Case No. 12-15893

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Petitioner
v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent

Petition for Review of an Order of the
Transportation Security Administration

PETITION FOR REHEARING *EN BANC*

Jonathan Corbett, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
Phone: +1 (305) 600-0410
E-mail: jon@professional-troublemaker.com

CERTIFICATE OF INTERESTED PARTIES

Petitioner 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 of Related Cases

- U.S. Chief Circuit Judge James L. Edmondson
- U.S. Circuit Judge Stanley Marcus
- U.S. Circuit Judge William Prior
- U.S. Circuit Judge Beverly Martin.
- U.S. Circuit Judge Gerald B. Tjoflat
- U.S. Circuit Judge Peter T. Fay
- U.S. District Judge Marcia G. Cooke
- U.S. Magistrate (Ret.) Ted E. Bandstra

Petitioner

- Jonathan Corbett

Respondent

- U.S. Department of Homeland Security
    - Janet Napolitano

    - Transportation Security Administration
        - John Pistole
- U.S. Department of Justice
    - Andrea W. McCarthy
    - Anne R. Schultz
    - Carlotta P. Wells
    - Jesse Grauman
    - Joseph W. Mead
    - Laura G. Lothman
    - Mark B. Stern
    - Rupa Bhattacharyya
    - Sandra M. Schraibman
    - Sharon Swingle
    - Stuart F. Delrey
    - Wilfredo Ferrer
    - William Turnoff

Additionally, there is significant public interest in this petition, as two million travelers are subject to the practices of the Transportation Security Administration herein reviewed on a daily basis, as well as countless travelers at international airports across the world as a result of pressure placed on foreign countries to meet American standards in aviation security.

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

Petitioner 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

By a 2-1 vote, the panel ruled in a published opinion that Petitioner's petition is time-barred due to a non-jurisdictional 60-day limit established by Congress for challenges to "orders" of the Transportation Security Administration (TSA). In doing so, they: 1) found that the "reasonable delay" exception attached to the 60-day limit is not triggered by a timely challenge as to jurisdiction when proper jurisdiction was altogether unclear, as later described herein, and 2) ignored Petitioner's assertion that a time limit on prospective constitutional injuries is unconstitutional.

By the same 2-1 split, the panel then "does what the Supreme Court, our Court, and many other courts have cautioned not to do:" it ruled on the constitutional issue presented as the merits of Petitioner's case in an "in the alternative" ruling. Panel Opinion, p. 27 (Martin, J, *dissenting*). In reaching the constitutional issue at the heart of Petitioner's case – whether the screening methods employed by the TSA are unconstitutional under the 4th Amendment – the panel did so prematurely not just because of the tradition of avoiding constitutional questions when cases can be decided on other grounds, but for a more important reason. As Petitioner argued in his briefs, and vigorously during oral arguments, the Court did not have sufficient facts upon which to make a decision because Petitioner was never, but should have been, afforded an opportunity for fact-gathering.

Finally, the majority opinion has imposed upon Petitioner a gag order that prohibits him from discussing sensitive documents that were accidentally leaked by the government

and were made publicly available on the Internet by international media, as well as ordered him not to disclose government documents simply because they are claimed to be "copyrighted" or "proprietary." There is no basis for such a gag order, and it must be overturned.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION

Petitioner began his litigation in the U.S. District Court for the Southern District of Florida, Case No. 10-CV-24106, on November 16th, 2010, with a complaint alleging that certain TSA screening practices were unconstitutional; to wit: the "nude body scanner" program and "pat-down" program. A "nude body scanner" is a device which peers under the clothing of an individual to image his or her nude body, while a "pat-down" is a police-style frisk whereby a screener uses his or her hands to touch the entirety of an individual's clothed body.

The TSA moved to dismiss for lack of subject matter jurisdiction, stating that the screening procedures constitute an "order" of the TSA, and TSA orders must be challenged, due to 49 U.S.C. § 46110, only in the U.S. Courts of Appeals, and the district court granted that motion on April 29th, 2011. Because the TSA's "order" was implemented in a secret "Standard Operating Procedures" manual, because of numerous discrepancies between the procedures described in the chapter containing § 46110 and the procedures used by the TSA to promulgate the "order," and because of constitutional due process issues that arise when hearing constitutional challenges in the courts of appeals rather than the district courts,

Petitioner challenged this dismissal in the appellate courts. Petitioner's appeal to this Court, Case No. 11-12426, was filed on May 27th, 2011, and the Court affirmed dismissal on February 27th, 2012. A timely petition for *certiorari* to the U.S. Supreme Court was then filed on May 22nd, 2012, which was denied on October 1st, 2012.

Having exhausted his opportunity to challenge the status of the TSA's search procedures as that of an "order," Petitioner re-filed his original claim in this Court on November 16th, 2012. This Court, *sua sponte*, asked the parties to address whether § 46110's 60 day time-limiting clause barred Petitioner's challenge. Jurisdictional Question, Dec. 5th, 2012. This issue was separately briefed and the Court decided to carry the issue with the case. Order, Feb. 22nd, 2013. The issue was again briefed along with the merits and extensively argued in oral arguments on June 4th, 2014. On September 19th, 2014, the Court ruled, in a 2-1 split, that § 46110 was non-jurisdictional, but nevertheless time-barred Petitioner's challenge because although Petitioner's *original* challenge in the district court was within 60 days of the issuance of the TSA's order, the date Petitioner *re-filed* his case was not within 60 days, and the majority opined that Petitioner's challenge to the status of the decision as an "order" did not trigger the "reasonable delay" exception established by Congress or any kind of implied equitable tolling. The majority also issued an "in the alternative" ruling on the merits, stating that the challenged search was constitutional. The dissenting judge objected to both the panel's decision that the petition was time-barred and to reaching the merits of a constitutional question when the case could be resolved without.

STATEMENT OF THE FACTS

Petitioner has thoroughly discussed the underlying facts in this case, some of which are Sensitive Security Information and filed under seal, in his briefs . Rather than re-produce them here and subject this document to redaction, Petitioner refers the Court to his opening brief, pp. 6 – 30.

However, this petition asserts error by the panel entirely on the law; therefore, while a review of the facts may provide interesting background, the Court may find such a review to be unnecessary for the resolution of the issues presented herein.

ARGUMENT

I. Any Delay In Filing Was "Reasonable" Under § 46110

49 U.S.C. § 46110(a) provides that challenges to TSA orders must be "filed not later than 60 days after the order is issued" except if "there are reasonable grounds for not filing by the 60th day." The panel, with guidance from the Supreme Court's in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), noted that this time limit is non-jurisdictional. Panel Opinion, p. 2. The only other circuit to consider this since *Henderson* is in accord. *Avia Dynamics v. F.A.A.*, 641 F.3d 515, 519 (D.C. Cir. 2011).

Notwithstanding finding that the statute is non-jurisdictional, the panel nevertheless imposed an extraordinarily narrow interpretation of the word "reasonable." The reason why this case was not filed within 60 days is that Petitioner began his challenge in U.S. District

Court. *Corbett v. U.S.*, Case. No. 10-CV-24106 (S.D. Fla., 2010). At that time, Petitioner had no way of knowing he was challenging an "order" because the order was issued in secret, and therefore quite reasonable assumed that his constitutional claim belonged in the same forum that nearly every other constitutional claim is began. Petitioner's Reply to Jurisdictional Question, Dec. 19th, 2012, pp. 2, 3. It was not until the government filed a motion to dismiss his district court case that Petitioner had any idea whatsoever that an order existed.

Respondent has argued, and the panel has agreed, that once the TSA filed that motion to dismiss, Petitioner was on notice of the order. Oral Arguments, June 4th, 2014, at 39:09 – 39:55[1]. But, Petitioner was never provided a copy of the order and certainly had the right to challenge whether this secret TSA ruling met the statutory definition of an order under § 46110, as well as the constitutionality of § 46110 as applied to his case. The panel's solution to this problem is that Petitioner should have filed an identical petition in both the district court and the Court of Appeals at the same time. Panel Opinion, p. 14. Petitioner should have been aware of this solution, the panel reasoned, based on a single case in this circuit decided 23 years ago. *Id.*, *citing* *Greater Orlando Aviation Authority v. F.A.A.*, 939 F.2d 954 (11th Cir. 1991).

The dissent notes that *Greater Orlando* stands for the filing of appeals seeking *different* remedies concurrently, and is not on point for the conclusion that *identical* appeals

[1] For the convenience of the Court, Petitioner has produced a non-official transcription of the oral arguments held on June 4th, 2014, and has attached them as Exhibit A.

should be filed concurrently within the federal court system. Panel Opinion, pp. 28, 29. The dissent also calls out cases where this Court and the Supreme Court have admonished that concurrent petitions are a waste of court resources. *Id*., p. 29, *citing Maharaj v. Sec. for Dep't of Corr.*, 432 F.3d 1292, 1307 (11th Cir. 2005); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982).

Petitioner is not an attorney. He does not have training in civil procedure. He has neither a Lexis-Nexus nor a Westlaw account. He is a *pro se* litigant; a citizen attempting to petition his government for redress, an American tradition. As Petitioner stated when asked during oral arguments why he did not file concurrent petitions, "As a *pro se* litigant, I was not aware that that was an option to me in 2010." Oral Arguments, June 4th, 2014, at 4:05 – 4:10. Even the panel did not unanimously agree on what was the correct procedure here. When the correct procedure cannot even be agreed upon by three judges of this Court, it is entirely "reasonable" that a *pro se* litigant may have inadvertently neglected to follow it. The majority even stunningly concedes that the correctness of their ruling is "debatable." Panel Opinion, p. 23.

Despite being a *pro se* litigant, Petitioner has consistently and without delay pursued this case since filing in the district court in 2010. *See also* Panel Opinion, p. 29 (Martin, J., *dissenting*) (Petitioner's pursuit "methodical and diligent"). Petitioner's original district court complaint was filed a mere 3 weeks after the TSA's order went into effect. *Corbett v. U.S.*, Case No. 10-CV-24106 (S.D. Fla., Nov. 16th, 2010). He timely appealed the district court's refusal of jurisdiction to the Court of Appeals, followed by a timely petition for

certiorari by the Supreme Court. *Corbett v. U.S.*, Case No. 11-12426 (11th. Cir. 2011) (notice of appeal filed May 27th, 2011); *Corbett v. U.S.*, 133 S. Ct. 161 (2012). Once the jurisdictional issue was settled by the Supreme Court's denial of *certiorari*, Petitioner promptly filed this action in this Court, well within 60 days of the Supreme Court's ruling.

Petitioner's challenge to the proper jurisdiction for his case was far from frivolous or "quixotic," as evidenced by the fact that about half a dozen other cases were filed against the same TSA order in district court by attorneys across the country who had the same belief as to jurisdiction. See, for example, *Blitz v. Napolitano*, Case No. 10-CV-930 (M.D. N.C.); *Durso v. Napolitano*, Case No. 10-CV-2066 (D.C.D.); *Redfern v. Napolitano*, 10-CV-12048 (D. Mass.); *Ventura v. Napolitano*, Case No. 11-CV-174 (D. Minn.). The government aggressively briefed the appeal of jurisdiction in this Court as well as in the half dozen other cases, even going to oral arguments on the issue in at least two of them. *Blitz v. Napolitano*, Case No. 11-2283 (4th Cir.), Oral Arguments, Oct. 25th, 2012; *Redfern v. Napolitano*, Case No. 11-1805 (1st Cir.), Oral Arguments, April 3rd, 2013. This is clearly not a matter of Petitioner being obtuse, but rather the signs of a legitimate controversy over jurisdiction.

Finally, the matter could have been a non-issue had the district court completed its obligations under 28 U.S.C. § 1631, which requires federal courts to transfer jurisdiction when a civil action is filed in the wrong court, whenever it is "in the interest of justice." Section 1631 provides that upon such a transfer, the receiving court will consider the case as filed on the date it was filed with the incorrect court. There exists no reason, of which Petitioner is aware, that it would not have been "in the interest of justice" to make such a

transfer, and no court has found that it would not have been. Indeed, the failure to issue such a transfer has thoroughly delayed justice and unnecessarily brought us here today. Other courts have similarly held that "[a] compelling reason for transfer [under § 1631] is that the ... case... will be time-barred if his case is dismissed and thus has to be filed anew in the right court." *Phillips v. Seiter*, 173 F. 3d 609 (7th Cir. 1999).

Though Petitioner did not request such a transfer in the district court, the wording of the statute implies that such a transfer must be made *sua sponte*, and the use of the word "shall" indicates that it is not discretionary beyond the determination of the interest of justice, which the district court never made. Further, Petitioner did indeed ask for such a transfer when this Court ruled on jurisdiction in the original case. *Corbett v. U.S.*, Case No. 11-12426 (11th Cir.), Cross Motion for Reconsideration, March 16th, 2012. The Court denied this request as untimely, even though no timeframe is established under § 1631. *Corbett v. U.S.*, Case No. 11-12426 (11th Cir.), Order, April 27th, 2012. The *en banc* court may, indeed, resolve this whole issue by overturning its own April 27th, 2012 ruling. *Id*.

"Reasonable," in a non-jurisdictional statute, does not mean that there are "extraordinary circumstances" or any such high bar, but rather, by a plain reading, requires only that there be *a reason* for the delay. For these reasons, there are indeed "reasonable grounds" to allow this petition to proceed.

II. Absent a Finding of Reasonable Delay, The Court Must Consider the Constitutional Due Process Implications Of Barring Challenges to Prospective Constitutional Injuries

Let us examine a hypothetical situation: Congress passes a law that re-instates slavery, abrogates the right to vote for women, and requires school children to recite the Lord's Prayer before each school day. At the same time, they pass another law that says that all challenges to the first law must be made within some timeframe – 24 hours, 1 week, 60 days, 1 year, or any other timeframe – of the law's passing. President Obama signs this law. No one files a challenge before the deadline passes.

Do we now have legalized slavery? Have we ended suffrage? Has religious freedom been suspended? If someone comes to your door demanding, a day after the deadline has passed, that you pick their cotton, is it now "too late" to challenge whether or not you must oblige?

Petitioner has adamantly argued, since the issue was first raised, that a statute which, in effect, prevents the challenge of a prospective constitutional injury is plainly unconstitutional. Petitioner's Response to Jurisdictional Question, Dec. 19th, 2012, p. 5; Oral Arguments, June 4th, 2014, at 06:39 – 07:56. The panel failed to address this constitutional issue, but, absent a finding of "reasonable grounds," it must.

The heart of Petitioner's case is whether TSA searches are permissible under the Fourth Amendment to the U.S. Constitution. Petitioner has the right to be heard as a result

of this amendment, as a result of Article III, Section 1, and under the due process guarantees of the Fifth Amendment. U.S. Const.: Article III; Amend. IV., Amend. V.

Congress may not modify the constitution without passing an amendment. U.S. Const., Article V. A law that circumvents or limits the constitution, without actually amending the constitution, is, by definition, unconstitutional. Congress may dictate whether the U.S. Supreme Court, of one of its inferior courts, has original jurisdiction over such matters. U.S. Const., Article III, Section 1. It is not challenged that Congress may make rules regarding the procedures for making complaints in the federal courts. But the idea that Congress can say that no more constitutional challenges can be made to a certain government policy after a certain date, *while even after that date it actively continues to enforce the policy upon the people*, is entirely unfounded and would, effectively, trash the constitution.

Yet, that is exactly what the panel has allowed Congress to do here. Since more than 60 days have passed since the TSA decided to implement its screening procedures, accepting the panel's opinion, *no one* may challenge the constitutionality of these screening procedures, in any forum, or at any time, whatsoever. This applies even though an individual may be subject to the procedures – perhaps even subject to the procedures *for the first time* – at a future date.

If the TSA order that Petitioner was challenging read that Christians would be screened solely by asking them to "swear to God that they're not a terrorist," while Muslims would be screened via body cavity search, the Court would have no hesitation to rule that such a challenge could not be time-limited because it was initially challenged in the wrong

court and now 60 days has passed since the order was issued, because every time a challenging party travels by airplane *in the future*, he or she will be re-injured. But because the panel was not impressed with the merits of Petitioner's claim, they ignored his the constitutional right to be heard. The Court should find that "reasonable grounds" exist in this case to avoid having to address this serious constitutional issue. But should it find that reasonable grounds do not exist, it *must* address this issue and find that the constitution bars a prohibition on challenges to prospective constitutional injuries.

III. The "In The Alternative" Ruling Fails to Adhere to the Doctrine of Constitutional Avoidance

The avoidance of unnecessary constitutional decisions has been urged at least as early as 1833 by Chief Justice John Marshall in *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va., 1833). Courts should not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 245 (1905). "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., *concurring*). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944). This tradition has been long-standing and unwavering, and as recently as *this year*, the U.S.

Supreme Court refused to "interpret" a statute when the case could be resolved on other grounds. *U.S. v. Apel*, 134 S.Ct. 1144, 1153 (2014).

The majority criticizes the dissent's refusal to adopt their position because 1) their non-constitutional means of dismissing the case was "debatable," and 2) the issue challenged by Petitioner may be challenged in the future. Panel Opinion, p. 23. The self-doubt in their own opinion is telling in its own right, but the panel cited no law supporting their contention that constitutional issues should be decided if judges are unsure about a ruling that decides the issue on other grounds – essentially, an "exception" to the doctrine of constitutional avoidance created by the panel. The fact that a challenge may re-occur is ubiquitous: in virtually every case where a court applied the doctrine of constitutional avoidance, the court did so with the knowledge that the issue may arise in the future. *See*, for example, *Apel*.

These two "exceptions" to the doctrine of constitutional avoidance, issued in this published opinion, are now guidance for the hundreds of judges and magistrates in the district courts within this circuit. The result will be to increase the number and complexity of issues appealed to this Court as district court rulings consider issues that they need not.

IV. If The Court Wishes to Reach the Merits, It Must Also Consider the Constitutional Due Process Implications Of Refusing Every Opportunity for Fact Finding

Petitioner has argued that due process requires the Court to afford some amount of fact-finding opportunity in order to present his case-in-chief. Petitioner's Motion to Transfer, November 16th, 2012; Oral Arguments, June 4th, 2014, at 11:36 – 13:08. The Court made

significant inquiry into the Respondent's position on the matter during oral arguments. Oral Arguments, June 4th, 2014, at 13:20 – 17:13.

Yet, the panel's opinion makes no mention of considering this issue. In fact, it could be more accurately stated that it seems like the issue was never even considered. Panel Opinion, p. 23 (noting, without discussion of the issue, that "we have a complete record"). This "complete record" is a record that was solely produced by the Respondent, and Petitioner has never had an opportunity to contribute to it. Deciding a civil rights claim on a set of facts put forth entirely by the government was clear error by the panel. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991) (noting that district court fact-finding is appropriate for a challenge to agency action that consisted of a record solely of the government's making). Respondent's note, during oral arguments, that Petitioner was free to attach evidence to his briefs before the Court does not mitigate the issue. Oral Arguments, June 4th, 2014, at 15:29 – 17:13. Petitioner's right to *gather* facts was abridged: without the ability to compel the government to produce evidence, Petitioner could not make his case.

Petitioner's Motion to Transfer, filed November 16th, 2012, thoroughly argues the issue, including a detailed analysis of what factual issues are important to be resolved, and Petitioner refers the Court to that argument and attaches it as Exhibit B.

V. The Panel's Sealing of Copyrighted, Proprietary, and Widely Distributed Documents Was Unlawful and Imprudent

The Court has sealed documents which are labeled by the government as copyrighted and/or proprietary. Panel Opinion, pp. 23 – 26. Petitioner has argued, repeatedly, that the

government may not shield a document from the public record merely by stamping a copyright symbol or a "Proprietary!" designation onto it. Petitioner's Brief, pp. 40 – 43; Petitioner's Motion for Clarification, October 21st, 2013. Nowhere in federal public records laws, *e.g.* the Freedom of Information Act, is such an exception described[2], even though a comprehensive list of exceptions is indeed enumerated by such legislation. 5 U.S.C. § 552(b).

The Court justified its decision to keep such documents under seal indefinitely with a citation of 11th Cir. R. 25-5. Panel Opinion, p. 24. This is in error. Firstly, 11th Cir. R. 25-5 neither says nor implies anything about documents that are merely copyrighted, and some of the sealed documents are merely copyrighted (as opposed to proprietary). Second, the Court made no inquiry, despite Petitioner's request, as to whether or not any of the documents actually represented proprietary information – mere markings from the author cannot possibly have the legal effect of turning a document that was otherwise releasable information into unreleasable information. Third, 11th Cir. R. 25-5 does not override federal statutes that describe which documents are public records. If a document is available under the Freedom of Information Act, applying a court rule to suppress the release of those documents would be contrary to the plain meaning of the statute and intent of Congress.

[2] 5 U.S.C. § 552(b)(4) exempts "trade secrets," but a trade secret is a far higher bar than something that is merely "copyrighted" or "proprietary." A cursory review will show that none of the documents contain actual trade secrets, and in any event, the government has not claimed that the documents contain trade secrets.

Finally, the majority also requires Petitioner not to discuss a sealed document that was accidentally made public via error of the Clerk of the Court and has since been published on the Internet by international news media. *Id*., pp. 23 – 26. News stories covering the leaked document, including links to the leaked document itself, have reached *millions* of Internet readers and radio listeners, and have been shared on social media thousands of times[3]. This document is clearly not a secret.

The rest of the world is free to share and discuss the document, and the government has conceded that they have no authority to ask them to stop. Respondent's Motion to Compel, Nov. 6th, 2013. Petitioner, on the other hand, is the only person in the world who cannot share or discuss this document due to the panel's order. This ruling is arbitrary and capricious, and represents a restraint on Petitioner's speech which serves no actual governmental interest in light of the fact that the whole world can already see this "secret" document.

CONCLUSION

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

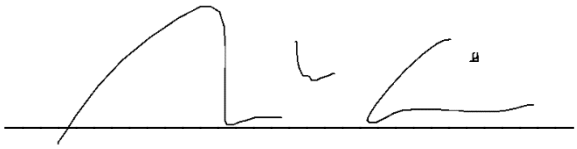
[3] Media outlets that have covered the story and linked to the leaked brief include:

1. Infowars – http://www.infowars.com/?p=92764
2. Daily Caller – http://dailycaller.com/?p=3922487
3. TechDirt – https://www.techdirt.com/articles/20131019/02322924936/

Infowars Daily Caller, and TechDirt are among the top 5,000 most popular Web sites in the United States, and receive *millions* of *daily* page views, according to Internet metrics firm Alexa Internet, Inc.

Dated: Miami, Florida
October 31st, 2014

Respectfully submitted,



Jonathan Corbett
Petitioner, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com

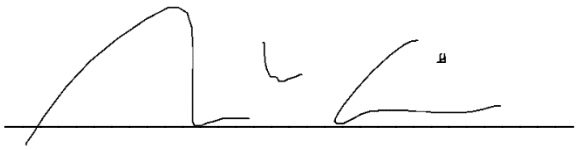
CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served this **Petition for Rehearing En Banc** on October 31st, 2014, on:

Respondent Transportation Security Administration to Sharon Swingle, via electronic mail at the following address: Sharon.Swingle@usdoj.gov.

Dated: Miami, Florida
October 31st, 2014

Respectfully submitted,



Jonathan Corbett
Petitioner, *Pro Se*
382 N.E. 191st St., #86952
Miami, FL 33179
E-mail: jon@professional-troublemaker.com

Opinion Sought to be Reheard

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-15893

D.C. Docket No. 1:10-cv-24106-MGC

JONATHAN CORBETT,

Petitioner,

versus

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

Petition for Review of an Order of the
Transportation Security Administration

(September 19, 2014)

Before MARCUS, WILLIAM PRYOR and MARTIN, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

In this petition for review, Jonathan Corbett alleges that airport screening procedures violate his right to be free from unreasonable searches. U.S. Const. amend. IV. But before we decide the merits of that argument, we must decide

whether the 60-day deadline for filing a petition in the court of appeals, 49 U.S.C. § 46110(a), is jurisdictional and whether Corbett established a reasonable ground for filing his petition more than two years after the Transportation Security Administration deployed these screening procedures in airports nationwide. Even though our Court previously held that the 60-day deadline is "mandatory and jurisdictional," *see Greater Orlando Aviation Authority v. Fed. Aviation Admin.*, 939 F.2d 954, 959 (11th Cir. 1991), a decision of the Supreme Court, *Henderson v. Shinseki*, ___ U.S. ___, ___, 131 S. Ct. 1197, 1206 (2011), together with an en banc decision of our Court, *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013) (en banc), later abrogated that prior panel precedent. Those decisions make clear that the 60-day deadline is not "jurisdictional," but is instead a claim-processing rule. Even though Corbett's delay in filing his petition does not defeat our jurisdiction, his petition is nevertheless untimely because no "reasonable ground[]" excuses his delay. 49 U.S.C. § 46110(a). The Administration, the district court, and our Court informed Corbett that Congress vested exclusive jurisdiction to hear his petition in our Court. Alternatively, even if Corbett had timely filed his petition, the screening procedure employed by the Administration requires only a reasonable administrative search that does not violate the Fourth Amendment. We dismiss Corbett's petition as untimely and, in the alternative, deny Corbett's petition on the merits. We also grant a motion to seal filed by the Administration.

I. BACKGROUND

We divide the background in two parts. First, we discuss the procedure issued by the Administration. Second, we discuss the procedural history of Corbett's petitions and the pending motions and jurisdictional question that we carried with the case.

A. The Standard Operating Procedure

Congress created the Administration, now an agency of the Department of Homeland Security, in response to the terrorist attacks of September 11, 2001, and charged the Administrator with ensuring civil aviation security. *See* 49 U.S.C. § 114; 6 U.S.C. § 203(2). The Administrator, in conjunction with the Director of the Federal Bureau of Investigation, must "assess current and potential threats to the domestic air transportation system" and take "necessary actions to improve domestic air transportation security." 49 U.S.C. § 44904(a), (e); *see also id.* § 44901. The Administration performs "the screening of all passengers and property" before boarding an aircraft to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a)(1); *see also id.* § 44903(b) (requiring the promulgation of "regulations to protect passengers and property on an aircraft" from "criminal violence or aircraft piracy"). And Congress has directed the Secretary of the Department to "give a high priority to developing, testing, improving, and

deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives . . . .” *Id.* § 44925(a).

To fulfill these statutory mandates, the Administration issues standard operating procedures for security screening nationwide. On September 17, 2010, the Administration issued the procedure challenged in this petition, which it implemented on October 29, 2010. The procedure requires the use of advanced imaging technology scanners as the primary screening method at airport checkpoints. If a passenger declines the scanner or alarms a metal detector or scanner during the primary screening method, he receives a pat-down instead.

The scanners detect both metallic and nonmetallic objects. The Administration instituted the procedure to remedy a weakness of walk-through and hand-held metal detectors. Unlike those earlier security mechanisms, the scanners also identify nonmetallic explosives and other nonmetallic items that pose a security threat. The Administration deemed the scanners “the most effective technology available to detect threat items concealed on airline passengers.” But even though the scanners and the new pat-down procedures significantly improve the detection of nonmetallic and concealed weapon devices, the Office of Intelligence of the Administration has concluded that the threat posed by improved

explosive devices and other weapons remains high and that terrorists continue to surveil and attempt to exploit security gaps in airport screening.

When the Administration first implemented the procedures, it employed scanners that displayed the body contour of the passenger, but they did not store, export, or print the images. The Administration deleted the images after an officer viewed them, and the Administration prohibited security officers from bringing cameras, cell phones, or other electronic recording devices into the viewing rooms.

Congress later enacted the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 826, 126 Stat. 11, 133–32, which required the Administration to equip scanners with automated target recognition software. That software eliminates passenger-specific images and instead uses a generic body contour. By May 16, 2013, the scanners distributed by the Administration were equipped with the updated software and displayed only a generic body contour.

The Administration last updated the pat-down procedure in 2012. The Administration earlier modified the procedure in response to the suicide bombing aboard a Russian aircraft in August 2004 and twice revised the policy after intelligence revealed that passengers could conceal contraband in certain areas of their bodies. Later testing revealed that some security officers failed to conduct sufficient pat-downs, which prompted the most recent revisions to the procedure. When a screener conducts a pat-down, he canvasses most of the passenger's body

and uses the back of his hands for sensitive areas. A screener of the same gender as the passenger conducts the pat-downs, and a passenger may request that the pat-down occur in a private location. A screener may conduct an opposite-gender pat-down only in "extraordinary circumstances" as determined by a Federal Security Director.

B. Procedural History of Corbett's Petitions

Corbett, *pro se*, challenges the use of the "nude body scanners," as he dubs them, and the pat-down procedure on the ground that they violate the Fourth Amendment. Corbett alleges that he has flown more than 100,000 miles on more than 100 domestic flights in the last 3 years and that each time he departs from a domestic airport he must undergo a security screening. He asserts that the security officers have denied him access three times because he refused to consent to the searches prescribed by the procedure. Corbett argues that substitute screening measures—canine sniff teams, metal detectors, and explosive trace detectors—are less intrusive and more effective at identifying terrorist threats.

In November 2010, Corbett filed a petition in a district court in Florida challenging the procedure implemented a month earlier. As early as December 2010, the Administration notified Corbett that Congress vested exclusive jurisdiction over his petition in the court of appeals. After a magistrate judge also concluded that the court of appeals had exclusive jurisdiction, the district court

dismissed Corbett's petition for lack of jurisdiction in April 2011. We affirmed that dismissal. *See Corbett v. United States*, 458 F. App'x 866, 870 (11th Cir. 2012). Corbett petitioned for a writ of certiorari, which the Supreme Court denied on October 1, 2012. *Corbett v. United States*, 133 S. Ct. 161 (2012). Exactly two years after he commenced those proceedings in the district court, Corbett filed this petition in our Court on November 16, 2012.

In March 2013, the Administration moved to file under seal certain portions of the administrative record and to file under seal and *ex parte* other portions of the record. The record contains five kinds of documents: public information; copyrighted and propriety material; "For Official Use Only" documents; documents designated as sensitive security information; and classified documents. In June 2013, our Court temporarily granted, in part, the motion to seal and carried the remainder of the motion with the case.

Corbett signed a nondisclosure agreement to receive access to the For Official Use Only administrative record. But in October 2013, the office of the clerk of the Court mistakenly uploaded Corbett's unredacted brief to the public docket containing some of the For Official Use Only information. Corbett alleges that a third party obtained his brief when it was available online and linked it to a website, which includes a 16-minute interview with Corbett discussing this information in his brief. After that incident, Corbett filed a motion to unseal the

For Official Use Only information, which we temporarily denied and instructed him not to disclose, even if the information was already available to the public through the inadvertent disclosure by the Clerk. Corbett now urges our Court to "release" him from its order barring disclosure of For Official Use Only Information documents.

II. DISCUSSION

Before we can address the merits of this controversy, we have to decide whether we have jurisdiction over it. That is, we must first decide whether the 60-day deadline, 49 U.S.C. § 46110(a), is a jurisdictional rule or a claim-processing rule. We then consider whether Corbett has offered a reasonable ground for his two-year delay in filing his petition in our Court. We next explain that, even if it were timely, Corbett's petition fails because the challenged screening procedure satisfies the requirements of an administrative search under the Fourth Amendment. We also grant the motion to seal filed by the Administration and deny Corbett's motion to unseal.

A. We Have Jurisdiction, But Dismiss Corbett's Petition as Untimely.

Congress granted the courts of appeals exclusive jurisdiction to decide a petition like Corbett's, *id.*, and we have already decided in a separate action between these parties that the challenged procedure constitutes a final order. *Corbett*, 458 F. App'x at 870–71; *see also Blitz v. Napolitano*, 700 F.3d 733, 739–

40 (4th Cir. 2012); *Durso v. Napolitano*, 795 F. Supp. 2d 63, 67–69 (D.D.C. 2011). But before we can address Corbett's arguments about reasonable grounds for his two-year delay in filing his petition, we must decide whether the 60-day deadline is jurisdictional or whether it is a claim-processing rule.

1. The 60-Day Deadline Is Not Jurisdictional.

There is "a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule." *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 916 (2004). "[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Id*. And "a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson*, 131 S. Ct. at 1202.

In *Greater Orlando Aviation Authority v. Federal Aviation Administration*, we held that the 60-day deadline for filing a petition challenging a final order is "mandatory and jurisdictional," 939 F.2d at 959 (internal quotation marks omitted), but decisions of the Supreme Court and our Court sitting en banc have abrogated that prior panel precedent, *see Henderson*, 131 S. Ct. at 1204–06; *Avila-Santoyo*, 713 F.3d at 1359–62. The Supreme Court has instructed that a deadline for judicial

review of an administrative decision is a nonjurisdictional claim-processing rule when Congress provides no "clear statement" that the rule is jurisdictional. *Sebelius v. Auburn Reg'l Med. Ctr.*, ___ U.S. ___, ___, 133 S. Ct. 817, 824 (2013); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16, 126 S. Ct. 1235, 1245 (2006) ("If [Congress] clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." (footnote omitted)). To determine whether a provision is jurisdictional, we look to its "context, including [the Court's] interpretation of similar provisions in many years past." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168, 130 S. Ct. 1237, 1248 (2010).

In *Henderson*, the Supreme Court identified three factors that guided its conclusion that the 120-day deadline for seeking judicial review of a decision of the Board of Veterans' Appeals was not jurisdictional: the text, the statutory context, and the degree of flexibility afforded to potential claimants. 131 S. Ct. at 1204–06. The plain language of the statute in *Henderson* did "not suggest, much less provide clear evidence, that the [120-day] provision was meant to carry jurisdictional consequences." *Id.* at 1204. Congress placed the deadline in a subchapter titled "Procedure" instead of the subchapters titled "Jurisdiction; finality of decisions" or "Organization and Jurisdiction," which "suggest[ed that] Congress regarded the 120-day limit as a claim-processing rule." *Id.* at 1205. And

when a veteran petitioned the Veterans Administration for benefits, those proceedings were "solicit[ous]" to veterans and far more "informal and nonadversarial" than ordinary civil litigation. *Id.* at 1205–06. For these three reasons, the Court concluded that Congress did not intend the 120-day limit "to carry the harsh consequences that accompany the jurisdiction tag." *Id.* at 1206.

Our Court, sitting en banc, applied *Henderson* in an immigration case when we overruled our precedent, *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148 (11th Cir. 2005), and held that the 90-day deadline to file a motion to reopen after a final order of removal, 8 U.S.C. § 1229a(c)(7)(C)(i), was not jurisdictional. *Avila-Santoyo*, 713 F.3d at 1362. We explained that *Henderson* had abrogated our precedent in *Abdi* when we evaluated the statute under the clear statement rule used by the Supreme Court. *Id.* at 1359–60. The text of the statute gave no indication that the 90-day deadline carried jurisdictional consequences. *Id.* at 1361. Congress placed the 90-day deadline within a section titled "Removal Proceedings," which addressed various procedural and administrative aspects of a removal proceeding. *Id.* And the exceptions to the 90-day deadline suggested "a certain degree of flexibility that is inherently inconsistent with the jurisdictional label." *Id.* at 1362 (internal quotation marks omitted).

Like the 90-day deadline in *Avila-Santoyo*, the 60-day deadline that governs Corbett's petition is not jurisdictional. *See Avia Dynamics, Inc. v. Fed. Aviation*

Admin., 641 F.3d 515, 519 (D.C. Cir. 2011). The text does not suggest that Congress intended the deadline to have jurisdictional consequences. *See Arbaugh*, 546 U.S. at 510, 126 S. Ct. at 1242 ("[W]e have clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." (internal quotation marks omitted)). That is, Congress did not phrase the 60-day deadline in jurisdictional terms when it instructed petitioners where and when to file:

> [A] person disclosing a substantial interest in an order issued by the Secretary . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed no later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

49 U.S.C. § 46110(a). Additionally, Congress placed the deadline in the subsection titled "Filing and venue." To be sure, the first sentence of that subsection references the subject-matter jurisdiction of the courts of appeals over these petitions so that petitioners would know where to file. *Id*. But in another subsection, "Authority of court," Congress granted the courts of appeals exclusive jurisdiction over these kinds of petitions. *Id.* § 46110(c). Any reference to that exclusive jurisdiction in the "Filing and venue" subsection, *id.* § 46110(a), does not convince us that the 60-day deadline is part and parcel of the jurisdictional limitations announced in subsection 46110(c). *See also cf. Avia-Dynamics, Inc.*,

641 F.3d at 518 ("Although we have characterized section 46110(a) as a jurisdictional statute, we have never held that the *limitation portion* of section 46110(a)—set forth in the second and third sentences—is jurisdictional." (citations omitted)). Moreover, the exception for "reasonable grounds for not filing by the 60th day," 49 U.S.C. § 49110(a), affords petitioners a "degree of flexibility" that does not suggest the deadline is jurisdictional. *See Avila-Santoyo*, 713 F.3d at 1362.

In the same way that *Henderson* abrogated our precedent in *Abdi*, *Henderson* also abrogated our precedent in *Greater Orlando* that would otherwise govern this appeal. *See United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) ("We may disregard the holding of a prior opinion only where that holding is overruled by the Court sitting en banc or by the Supreme Court."(internal quotation marks omitted)). The new rule announced in *Henderson* "actually abrogate[d] or directly conflict[ed] with, as opposed to merely weaken[ed], the holding of the prior panel." *Id*. We now hold that the 60-day deadline is a claim-processing rule, not a limitation on our subject-matter jurisdiction.

2. Corbett Failed To Establish a Reasonable Ground for his Delay.

Corbett's dogged prosecution of his petition in the district court is not a reasonable ground to excuse his failure to file his petition on time in this Court. *See Greater Orlando*, 939 F.2d at 959–60 (ruling that petitioner's pursuit of state court

remedies did not excuse failure to file before the 60-day deadline); *Americopters, LLC v. Fed. Aviation Admin.*, 441 F.3d 726, 734 (9th Cir. 2006) ("[A] delay stemming from the filing of a petition or complaint with the wrong court is not, in general, a reasonable ground for delay."); *see also Sierra Club v. Skinner*, 885 F.2d 591, 594 (9th Cir. 1989) (dismissing for lack of subject-matter jurisdiction when petitioner failed to file within 60 days and filing petition in a district court did not provide a reasonable ground for delay). Corbett's "delay is even less excusable" because "the [Administration] advised [him] of the correct remedies or procedures to follow" and his "procedural missteps were based on a misapprehension of the law." *Americopters*, 441 F.3d at 734. We have recommended that petitioners file concurrent petitions in multiple courts where jurisdiction is not clear. *Greater Orlando*, 939 F.2d at 959–60. Our dissenting colleague contends that *Greater Orlando* stands for the proposition that *distinct* claims must be filed in separate courts. (Dissent Op. at 28.) We did say as much in *Greater Orlando*, but our dissenting colleague fails to acknowledge that we also advised that "[a]dditionally, the [petitioner] could have filed both appeals concurrently, instead of pursuing state court remedies while jurisdiction was being lost" elsewhere. *Greater Orlando*, 939 F.2d at 959-60.

Corbett failed to heed that advice, despite admonitions by the Administration, a magistrate judge, the district court, and our Court that we had

exclusive jurisdiction over his petition. He instead pursued his Fourth Amendment challenge in the district court for nearly two years. Courts of appeals have excused a petitioner's delay when the Administration caused a petitioner's confusion, *id*. at 960, or when a petitioner unsuccessfully attempted to exhaust administrative remedies, *Reder v. Adm'r of Fed. Aviation Admin.*, 116 F.3d 1261, 1263 (8th Cir. 1997), but Corbett has not alleged anything of the kind. His conduct—the "quixotic pursuit of the wrong remedies"—cannot excuse his delay. *Americopters*, 441 F.3d at 734.

B. Alternatively, the Screening Procedure Is a Reasonable Administrative Search.

Although the Supreme Court has mentioned only in dicta that airport screenings do not violate the Fourth Amendment, *see Chandler v. Miller*, 520 U.S. 305, 323, 117 S. Ct. 1295, 1305 (1997) ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports . . . ."); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48, 121 S. Ct. 447, 456 (2000), other courts of appeals have held that screening passengers at an airport is an "administrative search" because the primary goal is to protect the public from a terrorist attack, *see, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011); *United States v. Aukai*, 497 F.3d 955, 962–63 (9th Cir. 2007) (en banc); *United States v. Hartwell*, 436 F.3d 174, 178 (3d Cir.

2006). We now join their ranks and conclude, in the alternative, that the challenged procedure is a reasonable administrative search under the Fourth Amendment.

The Fourth Amendment permits the warrantless search of "closely regulated" businesses; "special needs" cases such as schools, employment, and probation; and "checkpoint" searches such as airport screenings under the administrative search doctrine. *Hartwell*, 436 F.3d at 178. Because administrative searches primarily ensure public safety instead of detect criminal wrongdoing, they do not require individual suspicion. *Elec. Privacy Info. Ctr.*, 653 F.3d at 10 (citing *Edmond*, 531 U.S. at 41, 47–48, 121 S. Ct. at 450. Whether suspicionless checkpoint searches at airports are reasonable depends on "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640 (1979).

The scanners at airport checkpoints are a reasonable administrative search because the governmental interest in preventing terrorism outweighs the degree of intrusion on Corbett's privacy and the scanners advance that public interest. *Id*. Corbett argues that the scanners are not narrowly tailored to aviation security needs, that the scanners are ineffective for their intended purpose, and that the Administration has misled the public as to the likelihood of the threat. But "[t]he need to search airline passengers 'to ensure the public safety can be particularly

acute,' and, crucially, an [advanced imaging technology] scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form." *Elec. Privacy Info. Ctr.*, 653 F.3d at 10 (quoting *Edmond*, 531 U.S. at 47–48, 121 S. Ct. at 457).

"[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance." *Hartwell*, 436 F.3d at 179; *see United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) ("It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. . . . [T]he potential damage and destruction from air terrorism is horrifically enormous."); *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979) ("The government unquestionably has the most compelling reasons[—]the safety of hundreds of lives and millions of dollars worth of private property[—]for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane."); *see also United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002). Corbett argues that the Administration has misled the public as to the severity of the threat that terrorism poses to commercial airplanes, but that suggestion borders on the absurd and the record refutes it. For example, on December 25, 2009, a terrorist attempted to detonate a nonmetallic explosive device hidden in his underwear while aboard an American aircraft flying over the United States, for which Al Qaeda claimed credit. Passenger Screening Using

Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,299 (Mar. 26, 2013). Numerous other publicly known incidents of aviation terrorism have involved nonmetallic explosives. *Id.* These reported instances, not to mention those incidents unknown to the public, establish that the Administration has reasonably assessed the threat of aviation terrorism. In any event, the validity of a screening program does not "turn[] on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program." *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 675 n.3, 109 S. Ct. 1384, 1395–96 n.3 (1989); *see Cassidy v. Chertoff*, 471 F.3d 67, 83 (2d Cir. 2006) (explaining that the government "need not adduce a specific threat" to the ferry system before engaging in suspicionless searches). Instead, "[w]hen the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 676 n.3, 109 S. Ct. at 1396 n.3.

Contrary to Corbett's assertion, the scanners effectively reduce the risk of air terrorism. *See, e.g.*, *Hartwell*, 436 F.3d at 179–80. Although this proposition is self-evident, Corbett disputes it on the ground that he has circumvented the scanners and speculates that the rates of failure and false-positives are high. But the Fourth Amendment does not require that a suspicionless search be fool-proof

or yield exacting results. *See Von Raab*, 489 U.S. at 676, 109 S. Ct. at 1396 (rejecting the argument that drug-testing violates the Fourth Amendment because employees may attempt to deceive the test); *Cassidy*, 471 F.3d at 86 (rejecting the argument that screening of ferry passengers violates the Fourth Amendment "because it is not sufficiently thorough"); *MacWade v. Kelly*, 460 F.3d 260, 274 (2d Cir. 2006) (ruling that the deterrent effect of an antiterrorism screening program in the New York City subway system "need not be reduced to a quotient" to satisfy the Fourth Amendment).

The Supreme Court has explained that the evaluation of effectiveness is "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Michigan Dep't of St. Police v. Sitz*, 496 U.S. 444, 453, 110 S. Ct. 2481, 2487 (1990). Choosing which technique best serves the government interest at stake should be left to those with "a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id.* at 454, 110 S. Ct. at 2487. "[W]e need only determine whether the [scanner] is a reasonably effective means of addressing the government interest in deterring and detecting a terrorist attack" at airports. *MacWade*, 460 F.3d at 273 (internal quotation marks omitted). Common sense tells us that it is.

Corbett argues that metal detectors, bomb-sniffing dogs, explosive trace portals, and explosive trace detectors would be better substitutes for security screening because those methods are less invasive, but we are unpersuaded that the Constitution requires these substitutes. *Cf. Aukai*, 497 F.3d at 962 ("A particular airport security screening search is constitutionally reasonable provided that it is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives and that it is confined in good faith to that purpose." (alteration and internal quotation marks omitted)). Metal detectors cannot alert officers to nonmetallic explosives, and the United States enjoys flexibility in selecting from among reasonable alternatives for an administrative search. *See Sitz*, 496 U.S. at 453–54, 110 S. Ct. at 2487; *see City of Ontario, Cal. v. Quon*, 560 U.S. 746, 764, 130 S. Ct. 2619, 2632 (2010) ("Even assuming there were ways that [officers] could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.").

The scanners pose only a slight intrusion on an individual's privacy, especially in the light of the automated target recognition software installed in every scanner. The scanners now create only a generic outline of an individual, which greatly diminishes any invasion of privacy. Before the agency incorporated that software, the District of Columbia Circuit held that the scanners did not violate the Fourth Amendment. *See Elec. Privacy Info. Ctr.*, 653 F.3d at 10–11. And to the

extent that Corbett's petition challenges the use of scanners without that software, his petition is moot because those scanners no longer operate in any airport. *See Redfern v. Napolitano*, 727 F.3d 77, 84–85 (1st Cir. 2013) (vacating and remanding to the district court to dismiss as moot because the Administration removed from airport screening checkpoints all "non-ATR-equipped backscatter scanners").

Corbett also challenges the pat-down procedure, but that procedure as a secondary screening technique is a reasonable administrative search. The pat-downs also promote the governmental interest in airport security because security officers physically touch most areas of passengers' bodies. Corbett does not dispute that the pat-down procedures are effective, but argues that they are "extraordinarily intensive" and the "use of fingers to palpate the skin makes the TSA's pat-down procedure the most intensive search ever conducted." Undeniably, a full-body pat-down intrudes on privacy, but the security threat outweighs that invasion of privacy. And the Administration reduces the invasion of privacy through several measures: the pat-down is not a primary screening method; a member of the same sex ordinarily conducts it; a passenger may opt to have a witness present during the search if he desires to have the security officer conduct the pat-down in private; and the procedure requires a security officer to use the back of his hand while searching sensitive areas of the body.

The Fourth Amendment does not compel the Administration to employ the least invasive procedure or one fancied by Corbett. Airport screening is a permissible administrative search; security officers search all passengers, abuse is unlikely because of its public nature, and passengers elect to travel by air knowing that they must undergo a search. *Hartwell*, 436 F.3d at 180. The "jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane" outweighs the slight intrusion of a generic body scan or, as a secondary measure, a pat-down. *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (quoting *United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring)).

As a final note, our dissenting colleague argues that a determination on the merits is unnecessary because we hold that Corbett's petition was untimely. (Dissent Op. at 27.) But our dissenting colleague relies on opinions stating that constitutional rulings should be avoided where other outcomes could be reached on the merits. *See, e.g.*, *United States v. Charles*, 722 F.3d 1319, 1332–35 (11th Cir. 2013) (Marcus, J., specially concurring) (concluding that it was unnecessary to answer a constitutional question where it was not required for the holding that there was no plain error); *Shaw v. Martin*, 733 F.2d 304, 314 (4th Cir. 1984) (declining to rule on a constitutional question where the evidence would not support the claim even if the constitutional question were decided in petitioner's

favor). These decisions do not stand for the proposition that a merits issue should not be *reached* if it involves a constitutional question. And here, there is no way to resolve the merits without ruling on the constitutional question, so the canon of constitutional avoidance is inapposite.

We make our ruling on the merits because, as our dissenting colleague recognizes, the procedural question of timeliness is debatable, and it is not jurisdictional. Further, the parties have briefed and argued the merits, and we have a complete record. The answer on the merits is clear, as each circuit court to examine it has ruled. And the issue will almost certainly recur, perhaps even with the same petitioner. Our dissenting colleague's contention that we should not address the merits is odd because she suggests that Corbett *did* establish reasonable grounds for the untimeliness of his petition. (Dissent Op. at 28.) If so, then we would be obliged to address the merits of his petition. But our dissenting colleague fails to explain how the merits of this controversy should be resolved.

C. We Grant the Motion to Seal by the Administration and Deny the Motion to Unseal by Corbett.

Before oral argument, we carried with the case three issues raised by the motion to seal filed by the Administration: (1) whether the copyrighted materials should remain under seal; (2) whether Petitioner should have access to the sensitive security information; and (3) whether Respondent should be required to

file a redacted version of the classified documents or an index with summaries of those documents. We now grant that motion to seal.

As to the copyrighted materials, Eleventh Circuit Rule 25-5 contemplates that parties may file under seal "proprietary or trade secret information." 11th Cir. R. 25-5. And every court of appeals in which the Administration has submitted proprietary information about the scanner technology has ordered sealed. *See* Order, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 10-1157 (D.C. Cir. Feb. 22, 2011); Order, *Redfern v. Napolitano*, No. 11-1805 (1st Cir. Aug. 14, 2012). The Administration filed under seal the proprietary information—an operations manual for an advanced imaging technology scanner—because the owner of the information marked the manual with the warning that customers "shall not disclose or transfer any of these materials or information to any third party" and that "[n]o part of this book may be reproduced in any form without written permission" from the company.

We also grant the motion to seal the sensitive security information because Corbett has no statutory or regulatory right to access it. Sensitive security information is "information obtained or developed in the conduct of security activities[,] . . . the disclosure of which TSA has determined would . . . [b]e detrimental to the security of transportation." 49 C.F.R. § 1520.5(a)(3). The Administration may share Sensitive Security Information only with "[c]overed

persons" who have a "need to know" the information "to carry out transportation security activities." *Id.* §§ 1520.7(j), 1520.11(a)(1). Congress has permitted the disclosure of sensitive security information during discovery to civil litigants in a *district* court who demonstrate a substantial need for it, Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(d), 120 Stat. 1355, 1382 (Oct. 4, 2006), but Corbett is not a litigant in a district court. We reject his suggestion that Congress surely intended to allow litigants in the courts of appeals access to sensitive security information because the plain text of the Act suggests otherwise. We need not address whether Corbett has established a "substantial need" to the information.

Finally, we grant the motion to seal the classified information and do not require the Administration to file a redacted version or index. The Classified Information Procedures Act "allows the district court to permit the government either to redact the classified information or to substitute a summary or a statement of factual admissions in place of the classified documents." *United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) (describing 18 U.S.C. app. 3 § 4). Corbett fails to identify a corresponding statute for civil litigants. And, as a practical matter, Corbett did not need the classified information to argue his case.

We earlier entered a temporary order denying Corbett's motion to release him from his nondisclosure agreement, and we now deny that motion permanently

for two reasons. First, the Clerk of this Court caused the mishap that allowed the third party source to obtain the For Official Use Only information, and we do not prejudice the Administration for an error it did not commit. Second, Corbett likely breached his nondisclosure agreement by posting this privileged information on his blog and by sharing that information in an interview.

III. CONCLUSION

We **DISMISS** Corbett's petition for review as untimely. In the alternative, we **DENY** Corbett's petition because the challenged screening procedure does not violate the Fourth Amendment. We also **GRANT** the motion to seal by the Administration and **DENY** the motion to unseal by Corbett.

MARTIN, Circuit Judge, dissenting:

The majority does what the Supreme Court, our Court, and many other courts have cautioned not to do, and therefore I respectfully dissent.

The opinion finds that Mr. Corbett's petition is untimely, and he failed to establish a reasonable ground for his delay in filing it. If that is true, the case is over. Instead the opinion continues on with an unnecessary holding "in the alternative," Panel Op. at 2, which reaches the merits of Mr. Corbett's petition, and finds no violation of the Fourth Amendment.

Long ago, the Supreme Court explained that courts should not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 245 (1905); see also Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). Other courts adhere to this maxim. See, e.g., Shaw v. Martin, 733 F.2d 304, 314 (4th Cir. 1984) ("[W]e should not decide a constitutional question when a factual ground exists for our decision."). And until now, our Court has generally followed this precept as well. See, e.g., United States v. Charles, 722 F.3d 1319, 1334 (11th Cir. 2013) (Marcus, J., specially concurring) ("Declining to address an unnecessary

constitutional question preserves the unique place and character, in our scheme, of judicial review of governmental action for constitutionality, and pays heed to considerations of timeliness and maturity, of concreteness, definiteness, certainty, and of adversity of interests affected." (quotation marks omitted)). I do not understand why we ignore this established principle here.[1]

I am also concerned by the majority's conclusion that Mr. Corbett did not establish a reasonable ground for the timing of his filing. The opinion states: "We have recommended that petitioners file concurrent petitions in multiple courts where jurisdiction is not clear." Panel Op. at 14. For support, it cites only one case, Greater Orlando Aviation Authority v. Federal Aviation Administration, 939 F.2d 954 (11th Cir. 1991). And in citing that case, the majority says that I "fail[] to acknowledge" that in Greater Orlando, this Court "advised" the petitioner to file two appeals concurrently. But I do fully acknowledge that in Greater Orlando, this Court observed that the Greater Orlando Aviation Authority could have at the same time pursued (1) a state court appeal of a zoning board decision; and (2) an appeal in the 11th Circuit of a Federal Aviation Administration decision that ultimately

[1] The majority claims that the opinions cited here "stat[e]" that courts should only avoid ruling on constitutional grounds "where other outcomes could be reached on the merits." Panel Op. at 22. None of the opinions make that statement. Nor do others. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

related to the location of a new airport in Orlando. What I absolutely do fail to acknowledge, however, is that this Court's observation in the Greater Orlando decision somehow stands for the proposition that here, Mr. Corbett should have known to file identical briefs, asserting identical claims in both the District Court and this Court at the same time. Greater Orlando simply does not sanction this practice and neither does this Court's jurisprudence as a whole.

To the contrary, we have cautioned against the possibility of "resources wasted when two courts unnecessarily proceed along the same track and at the same time." Maharaj v. Sec. for Dep't of Corr., 432 F.3d 1292, 1307 (11th Cir. 2005); see also Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) ("[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.").

Given Mr. Corbett's pro se status, his active pursuit of this challenge was anything but "quixotic," as the majority characterizes it at one point. Panel Op. at 15 (quotation marks omitted). Cf. Sierra Club v. Skinner, 885 F.2d 591, 594 (9th Cir. 1989) ("We find it difficult to believe that someone among Sierra Club's legal advisers did not sound a note of caution as to jurisdiction."). Mr. Corbett's pursuit appears to me to have been methodical and diligent. Shortly after the Supreme Court confirmed he chose the wrong forum, he immediately filed here. I do not believe he should be penalized for doing so. This is especially true where there is

no allegation of bad faith, the filing deadline is not jurisdictional, and there is no prejudice to the government.

Exhibit A

Corbett v. D.H.S., 12-15893
Courtesy / Unofficial Transcript of Oral Arguments
Argued June 4th, 2014

For Petitioner: Jonathan Corbett ("Jon"), *pro se*

For Respondent: Sharon Swingle ("SS"), U.S. D.O.J.

For the Court: U.S. Circuit Judge Stanly Marcus (JSM)
U.S. Circuit Judge William Pryor (JWP)
U.S. Circuit Judge Beverly Martin (JBM)

This transcript prepared by Petitioner as a courtesy and is not a legal transcription.

Jon 01:06: Good morning. It's my pleasure to appear before you and thank you for taking the time to hear this case. I won't be going into any of the sealed portion of the record today. May it please the court, my name is Jonathan Corbett, and I'm the pro se petitioner, and the petition in front of the court asks the court to review search procedures by the TSA that are unreasonably and unconstitutionally invasive. What I'm asking the court today is for a ruling first that the court has jurisdiction over the subject, but then that due process compels further fact finding before the court can make a ruling on the merits of the case; that my constitutional claim cannot be adjudicated on a set of facts set forth entirely by the respondent. The court has asked both sides to discuss the effects of newer Supreme Court precedent on existing 11th Circuit precedent. The 11th Circuit decided *Greater Orlando Aviation Authority v. FAA* (939 F.2d 954) in 1991 which decided that the predecessor to [49 U.S.C. §] 46110 was indeed jurisdictional, but this case is bad law as of Henderson v. Shinseki [131 S. Ct. 1197]. That case, from the Supreme Court in 2011, ruled that a statute similar to 46110 -- its time limiting clause is a "claims processing rule." It defined "claims processing rules" as a rules that seek to promote orderly progress of litigation by requiring that parties take certain procedural steps at certain specified times, that's page 1203. The automatic presumption that a deadline is jurisdictional only applies in the United State, by tradition, to cases involving an appeal from one court to the next, which is not the case in this matter.

JWP 02:39: Mr. Corbett, let us assume that we agree with you about that, that this statute creates a deadline that is a claims processing rule and does not establish a jurisdictional deadline. Was there reasonable delay here?

Jon 02:58: The delay in this case, Your Honor, was caused by the inability to determine the proper jurisdiction at the outset. So the TSA's "order" that's being challenged here was issued in secret. I don't have a copy of that order still, and when I filed my action in the district court, there would be no way for me to determine that I was challenging an "order" that would be [properly] in front of this court.

JWP 03:22: When you filed in the district court, you knew enough to file, and you were told, were you not, that you had filed in the wrong place?

Jon 03:31: The TSA tried to argue that, and I took that issue to the Supreme Court. I'm not alone in that matter, either. About half a dozen other attorneys across the country brought their cases, similar to mine, in the district courts, and there's good reason why one would argue that this case belongs in the district court being that it's...

JWP 03:49: That may be, but what would have prevented you from, as a protective measure, filing in this court as well?

Jon 03:58: Filing in both courts at the same time?

JWP 04:00: Yes, litigants do that all the time, if they're uncertain about jurisdiction.

Jon 04:05: As a pro se litigant, I was not aware that that was an option to me in 2010.

JSM 04:10: Let me ask the question just a little bit differently, and for the purposes of my question, also, I will assume with you that this is not a jurisdictional issue, but the statute nevertheless requires that you file this claim within 60 days. There's no dispute that this wasn't filed within 60 days, the question is whether there was reasonable delay. Right?

Jon 04:38: Correct.

JSM 04:38: So that's the issue is reasonable delay under the statute, and that's what I want to ask you about. On 2/27/12, this court affirmed the dismissal by the district court, and in it, we made clear that this forum was the proper forum in which to bring an attack on a final determination by the head of the TSA because that's what the statute

says and that's what Congress commanded. You knew at least in February of '12 that the right forum was this forum because this court told you this was the right forum. The district court had said that, but we told you definitively that this was the right forum, yet you don't file your lawsuit in the 11th Circuit until almost 9 months later. By my count, it's 11/16/12 that you filed your suit in this circuit. Why would that delay be a reasonable one?

Jon 05:59: Your Honor, during that time I had a petition for cert in front of the U.S. Supreme Court as to this court's decision to deny jurisdiction on the original claim.

JSM 06:07: But why would that make the delay in filing in reasonable? I understand that you sought discretionary review by the Supreme Court of the United States but you could have filed a claim here. By that point, you knew.

Jon 06:22: Again, my understanding was that filing claims in 2 courts at once was not smiled upon practice in the federal court system, but perhaps I was mistaken.

JSM 06:31: Ok, I didn't want to take too much of your time on this issue, so you might as well go on to the merits of the case.

Jon 06:39: Sure, and one more thing about jurisdiction, Your Honor, there's one more reasonable ground that the court should consider, which is that, essentially, if this court denies this petition on jurisdictional grounds, it will deny anyone from addressing any prospective constitutional injury under this policy. That is, if I were to go through a checkpoint, or anyone else were to go through a checkpoint tomorrow, and be subject to this policy, they would no longer be allowed to vindicate their rights, because this court already decided that there's no Bivens actions allowed in the district court and then would decide that there's no actions allowed [after] 60 days, which is past that deadline for everyone. And I don't think that Congress intended to foreclose on prospective constitutional claims. A statute that did so would be a clear due process violation. So, I'd like the court to consider that a constitutional injury brought under 46110, the 60 days should toll from the date of the injury, not the date of the policy to avoid the constitutional quagmire of allowing the government immunity from prospective constitutional injuries. Moving forward to the core claim of the case, the claims that the scanners...

JSM 07:56: See the problem with that is that the statute as passed by Congress says the petition must be filed not later than 60 days after the order is issued.

Jon 08:08: Right...

JSM 08:09: That's the language Congress chose to use in creating jurisdiction in the circuit courts of appeal. They didn't have to write it that way, but they chose to write it that way.

Jon 08:22: Right, so in addition to "reasonable grounds," this court can imply equitable tolling into a non-jurisdictional time-limit statute, which is what I'm asking this court to do.

JSM 08:30: Right, but that's essentially the same thing as reasonable delay. Essentially, the theory behind equitable tolling might fit into the notion of reasonable delay and I was just inquiring why it would have been reasonable, and your only answer to me is, notwithstanding having been told by the district court, and by this court, and by the statute itself, which clearly says the jurisdiction is in the circuit, you waited 9 months until after the Supreme Court had denied *certiorari*.

Jon 09:03: Correct, I thought that I could wait until...

JSM 09:05: I understand.

Jon 09:05: ...the Supreme Court denied it, and additionally, the argument that I've just made for the prospective constitutional injury.

JSM 09:10: Right, I understand.

Jon 09:11: In order to determine whether or not the search is reasonable, the court needs a balancing test, but before the court can run any test, we need a set of facts. The TSA will point the court to the SSI portion of the record to determine what goes on during a search, but knowing what the search entails and specifically understanding intrusiveness is not a matter of reading a policy but understanding what actually goes on at the checkpoint. In other words, I'm asking the court to review the policy as-is implemented, not merely some words describing the policy. For that, I'd like to depose witnesses. The measure of invasiveness of a search is highly dependent on facts. One way invasiveness can be measured is based on how it makes the searched, in this case the public, feel. Do people feel demeaned, dehumanized, and violated when they're forced to let the TSA manhandle their most intimate areas, and their families' most intimate areas. I submit to the court that I can prove that they do, if I had an opportunity for fact

finding. Another measure of invasiveness is whether or not the search exceeds the scope of what it must be looking for. Is the search narrowly tailored to find weapons, as by law it must be? Neither more extensive nor intensive than necessary, according to *U.S. v. Aukai* [497 F.3d 955] in the 9th Circuit. I submit to the court that I can prove that the TSA search goes way beyond what the TSA needs to do its job, and if I had an opportunity for fact finding, I could prove that. And I'll note to the court that I'm not arguing that the TSA is required to implement minimally-invasive procedures, but that their current procedures don't even approach a definition of reasonable. So to figure out a balancing test, there's no binding precedent in this court specific to determining TSA search procedures, that I've found at least. The government also proposes no balancing test in its brief, arguing that, basically, there's a threat, the TSA addresses the threat, case closed. That's from Respondent's Brief, p. 31, but that misses the mark. The existence of a threat, even a grave threat, does not give the government carte blanch to employ any search it wants. *Blackburn v. Snow* [771 F.2d 556] is illuminating, that's 11th Circuit from 1985, where the Court of Appeals declared a blanket strip search policy for visitors to a jail to be unconstitutional. The risk presented if a visitor to a jail were to smuggle a weapon would almost certainly be loss of life, but even in light of that grave risk, the 1st Circuit struck down the notion that the government can use *any* search to counter such a grave risk. The idea...

JBM 11:36: Mr. Corbett, I'm sorry to interrupt you but I want a little more clarity about what relief you're seeking today. Let's assume that we give you what relief you want, what would that order say?

Jon 11:55: Absolutely. Well, as the court knows, the administrative record filed by the TSA contains nothing that I've produced. It contains only the elements produced by the respondent; there's been no adversarial fact finding, ever. Given that there's pertinent questions of fact, I ask the court for the opportunity to allow me to gather evidence in order to ensure my basic due process rights and to allow the panel to fairly adjudicate the case.

JBM 12:19: So for today, that's what you want. You want an order from us allowing discovery.

Jon 12:25: Absolutely, Your Honor.

JBM 12:26: I mean, you don't think we even get to the balancing test today.

Jon 12:31: Your Honor, the court doesn't have the facts in front of it from both sides. I don't see how the court could do so. The court has 2 tools available at its disposal, that I'm know of, in order to allow for that discovery, and the first is the appointment of a special master by Rule 48, and the second is a transfer to a district court under 28 U.S.C. § 2347(b)(3), which would essentially allow discovery similar to an ordinary civil action. The district courts are well-equipped to handle that process, and I submit to the court that such a transfer is appropriate for the purposes of a limited fact-finding. Thank you.

JSM 13:08: Thank you, counsel. Good morning.

SS 13:20: Thank you, Your Honor, Sharon Swingle from the Department of Justice for the Transportation Security Administration. Just to end where Mr. Corbett began, I want to make clear that even today, he seems to believe that this case should be, and is properly in, the district court. That is not correct and it is law of the case.

JSM 13:39: Well, no, I understood him to be saying something more nuanced than that. I understood him -- bear with me for a moment -- I understood him to be saying that, accepting that jurisdiction belongs in this court, and that is clearly the law of the case, and the law of this circuit, that fact finding is necessary and the circuit would have any number of options at its disposal in order to effect fact finding, one of which would be to appoint a special master. [The] other method would be to send it back to the district court to conduct discovery for this court.

SS 14:22: And to be clear, I do want to address this discrete point, which was not a subject of appellate briefing but was...

JSM 14:28: Right.

SS 14:28: ...the subject of motions practice and also his rehearing petition in the earlier action, that transfer provision is limited to Hobbs Act actions, it does not apply to actions under 46110.

JSM 14:40: Right but let me ask you this question, let me just put it to you directly: Let's assume, arguendo, we were to say -- and I really want to hear what you have to say about it, but for the purpose of my question assume -- 1) that the statute's 60-day provision is not jurisdictional and, 2) let's just further assume, for the purpose of my question, that a delay was reasonable because he was waiting for a cert petition to be ruled on by the Supreme Court. And we were to go to the merits of the case. Is he entitled to no fact finding, and if the answer is he might be

entitled to fact finding, how would an appellate court go about doing it, in your view?

SS 15:29: Well, and let me be clear, this is a petition for review of agency action, and so the normal background principles of agency action come into play here, and the normal principles say a court review agency action based on the administrative record. Now there are limited and narrow exceptions to that, in which the court can require an agency to supplement an administrative record, but the normal practice is not for the court to somehow engage in, itself, particularly in the Court of Appeals, fact finding about disputed allegations, it would be to remand to the agency to address or redress any identified deficiencies in the administrative record, and that is specifically provided for in 46110. I will note that because the agency process here to date, well, at least at the time he brought his initial action, had been one that did not provide for public input, it is true that he was not given an opportunity initially to submit comments. There is now an open agency process rule-making in which he is perfectly free to submit his views about the use of AIT scanners. That proposed rule-making was issued, I want to say, 18 months ago, and it is under agency consideration. I am not aware whether he did submit comments in that, but he certainly could have, and in fact even in this proceeding, we did not object to his submission of supplemental materials that he wished the court to consider. But the idea that a petition for review for agency action would be appropriately adjudicated through district court-like depositions or trial testimony with cross-examination is just not correct, and it is flatly contrary to basic agency law principles.

JWP 17:13: Do you agree that the deadline here is not jurisdictional?

SS 17:18: I'd like to speak to that if I may, Your Honor. I think that the issue is not necessary to be decided by the court and nothing turns on it. Obviously this court, in its prior decision in holding that the deadline was...

JWP 17:29: I think we have to determine whether we have jurisdiction or not, don't we?

SS 17:34: The court does, Your Honor, but even in the first decision that the court's order of, I guess, yesterday, day before, cites that decision recognized or held that the time deadline was jurisdictional, but then went on to apply the reasonable grounds for tolling or for excusing non-compliance and held that there were reasonable grounds and that the untimely petition could be adjudicated. So here, too, whether or not

it's jurisdictional, it incorporates the reasonable grounds exception, so a finding of reasonable grounds for delay would be a reason to find that the court could consider it. I think the jurisdictional nature...

JWP 18:15: Do you think there were reasonable grounds for delay here?

SS 18:18: If I can come back to that in one minute, Your Honor...

JWP 18:20: Sure.

SS 18.20: ...I just want to be clear, the Supreme Court case cited by this court specifically cabined to the side and did not decide whether time limits under the Hobbs Act, for seeking Court of Appeals review of agency action, were jurisdictional, so I think it's an open question in the Supreme Court. But I think it comes to bear only when the court is asked to adopt, essentially, implied tolling.

JSM 18:45: Right, I understand your position is we don't have to decide it. If we choose to decide it, what is your position?

JWP 18:49: Yeah.

SS 18:49: Well, I think you would look to indicia of Congressional intent. Some of those indicia are whether the statute uses the language of jurisdiction, and 46110 does, it talks about the exclusive jurisdiction of the court of appeals.

JWP 19:04: What about the filing deadline?

SS 19:06: Well, you know, obviously the requirement to timely file does itself incorporate an exception, so, I mean I think Congress intended for that exception to be applied as it was written. I...

JBM 19:21: Does a pending cert petition toll the time for filing?

SS 19:24: Well, I think more generally there certainly is no legal rule that it would. He didn't seek to stay issuance of this court's mandate. I think, generally, the question is at what point does a litigant's pursuit of incorrect legal remedies, however well-intentioned, not constitute reasonable grounds.

JBM 19:42: So what's the answer to that?

SS 19:43: Well, I think it needs to be a case-by-case determination, Your Honor.

JBM 19:47: What's the answer in this case?

SS 19:48: I think no. I think the case law is quite clear that simple legal mistake is not reasonable grounds. I think whatever latitude he might have had as a *pro se* petitioner, and I would note that the 9th Circuit four years before he brought his action had held that a challenge to TSA screening practices should be brought under 46110, exclusively in the Court of Appeals, he cites a handful of district court cases. Every one of those cases was dismissed for lack of jurisdiction, fairly soon within his filing of this action, yet he continued on for several years to litigate this case only in the court of appeals, he never sought to bring an action here directly. He didn't ask even this court to consider transferring it to itself until after the final judgment in the prior appeal. And then even after he came back in this court under 46110, the first thing he filed was a motion to transfer the case to district court. So I think in that sense, that seems to represent a course of conduct that is just not reasonable in the government's view.

JSM 20:50: I'd like to go back, though, to the basic question. If we apply the factors outlined by the Supreme Court in *Henderson* in order to determine whether this is jurisdictional or not, we look to the plain language of the statute to determine whether it provides any evidence that the provision was meant to carry a jurisdictional consequence, we consider the placement within the statute to see if it's located in a subchapter maybe called procedure or jurisdiction, we consider the characteristics of the review scheme and so on. Applying those factors, is this jurisdictional or is it not?

SS 21:24: Well I think those factors do weigh in support of a finding of the limit being jurisdictional, Your Honor, I mean this is not an issue that...

JWP 21:33: Yeah it's an interesting point when we posed the jurisdictional question first to the parties, the response of TSA was that the court should dismiss the petition as untimely. The government did not assert that we should dismiss for lack of jurisdiction.

SS 21:57: Because ultimately, Your Honor, I don't think we believe that anything turns on it.

JSM 22:00: No, I understand your position that it doesn't matter, and that may be right, but I should like you to address my question...

SS 22:07: Absolutely, Your Honor.

JSM 22:07: ...and my question as simply as I know how to put it is whether it is jurisdictional or not?

SS 22:12: And again, Judge, I think there are a number of indicia in the statute that support the conclusion that it is. The statute uses the phrasing of jurisdiction, the statute does so in the course of setting up the exclusive review mechanism. We have, and as the Supreme Court recognized in the *Henderson* case, it's appropriate to look at history. The court in that case specifically distinguished the Hobbs Act-kind of review that is analogous to this here. We have a long history of courts finding this time limit to be jurisdictional.

JSM 22:43: Of course, it's interesting if you look at other portions of the statute, Authority of the Court under (c), there Congress specifically uses the word, "the court has exclusive jurisdiction," but there they...

SS 22:56: That's my point there...

JSM 22:56: But they don't necessarily in the provision we're talking about here.

SS 23:00: Well but I think they need to be read together, Your Honor, because of course, (c) provides that this is the exclusive means to get into any court to review an order, at least, for purposes of this case issued by the TSA after it...

JSM 23:12: Ok, let me ask you this question and then we'll go on to the merits. I want to go back again to the question that Judge Martin put to you a moment ago. There's no question that the delay here goes beyond 60 days. His only excuse for the 9 month delay after the circuit ruled in February is that he had a cert petition pending. Would that be sufficient to constitute reasonable delay?

SS 23:46: Not in our view, Your Honor.

JSM 23:47: Ok, tell us why not, simply.

SS 23:49: Well, I think a number of things. One, just to say a straight-forward legal matter, at this point, the court's mandate has issued. That was the law of the land. He took no steps to stay issuance of the mandate, so in fact that was binding law on him as a litigant. Two, I think he has identified his own legal mistake as the reason for the delay, but that is not a reasonable legal mistake. I mean, even putting aside the fact that under the case law, legal error, legal mistake, legal misinterpretation is not typically considered reasonable grounds, any mistake here is not reasonable in the face of what was, by that point, overwhelming and uniform case law indicating that the only place to bring a challenge of the type he brought was in the Court of Appeals. So I think once quixotic pursuit of a cert petition just cannot be in itself

sufficient to excuse non-compliance with time deadlines. And while, in fact, we did take a position in a similar case that someone's mistake, while they were still in the district court, at the point they became on notice, at that point their delay might be excusable. We are talking about someone who delayed literally years beyond that point here.

JSM 25:01: Why don't you go to the merits?

SS 25:03: If I may, Your Honor, and I have just a couple of very brief points I'd like to make. The first, and I want to be very clear, there is no "least restrictive means" requirement under the 4th Amendment, and I think, while Mr. Corbett recognizes that, he nevertheless continues to language talking about narrow tailoring and least intrusive means of searching, that is not the test, and it would be an unworkable test for the government. The Supreme Court has repeatedly held that the government has latitude to choose among reasonable alternatives, and I think that is of critical importance in this context, where TSA has to juggle what are competing and emergent threats to aviation security. It has to do so within resource constraints and taking into account questions of where to best allocate limited resources, and where technological developments may really fundamentally change the nature of screening practices at issue. Even within this very case, of course, we have a situation in which the development of effective, automated software has changed significantly the privacy interests at stake, and obviously the agency needs the ability to implement those things, but to do so in a measured and timely and reasonable way, and surely the 4th Amendment does not limit its ability to do that.

JBM 26:21: About this evolving technology, I'm not sure this has anything to do with the 4th Amendment, but is it my understanding from reading your brief that the TSA is no longer using backscatter because the manufacturer couldn't use the privacy software with that technology.

SS 26:41: That is absolutely correct, Your Honor. As you know we did re-print an image in our brief, but the only thing that a TSA scanner now sees -- that an individual at the checkpoint now sees -- is an automated, generic outline of a human.

JBM 26:55: I understand that, but do you have plans to re-instate the backscatter?

SS 26:59: No. There are no plans to re-instate the backscatter and as the 1st Circuit held in the *Redfern* [*v. Napolitano*, 727 F. 3d 77, 2013] case, any challenge to the use of that type of technology is moot. It is finished. There is nothing beyond pure speculation about whether we

would put those back in. We cannot do so, compliant with federal law, because Congress has mandated that any AIT scanner in use as a primary screening method has to have automated target software in, and so we've done that.

JBM 27:25: I understand that. Can the AIT technology work today without the privacy software, the ATR?

SS 27:37: No one at a checkpoint can see an image other than the automated image.

JBM 27:42: That wasn't exactly my question. My question is, is it today possible to operate the AIT without the ATR software?

SS 27:54: The machines have the technological capability of displaying an image, but they cannot do so except in a very limited test mode, and just to point the court to the precise place in the public record, at 1140 and 1141 of the administrative record, there's a letter to a member of Congress kind of describing the extremely -- really extraordinary limited circumstances -- in which anyone could ever see that image, and the short answer is no one in normal use will ever see anything individualized, nor could they. There are literally a handful of people within the TSA at large who have the ability to do that. So, I must confess we find somewhat puzzling the repeated references to body folds and -- it just simply doesn't happen, it's a generic outline.

JBM 28:47: Of course, I mean, like any other employer, you're dealing with human beings and, I guess, you've had instances where individuals stored images. I mean, it was an aberration, but that did happen, didn't it?

SS 29:04: I'm not aware of whether it did or not, but I will say quite clearly because obviously this is a claim for prospective injunctive relief against the procedures as they are written and applied, the fact that some individual might have violated them is not a basis for...

JBM 29:20: I agree with you, I was just curious...

SS 29:23: And in fact, just to be clear, under the old regime, TSA did have extremely stringent privacy safeguards in place. No scanner who was present at the checkpoint ever had access to individualized images. They were reviewed off-site. The machines didn't have the ability to store. People were prohibited from bringing...

JWP 29:40: These are the things you've told us are gone?

SS 29:44: Excuse me?

JWP 29:44: These are the procedures you told us are now moot.

SS 29:46: And they are all gone, that's right, Your Honor.

JWP 29:47: Ok, just wondering.

SS 29:48: But just to be clear, I want to, yeah. And then finally, I don't know if the court wishes to ask any questions about Mr. Corbett's claim of a right of access to the Sensitive Security Information or classified information in the record. We would rest on our briefs.

JSM 30:04: Thank you, I have one final question, though. I want to go back where we began with the deadline. I'm just curious about something. The statute says the petition must be filed not later than 60 days after the order is issued. This is the SOP...

SS 30:20: Right.

JSM 30:20: ...as applied here by the TSA. The SOPs are classified, right?

SS 30:26: The SOPs are Sensitive Security Information.

JSM 30:31: And therefore they would not be available to a petitioner.

SS 30:34: That's correct, Your Honor.

JSM 30:34: How would a petitioner know when to file a petition if he felt he was aggrieved by some procedure theoretically embodied in an SOP if he never saw the SOP and never knew when it had been issued in the first place?

SS 30:53: Well, certainly, Your Honor, we have said repeatedly that an individual may not have knowledge or any reason to know of the existence of the SOP until he's on notice of the existence of new screening practices, and that that would be reasonable grounds for delay. You know, obviously if he hasn't been screened he also might not have standing to challenge a particular agency screening practice, so we have not disputed that.

JSM 31:17: So translate that into English for me.

SS 31:19: If you don't...

JSM 31:21: Let me put my question simply.

SS 31:24: Right.

JSM 31:24: Let's just assume, hypothetically, I walk through TSA in Miami or Chicago or San Francisco and I believe that I'm aggrieved by the

procedures employed. And I want to sue. The statute Congress gave me the capacity to file a petition with the U.S. Court of Appeals in the appropriate jurisdiction. But I don't know when the SOP that's applicable was codified and issued because it wasn't publically issued. So I walk into circuit court in the location where the screening occurred and I file a complaint. And I say I'm aggrieved and I'm suing under the statute. I'm suing within a week of the incident having occurred. But let's just assume, hypothetically, that the SOP was issued 2 years earlier. Never publically promulgated but just issued. Could you come in and then say, under those circumstances, that's tough, Marcus, you're too late?

SS 32:46: I think that is a very difficult question and let me explain why. I think we have here screening practices that were widely publicized at the time. That many people knew to challenge in a fairly quick kind of way. I think you posit a case...

JSM 33:01: The question I've raised, let me preface it by saying, that's not the case we have here.

SS 33:05: Exactly, Your Honor.

JSM 33:07: So you do not have to tell me...

SS 33:08: So, I...

JSM 33:09: ...because in this case the circuit and the district court clearly and plainly stated the date that the SOP was issued.

SS 33:16: Exactly, Your Honor, I think...

JSM 33:17: So that's not my question. I want you to just assume my hypothetical and help me understand if I don't know when the SOP is issued. I know when I believe I was aggrieved. And I file a claim and it turns out that it wasn't within the 60 days because the SOP was issued years earlier and they're still operating under that SOP. Is that a reasonable delay?

SS 33:44: If you'll give me just a little bit of latitude, Your Honor...

JSM 33:47: I sure will.

SS 33:47: ...I think there are very difficult administrative law questions and I think that the case law is very conflicting about whether someone who was not initially subject to agency action can wait a long period of time and then, when they are later subject to that rule, challenge it beyond that timeframe. I think that...

JWP 34:05: Of course, you mentioned earlier that there might be an absence of standing...

SS 34:12: There might...

JWP 34:12: ...on the part of the individual to sue until they've actually been subjected to the procedure...

SS 34:19: That's right, Your Honor...

JWP 34:19: ...and so what I guess, is it fair to say without prejudicing the rights of the government that it goes into the analysis of whether it is reasonable delay and it is conceivable that, in fact, that that would be considered a timely petition?

SS 34:40: I think one would need to look at the precise circumstances, and as I said...

JSM 34:43: And that's why, counsel, when I asked you the question, I started out by saying let's just assume hypothetically that one of us walks into an airport, is screened by the TSA, and comes away with a conclusion that he's been aggrieved. And within one week, lodges a complaint with the U.S. Court of Appeals in the appropriate jurisdiction. Under those circumstances, there probably would be little question about my standing or someone's standing to bring suit. So I want you to assume that it's justiciable for my purposes and I appreciate how difficult the question is but it just struck me when I read the statute and I looked at it and I said, how is an aggrieved person to know when to file suit...

SS 35:36: And again, Your Honor...

JSM 35:37: If he does it immediately after what he claims is, you know, the mistake?

SS 35:42: I think that may well turn on whether the individual should have known at an earlier point, or whether the screening practices were widely known about at the time.

JWP 35:49: But it also would turn on whether they had standing.

SS 35:52: It could well, Your Honor. But I will say that...

JWP 35:54: You wouldn't suggest, would you, that they were obliged to file a petition before they had standing?

SS 36:02: Absolutely not, Your Honor. I will say that there is some case law in other administrative law cases in which courts have rejected the idea that only later aggrieved individuals, that later aggrieved individuals

who are otherwise outside a time limit for challenging agency action can do so when there are people who did have standing at the time who could have, but I think this is extremely fascinating but in this case ultimately not a dispositive question because Mr. Corbett, in fact, became aware of and brought his first action within a matter of weeks after TSA had implemented the new screening practices, and there is no question that he was on extremely short notice at that time, I believe, back in October or November...

JSM 36:44: Of course he couldn't have known when he filed his suit that he just happened to stumble into the right timeframe, could he? He just filed it in the wrong forum.

SS 36:53: No, but he has said that he's an extremely frequent flier who is repeatedly subject to airport scanning procedures and in this case he said he was immediately subjected to them, so, I don't think there's any timeliness issue about the initial filing...

JSM 37:08: No, no, that wasn't my point. I agree that there was no timeliness problem when he filed in district court, he just happened to pick the wrong forum. I'm simply saying, you can fly all the time but you don't know...

SS 37:19: Absolutely, Your Honor.

JSM 37:19: ...when they SOP was issued because it's not a matter of public record, and so if you claim to have been aggrieved, Congress meant to give you a means to get into a court of law, a circuit court of law, to challenge it, and I'm just trying to figure out how an aggrieved party would know when to file.

SS 37:36: And, Your Honor, I really am not trying to be difficult. I can just envision a situation in which someone who has never flown flies for the first time, doesn't like the fact that their bag must be x-rayed, and brings a 4th Amendment claim.

JSM 37:48: Right.

SS 37:48: Right, would that be timely? It's hard to imagine...

JSM 37:51: Hard to imagine, I agree.

SS 37:52: Yeah, even if they didn't previously have standing.

JSM 37:54: I agree. I appreciate your efforts.

SS 37:56: Thank you, Your Honor.

JSM 37:56: Thank you very much. Mr. Corbett, you've reserved 3 minutes.

Jon 38:05: Your Honors, you're absolutely correct that one who wishes to challenge TSA procedures has no idea when these SOPs were issued. In fact, the SOP is continually re-issued. The TSA has claimed here that they've removed those backscatter x-ray scanners, and I bet that was done by re-issuing an SOP. How many times has the SOP been reissued in the last several years since I brought my claim? Was there an SOP issued within 60 days of November 2012 when I filed this claim?

JWP 38:35: Well if there was, you weren't challenging it, because you're basing your challenge on what you did know much earlier, right?

Jon 38:45: What I did know is nothing. I knew that I went to a checkpoint and that the TSA asked to, essentially, photograph my body with an x-ray.

JWP 38:53: Right, you're challenging the procedures to which you were subjected, right?

Jon: 38:58: I'm challenging the TSA procedures that require me to be subjected to the body scanners and to the pat-downs, whether they were issued in 2010, in 2012, or yesterday.

JWP: 39:08: Ok.

JSM: 39:09: See the problem you have, though, as I see it, and you can address it for me, if you'd like, but the problem I think that you have is you knew with clarity, because the court put you on notice, that the TSA revised its security screening procedures for air passengers effective October 29th, 2010, the revised procedures were contained in a document, the Standard Operating Procedures, so, in this case you knew, at least as of the date the court told you that, which was February 27th, 2012, so you weren't shooting blanks in the night to the extent that you were challenging the 2010 SOP.

Jon 39:55: Correct. And, Your Honor, the opposing counsel wants to paint this as some kind of unreasonable legal mistake that was -- should have been obvious to anyone who reviewed the case law. There's no case law that, when the TSA changes body scanners that they have to issue an order. In fact, that issue was brought up in EPIC v. Napolitano, or *EPIC v. D.H.S.*, where they had a large argument in the D.C. Circuit over what procedures are required when they do such things. So, the TSA's argument that every lawyer should have known that this is the

right place to file is absurd. If I can go to the merits just for a moment, the TSA seems to be arguing that their removing these backscatter systems and putting in some kind of privacy software mitigates this privacy issue, and it doesn't. Here's two reasons. The first is that the TSA concedes that these machines are still taking images of your nude body as you pass through them. Whether or not they're reviewed by a person or a machine, the TSA is still taking images of your nude body. The second is that these scanners come hand-in-hand with the pat-down procedures. The reason is that when the TSA's scanners produce what they call an "anomaly," that is, some kind of alert that says you've got to check this person out, that person is subjected to a pat-down. The pat-downs are extraordinarily invasive. So these two technologies, or the technology and the pat-down, come hand-in-hand; they're inseparable.

JSM 41:24: Thank you, counsel. This court will be in recess until 10 AM tomorrow.

Exhibit B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Jonathan Corbett Petitioner v. United States Department of Homeland Security, Respondent	**No. 12-_____** **MOTION TO TRANSFER TO DISTRICT COURT**

Jonathan Corbett, *pro se* Petitioner, hereby moves this Court to transfer proceedings to the United States District Court for the Southern District of Florida[1] as per 28 U.S.C. § 2347(b)(3), or alternatively as implied by 49 U.S.C. § 46110 or under 28 U.S.C. § 1651.

I. BACKGROUND

In or around October 2010, the Transportation Security Administration ("TSA") began implementation of a secret order requiring the inspection of the genitals, breasts, and buttocks of everyday travelers seeking to pass through airport security checkpoints across this nation. This search was ordered for use as primary screening, meaning that the search is the first in the line of TSA inspections and is

[1] This venue is appropriate because it is the venue in which Petitioner resides.

performed with neither suspicion nor as a later part of a search program that "escalates in intrusiveness."

The order has not been released publicly[2], but it is clear through the TSA's own public admissions that it has two distinct components: 1) the "nude body scanner[3]" component, which involves devices that create images of a person without his or her clothing using x-rays or other radiation for inspection by either a TSA screener or an automated system, and 2) the "pat-down" component, a police frisk-style search that requires TSA screeners to use their hands to physically touch the genitals, buttocks, and breasts of the traveler being searched. While the TSA is still in the process of implementing this order and therefore many travelers will still find themselves proceeding through the tried-and-true metal detectors, a consistently increasing percentage are required to submit to the genital inspection program, presently to the tune of at least 100,000 individuals *daily*.

This petition seeks to have this Court declare both components of the TSA's genital inspection program unconstitutional under the Fourth Amendment to the U.S. Constitution. In order to pass constitutional muster, checkpoint stops must be evaluated against a three-pronged test most clearly described in *Illinois v. Lidster*,

[2] The SOP is alleged by the TSA to constitute "Sensitive Security Information." See 49 U.S.C. 114, 40119.

[3] Nude body scanners have been given a plethora of names, which include Whole Body Imaging (WBI), Advanced Imaging Technology (AIT), Backscatter X-Rays (BKSX), and Millimeter Wave Devices (MMW). This petition refers to all such designated devices and any similar devices.

540 U.S. 419, 427 (2004). Additionally, suspicionless, "administrative searches" such as those ordered by the TSA must be evaluated against a stricter standard limiting their scope, as articulated in *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007). The TSA's genital inspection program can pass neither of these tests.

II. CASE HISTORY

Petitioner originally filed an action seeking review of the genital inspection program on November 16th, 2010, in the United States District Court for the Southern District of Florida. *Corbett v. United States*, 10-CV-24106 (S.D.F.L). This case was dismissed because that Court found that the genital inspection program was component of a TSA "order," and 49 U.S.C. § 46110 had divested the district courts of jurisdiction, with jurisdiction instead proper in this Court. Petitioner appealed that decision to this Court, which affirmed the ruling, and the U.S. Supreme Court refused *certiorari*. *Corbett v. United States*, 458 Fed. Appx. 866 (11th Cir. 2012), *cert. denied*, (collectively with district court proceedings, "*Corbett I*").

The appeals in *Corbett I* largely raised due process concerns because unlike most orders covered by § 46110, the genital inspection program was proceeded by no hearings, no public comment period, and was not even known to the public until well after it was issued. As a result, neither Petitioner nor any other party has ever

had an opportunity to gather and present evidence, call witnesses, or otherwise receive the *de novo* proceedings that due process demands. However, this Court, in affirming the dismissal of *Corbett I*, assured Petitioner that this Court can indeed afford him the due process to which he is entitled, and specifically noted that if a petition were filed in this Court, the Court may "transfer certain cases to a district court" to resolve questions of fact if the district court is better suited to do so. *See Corbett I*, Circuit Court Opinion, p. 8.

III. ARGUMENT

A. Genuine Issues of Fact Must Be Resolved

Both the *Lidster* and the *Aukai* tests require facts to be established before this Court may rule on the law.

Lidster is a three-pronged test designed to determine whether a checkpoint stop comports with the Fourth Amendment. The three prongs are "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster* at 427.

Each prong itself may have many sub-components. In order to determine the gravity of the public concerns served by the search, in this particular instance,

the Court must consider fact-based questions including but not limited to the following:

1. How likely is it that a terrorist will target air travel in the future?
2. How much damage would likely be inflicted on the public should a terrorist attack be successful?
3. Can a small non-metallic explosive[4] actually bring down an airplane?

To determine the degree to which the genital inspection program advances the public interest, the Court must consider fact-based questions including but not limited to the following:

1. How effective is the genital inspection program at detecting non-metallic explosives?
2. Are there other, more effective methods that will accomplish the same aims?
3. Since a terrorist could hide an explosive from the genital inspection program by inserting it into a body cavity, is there any deterrent value at all?
4. Even if the genital inspection program does deter air terrorism, does it actually make the public any safer? (For example, if a terrorist realizes that

[4] The sole justification put forth by the TSA in support of their decision to implement the genital inspection program is that metal detectors cannot detect small explosive devices that lack metallic components. However, there is a lack of evidence to support that a small, non-metallic explosive device of the type that the program searches for is powerful enough to cause the demise of a commercial jetliner.

he cannot blow up 150 passengers on an airplane and instead blows up 150 passengers on a train, has the public's interest actually been served?)

5. What is the risk of cancer associated with the exposure to radiation produced by nude body scanners? What is the risk of transference of pathogens via the genital pat-down? Is it possible that more Americans will die due to the genital inspection program causing cancer and spreading disease than could possibly be saved by any terror deterrence the program might have?
6. Are travelers replacing air travel with car travel because of the intrusiveness of TSA searches? If so, since air travel is significantly safer than car travel, are more Americans dying on the roads than could possibly be saved by any terror deterrence the program might have?

Finally, to determine the severity of the interference with individual liberty, the Court must consider fact-based questions including but not limited to the following:

1. Would a reasonable member of the general public, if given the details of the intensity of TSA searches, find the searches offensive, undignified, humiliating, and/or disgusting?
2. What have been the effects on the general public? Have people experienced psychological or physical trauma as a result of the genital inspection

program? Have there already been "cancer clusters" and incidences of TSA-transmitted pathogens?

3. What is the severity of the potential health-related issues associated with genital inspection program, as described above?
4. Are there other, less invasive methods that will accomplish the same aims?

Because TSA searches are suspicionless searches forced upon the general public in the midst of exercising their constitutional right to travel, *Aukai*, as well as many other courts, have placed more stringent requirements on TSA searches. *Aukai* requires that "(1) the search is 'no more extensive or intensive than necessary, in light of current technology, to detect the presence of weapons or explosives;' (2) the search 'is confined in good faith to that purpose;' and (3) a potential passenger may avoid the search by choosing not to fly." *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (*en banc*); *see also U.S. v. Fofana*, 620 F.Supp.2d 857 (S.D.O.H. 2009); *George v. Rehiel et. al*, No. 10-586, Order (D.E. #43, Oct. 28, 2011) (E.D.P.A.).

Many questions of fact (some overlapping with those required to evaluate the *Lidster* test and others not) arise when considering the *Aukai* test, including but not limited to the following:

1. Is the genital inspection program necessary to detect weapons or explosives? Are there less invasive but equally or more effective alternatives?

2. Is the genital inspection program useful for the detection of weapons or explosives?
3. Did the TSA implement the genital inspection program in good faith, or were there ulterior motives?
4. Does the TSA's implementation of the genital inspection program allow travelers to avoid the search by electing not to fly?

The sixteen questions listed above only address *some* of the facts that will be in dispute in relation to this petition. These are *not* questions of law, and Petitioner as of yet has never had an opportunity to gather evidence (*a la* discovery) or present evidence.

B. This Court Has the Authority to Transfer to the District Court

In its order affirming *Corbett I*, this Court noted that 28 U.S.C. § 2347(b)(3) permits this Court to transfer proceedings to a district court. This statute allows the Court to:

> ...transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

The government objected to the Court's opinion that § 2347(b)(3) can be applied to orders of the TSA. *See Corbett I*, Motion for Clarification. The Court declined to rule on the government's objection, declaring it irrelevant to the proceedings at hand. However, 28 USC § 2341(3)(B) makes clear that the statute applies to orders of "the Secretary of Transportation" and the administrator of the TSA is the "Under Secretary of Transportation for Security." Respondent has admitted the same in *Corbett I* in invoking 49 USC § 46110, which also defines its applicability as to the "Under Secretary of Transportation for Security," and Respondent is estopped from arguing otherwise here.

Regardless, 28 U.S.C. § 2347(b)(3) is but one source of authority for this Court's power to transfer this case to a district court. This Court can also imply the same authority from 49 USC § 46110, which requires actions to be originated in this Court, but does nothing to prevent this Court from exercising its authority, when the interest of justice so dictates, to utilize the district courts for their superior fact-finding resources. On the contrary, it should be noted that 49 USC § 46110(c) invites this Court to "tak[e] other appropriate action when good cause for its action exists." This is especially appropriate in this instance, where due process concerns require the Court to read authority to conduct proper fact finding tools into the statute, for failure to do so may render the statute unconstitutional as applied. "[W]here a statute is susceptible of two constructions, by one of which

grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000).

Finally, this Court may also derive its authority from the All Writs Act, 28 U.S.C. § 1651. This statute, which provides that this Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions," aligns well with a situation in which asking for district court intervention would result in a reasonable determination of facts while hearing this petition solely according to appellate procedure may result in fact deficiency serious enough as to curtail due process. See *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), *citing* Harris v. Nelson, 394 U.S. 286, 299, 89 S. Ct. 1082, 1090-91 (1969) ("recognizing that courts may rely on their authority under the All Writs Act 'in issuing orders appropriate to assist them in conducting factual inquiries.'").

C. This Court Should Utilize Its Authority to Transfer

Since it is undisputed that no proceedings of any kind (of which Petitioner or any member of the public may have participated) have been held at the agency level – or at any level – this Court is left with the task of not only determining facts, but ensuring that Petitioner's right to marshal facts is accommodated. There exists three options for doing so: remanding to the agency, attempting fact finding

in this Court via ad-hoc discovery orders or the appointment of a special master, or engaging the assistance of the district courts.

Remanding to the agency is impossible in this circumstance. The genital inspection program stems from an order contained within a document that by law cannot be released to the public. The TSA, quite reasonably, does not and cannot hold public hearings on such documents. There exists no procedure for holding such a proceeding. They similarly do not and cannot deal with discovery demands – again, no procedure exists.

Beyond that, the core of Petitioner's challenge is outside of the agency's area of expertise. That is, the TSA's core area of expertise is (allegedly) security, not constitutional law, and the agency is therefore unable to hold a hearing that aims to address constitutional challenges. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *see also* *Johnson v. Robinson*, 415 U.S. 361 (1974). As the subject matter is outside of the TSA's area of expertise, it would be both improper and futile to direct the TSA to hold proceedings, and such proceedings would amount to no more than the fox guarding the hen house.

This Court may also be tempted to engage in fact finding itself. However, the Federal Rules of Appellate Procedure do not accommodate fact finding. The

word "discovery" does not even exist within the appellate procedure, and although this Court has the authority to order any fact finding it so chooses, essentially this Court would be forced to make up the rules as it goes along, exponentially increasing length and uncertainty of litigation. Perhaps the only section of the appellate procedure that could possibly accommodate is the appointment of a special master as per Fed. R. App. P. Rule 48, but even then, this offers no advantage and many disadvantages (most notably, that there is still no formal process as found in the Fed. R. Civ. P.) in comparison to a district court transfer.

When agency hearings have been altogether foregone, when holding new hearings is an impossibility, and when substantial questions of fact exist that will require more than "a few affidavits" from the parties (in this case, significant discovery of the variety likely to require court intervention[5] as well as perhaps dozens of witnesses), transfer to the district court best utilizes judicial resources, affords due process, and is in the interest of justice.

It should also be noted that this case raises issues of significant public importance, which is all the more reason why this case deserves the most thorough fact finding process that this Court may afford. The genital inspection program has

[5] It is anticipated that there will be significant disputes as to what is releasable and what is not, in light of the potential for the government to claim that any documents that may be beneficial to the Petitioner's case constitute SSI.

brought about no less than half a dozen federal lawsuits[6], threats of fines[7] and even arrest of travelers who have refused to participate[8], national scale protests[9], condemnation by countless lawmakers and legislative bodies at all levels of government[10], and even Presidential attention[11]. Affecting 2 million travelers

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[6] Most of these lawsuits have been dismissed on jurisdictional grounds, as was *Corbett I*, and as such, the merits of these cases have never been heard. *See*, for example, *Blitz v. Napolitano*, No. 11-2283 (4th Cir. 2011), *pending*; *Roberts v. Napolitano*, 10-CV-1966, 2011 WL 2678950 (D.D.C., July 7th, 2011); *Durso v. Napolitano*, 10-CV-2066, 2011 WL 2634183 (D.D.C. July 5th, 2011); *Redfern v. Napolitano*, 10-CV-12048, 2011 WL 1750445 (D. Mass., May 9th, 2011);

[7] For example, in November 2010, passenger John Tyner refused to allow the TSA to touch his genitals, and was threatened with a fine of $11,000. *See* "TSA Investigating 'Don't Touch My Junk' Passenger," Wired Magazine, November 16th, 2010, http://www.wired.com/threatlevel/2010/11/tsa-investigating-passenger/

[8] For example, in July 2011, passenger Andrea Abbott was arrested for "disorderly conduct" after refusing to allow the TSA to touch her teenage daughter's genitals. See "Mom jailed for raging on TSA agents over daughter's pat down; didn't want girl's 'crotch grabbed,'" NY Daily News, July 13th, 2011, http://articles.nydailynews.com/2011-07-13/news/29788651_1_tsa-agents-nashville-airport-nashville-police

[9] For example, in November 2010, the "National Opt-Out Day" protest occurred in dozens of airports across the country. See "How Your TSA Pat-Down Will Look On Opt-Out Day," Gothamist, November 22nd, 2010, http://gothamist.com/2010/11/22/photos_what_your_tsa_pat-down_will.php

[10] For example, the legislature of the State of Texas was set to outlaw invasive pat-downs before the TSA threatened to shut down all flights to the state; Alaska State Rep. Sharon Cissna was molested by TSA over her prosthesis following breast cancer surgery; U.S. Rep. Rand Paul was detained for over 1 hour at a TSA checkpoint; U.S. Rep. John Mica (a TSA authorization sponsor in 2002) referred to the agency as "the little bastard child I created," *etc., ad nauseum*. *See* generally, "Some states want TSA to ease up," USA Today, May 13th, 2011, http://usatoday30.usatoday.com/news/nation/2011-05-12-invasive-tsa-pat-down-groping-law_n.htm

daily, TSA inspection is perhaps the most common interaction that a U.S. citizen may have with the federal government, and yet here we are with a case of first impression for this Court now two years and 1.4 billion passengers later.

IV. CONCLUSION

It is high time that this controversy receive full judicial review, and for the foregoing reasons, fact finding in the district court is the most prudent step towards that objective. Petitioner therefore requests that this Court transfer the proceedings to the United States District Court for the Southern District of Florida.

Dated: Miami, FL
November 16th, 2012

Respectfully submitted,

_____

Jonathan Corbett
Petitioner, *Pro Se*
2885 Sanford Ave SW, #16511
Grandville, MI 49418
E-mail: jcorbett@fourtentech.com

[11] See "Obama, Clinton ask TSA to make body screening less invasive," International Business Times, November 22nd, 2010, http://www.ibtimes.com/obama-clinton-ask-tsa-make-body-screening-less-invasive-247986