

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NADINE PELLEGRINO &
HARRY WALDMAN,

Plaintiffs–Appellants,

v.

UNITED STATES OF AMERICA
TRANSPORTATION SECURITY
ADMINISTRATION, et al.,

Defendants–Appellees.

3d Cir. No. 15-3047

On Appeal from the
United States District Court
for the Eastern District of
Pennsylvania,

No. 2-09-cv-05505

**Motion of Freedom to Travel USA and Restore the Fourth, Inc.
Under Fed. R. App. P. 29(b)(2) for Leave to File an *Amici Curiae* Brief
in Support of Appellants’ Petition for Rehearing En Banc**

On July 11, 2018, a divided panel of this Court issued a precedential decision in the above-captioned case. The panel determined that the law enforcement proviso of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), does not render Transportation Security Officers (TSOs) liable when they commit intentional torts. 896 F.3d 207, 218 (3d Cir. 2018).

On August 27, 2018, Appellants petitioned for rehearing en banc.

Movants Freedom to Travel USA and Restore the Fourth, Inc. now seek the Court’s leave under Federal Rule of Appellate Procedure 29(b)(2) to file a joint *amici curiae* brief in support of Appellants’ rehearing petition. Attached to this motion are: (1) the proposed joint amici brief (Exhibit A); and (2) corporate disclosure forms for each Movant (Exhibit B).

Identities of the Proposed Amici

Freedom to Travel USA is a non-profit nonpartisan grassroots civic association concerned with the privacy and dignity of every American who travels by air. Freedom to Travel routinely files amicus briefs in cases that concern TSO screening procedures. *See, e.g.,* Brief of *Amicus Curiae* Freedom to Travel USA in Support of the Petition for a Writ of Certiorari, *Corbett v. TSA*, No. 14-1263 (U.S. filed May 1, 2015). In this capacity, the First Circuit granted Freedom to Travel permission to participate at oral argument in *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013).

Freedom to Travel's membership is exemplified by co-founder Wendy Thomson. As a result of a birth defect, Wendy's right leg was amputated when she was 4-years-old. Wendy thus wears a prosthetic leg. In her career as a management consultant, Wendy needed to travel by air on a regular basis. But since the mid-2000s, Wendy faced increasingly degrading TSO pat-downs because of her prosthesis. As such, Wendy was forced to give up air travel completely – and her career with it.

Restore the Fourth, Inc. is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth advances this mission by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases. *See, e.g.,* Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct.

2206 (2018); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

Interest of the Proposed Amici

Freedom to Travel USA and Restore the Fourth, Inc. (together, “Amici”) are interested in this case because they believe that federal tort liability is an essential check against abusive government searches of airline passengers. The Amici also believe that a plain reading of the Federal Tort Claims Act’s law-enforcement proviso, 28 U.S.C. § 2680(h), establishes such liability. The panel majority here erred in holding otherwise.

Reasons to Allow the Proposed Amici Brief

The Court should allow the Amici brief for three reasons:

First, the proposed Amici “are entities with particular expertise not possessed by any party to the case.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). Freedom to Travel has devoted itself to close examination of passenger screening procedures and TSO abuses of them. *See, e.g.*, Brief of *Amicus Curiae* Freedom to Travel USA in Support of Plaintiffs-Appellants on the Merits, *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013) (No. 11-1805). Restore the Fourth, in turn, has developed a deep knowledge of the history surrounding civil liability for search-and-seizure abuses. *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

Second, the proposed Amici brief “collect[s] background or factual references that merit judicial notice.” *Neonatology Assocs., P.A.*, 293 F.3d at 132. In particular, the proposed brief affords the Court a comprehensive picture of all the tortious injuries that TSOs are capable of inflicting on the traveling public. The brief catalogues public accounts of such injuries and journalistic investigations of TSO misconduct. This information “will help the [C]ourt toward [the] right answers.” *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999).

Third, the proposed Amici brief serves to “explain the impact” of the panel’s holding on a diversity of “other group[s]” not before the Court. *Neonatology Assocs., P.A.*, 293 F.3d at 132. The panel decision implicates and limits the rights of hundreds of millions of Americans, whose experiences with TSOs vary greatly based on material differences in gender, age, and disability. In this situation, “an amicus may provide important assistance to the court” – “[e]ven when a party is very well represented.” *Neonatology Assocs., P.A.*, 293 F.3d at 132. It is for this reason the Court has emphasized that “most courts of appeals freely grant [amici] leave to file, provided the [proposed] brief is timely and well-reasoned.” *Id.* at 133.

Conclusion

Based on the foregoing points and authorities, the Court should grant Freedom to Travel USA and Restore the Fourth, Inc. leave to file the attached joint amici brief in support of Appellants’ rehearing petition.

Respectfully submitted,

Dated: September 4, 2018

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CERTIFICATE OF COMPLIANCE

Counsel certifies under Fed. R. App. P. 32(g) that the foregoing motion meets the formatting and type-volume requirements set under Fed. R. App. P. 27(d) and Fed. R. App. P. 32(a). The motion is printed in 14-point, proportionately-spaced typeface utilizing Microsoft Word 2010 and contains **843 words**, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. I further certify that counsel for all parties to this case are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: September 4, 2018

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Exhibit A

to the Motion of Freedom to Travel USA and
Restore the Fourth, Inc. Under Fed. R. App. P. 29(b)(2)
for Leave to File an *Amici Curiae* Brief in Support of
Appellants' Petition for Rehearing En Banc

No. 15-3047

United States Court of Appeal for the Third Circuit

Nadine Pellegrino & Harry Waldman,

Plaintiffs–Appellants,

v.

United States of America
Transportation Security Administration, et al.,

Defendants–Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Case No. 2-09-cv-05505

**BRIEF OF *AMICI CURIAE* FREEDOM TO TRAVEL USA &
RESTORE THE FOURTH, INC., SUPPORTING APPELLANTS'
PETITION FOR REHEARING EN BANC**

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United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. 15-3047

Nadine Pellegrino & Harry Waldman

v.

United States of America Transportation Security
Administration, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

(Page 1 of 2)

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom to Travel USA
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no parent corporation who is subject to disclosure.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no shareholders who are subject to disclosure.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
Not applicable.

/s/Mahesha P. Subbaraman
(Signature of Counsel or Party)

Dated: 9-4-2018

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Restore the Fourth, Inc.
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None. Restore the Fourth, Inc. is a non-profit corporation incorporated under Massachusetts law and registered under Section 501(c)(4) of the Internal Revenue Code. It has no parent corporation who is subject to disclosure.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None. Restore the Fourth, Inc. is a non-profit corporation incorporated under Massachusetts law and registered under Section 501(c)(4) of the Internal Revenue Code. It has no shareholders who are subject to disclosure.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/Mahesha P. Subbaraman
(Signature of Counsel or Party)

Dated: 9-4-2018

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Amicus Identity, Interest, & Authority to File

A. Identity of the Amici

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Freedom to Travel's membership is exemplified by co-founder Wendy Thomson. As a result of a birth defect, Wendy's right leg was amputated when she was 4-years-old. Wendy thus wears a prosthetic leg. In her career as a management consultant, Wendy needed to travel by air on a regular basis. But since the mid-2000s, Wendy faced increasingly degrading TSO pat-downs because of her prosthesis. As such, Wendy was forced to give up air travel completely – and her consulting career with it.

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lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases. *See, e.g.,* Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

B. Interest of the Amici

The Amici are interested in this case because they collectively believe that federal tort liability is an essential check against abusive government searches of airline passengers. The Amici also believe a plain reading of the Federal Tort Claims Act's law-enforcement proviso, 28 U.S.C. § 2680(h), establishes such liability. The panel majority in this case erred in holding otherwise.

C. Authority of the Amici to File

The Amici file this brief under Fed. R. App. P. 29(b)(2), which authorizes – with court permission – the filing of amicus briefs in support of petitions for rehearing en banc.

The Amici also affirm under Fed. R. App. P. 29(a)(4)(E) that no party, nor counsel for any party, in this case: (1) wrote this amicus brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only the Amici, including their members and counsel, have contributed money to fund the preparation and submission of this brief.

Argument

When Alexis de Tocqueville first visited America in the 1830s, one aspect of the young nation that quickly drew his attention was “[t]he right granted to the courts of justice of judging the agents of the executive government, when they have violated the laws.”¹ He was surprised to find that this right was “so natural a one that it cannot be looked upon as an extraordinary privilege.”² He was also surprised to find that this right, far from weakening “the springs of government,” in fact “increased ... that respect which is due to the authorities” while simultaneously “render[ing] those ... in power more scrupulous of offending public opinion.”³

Congress carried forward these observations when it passed the “law enforcement proviso” to the Federal Tort Claims Act (FTCA). *See* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h)). This proviso guarantees the tort liability of “any officer of the United States who is empowered by law to execute searches.” *Id.* By its own account, Congress enacted this proviso to “submit the Government to liability whenever its agents act under color of law so as to injure the public through search[es] ... without warrants.” S. REP. NO. 93-588, at 3 (1973).

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 107 (H. Reeve trans., 7th ed., 1847).

² *Id.*

³ *Id.*

In few contexts is such liability more important than when the government conducts administrative searches of airline passengers. *See Ruskai v. Pistole*, 775 F.3d 61, 68 (1st Cir. 2014) (collecting cases that hold airline passenger screening is an administrative search). “Because administrative searches require no warrant ... they invest law enforcement with the power to invade the privacy of ordinary citizens.” *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007). “This power carries with it a vast potential for abuse.” *Id.* (quoting *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998)).

That potential has materialized time and again at American airports over the last decade. Ever since the government decided to conduct security screening at airports using a combination of body scans and pat-downs, *see Redfern v. Napolitano*, 727 F.3d 77, 80 (1st Cir. 2013), passengers have suffered “shocking” abuses at the hands of Transportation Security Officers (TSOs).⁴ U.S. Representative Francisco Canseco, for example, has described his experience with a TSO pat-down this way: “[The TSO] touched me in my private parts and it hurt.”⁵ U.S. Senator Claire McCaskill has described her experience with a TSO pat-down in similar terms.⁶

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

⁵ Keith Laing, *GOP Lawmaker: TSA Agent ‘Hurt My Privates’ During Pat-Down*, THE HILL, Apr. 26, 2012, <https://bit.ly/2Pw1DUf>.

⁶ *See* Aaron Blake, *Sen. Claire McCaskill on TSA Pat-Down: ‘OMG’*, WASH. POST, Mar. 11, 2013, <http://wapo.st/15Ic9M2>.

The government's response to these abuses has been a well-rehearsed "bureaucratic kabuki dance." *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 381 (D. Md. 1997). First, the government denies that any abuse occurred.⁷ Then, in the face of public exposure – as occurred with TSO strip-searches of three seniors⁸ – the government issues a *mea culpa* and promises reform. But no lasting changes are ever made, and no TSOs are ever prosecuted. Instead, as whistleblowers and federal investigations have revealed, abuses by TSOs continue to persist.⁹

Against this backdrop, the panel decision here merits rehearing en banc. *See Pellegrino v. USA Transp. Sec. Admin.*, 896 F.3d 207 (3d Cir. 2018). The panel majority held that TSOs are not liable for their intentional torts like assault because the FTCA's law enforcement proviso applies "only [to] criminal law enforcement officers." *Id.* at 218. Through their rehearing petition, Appellants Pellegrino and Waldman demonstrate why this holding is utterly inconsistent with the proviso's text and controlling precedent. Through this brief, the Amici seek to afford the Court a more detailed picture of the TSO abuses that the panel decision now throws out of court.

⁷ *See, e.g., infra* note 39 ("[A]n investigation was initiated and it was determined that the Transportation Security Officer (TSO) followed standard operating procedures....").

⁸ *See infra* note 31.

⁹ *See, e.g., infra* note 51 at 20 (noting the many "serious examples of misconduct that appear to exist at all levels" of the TSA).

I. Airline passengers face a significant risk of tortious injury from Transportation Security Officers (TSOs).

A. Sexual harassment

Male, female, and transgender passengers have all reported being sexual harassed by TSOs. One of the most notorious instances to date is the April 2015 revelation that TSOs were “fondl[ing] male passengers as they came through a security checkpoint at Denver International Airport.”¹⁰ The TSOs achieved this by “press[ing] a touchscreen button indicating that [a] man being screened was actually a woman.”¹¹ This produced a false alarm that let the TSOs perform an unnecessary “pat down of the ... groin.”¹²

Following the revelation of this scheme, former TSO Jason Harrington disclosed that he was not surprised by the Denver TSOs’ conduct.¹³ While at O’Hare Airport from 2007 to 2013, Harrington routinely heard fellow TSOs use terms like “Code Red” and “Fanny Pack, Lane 2” to harass women.¹⁴ CBS News also found a “pattern

¹⁰ Tom McGhee, *TSA Screeners Accused of Groping Men During Checks at Denver Airport*, DENVER POST, Apr. 14, 2015, <http://dpo.st/2996Ema> (later updated June 7, 2016).

¹¹ *Id.*

¹² *Id.*

¹³ Jason Harrington, *Former TSA Agent: Groping Scandal Is Business as Usual*, TIME, Apr. 15, 2015, <http://ti.me/1ywhFUx>.

¹⁴ Jason Harrington, *Dear America, I Saw You Naked*, POLITICO MAGAZINE, Jan. 30, 2014, <https://politi.co/1cCMRnZ>.

of women” complaining of sexual harassment across “500 records of TSA complaints” at Dallas-Fort Worth Airport.¹⁵

Transgender passengers have likewise reported being harassed by TSOs. Take Shadi Petosky. In September 2015, she was traveling through Orlando International Airport when a body scan registered an anomaly based on her male genitalia.¹⁶ TSOs detained Petosky for over 40 minutes, patted her down twice, and disassembled her luggage.¹⁷ Petosky’s experience subsequently prompted 32 members of Congress to release a letter expressing “strong concerns regarding the [TSOs’] treatment of transgender individuals.”¹⁸

And on it goes. This year (2018) is no exception. Harvard graduate student Zainab Merchant reports that TSOs at Boston Logan Airport forced her to “reveal[] her bloodied menstrual pad.”¹⁹ Chiropractor Mark Frey reports that TSOs at Palm Beach

¹⁵ *Female Passengers Say They’re Targeted by TSA*, CBS NEWS (DFW AFFILIATE), Feb. 3, 2012, <https://cbsloc.al/2PyKIk7>.

¹⁶ *See James Queally, Transgender Woman Says TSA Detained, Humiliated Her Over Body ‘Anomaly*, L.A. TIMES, Sept. 22, 2015, <http://fw.to/c8PnFeL>.

¹⁷ *See id.*

¹⁸ Letter from Adam B. Schiff, et al., Member of Congress, to Peter Neffenger, Administrator, Transp. Sec. Admin., at 1 (Oct. 8, 2014), <http://bit.ly/2cMauO4>.

¹⁹ Rowaida Abdelaziz, *Muslim Woman Says TSA Forced Her to Show Her Bloodied Pad During Airport Screening*, HUFF. POST, Aug. 23, 2018, <https://bit.ly/2LjzI7r>.

Airport “put their hands inside his shorts” and “‘fondl[ed]’ him.”²⁰ And then there is ex-TSO Jason Harrington’s chilling observation that many victims of TSO abuse “will likely never even know they were assaulted, since so many passengers have their private parts fondled when passing through the scanners.”²¹

B. Traumatized children

Under present government policy, children generally cannot be put through a body scan unless they are “able to remain standing in the required position for 5 seconds.”²² This means TSO pat-downs are the primary form of screening for many children.

For Selena and Todd Drexel, this meant watching a TSO pat-down their six-year-old daughter Anna.²³ Video of the event shows a TSO “rubbing [Anna’s] inner thighs and running her fingers inside the top of [Anna’s] blue jeans.”²⁴ Initially “confused” by how the TSO had touched her, Anna later “broke down into tears.”²⁵

²⁰ Lidia Ryan, *Westchester Man Suing TSA for Groping Him in Front of Daughters*, CONN. POST, Aug. 13, 2018, <https://bit.ly/2CcoaTS>.

²¹ Harrington, *supra* note 13.

²² *Traveling with Children (Screening Technology)*, TRANSP. SEC. ADMIN., <http://bit.ly/1KvSSUq> (last visited Sept. 3, 2018).

²³ See Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, <http://abcn.ws/2cLjQ1n>.

²⁴ *Id.*

²⁵ *Id.*

Anna and her parents are not alone in this experience. Lori Croft was forced to watch as TSOs patted-down her 4-year-old granddaughter, Isabella, while “yelling and calling the crying girl an uncooperative suspect.”²⁶ Anne Schulte likewise had to watch as TSOs subjected her 3-year-old daughter Lucy to a pat-down that reduced Lucy to tears.²⁷ And Kevin Payne was forced to watch as a TSO patted-down his 10-year-old daughter Vendela for “nearly two minutes,” leaving Vendela with a “blank stare.”²⁸

Besides inappropriate touching, children also face trauma from TSOs who attempt to turn pat-downs into “a game to play.”²⁹ A 2014 video of a TSO patting-down a 2-year-old child puts this risk in concrete terms: “While [the child] wriggles about, a male [TSO] ... pats down the child, feeling his legs and torso, then applauds him. ‘You did a good job!’ the [TSO] tells the boy.”³⁰

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

²⁷ See Gio Benitez, *TSA Apologizes for Traumatizing Disabled Toddler*, ABC NEWS, Feb. 21, 2013, <https://yhoo.it/2wBaw7R>.

²⁸ Elizabeth Chuck, *Father Outraged by ‘Uncomfortable’ TSA Pat-Down on 10-Year-Old Daughter*, NBC NEWS, Jan. 6, 2016, <http://nbcnews.to/1Ju6h0M>.

²⁹ Daniel Tercer, *TSA Frisks Groom Children to Cooperate with Sex Predators, Abuse Expert Says*, RAW STORY, Dec. 1, 2010, <http://bit.ly/2cMnjrz> (quoting TSA Security Director James Marchand).

³⁰ Ryan Grenoble, *Video of TSA Patting Down Boy, 2, and Sister 6, Sparks Outrage*, HUFF. POST, Apr. 24, 2014, <http://huff.to/1jVEYuC>.

C. Humiliation of seniors and the disabled

For many seniors and disabled persons, TSO pat-downs are a fact of life. Consider Lenore Zimmerman (age 85), Ruth Sherman (age 88), and Linda Kallish (age 66). Because of their respective medical devices, all three women had to undergo TSO pat-downs at JFK Airport.³¹ And during these pat-downs, TSOs ordered each woman to remove her pants.³² The government later admitted fault for this – but only after a major political figure intervened.³³

Now consider Tom Sawyer, a cancer survivor with a urostomy bag. During a pat-down, a TSO tore this bag heedless of Sawyer's warnings, spilling urine all over Sawyer.³⁴ After Sawyer's plight garnered national attention, then-TSA Administrator John Pistole apologized to Sawyer.³⁵ Yet, less than nine months later, Sawyer suffered the same humiliation *at the same airport*.³⁶

³¹ Richard Esposito & Alicia Tejada, *Now Three Grandmas Say They Were Strip-Searched at JFK [Airport]*, ABC NEWS, Dec. 6, 2011, <http://abcn.ws/2dSDiJL>.

³² *Id.*

³³ *TSA Admits Violations in Searches of Elderly Women*, WABC 7 EYEWITNESS NEWS, Jan. 18, 2012, <https://7ny.tv/2oA4vUC> (noting the intervention of U.S. Senator Chuck Schumer).

³⁴ Jane Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS, Nov. 24, 2010, <http://abcn.ws/2dJmIwE>.

³⁵ *Man Says He's Mishandled By Airport Screener Again*, CBS NEWS (DETROIT), July 23, 2011, <http://cbsloc.al/2dxdddit>.

³⁶ *See id.*

This kind of abuse is a persistent risk for seniors and the disabled – no matter how much notice is provided. Consider breast cancer survivor Denise Albert, who told TSOs in advance about a port in her chest for chemotherapy.³⁷ TSOs nevertheless tried “to do a body cavity search [of Albert] in public” – a reality corroborated by a cellphone video showing a TSO “grabb[ing] [Albert’s] left thigh and [running] her hands up to Albert’s crotch.”³⁸

D. Physical endangerment

How TSOs handle passengers can be a life-or-death matter. Melinda Deaton was traveling through Dallas-Love Field Airport when her feeding tube triggered a TSO pat-down.³⁹ Without regard to Melinda’s medical bracelet, TSOs removed Melinda’s clothing and handled her feeding tube, risking its sterility and her life.⁴⁰ The government later declared the TSOs acted properly.⁴¹

Then there is the case of Hannah Cohen. Flying home after receiving treatment for a brain tumor, Hannah was “blind in one

³⁷ Travis Andrews, *‘You Cannot Touch Me There,’: Breast Cancer Patient Claims TSA ‘Humiliated’ and ‘Violated’ Her*, WASH. POST, Dec. 8, 2016, <http://wpo.st/ieQP2>.

³⁸ *Id.*

³⁹ See Omar Villafranca, *TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC NEWS (DALLAS AFFILIATE), July 19, 2012, <http://bit.ly/2dk1VjL>.

⁴⁰ *Id.*

⁴¹ *Id.*

eye, deaf in one ear and partially paralyzed.”⁴² These infirmities left Hannah “easily confused and frightened” – a state of mind that took hold when a TSO body-scan led to a false alarm on Hannah’s shirt.⁴³ While Hannah’s mother pleaded with the TSOs to exercise restraint, the TSOs “smash[ed] [Hannah’s] face into the floor.”⁴⁴

The risk of physical injury from a TSO search is not limited to the disabled. CNN commentator Angela Rye reports that during a TSO pat-down: “[The TSO] went down my leg, up my dress, and her hand sideways hit[] me right in the crack of my labia. Startled, I jump[ed] and fe[lt] a lump in my throat trying to hold back tears.”⁴⁵ A police officer who filmed Rye’s pat-down later informed Rye that he intended “to write up an incident report.”⁴⁶

II. Federal tort liability is an essential check on abusive TSO searches of airline passengers.

A. Passenger complaints are not collected

When it comes to collecting passenger complaints about TSO conduct, the GAO has found the government does next to nothing.

⁴² Matt Teague, *Disabled Cancer Patient Slammed to the Ground by TSA Guards*, GUARDIAN, July 2, 2016, <http://bit.ly/29mxcQD>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Angela Rye, *Dear TSA: The Country Is Not Safer Because You Grab Vaginas*, CNN, Dec. 22, 2016, <http://cnn.it/2hFEq4W>.

⁴⁶ *Id.*

The government does not require TSOs to “collect ... the screening complaints that air passengers submit in person.”⁴⁷ The government does not even take steps to ensure that sufficient comment cards are accessible to passengers in all national airports.⁴⁸

Even more troubling is the GAO’s assessment of how the government treats any passenger complaints that survive the above gauntlet. For example, the government does not bother to “identify patterns and trends in screening complaints.”⁴⁹ Only when a given complaint has “the potential to attract the attention of the media” does the government take steps to learn more.⁵⁰

B. TSO misconduct is tolerated

The government’s disregard of passenger complaints ultimately goes hand-in-hand with a pervasive tolerance for TSO misconduct. In 2016, members of Congress released a comprehensive report on this point that found “serious examples of [TSO] misconduct ... at all levels.”⁵¹ The report further concluded that the government

⁴⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-43, AIR PASSENGER SCREENING: TSA COULD IMPROVE COMPLAINT PROCESSES 23–24 (2012), <https://bit.ly/2MMvf2E>.

⁴⁸ *See id.*

⁴⁹ *Id.* at 24.

⁵⁰ *Id.* at 24 n.36.

⁵¹ HOMELAND SEC. COMM., U.S. HOUSE OF REPRESENTATIVES, MISCONDUCT AT TSA THREATENS THE SECURITY OF THE FLYING PUBLIC 20 (2016), <http://bit.ly/29RVePM>.

had “not taken all the necessary steps to insure that [TSOs] follow policies and that misconduct is properly addressed.”⁵²

Perhaps the most telling example of this reality is the fate of the Denver TSOs who groped numerous unsuspecting male passengers in 2015. They were fired.⁵³ That is it. The government made no effort to prosecute these TSOs at all. Such lax accountability then affords a troubling vision of the future, as proposals are continually brought forward to put TSOs on “buses, trains, and ferries.”⁵⁴

Conclusion

In “situations of abuse,” tort liability is “an important means” of holding people accountable. *Butz v. Economu*, 438 U.S. 478, 506 (1978). That is why Congress passed the FTCA’s law enforcement proviso: to reaffirm that “[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.” *United States v. Lee*, 106 U.S. 196, 220 (1882). That is also why the Court should grant rehearing in this case.

⁵² *Id.*

⁵³ Alex Johnson, *No Charges for Denver TSA Screeners Accused of Groping Attractive Men*, NBC NEWS, July 7, 2015, <http://nbcnews.to/1NQ0hNN>.

⁵⁴ Sebastian Modak, *TSA May Start Securing Trains, Buses, and Ferries*, CONDE NAST TRAVELER, Sept. 29, 2016, <https://bit.ly/2MMi7ec>.

Respectfully submitted,

Dated: September 4, 2018

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Certificate of Compliance

The undersigned counsel certifies:

- Per Fed. R. App. P. 32(g), this amici brief meets the formatting and type-volume requirements of Fed. R. App. P. 32(a) and 29(b)(4). This brief is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains **2,600 words**. This includes headings, footnotes, and quotations, and excludes: (1) all items identified by Fed. R. App. P. 32(f); and (2) per 3d Cir. L.A.R. 29.1(b), the amicus identity statement required by Fed. R. App. P. 29(a)(4)(D) [formerly Fed. R. App. P. 29(c)(4)].
- Per 3d Cir. L.A.R. 31.1(c), this brief has been scanned and found virus free using **Windows Defender (version 1.275.718.0)**.
- Per 3d Cir. L.A.R. 28.3(d) & 46.1(e), the attorney whose name appears on this brief was admitted to the Bar of the United States Court of Appeals for the Third Circuit on **September 15, 2015**, and is currently in good standing with the Court.

Dated: September 4, 2018

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Certificate of Service

The undersigned counsel certifies that on September 4, 2018, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. The undersigned counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 4, 2018

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Exhibit B

to the Motion of Freedom to Travel USA and
Restore the Fourth, Inc. Under Fed. R. App. P. 29(b)(2)
for Leave to File an *Amici Curiae* Brief in Support of
Appellants' Petition for Rehearing En Banc

United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. 15-3047

Nadine Pellegrino & Harry Waldman

v.

United States of America Transportation Security
Administration, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

(Page 1 of 2)

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom to Travel USA
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no parent corporation who is subject to disclosure.

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None. Freedom to Travel USA is a non-profit nonpartisan grassroots civic association. It has no shareholders who are subject to disclosure.

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Not applicable.

/s/Mahesha P. Subbaraman
(Signature of Counsel or Party)

Dated: 9-4-2018

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3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/Mahesha P. Subbaraman
(Signature of Counsel or Party)

Dated: 9-4-2018