

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ADRIENNE DURSO  
[REDACTED]

Carlsbad, CA 92009

D. CHRIS DANIELS  
[REDACTED]

Covington, KY 41015

MICHELLE NEMPHOS, as parent and  
next friend of the minor child C.N.,  
[REDACTED]

Hunt Valley, MD 21030

C.N., a minor child  
[REDACTED]

Hunt Valley, MD 21030

Plaintiffs,

v.

JANET NAPOLITANO, in her official  
capacity as Secretary of Homeland Security  
U.S. Department of Homeland Security  
Washington, DC 20528

JOHN S. PISTOLE, in his official capacity  
as Administrator of the Transportation  
Security Administration  
601 S. 12<sup>th</sup> Street  
Arlington, VA 20598

Defendants.

Civil Action No.

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiffs Adrienne Durso, D. Chris Daniels ("Chris Daniels"), Michelle Nemphos, as parent and next friend of the minor child C.N., and C.N., a minor child, by and through their attorneys, Drinker Biddle & Reath LLP, bring this action against

defendants Janet Napolitano and John S. Pistole in their official capacities as Secretary of Homeland Security and Administrator of the Transportation Security Administration, respectively, and in support thereof aver as follows:

### INTRODUCTION

1. Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor child C.N., and C.N., a minor child, (collectively, “Plaintiffs”) – U.S. citizens who use commercial airlines – bring this action under the Fourth Amendment of the United States Constitution to enjoin the Department of Homeland Security (“DHS”) and the Transportation Security Administration (“TSA”) (collectively, “Defendants”) from continuing to unlawfully use whole body imaging (“WBI”) technology and newly-implemented enhanced pat-down procedures as the first line of airport security screening in the United States.

2. Plaintiffs all desire to protect themselves and their fellow travelers from security risks while flying. At the same time, however, Plaintiffs are unwilling to undergo unnecessarily invasive and degrading practices merely in the name of security if doing so would violate constitutionally protected rights. WBI scanners and enhanced pat-down procedures, when employed as primary means of airline traveler screening, violate such rights.

3. Today, WBI scanners and enhanced pat-downs are being used by the Defendants as the primary means of airline traveler screening in airports throughout the United States. Where deployed, WBI scanners are the true first line of screening. This technology allows a TSA officer to see beneath an individual’s clothing and view a graphic and detailed visual image of a person’s body, including the contours of his or her

genitals. It is only when an individual refuses to undergo this screening method that she is presented with an alternative screening option, the enhanced pat-down. Under the newly implemented enhanced pat-down, a TSA officer slides his or her hands over an individual's breasts, buttocks, groin, and inner thighs, and inserts his or her fingers *inside* the entire circumference of the pants' waistband.

4. Although it is well established that subjecting airline passengers to limited searches designed to detect weapons and explosives is consistent with the Fourth Amendment, it is equally well established that such searches must be reasonable. The new full-body scanning and enhanced pat-down screening regime implemented by the Defendants fails to meet this standard and is thus violative of the Fourth Amendment. It further forces all travelers who wish to fly, regardless of any preliminary indication that they pose a security risk, to choose between two objectionable alternatives: submit to a virtual strip search, or suffer the indignity of allowing an unknown officer to literally place his or her hands in your pants.

#### **PARTIES**

5. Plaintiff Adrienne Durso is a recent breast cancer survivor. As part of her treatment, Ms. Durso underwent a mastectomy on her left breast. Despite informing a TSA agent of this fact, Ms. Durso was subjected to a pat-down wherein she was repeatedly and forcefully touched and prodded at the mastectomy area, leaving Ms. Durso in pain and on the verge of tears. Ms. Durso, a mother of a teenage son who stood watching as she suffered through this experience, is a U.S. citizen and resident of California.

6. Plaintiff D. Chris Daniels is a regional sales manager in the telecommunications industry, a job which requires that he travel approximately 25 weeks each year. After passing through a WBI scanner, Mr. Daniels was subjected to an aggressive and invasive pat-down of his genitals, presumably due to the fact that Mr. Daniels has an enlarged testicle resulting from an injury he suffered as a teenager. The pat-down was a traumatic experience for Mr. Daniels who is now apprehensive about flying, despite the pressures of his job to do so. Mr. Daniels, a father of two, is a U. S. citizen and resident of Kentucky.

7. Plaintiff Michelle Nemphos, as parent and next friend of the minor child C.N., is a concerned mother whose daughter, when she was twelve years old, was subjected to a WBI scan without the consent of her guardian. As a result, C.N. was subjected to a virtual strip search without the consent or even knowledge of any adult responsible for her. Ms. Nemphos is a U.S. citizen and resident of Maryland.

8. Plaintiff C.N., a minor child, was twelve years old at the time when she was flying home with family friends, who were C.N.'s legal guardians during her trip. While passing through security, C.N. was pulled out of line without the knowledge, let alone consent, of any of C.N.'s guardians and subjected to a WBI scan without the consent of her guardians. C.N. was not informed of her ability to refuse such a scan and, as a result, C.N. was subjected to a virtual strip search. C.N. is a U.S. citizen and resident of Maryland.

9. Defendant Janet Napolitano is the Secretary of the Department of Homeland Security ("DHS"), the governmental body which oversees the Transportation Security Administration ("TSA"). As head of the DHS, Secretary Napolitano has

authority over TSA policies, procedures, and practices relating to airline and airport security measures, including those challenged in this lawsuit. Defendant Napolitano is sued in her official capacity.

10. Defendant John S. Pistole is the Administrator of the Transportation Security Administration. As the TSA Administrator, Mr. Pistole has authority over TSA policies, procedures, and practices relating to airline and airport security measures, including those challenged in this lawsuit. Defendant Pistole is sued in his official capacity.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiffs' claim for relief arises under the Constitution of the United States.

12. Venue is appropriately vested in this Court pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1391(e), as the District of Columbia is a judicial district in which at least one defendant resides, and because a substantial part of the acts or omissions giving rise to the claims herein occurred in the District of Columbia.

### **BACKGROUND**

#### **A. Advent and Use of Whole Body Imaging ("WBI") Scanners**

13. In the years between 2001 and 2009, most airports in the United States used a combination of walk-through metal detectors, metal-detecting wands, and traditional (or back-of-the-hand) pat-downs as primary traveler screening methods.

14. During the Spring of 2009, the DHS made a determination that Whole Body Imaging ("WBI") scanners, which were previously only deployed for secondary

screening in limited pilot projects, would be utilized in the future as the primary screening technique in U.S. airports.

15. Since that determination, the DHS has rapidly deployed, and continues to rapidly deploy, WBI scanners throughout U.S. airports. By the end of December 2010, 491 machines are scheduled to be deployed in the U.S. An additional 500 machines are scheduled to be deployed in 2011. On information and belief, WBI full-body scanners will become the primary and first means of screening at most U.S. airports by 2012.

16. The DHS and TSA have deployed two types of WBI scanning devices: those that use millimeter wave technology, and those that use backscatter x-ray. No matter the type of device used, the purpose and effect is the same: WBI scanners use technology that enables screeners to see beneath individuals' clothing and view a graphic and intrusive level of detail, including the contours of a person's genitalia. When an individual enters the full-body scanner, the device captures a detailed, rotating, three-dimensional image of an individual's unclothed body which is viewed in real-time by TSA personnel in another room.

17. Many have described use of WBI technology as a "virtual strip search." Not only does WBI technology expose the body as if it is unclothed, but on information and belief, it goes much further: WBI technology can expose evidence of mastectomies, menstruation, colostomy appliances, large scars, catheter tubes, penile implants and other internal prosthetic devices. On this level, the WBI scanning may be viewed as even more intrusive and violative of privacy concerns than a traditional strip-search.

18. Where utilized, these scanners are a first means of airport security for all persons flying out of U.S. airports.

**B. Advent and Use of Enhanced Pat-Down Procedures**

19. Under new TSA procedures, if a person chooses to “opt out” of a WBI scan, that individual may select to undergo the so-called “enhanced pat-down.” This is the sole alternative offered to individuals who decline to enter a WBI scanner.

20. In late October 2010, the TSA began implementing the new pat-down procedure. This new pat-down is significantly more invasive and intrusive than the former pat-down in that, among other things, the officer literally places his hands inside the traveler’s pants.

21. This new procedure replaces the TSA’s former back-of-the-hand pat-down procedure which had been in effect since at least 2002. Under the previous technique, a TSA officer would merely brush the back of his or her hand along the traveler’s clothing to feel for weapons or other contraband.

22. Under the new “enhanced pat-down” procedure, TSA officers use their palms and fingers to conduct a detailed inspection of a traveler’s entire body. On information and belief, the officer runs his or her open hands and fingers over most parts of an individual’s body including the breasts, and uses the back of the hands when touching the buttocks. Additionally, officers slide their hands all the way from the inner thigh up to the groin until the hand cannot venture any higher because it is literally stopped by the person’s groin.

23. As part of the enhanced pat-down, a TSA officer will also insert his fingers *into* an individual’s pants and move his fingers, while still inside the pants, around the entire circumference of the waistband.

**C. Adrienne Durso Subjected to an Unreasonable Search on August 25, 2010**

24. On the afternoon of August 25, 2010, Adrienne Durso and her teenage son arrived at the Albuquerque International Sunport ("ABQ"). Ms. Durso and her son had flown in and out of ABQ on numerous occasions prior to this date without issue.

25. Ms. Durso is a recent breast cancer survivor who, as part of her treatment, underwent a mastectomy of her left breast.

26. As they approached the ABQ security checkpoint, Ms. Durso and her son placed their carry-on items onto the X-ray machine belt.

27. On this day, the agents at the ABQ security checkpoint were screening travelers via both WBI scanners and traditional walk-through metal detectors.

28. Ms. Durso, a frequent airline traveler, had passed through WBI scanners in the past. Each time, Ms. Durso was thereafter subjected to a pat-down. On information and belief, this subsequent pat-down was conducted because the agent viewing the WBI scan could see either that Ms. Durso was missing her left breast or that there was an abnormality in that region.

29. On this date, Ms. Durso selected to enter the walk-through metal detector. Although she did not trigger the metal detector's alarm, Ms. Durso was informed that she would be required to undergo a pat-down.

30. While walking with a TSA agent toward the pat-down area, Ms. Durso informed the agent that she had undergone a mastectomy of her left breast.

31. The TSA agent then proceeded to pat-down Ms. Durso, placing the focus of her efforts on the area of Ms. Durso's mastectomy. The agent forcefully applied



**D. Chris Daniels Subjected to an Unreasonable Search on November 18, 2010**

37. On the morning of Thursday, November 18, 2010, Chris Daniels arrived at the Fort Lauderdale-Hollywood International Airport ("FLL"). As a frequent flyer for business who travels approximately 25 weeks or more per year, Mr. Daniels was accustomed to the normal security screening procedures at U.S. airports.

38. Mr. Daniels was scheduled to fly to Greenville, South Carolina for a business meeting and then back to his home in Kentucky the following day.

39. On this day, the agents at the FLL security checkpoint were screening travelers via WBI scanners.

40. Mr. Daniels placed his belongings on the X-Ray machine belt and entered the WBI scanner.

41. Upon exiting the WBI scanner, Mr. Daniels, who as a young teenager was struck in the groin and suffers from permanent swelling in one of his testicles, was informed by a TSA agent that he would be subjected to a pat-down.

42. Mr. Daniels questioned the agent on why he was being forced to endure a pat-down after going through the WBI scanner. The agent responded by asking Mr. Daniels what he had in his pants. Evidently, the TSA agent reviewing the image of Mr. Daniels' unclothed body questioned why one of Mr. Daniels testicles appeared larger than the other.

43. Mr. Daniels responded to the agent, explaining that he had suffered an injury which resulted in an enlarged testicle. Mr. Daniels explained the same to two supervisors who arrived shortly thereafter.

pressure to this and the surrounding area, both by running her hands over and applying pressure to the region.

32. Ms. Durso reminded the agent of her operation, although the agent continued to repeatedly and aggressively pat-down the area. The agent then asked Ms. Durso to turn around, whereupon the agent continued to apply pressure to the area where Ms. Durso's surgery had taken place.

33. After this prolonged pat-down came to an end and she reunited with her son, Ms. Durso requested to speak with a supervisor about the aggressive pat-down to which she was subjected. Ms. Durso explained the invasive and forceful nature of the pat-down. The supervisor responded that all travelers are subjected to the same treatment. When Ms. Durso's seventeen-year-old son asked why he wasn't subjected to a pat-down, the supervisor responded that was because he "didn't have boobs." By the time she left the screening area, Ms. Durso was almost in tears.

34. Ms. Durso had undergone pat-downs in the past, but none were as aggressive, invasive, painful, or thorough as the one she was subjected to on August 25th.

35. As a direct result of this incident and her fear that she will be subjected to similar pat-downs in the future, Ms. Durso is apprehensive about flying out of ABQ and other airports which utilize WBI scanners and enhanced pat-down techniques as the first line of airport security screening.

36. Ms. Durso has suffered damages, and will continue to suffer damages, as a result the Defendants' use of WBI scanners and enhanced pat-downs as a first line of air traveler security screening.

44. Mr. Daniels, who had never been subject to a pat down before due to his medical issue, informed the agent and the supervisors that he would rather leave the airport and drive to his destination than be subject to the invasive search the agents had told Mr. Daniels they would perform.

45. The TSA agents told Mr. Daniels that he was not free to leave the airport and insisted that he accompany them to a private screening room.

46. Mr. Daniels believed that if he did not comply with the agents' demands, he might be arrested. Out of fear and intimidation, Mr. Daniels complied and permitted the agents to perform the pat-down.

47. While in the private screening room, the TSA agent aggressively touched Mr. Daniels' genitals over his pants, running his hands multiple times over Mr. Daniels' swollen testicle and surrounding groin area.

48. When the TSA agents had satisfied themselves that Mr. Daniels merely had an enlarged testicle, they permitted Mr. Daniels to leave.

49. As a result of this fondling of his body, and in particular his genitals, Mr. Daniels was emotionally traumatized and was unable to continue his business trip.

50. Rather than continue to subject himself to such behavior by the TSA and unable to conduct business due to his traumatic experience with the TSA, Mr. Daniels cancelled his remaining business meetings and flew directly home.

51. Mr. Daniels objects to the use of WBI scanners and enhanced pat-downs as a first line of airport screening. In his eyes, the pat-down is a physical molestation and the WBI scanner is an intrusive and unjustified measure which poses a real and substantial threat to medical privacy.

52. Given Mr. Daniels' medical issue and the increasingly frequent use of WBI scanners and enhanced pat-downs, Mr. Daniels fears that he will continue to be subjected to invasive, physical searches of his groin area every time he flies. As a result of his encounter with TSA and this ongoing concern, Mr. Daniels avoids flying whenever possible.

53. Because his job requires that he fly frequently, and because his earnings are largely commission-based, Mr. Daniels' ability to earn a living has been hampered. In fact, Mr. Daniels has made the difficult decision to cancel two business-oriented trips as a direct result of his encounter with TSA on November 18. Mr. Daniels is concerned that if the existing regulations stay in place, his ability to support his family and continue working as a regional sales manager will be substantially and detrimentally impacted.

54. Mr. Daniels has suffered damages, and will continue to suffer damages, as a result the Defendants' use of WBI scanners and enhanced pat-downs as a first line of air traveler security screening.

**E. C.N., a Minor Child, Subjected to an Unreasonable Search on June 26, 2010**

55. On June 26, 2010, 12 year old C.N. was traveling home with family friends from a vacation in Florida. The adults with whom she was traveling were C.N.'s legal guardians for her trip as Michelle Nemphos, the mother of C.N., had provided a written parental travel consent to them.

56. After permitting all of the adults with whom she was traveling to pass through the metal detector, TSA agents at Tampa International Airport ("TPA"), pulled

C.N. from the metal detector line and told her she had been chosen at “random” to be subjected to a WBI scan.

57. Because the TSA agents had separated C.N. from the adults with whom she was traveling and did not tell the adults or C.N. that C.N. could opt out of going through the WBI scanner, C.N. was forced to go through the WBI scanner alone. Further, the TSA agents never sought permission from any adult traveling with C.N. for permission to subject to her to the WBI scan.

58. Upon exiting the WBI scan, C.N. was frightened and traumatized from her experience.

59. When C.N. arrived home later that same day at approximately 4:00 p.m, she told her mother what had happened.

60. When her mother learned what had happened to her daughter, she was extremely concerned because not only was C.N. forced to go through the traumatic experience of being separated from her traveling party, but C.N. was also subject to potentially dangerous radiation. Further, C.N. and her family’s religious beliefs provide that having an unauthorized stranger look at C.N.’s body is extremely offensive and borders on the pornographic. Thus, the WBI scan of C.N. violated the religious beliefs of C.N. and her family.

61. Due to her concerns, Michelle Nemphos filled out an online complaint form with the TSA. As a result of Ms. Nemphos’ complaint, Michael McElroy, the TSA Administrative Supervisor at TPA, contacted her to discuss the treatment of daughter by the TSA. Mr. McElroy requested that Ms. Nemphos provide a detailed description of her daughter along with a picture so that a review of the surveillance footage could occur.

However, after Ms. Nemphos provided this information and followed-up with Mr. McElroy several times, she never received any response from the TSA as to the result of their review of the incident.

62. Based on C.N.'s experience with the TSA at TPA, Ms. Nemphos will not permit C.N. to travel out of a concern that she will be subjected to a WBI scan again.

63. C.N. has suffered damages, and will continue to suffer damages, as a result of the Defendants' use of WBI scanners and enhanced pat-downs as a first line of air traveler security screening.

### COUNT I

#### United States Constitution Fourth Amendment

64. Plaintiffs hereby incorporate each of the allegations above as if set forth herein at length.

65. Plaintiffs are entitled to judicial relief under 5 U.S.C. § 702, as they have suffered and are suffering a legal wrong because of the actions of an agency or an officer or employee thereof.

66. In the last year, Defendants have implemented a sea change in airport screening measures. They have abrogated effective and privacy-protecting measures such as walk-through metal detectors, metal-detecting wands, and back-of-the-hand pat-downs, and put in their place virtual strip searches and crude full-body pat-downs. Presented with a choice of WBI scanning or an enhanced pat-down as the primary means of screening, the modern air traveler in the United States is forced to choose between the lesser of two evils, neither of which should be constitutionally protected.

67. The Fourth Amendment protects individuals from unreasonable searches and seizures.

68. The TSA's use of WBI scanners and enhanced pat-downs on air travelers constitutes both a government-imposed search and seizure.

69. These primary screening methods require that, in order to fly, an individual must either allow an unknown government agent to view them nude, or alternatively, allow an unknown government agent to perform an intimate and heavy-handed pat-down of one's most sensitive and private areas. No matter which option is taken, a passenger's privacy rights, civil liberties, and freedoms are compromised by such an intrusive and overreaching search and seizure.

70. Given the profane, degrading, intrusive, and indecent nature of these searches, they are patently unreasonable and violative of the Fourth Amendment.

71. Chris Daniels has elected to refrain from these unconstitutional searches, and as a result, his ability to earn a livelihood in his chosen profession has been hampered. Adrienne Durso has also elected to refrain from these unconstitutional searches, and as a result, is hesitant to fly on commercial airlines in the future. Lastly, Michelle Nemphos has elected to have her daughter, C.N., refrain from these unconstitutional searches, and as a result, C.N. is not permitted to fly on commercial airlines. While Adrienne Durso, Chris Daniels and C.N. greatly value airline security, they all agree that such an infringement on our civil rights and liberties should not be permitted merely in the name of security.

PRAYER FOR RELIEF

WHEREFORE, Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, respectfully request that this Court enter judgment in their favor and against the Defendants. Further, Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, respectfully request that this Court enter an order granting the following relief:

(a) Permanently enjoining Defendants from continuing to use either WBI scanning technology or enhanced pat-downs as a first and primary means of screening for air travelers in the United States;

(b) Declaring that the Defendants' policy of utilizing WBI scanning technology or enhanced pat-downs, or both, as a first and primary means of screening for air travelers in the United States is a violation of the Fourth Amendment to the United States Constitution;

(c) Awarding damages to Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, as a result of Defendants' unconstitutional conduct, including compensatory and all other measures of damages legally allowed;

(d) Awarding damages to Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, as a result of Defendants' unconstitutional conduct, including compensatory and all other measures of damages legally allowed;



(e) Awarding to Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, their costs and reasonable fees and expenses of their attorney pursuant to 28 U.S.C. § 2412; and

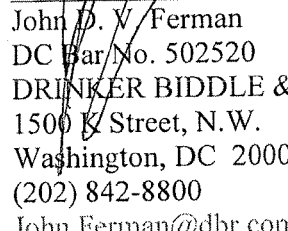
(f) Awarding Adrienne Durso, Chris Daniels, Michelle Nemphos, as parent and next friend of the minor C.N., and C.N., a minor child, all such other equitable relief this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand a trial by jury on all claims that can be so tried.

Dated: December 6, 2010

Respectfully submitted,



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John D. V. Ferman  
DC Bar No. 502520  
DRINKER BIDDLE & REATH LLP  
1500 K Street, N.W.  
Washington, DC 20005  
(202) 842-8800  
[John.Ferman@dbr.com](mailto:John.Ferman@dbr.com)

Of Counsel:

Jason P. Gosselin  
Bradford Barron  
Alexander M. Brodsky  
DRINKER BIDDLE & REATH LLP  
One Logan Square, Suite 2000  
Philadelphia, PA 19103  
(215) 988-2700  
[Jason.Gosselin@dbr.com](mailto:Jason.Gosselin@dbr.com)  
[Bradford.Barron@dbr.com](mailto:Bradford.Barron@dbr.com)  
[Alexander.Brodsky@dbr.com](mailto:Alexander.Brodsky@dbr.com)

John W. Whitehead  
Doug R. McKusick  
THE RUTHERFORD INSTITUTE  
Post Office Box 7482  
Charlottesville, VA 22906  
(434) 978-1789  
[johnw@rutherford.org](mailto:johnw@rutherford.org)  
[douglasm@rutherford.org](mailto:douglasm@rutherford.org)

*Counsel for Plaintiffs  
Adrienne Durso, Chris Daniels,  
Michelle Nemphos, as parent and  
next friend of the minor C.N., and  
C.N., a minor child*