planes in order to further the government's interest in securing against terrorism as described above, however nothing in this stipulation shall be construed to suggest that these searches are not subject to 4th Amendment protections.

II. Congressional Intent

DEFENDANT claims that Congress intended for it to create the PROCEDURES, including the use of imaging devices which create nude images of every traveller who passes through them, as well as touching the genitals of passengers who object to the creation of these nude images. See Deft's Opp., p. 1. While Congress' intent is moot and invalid if and when Congress decides to act in a manner that violates the Constitution, after thorough research, CORBETT can find no evidence that Congress intended any such thing. Congress has directed the TSA to work to secure aircraft against emerging threats, including explosives. The TSA implemented this Congressional mandate by implementing the PROCEDURES, however upon belief and evidence, Congress never specifically requested or approved these PROCEDURES. Rather, the TSA has decided on them unilaterally. Indeed, there are no fewer than two bills presently circulating Congress to curtail these searches (HR 6416, "The American Traveler Dignity Act," being most notable).

III. "The Underwear Bomber" and "The Shoe Bomber"

DEFENDANT, publicly as well as in its opposition to the MOTION, repeatedly mentions, in justification of the nude body scanners, the case of Umar Farook Abdulmutallab, better known as "the underwear bomber," a man whom the DEFENDANT alleges (and CORBETT is willing to stipulate) attempted to blow up a plane over US soil using an explosive hidden within his underwear. See Deft's Opp. p. 1, Deft's Opp Exhibit A, p. 7, *etc*. However, in CORBETT's complaint, it is alleged that a GAO study has shown it was unlikely that nude body scanners would have detected this individual's explosives. See Plaintiff's Complaint ¶ 21. DEFENDANT, who is in possession of this study while CORBETT is not, has not only failed to respond to this allegation in its opposition, but has provided no evidence at all to suggest that it has reason to believe the nude body scanners would have stopped this man. Further, DEFENDANT concedes that the nude body scanners "do not specifically identify explosives[.]" See Deft's Opp. Exhibit A, p. 11.

DEFENDANT is also keen on mentioning the case of Richard Reed, better known as "the shoe bomber" for attempting to blow up a plane over US soil with a bomb concealed in his shoe. See Deft's Opp. Appendix A, p. 4. However, nude body scanners cannot see through a shoe, and DEFENDANT makes no claim that its pat down procedure would include the inside of a shoe.

Quite simply, the new PROCEDURES in actuality address neither the shoe bomber nor the underwear bomber. As such, mentions of these incidents should be disregarded as unfounded for the purposes of ruling on the MOTION, and DEFENDANT should be on notice that while it may make unsubstantiated, irrelevant, and distracting claims to the court of public opinion, CORBETT will seek to bar DEFENDANT from introducing evidence in this court without foundation.

SPECIFIC REPLIES

DEFENDANT, in its opposition, states that CORBETT failed to meet all 4 tests required for a preliminary injunction. While DEFENDANT attempts to argue every angle, it succeeds at none for the following reasons.

I. Plaintiff is likely to succeed on the merits

CORBETT's good faith effort to distill the DEFENDANT's claims against the merits of this case are: 1) that this court has no jurisdiction, 2) that the searches are reasonable, and 3) that there exists no right to travel by air, and therefore anyone travelling by air consents to the TSA's searches and, essentially, elects to give up their rights.

DEFENDANT's claim that this court has no jurisdiction is based on stretching a law regarding appealing a decision by certain administrative agencies (a "final order") to cover this case, which does not appeal a final order but is a broad constitutional challenge. DEFENDANT, knowing that this distinction is real, attempts to distract the Court by stating that the order (in this case, the TSA's revised Standard Operating Procedures ["SOP"]) and the PROCEDURES are "inescapably intertwined" by citing a case where the petitioner is not similarly situated.

The case cited, Green, involves an individual who was a pilot licensed by the FAA, had adverse action taken against his license by the FAA, and subsequently sued. The plaintiff attempted to challenge this adverse action using 5th Amendment due process claims. The court held that challenging the order and the due process procedures that resulted in the order are essentially the same, or that they were "inescapably intertwined," and therefore should be treated as the same for the purposes of a 49 USC § 46110(a) determination.

Indeed, a review of case law in which 49 USC § 46110 jurisdictional questions are raised shows that a vast majority of such cases are cases in which the petitioner seeks to vacate an order adversely affecting his or her license issued by an agency protected by 49 USC § 46110.

This contrasts with the instant matter, in which the "order[1]" directing the searches is not challenged, but rather we have a broad constitutional challenge of the actions of the DEFENDANT. It is clear in this case that there is no order against CORBETT in particular, but rather that the DEFENDANT has decided to undertake illegal actions as a matter of general practice and

[1] CORBETT does not stipulate that the Standard Operating Procedures are an order, nor stipulate he that they encompass the PROCEDURES, as to the best of CORBETT's knowledge, the SOP documents are not public and CORBETT is not in possession of any SOP documents that call for the PROCEDURES. However, this is moot as CORBETT's suit is a broad constitutional challenge rather than a challenge of the SOP.

procedure. Appellate courts have held numerous times that the jurisdiction of the District Court for broad constitutional challenges is not usurped by 49 USC § 46110(a). *Crist v. Leippe*, 138 F.3d 801 (1998), *Foster v. Skinner,* 70 F.3d 1084 (1995), *Mace v. Skinner*, 34 F.3d 854 (1994).

It would be difficult to imagine a more broad challenge than the constitutionality of the TSA search program. Contrasting with Green, who challenged the due process used to issue a specific order, there is no question that CORBETT's challenge is the type of Mace and not Green.

That this distinction exists in this case is further evidenced by continuing to read the statute presented by the DEFENDANT, 49 USC § 46110. Reading from where the DEFENDANT left off, the statute next bars claims that are older than 60 days. If DEFENDANT's argument that a claim of an illegal search must be treated as appealing an order rather than as a new cause of action is taken as true, then it must be true that a suit alleging an illegal search cannot be made after 60 days has passed from the revision of the SOP. This would leave anyone who was illegally searched more than 60 days after the SOP revision no recourse to challenge that illegal search. This was clearly not the intent of Congress and would be repugnant to the due process guarantees of the Constitution.

Lastly, the District Court's ability to take in evidence and determine questions of fact via a jury make the it best suited for this action. Though DEFENDANT has not yet answered the complaint, it is likely that based on its answer, there will be many questions of fact that CORBETT is entitled to have decided by a jury[2]. For example, whether or not society is prepared to accept a certain search procedure to be reasonable is a relevant question of fact, and a panel of many "ordinary" citizens is best able to offer the diverse viewpoints required to come to a conclusion that encompasses many segments of society. Should there be any ambiguity in 49 USC § 46110(a) and/or how it applies to the facts in these circumstances, the ambiguity should be decided in the interest of justice, and proceeding in this court best serves justice. See *Ibrahim v. DHS*, 538 F.3d at 1256 (2008) ("…it makes sense that it be a court with the ability to take evidence").

Proceeding to DEFENDANT's second merit contention (that the searches are reasonable), DEFENDANT has an uphill battle in justifying a search which requires the visual and/or manual inspection of genitals. Though this is not the first time the government has argued otherwise, the Court of Appeals has held, "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324

[2] Indeed, the mere presence of questions of fact is evidence that this action is not an "appeal" of a decision deserving to be heard in an appellate court, but a broad constitutional challenge. Contrasting to Green, for example, the due process questions raised were devoid of genuine questions of fact.

F.2d 450 (1963). Common sense dictates that the desire to shield one's body from the touch of strangers is at least equal in importance to shielding from view. DEFENDANT brushes this off, arguing that since the stakes are great (potential loss of hundreds of lives and millions of dollars of property), "good faith" measures must be accepted without judicial review. See Deft's Opp., p. 10.

CORBETT does not suggest in this action that the TSA lacks good faith intent to secure passengers. However, good faith alone cannot be the test as to whether a search is constitutional. Otherwise, the TSA could justify virtually any search that may lead to greater security, including full strip searches, body cavity searches, searching of laptops and cell phones, and even sending agents to search a passenger's home and vehicle. In other words, there becomes a point where the good faith intent of a government agency can lead it beyond the limits of the Constitution.

The DEFENDANT quotes Judge Friendly in Edwards (who is actually quoting himself from *US v. Bell*, 464 F.2d 667 (1972)) in support of its position that good faith alone justifies any search. This is laughable for four reasons: 1) Judge Friendly in Bell was by no means suggesting that any search was justified, but rather that a search was justified, 2) the intensity of search that Judge Friendly had in mind was that of a Terry search[3], a far cry from nude body imaging and genital groping, 3) the search in Bell occurred after a metal detector alarmed, whereas the PROCEDURES are performed based on no suspicion whatsoever, and 4) After Judge Friendly's self-quotation in Edwards ends, he proceeds to admit "that view was not accepted by a majority [of the court.]"

As DEFENDANT is aware that the reasonableness of their actions will be held to a higher degree of scrutiny than simple good faith, they continue to discuss what they have done to mitigate privacy issues, including having the TSA officer reviewing nude body scanner images be in a different location and, allegedly, being unable to save the images produced. See Deft's Opp., p 12. These privacy mitigations are fraught with the potential for error, are overstated, and evidence will show that they are hollow promises. In particular, the TSA contends that the images cannot be saved, but yet later reveals that the devices "can" save but that feature is simply disabled. See Deft's Opp. Appendix A-2, p 8. The TSA "assures" the public that these features are only for testing and are turned off when used with actual passengers, but the potential for error, manipulation, or simply for a TSA officer to sneak a camera into the viewing room are great.

The DEFENDANT, in its opposition, further absurdly claims that the images produced are not "photographs" because they have been digitally manipulated. See Deft's Opp., p. 12, Deft's Opp. Appendix A, p. 13. However, 1) digitally manipulating a photograph does not make it any

[3] The search performed in Bell was a pat down of the outer clothing of the individual for hard objects "from chest to hips." The individual being male, this search involved no invasive touching.

less a photograph, 2) even if it did, the photograph must first exist to be digitally manipulated, and 3) this is a moot discussion of semantics, as it is undisputed that the images produced are clear enough to see folds of the skin, body abnormalities, and genitals (See Deft's Opp. Appendix A-3).

It is not necessary to seriously consider the privacy attempts made by the TSA as mitigating any more so than would be attempts by a rapist to make his victim comfortable or attempts by a murderer to perpetrate his crimes in a "quick and painless" fashion[4]. There is no privacy remedy in place by the TSA, nor can there be, that makes it acceptable to image the nude body of every traveller (or a random subset thereof) without suspicion. The violation is incurable, and placing the screener far from the passenger serves only to make the violation less obvious to that passenger.

The DEFENDANT claims that 99% of those selected for nude body scanning go through the scanners without "opting out." As the technology used by the TSA virtually removes one's clothing and presents one's nude body for government inspection without any action (such as physically removing one's clothing) by the search victim, if one does not know what is going on (despite the TSA's sparse and vague signage, it is quite possible many do not), or one closes one's eyes and pretends he or she is in another place ("If I just get through this scan, I can go and see my family for the holidays…"), the violation is committed quickly and without any tactile stimuli to the search victim. A peeping tom similarly produces no distress to the victim unless and until the victim catches the peeping tom and is confronted with the fact that he or she has been violated. The TSA has removed the confrontation, but has not removed the violation.

Further, by the DEFENDANT's own admission in its opposition to the MOTION, the TSA penalizes those who opt out of the nude body scanners with increasingly invasive searches, in the form of physical genital groping. See Deft's Opp., p. 12. When confronted with an option of having a government agent look at you naked, physically touch your genitals, or not be able to see your family, take a vacation, or keep your job – not to mention risk a confrontation with the TSA which may lead to fine or arrest – it should be no surprise that many choose the scanners. However, this choice should not be confused with consent.

The DEFENDANT presents two more "mitigating" factors distinct from those above: lack of "stigma" and "expectations." See Deft's Opp., p. 14. DEFENDANT claims that since many people are searched, travellers should feel less violated because there is no "stigma." It is a well-established fact that humans are more likely to express a certain behavior if others are "doing it too;" this is often referred to as "peer pressure." CORBETT submits to the Court that "more people

[4] Though these may be sentencing considerations, they do not change the fact that a rape or murder has occurred.

being searched" simply means "more people have been violated," and the fact that people are violated together is a psychological manipulation tactic used by the TSA to generate compliance, as are the uniforms and recently added badges designed to make TSA agents appear like law enforcement officers. DEFENDANT also states that since people expect to be searched at an airport, the search is less invasive. The idea that the government can turn an unreasonable search into a reasonable one by giving notice that one is to be violated is repulsive. Our rights as Americans cannot be nullified upon "notice" by the government.

DEFENDANT is relying on this Court to decide that anything in the name of preventing a terrorist from blowing up or hijacking an aircraft is justified and reasonable. Beyond being unreasonable because of the invasiveness of the search, over DEFENDANT's objections, a search is inherently unreasonable if it is ineffective, especially when it comes to an extremely invasive search. Indeed, CORBETT submits to the court 3 reasons, though there may be more, that would render a search unreasonable under the 4th Amendment: 1) that it is so invasive that it cannot be tolerated, 2) that it is so ineffective that it is useless or arbitrary, and 3) that the level of efficacy is too low to justify the intensity of the invasiveness. A finding of any of these reasons alone justifies a finding that the search is unconstitutional. In this case, both the 1st and the 3rd reasons, independently of each other, clearly render the PROCEDURES unreasonable, as may the 2nd, depending on the outcome of discovery, which, upon evidence and belief, will show that DEFENDANT knows these scanners are of minimal efficacy against well-concealed explosives.

It should also be noted that efficacy is the essence of "probable cause," which is often a standard used to determine reasonableness of a search. A finding of probable cause is essentially a conclusion that a search was likely to produce results based on the fact, or in other words, that a search is likely to effect a positive result. Therefore, efficacy may be a more common disqualifier for a search being deemed reasonable than over-invasiveness.

Indeed, the DEFENDANT admits this in its citation of Lidster, in which the court tested the reasonableness of a suspicionless search by balancing the "gravity" of failing to search, the "degree" in which the search will help the situation, and the "severity" of the search's intrusion on the searched. Having explored the severity of the search's intrusion, we turn to gravity and degree.

With respect to gravity, we all understand that the consequences of a midair terrorist attack would be quite grave. It does, however, deserve note that if the gravity as it applies specifically to the PROCEDURES were so great, it would be reasonable that the TSA would apply these searches to all passengers. After all, the explosives the TSA is trying to preclude are not recently discovered or invented, and yet only months ago the TSA would let about 2 million passengers daily through

security checkpoints without using the PROCEDURES[5]. The DEFENDANT's opposition states that "[t]he fact that not every passenger is subject to either AIT or a standard[6] pat-down does not invalidate these methods of screening." though it would seem that one could gain insight into the gravity, or lack thereof, the TSA places on its use of the PROCEDURES. Indeed, the TSA's actions should be considered the more reliable indicator of their view of gravity than their words.

The "degree" test, put another way, is simply how likely the search is to make the situation better, or as discussed earlier, the efficacy. As discussed in General Reply, Section III, CORBETT, in his complaint, has cast doubt on the efficacy of these machines, and the DEFENDANT, as of yet, has not even begun to put any of these doubts to rest. CORBETT believes that discovery will shed significant light on this topic, but for the purposes of this pre-discovery MOTION, the Court may weigh heavily on the fact that in its twenty page, plus lengthy appendices, opposition, DEFENDANT has not refuted CORBETT's claim other than to erroneously say that the Court should not consider it.

The final component to DEFENDANT's argument against the merits of this case is a claim that that there exists no right to travel by air. In saying this, DEFENDANT implicitly concedes that there is a constitutional right to travel generally, as well they must: the Supreme Court has long held the same. CORBETT will seek to persuade this Court that in light of the changes in society and business over the last several decades, in 2010, denying the right to travel by air is essentially denying the right to travel, as well as other fundamental rights, such as contract rights.

CORBETT's most frequent business travel in 2010 has been between Miami and New York, and Miami and Seattle. The next fastest means of public transportation is by train[7]. Between Miami and New York, the train is approximately 1 day and 6 hours, or more than 10 times longer (flight time: under 3 hours) and about twice as expensive as air travel. Between Miami and Seattle, the train is approximately 4 days and 2 hours, or about 20 times longer (flight time: approx. 5 hours) and again twice the cost. A 2 day business trip to New York would become a 5 day trip by train

[5] Still today, the TSA allows roughly 1.8 million passengers daily through security checkpoints without using the PROCEDURES, based on Deft's Opp. Exhibit A, p. 15, which states that only 8% of passengers are currently screened.

[6] CORBETT's complaint refers to "enhanced pat-down procedures," however the TSA now refers to these procedures as its new "standard pat-down procedures." Nomenclature notwithstanding, the new "standard pat-down procedures" as referred to by the TSA are the procedures that involve genital groping and are the procedures complained of in this case.

[7] Travel by car may be marginally faster (though not by much), but since many people do not have drivers licenses, do not have a car, do not know how to drive, are unable to drive due to age or handicap, or have been disqualified from driving, and since every state considers driving to be a privilege rather than a right, the more appropriate consideration is train travel.

instead of air, and a 2 day trip to Seattle would become 10. These time frames make business trips impossible; the time is simply too long to accommodate. Instead, employers will replace an employee who objects to the PROCEDURES with one who does not. This essentially leaves many Americans in a position where they may exercise their rights or feed their families, but not both.

Beyond business, it is also more common today than in years past for family members to live, study, and work farther apart from each other (perhaps as a result of air travel). Consider an individual with a full-time job and 2 vacation weeks per year. This individual would simply not be able to see family cross-country without air travel. Considering a 4 day trip across the country and a 4 day trip back, even a brief excursion would require using nearly the entirety of this individual's vacation days for the year. With air travel, it would be possible to do over an ordinary weekend.

Though one would hope the DEFENDANT is familiar with the geography of the US, in light of the DEFENDANT's suggestion in its opposition that one can simply avoid flying and just take the train or car, it apparently needs to be mentioned that it is not possible to do that with all 50 states. Indeed, in order to freely travel between Hawaii and any of the other 49 states, air travel is a must, unless the DEFENDANT is suggesting we return to travel by boat[8]. CORBETT is unaware of how long a boat ride to Hawaii would take, but he imagines that it's long, especially if you combine it with the cross-country train trip that the DEFENDANT suggests. Naturally, trips to Europe, Asia, Africa, and Australia are similarly impossible, and trips to Alaska would require international travel, a US passport, and submission to a Customs search by 2 different countries.

Indeed, for the above reasons, it is not simply "inconvenient" to travel by other means, but impractical or impossible, and a clear undue burden on the constitutional right to travel.

Further, it must be stated that the TSA's jurisdiction is not limited to air travel, and that the TSA has recently taken to searching Greyhound bus passengers, as well as trucks at roadside checkpoints. As the TSA expands its role, it is CORBETT's great fear that the next step is to use nude imaging devices on trains and/or buses, at which point the TSA argument that the search can be avoided using alternate transportation modes is further weakened. Even private vehicles are not exempt, as the TSA presently experiments with truck-mounted imaging devices.

II. Plaintiff would indeed suffer irreparable harm

DEFENDANT states that CORBETT's claim of emotional trauma that would be caused by submitting to nude imaging or genital groping at the hands of his government is "speculative."

[8] "Commuter boat" travel to Hawaii is non-existent. Beyond luxury cruise ships, this mode of transportation does not exist.

CORBETT has been witness to his emotions for the entirety of his life, and therefore predicting an emotional response is not based on speculation but rather based on evidence observed over a long period of time. Indeed, CORBETT has witnessed 100% of CORBETT's emotional responses, and could likely be qualified as an expert on them. However, the Court need not presently examine the issue of whether CORBETT would experience "extreme emotional distress." As DEFENDANT points out in its opposition, invasion of privacy in and of itself can constitute irreparable harm, even without a showing of emotional distress. See Deft's Opp., p. 15, Footnote 10.

CORBETT cannot simply mitigate his damages by not flying, as thoroughly discussed in the previous section. Without air travel, CORBETT's businesses would also be irreparably harmed, and monetary compensation cannot fully compensate for the loss of something for which one has worked their whole life. CORBETT's claim of irreparable damage to his business is significant per the Supreme Court, which has "repeatedly recognized the severity of depriving someone of his or her livelihood." *FDIC v. Mallen*, 486 U.S. 230 (1988). Should CORBETT not be able to fly, he would also suffer economic loss, as he has contracts with the air carriers that would be interfered with to the extent that the DEFENDANT's actions could give rise to a tortious interference claim.

DEFENDANT has essentially placed CORBETT in a "damned if you do, damned if you don't" situation, whereby there is no action CORBETT may take to avoid a violation of his rights. The best CORBETT can do is attempt to avoid the PROCEDURES by trying to use security lanes that do not yet have nude body scanners in place. However, this is no guarantee, as the TSA can, and frequently does, select individuals at random to switch to security lanes with a nude body scanner in place. Should CORBETT be selected at random and then refuse both nude body scanning and genital groping, CORBETT, according to the TSA's public statements, could be subjected to an $11,000 civil penalty. A solution involving risk of fine equal to approximately 4 months of the median pre-tax salary in this country is hardly an acceptable solution.

Further, the TSA boasts to the public that an additional 1,000 nude body scanners will be in place within approximately one year, thus more than tripling the current count of body scanners. As this happens, the availability of security lanes without nude body scanners will narrow, and the TSA makes itself clear that its goal is to have every passenger pass through a nude body scanner as soon as it can get nude body scanners in place everywhere.

With that in mind, several of the DEFENDANT's suggestions to how CORBETT can continue his life without injury are absurd to the point that they approach misrepresentations so blatant as to be deserving of sanctions. The first of these is that CORBETT can simply choose to fly out of an airport without nude body scanners. The DEFENDANT mentions that only a fraction

of airports have nude body scanners in place, but fails to mention that these are the largest airports in the country and therefore this "fraction" actually accommodates the majority of travellers in the nation. DEFENDANT also fails to mention how fast this "fraction" will become a majority (or an entirety) of airports over the next year as their 1,000 new nude body scanners are installed. DEFENDANT tries to bring this point home by stating that "Plaintiff admits that one of his upcoming flights is from an airport that does not use [nude body] scanners." However, the one airport CORBETT was scheduled to fly through without nude body scanners was actually in a foreign country. Indeed, upon knowledge and belief, despite CORBETT departing from about a dozen different domestic airports this year, there is not a single one that does not presently have a nude body scanner installed.

The next misrepresentation is that CORBETT is not "likely" to be asked to go through a nude body scanner in the immediate future. Some simple math: If CORBETT flies 25 segments next year, as he at least did this year, and has only a 10% chance of being selected for a scanner at each airport, his odds of being selected in 2011 are 92.8%. Calculaton:

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Chance = 1 – (1 – odds)^opportunities
Chance = 1 - (1 - 0.10)^25
Chance = 0.928 = 92.8%
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Using 10% as the odds is generous to the DEFENDANT[9], and as the year progresses, the odds increase as the TSA installs their 1,000 new machines. CORBETT is unaware of how the DEFENDANT could possibly claim, with odds like these, that CORBETT is unlikely to be asked to submit to a nude body scan.

DEFENDANTS further allege that since CORBETT has not alleged that he has yet been asked to undergo a nude body scan, he must be unlikely to be asked in the future. However, as mentioned here and in the complaint, it is only very recently that the TSA has ramped up the use of these scanners. But, to set the DEFENDANT's mind at ease, CORBETT was indeed asked to proceed through a nude body scanner in or about September 2010. This was before the TSA "enhanced" their pat downs to involve genital touching. CORBETT opted out and was given a pat down that did not involve the touching of his genitals, and was allowed to proceed. As CORBETT's rights were not infringed during that encounter, it was not included in the complaint.

[9] Deft's Opp. Exhibit A, p. 15 states that in November 2010, 8% of passengers were screened by AIT. As the TSA plans to triple its machines by the end of 2011, logic would dictate that by the end of 2011, 24% of passengers would be nude body scanned. Using 24% as the odds in our calculation, the odds of CORBETT being screened in 25 flights is a stunning 99.9%. Further, this 8% number was skewed downwards by the fact that the TSA turned off many of its nude body scanners for the Thanksgiving holiday weekend.

However, the option to accept a pat down that does not involve genital touching is no longer an option, and such is the basis for this suit.

Continuing on the misrepresentation list is the assertion that CORBETT is unlikely to encounter genital groping because only a small percentage of passengers are selected for the new pat down. DEFENDANT fails to make clear that 100% of passengers who are selected for the nude body scanners and choose to opt out are given the new pat down. As CORBETT will refuse nude body scanning if selected (as is his right), his odds of being selected for a pat down complete with genital groping are the same as for the scanner – or using our above calculation, in the 92.8% range.

Next, the DEFENDANT argues that since 99% of people that are asked to use the nude body scanners "choose" to use them, they can't be terribly traumatizing. This fallacy has been discussed in the previous section, but in partial restatement: travellers are coerced into "accepting" the nude body scanners because of lack of ability to see what is happening, because of desire to avoid confrontation with uniformed US government agents, because of peer pressure, because they simply want to see their families or keep their jobs, and last and most importantly, because if they opt out, the TSA will penalize them with "increasingly invasive searches" – that is, touching their genitals.

Last, the DEFENDANT states that all of CORBETT's proposed injuries are simply speculation based on media reports. However, one need not look any further than the publicly available documents produced by the TSA and the filings made by the DEFENDANT. It is without argument that the TSA does produce images of the nude body of passengers, and without argument that the TSA's new pat down procedure involves the touching of the genitals of the passengers (or as the DEFENDANT puts it, the "groin area"). See Deft's Opp., p. 13, Deft's Opp Exhibit A p. 13, *etc*. It is true that there are now thousands of media reports of the abuse of American citizens at the hands of the TSA, but it takes no more than a trip to the airport and www.tsa.gov to see that these reports are founded. CORBETT has personally witnessed TSA searches involving the touching of breasts and genitals, as well as TSA agents placing their hands inside the waistbands of travellers.

III. A restraining order would not harm the Defendant and would be in the public interest

DEFENDANTS argue that the importance of the PROCEDURES "cannot be overstated." However, for over 9 years since the attacks of September 11th, 2001, these PROCEDURES have not been in place, and neither the DEFENDANT nor the public has suffered as a result. On the other hand, the public has indeed suffered as a direct result of the PROCEDURES, with no less than hundreds of stories posted on the Internet by individuals who felt sexually violated by the TSA over the last several weeks. CORBETT can gather testimony from these individuals during discovery. It

is in the public interest to grant this MOTION as it will force the TSA to consider that it has gone too far, a consideration that TSA officials presently refuse to contemplate with a reasonable mind.

In the instant MOTION, CORBETT is not asking that the Court order the DEFENDANT to discontinue its procedures. CORBETT is simply asking that the Court order that he personally be exempted after producing a declaration under penalty of perjury, unrefuted by the DEFENDANT, that clearly evidences that he is not a risk to a flight. The DEFENDANT states that this "does not mitigate the harm to the government's interest in national security." Does the DEFENDANT expect anyone to take seriously the suggestion that there is no difference in risk between allowing one individual to not be subjected to the PROCEDURES and allowing all individuals to not be subjected to the same? See Deft's Opp., p. 18.

DEFENDANT has claimed that CORBETT's testimony is the same as a "would-be terrorist would make[.]" See Deft's Opp., p. 18. Disregarding the offensiveness of this comment and the fact that terrorists do not petition US courts for easier access to carry out their evil, let us further consider this position. The DEFENDANT has stated that CORBETT is free to get on an airplane from an airport that does not yet have the scanners. Though for the purposes of making business trips and freely traveling about the country, this is not a viable option for CORBETT, it would certainly be viable for one who was intent on blowing up a plane. Unless the DEFENDANT's position is that a terrorist would be unwilling to go on a "road trip" to get to an airport lacking the PROCEDURES, an order by this Court restraining the TSA from using the PROCEDURES on anyone, but especially CORBETT, would cause no benefit to an actual would-be terrorist.

Temporary injunctive relief should be tailored as narrowly as possible to provide relief, which is the sole reason why CORBETT's MOTION requests temporary relief for himself only. This MOTION specifies only one individual and requests only two things: that the TSA not image him nude, and that the TSA not touch his genitals, both in the context of suspicionless searches required to board an aircraft. The MOTION is quite narrowly tailored, and allows the TSA to utilize any security procedure with CORBETT that it has already done with him in the past. CORBETT very much agrees with the DEFENDANT that temporary relief should generally be "used to preserve the status quo," and the MOTION is just that. The TSA, in implementing the new procedures, has changed the status quo, and CORBETT simply seeks a return to the way it was just a couple months prior to now while the Court and a jury decide this case.

DEFENDANT's claim of undue administrative effort is also an unpersuasive reason to deny the MOTION. The TSA has set up many lists in the past – no fly lists, watch lists, trusted traveller programs, *etc.* – and indeed already maintains lists of individuals exempted from the

PROCEDURES, such as certain US government officials as well as pilots. CORBETT is also willing to carry a certified copy of any order issued by the Court with him while travelling so that the DEFENDANT and its TSA are not confused as to their responsibilities.

CONCLUSION

DEFENDANT asserts that CORBETT cannot simply "disagree" with the DEFENDANT's choices for "the most effective responses to the threat of terrorism." CORBETT may not be a counterterrorism expert, however CORBETT does know when his rights are being violated. CORBETT is also able to apply common sense to the effectiveness of security procedures, and when a procedure violates CORBETT's rights and common sense dictates its ineffectiveness, CORBETT has met his burden in stating a claim that is likely to be successful.

It will soon be time for the DEFENDANT to prove that CORBETT is mistaken and its PROCEDURES are not so invasive, and are sufficiently effective, as to justify them as reasonable under the 4th Amendment. In the meantime, and for the foregoing reasons, CORBETT is entitled to temporary relief and his motion should be GRANTED by this Court.

Dated: Miami, Florida

December 13th, 2010

Respectfully submitted,

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