IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 11-12426

UNITED STATES' OPPOSITION TO
APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff-appellant Jonathan Corbett seeks to enjoin the Transportation Security Administration (TSA) from using advanced imaging technology (AIT) scanners and pat-down procedures to screen passengers at airport checkpoints. The district court denied his motion for a preliminary injunction, and dismissed his claim for lack of jurisdiction. Corbett seeks a preliminary injunction from this Court pending appeal. That motion should be denied, because the plaintiff fails to meet the stringent criteria for the extraordinary remedy of a preliminary injunction.

First, Corbett has not established a substantial likelihood of success on appeal, because he has not shown that the district court erred in holding that it lacked jurisdiction, nor has he shown that the challenged screening procedures violate the Fourth Amendment. Corbett has also failed to show that TSA's use of AIT and current pat-down procedures threatens him with irreparable injury; he is not required to undergo these screening methods (and does not even allege that he has previously been subjected to them), and, in any event, significant privacy protections are in place for those who do undergo screening. Moreover, it is readily apparent that the emergency relief Corbett seeks poses a substantial risk to the public — a conclusion that is underscored by the attempted bombing of a Detroit-bound airplane on December 25, 2009, and the more recent placement of explosive devices inside printers transported on passenger and cargo airplanes. Every court to consider a similar motion has refused to enjoin TSA's use of AIT scanners and its pat-down

procedures. *See Elec. Privacy Info. Ctr. v. DHS*, No. 10-1157, Order (D.C. Cir. Sept. 1, 2010) (attached as Exh. A); *Blitz v. Napolitano*, No. 1:10-cv-930, Transcript of 12/10/10 Hearing, at 53-58 and 12/13/2010 Order (M.D.N.C.) (attached as Exh. B). This Court should likewise deny Corbett's motion for a preliminary injunction.

STATEMENT

1. Statutory and Regulatory 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 ¶ 9.[1] To combat that threat, Congress has charged the TSA Administrator with overall responsibility for civil aviation security. 49 U.S.C. § 114(d). The Administrator, working together with the Director of the FBI, 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 security," *id.* § 44904(e), and is authorized to "prescribe regulations to protect passengers and

[1] John Pistole, the Administrator of TSA, provided a Dec. 6, 2010 declaration in support of the government's opposition to a motion for a temporary restraining order and preliminary injunction filed in district court. *See* Exh. A, Def. Memorandum in Opp. to Plaintiff's Mtn. for Temp. Restraining Order And/Or Prelim. Inj., D. Ct. Dkt. 10-2 (Pistole Decl.) (attached as Exh. C).

property on an aircraft" from "criminal violence or aircraft piracy," *id.* § 44903(b).

Federal law requires "the screening of all passengers and property" before boarding to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a). An airline must "refuse to transport" a passenger who does not consent to a search of his person or property, *id.* § 44902(a), and is authorized to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," *id.* § 44902(b).

Congress has required the Secretary of the Department of Homeland Security — TSA's parent agency — 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." *Id.* § 44925(a). Congress has also directed the Secretary to develop a strategic plan for deploying explosive detection equipment at airport screening checkpoints, including the backscatter x-ray scanner equipment described below. *Id.* § 44925(b).

2. TSA's Use Of AIT Screening And Pat-Down Procedures

a. Advanced imaging technology creates an image of the full body, showing the contours of the body in order to reveal metallic and non-metallic objects on the body or concealed in an individual's clothing. Pistole Decl. ¶ 32. AIT machines address a "critical weakness in aviation security," *i.e.*, the "inability of

walk-through and hand-held metal detectors to screen for small threat items and non-metallic explosive devices." Pistole Decl. ¶ 32.

After "extensive laboratory and operational testing" of AIT, beginning in 2007, TSA approved two AIT systems for operational use and began deploying them in select airports. Pistole Decl. ¶¶ 22, 29. The "backscatter" system creates an image by bouncing very small amounts of x-ray off the individual being screened; the "millimeter radio wave" system bounces electromagnetic radio waves off the individual. Pistole Decl. ¶¶ 29-30.

In June 2008, the Senate Appropriations Committee acknowledged the importance of AIT as part of TSA's screening technology, and encouraged TSA to expand the use of AIT scanners to additional airports. S. Rep. No. 110-396 at 60 (2008). Following the attempted bombing on December 25, 2009, the President directed TSA to "[a]ggressively pursue enhanced screening technology, protocols, and procedures" to prevent similar attempts in the future. www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack. TSA subsequently determined, based on an analysis of available technology as well as intelligence, that AIT scanners are "the most effective method to detect threat items concealed on passengers, such as the non-metallic explosives" used in the December 25, 2009, bombing attempt. Pistole Decl. ¶ 24.

Accordingly, TSA determined in January 2010 that AIT should be deployed as

part of its primary screening program. Pistole Decl. ¶ 25. That decision is reflected in TSA's Standard Operating Procedures (SOP) for checkpoint screening, which was revised on September 17, 2010 to include procedures for use of AIT as a primary screening device and modifications to the pat-down procedures; those changes were implemented on October 29, 2010. Pistole Decl. ¶ 25. The SOP constitutes "Sensitive Security Information," *id.*, which cannot be publicly released. *See* 49 U.S.C. § 114(r); 49 C.F.R. Parts 15, 1520.

Currently, there are 486 AIT machines deployed at 78 airports nationwide. *See* www.tsa.gov/approach/tech/ait/faqs.shtm (providing list of airports at which AIT is deployed). TSA's goal is to deploy nearly 1,000 AIT machines by the end of calendar year 2011. Pistole Decl. ¶ 26. To date, however, AIT machines have not replaced walk-through metal detectors, and no security checkpoint uses only AIT screening technology. *See* Pistole Decl. ¶ 31.

b. TSA has determined that AIT machines are safe, efficient, and protect passenger privacy. The radiation exposure a passenger receives from screening by a backscatter machine is equivalent to the radiation exposure a passenger receives in approximately two minutes while flying on an airplane. Pistole Decl. ¶ 35. The Food and Drug Administration, the National Institute for Standards and Technology, and the Johns Hopkins University Applied Physics Laboratory have each conducted

independent evaluations of the radiation exposure of backscatter machines, and have concluded that the machines comply with established safety standards. Pistole Decl. ¶ 34. A millimeter wave AIT machine uses radio waves that are thousands of times less powerful than a cell phone transmission. Pistole Decl. ¶ 35.

In addition, rigorous privacy safeguards are in place to protect members of the traveling public who are screened using AIT machines. *See generally* Department of Homeland Security, Privacy Impact Assessment Update for TSA Whole Body Imaging, D. Ct. Dkt. 10-4. The AIT machines used by TSA do not produce photographs, nude or otherwise, nor do they produce clear images. Pistole Decl. ¶ 37. Backscatter machines used by TSA display body contours and outlines, rather than a detailed anatomical image. Pistole Decl. ¶ 37. Millimeter wave machines use imaging software that blurs the face of the person being screened. Pistole Decl. ¶ 37. All images are viewed in a walled-off location, by a transportation safety officer who never sees the actual passenger being screened. Pistole Decl. ¶ 38. The AIT machines used in airports cannot store, export, print, or transmit images, and transportation safety officers are prohibited from bringing cameras, cell phones, or other electronic recording device into the viewing room. Pistole Decl. ¶ 38.

c. Passengers who are being screened in a security lane that employs an AIT scanner are advised that they may decline to go through the scanner and opt

instead for a standard pat-down — the same procedure that is used when a person sets off an alarm at an AIT machine or a walk-through metal detector. Pistole Decl. ¶¶ 39, 43. The pat-down procedures help TSA find possible explosives, chemical weapons, and other dangerous items that otherwise might go undetected. Pistole Decl. ¶ 43.

TSA's standard pat-down procedures were changed following the December 25, 2009, attempted bombing, and after covert testing showing that, when "testers were able to get items through screening, it was largely because [transportation security officers] were not being thorough enough in the pat-downs." Pistole Decl. ¶¶ 44-46. The new pat-down procedures involve an inspection of the upper thigh and groin area to search for concealed items. Pistole Decl. ¶ 48. Pat-downs are conducted by an officer of the same gender as the passenger, and passengers may request private screening with a witness of their choice. Pistole Decl. ¶ 51. These procedures help to ensure that pat-downs are as minimally invasive as possible while still remaining effective. As TSA Administrator Pistole has noted, "[t]he prior pat-down procedures would not have detected the explosives" concealed on the body of the December 25, 2009, bomber. Pistol Decl. ¶ 49. Based on the changes to pat-down procedures and the use of AIT, TSA has detected numerous small, non-metallic concealed items. Pistole Decl. ¶ 50.

3. Prior Proceedings

Corbett brought this pro se action challenging under the Fourth Amendment TSA's use of AIT technology and its current pat-down procedures. *See* Complaint, D. Ct. Dkt. 1. Although Corbett alleges that he is a frequent air traveler, he does not allege that he has been screened with an AIT machine or subjected to a pat-down search under the current pat-down procedures. Instead, he alleges that he is experiencing "emotional distress at the thought of being subjected to the new screening procedures" at some unspecified point in the future. Complaint ¶¶ 3, 24-27.

Corbett moved in district court for an emergency injunction barring TSA from using an AIT scanner or its current pat-down procedures to screen him or any other passenger without probable cause or other reasonable suspicion. *See* Plaintiff's Emergency Motion for Temporary Restraining Order And/Or Preliminary Injunction, D. Ct. Dkt. 4. The district court denied the motion on the ground that there was no "true emergency," 11/17/10 Order, and also denied Corbett's subsequent motion for a permanent injunction, 3/30/11 Order. The district court adopted the recommendation of the magistrate judge, who reasoned that Corbett was unlikely to succeed on his claim because the district court lacked jurisdiction under 49 U.S.C. § 46110 and the challenged screening procedures were reasonable in light of "the grave threat posed by airborne terrorist attacks" and the "government's interest in the

safety of the passengers and the public at large." 3/2/11 Magistrate Report and Recommendation, at 6, 8-9. The magistrate judge also noted that Corbett could not establish irreparable injury because he "is free to avoid additional screening by electing not to travel by air," and that issuing an injunction barring the use of the challenged screening procedures would "cause substantial harm to the public" by compromising TSA's ability to prevent terrorist attacks. *Id.* at 9-10.

The district court subsequently granted the government's motion to dismiss the complaint, ruling that it lacked subject matter jurisdiction over Corbett's claim because it "squarely attacks a TSA order or regulation concerning airport security," and, under 49 U.S.C. § 46110, the exclusive mechanism for review is a petition filed with the U.S. Court of Appeals for the D.C. Circuit or this Court. 4/29/11 Order, at 3-4. Corbett has appealed the dismissal of his claim.

ARGUMENT

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). A party seeking an injunction "must establish that '(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction

would not be adverse to the public interest.'" *Forsyth County v. U.S. Army Corps of Engineers*, 633 F.3d 1032, 1039 (11th Cir. 2011) (quotation marks omitted). A court should not grant the "extraordinary and drastic remedy" of a preliminary injunction "unless the movant clearly establishes the burden of persuasion" for all four requirements. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (quotation marks omitted).

As we next show, Corbett has not established *any* of the four requirements for injunctive relief. Furthermore, his motion fails to comply with the Federal Rules of Appellate Procedure. Accordingly, the motion should be denied.

1. At the outset, Corbett's motion should be summarily rejected because, although he seeks an injunction pending appeal under Federal Rule of Appellate Procedure 8(a)(2), *see* Appellant's Motion for Preliminary Injunction at 3, he did not first seek that relief in district court as required by Rule 8(a)(1). His failure to move in district court for an injunction pending appeal, or to show that doing so would have been impracticable, bars the relief he seeks here. *See SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 38 (2d Cir. 1993).

2. In any event, Corbett cannot satisfy any of the four requirements for interim injunctive relief.

a. First, and foremost, Corbett has not shown a substantial likelihood of success on appeal. In order to satisfy this requirement, Corbett must demonstrate

both that the district court erred in dismissing his claim for lack of jurisdiction and also that he is likely to succeed on the merits of his Fourth Amendment claim. As the Supreme Court recognized in *Munaf v. Geren*, 553 U.S. 674, 690 (2008), a difficult jurisdictional question makes success on appeal even "more *unlikely* due to potential impediments to even reaching the merits" of the claim. Here, the district court correctly ruled that it lacked jurisdiction over his claim under 49 U.S.C. § 46110. In addition, the challenged screening procedures do not violate the Fourth Amendment.

Section 46110 vests exclusive jurisdiction in the courts of appeals to consider challenges brought to TSA orders concerning aviation safety. As this Court held in *Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993), construing a prior version of § 46110, only courts of appeals have jurisdiction to review an "order" relating to air commerce or safety. *Id.* at 518-519. The term "order" is construed expansively, *see id.* at 519, and includes an agency action that is "the definitive statement on the subject matter it addressed." *City of Alexandria v. Helms*, 728 F.2d 643, 646 (4th Cir. 1984). A plaintiff may not circumvent this exclusive review process by bringing a claim in district court that does not challenge the aviation order directly, but is "inescapably intertwined with a review of the procedures and merits surrounding the [federal agency's] order." *Green*, 981 F.2d at 521; *see also Merritt v. Shuttle, Inc.*, 187 F.3d 263, 270-71 (2d Cir. 1999).

As Administrator Pistole explained in his declaration, TSA updated the SOP

for checkpoint screening, which requires the expanded use of AIT machines and implements their use as part of TSA's standard security screening procedures, on September 17, 2010. Pistole Decl. ¶ 25. The SOP also incorporates revised pat-down procedures that are required to be implemented as part of TSA's standard security screening procedures. Pistole Decl. ¶ 46. The SOP was approved by the TSA Administrator and sets forth the mandatory procedures that passengers must follow and TSA screening officers must apply in screening passengers. *See* Pistole Decl. ¶¶ 25, 46. The SOP thus represents a definitive statement of agency policy issued under the authority of 49 U.S.C. § 44901(a), and constitutes an "order" within the meaning of § 46110(a). *See Redfern v. Napolitano*, 2011 WL 1750445, *5-*8 (D. Mass. May 9, 2011); *see also Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (security directive requiring airline passengers to present identification or face more intensive screening is "order" under § 46110).

Corbett's claim that AIT scanners and pat-downs are illegal screening procedures directly challenges the SOP. At the very least, his claim is "inescapably intertwined" with a review of TSA's order. *See Redfern*, 2011 WL 1750445, at *6. Accordingly, the district court lacked jurisdiction under § 46110.

Corbett asserts that the "question of the applicability of 49 U.S.C. § 46110 is wholly irrelevant" to whether he has shown a likelihood of success on appeal, because § 46110 confers jurisdiction on the court of appeals. Appellant's Motion for

Preliminary Injunction, at 3-4. But Corbett's failure to file a petition for review under § 46110 precludes this Court from exercising jurisdiction under that provision. *See Merritt*, 187 F.3d at 271 n.6. Furthermore, even if the district court had authority under 28 U.S.C. § 1631 to transfer the case to this Court for consideration, *cf. Gilmore*, 435 F.3d at 1133-1134, Corbett did not request transfer or show that it would be in the interests of justice.

Corbett also fails to show that he is likely to succeed on his Fourth Amendment claim. Although he asserts in his declaration filed in support of his motion for a preliminary injunction that he was asked to submit to scanning by an AIT machine in September 2010, he makes no similar allegation in his complaint and even his declaration does not assert that he submitted to such scanning, either by an AIT machine or a pat-down search. Corbett lacks standing to challenge screening methods to which he has not been subjected. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III.").

In any event, the challenged screening procedures are reasonable under the Fourth Amendment. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (the "ultimate measure of the constitutionality of a governmental search" is reasonableness). In judging the reasonableness of a checkpoint search conducted without individualized suspicion, a court balances "the gravity of the public

concerns" served by the search, the degree to which it "advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (quotation marks omitted).

The Supreme Court has recognized that the need for airport screening "to ensure public safety" can be "particularly acute." *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). The Supreme Court has also held that the government's interest in preventing substantial harm can justify suspicionless searches, and has identified as a good illustration of this principle "the practice of requiring the search of all passengers seeking to board commercial airliners, as well as their search of their carry-on luggage." *NTEU v. Von Raab*, 489 U.S. 656, 675 n.3 (1989). In *NTEU*, the Supreme Court quoted approvingly from Judge Friendly's opinion in *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, that 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 search so that he can avoid it by choosing not to travel by air.

489 U.S. at 675 n.3. And courts of appeals have consistently and repeatedly upheld specific airport screening procedures as reasonable under the Fourth Amendment. *See, e.g.*, *United States v. Aukai*, 497 F.3d 955, 962-963 (9th Cir. 2007) (en banc); *United States v. Hartwell*, 436 F.3d 174, 179-181 (3d Cir. 2006). As the en banc

Ninth Circuit recognized in *Aukai*, airport screening searches serve a "'special governmental need[], beyond the normal need for law enforcement,'" that justifies a search of all passengers without a warrant or individualized suspicion. 497 F.3d at 959-960 (quoting *Von Raab*, 489 U.S. at 665-666).

Under the Fourth Amendment balancing test, TSA's use of AIT and pat-downs to screen passengers is also reasonable. Preventing terrorist attacks on airplanes and passengers is a public concern of the utmost importance. *See, e.g.*, *Hartwell*, 436 F.3d at 179 ("[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance."); *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) ("It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft."); *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979) (noting the government's compelling interest in saving "hundreds of lives and millions of dollars worth of private property" by searching airline passengers for weapons or explosives).

AIT screening procedures and the current pat-down procedures further the public interest in preventing terrorist attacks. Corbett seeks to limit the TSA to using metal detectors to search passengers and their luggage. *See* Appellant's Motion for Preliminary Injunction, at 5. It is obvious, however, that deterring and preventing terrorist attacks requires screening for non-metallic weapons and explosives. *See* Pistole Decl. ¶¶ 17, 24; *Marquez*, 410 F.3d at 616 (recognizing need "for screening

procedures designed to detect non-metallic threats to air safety"). Since 9/11, attempted terrorist attacks against airlines have become more sophisticated, and have involved non-metallic explosives and other threats in the form of powders, liquids, and other non-metallic materials. Pistole Decl. ¶¶ 11-18, 21. Recent terrorist bombing attempts have involved small amounts of non-metallic explosives, which were not and could not have been discovered by a metal detector or the pat-down procedures then in effect. Pistole Decl. ¶ 15. Experts at TSA have determined that AIT scanners and the revised pat-down procedures, when utilized as part of a multi-layered security system, are the best means of defending against terrorist threats and addressing a "critical weakness in aviation security," the inability of metal detectors to identify non-metallic explosives. Pistole Decl. ¶¶ 17, 24, 32, 47, 49. That security judgment is entitled to deference. *See Winter*, 129 S. Ct. at 378-381.

Corbett speculates that, if screening officials do not pay attention or do not fully search a passenger's luggage, AIT machines and pat-down procedures may be less effective than other screening methods at protecting aviation safety. But speculation that current screening methods may not be fool-proof does not render those screening methods constitutionally unreasonable. Similarly, Corbett's misleading description of congressional testimony by an official of the Government Accountability Office regarding TSA's use of AIT does not support his claim. The GAO official noted statements by TSA officials that laboratory and operational

testing of AIT scanners was performed prior to the deployment of the machines, but observed that the results of the testing were classified and that "it remains unclear whether the AIT would have been able to detect the weapon [used in the attempted bombing on Dec. 25, 2009] based on the preliminary TSA information we have received." www.gao.gov/new.items/d10484t.pdf. This statement does not undermine the expert judgment of TSA officials that using AIT machines and modified pat-down procedures to screen for non-metallic explosives and other dangerous substances concealed on passengers will best enhance aviation safety.

Finally, AIT and the current pat-down procedures impose only a modest burden on individual liberty, in light of the significant privacy protections that TSA has put in place. As noted, the images produced by AIT machines do not show enough detail for personal identification, and are viewed remotely by an agent who never sees the passenger being screened and cannot store or record the images. Pistole Decl. ¶¶ 37-38. Since every passenger is potentially subject to AIT screening in airports where it is in use, there is virtually no "stigma attached to being subjected to search," and the public nature of the scan limits the possibility for abuse. *Hartwell*, 426 F.3d at 180. In addition, passengers are given advance notice that they may be subject to search using an AIT scanner, and are given a right to opt instead for a pat-down. Pistole Decl. ¶¶ 28, 39. "[N]otice and the opportunity to decline" are recognized as "as beneficial aspects of a suspicionless search regime because those features

minimize intrusiveness." *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006).[2]

As the Court in *Aukai* reasoned, airport searches are reasonable where they are "neither more extensive nor more intensive than necessary under the circumstances to rule out the presence of weapons or explosives." 497 F.3d at 962. Here, TSA has concluded that AIT — or the alternative of a pat-down search — is the most effective method to detect threat items on passengers, including metallic and non-metallic explosives. Pistole Decl. ¶¶ 24, 49. Because AIT and pat-downs are the only method by which TSA has concluded it may detect non-metallic explosives, and because of the substantial measures in place to protect individual privacy, the TSA's use of those screening methods is reasonable.

b. In addition to failing to show a likelihood of success on appeal, Corbett fails to show that he will suffer irreparable injury if an injunction is not granted. As Corbett himself emphasizes, *see* Appellant's Motion for Preliminary Injunction, at 8-9, AIT scanners are not used in every airport nor in all lanes in any given airport. As of December 1, 2010, AIT was used to screen no more than 8% of air passengers.

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[2] Corbett's motion appears to argue, without explanation, that millimeter-wave scanners are constitutionally permissible but back-scatter scanners are not. *See* Appellant's Motion for Preliminary Injunction, at 6. The images that the two technologies provide are substantially similar, *see* Pistole Decl., Exh. 3; www.tsa.gov/approach/tech/ait/how_it_works.shtm, and the Senate Appropriations Committee specifically directed TSA to employ both technologies. S. Rep. No. 110-396, at 60.

Pistole Decl. ¶¶ 26, 42. If Corbett does not wish to be subject to AIT, he "simply needs to find a checkpoint or an airport where the devices are not deployed." Appellant's Motion for Preliminary Injunction, at 8-9. Corbett can also fly from an airport that does not use AIT, or travel by other means such as automobile, bus, or train. That these alternatives may be less convenient does not establish irreparable injury. *See Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 813 (2d Cir. 1996); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (there is no "constitutional right to the most convenient form of travel").

Moreover, TSA has put in place significant privacy-protecting measures, and is exploring technological enhancements to AIT machines that would further address privacy concerns. Pistole Decl. ¶ 40. Corbett has not shown that agency implementation of AIT creates a significant risk of irreparable harm to members of the flying public, and his anecdotal assertions furnish no basis for shutting down this essential transportation security program. Furthermore, the government would not oppose expedition of this appeal.

c. The Supreme Court has stressed that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (quotation marks omitted). In this case, the balance of equities and consideration of the overall public interest in this case tip strongly in favor of TSA.

The Supreme Court has repeatedly held that the public interest in preventing terrorism and protecting national security is compelling. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."). In light of the recent placement of explosive devices inside printers transported on passenger and cargo airplanes in September 2010, the attempted bombing of an airliner on December 25, 2009, and other recent terrorist attacks or attempted attacks, the importance of the AIT program is readily apparent. Individuals who travel by airplane and other individuals who could potentially be harmed by a terrorist attack using an airplane have an extremely strong interest in maintaining the AIT system, given that TSA has determined that AIT is "the most effective method to detect threat items concealed on passengers." Pistole Decl. ¶ 24. The possible harm to third parties from enjoining the AIT program is very real, and the requested injunction is palpably contrary to the public interest.

In sum, under the relevant standard, no injunction pending review should be issued in the instant case. Corbett has failed to make the strong showing required for the extraordinary relief he seeks.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Respectfully submitted,

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JUNE 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2011, I filed and served the foregoing United States' Opposition to Appellant's Motion for Preliminary Injunction by sending it to the Court and to the following party by overnight delivery, postage prepaid:

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