IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, et al., Petitioner, v. TRANSPORTATION SECURITY ADMINISTRATION, Respondent.	Nos. 16-1135 & -1139

REPLY IN SUPPORT OF RESPONDENT'S MOTION TO FILE PORTIONS OF THE ADMINISTRATIVE RECORD UNDER SEAL AND PORTIONS OF THE ADMINISTRATIVE RECORD UNDER SEAL AND *EX PARTE*

Respondent Transportation Security Administration (TSA) has moved to file portions of the administrative record under seal, and portions *ex parte* and under seal. In its opposition, Petitioner does not object to the filings of copyrighted, proprietary, and For Official Use Only material under seal, nor does Petitioner object to the filing of classified information *ex parte* and under seal. However, Petitioner argues that Volumes 4A-E of the administrative record, containing Sensitive Security Information, should be made available to Petitioner. Petitioner's arguments for access are erroneous, and should be rejected by this Court.

1. Petitioner asserts that it has a right of access to Sensitive Security Information (SSI) pursuant to § 525(d) of the 2007 Homeland Security

Appropriations Act, Pub. L. 109-295, 120 Stat. 1355 (2006). By its plain terms, however, that provision applies only "in civil proceedings in the United States District Courts, where a party seeking access to SSI demonstrates that the party has substantial need of relevant SSI in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the information by other means." This action is a petition for review from a TSA order brought directly in the Court of Appeals pursuant to 49 U.S.C. § 46110(a), *not* a civil proceeding in a U.S. District Court. Section 525(d) provides no right of access to SSI in a petition for review action brought directly in the court of appeals. *See Corbett v. TSA*, 767 F.3d 1171, 1183 (11th Cir. 2004) (rejecting argument that litigants in the courts of appeals are entitled to access SSI under § 525(d)).

2. Construing § 525(d) to confer a right of access to SSI materials in a petition for review case brought directly in the court of appeals is not only at odds with the plain language of that statutory provision, it contravenes basic principles of administrative law. EPIC apparently believes that it needs access to SSI relied on by TSA in issuing the final rule in order to put forward contrary evidence before this Court. *See* Petitioner's Opp. to Resp.'s Mtn. to File Portions of the Admin. Record *Ex Parte* 5 (asserting that § 525(d) "should apply where the appeals court operates as the finder of fact"). But the court of appeals does not sit as a factfinder in a petition for review case under § 46110, instead applying the deferential standards of

review that apply to agency action. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

3. Petitioner also suggests that it "implicates matters of fundamental fairness" to deny EPIC access to the SSI volumes in the administrative record. Petitioner Electronic Privacy Information Center has been on notice since 2011 that TSA relied in part on SSI to support its use of AIT as a primary screening method at airport security checkpoints. *See Electronic Privacy Inf. Ctr. v. TSA*, No. 10-1157, Motion for Leave to File Sealed *Ex Parte* Supplemental Appendix 3 (D.C. Cir. filed Jan. 28, 2011) (explaining that "certain portions of the administrative record constitute SSI and must therefore be redacted from the public record"); *Electronic Privacy Inf. Ctr. v. TSA*, No. 10-1157, Order (D.C. Cir. Feb. 22, 2011) (granting motion to file SSI materials *ex parte*). The Notice of Proposed Rulemaking also made clear that the rulemaking record might contain SSI that would not be publicly disclosed. *See* Notice of Proposed Rulemaking, Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,288, 18,296 (Mar. 26, 2013). And the preamble to the Final Rule again explained that some of the information before the agency constituted SSI and could not be made public. *See* Final Rule, Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,364, 11,386,

11,389, 11,390 (Mar. 3, 2016). Petitioner did not raise an objection to that procedure in the administrative proceedings, nor did it make such an argument in its opening brief. Any objection to the procedural fairness of the agency rulemaking proceedings has been waived.

4. In any event, it is not unfair for TSA to submit the SSI portions of the Administrative Record *ex parte* to the Court in defending the challenged rule. Such a submission is consistent with the statute and regulations governing SSI, *see* 49 U.S.C. § 114(r); 49 C.F.R. §§ 1520.7, 1520.9, 1520,11, and this Court has previously rejected a constitutional challenge to an administrative agency's reliance on SSI and classified information filed with a reviewing court *ex parte*, and not provided to the petitioners, to defend challenged agency action. *See Jifry v. FAA*, 370 F.3d 1174, 1184 (D.C. Cir. 2004); *see also Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016) (reasoning that court of appeals has "inherent authority" to review sensitive information in the administrative record *in camera* as part of its judicial review function). That principle governs here.

Respectfully submitted,

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OCTOBER 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I electronically filed the foregoing Reply in Support of Respondent's Motion to File Portions of the Administrative Record Under Seal and Portions of the Administrative Record Under Seal and *Ex Parte* with the Clerk of the Court and served opposing counsel through the appellate CM/ECF system.

/s/ Sharon Swingle
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