IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REBECCA BROWN, *et al.*, *Plaintiffs*, v. TRANSPORTATION SECURITY ADMINISTRATION; *et al.*, *Defendants*.	Civil Action No. 2:20-cv-64-MJH-KT

COMBINED REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs fail in their Opposition and Cross-Motion ("Opp."), ECF No. 174, to salvage their challenges to the formal policies of TSA[1] addressing bulk currency at passenger screening checkpoints in airports. For the reasons detailed below, the Court should dismiss Counts I and II for lack of jurisdiction or, in the alternative, grant summary judgment for TSA on those counts.

To start, this Court lacks jurisdiction over Counts I and II because Plaintiffs have brought their claims in the wrong forum. Plaintiffs concede (Opp. 1) that, at bottom, their claims challenge a "set of formal, written screening policies"—TSA's SOPs and MD 100.4. But every court to have reviewed challenges to TSA's screening SOPs and related security directives has held that Congress, through 49 U.S.C. § 46110, channeled exclusive review of such challenges to the courts of appeals. Plaintiffs ignore this body of law entirely, and instead ask this Court to construe § 46110 in a manner that the Third Circuit (amongst other courts of appeals) has squarely rejected. Indeed, Plaintiffs' argument fails even on its own terms: it distorts the procedural requirements for a certain type of TSA order issued under an entirely different provision into a universal definition of any and every order that TSA may issue. This Court should adhere to the uniform body of law rejecting this tortured reading of the statutes TSA administers and dismiss Counts I and II without prejudice.

Independently, this Court lacks jurisdiction because Plaintiffs fail to carry their burden to establish Article III standing. To establish an injury, Plaintiffs primarily recount details concerning isolated incidents from five and ten years ago in which their currency was seized by law enforcement, not TSA. But it is well-settled that past injury cannot confer standing to seek the prospective relief exclusively sought here. Nor may Plaintiffs obtain relief based on the costs that they voluntarily incur by refusing to fly without currency because Plaintiffs fail to show these costs are necessary. Absent such evidence, their attempts to purchase standing cannot be credited under controlling precedent.

Plaintiffs' claims are similarly deficient on the merits. Numerous courts, including the Third Circuit, have recognized that TSA screeners may notify law enforcement when they uncover evidence

[1] All abbreviated and defined terms retain their definition provided in Defendants' Memorandum in Support of their Motion for Summary Judgment ("Defs.' Br."), ECF No. 172.

of potential criminal activity so long as that evidence was discovered incidentally during a lawful administrative search. Indeed, Plaintiffs concede (Opp. 32 n.14) that both the relevant statutes and Fourth Amendment authorize TSA screeners to notify law enforcement when they encounter evidence of illegal drugs or child pornography under the plain view doctrine. That concession is fatal to Plaintiffs' claims. Courts around the country have recognized that, like substances that appear to be illegal drugs or pornographic materials that appear to depict minors, bulk currency may be seized when found in plain view and accompanied by additional evidence of criminal activity. The challenged TSA policies do not even go that far—they merely direct screeners to notify law enforcement when large amounts of cash appear to relate to criminal activity, not seize the currency—and therefore fall squarely within the bounds of the Fourth Amendment and TSA's statutory authorizations.

In an unsuccessful attempt to evade this settled law, Plaintiffs construct and tear down a strawman, misrepresenting the TSA policies at issue. Plaintiffs, for example, repeatedly invoke (*e.g.*, Opp. 2) the directive to "maintain control of the suspicious item" to claim that TSA directs its screeners to seize bulk currency. But that directive is taken from a different part of Chapter 12 of TSA's SOPs, not the subsection that specifically addresses bulk currency. The instructions that are specific to bulk currency unequivocally direct TSA screeners to return bulk cash once the screener determines the currency does not conceal a prohibited threat item, even when the screener contacts law enforcement. Accordingly, if this Court reaches the merits, it should grant Defendants' motion for summary judgment because TSA's policies are lawful under the Fourth Amendment and TSA's statutory directives.

ARGUMENT

I. Congress granted the courts of appeals exclusive jurisdiction over challenges to TSA's SOPs and screening directives.

This Court should dismiss Plaintiffs' claims against TSA for lack of subject-matter jurisdiction because Congress granted exclusive jurisdiction to the federal courts of appeals over challenges to formal TSA policies. Defs.' Br. 17-20. Plaintiffs concede on the opening page of their brief that they are challenging "a series of formal, written policies," Opp. 1—Management Directive 100.4 and the

screening SOPs. That concession is fatal: every appellate court to address the issue has held that TSA's SOPs and binding directives are orders for purposes of 49 U.S.C. § 46110 and therefore may only be challenged in an appropriate court of appeals. Defs.' Br. 18-20. Indeed, Plaintiffs respond with no authority in which *any* court at *any* level construed § 46110 to authorize challenges to TSA's screening SOPs or security directives. Plaintiffs instead rehash arguments about the scope of § 46110 that the Third Circuit and other courts have rejected. As detailed below, these arguments fail.

a. Plaintiffs first argue (Opp. 26-27) that TSA SOPs are not orders for purposes of § 46110. Plaintiffs specifically contend that an order under § 46110 must satisfy the procedural requirements that apply to a different type of order in 49 U.S.C. § 46105(b), and that the SOPs and directives at issue do not qualify because they do not contain findings of fact and were not served on parties to a proceeding or affected persons. The Third Circuit precedent in *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998), forecloses this argument. There, the court rejected for purposes of § 46110 a narrow definition of a TSA order that would encompass only determinations in administrative adjudications served by the Administrator on the parties to that adjudication, as would be required under § 46105(b). Instead, the court held that to qualify under § 46110 "an 'order' must be final, but need not be a formal order, the product of a formal decision-making process, or be issued personally by the Administrator." *Id.* Here, Plaintiffs concede that "the Cash-Screening Policies are final agency *actions*," Opp. 28 n.13, and "formal, written policies," Opp. 1. That is the end of the matter.[2]

Other courts have reached the same conclusion: "§ 46110 and § 46105 do not use the term 'order' in the same way; the former's use of the term is broader, 'because of its function in providing

[2] Plaintiffs mistakenly invoke *Aerosource* (Opp. 28) as support for their position because the court held that the FAA actions at issue in that case were not orders. But the Third Circuit reached that conclusion because the agency actions "were advisory in nature"—"they imposed no obligations, denied no right, and did not fix or alter a legal relationship." *Aerosource*, 142 F.3d at 580. Here, MD 100.4 and the screening SOPs are TSA's final and binding policies regarding bulk currency at passenger screening checkpoints. MD 100.4 directly states that "[a]ll screening, searches and regulatory inspection must be conducted in accordance with this directive." § 7 (AR11); *see also id.* § 1 (AR1) ("This directive establishes TSA policies . . ."). And the current SOPs state that TSA personnel "must use and implement these standard operating procedures in carrying out their functions related to security screening of passengers, accessible property, and checked baggage." (AR112).

for judicial review.'" *Durso v. Napolitano*, 795 F. Supp. 2d 63, 68 (D.D.C. 2011) (quoting *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 520 (D.C. Cir. 2011)); *see also Ventura v. Napolitano*, 828 F. Supp. 2d 1039, 1042 (D. Minn. 2011) ("[A]s courts have repeatedly held, even informal orders 'not subject to the procedural requirements laid out in . . . 49 U.S.C. § 46105(b)' are reviewable under § 46110."). "Thus, the fact that § 46105(b) requires 'orders' to include factual findings and be served on affected parties does not mean that an agency determination made without those steps is not an 'order' for the purposes of § 46110." *Durso*, 795 F. Supp. 2d at 69.

The Fourth Circuit addressed this uniform body of law when rejecting the same argument that Plaintiffs advance here in an indistinguishable challenge to checkpoint screening SOPs, explaining "[n]one of our sister circuits have adopted such a narrow view of § 46110 . . . and the adoption of the Plaintiffs' interpretation would contravene the plain language of the statute and controlling precedent." *Blitz v. Napolitano*, 700 F.3d 733, 740 (4th Cir. 2012). The D.C. Circuit, First Circuit, Ninth Circuit, Tenth Circuit, and Eleventh Circuit are in accord. *See Roberts v. Napolitano*, 463 F. App'x 4, at *5 (D.C. Cir. 2012) ("[T]he SOPs are 'orders' within the meaning of section 46110"); *Ruskai v. Pistole*, 775 F.3d 61, 65 (1st Cir. 2014) (similar); *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (holding "the TSA Security Directive . . . is an 'order' within the meaning of § 46110(a)."); *Tulsa Airports Improvement Tr. v. Fed. Aviation Admin.*, 839 F.3d 945, 949 (10th Cir. 2016) (holding that "'orders' for purposes of" § 46110 include "letters from the FAA . . . not issued by the Administrator"); *Corbett v. United States*, 458 F. App'x 866, at *870 (11th Cir. 2012) ("the SOP was an order under § 46110").

So, too, are many district courts. *See, e.g.*, *Muir v. United States Transportation Sec. Admin.*, No. 1:20-CV-01280, 2021 WL 231733, at *11 (C.D. Ill. Jan. 22, 2021) ("The SOP has been widely and uniformly held to be a final order within the meaning of § 46110(a), and challenges to the SOP therefore lie within the exclusive jurisdiction of the courts of appeals."), *aff'd*, No. 21-1312, 2021 WL 3780089 (7th Cir. Aug. 26, 2021); *Frey v. Town of Jackson*, No. 19-CV-50-F, 2019 WL 13260516, at *19 (D. Wyo. Dec. 2, 2019) ("the SOP are final for purposes of being a § 46110 'order'").

Plaintiffs address (Opp. 29) only one of these decisions, arguing that the First Circuit found a final order for purposes of § 46110 in *Ruskai* because the plaintiff in that case challenged both "TSA's

security protocol and refusal to grant [plaintiff's] requested accommodation." 775 F.3d at 65. But the First Circuit's exercise of exclusive jurisdiction did not turn on the secondary challenge to the denial of an accommodation, as demonstrated by the First Circuit's reliance on *Blitz*, 700 F.3d at 740, which squarely held that the SOPs at issue here are orders under § 46110(a), and *Gilmore*, 435 F.3d at 1133, which held that a TSA directive was an "'order' within the meaning of § 46110(a)."

Unable to marshal any authority construing § 46110 as they do, Plaintiffs instead invoke *Mace v. Skinner*, which construed a predecessor of § 46110 to authorize district court jurisdiction "over a *Bivens*-type action that challenges conduct arising out of an administrative agency decision." 34 F.3d 854, 856 (9th Cir. 1994). That holding has no relevance here because it was predicated in part on the fact that the plaintiff was "seeking to recover damages, a remedy not found among the possibilities of" the statute's exclusive grant of jurisdiction. *Id.* at 858. And as the Ninth Circuit subsequently clarified, *Mace* does not apply to constitutional challenges that "squarely attack[] the orders issued by the TSA with respect to airport security" because review of those challenges is "inescapably intertwined with a review of the . . . order." *Gilmore*, 435 F.3d at 1133 n.9 (quoting *Mace*, 34 F.3d at 858). Here, Plaintiffs seek to enjoin and vacate (which are the same types of relief specified in § 46110) a TSA management directive and SOPs (which are the same types of TSA orders with respect to airport security that the Ninth Circuit addressed in *Gilmore*).[3]

b. Even if Plaintiffs' construction were not foreclosed by precedent (it is), it fails on its own terms because § 46105(b) does not purport to define the term "order," much less for all of Chapter 461. When Congress defines a term for use throughout a particular chapter of the U.S. Code, it states as much. In the APA, for example, Congress included sections titled "Definitions" that specified what terms "mean[]" "[f]or the purpose of this chapter." 5 U.S.C. §§ 551, 701(b). "Had Congress likewise

[3] *Merritt v. Shuttle, Inc.* declined to "decide whether a broad-based, facial constitutional attack on an FAA policy or procedure . . . might constitute . . . a stand-alone federal suit," 187 F.3d 263, 267 (2d Cir. 1999), and thus does not help Plaintiffs here. And *Vanderklok v. U.S.*, 868 F.3d 189 (3d Cir. 2017), did not purport to define "orders" for purposes of § 46110. That case instead emphasized that Congress, which "can tailor any remedy to the problem perceived," "chose to limit the scope of judicial review of TSA actions." *Id.* at 208. That is precisely why this Court should not expand its own jurisdiction contrary to Congress's carefully tailored review scheme.

intended" § 46105(b) "to have such an effect, it knew how to say so." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 216 (2018). But Congress did no such thing in § 46105(b), which merely prescribes certain procedural requirements for the specific category of orders addressed in that section. Accordingly, Plaintiffs' repeated exhortations for this Court to "follow" an "explicit definition" (Opp. 26) miss the mark—there is no definition to follow. *See Nat'l Fed'n of Blind v. U.S. Dep't of Trans.*, 78 F. Supp. 3d 407, 412 (D.D.C. 2015) ("section 46110 does not" "contain a definition of order").

In these circumstances, then, "statutory terms are generally interpreted in accordance with their ordinary meaning," *Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013). And when the operative language in § 46110(a) was first enacted in 1938, *see* Civil Aeronautics Act of 1938, Ch. 601, § 1006(a), 52 Stat. 1024, the ordinary meaning of the term "order" included "a command or direction authoritatively given," *Black's Law Dictionary* 1298 (3d ed. 1933) ("[a] mandate, precept; . . . a rule or regulation"); *see also* 7 *Oxford English Dictionary* 183 (1933) ("[t]he action or an act of ordering; regulation, direction, mandate"). TSA's screening SOPs and Management Directive 100.4 fall squarely within this definition: they are commands and directions authoritatively given to TSA screeners with which passengers must then comply. *Ventura*, 828 F. Supp. 2d at 1043 ("The [SOP] is TSA's final decision on the issue, and it imposes consequences on passengers who refuse to comply with it.").

The relevant statutory language and context confirm that "order" in § 46110 encompasses the policies challenged here. By its terms, § 46110 applies to an "order issued by . . . the Administrator . . . in whole or in part under this part, part B, or subsection (*l*) or (r) of section 114." Subsection (*l*) of § 114 is entitled "Regulations," 49 U.S.C. § 114(*l*), and general regulations addressing security procedures and requirements are the subject of that subsection, *see, e.g.*, *id.* § 114(*l*)(2) (describing emergency procedures). Accordingly, the reference in § 46110 to an "order issued . . . in whole or in part under . . . subsection (*l*) or (r)" *necessarily* encompasses generally applicable procedures like the SOPs or MD 100.4. Plaintiffs' contrary position, which would limit orders to a narrow category of final determinations in administrative adjudications, improperly renders part of § 46110 a nullity. But courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S.

167, 174 (2001). Thus, even if this Court were writing on a blank slate (and it is not, given the Third Circuit's authoritative rejection of Plaintiffs' position), Plaintiffs' argument would still fail.

c. Plaintiffs relatedly argue (Opp. 27) that the SOPs and MD 100.4 cannot be orders because they were never issued to Plaintiffs or officially made public, and therefore § 46110's sixty-day deadline for the filing of petitions cannot have begun to run. But "plaintiffs' concern that an order could take effect and trigger the sixty-day window without anyone knowing, thereby precluding any judicial review thereof, is unfounded: if an order is kept secret, the sixty-day period will be tolled until plaintiffs receive some notice of the order's contents or effect." *Durso*, 795 F. Supp. 2d at 69. Here, Plaintiffs evidently have received notice of the orders' contents given the orders are the subject of their brief. Accordingly, "TSA's failure to provide public notice of the Screening Checkpoint SOP or its contents prior to its effective date does not prevent the SOP from being an order" under § 46110. *Id.*; *see also Roberts v. Napolitano*, 798 F. Supp. 2d 7, 10 (D.D.C. 2011) ("an agency determination need not be preceded by public notice to be an order under § 46110"), *aff'd,* 463 F. App'x 4 (D.C. Cir. 2012).

d. Plaintiffs next argue (Opp. 28-29) that the APA limits the term "order" to decisions issued after formal adjudications, and the term "order" in § 46110 should be construed accordingly. But the APA defines "order" broadly as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). TSA's SOPs and directives, which are binding on TSA employees and must be complied with by passengers, readily satisfy that definition. *See Ventura*, 828 F. Supp. 2d at 1043. Moreover, the Third Circuit's controlling decision in *Aerosource* defined order under § 46110 by importing the APA's conception of final agency *action*. 142 F.3d at 577. Here, Plaintiffs concede they challenge "final agency *actions*," Opp. 28 n.13.

e. Plaintiffs are also wrong (Opp. 29-30) that Defendants' construction of § 46110 would preclude any challenges to TSA SOPs or security directives. As evidenced by the many cases cited *supra* pp. 3-4, a potential plaintiff can readily identify widespread TSA practices and, if those practices are derived from TSA's formal policies, bring suit in an appropriate court of appeals. *See also Ventura*, 828 F. Supp. 2d at 1043 ("Although the details of the challenged Standard Operating Procedure are

not publicly available, there is sufficient information about what the procedure requires to allow challenges."). Plaintiffs could (and should) have done so here after realizing that their claims challenge a "set of formal, written screening policies," Opp. 1. Moreover, the non-jurisdictional and toll-able nature of the 60-day timing bar, *see Avia Dynamics*, 641 F.3d at 519, ensures that "if an order is kept secret," plaintiffs can nonetheless bring suit within sixty days of "receiv[ing] some notice of the order's contents or effect," *Durso*, 795 F. Supp. 2d at 69, such as by experiencing the procedures. And § 46110 even authorizes courts to "allow the petition to be filed after the 60th day . . . if there are reasonable grounds for not filing" before that cut-off. Accordingly, Defendants' construction does not foreclose judicial review altogether—rather, it merely channels that review to the forum that Congress selected.[4]

f. Finally, Plaintiffs assert (Opp. 30) that, if § 46110 applies, the appropriate course is "transfer to the court of appeals 'in the interest of justice.'" But Plaintiffs do not explain why transfer would be in the interest of justice or even indicate to which court of appeals this action should be transferred. They cannot do so for the first time on reply. *See Hayes v. Silvers, Langsam & Weitzman, P.C.*, 441 F. Supp. 3d 62, 67 n.5 (E.D. Pa. 2020). In any event, courts routinely dismiss challenges to TSA policies without prejudice to allow Plaintiffs to refile in the relevant court of appeals. *See, e.g.*, *Blitz*, 700 F.3d at 738 (affirming dismissal without prejudice based on § 46110). This Court should do the same to ensure review is conducted on a limited administrative record as Congress intended.

II. Plaintiffs fail to carry their burden to establish Article III standing.

Independently, this Court lacks subject-matter jurisdiction because Plaintiffs fail to carry their burden to establish Article III standing. Defs.' Br. 11-17. Plaintiffs' responses are unavailing.

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[4] *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993), and *McNary v. Haitian Refugee Ctr., Inc.*, 98 U.S. 479, 492 (1991), addressed statutes that channeled judicial review of the denial of individual applications, and authorized district courts to exercise jurisdiction over programmatic challenges. Those cases have no bearing on § 46110, which grants exclusive jurisdiction to courts of appeals for review of even programmatic orders. *See Corbett*, 458 F. App'x at 871 ("Unlike the statute in *McNary*, § 46110's grant of jurisdiction is broad."); *Ventura*, 828 F. Supp. 2d at 1044 (similar). *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 145 S. Ct. 2006 (2025), is likewise distinguishable. The Court there considered whether a statute granting courts of appeals exclusive jurisdiction to determine the validity of final orders of the FCC precluded a challenge to the validity of those orders *as a defense* to liability in subsequent enforcement proceedings. *Id.* at 2011. That question has no bearing on whether a plaintiff can bring direct challenge to a TSA order in district court, which is the posture here.

a. Plaintiffs seek prospective relief on the basis of past injury, but fail to demonstrate either that any future injury is certainly impending or that their self-inflicted present harms are a reasonable response to that minimal risk of future injury. Defs.' Br. 12-16. Plaintiffs first respond (Opp. 21-22) by reciting the facts of their prior allegedly unlawful searches and seizures. But "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief," *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974), because prospective injunctive or declaratory relief cannot remedy that past injury. For this reason, Plaintiffs can satisfy the injury-in-fact requirement only by adducing evidence of a "certainly impending" harm. *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 893 (3d Cir. 2020). Plaintiffs' recounting of incidents from five (Esposito) and ten (Berger) years ago "does nothing to establish a real and immediate threat that [plaintiffs] would again be" subjected to harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

Plaintiffs then invoke (Opp. 21) the Court's motion to dismiss decision to argue that "it is a reasonable inference that if Plaintiffs were to resume domestic air travel with large sums of cash . . . there would be an imminent, substantial risk" of purportedly unlawful seizures. But that is the very inference that the Supreme Court emphatically rejected in *Lyons*, 461 U.S. at 105. In any event, the motion to dismiss decision cannot confer standing at summary judgment because the "manner and degree of evidence required" to establish standing increases "at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs' "general factual allegations" of imminent future injury may have sufficed at the motion to dismiss stage, But Plaintiffs must now set forth by evidence "specific facts" to establish an imminent future injury to sustain their claims. *Id.*[5]

They fail to do so. The available evidence instead demonstrates that Plaintiffs' experiences were isolated and uncommon events. Plaintiff Berger, for example, testified that he had travelled with bulk currency "on numerous occasions" and "had never had the same experience that [he] had" when his cash was seized. *See* Defs.' Ex. C, Berger Dep. Tr. 42:9-20. Accordingly, it is purely speculative to

[5] *Diamond Alternative Energy, LLC v. Env't Prot. Agency*, 145 S. Ct. 2121 (2025), does not authorize courts to substitute "common sense" for the specific facts substantiated by evidence that are necessary to establish standing at summary judgment. To the contrary, the Court there properly relied on "record evidence" to "confirm[]" the petitioners' suppositions about the effect of a regulation. *Id.* at 2137.

believe that he would again experience a seizure if he resumed flying with bulk currency. Plaintiffs nonetheless insist (Opp. 23) that TSA's alleged practices "harm[] more than a thousand travelers each year," but fail to adduce any evidence in support of that proposition, and therefore fail to carry their burden on summary judgment, *Greenberg v. Lehocky*, 81 F.4th 376, 384 (3d Cir. 2023). And, in any event, TSA screened 904 million travelers in 2024 alone. TSA, *2024 By the Numbers*, https://www.tsa.gov/sites/default/files/tsa_2024_yir_by_the_numbers.pdf (last accessed July 28, 2025). So even if Plaintiffs were correct that a thousand travelers experienced an allegedly unlawful search or seizure in 2024, that would mean only 0.0001% of screened travelers had that experience. The minuscule risk of Plaintiffs falling within that category is far "too speculative to be an imminent injury." *Thompson v. Horsham Twp.*, 576 F. Supp. 2d 681, 690 (E.D. Pa. 2008); *see also Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) ("Plaintiffs do not allege an injury-in-fact when they rely on a 'chain of contingencies' or 'mere speculation.'").

Plaintiffs next argue (Opp. 23-24) that they suffer an injury in fact in the form of the costs that Esposito and Berger claim to incur because they no longer fly with bulk currency. But these costs are self-inflicted—Esposito and Berger, of course, voluntarily elect not to fly with currency. Those costs therefore cannot confer standing absent evidence of both their existence and necessity. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013) (Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011) ("[Plaintiffs'] alleged time and money expenditures to monitor their financial information do not establish standing, because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than the alleged 'increased risk of injury' which forms the basis for [Plaintiffs]' claims."). Plaintiffs fail to establish both the existence and the necessity of these costs.

Start with Esposito. Plaintiffs claim that, to avoid flying with currency, she must "(1) withdraw money at an ATM when she arrives (which *can* bring fees); (2) set up an account to which she transfers money (which *can* bring fees); or (3) drive to casinos." Opp. 23-24 (emphasis added); *see also* Esposito Decl. ¶ 74 ("can result in fees"). The mere *possibility* of fees, however, does not suffice to justify self-

inflicted harm. Instead, Esposito must adduce evidence indicating that these fees are unavoidable or certainly impending. *See Kamal v. J. Crew Grp., Inc.*, 416 F. Supp. 3d 357, 364 (D.N.J. 2019) (Because "the hypothetical future harm . . . is not 'certainly impending,'" "shouldering the burden and cost of preventing that harm is insufficient for standing to attach."). She adduces no such evidence.[6]

Nor has Esposito even carried her burden to show that she would certainly travel with large amounts of bulk currency absent TSA's alleged policies or practices. For one, she testified that she does not gamble "big money," and instead plays "penny slots" and "$5, $10 blackjack." Defs.' Ex. B, Esposito Dep. Tr. 58:22-59:4; *id.* at 58:13-16 ("Sadly, it's rare that I win. But I don't win in large amounts. If I win a few hundred dollars, I'm happy and I walk away. So it's never been a windfall for me."). Accordingly, the record refutes her newly-asserted need to travel with over $10,000 in bulk currency. And in a conflict between her sworn deposition testimony and a subsequent self-serving declaration, the former trumps the latter: "'conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment.'" *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009) (quoting *Blair v. Scott Specialty Glass*, 283 F.3d 595, 608 (3d Cir. 2002)). She also testified that she now lacked "the time" to fly to casinos. Defs.' Ex. B, Esposito Dep. Tr. 82:8-11. Any injury that could result from such travel is therefore not certainly impending.

Plaintiff Berger's self-incurred injuries are similarly deficient. Plaintiffs claim (Opp. 24) that he "must turn away potential business partners who want to travel with over $10,000 in cash," citing to paragraphs in his declaration in which he asserts that he "now avoid[s] doing business with anyone who flies with more than $10,000," Berger Decl. ¶ 18. This makes no sense. There is no reason for Berger to refuse business in which *other* people incur the risk (which is negligible in any event, as explained *supra* pp. 9-10) of being seized or having their currency seized at an airport. Indeed, even if Berger were to arrange for a sale to a potential business partner and that potential business partner

[6] Plaintiffs cite (Opp. 24) *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022), to argue that the existence of a "legally available 'alternative'" cannot foreclose standing on the basis of an injury incurred to avoid that legally available alternative because Plaintiffs are still forced "to forego exercising a right." But *Cruz* addressed a challenge to government regulations that burdened political speech protected by a "First Amendment right." *Id.* at 298. Plaintiffs here identify no constitutional provision that creates a right to carry over $10,000 in bulk currency on planes to casinos.

were to be seized at an airport, Berger would be in no worse of a position than if he had refused to do business with that individual, as he claims. Berger's refusal to conduct business with third parties to reduce a speculative risk of harm to those third parties is thus a quintessential self-inflicted harm that cannot confer standing. *Clapper*, 568 U.S. at 416.

Indeed, the voluntarily incurred costs that Berger and Esposito assert are analogous to the asserted self-censorship harms that the Supreme Court and Third Circuit have held insufficient in challenges to government actions that allegedly caused the censorship. *See Reading v. N. Hanover Twp., New Jersey*, 124 F.4th 189, 198 (3d Cir. 2024) ("Because Reading cannot show a likelihood of future harm, she likewise cannot prevail on her theory of present self-censorship."); *Murthy v. Missouri*, 603 U.S. 43, 73 (2024) (similar). Nor does the record support Berger's self-serving assertions that travelling with cash is necessary in his line of business—instead, he testified that he had used cash less frequently to acquire equipment over his time in the industry. *See* Defs.' Ex. C, Berger Dep. Tr. 69:3-8.

More fundamentally, neither Esposito nor Berger adduce any evidence to establish that the costs they voluntarily incur by not flying with bulk currency are a reasonable response to the minimal threat (assuming *arguendo* that such a threat even exists) posed by the challenged TSA policies. There can be no dispute of fact that seizure of currency by law enforcement is exceedingly rare even in Plaintiffs' experience, *supra* pp. 9-10, so the real impact of the TSA policies that Plaintiffs challenge here are, at most, an additional few seconds of screening. *See* Defs.' Ex. D, Leyh Dep. Tr. 371:15-17 ("It only takes, you know, a few seconds to just take a picture and send it over."). The self-inflicted loss of business opportunities over a few seconds of screening is an impermissible attempt to manufacture standing. *Clapper*, 568 U.S. at 415-418 ("costly and burdensome measures" to protect confidential communications cannot confer standing). Indeed, Plaintiffs emphasize (Opp. 24) that Berger and Esposito incur these costs to avoid harms "based on personal experience." But that is precisely the problem with their theory: "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8; *see also Clapper*, 568 U.S. at 418 ("allegations of a subjective 'chill' are not an adequate substitute for . . . a threat of specific future harm") (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)).

At bottom, then, Plaintiffs base their assertion of an injury in fact on self-serving affidavits that recount costs that Plaintiffs voluntarily incur to avoid the speculative repetition of isolated incidents that took place five or ten years ago. Any potential harm posed by TSA policies is far too speculative to justify these self-inflicted costs, and Plaintiffs therefore lack Article III standing.[7]

b. Independently, Plaintiffs lack Article III standing because any injury that they establish would be traceable to the failure of individual screeners to adhere to TSA's lawful policies, not the policies themselves. Defs.' Br. 16-17. Plaintiffs respond (Opp. 24) that TSA's policies "predictably" led to unlawful searches and seizures of "bulk cash." But as explained *infra* pp. 22-23, TSA's policies unequivocally direct screeners *not* to seize bulk currency once it has been determined that the bulk currency does not contain or conceal a prohibited item that threatens transportation security. *See* MD 100.4 § 6(C)(2) (AR8-9); SOP Ch. 12 § 2(5)(b) (AR162). A screener that nonetheless seizes Plaintiffs' currency would not be responding in a "predictable" way to TSA policies that prohibit such actions. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019) (traceability requires "showing that third parties will likely react in predictable ways"). And because Plaintiffs can show only "isolated misuse" of a challenged provision, they lack standing to seek prospective relief that would enjoin reliance on or use of that challenged provision because the harm suffered is not traceable to the provision itself. *Schirmer v. Nagode*, 621 F.3d 581, 588 (7th Cir. 2010); *see also* Defs.' Br. 17.

As to redressability, Plaintiffs again (Opp. 25) fall back on the Magistrate Judge's report and recommendation at the motion to dismiss stage. But that report merely acknowledged that, at a time when Plaintiffs asserted the existence of an informal, unwritten policy, "[t]he Government Defendants

[7] Plaintiffs' remaining authorities (Opp. 23) predate the Supreme Court's authoritative instruction on the cognizability of self-inflicted injuries intended to avoid the risk of future harm in *Clapper* and, in any event, are distinguishable. The quoted language from *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), summarized the unique law authorizing pre-enforcement challenges to the constitutionality of criminal statutes, which are not at issue here. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993), is even further afield. The Court there held only that, to establish standing at the motion to dismiss stage to challenge an ordinance according preferential treatment to minority-owned businesses in the award of city contracts, a plaintiff need show only that it would have submitted a bid but for the ordinance. *Id.* at 658. The Court did not purport to hold that any change in behavior attributable to a challenged government action amounts to a cognizable injury in fact, and *Clapper* soundly rejects any such contention.

do not dispute that . . . the prospect of such injuries would be redressable by injunctive relief." ECF No. 66 at 3-4. While undisputed at the motion to dismiss stage, it is now clear that Plaintiffs have failed to adduce evidence sufficient to establish that enjoining application of the *written* policies would prevent unlawful searches and seizures. In light of the directives prohibiting TSA personnel from seizing bulk currency contained in those written policies, an injunction against application of those policies would, if anything, have the opposite effect.

c. Plaintiffs also fail to carry their burden to establish standing to challenge TSA's policies concerning international travelers, which Plaintiffs challenge for the first time at summary judgment, *compare* 1st Am. Compl. ¶ 503 (alleging "there are no legal requirements to report to the government that one is traveling domestically with any amount of cash") *with, e.g.*, Opp. 8 (arguing "there is no transportation security purpose for determining whether a traveler with more than $10,000 is traveling internationally"). Indeed, Plaintiffs ask this Court to vacate and enjoin all TSA screening policies concerning bulk currency, including TSA's policies requiring STSOs to notify a law enforcement officer if an individual is unlawfully traveling outside the United States with more than $10,000 in currency without notifying Customs and Border Protection (CBP). *See* Proposed Order, ECF No. 173-1 (enjoining application of Chapter 12 entirely); SOP Ch. 12 § 2(3)(a)-(b)(AR161). But Plaintiffs may not amend their complaint through summary judgment submissions, much less a proposed order divorced from the evidence necessary to obtain the relief sought. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy.").

In any event, Plaintiffs "'must demonstrate standing for each claim that they press' against each defendant, 'and for each form of relief that they seek.'" *Murthy*, 603 U.S. at 61. Here, Plaintiffs have not adduced *any* evidence that would confer standing to challenge policies concerning *international* travelers. To the contrary, Berger testifies regarding a trip from San Diego to New Jersey, Pls. Ex. 13, Berger Decl. ¶¶ 66-67, and Esposito testifies regarding a trip from Georgia to North Carolina, Pls.' Ex. 12, Esposito Decl. ¶¶ 13-14. This evidence (which is insufficient to establish standing to challenge

even TSA's policies regarding domestic travelers, *supra* pp. 8-14) plainly cannot confer standing at the summary judgment stage to obtain relief directed at TSA's policies concerning international travelers.

d. At a minimum, Plaintiff Brown must be dismissed given Plaintiffs' failure to argue that she faces any likelihood of future injury because "her father," the sole reason she intended to travel with large amounts of currency, "has since passed away." Opp. 22 n.11. Thus, her claims must be dismissed without prejudice. *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed."). And that holds true even if this Court maintains jurisdiction over other Plaintiffs. *See, e.g.*, *Slaughter v. Trump*, --- F. Supp. 3d ----, 2025 WL 1984396, at *5 (D.D.C. July 17, 2025) (dismissing claims of only one plaintiff for lack of jurisdiction).

III. TSA is entitled to summary judgment on the merits.

If this Court reaches the merits, it should grant Defendants' motion for summary judgment on Counts I and II. Plaintiffs cannot (and do not) dispute that TSA may conduct lawful administrative searches and seizures of passengers and their possession at airport screening checkpoints. *See* Defs.' Br. 21-23. While those searches and seizures are initiated to detect and prevent threats to transportation security, TSA officials conduct hundreds of millions of searches annually and invariably encounter evidence of potential criminality unrelated to transportation security, such as images that appear to be child pornography, substances that appear to be illegal drugs, or, indeed, suspiciously-packaged bulk currency that appears to relate to criminal activity. Plaintiffs would require (Opp. 31-35) that TSA officials turn a blind eye to such evidence and would even prohibit screeners from notifying law enforcement upon its discovery.

Neither the Fourth Amendment nor TSA's statutory authorizations compel such an extraordinary outcome. As explained *infra* pp. 16-20, courts around the country have consistently held that it is permissible for airport security screeners to report evidence of potential criminal activity uncovered during a lawful administrative search to law enforcement, even when the potential criminal activity did not pertain to transportation security. Courts have also consistently held that bulk currency can constitute strong evidence of criminality and may even be seized for forfeiture in appropriate

circumstances, including when discovered at airport passenger screening. It therefore follows that TSA may direct screeners to notify law enforcement when a screener uncovers large amounts of currency that carries indicia of criminal activity. And that is all TSA policy directs: while TSA does not seize bulk currency for forfeiture itself, its policies instruct its agents to inform law enforcement where large amounts of currency "appear[] to relate to criminal activity," SOP Ch. 12 § 2(3) (AR162); *see also* MD 100.4 § 6(C)(2) (AR8).

a. TSA's policies and practices regarding bulk currency comply with the Fourth Amendment.

TSA's policies regarding bulk currency found incident to a lawful administration search are fully consistent with the Fourth Amendment. Defs.' Br. 23-28. Start with what is not in dispute. Plaintiffs do not (and cannot) contest that TSA may conduct an administrative search at airport checkpoints under the Fourth Amendment. Defs.' Br. 22-23. Nor could Plaintiffs argue—contrary to then Judge-Alito's controlling opinion for the Third Circuit—that when these administrative searches and seizures are extended based on the discovery of a potential threat item, that amounts to "a single search under the administrative search [and seizure] doctrine." *U.S. v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006). The Fourth Amendment therefore permits TSA screeners to complete their security screening for as long as reasonably necessary to extinguish potential hazards to transportation security. Defs.' Br. 23-28. To that end, TSA screeners are not limited to examining items that present obvious threats, but may also inspect innocuous items—such as books, stacked paper or photographs, and bulk currency—to ensure that those items do not conceal threats. *Hartwell*, 436 F.3d at 181 n.13.

The first disputed question of law, then, is whether the Fourth Amendment requires TSA officials to ignore potential evidence of criminal activity uncovered during the lawful administrative search if that criminal activity is unrelated to the threats to transportation security that justify the administrative search in the first place. But here, too, Third Circuit precedent is dispositive. In *Hartwell*, the court addressed the argument that the Fourth Amendment requires the suppression of drugs that were uncovered during by a TSA screener because the lawful administrative search and seizure conducted at the checkpoint must be limited to a search for weapons or explosives. 436 F.3d

at 181 n.13. Then-Judge Alito's decision squarely rejected that argument, explaining that "[e]ven assuming that the sole purpose of the checkpoint was to search only for weapons or explosives, the fruits of the search need not be suppressed so long as the search itself was permissible." *Id.*

Other courts have similarly held that TSA screeners may notify law enforcement of potential contraband discovered during a lawful administrative search. In *United States v. $557,933.89*, 287 F.3d 66, 81–82 (2d Cir. 2002), then-Judge Sotomayor rejected in the context of seized money orders the very argument that Plaintiffs advance here: "that once [TSA screeners] found [no weapons or explosives], they were required to close up the briefcase and send [the screened traveler] on his way" and "ignore anything else that they might have found." This argument was incorrect because it "would eviscerate the plain view doctrine altogether." *Id.* at 82. Other courts have reached the same conclusion. *See U.S. v. Marquez*, 410 F.3d 612, 617 (9th Cir. 2005) ("The mere fact that a screening procedure ultimately reveals contraband other than weapons or explosives does not render it unreasonable, *post facto*."); *U.S. v. Skipwith*, 482 F.2d 1272, 1277 (5th Cir. 1973) (rejecting argument that "even if a weapon discovered during [airplane screening] search could have been introduced into evidence, the cocaine should have been excluded since the search was not and could not have been conducted for the purpose of discovering illicit drugs"); *U.S. v. $124,570 U.S. Currency*, 873 F.2d 1240, 1247 n.7 (9th Cir. 1989) ("Nothing we say today precludes FTS officers from reporting information pertaining to criminal activity, as would any citizen.").[8]

Plaintiffs attempt (Opp. 32) to distinguish this body of law by arguing that, unlike possessing child pornography or controlled substances, traveling with bulk currency is not necessarily illegal. But it is also not necessarily illegal to travel with artfully-concealed baking soda or pornographic materials

[8] *U.S. v. Fofana*, 620 F. Supp. 2d 857 (S.D. Ohio 2009), is not to the contrary. The court in that case held that a TSA official was no longer conducting a lawful administrative search when the official began opening envelopes that contained passports "to look for contraband evidencing criminal wrongdoing." *Id.* at 864. The TSA policies at issue here, however, expressly prohibit "searches for purposes of discovering illegal items." SOP Ch. 12, Overview (AR161). And TSA officials do not depart from the lawful transportation security purposes by confirming that bulk currency does not contain or conceal a prohibited threat item. Indeed, in *Fofana* the court was careful to acknowledge that potential "contraband discovered in the course of an otherwise constitutionally reasonable airport search may be reported to law enforcement." 620 F. Supp. 2d at 866. That is all TSA policy requires.

depicting of-age individuals. That is precisely why TSA officials may lawfully report *potential* evidence of criminal activity to law enforcement—because it is ultimately for law enforcement to determine whether a suspicious white powder that *appears* to be cocaine is a controlled substance, whether pornographic materials depicting individuals that *appear* young is child pornography, or, indeed, whether suspiciously-packaged bulk currency that *appears* to relate to criminal activity is illegal money laundering or unlawfully undeclared currency. In each of those scenarios, a TSA screener reports the existence of potential evidence relating to criminal activity to law enforcement.

And the law is well-settled that possession of large amounts of currency can be "strong evidence that the cash is connected with drug activity." *U.S. v. $84,615 in U.S. Currency*, 379 F.3d 496, 501–02 (8th Cir. 2004); *U.S. v. $159,880.00 in U.S. Currency*, 387 F. Supp. 2d 1000, 1013 (S.D. Iowa 2005) (similar); *U.S. v. One Lot of U.S. Currency ($36,634),* 103 F.3d 1048, 1055 (1st Cir. 1997) ("Carrying a large sum of cash is 'strong evidence' of [a connection to illegal drug activity] even without the presence of drugs or drug paraphernalia."); *U.S. v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 468 (7th Cir. 2005) (same); *see also U.S. v. Bajakajian*, 524 U.S. 321, 353 (1998) (Kennedy, J., dissenting) ("One of the few reliable warning signs of some serious crimes is the use of large sums of cash").

For this reason, numerous courts have held that the Fourth Amendment permits TSA officials to notify law enforcement of bulk currency that appears to relate to criminal activity if that currency is discovered during an otherwise lawful administrative search. *See White v. United States*, No. 2:24-cv-02159, Dkt. 38 (Order) at 18 (N.D. Cal. May 6, 2025) ("the Ninth Circuit considers a large quantity of cash a reasonable item to report to law enforcement as potential evidence of a crime, provided that it was discovered in the course of an otherwise permissible search"); *id.* at 18-19 (holding that TSA officers "may report the presence of cash to law enforcement as potential indicia of criminal activity, just as any citizen could, if they observed it on the street"); *U.S. v. $145,850 U.S. Currency*, No. 1:10-CV-71, 2010 WL 3063814, at *4 (E.D. Va. July 30, 2010) ("Well within the scope of this lawful search, the TSA agents permissibly inquired further and discovered that the masses were separately-wrapped bundles of money. Provided that authorities had probable cause to believe the cash was contraband,

the subsequent seizure of the cash visible in plain view was constitutional.") (citations omitted). As then-Judge Sotomayor explained for the Second Circuit in *$557,933* when authorizing the seizure of blank money orders, "[e]ven to the layman, untrained in the ways of narcotics traffickers and the details of currency transaction reporting requirements, the presence at the airport of a person carrying a briefcase full of blank money orders of small (at least relative to the total value of the money orders) denominations would give rise to a well-founded suspicion that some kind of 'criminal activity [was] afoot.'" 287 F.3d at 87.[9]

Plaintiffs' authorities (Opp. 32) on this question only emphasize the point. In *U.S. v. Dyer*, 2019 WL 6218899, at *11 (M.D. Pa. Nov. 21, 2019), *aff'd,* 54 F.4th 155 (3d Cir. 2022), "the government . . . put forward no evidence that the cash" seized when a search warrant was executed at an individual's house "had the immediate appearance of wrongdoing," as "the police presented no testimony as to why they seized Mr. Dyer's cash." That additional evidence is precisely what TSA policies require: the policies emphasize that "[t]raveling with large amounts of currency is not illegal" and require reporting only "[w]hen currency appears to be indicative of criminal activity," MD 100.4 § 6(C)(2) (AR9); *see also* SOP Ch. 12 § 2(3) (AR162). Indeed, the record shows that TSA disciplined an employee for failure to comply with TSA SOPs by merely reporting bulk currency (not seizing it, as in *Dyer*) because that employee failed to "articulate" why "the bag appeared suspicious." Defs.' Ex. R, TSA_02162 (Letter of Counseling, dated October 11, 2018); *see also* Defs.' Br. 35-36.

[9] Indeed, courts routinely hold that bulk currency may be seized at both airports and in other locations under the plain view doctrine. *U.S. v. Brooks*, 22 F.4th 773, 779 (8th Cir. 2022) ("That search was conducted by a TSA agent at a TSA screening area. A TSA supervisor then contacted TSA managers, who notified the Little Rock police officers stationed at the airport that an agent had discovered bulk cash. . . . The discovery of the vacuum-sealed cash was thus independent of any constitutional violations that may have later occurred."); *U.S. v. Hernandez–Rivas,* 348 F.3d 595, 599 (7th Cir. 2003) (upholding seizure of $10,000 cash under plain view doctrine); *U.S. v. Platt*, 734 F. Supp. 1193, 1197 (W.D.N.C. 1990) ("the plain view exception allowed the agents to seize the jewelry and cash found in the trunk of Defendant's car"); *U.S. v. Watson*, 983 F.2d 1070, at *4 (6th Cir. 1993) (unpublished) ("The agent also had probable cause to believe that the stack of money he observed in plain view was evidence of a crime . . ."); *U.S. v. Jones*, 187 F.3d 210, 221 (1st Cir. 1999) ("Pursuant to this lawful *Terry* investigation, therefore, Sanzi had legal access to the bills and justifiably seized them."); *U.S. v. Phan*, 628 F. Supp. 2d 562, 572 (M.D. Pa. 2009) ("the incriminating character of the currency was immediately apparent, and the agents were justified in seizing the currency").

The Third Circuit's unpublished decision in *U.S. v. Law*, 384 F. App'x 121 (3d Cir. 2010), likewise addressed bulk currency that was found and seized in a bag absent *any* indication of criminal activity. But the court took care to explain that its holding "is not to say that large amounts of cash may *never* be inherently incriminating. The incriminating nature of a large amount of cash *may* be immediately apparent—thus giving rise to probable cause—where the totality of the circumstances provides some indication that the cash is contraband." *Id.* at 123. That is the very assessment that TSA's policies call for: bulk currency carried by domestic travelers through passenger screening checkpoints should be reported only where there exists additional evidence of criminal activity, including where "the currency may be all in the same denomination, packaged with rubber bands or plastic wrap, or carefully concealed in accessible property." SOP Ch. 12 § 2(3) (AR162). Moreover, it is a federal crime punishable by a term of imprisonment of up to five years to knowingly conceal more than $10,000 in currency or other monetary instruments when traveling internationally to intentionally evade reporting requirements. 31 U.S.C. § 5332; *see also* 31 U.S.C. § 5316 (detailing reporting requirements). That statute independently establishes that bulk currency can be contraband.

Plaintiffs nonetheless advance five arguments for why TSA's policies run afoul of the Fourth Amendment. These arguments misconstrue both the facts and the law.

1. Plaintiffs are incorrect (Opp. 35-36) that TSA's policies create a "systematic, secondary criminal-law-enforcement purpose" that renders unlawful an otherwise constitutional administrative search. To the contrary, both MD 100.4 and the SOPs unequivocally prohibit searches conducted for law-enforcement purposes. MD 100.4 § 6(C)(1) (AR8) ("Administrative and special needs searches may not be conducted to detect evidence of crimes unrelated to transportation security."); SOP Ch. 12, Overview (AR161) ("Screening of property is conducted for security purposes. TSOs are not authorized to conduct searches for purposes of discovering illegal items."). Plaintiffs' principal authority (Opp 35-36) on this question—*United States v. McCarty*, 648 F.3d 820 (9th Cir. 2011)—illustrates the point. The Ninth Circuit in that case held a TSA screener exceeded the scope of a permissible administrative search "when she read the content of the letters and looked at the newspaper articles and advertisements" because "she had abandoned the search for safety hazards and

was reviewing the items to confirm her feeling that the photographs were contraband evidencing children in harm's way." *Id.* at 836. But that latter investigation is what TSA policies prohibit screeners from doing, which is precisely why referrals to law enforcement are appropriate.

To be sure, large amounts of currency discovered at a checkpoint "need to be screened to clear it to enter sterile areas" because "cash in very large quantities may shield explosive materials and other threat items." MD 100.4 § 6(C)(2) (AR9). But the initial assessment of potential criminality is made pursuant to a lawful administrative search of the currency or the bag it is in. *See, e.g.*, SOP Ch. 12 § 2(a) (AR161) ("Do not ask questions of the individual about the currency except as it relates to security."). The subsequent referral allows that initial assessment to validated or rejected by law enforcement, not TSA. And Third Circuit precedent is clear that a TSA screener conducting a lawful administrative search need not ignore evidence of criminality so long as that evidence is uncovered during a security screening. *See Hartwell*, 436 F.3d at 181 n.13 ("Since the object in Hartwell's pocket could have been a small knife or bit of plastic explosives, the TSA agents were justified in examining it."). Accordingly, TSA's policies directing screeners to report evidence of criminal activity when encountered during lawful administrative screening do not create an impermissible secondary purpose.

Indeed, there is no principled distinction between the assessments of whether bulk currency appears to relate to criminal activity and whether a suspicious white powder appears to be a controlled substance or whether photographic material depicting young individuals appears to be child pornography, so long as all of those initial assessments are made during an administrative search for items that threaten transportation security. Plaintiffs concede (as they must) that the latter two assessments provide a lawful basis for TSA screeners to notify law enforcement. *See* Opp. 32 n.14 ("Plaintiffs' arguments do not call into question Screeners' ability to act if contraband is discovered during the screening process, such as illegal drugs or child pornography."). It necessarily follows, then, that a TSA screener may notify law enforcement of suspicious bulk currency for the same reasons that a screener may notify law enforcement of potential illegal drugs or child pornography

encountered during a lawful administrative search—he or she has identified possible evidence of criminal activity in plain view while searching for a prohibited threat item.[10]

2. Plaintiffs are similarly wrong (Opp. 36-37) that TSA policies require seizure of travelers and their bulk currency without reasonable suspicion. Again, TSA's written policies unambiguously state the exact opposite—they prohibit the extension of the administrative search or seizure on the basis of bulk currency except as necessary to determine that the bulk currency does not contain or conceal a security threat. As to the traveler, MD 100.4 makes clear, both when addressing potential evidence of crimes generally and when addressing bulk currency, that "[a]lthough an individual may be requested to wait until law enforcement arrives, he or she is free to leave the screening checkpoint once applicable screening requirements have been completed successfully." MD 100.4 § 6(C)(1) (AR8); *id.* § 6(C)(2) (AR8-9).

And the SOPs implement this instruction as to both the traveler and her possessions in all possible scenarios that follow from an encounter with bulk currency. Where no law enforcement notification is made, the SOPs require that "the STSO must return the individual's property and clear the individual into the sterile area after successfully completing screening requirements." SOP Ch. 12 § 2(4) (AR162). Where law enforcement has been notified and has arrived, the TSA screener similarly must "return all property to the individual. Leave further action regarding the individual and their property to law enforcement." SOP Ch. 12 § 2(5)(b) (AR162). And where law enforcement has been notified but has not yet arrived, the SOPs instruct screeners to "return all property to the individual. The individual may be asked to wait until a LEO arrives, but the individual is free to leave the screening checkpoint once screening is finished." SOP Ch. 12 § 2(5)(a) (AR162); *see also* Pls.' Ex. 3, Leyh Dep. Tr. 231:6-9 ("Q. Is the STSO supposed to notify the individual that they are free to leave the screening checkpoint? A. Yes."). In no scenario may a screener seize the traveler or her property.

[10] Plaintiffs do not (and cannot) contest that a TSA administrative screening satisfies the other two requirements for application of the plain view doctrine: a TSA screener does not "violate[] the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed" and "ha[s] 'a lawful right of access to the object itself.'" *U.S. v. Menon*, 24 F.3d 550, 559 (3d Cir. 1994).

Plaintiffs nonetheless excise (Opp. 36-37) language from a more general section of the SOPs to argue that TSA instructs screeners that "they 'must' 'maintain control of' the cash." The SOPs nowhere direct screeners to maintain control of cash—to the contrary, in the specific provisions addressing "discovery of large amounts of currency," the SOPs make clear that the currency must be returned, *supra* p. 22. Plaintiffs also misleadingly quote (Opp. 36) the language stating that "the traveler 'may be asked to wait until a LEO arrives'" to suggest TSA policies require seizure of the traveler. But Plaintiffs omit the second part of that instruction, which directs that "the individual is free to leave the screening checkpoint once the screening is finished." SOP Ch. 12 § 2(5)(a).

Plaintiffs also falsely claim (Opp. 37) that "traveling with $100 suffices for a criminality assessment" because "the Policies equate whatever a Screener arbitrarily deems a 'large amount of currency' with currency that 'appears to relate to criminal activity.'" None of the cited materials support this assertion. To the contrary, the deposition testimony makes clear that the criminality assessment turns on "what [the screener] sees with [the currency]," including whether it was "artfully concealed" or "rolled up into something else that would draw some suspicion." Pls.' Ex. 3, Leyh Dep. Tr. 116:5–116:15. That is the very assessment that even Plaintiffs' authorities require. *Supra* pp. 19-20. And the training slide that lists large amounts of currency as potential evidence of criminal activity is a "Checked Baggage Physical Search Lesson Plan." Pls.' Ex. 7 at TSA0324. That training has no relevance to the policies of TSA screeners at *passenger* screening checkpoints, which are at issue here.

In any event, the way in which TSA policies define whether bulk currency is related to criminal activity is immaterial to the question of whether those policies require unlawful searches and seizures. That is because TSA's policies are clear that *even if* the bulk currency appears to pertain to criminal activity and law enforcement should be notified, the currency must still be returned to the passenger, who must still be "free to leave the screening checkpoint," SOP Ch. 12 § 2(5)(a). So no unlawful seizure occurs in any circumstance.[11]

[11] *U.S. v. Ortiz*, 714 F. Supp. 1569, 1573 (C.D. Cal. 1989), *aff'd*, 899 F.2d 19 (9th Cir. 1990), held that the Fourth Amendment does not authorize the administrative searches of passenger baggage by non-law enforcement personnel. That is no longer good law. *See U.S. v. Aukai*, 497 F.3d 955, 960 (9th

3. Plaintiffs next misrepresent TSA's written policies (Opp. 38) to argue that they require screeners "to keep the cash . . . after determining the traveler has no prohibited item" or even "indefinitely." But this argument rests on Plaintiffs' effort to conflate the general "maintain control" instruction with the particularized directives in the subsection of TSA's SOPs that explicitly address bulk currency, which refute Plaintiffs' misconstruction. And the discovery record is clear that TSA officials do not accept Plaintiffs' misreading of TSA policy. The Assistant FSD at Houston Hobby Airport, for example, sent out a reminder that expressly directed screeners that: "If the supervisor or SOCC calls for a [law enforcement officer] and they have not responded by the time the screening is complete release the passenger and/or bag." Defs.' Ex. J, TSA_ESI_00003692 (Email from William Byrne, Aug. 8, 2019); Defs.' Br. 31. Additional evidence demonstrates that the FSD in Charlotte, North Carolina, the Assistant FSD for Utah, the Acting FSD for Alaska, and the Assistant FSD for El Paso, Texas, all understood TSA's policies in the same way. *See* Defs.' Br. 32-33. Indeed, where discrepancies were identified, they were corrected through direction from TSA. *See* Defs.' Br. 34-35.

4. Plaintiffs separately argue (Opp. 38-39) that TSA policies unconstitutionally direct screeners to obtain a passenger's information (name and flight information) without probable cause to provide that information to TSA's coordination center when contacting law enforcement. But the record establishes that the collecting of this information does not extend the lawful administrative search or seizure—as one FSD directed, "[w]hatever information we need for the SIRT report can be obtained at the same time the search is taking place and therefore there is no need to 'detain' the passengers until LEOs arrive." Defs.' Ex. M, TSA_ESI_00003930 (Email from Kevin Frederick, Federal Security Director, to Sterling Payne, dated Mar. 25, 2015); *see also* Defs.' Br. 32.

More fundamentally, Plaintiffs are wrong on the law: the re-presentation of a passenger's identification and boarding pass to TSA personnel does not constitute a separate search or seizure

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Cir. 2007). And *U.S. v. Sokolow*, 490 U.S. 1 (1989), supports Defendants' position. The Court there held that DEA agents had reasonable suspicion to seize the defendant because of multiple factors, including that he paid $2,100 in cash for airplane tickets "from a roll of $20 bills containing nearly twice that amount of cash." *Id.* at 9. This is fully consistent with TSA's policy which similarly requires an assessment of the circumstances for the far less drastic step of notifying law enforcement.

under settled Supreme Court precedent. As then-Judge Sotomayor explained for the Second Circuit, "[a]s long as" that "search" of the passenger's information "was of no greater scope or intensity than the airport security personnel's" prior search of the same, "then 'no additional invasion of [defendant's] privacy interest' occurred and there was no additional 'search' for purposes of the Fourth Amendment." *$557,933.89*, 287 F.3d at 87 (quoting *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)); *see also U.S. v. Jacobsen*, 466 U.S. 109, 117 (1984) (holding that it was no "search" for government to reexamine contents of package already legitimately opened and partially repackaged because "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."); *Menon,* 24 F.3d at 563 (where one officer legitimately saw characteristics of an object during a search, a second officer was entitled to look at the object "to the same extent" as the first without negating plain view applicability). Thus, because a traveler must present his or her boarding pass and identification to TSA personnel to enter the sterile area at an airport, no additional search occurs when a TSA screener records information from those materials to notify law enforcement.

5. Finally, Plaintiffs argue (Opp. 39-40) that TSA policies require screeners to extend the search and seizure of travelers and their currency longer than necessary to effectuate the transportation security purpose of the initial administrative search. But TSA's policies require no such thing. As explained *supra* pp. 22-23, Plaintiffs misconstrue TSA policy contrary to express language in MD 100.4, the SOPs, and subsequent TSA instruction, all of which make clear that a TSA screener may not search or seize either a traveler or her bulk currency beyond the time necessary to determine that the currency does not contain or conceal a prohibited threat item. Any assessment of whether the bulk currency appears to relate to criminal activity occurs both during and incidental to the administrative search intended to determine whether bulk currency conceals a prohibited threat item before that bulk currency can be cleared to enter the sterile area at an airport. That is because the indicia of criminality that MD 100.4 and the SOPs identify are immediately apparent during the course of the security search. *See* SOP Ch. 12 § 2(3)(b) (AR162). ("all in the same denomination, packaged with rubber bands or plastic wrap, or carefully concealed"); MD 100.4 § 6(C)(2) (AR9) ("quantity, packaging,

circumstances of discovery . . . concealment"). And as explained *supra* pp. 24-25, a passenger has already provided his or her identification and boarding pass to a TSA official at the screening checkpoint, so no additional search or seizure occurs when that information is recorded.

Plaintiffs misleadingly excise language from Defendants' brief to argue that TSA "admits" that "anyone traveling with a large amount of cash should necessarily expect 'slightly longer questioning at TSA checkpoints.'" Opp. 40 (quoting Defs.' Br. 16). TSA admitted no such thing. Rather, in contesting Plaintiffs' claimed injury for purposes of Article III standing, Defendants explained that Plaintiffs "[a]t the very most . . . can *speculate* that there is a potentially heightened risk that travelling with bulk currency may expose them to slightly longer questioning." Defs.' Br. 16 (emphasis added). Critically, any such questioning could occur only for transportation security purposes under unambiguous TSA directives. *See* MD 100.4 § 6(C)(2) (AR9) ("As a general matter, there should be no reason to ask questions of the passenger about currency, although there may be times when questions are warranted by security needs."). And Plaintiffs do not (and cannot) dispute that TSA may lawfully search and seize individuals and their currency for security purposes.

In any event, even if TSA policies required an additional search or seizure for some highly abbreviated period of time (they do not), the policies would still be lawful because that additional search or seizure would be justified by reasonable suspicion based on what the TSA screener determined to be evidence of potential criminal activity in plain view. *See $557,933.89*, 287 F.3d at 86–87 ("[S]o long as the airport security personnel had reasonable suspicion arising from the facts known to them, the brief detention of claimant's luggage was proper."). And the law is settled that suspiciously-packaged or artfully-concealed bulk currency qualifies as such evidence. *Supra* p. 18.[12]

Plaintiffs respond (Opp. 40) that "[n]one of this serves a transportation-security purpose," so it must necessarily be unlawful. But this is the very argument that the Supreme Court rejected in *Arizona*, 480 U.S. at 325: that because the officers' action "directed to the" evidence of potential

[12] The existence of reasonable suspicion distinguishes any extension from those held unlawful in *Rodriguez v. U.S.*, where the Court carefully cabined its holding to "an otherwise-completed traffic stop" that is extended "*absent* reasonable suspicion," 575 U.S. 348, 353 (2015) (emphasis added).

criminal activity in plain view "was unrelated to the justification for" the search or seizure in the first instance, "it was *ipso facto* unreasonable." This argument was incorrect, the Court explained, because "[t]hat lack of relationship *always* exists with regard to action validated under the 'plain view' doctrine; where action is taken for the purpose justifying the entry, invocation of the doctrine is superfluous." *Id.* TSA's policies therefore comport fully with the Fourth Amendment.

b. TSA is statutorily authorized to inform law enforcement when TSA encounters evidence of potential criminal activity during a lawful administrative search.

Plaintiffs also argue (Opp. 30-35) that TSA screeners exceed the scope of TSA's statutory authority by notifying law enforcement when a TSA screener encounters bulk currency that appears to relate to potential criminal activity. TSA's statutory authorizations, however, do not impose any greater constraint on TSA policy than does the Fourth Amendment. To the contrary, 49 U.S.C § 44901(a) directs the Administrator of the TSA to "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation." This broad directive neither specifies nor constrains the subject matter or purpose of that screening.

Plaintiffs' claim regarding statutory authorization also rests on a mistaken premise—that when a TSA screener identifies evidence of potential criminal activity and notifies law enforcement, that screener has conducted a search or seizure distinct from the indisputably lawful administrative search that the screener conducts for items that threaten transportation security. The Third Circuit squarely rejected that premise in *Hartwell*, holding that individuals at transportation security checkpoints "experience[] a single, warrantless search, . . . initiated without individualized suspicion" and "justified by the administrative search doctrine," even when that search "escalat[es] in invasiveness . . . after a lower level of screening disclosed a reason to conduct a more probing search." 436 F.3d at 178, 180.

Within that framework, TSA's directives and SOP are clear that all escalation must be linked to a transportation-security purpose, which is a lawful basis for the administrative searches that TSA screeners conduct. *See* MD 100.4 § 4(A) (AR1) (describing TSA's overarching principles for conducting administrative searches as "[a] search conducted without a warrant as part of a regulatory

plan in furtherance of a specified non-law enforcement government purpose such as to determine compliance with TSA regulations or to prevent the carriage of threat items or entry of an unauthorized person into the sterile area, or to screen passengers entering any public conveyance"); *id.* § 6(A)(1) (AR8) ("TSA conducts all administrative and special needs searches in a manner designed to be minimally intrusive, in light of current technology, to detect the presence of threat items."); *id.* 6(C)(1) (AR8) ("Administrative and special needs searches may not be conducted to detect evidence of crimes unrelated to transportation security. However, if such evidence is discovered, TSA personnel shall refer it to a supervisor or a law enforcement official for appropriate action."); SOP Ch. 12, Overview (AR161) ("Screening of property is conducted for security purposes. TSOs are not authorized to conduct searches for purposes of discovering illegal items."); *see also* Defs.' Br. 4-9.

For this simple reason, Plaintiffs are incorrect (Opp. 30) that TSA policies "require [s]creeners to do general criminal law enforcement" without statutory authorization. TSA screeners conduct searches and seizures for transportation-security purposes, as they have been directed by Congress to do. If they encounter "information pertaining to criminal activity" during those searches, the screeners may "report[]" that information to law information, "as would any citizen," consistent with the holdings of numerous courts around the country. *$124,570*, 873 F.2d at 1247 n.7; *see also supra* pp. 16-19. None of Plaintiffs' arguments justify departing from that well-established body of law.

Plaintiffs first observe (Opp. 30-31) that agencies must have statutory authority to take any particular action. True enough. But TSA is statutorily *required* to "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation." 49 U.S.C. § 44901(a). TSA's screening policies contained in MD 100.4 and the SOPs do precisely that. Accordingly, so long as a TSA screener determines that bulk currency appears to relate to criminal activity pursuant to that statutorily mandated screening, TSA screeners act with congressionally conferred authority.

Plaintiffs next argue (Opp. 31) that TSA's statutes authorize screeners to search for and seize only items that pose threats "relating to transportation security." In support, Plaintiffs invoke the Ninth Circuit's statement in *McCarty* that TSA's warrantless searches are constitutional only "because

TSA screeners are limited to the single administrative goal of searching for possible safety threats," 648 F.3d at 831. But Plaintiffs elide the footnote appended to that very sentence in which the Ninth Circuit explained that, "[o]f course, longstanding precedent allows a screener to call law enforcement if she inadvertently discovers a possibly contraband item in the course of performing her safety check, so long as the scope of the search remains properly cabined to the extent of the lawful administrative search." *Id.* at 831 n.14. And that is precisely what the challenged provisions in the SOPs and MD 100.4 do: instruct screeners on the process to follow when they inadvertently discover possible contraband while conducting a lawful administrative search. No additional statutory authorization is required because the actions taken to identify and assess whether bulk currency appears to pertain to criminal activity are part and parcel of the lawful administrative search.

Plaintiffs also emphasize (Opp. 31) that TSA screeners "are not trained on issues of probable cause" or "reasonable suspicion." But that is why TSA screeners notify law enforcement upon finding evidence of criminal activity, which ensures the determination of whether to seize the passenger or her possessions is left to an official that has received such training. Indeed, to ensure that a TSA screener does not conduct such a seizure, TSA policies direct that, in all events following notification of law enforcement, a TSA screener must "return all property to the individual" and "the individual is free to leave the screening checkpoint once screening is finished." SOP Ch. 12 § 2(5)(a) (AR162); *supra* pp. 22-23. This is fully consistent with TSA's statutory authorities.

Plaintiffs insist (Opp. 31-32) that TSA lacks authority to direct screeners to make an assessment of whether bulk currency appears to relate to criminal activity because that assessment "serves no transportation-security purpose." But Plaintiffs concede (as they must) that their "arguments do not call into question Screeners' ability to act if contraband is discovered," Opp. 32 n.14, arguing instead that bulk currency is not contraband. That concession is fatal to Plaintiffs' claim: a TSA screener, of course, has no way of knowing whether a suspicious white powder is an illegal drug or whether photographic materials depicting unclothed individuals that appear to be young is child pornography. In all circumstances, the TSA screener merely identifies the material as evidence of *potential* criminal activity. For that reason, multiple appellate courts have expressly authorized TSA

screeners to notify law enforcement if they discover "a *possibly* contraband item," *McCarty*, 648 F.3d at 831 n.14, or "information *pertaining* to criminal activity," *$124,570 U.S. Currency*, 873 F.2d at 1247 n.7. That is exactly what TSA policies instruct screeners to do with bulk currency—inform law enforcement if (and only if) the bulk currency appears to relate to criminal activity. And there can be no serious dispute that, depending on the circumstances, bulk currency can amount to such evidence. Dozens of courts that have reached that very conclusion. *See supra* pp. 18-19.

Plaintiffs next argue (Opp. 33-35) that TSA policies require "actual seizures and searches" of travelers with bulk currency absent a transportation-security purpose, and therefore fall outside the scope of congressionally-authorized agency action. These assertions rest on the same mischaracterizations of both the law and TSA policy refuted *supra* pp. 22-23. TSA's policies specifically addressing bulk currency neither authorize a screener to maintain control of currency (in fact, they direct the return of a passenger's possession following security screening) nor detain the traveler when law enforcement is notified (in fact, they instruct that the traveler is free to leave). *Id.* Plaintiffs also note (Opp. 33-34) that the traveler may have to "re-present their travel documents" if a screener notifies law enforcement. But under settled law aptly summarized by then-Judge Sotomayor in *$557,933.89*, that process is not a separate search or seizure because the traveler just presented that very information to TSA. 287 F.3d at 87 (collecting authorities); *supra* pp. 24-25.

In short, Plaintiffs' statutory-authority argument boils down to the position that TSA agents must turn a blind eye to evidence of criminal activity that they encounter during a lawful administrative search if that potential criminal activity is unrelated to transportation security. Courts have time and time again rejected such a rule, which would "'impose an unworkable and unreasonable constraint' on government agents engaged in good faith administrative searches 'by requiring that they avert their eyes from obvious unlawfulness.'" *McCarty*, 648 F.3d at 831 n.14. For this reason, courts routinely authorize TSA officials to notify law enforcement—or even to seize the property for forfeiture, a far more drastic step than those authorized by the TSA policies at issue here—if those officials discover evidence of criminal activity during a lawful administrative search. *Supra* pp. 16-19. That precedent squarely forecloses Plaintiffs claims.

Dated: August 11, 2025

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

ANDREW WARDEN
Assistant Director, Federal Programs Branch

/s/ Alexander W. Resar
ALEXANDER RESAR (NY Reg. No. 5636337)
Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188
E-mail: alexander.w.resar@usdoj.gov

Counsel for Defendants