

# **EXHIBIT 2**

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IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

JONATHAN BLITZ, MARLA	)	
TUCHINSKY, and as legal,	)	Civil Action
guardians of EB, their minor	)	
child,	)	Case No. 1:10CV930
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	Greensboro, North Carolina
JANET NAPOLITANO, Secretary	)	
of Homeland Security, and	)	December 10, 2010
JOHN PISTOLE, Administrator	)	
Transportation Security	)	2:06 p.m.
Administration,	)	
	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF MOTION FOR TEMPORARY RESTRAINING ORDER  
BEFORE THE HONORABLE WILLIAM L. OSTEEEN, JR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Jonathan Blitz, Esq.  
Jonathan Blitz, Attorney At Law  
PO Box 61764  
Durham, NC 27715

For the Defendants: Carlotta P. Wells, Esq.  
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I N D E X

WITNESSES: PLAINTIFF

None

WITNESSES: DEFENDANT

None

EXHIBITS:

MARKED RCVD

None

Court Reporter: Joseph B. Armstrong, RMR, FCRR  
324 W. Market, Room 101  
Greensboro, NC 27401

Proceedings reported by stenotype reporter.  
Transcript produced by Computer-Aided Transcription.

1 Greensboro, North Carolina

2 December 10, 2010

3 (At 2:06 p.m., proceedings commenced.)

4 THE COURT: All right. Good afternoon. We are  
5 here on a motion for temporary restraining order and/or  
6 preliminary injunction in 1:10CV930, Blitz versus  
7 Napolitano, I'll just say et al. for purposes of this  
8 introduction. Mr. Blitz, if you will state for the record  
9 that you are here and who is seated at your table with you.

10 MR. BLITZ: Yes, Judge. Good afternoon, Jonathan  
11 Blitz here on my own behalf and also on behalf of Marla  
12 Tuchinsky, who's my wife, and also we're here on behalf of  
13 EB who is our minor child as described in the pleadings.

14 THE COURT: All right. And for the Government?

15 MR. BECK: Your Honor, it's my pleasure to  
16 introduce Carlotta Wells from the Federal Programs Branch  
17 Civil Division who will be making the argument today; Joseph  
18 Mead, also from Federal Programs; and Gillian Flory from  
19 Transportation Security Administration, also general  
20 counsel.

21 THE COURT: All right. Good afternoon to all of  
22 you. Mr. Blitz, I assume you'll be handling the argument  
23 for all the plaintiffs in the case.

24 MR. BLITZ: I'm the only lawyer and one of the two  
25 who can speak.

1           THE COURT: All right. I'll certainly hear from  
2 you. The matter has been pretty thoroughly briefed at this  
3 point in time, and then I have the affidavits of the  
4 plaintiff -- plaintiffs as well as the affidavits and other  
5 attachments of the defendants in the case, and I have looked  
6 at that. It seems to me probably roughly 20 minutes a  
7 side's about enough, but I'll give the plaintiff the opening  
8 and closing arguments. I don't have a red light or a  
9 stopwatch. So if we run over, that will be all right. But  
10 if you start running well over, I may stop you.

11           MR. BLITZ: Well, I'm sure my wife will stop me if  
12 I should.

13           THE COURT: All right.

14           MR. BLITZ: May I approach the lectern?

15           THE COURT: You may.

16           MR. BLITZ: Thank you.

17           THE COURT: You may proceed.

18           MR. BLITZ: May it please the Court, I am going to  
19 ask a rhetorical question that I'll return to later. If the  
20 plaintiffs were allowed to proceed in this case, and we  
21 demonstrate to the appropriate standard of proof through  
22 competent witnesses offering admissible evidence that there  
23 is a more effective, less invasive way to meet the  
24 defendants' legitimate objectives of deterrence and  
25 detection, would the plaintiffs then be entitled to relief

1 from this Court?

2           We brought this suit because on two occasions  
3 Plaintiff Marla Tuchinsky was subjected to highly invasive,  
4 humiliating searches of her body, including groping of her  
5 genitals and stroking of her breasts, along with hand  
6 searching inside of her pants by defendants' agents. Both  
7 times she departed out of RDU Terminal 2. There was no  
8 reasonable basis for the invasiveness of the searches, and  
9 contrary to what Defendant Pistole might have stated in his  
10 declaration, plaintiff was not able to choose a screening  
11 lane that would have put her through a less invasive search.  
12 At RDU Terminal 2, you either get scoped or you get groped.  
13 On the return flights, my wife was subjected to a typical,  
14 much less invasive search, and we don't complain of that  
15 kind.

16           Just as a little background, Plaintiff Tuchinsky  
17 has logged over 1 1/2 million air miles. She's traveled to  
18 every continent in the world except for Antarctica on  
19 business, and that's in the last few years. She has never  
20 been subjected to such an invasive search of her person even  
21 on international flights to and from the United States, and  
22 even when she was flying on one-way tickets or otherwise  
23 more indicia that might provide a reasonable basis for a  
24 more invasive search.

25           The two incidents were typical flights, and yet on

1 the return, plaintiff was unmolested.

2 THE COURT: Typical as compared to what?

3 MR. BLITZ: As compared to her departures from RDU  
4 Terminal 2 on those particular days when these invasive  
5 searches were conducted.

6 THE COURT: So you don't mean to suggest they were  
7 typical as compared to the other 100,000, million travelers  
8 we have in the United States each day, whatever the number  
9 is.

10 MR. BLITZ: Only to the extent that the sample  
11 that she's subjected to is enormous based on the fact that  
12 she's traveled through a very high percentage of all the  
13 airports in the world.

14 THE COURT: All right.

15 MR. BLITZ: As discussed in our motion and  
16 supporting documents, we also have an infant son who we love  
17 very much, and we're very concerned that he will be  
18 subjected to highly invasive searches without a reasonable  
19 basis.

20 We have invoked the original jurisdiction of this  
21 Court under one of the most basic causes of action  
22 available. We seek relief from the Article III courts for  
23 the unconstitutional actions of an Article II agency. We're  
24 here under 28 USC 1331 with a claim arising under the  
25 Constitution of the United States, and this cause of action

1 has been recognized for more than 200 years in a series of  
2 cases stretching from Marbury to Norris to Bell to Bivens to  
3 this summer's Supreme Court opinion in Free Enterprise Fund.

4           We claim that we're very likely to be subject to  
5 an invasive search that violates the Fourth Amendment, and  
6 we're asking for this Court only to enjoin those features of  
7 that search that we contend violated the reasonableness  
8 requirement of the Fourth Amendment, only for the next nine  
9 days, and only as to the plaintiffs.

10           The Fourth Amendment claim is formally alleged in  
11 paragraph 63 through 65 and paragraph 69 of our first  
12 complaint, but we made another claim. That claim is that we  
13 have no available proceedings other than this action that  
14 would provide meaningful review of our claims and that  
15 failure to provide a forum is a Fifth Amendment violation.  
16 We're seeking a very narrowly tailored order at this point  
17 in time so we can take an upcoming trip with our son to see  
18 his grandfather without further violation of our rights, and  
19 we have further narrowed our prayer for relief in response  
20 to Defendant Pistole's declaration.

21           This Court has proper original jurisdiction of  
22 these claims. Now, defendants say that 49 USC Section 46110  
23 strips the District Courts of all jurisdiction to review any  
24 of defendants' actions. However, the controlling Supreme  
25 Court authority does not permit that statutory instruction.



1           THE COURT: Tell me how you distinguish a case  
2 like City of Tacoma versus Taxpayers and the present case.

3           MR. BLITZ: I'm sorry. I'm not familiar with City  
4 of Tacoma.

5           THE COURT: Well, explain to me then why you  
6 consider the Free Enterprise Fund case to be similar enough  
7 to this case in terms of statutory review -- or the  
8 statutory provisions for review --

9           MR. BLITZ: Okay.

10          THE COURT: -- to make it controlling as to the  
11 statute at issue in this case.

12          MR. BLITZ: The reason is, for more than 200  
13 years, Congress has not presumed to strip a District Court  
14 of jurisdiction when doing so forecloses the possibility of  
15 meaningful judicial review of executive branch action.

16          THE COURT: You don't think you can get meaningful  
17 review in a Circuit Court?

18          MR. BLITZ: No, and McNary and the other authority  
19 says why, and the reason is -- and I apologize because I'm a  
20 little nervous, and I want to get it right. It's exactly  
21 what the Supreme Court in McNary, Reno and Free Enterprise  
22 said you can't do because it creates this constitutional  
23 dilemma where you don't have any opportunity to marshal  
24 facts or present evidence. There's nowhere for the  
25 witnesses to sit in a Circuit Court, and it's --

1           THE COURT: Well, doesn't it depend on what you're  
2 challenging? What are you really challenging here? Are you  
3 suggest -- to put it in perspective, are you suggesting that  
4 some Lone Ranger TSA agent searched your wife in a manner  
5 that was inconsistent with TSA policy, or are you suggesting  
6 that the present TSA policy leads to an unconstitutional  
7 search? Which of the two are you suggesting?

8           MR. BLITZ: We don't know, and we have no way of  
9 knowing because we don't know what TSA policy is. And if it  
10 is TSA policy, then the policy is unconstitutional. If it's  
11 not TSA policy, then we've also brought a failure to  
12 supervise claim.

13           THE COURT: Well, the TSA has filed an affidavit  
14 saying that we -- Pistole has generated this standard  
15 operating procedure that requires a backscatter search and  
16 then under some circumstances the enhanced pat down. I'm  
17 paraphrasing, but I don't want to read the affidavit again  
18 at this point in time. So, I mean, why isn't that proof  
19 that the search that you are complaining about is the TSA  
20 policy?

21           MR. BLITZ: If it is the TSA policy, then it's an  
22 unreasonable search, and we should have an opportunity to  
23 marshal facts and present evidence before some Article III  
24 body to demonstrate that it's unreasonable.

25           THE COURT: What facts over and above the policy,

1 the SOP, do you need?

2 MR. BLITZ: First of all, we don't have the SOP.  
3 Second -- see -- see, this is the issue. And I'm not trying  
4 to evade the question, I just want to back up a little bit.

5 What you've got is a situation where you have this  
6 Section 46110, and 46110 was designed for -- Congress  
7 intended it and we must presume that Congress intended it  
8 this way, but if you just read it, this is what Congress  
9 intended, that you go through an agency adjudicative  
10 proceeding, you present your facts, you get your due  
11 process, then you go up to the Court of Appeals where they  
12 review what the agency did. That's the normal procedure.  
13 You get your due process in the agency.

14 Here, there is no agency proceeding. They're  
15 saying whatever we write in an SOP is an order. Whatever is  
16 in an order goes up to the Court of Appeals. And whatever  
17 goes up to the Court of Appeals are the facts, and those  
18 facts are presumed to be correct because the agency found  
19 them.

20 THE COURT: Isn't what you just said about what  
21 46610 contemplates as a final agency order, isn't that  
22 contrary to the law? And by that I mean take, for example,  
23 the Atorie Air case where they examined what constituted an  
24 order, and they said there's two requirements to an order,  
25 finality -- let's see. Finality and -- I've lost my cite.

1 But the bottom line is it's got to be a final order, and  
2 that case goes on to say.

3 "To be deemed 'final,' an order under Section  
4 1486(a) need not be the culmination of lengthy  
5 administrative proceedings. It need only be an  
6 agency decision which 'imposes an obligation,  
7 denies a right, or fixes some legal relationship.'  
8 If the order provides a 'definitive' statement of  
9 the agency's position, has a 'direct and  
10 immediate' effect on the day-to-day business of  
11 the party asserting wrongdoing, and envisions  
12 'immediate compliance with its terms,' the order  
13 has sufficient finality to warrant the appeal  
14 offered by 1486."

15 Isn't that pretty consistent with what most cases  
16 have held with respect to what constitutes an order?

17 MR. BLITZ: Right, but here's the thing. Atorie  
18 Air, how did the facts in that case start out? The Court  
19 says: "...a principal operations inspector of the FAA  
20 advised Atorie that it was in violation of a federal  
21 aviation safety regulation and subject to certificate  
22 revocation."

23 What happened? The agency went out to a specific  
24 party, gave them notice pursuant to 46105, and started a  
25 proceeding. It may be an abbreviated proceeding. It may

1 just be the agency saying, you, private person, you have  
2 violated a regulation. Therefore, you can come before the  
3 agency, complain about it. You can get an ALJ hearing. We  
4 can take evidence. We can produce a record. You can appeal  
5 it to the NTSB. We may take away your certificate in the  
6 meantime because of safety reasons, and, you know, since  
7 it's not really relevant here, who cares about the  
8 constitutionality of that, you know, pre-notice seizure.

9           The big issue is it's a private individual. They  
10 go before -- or it's a corporation. They go before the  
11 agency, and they get due process, and then they go up to the  
12 Court of Appeals, and the Court of Appeals decides  
13 everything around those circumstances, and they can rely on  
14 the agency to give the due process.

15           Here, they've done something. I never got notice  
16 under Section 46105. What's my remedy to that?

17           THE COURT: Isn't your remedy to take it to the  
18 Court of Appeals like the statute allows?

19           MR. BLITZ: No, it's not, because if you do that,  
20 then you violate McNary, and you violate Reno, and you  
21 violate Free Enterprise Fund. Because if Congress meant to  
22 do that, meant to strip me of any forum where I can  
23 establish a factual basis for my claims, then now an Article  
24 II agency can write whatever they want in an order, and I  
25 can't get any meaningful judicial review, and that's what

1 Reno says, and that's what McNary says, and that's why this  
2 case is so important. That's why you --

3 THE COURT: That's not what Tacoma says. Tacoma  
4 says -- I'll just tell you the language from Tacoma which  
5 was a proceeding under 313(b) of that particular act, and  
6 that act says:

7 "Any party to a proceeding under this chapter  
8 aggrieved by an order issued by the Commission in  
9 such proceeding may obtain review of such order in  
10 the United States Court of Appeals for any circuit  
11 wherein the licensee or utility to which the order  
12 relates is located. Upon the filing of such  
13 transcript, the Court shall have exclusive  
14 jurisdiction to affirm, modify, or set aside such  
15 order in whole or in part."

16 And the Supreme Court goes on to say:

17 "The statute is written in simple words of  
18 plain meaning and leaves no room to doubt the  
19 congressional purpose and intent. It can hardly  
20 be doubted that Congress, acting within its  
21 constitutional powers, may prescribe the  
22 procedures and conditions under which the courts  
23 in which -- under which, and the courts in which,  
24 judicial review of administrative orders may be  
25 had."

1           MR. BLITZ: But the issue is, can you read this  
2 statute to -- can you construe this statute to mean that  
3 anything that they do, even if there's no notice under  
4 46105, even if there's no other party who this is happening  
5 to -- that talked about a licensee or designee. This talks  
6 about -- you know, 46101 talks about where they start with  
7 investigations and complaints. There's always another party  
8 there. There's always somebody else in the room trying to  
9 marshal facts, trying to create a record, trying to argue a  
10 position. That's what an order comes out of under this  
11 statute. It comes out of this statute from an adjudicative  
12 proceeding. It doesn't come out --

13           THE COURT: All right. Let me structure the  
14 argument for you, and you tell me where this goes awry.

15           First we look at the regulations, and the  
16 regulations under 49 USC Section 114, we'll start with L --

17           MR. BLITZ: I'm sorry, 49?

18           THE COURT: USC Section 114.

19           MR. BLITZ: Is that CFR? That's not a regulation,  
20 though, that's a statute.

21           THE COURT: United States Code.

22           MR. BLITZ: Okay. Sorry, Judge.

23           THE COURT: Section 114: Notwithstanding  
24 emergency procedures -- well, let's see.

25           "The Under Secretary is authorized to issue,

1           rescind, and revise such regulations as are  
2           necessary to carry out the functions of the  
3           Administration.

4           Notwithstanding any other provision of law or  
5           executive order, if the Under Secretary determines  
6           that a regulation or security directive must be  
7           issued immediately in order to protect  
8           transportation security, the Under Secretary shall  
9           issue the regulation or security directive without  
10          providing notice or an opportunity for comment and  
11          without approval of the Secretary."

12          So Congress has made allowance for the issuance of  
13          orders without notice, without a hearing, and without any  
14          rules -- promulgation of rules.

15          MR. BLITZ: Does that section then say that the  
16          only way you can appeal it is under 46110?

17          THE COURT: Do you have 46110 in front of you?

18          MR. BLITZ: I do.

19          THE COURT: You see 114(1) specifically referenced  
20          in 46110?

21          MR. BLITZ: I apologize. I said I have it in  
22          front of me, but I don't believe it does.

23          THE COURT: All right. I've got it. Somewhere in  
24          here I've got it. 46110:

25          "Except for an order related to a foreign air



1 carrier...in whole or in part...part B, or  
2 subsection (l) or (s) of section 114 may apply for  
3 review of the order by filing a petition for  
4 review in the United States Court of Appeals for  
5 the district of Columbia Circuit..."

6 So, I mean, as I read 46110, the statute  
7 specifically contemplates appeal to the Court of Appeals of  
8 an order that's issued without notice, opportunity to  
9 comment, or anything else.

10 MR. BLITZ: Well, then unfortunately, Judge, it  
11 violates McNary, it violates Reno, and it sets up a  
12 situation where there's no way we can ever have meaningful  
13 scrutiny in the --

14 THE COURT: Well, doesn't this go back to the  
15 original question, which is what's the basis of your  
16 complaint? Is it a challenge to the procedure, that is,  
17 either submit to the backscatter machine or an enhanced pat  
18 down, a grope search, whatever you want to call it, or is it  
19 a challenge to the manner in which the procedure is actually  
20 conducted by various TSA employees?

21 MR. BLITZ: I don't know, and the reason I don't  
22 know is because we're subject to a law that is a secret, and  
23 we're under an \$11,000 penalty if we walk away from that  
24 screening on the one hand. So we have to submit to those,  
25 and there's just no way to know what the law is. So there's

1 no way to effectively challenge it.

2 I believe that we can marshal the facts to show  
3 that there are less invasive searches that will more  
4 effectively actually meet the objectives of the agency. But  
5 the issue you've got to decide first is --

6 THE COURT: All right. Let's go back to your  
7 original question, and specifically on these less invasive  
8 ways to accomplish the same security. Now, are you  
9 suggesting that in evaluating whether or not a Fourth  
10 Amendment search is reasonable or -- or a search is  
11 reasonable or unreasonable under the Fourth Amendment, that  
12 one of the factors I have to take -- or should take into  
13 consideration is the availability of other alternatives to  
14 that search?

15 MR. BLITZ: Absolutely.

16 THE COURT: All right. Now, what is there in the  
17 record at this point based on evidence presented by the  
18 plaintiff to suggest that there is a less invasive or more  
19 reasonable method by which the same security levels can be  
20 met?

21 MR. BLITZ: First of all, there's the fact that  
22 the agency itself is in the vast majority of the air system  
23 deploying less invasive procedures.

24 The second is that the plaintiff has never --  
25 Plaintiff Tuchinsky, or myself for that matter, and I've

1 traveled a fair amount, has never encountered searches this  
2 invasive anywhere in the world. So these are clearly the  
3 most invasive types of searches --

4 THE COURT: How did the explosive in the underwear  
5 get found?

6 MR. BLITZ: By a group of passengers.

7 THE COURT: After the individual had made it on to  
8 the plane.

9 MR. BLITZ: Through an airport that had scanners.

10 THE COURT: All right. And did they go through  
11 the scanners?

12 MR. BLITZ: We don't know.

13 THE COURT: And how did the explosives -- where  
14 was the explosive material found that was apparently  
15 secreted, for lack of another way to describe it, in the  
16 breast area on this particular woman, apparently?

17 MR. BLITZ: We don't have any knowledge of that  
18 other than Defendant Pistole's declaration.

19 THE COURT: Why should I assume or find that there  
20 are other methods in place in other places or other  
21 countries that more effectively screen or discover these  
22 threats?

23 MR. BLITZ: Okay. We're in two different places  
24 here. If we're still talking about the jurisdictional  
25 issue --

1 THE COURT: I have moved to a different place.

2 MR. BLITZ: You have, okay.

3 THE COURT: Your -- one of your contentions is  
4 going to the substantive merits of your motion.

5 MR. BLITZ: Correct, what we have to do at this  
6 point.

7 THE COURT: Then in determining whether or not a  
8 search under the Fourth Amendment is unreasonable, I do that  
9 by comparison to other possible ways in which the threats  
10 can be met, right?

11 MR. BLITZ: Right.

12 THE COURT: And my question simply is, what  
13 evidence is there from the record, as it presently sits  
14 before me, that there are other methods that would more  
15 reasonably meet the same security level?

16 MR. BLITZ: Other than what I've described, which  
17 is the experiences of the plaintiff and the fact that these  
18 searches are the most invasive in the world, we don't have  
19 any evidence at this point.

20 THE COURT: All right. I'll let you proceed ahead  
21 with your argument.

22 MR. BLITZ: You know, if we -- I don't know if  
23 Your Honor is satisfied about the jurisdictional issue or  
24 not. I really can't tell.

25 THE COURT: Well, unfortunately, it's not a

1 question and answer. I get to ask the questions, and you  
2 have to answer them.

3 MR. BLITZ: I understand. I just want to use my  
4 time wisely and not waste the Court's time.

5 But I think that the -- that there's a larger  
6 issue here that's implicated by this case, and, frankly, as  
7 an attorney, I'm pretty disturbed about it, and I didn't  
8 know it was here before I started this case.

9 If you look at what happens here, as a matter of  
10 practical effect you have an agency making secret laws that  
11 we have to comply with. It's affecting hundreds of millions  
12 of Americans. You have a jurisdictional statute that  
13 purports to send those up for review only in an appellate  
14 court. And so you've set up a situation that's been talked  
15 about again and again and again for 200 and some odd years  
16 where there is no way that a District Court will ever get  
17 one of these cases if you follow their line of argument; and  
18 according to McNary and the other authorities, you don't  
19 ever get to marshal facts in support of your claims, and you  
20 basically end up with a right without a remedy which just  
21 cannot be under the Constitution.

22 If I could go to the agency and engage in some  
23 sort of fact-finding procedure where I could try to bolster  
24 my claims, that's one thing. But if I can't ever go before  
25 that agency, and the only place I can go is the Court of

1 Appeals, then as we quoted in our brief, McNary says that's  
2 tantamount to denial of judicial review. So we don't read  
3 the statutes that way, and that's what's most disturbing  
4 about this case to me.

5 In addition, these are highly invasive searches.  
6 They go far beyond anything else that most people have ever  
7 experienced, and the people who have experienced them have  
8 been deeply troubled by them.

9 As you look at the cases in which 46110 -- and I'm  
10 going to sit down in a minute -- has been applied, I'd just  
11 point out to you that almost every single one of those cases  
12 involved an aircraft mechanic, a flight instructor, a pilot  
13 or municipality, someone who was given notice; and they can,  
14 and in most cases they have, raised their claims before the  
15 agency in a meaningful proceeding that bears all the  
16 hallmarks of due process, and the courts have said you're  
17 not entitled to go and re-litigate that case in the District  
18 Court. You're not -- you don't get two or three or four  
19 bites at the apple if you've had two in front of the agency.  
20 We don't know if there is an apple, much less do we ever get  
21 to bite into it, and this Court doesn't get a slice either.

22 And so what do we do? The courthouse door is  
23 barred to us. The Court of Appeals window is open; but if  
24 we manage to climb up a ladder and get in there, there's no  
25 evidence. How am I going to provide any evidence to the

1 Court of Appeals? There's nowhere to go. They send me back  
2 down to the agency if they haven't already found that, as  
3 46110 states, that all the facts that they found are  
4 entitled to deference. If they're supported by any  
5 substantial evidence, they're deemed to be true. That's not  
6 due process. McNary says it's not due process, Free  
7 Enterprise -- all of those cases say that's not due process.

8           And I just want to say one other thing, and I will  
9 tell the Court I'm certainly not going to look to re-argue  
10 this issue before the Court, I appreciate your time on it,  
11 if there is a 12(b)(1) motion, because I think -- I think to  
12 me it's clear. But this case has really staggering  
13 implications; and if the terrorists who authored this  
14 Inspire Magazine that the Court's been provided, although  
15 I'm not sure what exactly the relevance is, they're going to  
16 win because they will have set a frightening precedent where  
17 an Article II agency gets to write a document, it's a secret  
18 document, they call it an order, and thus there's never  
19 going to be any meaningful review of the constitutionality  
20 of what they're doing. If they decide --

21           THE COURT: Now, stop right there. That -- where  
22 you have just crossed is what troubles me, because -- on  
23 your argument, and it's this. It sounded to me like what  
24 you're arguing is we've got a procedure we think has been  
25 put in place, it's a secret procedure, and no one can review

1 that procedure.

2 But if it is the procedure about which you are  
3 complaining, and the procedure is written as Pistole  
4 describes in his affidavit, a standard operating procedure,  
5 and that is an order, I mean, that order can be reviewed  
6 thoroughly by the Fourth Circuit Court of Appeals or the DC  
7 Circuit or any other circuit.

8 MR. BLITZ: No, it can't.

9 THE COURT: Why not?

10 MR. BLITZ: Because there's no other evidence that  
11 will come in than what the agency --

12 THE COURT: How do you know that?

13 MR. BLITZ: Because that's what the statute says.  
14 That's what the -- I mean, the statute says that anything  
15 that they do is -- if it's supported by substantial  
16 evidence, there's no -- the record consists of the record of  
17 the agency. It's a review of an administrative proceeding,  
18 and that's why you can't read 46110 in this way -- in this  
19 super broad way because McNary says if you deny me as a  
20 litigant, not a party to an agency proceeding, mind you, but  
21 just somebody who has been subjected to executive branch  
22 action -- remember, I never did anything in front of the  
23 agency. I never got there because I never got notice,  
24 right?

25 THE COURT: I know your forum -- it seems to me,



1 one argument -- I'm not saying I'll rule this way, but one  
2 argument is you never got notice, you never had an  
3 opportunity to be heard, and now you're subject to this rule  
4 that's going to require them to conduct this search on you  
5 if you try to board an airplane under some circumstances.

6 MR. BLITZ: Right.

7 THE COURT: And that search is set out apparently  
8 in this standard operating procedure.

9 MR. BLITZ: Right.

10 THE COURT: And your forum for review of that is  
11 in a Court of Appeals. Congress gave you that forum.

12 MR. BLITZ: But the Mace line of cases says that  
13 where I'm complaining about something -- I'm not complaining  
14 about -- I mean, obviously I have to have an injury from the  
15 order itself in order to have standing, but --

16 THE COURT: No, I mean, the statute makes clear if  
17 it affects you -- if you are someone affected by the order,  
18 you have right of review in a Circuit Court.

19 MR. BLITZ: And what McNary says is that if that's  
20 the only place I ever get to introduce any evidence, that's  
21 tantamount to a denial of judicial review. That's where the  
22 constitutional problem is because this deck is totally  
23 stacked against me. An Article II agency is acting, hurting  
24 me, and I can't come into this court and show evidence and  
25 proffer anything to the Court.

1           THE COURT: You can't file an affidavit in the  
2 Circuit Court?

3           MR. BLITZ: As McNary said, Circuit Courts are not  
4 set up -- the courts of appeals are not set up to take  
5 evidence, and, therefore, if you send me there -- I mean,  
6 it's not my rule, Judge, it's McNary. It's the Supreme  
7 Court. The Supreme Court has said it's not the same thing.  
8 It's not fungible. An appearance here, a trial here. I  
9 mean, I go back to my rhetorical question. If I am allowed  
10 to proceed and I show you that evidence, then what happens?  
11 I get my relief. I get my relief. And that's the way it's  
12 supposed to work. To do otherwise violates 200-plus years  
13 of -- and I hate to cite Marbury versus Madison, but thank  
14 God I've got a time in my career when I can do it, and it  
15 makes sense.

16           THE COURT: Tell me what Article III says about  
17 establishing courts.

18           MR. BLITZ: Judge, my pocket copy of the  
19 Constitution is not with me.

20           THE COURT: I mean, you're taking me back to  
21 Marbury versus Madison, which is good law, but the  
22 Constitution itself originally, doesn't it say that there  
23 shall be a Supreme Court and such other inferior courts as  
24 Congress shall establish from time to time?

25           MR. BLITZ: Correct, but if you go to McNary,

1 which doesn't go all the way back to Marbury, and consider  
2 the allocation of judicial power among the courts, it  
3 basically says when you look at the way that the federal  
4 courts are set up, if you can't go somewhere to plead your  
5 case with evidence -- such competent evidence as would  
6 establish my right to my constitutional claim, then you've  
7 denied me due process, and, therefore, we're not going to  
8 read the statute that way.

9           And if you look at the cases involving this, and  
10 you brought up Atorie, and they're all -- I tried to list as  
11 many out in my brief. Almost every single one of those,  
12 with the exception of Gilmore -- and I'll just tell you  
13 right now, Judge, Gilmore was wrong. Gilmore was wrong in a  
14 scary way, because what did the Circuit Court do? They  
15 said, oh, we'll examine that administrative decision. I'm  
16 not going to show it to you or your lawyer. We're just  
17 going to look at it. Oh, you lose. That's scary. That's  
18 not constitutional.

19           Constitutional is you come in here. We have a  
20 trial. We establish that there's a more effective way to do  
21 it. Maybe we don't. Maybe we lose on Rule 56, you know,  
22 summary judgment. There's no shame in losing on summary  
23 judgment. Maybe you're right. Maybe there is no more  
24 effective way.

25           THE COURT: I haven't ruled yet.

1           MR. BLITZ: I know, but I'm just saying I ought to  
2 get a shot. I get a chance to do it. And if we've gotten  
3 so scared of terrorists and so frightened of what might  
4 happen on an airplane that we're going to let an executive  
5 branch agency write whatever they want in a secret order and  
6 no judge can review it with evidence that an individual  
7 affected by that order suffers, then we've gone -- they've  
8 won already.

9           I really appreciate the Court's time. I just ask  
10 for maybe a minute or two to stand up in rebuttal.

11           THE COURT: All right. Ms. Wells?

12           MS. WELLS: Good afternoon, Your Honor.

13           THE COURT: Good afternoon.

14           MS. WELLS: I don't think anybody here or anywhere  
15 can dispute that the threat to aviation security is real.  
16 Defendant TSA has deployed a risk-based, layered approach to  
17 deal with the ever evolving terrorist threat that now  
18 exists. The reality in today's world is that there are  
19 individuals who very much wish to harm American citizens,  
20 including the air traveling public, and any success on their  
21 part to deploy explosives on even one airplane would amount  
22 to a catastrophe.

23           Now, one aspect of the layered security system  
24 that TSA has adopted is the checkpoint screening process  
25 which is at issue here in this case. This screening is

1 necessary to keep the terrorists guessing and thus to  
2 protect all air travelers.

3 THE COURT: All right. Let's skip forward to the  
4 order --

5 MS. WELLS: Okay.

6 THE COURT: -- and talk about that for just a  
7 minute, because I have looked at Pistole's affidavit, and on  
8 page 9 -- I mean, the core order is the SOP -- apparently  
9 the SOP that was revised and implemented on October 29,  
10 2010.

11 MS. WELLS: Right.

12 THE COURT: It's not attached here because the  
13 Government contends that it's sensitive security  
14 information. But it looks to me like there's some careful  
15 choosing of words here. The language of the affidavit says:  
16 "Although the checkpoint screening SOP is not public, it  
17 sets forth the mandatory procedures that both TSOs and  
18 passengers must follow in order for a passenger to enter the  
19 sterile area of the airport."

20 Now, that creates, first of all, an interesting  
21 little dichotomy in that we've got a nonpublic directive  
22 that passengers have to follow. I mean, how do I follow it  
23 or know that I'm following something that's not available to  
24 me? That dichotomy intrigues me a little bit.

25 But in any event, Pistole, who has said in here

1 that this decision is reviewable by a United States Court of  
2 Appeals under 49 USC Section 46110 -- I would assume if he's  
3 familiar with the statute, he knows what an order is, or he  
4 knows that it talks about orders, but he characterizes this  
5 as an SOP.

6           So walk me through and explain why I should find  
7 under 46110 that the backscatter and enhanced pat downs  
8 constitute an order for purposes of 46110.

9           MS. WELLS: Okay. I'd like to back up for just a  
10 minute and clarify that what we're talking about here is  
11 alternative imaging technology, which includes not just the  
12 backscatter scanners, but also the millimeter wave scanner.  
13 That's why we lump them together --

14           THE COURT: I think your affidavits made that  
15 clear.

16           MS. WELLS: -- because it does encompass both of  
17 them.

18           First of all, the standard operating procedures  
19 are an order, in our view, that come under the purview of  
20 49 USC 46110, and they are for a variety of reasons.

21           THE COURT: All right. That's what I wanted to  
22 hear.

23           MS. WELLS: I think -- I know Mr. Blitz would  
24 rather not have you follow Gilmore, but we actually think  
25 that that case is the closest parallel to the situation that

1 we have here, and I would just also note that there actually  
2 is a decision from the Eastern District of Michigan which  
3 has found that an SOP, or standard operating procedure, is  
4 an order. That's the Thompson versus Stone case. But I  
5 think the analysis in Gilmore by the Ninth Circuit is a lot  
6 more thorough and really spells out why something like the  
7 security directive in that case and the standard operating  
8 procedure that we have here relating to the check point  
9 security measures come under the order.

10 THE COURT: All right. Let's break it down --

11 MS. WELLS: First of all --

12 THE COURT: No, first of all, you've introduced  
13 another term here. Let's -- tell me what a "security  
14 directive" is.

15 MS. WELLS: The security directives are parallel  
16 to standard operating procedures, and generally those are  
17 what are -- TSA issues to air carriers, for example, maybe  
18 airport operators, a port authority, anybody else who is a  
19 partner with TSA in securing areas where passengers  
20 travel -- are traveling and are, therefore, joining in  
21 combating the efforts of terrorists to cause harm.

22 So a security directive would be something -- and  
23 in Gilmore the security directive at issue there was one  
24 that was issued to the airlines that set up the procedures  
25 of what do you do or don't do if a passenger appears to get

1 on a flight and doesn't show an identification, something  
2 that is required for traveling. And if you don't have an  
3 identification, then they kick into the alternative measures  
4 that they will apply, one of which includes a pat down.

5 So it's an identical -- you know, direct analogy  
6 to the situation here where you show up at the airport, you  
7 want to get on the airplane, you know you have to go through  
8 the checkpoint, and you know you've going to be subjected to  
9 a search at that checkpoint.

10 THE COURT: Okay.

11 MS. WELLS: And you know that there are procedures  
12 that the agency has put into place that are going to affect  
13 how you're getting from point A to point B and into the  
14 secure area is going to be conducted. You know that when  
15 you show up to the airport, all of us do, and we have for  
16 many years. Even prior to 9/11, we were searched.

17 THE COURT: All right. What's the difference then  
18 between the security directive and the SOP?

19 MS. WELLS: The SOP is issued to people who  
20 actually implement TSA procedures, like the screening  
21 officials, the transportation security officers who conduct  
22 the screening. Most of them are TSA employees. So the  
23 standard operating procedures, the way I've been thinking  
24 about it -- I'm not sure the agency would necessarily buy  
25 into this -- is they're more directed to the internal



1 personnel. If you have an airport, however, like where they  
2 have contract screeners, they would follow the same  
3 procedures as the TSA screeners, which for the most part the  
4 standard operating procedures are directed to, in this  
5 instance, the TSA screeners who are responsible for  
6 maintaining security at the screening checkpoints.

7 THE COURT: All right. Tell me why the SOP is an  
8 order.

9 MS. WELLS: Well, first of all, as I just alluded  
10 to, it does impose an obligation on the passengers, such as  
11 plaintiffs, to make sure that you comply with these  
12 procedures. So, therefore, that means at a minimum you're  
13 passing through either an AIT machine or a walk-through  
14 metal detector, and you're placing your bags on a conveyor  
15 belt, and those bags are also being screened. That's the  
16 obligation that's placed on the passenger.

17 And by the way, Your Honor, I do want to point out  
18 that most of the references in support that are cited in  
19 both the declaration of Administrator Pistole and that of  
20 Ms. Seagraves are actually cites to the TSA website. A lot  
21 of the information about what the requirements are and what  
22 the obligations are and what the technology is is, in fact,  
23 public knowledge. There's a wealth of information that is  
24 available to any member of the traveling public on that  
25 website. So it's not as if these are all procedures that

1 are happening in a total secret vacuum.

2 Another indicia of why that makes the SOP, or  
3 standard operating procedure, an order is that if, in fact,  
4 a petition for review were to be filed in a Court of  
5 Appeals, there would be an adequate record that would be  
6 presented to that court for purposes of making an informed  
7 decision.

8 Now, we included a footnote in our brief to a  
9 pending case in the DC Circuit, which is EPIC versus  
10 Napolitano, or TSA, and in that case the plaintiffs, which  
11 includes an advocacy organization and some individuals, are  
12 challenging the standard operating procedure that was issued  
13 back in January of this year that actually implemented the  
14 rollout of the AIT. So it steps back not just to the  
15 checkpoint technology which now includes the revised pat  
16 downs, but also the use of this alternative imaging  
17 technology. That case, which went directly from a letter  
18 from a TSA official to one of the plaintiffs denying their  
19 challenge to the procedure, is now directly in the DC  
20 Circuit, and in connection with that case, which is  
21 currently being briefed, the agency has, in fact, put  
22 together a record that includes over 132 items, I believe.  
23 It's somewhere around there.

24 So it doesn't -- it wouldn't be a denial of  
25 meaningful review. There, in fact, would be an adequate

1 record to the policy and to the implementation of the policy  
2 itself directly in the Court of Appeals. So it's not --  
3 that isn't an alternative forum, it's the forum that  
4 Congress has chosen. There would not be a denial of appeal  
5 if the case were to be transferred to that level.

6           Now, the standard operating procedure also  
7 provides a definitive statement of TSA's position relating  
8 to the screening and sets forth the procedures. I don't  
9 think even the plaintiffs here doubt that. The standard  
10 operating procedure also has an immediate and direct effect  
11 on air passengers, and it obviously required immediate  
12 compliance; although, here it was issued in September, but  
13 the effective date was October 29, and as of that date the  
14 expectation was anybody who wanted to get on an airplane  
15 would have to comply.

16           And for these reasons, the SOP has all the indicia  
17 that the courts have required for an order within the  
18 meaning of 46110.

19           Now, I also would note that to the extent that  
20 plaintiffs here raise constitutional claims in addition to  
21 challenging the procedure and the policy itself if that, in  
22 fact, is what they're challenging here, those claims would  
23 be inextricably intertwined with their challenge to the  
24 merits of the order, and I think that the case law is --  
25 definitely supports the position that where you have a

1 challenge to an order as applied to you that's inextricably  
2 intertwined and can't be separated from a challenge to the  
3 merits of that order and the procedures that are being  
4 implemented as a result of that order, then jurisdiction  
5 vests exclusively with the Court of Appeals, and not with  
6 the District Courts.

7           Now, neither the decision in McNary, nor the  
8 decision of the Ninth Circuit in Mace, which relies on  
9 McNary, dictates otherwise. And I would note actually that  
10 the Gilmore decision, which is also a Ninth Circuit  
11 decision, really just gives Mace passing reference in a  
12 footnote. So they were not troubled at all by the fact that  
13 the challenge to the security directive as applied to  
14 Mr. Gilmore was inextricably intertwined with the challenge  
15 to the actual, you know, application of the security  
16 directive itself. We would say that we have the same  
17 situation here.

18           Now, McNary involved a statute that it  
19 contemplated direct review of individual denials of special  
20 agricultural worker, SAW, status rather than referring to a  
21 general constitutional challenge to policies and practices.  
22 Those were more typically individual -- specific individual  
23 application cases. But the Supreme Court in Thunder Basin,  
24 which is a decision after McNary, noted that McNary, in  
25 fact, would not permit a plaintiff to circumvent an

1 exclusive review scheme by raising constitutional claims  
2 which could be addressed by the Court of Appeals.

3 In Thunder Basin, the Court was looking at a  
4 scheme similar to this one and similar to the one Your Honor  
5 referred to in the Tacoma case where Congress clearly has  
6 intended to set up a particular way for people to challenge  
7 orders and have set up a whole scheme designed to --

8 THE COURT: Is that --

9 MS. WELLS: -- of the Court of Appeals.

10 THE COURT: Let me back up one second before we  
11 switch to this. Under 114(1) -- is it 114? Under 49 USC  
12 Section 114(1), we've got this emergency procedures,  
13 (1) (2) (A) :

14 "If the Under Secretary determines that a  
15 regulation or security directive must be issued  
16 immediately in order to protect transportation  
17 security, the Under Secretary shall issue the  
18 regulation...without...notice or...opportunity for  
19 comment and without prior approval of the  
20 Secretary."

21 And then it looks to me like under that statute,  
22 it contemplates a review by the Transportation Security  
23 Oversight Board within a certain period of time after that  
24 emergency regulation has been issued. Am I reading that  
25 correctly?

1 MS. WELLS: I think to the extent that there would  
2 be a regulation issued, yes. I do think that that is a  
3 provision which relates also to the issuance of security  
4 directives.

5 Part of the problem we're dealing here obviously  
6 is the threat is constantly evolving, and so, you know, a  
7 security directive that is issued in, you know, January may  
8 or may not actually apply to a situation as it exists in  
9 March or April, and I think Congress clearly intended to  
10 allow the Secretary of Homeland Security or the  
11 Administrator of TSA some flexibility in making sure that  
12 they could react very quickly to the evolving situation.

13 And I think that's primarily what 114 is getting  
14 to with respect to the security directives, and we would  
15 suggest that even though the statute doesn't exclusively  
16 address standard operating procedures that they basically  
17 come within the ambit of some -- you know, they're very  
18 similar to the security directive.

19 Now, I would also note that 49 USC Section --

20 THE COURT: Wait a minute. Then would an SOP  
21 issued on short notice under emergency changes be subject to  
22 review by the Transportation Security Oversight Board?

23 MS. WELLS: No.

24 THE COURT: So they're not really the same then.

25 MS. WELLS: No. And I think it's mostly because,

1 again, the examples I think we've provided in Mr. Pistole's  
2 declaration of where the standard operating procedures had  
3 to be changed very quickly --

4 THE COURT: Before we go to Mr -- back up, though.  
5 I want to -- I mean, if the SOPs aren't going to be  
6 submitted to this oversight board, then I don't see any  
7 reason to treat them the same as a security directive under  
8 the statute. Explain to me why I should.

9 MS. WELLS: I mean, I need to verify this. Let  
10 me -- if you -- I don't know the answer to your question as  
11 to whether or not, in fact, all security directives have to  
12 go to the transportation security board.

13 THE COURT: I mean, the statute says this is an  
14 emergency security directive.

15 MS. WELLS: If I could just have a moment.

16 THE COURT: All right.

17 (Short pause.)

18 MS. WELLS: Apparently, Your Honor, what I've been  
19 advised is that transportation security directives go to  
20 this oversight board, but aviation ones do not.

21 THE COURT: All right. So your aviation security  
22 directives are generated under -- is it 4409 -- let me  
23 see -- 44901.

24 MS. WELLS: Well, 44901 is the statute that  
25 provides the authority for the screening of all passengers

1 before boarding.

2 THE COURT: All right.

3 MS. WELLS: And requires passenger compliance with  
4 screening procedures. That's in 44902.

5 THE COURT: All right. Let me let you back up  
6 then. So the SOP and a security directive are different  
7 creations. Does an SOP -- as I read Pistole's affidavit, an  
8 SOP is approved by Pistole. That's the final level of  
9 approval within -- before it's implemented by TSA. Is that  
10 correct or incorrect?

11 MS. WELLS: That's correct.

12 THE COURT: All right. And under what authority  
13 is an SOP generated or approved by the Under Secretary?

14 MS. WELLS: And, again, I believe it's set forth  
15 in the statute.

16 THE COURT: Which one?

17 MS. WELLS: Let's see. The statute generally  
18 would be 44904 -- 49 USC Section 44904 which provides that  
19 together with the director of the Federal Bureau of  
20 Investigation, the administrator must take necessary actions  
21 to approve domestic transportation using his authority to  
22 prescribe regulations to protect passengers and property on  
23 an aircraft -- in an aircraft.

24 THE COURT: So is the SOP an order or a  
25 regulation?



1 MS. WELLS: It's an order, and the authority for  
2 the SOP itself comes from 49 CFR Section 1540.105, which we  
3 have cited in our papers. So the statute gives the  
4 administrator the authority to implement regulations. One  
5 of the regulations that's been implemented is 49 CFR  
6 1540.105, and that provides the authority for issuing the  
7 standard operating procedures.

8 THE COURT: Then is it that regulation or the SOP  
9 that constitutes the order of the agency?

10 MS. WELLS: The SOP.

11 THE COURT: All right.

12 MS. WELLS: In this instance. And, you know, Your  
13 Honor --

14 THE COURT: Hold on one second. I thought I had  
15 these, but I don't. Let me pull them up real quick. What  
16 was the authority for the regulation?

17 MS. WELLS: The regulation itself?

18 THE COURT: Um-hum.

19 MS. WELLS: Is, I believe, 44 -- 49 USC Section --

20 THE COURT: No, you cited it to me.

21 MS. WELLS: 44901 is for screening, 44904 is to  
22 prescribe regulations.

23 THE COURT: Prescribe a regulation under that  
24 statute, and then there was another step, CFR.

25 MS. WELLS: The CFR is 49 CFR 1540.105.

1 THE COURT: 1540 point what?

2 MS. WELLS: 105.

3 THE COURT: All right. 49 CFR 1540.105.

4 MS. WELLS: Oh, I'm sorry. It's 40 CFR. No, it  
5 is 49.

6 THE COURT: 49 CFR 1540.105.

7 MS. WELLS: Right. And it relates --

8 THE COURT: I assume you're referring to two --  
9 (a) (2)? It says:

10 "No person may enter, or be present within, a  
11 secured area, AOA, SIDA or sterile area without  
12 complying with the systems, measures, or  
13 procedures being applied to control access to or  
14 presence or movement in, such areas."

15 So the statute prescribes that regulation or --

16 MS. WELLS: The statute authorizes or provides  
17 authority to prescribe regulations to protect passengers and  
18 property on an aircraft. This particular regulation sets  
19 forth the fact that in order to enter a secure or sterile  
20 area of an airport, the passenger must submit to screening,  
21 and then the SOP or the order actually implements the  
22 procedures by which TSA is going to make sure that nobody  
23 enters that secured, sterile area who poses a risk. They're  
24 going to do what they can to make sure that, in fact, it  
25 stays secure.

1           THE COURT: So ultimately what we're left with is  
2 a procedure approved by Pistole then becomes an order of  
3 TSA?

4           MS. WELLS: Right.

5           THE COURT: Or an order for purposes of the  
6 regulation. That's the Government's position.

7           MS. WELLS: Right. It becomes an order within the  
8 meaning of 46110.

9           I would also note, Your Honor, that the standard  
10 operating procedures are the instructions that the screeners  
11 and the other security personnel follow as they're  
12 implementing TSA's policy regarding checkpoint screening.  
13 It would to -- you know, to provide these to the general  
14 public as written would be to provide a roadmap to anyone as  
15 to what the vulnerabilities could be in that system and to  
16 ways to -- that, therefore, be -- an individual of some kind  
17 could evade the systems --

18           THE COURT: At this point the statutes permit  
19 these to be done --

20           MS. WELLS: Right. And, in fact --

21           THE COURT: -- without public disclosure, and I  
22 don't see that being challenged unless it's indirectly at  
23 this point in time.

24           MS. WELLS: Right. And I would just note for that  
25 that, you know, 49 USC Section 114(s)(1)(C) is basically the

1 authority for the security -- sensitive security  
2 information, or SSI. And that statutory provision prohibits  
3 the disclosure of information that's obtained or developed  
4 in carrying out security if the TSA administrator decides  
5 that disclosing the information would be detrimental to  
6 security. And for the reason that I just referred to,  
7 clearly the SOP by allowing the road -- you know, the  
8 roadmap to be out there for people to identify what the  
9 vulnerabilities would be would clearly be detrimental to  
10 security.

11 THE COURT: All right.

12 MS. WELLS: So just to sum up, we would -- we do  
13 submit here the SOP is an order that comes within 46110 and,  
14 therefore, the statute vests jurisdiction in the Court of  
15 Appeals.

16 In addition in this situation given the claims as  
17 they've been presented, any constitutional claims are  
18 inex--- inextricably intertwined with a challenge to the  
19 policies and procedures itself, and, therefore, that also  
20 belongs in the Court of Appeals.

21 And I would just finally note --

22 THE COURT: Well, let's go to Mr. Blitz's question  
23 for just a moment or his complaint for just a moment about  
24 the record in the Court of Appeals. So what you envision is  
25 a filing within the Court of Appeals. The agency would then

1 submit its record as to the generation or creation of this  
2 SOP, but you -- at this point in time the only thing that I  
3 can have any evidence of that exists is the SOP itself.  
4 Clearly, it looks like from Pistole's affidavit that he  
5 considered some information in generating the SOP, but all  
6 I've got in his affidavit is this we generated these SOPs,  
7 and they're not subject to public disclosure under these  
8 regulatory matters.

9           But let's say that Mr. Blitz contends, either  
10 previously or in anticipation, the search that's going to be  
11 conducted is unconstitutional because it is completely  
12 unreasonable for whatever reason, pick your reason. How  
13 does he make a record to challenge the administrator's SOP?

14           MS. WELLS: I mean, I think, first of all, the  
15 record that will be provided to the Court of Appeals will be  
16 similar to a record that is created in an APA case. In APA  
17 cases, the agency is responsible for compiling the record,  
18 and that becomes the basis for the Court's decision. So I  
19 do think that this procedure would not be different,  
20 certainly no less meaningful, than that type of procedure if  
21 it goes up to the Court of Appeals.

22           The other thing is that I think, you know, an  
23 as-applied challenge -- I mean, we're obviously not  
24 advocating for this here, but, I mean, there are procedures  
25 in place if one feels there's been a wrong done to you under

1 the tort law, and those procedures would be different -- it  
2 would be different, you know, complaining about something  
3 that's specific that happened to you by a TSO presumably,  
4 and then there are those laws that you could then challenge  
5 that application of the procedure to you under the FTCA --

6 THE COURT: So the Government wouldn't be in here  
7 arguing that an improper execution of the SOP because it led  
8 to tort law damages is inextricably intertwined. That would  
9 have to be a separate, standalone claim.

10 MS. WELLS: Right. So that would be another  
11 opportunity, another forum, another way to go. So he would  
12 not be precluded in either event.

13 THE COURT: All right. Hold on just a minute,  
14 Ms. Wells.

15 (Short pause.)

16 THE COURT: Thank you Ms. Wells. Mr. Blitz,  
17 anything further you want to add by way of rebuttal?

18 MR. BLITZ: Just briefly, Judge, if I could just  
19 stand here for a moment. I just want to point the Court's  
20 attention to McNary at 496 and 497 where they specifically  
21 talk about how inadequate it is to have a record of the  
22 agency go up to the Court of Appeals on a judicial review  
23 where there's been no opportunity to participate in the  
24 adjudicatory proceeding in front of the agency. They  
25 specifically call that out as the problem.

1           Second, the only place the agency's regulations  
2 mention Section 46110 is specifically in the context of an  
3 adjudicative proceeding, and that's at 49 CFR part 1503.661.  
4 That's the only place I could find that they mention it.  
5 Now, I'm not the greatest researcher in the world.

6           The only other thing is I really just hope that  
7 this Court looks at that Thompson case and the way that that  
8 was done because I think it was a big mistake. What the  
9 Court did, and I talk about this in my brief, so I'll just  
10 mention it, is they look back to a Sixth Circuit case from  
11 1965 where I think it was a pilot got their certification  
12 taken away because they flew a helicopter too low, and then  
13 that helicopter pilot went in and had some hearings, two, in  
14 fact, in front of the FAA and then went into District Court  
15 and said I've got a claim here. And the District Court  
16 said, wait a minute. You just litigated this twice in front  
17 of the agency. No jurisdiction. The Court of Appeals said  
18 you've got plenty of due process.

19           The application of that kind of precedent --

20           THE COURT: Mr. Blitz, I'd suggest instead of  
21 focusing on Thompson that if you want to distinguish a case,  
22 the Gilmore versus Gonzalez case is the case that you ought  
23 to consider addressing.

24           MR. BLITZ: Judge, there's just not much to say  
25 about Gilmore except that it's very interesting that the

1 Court of Appeals evaluated all of his constitutional claims  
2 and essentially dismissed them using a 12(b)(1) type  
3 standard. So if everything you said was true, Mr. Gilmore,  
4 and you really had to show your driver's license, you don't  
5 have a claim.

6 THE COURT: Well, the Circuit Court --

7 MR. BLITZ: Then they said 46110 gives us  
8 jurisdiction.

9 THE COURT: The Circuit Court is the one that  
10 found it had jurisdiction to entertain the claims, and the  
11 jurisdiction was not proper -- that the District Court had  
12 ruled properly.

13 MR. BLITZ: I understand, and all I can say is  
14 that Gilmore is wrong, and Gilmore is wrong in light of  
15 McNary. I mean, you know, the Ninth Circuit does err on  
16 occasion. I don't know what to say. It's not binding  
17 precedent in this circuit. I realize it's quite persuasive,  
18 but, Your Honor, I'm raising arguments that I'm not sure  
19 were raised in Gilmore. I'm not sure they've been raised  
20 since Mace versus Skinner, and the thing about Mace is Mace  
21 was an aircraft mechanic who had an opportunity for hearing  
22 in front of the agency, and he didn't like the way the  
23 hearing was conducted.

24 I've never had a hearing. I've never had notice.  
25 I don't have anywhere to present anything. And if I go up



1 to the Court of Appeals, they've just said it's going to be  
2 under an APA standard which means that the agency's findings  
3 are going to be entitled to substantial deference, and  
4 that's exactly -- I mean, exactly what the Court in McNary  
5 said works this terrible injustice and insulates Article II  
6 action from Article III review, meaningful judicial review.

7 THE COURT: In McNary -- McNary --

8 MR. BLITZ: I can get the full cite if you would  
9 like.

10 THE COURT: McNary didn't address a limited forum  
11 type clause of the type that we have here. McNary says:

12 "This case relates only to the SAW amnesty  
13 program. Although additional issues were resolved  
14 by the District Court and the Court of Appeals,  
15 the only question presented to us is whether  
16 Section 210(e) of the Immigration and Nationality  
17 Act, which was added by Section 302(a) of the  
18 Reform Act and sets forth the administrative and  
19 judicial review provisions of the SAW program  
20 precludes a federal District Court from exercising  
21 general federal-question jurisdiction over an  
22 action alleging a pattern or practice of  
23 procedural due process violations by the (INS) in  
24 its administration of the SAW program. We hold  
25 that given the absence of clear congressional

1 language mandating preclusion of federal  
2 jurisdiction and the nature of respondents'  
3 requested relief, the District Court had  
4 jurisdiction to hear respondents' constitutional  
5 and statutory challenges."

6 On the next page, at least my next page:

7 "The Reform Act expressly prohibited judicial  
8 review of such a final administrative  
9 determination of SAW status except as authorized  
10 by Section 210(e)(3)(A). That subsection  
11 permitted 'judicial review of such a denial only  
12 in the judicial review of an order of exclusion or  
13 deportation.'"

14 So that statute -- McNary was dealing with a  
15 situation where the statute permitted an agency to act, but  
16 then only permitted review for the deportation or -- in the  
17 deportation or exclusion process, and there was no  
18 intermediate review of any type permitted of this SAW or  
19 whatever you want to call that determination of whether  
20 someone could remain.

21 And I see that, at least for argument purposes, it  
22 seems to me that statute is very different from one that  
23 says you may file a claim if you're affected by an order in  
24 the Circuit Court, which does permit judicial review. It  
25 may not be the preferred forum. I understand your arguments

1 about whether or not the Court of Appeals as opposed to a  
2 District Court is a better forum for presenting evidence and  
3 can more fairly proceed, and I'm not saying the Circuit  
4 Court would be bad. I'm simply saying that that's what  
5 District Courts do generally is take evidence and create a  
6 factual record.

7           But as I see it, the McNary issue was very  
8 different from this issue because there was just no  
9 allowance for any review of that intermediate decision as to  
10 whether an illegal alien qualified for relief as determined  
11 by the agency. You agree or disagree?

12           MR. BLITZ: I agree that that's the narrow holding  
13 in McNary, but if you look at McNary and Reno and the larger  
14 legal principles that are laid down in that case, they stand  
15 for the larger principle that whatever an administrative  
16 agency does in the review process, if you don't have an  
17 opportunity to meaningfully participate in that, and then  
18 that decision goes up to only Circuit Court review, you're  
19 in a courtroom with no witness stand, and you've never been  
20 given access to a process by which you can marshal facts to  
21 support your claim. And when they looked at --

22           THE COURT: Isn't that true for any agency  
23 decision?

24           MR. BLITZ: No, it's not. It's not. And if you  
25 look at all the cases that they cite -- there's all these

1 agency decisions under 46110 that people are coming into  
2 court and complaining about, and they're getting sent up to  
3 the Circuit Court. Why are they getting sent up to the  
4 Circuit Court? Because they already had a chance to  
5 participate meaningfully in a proceeding. Whether it was,  
6 hey, we don't want this airport here, and we don't like the  
7 way FAA heard our notice and comment or whether they took  
8 our certificate away. I mean, whatever the agency has done.

9           And, again, it's really hard -- they're straining  
10 to read 46110 this way. I mean, their own regulations talk  
11 about what's in a final order, and then the statute says  
12 that the order shall set out what facts it's based on. I  
13 apologize. The order shall include the findings of fact on  
14 which the order is based and shall be served on the parties  
15 to the proceeding and the persons affected by the order.

16           How is it possible that anything that they do has  
17 these types of hallmarks and due process? I mean, they're  
18 shoehorning this under here so they can do what they want  
19 and then not be subject to judicial review. And where we've  
20 brought a claim that we will never have an opportunity to  
21 marshal facts for, that's just -- you know, that's just  
22 not -- that's just not what this statute contemplates, and  
23 you're not allowed to presume that it does. In fact, you  
24 have to have a very strong presumption that it doesn't  
25 because it raises such a powerful due process claim.

1           If there are no more questions?

2           THE COURT: All right. Let's take a recess and  
3 come back, and we'll figure out where we're going. We'll  
4 stand in recess for 15 minutes.

5           (At 3:24 p.m., break taken.)

6           (At 3:52 p.m., break concluded.)

7           THE COURT: All right. Mr. Blitz and Ms. Wells, I  
8 appreciate the arguments that were advanced here today. I  
9 think there's something to commend both sides. Mr. Blitz, I  
10 certainly understand your concern about secrecy which you  
11 say seems to run contrary to a lot of things our court  
12 system stands for, and I very much appreciate your  
13 confidence in the District Court to conduct an appropriate  
14 fact-finding mission. I wouldn't be quite so quick to sell  
15 the Circuit Courts short in that regard, but I do appreciate  
16 your comments in that regard.

17           I am going to deny the motion. I will explain my  
18 reasoning on that briefly. And then at the end of that,  
19 Mr. Blitz, depending on how you wish to proceed, I know  
20 you're traveling next week, we can talk a little bit about  
21 whether -- what your preference is in terms of procedural  
22 posture of the case if you want to proceed from here. But  
23 let me explain my reasoning, and then you can let me know  
24 what you want to do.

25           Presently before the Court is plaintiff's motion

1 for preliminary injunction, Document 4. And as I just  
2 mentioned, I conclude that the plaintiffs have not  
3 demonstrated that the extraordinary remedy of a preliminary  
4 injunction should be issued in this case, and I will  
5 therefore deny the motion for a TRO and preliminary  
6 injunction.

7 To obtain a preliminary injunction, the plaintiff  
8 must establish that he is likely to succeed on the merits;  
9 that he is likely to suffer irreparable harm in the absence  
10 of preliminary relief; and that the balance of equities tips  
11 in his favor; and, finally, that an injunction is in the  
12 public interest. That's Winter, 129 S. Ct. at 374.

13 For multiple reasons, I conclude that the  
14 plaintiffs have not shown that they are likely to succeed on  
15 the merits of their claims against defendants such that a  
16 TRO or preliminary injunction should issue.

17 First, it is, at best, unclear at this point  
18 whether this Court has jurisdiction to adjudicate  
19 plaintiffs' claims. When I say "at best," what I mean by  
20 that is it seems to me I do not.

21 By statute, a person disclosing a substantial  
22 interest in an order issued by the administrator for the  
23 Transportation Security Administration, TSA, under Part A of  
24 Subtitle 7 of Title 49 of the United States Code, which I'll  
25 refer to hereinafter as Part A, may apply for a review of

1 the order by filing a petition for review in the United  
2 States Court of Appeals for the DC Circuit or in the Court  
3 of Appeals of the United States for the circuit in which the  
4 person resides or has its principal place of business.  
5 That's 49 USC Section 46110(a). That statute further  
6 provides that the United States Court of Appeals has  
7 exclusive jurisdiction to affirm, amend, modify, or set  
8 aside any part of the order. That's 46110(c).

9           The TSA screening procedures at issue in this case  
10 are required under TSA's current standard operating  
11 procedures for checkpoint screening; that is, SOP. The SOP  
12 on this record appears to meet the criteria set forth in  
13 Section 46110(a) in that it is issued by the administrator  
14 for TSA and is apparently issued pursuant to the  
15 administrator's mandate under Part A which requires the  
16 administrator to provide for the screening of all passengers  
17 and property that will be carried aboard a passenger  
18 aircraft operated by an air carrier or foreign air carrier  
19 in air transportation or interstate air transportation.  
20 That's 4901(a).

21           Thus, if the SOP constitutes an order for purposes  
22 of 49 USC Section 46110, then the Court of Appeals is the  
23 proper forum for review that the plaintiffs seek. *City of*  
24 *Tacoma versus Taxpayers of Tacoma*, 357 US at 336. In that  
25 case, the Supreme Court held that a statute vesting the

1 Court of Appeals with exclusive jurisdiction to review an  
2 administrative order necessarily precluded de novo  
3 litigation between the parties of all issues and hearing in  
4 the controversy and all other modes of judicial review.

5           While it is not entirely clear to this Court that  
6 the SOP constitutes an order under Section 46110, at this  
7 point, based on the record presently before me, I conclude  
8 that it is an order within the meaning of the statute. At a  
9 minimum, this difficult jurisdictional matter makes success  
10 on the merits less likely.

11           But with respect to the question of whether or not  
12 the SOP constitutes an order, the Fourth Circuit has stated  
13 that the existence of a reviewable administrative record is  
14 a determinative factor in defining an administrative  
15 decision as an order and also that the agency action must be  
16 the final disposition of the matter it addresses to be  
17 deemed an order. That's *City of Alexandria versus Helms*,  
18 728 F.2d at 646.

19           It does seem to be clear that the administrative  
20 record does not have to be lengthy. It need only be an  
21 agency decision which imposes an obligation, denies a right,  
22 or fixes some legal relationship. Another part of the test  
23 includes the question of whether or not the order provides a  
24 definitive statement of the agency's position or -- and has  
25 a direct and immediate effect on the day-to-day business of



1 the party asserting the wrongdoing and envisions immediate  
2 compliance with its terms. Those are other factors in  
3 determining whether or not the SOP constitutes an order.

4 I find that because the SOP conclusively settles  
5 the matter of deploying the screening methods at issue in  
6 this case, the SOP is a final disposition by TSA and the SOP  
7 itself, and the documents that TSA reviewed in connection  
8 with the SOP appear to constitute a reviewable  
9 administrative record. As Pistole points out in his  
10 affidavit, there have been specific written SOPs generated  
11 by TSA.

12 In support of these propositions, see *Green versus*  
13 *Brantley* 981 F.2d 514; *Atorie Air versus FAA*, 942 F.2d 954;  
14 and *Southern California Aerial Advertisers Association*  
15 *versus FAA*, 881 F.2d 672.

16 Further, other Federal Courts have held that TSA  
17 actions similar to the SOP at issue in this case constitute  
18 orders under Section 46110 and, therefore, cannot be  
19 reviewed in the District Court. That's *Gilmore versus*  
20 *Gonzales*, 435 F.3d 1125; *Green versus TSA*, 351 F. Supp. 2d  
21 1119.

22 Although plaintiffs have advanced reasonable  
23 arguments as to why the SOP should not be considered an  
24 order for purposes of Section 46110, this Court concludes in  
25 light of the foregoing authorities that plaintiffs have not

1 made a clear showing that this Court has jurisdiction to  
2 adjudicate their claim. See Winter 129 S. Ct. 376.

3 Plaintiffs have not satisfied this Court that they  
4 are likely to succeed on the merits. See Munaf versus Geren  
5 553 US 674 wherein that Court stated a difficult question as  
6 to jurisdiction makes success on the merits more unlikely  
7 due to potential impediments to even reaching the merits,  
8 and, thus, plaintiffs are not entitled to a preliminary  
9 injunction in this case.

10 This Court also concludes that plaintiffs have not  
11 made the requisite clear showing that they are likely to  
12 succeed on the merits with respect to the reasonableness of  
13 the challenged screening procedures. Defendants have  
14 proffered significant evidence of the grave threats that  
15 adhere in air travel, the failure of less sensitive  
16 screening methods to identify and neutralize those threats,  
17 and the efforts by TSA to make the challenged screening  
18 procedures as minimally invasive as possible. Although  
19 plaintiffs have made sensible arguments that the challenged  
20 screening procedures are unreasonably invasive, even in  
21 light of the threats they seek to combat, at this point for  
22 purposes of a TRO or preliminary injunction, I cannot find  
23 that plaintiffs are likely to succeed on the merits or  
24 demonstrate that such is the case.

25 Finally, it appears to me that in the absence of

1 that -- let me back up. It appears to me that the  
2 plaintiffs have not made a clear showing that the requested  
3 injunction is in the public interest. Again, defendants  
4 have proffered significant evidence of the utility of the  
5 challenged screening methods and neutralizing threats of  
6 aviation-related terrorism. Given the presence of such  
7 threats and this Court's conclusion that the plaintiffs have  
8 not shown that they are likely to succeed in demonstrating  
9 violations of their constitutional rights, an injunction  
10 reducing defendants' ability to employ the challenged  
11 methods would not benefit the public at least based on the  
12 record as it exists at this preliminary stage of the  
13 proceedings.

14 So that, Mr. Blitz, is my ruling. I don't know  
15 whether or not -- I told you I wouldn't dismiss it, and I  
16 won't dismiss the case until you've had a chance to respond  
17 to the 12(b)(1) argument. I don't feel that that's been  
18 fully briefed at this point in time. But that's my finding,  
19 and I don't know if you have a preference as to simply  
20 denying the motion and then you may decide whether you want  
21 to proceed in the Fourth Circuit under an appeal of that  
22 order, or whether something else would be more appropriate.  
23 I'll hear from you. Do you understand my question?

24 MR. BLITZ: I think I do, Judge. I think I'm not  
25 going to ask you to go further than just denying the motion

1 because that's all before the Court. Is the Court making  
2 its own motion at this time?

3 THE COURT: No, I'm not. I will not -- I'm not  
4 interested -- you haven't had the full -- the benefit of the  
5 full time to respond. There is no 12(b) -- actually, there  
6 is no 12(b)(1) motion pending. All we are in at this point  
7 is a motion for TRO and a response to that motion as I set  
8 out. But to the extent you want to appeal this order, if  
9 you wanted me to do something different other than simply  
10 deny the motion at this point, I would certainly hear from  
11 you on that.

12 MR. BLITZ: Well, Judge, I think I've made it  
13 pretty clear that I think that Article III proceedings  
14 belong in this court, and I'm going to try to keep them in  
15 this court. I'm certainly not going to look to this Court  
16 to dismiss it for lack of jurisdiction. I'm going to  
17 militate pretty heavily against that.

18 THE COURT: I mean, if you're asking --

19 MR. BLITZ: Maybe I don't understand your  
20 question. I mean, you've made your ruling on the motion  
21 that's before you.

22 THE COURT: I understand your -- what I understand  
23 you to be saying is, no, Judge, at this point deny the  
24 motion, I'm not asking you to do anything else, nor is there  
25 anything else before you to rule upon at this point.

1           MR. BLITZ: Right, and I don't think I could ask  
2 you to do anything else other than give you a notice of  
3 appeal, which I'm not doing --

4           THE COURT: Okay.

5           MR. BLITZ: -- at this point. I mean, certainly I  
6 have time to make that decision.

7           THE COURT: You do, and I certainly didn't mean to  
8 force you, but you're traveling next -- I think --

9           MR. BLITZ: Well, you know, to the extent -- yeah,  
10 I mean, to the extent we don't have the protection of the  
11 Court's order, that's where we are, and I certainly do have  
12 an appealable issue. But in terms of the other issues that  
13 the Court's raised, we appreciate you giving a look into  
14 our -- into your thought process behind it, and we would --

15           THE COURT: Was it the 14th?

16           MR. BLITZ: It's the 14th through the 18th. So we  
17 leave here Tuesday afternoon.

18           THE COURT: And today -- I was not checking the  
19 time on you. It's not time to go home yet. I was checking  
20 the date to see what day it is. Today is the 10th. So you  
21 would at least have Monday --

22           MR. BLITZ: You know, I'm not interested in  
23 ruining anybody's weekend for sure, either here or at the  
24 Court of Appeals.

25           THE COURT: I would make some comment about you

1 messing my night up last night, but that's okay.

2 MR. BLITZ: Well, we appreciate the Court's time  
3 and the thoughtfulness --

4 THE COURT: It's a very interesting issue, it's a  
5 novel issue, and there clearly is a lot of developing case  
6 law on it, and I certainly by denying the motion don't mean  
7 to suggest you haven't made some arguments that certainly  
8 have some substance to them. So at this point in time to  
9 the extent -- I'm denying the motion. If you wanted me to  
10 consider doing something else, I would, but you've answered  
11 that question, so I'll deny the motion. You can decide how  
12 you want to proceed from here.

13 MR. BLITZ: The only thing I would bring up,  
14 Judge, and I'm sorry I didn't mention this to counsel, it's  
15 been sort of a long week, but there was -- there's a  
16 standard mediation order that goes out, and I would just ask  
17 counsel, do you think this case is susceptible to mediation?

18 THE COURT: All right. We don't -- in this  
19 district, we don't do much of the talking back and forth  
20 between counsel in the courtroom. Generally speaking, any  
21 questions you have, address them to me; and if there's  
22 something you want to talk about with counsel, you can  
23 discuss that with them outside the court.

24 MR. BLITZ: I apologize, Judge.

25 THE COURT: That's all right.

1           MR. BLITZ: The issue of mediation, I don't  
2 believe this case is susceptible to mediation. Unless  
3 counsel -- opposing counsel would object, I would ask that  
4 Your Honor not direct us to mediation in this case.

5           THE COURT: I'll leave that general -- a lot of  
6 that unfolds within the Clerk's Office after answers or  
7 motions have been filed and addressed, so I think at this  
8 point in time I'll deny the motion. We'll see where we go  
9 from here and how the Government wishes to proceed. And  
10 then once we get past that, if you want to raise that again  
11 about mediation, you can. I don't think the mediation part  
12 would be done. Ms. Kemp can correct me if I'm wrong, she  
13 probably knows, but that doesn't usually happen until after  
14 the Rule 26 -- that stuff has been done.

15           THE CLERK: Yes, sir.

16           THE COURT: So nothing for me to do. Thank you  
17 both for your arguments. I generally will come down, and  
18 I'll do it again today. We'll recess court, and I'll come  
19 down and say hello to the lawyers. And, again, thank you  
20 for your time. A very interesting issue and one of first  
21 impression in this court. We'll stand adjourned.

22                   (At 4:07 p.m., break taken.)

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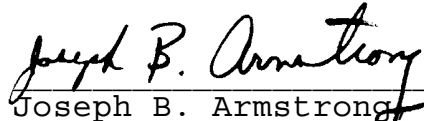
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C E R T I F I C A T E

I, JOSEPH B. ARMSTRONG, RMR, FCRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability; and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Date: 12/16/10

  
\_\_\_\_\_  
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