UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

Jonathan Corbett, Appellant v. United States of America, Appellee	**Case No. _____** **APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION**

SUMMARY

Plaintiff-Appellant Jonathan Corbett ("CORBETT") filed suit against the Defendant-Appellee 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. This action was dismissed on April 29th, 2011 based on the District Court erroneously determining that it does not have jurisdiction. A timely Notice of Appeal was filed along with this motion on May 27th, 2011.

Defendant's PROCEDURES cause irreparable and mounting harm on a daily basis to not only CORBETT but the general public of the United States of America in the form performing searches that do not comport with the Fourth Amendment to the United States Constitution, and instead constitute sexual assault, on a scale of no less than tens of thousands of individuals per day.

BACKGROUND

The TSA is the federal agency created nearly 10 years ago to, among other things, oversee airport security screening in the United States. With few exceptions, airports that have commercial passenger flights have security checkpoints that separate a "non-secure" area of the airport from a "sterile" area. Traditionally, all passengers entering the sterile area are subject to government-

mandated personal inspection by metal detection devices, x-ray imaging of their belongings, and other varieties of minimally-invasive administrative search techniques[1].

On or about the end of October 2010[2], the TSA implemented two significant changes to their "primary" screening procedures (constituting the PROCEDURES): 1) that all passengers shall pass through imaging devices (where available) that use x-rays or other radiation to penetrate the clothing of the passenger and produce a graphic, three-dimensional image of their nude body, and 2) any passenger that refuses to pass through one of the aforementioned "nude body scanners" (as well as many passengers that do[3]) will be subjected to an invasive "pat-down" in which a TSA employee will use his or her hands to touch all over the passenger's body, necessarily including touching the genitals, buttocks, and breasts of the passenger, and the TSA employee will also put his or her hands inside the pants of the passenger for a "waistband check." Though the TSA prefers to use euphemisms ("advanced imaging technology" instead of "nude body scanner," "moving hands up the legs of the traveler until 'resistance' is met" instead of "touching the genitals of the passenger," *etc.*), the fact that the TSA employs the general procedures described in this paragraph tens of thousands of times on a daily basis is publicly admitted by the TSA and undisputed thus far in this case.

CORBETT filed a civil action in the United States District Court for the Southern District of Florida on November 16th, 2010, along with a motion for a Temporary Restraining Order and/or Preliminary Injunction. CORBETT's motion was denied in large part, and CORBETT's case was dismissed entirely, based on the District Court's belief that 49 USC § 46110 removed its subject

[1] The legality of minimally-invasive administrative searches at airport checkpoints is not in dispute. Rather, the instant case disputes new, highly-invasive search procedures employed by the TSA.
[2] The TSA conducted small-scale testing of these PROCEDURES at several airports prior to this date.
[3] The nude body scanner images often show medical devices, physical deformities, etc., that cause the image to be insufficient to clear a passenger, and all such passengers are given the "pat-down" described, as well as any other passenger who "fails" the nude body scanner.

matter jurisdiction. The United States District Judge did not rule on the constitutionality of the search procedures. CORBETT's instant appeal is on the grounds that the District Court erred ruling that it did not have jurisdiction.

STANDARD OF REVIEW

This motion is filed under Fed. R. App. P. 8(a)(2), which provides for applying to the appellate court for preliminary relief during the course of an appeal. As the District Court has erroneously ruled that it has no jurisdiction over this case, moving first in the District Court is impractical and therefore this motion is appropriately made in the appellate court under Rule 8(a)(2) rather than in the District Court under Rule 8(a)(1).

The criteria for deciding a preliminary injunction in federal court, both at the trial and appellate court levels, is 1) the likelihood the moving party will prevail on the merits, 2) the prospect of irreparable injury to the moving party if relief is withheld, 3) the possibility of harm to other parties if relief is granted, and 4) the public interest. Each of these criteria are discussed below.

ARGUMENT

A. CORBETT Is Likely To Prevail On The Merits

In the District Court, for the purposes of a motion for a preliminary injunction, the question of whether or not CORBETT was likely to prevail on the merits required the Court to first determine whether 49 USC § 46110 applied to the instant case. If it did, the Court lacked jurisdiction and could go no further: the motion must be denied and the case must be dismissed.

Here in the Court of Appeals, for the purpose of this motion, the question of the applicability of 49 USC § 46110 is wholly irrelevant: if the statute applies, this Court has original jurisdiction

(which may be obtained by transferring this case to this Court *sua sponte*, by transferring this case to this Court via motion of one of the parties, or by the plaintiff re-filing in this Court); if the statute does not apply, this Court has appellate jurisdiction. Either way, the 11th Circuit Court of Appeals indeed has jurisdiction sufficient to grant this preliminary injunction. The Plaintiff therefore need not waste this Court's time with a discussion of 49 USC § 46110 in this motion, and will save that detailed discussion for his opening brief.

With jurisdiction to issue a preliminary injunction assured regardless of the applicability of 49 USC § 46110, we may now turn to the heart of the matter at hand: whether the PROCEDURES as unilaterally decided upon and applied by the TSA are constitutional. A look at the history of the administrative searches in airports will rapidly show that the TSA's PROCEDURES are the most radical, expansive, intrusive, and invasive administrative search that the federal government has ever attempted to impose on the general public absent any sort of suspicion whatsoever.

Case law relating to airport security screening goes back 50 years. CORBETT does not dispute that the TSA has broad authority to conduct searches at airport security checkpoints. *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) ("Airport screening searches are constitutionally reasonable administrative searches"). However, the TSA's authority is not boundless: "The scope of such searches is not limitless. A particular airport security screening search is constitutionally reasonable *provided that it is no more extensive nor intensive than necessary*, in the light of current technology, to detect the presence of weapons or explosives and that it is confined in good faith to that purpose." *Aukai*, 497 F.3d at 962 (citing *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973)) (emphasis added). Even when administrative security interests are "legitimate and substantial," the interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488

(1960). Fourth Amendment safeguards "dictate a critical examination of each element of the airport security program." *Davis*, 482 F.2d at 913.

Courts require that airport security searches be "minimally intrusive," "well-tailored to protect personal privacy," and "neither more extensive nor more intensive than necessary under the circumstances to rule out the presence of weapons or explosives." *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006); *See also:* *Aukai*, 497 F.3d at 962. Searches are reasonable if they "escalat[e] in invasiveness only after a lower level of screening disclose[s] a reason to conduct a more probing search." *Hartwell*, 436 F.3d at 180.

It requires no surveys, expert witnesses, or deep deliberation to conclude that the PROCEDURES, which require all travellers to consent to the visual or manual inspection of their genitals, constitute a highly invasive search, or at the least, a search significantly more invasive than that of a metal detector. "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 F.2d 450 (1963). We respectfully submit to the court that the desire to shield one's figure from the touch of strangers is at least as basic as the desire to shield from view.

Far from the "minimally intrusive" searches upheld in *Aukai* and *Hartwell*, the TSA rule requires individuals to submit to a digital strip search or manual molestation that is highly intrusive, and unlike the escalating searches at issue in *Aukai* and *Hartwell*, the PROCEDURES subject all travelers to the most invasive search available as the first tool used in the screening process, without any escalation. Aukai and Hartwell were first scanned by walk-through metal detectors. *Aukai*, 497 F.3d at 962; *Hartwell*, 436 F.3d at 180. Metal detectors produce no naked image of the traveler and require no manual genital probing. After Aukai and Hartwell set off alarms on walk-through metal detectors, they were screened with hand-held magnetometers. *Id*. These are also less invasive than

body scanners, and again produce no naked image of the traveler and again require no manual genital probing. After Aukai and Hartwell set off alarms on the hand-held metal detectors, security agents asked them to empty their pockets. *Id*. This procedure is also less invasive than body scanners. Only after these minimally-invasive procedures revealed additional evidence of contraband were Aukai and Hartwell subjected to the maximally invasive search.

Alternative technologies, including explosive-sniffing dogs, explosive trace detection (ETD) swabs, passive millimeter wave scanners, and both hand-held ("wand") and walk-through metal detectors detect weapons with a far less invasive search and significantly greater accuracy. The TSA also employs or has employed other security techniques: "Behavior Detection Officers," who interact with passengers and attempt to assess physiological signs of malicious intent, "puffer machines" that sample air around a passenger for explosive trace, the "no-fly list," *etc*. There is no shortage of options for minimally-invasive search techniques.

The tired adage that "if it makes it safer, it's worth it" does not comport to the Fourth Amendment, but better yet, does not even apply here. That is, there is also no justification for any assertion that the nude body scanners plus genital molestation routine is any more effective than the other minimally-invasive techniques. For example, a metal detector would detect a firearm hidden inside a body cavity, while a nude body scanner (which produces images only of the surface of the body, as if you were looking at the traveler without any clothes on) or manual genital inspection would fail to detect this. A bomb-sniffing dog may alert to a passenger who had checked in a bag full of explosives, but a nude body scanner or manual genital inspection would not. A metal detector will wake up a sleepy TSA screener, but a nude body scanner or manual genital inspection will not be effective with a screener who isn't paying attention.

This is not simply conjecture on the part of the plaintiff-appellant. The Government Accountability Office (GAO) has had much critical review of the TSA's program, from safety, to

privacy, to efficacy, to cost. Perhaps most damaging to the TSA's credibility is despite the fact that the TSA repeatedly justifies the PROCEDURES to protect against attacks like the one attempted by "Underwear Bomber" Umar Farook Abdulmutallab in December 2009, the GAO has reported that it was unlikely that nude body scanners would have detected this individual's explosives. See GAO, "Aviation Security: TSA Is Increasing…," http://www.gao.gov/new.items/d10484t.pdf (Mar. 17, 2010).

The TSA has failed to offer any meaningful study to show the efficacy of the PROCEDURES in the fight against terrorism. The GAO implored the TSA to conduct any sort of cost/benefit analysis whatsoever, and after research and to the best of the CORBETT's knowledge, the TSA to date has failed to do so. *Id.* When common sense and GAO studies indicate that the new PROCEDURES have gaping holes and the TSA fails to conduct studies to show that they do truly "know better," the Court cannot simply "take the TSA's word for it" that these PROCEDURES are necessary. After 6 months as a primary screening tool and nearly 2 years of the pilot program, a lack of study is inexcusable[4].

Indeed, the TSA's decision to use these machines, and refusal to study their efficacy, is perplexing, as it seems to offer no measurable security benefits, has an extremely high cost, and tramples the Fourth Amendment rights of Americans. United States Congressman Jason Chaffetz was not the first to suggest that money and politics, rather than good security practice, are behind this when he stated that the reason the PROCEDURES were deployed instead of non-invasive, far less expensive, and more effective explosive-sniffing dogs is that "machines have something that (bomb-sniffing) dogs don't have – lobbyists!" "House GOP Moves to End Money for New Body Scanners," http://abcnews.go.com/Travel/wireStory?id=13596135 (May 13, 2011).

[4] A lack of study before even purchasing the first nude body scanner is an inexcusable waste of the taxpayer's dollars, but to see that *years later there is still no study* is *patently absurd*.

B. CORBETT's Irreparable Harm Mounts on a Continuous Basis

It is clear that in general, the deprivation of a constitutional right constitutes an irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Klein v. City of San Clemente, WL 3152381, at *8 (9th Cir. 2009) (quoting Elrodv. Burns, 427 U.S. 347 (1976)).

CORBETT is a frequent flyer who has been subjected to parts of the PROCEDURES during their pilot program. CORBETT now prepares for every flight that he takes knowing that the government may face him with a choice of being photographed naked, being physically molested, or being denied access to his flight and threatened by the TSA with a civil penalty of $11,000 for failing to complete a security screening. This causes CORBETT significant anxiety and emotional distress both at the airport and during the days preceding a flight. Irreparable harm has already occurred and will continue to occur but for injunctive relief.

C. There is Little Possibility of Harm to Respondents if Relief is Granted

The PROCEDURES are ineffective. No independent evidence currently establishes the effectiveness of the nude body scanners. The agency itself has refused to conduct a cost/benefit analysis that would make possible a determination of efficacy.

Further, no airport in the United States has fully deployed the PROCEDURES. That is, because there are more travelers than the quantity of nude body scanners operated by the TSA can process, travelers are selected semi-randomly to undergo the PROCEDURES. Some airports do not yet have any nude body scanners.

The locations of these body scanners be easily seen and identified by anyone in the public area of an airport. Therefore, even if one grants the TSA the benefit of the doubt that the nude body

scanners do protect against terrorism, a would-be terrorist simply needs to find a checkpoint or an airport where the devices are not deployed[5]. Temporary injunctive relief against the implementation of the PROCEDURES does not create any risk or loophole that does not already exist, but it does prevent continued irreparable harm to CORBETT and to the public.

D. There is Overwhelming Public Interest in Granting CORBETT's Motion

Each day, approximately 2 million air travellers pass through US airports, and no less than tens of thousands of them are subjected to the PROCEDURES. While CORBETT is experiencing emotional harm and a violation of his constitutional rights, others are coerced into compliance with the procedures, with false "consent" given under duress and the infamous TSA threat of "Do you want to fly today?" Some business travelers are faced with the prospect of losing their jobs if they decline a TSA search: true consent cannot be obtained under penalty of being unable to feed your family.

If CORBETT's case on the merits is successful and the PROCEDURES are declared unconstitutional, that necessarily means that every person who has been subjected to the PROCEDURES has been sexually assaulted by the government of the United States of America.

Every state in our union has a law against the unwanted touching of one's genital area, whether it be called sexual assault, battery, forcible touching, sexual abuse, or something else entirely, it is a crime. Until this injunction is issued, the defendant-appellee through its TSA will continue to perpetrate this crime on tens of thousands of Americans daily.

[5] The fact that it would be possible for one to travel around the country in order to find airports where the PROCEDURES are not in use does not mean that CORBETT can mitigate his damages by doing so. CORBETT is a business traveler and cannot accomplish his travel needs by road-tripping to distant airports and hoping to find a checkpoint lacking a nude body scanner. The Constitution does not impose upon CORBETT the burden of actively circumventing and thwarting the government's attempts to violate his Fourth Amendment rights; rather, the government has a duty to ensure that it does not violate his rights.

The nude body scanners are no better: persuading someone to submit to nude photography of their body under the false color of law is also a crime in every state in the country. A police officer who informs a motorist pulled over for a traffic violation that new department policy requires her to be strip searched would find himself in jail.

The TSA decided to forego public comment on these PROCEDURES before they were implemented. The TSA further ignored hundreds of complaints about the PROCEDURES submitted to the TSA directly by the public during pilot programs prior to the full "launch date[6]." Since full launch, the TSA has ignored thousands of complaints expressed both directly to the TSA as well as countless others posted publicly on the Internet in the last 6 months since full launch. *See* Appendix 2 (a brief sampling of some complaints written by those who have experienced the PROCEDURES). Shock videos of the TSA touching the chests, genitals, and buttocks of young children have circled the Internet, attracting *over ten thousand* comments deploring the exact TSA conduct complained of here. *See* "YouTube – 6 Year Old Girl Groped By TSA," http://www.youtube.com/watch?v=-3sH1GaO_nw (Apr. 9, 2011). Though it extraordinarily disturbing to see a child put through the PROCEDURES, age is irrelevant to the legal argument here: no person, aged six, sixty, or six hundred years should be subjected to such humiliation via a suspicionless search in the freest country in the world.

The TSA has also ignored the questions and complaints of our elected leaders. No less than half a dozen state and local governments (including the States of Texas[7] and New Jersey, and the City of New York) have legislation pending to prohibit the use of the PROCEDURES. The TSA

[6] These complaints were produced by the TSA in EPIC v. DHS, 10-1157 (DC Cir. 2010). They are not attached here because they are hundreds of pages long, but can be provided to the Court upon request.

[7] The legislation in Texas was withdrawn by its sponsor three days before the filing of this document because the TSA and Department of Justice threatened that they would shut down airports in the State of Texas if the legislation passed.

found itself in the national media on and around February 20th, 2011, when Alaska State Rep. Sharon Cissna, a breast cancer survivor, was refused access to her flight when she declined to let the TSA touch her breasts. *See* "Alaska lawmaker refuses pat-down, takes ferry," http://www.msnbc.msn.com/id/41718833/ns/travel-news/ (Feb. 22, 2011). The United State House of Representatives has repeatedly requested explanations from the TSA; on at least one occasion this year, the TSA has refused to testify in front of a House subcommittee which had invited them. *See* "TSA Chief Rebuffs House Invitation," http://transportation.house.gov/news/PRArticle.aspx?NewsID=1245 (Apr. 14, 2011). The House's Appropriations Committee earlier this month voted to cut funding for the purchase of additional nude body scanners. Even President Barack Obama, last November, asked the TSA to find a way to be less invasive. *See* "Obama, Clinton ask TSA to make body screening less invasive," http://www.ibtimes.com/articles/84356/20101122/airport-screening-body-scan-travel-thanksgiving-travel-pat-down-pat-down-tsa-tsa-aaa-brack-obama-bar.htm (Nov. 22, 2010). The TSA has been consistent in ignoring everyone from travelers to the President of the United States.

Further, the TSA's PROCEDURES affect disabled and elderly Americans at a disproportionate rate. Any traveler with any kind of medical device – from a nicotine patch to an ostomy appliance – will automatically "fail" the nude body scanner and be forced to undergo a pat-down (as are all others who "fail" the nude body scanner). As Rep. Cissna learned, even scars from surgery can lead to failing the nude body scanner. Horror stories abound in the news and on the Internet of travelers who have had urostomy bags broken, injuries painfully probed at, and the like, even after informing the TSA screener of the special need. *See* Appendix 2.

The "false positive" issue with the nude body scanners affects not only the disabled, but many other groups of people. Women may be targeted due to birth control patches or feminine hygiene products. Body piercings which would not have alarmed a metal detector (because metal

detectors typically do not alarm on the soft metals from which jewelry is made) now become an alarm with a nude body scanner, and as travelers with nipple rings have learned, the "resolution" of those alarms becomes extremely invasive.

The TSA has a list of tired counterarguments to persuade the public and the courts that the procedures really "aren't so bad" and that their privacy was considered. These include: 1) that the person viewing the nude body scanner images is in a different room, 2) that nude body scanner images (allegedly) cannot be saved, printed, or transmitted, and 3) that pat-downs are (usually) conducted by same-gender screeners. These counterarguments fail to be persuasive: if photographing a traveler naked is unconstitutional, it does not become constitutional based on how long the image is stored or who looks at it. If touching the genitals of a traveller is unconstitutional, it is not made constitutional based on the person doing the touching having the same type of genitals as the traveler[8].

CONCLUSION

The appellant does not deny the existence of terrorism and the risk it poses to aviation in the United States. This risk can be mitigated by the use of non-invasive search techniques. The TSA has instead chosen to implement highly-invasive, unproven, and illogical techniques. These techniques, as applied as a suspicionless administrative search to the general public without any sort of escalation path (starting with minimally-invasive searches and proceeding to more invasive searches as warranted) cannot comport with the Fourth Amendment requirement for searches to be reasonable. Instead, they constitute sexual assault.

In light of the fact that the nude body scanner system is only partially implemented (and therefore even if the machines were effective, they can be easily circumvented by a would-be

[8] In fact, many men may find this makes the PROCEDURES even more invasive.

terrorist) the additional risk of terrorism caused by granting a preliminary injunction is nil. At the same time, the risk of harm to CORBETT and to the general public is certain and great. Without any demonstration (of the variety that includes evidence, rather than simply assertions) by the defendant-appellee that it will be harmed by an injunction, CORBETT is entitled to preliminary relief while his appeal is considered.

PRAYER FOR RELIEF

The appellant hereby moves the court to:

1) Issue a preliminary injunction requiring the TSA to discontinue its use of nude body scanners (including "backscatter x-rays" and "millimeter wave scanners") as a primary screening tool, and
2) Issue a preliminary injunction requiring the TSA to revert its "pat-down" procedures to the standard procedures that were commonly used prior to October 2010.

Dated: Miami, Florida
May 27th, 2011

Respectfully submitted,

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