Case No. 15-2356

United States Court Of Appeals
for the First Circuit

SAI
Petitioner

v.

DAVID P. PEKOSKE,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR
OF THE TRANSPORTATION SECURITY ADMINISTRATION
Respondent

Petition for Review of Agency Orders Under 49 U.S.C § 46110

OPENING BRIEF OF PETITIONER SAI

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INTRODUCTION

When Congress created the U.S. Transportation Security Administration to protect our nation against a recurrence of September 11th, 2001-style attacks, it entrusted the agency with exceptional privileges to allow it to accomplish its mission unimpeded by the red tape that encumbers most of the rest of the government. First, TSA was given authority to conduct the most comprehensive administrative search program in the nation's history in order to prevent weapons, explosive, and incendiaries ("WEI") from finding their way on board passenger airplanes. Second, TSA was given a means to keep information, the dissemination of which would harm transportation security, secret, merely by declaring it to be "Sensitive Security Information" ("SSI"). Third, TSA was given a means to issue "orders" in a quasi-judicial capacity, and to have those orders be reviewable only in the U.S. Court of Appeals.

Unfortunately, although perhaps unsurprisingly, the "red tape" that other federal agencies have to deal with was put there for a reason, and the latitude given to TSA has been regularly abused. TSA now uses its administrative search doctrine to search for, and prohibit, *non*-WEI that poses no threat to aviation security. It abuses the SSI designation to shield its policies from disclosure – as well as judicial review – even when public disclosure poses no threat to transportation security. And it uses the jurisdictional channeling provided by

Congress for challenges to quasi-judicial "orders" to avoid district court challenges to general policy decisions.

Petitioner Sai is a frequent traveler who is regularly subject to TSA's policies – which TSA insists are "orders" pursuant to Title 49, Chapter 461 of the U.S. Code (hereafter, "Ch. 461 Orders") – some of which they[1] are aware of, and others that have been withheld as SSI. Sai comes before the Court to ask the Court to determine the boundary between Ch. 461 Orders and mere policy decision, rule, or regulation, and subsequently seeks a determination – either in this Court if they are Ch. 461 Orders, or via transfer to a district court if they are not – that several TSA practices are *ultra vires* or otherwise unlawful as they impose obligations and restrict their liberty other than as allowed by law.

JURISDICTIONAL STATEMENT

Congress has channeled challenges to Ch. 461 Orders to this Court under 49 U.S.C. § 46110(a), giving the Court jurisdiction to determine if a challenge implicates an "order" and, if so, to adjudicate it. Any person with "a substantial interest" in an order "with respect to [the TSA's] security duties and powers" may "apply for review of the order by filing a petition for review in the United States

[1] Petitioner uses gender-neutral pronouns.

Court of Appeals for the District of Columbia Circuit." 49 U.S.C. § 46110(a). The circuit courts have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings." 49 U.S.C. § 46110(c); *Tooley v. Napolitano*, 556 F.3d 836, 840-41 (D.C. Cir. 2009).

To the extent that the Court agrees with Petitioner that certain challenged TSA policies are not Ch. 461 Orders subject to § 46110, the Court may be deprived of jurisdiction to consider further merits challenges to those non-order policies. Petitioner asks that in this scenario, their challenges to those policies be severed and transferred to the U.S. District Court for the District of Massachusetts. The district court would have jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction to make such a transfer under 28 U.S.C. § 1631.

STATEMENT OF THE ISSUES

Petitioner challenges several alleged Ch. 461 Orders of TSA, and divides those challenges in 2 categories:

1. **The Non-WEI Challenges**. First, Petitioner challenges whether TSA's policy prohibiting certain non-WEIs from passing through its checkpoints is actually a Ch. 461 Order, or is rather a regulation, rule, policy, or not subject to 49 U.S.C. § 46110. In particular, Petitioner challenges TSA prohibitions on benign

liquids in containers larger than 100 mL and toys, replicas, or other objects that resemble WEI. To the extent that these prohibitions are a Ch. 461 Order, Petitioner further challenges them here as *ultra vires*. To the extent that they are not an order, Petitioner requests that the Court sever this claim and transfer it to the district court for a determination as to what relief, if any, should be granted on the same grounds.

2. **The SSI Designation Challenges**. Second, Petitioner challenges whether designation of information as SSI constitutes a Ch. 461 Order, as regularly argued by the agency. Petitioner further challenges whether TSA's practice of designating entire documents as SSI when only pieces of those documents meet the criteria for SSI designation. As with the non-WEI challenges, should the Court determine that SSI designations are not "orders," Petitioner again requests transfer to the district court for a determination on the challenged practice.

STATEMENT OF THE CASE

This petition is an original proceeding brought under 49 U.S.C. § 46110. As such, there were no proceedings in any court below. Further, Petitioner was neither entitled to, nor received, any proceedings in the agency. TSA has provided an administrative record *in camera*.

Initially a *pro se* filing, the Petition challenges "*all* 'orders' issued pursuant to 49 USC § 46110(a) and/or § 46105(b) that affect Petitioner." Petition, p. 1. There had been extensive motion practice to determine what orders Petitioner was challenging, as well as *in forma pauperis* requests, appointment of counsel requests, motions to seal and file *in camera*, and others. In sum, the Court denied IFP motions (under substantial protest, Petitioner paid then the filing fee), denied appointment of counsel motions[2], and as to motions to seal and file in camera by the government, they were largely granted, and essentially the entirety of the administrative record, save for a summary written by opposing counsel, remains unavailable to Petitioner. Notwithstanding, the Court's ordered on February 1st, 2021 that the case proceed to briefing, even if Petitioner must argue "hypothetically."

Petitioner retained counsel, who appeared on their behalf on February 17th, 2021, and obtained a modest extension of time to file this brief by April 2nd, 2021.

[2] The undersigned counsel appreciates that court-appointed counsel in civil cases is generally not constitutionally guaranteed and is subject to limited appropriations. As a counterpoint, the docket now contains 191 entries and 23 orders of the Court over 5 and a half years, the vast majority of which would have been avoided had counsel been appointed, and now Petitioner must proceed with his challenge "blind" whereas appointed counsel could have been cleared to view the SSI administrative record. With the utmost respect and benefit of hindsight, it seems to the undersigned counsel that neither the interest of justice nor the preservation of the Court's resources benefitted from denying Sai's motions to appoint counsel.

With the advice of counsel, and in consideration of the limitations on the administrative record ordered by the Court, Petitioner continues their Petition in regards to the alleged "orders" that implement the policies described *supra* in the Statement of the Issues and abandons their challenges to any other "orders."

STATEMENT OF THE FACTS

The Aviation and Transportation Security Act ("ATSA"), enacted after the terrorist attacks of September 11th, 2001, created the TSA and charged it with ensuring transportation security, including civil aviation security. *See* Pub. L. No. 107-71, 115 Stat. 597 (2001). Most visibly, and perhaps most importantly, TSA conducts checkpoint screenings at nearly every airport in the country from which commercial passenger flights depart. These screenings are performed under the "administrative search doctrine," an exception to the warrant requirement of the Fourth Amendment.

During its checkpoint searches, TSA screeners are looking for weapons, explosives, and incendiaries ("WEI"). Because some items may be dual-purpose (that is, they may have both an innocent use and a WEI-use), TSA maintains a "prohibited items list" to help both passengers and its screeners determine what is and is not allowed to pass through the checkpoint. Relevant to this challenge, TSA

does not allow "toy" or other replica versions of WEI (*e.g.*, a water gun)[3], nor does it allow liquids in containers larger than 100 mL. TSA alleges that replica weapons might be as useful to sky terrorists as real ones, and that it is too burdensome to distinguish water from explosive liquids, such as nitroglycerin.

Outside of the checkpoint, TSA employees are tasked with keeping sensitive information from being disseminated publicly by marking it as SSI. When information is requested by a member of the public, most frequently through the Freedom for Information Act, TSA withholds it using Exemption 3. Some documents are withheld in full if they contain any SSI, whereas other documents are redacted and released with the SSI omitted. All decisions relating to SSI designation are considered by TSA to be "orders" of the agency.

Petitioner Sai is a frequent flyer who has had frequent difficulties with TSA, in large part due to their databases being unable to handle mononymic individuals and because Sai has a host of disabilities that often make compliance with screening requests more challenging or result in Sai being profiled under TSA behavioral observation programs. *See* Sai Affidavit, October 10th, 2017, pp. 24 – 32. They have been directly affected by TSA's policies prohibiting non-WEI. *Id.*,

[3] The prohibited items list states that it only bans "realistic" replicas; however, it has been both Sai's experience and the general public's that as a matter of TSA practice, anything *vaguely* resembling a gun or an explosive is treated as a prohibited replica. *See* Sai Affidavit, October 10th, 2017, pp. 30 – 37.

pp. 30 – 37. They have also been directly affected by TSA's SSI policies, described *supra*, in relation to FOIA requests they have filed. *Id*., pp. 3 – 21.

SUMMARY OF THE ARGUMENT

First, TSA's expression of policy in a generalized, as opposed to individualized, form can never constitute an "order" as described by Ch. 461, because it necessarily lacks the proceedings, including service of process, intake of evidence, and the like, necessary to create an administrative record that would enable appellate review. TSA's non-WEI policy is generalized, its policy of refusing to segregate SSI is generalized, and its SSI determinations, although case-by-case, still lack proceedings and the development of an administrative record.

Second, TSA's prohibition (whether as a result of formal rule or merely informal practice) on non-WEI is *ultra vires*. So long as TSA possesses the capability to distinguish between WEI and benign items, and doing so is reasonably practical, it must do so.

Third, TSA's policy of refusing to redact SSI, at least in the context of FOIA requests, fails to meet the requirement that information subject to a FOIA exemptions that is reasonably segregable from other information be segregated and the remainder of the information made public.

ARGUMENT

I. TSA's Prohibited Item List, Internal Watch Lists, and SSI Designations Are Not Chapter 461 "Orders"

Title 49, Chapter 461 of the U.S. Code, entitled "Investigations and Proceedings," sets out the procedures by which TSA, as well as the Federal Aviation Administration, can carry out quasi-judicial proceedings to accomplish agency enforcement goals. Section 46101 allows for private initiation of administrative proceedings. Sections 46102 – 46104, 46109, and 46111 deal with civil procedures for administrative law proceedings. *See* § 46102 (who conducts proceedings, appearances, public access, conflicts of interest), § 46103 (service of process), § 46104 (evidence), § 46109 (joinder), § 46111 (special procedures for certificates revoked due to terrorism concerns). Section 46105 allows for immediate application of "a regulation prescribed or order issued" by TSA or FAA. Sections 46106 and 46107 allow the government to enforce in Article III courts.

The sole remaining section is § 46110, which speaks of a non-government party's right to appeal to Article III courts. In particular, it requires review of "an order issued" by the enumerated agencies to be heard by the U.S. Courts of Appeal. It sets a short window for filing a petition for review – 60 days – and allows the reviewing court to adjust or affirm the order as it sees fit. With the

context described *supra*, the purpose of § 46110 and its channeling of review to the Courts of Appeals, is readily apparent: to allow these two agencies to conduct enforcement proceedings, including fact-finding, without having those proceedings be thrown out and re-done simply because a lawsuit was filed in U.S. District Court. *Suburban O'Hare Comm'n*, 787 F.2d 186, 192 (7th Cir. 1986) ("[T]he purpose of having agency decisions reviewed by courts of appeals is to avoid duplicative factfinding.").

Before 2011, Ch. 461 lived in harmony because the agencies and the courts used it for its obvious intended purpose: quasi-judicial administrative enforcement actions. See *Boniface v. D.H.S.*, 613 F.3d 282 (D.C. Cir. 2010) (appeal of denial of request for waiver from individual TSA threat assessment following significant adjudicative proceedings); *Zoltanski v. F.A.A.*, 372 F.3d 1195 (10th Cir. 2004) (appeal from civil penalty proceeding); *Tur v. F.A.A.*, 104 F.3d 290, 292 (9th Cir. 1997) (FAA revocation of "airman certificate" after hearings and appeal to NTSB); *Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995) (suspended pilot certificate); *Mace v. Skinner,* 34 F.3d 854 (9th Cir. 1994) (F.A.A. mechanic's certificate revocation proceeding); *Green v. Brantley,* 981 F.2d 514, 519 (11th Cir. 1993) (revocation of Designated Pilot Examiner certificate); *Southern California Aerial Advertisers' Association v. F.A.A.,* 881 F.2d 672, 675 (9th Cir. 1989) (adjustment of airspace usage rights after significant public proceedings); *City of Alexandria v. Helms*, 728

F.2d 643, 645 (4th Cir. 1984) (challenge to environmental impact); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir. 1983) (revocation of her Airman Certificate); *New York v. F.A.A.*, 712 F.2d 806 (2nd Cir. 1983) (denying the amendment of an operating certificate); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3rd Cir. 1998) (plaintiff's repair work was reported as faulty). In each of these cases, there was an opportunity, during quasi-judicial proceedings within the agency, for the introduction of evidence and the creation of an "administrative record," which consists of all documents, transcripts, and evidence related to the controversy. If an affected party disputes the final outcome of the agency proceedings (the "order"), the administrative record is bundled up and shipped off to a Court of Appeals, whereby an Article III judge can determine if the agency's order is in accordance with relevant law.

Starting in 2011, however, TSA began arguing that virtually any written policy decision of TSA constitutes a Ch. 461 "order," even when there has been no one appointed to conduct proceedings pursuant to § 46102, even when there has been no service of process pursuant to § 46103, even when the challenging party has been afforded no opportunity to present evidence pursuant to § 46104, and even when there is no "administrative record" other than post-hoc assembly of documents unrelated to any "proceedings" before the agency. Unfortunately, several courts have indulged them. *Corbett v. United States*, 458 Fed.Appx. 866

(11th Cir. 2012) (challenge to constitutionality of TSA body scanner program; program held to be an "order" despite no individualized proceedings); *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012) (same)

As a threshold matter, Petitioner asks the Court to determine whether TSA's prohibited item list, SSI designations, and general refusal to redact and segregate SSI constitute Ch. 461 "orders," in which case this Court should hear Petitioner's merits challenges thereto, or if they are not covered by § 46110, in which case Petitioner's merits challenges should be transferred to a U.S. District Court. In doing so, we ask the Court to depart from the expansive view of the nature of § 46110 that its sister circuits have adopted over the last decade and instead cabin § 46110's jurisdictional channeling to that which Congress intended: appeals from individualized, quasi-judicial proceedings.

Prohibited Item List. TSA, at least initially, created its watch list by publication in the Federal Register. 68 FR 7444 (Feb 14th, 2003). TSA itself clearly describes the prohibited items list as an "interpretive rule." *Id*. Regardless of whether this is more properly classified as a legislative rule than an interpretive rule, this is clearly not in any way related to any kind of individualized, quasi-judicial proceeding. It is either a statement of the law, or a statement of how TSA interprets the law, and thus not an "order" created after following the procedures of Ch. 461.

SSI Designations. SSI designations are done on a case-by-case basis, but still lack the quasi-judicial nature required to fall under the ambit of Ch. 461. First, SSI decisions are often made by low-level employees by doing nothing more than stamping "Sensitive Security Information" onto a page and affixing a cover sheet. But, even when higher-ranking officials consider whether information should be considered SSI, there are no "proceedings" conducted. There is no "administrative record" created. There is no notice given, evidence received, or findings documented. The end result is a castration of the Freedom of Information Act, whereby TSA can arbitrarily deny requests as implicating SSI and force the requestor to first litigate the SSI issue in the Court of Appeals. Likewise, the same effect is had in proceedings in U.S. District Courts, where discoverable material is labeled SSI and the district court is powerless to tell TSA otherwise[4].

Petitioner therefore requests that the Court declare that each of these categories does not implicate a Ch. 461 Order and to transfer (after severing, if necessary) the merits challenges infra relating to those claims to the U.S. District Court for the District of Massachusetts.

[4] The district court may order TSA to disclose SSI despite it being SSI, but it may not contradict TSA's assertion that an item constitutes SSI, should SSI decisions be considered a Ch. 461 Order.

II. When Distinguishing Threats from Non-Threats is Possible and Practical, TSA Must Do So

TSA's mandate regarding airport checkpoint security is not to take toys from children or increase airport concession sales by confiscating water bottles. It is to keep WEI from being brought on board an airplane. Its administrative searches must be "no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives." *U.S. v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (*citation omitted*).

TSA may indeed have broad latitude to determine what is, and is not, WEI, and so Petitioner makes no challenge as to their determination that bowling pins, kayak paddles, cast iron pans, and tent poles might be a good enough weapon to merit being banned[5].

However, TSA regularly prohibits things that "resemble" weapons, such as water guns, souvenir Star Wars bottles[6], and other toys, as well as things that "could be" explosives, such as water, on the theory that its checkpoint staff should not be burdened with distinguishing between the two.

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[5] TSA. "What Can I Bring?" https://www.tsa.gov/travel/security-screening/whatcanibring/all-list (Retrieved April 1st, 2021).

[6] Travel + Leisure. "TSA Banned These Popular Disney Star Wars Land Souvenirs…" https://www.travelandleisure.com/airlines-airports/tsa-banned-star-wars-land-coke-souvenirs-on-flights (Retrieved April 1st, 2021).

Were there a genuine issue of whether an item may or may not be an actual WEI, *e.g.,* because of technical limitations or other practical considerations, Petitioner would, of course, concede that TSA would have authority to prohibit an item in the interest of caution. But regarding plastic toys or nearly any other type of replica, TSA has advanced x-rays, now more like medical CT scanners, that can easily distinguish Nerf from Glock. Likewise, TSA possesses the means for distinguishing water from nitroglycerin: each checkpoint is equipped with test strips that can be waived over the opening of a container to detect explosive vapor. TSA regularly uses this procedure to clear "medicinal liquids" (liquid medicine, breast milk, diabetic supplies, and other medical necessities), but the refuse to do so to clear anything else, from a bottle of Fiji water to priceless antique snow globes.

Petitioner submits that this may be accomplished at a *de minimus* cost of money and time for the agency, and unless the agency can show otherwise, its banning of these non-WEIs should be considered outside its mandate and thus *ultra vires*. It should be required to distinguish between threats and non-threats when possible – in fact, that is literally its only job.

III. TSA May Not Withhold an Entire Document as Sensitive Security Information Merely by Including Some Sensitive Security Information

In 2009, TSA made a mistake: it released a document containing SSI to the public as a result of breaking its own redaction protocols and relying upon redactions that were able to be reversed. *See* DHS Office of the Inspector General. "TSA's Breach of Sensitive Security Information." https://www.oig.dhs.gov/assets/Mgmt/OIG_10-37_Jan10.pdf (Published January 2010). As what was ostensibly a temporary stopgap, TSA's then acting administrator ordered that an entire class of documents "are SSI in their entirety." *Id*., p. 47. In other words, rather than ensure that redactions were properly done, TSA would simply declare entire documents to be SSI and then not release them at all.

The acting administrator's order did not turn out to be temporary, as 12 years later, TSA still does not release any part of the class of documents it withheld after the 2009 incident and, upon belief, has expanded that practice to an even larger collection of documents.

The laws relating to SSI should be considered along with the context of the Freedom of Information Act ("FOIA"), without which the agency would be free to withhold virtually any document. "FOIA also provides for partial disclosure of

documents that contain some exempted information, mandating that 'all reasonably segregable, non-exempt portions of any agency records must, after deletion of the exempt material, be disclosed to a requester, 5 U.S.C. § 552(b).'" *Church of Scientology Int'l v. Dept. of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (*citation omitted*); see also *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, No. 19-547, at *14 n.5 (Mar. 4th, 2021) ("Agencies must disclose '[a]ny reasonably segregable portion" of a document containing some exempt information.").

Normally, a district court would be able to order this segregation, but since TSA claims all SSI designations are Ch. 461 "orders," it leaves the district courts powerless to do so, and thus it is necessary to ask a Court of Appeals the question of whether the law allows TSA to refuse to redact the SSI from a document where the SSI is reasonably segregable. If the Court holds that SSI designations are Ch. 461 "orders," we ask the Court to declare this refusal-to-redact policy, which is inextricably intertwined with the purported SSI orders that result from it, as failing to comport with its obligations when reading the SSI laws in conjunction with FOIA.

CONCLUSION

The Court should clarify the line between a Ch. 461 "order" vs. general policies, federal regulations, and everything else, and some court (whether this one or a U.S. District Court) should prohibit TSA from continuing its ultra vires non-WEI policies and unlawful SSI policies. Accordingly, Plaintiff prays for:

1. Declaratory relief, that TSA's non-WEI policies, individual SSI designations, and policy of refusing to provide some reasonably segregable information using the excuse of SSI, are not "orders" subject to 49 U.S.C. § 46110,

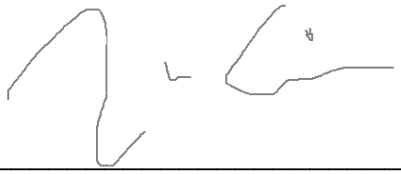
2. An order transferring the remainder of Petitioner's claims to the U.S. District Court for the District of Massachusetts, or in the alternative,

3. An order setting aside TSA's non-WEI policies and policy of refusing to redact reasonably segregable SSI.

Dated: Boston, MA

April 2nd, 2021

Respectfully submitted,



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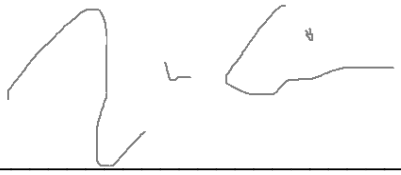
RULE 32(a)(7) CERTIFICATE

This brief complies with Fed. R. App. P. Rule 32(a)(7) because it contains approximately 4,200 words.

Dated: Boston, MA

April 2nd, 2021

Respectfully submitted,



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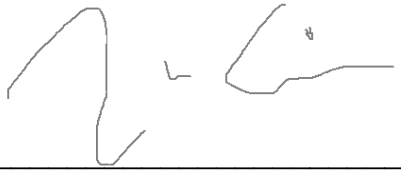
RULE 26.1 STATEMENT

Petitioner is an individual, and no corporation has an interest in this petition.

Dated: Boston, MA

April 2nd, 2021

Respectfully submitted,



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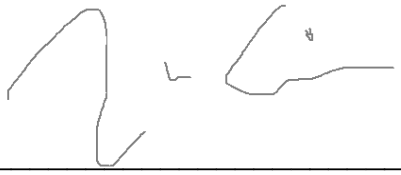
CERTIFICATE OF SERVICE

I certify that this document was served on Respondent Pekoske via the CM/ECF system on April 2nd, 2021.

Dated: Boston, MA

April 2nd, 2021

Respectfully submitted,



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