No. 12-15893

# In the United States Court of Appeals for the Eleventh Circuit

JONATHAN CORBETT,

*Petitioner*,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

*Respondent*.

Petition for Review of an Order of the
Transportation Security Administration

## BRIEF OF *AMICUS CURIAE* FREEDOM TO TRAVEL USA IN SUPPORT OF JONATHAN CORBETT'S PETITION FOR REHEARING EN BANC

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## Certificate of Interested Persons & Corporate Disclosure Statement

In accordance with Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that in addition to the persons and entities identified in Jonathan Corbett's Petition for Rehearing En Banc, and in the TSA's previous certificates, the following attorneys, persons, and entities may have an interest in the outcome of this case:

- Adams, Emily (counsel-of-record for *amicus* Freedom to Travel)
- Beeker, Renee (co-founder, Freedom to Travel)
- Freedom to Travel USA ("Freedom to Travel") (unincorporated, non-partisan grassroots civic association)
- Pierce, Charles (co-founder, Freedom to Travel)
- Subbaraman, Mahesha (former counsel for Freedom to Travel on amicus brief filed in *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013))
- Thomson, Wendy (co-founder Freedom to Travel)

Additionally, in accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that Freedom to Travel USA is an unincorporated non-partisan grassroots civic association with no parent corporation or shareholders who are subject to disclosure under the preceding rules.

Dated: November 9, 2014

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## Certification Under Eleventh Circuit Rule 35-5(c)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the U.S. Supreme Court and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

- *Porter v. Califano,* 592 F.2d 770 (5th Cir. 1979).[1]
- *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968).
- The strict rule of constitutional avoidance. *See, e.g., Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11, 124 S. Ct. 2301, 2308 (2004).

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ATTORNEY OF RECORD FOR
*AMICUS CURIAE* FREEDOM TO TRAVEL USA

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Dated: November 9, 2014

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[1] This Court has adopted as binding precedent all Fifth Circuit decisions before October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

# Table of Contents

**Page**

# Table of Authorities

**Page**

## Cases

**Other Authorities**

## Statement of the Issues

The TSA's present use of body scans and full-body pat-downs at airports affects the rights of over 700 million travelers annually. Petitioner Jonathan Corbett challenged these administrative searches under the Fourth Amendment—a claim that called for close judicial scrutiny of these searches' actual intrusiveness. A divided panel upheld these searches as reasonable based solely on a facial review of a limited TSA record that lacked current documentation of passengers' actual reported experiences with the TSA searches. And it reached this sweeping constitutional ruling despite having first concluded that Corbett's claim was untimely.

The panel's sparse review is contrary to this Court's decision in *Porter v. Califano*, which holds that it is improper for courts to rely on a one-sided agency record in deciding a constitutional claim. It also conflicts with the Supreme Court's decision in *Sibron v. New York*, which rejects facial review of Fourth Amendment claims. But these conflicts only exist because the panel majority explicitly refused to follow the strict rule of constitutional avoidance. *En banc* review is thus merited to decide if this Court should either withdraw the panel's Fourth Amendment opinion or order necessary fact-finding on the intrusiveness of TSA scans and pat-downs.

## Statement of Facts

Most of the following facts do not appear in the panel decision because the panel relied entirely on the record built by the TSA to justify its searches. These facts thus expose what the TSA record lacks and demonstrate why the panel should not have validated these searches absent vital fact-finding.

***Body Scans Render Pat-Downs as Primary Screening Technique:*** The TSA screens nearly 700 million passengers annually by requiring either: (1) a body scan analyzed by a computer for anomalies ("AIT-ATR"); or (2) a pat-down. A pat-down is also required "if an anomaly is detected using advanced imaging technology, if an officer determines that the traveler is wearing non-form fitting clothing, or on a random basis."[2]

Body scans carry a "sometimes greater than 50 percent"[3] rate of false alarms because these scans only detect "anomalies" like body fat.[4] "Many

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[2] *Transgender Travelers*, TRANSP. SEC. ADMIN., http://www.tsa.gov/traveler-information/transgender-travelers (last revised July 28, 2014).

[3] *See* Jacopo Prisco & Nick Glass, *New Airport Scanner Could Make Going Through Security a Breeze*, CNN, Oct. 1, 2014, http://www.cnn.com/2014/10/01/tech/innovation/mci-alfa3-scanner/.

[4] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-357, ADVANCED IMAGING TECHNOLOGY: TSA NEEDS ADDITIONAL INFORMATION BEFORE PROCURING NEXT-GENERATION SYSTEMS 14 (2014);

travelers [thus] suffer . . . indignities due to physical searches, triggered by AIT 'anomaly' detection, that reveal nothing about whether the 'anomaly' poses a threat."[5] Yet, despite being aware of this problem, the TSA "is not analyzing AIT-ATR systems' false alarm rate in the field."[6]

TSA's full-body pat-downs are intense probes of one's "entire body, including the posterior, crotch, and chest." This procedure has resulted in many reported injuries, including by members of Congress.[7] Sen. Claire McCaskill and Rep. Francisco Canseco have both reported being injured by TSA pat-downs in recent years.[8] Their experience mirrors that of many others, some of whose complaints have been recorded by the ACLU; these complaints consistently mention (1) "intense feelings of violation and humiliation"; (2) "being physically hurt by the searches"; and (3)

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5 *TSA Oversight Part I—Whole Body Imaging: Hearing Before the Subcomm. on Nat'l Sec., Homeland Defense, & Foreign Operations of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 73–74 (2011) (statement of Fred Cate, Director, Ctr. for Applied Cybersecurity Research, Indiana Univ.)

6 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 11, 13.

7 *New Airport Security Procedures*, CNN, Nov. 23, 2010, http://www.cnn.com/2010/TRAVEL/11/23/tsa.procedures.primer/index.html.

8 *See* Aaron Blake, *Sen. Claire McCaskill on TSA Pat-Down: 'OMG'*, WASH. POST, Mar. 11, 2013, http://wapo.st/15Ic9M2; Keith Laing, *GOP Lawmaker: TSA Agent 'Hurt My Privates' During Pat-Down*, THE HILL, Apr. 26, 2012, http://thehill.com/policy/transportation/224045-gop-lawmaker-tsa-pat-down-hurt-my-privates-.

"unnecessary repeated touching of intimate areas."[9] In short, this is not a matter of a few minor complaints by a handful of passengers—rather, "[t]he stories concerning TSA misconduct have been as shocking as they have numerous."[10]

***Sexually Harassed Women:*** A recent CBS News investigation of "more than 500 records of TSA complaints" found a "pattern of women" complaining of sexual harassment.[11] This pattern is corroborated by Jason Harrington, a TSA screener from 2007 to 2013, who heard TSA agents use terms like "Code Red" to harass women during TSA searches.[12] The TSA, in turn, has failed to comply with a FOIA request seeking all reports of "sexual misconduct" by TSA agents in 2013 at five U.S. airports, resulting in an ongoing FOIA lawsuit.[13]

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9 *Passengers' Stories of Recent Travel*, ACLU, https://www.aclu.org/passenger-stories-recent-travel (last visited Nov. 6, 2014).

10 Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 3 & nn. 4–8 (2013) (collecting stories).

11 *Female Passengers Say They're Targeted by TSA*, CBS NEWS – DALLAS-FORT WORTH AFFILIATE, Feb. 3, 2012, http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/.

12 Jason Harrington, *Dear America, I Saw You Naked*, POLITICO MAGAZINE, Jan. 30, 2014, http://www.politico.com/magazine/story/2014/01/tsa-screener-confession-102912.html.

13 Complaint at 1–3, *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, No. 1:14-cv-01179 (D.D.C. filed July 11, 2014), ECF No. 1.

***Traumatized Children:*** In addition to women, children have been traumatized by TSA pat-downs. For example, video shows TSA agents patting down a 6-year-old girl by "rubbing [her] inner thighs and running . . . [their] fingers inside the top of [her] blue jeans," causing the girl to cry.[14] A 4-year-old girl was forced to undergo a pat-down with TSA agents "calling the crying girl an uncooperative suspect."[15]

***Humiliated Seniors & Disabled Persons:*** Seniors Lenore Zimmerman and Ruth Sherman report being strip-searched by TSA agents because of medical devices attached to their bodies.[16] John Deaton reports watching TSA agents strip search his wife due to a medical tube in her stomach.[17] These are not isolated instances: rather, as Mary Ruskai has attested in a

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[14] *See* Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, http://abcnews.go.com/GMA/parents-year-girl-pat-airport-procedures-changed/story?id=13363740.

[15] Roxana Hegeman, *TSA Defends Pat-Down of 4-Year-Old at Kan. Airport*, ASSOCIATED PRESS, Apr. 26, 2012.

[16] *See TSA Admits Violations in Searches of Elderly Women*, WABC7 NEWS, Jan. 18, 2012, http://7online.com/archive/8510128/.

[17] Omar Villafranca, *TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC NEWS—DALLAS FORT-WORTH, July 19, 2012, http://www.nbcdfw.com/news/local/TSA-Agents-Allegedly-Strip-Search-Woman-Fiddle-With-Feeding-Tube-162985046.html.

suit that is now pending before the First Circuit, TSA pat-downs are "the primary screening device" for disabled travelers like her.[18]

***Discretionary Privacy Measures*:** While the TSA has long touted its use of various privacy measures like private screenings, these measures are "voluntarily appli[ed]" and thus may be denied at any time.[19] Dying cancer patient Michelle Dunaj faced this reality when she "asked for privacy and was turned down" after her feeding tubes led to a pat-down.[20] Cindy Gates also had the same experience when her prosthetic breast sparked a pat-down: "'The [TSA] agent wanted to do a pat down but I asked for a private screening and she said 'no.' She then started feeling my breast.'"[21]

***TSA Fails to Collect Complaints***: According to a recent GAO report, the TSA lacks any "policy to guide airports' efforts to receive air passenger

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[18] Petitioner's Response to Respondent's Rule 28(j) Letter at 1, *Ruskai v. Pistole*, No. 12-1392 (1st Cir. filed Oct. 9, 2014) (explaining why the *Corbett* panel's decision does not govern the resolution of Ruskai's case).

[19] *See* BART ELIAS, CONG. RESEARCH SERV., R42750, AIRPORT BODY SCANNERS: THE ROLE OF ADVANCED IMAGING TECHNOLOGY at i (2012) ("Summary").

[20] Joel Moreno, *Dying Woman Humiliated by Revealing TSA Pat-Down*, KBOI2, Oct. 9, 2012, http://kboi2.com/news/local/173291181.html.

[21] Angie Holdsworth, *Phoenix Woman Says She Was 'Humiliated' by TSA at Sky Harbor Airport,* ABC NEWS – ARIZ., May 24, 2012, http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/phoenix-woman-says-she-was-humiliated-by-tsa-security-at-sky-harbor-airport.

complaints" and does not require its staff to "collect . . . the screening complaints that air passengers submit in person."[22]

## Argument and Authorities

### 1. The panel improperly decided the constitutionality of intrusive body searches affecting millions of Americans based solely on a one-sided agency record, in conflict with *Porter v. Califano*.

Over Judge Martin's dissent, the panel upheld TSA body scans and pat-downs under the Fourth Amendment because (1) the body scanners "pose[d] only a slight intrusion" given the scanning software used and (2) the pat-downs were reasonable given their status as a secondary search, the use of alternative TSA privacy measures, and the government's interest in the pat-downs. *Corbett v. TSA*, 767 F.3d 1171, 1181–82 (11th Cir. 2014). The panel noted that it rested on "a complete record." *Id.*

This statement implies that the panel had a full record in regards to the intrusiveness of the TSA searches. It did not. What the panel had was a one-sided record built by the TSA to justify these searches. *See id.* at 1176. Such a record enables review under the Administrative Procedures Act. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607

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[22] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-43, AIR PASSENGER SCREENING: TSA COULD IMPROVE COMPLAINT PROCESSES 23, 31 (2012).

(1985). But Fourth Amendment review requires more: it requires an even-handed record of concrete facts—not abstract policy statements—showing the *actual* intrusiveness of a given search. *See, e.g.*, *Safford Unified Sch. Dist. No. 1. v. Redding*, 557 U.S. 364, 373–75, 129 S. Ct. 2633, 2641–42 (2009).

Such facts matter because "[a] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18, 88 S. Ct. 1868, 1878 (1968). And this principle is of particular importance in determining the validity of administrative searches since these searches carry "a vast potential for abuse." *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007). As such, this Court has invalidated administrative business searches on three separate occasions based on concrete facts evincing outrageous uses of police force. *See Berry v. Leslie*, 767 F.3d 1144, 1145 (11th Cir. 2014) (collecting cases).

Therefore, if Fourth Amendment review requires concrete facts relating to the actual intrusiveness of a search, then Fourth Amendment review of TSA body scans and full-body pat-downs requires a factual record that is capable of answering the following kinds of questions:

- How many reports of physical and emotional injuries has the TSA received from passengers regarding body scans and pat-downs?

- How many times has the TSA denied or refused to afford its discretionary privacy measures?

- How many TSA agents have been disciplined for misconduct related to the administration of body scans or pat-downs?

- How many "false positives" from body scans have resulted in unnecessary or improper TSA full-body pat-downs?

It is doubtful the TSA record in this case could sufficiently answer these questions when the TSA has admitted its failure to collect data related to these questions (*see supra* notes 3, 21) and the TSA has a clear interest in protecting its reputation. And there lies the reason why this court has ruled that "[i]t is improper to rely heavily on the investigative findings and conclusions of an interested agency in a case . . . involving delicate and complex matters of an individual's constitutional right against the government." *Porter v. Califano,* 592 F.2d 770, 772 (5th Cir. 1979).[23] Indeed, to rely on an agency record alone in constitutional cases means placing key rights "at the mercy of administrative officials." *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 52, 56 S. Ct. 720, 726 (1936). This Court thus held in *Porter* that "even in an area as sensitive as the judgments

[23] This Court has adopted as binding precedent all Fifth Circuit decisions before October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

of the Secret Service in protecting the President," courts must still "make an independent assessment of a First Amendment claim." 592 F.2d at 772.

This is no less true for a Fourth Amendment claim, for "the essential independence . . . of the judicial power . . . in the enforcement of constitutional rights requires that [a] federal court should determine such an issue **upon its own record** and the facts elicited before it." *Crowell v. Benson*, 285 U.S. 22, 64 52 S. Ct. 285, 297 (1932) (emphasis added). Hence, in reviewing the Fourth Amendment validity of the NYPD's stop-and-frisk policy—which impacted 4.4 million people over 8 years—a district court reviewed millions of police reports and held a 9-week trial during which 12 people testified about their experiences with the policy. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 572–76, 625-56 (S.D.N.Y. 2013).

TSA body scans and pat-downs affect *over 700 million people every year* and entail unique intrusions for women, children, seniors, and the disabled. *See supra* pp. 1-7. Yet, the panel validated these searches without any fact-finding at all. Had such fact-finding occurred, the panel might have reconsidered many of its core assumptions about the TSA searches. For example, based on the TSA record, the panel assumed that TSA pat-downs are "not a primary screening method" and that the TSA guarantees

various privacy measures. 767 F.3d at 1182. But the reports cited by Amicus indicate the TSA pat-downs are in fact the *de facto* primary screening method for many Americans and the TSA's privacy measures are discretionary and can be denied at any time. *See supra* p. 6.

The panel decision thus stands in stark contrast with *United States v. Hartwell,* 436 F.3d 174 (3d Cir. 2006) and *United States v. Aukai,* 497 F.3d 955 (9th Cir. 2007) (en banc), which validated airport metal detector searches based on a close analysis of real-world facts. In *Hartwell,* for example, the Third Circuit noted how the searches at issue "escalat[ed] in invasiveness" for good cause. 436 F.3d at 180; *see also Aukai*, 497 F.3d at 957–58. TSA scans and pat-downs, on the other hand, require many travelers to endure a full-body pat-down absent good cause. *See supra* pp. 1–7. Yet, the panel did not get the chance to consider this reality because it reviewed the TSA searches based solely on an inadequate TSA record. This Court's holding in *Porter v. Califano*, in turn, does not permit such a holding to stand.

**2. The panel improperly decided the facial validity of a search policy under the Fourth Amendment, in conflict with *Sibron v. New York.***

In *Sibron v. New York,* the Supreme Court held that the "validity of a warrantless search is pre-eminently the sort of question which can only be

decided in the concrete factual context of the individual case." 392 U.S. 40, 60–62, 88 S. Ct. 1889, 1900–02 (1968). The Court thus refused to decide the "facial constitutionality" of New York's stop-and-frisk statute because its inquiry into the actual police searches at issue would not be served "by an attempt to pronounce judgment on the words of the statute." *Id.*

Here, however, the panel did just this: it validated the TSA searches based solely on the words of a TSA order and record, apart from the concrete context of Corbett's case or a factual record of Americans' actual experiences with the TSA searches. And the panel went one step further, rendering a facial Fourth Amendment judgment—instead of an as-applied one, limited to Corbett—because "the issue will almost certainly recur." 767 F.3d at 1182. Such reasoning contravenes the core of *Sibron*, which stands for "reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008).

**3. The panel unnecessarily decided constitutional matters of great significance, in conflict with the rule of constitutional avoidance.**

The panel majority decided the validity of TSA body scans and full-body pat-downs as an alternative argument after finding Corbett's petition

was untimely. *Corbett*, 767 F.3d at 1178. This holding was thus wholly unnecessary and, as Judge Martin aptly noted in dissent, disregarded the strict rule of constitutional avoidance. *Id.* at 1184 & n.1 (Martin, J., dissenting).

Under this rule, a court generally must not decide constitutional questions "unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring). This rule further "requires strictest adherence when matters of great national significance are at stake." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S. Ct. 2301, 2308 (2004).

The panel majority reasoned, however, that constitutional avoidance is optional where (1) the narrower ground for decision is a debatable, non-jurisdictional matter of procedure; (2) "the parties have briefed and argued the merits, and we have a complete record"; (3) "[t]he answer on the merits is clear"; and (4) "the issue will almost certainly recur." *Corbett,* 767 F.3d at 1182. But upon closer examination, each of these rationales is unavailing.

***First,*** non-jurisdictional matters of procedure are no exception to the rule of constitutional avoidance. To the contrary, the rule both "allows and

encourages the court to first resolve procedural issues before reaching substance." *Slack v. McDaniel*, 529 U.S. 473, 485, 120 S. Ct. 1595, 1604 (2000); *see also Jackson v. Crosby*, 437 F.3d 1290, 1295 (11th Cir. 2006) ("The court . . . will not pass upon any constitutional questions in the record if the case can be disposed of on other grounds, e.g., procedural grounds . . . .").

***Second,*** while the parties may have briefed the merits, Corbett is a *pro se* litigant who lacked "the benefit of any fact-finding . . . pertinent to resolving" his constitutional claim. *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013) (Marcus, J., concurring); *see Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976) ("[C]ourts . . . should prefer to construe legal rights only when the most effective advocates of those rights are before them."). Moreover, as explained above, the panel did not have a complete record before it—only a one-sided TSA record that might be sufficient for purposes of APA review, but not for purposes of constitutional review as explained by this Court in *Porter v. Califano,* 592 F.2d at 772.

***Third,*** the answer on the merits is not clear. Only the D. C. Circuit has decided the validity of TSA scans and pat-downs—and it did so based on the same one-sided TSA record that the panel relied on here, without any recognition of the problems that this poses in terms of Fourth Amendment

review. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10–11 (D.C. Cir. 2011). But when a court has an even-handed record of facts in a Fourth Amendment case, other answers on the merits become possible. *See, e.g.*, *Blackburn v. Snow*, 771 F. 2d 556 (1st Cir. 1985) (invalidating a local prison's blanket strip-search policy for all visitors of inmates).

***Fourth,*** while the issue in this case "will almost certainly recur," that is only because it is a "matter[] of great national significance"—something that *favors* strict adherence to the rule of constitutional avoidance rather than the abrogation of it. *Elk Grove*, 542 U.S. at 11, 124 S. Ct. at 2308.

## Conclusion

Judge Martin's dissent is right: the panel should not have decided Corbett's Fourth Amendment claim after deeming it untimely. This Court should therefore grant *en banc* review to withdraw the panel's Fourth Amendment opinion or—in the alternative—permit fact-finding sufficient to enable fair resolution of Corbett's Fourth Amendment claim.

Dated: November 9, 2014

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## Certificate of Filing and Service

I hereby certify that on November 10, 2014, I caused this amicus brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Mark B. Stern

Sharon Swingle

With his consent, I also caused a copy of this brief to be served to Jonathan Corbett (jcorbett@fourtentech.com) via email. I also caused a copy of this brief to be sent via U.S. Mail, postage prepaid, to the following:

Janet Napolitano
U.S. Department of Homeland Security
Washington DC 20530

I also certify that on November 10, 2014, I caused the required 15 copies of the proposed amicus brief to be sent to the Clerk of this Court via U.S. Mail, postage prepaid.

Dated: November 10, 2014

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