UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

Jonathan Corbett, Appellant v. United States of America, Appellee	**No. 11-12426** **REPLY TO APPELLEE'S OPPOSITION TO APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION**

SUMMARY

Plaintiff-Appellant Jonathan Corbett ("CORBETT") filed a motion for preliminary injunction against Defendant-Appellee United States of America ("DEFENDANT"), to which DEFENDANT has filed objection. This is a reply to said objection.

REPLY

A. Case Law Discussed

DEFENDANT begins by bringing to this Court's attention that "every court to consider a similar motion" has denied it, citing two cases. The first, *EPIC*, is a case in which the plaintiff is not similarly situated. That plaintiff most directly challenges the procedures by which the TSA conducts rulemaking and its failure to hold public comment periods as required by law. The second case, *Blitz*, is a case in which the plaintiff is actually similarly situated, however the district court judge in that case erred in the same way that brings about this appeal – by ruling that he had no jurisdiction as per 49 USC § 46110.

The fact of the matter is that no court of which CORBETT is aware has ruled on the constitutionality of the nude body scanner and genital pat-down routines that the TSA has recently made ubiquitous in US airports. The DEFENDANT wishes to make an impression on this Court by

showing that TSA procedures are often upheld. *See* Appellee's Opp. To Motion for Prelim. Injunciton, pp. 14, 15, 16, 17, 18, 20. CORBETT does not oppose DEFENDANT's assertion that there is an acute need for airport security in light of very real threats of terrorism. However, CORBETT is asking this Court to review a search regimen that is far outside the boundaries of what any courts have allowed or even considered. It is nearly beyond belief that the TSA could even consider that nude imagery and genital probing of any traveler with no suspicion is acceptable, responsible, and within the limits set by our framers in the US Constitution.

B. Procedure Was Properly Followed

Rule 8 of the Federal Rules of Appellate Procedure provides for preliminary injunctions on appeal, and specifically authorizes the motion to be filed directly with the appellate court in the event that filing first in the trial court would be "impracticable." *See* Fed. R. Civ. P. 8(a)(2). DEFENDANT claims that there was no showing of impracticability. *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 10.

The US District Court from which appeal has been made has already determined – albeit erroneously – that it does not have jurisdiction over this case. The same Court has already denied a motion for preliminary injunction. Does DEFENDANT truly suggest that it is "practicable" to file in a court which does not believe it has jurisdiction and has thus already denied a similar motion?

If so, the DEFENDANT's suggestion is not supported by the case law it cites. In *Dunlap,* the moving party "ha[d] not pursued relief in the district court" and made "no explanation why the instant motion for a stay pending appeal was made in the first instance to [the appellate court.]" *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001), partially quoting *Hirschfeld v. Board of Elections*, 984 F.2d 35, 38 (2nd Cir.1993).

C. Standing is Clear

DEFENDANT spends a brief time questioning CORBETT's standing to bring this suit, however it is unmistakable that CORBETT has personal interest in the outcome of this suit. CORBETT has directly stated that the DEFENDANT has attempted to use its nude body scanners on him. *See* Decl. of Jonathan Corbett, paragraph 4.

Further, DEFENDANT estimates that 8% of passengers will be asked to go through the nude body scanners. *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 18. CORBETT estimates that he has flown no less than 100 flight segments within the last 4 years. *See* Decl. of Jonathan Corbett, paragraph 3. Should we assume the DEFENDANT's estimate to be true and CORBETT continues this average of at least 25 flight segments per year, there is over an 87% chance that CORBETT will be subjected to these procedures again within the next year, and a 99.98% chance over the next 4 years[1]. The idea that the DEFENDANT's actions, as complained of by CORBETT, will not likely affect CORBETT is unworthy of serious consideration.

D. This Court Has Jurisdiction, Whether It Is Original or Appellate

DEFENDANT is incorrect in its assertion that in order to show a likelihood of success on the merits, CORBETT must show that the district court erred in determining that it did not have jurisdiction. As thoroughly discussed in the original motion, it is undisputed and indisputable that this Court either properly has appellate jurisdiction, if CORBETT is correct that the district court erred, or original jurisdiction, if CORBETT is incorrect and the district court did not err. The fact that CORBETT has not *presently* motioned to have this case transferred to this Court has nothing to do with whether this case is likely to succeed *on the merits*.

Indeed, the DEFENDANT begrudgingly admits that this case could be transferred to this Court for original jurisdiction via 28 USC § 1631 by motion in the district court. What the

[1] Calculations: $1 - (1 - 0.08)^{25} = 87.6\%$, $1 - (1 - 0.08)^{100} = 99.98\%$

DEFENDANT fails to admit is that either this Court or the district court may, *sua sponte*, transfer this case under the same. *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006).

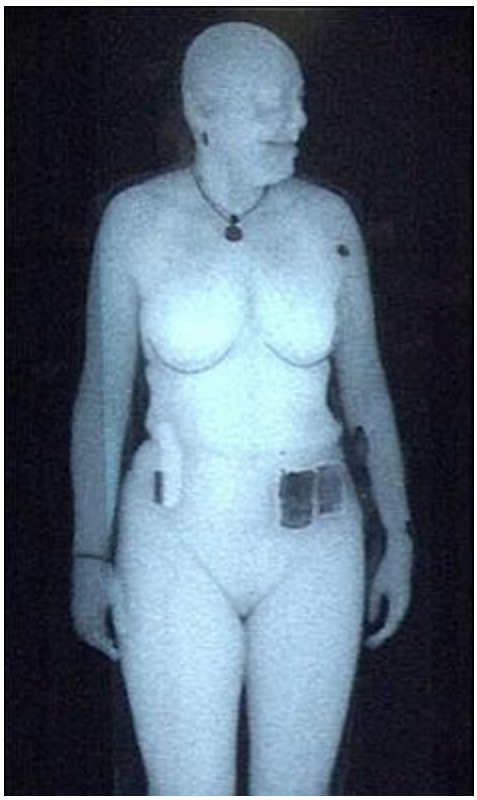
It is therefore assured that CORBETT can find jurisdiction in these Courts, and without even the requirement of filing a new case. His belief that jurisdiction is proper in the district court makes an appeal, rather than a motion for transfer, the proper action for CORBETT to take, but should not preclude CORBETT from obtaining preliminary relief while jurisdiction is figured out. The DEFENDANT and this Court may rest assured that in the unlikely event that CORBETT's appeal is denied by this Court (and, if necessary, the US Supreme Court), he will motion for the transfer. In the meantime, DEFENDANT cannot have it both ways by arguing that the appeal should be denied because the district court did not have jurisdiction, but the preliminary injunction should be denied because the appeals court does not yet have jurisdiction. Such an argument is not in the interest of justice and has nothing to do with the merits of this case.

E. The TSA Procedures Are Not Reasonable

CORBETT complains of two separate procedures that are often used in combination with each other: the nude body scanners and a pat-down procedure that involves direct contact with the genitals and other private areas of those being searched.

Starting with the nude body scanners, the DEFENDANT seeks to minimize the function of these machines by refusing to call the images "photographs" and by stating that the machines simply display "contours and outlines" and that the images are not "clear."

The DEFENDANT may argue semantics, however let us all be clear about what these images are and what they show. The image included on this page was a backscatter x-ray scanner test released by the TSA towards the beginning of their program. The TSA no longer releases images showing this level of detail now that it has seen the public outcry, however let there be no doubt that the TSA's equipment is capable of producing images of at least this level of detail, and unlike the woman in this image, travelers are forced to assume a position with their arms in the air and their legs spread. Photograph, image, pictograph, AIT – the name chosen by the TSA does not make it more or less compliant with the Fourth Amendment.



While the lawyers for the TSA seem to feel that this image is "unclear" and just a "body contour," the TSA's ground staff doesn't seem to agree. In May 2010, a TSA screener here in Miami was arrested for assaulting a co-worker after tests of the nude body scanner revealed to this co-worker that he had a "small penis," and said co-worker made fun of him for it. *See* District Court, Objection to Magistrate's Report & Recommendation, Exhibit A. Clearly, the level of detail of these scans is sufficient to cause embarrassment.

Is it a reasonable search to require members of the public to be subjected to nude imaging of this intensity (or any intensity)? Is it reasonable for our mothers, children, and spouses to be subjected to this kind of search?

The TSA's argument is not helped by the fact that these scanners are shown to be largely ineffective, as thoroughly discussed in the original motion. In their reply, DEFENDANT asks this court to give "deference" to the "expert judgment" of the TSA as to the efficacy of these machines. *See* Appellee's Opp. To Motion for Prelim. Injunciton, pp. 16 – 17.

However, the DEFENDANT has brought forth nothing to the table to show that they are deserving of said deference. Perhaps the reports that these "experts" allegedly employed by the TSA have produced are "sensitive security information" and therefore cannot be publicly filed here – but can't they be summarized or described? Can they at least be quantified? Can the TSA at least allege that they did a single study showing the efficacy of the nude body scanner program?

The DEFENDANT thows away CORBETT's interpretation of the GAO study he mentioned in the original motion. *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 17. Yet, the DEFENDANT still does not assert that the nude body scanners would likely have caught "the underwear bomber." The DEFENDANT justifies the nude body scanners by saying that the underwear bomber is an example of a non-metallic threat and that the nude body scanners detect things that are not metal, but let us discontinue the word games: Would the nude body scanners have caught this man or not? The GAO seems to be leaning towards the negative, and the TSA has done nothing to show otherwise.

The DEFENDANT throws away CORBETT"s discussions of weaknesses of the nude body scanners as "speculation." *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 16. CORBETT claimed that a metal detector would be better at detecting a weapon in a body cavity than a nude body scanner, that an explosive swab test would detect a terrorist who checked a bag full of explosives while a nude body scanner would not, and that a metal detector has an alarm that alerts a screener who might not be paying careful attention while a nude body scanner does not. *See* Appellant's Motion for Prelim. Injunction, p. 6. Yet, while throwing CORBETT's discussion away as speculation, DEFENDANT makes no attempt to correct CORBETT.

Indeed, the authors of the opposition to this motion are utterly confused as to the technologies in use and their purpose. A footnote at the bottom of page 18 of the opposition states that CORBETT's motion argues that one type of nude body scanner is acceptable while the other is unconstitutional. What CORBETT actually argued was that **passive** millimeter wave scanners are acceptable. *See* Appellant's Motion for Prelim. Injunction, p. 6. Passive millimeter wave scanners

are more similar to infrared goggles in that they emit no radiation and simply look at light being emitted in a different way than the human eye can. Like infrared goggles, they can be used from afar and do not require a passenger to walk through any contraption. *Passive millimeter wave scanners are not nude body scanners*. The nude body scanners employed by the TSA and complained of by CORBETT are more technically known as "backscatter x-ray" devices and "**active** millimeter wave scanners." See: "Passive Millimeter Wave Technology," http://www.millivision.com/.

The second procedure complained of by CORBETT is the new pat-down which necessarily requires contact with the genitals of the traveler being searched, as well as buttocks and breasts. DEFENDANT again plays with semantics but admits that this pat-down contains an "upper thigh and groin area" check. *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 7. Let us all be clear, as we all know what "upper thigh" and "groin" really mean: the TSA pat-down will necessarily touch your penis or vulva – no less than four times as their hands travel up each of your legs and onto your genitals from both the back and front of your body.

Is it a reasonable search to require members of the public to be subjected to such direct molestation in exchange for the ability to travel "freely?" Is it reasonable for our mothers, children, and spouses to be subjected to this kind of search?

Is there a boundary that the DEFENDANT would agree that they cannot cross? CORBETT must assume that a full body cavity search of every traveler (or a random subset) would help ensure that no weapons are on-board an airplane. Which intensity of sexual assault is the TSA's limit?

The DEFENDANT would like deference, but the American public does not and should not defer to anyone that demands to sexually assault them and their families. CORBETT does not presume that the men who wrote the US Constitution would have allowed a government agent to touch the breasts of their wives as a condition of boarding a ship, no matter how serious the threat of sabotage or piracy was. The Fourth Amendment that these men wrote was to protect against *exactly this variety of government invasion*.

F. Irreparable Harm Has Already Occurred And Mounts Daily

The DEFENDANT's "if you don't like it, don't fly," or fly from an airport far away that may not yet have nude body scanners but still may ask you to submit to a pat-down of your genitals, does not eliminate the harm caused to CORBETT and the public, but beyond that, is less credible as every day goes by. The TSA seeks not only to increase its count of nude body scanners in airports, but also seeks to increase the number of modes of transportation for which it performs body searches. The TSA has already begun searching passengers at train and bus stations across the country. *See* District Court, Objection to Magistrate's Report & Recommendation, Exhibits C, D, & E.

The DEFENDANT dismisses CORBETT's harm as an "inconvenience." While it is sickening that a violation of constitutional rights ever be described as a mere inconvenience, it is also non-compelling. If CORBETT were to plan a business trip using the DEFENDANT's suggestions, he would have to rent a car to drive over 100 miles to an airport with commercial flights but no scanners, pay exorbitant airfare in order to use this airport, have to find an airport at the destination and likely also drive over 100 miles using a rental car, pay exorbitant airfare in order to use that airport, and hope/pray that he is not randomly selected for a pat-down at these airports. While it is true that, in exchange for likely doubling his airfare, adding on hundreds of dollars in rental car costs, and adding several hours or more to each trip, it is possible that maybe CORBETT could avoid the nude body scanners, the threat of genital molestation is now in effect at every US airport with commercial flights. Every one, without exception.

If CORBETT were to instead increase his cost and time even further – to days rather than hours – by taking a train or bus, there is still no guarantee that the TSA will not be there with their blue latex gloves on and ready. However, again, even if CORBETT were to avoid a search, this is not just a mere inconvenience. Business trips require at least some level of expediency in travel. While living in Miami, by air, CORBETT could leave for New York in the morning, attend a

meeting, and be home in time for dinner; by train, the round-trip transportation time is approximately 52 hours. There is a point where "inconvenience" becomes "impossibility," and in 2011, denial of the ability to travel by air is past that point.

The government argument is essentially that if they are violating CORBETT's rights, CORBETT is legally obligated to take all of the above actions, including the accompanying harm to his business, to "avoid" being harmed. CORBETT disagrees strongly and suggests to this Court that the government is responsible for ensuring that it does not harm its citizens by infringing on their rights, and not the other way around.

G. For The Same Reasons (And More) That CORBETT Is Harmed, So Is The Public

CORBETT has detailed the harm to the public caused by the DEFENDANT in the original motion, however the DEFENDANT seems to suggest that that harm is outweighed by the "fact" that terrorists will blow up a plane if the government is not permitted to photograph and touch our genitals.

To begin this argument, the DEFENDANT erroneously claims that CORBETT "seeks to limit the TSA to using metal detectors to search passengers and their luggage." *See* Appellee's Opp. To Motion for Prelim. Injunciton, p. 15. Instead, CORBETT suggested a large variety of methods that the TSA could (and in some instances, does) use, including explosive-sniffing dogs, explosive trace detection (ETD) swabs, passive millimeter wave scanners, hand-held ("wand") and walk-through metal detectors, behavior detection officers, puffer machines, and the no-fly list. *See* Appellant's Motion for Prelim. Injunction, p. 6. CORBETT at no time in this case has ever discussed the screening of luggage, and does not oppose using x-rays for luggage screening.

The DEFENDANT then continues to justify these unreasonable searches with one example of a failed terrorist (the underwear bomber) who not only may not have been caught by these new invasive procedures, but also did not even board his plane within the United States! CORBETT

would like to remind the DEFENDANT and point out to the Court that the TSA has never caught a single terrorist, both with its former techniques and its new ones, in the entire history of the agency.

If the TSA intends to persuade this Court that the genital prodding and photography complained of is required by some immediate threat that would actually be reduced by these procedures, it must do so not by requesting deference, but by providing evidence. The fact of the matter is that while it is a certainty that every day tens of thousands of Americans are sexually assaulted at our airports by the DEFENDANT, it is only in the TSA's "speculation" that their new procedures would stop a terrorist.

CONCLUSION

CORBETT has shown compelling reasons to temporarily enjoin the actions of the DEFENDANT, both in his interest and the interest of the public. The DEFENDANT has failed to present any facts that support its argument that the public is better served by the new procedures than the old.

Dated: Miami, Florida
June 17th, 2011

Respectfully submitted,

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