ORAL ARGUMENT SCHEDULED FOR MARCH 16, 2012
FINAL VERSION
Case Nos. 11-5226 and 11-5228

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Michael S. Roberts, et al.,

Plaintiffs-Appellants,

v.

Janet Ann Napolitano, et al.,

Defendants-Appellees,

On Appeal from the United States District Court for the District of Columbia
(1:10-cv-01966-BJR and 1:10-cv-02066-BJR)

JOINT BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and Amici

The parties in the District Court and in this consolidated appeal are: plaintiffs Michael S. Roberts, Ann Poe, Adrienne Durso and D. Chris Daniels; and defendants Janet Napolitano, in her official capacity as Secretary of Homeland Security, and John S. Pistole, in his official capacity as Administrator of the Transportation Security Administration (collectively "Defendants"). Plaintiffs in the District Court Michelle Nemphos, as parent and next friend of her minor child C.N., and C.N., are not appealing the lower court's ruling.

Ruling Under Review

The rulings under review are two judgments granting the Defendants' motions to dismiss and dismissing the cases. *See* JA012 and JA089. These judgments were dated July 7, 2011, and July 5, 2011, respectively, and were issued by Judge Henry H. Kennedy, Jr. Memorandum Opinions explaining the judgments were issued on the same days. *See* JA005-013, JA072-088.

Related Cases

The case on review is a consolidated appeal from the United States District Court for the District of Columbia and was not previously before this Court or any other court. There are no other related cases.

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

CASES

** Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

OTHER AUTHORITIES

GLOSSARY

TSA	Transportation Security Administration
DHS	Department of Homeland Security
Mot.	Defendants' Motion to Dismiss the Roberts Complaint
Opp. Mot.	Plaintiff's Opposition to Defendant's Motion to Dismiss the Robert's Complaint
WBI	Whole Body Imaging
SSI	Sensitive Security Information
SOP	Standard Operating Procedure
FAA	Federal Aviation Administration

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims for relief arise under the Constitution of the United States. This Court has jurisdiction over these appeals pursuant to 28 U.S.C. § 1291. The Appellants noticed their appeals on September 1, 2011, within sixty days of the July 5, 2011 and July 7, 2011 final orders dismissing the district court cases for lack of subject matter jurisdiction.

STATEMENT OF THE ISSUE

Does a United States District Court have jurisdiction to decide commercial airline pilots' and passengers' claims for violations of the Fourth Amendment arising from the unreasonable search and seizure of the pilots and passengers due to the use of full body pat-downs and whole body imaging at airports?

STATUTES AND REGULATIONS

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall--

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

49 U.S.C. § 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

STATEMENT OF THE FACTS

The Transportation Security Administration ("TSA"), acting under the auspices of the Department of Homeland Security ("DHS"), has begun a new regime of security screening that subjects all passengers and many pilots to virtual strip searches and invasive, full body pat-downs. *See* JA019-021, 094-096. In implementing its new policy, the TSA provided no notice and permitted no input from the public, and will only acknowledge the existence of this new policy, while refusing to disclose the actual policy or its factual basis. *See* Defendants' Motion to Dismiss Roberts Complaint (hereinafter "Mot."), pp. 5-6 n.4; Plaintiff's Opposition to Motion to Dismiss Roberts Complaint (hereinafter "Opp. Mot."), pp. 8-9. The TSA's and DHS's decision to avoid any meaningful discussion on the merits of these new screening techniques was for good reason: the whole body imaging machines that conduct the virtual strip searches are easily compromised, they expose air travelers to radiation, and they effectively permit air travelers to be viewed nude by total strangers; the newly-developed full body pat-downs, referred to by TSA as "enhanced pat-downs," likewise submit passengers to an uncomfortable and humiliating experience in which their most intimate body parts are groped until an unknown agent sees fit. *See* JA019-021, 094-096. Now that the TSA's actions have been challenged as violating the Fourth Amendment, the TSA and DHS seek to recharacterize these claims as challenges to the secret

policy, and, therefore, that review is only appropriate by a United States Court of Appeals. In essence, to avoid review by the United States District Court for the District of Columbia, the TSA and DHS contend that even though no one can see the secret policy, that any challenge to the TSA's actions is a challenge to the policy.

A. Security Guidelines

According to Janet Napolitano, in her official capacity as Secretary of the DHS, and John Pistole, in his official capacity as Administrator of the TSA (collectively, "Defendants"), on September 17, 2010, the TSA issued new guidelines in the form of a Standard Operating Procedure ("SOP") to its security officers altering how they screen airport passengers. *See* Mot. at 5-6. According to Defendants, on October 29, 2010, the TSA implemented this SOP (the "October SOP"). *See Id*. at 5. Based on Defendants' representations regarding the October SOP, it requires TSA agents to use whole body imaging ("WBI") devices for screening passengers, or, if a passenger "opts out" of such WBI screening, requires the TSA agents to perform an enhanced pat-down. *See* Mot. at 4-5. The WBI produces a virtual nude image of the traveler, while the enhanced pat-down requires the TSA agent to grope the entire body of the passenger, including the genitals, with the agent's palm and fingers, as opposed to the prior pat-down procedure involving only the back of the agent's hand. *See* JA020-21. In essence,

the TSA's policy requires travelers to either suffer an impermissible strip search by a machine or suffer a heavy-handed groping by a government agent. *See* JA017. In either event, the traveler is subjected to an illegal search and seizure in violation of the Fourth Amendment. *Id*.

On November 12, 2010, the TSA issued new procedures providing for a different screening process for pilots and kept in place the procedures for passengers. Mot. at 6. A day later, the TSA implemented this SOP (the "November SOP"). *Id*. The November SOP provides that uniformed pilots would be screened using a metal detector as a first line of screening. *Id.* If a pilot is unable to successfully pass through the metal detector, the TSA requires the pilot to pass through a WBI device or be subjected to an enhanced pat-down. *Id.* The TSA made no allowances for pilots with metal medical implants, not even permitting the use of a metal detecting "wand" to isolate the triggering object and thereby enable the TSA agent to confirm the presence of a metal medical implant. *See* Mot. at 9. Thus, for pilots with these implants, their frontline screening requires a full body pat-down or the use of whole body scan.

Although the TSA claims that the October and November SOPs (collectively, "Challenged SOPs") exist, the TSA refuses to produce them as the TSA has deemed them Sensitive Security Information ("SSI") pursuant to Section 114(r) and 49 CFR parts 15 and 1520. Mot. at 5-6 n.2. Further, even though the

TSA claims that the October SOP is its "final decision directing the use of [WBI] machines," the TSA's own admissions belie that claim. Mot. at 6. First, the Assistant Administrator for Security Operations for the TSA, Lee R. Kair, has declared that "[t]he SOP is revised as necessary – and often upon short notice …." *See* JA060. Further, Mr. Kair states that he essentially has *carte blanche* to modify the SOP as he sees fit because he is "responsible for developing, authoring and implementing – and in some cases – approving – TSA's SOPs, including those with regard to [WBI] and the revised pat-down procedures." *See* JA059. Lastly, only two weeks after the October SOP was implemented, the TSA altered the October SOP to, in some cases, permit pilots to avoid being screened by a WBI device or enhanced pat-down. *See* JA066.

B. Lawsuit

The current appeal stems from two now-consolidated companion cases, each of which was filed in the District Court for the District of Columbia not long after implementation of the new screening regime. *See* JA002, 069. The first lawsuit, filed on November 16, 2010, was brought by two veteran pilots, Michael Roberts and Ann Poe (collectively, "Pilots"). *See* JA015-31. The second lawsuit, filed on December 6, 2010, was brought by four airline passengers, only two of which are before the Court, Adrienne Durso and D. Christopher Daniels (collectively, "Passengers"). *See* JA090-109. All of the Pilots and Passengers were subjected to

searches that violated their Fourth Amendment rights, and the Pilots and Passengers sought, *inter alia*, an injunction preventing Defendants from using enhanced full body pat-downs and whole body imaging as a frontline of screening. *See* JA027, 105.

On February 8, 2011 and April 29, 2011 Defendants filed nearly identical Motions to Dismiss in the two companion cases, arguing that the District Court for the District of Columbia lacked subject matter jurisdiction. *See* JA002-3, 069. In particular, Defendants asserted that because Section 46110 provides exclusive jurisdiction to federal appellate courts when claims relate to security-related "orders" of the TSA, the Pilots' and Passengers' claims must be brought in the appropriate court of appeals. *See* JA005, 072. In support of this position, Defendants first alleged that the Challenged SOPs, which they will not permit the Pilots and Passengers to view, was issued by the TSA "'in whole or in part under' Title 49, Subtitle VIII, Part A … thereby falling within the ambit of section 46110." *See* Mot. at 7. Next, Defendants argued that the October SOP was an "order" because it marks the "consummation" of TSA's decision-making process and it gives rise to legal consequences. *See* Mot. at 14-16. Finally, Defendants claimed that even if the Pilots and Passengers are not deemed to have disputed the Challenged SOPs, that the Pilots' and Passengers' claims are "inescapably intertwined" with the Challenged SOPs and, thus, subject to the jurisdictional

limitations of Section 46110. *See* Mot. at 20-24. The District Court granted Defendants' motions to dismiss finding that Section 46110 is applicable and jurisdiction is properly vested before a court of appeals. *See* JA014, 089.

SUMMARY OF THE ARGUMENT

Pursuant to Title 28 U.S.C. Section 1331, a United States District Court has jurisdiction to decide the Pilots' and Passengers' claims for violations of their Fourth Amendment rights arising from unreasonable searches and seizures of their persons due to the use of full body pat-downs and whole body imaging at airports. The Defendants attempt to twist the Pilots' and Passengers' claim from one based on Fourth Amendment grounds to arguing that the Pilots and Passengers are challenging the Challenged SOPs.

The Defendants rely on Title 49 U.S.C. Section 46110 to allow them to transform the Pilots' and Passengers' constitutional claims to claims challenging an administrative order. Not only does a United States District Court have jurisdiction pursuant to Title 28 U.S.C. Section 1331 for Constitutional claims, but Title 49 U.S.C. Section 46110 does not divest a United States District Court of jurisdiction because Section 46110 does not apply to the Pilots' and Passengers' claims for three reasons. First, the Challenged SOPs, which the government agents were following when they violated the Pilots' and Passengers' Fourth Amendment rights, is not an order within the meaning of Section 46110 because the Challenged SOPs are not final and there is not an administrative record supporting the Challenged SOPs. Second, the Pilots' and Passengers' claims are not inescapably intertwined with the Challenged SOPs because the Pilots and Passengers seek

relief that the court of appeals is unable to grant - namely, an injunction against the use of such violative practices; the Challenged SOPs are not the result of a true administrative process; and the inescapably intertwined doctrine does not apply to constitutional challenges such as those brought by the Pilots and Passengers. Finally, divesting a United States District Court of jurisdiction violates the Pilots' and Passengers' due process rights because only a District Court is guaranteed to provide meaningful judicial review.

ARGUMENT

I. A United States District Court Has Jurisdiction Over Constitutional Claims Pursuant To Title 28 U.S.C. Section 1331.

A United States District Court has jurisdiction over constitutional claims pursuant to Title 28 U.S.C. Section 1331. The Defendants cannot change the nature of the Pilots' and Passengers' claims by contending that the authority for the Defendants' challenged actions are secretive administrative orders. The Pilots and Passengers have clearly brought a lawsuit alleging violations of the Constitution; therefore, the United States District Court for the District of Columbia has jurisdiction.

Title 28 U.S.C. Section 1331 is very simple and clear. It provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution . . . of the United States." The Pilots and Passengers have clearly brought a civil action "arising under the Constitution," as they claimed a violation of their Fourth Amendment rights. *See* JA026-27, 103-104. Therefore, the United States District Court for the District of Columbia has original jurisdiction over the Pilots' and Passengers' lawsuits.

The Defendants contended, and the District Court erred in agreeing, that the Pilots' and Passengers' claims could somehow be deemed to be claims challenging the validity of the Challenged SOPs, and, therefore, that Title 49 U.S.C. Section 46110, which relates to agency orders, somehow applies to the Pilots' and

Passengers' claims. They are mistaken. The Pilots and Passengers brought suit alleging violations of their Fourth Amendment rights and no amount of attempted recharacterization can alter what was alleged in their complaints. Thus, the District Court erred in holding that it lacked jurisdiction.

II. The Challenged SOPs Are Not Orders Within The Meaning Of Title 49 U.S.C. Section 46110.

As the Defendants agree, 49 U.S.C. Section 46110's jurisdictional limitations do not apply to all actions of the TSA, but only apply to "orders issued by the FAA or TSA concerning air commerce and safety, including aviation security." Mot. at 12 (citing *City of Rochester v. Bond*, 603 F.2d 927, 932-35 (D.C. Cir. 1979)). However, the Challenged SOPs cannot be considered "orders" pursuant to Section 46110 because: (1) the Challenged SOPs are not final; and (2) there is not an adequate record.

A. The Challenged SOPs Are Not Final.

Although Defendants label the Challenged SOPs as "TSA's final agency decision," *see* JA060, they present no independent evidence to support this alleged fact. Defendants have not allowed the Pilots and Passengers, the District Court, or this Court to review the Challenged SOPs to determine whether they can be reasonably deemed to be final "orders." Instead, Defendants maintain the Challenged SOPs behind a veil of secrecy. As a result, the Challenged SOPs cannot be fairly deemed to be final orders.

Although this Court has held that, as a general principle, an "order" should be given an expansive reading under Section 46110, it does not encompass every action of the TSA. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007). For an agency action to be an "order" pursuant to Section 46110, the action must be final, meaning that it "must mark the consummation of the agency's decision-making process, and it must determine rights or obligations or give rise to legal consequences." *Id.* (internal quotations omitted). This Court has stated that an agency action is "final" if "[n]othing in the [agency action] indicates that the [agency's] statements and conclusions are tentative, open to further consideration, or conditional on future agency action." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007).

Notwithstanding Defendants' refusal to allow a review of the Challenged SOPs, Defendants' own conduct and admissions demonstrate that the Challenged SOPs cannot be deemed to be final "orders." Indeed, Defendants admit that the Challenged SOPs can be "revised as necessary – and often upon short notice." JA060. On November 12, 2010, less than two weeks after it was implemented, Defendants revised the October SOP to alter the security protocols for pilots. Mot. at 6. Such rapid and seemingly constant changes to the Challenged SOPs by Defendants belie their claim that they are final.

B. There Is Not An Adequate Record.

Even if the Challenged SOPs could be considered final, they still cannot be found to be "orders" because they do not have an adequate administrative record. As Defendants admit, the Challenged SOPs are considered SSI and are promulgated solely by the TSA. As a result, the record supporting the Challenged SOPs is composed solely of information supplied by the TSA.

As Defendants recognize, courts, including this one, have held that an administrative record is necessary for an "order" to be subject to Section 46110. Mot. at 16 n.12 (citing *City of Rochester*, 603 F.2d at 932). Although the District Court relied on a more recent D.C. Circuit case to find that an administrative record is not necessary, that case, *Safe Extensions*, is distinguishable. 509 F.3d 593 (D.C. Cir. 2007). First, this Court noted various examples where the agency had argued that Section 46110 did not require an adequate record, contradicting its stance in *Safe Extensions*. *Id.* at 600. Lastly, the *Safe Extensions* Court had an adequate record that allowed for public notice and comment, unlike the secret proceedings here. *See id.* at 596.

Further, courts have found that not only does a record have to exist, but it has to be adequate. *City of Rochester*, 603 F.2d at 932; *see also Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993); *Atorie Air, Inc. v. FAA*, 942 F.2d 954, 960 (5th Cir. 1991); *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 968-69 (9th Cir.

1989). At the District Court, Defendants cited to a Ninth Circuit case for the proposition that even a single letter has been found to create an adequate record. Mot. at 16 n.12 (citing *San Diego Air Sports*, 887 F.2d at 969). While a record consisting of "no more than a letter" may be sufficient for review of procedural actions, it is not adequate for a substantive review of an invasive search and seizure like that sought here by Plaintiffs. *See Atorie Air*, 942 F.2d at 960; *see also San Diego Air Sports Ctr., Inc.*, 887 F.2d at 969.

Defendants erroneously argued to the District Court that the record here is adequate by citing to the index of the administrative record filed in this Court in *Electronic Privacy Information Center v. United States Department of Homeland Security*, No. 10-1157. Mot. at 16 n.12. However, any "record" to which Defendants cite is secret. It has not and cannot be seen by the Pilots or Passengers as Defendants claim all information relating to the Challenged SOPs is SSI. A secret record of SOPs that violates the rights of all air passengers and pilots, including the Passengers and Pilots, cannot be held to be adequate for review.

III. The Pilots' And Passengers' Claims Are Not Inescapably Intertwined With A Review Of The Challenged SOPs.

The Pilots' and Passengers' claims are not inescapably intertwined with a review of the Challenged SOPs because the Pilots and Passengers have not sought to overturn the Challenged SOPs. Rather, the Pilots and Passengers seek to have the use of enhanced pat-downs and whole body scanners declared unconstitutional and

enjoin the Defendants' further use of such screening methods. The Pilots and Passengers challenge the search and seizure of their persons, not the secretive process whereby the Defendants gave itself power to search and seize U.S. citizens. Because the Pilots and Passengers have brought a constitutional claim against the Defendants, the inescapably intertwined doctrine does not apply.

A. The Pilots And Passengers Have Not Sought Review Of The Challenged SOPs.

The Pilots and Passengers did not seek to have the District Court review the Challenged SOPs. Rather, they sought to enjoin the Defendants from continuing to violate their Fourth Amendment rights. Because the Pilots and Passengers have not sought review of the Challenged SOPs and because the relief sought by the Pilots and Passengers can only be granted by the District Court, the Pilots' and Passengers' suit is not inescapably intertwined with a review of the Challenged SOPs.

While courts of appeal have original jurisdiction over certain orders pursuant to Section 46110, they may also have original jurisdiction over "claims that are 'inescapably intertwined' with review of such orders." *Breen v. Peters*, 474 F. Supp. 2d 1, 4 (D.D.C. 2007). As stated by this Court, "[a] claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Id.* (citing *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir.

2001)). Further, as noted by the District Court, a "critical point" in analyzing the application of the inescapably intertwined doctrine "is whether review of the order by a court of appeals would allow for adjudication of the plaintiff's claims and could result in the relief that the plaintiff requests." JA081 (citing *Breen*, 474 F. Supp. 2d at 5).

In applying the inescapably intertwined doctrine, the District Court properly determined that the relief sought by the Pilots and Passengers was not the relief that a court of appeals could provide. *See* JA082-83. In particular, the district court noted that the Pilots and Passengers sought "a permanent injunction barring the use of [WBI] scanners or enhanced pat-downs as a primary means of screening air travelers." JA082. The district court then examined the type of relief that a court of appeals could provide and noted that the court of appeals was limited to "a firm[ing], amend[ing], modify[ing], or set[ting] aside any part of 'the SOP.'" JA083 (alterations in original). However, after determining that the relief sought by the Pilots and Passengers was different than the relief that could be afforded by the court of appeals, the District Court went on to hold that this difference was not sufficient to avoid the application of the inescapably intertwined doctrine. *See* JA083. In support of this conclusion, the District Court rationalized that, because the court of appeals could hear the Pilots and Passengers constitutional claims and could provide a remedy by setting aside or modifying the Challenged SOPs, the

inescapably intertwined doctrine applied. However, the District Court's analysis is flawed.

As recognized by the District Court, the Pilots and Passengers do not seek to have the Defendants prevented from using the Challenged SOPs as the basis of the ability to search and seize persons attempting to transit through an airport; but, rather, the Pilots and Passengers seek to enjoin the Defendants from using enhanced pat-downs and whole body scanners as a first line of security on United States citizens merely for transiting through an airport in the United States. The District Court relied on the proposition that, should the Challenged SOPs be modified by a court of appeals so as to prevent improper searches and seizures by the Defendants through the use of WBI scanners or enhanced pat-downs, such improper practices would be essentially banned from use in the future. However, such would not necessarily be the case. The Defendants could merely reauthorize the TSA through some other SOP to use WBI scans and enhanced pat-downs as primary screening methods. If the past actions of the Defendants are any indication, a new SOP would in all likelihood be secret. Therefore, the Pilots and Passengers seek to have the Defendants enjoined from using WBI scanners and enhanced pat-downs as the primary method of screening so as to prevent such a never-ending game of cat and mouse.

B. The Inescapably Intertwined Doctrine Does Not Apply Where There Is No True Administrative Process.

In addition to the District Court's improper finding that a court of appeals could provide the relief sought by the Pilots and Passengers, the District Court also erred in even looking to the inescapably intertwined doctrine because the agency at issue failed to follow a true administrative process. As noted by the court in *Breen*, whether a court of appeals has authority to hear the claim on direct review depends on "whether the administrative agency had the authority to decide th[e] issues raised by the claim." *Breen*, 474 F. Supp. 2d at 4 (citing *Merritt*, 245 F.3d at 188 n.9).

This requirement that the agency actually hear or have the opportunity to hear an "inescapably intertwined" claim in order for a court of appeals to have original jurisdiction is appropriate because the court of appeals would then review a fully-developed administrative record. As noted by the Ninth Circuit, the "inescapably intertwined" or "collateral attack doctrine prevents plaintiffs from crafting constitutional tort claims either as a means of 'relitigating the merits of the previous administrative proceedings,' or as a way of evading entirely established administrative procedures." *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (citing *Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997)). This necessarily presumes that if something is deemed to be "inescapably intertwined," there has already been an administrative hearing at which all interested parties were given

the opportunity to present their arguments and develop an accurate record. *See id.*; *see also Tur*, 104 F.3d at 292 (holding that district court lacked jurisdiction due to Section 46110 because it would merely result in "new adjudication over the evidence and testimony" already considered by relevant government agencies). A review of various statutes like Section 46110, as well as the legislative intent behind them, demonstrates that Section 46110 was not intended to apply to cases without an administrative record.

The United States Code is replete with provisions similar to Section 46110 that vest jurisdiction to review agency orders in the court of appeals.[1] The traditional rationales for such restrictions on judicial review are preservation of judicial resources and efficiency of administrative process. Quite simply, vesting jurisdiction in a court of appeals is a means of eliminating one layer of review in situations where a district court would essentially duplicate the fact-finding already performed by an agency:

> [A]dministrative agencies . . . perform much the same functions with respect to the courts of appeals as do district courts. Evidence is heard, a record is prepared and sifted, issues are identified and resolved. Frequently, indeed, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge or

[1] A partial illustrative list is provided in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction 2d* § 3941 (1992), which cites approximately 60 such provisions.

> hearing examiner, and resolution by a collegial body. The questions open for judicial review are commonly questions of law or review of a record for substantial evidence to support the administrative decision – matters as to which a district court would play the same role as a court of appeals. Review initially by a district court, and then by a court of appeals, would impose added burdens of delay on the administrative process, and of delay and expense on the parties.

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* 2d § 3940, at 757 (1992).

Were an agency to conduct a quasi-judicial proceeding and then permit appeal to a district court, the role of a district court would be futile. This Court, in reviewing an employee discharge dispute first brought before the Civil Service Commission and then appealed to a district court before finally landing before the court of appeals, lamented the inefficiency of such a procedure:

> Duplication, delay, expense and despair for the employee litigant are inherent in such a system. The interposition of the district court serves, it seems to us, no viable purpose …. The record before us is identical to that [which has already been made at the administrative level and presented to the district court.]

Polcover v. Sec'y of the Treasury, 477 F.2d 1223, 1227 (D.C. Cir. 1973). Thus, if the agency could not have heard the claim, then the claim cannot be said to be "inescapably intertwined" and subject to review by a court of appeals at the first instance.

The District Court avoided this requirement by contending that the ultimate reason for the statutory review provision found in Section 46110 was not to avoid re-litigation of agency proceedings, but to have a coherent application of judicial authority on an agency decision. *See* JA084 (citing *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979)). However, the District Court's argument that only a court of appeals may review an agency's determination pursuant to the statutory review provisions of Section 46110 due to the concerns of coherency is misplaced in this instance. The concern over a coherent application of judicial review may be appropriate where the issue is the application of an agency's regulations, such as the determination of what constitutes a "hazard" for flight plans as was the case in *City of Rochester*. *See* 603 F.2d at 929. However, the concern over coherency is not apparent where there is a constitutional challenge to an agency's actions, such as here. Further, this concern over coherency is not even built in the calculus of Section 46110. This is because Section 46110 allows any court of appeals to hear a claim challenging a SOP. If there was a coherency concern, only one court would have jurisdiction not 12.

Here, not only have Defendants not reviewed the Pilots' and Passengers' claims, but the Pilots' and Passengers' claims are such that there is not a need to have one court hear all the challenges to the Defendants' actions. Because Defendants contend that the contents of the Challenged SOPs are deemed to be

SSI, at no time was there any opportunity for the Pilots and Passengers, or anyone from the public, to present to Defendants any arguments or evidence in relation to the Challenged SOPs, or the conduct deriving therefrom. Rather, the entire process relating to the Challenged SOPs was performed without any actual, let alone possible, input from any person or entity other than Defendants. As a result, the "inescapably intertwined" doctrine's purpose of preventing a party from re-litigating a claim already brought before any agency would not be met. *See Americopters*, 441 F.3d at 736.

C. The Inescapably Intertwined Doctrine Does Not Apply To The Pilots' And Passengers' Broad Constitutional Challenge.

The "inescapably intertwined" doctrine does not apply to broad constitutional challenges like those brought by the Pilots and Passengers. As courts have recognized, the "inescapably intertwined" doctrine only applies to claims that are based on individualized issues. It does not apply to a broad constitutional claim because such a claim is necessarily not a "re-litigation" of an administrative hearing. Rather, a broad constitutional challenge raises issues outside of the administrative context and requires fact finding by a district court.

As noted by the Ninth Circuit, a claim "may be heard by a district court – if the claim 'constitute[s] a broad challenge to the allegedly unconstitutional actions of the FAA,' and is not a claim merely 'based on the merits of [an] individual situation.'" *Americopters*, 441 F.3d at 736 (citing *Mace v. Skinner*, 34 F.3d 854,

858-59 (9th Cir. 1994)). This constitutional claim exception to the "inescapably intertwined" doctrine is further explained by the Ninth Circuit's decision in *Mace*.

As in *Americopters*, the Ninth Circuit in *Mace* found that, unlike where the plaintiff merely sought review of the procedure or merits of a FAA order, a district court could maintain jurisdiction over a claim where the plaintiff alleged a constitutional challenge to an FAA "order." *See* 34 F.3d at 858. This ability of the district court to maintain jurisdiction was due, in part, to the fact that the "administrative record … would have little relevance to [the] constitutional challenges …." *See id.* at 859. Further, the Ninth Circuit noted that a challenge to the "constitutionality of [an FAA order] should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *See id.*

The constitutional challenge exception to the "inescapably intertwined" doctrine was upheld four years later in *Crist v. Leippe*. *See* 138 F.3d 801 (9th Cir. 1998). In *Crist*, the court stated that "section 46110 permits jurisdiction in the district court to hear broad constitutional challenges only where the agency's order did not address those challenges." 138 F.3d at 804. After determining the plaintiff had, in fact, brought a constitutional challenge, the court examined the FAA's purported "order" and noted that it "did not provide a definitive statement of the agency's position on Crist's constitutional challenge, and the board did not come

close to developing a record permitting informed judicial evaluation of his challenge." *Crist*, 138 F.3d at 804. The court went on to hold that without a "decision on Crist's [] constitutional claim that an appellate court can review, section 46110 does not preclude jurisdiction in the district court to consider its merits." *Id.* at 804-05.

The District Court held that the inescapably intertwined doctrine does apply to constitutional challenges based on the Ninth Circuit's case of *Gilmore v. Gonzales*. *See* JA084-85 (citing *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 n.9, 1135-39 (9th Cir. 2006)). However, the facts of *Gilmore* are distinguishable from the facts of this case. In *Gilmore*, a plaintiff challenged the enforcement of a passenger identification policy for all airline passengers. *See id*. at 1129. While the *Gilmore* plaintiff attempted to argue that the identification policy was unconstitutional, the court held that he did not, in fact, have any viable constitutional challenges to the law. *See id*. at 1135-40. In particular, the Ninth Circuit held that Gilmore's Fourth Amendment rights were not violated due to the application of the identification program because at no time was he actually seized and/or searched. *See id*. The same cannot be said of the Pilots and Passengers, who were subjected to intrusive searches of their persons. Thus, *Gilmore* is inapplicable to the claims brought by the Pilots and Passengers.

IV. Mandating Original Jurisdiction In A Court Of Appeals Violates The Due Process Rights Of The Pilots And Passengers.

The District Court erred in applying a jurisdictional statute that effectively eviscerates the Pilots' and Passengers' ability to argue their claim and vindicate their rights. Given the clear and apparent due process concerns that result from mandating original jurisdiction in a court of appeals, this Court should reverse the decision of the District Court.

Judicial review provisions that have the practical effect of foreclosing constitutional claims from meaningful judicial review are unconstitutional, and, thus, reading a jurisdictional statute in such a manner is to be avoided. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3183, 3149-51 (2010); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 63-64 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991). In choosing between the various plausible constructions of Section 46110, a district court is "obligated to construe the statute to avoid constitutional questions that would be presented by a broad construction." *United States v. Hersom*, 588 F.3d 60, 67 (1st Cir. 2009). Where a statute is "susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000). Because application of Section 46110 gives rise to such "grave and doubtful constitutional questions," the District Court should have interpreted it

so as to avoid such questions by substantively ruling on the Pilots' and Passengers' claims.

There is more than ample authority for the proposition that even where a statute could be read so as to divest jurisdiction from a district court, it should not where constitutional issues are implicated. For example, in *McNary v. Haitian Refugee Center, Inc.*, a class of immigrants brought suit in district court alleging that the government's methodology in reviewing applications to a federal amnesty program was arbitrary and violative of applicants' due process rights. 498 U.S. 479 (1991). The government challenged the district court's jurisdiction on the basis that a statute similar to Section 46110 mandated that the respondent class file suit in the court of appeals. The Supreme Court, in upholding the district court's jurisdiction despite the statutory command, explained that if the respondent class was "not allowed to pursue [its] claims in the District Court, [it] would not as a practical matter be able to obtain meaningful judicial review" because, among other reasons, appellate court review effectively prevents the class from compiling a record, presenting evidence, and putting forward a meaningful case. *Id*. at 496.

As the Court explained, "administrative or judicial review of an agency decision is almost always confined to the record made in the proceeding at the initial decision-making level." *Id*. In *McNary*, the respondents' contribution to this record was minimal; it included program application materials, other evidence

of program eligibility furnished by the applicant, and notes taken by government agents during the applicant's interview. *Id.* at 485. The Court explained that because of the "lack of [interview] recordings or transcripts . . . and the inadequate opportunity for [applicants] to call witnesses or present other evidence . . . the courts of appeals . . . [would] have no complete or meaningful basis upon which to review application determinations." *Id*. at 496. Because this record does not "address the kind of procedural and constitutional claims respondents bring in this action," *id*. at 493, limiting judicial review would be inappropriate in light of the fact that a court of appeals "would lack the fact-finding and record-developing capabilities of a federal district court." *Id*. at 497. As a result, review of the Pilots' and Passengers' claims in a court of appeals would deprive them of their due process rights. *See id*. at 497-98; *see also Reno,* 509 U.S. at 63 (holding district court jurisdiction proper where application of statute requiring circuit court review would "effectively exclude an applicant from access [to] administrative and judicial review procedures," including "opportunity to build an administrative record on which judicial review might be based").

That a due process violation results from application of Section 46110 is even more evident than that in *McNary*. Whereas in *McNary*, the plaintiffs were able to contribute to a record and present *some* evidence in the initial decision-making process, the Pilots and Passengers here are guaranteed no such opportunity.

Rather, the initial decision-making process in the present case was conducted without the Pilots' and Passengers' knowledge, let alone participation or input. Not only were deliberations unilateral, they were secretive. And not only were deliberations secretive, so, too, is the decision reached, according to Defendants. If the review scheme advocated by the government in *McNary* – which provided for *some* contribution to the record by respondents – was insufficient and "not meaningful," application of the jurisdictional statute in the current context would be an even more patent and egregious due process violation.

Just as was the case in *McNary*, the record here would not "address the kind of procedural and constitutional claims" at issue in the dispute. There, as here, the record established at the initial decision-making was a wholly inadequate basis for review of the constitutional claims before the court. In the present case, Defendants' record will not provide sufficient information to determine whether its security procedures pass Fourth Amendment muster. Even if some relevant information from the secret proceeding is adduced, Defendants cannot seriously maintain that such information will be complete and impartial; although, if Defendants are able to keep their record a mystery at the appellate court, the Pilots and Passengers will never have the opportunity to demonstrate this bias in the record.

The District Court gave short shrift to this analysis concluding, rather summarily, that *McNary* did not apply because (1) its holding was "statutory, not constitutional;" and (2) because "a court of appeals reviewing an agency determination has the authority to supplement the record." *See Durso Op.*, pp. 15-16. With respect to the former, the District Court offered a one-sentence analysis stating that "*McNary*'s holding was statutory, not constitutional: the [*McNary*] Court explained that the language of the provision in question did not reveal a congressional intent to restrict the type of claim at issue." JA086. While it is true that the *McNary* holding was statutory, so, too, was the District Court's holding with respect to Section 46110. In *McNary*, the plaintiffs argued that their constitutional claim fell outside the limitations of the jurisdictional statute, and the Supreme Court concluded that district court was proper. In reaching this decision, the Supreme Court placed heavy emphasis on the fact that imposition of court of appeals' jurisdiction would be inappropriate given due process concerns – namely, the limited record and highly deferential standard of review mandated by the statute. *McNary,* 498 U.S. at 493. The Pilots' and Passengers' argument here is no different - the statute at issue is not intended to cover the type of dispute at bar as evidenced by the statute's language and the adverse constitutional implications that would arise with court of appeals' jurisdiction; this Court should, therefore, "construe the statute to avoid constitutional questions that would be presented by a

broad construction," and vest jurisdiction with the district court. *Hersom*, 588 F.3d at 67.

To further support its conclusion that appellate jurisdiction would not result in a due process violation, the District Court notes that a court of appeals has the power to supplement the record. *See* JA087; 28 U.S.C. § 2347(c).[2] While it is true that a court of appeals *may* do so in *certain circumstances*, they rarely do so in practice, and the District Court does not contest this point. If the Pilots and Passengers brought suit in this Court and endeavored to invoke 28 U.S.C. 2347(c) to supplement the record, there is no guarantee that this Court would find "reasonable grounds for failure to adduce the evidence before the agency." Defendants could contend that the Pilots and Passengers are unable to meet this standard because they were *never permitted* to bring forth evidence in the first place, and, hence, it's not unreasonable that they failed to do so. This only further

[2] Section 2347(c) provides:

> If a party to a proceeding to review applies to the court of appeals . . . for leave to adduce additional evidence and shows to the satisfaction of the court that —
>
> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court *may* order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. . . .

28 U.S.C. § 2347(c) (emphasis added).

lends credence to the argument that Section 46110 was not intended to cover the type of claim presented here.

Section 46110(c) provides that findings of fact by the Defendants, if "supported by substantial evidence, are conclusive." If applied to the case at bar, not only would the Defendants' "record" constitute the sole source of facts for review by the appellate court, but the Defendants' factual assertions would be taken at the Defendants' word, as long as they are supported by a sufficient quantum of evidence. Because a deficient factual record generally cannot be remedied in the court of appeals, *see, e.g., Congress & Empire Spring Co. v. Knowlton*, 103 U.S. 49, 61 (1880), a court of appeals must affirm an agency's decision if this evidentiary threshold is satisfied "regardless of what its views might have been had it had the power of fact determination." *Specht v. Civil Aeronautics Bd.*, 254 F.2d 905, 913 (8th Cir. 1958); *see also North Am. Airlines, Inc. v. Civil Aeronautics Bd.*, 240 F.2d 867, 871-872 (D.C. Cir. 1956).

The District Court's application of Section 46110, and the "substantial evidence" standard that is part of it, tilts the playing field so heavily in Defendants' favor that it would effectively deprive the Pilots and Passengers of meaningful judicial review. Under the substantial evidence standard, a court of appeals is not to ask whether the record is complete and thorough. It is not to ask whether the record is neutral and unbiased. Rather, the only question for a court of appeals is

whether "sufficient evidence exists that a reasonable mind might accept as adequate to support a conclusion." *Aircraft Owners & Pilots Assn. v. FAA*, 600 F.2d 965, 970 (D.C. Cir. 1979). On this basis then, Defendants could argue that whether the "record" is complete or impartial is irrelevant, as long as *its own* findings can be supported.

While this standard may be appropriate in instances where parties participate in a prior quasi-judicial proceeding, it has no place here. This Court has recognized that "application of the substantial evidence standard may be troublesome, as well as purposeless, when applied to an informal adjudicatory decision made absent the creation of an adequate record." *Id.*; *see also Camp v. Pitts*, 411 U.S. 138, 141 (1973); *Tiger Int'l, Inc. v. Civil Aeronautics Bd.*, 554 F.2d 926, 935-36 (9th Cir. 1977). Where no one other than the Defendants has any say in the composition of the record, the Defendants' policy will be granted great deference and almost certainly affirmed.

The District Court effectively punted on the issue and relied on *Aircraft Owners* to reach its conclusion that "arguments regarding the standard of review are properly directed to the reviewing court of appeals." In *Aircraft Owners*, however, the parties never disagreed as to whether original jurisdiction in the court of appeals was proper. Rather, only after bringing suit in the court of appeals did the parties argue what standard of review was appropriate. In short, the issue was

reviewed by the court of appeals *only* because that was where suit was brought. The district court cites to no authority for the proposition that only a court of appeals is to make determinations with respect to the substantial evidence standard. It erred by failing to address this question and by failing to consider its effects on the Pilots' and Plaintiffs' due process rights. The District Court had the power to remedy the due process violation by maintaining jurisdiction, and this Court should reverse the District Court's decision in order to secure the Pilots' and Passengers' constitutional rights and prevent an appeal relating to this same issue down the road.

V. Conclusion.

The District Court erred by holding that it lacked jurisdiction over the Pilots' and Passengers' claims. In fact, the District Court has jurisdiction because the Pilots' and Passengers' claims arise under the Constitution. Further, the statute on which the District Court's holding is based is inapplicable. In particular, Section 46110 cannot divest the District Court of jurisdiction in this case because it only applies to orders, which the SOP is not. Further, the Pilots' and Passengers' claims are not inescapably intertwined with a review of the SOP. Finally, application of Section 46110 violates the due process rights of the Pilots and Passengers.

CONCLUSION

For the foregoing reasons, the Court should overrule the district court's rulings below and remand the cases for further proceedings.

Dated: December 29, 2011

Respectfully submitted,

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Dated: December 29, 2011

CERTIFICATE OF SERVICE

I, Brianna Silverstein, hereby certify that on the 29th day of December, 2011, I filed, via CM/ECF, the foregoing Joint Brief of Appellants and the Joint Appendix, and delivered 8 hard copies of the Brief and 7 hard copies of the Joint Appendix to The United States Court of Appeals for the District of Columbia. Additionally, I served a copy of the Joint Appendix via U.S. Mail, on the following party:

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