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

PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

INSTITUTE FOR JUSTICE

Dan Alban*
VA Bar No. 72688
dalban@ij.org

Jaba Tsitsuashvili*
DC Bar No. 1601246
jtsitsuashvili@ij.org

Robert Fellner*
DC Bar No. 90027493
rfellner@ij.org

Nick DeBenedetto*
NJ Bar No. 382442021
ndebenedetto@ij.org

901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Marco Vasquez Jr.*
TX Bar No. 24115892
mvasquez@ij.org

816 Congress Avenue, Suite 970
Austin, TX 78701
(512) 480-5936

*Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

CODES AND STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

TSA's Cash-Screening Policies require Screeners to take additional steps when they encounter travelers with "large" amounts of cash during checkpoint screening, ***even after determining there are no signs of prohibited items***. TSA admits these additional steps advance no transportation-security purpose. So, TSA's Cash-Screening Policies exceed its statutory authority. TSA also violates the Fourth Amendment by impermissibly transforming these limited-purpose administrative searches for "threat items" into generalized law-enforcement searches that treat cash as contraband. TSA argues Screeners have "reasonable suspicion" to extend these administrative searches every time they encounter "large" amounts of cash, or cash in rubber bands (or stored in other innocuous ways). But TSA's extreme position finds no support in Fourth Amendment jurisprudence. Indeed, the case TSA most relies on defeats its position, holding that while flying with "over half a million dollars . . . in cash form" may be "foolhardy," it is "not necessarily . . . indicative of criminal activity[.]" *United States v. $557,933.89*, 287 F.3d 66, 88 (2d Cir. 2002).

That is why TSA spends half its brief rehashing its baseless procedural arguments that (1) Plaintiffs have no standing because, it says, TSA's active enforcement of its national Cash-Screening Policies is "speculative," and (2) this Court has no jurisdiction because, it says, a claim-channeling statute governing appeals of individualized, adjudicative agency "orders" also applies to generalized agency rules even though that statute says nothing of the sort. Each is addressed in turn below.

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claims for Prospective Relief.

TSA reasserts its request for this Court to reverse its prior holding on standing. TSA is wrong. This Court already correctly held Plaintiffs have standing. ECF 78 at 3; ECF 66 at 3–7. Record evidence now confirms that holding. *See* Pls. Br. 21–26; Esposito Decl. ¶¶ 6, 10; Berger Decl. ¶¶ 6, 18.

Standing requires (1) an injury in fact (2) traceable to TSA's conduct (3) that can be redressed

by the Court. TSA argues that Plaintiffs lack all three, but their traceability and redressability arguments just recapitulate their merits arguments—Plaintiffs injuries aren't traceable to TSA's policies, the agency says, because TSA's policies don't direct Screeners to break the law, and so enjoining those policies could not redress those injuries. But, of course, the opposite is true as well: If TSA's policies do direct Screeners to break the law (and, as discussed in Part III below, they do), those policies cause Plaintiffs' injuries, and this Court can cure those injuries by enjoining or vacating the policies.

TSA fares no better with respect to injury in fact. This Court previously held that "resum[ing] domestic air travel with large sums of cash" would result in "an imminent, substantial risk that [Plaintiffs'] persons, effects and cash would be subjected to seizure" once again. ECF 66 at 5; *see also* ECF 78 at 3 (agreeing the allegations qualify as substantial risk). The record bears this out. Namely, TSA's written policies require certain actions for travelers with "large" amounts of cash. Pls.' Br. 7–10. Plaintiffs want to travel with "large" amounts of cash (a wholly lawful act) but don't want to be subjected to the actions TSA's written cash-related policies require. So Plaintiffs are currently foregoing flying with large amounts of cash, costing them time and money to boot. Pls.' Br. 22–24. No matter who ultimately wins on the merits, that's standing to challenge TSA's written Cash-Screening Policies, as this Court already sensibly recognized. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); *accord* ECF 78 at 3; ECF 66 at 5–6.

In response, TSA argues either that this Court's analysis misinterprets *Lyons* or that the summary-judgment record somehow eliminates Plaintiffs' injury. Neither is correct. TSA ignores Plaintiffs' injuries by characterizing this Court's prior holding on substantial risk as "the very inference that the Supreme Court emphatically rejected in" *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). TSA Reply 9. But, unlike in *Lyons*, Plaintiffs here offer much more than speculation given that they are ***currently suffering injury*** by forgoing flying with cash to avoid being harmed by TSA's actively enforced Cash-Screening Policies. Pls' Br. 22–24. So TSA's repeated references to "speculation" carry

no weight. *See* ECF 66 at 4–5 (agreeing Plaintiffs don't offer speculation). And in *Lyons* the Court rejected the idea one could generate standing by pledging to engage in future illegal activity to trigger enforcement, *see* 461 U.S. at 103, 106, but Plaintiffs just want to travel with cash, which is ***totally legal***.

Without the law on its side, TSA misconstrues the record. ***First***, TSA argues these are "isolated incidents from five and ten years ago in which [Plaintiffs'] currency was seized by law enforcement, not TSA." TSA Reply 1, 9. That's wrong on multiple fronts. For starters, this case was filed in January of 2020—before the most recent incident. *See* TSA Resp. to SUMF ¶¶ 250, 265, 276. And Plaintiffs stopped flying with "bulk" cash because of these incidents. SUMF ¶¶ 274, 290; *see* ECF 66 at 6 ("It is hardly surprising that one would take steps to guard against a risk after . . . becoming aware of it."). At any rate, the record confirms Plaintiffs' experiences aren't isolated incidents; they're TSA policy. Pls.' Cross-MSJ 3–20. Along those lines, TSA says any injury is speculative because TSA screens millions annually, ignoring that most travelers don't have "bulk currency" that would trigger its policies. Moreover, under its cash-screening policies, TSA admits that, in just six years, it recorded 7,567 "bulk currency" incidents at TSA checkpoints. TSA SUMF Resp. ¶¶ 174–75. And while TSA points the finger at law enforcement for Plaintiffs' seizures, TSA also ignores that its screeners seized Plaintiffs and their cash ***before*** law enforcement did so. *Id.* ¶¶ 252–60, 267–72, 278–87. Simply put, Plaintiffs object to what TSA's actively enforced, written policies require Screeners to do.

Second, TSA misconstrues the record by arguing Plaintiffs haven't been injured because the costs they're incurring to avoid being harmed again by TSA's policies are "self-inflicted" and "voluntar[y]." TSA Reply 1, 10, 12–13. TSA relies on *Clapper*'s statement that parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 568 U.S. at 416. This Court already rejected TSA's reading of *Clapper*. ECF 66 at 4–5. Rightfully so: Plaintiffs' alternative travel arrangements after extended TSA searches and seizures, as well as their loss of cash for months, aren't "manufacture[d]."

See Esposito Decl. ¶¶ 10, 74; Berger Decl. ¶¶ 10–18, 76–87. Nor does TSA point to anything in the record showing otherwise. What's more, the costs Plaintiffs have incurred aren't "voluntary" in light of (1) TSA's written cash-related policies concerning travelers with "bulk cash"; (2) TSA's widespread enforcement of those policies across the country; and (3) Plaintiffs' past injuries at the hands of TSA under these same policies.[1] *Supra* at 2–3. But even setting this all aside, Plaintiffs' standing doesn't rise and fall with the costs they've incurred "to mitigate and avoid [future] harm." *Clapper*, 568 U.S. at 414 n.5. Plaintiffs ***also*** have standing because there's a substantial risk of future injury. *Supra* at 2–3.

Third, TSA takes aim at Ms. Esposito's testimony. TSA begins by focusing on Ms. Esposito's testimony that withdrawing cash or setting up accounts at casinos "can" result in fees, TSA Reply 10–11, even though Ms. Esposito testified that "those options come with fees." Defs.' Ex. B, Esposito Tr. 69:20–70:8. TSA also ignores that Ms. Esposito ***now drives to casinos*** with cash instead of flying, which forces her to forgo flying for free—another cost to avoid future harm. Esposito Decl. ¶¶ 7, 10, 74. TSA then selectively quotes from Ms. Esposito's testimony regarding the amount she gambles with and her plans to fly to casinos. But how much Ms. Esposito typically gambles in one sitting, Esposito Tr. 58:19–59:8, doesn't change the fact that she's traveled with more than $2,000 in cash before her TSA encounter. *Id.* at 68:20–69:11. And she's ready to resume air travel with large amounts of cash in 2025 if TSA's policies end. Esposito Decl. ¶¶ 6–10, 68, 70–73, 75; Esposito Tr. 23:10–16.

Fourth, TSA nitpicks Mr. Berger's testimony. TSA begins by stating it "makes no sense" for Mr. Berger to turn away business because any seizure of a potential business partner flying with cash wouldn't put Mr. Berger in a "worse position." TSA Reply 11–12. First of all, it would; he'd either lose that sale or have it delayed. Berger Decl. ¶ 72. But that's beside the point. Mr. Berger ***himself*** can

[1] For these reasons, TSA misses the mark when it argues that Plaintiffs' costs are analogous to self-censorship harms. TSA Reply 12. Here, Plaintiffs don't assert a free speech claim, offer much more than generalized allegations, and have not resumed domestic air travel with "bulk" cash since they were subjected to those policies. *See* Esposito Decl. ¶¶ 10, 74; Berger Decl. ¶¶ 10–18, 76–87.

no longer fly with "bulk" cash to negotiate cash transactions, and cash transactions are both common in his industry and beneficial. *Id.* ¶¶ 9–18, 74–83. Separately, TSA argues there's no support for the idea that traveling with cash is "necessary" for Mr. Berger's business because he has "used cash less frequently." TSA Reply 12. But that's a wholly manufactured, troubling standard—suggesting a plaintiff lacks standing merely because the government prefers they act differently. The Supreme Court has already rejected such reasoning because the government doesn't decide for us what's "necessary." *See Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022); *see also Saenz v. Roe*, 526 U.S. 489, 498–500 (1999) (discussing the constitutional right to travel).[2] And Mr. Berger and others in his industry "often prefer to use cash" to purchase and sell vehicles because it allows for quick negotiation, purchase, and transfer. Berger Decl. ¶¶ 9–17. That's enough.

TSA fails to undermine this Court's prior, common-sense conclusion that there's standing.

II. Section 46110 Does Not Strip this Court of Jurisdiction Over Plaintiffs' Claims.

TSA also asks this Court to reverse its prior decision that 49 U.S.C. § 46110 does not deprive it of jurisdiction. TSA argues that § 46110's assignment of jurisdiction to the courts of appeals "for review of an order" encompasses not just the adjudicative "orders" described in Chapter 461 of Title 49 (and the APA), but also any generalized "rule" developed via agency rule making. *See* 5 U.S.C. § 551(4)–(7) (defining key terms). This Court already correctly concluded that § 46110 is no obstacle. ECF 78 at 4; ECF 66 at 7–9. TSA's position ignores the text of the statute as well as the APA's clear distinction between adjudicative, individualized "orders" and generalized "rules." As the prior magistrate judge wrote, "the statute contemplates an actual *order* issued by the TSA Administrator,

[2] TSA also argues Plaintiffs lack standing to challenge policies for international travelers. TSA Reply 14–15. This is puzzling. A screener who discovers cash that appears to exceed $10,000 must first investigate whether the traveler is flying internationally under Step 3.a of the Cash SOP. Pls.' Cross-MSJ 8. Plaintiffs have long raised this argument. *See, e.g.*, ECF 43 at ¶ 359. However, Plaintiffs could not confirm the SOPs required this investigation until they were produced in discovery. Moreover, Ms. Esposito testified she ***has*** traveled internationally with approximately $9,000–10,000 (in euros) to pursue her recreational gambling hobby at casinos. Defs.' Ex. B, Esposito Tr. 80:13–81:3.

rather than an informal policy or practice. The requisite formality is reinforced by the statute's contemplation of a date of *issuance*, administrative *proceedings* and a *record*." ECF 66 at 8; *accord* ECF 78 at 4 ("[T]his statute contemplates jurisdiction over formal administrative orders."). Second, TSA's attempted rewrite of § 46110 also requires rejecting the APA's clear distinction between "orders" and "rules." Finally, TSA relies on authorities that are neither binding nor persuasive. Despite TSA's best efforts to suggest otherwise, the Third Circuit has never determined that an SOP is an "order" under § 46110, and neither have the First or Tenth Circuits, despite what TSA claims.

a. As the Court previously ruled, the statutory text resolves this question in Plaintiffs' favor. In any case of statutory construction, the "analysis begins with the language of the statute…[a]nd where the statute provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citations omitted). TSA's argument that its generalized screening policies are an "order" reviewable only under § 46110 "hits the immutable obstacle of [§ 46110's] text." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 814 (2024). If Congress wanted § 46110 to cover "rules," it could have said so; instead, it limited the statute to review of "orders."[3] Indeed, the eleven sections of Chapter 461, "Investigations and Proceedings," are most naturally read as an interrelated statutory scheme for how the TSA Administrator (or his delegates) may "conduct proceedings," §§ 46102(b), 46110(d), where parties "may appear and be heard," § 46102(b), present "objections," § 46110(d), "subpoena" and "examine witnesses," § 46104, and issue "orders" based on "findings of fact," which "shall be served on the parties to the proceeding." §§ 46105(b), 46110(c).

[3] TSA insists that "order" must be interpreted broadly. TSA Reply 3 (citing *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998)). But the issue in *Aerosource* was not whether a general "rule" was an "order," but whether an "order" included individualized reports and alerts that FAA issued regarding Aerosource's defective servicing of aircraft parts, as well as FAA letters denying Aerosource's appeals requesting recission of same. *Id.* The panel ultimately determined these were not "orders" under § 46110 because they had no legal effect. *Id.* at 579–81. But even if they had been legally binding, such individualized determinations are worlds apart from general APA "rules" such as the Cash-Screening Policies at issue in this case. *Compare* 5 U.S.C. § 551(4)–(5), *with* (6)–(7).

This is fully consistent with the APA's definitions of "orders" (covered by § 46110) as distinct from "rules" (not covered by § 46110). 5 U.S.C. § 551(6) ("'order' means the whole or 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"); *see also id.* § 551(7) ("'adjudication' means agency process for the formulation of an order"); *cf. id.* § 551(4)–(5) (defining "rule" and "rule making"). And in interpreting § 46110, the Third Circuit noted with approval that "[i]n interpreting the term 'order' as used in this section, some courts have looked to the use of the term in the [APA]," which "broadly defines 'order' as 'the whole or part of a final disposition . . . of an agency ***in a matter other than rulemaking***[.]'" *Aerosource*, 142 F.3d at 577 n.8 (quoting 5 U.S.C. § 551(6)) (emphasis added). And § 46110(b) itself indirectly references the APA definition of an order when it directs that the "record of any proceeding in which the order was issued" be filed with the court, "as provided in section 2112 of title 28."[4] Indeed, courts have long recognized the importance of this distinction between "orders" adjudicating the rights of specific parties and "rules" that apply uniformly to all: "[I]n administrative law, orders are not rules; the two are mutually exclusive." *Robert W. Mauthe MD PC v. Millennium Health LLC*, 58 F.4th 93, 100–01 (3d Cir. 2023) (Phipps, J., concurring) ("The rule-order distinction is a fault line in administrative law: it separates two adjacent concepts that together comprise a continental foundation for regulation by administrative agencies."); *see also Shea v. Office of Thrift Supervision*, 934 F.2d 41, 43 (3d Cir. 1991) ("'Orders' are generally issued as a result of an adjudicatory proceeding[.]").[5]

[4] 28 U.S.C. § 2112 contains rules for administrative records for judicial review of "orders of administrative agencies, boards, commissions, and officers," as provided by the APA. *See, e.g.*, Fed. R. App. P. 16(a) (record on review or enforcement of an agency order, 1967 advisory committee note stating "Subdivision (a) is based upon 28 U.S.C. § 2112(b)").

[5] *See also W & T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237, 239 (5th Cir. 2019) (agency action was a rule—even though the agency labeled it an "order"—because it involved the "creation and uniform application of a new methodology"); *Safari Club International v. Zinke*, 878 F.3d 316, 333 (D.C. Cir. 2017) ("determination" about importing ivory was a "rule" because it "applied to all potential imports of sport-hunted elephant trophies from Zimbabwe" and did not "adjudicate any dispute between specific parties"); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (agency action

In response, TSA claims that the meaning of "order" is undefined, and thus unclear, because Chapter 461 does not have a "definitions" section. TSA Reply 5. But "[t]he lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous, just as the presence of a definition does not necessarily make the meaning clear." *Goldstein v. S.E.C.*, 451 F.3d 873, 878 (D.C. Cir. 2006). Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). And we have such context: Orders ***are*** defined in the APA, 5 U.S.C. § 551(6), and while § 46105(b) doesn't explicitly use the term "definition," its description of an "order" provides a clear working definition consistent with the APA: "An order of the [TSA Administrator] shall include the findings of fact on which the order is based and shall be served on the parties to the proceeding and the persons affected by the order."[6] That definitional context is echoed in § 46110, which refers to review of orders with "[f]indings of fact . . . supported by substantial evidence," § 46110(c), and requires objections be considered "only if the objection was made in the proceeding conducted by the [TSA Administrator]," § 46110(d).

In contrast, TSA's interpretation requires reading each section as wholly independent when it claims that "order" in § 46110 refers to "a different type of order [from that] in § 46105(b)." TSA Reply 3. That's not how statutory analysis works. Indeed, TSA cannot point to any other type of "order" discussed in Chapter 461 because there is none. Instead, both § 46105(b) and § 46110(b) and (d) refer to orders arising out "proceedings" conducted by the TSA Administrator. *See also* § 46102

---

was a rule because it "affected the rights of a broad category of individuals not yet identified").

[6] Section 46105 also repeatedly refers separately to "regulations" and "orders" in parts (a) ("a regulation prescribed or order issued") and (c) (the TSA Administrator "may prescribe regulations and issue orders"). But § 46110 only refers to ***review of orders***. § 46110(a) ("a person disclosing substantial interested in an order issued by the [TSA Administrator] . . . may apply review of the order by filing a petition for review."). Ignoring this distinction would render the reference to "regulations" surplusage, contrary to the duty to "'give effect, if possible, to every clause and word of a statute.'" *United States v. Jackson*, 964 F.3d 197, 203 (3d Cir. 2020) (quoting *Duncan v. Walker*, 533 U.S. 167, 167 (2001)).

(proceedings). Likewise, both § 46105(b) and § 46110(c) also refer to the order being based on "[f]indings of fact" by the TSA Administrator. And just as § 46102 refers to the right of a person to "appear and be heard before [the TSA Administrator]" in a proceeding, § 46110(d) refers to the requirement that a reviewing court may consider an objection to an order "only if the objection was made in the proceeding conducted by [the TSA Administrator]." Therefore, TSA's argument that "order" in § 46105(b) means something different from "order" in § 46110 runs squarely against the Supreme Court's guidance on interpreting the same term in related provisions of a statute: "there is a presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 754 (1988) ("In the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012).

In short, there is only one type of order described in Chapter 461, and it is the type of individualized, adjudicative order described in § 46110 as being based on "[f]indings of fact" and in which "objections" can be "made in the proceeding conducted by [the TSA Administrator]." § 46110(c)–(d). Since Plaintiffs do not challenge any such "order," and instead bring a broadside challenge to the constitutionality of TSA's generally applicable Cash-Screening Policies (which are "rules" in the APA parlance), § 46110 is inapplicable. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993). TSA's attempt to distinguish these cases as "statutes that channeled judicial review of the denial of individual applications," TSA Reply 8 n.4, fails for the same reason—TSA misunderstands § 46110 as the sole path to challenge ***any*** TSA action, contrary to all textual evidence indicating § 46110 is limited to challenging "orders" arising

from individualized adjudicatory "proceedings."[7]

b. TSA places great weight on nonbinding authorities that stray from the text of the statute. TSA Reply 3–4. True, courts in other circuits have held that "orders" as described in § 46105(b) are different from those referenced in § 46110. But TSA overstates the holdings of these authorities, attributing to several circuits holdings that they have not reached about § 46110 applying to screening policies, when those cases instead merely say that an "order" for § 46110 purposes can include "informal" communications, such as a letter stating the agency's final decision. For example, TSA again points to *Ruskai v. Pistole*, 775 F.3d 61, 65 (1st Cir. 2014), TSA Reply 4, but the First Circuit held that it was ***both*** "TSA's security protocol and refusal to grant Ruskai's requested accommodation [that] constitute a final order reviewable by this court." TSA's denial letter refusing to grant Ruskai's request for alternative screening accommodation, *id.*, is the sort of individualized "order" for which § 46110 was designed to provide judicial review. Similarly, TSA cites *Tulsa Airports Improvement Trust v. FAA*, 839 F.3d 945 (10th Cir. 2016), which was not about screening policies, but an FAA letter denying reimbursement of certain expenses that the Trust had incurred. *Id.* at 947, 949. Both cases, along with *Aerosource*, reenforce Plaintiffs' position that § 46110 is for review of individualized adjudications by TSA, not any generalized "rules" TSA develops via agency rulemaking, such as the screening policies at issue here. Moreover, this Court's role is not to simply adopt the conclusions of other circuits. Rather, "[w]here the statutory language is clear, [a court's] sole function . . . is to enforce it according to its terms." *Rake v. Wade*, 508 U.S. 464, 471 (1993) (internal quotations omitted).

c. Finally, even if TSA is correct that § 46110 applies to these claims (it is not), Plaintiffs have already noted that the proper remedy would be to transfer this case to the court of appeals in the

[7] TSA further misses the mark when it argues that § 46110(a)'s reference to 49 U.S.C. § 114(l) means that any generally applicable rule like the SOPs or MD 100.4 is subject to review under § 46110. TSA Reply 6. Instead, § 46110(a) only references review of ***orders*** issued by the TSA Administrator under the authority of 49 U.S.C. § 114(l), not review of all rules or regulations issued thereunder.

interest of justice. It is obvious that doing so after more than five years of litigation and extensive discovery would be in the interests of justice and would promote judicial efficiency. If the Court determines transfer is appropriate, Plaintiffs observe that given the diversity of the plaintiffs (and the putative class), the D.C. Circuit may be the most appropriate venue for transfer.

III. On the Merits, Plaintiffs Are Entitled to Summary Judgment.

TSA's Cash-Screening Policies (A) are unlawful and (B) violate the Fourth Amendment.

A. TSA's Cash-Screening Policies exceed TSA's statutory authority.

TSA defends its Cash-Screening Policies by claiming that Congress gave Screeners the authority to conduct checkpoint screenings for any "subject matter or purpose" at all. TSA Reply 27. Congress did not. If it had, such unbounded suspicionless screenings would be unconstitutional—so they're statutorily limited to a transportation-security purpose. Pls.' Cross-MSJ 30–31. Since just about everything the Cash-Screening Policies require Screeners to do serves no transportation-security purpose, the Policies necessarily exceed statutory authority. Pls.' Cross-MSJ 3–10, 30–35. Facing that reality, TSA tries to rewrite the Policies to be "consistent with TSA's statutory authorities," TSA Reply 29—first by misrepresenting what the Policies actually require Screeners to do, TSA Reply 28–30, and second by misrepresenting what Plaintiffs say the law prohibits Screeners from doing, TSA Reply 30. Those efforts fail. TSA's off-mission Cash-Screening Policies must be vacated and enjoined.

1. TSA argues that Congress's directive for the agency to "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft," 49 U.S.C. § 44901(a), "neither specifies nor constrains the subject matter or purpose of that screening." TSA Reply 27. Except it does. *See* Pls.' Cross-MSJ 30–31 (quoting additional sections of TSA's organic statutes, which the agency's brief conspicuously ignores). That screening is "a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance" and "whether the [passenger's] property unlawfully contains a dangerous

weapon, explosive, or other destructive substance." 49 U.S.C. § 44902(a)(1)–(2). Beyond those targeted searches, the screening also serves the agency's more general (yet still circumscribed) authority to "assess threats to transportation" or "exercise . . . powers" "relating to transportation security." *Id.* § 114(f)(2), (16). So, even though "[i]tems other than weapons or explosives can give a TSA Screening Official reason to increase the level of scrutiny when circumstances suggest that it is reasonable to conduct a more probing investigation," that probing must be "in an effort to ascertain whether [the traveler] pose[s] a risk to passengers or airplane security." *George v. Rehiel*, 738 F.3d 562, 579 (3d Cir. 2013). Indeed, TSA's checkpoint screening process only passes constitutional muster in the first place "***because*** the [government] has an overwhelming interest in preserving air travel safety, and the procedure is ***tailored*** to advance ***that interest*** while proving to be ***only minimally invasive***." *United States v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006) (emphasis added).[8]

Thus, ultimately, even TSA admits that "all escalation must be linked to a transportation-security purpose." TSA Reply 27. In other words, Screeners "are not authorized to conduct searches for purposes of discovering illegal items such as drugs, drug paraphernalia, or child pornography, or to conduct searches that require warrants on behalf of law enforcement agencies." AR161. And yet: As detailed in Plaintiffs' opening brief, the Cash-Screening Policies require Screeners—authority and training be damned—to undertake escalations not linked to any transportation-security purpose, (1) by actively undertaking to discern whether cash constitutes "evidence of crimes unrelated to transportation security," Pls.' Cross-MSJ 32; SUMF ¶ 1, and (2) by subjecting travelers with cash to searches and seizures that do not "advance a transportation security purpose." Pls.' Cross-MSJ 33; SUMF ¶¶ 3–5, 56, 71, 78, 80, 90, 92, 94, 104, 136–37. That record evidence ends the inquiry. "The

[8] Because the statute is not "susceptible of [TSA's anything-goes] construction," the "canon of constitutional avoidance" does not "come[] into play." *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (citation omitted). But if the Court finds TSA's anything-goes statutory construction "plausible," *id.*, then constitutional avoidance requires rejecting it—lest the suspicionless checkpoint screening process violate the "tailor[ing]" required "under the administrative search doctrine," *Hartwell*, 436 F.3d at 181.

case law dealing with airport checkpoint searches teaches that a checkpoint search tainted by 'general law enforcement objectives' such as uncovering contraband evidencing general criminal activity is improper." *United States v. Fofana*, 620 F. Supp. 2d 857, 863 (S.D. Ohio 2009) (collecting cases).

2. Facing those on-point legal headwinds, TSA resorts to "*post hoc* interpretation[s]" of the Cash-Screening Policies that cannot "cure the conflict between the challenged regulation and the statutes." *Jean v. Nelson*, 472 U.S. 846, 856 n.3 (1985) (citation omitted). That is, TSA hopes the Court will keep the Policies on the books and let the agency keep doing what it's doing by (1) misrepresenting what the Policies actually require Screeners to do, TSA Reply 28–30, and (2) misrepresenting what Plaintiffs say the law prohibits Screeners from doing, TSA Reply 30. But the Policies "just mean[] what [they] mean[]," and the agency can't pull such a fast one. *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). Or, perhaps more generously, "if the agency is indeed so confused that it has spoken out of both sides of its regulatory mouth, it has to be the side speaking unambiguously through [the actual text of the Policies], rather than the side speaking in garbled terms so quickly disavowed, that speaks the more loudly." *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1166 (10th Cir. 2016) (Gorsuch, J.).

a. First, TSA pretends the Cash-Screening Policies only require Screeners to passively report information to law enforcement, without requiring Screeners to do anything that's not "part and parcel of the lawful administrative search" or "a separate search or seizure" divorced from the transportation-security purpose. TSA Reply 28–30. That's false. First, the "Suspicious" Item SOP (Ch. 12 § 1) requires Screeners to "[m]aintain control" of anything they deem "evidence of criminal activity"—which TSA defines to include "suspicious" cash in any amount. Second, the Cash SOP (Ch. 12 § 2) requires Screeners to demand boarding pass and ID upon encountering a "large" amount of cash that "appears to exceed $10,000," is rubber-banded, the same denomination, or carefully concealed. Those are both active intrusions on travelers (not passive information-sharing) that are divorced from any transportation-security purpose. Pls.' Cross-MSJ 5, 8–9, 33–34. That's why TSA's reliance on footnote

14 of *United States v. McCarty*, TSA Reply 29, is unavailing. The problem is not whether Screeners can "call law enforcement if [they] inadvertently discover[] a possibly contraband item." 648 F.3d 820, 831 n.14 (9th Cir. 2011). The problem is that the Cash-Screening Policies require Screeners to assess cash for non-transportation-security purposes, treat it as a contraband item based on innocuous characteristics (i.e., based on characteristics that don't make it a possibly contraband item), and subject travelers to non-transportation-security searches and seizures on that innocuous basis—meaning the Policies don't, as *McCarty* requires, keep Screeners "properly cabined to the extent of the lawful administrative search." *Id.*

What's particularly vexing about TSA's post-hoc rewrite of the Cash-Screening Policies is that TSA simultaneously and irreconcilably insists (1) the Policies' directive to "[m]aintain control of" "evidence of criminal activity" doesn't apply to currency, TSA Reply 30, yet (2) "bulk currency can amount to such evidence" in any amount, TSA Reply 30, as can $10,000 in particular, TSA Reply 20. The Court should not get distracted by such "garbled terms." *El Encanto, Inc.*, 825 F.3d at 1166. The Policies mean what they say: Screeners "must" "[m]aintain control" of any item they think is "evidence of criminal activity," and the Policies make clear that, in TSA's eyes, cash satisfies that criteria based on several independently sufficient characteristics (amount, packaging, etc.). AR161–162. That serves no transportation-security purpose. Nor do the travel-document demands that come ***after*** determining "there are no signs of prohibited items" whenever "a large amount of currency" "appears to exceed $10,000" or "to relate to criminal activity" just because it's in the same denomination or in rubber bands. Pls.' Cross-MSJ 32–34. Even if all that isn't unconstitutional (which it is, as explained below), it still exceeds Screeners' statutory authority because it serves no transportation-security purpose and, as explained next, is not cabined to inadvertent, plain-view discovery of items that can obviously give rise to reasonable suspicion on immediate appearance.

b. Second, TSA disingenuously argues that adopting Plaintiffs' position would require Screeners to "turn a blind eye to evidence of criminal activity." TSA Reply 30. But that's based on TSA's (hopefully feigned) failure to grasp that potential child pornography is not the same as a lot of cash, same-denominated cash, or rubber-banded cash. Then-Judge Sotomayor explained it well in the case that TSA, for some odd reason, thinks helps it the most. Despite Screeners' limited front-end transportation-security authority, the plain-view doctrine permits Screeners to take action—including potentially even the temporary seizure of an item—***if*** the potentially incriminating nature of that item is and would be readily apparent even without any general law-enforcement training. *$557,933.89*, 287 F.3d at 84–87. Therefore, a TSA policy that identified certain characteristics, whether individually or together, as potentially indicative of child pornography or cocaine might—depending on what those characteristics were—easily pass muster by virtue of the plain-view doctrine. The Court need not pass on such hypothetical policies, though. It only needs to pass on the very real Cash-Screening Policies before it. And those Policies treat—in writing—***precisely*** the characteristics (amount of cash, ***or*** its denomination, ***or*** its packaging) that Judge Sotomayor and the Second Circuit, the Third Circuit, and the Supreme Court have told us ***cannot*** independently satisfy the plain-view reasonable-suspicion standard. *Id.* at 88 ("Currency—that is to say, cash—is of course accrued by all types of legitimate businesses, often in small denominations, and though for a business to choose to keep (and transport) over half a million dollars of its proceeds in cash form would be, to say the least, foolhardy, it would not necessarily be indicative of criminality—foolishness not yet being a crime."); *United States v. Dyer*, 2019 WL 6218899, at *11 (M.D. Pa. Nov. 21, 2019), *aff'd*, 54 F.4th 155 (3d Cir. 2022) (citing *United States v. Law*, 384 F. App'x 121, 122–23 (3d Cir. 2010)) ("[C]ash, in and of itself, is innocuous, even in large bundles and wrapped in rubber bands."); *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (traveling with a large amount of cash is not reasonable suspicion). Because it's those innocuous circumstances standing alone—including the mere presence of a large amount of cash, its denominations, or its

packaging—that trigger the Cash-Screening Policies' non-transportation-security searches and seizures of persons and property, TSA's efforts to distort and weaponize the plain-view doctrine fall flat. *See* Pls.' Cross-MSJ 12–13, 37.

* * *

In short, TSA's Cash-Screening Policies require Screeners to take actions upon encountering cash that TSA admits are wholly unrelated to transportation security, and to do so in innocuous circumstances that the law unequivocally tells us cannot give rise to reasonable suspicion of criminality.

B. TSA's Cash-Screening Policies violate the Fourth Amendment.

As above, TSA's Fourth Amendment arguments proceed on the false (inflammatory) premise that Plaintiffs' arguments would "require[] TSA officials to ignore potential evidence of criminal activity." TSA Reply 16. As explained above: Not so. Plaintiffs' arguments do no damage to the plain-view doctrine, properly understood. Plaintiffs' arguments prohibit only what the Fourth Amendment prohibits, but the Cash-Screening Policies require: treating cash—based solely on amount, packaging, or other innocuous characteristics—as potential contraband that triggers non-transportation-security searches and seizures. In other words, at bottom, the unconstitutionality of TSA's Cash-Screening Policies flows from one corrosive idea, written into the Policies and doubled-down on now: that a "large amount of currency," the "quantity" of cash, the "denomination" of the cash, the "packaging" of cash, the "circumstances of discovery" of cash, "or" the "method by which the cash is carried" can each independently suffice for TSA Screeners to deem cash reasonable suspicion of crime requiring non-transportation-security seizures and even searches. Because the Policies clearly say that—while the caselaw (TSA's included) plainly holds otherwise—the Policies must be vacated and enjoined.

1. The Policies require Screeners to make general criminality assessments unmoored from transportation security, so they are an impermissible programmatic secondary motive.

TSA fails to refute Plaintiffs' argument that the Cash-Screening Policies amount to an impermissible non-transportation-security law-enforcement program. *See* Pls.' Cross-MSJ 35–36. First,

Hartwell gets TSA nowhere because that case just says properly cabined administrative searches are generally constitutional, and that requiring Mr. Hartwell to reveal the contents of his pockets fell within that authority. 436 F.3d at 176–77. Second, the agency's false equation of the Policies with Screeners' authority to act when they happen upon drugs or child pornography misses the point, as explained. It's a red herring because TSA's Policies don't mirror the plain-view doctrine. Rather, they say Screeners "must determine if the currency" "appears to exceed $10,000" or "appears to relate to criminal activity" and to prolong travelers' detention to re-collect documents for law enforcement ***after*** determining that "there are no signs of prohibited items." AR162. TSA admits it does all that in hopes of uncovering crime, that none of it serves any transportation-security purpose, and that it's all in hopes of turning travelers over to law enforcement. SUMF ¶¶ 56, 71, 78, 80, 90. All that, even though Screeners are "not trained on issues of . . . reasonable suspicion." *Vanderklok v. United States*, 868 F.3d 189, 208 (3rd. 2021).

And there's more. TSA internally promotes its Cash-Screening Policies as proof that it's a good "partner" to ICE and other law-enforcement agencies. It internally declares "TSA and DEA: Partners Against Crime." It internally trumpets "efforts to help prevent illegal bulk cash and criminal activity." And it encourages Screeners to view traveling with cash as improper. Pls.' Cross-MSJ 19–20. No wonder ICE said it best, after a TSA-initiated cash seizure: "Without your initiation of these cases the program [would] not exist." *Id.* 20. In short, TSA has developed precisely the off-mission, suspicionless crime-fishing program that *Hartwell* and other courts upholding checkpoint screenings assured us would not come to pass. And, as explained next, it vacuums up wholly innocent conduct.

2. By equating the quantity or packaging of cash with criminality, the Policies require Screeners to seize cash and travelers without reasonable suspicion.

TSA does not dispute that if the Cash-Screening Policies require searches or seizures based on any of the following, then the Policies are unconstitutional:

> Screeners are trained that "[l]arge amounts of currency," standing alone, is "evidence of criminality activity." SUMF ¶ 110. (3) There is no right or wrong answer to the criminality assessment. SUMF ¶¶ 105, 107–09, 111. (4) The "quantity," "packaging," "circumstances of discovery," "or" "method by which the cash is carried" each independently suffices for a criminality assessment. SUMF ¶¶ 14, 19 (emphasis added). (5) Traveling with $100 suffices for a criminality assessment. SUMF ¶¶ 109–10. Simply put: the Policies equate whatever a Screener arbitrarily deems a "large amount of currency" with currency that "appears to relate to criminal activity[.]"

Pls.' Cross-MSJ 37. TSA just says that no searches or seizures come of these facts. TSA Reply 15, 22–23. That's wrong, as explained. First, the Policies require Screeners to "[m]aintain control of" "evidence of criminal activity," and TSA vehemently maintains that "bulk currency can amount to such evidence" in any amount, TSA Reply 30, as can $10,000 in particular, TSA Reply 20. Second, the Policies require re-presentation of documents after a Screener determines that no prohibited item exists, based solely on any of the fact scenarios quoted above—an off-mission seizure of person and property sans reasonable suspicion. Pls.' Cross-MSJ 36–37. By trying to recast the Policies as passive reporting of information to law enforcement without intrusions on travelers, contra the Policies' clear terms, TSA violates the "foundational principle of administrative law" that post-hoc rewrites in litigation can't save unlawful agency action. *DHS v. Regents*, 591 U.S. 1, 20 (2020) (citation omitted). As detailed in Plaintiffs' opening brief (and as a casual read of the Policies makes plain), the Policies require Screeners to seize persons and property based on the mere presence of cash with certain innocuous characteristics. Pls.' Cross-MSJ 30–40 (detailing the Policies and their legal and constitutional defects).

3. By requiring Screeners to keep the cash they seize after determining the traveler has no prohibited item, the Policies require Screeners to keep cash seized indefinitely.

Again, TSA does not dispute that Plaintiffs' reading of the Cash-Screening Policies would violate the Constitution by requiring Screeners to keep cash without probable cause. Pls.' Cross-MSJ 38. TSA disputes only whether that's what the Policies say. TSA Reply 24. TSA asserts that the Policies' directive that Screeners "must" "[m]aintain control" of "evidence of criminal activity" (Ch. 12 § 1)

doesn't apply to "currency [that] appears to relate to criminal activity" (Ch. 12 § 2). That argument is grammatically impossible to square—especially with TSA still so sure that "bulk currency can amount to such evidence" in any amount, TSA Reply 30, as can $10,000 in particular, TSA Reply 20.

4. By requiring Screeners to record personal information for no transportation-security purpose and without probable cause, the Policies mandate unconstitutional searches.

TSA claims "the record establishes" that re-collecting a traveler's documents "does not extend the lawful administrative search or seizure"—by pointing to one 2015 email that does no such thing. TSA Reply 24. Regardless, the Policies themselves tell us that Screeners require travelers to re-collect and re-present their travel documents ***after*** Screeners determine "there are no signs of prohibited items." AR162. TSA admits doing so serves no transportation-security purpose. SUMF ¶¶ 78–80. So, it's necessarily not part of the lawful administrative search or seizure, which must be cabined to a transportation-security purpose. Pls.' Cross-MSJ 38–39. Moreover, TSA badly misunderstands the caselaw it relies on for its proposition that "the re-presentation of a passenger's identification and boarding pass to TSA personnel does not constitute a separate search or seizure." TSA Reply 24–25. Those cases—cited at TSA Reply 25—all said that re-examination ***of an item subject to the plain-view doctrine*** did not constitute a separate search or seizure. Here, that item would be the ***cash itself***—it would not be the packed-away travel documents. According to TSA's novel theory of the Fourth Amendment, packed-away travel documents are forever subject to baseless demands for re-presentation because they were presented at the start of the screening process. That's not the law.

5. The Policies require Screeners to extend or prolong the seizure of travelers with cash "longer than is necessary to effectuate [the transportation security] purpose." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (cleaned up).

Finally, TSA's only response to Plaintiffs' *Rodriguez* argument is to double down on what Plaintiffs explained above is the root of the problem here: TSA's wildly unconstitutional view that any one of the innocuous characteristics identified in the Cash-Screening Policies can suffice to establish reasonable suspicion. TSA Reply 25–27. If that's wrong—and it is—then Plaintiffs' *Rodriguez*

arguments carry the day. *See* Pls.' Cross-MSJ 39–40. The caselaw uniformly holds (TSA's included) that those innocuous characteristics cannot establish reasonable suspicion, even though TSA goes to great lengths to misrepresent its own cited cases as somehow establishing as much.[9] In any event, even if the Court reads the Policies—despite their plain text—as requiring reasonable suspicion before Screeners take the actions challenged here, reasonable suspicion cannot justify a ***search*** (only probable cause can), yet the Cash-Screening Policies require such searches (of Plaintiffs' travel documents) and therefore violate the Fourth Amendment and *Rodriguez* anyway. Pls.' Cross-MSJ 38–39.

* * *

TSA's arguments have only crystallized what was already clear from the face of the Cash-Screening Policies: that they violate the Fourth Amendment and must be vacated and enjoined.

CONCLUSION

The Court should grant summary judgment for Plaintiffs (including provisionally on behalf of the putative class, pending class certification), deny summary judgment for TSA, vacate TSA's Cash-Seizure Policies, and enjoin TSA from continuing the conduct required by those policies.

[9] The following—including TSA's cited cases—all make clear that TSA is woefully wrong in arguing that the Cash-Screening Policies' stated cash characteristics can independently establish reasonable suspicion (even if in some instances a combination of those characteristics might—an assessment that Screeners are not trained to make, but which they must do in order to determine whether to seize and search travelers, their cash, and their travel documents after determining that no prohibited items exist). *Sokolow*, 490 U.S. at 9; *Law*, 384 F. App'x at 122–23; *$557,933.89*, 287 F.3d at 88; *Dyer*, 2019 WL 6218899, at *11; *United States v. $84,615*, 379 F.3d 496, 501–02 (8th Cir. 2004); *United States v. $159,880.00*, 387 F. Supp. 2d 1000, 1013–18 (S.D. Iowa 2005); *United States v. One Lot of U.S. Currency*, 103 F.3d 1048, 1054 (1st Cir. 1997); *United States v. Funds*, 403 F.3d 448, 467–70 (7th Cir. 2005); *United States v. $145,850*, 2010 WL 3063814, at *3–5 (E.D. Va. July 30, 2010); *United States v. Brooks*, 22 F.4th 773, 776–77 (8th Cir. 2022); *United States v. Hernandez-Rivas*, 348 F.3d 595, 597–99 (7th Cir. 2003); *United States v. Platt*, 734 F. Supp. 1193, 1193–97 (W.D.N.C. 1990); *United States v. Jones*, 187 F.3d 210, 212–14 (1st Cir. 1999); *United States v. Phan*, 628 F. Supp. 2d 562, 565–68, 572 (M.D. Pa. 2009).

Dated: September 5, 2025.

Respectfully submitted,

INSTITUTE FOR JUSTICE

/s/ Dan Alban
Dan Alban*
VA Bar No. 72688
dalban@ij.org

Jaba Tsitsuashvili*
DC Bar No. 1601246
jtsitsuashvili@ij.org

Robert Fellner*
DC Bar No. 90027493
rfellner@ij.org

Nick DeBenedetto*
NJ Bar No. 382442021
ndebenedetto@ij.org

901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Marco Vasquez Jr.*
TX Bar No. 24115892
mvasquez@ij.org

816 Congress Avenue, Suite 970
Austin, TX 78701
(512) 480-5936

*Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2025, a true and correct copy of the foregoing document was filed via the Court's CM/ECF System and served upon all counsel of record.

/s/ Dan Alban

CERTIFICATE OF COMPLIANCE

Counsel for Plaintiffs certifies that this Brief complies with this Court's font and typesetting rules as set forth at LCvR 5.1(B) of the Local Rules of Court. Specifically, this Brief was written in Garamond 12-point font, which complies with this Court's requirement that filings be written in font that is no "smaller than 12 point word processing font." LCvR 5.1(B).

/s/ Dan Alban