UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN BIERFELDT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:09-cv-01117-RMU
	)	
JANET NAPOLITANO,	)	
	)	
Defendant.	)	

**DEFENDANT'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, defendant move to dismiss plaintiff's complaint for lack of jurisdiction and failure to state a claim. In the alternative, defendant respectfully requests that this Court enter judgment on the pleadings or, in the alternative, summary judgment in favor of defendant on the grounds that there are no material facts in dispute and that defendant is entitled to judgment as a matter of law. In support of this motion, the defendant refers the Court to the accompanying memorandum and declarations filed in support of this motion.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
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INTRODUCTION

This action arises from a mandatory screening conducted, pursuant to 49 U.S.C. § 44901(a), by officers of the Transportation Security Administration ("TSA") of plaintiff's carry-on baggage during a pre-flight screening in the St. Louis Airport. Because an x-ray image of plaintiff's baggage showed an opaque object, TSA officers conducted a physical search of his bag and located a metal box. To insure that this box did not contain a weapon or explosive, the TSA officer opened the box and discovered that it contained a substantial amount of currency, which plaintiff now concedes was approximately $4700. When plaintiff refused to respond to even the most innocuous questions about the currency, the TSA officer, consistent with TSA directives, reported the matter to the local law enforcement authority, the St. Louis Airport Police Department.

In his complaint, plaintiff does not directly challenge TSA's authority to examine the contents of the metal box or to ask him questions about his travel. Instead, he contends that TSA violated the Fourth Amendment and exceeded TSA's statutory authority by asking him questions

regarding the money and referring the matter to the St. Louis Airport Police Department. (Compl., ¶¶ 36, 38.) In other words, plaintiff contends that TSA officers may only take action if they find a weapon or explosives and must ignore anything else that they might discover in their limited search for weapons and explosives. Based on that claim, plaintiff requests that this Court (1) declare the actions taken by TSA violated plaintiff's rights under the Fourth Amendment and exceeded its statutory authority, and (2) enjoin defendant and her employees from "authorizing or conducting suspicionless pre-flight searches of passengers or their belongings for items other than weapons and explosives."

Plaintiff's complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) because this Court does not have jurisdiction to address the merits of plaintiff's claims for at least three reasons. First, plaintiff claims that the actions taken in this case were taken pursuant to TSA's directives and order. (Compl., ¶¶ 31, 36, 38.) Directives issued by TSA regarding screening procedures are "orders" with the meaning of 49 U.S.C. § 46110. TSA's screening policies are, therefore, only subject to judicial review by the United States Courts of Appeals, which by statute have exclusive jurisdiction to affirm, modify, or set aside such orders. Plaintiff seeks to make an end-run around this jurisdictional provision by challenging TSA's directives in this Court.

Second, plaintiff lacks standing to obtain the equitable relief he seeks. As courts have recognized, past exposure to alleged illegal conduct is not sufficient to show a present case or controversy for either declaratory or injunctive relief. Instead, a plaintiff is required to show "a real and immediate threat" that such alleged illegal acts will be repeated in the future. Id. Here, plaintiff tries to meet this requirement by alleging that "it is likely that [he] will again be subjected to unconstitutional searches and seizures by TSA agents and/or its deputies because

[he] frequently travels by airplane throughout the country carrying cash as part of his duties as the Director of Development of the Campaign for Liberty." (Compl., ¶ 34.) However, this allegation is belied by the fact that he has not alleged any other such incidents in any of his frequent travels either before or subsequent to this incident. It also ignores the fact that the incident arose not simply because he was carrying a large amount of cash. Instead, TSA discovered the cash because it was contained in a metal box, which TSA was required to examine to insure that it did not contain a weapon or explosives.

Third, to the extent that plaintiff seeks to challenge TSA's directives regarding the appropriate actions to take when a TSA employee discovers evidence of possible criminal activity in its search for weapons and explosives, plaintiff's claim is moot because TSA has amended those directives. The newly revised directive refines the situations in which a passenger would be questioned about large quantities of currency discovered as a result of the screening process and provides examples of situations in which the discovery of currency would merit questioning. As a result, a recurrence of the underlying situation is now even more remote.

Even if this Court had jurisdiction, it should dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim or, in the alternative, grant summary judgment for defendant, pursuant to Fed. R. Civ. P. 56. Plaintiff's claim that TSA violated the Fourth Amendment by asking him questions regarding the money found in the box and referring the matter to the St. Louis Airport Police has no merit. Contrary to plaintiff's claim, TSA checkpoint screeners are not required to turn a blind eye to objects found during a search for weapons or explosives that may indicate possible criminal activity. Indeed, the Fourth Amendment is not implicated if screeners notify trained police officers and briefly delay the passenger so that those

officers have an opportunity to confirm or dispel any suspicions of criminal activity, provided the scope of the search giving rise to those suspicions is no more intrusive than necessary to accomplish its purpose. The actions taken by TSA here were consistent with those limitations.

Plaintiff's claim that TSA's actions exceeded its statutory authority also has no merit. This claim is predicated upon an assumption that TSA officers "are instructed as a matter of standard operating procedure to search for 'contraband' beyond weapons and explosives." (Compl., ¶ 31.) This claim mischaracterizes TSA's policy. Contrary to plaintiff's suggestion, TSA does not direct its employees to search for contraband. Instead, TSA's directives simply instruct TSA employees to contact local law enforcement if they discover evidence of suspected criminal activity in the course of a search for weapons and explosives. This directive is consistent with TSA's authority to establish "a uniform procedure for searching and detaining passengers and property." 49 U.S.C. § 44903.

Finally, even if plaintiff had standing and stated a claim with respect to the particular actions taken in his case, he is not entitled to any injunctive relief. As explained infra at 26-30, claims regarding violations of the Fourth Amendment turn on the facts of a particular case, and do not provide a basis for injunctive relief for searches in general. This is especially true where, as here, an injunction would tread upon sensitive security functions which are committed to TSA and entangle the Court into the day-to-day administration of the screening operations.

Accordingly, this Court should dismiss plaintiff's complaint for lack of jurisdiction or for failure to state a claim. In the alternative, this Court should grant summary judgment for defendant.

BACKGROUND

A. Statutory and Regulatory Background

TSA is a component of the Department of Homeland Security charged with ensuring the safety of all modes of transportation.[1] See, e.g., 49 U.S.C. § 114. With respect to air transportation, Congress has mandated that TSA apply certain measures to preempt threats to air travel, including the screening of all passengers and property "before boarding." 49 U.S.C. § 44901(a); see 49 C.F.R. §§ 1544.201-1544.213. To this end, TSA is required to prescribe regulations requiring air carriers to "refuse to transport – [] a passenger who does not consent to a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. § 44902(a); see 49 C.F.R. §§ 1540.107 and 1544.201(c). By operation of law, "[a]n agreement to carry passengers or property in air transportation . . . is deemed to include an agreement that the passenger or property will not be carried if consent to search for [these] purpose[s] . . . is not given." 49 U.S.C. § 44902(c).

In addition, Congress has directed TSA to "prescribe regulations to protect passengers and property . . . against an act of criminal violence or aircraft piracy,"[2] including "a uniform procedure for searching and detaining passengers and property" to ensure the safety and efficient

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[1] Following September 11, 2001, Congress enacted the Aviation and Transportation Security Act, by which it created TSA and charged it with oversight of the nation's aviation security system. See Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001). Subsequently, Congress transferred TSA to the newly created United States Department of Homeland Security, whose primary mission is to "prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism." Homeland Security Act of 2002, Pub. L. 107-296, § 101(b)(1), 116 Stat. 2135, 2142 (2002).

[2] The particular offense of "aircraft piracy" is defined as "seizing or exercising control of an aircraft . . . by force, violence, threat of force or violence . . . ." 49 U.S.C. § 46502(a).

treatment of passengers by TSA personnel. 49 U.S.C. § 44903(b). TSA is also responsible for requiring each operator of an airport to "establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers" through the use of "qualified State, local, and private law enforcement personnel." 49 U.S.C. § 44903(c).

In accordance with these congressional mandates, TSA has adopted a uniform set of policies and procedures regarding the pre-flight screening of passengers and their carry-on baggage. These standard operating procedures ("SOP") for the checkpoint set forth the processes and responsibilities of TSA personnel at airport security checkpoints. (Declaration of William Switzer III ("Switzer Decl."), ¶ 3.) As part of this process, carry-on items undergo an x-ray examination. (Declaration of Ron Bardmass ("Bardmass Decl."), ¶ 6.) When an x-ray is inconclusive (i.e., TSA cannot determine whether the bag contains a weapon or other prohibited item), a Transportation Security Officer ("TSO") conducts a physical examination of the bag to determine whether it contains a weapon or other prohibited item. Id.

TSA has issued directives regarding the procedures its personnel should follow when a search for weapons or explosives uncovers illegal drugs, drug paraphernalia, or large sums of cash, through Management Directive 100.4, which addresses screening at airports. (Attachment 1 to Switzer Decl.) At the time of the incident at issue, it stated in relevant part that while a search "should be no more intensive or extensive than reasonably necessary to detect threat items or to determine compliance with TSA regulations," "[e]vidence of crimes shall be referred to a law enforcement officer for appropriate action." Id. at 6.

On September 1, 2009, TSA revised that directive to clarify the procedures to be taken

when evidence of crimes is found during a search. (Attachment 2 to Switzer Decl.) For example, the revised directive states:

> Screening may not be conducted to detect evidence of crimes unrelated to transportation security. However, if such evidence is discovered, TSA shall refer it to a supervisor or a law enforcement official for appropriate actions. This report satisfies a TSA employee's obligation to report know or suspected violations of federal law. (*ref.* TSA MD 1100.73.5, *Employee Responsibilities and Conduct*, Section 5(A)(9)). Although an individual may be requested to wait until law enforcement officials arrives, he or she is free to leave the checkpoint once applicable screening requirements have been completed successfully. TSA officers should complete an Incident Report whenever law enforcement is notified. Examples of ordinary criminal wrongdoing include possession of illegal drugs and child pornography, and money laundering (i.e., transferring illegally gained money through legitimate channels so its illegal source is untraceable).

Id. at 6. The revised directive also elaborates on how TSA screeners should respond when large sums of currency are found:

> Traveling with large amounts of currency is not illegal. Sometimes currency discovered at the checkpoint will need to be examined to clear it to enter the sterile area (or other secured areas). As a general matter, there should be no reason to ask questions of the passenger about currency, although there may be times when questions are warranted by security needs. When currency appears to be indicative of criminal activity, TSA may report the matter to the appropriate authorities. For all flights, factors indicating that cash is related to criminal activity included the quantity, packaging, circumstances of discovery, or method by which the cash is carried, including concealment. For international flights, currency that exceeds $10,000 may not be transported into or out of the United States unless it has been reported to Custom and Border Protection (CBP). TSA may notify CBP and/or law enforcement authorities pursuant to its standard operating procedures that the individual possesses a sum of currency. TSA may also note factors related to criminal activity for purposes of notifying CBP and/or law enforcement, as well as request that the individual remain accessible pursuant to such notification.

Id.

Similarly, Operations Directive 400-54-2 (Attachment 3 to Switzer Decl.) states that "[w]hen TSA discovers contraband during the screening process that is not a TSA Prohibited Item, the matter should be referred to the local Law Enforcement Officers as appropriate."

B. Factual Background

Plaintiff is the Director of Development for the Campaign for Liberty, a political organization that emerged from Congressman Ron Paul's attempt to win the Republican nomination for President. (Compl. ¶ 6.) On March 29, 2009, plaintiff arrived at the St. Louis Airport carrying a number of items, including a metal money box which was stored in his laptop bag. Id. ¶ 17. Plaintiff voluntarily entered the screening process and placed his bag on a conveyor for x-ray screening. Id. Because the x-ray screening of plaintiff's laptop bag was inconclusive due to the presence of an opaque object on the x-ray image, TSO Devore began a search of plaintiff's bag to determine that it did not conceal a weapon. In doing so, Devore found a metal box that contained a large sum of money. (Bardmass Decl., ¶ 7.) Plaintiff immediately became evasive in response to innocuous questions about the currency, prompting Devore to summon Supervisory Transportation Security Officer ("STSO") Bardmass. Plaintiff continued to make evasive responses to STSO Bardmass's questions that were intended to determine only whether plaintiff had any legitimate explanation for the large sum of money. (Attachment 1 to Bardmass Decl., Transcript ("Tr.") at 11 (STSO Bardmass explaining to a Duty Sergeant of the St. Louis Airport Police that "[w]hile I had them out [at the checkpoint], I tried to ask him some questions just to

clear things up")).[3] Because plainitff's steadfast refusal to respond to any questions was delaying completion of the screening process, STSO Bardmass led plaintiff to a small office just behind the checkpoint in order to complete the examination of the metal box and to try to resolve the matter. (Compl., ¶ 19; Bardmass Decl., ¶ 8.)

Once in the office, STSO Bardmass examined the box to verify its contents. In order to determine whether the currency actually constituted an unusually large sum, he asked plaintiff if he knew how much money was in the box, to which plaintiff replied that he did not "know exactly." (Tr. at 1.) STSO Bardmass also inquired about plaintiff's occupation in order to determine whether plaintiff would understandably be carrying a large amount of currency, to which plaintiff responded: "Am I legally required to tell you that?" (Tr. at 1.) After plaintiff continued to persistently rebuff the officer's efforts to clarify whether there was a need to notify law enforcement of the large quantity of currency found in plaintiff's carry-on bag, STSO Bardmass concluded he would be unable to make that determination on his own and asked TSO Devore to summon the St. Louis Airport Police Department. (Tr. at 1.) The St. Louis Airport Police Department is the law enforcement entity with jurisdiction over Lambert-St. Louis International Airport. See http://www.flystl.com/flystl/security/police. It is responsible for traffic control, criminal investigations, and enforcement of local, state, and federal laws at the airport. Id.

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[3] As explained in the Complaint, ¶ 20, plaintiff recorded his interaction with TSA personnel and Airport Police officers, which the American Civil Liberties Union has made available at its website. See http://www.aclu.org/safefree/general/39922res20090618.html. A transcript of that recording is included as Attachment 1 to the Declaration of Ron Bardmass ("Bardmass Decl.").

Less than sixty seconds later, Officer Shelton of the St. Louis Airport Police arrived. Tr. at 2. Officer Shelton also tried to ask plaintiff basic questions to resolve the matter, but again plaintiff refused to answer basic questions:

Shelton: How much money do you have in here?

Bierfeldt: I don't know the exact amount.

Shelton: Where does this come from; where is it coming from?

Bierfeldt; It's coming from somewhere.

Shelton: Where?

Bierfeldt: Where?

Shelton: I'm not going to play games with you.

(Tr. at 3.) At that point, Officer Shelton called his dispatcher and explained that plaintiff had a large sum of money and was refusing to answer questions regarding it. (Tr. at 3.) Shortly thereafter, two other officers from the St. Louis Police Department arrived. (Compl., ¶ 23.) Officer Shelton continued to try to elicit information that would allay any doubts about cash in plaintiff's possession. But to each question that probed anything other than his identity or destination, plaintiff responded by asking whether he was "legally required" to answer the questions. (Tr. at 4-5.) Officer Shelton tried to respond by explaining the purpose of his questions:

Shelton: You're coming in with some money, but you don't want to answer any questions, you know, how much, how much it is and why it's in your possession. I mean . . . .

Bierfeldt: Right, I'm saying I don't know.

Shelton: Why is it a secret why you have money or something?

Bierfeldt:	I don't know the exact amount. You're asking where my employment is and I'm simply asking if I am legally required . . . .
Shelton:	Well I 'm asking . . . The question is why do you have this money? That is the question. That is the major question.

* * * *

Bierfeldt:	Am I'm being detained because of the law, sir?
Shelton:	Because you have a large sum of money that you can't answer why you have it.

(Tr. at 4.)

Plaintiff finally stated that the box contained approximately $4700 (Tr. at 5), but he continued to refuse to answer questions regarding why he possessed such a large sum of money. Instead, his evasive responses raised further questions regarding the matter. Plaintiff claimed initially that the money was his, but later stated that "the money does not belong to [him]." (Tr. at 7.) Instead, he stated that the money was simply "in his possession." (Tr. at 9.) At that point, airport police informed plaintiff that he was going to be taken down to the station to "find out if [plaintiff] stole it." (Tr. at 7.)

Before taking him down for further questioning, a plain clothes Duty Sergeant from the St. Louis Police Department arrived and noticed that plaintiff had some campaign materials that seemed to indicate that he was working for Campaign for Liberty. (Compl., ¶ 29.) When the Duty Sergeant asked plaintiff whether he worked for Campaign for Liberty, plaintiff finally confirmed that he worked for Campaign Liberty and that the money constituted contributions collected at an event in St. Louis. (Tr. at 11.) Plaintiff was then released by the St. Louis Airport Police. (Tr. at 12.) The St. Louis Airport Police officers explained that had plaintiff simply told

them this information initially, none of their ensuring questioning would have been necessary. (Tr. at 11.)

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER PLAINTIFF'S CLAIMS.

A. The United States Courts of Appeal Have Exclusive Jurisdiction to Review TSA's Orders Challenged by Plaintiffs.

Plaintiff's Complaint must be dismissed because 49 U.S.C. § 46110 vests exclusive jurisdiction over his claims in the United States Courts of Appeals. This section provides, in relevant part, that:

> a person disclosing a substantial interest in an order issued by [TSA or FAA][4] in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). The statute further provides that the United States Courts of Appeals have "exclusive jurisdiction to affirm, amend, modify or set aside any part of the order." 49 U.S.C. § 46110(c). When an individual challenges an action that falls within the scope of this provision, the Courts of Appeals have exclusive initial jurisdiction over the claim and any other claims that are "inextricably intertwined." See, e.g., Merritt v. Shuttle, Inc., 187 F.3d 263, 270-71 (2d Cir. 1999) ("Merritt I") (reviewing authority regarding scope of predecessor to § 46110). A claim is inextricably intertwined "if it alleges that the plaintiff was injured by such an order and that the

[4] When this provision was adopted, the head of TSA was the Under Secretary of Transportation for Security, see, e.g., 49 U.S.C. § 114(b)(1), one of the agency heads listed in § 46110.

court of appeals has authority to hear the claim on direct review of the agency order." Meritt v. Shuttle, Inc., 245 F.3d 182, 187 (2d Cir. 2001) ("Merritt II") (citing City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336, 339 (1958)). Thus, where a plaintiff's claim rests in whole or in part on the context that gives rise to an order or the motivations and actions of those applying an order, that claim is necessarily directed at the merits of the order in question, and thereby within the exclusive jurisdiction provision of § 46110(c). Id. at 189 (discussing Merritt I). This includes constitutional claims that "squarely attack" particular agency orders. Gilmore v. Gonzales, 435 F.3d 1125, 1133 n.9 (9th Cir. 2006) (finding "due process vagueness challenge" to TSA order to be within § 46110's scope); but see Mace v. Skinner, 34 F.3d 854, 858 (9th Cir. 1994) (reserving district court jurisdiction over broad constitutional claims for monetary damages from predecessor provision to § 46110).

The United States Court of Appeals for the District of Columbia and other circuit courts "have emphasized that the term 'order' in this provision should be read 'expansively.'" City of Dania Beach, Fla. v. FAA, 485 F.3d 1181, 1187 (D.C. Cir. 2007). Accord Aviators for Safe & Fairer Regulation v. FAA, 221 F.3d 222, 225 (1st Cir. 2000); New York v. FAA, 712 F.2d 806, 808 (2d Cir. 1983). Hence, as used in § 46110, the term "order" is interpreted expansively to reach any agency determination that "possess[es] the quintessential feature of agency decisionmaking suitable for judicial review: finality." Village of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 68 (D.C. Cir. 2006) (citing Aerosource, Inc. v. Slater, 142 F.3d 572, 577-78 (3d Cir. 1998)). Thus, the agency act in question is reviewable as an order under § 46110 if it (a) "mark[s] the 'consummation' of the agency's decisionmaking process" on a subject, rather than an advisory position, and (b) determines the rights or obligations of the public, or is an act from

which "'legal consequences will flow.'" Id. (quoting Bennett v. Spear, 520 U.S. 154, 177-178 (1997)).

The requirements for reviewability under § 46110 are easily satisfied in this case. First, plaintiff's complaint explicitly challenges TSA directives on screening. In his Complaint, plaintiff claims that his search and "detention" were the products of "a policy, practice, custom" that TSA follows in the course of screening passengers and their property before they are allowed to board commercial aircraft. (Compl., ¶ 4; see also id. at ¶¶ 30-31, 36, 38.) Contrary to plaintiff's contention, the orders do not direct or encourage TSA personnel to look for large sums of money or other evidence of possible criminal activities. (Attachments 1 through 3 to Switzer Decl.) Instead, TSA's SOP, Management Directive 100.4, and Operations Directive 400-54-2 direct TSA screeners to refer discoveries of items that may be criminal in nature to law enforcement authority. See supra at 6-8. Congress vested TSA with authority to issue such policies and procedures under 49 U.S.C. § 44901 and 49 U.S.C. § 44903, two statutory provisions within the same part of Title 49 as § 46110. As such, these statements of TSA policy satisfy the threshold eligibility requirement of being an authoritative agency action taken under a statutory authority listed in § 46110.

Second, the challenged orders meet the "finality" requirement. These policies and directives regarding screening are the consummation of the exercise of TSA's authority under §§ 44901 and 44903 to direct how screening will proceed. Each of the procedures or directives to screening personnel regarding the discovery of cash or other potential evidence of crime reflects the Administrator's definitive policy determinations of how to proceed in that circumstance. Indeed, nothing in these directives suggests that TSA's conclusions about how to proceed when

large sums of currency are discovered "are tentative, open to further consideration, or conditional on future agency action," Dania Beach, 485 F.3d at 1188, and plaintiff makes no allegations to the contrary. Moreover, the directives determine "rights or obligations" - another indicia of reviewability under § 46110 - as they embody "marching orders" from TSA management to its personnel. Id.

The fact that the directives were not products of formal proceedings is irrelevant. Courts do not require that the actions in question be the product of formal agency decision making in order to qualify for consideration under § 46110. Aerosource, 142 F.3d at 577. Nor is a prior administrative proceeding a prerequisite to the invocation of the exclusive jurisdiction provided by § 46110. Safe Extensions, Inc. v. FAA, 509 F.3d 593, 598-99 (D.C. Cir. 2007); Gilmore, 435 F.3d at 1133. Instead, courts have recognized that a single letter, Dania Beach, 485 F.3d at 1187-88,[5] or a TSA security directive, Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1125 (W.D. Wash. 2005), will qualify as "orders" within the meaning of § 46110.

The screening directives at issue here are similar in nature to the directives at issue in Green. In that case, plaintiffs alleged that TSA's actions in maintenance, management, and dissemination of the so-called No-Fly list were unconstitutional. 351 F. Supp. 2d at 1122. As here, TSA moved to dismiss on the grounds that the No-Fly list and Selectee list are security directives issued by TSA and, therefore, can be reviewed only by the Courts of Appeals under 49 U.S.C. § 46110. The district court agreed, finding that the "the Security Directives are 'orders' for

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[5] Accord San Diego Air Sports, Inc. v. Fed. Aviation Admin., 887 F.2d 966, 970 (9th Cir. 1989) (letter from FAA providing that parachuting would not be allowed in San Diego Terminal Control area was an "order" under predecessor provision to § 46110); Southern California Aerial Advertisers' Ass'n v. Fed. Aviation Admin., 881 F.2d 672, 676 (9th Cir. 1989) (letter from FAA prohibiting fixed wing aircraft over Los Angeles Airport was a final "order").

the purpose of § 46110(a), and the courts of appeals have exclusive jurisdiction over Plaintiffs' claim relating to them." Id. at 1125. As the court explained, the directives "provide a definitive statement of TSA's position and have a direct and immediate effect on persons listed on the No-Fly List, barring travel on commercial aircraft." Id. Moreover, the directives impose obligations because "[e]ach aircraft operator is required by law to comply immediately with Security Directives." Id. at 1124-25. Accord Gilmore, 435 F.3d at 1132-33 (courts of appeals had exclusive jurisdiction over challenge to directive requiring airline passengers to present identification or to be subject to a more thorough search).

Accordingly, this Court should dismiss plaintiff's claim because under § 46110 the Courts of Appeals have exclusive jurisdiction of such claims.

B. Plaintiff Lacks Standing to Seek Declaratory and Injunctive Relief.

Even if 49 U.S.C. § 46110 were not a jurisdictional impediment to plaintiff's claim, plaintiff's claims should be dismissed for lack of standing. Article III of the Constitution "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). This is a "bedrock requirement." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Simon v. Eastern Ky. Welfare Rights Org, 436 U.S. 26, 37 (1976). A court's standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

The plaintiff has the burden of establishing standing. Daimler-Chrysler Corp. v. Lund, 547 U.S. 332, 342 (2006). To satisfy this burden, the plaintiff must show "personal injury fairly traceable to defendant's alleged unlawful conduct and likely to be redressed by the required relief." Id. (quoting Allen v. Wright, 468 U.S. at 751). Accord Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

In this case, plaintiff does not seek damages for past action, but, instead, seeks a declaration that TSA violated plaintiff's rights under the Fourth Amendment and exceeded its statutory authority as well as an injunction enjoining TSA and its employees from "authorizing or conducting suspicionless pre-flight searches of passengers or their belongings for items other than weapons and explosives." (Compl., Prayer for Relief.) Plaintiff has not made the prerequisite showing of injury for such declaratory and injunctive relief. To meet the injury in fact requirement, a plaintiff's injury must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks omitted). Accord Byrd v. Env'tl Prot. Agency, 174 F.3d 239, 243 (D.C. Cir. 1999). An allegation of injury that is "remote, contingent, or speculative," and consists of "nothing more than the bare possibility of some injury in the future," fails to present a justiciable question. Gange Lumber Co. v. Rowley, 326 U.S. 295, 305 (1945).

It is well settled "that a past injury, without more, cannot form the basis for either injunctive or declaratory relief." Bolger v. District of Columbia, 510 F. Supp. 2d 86, 92 (D.D.C. 2007). As the Supreme Court stated in O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974), "[p]ast exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Accord Haase v.

Sessions, 835 F.2d 902, 911 (D.C. Cir. 1987) (applying the same standard to declaratory relief). Instead, a plaintiff must show that is "realistically threatened by a repetition of his experience." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

In Lyons, the plaintiff sued the City of Los Angeles and several police officers, alleging that the officers had applied a chokehold when they stopped him for a traffic violating, causing him injury. Id. at 105-06. The plaintiff sought damages and an injunction barring chokeholds except when a suspect threatened to use deadly force. The Supreme Court found that while the plaintiff may have standing to seek damages against the individual officers and even the City, he lacked standing to seek injunctive relief because he could not establish "a real and immediate threat" that an officer would choke him again. Id. The Court found that five months had elapsed between the date of the alleged incident and that there had not been any further "unfortunate encounters between Lyons and the police." Id. at 108. Accord NRDC v. EPA, 440 F.3d 476, 483 (D.C. Cir. 2006) (future injury must "substantially probable" and not "purely probablistic"); Langevine v. District of Columbia, 40 F.3d 474, 1994 WL 609454, *2 (D.C. Cir. 1994) (holding injunctive relief for false arrest and imprisonment not available because no future harm could be established)

The decision by the District of Columbia Circuit Court of Appeals in Haase v. Sessions, 835 F.2d at 12, also illustrates this point. In that case, a journalist brought an action against the Commissioner of the United States Custom Service and the Director of the Federal Bureau of Investigation for injunctive and declaratory relief with respect to an allegedly illegal search of his luggage during his return to the United States from Nicaragua. While the Court of Appeals remanded the case to the district court for further consideration, the Court of Appeals stressed that

even if plaintiff could establish that the defendants had a policy of conducting such searches, plaintiffs "must not only demonstrate its existence, but also that they are likely to be subjected to the policy again." Id. at 911.

In this case, plaintiff cannot show that future harm is substantially probable. While TSA admittedly has issued orders directing TSA officers to report evidence of suspected criminal activity to the appropriate law enforcement officers, plaintiff has not established that he is likely to be subject to the policy again. He attempts to meet this requirement by alleging that he will likely be subjected to alleged unconstitutional searches and seizures by TSA agents "because [he] frequently travels by airplane throughout the country carrying cash as part of his duties as the Director of Development of the Campaign for Liberty." (Compl., ¶ 34; see also id. ¶ 6 (alleging plaintiff "frequently travels to events around the country, often transporting significant sums of cash derived from sales of tickets to Campaign events as well as sales of t-shirt, stickers, and political literature").) This allegation is insufficient to establish that future injury is probable because 1) there is no accompanying allegation that plaintiff has been stopped in the past when carrying cash, and 2) it ignores the various conditions which led to the incident at issue. As explained supra at 8, TSA opened the metal box containing the money only because the x-ray image of his carry-on bag was inconclusive. While plaintiff alleges that he often carries large sum of money, he does not allege that he normally carries it in a metal box. Nor does he allege that the amounts of cash he regularly carries when traveling by air are comparable to (or exceed) the amount that he carried on March 29, 2009. Furthermore, TSA referred the matter to the St. Louis Airport Police in accordance with the screening directives then in force because he refused to answer questions and gave evasive answers regarding why he was carrying such a large sum of

money. Thus, in order to trigger another incident, he would not only have to travel by air, he would have to carry a large sum of money in a container that would require physical inspection, and package that currency in a manner that would prompt a security concern due to its bulk.

The speculative nature of this claim is underscored by the fact that it has been over five months since the incident and there have been no allegations of further incidents despite his alleged frequent travels. Nor has he alleged any prior stops by TSA because he was carrying a large sum of money. Moreover, as explained supra at 6-7, TSA has recently issued a revised directive which clarifies the procedures for TSOs to follow when, as here, they discover a large sum of currency. That new guidance makes the likelihood of another incident even more speculative. (Attachment 2 to Switzer Decl. at 6.)

Accordingly, plaintiff's claims should be dismissed for lack of standing.

C. Plaintiff's Challenges to TSA's Orders Are Moot.

Article III of the Constitution limits the federal courts to the resolution of live "cases" and "controversies." U.S. Const., art. III, § 2. This limitation prohibits the court from considering a claim "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). As the Supreme Court has recognized, where a defendant has amended its regulations, "the issue of the validity of the old regulations is moot." Princeton University v. Schmid, 455 U.S. 100, 103 (1982). Accord Forest Guardians v. U.S. Forest Service, 329 F.3d 1089, 1095 (9th Cir. 2003) (case was mooted by the agency's post litigation clarification of policy that superceded a prior policy concerning issuance of temporary permits); American Bankers Assoc. v. Nat'l Credit Union Admin., 271 F.3d 262, 274 (D.C. Cir. 2001) (dismissing as moot a challenge to a regulation that was repealed during

the pendency of the litigation); Nat'l Mining Assoc. v. U.S. Department of Interior, 251 F.3d 1007, 1001 (D.C. Cir. 2001) (revision of regulations during the pendency of litigation mooted a challenge to those regulations); Arizona Public Serv. Co. v. EPA, 211 F.3d 1280, 1296 (D.C. Cir. 2000) (dismissing challenge on mootness after EPA clarification).

In this action, plaintiff seeks to challenge the directives issued by TSA regarding screening of passenger and their luggage. He contends that the directives are invalid because "TSA agents are instructed as matter of standard operating procedure to search for 'contraband' beyond weapons and explosives" and fail to direct them "to limit their search authority to detecting weapons or explosives." (Compl., ¶¶ 31-32.) As explained infra at 32-33, this mischaracterizes those directives. But, even if the TSA directives were unclear or ambiguous at the time of the incident at issue here, TSA has refined and narrowed the procedures to follow when evidence of possible criminal activity is discovered. (Attachment 2 to Switzer Decl.) These revised procedures reiterate that "[s]creening may not be conducted to detect evidence of crime unrelated to transportation security," but now include more detailed instructions on the appropriate procedures to follow when large amounts of currency are found and describe specific factors that suggest when the currency discovered through the otherwise permissible administrative search may be evidence of criminal conduct. Id. at 6. To the extent that the prior version of this directive was susceptible to an unconstitutional interpretation, a point TSA does not conceded, TSA has already revised its policies, practices, and customs regarding screening in a manner that would be consistent with the full scope of any putative injunctive relief to which plaintiff could be entitled.

Thus, plaintiff's challenge or request for relief with respect to the prior directives is moot.[6]

II. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Plaintiff's Fourth Amendment Rights Were Not Violated by TSA.

To accomplish its mission to protect air passengers, Congress charged TSA with screening every passenger and every passenger's property to detect weapons, explosives, or other dangerous items. 49 U.S.C. § 44901. In his complaint, plaintiff does not challenge this authority. Indeed, he cannot. Courts have repeatedly recognized that such searches are valid and reasonable under administrative search doctrine. See, e.g. United States v. Aukai, 497 F.3d 955, 960-61 (9th Cir. 2007) (en banc); United States v. Hartwell, 436 F.3d 174, 179 (3d Cir. 2006); United States v. $557,933.89 in U.S. Funds, 287 F.3d 66, 87 (2d Cir. 2002); United States v. Cyzewski, 484 F.2d 509, 513 (5th Cir. 1973); see also City of Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000); Chandler v. Miller, 520 U.S. 305, 323 (1997).[7] It is specifically because TSA's function at airports is to ensure the safety of the airline travel - rather than law enforcement - that challenges to its conduct at the checkpoints are evaluated, not under the usual standards of reasonable suspicion or probable cause applicable in the law enforcement context, but rather under a standard that assesses whether there is "a favorable balance between 'the gravity of the public concerns served by the [search], the degree to which [it] advances the public interest, and the severity of the

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[6] Plaintiff has no standing to challenge the new directive because he has not and cannot claim any injury caused by the new directive.

[7] Some courts also have approved airport searches on a consent-based rationale. See, e.g., United States v. Henry, 615 F.2d 1223, 1230-31 (9th Cir. 1980); United States v. Mather, 465 F.2d 1035, 1036 (5th Cir. 1972), although more recent decisions disfavor that approach, see, e.g., Aukai, 497 F.3d at 962; Hartwell, 436 F.3d at 180, n.11.

interference with individual liberty.'" Hartwell, 436 F.3d at 178-79 (quoting Illinois v. Lidster, 540 U.S. 419, 427 (2004)). Courts have held uniformly that TSA's screening procedures are minimally intrusive and "'escalat[e] in invasiveness only after a lower level of screening disclose[s] a reason to conduct a more probing search.'" Aukai, 497 F.3d at 962 (quoting Hartwell, 436 F.3d at 180). The fact that the search escalates in this manner after some unexpected but potentially problematic discovery does not upset this analysis. See, e.g., Hartwell, 436 F.3d at 181 n.13 (collecting authority for the proposition that the discovery of items apart from weapons and explosives does not invalidate a search at an airport checkpoint).

Plaintiff's apparent contention that TSA officers violated the Fourth Amendment by asking him questions regarding the money found in the metal box and referring the matter to the St. Louis Airport Police is without merit. In effect, plaintiff contends that TSA must ignore anything it might find in its limited search that are not weapons or explosives, even if the item in question may indicate possible criminal activity. This particular theory has been rejected repeatedly by courts in the context of motions to suppress evidence found in such searches in criminal cases. Aukai, 497 F.3d at 959-61 (affirming denial of motion to suppress methamphetamine); Hartwell, 436 F.3d at 181 n.13 (affirming denial of motion to suppress crack cocaine); United States v. Marquez, 410 F.3d 612, 617 (9th Cir. 2005) ("The screening at issue here is not unreasonable simply because it revealed that Marquez was carrying cocaine rather than C-4 explosives."). $557,933, 287 F.3d at 81-87 (affirming denial of motion to suppress financial instruments).

Even assuming that the questioning here could only pass muster if permissible under the Fourth Amendment standards applicable to law enforcement activities, courts have held that "the brief detention of [a passenger's] luggage . . . in order to allow trained police officers to 'quickly

confirm or dispel'" suspicion of possible criminal activity does not violate the Fourth Amendment as long as: (1) "the scope of that initial search . . . was no more intrusive than necessary to accomplish its purpose of detecting weapons or explosives, " and (2) there was a "reasonable suspicion" of possible criminal activity. $557,933, 287 F.3d at 81, 86-87 (internal quotations and citations omitted). Two recent decisions demonstrate in unambiguous fashion that when a search for weapons and explosives objects uncovers indicia of other criminal activity, reasonable steps may be taken to address wrongdoing.

For example, in United States v. $557,933, airport security personnel opened a passenger's briefcase because they could not determine there was no dangerous item therein based on an x-ray image, which revealed a large number of unsigned, undesignated money orders. Id. at 71-72. Because they believed this discovery to be indicative of possible criminal activity, the security officers detained the briefcase in order for the Port Authority Police, which has primary law enforcement jurisdiction over the airport, to investigate further. There, as here, the passenger argued that the purpose of the airport screening was to search for weapons or explosives and that the security personnel "were required to ignore anything else that they might have found." Id. at 81. The Second Circuit, in a decision authored by then-Judge Sotomayor, rejected this claim, holding that "[a]s long as the scope of that initial search comported with the Fourth Amendment – i.e., was no more intrusive than necessary to accomplish its purpose of detecting weapons or explosives – then it is of no constitutional moment that the object found was not what was sought." Id. at 81-82. The court found that "the presence at the airport of a person carrying a briefcase full of blank money orders of small (at least relative to the total value of the money orders) denominations would give rise to a well-founded suspicion that some kind of 'criminal

activity [was] afoot.'" Id. at 87 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)). The court found that "[d]etaining the briefcase briefly so that trained law enforcement personnel could investigate further was completely proper, especially when one considers that failing to have done so would likely have resulted in claimant and his money orders disappearing altogether." Id. Accord United States v. Hooper, 935 F.2d 484, 492-98 (2d Cir. 1991) (upholding a brief detention of an traveler's luggage on reasonable suspicion that the luggage contained narcotics pending an investigation to establish probable cause).

Then-Judge Alito's decision for the Third Circuit in United States v. Hartwell, 436 F.3d at 178-81, is to the same effect. In that case, the defendant set off a magnetometer when he walked through security at the Philadelphia airport. The TSOs then used a magnetic wand to pinpoint any metal on his person. They detected something in the pocket of his pants and discovered that the object was crack cocaine. The TSOs called the Philadelphia police, who conducted a further search of the defendant and found two additional packages of drugs and about $3000 in cash. The Third Circuit found that the search did not violate the Fourth Amendment. The Third Circuit held that "[e]ven assuming that the sole purpose of the checkpoint was to search only for weapons and explosives, the fruits of the search need not be suppressed so long as the search itself was permissible." Id. at 181 n.13. The court explained that the search by TSA of his pockets was permissible "[s]ince the object in Hartwell's pocket could have been a small knife or a bit of plastic explosives." Id.

The actions taken by TSOs in this case are consistent with the actions of security screeners upheld by $ 557,933 and Hartwell. First, plaintiff presents no plausible claim that the scope of the search in this case was impermissibly broad. As plaintiff concedes, TSA has the authority to

search for weapons and explosives. (Compl., ¶13.) In this case, TSA conducted a routine x-ray screening of plaintiff's bag. As with the briefcase in $557,933, the results of the x-ray screening showed a metal box but the contents were inconclusive. Therefore, the TSO opened both the bag and the metal box in order to insure that they did not contain a weapon, explosives, or other dangerous items. Courts have consistently found that where, as here, an x-ray scan is inconclusive, a physical search of the bag or object is permissible. Tobert v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002) (abrogated in part by Aukai, 497 F.3d at 962) ("[A]n x-ray scan may be deemed inconclusive justifying further search even when it doesn't affirmatively reveal anything suspicious."); United States v. Pulido-Baquerizo, 800 F.2d 899, 901 (9th Cir. 1986) (finding a physical search of bag after inconclusive x-ray was permissible). Thus, there can be no dispute that the scope of the initial search "was no more intrusive than necessary to accomplish its purpose of detecting weapons or explosives." $557,933, 287 F.3d at 81. Indeed, "[g]iven the myriad of devices which threaten air safety, anything less than a thorough search of [plaintiff's] bag would have been dangerously incomplete." United States v. Wehrli, 637 F.2d 408, 410 (5th Cir. 1981).

Second, the discovery of the cash in the box and plaintiff's refusal to answer to basic questions regarding the money supported a reasonable suspicion that plaintiff may be involved in criminal activity. "Reasonable suspicion" does not require either probable cause or evidence of a direct connection linking the suspect to a specific crime. United States v. Cortez, 449 U.S. 411, 417-18 (1981). Instead, an investigatory Terry[8] stop "requires only a 'minimal level of objective

[8] Terry v. Ohio, 392 U.S. 1 (1968) (holding that brief investigatory "stop" by law enforcement predicated on reasonable suspicion of criminal activity does not violate Fourth Amendment).

justification.'" United States v. Edmonds, 240 F.3d 55, 59 (D.C. Cir. 2001) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)). An officer may initiate such a stop "based not on certainty but on the need to 'check out' a reasonable suspicion." United States v. Clark, 24 F.3d 299, 303 (D.C. Cir. 1994). When determining whether a Terry stop was supported by reasonable suspicion, a court does not separately scrutinize each factor. Instead, the issue is whether the totality of circumstances give rise to "a well-founded suspicion that some kind of 'criminal activity [may be] afoot.'" $557,933, 287 F.3d at 87 (quoting Terry, 392 U.S. at 30). In evaluating the circumstances, courts must give "due weight" to the officer's inferences and evaluate the totality of the circumstances." United States v. McCoy, 513 F.3d 405, 412 (4th Cir. 2008) (citing Onelas v. United States, 517 U.S. 690, 699 (1996)).

Here, the discovery of a large amount of cash combined with plaintiff's statement that he did not know how much was in the box certainly created suspicion. As Officer Shelton explained after plaintiff finally admitted the amount of currency in the box, "carrying $4700 with you – it's not a usual thing." (Tr. at 6.) Indeed, courts have held that possessing large amounts of cash is "strong evidence" of a connection with illegal drug activity or other criminal activity. See, e.g., U.S. v. $84,615 in U.S. Currency, 379 F.3d 496, 501-502 (8th Cir. 2004); United States v. $215,300, 882 F.2d 417, 419 (9th Cir. 1989). Thus, courts have found that carrying large sums of cash can be a factor that provides a basis for an investigatory stop.[9] For example, in upholding an

[9] Both the version of MD 100.4 in effect at the time of the underlying incident in this case and the version currently in force are consistent with this position. Under the version in effect on March 29, 2009, screeners could conduct questioning as necessary "to determine compliance with TSA regulations" regarding screening. (Attachment 1 to Switzer Decl. at 6.) Likewise, under the revised MD 100.4, passengers may be asked questions about currency in their possession "when warranted by security needs." (Attachment 2 to Switzer Decl. at 6.) In either case, the questioning is permissible when necessary to resolve obstacles to concluding the pre-

investigatory stop under Terry, the Supreme Court found that the fact that an individual paid $2100 in cash for an airline ticket with a roll containing twice that amount was "out of the ordinary" because "few vacationers carry with them thousands of dollars." United States v. Sokolow, 490 U.S. 1, 8-9 (1989). Similarly, in United States v. Chhein, 266 F.3d 1, 8 (1st Cir. 2001), the court found that $2000 discovered during a consensual pat-down search during a traffic stop justified a further investigation under Terry without an warrant.[10]

Plaintiff's evasive answers to simple questions regarding the amount of money and why he was carrying such a large amount of cash only added to the suspicion. (Tr. at 1-8.) Rather than answering those questions, plaintiff responded by asking whether he was legally required to tell him that. Id. As courts have recognized, "implausible and evasive responses" can create "even more reasons to investigate." United States v. Richards, 500 F.2d 1025, 1029 (9th Cir. 1974). Accord United States v. McCarthy, 77 F.3d 522, 531 (1st Cir. 1995) ("[W]hile it is clear that [a person] had a constitutional right not to answer any questions, the fact that his responses were evasive and, at times, defiant is relevant in evaluating the scope of the officers' conduct.").

Courts have found that large amounts of cash, when combined with evasive behavior, can be a basis for a reasonable suspicion to further question someone. For example, in United States v. $80,633.00, 512 F. Supp. 2d 1196, 1204 (M.D. Ala. 2007), a TSA agent discovered a large

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flight screening.

[10] The fact that the directive gives $10,000 as an example of an amount meriting referral does not mean that TSA's action were improper. As explained supra at 8-9, TSA officers did not know the exact amount of money because plaintiff refused to tell them. Moreover, as the examples cited above indicate, even amounts less than $10,000 can be considered suspicious, especially where as here, plaintiff refused to provide any explanation for carrying such a large sum of money, and TSA officers should not be expected to count large amount of currency.

amount of cash in a shaving bag located in a passenger's carry-on. The TSA agent noticed that the passenger began behaving nervously when the money was discovered, and the agent reported it to the airport police. The court concluded that this behavior was "sufficient to justify a TSA agent in briefly detaining him." Id. Similarly, in United States v. $191,910 in U.S. Currency, 772 F. Supp. 473, 478 (N.D. Cal. 1991), the court found that the discovery of approximately $15,000 in cash combined with evasive answers as to whom the money belonged provided reasonable suspicion for the agent to conclude that some criminal activity may be afoot. See also United States v. Cottman, 497 F. Supp. 2d 598, 604 (D. Del. 2007) (finding that $500 in cash found on a person known by the officer to be on probation, who was stopped in a high drug area with a person suspected of dealing drugs and who gave evasive answers to questioning amounted to reasonable suspicion to justify further searches). Under the totality of the circumstances, TSA acted reasonably in referring the issue to the police to investigate.

Third, the "detention" by the TSA officers of plaintiff and his box until the St. Louis Airport Police arrived was "brief," lasting only approximately two minutes. As with the briefcase in $557,933, it took the police officers less than two minutes to respond to investigate the matter. Compare (Tr. at 1-2) with 287 F.3d at 66. Such a brief detention "demonstrat[es] both diligence and the minimal nature of the detention." 287 F.3d at 66. Plaintiff tries to obscure this fact by suggesting that the St. Louis Airport Police "were acting pursuant to deputation agreement with the TSA." (Compl., ¶ 24.) While TSA has the authority to "deputize a State or local law enforcement officer to carry out Federal airport security duties," 49 U.S.C. § 44922, the police here were not acting in that capacity. Instead, like the airport police in $557,933, the police officers were acting pursuant to their authority as police officers for the St. Louis Airport Police.

See supra at 9. As the transcript demonstrates, once they arrived, it was the police (not TSOs) who were asking plaintiff the questions. Moreover, their questions indicate that they were asking him questions related to possible criminal activities, not assisting in the search for weapons or explosives. Tr. at 6-9. Indeed, plaintiff's entire claim is predicated on the fact that their questions related to criminal matters. Accordingly, plaintiff's characterization of the police as "the TSA-led interrogation team" (Compl., ¶ 25) simply does not square with the facts.[11]

In sum, the brief questioning and detention of plaintiff by TSA officers to determine whether the St. Louis Airport Police needed to be called in order to investigate the suspicion raised by the large amount of cash found during a permissible search did not violate the Fourth Amendment. As in $557,933 and Hartwell, TSA officers are not required to turn a blind eye to evidence of possible criminal activity.

The cases in which the courts have excluded items found during screenings at airports under the Fourth Amendment are not analogous. In United States v. Fofana, 620 F. Supp. 2d 857 (S.D. Ohio 2009), the district court found that the search violated the Fourth Amendment because its exceeded the permissible scope of the search. The TSO admitted that at the time she found the

[11] Even if the entire length of the detention was attributed to TSA, the length is still relatively brief, lasting only about twenty minutes. As the Second Circuit noted in $557,933, 287 F.3d at 86 n.16, courts have upheld Terry-type detentions of periods of longer than twenty minutes. See United States v. Sharpe, 470 U.S. 675, 687 (1985) (upholding a 20-minute Terry investigation of luggage because suspect's action contributed to the delay); Hopper, 935 F.2d at 495-98. In this case, as the police explained in the end, the length of the detention was attributed entirely to his evasive answers. (Tr. at 11.) As the transcript indicates, even after the officers from the St. Louis Airport Police arrived to try to resolve the matter, plaintiff continued to refuse to answer basic questions. See supra at 10–11. Indeed, he further added to the suspicion by giving contradictory answers regarding whether the money belonged to him. Although he initially had said that the money belonged to him, he later stated that it was "in [his] possession." (Tr. at 9.)

envelopes containing the passports, the bags already had been through the x-ray machine and had been checked for explosive residue. She further stated "that when she opened the envelopes she did not believe that they contained weapons, but instead was looking for contraband." Id. Similarly, in United States v. $124,579 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989), the court invalidated a seizure following an airport search not because the search revealed evidence unrelated to the purpose of the search, but because the evidence indicated that the security personnel had been given financial incentives to search more intensively than necessary for security reasons in hope that they would find evidence of criminal wrongdoing. Neither of these fact patterns are present here.

Accordingly, this Court should dismiss plaintiff's claim that the questioning and detention of plaintiff by TSA violated the Fourth Amendment.

B. TSA Did Not Exceed its Statutory Authority.

Plaintiff's claim that TSA's actions in this case exceeded its statutory authority also has no merit. Pursuant to 49 U.S.C. § 44901(a), TSA is mandated to "provide for the screening of all passengers and property, including . . . carry-on and checked baggage . . .that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation." 49 U.S.C. § 44901(a). In addition, TSA is directed "to prescribe regulations to protect passengers and property . . . against an act of criminal violence or aircraft piracy," including "a uniform procedure for searching and detaining passengers and property" to ensure the safety and efficient treatment of passengers by TSA and law enforcement. 49 U.S.C. § 44903(b). TSA is also responsible for requiring each operator of an airport to "establish an air transportation security program that provides a law enforcement presence and capability at each of

those airports that is adequate to ensure the safety of passengers" through the use of "qualified State, local and private law enforcement personnel." 49 U.S.C. § 44903(c).

The actions taken by the TSA officers in this case are fully consistent with that authority. Plaintiff's contrary claim is predicated upon the erroneous assumptions that TSA agents "are instructed as a matter of standard operating procedure to search for 'contraband' beyond weapons and explosives," and "receive no policy, protocol, or training directing them to limit their search authority to detecting weapons or explosives." (Compl., ¶¶31-32.) Plaintiff can point to no source for such a policy or practice. In fact, this claim is directly contradicted by the version of TSA Management Directive 100.4 in place at the time of the incident. (Attachment 1 to Switzer Decl.) On its face, it states:

> All administrative or special needs search are to be tailored to the transportation security purpose for which they are conducted. These searches should be designed to be minimally intrusive, in that they should be no more intensive or extensive than reasonably necessary to detect threat items or to determine compliance with TSA regulations.

Id. at 6. The directive further states that "[w]hen conducting an administrative or special needs search, the purpose of the search is to detect threat items or to determine compliance with TSA regulations." Id. The Standard Operating Procedures issued by TSA regarding screening are consistent with this purpose. Switzer Decl., ¶¶ 4-5; Bardmass Decl., ¶ 6.

While the purpose of the screening searches is to find weapons or explosives, TSA recognizes that during the course of such screening, a TSO may discover contraband or objects which may indicate possible criminal activity.[12] TSA has thus issued Operations Directive 400-

[12]As courts have noted at various points in the three decades in which pre-flight screening has been conducted at airports,

54-2 "to provide guidance to ensure nationwide consistency" as to the appropriate action to take when such items are found. (Attachment 3 to Switzer Decl.) This directive states that "the matter should be referred to the local Law Enforcement Officers as appropriate." Id.; see also (Attachments 1 to Switzer Decl. (TSA Management Directive No. 100.4, stating that "[e]vidence of crimes shall be referred to a law enforcement officer for appropriate action), and 2 (Revised TSA Management Directive No. 100.4).) These directives are consistent with TSA's authority to establish "a uniform [screening] procedure." 49 U.S.C. § 44903(b).

Plaintiff's effort to create a different impression of TSA's purpose and intent in screening passengers and their accessible property by misquoting statements made by TSA's Chief Counsel Francine Kerner (Compl., ¶ 30) is unpersuasive. That statement, which expanded on TSA's screening policies in effect on March 29, 2009, explains that "[i]n reacting to potential security problems or signs of criminal activity, TSA officers are trained to ask questions and assess passenger reactions, including whether a passenger appears to be cooperative and forthcoming in responding." See http://www.tsa.gov/blog/2009/travel-with-large-amounts-of-cash.html. (emphasis added). She explains further that "[w]hen presented with a passenger carrying a large sum of money through the screening checkpoint, the TSA officer will frequently engage in

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> The mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable, post facto. "Of course, routine airport screening searches will lead to discovery of contraband and apprehension of law violators. This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional."

United States v. Marquez, 410 F.3d 612, 617 (9th Cir. 2005) (quoting United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973)). Accord, e.g., United States v. Edwards, 498 F.2d 496, 496 & n.1 (2d Cir. 1974) (identifying appellate decisions as early as 1971 involving discoveries of criminal activity as a result of otherwise permissible pre-flight searches).

dialogue with the passenger to determine whether a referral to law-enforcement authorities is warranted." Id. "The TSA officer may consider all circumstances in making the assessment, including behavior and credibility of the passenger. Thus, a failure to be forthcoming may inform the TSA officer's decision to call law enforcement authorities." Id.

When read in full, the statement is thus consistent with the directives at issue, as well as case law interpreting the Fourth Amendment in this context. Contrary to plaintiff's allegation, the statement does not suggests that "TSA believes that its mission includes detecting 'signs of criminal activity.'" (Compl., ¶ 30.) Instead, she simply states that "TSA officials routinely come across evidence of criminal activity at the airport checkpoint. Examples include evidence of illegal drug trafficking, money laundering, and violations of currency reporting requirements prior to international flights."

The actions taken by the TSOs in this case were fully consistent with those directives and TSA's statutory authority. Plaintiff makes no allegation in his Complaint that the search of plaintiff's luggage was broader than necessary to insure that his bag did not contain a weapon or explosives. Indeed, he cannot. As explained supra at 8, because the x-ray screening was inconclusive, the TSO opened his bag and found a metal box. The TSO opened the box to insure that it did not contain a weapon or other prohibited item. Thus, contrary to plaintiff's claim, this is not a case in which the TSO was looking for contraband. Instead, the TSO happened upon the cash during his limited search for weapons and explosives. Because the amount was "out of the ordinary," United States v. Sokolow, 490 U.S. at 8, he asked some preliminary questions to try to determine whether the plaintiff had an explanation for carrying this large sum of cash. (Tr. at 1.) When plaintiff refused to answer his questions, the TSOs referred the matter to the St. Louis

Airport Police. Id.

In short, TSA's searches are not designed to look for signs of illegal activity, but if during a search for weapons and explosives, evidence of possible illegality presents itself, TSA instructs its officers to report the matter to law enforcement just as any other citizen would. Because TSA acted within its statutory authority, plaintiff's claim that TSA exceeded its statutory authority has no merit and should be dismissed.

III. EVEN IF PLAINTIFF HAD STANDING AND STATED A CLAIM WITH RESPECT TO THE PARTICULAR ACTIONS TAKEN IN THIS CASE, HE IS NOT ENTITLED TO ANY INJUNCTIVE RELIEF.

Even if plaintiff had standing and stated a claim with respect to the particular actions taken in this case, he is not entitled to any injunctive relief. On its face, the Complaint seeks "to enjoin defendant, her officers, agents, servants, employees and all persons in active concert or participation with her who receive actual notice of the injunction, from authorizing or conducting suspicionless pre-flight searches of passengers or their belongings for items other than weapons and explosive." (Compl, Prayer for Relief.) Such relief, however, does not match the claims raised in the Complaint. While plaintiff makes bald allegations that TSA does not limit its searches to weapons or explosives (Compl., ¶¶ 32-33) plaintiff does not allege that the scope of the search of his belongings was more intrusive than necessary to search for weapons or explosives. Indeed, he cannot. See supra at 22. Instead, his claim is that it was TSA's alleged "detention and interrogation," which violated the Fourth Amendment and exceeded TSA's statutory authority. (Compl., ¶¶ 35-38.) Thus, even if plaintiff had standing and stated a claim with respect to the actions taken by the TSA employees after the discovery of the large sum of unexplained money, he has no standing to seek an injunction limiting the scope of TSA's searches

because such relief does not redress his alleged injuries. Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663-64 (D.C. Cir. 1996).

If, on the other hand, plaintiff seeks an injunction requiring TSA and its employees to turn a "blind eye" to any item found in a search other than a weapon or explosives, no matter the nature of the item or the circumstances surrounding it, such relief likewise would be inappropriate. As the Supreme Court has stressed, an injunction is an extraordinary remedy, and "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Weinberger v. Romero-Baccelo, 456 U.S. 305, 313 (1982). Moreover, it is well established that the scope of any injunctive relief should be no more broad than necessary to remedy the particular injury to the plaintiff. See, e.g., Lewis v. Casey, 518 U.S. 343, 357 (1996); Califano v. Yamasaki, 442 U.S. 682, 702 (1979). These limitations are especially appropriate where the injunction implicates executive functions and decisionmaking. See Rizzo v. Goode, 423 U.S. 362, 366-70 (1976) (finding district court's imposition of a "comprehensive program" governing police misconduct complaints constituted "an unwarranted intrusion by the federal judiciary" into law enforcement's "discretionary authority" because plaintiff did not show that the alleged police misconduct was the result of a deliberate plan or policy); Alliance to End Repression v. Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984) (en banc) ("Fine tuning investigative guidelines is the responsibility of the executive, not us").

The Supreme Court's decision in Lewis illustrates these limitations. In that case, inmates brought a civil rights action alleging that Arizona prison officials violated their constitutional right of access to the courts. Although the district court found that only two inmates who were either illiterate or a non-English speaker suffered any actual injury, it responded by mandating a broad,

systemwide injunction requiring changes in prison libraries and legal assistance programs. The Supreme Court reversed, finding that granting a remedy beyond the scope of their injuries was inappropriate. Id. at 360.

The decision by the Seventh Circuit in Rahman v. Chertoff, 530 F.3d 622 (7th Cir. 2008), is to the same effect. In that case, plaintiffs filed a class action against the Secretary of Homeland Security and various government officials asserting that delays experienced in reentry to the United States from travel abroad due to watch lists violated the Fourth and Fifth Amendment. The district court certified two nationwide classes. The Seventh Circuit reversed, finding that class certifications were precluded as named representatives' claims were not typical of class members' claims. The court found that plaintiffs are only "entitled to relief that will redress any discrete wrongs done them" and that claims regarding "improper arrests are best handled by individual suits for damages (and potentially through the exclusionary rule), not by a structural injunction designed to make every error by the police an occasion for a petition to hold the officer .. in contempt of court." Id. at 626-27. The court explained that:

> [d]ecisions favorable to particular plaintiffs will have their effect in the normal way; through the force of precedent. If this seems a modest vision of the judiciary's role, we answer that modesty is the best posture for the branch that knows the least about protecting the nation's security and that lacks the full kit of tools possessed by the legislative and executive branch.

Id. at 627-28.

The same reasoning applies here. As the courts have recognized, the Fourth Amendment does not require TSA to turn a blind eye to items that may indicate that possible criminal activity is afoot. See supra at 23-25. Further, even if the determination of whether the actions taken by

the TSA were permissible turns on whether the questioning and referral even constituted a "detention" and if so whether there was "reasonable suspicion" to support a Terry stop investigation, those inquiries turn on the facts of the particular case. Thus, even if the Court were to find that TSA's actions in this particular case violated the Fourth Amendment or exceeded its statutory authority, injunctive relief is not appropriate. Instead, as the court found in Rahman, the boundaries of appropriate actions should be developed through the force of precedent. Moreover, like the relief in Rizzo, Lewis, and Rahman, the injunctive relief sought by plaintiff here also treads upon sensitive security functions that are committed to the TSA. Such an injunction would entangle the Court in the day-to-day factual determinations made by the TSA regarding referrals to law enforcement authorities. Accordingly, this Court should decline to grant any injunctive relief to plaintiff in this case.

CONCLUSION

For the above stated reasons, this Court should dismiss plaintiff's claims for lack of jurisdiction and for failure to state a claim or, in the alternative, should grant summary judgment for defendant.

Respectfully Submitted,

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