No. 15-10757

IN THE 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

BRIEF FOR RESPONDENT

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C**ERTIFICATE 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:

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STATEMENT REGARDING ORAL ARGUMENT

The Transportation Security Administration does not request oral argument because it believes that the facts and legal arguments are adequately presented in the briefs and the record. Should the Court deem oral argument appropriate, counsel for the government will attend and present Respondent's position.

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STATEMENT OF JURISDICTION

This petition for review was filed on February 23, 2015, pursuant to 49 U.S.C. § 46110, which gives the courts of appeals exclusive jurisdiction to review an order of the Transportation Security Administration (TSA).[1] Under section 46110(a), a petition for review must be filed within sixty days after the order is issued, unless there are "reasonable grounds for not filing by the 60th day." As the Government explained in its previous response to the Court's jurisdictional question, *see* Respondent's Position Regarding the Court's Jurisdictional Question of 3/13/2015 (filed Mar. 27, 2015), petitioner's challenge to TSA's pre-departure interview process for certain international flights challenges a TSA "order" within the meaning of section 46110(a). As explained more fully below, the Court does not have jurisdiction to review petitioner's challenge to the designation of certain information as Sensitive

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[1] Section 46110 applies to orders issued by "the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary * * * in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114." 49 U.S.C. § 46110(a). When TSA was created, Congress appointed the Under Secretary of Transportation for Security as the head of TSA. 49 U.S.C. § 114(b)(1). In 2002, the functions of TSA and the Under Secretary of Transportation for Security were transferred to the Department of Homeland Security. 6 U.S.C. §§ 203(2), 551(d). Statutory references to the Under Secretary of Transportation for Security are thus deemed to refer to TSA and its Administrator. *See id.* §§ 552(d), 557.

Security Information (SSI) because petitioner has not properly challenged the designation to permit the agency to issue a final determination.

STATEMENT OF THE ISSUES

1. Whether TSA's pre-departure interview process violates petitioner's right to international travel under the Fifth Amendment.

2. Whether the Court has jurisdiction to review TSA's designation of certain information about the pre-screening interview process as Sensitive Security Information, and, if so, whether TSA's designation was arbitrary and capricious.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Congress has charged the TSA Administrator with responsibility for civil aviation security of aircraft operating to or from the United States. *See* 49 U.S.C. §§ 114, 44901, 44906. The Administrator must provide for "the screening of all passengers and property . . . that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier" before boarding 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.* § 114(e); *id.* § 44903(b) (requiring the promulgation of "regulations to protect passengers and property on an aircraft" from "criminal violence or aircraft piracy"); 49 C.F.R. §§ 1540.105(a)(2), 1540.107(a). Congress further instructed that, subject to TSA regulations, a domestic or foreign air

carrier "may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b).

Pursuant to its statutory authority, TSA issued regulations for certain passenger aircraft operators, found at 49 C.F.R. part 1544. Under those regulations, covered aircraft operators must develop a security program that provides "for the safety of persons and property traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy, and the introduction of explosives, incendiaries, or weapons aboard an aircraft." 49 C.F.R. § 1544.103(a)(1). The Aircraft Operator Standard Security Program (AOSSP), issued and updated by TSA, sets out the specific requirements that each aircraft operator's security program must satisfy, including procedures about the screening of passengers and checked bags. *See* AR 222-528 (AOSSP effective Dec. 18 2014);[2] 586-93 (Keane Decl.). Each operator's security program must adopt provisions of the AOSSP as its security program, and any changes or modifications must be approved by TSA. 49 C.F.R. § 1544.103(a)(3), (c)(3), (c)(4); *see also* AR 219 (example of TSA-approved security program amendment).

Congress has also directed the Administrator of TSA to "prescribe regulations prohibiting the disclosure of information obtained or developed" in carrying out

[2] Citations to "AR__" refer to the Administrative Record filed with the Court.

TSA's transportation and aviation security authorities that the Administrator determines would "be an unwarranted invasion of personal privacy;" reveal "trade secret or privileged or confidential commercial or financial information;" or, as relevant here, "be detrimental to the security of transportation" if disclosed. 49 U.S.C. § 114(r)(1). Pursuant to that authority, TSA has issued regulations governing "the maintenance, safeguarding, and disclosure of " information that TSA has determined to be Sensitive Security Information. 49 C.F.R. § 1520.1(a); *see also id.* § 1520.5 (defining Sensitive Security Information).

II. TSA's Pre-Departure Interview Program

The pre-departure interview process was imposed in response to two incidents involving terrorism: the hijacking of TWA flight 847 in June 1985, and a terrorist plot in April 1986 to blow up an El Al flight from London's Heathrow Airport to Tel Aviv. *See* AR 588-89. The latter incident, referred to as the Hindawi incident, involved a plot to destroy an El Al airliner by Nezar Nawwaf al-Mansur al-Hindawi, a Jordanian national who had been recruited for this purpose by Syrian Air Force Intelligence. *Id.*; *see generally* Jane Eisner, *'I Hate You!' She Shouts To Jet-bomb Defendant*, Phila. Inquirer (Oct. 8, 1986), http://articles.philly.com/1986-10-08/news/26061190_1_anne-marie-murphy-israeli-jumbo-jet-nezar-hindawi. Hindawi placed explosives in the carry-on baggage of his pregnant fiancée, Anne Marie Murphy, without her knowledge. When Ms. Murphy arrived at the airport, El Al

security officials questioned her about her luggage and its contents, and detected the explosives and thwarted the plot. The FAA subsequently revised screening requirements for passengers on certain international flights to the United States. The pre-boarding interview requirements, currently found in the AOSSP, carry forward the FAA requirements and oblige a carrier to interview passengers and to examine their documentation to evaluate whether any passenger or the passenger's baggage present potential concerns that warrant additional screening.

The AOSSP requires an interviewer to examine the passenger's documentation to identify whether it shows any "critical signs" that would suggest that the passenger is either an active or an unwitting participant in some sort of threat. *See* AR 590 (Keane Decl.); AR 465 (AOSSP § 11.4.C). If so, the aircraft operator must ask local authorities to investigate and evaluate the documentation. If the appropriate local authorities evaluate the passenger's documents and determine that the documentation is valid or that the passenger is not a threat, the passenger is subjected to additional screening procedures, such as a hand-held or walk-through metal detector or a physical search, before being permitted to board the aircraft. AR 590 (Keane Decl.); AR 469(AOSSP § 11.5.1); AR 212-13, 215-16 (Security Directive 1544-09-06K); AR 579 (Security Directive 1544-14-03).

The AOSSP also requires an interviewer to evaluate a passenger's behavior and appearance for "suspicious signs" that might suggest that the passenger is a threat. AR

590 (Keane Decl.); AR 466 (AOSSP § 11.4.C.2). After identifying a suspicious sign, the interviewer must then conduct further questioning to "resolve" the sign—that is, to determine whether the sign has an innocuous explanation. *See* AR 590 (Keane Decl.); AR 466 (AOSSP § 11.4.C.2.). If a suspicious sign can be resolved, the interview program does not require that the passenger be subjected to additional screening as a result of that suspicious sign before being permitted to board the aircraft. AR 590 (Keane Decl.); AR 466 (AOSSP § 11.4.C.2).

The AOSSP requires the interviewer to pose a series of questions to a passenger about his or her baggage. AR 591 (Keane Decl.); AR 468 (AOSSP § 11.4.C.5). If the questioning uncovers any unresolved critical signs or suspicious signs or provides any reason to conduct additional inspection, the passenger's baggage will be screened more thoroughly before the passenger is permitted to board the flight. AR 591 (Keane Decl.); AR 465 (AOSSP § 11.4.C.5); AR 471 (AOSSP § 11.7). If there are no critical or suspicious signs and no concerns about the passenger's baggage, there is no requirement for additional screening under the AOSSP.

The pre-departure interview process conducted pursuant to the AOSSP does not require denial of boarding to a passenger who refuses to cooperate during the interview. AR 591-9 (Keane Decl.). A passenger's refusal to cooperate with the interview is a suspicious sign. *See* AR 591 (Keane Decl.); AR 466 (AOSSP § 11.4.C.2.c). But the AOSSP does not require an airline to deny a passenger

boarding or to enlist law enforcement if a suspicious sign cannot be resolved. *See* AR 569-72 (AOSSP § 11.4.C). Rather, if the passenger demonstrates no other suspicious or critical signs other than refusing to cooperate, the passenger and his or her baggage will simply undergo additional screening. *See* AR 590 (Keane Decl.); AR 573-74 (AOSSP §11.5). The passengers can be cleared for boarding without participating in an interview with a screener, if other screening methods dispel any security concerns. To repeat, nothing in the AOSSP requires an airline to deny boarding to a passenger because of his or her non-cooperation with the interview process. AR 591 (Keane Decl.); *see also* AR 466, 469 (AOSSP §§11.4.C.2.c, 11.5); AR 212, 215-16 (Security Directive-1544-09-06K); AR 219-21 (airline-specific security program amendment). Under the interview program, the "only circumstance in which a passenger would be denied boarding under the pre-boarding interview process" is if the passenger exhibited a critical sign that could not be resolved by local law enforcement authorities. AR 591. Refusal to cooperate is not a critical sign.

There are also additional reasons, unrelated to lack of participation in the pre-departure interview process, that may result in denial of boarding, such as a passenger's inclusion on a watchlist. AR 592 (Keane Decl.). And, of course, airlines always have the statutory authority to deny boarding to passengers that they decide might pose a threat to flight safety. *Id.*; 49 U.S.C § 44902(b).

Details of the selection parameters and the screening procedures of the pre-departure interview program contained in the AOSSP are Sensitive Security Information,[3] and may only be disclosed to covered persons with a need to know pursuant to 49 C.F.R. § 1520.9.

III. Factual and Procedural Background

Petitioner Jonathan Corbett alleges that, on December 25, 2014, he flew from London Heathrow Airport to John F. Kennedy Airport in New York on American Airlines after participating in the pre-departure interview process. Br. 12, 38 (Ex. A Declaration of Jonathan Corbett). According to his petition, petitioner was questioned by an interviewer in the American Airlines lounge prior to boarding. Although petitioner was initially cooperative with the interviewer, he eventually refused to answer the screening questions. Br. 12-13. A second interviewer conducted another interview with petitioner shortly thereafter, posing what petitioner alleges were different questions, and petitioner cooperated with the second interviewer, Br. 13-14. Having completed the interview, petitioner was "cleared to

[3] Consistent with this Court's order of October 1, 2015, TSA filed a two-volume administrative record containing Sensitive Security Information, *in camera* and *ex parte*. *See* Order, *Corbett v. TSA*, No. 15-10757 (11th Cir. Oct. 1, 2015). TSA subsequently filed a redacted, public version of the administrative record.

fly" and boarded the flight. Br. 14. He returned to the United States on his intended flight.

After he completed his flight and returned to the United States, petitioner filed a petition challenging the pre-departure interview process as a violation of the Fifth Amendment and the designation of the pre-departure interview process as Sensitive Security Information as erroneous.

SUMMARY OF ARGUMENT

1. TSA's requirement that an airline screen passengers on certain flights to the United States by posing questions to determine their potential risk to the safety of the flight does not violate the Fifth Amendment right to international travel. As petitioner's own experience demonstrates and the AOSSP confirms, TSA does not require an airline to deny boarding to a passenger because that passenger was not cooperative with the interview process. The interview process is a reasonable regulation of international travel.

Petitioner's remaining arguments that the interview process violates the Fifth Amendment are without merit. Because airline interviewers are not law enforcement officers or otherwise charged with enforcing federal criminal laws, the interview process does not implicate the Fifth Amendment's protections against self-incrimination. Petitioner's unsupported allegations that the interview process is based upon unlawful discrimination are without merit, and he has provided no basis to

support his standing to raise such a claim. The agency's reliance on an affidavit to explain the historical rationale for the pre-departure interview process was appropriate where the documentary record would not otherwise be sufficient for judicial review.

2. This Court lacks jurisdiction to review petitioner's challenge to the TSA's designations of protected operational details and security protocols of its pre-departure interview process as Sensitive Security Information. He has not sought review of the designations with the agency itself prior to seeking judicial review, and, accordingly, the agency has not been able to render a final determination and provide an adequate record in support of its determination for this Court's review. In any event, his challenge is meritless. His blanket challenge to all of TSA's Sensitive Security Information designations in the present administrative record does not identify with any particularity any improper designation, nor has he provided any reason to believe those portions are improperly designated.

STANDARD OF REVIEW

This Court's review of the TSA Administrator's "order" is governed by 49 U.S.C. § 46110(c) and the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). The TSA Administrator's "[f]indings of fact . . ., if supported by substantial evidence, are conclusive." 49 U.S.C. § 46110(c). Because § 46110(c) is silent about the standard of review for non-factual matters, the standard for review is provided by the APA, *see Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 717-18 (1st Cir. 1999), which requires

that agency action be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012) (reviewing challenge to TSA's designation of Sensitive Security Information under arbitrary and capricious standard).

ARGUMENT

I. TSA's Pre-Departure Interview Process Does Not Violate the Fifth Amendment.

Petitioner's primary contention is that TSA's requirement that an airline screen passengers by posing questions to determine their potential risk to the safety of the flight violates his right to international travel protected by the Fifth Amendment. Br. 15-16. In particular, he contends that under the pre-departure interview program, a passenger who refuses to answer questions during an interview "is likely" to be denied boarding, although he concedes that such a consequence is "not mandatory." *Id.* at 16.

1. Participation in the pre-departure interview process does not violate petitioner's right to international travel under the Fifth Amendment. The Fifth Amendment right to international travel does not encompasses a right to travel in any particular manner or on a particular carrier. *See Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (holding that there is no constitutional right to the most convenient form of travel); *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th

Cir. 2006) (holding that there is no "right to travel by airplane"); *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991) (holding that "travelers do not have a constitutional right to the most convenient form of travel"). Nor is there any Fifth Amendment right to be free from security inspections, delay or inconvenience. *See League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007)(finding that a law causing inconvenience to a traveler does not amount to a denial of the right to travel); *Torraco v. Port Auth.*, 615 F.3d 129, 141 (2d Cir. 2010) (holding that a delay of "a little over one day . . . was a minor restriction that did not result in a denial of the right to travel"); *Green v. Transportation Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (holding in the context of a challenge to enhanced security screening that "[p]laintiffs do not have a right to travel without any impediments whatsoever").

2. Even assuming that there were some protected due process interest in travelling internationally by air or on a particular carrier, furthermore, the pre-departure interview process would easily satisfy constitutional requirements because it a "reasonable government regulation within the bounds of due process." *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999); *Gilmore*, 435 F.3d at 1137 (accord). As the Supreme Court has explained, "the freedom to travel abroad . . . is subject to reasonable governmental regulation." *Haig v. Agee*, 453 U.S. 280, 306-07, 101 S. Ct. 2766, 2781-82 (1981) (upholding constitutionality of regulation authorizing

the revocation of a passport where the passport holder's foreign activities are likely to cause serious damage to national security).

Any burden associated with participating in an interview and additional screening measures is reasonable and does not amount to a deprivation of the right to international travel. The pre-boarding interview seeks to identify and resolve any security concerns during pre-boarding screening. As petitioner concedes, TSA has a significant interest in aviation security in foreign countries that would affect flights to the United States, Br. 26. And courts of appeals have upheld screening programs that impose similar burdens under the stricter standard for challenges to the right to interstate travel. *See Gilmore*, 435 F.3d at 1137 (identification policy requiring passengers to provide identification or be subject to additional screening measures, similar to "behavioral profiling, magnetometer screening, identification check, and physical search of the passenger's person and carry-on baggage" did not violate interstate right to travel); *see also Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 14 (D.C. Cir. 2008) (right to travel internationally carries with it lesser protection that the right to travel within the United States). Any burden on petitioner's right to international travel posed by participation in an interview and possible selection for additional screening of the passenger's person or baggage does

not violate the right to international travel.[4] *Cf. Corbett v. TSA*, 767 F.3d 1171, 1182 (11th Cir. 2014) (use of scanners and pat-down procedures were reasonable searches); *Ruskai v. Pistole*, 775 F.3d 61, 77 (1st Cir. 2014) (use of metal detectors and pat-downs was reasonable); *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (en banc) (airport screening searches were reasonable); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.) (airport carry-on baggage search was reasonable).

In an attempt to argue that the interview process is not a reasonable regulation of the right to international travel, petitioner offers various critiques of the AOSSP interview process based on his own evaluation of the interview process' efficacy and assessment of personnel training standards, *see* Br. 25-26, without any factual basis for those evaluations. He further suggests, based solely on the page count of the administrative record in this case and its lack of classified materials, that the interview process was devised as a "knee-jerk reaction" to one particular aviation security event, and, as such, is constitutionally problematic. *See* Br. 26 ("The Administrative Record in this case is notably different than the records produced for other petitions that this Court has denied. . . . [In addition to the smaller number of pages,] there exists no

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[4] Petitioner cites certain international law sources relating to a right to return to a person's home country, *see* Br. 22-23, but he does not appear to argue that TSA's pre-departure interview process violates any such rights, nor does he point to any basis for a private right of action enforceable in federal court for violations of those international declarations and conventions.

classified portion of the record.")(citation omitted). He provides no reason for this Court to conclude that the pre-departure interview program is an unreasonable regulation of the international right to travel.

Petitioner repeatedly suggests that the pre-departure interview program requires denial of boarding for a passenger who refuses to participate in the process. But the TSA official with responsibility for the AOSSP has submitted a sworn declaration making clear that TSA does not require denial of boarding for refusal to participate in the pre-boarding interview. *See* AR 589; AR 591 ("Under the AOSSP, the only circumstance in which a passenger would be denied boarding under the pre-boarding interview process is if the passenger exhibited a sign that could not be resolved by local law enforcement authorities."). TSA previously made that representation in its filing to the Court. S*ee* Letter, *Corbett v. TSA*, No. 15-10757 (11th Cir. May 12, 2015). And a review of the AOSSP, which is part of the administrative record, makes clear that it does not require denial of boarding to a passenger who declines to answer questions posed in a pre-boarding interview. *See* AR 570-72 (AOSSP §11.4.C.2); *see also* AR 590 (Keane Decl.). [5]

[5] Petitioner alleges that, at some point, a TSA customer service representative told him that denial of boarding was mandatory. Any mistaken statement by a TSA representative has been clearly corrected by TSA's filings with this Court, including its filing of the AOSSP itself as well as the sworn declaration of a TSA official.

Petitioner nevertheless asserts that refusal to participate in the interview process is *likely* to result in denial of boarding. *See* Br. 19. Petitioner's argument appears to rest on his misapprehension that the resolution of "suspicious signs"–such as being unwilling or unable to participate in the interview process–could result in law enforcement intervention. Br. 16 ("A suspicious sign may be resolved by the interviewer, but if they cannot . . . law enforcement will be summoned."). As described in the Keane Declaration, the AOSSP does not require the involvement of law enforcement to resolve all signs, AR 591-92, and a review of the AOSSP confirms no such requirement exists, AR 570 (AOSSP § 11.4.C.2). Notably, petitioner himself was permitted to board after declining to participate in a pre-boarding interview. Significantly, TSA's interpretation of its own regulations, including those contained in the AOSSP, is entitled to deference. *See Assa'ad v. U.S. Attorney Gen.*, 332 F.3d 1321, 1326 (11th Cir. 2003) (explaining that the court defers to the agency's "interpretation of its own regulations unless that interpretation is 'plainly erroneous or inconsistent with the regulation'").

3. Petitioner next argues that TSA's interview process violates his "right to remain silent" under the Fifth Amendment, asserting that he has the "absolute right to refuse to participate in such an interrogation." Br. 27-29. As this Court has recognized, the Fifth Amendment's protection against self-incrimination protects against "the infliction of criminal penalties on the basis of compelled, testimonial self-

incrimination." *United States v. Gecas*, 120 F.3d 1419, 1428 (11th Cir. 1997). It does not apply when the subject does not face the possibility of criminal conviction on the basis of his statements. *Id.* at 1432.

In this context, petitioner would not face criminal liability on the basis of his statements in a screening interview because the interviewers are not law enforcement officers or otherwise enforcing criminal laws. Airline personnel or independent contractors who conduct pre-departure interviews are not law enforcement officers, and they are not charged with enforcement of criminal laws. Courts have held in related contexts that those who conduct airport screening are not law enforcement officers, but rather they conduct administrative searches to protect public safety. *See, e.g.*, *Corbett*, 767 F.3d at 1180 (TSA passenger screenings are administrative searches, which "primarily ensure public safety instead of detect criminal wrongdoing."); *Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) ("[S]creening passengers at an airport is an 'administrative search' because the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack."); *Edwards*, 498 F.2d at 499-501 (carry-on baggage search at airport designed to detect threats). Private security contractors conducting pre-departure interviews on behalf of airlines, similarly, are not law enforcement officers or otherwise enforcing criminal law. Because an airline interviewer has no authority to enforce criminal laws, requiring a passenger to

participate in an interview does not implicate the Fifth Amendment's protection against self-incrimination. And in any event, the actions of airline employees and local authorities in a foreign airport, making decisions about whether security concerns about a passenger have been resolved, are not properly attributed to the U.S. government. *See George v. Rehiel*, 738 F.3d 562, 583-84 (3d Cir. 2013) (concluding that TSA screeners are not responsible for the conduct of local law enforcement officials that they summon).

4. Petitioner also claims that TSA's challenged screening policy is subject to strict scrutiny because it violates his "fundamental rights" and also constitutes impermissible discrimination against minorities. Br. 23-24. As noted above, however, the right to travel internationally is subject to reasonable government regulation under the Due Process Clause. He cites no authority for the proposition that he has a due process right not to be subject to reasonable aviation screening prior to boarding an aircraft, unless the particular screening methods used are the most narrowly tailored to accomplish the government's purpose. *Cf. Corbett*, 767 F.3d at 1182 (rejecting argument that airport security screening search must use "the least invasive procedure" possible).

As for petitioner's claim of impermissible discrimination, he has made no allegation that would support his standing to challenge TSA's policy on the grounds that the policy discriminates against protected racial or religious classes. Br. 29.

Petitioner does not contend that he has been subjected to unlawful discrimination, or that he was selected for additional screening because of his race or religion. Accordingly, he lacks standing to challenge the pre-departure interview screening policy on this basis. *See Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994) (en banc) (plaintiff must establish standing to prosecute any action in federal court); *Graves v. Florida Prob. & Parole Comm'n*, 456 F.2d 1300, 1301 (5th Cir. 1972) (inmate has standing to sue when his complaint included allegations that he was victim of racial discrimination). And even if petitioner had standing, his allegations that the policy requires or is based on ethnic and religious profiling, are without any factual support, and the Court should disregard them. *Cf. Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th Cir. 2010) (conclusory allegations of discrimination are insufficient).

Petitioner complains that passengers who do not speak a common language with the interviewer may be singled out for additional screening, Br. 30-31, but he was not himself subject to additional screening on this basis. More fundamentally, however, the AOSSP specifically permits the interview to be conducted through an interpreter, AR 568 (AOSSP § 11.4.B.2), and states that the elements of the interview program are non-discriminatory and to be applied in a uniform and consistent manner, AR 569 (AOSSP § 11.4.C). The pre-departure interview process is not based upon unlawful racial or religious discrimination, nor do the AOSSP's requirements

impose discriminatory policies, and petitioner's conclusory assertions to the contrary should be rejected.[6]

5. The Court should also reject petitioner's argument, Br. 24-25, that the Court must disregard portions of the declaration of Michael T. Keane, TSA Director Aviation, that explain the historical basis for the pre-departure interview process and the continuing justification for that process. As Mr. Keane explains in his declaration, the pre-departure interview process was initially imposed in response to the hijacking of TWA flight 487 in June 1985 and the attempted bombing of an El Al flight from London Heathrow to Tel Aviv in April 1986. The pre-departure interview process has been continued to be used by TSA, to which the authority to require aviation security screening was transferred in 2002, *see* Assumption of Civil Aviation Security Functions and Responsibilities, 67 Fed. Reg. 7939, 7939-40 (Feb. 20, 2002). Although TSA does not have a complete documentary record of the original decision to require pre-departure interview screening, Mr. Keane's declaration explains the historical need

[6] Any suggestion that the AOSSP's interview program imposes discriminatory policies or is intended to apply in a discriminatory manner on the basis of race, color, national origin, sex or ancestry is meritless. The same interview program applies to all passengers, and federal law specifically prohibits such discrimination. *See* 49 U.S.C. §§ 40102(a)(5), 40127(a) (prohibiting discrimination in foreign and interstate air transportation).

for and background of the pre-departure interview screening process and the basis for TSA's decision to continue that process as subsequently amended.

Courts have recognized the proper use of such affidavits in related contexts. As the Supreme Court recognized in *Camp v. Pitts*, an agency may provide a declaration that fleshes out the "contemporaneous explanation of the agency decision," where there is insufficient contemporaneous documentation to permit effective review of the decision. 411 U.S. 138, 143, 93 S. Ct. 1241, 1244 (1973). Lower courts have similarly approved the submission of an agency declaration to provide a complete explanation of the basis for a challenged agency determination. *See Jifry v. FAA*, 370 F.3d 1174, 1181 (D.C. Cir. 2004) ("Consistent with *Camp v. Pitts*, [411 U.S. at 143, 93 S. Ct. at 1244], where the Supreme Court stated that when an agency official fails to adequately explain its decision, the agency should submit 'either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary,' the affidavit of TSA Deputy Administrator Stephen McHale provides an adequate basis for the TSA's determination that Jifry and Zarie each posed a 'security threat.'"); *Environmental Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (affidavits are proper where they are "merely explanatory of the original record"). Petitioner asserts that the Court must ignore the information in this declaration, because the declaration contains a *post hoc* rationalization for the agency decision. There is no reason to credit his argument,

which is contradicted by the sworn declaration of an agency official. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10, 122 S. Ct. 431, 151 (2001) (In the absence of clear and convincing evidence to the contrary, "[a] presumption of regularity attaches to the actions of Government agencies.").

Furthermore, petitioner challenges TSA's current use of the pre-departure interview screening process, not its historic use. Mr. Keane's declaration, in addition to explaining the historic background for FAA's implementation of the pre-departure interview screening process, explains that TSA has continued to use this screening method as an integral part of TSA's security screening program to detect potential threats to aviation security. *See, e.g.*, AR 587. And, as such, Mr. Keane's declaration provides a contemporaneous basis for the continued use of the process.

II. Petitioner has not Properly Challenged the Designations of Sensitive Security Information.

This Court does not have jurisdiction to consider petitioner's challenge to the designation of certain information about the pre-departure interview process as Sensitive Security Information. As stated in TSA's response to the Court's jurisdictional question, *see* Respondent's Position Regarding the Court's Jurisdictional Question of 3/13/2015, TSA's final determination that certain information contains SSI is an "order" that this Court has jurisdiction to review under 49 U.S.C. § 46110. *See, e.g., Lacson v. U.S. Dep't of Homeland Sec.*, 726 F.3d 170, 173-77 (D.C. Cir. 2013).

TSA initially filed the administrative record *ex parte* and under seal, in accordance with this Court's order. After reviewing the documents in the record for Sensitive Security Information, TSA filed a public version of the administrative record, redacted to protect the information designated as Sensitive Security Information.

For the first time in his brief, petitioner challenged TSA's designations, Br. 31-32. He has not sought review of the designations with the agency itself prior to seeking judicial review. Even now, moreover, he has not identified with any particularity which portions of the record he believes are improperly designated, simply raising a blanket challenge to all of TSA's designations. As presented, the agency has not been given the opportunity to review the designations in light of his specific challenges in order to make a final agency determination that would properly be subject to judicial review. *See Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012) (examining TSA's justifications of each challenged designation and its relationship to TSA's regulations on designating Sensitive Security Information). And petitioner's failure to bring his challenge to the agency in the first instance has meant that TSA was not able to issue a reasoned explanation for why it was upholding specific designations, which could have been included in an administrative record, in order to assist the Court's review of those designations.

In any event, petitioner's challenge is without merit, and his arguments fail to show that TSA's designations are arbitrary or capricious. Petitioner objects to the

withholding of portions of documents in the record on the basis that some were created as many as nineteen years ago. He urges this Court to itself impose a requirement – to be used for the first time here – that Sensitive Security Information designations must automatically or presumptively expire a certain number of years, in a manner similar to classified information. Br. 31-32 (objecting that "TSA still considers this a secret almost 19 years later and has no plans to remove the SSI designation based on age").

This Court need not devise such a process out of whole cloth, as Congress has done so already. In Section 525(a)(2) of the Department of Homeland Security Appropriation Act of 2007, Congress directed the U.S. Department of Homeland Security to institute a policy to provide that "sensitive security information that is three years old . . . shall be subject to release upon request," with certain caveats. Pub. L. No. 109–295 § 525(a)(2), 120 Stat. 1355, 1382 (2006).[7] The first, and most

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[7] Section 525 of the Department of Homeland Security Appropriations Act has never been codified, but Section 525 has been reenacted in each subsequent act of Congress providing appropriations to the Department of Homeland Security. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 522, 121 Stat. 2074 (Dec. 26, 2007); Consolidated Security, Disaster Assistance, & Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 510, 122 Stat. 3682 (Sept. 30, 2008); Legislative Branch Appropriations & Continuing Appropriations Resolution of 2010, Pub. L. 111-68, div. B, § 101, 123 Stat. 2044 (Oct. 1, 2009); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, div. B, § 510, 123 Stat. 2170 (Oct. 28, 2009); Department of Defense & Full-Year Continuing Appropriations Act,

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applicable exception to the disclosure rule, is that the information not be "incorporated in a current transportation security directive, [or] security plan," such as TSA's documents describing the pre-departure interview process. *Id.* As TSA has explained, the pre-departure interview screening process has remained in force since 1986, with periodic amendments, and is currently in use today. There is nothing arbitrary or capricious about designating as Sensitive Security Information the specific screening methods used by air carriers to detect potential threats to aviation security. *See* 49 C.F.R. § 1520.5(b)(9)(i) (designating "any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person" as Sensitive Security Information protected from public disclosure); *Robinson*, 689 F.3d at 892; *cf. Lacson*, 726 F.3d at 179 (reviewing whether certain disclosures impermissibly revealed Sensitive Security Information).

2011, Pub. No. 112-10, §§ 1101, 1104, 125 Stat. 102 (Apr. 15, 2011); Consolidated Appropriations Act, 2012, § 510, Pub. L. No. 112-74 (Dec. 23, 2011); Consolidated & Further Continuing Appropriations Act, 2013, § 510, Pub. L. No. 113-6 (March 26, 2013); An Act Making Continuing Appropriations for the Fiscal Year Ending September 30, 2014, Pub. L. No. 113-46, div. A, § 101, 127 Stat. 558, 558 (Oct. 17, 2013); Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, div. F, § 510; Continuing Appropriations Resolution, 2015, Pub. L. No. 113-164, §101, 128 Stat. 1867 (Sept. 19, 2014).

CONCLUSION

For the foregoing reasons, the petition for review should be denied in part and dismissed in part.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the count of Microsoft Word 2010.

I certify that his brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and served it on the following party via electronic mail:

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