[ORAL ARGUMENT NOT YET SCHEDULED]

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

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTIVE RELIEF

Respondents Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, et al., hereby oppose petitioners' emergency motion for injunctive relief pending adjudication of their petition for review challenging respondents' advanced imaging technology (AIT) program for screening passengers at airport checkpoints.[1] Particularly in light of the attempted Detroit

[1] For the Court's information, a detailed description of the AIT program can be found at www.tsa.gov/approach/tech/ait/index.shtm.

airplane bombing of December 25, 2009, and other recent events, it is readily apparent that the emergency relief requested by petitioners poses a substantial risk to the public, and petitioners have failed to make the compelling showing required to secure the extraordinary relief they seek. Petitioners' lack of actual harm is clearly demonstrated by the fact that they are not required to undergo AIT airport screening; under agency operating protocols, petitioners may opt out of AIT screening and undergo an alternative screening method. Accordingly, petitioners' emergency motion should be denied.

REASONS WHY THE MOTION SHOULD BE DENIED

1. At the outset, we stress that notwithstanding petitioners' rhetoric, there is no actual "emergency" here. The Transportation Security Administration (TSA) has been using AIT on a trial basis at select airports for several years, and the ongoing process of rolling out the program on a nationwide basis creates no exigency.[2] There will be no sudden change in agency policy or procedure on or about July 13, the date that petitioners asserted as the deadline for judicial action. If petitioners want an

[2] We note also in this regard that the websites of both petitioner Electronic Privacy Information Center and petitioner Bruce Schneier indicate that they have been monitoring the development of this program for approximately the last five years. See www.epic.org; http://www.schneier.com/blog/archives/2009/05/me_on_full-body.html; http://www.schneier.com/blog/archives/2005/06/backscatter_x-r.html.

expedited briefing and argument schedule for their petition for review, we certainly have no objection, and ask only that the Government receive 30 days from the filing of petitioners' opening brief to file our respondents' brief. In other words, although there is no emergency here, we nevertheless stand ready, willing and able to meet any reasonable expedited briefing and argument schedule the Court sets.

2. Petitioners seek a mandatory injunction to block implementation of the AIT program.[3] This Court should deny the injunction because petitioners have not made the showing necessary to justify "the extraordinary remedy of injunction." Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 376-77 (2008) (quotation omitted); see also Munaf v. Geren, 128 S. Ct. 2207, 2218-19 (2008).

The four criteria that must be addressed with respect to a motion for emergency relief are: "(I) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. R. 18(a)(1). It is of course well settled that extraordinary relief is to be granted only if the moving party clearly demonstrates that the factors warranting such

[3] Although petitioners style their motion as a request for a stay of an agency rule, in reality it is a request to enjoin the AIT program pending disposition of their petition for review.

relief are satisfied. See, e.g., Winter, supra; Munaf, supra; Federal Trade Commission v. Exxon Corp., 636 F.2d 1336, 1343 (D.C. Cir. 1980).

3. With respect to the merits, TSA's letter of May 28, 2010 (TSA May 2010 Letter) to petitioners' counsel (exhibit 4 to petitioners' emergency motion) thoroughly addresses and effectively refutes petitioners' various contentions. Petitioners cannot establish a substantial likelihood of success on the merits.

Regarding petitioners' claim under the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551, 553-59, TSA correctly stated that it "does not interpret [petitioners'] letter [requesting immediate suspension of the AIT program] to seek a rulemaking or to constitute a petition under 5 U.S.C. § 553." TSA May 2010 Letter at 1 n.1. A request to shut down a program is not a "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Contrary to petitioners' intimation, there is no "rule" at issue here. TSA has not issued any "rule" as that term is defined in 5 U.S.C. § 551(4), nor have petitioners requested the issuance, amendment or repeal of one.[4]

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[4] The APA states that:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

(continued...)

TSA also accurately informed petitioners that it "is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures" – especially given the agency's statutory mandate under 49 U.S.C. § 44925 to develop and deploy technologically advanced screening equipment. See TSA May 2010 Letter at 1. The more widespread use of the already deployed, but more effective screening equipment at issue here does not fall within the APA rulemaking framework. A decision to deploy AIT technology for security purposes is no more a "rule" subject to APA notice-and-comment rulemaking than is a decision by the Secret Service to more widely deploy upgraded surveillance equipment to monitor the White House perimeter, or a decision by the Marshals Service to place better metal detectors at the entrances to federal courthouses.

Petitioners fare no better with regard to their Fourth Amendment claim. As the agency stated, "TSA screening protocols at airport checkpoints have been upheld by the courts as 'special needs searches' or 'administrative searches' under the Fourth

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[4](...continued)

> requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. § 551(4).

Amendment." TSA May 2010 Letter at 6 (citing United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc), United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006) (Alito, J.), and Torbei v. United Airlines, 298 F.3d 1087 (9th Cir. 2002)). Such searches are prophylactic in nature and designed to advance the vital goal of protecting the public, rather than being focused on criminal law enforcement and directed at apprehending specific suspects; they do not require either a warrant or individualized suspicion. See id. at 6-8 (citing, inter alia, NTEU v. Von Raab, 489 U.S. 656 (1989) (upholding random drug testing of armed Customs officers), and Cassidy v. Chertoff, 471 F.3d 67, 85 (2d Cir. 2006) (Sotomayor, J.) (upholding security screening of ferry passengers)).

Furthermore, TSA respects the fundamental values of individual autonomy and privacy by allowing individuals to request an alternative method of screening (a patdown search) if they choose to do so, and by ensuring – contrary to petitioners' assertion – that AIT images will not be stored, transmitted or otherwise misused.[5] Indeed, prior to deployment at checkpoints, AIT machines are actually rendered incapable of storing and transmitting images. See TSA May 2010 Letter at 9.

[5] This is but one of several of petitioners' factual claims with which respondents strongly take issue, but in the interest of brevity we will not detail those disagreements in this summary submission.

Petitioners' invocation of the Privacy Act, 5 U.S.C. § 552a, is also misguided. As TSA has explained, the Privacy Act does not come into play here, because all Privacy Act requirements "are linked to the agency maintaining a system of records," and "TSA does not maintain a system of records by using AIT." TSA May 2010 Letter at 8. Far from being part of a "system of records" for Privacy Act purposes, "AIT does not collect and retrieve information by a passenger's name or other identifying information assigned to that individual, nor do we link any AIT images to any personally identifying information about the individual, such as name or date of birth"; moreover, "images are not retained and all images are immediately deleted after AIT screening is complete." Id. The AIT program thus does not implicate the Privacy Act.

By the same token, petitioners' claim that the Chief Privacy Officer of the Department of Homeland Security (DHS) failed to fulfill the statutory mandate to protect privacy set forth in 6 U.S.C. § 142(1) is equally wide of the mark. The DHS Chief Privacy Officer prepared an initial Privacy Impact Assessment (PIA) dated January 2, 2008, a subsequent PIA dated October 17, 2008, and a PIA Update dated July 23, 2009, concerning the technology at issue here (the latter two documents are available online at http://www.dhs.gov/ files/publications/editorial_0511.shtm#14, but for the Court's convenience we attach all three of them to this response, as

Exhibits 1, 2 and 3, respectively). Petitioners do not mention the latter document, although it demonstrates that the DHS Chief Privacy Officer has continued to monitor this subject and has also striven for maximum transparency in notifying the public with respect to changes in the AIT program. See Exhibit 3 at 1 ("Reasons for this Update" section). Thus, petitioners are wrong in asserting that the DHS Chief Privacy Officer has been derelict regarding this important program.

Nor is there merit to petitioners' contention that the AIT program violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq.[6] As TSA stated, the agency's "decision to employ AIT would not implicate the RFRA unless it is deemed to substantially burden an individual's exercise of religion" (TSA May

[6] It is highly questionable whether petitioners – a secular organization and two individuals who do not assert a personal religious objection to AIT screening – have standing to raise RFRA claims. A party generally lacks standing to assert the rights and interests of others, or to complain of injuries that affect others. See, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975) ("A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). It is not immediately clear why these petitioners should be allowed to claim third-party standing on behalf of religious groups and/or individuals that have not chosen to join petitioners' action. See also Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (stating that "the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not"); id. at 116 (observing that Supreme Court has generally required the existence of "some genuine obstacle" to an individual's assertion of his or her own rights before it will allow them to be asserted by a third party, because only then does the individual's "absence from court los[e] its tendency to suggest that his right is not truly at stake, or truly important to him").

2010 Letter at 9, citing Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008)) – which AIT does not do, given that passengers can opt out of AIT screening in favor of a pat-down search, and TSA informs passengers of this fact. See attached Exhibits 4 and 5 (TSA signs stating that "use of this technology is optional"; also available online at http://www.tsa.gov/approach/tech/ait/how_it_works.shtm). Furthermore, even assuming arguendo that it imposes a substantial burden on religious exercise, AIT is necessary to further the compelling governmental interest in protecting the public, and therefore passes muster under RFRA. See TSA May 2010 Letter at 10.

4. Given the nature of the AIT program, petitioners face no likelihood of irreparable harm. The program is designed to respect individual sensibilities regarding privacy, modesty and personal autonomy to the maximum extent possible, while still performing its crucial function of protecting all members of the public from potentially catastrophic events. The opt-out provision and the operating protocols requiring immediate deletion of images and preventing their misuse highlight the AIT program's sensitivity to potential concerns on the part of passengers. See May 2010 TSA Letter at 8. Petitioners have not shown that agency implementation of a system with these privacy-respecting and privacy-protecting features creates a significant risk of irreparable harm to members of the flying public, and their anecdotal assertions

furnish no basis for .shutting down this essential transportation security program. See TSA May 2010 Letter at 4 (stating that "AIT screening is widely accepted by the traveling public," as shown by poll results and the infinitesimal number of complaints that TSA has received among "the millions of passengers screened using AIT").

5. The Supreme Court has stressed that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 129 S. Ct. at 376-77 (quotation omitted). The Court has further emphasized "the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction." Id. at 378. In the instant case, "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of" TSA. See id.

The interests of third parties and the public interest militate heavily against the injunction petitioners seek. In view of the attempted Christmas Day 2009 airliner bombing in Detroit and the August 2006 London liquids plot[7] (not to mention the September 2009 New York subway bombing plot and the May 2010 attempted Times

[7] See John F. Burns, 3 Britons Convicted in Plot to Blow Up Airliners After Series of Trials, N.Y. Times, July 9, 2010, at A6 (discussing London plot and stating that "most of the potential toll of 1,500 to 2,000 victims were likely to have been Americans," and that "[t]he seven flights singled out by the plotters for attack on a single day . . . were all flown by American or Canadian airlines and destined for New York, Washington, Chicago, San Francisco, Toronto and Montreal").

Square bombing, which did not involve aviation but nonetheless manifested the same intent and determination to do grievous harm on a very large and visible scale), the importance of the AIT program is readily apparent and can hardly be gainsaid. The possibility of harm to third parties from enjoining the AIT program is very real, and the requested injunction therefore would be palpably contrary to the public interest.

6. Finally, as TSA's lengthy and thorough letter of May 28, 2010 to petitioners shows, respondents do not take lightly the concerns that petitioners raise in their motion, and are conscientiously striving to balance the interests in security, liberty, privacy and personal dignity that are involved in this matter. TSA has carefully analyzed petitioners' legal arguments, however, and has shown that they are unfounded. See TSA May 2010 Letter. Quite apart from that fact, though, the stakes are simply too high to grant the extraordinary relief that petitioners seek in their emergency motion. Considerations of transportation security and the public interest mandate denial of petitioners' request.

In sum, under the relevant standard, no injunction pending review should be issued in the instant case. Petitioners have failed to make the strong showing required for the extraordinary relief they seek.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2010, I caused the foregoing Opposition to Emergency Motion for Injunctive Relief to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made automatically upon the following CM/ECF participants:

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/s/ John S. Koppel
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