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

REPLY 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
    - John F. Kelly, Secretary
    - Transportation Security Administration
        - Huban A. Gowadia, Administrator
- U.S. Department of Justice
    - Michael Shih
    - Sharon Swingle
    - Benjamin Mizer
    - Loretta Lynch

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ARGUMENT

I. TSA's Concession That It "Randomly Selects" Travelers For Selectee Status Forecloses Its Argument That Petitioner Lacks Standing

The TSA concedes that every time a traveler enters a TSA checkpoint, there is a chance that the traveler will be randomly selected as a "selectee" and thus be forced to be screened by body scanner. Respondent's Brief, p. 10. Respondent also does not dispute Petitioner's contentions that he has been a selectee before and that he regularly travels by air and is thus forced to "play the odds" several dozen times per year. According to Respondent, this is insufficient because: 1) past experiences do not demonstrate future harm[1], and 2) the odds of being subject to random selection on any given day are low. *Id*., pp. 14, 18, 19.

First, in the context of TSA screening, past experience are indeed predictive of future ones. This is because selection is more than merely

[1] In the same breath Respondent complaints that Petitioner was not yet subject to the new policy, it reminds the Court that this doesn't matter because past experiences cannot demonstrate future harm. Respondent's Brief, p. 14, 15. As usual, the TSA wants, but cannot be entitled to, the benefit of two contradicting viewpoints. However, Petitioner "does not need to wait until he is actually assaulted before obtaining relief." *Thomas v. Bryant*, 614 F.3d 1288, 1318 (11th Cir. 2010) (internal citation omitted).

random. Selection also happens because of the TSA creating profiles of travelers who supposedly present an increased risk. Factors like purchasing one-way tickets, purchasing tickets last minute, and paying cash for tickets, are well-known to affect one's odds of being selected. Therefore, one who meets the profile once, and is selected once, is likely to meet the profile again, and be selected again, unless they change their travel patterns. Petitioner has not and has no intention of changing his travel patterns. Decl. of Jonathan Corbett, ¶¶ 11, 12.

Second, the odds on any given day that Petitioner travels that he will be selected for additional screening are not as important as the fact that Petitioner regularly faces those odds. Even if the TSA only selects a small fraction of travelers for additional screening (and even if Petitioner did not meet a profile that gives him "more than random" odds of being selected), given enough opportunities, the odds will come around. For the same reason that "the house always wins" in Las Vegas, it is all but guaranteed that Petitioner will eventually be a random selectee.

Contrast the above to *City of L.A. v. Lyons*, 461 U.S. 95 (1983).[2], where, other than a general accusation of racism among L.A.P.D. officers, there was

[2] *Lyons* considers standing in the context of an injunction, not a § 46110 petition. However, the standing requirements are in many ways analogous

nothing to indicate that the plaintiff was at all likely to see repetition. "A sequence of individually improbable events would have to occur: (1) Lyons would have to do something to cause another run-in with the Los Angeles police; (2) the city would have to have authorized all police officers to use choke holds unnecessarily; (3) the police officers in that specific encounter would have to use a choke hold; and (4) the use in that situation would have to have been unnecessary." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1162 (11th Cir. 2008) (discussing *Lyons*). This four-link "chain of attenuation" resulted in a ruling that *Lyons* "did not establish a real and immediate threat that he would again encounter law enforcement officers who would unlawfully place him in a chokehold absent resistance or provocation." *Wusiya v. City of Miami Beach*, 614 F. App'x 389 (11th Cir. 2015) (discussing *Lyons).* Here, there is no such precarious "chain." It is established that Petitioner will have another (indeed, regular) interaction with the TSA. It is established that the TSA has authorized its screeners to continue to use the challenged practice on travelers like Petitioner. And, the argument of the case is that the challenged practice is never necessary or

since, as in *Lyons*, Petitioner is required to demonstrate the harm that will come to him in the future should the Court fail to act.

reasonable. The only question remaining is when the TSA will "select" Petitioner for enhanced screening next[3].

Any argument that Petitioner does not face a "realistic danger" of being subject to the policy, and thus does not have standing, is unsupported by the Administrative Record and the evidence before the Court. *Fla. State Conf. of the NAACP* at 1161. Allowing the TSA's argument of "we don't do it to everyone" to win the day would essentially insulate any government action that occurs on a randomized basis from judicial review. There is simply no authority to support this proposition in a situation where the government has conceded that they intend to continue a practice and intend to regularly "roll the dice" to see if Petitioner will be burdened by it. "[T]here is no per se rule denying standing to prevent probabilistic injuries." *Fla. State Conf. of the NAACP* at 1162.

[3] *Cf.* *also* *Smith v. Sec'y, Dep't of Corr.*, 602 F. App'x 466, 470-71 (11th Cir. 2015): "However, Smith's claim is too conjectural to confer standing, because the future injury he apprehends would only arise if (1) Smith's tooth restoration would fail, despite having worked for years without problems; (2) the FDC would order the prison dentists to extract teeth unnecessarily, in contradiction to the FDC regulation; (3) the dentist would extract the tooth, rather than repairing it; and (4) the extraction would be unnecessary under the circumstances."

II. Body Scanners Don't Find Weapons; Pat-Downs Do

Relevant to this case, the TSA conducts two varieties of pat-down:

1) A "full-body" pat-down, in which the screener touches the traveler from head-to-toe, lasting approximately 2 minutes and concluding with a swab for explosive trace residue.
2) A "resolution" pat-down, in which the screener, alerted by a body scanner to an area of the body to check specifically, conducts *a subset of the full-body pat-down* on that area alone, and generally concludes without a swab for explosive trace residue.

Decl. of Jonathan Corbett, ¶¶ 2 – 10.

The TSA wants this Court to believe that doing a *part* of the full-body pat-down is more likely to find a weapon than doing the *entire* full-body pat-down. That is absurd.

As Respondent refuses to explain to Petitioner or the public its alleged rationale for this fanciful conclusion, or to share the alleged studies it conducted showing that a less comprehensive pat-down is somehow more secure than a more comprehensive pat-down, and the Court has denied Petitioner's request to compel them to do so, it is up to the Court to review these allegations and the foundation for them with a skeptical eye. But the

fact of the matter is that body scanners don't find weapons — they merely direct a screener as to an area where *the screener* may find an object. If the full-body pat-down was going to touch that area anyway, what is the difference?

Plaintiff can hypothesize two arguments that are perhaps in the TSA's SSI documents not provided to Petitioner that could possibly be used to support the TSA's claim.

First, perhaps the TSA is alleging that a resolution pat-down is more thoroughly done on a particular area than it would be done in a full-body pat-down. For example, perhaps a traveler's shoulder is only touched for 10 seconds during a normal full-body pat-down, but if a body scanner points out an "anomaly" on the shoulder, 20 seconds will be spent there. However, based on Petitioner's personally watching and experiencing full-body and resolution pat-downs on hundreds of occasions, this is simply not what is done. Decl. of Jonathan Corbett, ¶¶ 7 – 10. A resolution pat-down is a brief check that is no more intensive on the target area than the full-body pat-down would have been. A resolution pat-down is a subset of a full-body pat-down[4].

[4] And, *arguendo*, even if the resolution pat-down was not a subset of the full pat-down, but rather a more thorough pat-down, there is still no reason to force travelers through a body scanner. All that need be done is to make the full-body pat-down as thorough as the resolution pat-down for selectee passengers. To introduce an entirely new

Second, perhaps the TSA is alleging that its screeners are not able to conduct a full-body pat-down as carefully as a targeted resolution pat-down, and are therefore more likely to miss something, due to its screeners', *e.g.*, lack of attention span, lack of training, distraction, or otherwise. If so, the solution to this problem should not be forcing a burden upon the public. While the TSA may not need to show the kind of "narrow tailoring" that strict scrutiny would require, it still needs to show that the means to effect its ends are rational. Failing to train employees to focus for the 2-minute pat-down as well as they do for a 10-second resolution pat-down, and instead intensifying a policy that 94% of the public opposes, is not rational.

The purpose of the body scanners is not to increase security beyond what a pat-down could. It is to save the TSA the time of having to conduct a pat-down on anyone who can be "cleared" by the body scanner. Especially given that the body scanner route omits the explosive trace swab, it is objectively not more secure. Before changing the policy, the TSA regularly informed the public that the pat-downs were sufficiently effective in comparison to the body scanners, and the government's argument that they meant that the pat-downs were some "minimal level" of security is merely

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requirement when a small fix to the existing requirements would do the job is not merely a failure to narrowly tailor, but truly irrational.

their attorny's spin on the issue unsupported by citation to the Administrative Record. For this reason, the Court should reject the TSA's attempt at painting the policy in question as sound security policy.

III. The TSA's Opinion That The Change Is *De Minimus* Is Entitled to No Deference and Is Contrary to *EPIC v. DHS*

In no other context is a full-body search considered "*de minimus*," as the TSA alleges its checkpoint screenings are. Respondent's Brief, p. 16. A machine looking over every inch of your body is objectively more intrusive than a *Terry* search. In defense of *Terry*'s seconds-long pat-down for weapons only, the U.S. Supreme Court responded to a similar government argument of "minimal intrusion" by stating that "it is simply fantastic to urge that such a procedure, performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry v. Ohio*, 392 U.S. 1, 16, 17 (1968). While there might not be as much "stigma" from being searched at the airport by the TSA

as there would be on the street by a police officer, that does not turn a "great indignity" into a negligible one[5].

Notwithstanding, the question as far as the applicability of the APA's notice-and-comment requirements is whether the change is "substantive," not whether it is "substantial," and Respondent's brief seems to conflate the two. Respondent's Brief, p. 29. The TSA contends that the change in policy here is so trivial as to not require adherence to rulemaking requirements, but the TSA contended the same in *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011) when the Court was reviewing the TSA's entirely optional body scanner program, and had no trouble finding that it triggered the notice-and-comment rulemaking required by the APA.

Finally, the TSA's argument that the change is actually no change at all because its previous APA rule left open the possibility that it would make

[5]This Court has already ruled that the body scanners pose a "slight intrusion," which is greater than Respondent's proposal that the Court consider the intrusion "*de minimus*." *Corbett v. Transp. Sec. Admin.*, 767 F.3d 1171, 1181 (11th Cir. 2014). But, respectfully, the Court has understated the intrusion, as evidenced by the public comments attached to Petitioner's principal brief as Exhibit A, in which 94% of the public felt that the intrusion was significant enough that the TSA should get rid of the scanners entirely. In light of this new evidence, produced after the 2014 case, demonstrating the "indignity" and "resentment" the body scanners arouse, the Court should re-consider this 2 - 1 panel decision. There is also argument that the "in the alternative" holding is non-binding dicta, given that the alternative ruling was unnecessary to resolve the case. Abramowicz, Michael; Stearns, Maxwell; *Defining Dicta*, 57 Stan. L. Rev. 953 (2005).

the body scanners mandatory is not even close to a natural reading of the original rule and certainly not clear enough to put *the general public* on notice. Putting the word "currently" in italics in its brief before the Court (p. 30) does not mean the public would have assumed that the word's presence indicated that "in the future, we reserve the right to change this without promulgating a new rule."

IV. The Court Should Not Consider the TSA's *Post-Hoc* Supplementation of the Administrative Record

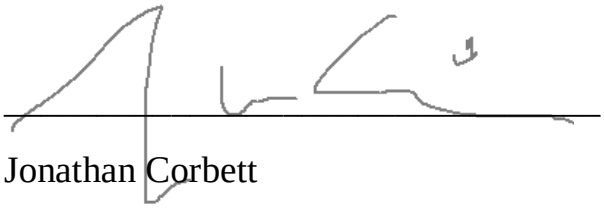
For the reasons mentioned in Petitioner's opposition to Respondent's motion to supplement, Petitioner references and incorporates his argument herein that no post-hoc arguments should be allowed into the Administrative Record, nor can "changes in factual circumstances" be used to justify the decision to change the policy in question at the time it was changed. The purpose of the Administrative Record is to put forth the evidence upon which the agency made its decision, not to allow government attorneys to come up with an explanation after the fact.

CONCLUSION

Converting an optional search into a mandatory one is a change sufficient to implicate the APA's rulemaking process and must not be arbitrary and capricious. Because the TSA's arguments that the new rule will make our airports more secure is devoid of logic, the policy is arbitrary, capricious, and irrational. It should therefore be **set aside** or **modified** by the Court.

Dated: Miami, Florida
May 15th, 2017

Respectfully submitted,



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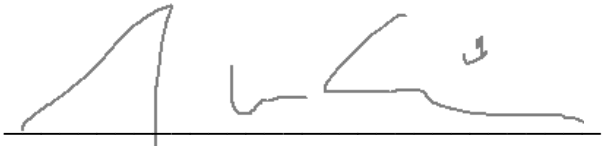
CERTIFICATE OF COMPLIANCE

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 3,100 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
May 15th, 2017

Respectfully submitted,



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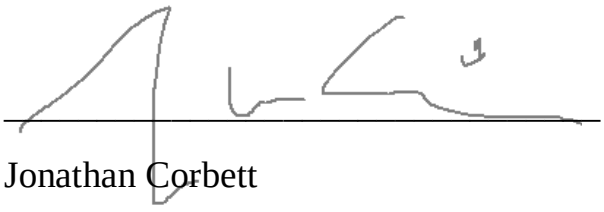
CERTIFICATE OF SERVICE

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 May 15th, 2017, via ECF.

Dated: Miami, Florida
May 15th, 2017

Respectfully submitted,



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DECLARATION OF JONATHAN CORBETT

I, Jonathan Corbett, declare the following:

1) My name is Jonathan Corbett, and I am a U.S. citizen over the age of 18.
2) I am the author of the attached Reply Brief, and I affirm that it is accurate to the best of my knowledge.
3) I have personally undergone dozens of pat-downs by the TSA over the last 7 years, and have witnessed several hundred pat-downs of others.
4) I have noticed that there are two types of pat-downs done at the screening checkpoints: full-body and resolution.
5) A full-body pat-down is done whenever a traveler declines to be screened by body scanner.
6) A full-body pat-down takes approximately 2 minutes consisting of the screener touching every inch of the body that is covered by clothing, from head to toe, after which the screener tests his or her gloves for explosive trace residue.
7) A resolution pat-down is done whenever a body scanner alerts that a passenger may have an object on their body.
8) A resolution pat-down takes approximately 10 seconds consisting of the screener touching the area that the body scanner indicates only, and does not include a test for explosive trace residue.

9) The area searched during a resolution pat-down is searched no more carefully than when that area is searched as part of a full-body pat-down.

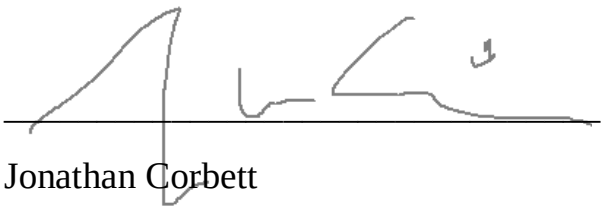
10) I therefore conclude that a resolution pat-down is entirely a subset of the full-body pat-down procedure; that is, if anything the resolution pat-down would have touched, the full-body pat-down would also have touched.

11) I frequently travel last-minute, resulting in purchasing of tickets within 7 days of a flight and, frequently, without knowing when I will return, thus requiring the purchase of one-way rather than round-trip tickets.

12) I have no intent to change this pattern.

Dated: Miami, Florida
May 15th, 2017

Respectfully submitted,



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