Case No. 13-14053

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Plaintiff/Appellant

v.

TRANSPORTATION SECURITY ADMINISTRATION,
UNITED STATES OF AMERICA,
ALEJANDRO CHAMIZO,
BROWARD COUNTY, and
BROWARD SHERIFF'S OFFICE
Defendants/Appellees

On Appeal From the United States District Court for the Southern District of Florida
Case No. 12-CV-20863 (Lenard/O'Sullivan)

PETITION FOR REHEARING *EN BANC* AND REHEARING BEFORE THE PANEL

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CERTIFICATE OF INTERESTED PARTIES

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 Joan A. Lenard
- U.S. Magistrate Judge John J. O'Sullivan

Appellant

- Jonathan Corbett

Appellees

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

        - Sharon Swingle
        - Andrea W. McCarthy
        - Rupa Bhattacharyya
        - Stuart F. Delrey
        - Wilfredo Ferrer
- Broward County, its agencies, and its employees, including:
    - Broward County Aviation Department
        - Robert L. Teitler
    - Broward Sheriff's Office

Non-Employee Attorneys for Appellee

- Counsel for Broward Sheriff's Office
    - Robert D. Yates

FED. R. APP. P. 35(b) STATEMENT

Appellant is not represented by counsel and is therefore exempted from the requirement to provide a Fed. R. App. P. 35(b) statement by 11th Cir. R. 35-5(c).

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

The United States Supreme Court has been clear that "exceptions to the warrant requirement must be 'few in number and carefully delineated.'" *Fernandez v. California*, 571 U.S. ___ (2014) (Ginsburg, J., *dissenting*) (*citing U.S. v. U.S.D.C. E.D. Mich.*, 407 U.S. 297, 318 [1972]). Appellant has asked the Court to clearly delineate the boundaries of administrative searches – a warrantless, causeless, consentless mode of search – in the context of aviation security screening. Instead, the panel has given the government *carte blanche* to do nearly anything it pleases at an airport security checkpoint.

In particular, while every other circuit to address the issue has limited the scope of the U.S. Transportation Security Administration's searches to that which is likely to find instrumentalities of destroying an airplane (*i.e.*, weapons and explosives), the panel of this Court has bestowed upon the TSA the ability to search for anything the TSA can reasonably argue is suspicious, from literature that the TSA doesn't like to credit cards in another person's name. This novel approach does not comport with the Fourth Amendment and any valid precedent relating thereto.

The Court has also exempted TSA screeners from liability under the Federal Tort Claims Act against a plain reading of the law in which Congress specifically and explicitly placed liability on those who are "empowered by law to execute searches."

The Court did this by making a finding that the TSA's screeners, who hold the title "Transportation Security Officer," are not "officers," a conclusion has not been drawn by any other court in the country of which Appellant is aware.

Finally, the Court failed to use this circuit's precedent for determining whether a tort claim is "derivative" of another tort claim for which sovereign immunity applies. The panel affirmed the district court's ruling that Appellant's claims for invasion of privacy and intentional infliction of emotional distress were derivative of other claims given sovereign immunity, noting that they are "based on the same underlying conduct." Panel Opinion, p. 19. But "same underlying conduct" is not the standard; rather, the standard is whether the immune conduct is "essential to" the claim in question. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001).

STATEMENT OF THE ISSUES MERITING PANEL REHEARING

In the district court, Appellant had two state law claims, among others, addressed by the panel: a civil conspiracy charge and Florida constitutional tort. Appellant addressed these issues in great detail in both the district court and in his briefs before this Court. It was, and still is, Appellant's belief that the district court's dismissal of his civil conspiracy charge significantly tightens the pleading requirements even beyond the heavy burden placed upon a plaintiff by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). It was, and still is, Appellant's belief that the district court clearly

misunderstood state law as to whether the Fla. state constitution's search & seizure protections create a cause of action similar to a federal *Bivens* claim.

The panel, however, dismissed these well-articulated claims *in a footnote*, stating tersely, "We agree with the district court's cogent analysis of these claims." Panel Opinion, p. 31, fn. 11. Respectfully, Appellant paid his filing fee to this Court, took the time to argue these claims, and complied with the Court's rules throughout the proceedings. These claims are non-frivolous and, having presented what he believes to be at least a colorable argument in support of them, Appellant humbly requests that the Court take the time to address these claims in detail.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION

Appellant filed suit in the U.S. District Court for the Southern District of Florida against the five Appellees over an unlawful search and seizure followed by the unlawful concealment of evidence of the incident in the form of false denials and fabrications in public records responses. In short, the TSA, with the assistance of the Broward Sheriff's Office, detained Appellant because he objected to their request to touch his genitals during the screening process, and proceeded to conduct a course of searches that exceeded the boundaries of the administrative search doctrine. After the incident, the TSA, with the assistance of Broward County, attempted to hide their actions by lying in response to a public records request.

The district court dismissed all of Appellants claims either on immunity grounds or for failure to state a claim. Final judgment dismissing the suit was entered on September 3rd, 2013. A timely Notice of Appeal was filed along with this motion on September 6th, 2013. After briefing, a three-judge panel of this Court affirmed the judgment of the district court, without oral arguments, on June 4th, 2014. Appellant timely files this motion for re-hearing.

STATEMENT OF THE FACTS

On August 27th, 2011, Appellant arrived at Fort Lauderdale–Hollywood International Airport with the intent of boarding a commercial airline flight. After reaching the TSA security checkpoint, a TSA employee directed Appellant to undergo screening using a nude body scanner. A nude body scanner is a device that uses electromagnetic radiation to create a detailed image of a person with their clothing removed. Appellant finds this screening to be morally and constitutionally objectionable and declined to consent to screening using nude body scanners.

The TSA allows travelers to "opt-out" of screening via nude body scanner and offers alternate screening to travelers who cannot or choose not to participate in the virtual strip search described above. This alternate screening consists of a full-body pat-down. Appellant was offered this alternate screening and consented to it with the

qualification that the TSA screener may not touch his genitals. This condition was unacceptable to the TSA screener, as well as to that screener's supervisor.

A higher-level TSA supervisor, Appellee Alejandro Chamizo, was contacted via phone and arrived at the scene, confirming the screener and supervisor's position that Appellant must consent to having his genitals inspected. Chamizo then directed his subordinates to conduct a retaliatory search on Appellant's baggage, which had already been screened via x-ray and would not have been touched again had Appellant cooperated with the invasive pat-down requested. The search of Appellant's two small bags extended for approximately half an hour and included search techniques far beyond anything required to determine if they contained weapons or explosives. In particular, the screeners read pages of books, inspected credit cards, and reviewed identification cards.

While the retaliatory search was in process, Chamizo summoned local law enforcement, Appellee Broward Sheriff's Office ("BSO"), and began to threaten Appellant with arrest and forcible search. Chamizo, without Appellant's consent, provided BSO with Appellant's identification documents for the purpose of running a criminal records check. After BSO indicated that they would not be arresting Appellant and the retaliatory bag search was completed, Chamizo informed Appellant that he was being ejected from the checkpoint and would not be able to fly. Appellant left the airport, missing his flight.

Subsequent to the incident described above, Appellant submitted public records requests to Appellees TSA and Broward County, seeking documents related to the incident and CCTV camera footage of the incident. All parties denied possession of CCTV video, and TSA refused to provide any documents. Since CCTV cameras were plainly visible at the checkpoint, Appellant pressed the matter of who owns those cameras, and eventually, Broward County relented that they own the cameras, but were directed to lie about the existence of video by the TSA. Broward County claimed that the TSA had deemed the footage to be "Sensitive Security Information" ("SSI"), 6 U.S.C. § 114, and that not just the contents of the footage, but its mere existence, was SSI.

ARGUMENT

I. Defining The Scope of Administrative Searches Is An Issue of Great Importance

"Exceptions to the warrant requirement must be 'few in number and carefully delineated.'" *Fernandez v. California*, 571 U.S. ___ (2014) (Ginsburg, J., *dissenting*) (*citing* *U.S. v. U.S.D.C. E.D. Mich.*, 407 U.S. 297, 318 [1972]). An administrative search is one such exception, and is defined as a search conducted for specific public safety purposes, rather than general law enforcement objectives. *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*). The only thing that separates a Fourth Amendment-compliant administrative search from an unconstitutional search without a warrant is this fine line; otherwise, any search could simply be labeled "administrative" and entirely circumvent the Fourth Amendment.

The TSA conducts these administrative searches on a massive scale, to the tune of nearly 2 million searches per day[1]. Many of these travelers must either tolerate the TSA's intrusion upon their bodies and property or face significant consequences: business travelers may otherwise lose their job and distant family members may no longer be able to see each other. It is obvious to anyone who has ever been in an airport that air travel is a significant trigger of anxiety for many, including Appellant, and for Appellant and many others, uncertainty with how the checkpoint search will go can

[1] Source: http://blog.tsa.gov/2014/01/tsa-blog-year-in-review-2013.html

contribute to that. These two million passengers per day, including Appellant, deserve to understand precisely what the TSA can and cannot do at the checkpoint. That is not to say the TSA need be required to publish its internal security procedures, but there should be a clear delineation between lawful and unlawful conduct, and in order to achieve that, the full Court should closely examine these issues.

II. There Exists A Conflict Between This Circuit and Other Federal Courts Regarding the Lawful Scope of TSA Searches

The land comprising the Ninth Circuit contains four of the top 10 busiest airports in the country[2] and therefore has had more opportunity to address the boundaries of administrative searches at airports than any other circuit. Over 40 years ago, that Court first clearly articulated that the specific public safety objective of airport security screenings is "to prevent the carrying of weapons or explosives aboard aircraft." *United States v. Davis*, 482 F.2d 893, 908 (9th Cir.1973). This has not changed over those 4 decades, as when that Court re-visited the issue *en banc* in 2007, it declared that a TSA search must be "no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [and must be] confined in good faith to that purpose." *Aukai* at 962; *see also United States. v. McCarty*, 648 F. 3d 820 (9th Cir. 2011) ("the constitutional bounds of an airport

[2] Airports: Los Angeles, CA (LAX); San Francisco, CA (SFO); Las Vegas, NV (LAS); Phoenix, AZ (PHX). Source: Federal Aviation Administration, List of Commercial Airports based on CY2013 Enplanements.
http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/media/preliminary-cy13-commercial-service-enplanements.pdf

administrative search require that the individual screener's actions be no more intrusive than necessary to determine the existence or absence of explosives that could result in harm to the passengers and aircraft").

Although perhaps no other circuit, save for this one in the instant case, has addressed the boundaries of TSA searches so squarely, district courts across the country have uniformly adopted the position set forth by the Ninth Circuit in *Aukai*, *Davis*, and *McCarty*, including, ironically, the district court in the instant case[3]. See *Corbett v. TSA*, 12-CV-20863, Dismissal Order (Nov. 16th, 2012, D.E. #69), p. 11; *see also United States v. Fofana*, 620 F.Supp.2d 857 (S.D.O.H. 2009); *Welch v. Huntleigh USA Corp.*, 2005 WL 1864296, at *5 (D. Or., Aug. 4, 2005) ("[TSA] screeners are able to conduct consensual administrative searches for items which are prohibited entry into the airport's sterile areas."); *Hernandez v. United States*, 12-CV-03165 (D. Colo., Feb. 28th, 2014) (*concurring with* Aukai*); Vanbrocklen v. United States*, 08-CV-312 (N.D. N.Y., April 7th, 2010) (*concurring with* Aukai). Further, the panel's reliance on *George v. Rehiel* (738 F. 3d 562, 3rd Cir. 2013) misses the mark: in that case, the panel held that the TSA *need not ignore* the contents of documents that they have seen in the course

[3] The district court adopted the view of *Auaki* that the search must be limited to weapons or explosives, and then puzzlingly concluded that the screener may have thought that reading Appellant's book may have helped him to find explosives (Dist. Ct. Dismissal Order, D.E. #69, p. 14). The panel in this case did not discuss *Aukai* at all, but adopted different logic: that reading Appellant's book may have uncovered that he is an extremist ("a TSA screener could have reasonably factored the contents of a book possessed by a passenger into the totality of the circumstances relevant in determining whether the passenger presented a security threat," p. 15). This conclusion is in direct contrast with *Aukai*.

of their search. *George* at 586. It does not stand for the panel's proposition that the TSA may *actively seek to read* the contents of documents carried by travelers[4,5].

III. The District Court's FTCA Interpretation Fails to Follow the Supreme Court's Rules of Construction and Relies on the Fading Proposition that Airport Screenings Are "Consent Searches"

The government has argued, and the panel has agreed, to limit the scope of the exception within 28 U.S.C. § 2680(h) to law enforcement officers. This limitation requires the violation of two of the most basic canons of construction. First, the Supreme Court mandates that "in interpreting a statute, a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 254 (1992). This flows

[4] This should not be read as a concession by Appellant that the TSA need not ignore the contents of lawfully possessed documents that they have incidentally come to learn. While the TSA obviously not need to ignore, for example, a document indicating the traveler was about to blow up a plane, Appellant's position is that the Third Circuit went too far in ruling that the TSA may consider Arabic language flashcards as sufficient to provide reasonable suspicion to detain a traveler. The TSA's job is not to identify suspicious individuals, but rather to determine whether an individual has or has not a dangerous item in his possession. However, this question need not be reached, as the complaint alleges not that the TSA incidentally saw his documents during a lawful checkpoint screening, but that they actively sought to read his documents and that such active reading of his documents is unconstitutional.

[5] Nor does the text of the statute that implements these searches, nor any other source of federal law of which Appellant is aware. *See*, for example, 49 U.S.C. § 44902, which mandates searching for "a dangerous weapon, explosive, or other destructive substance," as opposed to suspicious reading material or other "suspicious" items.

from the canon of "plain meaning." *Caminetti v. United States*, 242 U.S. 470 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."). Second is the canon of "superfluous language. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 122 S.Ct. 441 (2001).

The exact text before the Court for parsing is as follows:

> *For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.*

28 U.S.C. § 2680(h).

The district court found that the "limited, consensual searches" performed by the TSA do not count as "searches" in the context of § 2680(h). Dist. Ct. Dismissal Order, p. 17 (*citing* *Weinraub v. United States*, 2012 WL 3308950, at *7 [E.D.N.C., Aug. 13, 2012]). The panel, on the other hand, found that TSA screeners are not "officers of the United States." Panel Opinion, p. 23.

Both of these readings fail to apply these basic canons of construction. The text of the statute clearly says "searches" with no words suggesting that "searches" should

be interpreted narrowly or otherwise limited. "Search" is a fairly well understood term in both the legal community and the lay community, and encompasses those times when the government inspects your person or belongings, as clearly a TSA screener does. The district court ignored the plain meaning of the word "searches" and continued on to ascertain legislative intent, which fails to follow the Supreme Court's mandate that when the text is clear, "this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank* at 254[6]. *See Armato v. Doe*, 11-CV-2462 (D. Ariz., May 15th, 2012) ("There is no explanation how the FTCA's statutory language is ambiguous and, absent such an explanation, the resort to legislative history appears unwarranted.")

Likewise, interpreting "officers" to only mean "law enforcement officers" as the panel did renders superfluous the words "investigative or." If Congress had intended § 2680(h) to apply only to law enforcement officers, it would have said so, but as it included "investigative or," those words must be given meaning. The panel concluded that since Congress used the words "employee" sometimes and "officer" other times within the statute, it must have meant different things by those words. There is no canon of construction that prevents Congress from using synonyms and intending them

[6] The district court did not explicitly find, but did cite *Pellegrino v. TSA*, 2014 WL 1489939 (E.D. Pa., Apr. 16th, 2014) which found, that the word "searches" was ambiguous. Dist. Ct. Dismissal Order, p. 20. The court in *Pellegrino* reasoned, without any reason found in the statute to do so, that maybe Congress intended "searches" not to "encompass all Fourth Amendment searches." There was no reason for the *Pellegrino* court, nor any other court, to question Congress' clear wording and instead inquire as to whether it "really meant" all searches. The text said "searches," Congress meant "searches," not "some searches."

to have the same meaning, but even if one wants to interpret the word "officer" to mean something more specific than "employee," one need not interpret it so strictly as to mean "law enforcement officer" only. The panel's decision also does not comport with the fact that even the lowest level TSA screeners wear a badge and hold the job title "Transportation Security Officer."

Finally, both the panel and the district court include in their reasoning that, TSA searches being "consent searches" somehow means that the searches are less than the search intended by § 2680(h). There is no compelling explanation as to why consent searches would be excluded from § 2680(h)'s ambit. *Armato*, p. 6 (consent "does not address the relevant question of whether TSA agents are 'empowered by law' to conduct such searches"). But, at any rate, while many older rulings refer to airport searches as consent searches, recent case law from across the country shows a shift towards holding that TSA searches are not based on consent. *Aukai* at 960, 961 (distinguishing between "consent" and "election to attempt entry into the secured area."); *Armato*; *George* at 575 (noting 9th Circuit precedent); *Pellegrino*, fn. 4 (noting 9th Circuit precedent); *Vanbrocklen* (concurring with *Aukai*).

IV. The Panel Failed to Use This Circuit's Precedent for Determining "Derivation"

During both the district court proceedings and in proceedings before the panel, Appellant has clearly articulated this circuit's precedent regarding determining whether a claim is derivative of a barred claim, but both courts have refused to use this precedent

with no explanation as to why they decided to deviate from established law. Plaint. Opp. to Deft. USA & TSA's Motion to Dismiss, D.E. #38 (July 9th, 2012), p. 9; Appellant's Brief, pp. 29, 30.

Instead of using this circuit's precedent, the district court found that the 2 tort claims "hinge on the same underlying governmental conduct" and are therefore derivative. Dist. Ct. Dismissal Order, p. 19. The panel likewise found that the claims "are based on the same underlying conduct." Panel Opinion, p. 19. Again, Appellant re-iterates: whether a claim "hinges on" or is "based on" another claim is *not* the standard set forth by this Court. The standard is whether a claim is "essential to" another claim. *O'Ferrell* at 126. This standard produces an entirely different result, and Appellant implores the Court to use the *O'Ferrell* test or explain that *O'Ferrell* is no longer good law in this circuit.

V. Appellant's State Law Claims Should Be Fully Addressed

Appellant has well-plead state law claims in his operative complaint before the District Court. Plaint. First Am. Compl., p. 14. Two of those claims in particular, Counts 19 & 20 (civil conspiracy) and Count 21 (Fla. Const. unreasonable search) were affirmed in dismissal by the panel in mere footnotes without explanation.

The issue behind the civil conspiracy claim was whether Appellant met the plausibility requirements set forth under Supreme Court precedent for pleadings set by, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The issue at hand behind the Florida constitutional claim was whether that particular part of the Florida constitution is "self-

executing." Appellant has advanced thorough arguments in front of both the district court and the panel as to why those claims should be allowed to proceed.

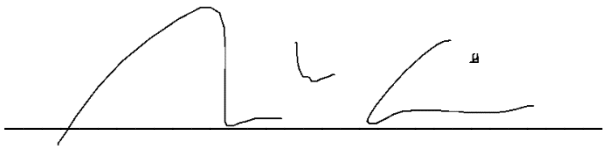
Appellant understands that many issues were presented in this case and that the Court has limited time and resources to devote to resolving its case load. However, in affirming the district court without providing a detailed explanation as to why, the panel has deprived Appellant of meaningful ability to appeal the decision. Appellant respectfully requests that the panel re-review these two claims and provide an analysis as to the rationale behind their decision.

CONCLUSION

For the above reasons, the issues above should be re-heard by the full court and the panel.

Dated: Miami, Florida
July 15th, 2014

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 this **Petition for Rehearing En Banc & Rehearing Before The Panel** on July 15th, 2014, on:

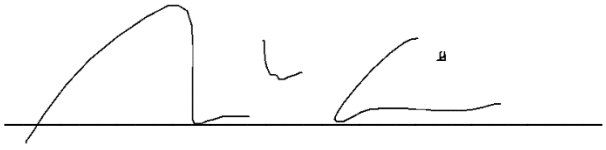
Appellees United States of America, Transportation Security Administration, and Alejandro Chamizo to Sharon Swingle, via electronic mail at the following address: Sharon.Swingle@usdoj.gov.

Appellee Broward County to Robert Teitler via electronic mail at the following address: RTEITLER@broward.org

Appellee Broward Sheriff's Office to Robert Yates via electronic mail at the following address: RDYPA@hotmail.com

Dated: Miami, Florida
July 15th, 2014

Respectfully submitted,



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Opinion Sought to be Reheard