05-6754-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRENDAN MACWADE, ANDREW SCHONEBAUM,
JOSEPH E. GEHRING JR., PARTHA BANERJEE and NORMAN MURPHY,

Plaintiffs-Appellants,

—against—

RAYMOND KELLY, Commissioner of the
New York City Police Department and THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, FAMILIES OF SEPTEMBER 11, INC., ALLIED EDUCATIONAL FOUNDATION; U.S. REPRESENTATIVES PETER T. KING AND GINNY BROWN-WAITE; NEW YORK STATE SENATOR MARTIN J. GOLDEN; NEW YORK ASSEMBLYMEN VINCENT M. IGNIZIO AND MATTHEW MIRONES; NEW YORK CITY COUNCIL MEMBER JAMES S. ODDO; AND STEPHEN M. FLATOW IN SUPPORT OF DEFENDANTS-APPELLEES, SEEKING AFFIRMANCE

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April 4, 2006

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and Families of September 11, Inc., hereby state that they are non-stock, non-profit corporations organized under Section 501(c)(3) of the Internal Revenue Code, and therefore, there are no parent corporations or publicly held corporations that own stock of *amici*.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is an established nonprofit public-interest law and policy organization based in Washington, D.C., with supporters nationwide, including many who live and work in the New York City area. WLF devotes a substantial portion of its resources to promoting America's security, the rule of law, individual rights, free enterprise, and limited government. To that end, WLF has appeared before federal and state courts in numerous cases involving national security to ensure that federal, state and local governments possess the tools necessary to protect the country from those who would seek to destroy it or harm its citizens. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Hanft*, 423 F.3d 386 (D.C. Cir. 2005). The WLF has appeared in numerous cases involving the Fourth Amendment specifically, including some of the leading U.S. Supreme Court cases most relevant here. *See, e.g.*, *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Chandler v. Miller*, 520 U.S. 305 (1997); *Nat'l Treasury Employees Union v. Von Raab*, 489 US. 656 (1989).

The Allied Educational Foundation ("AEF") is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy,

and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

Families of September 11, Inc. ("FOS11") is a nonprofit organization founded in October 2001 by families of those who died in the September 11 terrorist attacks. Membership in FOS11 is open to those affected by the events of September 11, be they family members, survivors, responders, or others who support its mission: "To raise awareness about the effects of terrorism and public trauma and to champion domestic and international policies that prevent, protect against, and respond to terrorist acts." *See http://www.familiesofseptember11.org*. FOS11 supports the Defendants' subway inspection policy as furthering these objectives.

Honorable Peter T. King represents New York's Third Congressional District, which includes parts of Nassau and Suffolk Counties, in the United States House of Representatives. As Chairman of the House of Representatives Committee on Homeland Security, Congressman King strongly supports the efforts of federal, state and local law enforcement to protect and secure Americans against a terrorist attack. Congressman King also supports anti-terrorism measures designed specifically to prevent an attack directed at New York City's mass transit facilities because his constituents in the Third Congressional District are in close proximity to, and regularly use, the mass transit system.

Honorable Ginny Brown-Waite represents Florida's Fifth Congressional District in the United States House of Representatives. Representative Brown-Waite is a member of the House of Representatives Committee on Homeland Security and a member of its Subcommittees on Emergency Preparedness, Science, and Technology; Intelligence, Information Sharing, and Terrorism Risk Assessment; and Investigations. She is an ardent supporter of providing the best resources to federal, state and local law enforcement officials to guarantee the safety of all Americans.

Honorable Martin J. Golden, New York State Senator, represents the 22nd Senate District in Brooklyn and is a member of the New York Senate's Committees on Veterans, Homeland Security, and Military Affairs; Tourism, Recreation & Sports Development; Banks; Investigations & Government Operations; and Crime Victims, Crime & Corrections. As a former New York City police officer, he fervently believes law enforcement must possess the tools necessary to prevent and respond to the threat of terrorism, as well as the ability to capture and punish terrorists. He recently voted with the Senate Majority to pass legislation that would give New York the toughest, most comprehensive anti-terrorism laws in the country. Senator Golden supports the NYPD subway inspection program as furthering these objectives.

Honorable Vincent M. Ignizio is a New York State Assemblyman representing the 62nd Assembly District, which includes the South Shore of Staten Island, and is a member of the New York Assembly Committee on Corporations, Authorities and Commissions. Many of Assemblyman Ignizio's constituents commute to New York County and use the City's subways. Assemblyman Ignizio is concerned for the welfare and safety of his constituents and in his representative capacity, supports the challenged NYPD subway inspection policy to deter acts of terrorism on the subways.

Honorable Matthew Mirones is a New York State Assemblyman representing the 60th Assembly District in Staten Island and Brooklyn. As a member of the New York Assembly Committee on Transportation he supports the NYPD's efforts to protect mass transit facilities and passengers from today's threat of terrorism. Assemblyman Mirones is also a member of the Committees on Cities and Corporations, Authorities, and Commissions, and he further supports the program to protect his constituents, many of whom use the City's subways on a daily basis.

Honorable James S. Oddo, the Minority Leader of the City Council, represents New York's 50th District which encompasses Staten Island and Brooklyn. He is concerned for the safety and security of all the City's citizens and visitors, many of whom use and rely on the City's mass transit system every day,

from the threat of a terrorist attack. In his representative capacity, and as the son of a retiree of the New York City Transit Authority, a brother of a retired NYPD Officer, and a brother of a retired FDNY lieutenant, Council Member Oddo is well aware of the terrorist threat facing the City, and he supports the NYPD's subway inspection policy as a method to prevent an attack.

Stephen M. Flatow is a resident of New Jersey. In 1996, his daughter, Alisa Flatow, then a 20-year-old Brandeis University student, was killed by the Palestinian Islamic Jihad in a bus bombing while studying abroad in Israel. In October 1996, Congress enacted the Civil Liability for Acts of State Sponsored Terrorism Act, the so-called "Flatow Amendment." Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note). Mr. Flatow supports New York City's policy to deter similar bombings on the City's subways.

All *amici* appeared below as *amici* in two separate briefs filed pre- and post-trial (the latter upon the District Court's invitation) supporting the NYPD and City of New York. *Amici* are filing this brief pursuant to Fed. R. App. P. 29 with the consent of all parties.

PRELIMINARY STATEMENT

The question posed by this case is whether courts should impose unprecedented, impractical and crippling restrictions on the ability of law enforcement to protect against a very real threat of a potentially catastrophic terrorist attack on this City's mass transportation system. Contrary to the arguments made by Plaintiffs on appeal, this case is not about safeguarding against undue restrictions on civil liberties, nor preventing warrantless police searches on New York City sidewalks. Distilled to their core, Plaintiffs' positions are that the United States Constitution *requires* that New York City allow individuals the unfettered right to bring uninspected bags, packages and containers into one of the City's—indeed the country's—most vulnerable potential terrorism targets, at least unless and until it should learn in advance of an imminent terrorist attack. Further, Plaintiffs contend that visual inspections of bags, lasting but a matter of seconds, solely conducted to deter and detect the existence of explosive devices on a random and voluntary basis—not unlike procedures ubiquitous at airports, courthouses, government office buildings and apparently even the offices of the New York Civil Liberties Union—are "fundamentally intrusive" and constitutionally impermissible when they are conducted by the New York City Police Department.

To accept Plaintiffs' arguments would be to abandon not only established precedent, but common sense. Notably absent from Plaintiffs' 50-page brief is any mention of the substantial evidence—both in the public record and in the proceedings below—of the extent of the terrorist threat to urban mass transportation facilities such as the New York City subway system, which is used by some 4.7 million passengers each day. That omission is striking not only because it is what gave rise to the bag inspection program at issue in this case, but also because it is the threat of such an attack that ultimately must be weighed against the minimal intrusion at issue here under any constitutional balancing test.

The issues here are not new. More than thirty years ago, this Court addressed complaints similar to those Plaintiffs are making here in connection with then-novel carry-on bag searches at airports. In upholding the inspections in the face of a constitutional challenge, Judge Friendly observed:

> More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment.

United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974).

Since *Edwards* was decided, the need for bag inspection programs designed to guard against terrorist threats has grown dramatically. As *Amici* demonstrated below, urban mass transit is, if anything, an even more vulnerable

and potentially deadly target for terrorists than airplanes, especially in New York City given its locale, importance and the volume of passengers that use the subways. Most passengers understand the need for programs such as the bag inspection program. As plaintiffs in another case currently pending before this Court have argued, "September 11 has taught us that cities are terrorist targets, and most city dwellers experience handbag and briefcase searches in that light."[1]

Plaintiffs and their counsel have cautioned against the use of recent terrorist attacks as an excuse to take away our most cherished constitutional rights, such as the right to be free from unreasonable searches and seizures. *Amici* agree in principle that terrorism cannot justify the elimination of basic constitutional rights. But those rights are meaningless if the government cannot adequately safeguard the right of its citizens to live in safety. As detailed further below, there have been enough subway and rail bombings, attempted bombings and intelligence reports and studies available in the public record to demonstrate that it would be reckless to hold that the public effectively has a Constitutional right to bring uninspected backpacks and packages into subways and other mass transit facilities. The Fourth Amendment certainly does not mandate such an absurd result.

The District Court's judgment should be affirmed.

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[1] *Cassidy v. Chertoff*, No. 05-1835-cv (2d Cir. 2005), Brief of Appellants at 29.

STATEMENT OF FACTS[2]

The NYPD instituted its subway inspection program immediately after a series of horrific and deadly bombings in London. *MacWade v. Kelly*, No. 05 Civ. 6921, at 9 (RMB) (FM) (S.D.N.Y. Dec. 7, 2005) (hereinafter "Slip Op."); SPA10.[3] Just 19 days before this suit was filed, on July 7, 2005, four young men entered the London underground and one bus and detonated "explosives concealed in carry-on type containers,"[4] killing 52 passengers and injuring 700 others. Images of the aftermath showed just how deadly hidden explosive devises could

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[2] *Amici* adopt Appellees' Statement of Facts and address here only the issue of the terrorist threat to the New York City subway system and other urban mass transportation facilities. This Court may take judicial notice of facts concerning prior subway attacks set forth in the government reports and in news accounts. *See Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Dep't of Parks and Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) ("[J]udicial notice may be taken at any stage of the proceeding.") (quoting Fed. R. Evid. 201(f))). Indeed, other courts have specifically taken judicial notice of the September 11th and other terrorist attacks. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 100-101 (E.D.N.Y. 2005) (taking judicial notice of September 11th and other attacks); *Int'l Soc'y for Krishna Consciousness of California Inc. v. City of Los Angeles*, 59 Fed. Appx. 974, 975 (9th Cir. 2003) (taking judicial notice of September 11th attacks "the obvious fact that airport security needs are not what they used to be"); *E.E.O.C. v. Trans States Airlines, Inc.*, 356 F. Supp. 2d 984, 988 (E.D. Mo. 2005) (taking judicial notice that "that air travel in the United States was eliminated for several days following the [September 11th] attacks and that the airline industry has since drastically changed because of these attacks.").

[3] "SPA" refers to the Special Appendix filed by the Parties; "JA" refers to the Joint Appendix.

[4] Cohen Decl. ¶ 25, JA1686.

be. One survivor of the attacks, Ian Wade, described what he experienced that morning:

> We had just got through King's Cross when I heard an almighty 'boom, boom' and the carriage stopped immediately. The electricity went completely and the carriage filled with soot. We could just make out what was in front but nothing else. The explosion was on the ceiling of the carriage in front and all the glass from the carriage had caved in. People were trying to kick the windows in. I could see there were people with their clothes burned off, people with limbs missing. There must have been at least one death in there. I have never known anything like it. My wife Evie really thought that we were going to die.

Account of Ian Wade (July 8, 2005).[5] The bombings were apparently coordinated by Islamic extremists affiliated with Al Qaeda,[6] the same terrorist group responsible for the 9/11 attacks in Manhattan, Washington, D.C., and Pennsylvania and other acts of terrorism throughout the globe. Four bombs were found in subways once again in London two weeks later, in a failed attempt to kill more subway passengers and strike more fear in the British public. And just months earlier, police in France broke up a terrorist cell intent on bombing the Paris metro, which, like New York, had been a target for terrorists before.[7]

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5 Available at *http://news.bbc.co.uk/1/hi/uk/4662365.stm*.

6 Sarah Lyall and Douglas Jehl, *London Bombers Visited Earlier, Apparently on Practice Run*, N.Y. Times, Sept. 21, 2005, at A6; *see also* CBC News, *Al-Qaeda-Linked Bombings* (July 8, 2005) (available at *http://www.cbc.ca/news/background/london_bombing/alq_bombing.html*).

7 *See* Craig S. Smith and Helene Fouquet, *9 Held in France Planned to Attack, Official Says*, N.Y. Times, Sept. 28, 2005, at A7; *see also* Associated

Yet the terrorist threat to urban mass transportation did not just emerge over the past year. According to a Congressional Research Service Report, there have been a total of 181 terrorist attacks on trains and rail-related targets worldwide between 1998 and 2003, an average of 30 per year. David Randall Peterman, *Passenger Rail Security: Overview of Issues*, at 1 (2005) (hereinafter "Peterman, *Passenger Rail Security*").[8] Passenger rail systems are inherently vulnerable to attack "'because they are so accessible and extensive.'" *Id*. at 1 (quoting *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, at 391 (W.W. Norton 2004)). As noted in a Senate Report published a year before the London bombings, "[t]he transit system is intentionally barrier-free to handle large numbers of passengers efficiently and conveniently, but this characteristic makes transit more vulnerable to terrorist acts." Senate Report of the Committee on Commerce, Science and Transportation on the Rail Security Act of 2004, S. 2273, S. Rep. 108-278, at 2 (May 21, 2004) (hereinafter, "Senate Report");[9] *see also* Slip Op. at 8-9, SPA9-10; JA1764-65 (Sheehan Decl. ¶¶ 18-19).

Press, *Plot to Attack Paris Subway, Airport* (Sept. 27, 2005) (available at *http://msnbc.msn.com/id/9501919/*).

8 Available at *http://www.mipt.org/pdf/CRS_RL32625.pdf*.

9 Available at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:sr278.108.pdf*.

In addition to the recent London bombings, recent attacks on trains and subways have included:

- The March 11, 2004 bombings of rail lines in Madrid, Spain, in which ten explosions occurred during the height of rush hour, killing 191 people and injuring about 2,000 others.[10]

- The March 24, 2004 discovery by railway workers of a bomb with seven detonators buried in the bed of a commuter line between France and Switzerland.[11]

- The February 2004 terrorist bombings of a subway station in Moscow by Chechen extremists, which killed 41 people, followed by the August 2004 subway bombing that killed ten more and injured 50.[12]

- The wave of terrorist bombings in French subways and trains between July and October 1995, in which 8 people were killed and more than 150 injured.[13]

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10 *See* Ray Sanchez, *In the Subways: Reminder of Vulnerability*, Newsday (City ed.), May 17, 2004, at A-04; *see also* Peterman, *Passenger Rail Security*, at 1 n.4.

11 *See* Craig S. Smith, *French Worker Finds a Bomb Partly Buried on Rail Line*, N.Y. Times, Mar. 25, 2004, at A13; *see also* BBC News, *France Urges Calm Over Rail Bomb* (March 24, 2004) (available at *http://news.bbc.co.uk/2/hi/europe/3565417.stm*).

12 *See* Associated Press, *Report: Moscow Subway Chief Says Vigilant Passengers Prevented Two Explosions on Network* (Sept. 22, 2005); *see also* CNN, *Timeline: Russia Terror Attacks* (Sept. 2, 2004) (available at *http://www.cnn.com/2004/WORLD/europe/09/01/russia.timeline/index.html*)

13 *See Subway Bombing Brings Back Terror to Paris*, The Miami Herald, Dec. 4, 1996, at 20A; *see also* CNN, *French Police in Anti-Terror Raids* (June 15, 2004) (available at *http://www.cnn.com/2004/WORLD/europe/06/15/france.arrests/index.html*).

A similar attack in New York could be catastrophic. Nearly 60% of the *entire United States passenger rail ridership* takes place on New York City area rail systems, including its subways. Peterman, *Passenger Rail Security*, at 9. In addition to the potential loss of life and large number of casualties, an attack could have devastating economic and other effects. Even the brief disruptions of rail service after the 2001 terrorist attacks, for example, "caused emergencies for several cities awaiting rail deliveries of chlorine used to purify their water." Senate Report at 3. Given the fact that New York City is already a terrorist target, the subways and other rail lines present an obvious risk to public safety. *See* Slip Op. at 8, SPA9.

Indeed, the New York City subway has already proven to be a target for those intent on killing large numbers of civilians. *See* Slip Op. at 8-9, SPA9-10. The Federal Bureau of Investigation and Department of Homeland Security has received intelligence reports of a possible terrorist plot to bomb trains and buses in major U.S. cities, "us[ing] improvised explosive devices—possibly constructed of ammonium nitrate and diesel fuel—concealed in luggage and carry-on bags, such as duffel bags and backpacks."[14] Separately, two men were

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[14] MSNBC Report, *U.S. Transit Systems Increasing Security* (Apr. 3, 2004) (available at *http://msnbc.msn.com/id/4652851*); CBS Report, *Transit Systems Tighten Security* (Apr. 3, 2004) (available at *http://www.cbsnews.com/stories/2004/04/06/terror/main610392.shtml*).

arraigned in 2004 for plotting to bomb the Herald Square and other New York City subway stations.[15] On July 31, 1997, the NYPD raided a Brooklyn apartment and seized several pipe bombs and arrested two men, one of whom told investigators that the bombs were intended to be used to kill Jews on the subway.[16] On December 21, 1994, Edward Leary exploded two bombs on separate occasions in New York City subway cars parked in a station, injuring himself and 50 others, 14 seriously.[17]

ARGUMENT

I. THE NYPD BAG INSPECTION PROGRAM FALLS SQUARELY WITHIN THE "SPECIAL NEEDS" DOCTRINE

Courts have long recognized that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Under the "special needs" doctrine, "[w]here a Fourth Amendment intrusion serves special governmental needs,

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15 Greg B. Smith et al., *Wanna-Be Bombers Eyed Several Spots*, N.Y. Daily News (City ed.), Aug. 29, 2004, at 3; *see also* CNN, *Police: Bomb Plot Suspects Scouted Many Sites* (Aug. 28, 2004) (available at http://www.cnn.com/2004/US/Northeast/08/28/ny.bombplot/index.html).

16 Joseph P. Fried, *Jury Convicts Man in Scheme to Set a Bomb in the Subway*, N.Y. Times, July 24, 1998, at B1; *see also* BBC News, *World: Middle East Palestinian Convicted of New York Bomb Plot* (July 24, 1998) (available at http://news.bbc.co.uk/1/hi/world/middle_east/138581.stm).

17 George James, *Man Convicted in Bombings on Subway*, N.Y. Times, Mar. 8, 1996, at B1; *see also* Associated Press, *Today in History: December 21* (Dec. 21, 2004) (available at http://www.msnbc.msn.com/id/6707565).

beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990) (internal quotation marks and citation omitted). Thus, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and entrances to courts and other official buildings." *Chandler v. Miller*, 520 U.S. 305, 323 (1997); *accord Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000).

In addition to searches at airports and governmental offices, the special needs doctrine has been applied to permit DUI roadblocks, *see Sitz*, 496 U.S. at 455, drug testing of students, government employees and railway employees, searches of probationers, DNA sampling of incarcerated and certain convicted sex offenders, and administrative trespass on private property. *See Nicholas v. Goord*, 430 F.3d 652, 660-61 (2d Cir. 2005) (collecting cases); *Palmieri v. Lynch*, 392 F.3d 73, 79-81 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 424 (2005). In the context of anti-terrorism programs, courts have specifically upheld

searches and inspections on ferries,[18] on highways inside military installations,[19] and indeed on subways and buses.[20]

Thus, the analysis for determining whether or not a program falls within the "special needs" doctrine is straightforward: does it serve a special governmental need beyond the normal need for law enforcement and, if so, would it be impractical to require a warrant or individualized suspicion? *Sitz*, 496 U.S. at 449-50. Plaintiffs' attempt to remove the bag inspection program from the realm of the "special needs" doctrine is not supported by existing precedent and, if accepted, could facilitate the carrying out of terrorist attacks like those that were carried out in London, Madrid, Moscow, Paris and elsewhere.

A. The Bag Inspection Program Serves a Special Governmental Need Beyond the Normal Need for Law Enforcement

While suspicionless searches are generally not permitted where the purpose of the program is "primarily for the ordinary enterprise of investigating

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18 *Cassidy v. Ridge*, No. 1: 04 CV 258, at 7-8 (D. Vt. Feb. 16, 2005), *appeal docketed sub nom., Cassidy v. Chertoff*, No. 05-1835-CV (2d Cir. Apr. 13, 2005).

19 *United States v. Green*, 293 F.3d 855, 859 (5th Cir. 2002), *cert. denied*, 537 U.S. 966 (2002).

20 *American-Arab Anti-Discrimination Comm. v. Massachusetts Bay Transp. Auth.*, No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *4-*7 (D. Mass. July 28, 2004) (upholding searches of boarding subway and bus passengers in proximity of Democratic National Convention, observing "[t]here is also no reason to have separate constitutional analyses for urban mass transportation systems and for airline transportation").

crimes," *Edmond*, 531 U.S. at 44, the bag inspection program was implemented shortly after the London subway bombings as part of the City's effort to deter and detect terrorism. *See* JA1630-1635.22 (NYPD Subway Inspection Directive and NYPD Training Presentation); Slip Op. at 9-11, SPA 10-12. The object of the program is not to deter ordinary crime but to prevent a potentially catastrophic terrorist attack on the subways. Guidelines implemented by the NYPD make clear that the sole purpose of the inspections is to deter and detect the existence of explosive devices, *not* to gather other evidence of ordinary criminal activity. Officers are instructed not to search containers too small to contain explosives, such as wallets and purses, and they are not permitted to "[i]ntentionally look for other contraband or read or attempt to read any written or printed material." JA1635.21 (NYPD Training Presentation).[21]

Plaintiffs attempt to argue that the bag inspection program does not qualify as a special need through the following invalid syllogism: (1) the special needs doctrine does not apply where the immediate purpose of the program is to detect unlawful conduct; (2) the immediate purpose of the bag inspection program is to detect persons who intend to bring explosive devices into the subway system;

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[21] This quotation is from a page that was apparently inadvertently omitted from the Joint Appendix. This page should have immediately followed JA1635 and *Amici* understand that Appellants are in the process of supplementing the record.

(3) it is unlawful to bring explosive devices into the subway system; therefore, (4) the bag inspection program cannot fall within the special needs doctrine. *See* Appellants' Br. at 23-32.

The Supreme Court in *Illinois v. Lidster*, 540 U.S. 419 (2004), and this Court in *Nicholas* made clear that the "prohibition on searches conducted pursuant to a 'general interest in crime control' did 'not refer to every law enforcement objective,' but rather only to normal law-enforcement objectives." *Nicholas*, 430 F.3d at 663 (citing *Lidster*, 540 U.S. at 424) (footnote omitted). Undeterred, Plaintiffs actually embrace these cases, and essentially argue that any program should be deemed to have a "normal law enforcement objective" if its objective includes the possible arrest of the person searched. Hence, under Plaintiffs' reasoning, a program designed to prevent a potentially catastrophic terrorist attack, potentially resulting in thousands of human casualties and having devastating economic and psychological effects, is but an ordinary crime control program, no different than an everyday traffic stop. Obviously, there is a profound qualitative difference between the objective of this counter-terrorism program and the ordinary law enforcement objectives of the NYPD.

Of course, no support exists for Plaintiffs' argument. To the contrary, every airport screening, border search, DUI roadblock, courthouse bag inspection and similar measures that have been upheld under the special needs doctrine may

result in the discovery of unlawful activity and thus the possibility of an arrest. The issue is not whether the goal of the program is to detect any unlawful activity. If that were the test, the "special needs" doctrine would be all but eliminated. Rather, it is whether the program goes beyond the normal need for law enforcement. There may be cases in which the line between a special governmental need and a "normal law enforcement" objective is not clear, but this is surely not one of them.

B. A Requirement of Individualized Suspicion Would Undermine the Ability of Law Enforcement to Prevent Terrorist Attacks on Urban Mass Transportation Facilities Like the New York City Subway System

Plaintiffs' attempt to prohibit any type of bag inspection program on New York City subways and trains absent individualized suspicion of wrongdoing would unreasonably and dangerously tie the hands of law enforcement personnel responsible for protecting the public from a terrorist attack in one of the most vulnerable targets in the country. The special needs doctrine was developed specifically to address situations where, as here, it would be impractical to require a warrant or individualized suspicion given the particular risk to public safety. *See Sitz*, 496 U.S. at 449-50. For this reason, the special needs doctrine is particularly suited to programs designed for purposes of public safety. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *Edmond*, 531 U.S. at 43; *Chandler*, 520 U.S. at 318-19; *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-

71, 673-75 & n.3 (1989); *accord United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006) (Alito, J.); *United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005); *Edwards*, 498 F.2d at 500-01.

As demonstrated by the recent London and Madrid bombings, modern-day terrorists have been able to develop explosive devices that are small enough to fit in a small bag, yet potent enough to kill and injure thousands of individuals in a large transit system. *See* Slip Op. at 33-34 & n.29, SPA34-35. Moreover, recent attacks have shown that terrorists are sophisticated enough to plan their attacks well in advance and to avoid attracting undue attention by their appearance and demeanor. JA1682-83 (Cohen Decl. ¶ 13 (testifying Program designed to confound terrorists who carefully plan their targets and conduct significant surveillance)); JA1765 (Sheehan Decl. ¶ 21 (testifying to terrorists' desire to conceal explosive devises in carry-on bags without arousing any suspicion)). In addition, the enormous size of the New York City subway and the number of passengers it serves—the subway and metropolitan rail systems carry more than half of the passenger rail ridership in the entire United States, *see* Peterman, *Passenger Rail Security*, at 9—further illustrates why it would be impractical to impose an individualized suspicion requirement in the context of the City's effort to deter and detect the existence of explosive devices on its subways.

Indeed, it is precisely for these reasons that mass transportation facilities present such a vulnerable target. *See id*. at 1; Senate Report, at 2. Thus, requiring individualized suspicion would not only be impractical, it would completely undermine the ability of law enforcement to safeguard against terrorist attacks on mass transportation facilities. *Cf. Marquez*, 410 F.3d at 616 ("[L]ittle can be done to balk the malefactor after [weapons or explosives] are successfully smuggled aboard, and as yet there is no foolproof method of confining the search to the few who are potential hijackers." (alteration in original) (internal quotation marks and citation omitted)).[22]

C. There is No "Diminished Expectation of Privacy" Requirement Under the Special Needs Doctrine

Plaintiffs contend that any suspicionless inspection program designed to prevent terrorist attacks in the New York City subways must be unconstitutional because the special needs doctrine can only be implemented where there is a diminished expectation of privacy and because subway passengers do not have such a diminished expectation of privacy. Plaintiffs are incorrect on both counts.

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[22] *See also Illinois v. Caballes*, 543 U.S. 405, 417 n.7 (2005) (Souter, J., dissenting) ("I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion.").

First, although this Court has discussed expectations of privacy in the context of the special needs analysis, it has never actually held that the applicability of the special needs doctrine rests on a diminished expectation of privacy. To the contrary, this Court has explicitly upheld the use of the special needs doctrine in the context of suspicionless searches of persons with no diminished expectation of privacy. In *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999), for example, the Court upheld the constitutionality of a statute providing for DNA testing of individuals convicted of certain crimes under the special needs doctrine, yet explicitly rejected the contention that the individual had any diminished expectation of privacy with respect to the blood testing that was at issue. *Id*. at 81-82; *see also Palmieri*, 392 F.3d at 80; *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (suggestion that airline passengers have diminished expectation of privacy "has little analytical significance").

Plaintiffs' reliance upon *Nicholas v. Goord* is misplaced. In that case, which resulted in separate opinions by each of the three members of the panel, the court did state that "almost every special-needs case considered by the Supreme Court has involved individuals with a diminished expectation of privacy" and that "this court has previously held that a 'diminished expectation of privacy' is a principal criterion of special-needs cases[,]" 430 F.3d at 666-67 (quoting *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004)), however neither *Nicholas* nor

Lifshitz held that a diminished expectation of privacy was a threshold requirement for the special needs doctrine to apply. In *Nicholas*, the discussion arose when the plaintiffs argued that another DNA testing statute should be scrutinized under the special needs analysis because of the belief in that case that the special needs test imposed stricter requirements than a general Fourth Amendment balancing test. *See* 430 F.3d at 664 & n. 22. Defendants argued that the court need not employ a special needs analysis where plaintiffs had an alleged decreased expectation of privacy. The panel rejected that argument and instead held that the special needs analysis should be applied regardless of any diminished expectations of privacy (and upheld the constitutionality of the statute). *Id*. at 666-68.

Likewise, although the *Lifshitz* panel stated that a diminished expectation of privacy is one of three "principal criteria" of special needs cases, because the court found that the defendant had a diminished privacy interest in the computer transmissions at issue in that case, *see* 369 F.3d at 186, 190, the court had no occasion to consider whether the special needs test would apply in the absence of a diminished expectation of privacy. The discussion relied upon by the Plaintiffs arose in another context, is *dicta*, and, to the extent it may be read to suggest that there must be a diminished expectation of privacy for an inspection program to fall within the special needs doctrine, it conflicts with this Court's decisions in *Marcotte* and *Albarado*.

While the issue of diminished expectation of privacy is relevant to the balancing test required in *applying* the special needs analysis, it has no bearing on *whether* the special needs analysis should apply in the first place. The applicability of the special needs doctrine focuses on the nature of the law enforcement program, *i.e.*, does it serve a special governmental need beyond the normal need for law enforcement and would it be impractical to require a warrant or individualized suspicion in the circumstances. The extent of any privacy interests focuses on the individual and hence is not relevant to whether the doctrine is applicable. It is no surprise, therefore, that courts have upheld suspicionless searches in airports and public courthouses, for example, without any discussion of any expectation of privacy, or minimizing the importance of such an inquiry. *See Albarado*, 495 F.2d at 806; *Hartwell*, 436 F.3d at 179-81 (airport search; no discussion of passengers' expectation of privacy); *Marquez*, 410 F.3d at 616-18 (same); *Legal Aid Soc'y of Orange County v. Crosson*, 784 F. Supp. 1127, 1130-32 (S.D.N.Y. 1992) (courthouse search; no discussion of subjects' expectation of privacy).[23]

[23] To the extent *dicta* in *Nicholas* and *Lifshitz* suggest that diminished expectation of privacy should be considered in determining whether the special needs doctrine should apply, *Amici* respectfully suggest that the Court should clarify that an individual's expectation of privacy is relevant only in the application of the special needs balancing test, not in determining whether the special needs doctrine is applicable in the first place.

D. In Any Event, Subway Passengers Do Not Have Any Greater Expectation of Privacy on Subways and Trains than Airplane Passengers, Motorists or Those Entering Courthouses and Other Government Buildings

Even if this Court were to assess Plaintiffs' expectations of privacy in determining whether the special needs exception should apply, the Court should hold that subway passengers do have a diminished expectation of privacy in their bags when they enter the subway system. First, the NYPD's extensive advance notice of the Program has put the riding public on notice that bags may be subject to inspection. *See Palmieri*, 392 F.3d at 83 (advanced notice decreases privacy expectations); *Leventhal v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001). Additionally, New Yorkers, like most Americans, are used to having to submit to bag inspections as a condition to enter a variety of public and private places.[24] *See*, *e.g.*, *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (noting reasonable expectation of privacy diminished in airports and schools); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (motorists have diminished expectation of privacy when traveling on a highway); *Nicholas*, 430 F.3d at 674 (Leval, J., concurring).

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[24] The American Civil Liberties Union of Vermont recently made this very point to this Court in its appellate brief in *Cassidy v. Chertoff*, No. 05-1835-cv (2d Cir. 2005), at 29 (emphasis added) when it argued, "subjective privacy expectations may depend on locale. September 11 has taught us that *cities are terrorist targets, and most city dwellers experience handbag and briefcase searches in that light*."

In this day and age, given the potentially catastrophic nature of the threat involved, and the undisputed record that mass transportation facilities including the New York City subways are particularly vulnerable to a terrorist attack, passengers that utilize mass transportation facilities should not have a reasonable expectation that they can carry bags into subways free from any inspection, no matter how fleeting and unintrusive. The privacy interests at stake are certainly no greater than those that exist in airports, courthouses and offices in and around the City and certainly do not rise to the level that would justify rendering the bag inspection program unconstitutional.

II. THE BAG INSPECTION PROGRAM DOES NOT VIOLATE THE FOURTH AMENDMENT

Plaintiffs argue that even if the bag inspection program falls within the special needs doctrine, it does not pass constitutional muster because the terrorist threat is not sufficiently immediate, because the program is not sufficiently effective, and because the inspections are fundamentally intrusive. Plaintiffs are wrong in every respect.

A. Law Enforcement is Not Required to Wait Until an Attack is Imminent Before Implementing a Special Needs Program

The reasonableness of a search conducted pursuant to the special needs doctrine is determined by balancing (1) the nature of the privacy interest allegedly compromised by the policy; (2) the character of the intrusion imposed by

the policy; and (3) the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them. *Earls*, 536 U.S. at 829; *Palmieri*, 392 F.3d at 81; *see also Nicholas*, 430 F.3d at 679 (Lynch, J., concurring).

Plaintiffs' suggestion that there must be proof of an "imminent terrorist attack," *see* Appellants' Br. at 31-32, 36-37, is misplaced. Plaintiffs rely entirely on the statement in *Edmond* that the Fourth Amendment "would almost certainly permit an appropriately tailored roadblock to thwart an imminent terrorist attack." 531 U.S. at 44. The Court was plainly citing an *illustration* of one circumstance that would clearly be appropriate under the special needs test; by no stretch of the imagination did the Court create only a "narrow terrorism exception" as Plaintiffs now suggest. *See* Appellants' Br. at 31. To the contrary, the Court in *Edmond* reaffirmed "the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute." 531 U.S. at 47-48.

No court has ever held that counter-terrorism measures are constitutionally permissible only when the government has advance knowledge of an imminent terrorist attack. To the contrary, counter-terrorism measures have been upheld absent any suggestion of any imminent or specific threat of attack. *See, e..g., Hartwell*, 436 F.3d at 179-80 (airport searches); *Green*, 293 F.3d at 859 (military installations). The substantial and undisputed threat to New York City

mass transportation facilities provides ample justification for the bag inspection program.

B. The Fourth Amendment Does Not Require Courts to Scrutinize the Efficacy of Programs Intended to Deter and Prevent a Terrorist Attack

The bulk of Plaintiffs' evidence and argument below was directed at their attempt to persuade the District Court that the bag inspection program was so ineffective as to be unconstitutional. As Judge Berman correctly recognized, however, nothing in the Fourth Amendment requires the Court to undertake a searching examination of the efficacy of the Program. Slip. Op. at 23-26, 35-37, SPA24-27, 36-38. To the contrary, Supreme Court and Second Circuit caselaw makes clear that it would be inappropriate for courts to second-guess the judgments of law enforcement and other public officials who are charged with protecting the public and making difficult choices of resource allocation. Further, in the context of special needs programs aimed at *deterring* a terrorist attack, it would be both impractical and unwise to require such programs to be anything more than a rational means of deterring terrorism.

As an initial matter, those courts that have had occasion to consider special needs searches aimed at deterring and detecting terrorist threats have never imposed any stringent "effectiveness" requirement as part of the constitutional analysis. *See Hartwell*, 436 F.3d at 179-80 & n.9; *Marquez*, 410 F.3d at 618

(upholding secondary screening of passengers when "procedure is geared towards detection and deterrence of airborne terrorism"); *Green*, 293 F.3d at 859-60 (holding traffic checkpoint to protect military installation in part from domestic and international terrorism constitutional).

Moreover, assessing the effectiveness of a program designed to *deter* a threat to public safety is inherently more difficult and impractical than other special needs programs. Unlike a drunk driving or border search program, for example, where detection is a primary goal and effectiveness can be objectively measured by the number of drunk drivers or illegal aliens apprehended, the efficacy of a program aimed at deterrence like the bag inspection program is best measured by the absence of a terrorist attack. *Cf. Von Raab*, 489 U.S. at 675 n.3 ("When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."); *see also Marquez*, 410 F.3d at 617-18. Most courts assessing "effectiveness" do so based on little more than common sense rather than on any detailed scrutiny of the record. *See, e.g., Nicholas*, 430 F.3d at 667-68, 669 ("Nor is there any question that New York's [DNA indexing for certain felons] statute is effective in advancing th[e] state interest [in solving crimes]."); *Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir. 2000) (simply noting that deference is necessary and that a

reasonable method of deterrence does not have to be the most effective measure); *Hartwell*, 436 F.3d at 180 (holding without explanation "[a]dditionally, it is apparent that airport checkpoints have been effective"); *Marquez*, 410 F.3d at 616-17.

The Supreme Court has also made clear that the judgment of law enforcement and other public officials as to the efficacy of a particular special needs program is entitled to substantial deference. In *Sitz*, the trial court heard extensive evidence on the effectiveness of a highway sobriety checkpoint program and, after finding that only 1.5 percent of drivers were arrested for alcohol impairment, concluded that the Michigan program violated the Fourth Amendment. 496 U.S. at 448-49, 454-55. The Supreme Court reversed, explaining that its prior decisions were

> not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. *But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers*.

496 U.S. at 453-54 (emphasis added); *accord Mollica*, 229 F.3d at 370; *Green*, 293 F.3d at 862.

The testimony of Deputy Commissioners David Cohen and Michael Sheehan, who possess nearly 70 years of combined counter-terrorism and intelligence experience and attested to the Program's effectiveness based on their knowledge and study of actual methods used by terrorists, more than adequately satisfied the standard of effectiveness required under *Sitz*. Cohen and Sheehan "testified persuasively that, because of the random nature of the [Program,] *i.e.*, because when and where an inspection will occur is not revealed in advance, the Program adds uncertainty and unpredictability to the planning and implementation of a terrorist attack which, in turn, increases the risk of failure and helps to deter an attack." Slip Op. at 24; SPA25. Ironically, the Plaintiffs themselves demonstrated that the random inspections have had a profound effect on their own travel plans such as renting a car just "to avoid the possibility of searches." *See* JA896 (Declaration of Joseph Gehring, Jr. ¶ 7).[25]

Such testimony illustrates well why this case particularly warrants the Court's deference to law enforcement professionals and public officials. Although

[25] *See also* JA899 (Declaration of Norman Murphy ¶ 10 ("I am now apprehensive when I see the police in the subway. My life and my routine have been disrupted because I could be searched again.")); JA 893 (Declaration of Andrew Schonebaum ¶ 13 ("I am afraid that I will be selected to be searched again. To avoid having to choose between consenting to a search and refusing one, I now sometimes use an alternative entrance to the Roosevelt Avenue subway station, and before using the main entrance I first check to see if searches are being conducted there.")).

Plaintiffs seem to complain, ironically, that there are too *few* police officers conducting bag inspections on too *few* people, striking the right balance requires an assessment of the risks, benefits and available resources, which is more appropriately the province of law enforcement professionals and public officials, not the courts, as cases such as *Sitz* and *Mollica* have recognized. As a practical matter the inquiry "involves only the question whether the [bag inspection program] is a '*reasonable* method of deterring the prohibited conduct;' the test does not require that the checkpoint be 'the most effective measure.'" *Mollica*, 229 F.3d at 370 (citing and quoting *Maxwell v. City of New York*, 102 F.3d 664, 667 (2d Cir. 1996) (emphasis added)).

Further, what is constitutionally acceptable in any case in terms of effectiveness necessarily varies depending on the nature of the risk to public safety at issue. *See Chandler*, 520 U.S. at 323; *accord Von Raab*, 489 U.S. at 674-75 & n.3. Here, if even one subway bombing is prevented as a result of the bag inspection program, that would potentially prevent the loss of hundreds or thousands of lives and many more injuries, not to mention the economic and psychological havoc that terrorist attacks are intended to inflict. Thus, given the barely minimal evidence of effectiveness that has been held to be sufficient in other contexts like border searches for illegal aliens, where the danger to life and limb is significantly less acute than the terrorist threat at issue here, and the

deference that should be afforded public officials, any doubt as to the effectiveness of the bag inspection program should be resolved in favor of the government.[26]

C. The Government's Compelling Interest in Deterring Terrorist Attacks Outweighs the Minimal Intrusion Involved in the Bag Inspection Program

Finally, the court must consider the nature of the privacy interest allegedly compromised by the bag inspection program, the character of the intrusion it imposes and the nature and immediacy of the City's concerns that are being addressed by the program. *Palmieri*, 392 F.3d at 81. Plaintiffs do not even attempt to balance these interests, though they continue to overstate the privacy interests at stake and the character of the intrusion that the bag inspection program imposes.

As an initial matter, there is no dispute that the government here has a compelling interest in deterring and detecting terrorist attacks on the City's

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[26] In *Edwards*, Judge Friendly stated that where the stakes are sufficiently high, the Fourth Amendment requires nothing more than good faith, reasonable scope and advance notice:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

498 F.2d at 500 (Friendly, J.) (citation omitted).

subways. Moreover, there is no dispute that the inspections are conducted in a minimally intrusive manner. The search required before a member of the public can fly on an airplane or enter the United States Courthouse in Foley Square is not unlike the brief bag inspection at issue here, which lasts a matter of seconds. The evidence adduced at trial confirmed that the inspections are carried out pursuant to strict procedures set forth in a written policy, which mandate that the inspections be "limited to what is minimally necessary to ensure that the backpack, container or carry-on item does not contain an explosive device." JA1635.15 (NYPD Training Presentation). The officers do not take names, request identification or record any demographic information, nor are they permitted to intentionally look for contraband (other than explosives) or read or attempt to read any written or printed material. *Id.*, JA1635.21. Subway passengers also possess the ultimate ability to decline to cooperate with the officers altogether and end the encounter and leave the station if they so choose. *Id.*, JA1635.7.

As discussed above, subway passengers' expectations of privacy should reflect the fact that similar inspections have long been commonplace in similar contexts such as airports, courthouses, government and other office buildings throughout New York City and elsewhere, public knowledge of the threat of terrorism as a result of such incidents as the London, Madrid and Moscow bombings, and the advance notice passengers are provided advising them of the

City's bag inspection policy. However, even if passengers retained a full expectation of privacy, when weighed against the government interest in this case and the nature of the intrusion, the balance tips heavily in favor of upholding the constitutionality of the program. In short, in this day and age, the potentially catastrophic consequences of a terrorist attack must outweigh the minimal intrusiveness of a voluntary and brief bag inspection.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of the District Court.

Dated: April 4, 2006
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(A)(7)(C)

Andrew T. Frankel, certifies as follows:

1. I am one of the attorneys for the *amici curiae* in this action, Washington Legal Foundation, et al., and am admitted to the Bar of this Court.

2. The instant Brief of *Amici Curiae* is being submitted pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure. It is set out in Times New Roman font with a font size of 14.

3. According to the word-counting software incorporated in Microsoft Word, the word-processing program on which this Brief was prepared, this Brief has a total of 6023 words, including headings, footnotes and quotations; and excluding the certificate of disclosure, table of contents, table of authorities, statement of interests of *amici curiae,* the signature block and this certification.

Dated: New York, New York
April 4, 2006

/s
Andrew T. Frankel

ANTI-VIRUS CERTIFICATION

Case Name: MacWade v. Kelly

Docket Number: 05-6754-cv

I, Natasha R. Monell, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 4/4/2006) and found to be VIRUS FREE.

/s/ Natasha R. Monell
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Record Press, Inc.

Dated: April 4, 2006