No. 11-1805

In the United States Court of Appeals for the First Circuit

JEFFREY H. REDFERN, et al.,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO, in her official capacity as Secretary of Homeland Security, et al.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Massachusetts

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MOTION OF *AMICUS CURIAE* FREEDOM TO TRAVEL USA FOR PERMISSION TO PARTICIPATE IN ORAL ARGUMENT

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Introduction

In *Redfern v. Napolitano,* Plaintiffs-Appellants Jeffrey Redfern and Anant Pradhan (collectively "Redfern") raise a critical Fourth Amendment challenge to the Transportation Security Administration's ("TSA") current use of nude body scans and full-body pat-downs ("TSA searches").

On November 30, 2012, this Court granted Freedom to Travel USA ("Amicus") permission to file an *amicus curiae* brief in support of Redfern on the merits of Redfern's Fourth Amendment claim.

Now, for the reasons set forth below, Amicus respectfully seeks this Court's permission under Federal Rule of Appellate Procedure 29(g) to participate in oral argument in this case. *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) ("[A]mici can easily seek . . . time to participate in oral argument."). In particular, Amicus seeks 3 minutes of argument time, but Amicus does not seek to intrude on Redfern's argument time.[1] Amicus also assents to the Government being given additional time for rebuttal if Amicus's motion is granted.

[1] Counsel for Amicus contacted Plaintiffs on March 4, 2013 to get their view on this Motion. Plaintiffs informed Counsel that they neither oppose nor endorse this Motion but emphasized that Plaintiffs do not believe time should be deducted from their argument time for Amicus.

Argument

Amicus respectfully seeks this Court's permission to participate in oral argument in *Redfern* because Amicus speaks for an important position that is not adequately represented by the parties. This case hinges on a determination of how intrusive the TSA searches are for every American who travels by air. Because this "administrative search scheme has long term implications," any constitutional evaluation of the TSA searches must necessarily extend beyond the narrow arguments advanced by the parties and "consider the entire class of searches permissible under the scheme." *United States v. Bulacan*, 156 F.3d 963, 967-68 (9th Cir. 1998).

Amicus respectfully submits that its participation at oral argument in *Redfern* would help the Court with this evaluation—and further prove the merits of Amicus's view over Redfern's and the Government's. Amicus recognizes that private *amici* are rarely given permission to argue. But how this Court decides *Redfern* stands to affect the rights and dignity of every American who travels by air for years to come. Hence, given the vital role of oral argument in this Court's decision-making process, Amicus hopes the Court will find for the following reasons that argument from Amicus

will "help the Court toward [the] right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999).

1. Amicus speaks for a unique position.

Amicus believes that its participation at oral argument would assist the Court first and foremost by giving voice to an important alternative approach to resolving Redfern's constitutional claim—one that neither Redfern nor the Government fully address in their briefing.

In short, Amicus respectfully maintains that if this Court finds that it has jurisdiction over Redfern's Fourth Amendment claim, then the Court should avoid deciding this claim until the Court has a properly developed factual record before it on the intrusiveness and effectiveness of the TSA searches. Amicus Br. 32-37. The Court has the inherent authority to build such a record and otherwise enable adversarial fact-finding.[2] *Id.* at 36-37. As such, the Court's review of the TSA searches should rest on a "careful perscrutation" of the TSA searches' specific facts—and not on the parties'

[2] *See* Fed. R. App. P. 48 (enabling the Court to appoint a special master who may in turn "requir[e] the production of evidence on all matters" and "examin[e] witnesses and parties"); *United States v. Kyllo,* 37 F.3d 526, 531 (9th Cir. 1994) (remanding case to district court for evidentiary hearing on intrusiveness of thermal scan to enable Fourth Amendment review).

untried assertions or the TSA's insufficient[3] (and still incomplete[4]) administrative record. *Spencer v. Roche*, 659 F.3d 142, 146 (1st Cir. 2011).

But neither of the parties advance such scrutiny. Instead, Redfern characterizes TSA millimeter scans with automatic threat recognition (ATR) as a "far less intrusive alternative" (Pls.' Suppl. Br. 17) and a "constitutional minimum" (Pls.' Suppl. Reply Br. 16) without any apparent concern for how many "false positives"—and subsequent full-body pat-downs—are caused by ATR scans, which is a key fact for gauging the *actual* intrusiveness of these scans. Amicus Br. 35. Then there is the Government,

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[3] Recent events reveal the insufficiency of this record. Just this year, the TSA both (1) stopped using backscatter scans and (2) agreed to let passengers carry pocket-knives onto planes—decisions that necessarily reflect the existence of new facts about the TSA searches that, in turn, should be accounted for in any constitutional review of the TSA searches. *See* Jeff Plungis, *TSA Will Permit Knives, Golf Clubs on U.S. Planes*, BLOOMBERG, Mar. 5, 2013, http://www.bloomberg.com/news/2013-03-05/tsa-will-per mit-knives-golf-clubs-on-u-s-planes.html; Jeff Plungis, *Naked-Image Scanners to Be Removed from U.S. Airports*, BLOOMBERG, Jan. 18, 2013, http://www.bloomberg.com/news/2013-01-18/naked-image-scanners-to-be-removed-from-u-s-airports.html. By contrast, the record submitted by the TSA in these proceedings is nearly two years out-of-date. *See Redfern v. Napolitano*, No. 11-1805, slip op. at 1 (1st Cir. May 2, 2012) (ordering the TSA to submit a similar record to the one it filed in the 2010-11 *EPIC* case).

[4] Based on Amicus's review of the Federal Register, as of March 7, 2013, the TSA has not published the requisite notice of rulemaking for the TSA searches. *See* Amicus Br. 33-34; Defs.' Suppl. Br. 6 n.1.

which casts the entire TSA search regime as a "modest intrusion" while still providing no clear description of the TSA's most intrusive search: the full-body pat-down. *See* Defs.' Suppl. Br. 10-12; *cf.* Amicus Br. 20 (noting the TSA's general failure to define pat-downs in terms of "what body parts may be touched, with what intensity, and for what duration").

The constitutionality of the TSA searches should not be adjudicated based on such oversimplified evaluations. The Court should instead evaluate these searches based on their actual facts as established through a properly developed record. With this in mind, Justice Ginsberg notes that: "[I]t is best left to the courts of appeals in the first instance to determine the appropriate mechanism for factfinding necessary to the resolution of a constitutional claim . . . [and] provision for such factfinding is not beyond the courts of appeals' authority." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 496 n.2 (1999) (Ginsberg, J., concurring). Thus, while Redfern hesitantly implies on the last page of his supplemental reply brief that a more developed factual record might be needed in this case (*see* Pls.' Suppl. Reply Br. 20), Amicus submits that its participation at oral argument would provide the Court with an unqualified presentation of this view as well as the just result that a full record enables the Court to achieve.

2. Amicus speaks for a diversity of travelers whose interests are not reflected in the present record before the Court.

Amicus believes that its participation at oral argument would also help the Court because Amicus speaks for travelers who are affected by the TSA searches in ways not reflected in the present record—travelers who neither Redfern nor the Government can claim to represent.

For example, in arguing for the constitutionality of ATR scanning, Redfern states that he plans to submit to all future searches by this method. *See* Pls.' Suppl. Br. 22-23 n.15. But this position obscures the need for this Court to also consider those children, seniors, and disabled persons *who cannot submit to ATR scanning* (i.e., due to their age or prosthetics) and, thus, are forced under the present TSA search regime to endure the "alternative" of a full-body pat-down.[5] The Government's briefing commits the same error on an even broader scale, failing to acknowledge *any* situations in which the TSA searches affect different travelers differently. *Compare*

[5] Recent events highlight the importance of this reality: on February 8, 2013, TSA agents detained and threatened to pat-down a three-year-old disabled child at Lambert-St. Louis International Airport, prompting a subsequent TSA apology in the face of widespread public outrage. *See* Gio Benitez, *TSA Apologizes for Traumatizing Disabled Toddler*, ABC NEWS, Feb. 21, 2013, http://abcnews.go.com/blogs/lifestyle/2013/02/tsa-apologizes-for-traumatizing-disabled-toddler/.

Defs.' Suppl. Br. 14 (describing the TSA searches as "a modest intrusion" without qualification), *with* Amicus Br. 24-32 (noting how the TSA searches burden women, parents/children, seniors, and disabled persons).

By contrast, Amicus—thanks to its diverse membership—can help the Court to better understand why it needs a more comprehensive factual record of the TSA searches. In this regard, consider Amicus co-founder Wendy Thomson.[6] Wendy's right leg was amputated when she was four-years-old. Wendy thus wears a prosthetic leg, which has given her a special understanding of how the TSA searches consistently intrude upon the bodily integrity of both disabled persons and women. Thus, given that Redfern's Fourth Amendment claim necessarily beckons the Court to "consider the entire class of searches permissible" under current TSA policy, Amicus respectfully submits that its participation at oral argument would help clarify to the Court why this case needs a factual record that accounts for a diversity of travelers. *Bulacan*, 156 F.3d at 967.

[6] *See* Glenda Lewis, *Bloomfield Hills Woman Part of a "No Fly" Group Addressing Washington About Airport Security Issues*, ABC 7 ACTION NEWS (May 18, 2012), http://www.wxyz.com/dpp/news/region/wayne_county/bloomfield-hills-woman-part-of-a-no-fly-group-addressing-washington-about-airport-security-issues.

3. Amicus's questions help to show that the present record before the Court is insufficient.

The third way that Amicus believes its participation at oral argument would help the Court is by directing the Court toward key questions that are relevant to constitutional review of TSA searches—questions that the present record in this case simply does not answer. Amicus Br. 35.

The importance of such questions may be seen in another Fourth Amendment case recently decided by this Court: *United States v. Green*, 698 F.3d 48 (1st Cir. 2012). In *Green,* the Court confronted "the extent of the privacy interest that an individual has in . . . cellular communications." *Id.* at 53. The Court specifically had to decide if retrieval of a defendant's International Mobile Subscriber Identity ("IMSI") number by DEA agents "constituted a search within the meaning of the Fourth Amendment." *Id.* In turn, the Court realized that it needed specific facts about the nature of an IMSI number, and thus asked "at oral argument, exactly what information can be gleaned about a subscriber using his IMSI number." *Id.* Ultimately, "*neither party was able to provide an answer*." *Id.* (emphasis added).

Amicus respectfully submits that its participation at oral argument in this case would help the Court identify similarly crucial questions with

respect to the TSA searches. For example: how exactly do the TSA's self-proclaimed "extensive protections" of individual privacy like private screenings (Defs.' Suppl. Br. 23) work in practice, and how often are they denied by TSA agents. Amicus Br. 23-24. The value of these questions to any constitutional review of the TSA searches cannot be understated—particularly to the extent these questions indicate that the factual record in this case is "insufficiently developed," and, thus, the Court should not decide the validity of the TSA searches until these questions are answered through genuine, adversarial fact-finding. *Green*, 698 F.3d at 53.

Conclusion

Amicus supports Redfern in his Fourth Amendment challenge to the TSA searches. But Amicus also believes that it represents a vital position, a diversity of travelers, and key concerns that are distinct from Redfern—in sum, a unique perspective that would greatly assist the Court in deciding the issues at hand. For this reason, and based on the argument above, Freedom to Travel USA respectfully asks this Court for 3 minutes of time during the oral argument in *Redfern* scheduled for April 3, 2013.

Respectfully submitted,

Dated: March 7, 2013

___/s_____________________________

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