

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN CORBETT,

Petitioner,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,

Respondent.

No. 12-15893

**RESPONDENTS' OPPOSITION TO PETITIONER'S
MOTION TO TRANSFER TO DISTRICT COURT**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of her knowledge, the following constitutes a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

Bandstra, Ted E.

Cooke, Hon. Marcia G.

Corbett, Jonathan

Delery, Stuart F.

Ferrer, Wilfredo A.

Grauman, Jesse

Mead, Joseph W.

Moore, Hon. K. Michael

Schraibman, Sandra M.

Schultz, Anne R.

Stern, Mark B.

Swingle, Sharon

Turnoff, William

Wells, Carlotta P.

/s/ Sharon Swingle
Sharon Swingle
Counsel for the United States

Simultaneously with the filing of a petition for review in this Court challenging the Transportation Security Administration's use of Advanced Imaging Technology (AIT) and pat-downs to screen airline passengers, petitioner Jonathan Corbett has also moved in this Court to transfer this case to district court.¹ Petitioner's request is precluded by this Court's prior ruling that jurisdiction over his challenge rests exclusively in the Court of Appeals under 49 U.S.C. § 46110. It is also premised on the erroneous notion that a court of appeals cannot adjudicate a Fourth Amendment challenge to TSA's screening practices.

1. Petitioner in this case brought a prior action in district court challenging TSA's use of AIT and its current pat-down procedures. *See Corbett v. United States*, No. 10-cv-24106-MCG (S.D. Fla. filed Nov. 16, 2010). The district court in that case denied petitioner's motion for an injunction that would bar TSA from using the challenged screening methods, and subsequently dismissed his action on the ground that it was a challenge to a TSA "order" that was subject to review exclusively in the court of appeals pursuant to 49 U.S.C. § 46110. Petitioner appealed; on appeal, this Court similarly denied his request for interim injunctive relief, *Corbett v. United States*, No. 11-12426, Order (11th Cir.

¹ Petitioner has also filed a "Motion to Stay Order" seeking a nationwide injunction barring TSA from using the challenged screening practices. The government has filed a separate opposition to that motion explaining why his arguments are meritless and his motion should be denied.

Jul. 27, 2011), and subsequently affirmed the district court's dismissal for lack of subject matter jurisdiction. *Corbett*, No. 11-12426, Opinion and Judgment (11th Cir. Feb. 27, 2012). A petition for certiorari was denied. *Corbett v. United States*, 133 S. Ct. 161 (2012).

Petitioner's transfer motion is nevertheless predicated on the assumption that he is entitled to litigate in district court a laundry list of questions that he considers relevant to his Fourth Amendment challenge, and to have evidentiary proceedings and district court fact-finding on his claim. *See* Motion 4-8 (listing "sixteen questions" that purportedly "only address *some* of the facts that will be in dispute in relation to this petition"). Petitioner offers no plausible basis for distinguishing this Court's prior ruling, which is dispositive here.

Although petitioner argues that his challenge cannot be adequately considered in this Court because he has not yet "had an opportunity to gather evidence (*a la* discovery) or present evidence," Motion 8, this Court has already held that "it appears there is an adequate administrative record for judicial review" of petitioner's challenge in the court of appeals. *Corbett*, No. 11-12646, 2/27/12 Order at 8. The D.C. Circuit had no difficulty in considering and rejecting based on an administrative record a similar Fourth Amendment challenge to TSA's use of AIT. *See EPIC v. DHS*, 653 F.3d 1, 10-11 (D.C. Cir. 2011). This Court has also rejected petitioner's argument that requiring him to

bring his challenge in the court of appeals violates due process. *Corbett*, 2/27/12 Order at 10; *accord Roberts v. Napolitano*, No. 11-5226, Order (D.C. Cir. Apr. 10, 2012); *Blitz v. Napolitano*, ___ F.3d ___, 2012 WL 5975223, *5-*8 (4th Cir. Nov. 30, 2012).

2. Asserted inadequacies in the existing administrative record would not create jurisdiction in district court. In any event, TSA is currently engaged in a rulemaking process in which petitioner will be able to submit any information he deems relevant. In *EPIC*, the D.C. Circuit ordered TSA to conduct notice-and-comment rulemaking regarding its use of AIT as a primary screening device at airport security checkpoints. 653 F.3d at 8. TSA has since notified the D.C. Circuit that a proposed rule is imminent. *See In re Electronic Privacy Information Ctr.*, No. 12-1307, Order (D.C. Cir. Sep. 25, 2012) (noting that TSA is in the process of finalizing AIT rulemaking documents and expect to publish a Notice of Proposed Rulemaking by February 2013). The validity of TSA's rule must ultimately be judged on the basis of the agency's reasoning and the administrative record, not on a record compiled in district court.²

² Petitioner cites several statutes as the source of this Court's purported authority to transfer this case to district court. Motion 8-9. Although, as set out in the Motion for Clarification in *Corbett*, No. 11-12426 (11th Cir. filed Mar. 3, 2012), the government's view is that 28 U.S.C. § 2347 does not apply to the review of TSA orders, it is unnecessary to reach this question because there is no basis on which to transfer this case to district court, regardless of the Court's authority to do so. *See Corbett v. United States*, No. 11-12426, Order (11th Cir. Apr. 27, 2012) (declining to reach same issue "because a resolution of the question does not affect

the ultimate disposition of this matter”).

CONCLUSION

For the foregoing reasons, petitioner's Motion to Transfer to District Court should be denied.

Respectfully submitted,

/s/ Mark B. Stern

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DECEMBER 2012

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2012, I filed and served the foregoing Respondents' Opposition to Petitioner's Motion to Transfer to District Court by sending it to the Court and to the following party by overnight delivery, postage prepaid:

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