Case No. 11-12426

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Plaintiff/Appellant

v.

UNITED STATES OF AMERICA,
Defendant/Appellee

On Appeal From the United States District Court for the Southern District of Florida
Case No. 10-CV-24106 (Cooke/Turnoff)

BRIEF OF APPELLANT JONATHAN CORBETT

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CERTIFICATE OF INTERESTED PARTIES

Plaintiff/Appellant Jonathan Corbett certifies that the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations known to him that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judges & Magistrates

- U.S. District Judge Marcia G. Cooke
- U.S. Magistrate Judge Ted E. Bandstra
- U.S. Magistrate Judge William C. Turnoff

Plaintiff/Appellant

- Jonathan Corbett

Defendant/Appellee

- United States of America, its agencies, and its employees, including:
    - U.S. Department of Homeland Security
        - Janet Napolitano
        - Transportation Security Administration
            - John Pistole

Attorneys for Defendant/Appellee

- U.S. Department of Justice
    - Wilfredo Ferrer
    - Douglas Letter
    - Sandra Schraibman
    - Sharon Swingle
    - Carlotta Wells
    - Tony West

Other Potentially Interested Parties

- The People of the United States of America
- Plaintiffs and Attorneys of Other Actions Regarding Similar Subject Matter
    - Roberts v. Napolitano, 10-CV-1966, DCD 11/16/2010
        - Marcus Roberts
        - Drinker Biddle & Reath LLP
            - Bradford Barron
            - Alexander Brodsky
            - John Ferman
            - Jason Gosselin
    - Fielder v. Napolitano, 10-CV-2878, COD 11/26/2010
        - Gary Fielder (*pro se*)
    - Redfern v. Napolitano, 10-CV-12048, MAD 11/29/2010

        - Jeffrey Redfern (*pro se*)
        - Anant Pradhan (*pro se*)
    - Blitz v. Napolitano, 10-CV-930, MDNC 12/03/2010
        - Jonathan Blitz (*pro se* for self, attorney for family)
        - Marla Tuchinsky
        - Minor Child E.B.
    - Durso v. Napolitano, 10-CV-2066, DCD 12/6/2010
        - Adrienne Durso
        - D. Chris Daniels
        - Michelle Nemphos
        - Minor Child C.N.
        - (attorneys same as Roberts v. Napolitano)
    - Ventura v. Napolitano, 11-CV-174, MND 01/24/2011
        - Jesse Ventura
        - Henson & Efron, P.A
            - David Olsen
            - Wesley Graham
- Corporations That Manufacture Nude Body Scanners
    - Rapiscan Systems and parent OSI Systems, Inc. (NASDAQ: OSIS)
    - L-3 Communications Holdings, Inc. (NYSE: LLL)

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant Jonathan Corbett requests oral arguments only in the event that this Court desires additional clarity than can be, or has been, provided to it in writing.

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STATEMENT OF JURISDICTION

Plaintiff/Appellant contends that the District Court had jurisdiction over the underlying dispute via 28 USC § 1331 as a result of the federal question created via the Fourth Amendment to the U.S. Constitution. *See also*: *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

Defendant/Appellee contends that District Court jurisdiction is foreclosed upon by 49 USC § 46110(a), which provides for exclusive jurisdiction for challenges to "final orders" of the TSA in the U.S. Court of Appeals. *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 1.

Plaintiff/Appellant disputes that the actions challenged in this lawsuit constitute a "final order," which is the basis of this appeal.

STATEMENT OF THE ISSUES

1. Whether the order dismissing Plaintiff/Appellant's lawsuit must be reversed due to the District Court ambiguously ruling either that the TSA procedures constituted an order under 49 USC § 46110, or failing to make a ruling.
2. Whether lack of finality, as evidenced by the Defendant/Appellee's recent admission in briefs filed in a separate case that the nude body scanner program constitutes an "interpretative rule" and "enforcement discretion" rather than a "binding rule," requires the order dismissing Plaintiff/Appellant's lawsuit to be reversed.
3. Whether the order dismissing Plaintiff/Appellant's lawsuit must be reversed due to the District Court failing to conduct the meaningful inquiry required to make a ruling, or in the alternative, due to the court granting a motion for which the moving party has not met its burden of proof.
4. Whether the order dismissing Plaintiff/Appellant's lawsuit must be reversed due to the controversy constituting a "broad constitutional challenge" for which the District Court maintains jurisdiction regardless of whether the TSA procedures constitute a 49 USC § 46110 order.
5. Whether the order dismissing Plaintiff/Appellant's lawsuit must be reversed due to the District Court ignoring constitutional issues which, in the event that

the TSA procedures constituted an order, would render 49 USC § 46110 unconstitutional.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

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.

II. Statement of the Facts

A. Background

On or about October 29th, 2010, the TSA implemented new policies requiring that all air travelers be subjected to screening using imaging devices, where available, that render the individual being screened nude using various types of radiation for visual inspection by a TSA employee. The TSA currently has approximately 500 such nude body scanners in place for active use in airports, and approximates that at this capacity, about 10% of travelers will be subjected to nude body scanners on a semi-random basis. *See* Dist. Ct., Deft.'s Opposition to Motion for TRO/PI, Exhibit A, p. 15.

Those who refuse to participate in this virtual strip search regimen, as well as those who cannot be cleared by the virtual strip search (because the nude body scanner shows an "anomaly" that can be caused by, for example, a medical device, clothing made of certain materials, or a piece of paper left in a pocket) are subject to a "pat-down" procedure that was "enhanced" as part of the aforementioned policy update. Also subject to these enhanced pat-downs are anyone who is sent through the traditional walk-through metal detector but sets off an alarm, and individuals who are physically unable to go through either the nude body scanners or metal detectors (such as those confined to wheelchairs). *See* Dist. Ct., Deft.'s Opposition to Motion for TRO/PI, p. 12.

The new pat-down procedure, by first-hand observation by CORBETT, by vast media reports, by countless first-hand accounts (including some recorded by video) on the Internet, and by admission of the TSA (using euphemisms such as "groin checks" and traveling up a passenger's leg until the screener meets "resistance"), necessarily involves the screener touching the penis and/or testicles of male travelers, vulva and breasts of female travelers, and buttocks of all travelers, generally four times per body part per search. *See* Dist. Ct., Deft.'s Opposition to Motion for TRO/PI, p. 13. Additionally, the pat-down calls for a "waistband check," in which the screener puts his or her hands inside the pants of the traveler via the waistband. The statements made in this paragraph have not been disputed by DEFENDANT.

The policy changes that resulted in the nude body scanners and "enhanced" pat-down that took effect on or about October 29th, 2010 were not made after a period of public comment, and in fact, have never been published in a publicly available document. *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 4, Footnote 1. The only place that these policy changes can be found is in an employee handbook that the TSA calls its "Screening Checkpoint Standard Operating Procedures" (SOP). *Id*. The TSA claims that this document cannot be released because it constitutes "Sensitive Security Information" (SSI). *Id*.

B. Procedural History

CORBETT, a frequent traveler who encounters the TSA on a regular basis, filed suit in U.S. District Court for the Southern District of Florida on November 16th, 2010 against DEFENDANT, complaining that the actions of the TSA violate his rights as guaranteed to him by the Fourth Amendment to the U.S. Constitution. DEFENDANT responded with a Fed. R. Civ. P., Rule 12(b)(1) motion to dismiss on February 22nd, 2011, claiming that the PROCEDURES constitute a "final order" of the TSA and therefore 49 USC § 46110 precluded the jurisdiction of U.S. District Court, in favor of the U.S. Court of Appeals.

On April 29th, 2011, U.S. District Judge Marcia G. Cooke dismissed CORBETT's complaint, with prejudice, granting DEFENDANT's motion to dismiss. Judge Cooke's four-page dismissal order asserts that CORBETT's "claim attacks a

TSA order." *See* Dist. Ct., Dismissal Order, p. 4. However, in the very next sentence, Judge Cooke acknowledges that CORBETT disputes this, and continues to state that she is unable to conduct "meaningful inquiry" and that ruling on CORBETT's dispute of the status of the PROCEDURES as an alleged order is "better addressed to the Eleventh Circuit Court of Appeals." Judge Cooke did not address CORBETT's specific arguments as to why the PROCEDURES do not constitute an order, and did not address CORBETT's constitutional arguments whatsoever.

CORBETT timely filed a Notice of Appeal, and hereby appeals on several grounds. A Fed. App. Civ. P., Rule 8(b) motion for preliminary injunction is also pending before this Court at this time.

C. EPIC v. Department of Homeland Security

Presently before the U.S. Court of Appeals for the District of Columbia Circuit is *Electronic Privacy Information Center v. Department of Homeland Security*, No. 10-1157 (05/28/2010). The controversy in this case also surrounds the TSA's nude body scanner program, though it focuses on the TSA's failure to uphold proper rule-making procedures.

In the instant case, the DEFENDANT claims that the SOP established the nude body scanner program and constitutes a "final order" (p. 12) that "represents the consummation of agency decisionmaking" (p. 12), "represents TSA's final decision"

(p. 4), and it "established obligations and 'fixes' a legal relationship" (p. 12). See Dist. Ct., Deft's Mem. In Support of Mot. To Dismiss, pp. 4, 12.

However, after making the above argument in an attempt to divest the District Court of jurisdiction, in *EPIC v. D.H.S.*, DEFENDANT takes the exact opposite position in an attempt to divest the Court of Appeals of jurisdiction as well. In its brief in that case, DEFENDANT states that the SOP constitutes an "interpretative rule" – an expression of an administrative agency's view on the law, rather than any kind of law or rule with the effect of law itself. See *Electronic Privacy Information Center v. Department of Homeland Security*, No. 10-1157 (05/28/2010), Initial Brief for Respondents (filed: 12/23/2010), p. 32[1]. DEFENDANT goes on to admit that the SOP does "not have the force and effect of law" (p. 33), "may be characterized accurately as a 'general statement[] of policy'" (p. 37), "does not have a present day binding effect" (p. 37), and "does not impose any rights and obligations" (p.37). *Id.*

D. Standard of Review

This Court reviews a district court's decision on whether to grant a Fed. R. Civ. P. Rule 12(b)(1) motion to dismiss *de novo*. See *Clark v. Riley*, 595 F.3d 1258, 1264

[1] This document is not attached due to its length. It is available on PACER, and the Plaintiff/Appellant would be pleased to provide copies to this Court upon request.

(11th Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

In reviewing an order granting a motion to dismiss, the appellate court must accept all well-plead facts as true and draw all reasonable inferences in favor of the appellants. *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996), *Washington Legal Found. v. Massachusetts Bar Found*, 993 F.2d 962, 971 (1st Cir. 1993). This is especially true of cases prosecuted *pro se*, such as this one, where courts are "required to construe liberally a *pro se* complaint." *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997).

SUMMARY OF ARGUMENT

A decision made by the TSA is not automatically an "order" under 49 USC § 46110 simply because it is written down. Rather, an order must follow (or in some circumstances, be immediately followed by) proceedings. These proceedings must create a meaningful administrative record which documents the facts surrounding the issue and the history of those proceedings such that appeal may be taken. There must be service effected on interested parties. And, most importantly, a review of the United States Code and relevant case law will show that "rule making" cannot be considered an order.

Orders are also subject to a test of "finality" – only "final" orders are subject to the exclusive jurisdictional limitations of 49 USC § 46110. This test includes the following factors that DEFENDANT cannot show apply: that the order imposes an obligation, denies a right, or fixes a legal relationship; that it provides a definitive statement of the agency's position; that it has a direct and immediate effect on the day-to-day business of the petitioner; and that it demands immediate compliance with its terms. The DEFENDANT was, in fact, able to show none of these qualifications. This fatal flaw in their motion to dismiss is driven home by the fact that their filings in *EPIC v. D.H.S.* plainly admit that the SOP does not meet these tests.

The "order tests" are further irrelevant to this action because broad constitutional claims are not subject to exclusive jurisdictional limitations even if they do have the effect of nullifying an order.

Lastly, the actions of the TSA in the instant case cannot be subjected to the exclusive jurisdictional limitations of 49 USC § 46110 because doing so would violate CORBETT's right to due process under the Fifth Amendment to the U.S. Constitution. Specifically, his right to gather and present evidence would be abridged to the point that a fair hearing would not be possible.

The District Court erred in 1) ambiguously either ruling that the TSA procedures constituted an order under 49 USC § 46110 or failing to make a ruling, 2) failing to rule that the tests for "finality" were not met, 3) failing to conduct the meaningful inquiry required to make the preceding ruling or, in the alternative, in granting the motion when the moving party had not proven grounds to do so, 4) ignoring and failing to apply the "broad constitutional challenge" rule, and 5) ignoring constitutional issues which, in the event that the TSA procedures constituted an order, would render 49 USC § 46110 unconstitutional.

ARGUMENT

I. Corbett Presented Arguments Which Clearly Preclude the PROCEDURES from Qualifying as a 49 USC § 46110 "Order"

For decades, only individualized proceedings, and generally quasi-judicial proceedings (in which an agency has accused a regulated individual of wrongdoing or, for example, debates the accuracy of an environmental impact assessment) have been treated as "orders." *See Boniface v. D.H.S.*, 613 F.3d 282 (D.C. Cir. 2010) (Appeal of denial of Boniface's request for waiver from individual TSA threat assessment following significant adjudicative proceedings); *Zoltanski v. F.A.A.*, 372 F.3d 1195 (10th Cir. 2004) (Appeal from civil penalty proceeding); *Tur v. F.A.A.*, 104 F.3d 290, 292 (9th Cir. 1997) (FAA revocation of Tur's "airman certificate" after hearings and appeal to NTSB); *Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995) (Suspended pilot certificate); *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) (F.A.A. mechanic's certificate revocation proceeding); *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993) (Revocation of Designated Pilot Examiner certificate); *Southern California Aerial Advertisers' Association v. F.A.A.*, 881 F.2d 672, 675 (9th Cir. 1989) (Adjustment of airspace usage rights after significant public proceedings, "FAA initiated an intensive review"); *City of Alexandria v. Helms*, 728 F.2d 643, 645 (4th Cir. 1984) ("In accordance with its regulations, the FAA prepared an environmental assessment of the test which it published on May 31, 1983, and

distributed to 200 people, including the Alexandria City Manager. Public comment on the assessment was received... and a response to that comment was published..."); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir. 1983) ("F.A.A. sent notice to appellant informing her of the proposed revocation of her Airman Certificate"); *New York v. F.A.A.*, 712 F.2d 806 (2nd Cir. 1983) (Denying the amendment of an operating certificate); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3rd Cir. 1998) (Plaintiff's repair work was reported as faulty). These proceedings allow for the introduction of evidence and the creation of an "administrative record," which consists of all documents, transcripts, and evidence related to the controversy. When an affected party disputes the final outcome of the agency proceedings, those proceedings are gathered together as the administrative record and challenged on appeal, rather than ignored and duplicated by a district court trial. *Suburban O'Hare Comm'n*, 787 F.2d 186, 192 (7th Cir. 1986) ("[T]he purpose of having agency decisions reviewed by courts of appeals is to avoid duplicative factfinding."). Indeed, a thorough read of 49 USC § 46110 will show that Congress established this law to allow administrative agencies to conduct proceedings without having those proceedings be thrown out and re-done simply because a lawsuit was filed in U.S. District Court.

We now contrast this to the instant case, where a group of administrators sat behind closed doors and came up with policy changes that affect not an individual, a

corporation, or an airport, but rather affect an entire nation. There were no "proceedings" and especially no individualized proceedings – a policy that affects the public could not be further from an individualized proceeding. There was no chance for anyone affected to submit evidence or register their complaints. See *EPIC v. D.H.S.*, Initial Brief for Respondents (filed: 12/23/2010), p. 23 (SOP modifications "exempt from notice and comment rulemaking"). If any "administrative record" exists, it consists solely of assertions by one party – the DEFENDANT – and not because of the failure of those opposed to the policy to present evidence, but because no procedure exists whereby one may submit opposing evidence. Indeed, no procedure even exists whereby one may learn that objectionable policy changes are under consideration. The policy changes that resulted, according to DEFENDANT's arguments in this case, became secret, unpublished law. See Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 4, Footnote 1 ("The SOP… cannot be publicly released"), p. 15 (The SOP "affects the rights of travelers").

The TSA could have instead chosen to follow standard rule-making procedures, whereby a proposed regulation is published in the Federal Register for public comment, proceedings are held, and an agency decision is made after consideration of all evidence received. If broadcasting security procedures to the public before implementation was a security concern for the TSA, they could have temporarily implemented them without proceedings and then later held the

proceedings. *See* 49 USC § 46105(c) (permitting emergency orders with proceedings held "immediately" after issuance). The TSA chose not to follow this path, and while determining their reasoning for this would be speculation, avoiding the public outcry that would surround hearings in which the government proposes manual and visual inspection of the genitals of the general public would seem to be a logical motivation.

Absent an administrative record, jurisdiction is forced to the District Court, as evidence must be taken in and the District Court is best suited to do so. "If the FAA's record were inadequate to permit review directly in the court of appeals, we would be inclined to find that the action, although final, is not an order…" *Suburban O'Hare Comm'n* at 193. The DEFENDANT has argued that "even a single letter" can suffice, however can one argue with sincerity that an issue as reaching as this can be decided based on review of a couple of pages? There have already been hundreds of pages filed in this case. Even if one wants to argue that a short administrative record would suffice, the DEFENDANT has submitted *not one sentence* of administrative record in the District Court.

A mere assertion that an administrative record exists is not enough to carry a motion, especially in light of the fact that the alleged administrative record, if any, has no relation to any proceedings and contains no facts submitted by opposing parties. The DEFENDANT has the burden of not only establishing that an administrative record exists, but that it is sufficient to allow for review. It is clear that

if any administrative record exists, it is incomplete to the point where it does not constitute a "record permitting informed judicial evaluation of [a] challenge." *Crist v. Leippe* at 804.

The result of the above is that DEFENDANT now asks the courts to consider anything written down by the TSA, regardless of proceedings, evidence, due process, or the Constitution, to be considered an "order." The test for what constitutes an "order" that DEFENDANT would like the Court to use can be summarized as, "Any written decision that affects someone and does not express that the decision is pending." This is supported neither by the text of the statute, nor any intent of Congress that CORBETT can find (or DEFENDANT has presented), nor decades of case law. Writing a final decision on paper does not automatically qualify that decision as a 49 USC § 46110 order.

Reading 49 USC § 46110 in the context of the rest of Title 49, Chapter 461 makes the purpose clear. Chapter 461 is entitled, "Investigations and proceedings," of which in the instant matter there were none. 49 USC § 46105(b) requires service of process on persons who are affected by "orders," yet CORBETT was never served. 49 USC § 46110(a) requires appeals by affected persons within 60 days – how exactly would one determine the starting point for that time limit when the offending rule was passed in secret and never published?

Indeed, the above makes the intent of Congress clear: 49 USC § 46110 was created to effect proceedings only. To interpret otherwise would be to render more than half of Chapter 461 meaningless, as most of the statute can only have meaning in the context of a proceeding. But, as further showing of Congressional intent, there is at least one other statute that uses the term "order" in the same context, and in that statute, 5 USC § 551(6), Congress provided a definition:

> "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing

Does DEFENDANT contend that modifying the SOP does not constitute "rule making," or rather does DEFENDANT contend that Congress intended that the term "order" must have a completely different meaning under 49 USC § 46110 than it does under 5 USC § 551(6)? Neither such contention is supported by statute, case law, or logic. If Congress intended a wholly different meaning, would it not have expressed that?

Instead of the TSA's "blank check" test, a better test for what constitutes an "order" has been used in the Eighth Circuit: an agency decision "constitutes a reviewable order only if it (1) is final, (2) contemplates immediate compliance, (3) is

public[2], and (4) is based on an administrative record that permits meaningful appellate review." *City of Pierre v. F.A.A.*, 150 F.3d 837, 840 (8th Cir. 1998). While lack of "finality" and "immediate compliance" aspects are discussed in the next section of this brief, the remaining factors are discussed above and clearly cannot be met.

DEFENDANT also argues that the challenge presented by CORBETT may be "inescapably intertwined" with the alleged "order" issued by the TSA and therefore must be subject to 49 USC § 46110. The phrase "inescapably intertwined" is a judicially-created expression. *Merritt v. Shuttle, Inc., 245 F.3d 182 (2nd Cir. 2001)*. With ample and sincere respect for the courts that have coined and furthered this phrase, this choice of words has led to an easily misunderstood and misapplied standard. At least one U.S. government defendant has been specifically called out by an appellate court for misapplication. *Ibrahim v. D.H.S.*, 538 F.3d 1250, 1255 - 1256 (9th Cir. 2008). DEFENDANT in this case also misapplies this standard, be it because they intend to confuse the issue or because they are confused by the issue.

[2] DEFENDANT, in its District Court filings, has taken particular objection to the fact that an order *must* be public, and has cited cases where non-public "security directives" were treated as orders. However, the statute that allows for the creation of "security directives," 49 U.S.C. § 114(l)(2), *specifically* exempts them from being public (allowing for issuance "without providing notice or an opportunity for comment"). The SOP is not created under 49 U.S.C. § 114(l)(2), does not (and has not been argued to) constitute a "security directive," and there exists no similar statutory exemption.

This phrase came about to prevent a plaintiff from forcing an appeal of a legitimate order to be heard by a district court, rather than an appellate court, simply by stating a constitutional grievance relating to the proceedings in question. *Merritt v. Shuttle, Inc.*

Contrast this to the instant matter where CORBETT is not inventing a constitutional claim in order to have a re-hearing of evidence, to circumvent the process of intra-agency proceedings, or to have a decision made against him overturned on constitutional grounds. There was no hearing of evidence, there was no process or proceedings to circumvent, and there was no decision made against CORBETT. There is nothing intertwined here: CORBETT is as directly as possible challenging the TSA's ability to use the PROCEDURES, whether or not the policy that establishes them constitutes an "order." The constitutional claim *is* the claim, not a means of collaterally attacking an order.

Further, in order for there to be "intertwinement," there must be an underlying order with which the challenge is intertwined. As discussed above, there is no underlying order: there were no proceedings, there was no administrative record to which CORBETT had an opportunity to contribute, there was no notice of the alleged "order" upon CORBETT (or anyone else, other than the DEFENDANT and its employees), and the alleged "order" constituted "rule making."

All of the above was presented to the District Court. See District Court, Plaintiff's Opposition to Defendant's Motion to Dismiss, Plaintiff's Objection to Magistrate's Report & Recommendation. However, the order dismissing the action addresses none of this, other than a sentence that acknowledges that CORBETT disputes that the PROCEDURES constitute an "order."

It is unclear to CORBETT whether Judge Cooke, in her dismissal order, is stating that she feels that the PROCEDURES constitute an "order" under 49 USC § 46110, or if she is stating that she is unable to determine whether or not they constitute an order. In the event of the former, the court erred by ruling that the SOP, a rule-making document lacking corresponding proceedings, meaningful administrative record, notice, and finality, constitutes an "order." In the event of the latter, the court erred by failing to rule that the SOP does not constitute an "order."

II. The Standard Operating Procedures Cannot Meet Tests for Finality, Even By DEFENDANT's Own Admission

"For an order to fall within the ambit of section 46110, it must be 'final.'" *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 11. The test for finality accepted by most courts is that it "imposes an obligation, denies a right, or fixes some legal relationship" as evidenced by the fact that it "provides a 'definitive' statement of the agency's position, has a 'direct and immediate' effect on the day-to-day business of the party asserting wrongdoing, and envisions 'immediate compliance

with its terms'" *Id; Crist v. Leippe* at 804; *Mace v. Skinner*; *Atorie Air v. F.A.A.*, 942 F.2d 954, 960 (5th Cir. 1991). *See also:* *C. & S. Air Lines v. Waterman Corp*, 333 U.S. 103, 113 (1948).

CORBETT repeatedly pleaded to the District Court that an affirmative determination of finality was not possible based on the filings before it. *See* Dist. Ct., Plaint. Opp. To Motion to Dismiss, pp. 4 – 8. It is impossible for a secret document to obligate anyone in America – if CORBETT were to "violate" the SOP, there would be no possible charge to levy against him. *Id,* p. 8. It is impossible for a secret document to provide CORBETT with a definitive statement of an agency's position – CORBETT wasn't provided with anything. *Id*, pp. 7, 8. It is impossible for a secret document to expect immediate compliance with its terms – how can one comply when one is not given the request? *Id*, pp. 7, 8. Finally, it is impossible that the SOP had an immediate effect on CORBETT as he is not a TSA screener. *Id*, p. 4.

The idea that CORBETT is somehow "bound" by the SOP is nonsense. Considerations of due process necessarily limit the persons who may be bound by an order. *Golden Gate Bottling Co. v. NLRB*, 414 U.S. 168, 180, 94. S. Ct. 414, 423 (1973). A TSA order cannot fix a legal relationship between the TSA and members of the general public.

DEFENDANT's arguments that the PROCEDURES constitute a final order are pure fantasy. An order, even if published, is unable to bind the general public, but the

idea that a secret document may impose obligations on and expect immediate compliance from the general public is absurd. Only in countries controlled by authoritarian regimes can laws be enacted in secret and without publication; in a free society such as ours, this possibility cannot and does not exist, and it is indeed a sad day when our government makes such arguments. However, the fact that DEFENDANT contradicts its filings in this case in *EPIC v. D.H.S.* is an admission not only that none of these factors are, in fact, present, but is also evidence of bad faith.

Perhaps it is possible that different attorneys working within the U.S. Department of Justice have not synchronized strategies and it was unintentional that they misled either (or both) the District Court in this case or the Court of Appeals in *EPIC*, and therefore CORBETT provides here a clear visual: a side-by-side comparison of what DEFENDANT has argued in both cases:

Filing by United States Government in Corbett v. US Motion to Dismiss	**Filing by United States Government in EPIC v. D.H.S. Initial Brief**
The SOP is not "tentative, open to further consideration, or conditional on future agency action." (p. 11)	"TSA's decision to [nude body scanners]… is an exercise of enforcement discretion … rather than imposition on itself of a binding rule." (pp. 31 - 32)
The SOP "represents TSA's final decision directing the use of [nude body scanners], as well as the revised procedures for the pat-down." (p. 4)	"The non-binding nature of TSA's decision is further highlighted by the fact that the agency has the discretion to determine whether and where to deploy [nude body scanner] units and at what rate to do so." (p. 39)

"[T]he SOP established obligations and 'fixes' a legal relationship … sets forth the rules which airline passengers must follow" (p. 12)	"If the Court determines that TSA has issued a rule here, that rule would constitute an interpretive rule … interpretive rules 'do not have the force and effect of law.'" (pp. 32 – 34)
"[T]he Screening Checkpoint SOP represents a definitive statement of agency policy that … **affects the rights of travelers**" (p. 15)	The SOP "may be characterized accurately as a 'general statement[] of policy' … does not have a present-day binding effect, that is, it **does not impose any rights and obligations**" (p. 37)
"The security screening procedure challenged here – i.e., the Screening Checkpoint SOP, which requires passengers to be screened via [nude body scanners] or standard pat-downs – is an order that falls within section 46110's exclusive jurisdictional channel to the court of appeals."	The "decision to use [nude body scanners] as a means of primary screening ... is not contingent on the existence of this alleged rule [the SOP]." (p. 36)
"The SOP is a final order of TSA" (p. 15)	TSA's decision to deploy [nude body scanners] as a primary screening method simply reflects the agency's interpretation of an existing statute" (p. 37)

The statement that the use of nude body scanners "is not contingent on the existence of" the SOP is especially alarming, considering that DEFENDANT's entire argument in its motion to dismiss in the instant case rested on its allegation that CORBETT's complaint challenges the SOP. If the SOP does not establish the nude body scanner program, then the argument regarding whether the SOP is an order is wholly irrelevant.

The District Court contends that it was "unable to conduct any inquiry as to the finality of the Screening Checkpoint SOP" because it has not been provided a copy.

See Dist. Ct., Dismissal Order, p. 4. CORBETT contends here that based on the arguments presented in the District Court, it is clear that under no circumstances can the PROCEDURES constitute an order. However, as Judge Cooke felt that reviewing the SOP was required in order for her to make a decision, was she thereafter suggesting that she has no authority to order DEFENDANT to produce this document for *in camera* review? Authority aside, DEFENDANT offered to produce the SOP. *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 4, Footnote 1. Other courts have ordered, without opposition from their U.S. government defendant, *in camera* production of the SOP. *Thomson v. Stone*, 05-CV-70825(DT), 2006 WL 770449 (E.D. Mich., Mar. 27, 2006). It should be noted that the SOP is not even a classified document, but rather is administratively labeled (by the TSA, with all other parties required to "take their word for it") as a "sensitive" document. *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 4, Footnote 1 ("The SOP… constitutes Sensitive Security Information").

The District Court erred by failing to expressly determine that the PROCEDURES and the policies which created them fail to meet the test for finality.

III. DEFENDANT's Motion to Dismiss Cannot Be Granted Since The Court Was Not Persuaded That CORBETT Challenged a "Final Order"

Generally, under the well-pleaded complaint rule, subject matter jurisdiction is determined from the face of the complaint, and not from any defense. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987). On a Fed. R. Civ. P. Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, any ambiguities concerning the sufficiency of the claims must be resolved in favor of the non-moving party. *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003).

While the plaintiff in a federal civil action carries the burden of establishing subject matter jurisdiction, that burden has been satisfied by raising a federal question, as CORBETT clearly did. Once that happened, "clear and convincing" evidence was required to dislodge the presumption that the PROCEDURES are subject to judicial review. *Kucana v. Holder*, 130 S. Ct. at 829-30. *See also:* *Breen v. Peters*, 474 F. Supp. 2d 1, 4, 8 (D.D.C 2007) (government did not meet its burden of proof to rebut plaintiff's established jurisdiction).

CORBETT's complaint, on its face, clearly established federal question jurisdiction pursuant to 28 USC § 1331 and the doctrine established in *Bivens v. Six Unknown Narcotics Agents* regarding constitutional claims. *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971). Virtually any claim brought directly under

the U.S. Constitution, even and especially one asking for review of agency action, provides a basis for federal question jurisdiction. *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 56, 113 S. Ct. 2485, 2496 (1993) (28 USC § 1331 "confer[s] jurisdiction on federal courts to review agency action").

DEFENDANT does not challenge that CORBETT's complaint meets the requirements of federal question jurisdiction under 28 USC § 1331 and *Bivens*. Rather, DEFENDANT claims that it meets the narrow criteria for exemption from this jurisdiction as per 49 USC § 46110. *See* Dist. Ct., Deft.'s Mem. in Support of Motion to Dismiss, p. 1. It must prove that assertion using clear and convincing evidence. *Kucana v Holder, Breen v. Peters.*

To allow a motion to dismiss that asserts the existence of evidence that the moving party has in its possession, but refuses to file and is unavailable to the Court and non-moving party, along with a claim that this secret evidence qualifies for a jurisdictional exemption, and then to place on the non-moving party the burden of proving that the secret evidence does not qualify for the exemption before even allowing discovery, would be patently absurd. It is entirely the requirement of DEFENDANT to prove to the Court that CORBETT is challenging a final order, and also to prove that in doing so CORBETT is compelled to present his case only in the Court of Appeals. If DEFENDANT cannot do this, the motion must be denied.

Judge Cooke states in her dismissal order that she was unable to determine if the instant case is challenging a final order. *See* Dist. Ct., Dismissal Order, p. 4. This is essentially a ruling by the District Court that DEFENDANT has failed to prove that this case qualifies for an exemption from the subject-matter jurisdiction that was clearly established in the complaint. At that point, the options available to the District Court were to continue its inquiry as to whether or not CORBETT was challenging the final order or to deny the motion as having failed to prove that the jurisdictional exemption exists.

CORBETT asserts that it was proven beyond any level of doubt that the PROCEDURES in no way constitute an order and in no way can be considered "final." The District Court was less persuaded by CORBETT's arguments, but not persuaded enough by DEFENDANT's arguments to rule that the PROCEDURES did constitute a "final" order. The District Court therefore erred by granting the motion while simultaneously ruling that a prerequisite to the success of the motion was lacking. DEFENDANT does not simply get "the benefit of the doubt" because it is the U.S. government.

IV. Broad Constitutional Challenges Are Not Subject to Statutory Exclusive Jurisdictional Limitations

Many courts (although not the U.S. Supreme Court) have read 49 USC § 46110 "expansively." *Atorie Air, Inc. v. FAA* at 960. This does not mean that 49 USC §

46110 has unlimited authority, however. Courts, including this Court and the U.S. Supreme Court, have clearly drawn the line that jurisdictional statutes cannot limit "broad constitutional challenges" to government policy. *McNary v. Haitian Refugee Center* (498 U.S. 479, 497 [1991]) (affirming 11th Cir. Ruling).

Mace v. Skinner was one of the earlier courts to decide that "broad constitutional challenges" to orders covered by this specific statute are to be reviewed by the district courts as new claims rather than by the circuit courts as appeals. The Supreme Court confirmed this in *McNary*. DEFENDANT has sought to minimize the value of both *McNary* and *Mace*, but the Supreme Court re-iterated itself in *Thunder Basin Coal Co. v. Reich* (510 U.S. 200, 213 [1994]). The case law at this point is clear: a broad constitutional challenge is "not subject to judicial review in the court of appeals but rather is reviewable by the district court." *City of Los Angeles v. F.A.A.*, 239 F.3d 1033, 1037 (9th Cir. 2001).

As "broad constitutional challenges" is a judicially-created standard that is defined neither by the legislature nor particularly clearly by the judiciary, we are left here with the question of whether this action falls towards the "individualized proceeding challenges" end of the spectrum that is clearly within 49 USC § 46110, or the "broad constitutional challenges" end of the spectrum which is clearly outside of 49 USC § 46110.

It is difficult to imagine how one could possibly make a complaint which falls more towards a "broad constitutional challenge" than the one in question here. The relief that CORBETT is requesting would require changes to the way approximately 60,000 TSA employees do their daily job in the screening of approximately 2,000,000 daily air travelers, based on an accusation that the policies in effect by DEFENDANT are violating the constitutional rights of the public on a daily basis. A judgment for CORBETT does not effect a personal exemption, but rather prevents the TSA from implementing its policy on the general public. The relief requested could not be "more broad" nor the challenge "more constitutional."

If CORBETT's case does not constitute a "broad constitutional challenge," then what does? If the SOP "ordered" the institution of racial profiling at security checkpoints, would the resulting Fourteenth Amendment claim somehow be "broader" than CORBETT's Fourth Amendment claim? If the SOP "ordered" that criticism of the TSA in any way will result in a fine, would the resulting First Amendment claim somehow be "broader" than CORBETT's Fourth Amendment claim?

If Congress intends to limit the jurisdiction of broad constitutional challenges, it must do so explicitly. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 2053 (1988), *Demore v. Hyung Joon Kim*, 538 U.S. 510, 517,

123 S. Ct. 1708, 1714 (2003). The Court reiterates this in *McNary*: language must be explicit to preclude "generic constitutional and statutory claims." 49 USC § 46110 discusses review of orders, and even if DEFENDANT would like an "expansive" reading of what an "order" might be, that expansive reading must stop at the boundary of constitutional claims, as constitutional claim jurisdiction can only be limited by explicit language that is clear without "expansive" reading.

There is good reason that broad constitutional challenges must be in a district court: evidence must be gathered. A claim that the government is violating one's constitutional rights is not some form of "appeal." It is a claim that must be reviewed *de novo* by the courts, with all the rights that accompany that – discovery, witnesses, trial by jury, *etc*. *McNary v. Haitian Refugee Center* at 497.

The "broad constitutional challenge" rule applies to the CORBETT's claim, and the District Court erred in both failing to address this claim and failing to apply it.

V. Constitutional Issues Preclude 49 USC § 46110 From Being Applied to the Instant Case

It is a core of our system of jurisprudence that "for every wrong, there is a remedy." "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Marbury v. Madison, 5 U.S. 137, 162 (1803). The Constitution codifies this in the Fifth Amendment, which allows for no one to "be deprived of life, liberty, or property, without due process of law."

This axiom applies particularly to claims between a citizen and his or her government, and most especially government in the form of a non-elected administrative agency. "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States." *United States v. Nourse*, 9 Pet. 8, 28-29 (1835).

This philosophy is not dead in modern times. In 1946, the Supreme Court decided *Bell v. Hood* (327 U.S. 678) which held that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." In 1971, the Supreme Court decided *Bivens v. Six Unknown Federal Narcotics Agents* (403 U.S. 388 [1971]), which in essence held the government accountable for constitutional violations

regardless of whether or not Congress or the States had passed legislation allowing for such accountability.

CORBETT's constitutional issue with the application of 49 USC § 46110 to his case is that doing so will exclude him from being able to fully gather and present facts in support of his case. CORBETT does not doubt that this Court could provide him with at least as learned and fair judges as the District Court, however all U.S. Courts of Appeals lack discovery, a witness stand, oral arguments by right, and trial by jury. This is by design: the U.S. Court of Appeals is a court meant to hear appeals, not meant to facilitate the marshaling of new facts.

CORBETT has the constitutional right under the Fifth Amendment to a fair trial in which he is allowed to gather and present facts. Exclusive appellate court jurisdiction "is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims" because appellate courts "lack the fact finding and record-developing capabilities of a federal district court." *McNary v. Haitian Refugee Center* at 497.

In the instant case, CORBETT never had any opportunity to gather or present facts. There were never any proceedings which he could have attended. Indeed, CORBETT did not know, and could not have known, about the rule-making done by the TSA until long after it was already completed.

Instead, DEFENDANT insists that CORBETT must challenge the PROCEDURES on appeal. During such an appeal, DEFENDANT would be able to submit to the Court any set of "facts" that it chooses and claim that it constitutes the administrative record. These facts, written by potentially anonymous "experts" hired by DEFENDANT and devoid of any challenging facts submitted by any opposing party, will be claimed to be entitled to "deference."

A judicial proceeding in which one party is denied fact-finding is a farce, as made clear by the U.S. Supreme Court in *McNary*, though it needs not nine learned men to point out a fact so obvious. Were the PROCEDURES to be treated as a 49 USC § 46110 "order," however, that would be precisely the result.

The dismissal order signed by Judge Cooke fails to address the constitutional issues raised herein, which were properly raised before the District Court, whatsoever. The District Court erred in failing to address these issues, and in failing to rule that application of the exclusive appellate jurisdiction of 49 USC § 46110 to the instant case would be unconstitutional.

CONCLUSION

For the above reasons, the dismissal order of the District Court must be reversed, it must be ordered that either the PROCEDURES do not constitute an "order" under 49 USC § 46110, that this case constitutes a broad constitutional challenge that is exempt from 49 USC § 46110, and/or that the exclusive jurisdictional limitations of 49 USC § 46110 are unconstitutional as applied to the instant case, and the case must be remanded for proceedings not inconsistent with this Court's ruling.

Dated: Miami, Florida
July 7th, 2011

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 8,650 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
July 7th, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served Defendant United States of America this **Brief of Appellant Jonathan Corbett** July 7th, 2011, to Sharon Swingle, via electronic mail at the following address: Sharon.Swingle@usdoj.gov.

Dated: Miami, Florida
July 7th, 2011

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