Case No. 15-15717

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,
Petitioner

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent

Petition for Review of a Decision of the
Transportation Security Administration

BRIEF OF PETITIONER JONATHAN CORBETT

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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 Cir. R. 26.1-1:

Petitioner

- Jonathan Corbett

Respondent

- U.S. Department of Homeland Security
    - Jeh Johnson
    - Transportation Security Administration
        - Peter Neffenger
- U.S. Department of Justice
    - Michael Shih
    - Sharon Swingle
    - Benjamin Mizer
    - Loretta Lynch

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Jonathan Corbett respectfully requests oral arguments to provide the Court more clarity than can be, or has been, provided to it in writing, and requests that oral arguments be assigned to the Court's satellite office in Miami, Fla.

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STATEMENT OF JURISDICTION

Any person with "a substantial interest" in an order "with respect to [the TSA's] security duties and powers" may "apply for review of the order by filing a petition for review in … the court of appeals of the United States for the circuit in which the person resides…" 49 U.S.C. § 46110(a). The Courts of Appeals have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings." 49 U.S.C. § 46110(c); *see also Corbett v. United States ("Corbett I")*, 458 Fed. Appx. 866 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 161 (2012); *Tooley v. Napolitano*, 556 F.3d 836, 840, 841 (D.C. Cir. 2009).

Petitioner challenges the TSA's decision to make screening via its controversial "body scanner program" mandatory, when it so chooses, while prior to December 2015, it was always optional for all passengers. This Court, and every court to hear arguments regarding the body scanner program, has determined that the decision to use the body scanners in the first place constitutes an "order" under 49 U.S.C. § 46110. *Corbett I*; *see also Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012). It follows that a modification to that order is, itself, an order, and Respondent itself considers this an order. *See* Opp. to Mot. to Stay (Jan. 7th, 2016).

Petitioner is a frequent flyer, having flown no less than 100,000 miles on over 100 domestic flights over the course of the past 3 years. *See* Mot. to Stay, Ex. B, Decl.

of Jonathan Corbett, ¶ 2. In the 2 months prior to the filing of this brief, petitioner has flown 4 flights and in the 2 months subsequent plans to take at least 2 more. *See* Exhibit B. Each day Petitioner flies from a domestic airport, he must traverse a screening checkpoint subject to the TSA's order. On at least 3 occasions, Petitioner has been subject to "selectee" (heightened) screening from the start of his screening, on several more occasions has been subject to elevated screening during the process, and once has been asked to deplane by the TSA to undergo further screening; it is fair to say that Petitioner regularly gets the "full treatment" from the TSA and there is no reason to expect that he will not in the future. *Id*. Petitioner has conducted substantial scholarly research regarding issues surrounding the challenged order that has been presented to the United States Congress as well as placed on the record by the legislature of the State of Texas. *See* Reply to Opp. to Mot. to Stay, Ex. A, Decl. II of Jonathan Corbett. It is clear that Petitioner has the "substantial interest" required by § 46110 (a), a fact underscored by *Corbett I*, in which, while unsuccessful on the merits, the Court exercised jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the Transportation Security Administration's mandatory screening via body scanner is a reasonable search under the Fourth Amendment to the United States Constitution.
2. Whether the Transportation Security Administration's mandatory screening order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedures Act.
3. Whether the Transportation Security Administration's mandatory body scanner screening was properly promulgated under the Administrative Procedures Act.

STATEMENT OF THE CASE

I. Course of Proceedings in the Agency & Other Courts

In or around September 2010, the Transportation Security Administration ("TSA") issued an order, effective in or around October 2010, to change the primary screening[1] methods used at airport security checkpoints across the country. Instead of the walk-through metal detectors previously used for primary screening, body scanners[2] or pat-downs were to be implemented wherever available. While the document implementing the policy was not – and has still not been – published for the general public's inspection[3], other, public TSA documents, as well as declarations by TSA officials and arguments by TSA attorneys in the federal courts, indicated that a passenger subject to the new screening policy was freely and universally allowed the right to elect whether their screening would be conducted via body scanner or via pat-down. *Corbett v. TSA ("Corbett II")*, 767 F.3d 1171, 1174 (11th Cir. 2014) ("If a passenger declines the scanner … he receives a pat-down instead.").

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[1] "Primary" screening refers to the first – and typically only, assuming the traveler "passes" – screening used on the general traveling public.

[2] A "body scanner" is a device that uses electromagnetic radiation to create an image of the traveler without his or her clothes. The TSA refers to these devices using many names, including but not limited to: Advanced Imaging Technology (AIT), Whole Body Imaging (WBI), backscatter x-rays, and millimeter wave scanners.

[3] As the Court is aware, the TSA considers this policy, known as the "Screening Checkpoint Standard Operating Procedures," to be Sensitive Security Information, pursuant to 6 U.S.C. § 114 and related federal regulations.

As no proceedings within the agency are available to members of the public aggrieved by a TSA policy, Petitioner and several other litigants across the country immediately filed suit. *Corbett I* at 870; *Blitz*; *Roberts v. Napolitano*, 798 F. Supp. 2d 7 (D.C. Cir. 2011); *Durso v. Napolitano*, 795 F. Supp. 2d 63 (D.C. Cir. 2011); *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013). After much debate over whether these searches were implemented by an "order" under 49 USC § 46110 and the effects of this on jurisdiction, the issue was resolved by a panel of this Court in a 2-1 vote, ruling that the delay caused by the jurisdictional debate made the challenge untimely, but, in the alternative, the TSA's searches, with *optional* use of the body scanners, was constitutional. *Corbett II*. The dissenting judge would have considered the petition timely and refused to join in the alternative judgment on the merits. *Id*.

On or about December 18th, 2015, the TSA announced that it reserved the right to require passengers to pass through a body scanner – with no "pat-down" option – at its discretion. *See* Mot. to Stay, Ex. A, Privacy Impact Assessment Update. With, as in 2010, no agency proceedings being available to Petitioner to air his grievances with the new policy, Petitioner immediately filed the instant lawsuit.

II. Statement of the Facts

A. Timeline of the TSA's Body Scanner Program

The technology behind the TSA's current body scanners was first commercially available no later than the 1990s. Admin. Rec., Vol. 2, p. 1926. No steps were taken to use these devices in an aviation security setting in America until 2007, and the devices were not used outside of testing purposes until 2010. *Corbett I* at 868.

The body scanners placed in airports in 2010 produced graphic images showing the nude body of travelers underneath their clothes. *Redfern* at 84 (passengers were "subjected to body scanners that depict revealing images of their bodies"). After public outrage relating to the TSA's requirement of, essentially, collecting and examining nude pictures generated of travelers, Congress required the TSA to remove the human element from the image review process, 49 U.S.C. § 44901(l) ("Limitations on Use of Advanced Imaging Technology for Screening Passengers"), and the TSA has complied by implementing Automated Target Recognition ("ATR") technology. ATR-enabled scanners, like all body scanners including the previous generation, use electromagnetic radiation measurements to generate an image of the subject beneath his or her clothing. The only difference with ATR is that this image is, under typical use scenarios, evaluated by a computer, rather than by a live person viewing the image[4].

[4] However, even the ATR body scanners may be configured to save, display, transmit, and print the images of the passenger's nude body when "test mode" is enabled. *See*

B. Notice-and-Comment Rulemaking Results for Optional Body Scanner Program

In *Elec. Privacy Info. Ctr. ("EPIC") v. D.H.S.*, 653 F.3d 1 (D.C. Cir. 2011), the TSA was challenged on its failure to engage in notice-and-comment rulemaking regarding its implementation of *optional* body scanning, and the D.C. Circuit, disagreeing with the TSA's argument that its body scanner/pat down implementation was not a "substantive rule" but either a "procedural rule," "interpretive rule," or "general statement of policy," ordered *post-hoc* notice-and-comment rulemaking. The TSA finally completed its obligations in the *EPIC* ruling in 2016, over five years late. *See* Exhibit C, "NPRM: Passenger Screening Using Advanced Imaging Technology (Federal Register Publication)."

Petitioner has taken the time to review all of the public comments submitted during the comment period, and out of the 5,578 comments submitted, 5,129 were opposed to the rule. *See* Exhibit A, Analysis of Public Comments on TSA Body Scanners by Jonathan Corbett. A rough accounting of the reasons given by the opposition comments that included reasons is: invasion of privacy (~34%), violation of rights/unconstitutional (~31%), health risks (~23%), ineffectiveness for security

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Admin Rec., Vol. 4, p. 4237 (describing "test mode" and image export). Although the TSA assures us that their checkpoint staff would never do such a thing, a passenger has no way of knowing if a scanner is using "test mode" or not, and thus such representations are less than completely comforting to many passengers, including Petitioner.

(~12%), cost/benefit analysis (~11%), concern for effects on children (~5%), and a distinct group that requested the TSA to be completely disbanded, defunded, and/or privatized (~2%)[5]. *See* Exhibit B, Declaration III of Jonathan Corbett.

The rule proposed to the public clearly contemplated that passengers would have the option of choosing a pat-down instead of using the body scanner. The notice of proposed rulemaking (NPRM) specifically stated that "individuals may opt-out of the AIT in favor of physical screening." *See* Exhibit C, Section III(B). "AIT screening is currently optional, but when opting out of AIT screening, a passenger will receive a pat-down. When TSA deploys AIT equipment at a screening lane, a sign is posted to inform the public that AIT may be used as part of the screening process prior to passengers entering the machine so that each passenger may exercise an informed decision on the use of AIT. The sign also indicates that a passenger who chooses not to be screened by AIT will receive a patdown." *Id*. at Section III(D).

[5] Percentages exceed 100% because some commenters gave multiple reasons for their opposition.

SUMMARY OF ARGUMENT

The Fourth Amendment to the U.S. Constitution prohibits searches without probable cause. U.S. CONST., Amend. IV. An exception to the probable cause requirement has been carved out for "administrative searches" – searches that are conducted for specific public safety purposes, rather than general law enforcement objectives. *U.S. v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*). Searches may not be more extensive or intensive than necessary to further that purpose. *Id.* Seizures must be evaluated against a reasonableness test that balances the threat against the efficacy and the intrusiveness of the search. *Illinois v. Lidster*, 540 U.S. 419 (2004).

Likewise, the Administrative Procedures Act requires the TSA's promulgation of rules and regulations to not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

For the reasons explained herein, the administrative record sheds no light on any rational, non-arbitrary basis for the TSA's decision to eliminate the pat-down option for travelers at its discretion[6]. Further, the administrative record provides no

[6] Petitioner writes about the Administrative Record in his possession, which is redacted and missing an entire volume of classified information. Nonetheless, it would be expected that any justification for eliminating the pat-down option would be at least alluded to in the index or redacted content of the Sensitive Security Information volume of the Administrative Record in his possession. There appears not to be a redacted discussion, but *no* discussion whatsoever.

explanation to justify its failure to engage in notice-and-comment rulemaking before unilaterally altering its screening policy in a fundamental way. For these reasons, the Court should modify the order of the TSA to restore the right of passengers to request screening via pat down.

ARGUMENT

I. The Administrative Record Reveals No Rational, Non-Arbitary Basis for Requiring Body Scanner Screening Over Pat-Down Screening

The origins of "rational basis review[7]" can be traced back at least as far as the dissent of Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 76 (1905) (law unconstitutional when "it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."). More modernly, the Supreme Court has described the test as whether a law "bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). This Circuit has more specifically described the test as: "(1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve

[7] Petitioner does not concede that rational basis review is the correct standard. The modern trend is towards finding that, in today's world, air travel is a fundamental right because some travel is simply not feasible without it. *Ibrahim v. D.H.S.*, 2012 U.S. Dist. LEXIS 180433 at *22 (N.D. Cal., Dec. 20th, 2012); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1148 (D. Or., June 24th, 2014). If air travel is to be thought of as a fundamental right, it is reasonable that strict scrutiny, or at least some level of heightened scrutiny, is appropriate. However, since the TSA does not even meet the rational basis test because the Administrative Record provides *no* justification whatsoever for considering the pat-downs insufficient, the Court may save this decision for another day.

it." *Blue Kendall v. Miami Dade*, 816 F.3d 1343, 1351 (11th Cir. 2016), *citing Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). The TSA has the authority to regulate aviation security, but the second prong of that test requires our attention.

The Administrative Record is illuminative on the reasons for adopting the body scanner and pat-down program as primary screening in 2010. There are many documents that address the effectiveness of the body scanners and provide some evidence of cost/benefit thought process and procedures by which the program is tested[8]. *See*, *e.g.*, Admin. Rec., Vol. 4, p. 3893 (results of body scanner field testing). However, the elephant in the room is that there is *no* discussion on the effectiveness of the pat-down component of the program, nor a comparison between how likely a body scanner is to find a dangerous item on a passenger as compared to a pat-down.

A rational basis review must conclude itself here: the TSA has not made any justification as to why it has decided to eliminate a screening tool and, thus, forcing some passengers to undergo screening using a highly controversial technology. When Petitioner challenged the introduction of the body scanners in 2010, the TSA justified its decision by the fact that metal detectors cannot detect non-metallic explosives while

[8] Petitioner does not concede that such documents adequately address the issues they purport to address, but merely notes that the TSA gave at least some thought and discussion to these issues.

body scanners can, and therefore metal detectors are insufficient. *Corbett II* at 1175; *EPIC* at 3. Here, there is not even a summary justification given as to why the pat-downs are insufficient. In fact, the TSA has previously said just the opposite: that pat-downs are an "effective alternative [to the body scanner] method of screening passengers." *EPIC* at 3. Any assertion that this policy change results in "heightened" security is unsupported by reasoning (let alone evidence), is contradicted by the TSA's prior position, and defies logic that the current pat-down, which touches every inch of a passenger's body, could possibly be insufficient. Any threadbare assertion that its new policy is necessary to improve security, without a shred of documentation showing the same, cannot support a finding of a rational basis. To pass a rational basis review requires the government to *explain* the rational basis, not merely assert its existence.

Likewise, the Administrative Procedures Act's standards, prohibiting "arbitrary and capricious" rulemaking, undertake a similar, arguably more stringent, review of the TSA's order. Under this standard, an order must be reversed if "the agency's decision is not supported by substantial evidence." *Safe Extensions v. FAA*[9], 509 F.3d 593, 604 (D.C. Cir. 2007) (*internal citation omitted*); *see also* 49 U.S.C. § 46110(c) ("…if supported by substantial evidence…"). "Substantial evidence 'means more than a mere scintilla…'" *Holt v. FAA*, 1999 U.S. App. LEXIS 19250 *3 (10th Cir. 1999).

[9] Both TSA and FAA orders are subject to the same provisions, and thus the same standard of review, of 49 U.S.C. § 46110.

Such evidence should be found "within the record," rather than via a *post-hoc* explanation by a TSA employee or its attorneys. *Safe Extensions* at 604. "An agency's unsupported assertion does not amount to substantial evidence." *Safe Extensions* at 606 (ruling an FAA order arbitrary and capricious because a 1-page letter of an FAA employee was insufficient evidence to support its position). Further, using the substantial evidence, the Court must review whether the agency "reached rational conclusions based on the evidence gathered." *City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005). Thus, as under rational basis review for constitutionality, the failure of the record to explain the reason, let alone provide substantial evidence that rationally leads to the reason, that pat-downs must be eliminated fails the APA's "arbitrary and capricious" review.

II. The TSA Failed to Meet Its Obligations Under the Administrative Procedures Act By Changing Its Rules Without Notice-and-Comment Rulemaking

In *EPIC*, the TSA argued that its body scanner/pat down implementation was not a "substantive rule" but either a "procedural rule," "interpretive rule," or "general statement of policy." *EPIC* at 5 – 9. The *EPIC* court had no trouble rejecting this argument. A rule is "substantive" if it "alter the rights or interests of parties." *Id.* at 5; *see also Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2nd Cir. 2013) ("substantive

rules 'change existing rights and obligations'"). Forcing the public to submit to a particular type of search clearly affects their obligations – the TSA can hardly argue that Petitioner is not "obliged" to comply with its rules if he wants to fly, just as the TSA cannot argue that he was "obliged" to ever go through a body scanner before the mandatory body scanning policy was implemented. As such, the *EPIC* court found that "the TSA's use of AIT for primary screening has the hallmark of a substantive rule." *Id*. at 6.

The TSA has indicated in earlier motion practice that its position on the matter is that even though introducing the body scanner program was ruled to have "substantively affected the public," removing a core component of that program (the passenger's right to choose as to whether to be screened a body scanner or a pat down) is somehow not substantive. This argument fails. The change is not a "narrow policy revision," but the imposition, for the first time, of a mandatory obligation to participate in the body scanner program without a pat down option.

Nor does the fact that the TSA has added privacy safeguards (automated target recognition) mean that eliminating the pat down option is not "substantive." Opp. to Mot. to Stay, p. 14. Adding ATR and removing pat-downs are two entirely unrelated matters. The fact of the matter, as shown by the public comments in the TSA's earlier notice-and-comment rulemaking, is that many, including Petitioner, still consider the body scanners to be offensive, unsafe, ineffective, or otherwise repulsive, and to those

people, the TSA has not mitigated their interest in the continuation of the pat down option. *See* Exhibit B.

Finally, any argument that the ability to make the body scanners mandatory was contemplated in the language of the previous notice-and-comment rulemaking does not offer a fair reading of the words of the proposed rule. *See supra*, Statement of the Case, Section II(B). No reasonable reader of the TSA's proposed rule would have expected anything other than a guaranteed right of passengers to choose to opt for a pat-down at any time.

III. The Proper Remedy Is to Modify the TSA's Order to Return Body Scanning to a Fully Optional Screening Method

There exist mechanisms by which the TSA, in the event of an emergency or otherwise urgent circumstance, can temporarily make changes to security procedures on a unilateral basis. For example, 49 U.S.C. § 114(l)(2) allows the TSA to issue security directives without prior approval. Or, the TSA could have invoked the "good cause exception" found with the APA if the TSA were to certify that waiting out a notice-and-comment period would result in "serious harm." 5 U.S.C. §§ 553(b)(3)(B) and (d)(3); *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010).

This is *not* the scenario the Court is reviewing.

Petitioner asks the court to review a policy change made not based on any new threat that is in some way different to the threats of 5 years ago, and made not using any emergency provision, but rather a garden-variety purported "evolution" of security procedures decided on over a period of at least several months. Were there urgency for the policy change, the TSA could have preserved its good faith as to its obligations under the Administrative Procedures Act by announcing to the public that, although it has temporarily implemented the new policy due to a security need, it would immediately begin the process of notice-and-comment rulemaking to make the change permanent. Instead, the TSA makes no claim for a good cause exception and unrepentantly seeks in bad faith to *never* conduct such notice-and-comment rulemaking, presumably because if optional body scanning was opposed by 94% of the public, then mandatory body scanning would be nearly unanimously opposed.

Congress has mandated that the public should not suffer obligations imposed on it without notice-and-comment rulemaking. 5 U.S.C. § 706 ("The reviewing court shall … (2) hold unlawful and set aside agency action found to be … (D) without observance of procedure required by law"). And the U.S. Supreme Court has indicated that restrictions on travel cannot be imposed without due process. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

The Court should modify the order of the TSA that permit it the discretion to refuse a request for screening via pat-down. If the basis of the Court's decision is the

APA challenge and not the constitutional challenge, it can avoid any possible security considerations by making its mandate effective 10 days after the order issues. This will allow the TSA ample time to issue an emergency security directive, if it truly feels that our nation's security will be dangerously weakened in the absence of the rule at issue. As the Court has held that "the argument that post-promulgation comments were sufficient to ameliorate the lack of pre-promulgation notice and comment" is "unpersuasive," a position which comports with a plain reading of the APA's requirement that rules failing to follow procedure be set aside, the Court should decline any invitation by the TSA to allow the rule to stand while it takes its time to conduct a comment period. *Dean* at 1280.

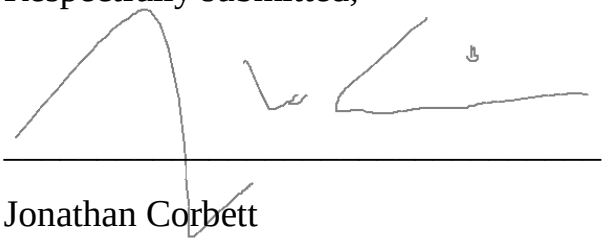
CONCLUSION

The TSA continues its quest to force more and more travelers to be searched via a controversial technology without demonstrating any need to do so. Its implementation of the body scanners as *optional* screening, after being forced by the Court of Appeals to conduct notice-and-comment rulemaking, was shown to be opposed by 94% of public commenters. Instead of taking note of the public position and reconsidering its use of the body scanners in general, the TSA has doubled-down by making the body scanner screening mandatory at its discretion. It has provided no justification for doing so, and has, once again, failed to conduct notice-and-comment rulemaking.

The Court, the rest of the government, Petitioner, and the rest of the citizens all share legitimate concerns about securing our nation from terrorism. But, we must not allow a perhaps over-eager agency to burden the rights of the public on a whim and without following the processes established by Congress and restrained by the Constitution. Absent any evidence that there will be any harm to our security whatsoever by patting down travelers instead of scanning them, the Court should enjoin the practice until the TSA produces that evidence and follows the Administrative Procedures Act to promulgate a new policy.

Dated: Miami, Florida
September 19th, 2016

Respectfully submitted,



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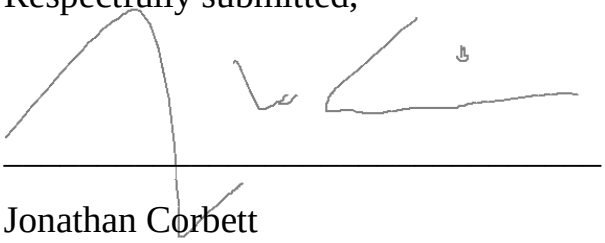
CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Petitioner in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 4,800 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
September 19th, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

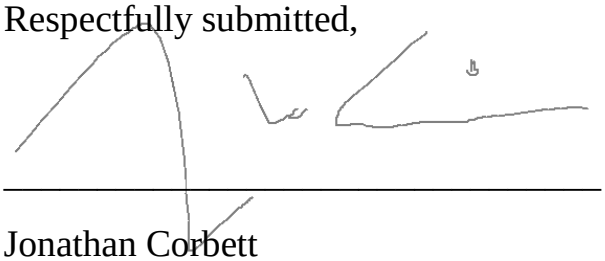
I, Jonathan Corbett, *pro se* Petitioner in the above captioned case, hereby affirm that I have served Defendant Transportation Security Administration this **Brief of Petitioner Jonathan Corbett** on September 19th, 2016, to the following individuals via electronic mail at the following addresses:

Sharon Swingle – Sharon.Swingle@usdoj.gov

Michael Shih – Michael.Shih@usdoj.gov

Dated: Miami, Florida
September 19th, 2016

Respectfully submitted,



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