Case No. 15-10757

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 Circuit Local Rule 26.1-1:

- Jonathan Corbett (Petitioner)
- Sharon Swingle, Jaynie Lilly, Benjamin Mizer, and Wildredo Ferrer (Counsel for Respondent)
- The TSA, its employees, and directors, including Michael Keane
- All airlines covered by the TSA's Aircraft Operator Standard Security Plan (AOSSP)
- All individuals who travel from foreign countries into the United States

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ARGUMENT

I. The Government's Description of the Consequences of Declining an Interview Does Not Match What Happens In Practice

The government's argument and the reason why it fails are simple. The argument is that since the order does not *require* airlines to deny boarding – or *require* subjecting a traveler to other unpleasant consequences – for refusal to participate in the interview program, Petitioner's challenge must fail. The reason this argument fails is that in practice, the effect of the order is denial of boarding or other unpleasant consequences because 1) the ambiguous wording of the order leaves it to the interviewers and local law enforcement to figure out how to "resolve" the "suspicious sign" of silence, 2) a reasonable reading of the order could leave a reasonable interviewer to conclude that "resolution" of silence can only be cured by speech, and 3) the TSA refuses to clarify the matter to the airlines and the public.

Petitioner's opening brief addresses point 1 and 2 with clarity. Petitioner's Brief, pp. 16 – 19. The TSA counters with a reading of the AOSSP and Keane Declaration that comes to the opposite conclusion: that non-cooperation will result in nothing more than "additional screening." Respondent's Brief, pp. 6, 7. But from the redacted documents Petitioner has, the more natural reading is Petitioner's. "A refusal to participate in the process is a suspicious sign … that must be resolved." Keane Decl.,

AR 591. Unless there is something in the redacted portion of the record that specifically says "suspicious signs are to be resolved by doing 'x' to screen the passenger and 'y' to screen the baggage," a natural reading of the AOSSP and Keane Declaration is that screeners are left to determine what resolution shall entail (or are required to let law enforcement decide), and any reasonable person would presume that silence is "resolved" by cooperation. A careful reading of Respondent's Brief fares no better. Passengers will not be denied boarding "*if* other screening methods dispel any security concerns." Respondent's Brief, p. 7 (*emphasis added*). Will ground staff feel that a bag search sufficiently "dispels" non-cooperation? Will local police?

Keane also specifically says that exhibiting a "sign" (without specifying critical or suspicious) that is not resolved will result in referral to "local" law enforcement. Kean Decl., AR 591. Petitioner's right to return to his home country should not be dependent on a foreign law enforcement officer's discretion tainted by a TSA designation that the passenger is suspicious. Furthermore, in other countries, refusal to cooperate with law enforcement may be a crime[1], again resulting, as a direct result of TSA's policy, in compelled speech.

[1] It does not require a trip to an oppressive regime to find laws that compel speech. For example, in England, where the incident that gave rise to this case occurred, travelers are required to share computer passwords under the U.K.'s Regulation of Investigatory Powers Act 2000, Part III, which would be impermissible under the Fifth Amendment in the U.S. *United States v. Doe*, 670 F.3d 1335 (11th Cir. 2012).

Finally, the TSA wants deference to its interpretation that AOSSP doesn't require denied boarding. Respondent's Brief, p. 16. But the TSA refuses to publish its interpretation: Petitioner has repeatedly offered to government counsel to dismiss this appeal in exchange for such a clarification. If the TSA actually announced a policy that silent passengers should not be denied boarding, that would be entitled to deference, but no deference is due to a post-hoc explanation in court when the agency interpretation hasn't been expressed to those whom it affects. The fact of the matter is that the TSA prefers the policy to be ambiguous as written because it will result in passengers being compelled to participate without, it hopes, liability to the TSA for unconstitutionally forcing them to speak.

II. The Government Has Failed to Identify a Rational Basis to Implement or Continue the Interview Program

Respondent does not appreciate Petitioner's contentions that the ISIP is without a rational basis. Respondent's Brief, pp. 14, 15. However, beyond asserting that Petitioner is wrong in concluding that a rational basis does not exist, Respondent failed to identify an explain any rational basis.

First, Respondent asserts that Petitioner has no factual basis for concluding that the ISIP is worthless. At the least, Petitioner has testified about his own experience and the basis for such a conclusion. The Administrative Record, however, is devoid of

any study whatsoever concluding that in the nearly 2 decades the program has operated, it has done an ounce of good. The TSA has not identified a single plot thwarted. If 2 decades of running a program produce 0 results, is Petitioner's argument of worthlessness truly devoid of factual basis?

Next, Respondent states that Petitioner argued "that the Court must disregard portions of the declaration" of Keane. Respondent's Brief, p. 20. Not so: Petitioner finds his declaration to be invaluable. What Petitioner said was that 1) Mr. Keane's justification for the start of the ISIP was based on an erroneous fact, and 2) it should have been submitted as supplemental evidence, not as part of the Administrative Record. Petitioner's Brief, pp. 10, 24, 25. Respondent has not disputed that Keane and the TSA were wrong about the Hindawi incident, but rather have stated that it doesn't matter whether the initial reason for starting the program was based in reality, but that there is "continuing justification" for the program. Respondent's Brief, p. 20. However, neither Keane nor the TSA's attorneys have described that justification. It is true they have described the existence of terror plots, but there has been no discussion of how the ISIP in any way, shape, or form, has helped or will continue to help to stop such plots. In other words, ISIP was not rationally related to any of the terror plots Respondent discusses.

III. Administrative Detentions Are Still Subject to Fifth Amendment Protections

Respondent has put for the idea that only during a law enforcement search or seizure is one entitled to assert Fifth Amendment rights. Respondent's Brief, pp. 16, 17. This argument deserves little discussion. Any time the government is asking for testimonial speech, whether it be in writing on an IRS tax form or verbally while chained to a pole in the back of a police precinct, the Fifth Amendment applies. Petitioner's Brief, pp. 27, 28 (citing cases for the same). The purpose of the ISIP is to uncover illegal activity subject to heavy penalties (terrorism), and Respondent cannot seriously argue that if his statements uncovered that he was planning on engaging in terrorist activity that he would "not face the possibility of criminal conviction based on his statements." Respondent's Brief, p. 17. Further, Petitioner's right to remain silent is not related to a discussion of the administrative search doctrine. Petitioner is not complaining of a search; he is complaining of an attempt to compel speech.

Respondent also offers that it is not responsible for "the actions of airline employees and local authorities in a foreign airport. *Id*. at 17. When the TSA mandates that those individuals act in accordance with a TSA policy, they are acting as agents of the government and it is well-settled that there is liability. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) (liability for constitutional violation by private actor when acting as agent for the government).

IV. Petitioner Is Not Required To Identify Reasons That Documents May Be Mislabeled as SSI In Order to Ask for Review

The TSA complains that Petitioner has not allowed it to make a review of its SSI determinations based on specific, particularized challenges by Petitioner. Respondent's Brief, p. 23. Specific, particularized challenges are neither possible nor required. They are not possible, obviously, because Petitioner does not have access to the full documents so he cannot possibly know and explain exactly why they are mislabeled. They are not required because the SSI designations may be challenged by anyone with "a substantial interest" in the designation. 49 U.S.C.§ 46110(a). There is no rule or requirement, and TSA cites no rule or requirement, that Petitioner explain what he thinks was wrong with the SSI designation, but merely that he have substantial interest.

It is clear that Petitioner, a civil rights advocate who regularly challenges TSA policy, and a frequent flyer regularly subject to the TSA's policy, has a substantial interest in the contents of these orders. Petitioner need show no more.

But, Petitioner has shown more. He has, at a minimum, shown that the TSA has extraordinarily dated documents marked as SSI, which raises significant red flags. Petitioner's Brief, pp. 31 – 33. It considers procedures that have been observable by the public for nearly 2 decades and utterly failed to stop the 9/11 attacks as unreleasable

secrets. This all is despite its admission that it is under specific Congressional mandate to release after 3 years except for certain extraordinary circumstances.

Regardless, Petitioner's right to have the Court review the SSI designation is granted by statute and the terms include no such requirement that Petitioner indulge the TSA with reasons for his suspicion that such documents may be mislabeled. Any assertion that the TSA has not been able to "issue a final determination" is absurd – the TSA produced a redacted Administrative Record in this case *because it made a final determination that the record contained SSI*. Respondent is actually asking for a second chance at making a final determination, which Petitioner is not required to afford them before asking for this Court's review.

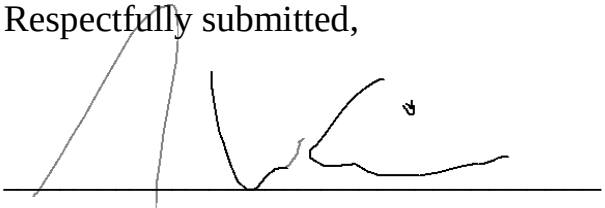
CONCLUSION

The order as currently written and interpreted by the interviewers and their employers is likely to lead to a choice of compelled speech or denied boarding or other negative consequences. Pursuant to the Court's authority under 49 U.S.C. § 46110(c), the TSA's order implementing ISIP should **modified** to clearly express that refusal to answer questions cannot be the basis for denied boarding or the summoning of law enforcement, and should clearly express that the consequence instead is additional screening as specified by the TSA.

Further, the Court should **set aside** any order of the TSA improperly designating any of the material in the Administrative Record as Sensitive Security Information.

Dated: Miami, Florida
March 4th, 2016

Respectfully submitted,



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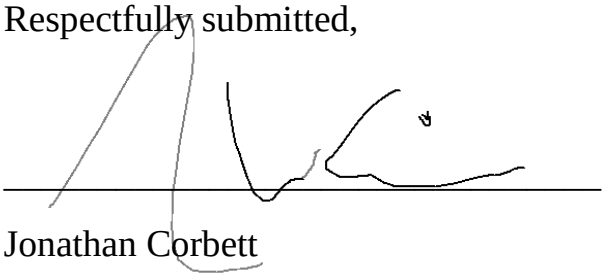
CERTIFICATE OF COMPLIANCE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that that this brief complies with Fed. R. App. P. 32(a) because it contains approximately 1,700 words using a proportionally-spaced, 14-point font.

Dated: Miami, Florida
March 4th, 2016

Respectfully submitted,



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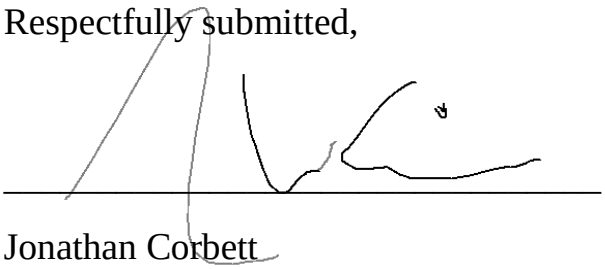
CERTIFICATE OF SERVICE

I, Jonathan Corbett, *pro se* Plaintiff in the above captioned case, hereby affirm that I have served Defendant United States of America this **Reply Brief of Petitioner Jonathan Corbett** on March 4th, 2016, via electronic mail to:

1) Sharon Swingle, Sharon.Swingle@usdoj.gov
2) Jaynie Lilley, Jaynie.Lilley2@usdoj.gov

Dated: Miami, Florida
March 4th, 2016

Respectfully submitted,



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