UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENDAN MacWADE, ANDREW SCHONEBAUM, JOSEPH GEHRING, JR., PARTHA BANERJEE, and NORMAN MURPHY, Plaintiffs, v. RAYMOND KELLY, Commissioner of the New York City Police Department and THE CITY OF NEW YORK. Defendants.	Case No. 05 CV 6921 (RMB)

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' OPPOSITION TO PLAINTIFFS' APPLICATION FOR INJUNCTION

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INTERESTS OF *AMICI CURIAE*

As set forth in the accompanying Motion for Leave to Appear as *Amici Curiae* and Appendix A hereto, *amici* Washington Legal Foundation ("WLF"), *et al.*, represent a variety of organizations, federal, state and local elected officials, and individuals interested in ensuring that governments at all levels possess the tools necessary to protect this country from terrorists who would seek to destroy it or injure its citizens.

PRELIMINARY STATEMENT

This case presents very important issues of public safety and homeland security that could impact the ability of federal, state and local law enforcement agencies to implement programs designed to protect the public against terrorist attacks like those committed in the United States on September 11, 2001, and in the London subways just three months ago. Broadly stated, the issue here is whether the government's effort to protect the public against terrorist attacks in the nation's largest urban mass transit system will be undermined by five plaintiffs who object to a voluntary bag inspection program ("Bag Inspection Program" or "Program") that is less intrusive than those mandatory and constitutionally permissible programs ubiquitous at airports, courthouses and government office buildings throughout the country.

It is undisputed that the government's interest in preventing terrorist attacks is compelling for there is perhaps no more important duty of government than protecting the lives of its citizens and visitors. The plaintiffs here, through their counsel, the New York Civil Liberties Union, ask this Court to invalidate a government program designed to deter and detect terrorist attacks in New York City subways. They do so first by suggesting incorrectly that the government is constitutionally prohibited from conducting anti-terror bag inspections at certain entrances to the mass transit system absent individualized suspicion of wrongdoing. Second, they ask the Court unnecessarily to conduct a hearing on the details of the program to second-

guess its efficacy under heightened standards of proof, and without deference to the views and resource allocation decisions of government officials charged with protecting the lives of the public. Third, they ask that the program be measured against the heightened, subjective sensitivities of five individuals who find the presence of police officers checking for explosive devices at subway entrances highly offensive and a source of extreme anxiety, rather than under any objectively reasonable standard.

The issues here are not new. More than thirty years ago, the Second Circuit 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. Urban mass transit is now just as attractive a target for terrorists as airplanes. As detailed further below (*see* pp. 4-7, *infra*), urban mass transportation facilities have been targeted by terrorists repeatedly in the recent past, precisely because they present such vulnerable and potentially deadly targets. The New York City subway system is particularly vulnerable given its locale, importance and the volume of passengers that use the subways every day.

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. Pointing out the atrocities committed and planned by modern-day terrorists is not simply a rhetorical device used as a scare tactic to deprive individuals of their basic civil liberties. Rather, these are simply the *realities* of the threats that we as a society face today, particularly here in New York and specifically with respect to urban mass transportation. Although those threats, at one time incomprehensible, were put sharply into focus most recently during the coordinated suicide bombings that killed and maimed subway and bus passengers in London on the morning of July 7, 2005, 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 grossly irresponsible for courts to rule that government and law enforcement must allow everyone the unfettered ability to bring uninspected backpacks and packages into subways and other mass transit facilities. The Fourth Amendment certainly does not mandate such an absurd result.

In their zeal to prevent the government from allegedly chipping away at our civil liberties and concerns about the proverbial "slippery slope," Plaintiffs are actually proposing to place much *greater* restrictions on law enforcement than have ever been warranted under constitutional jurisprudence. People might disagree as to whether a particular law enforcement program is the most effective. There are some who may even take offense at the notion of a police officer asking to inspect their bags for explosive devices at subway or train stations. But at its core, the constitutional analysis has always required a balancing of interests based on the facts and circumstances in each case. When the stakes are as high and as real as the record shows they are here, ultimately involving the right not to be killed by terrorists intent on murdering innocent men, women and children, it must take more than the minimal intrusion required under the NYPD's voluntary bag inspection program and second-guessing as to whether

law enforcement could be allocating its resources more effectively before a court should deem such a program unconstitutional.

STATEMENT OF FACTS

The Terrorist Threat Posed to Urban Mass Transportation

Shortly before this Court was initially scheduled to consider Plaintiffs' request to enjoin the NYPD's effort to inspect bags for explosive devices, New York City was under an elevated threat of a terrorist attack to its subways based on specific information obtained by the Central Intelligence Agency and the Federal Bureau of Investigation. The information was obtained after three men were arrested during a joint CIA-FBI raid in Iraq and one of the men indicated that nineteen operatives had been dispatched to New York to place explosive devices on subways using suitcases. ABC News, *Police Investigate New York Subway Terror Threat* (Oct. 6, 2005) (available at *http://abcnews.go.com/US/story?id=1190231*) (annexed to Affirmation of Andrew T. Frankel, dated Oct. 25, 2005 (hereafter "Frankel Aff.") as Ex. A). Whether or not this particular plot was genuine, the threat was all too believable given that just 19 days before this suit was filed, on July 7, 2005, four young men entered the London underground and one bus and detonated hand-held explosive devices, killing 52 passengers and injuring 700 others. Images of the aftermath showed just how deadly hand-held explosive devises could 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 7, 2005) (available at *http://news.bbc.co.uk/1/hi/uk/4662365.stm*) (annexed to Frankel Aff. as Ex. B). The bombings were apparently coordinated by Islamic extremists affiliated with Al Qaeda,[1] 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. Two weeks later, on July 21, 2005, four bombs were found in subways once again in London, in a failed attempt to kill more subway passengers and strike more fear in the British public. And just weeks ago, police in France broke up a terrorist cell intent on bombing the Paris metro, which, like New York, has been a target for terrorists before.[2]

Yet the terrorist threat to urban mass transportation did not just emerge over the past few weeks. According to a recent Congressional Research Service Report (issued before the London bombings), 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. *See* David Randall Peterman, *Passenger Rail Security: Overview of Issues*, at 1 (2005) (available at *http://www.mipt.org/pdf/CRS_RL32625.pdf*) (hereinafter, "Peterman, *Passenger Rail Security*") (annexed to Frankel Aff. as Ex. E). 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 of Commerce, Science and Transportation on the

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1 Sarah Lyall and Douglas Jehl, *London Bombers Visited Earlier, Apparently on Practice Run*, N.Y. Times, Sept. 21, 2005, at A6 (annexed to Frankel Aff. as Ex. C)).

2 Craig S. Smith and Helene Fouquet, *9 Held in France Planned to Attack, Official Says*, N.Y. Times, Sept. 28, 2005, at A7 (annexed to Frankel Aff. as Ex. D).

Rail Security Act of 2004, S. 2273, S. Rep. 108-278, at 2 (May 21, 2004) (hereafter, "Senate Report") (annexed to Frankel Aff. as Ex. F).

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 by Islamic extremists, in which ten explosions occurred at the height of the Madrid rush hour aboard four commuter trains, killing 191 people and injuring about 2,000 others. (Ray Sanchez, *In the Subways, a Reminder of Vulnerability*, Newsday (City ed.), May 17, 2004, at A-04 (annexed to Frankel Aff. as Ex. G)).

- 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. (Craig S. Smith, *French Worker Finds a Bomb Partly Buried on Rail Line*, N.Y. Times, Mar. 25, 2004, at A13 (annexed to Frankel Aff. as Ex. H)).

- The February 2004 terrorist bombings of a subway station in Moscow by Chechen extremists, which killed 41 people. Ten more people were killed and more than 50 injured in August 2004 after a woman blew herself up outside another Moscow subway station, and just a few weeks ago "vigilant passengers . . . prevented two serious explosions." (*Report: Moscow Subway Chief Says Vigilant Passengers Prevented Two Explosions on Network*, Associated Press, Sept. 22, 2005 (annexed to Frankel Aff. as Ex. I) *Attacks Linked to Warlord Shamil Basayev*, Associated Press, Sept. 17, 2004 (annexed to Frankel Aff. as Ex. J)).

- The wave of terrorist bombings in France between July and October 1995, when Islamic militants targeted public transportation facilities and killed 8 people and injured more than 150, including bombings at Paris transit facilities and subway cars. (*Subway Bombing Brings Back Terror to Paris*, The Miami Herald, Dec. 4, 1996, at 20A (annexed to Frankel Aff. as Ex. K), which also describes a December 1996 Paris subway bombing killing two people.)

- The March 20, 1995 attacks in Tokyo, Japan, in which members of the religious cult Aum Shinrikyo killed 12 people and injured 5,500 by releasing sarin nerve gas on a Tokyo subway. (Norimitsu Onishi, *After 8-Year Trial in Japan, Cultist is Sentenced to Death*, N.Y. Times, Feb. 28, 2004, at A3 (annexed to Frankel Aff. as Ex. L)).

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.

Indeed, the New York City subway has already proven to be a target for those intent on killing large numbers of civilians. In addition to last month's threat, the Federal Bureau of Investigation and Department of Homeland Security received intelligence reports last year 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."[3] Separately, two men were arraigned last year for plotting to bomb the Herald Square and other New York City subway stations.[4] 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.[5] 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.[6]

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3 *See* MSNBC Report, *U.S. Transit Systems Increasing Security* (Apr. 3, 2004) (available at *http://msnbc.msn.com/id/4652851* and annexed to Frankel Aff. as Ex. M) CBS Report, *Transit Systems Tighten Security* (Apr. 3, 2004) (available at *http://www.cbsnews.com/stories/2004/04/06/terror/main610392.shtml* and annexed to Frankel Aff. as Ex. N).

4 Greg B. Smith et al., *Wanna-Be Bombers Eyed Several Spots,* N.Y. Daily News (City ed.), Aug. 29, 2004, at 3 (annexed to the Frankel Aff. as Ex. O).

5 Joseph P. Fried, *Jury Convicts Man in Scheme to Set a Bomb in the Subway*, N.Y. Times, July 24, 1998, at B1 (annexed to Frankel Aff. as Ex. P).

6 George James, *Man Convicted in Bombings on Subway*, N.Y. Times, Mar. 8, 1996, at B1 (annexed to Frankel Aff. as Ex. Q).

The NYPD Bag Inspection Program

There are 468 subway stations in New York City, which are used by approximately 4.5 million passengers each weekday. Annually, the subway handles approximately 1.4 *billion* passengers, on 26 subway routes, and its cars travel over 347,188,000 miles.[7] Combined with other New York City rail systems, it is the largest rail system in the United States and one of the largest in the world. As noted above, nearly 60% of the entire United States passenger rail ridership takes place on New York City rail systems. Peterman, *Passenger Rail Security,* at 9.

The NYPD Bag Inspection Program is a highly regulated and minimally intrusive regime. The NYPD implemented the Program in direct response to the July 7, 2005 bombings and July 21, 2005 attempted bombings in the London Underground "[i]n order to increase deterrence and detection of potential terrorist activity and to give greater protection to the mass transit riding public." NYPD Subway Search Directive (Docket No. 10, Ex. B). NYPD instructions require the security checkpoint supervisor to establish a numerical frequency of passengers to inspect based on a "[s]ystematic, non-arbitrary, non-fact-based method." NYPD Training Presentation (Docket No. 10, Ex. C at 2). These factors include the "volume of passengers at the station, bus stop, etc., the available police personnel on hand to perform inspections, and the flow of commuter traffic into the station, bus stop or terminal." NYPD Subway Search Directive (Docket No. 10, Ex. B). "If [an] individual refuses to submit to inspection [*sic*], the [NYPD] shall request that the individual leave the mass transit facility. A person who refuses to leave the system or attempts to avoid the checkpoint and enter the system is subject to arrest." *Id.*

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[7] *See http://www.mta.info/nyct/facts/ffsubway.htm* (annexed to Frankel Aff. as Ex. R).

The searches are to be conducted in a minimally intrusive manner. "Any individual may refuse to permit such an inspection and elect not to enter the mass transit system. A refusal to permit inspection shall not constitute probable cause for an arrest or reasonable suspicion for a forcible stop, however, the individual will not be permitted access to the system with the un-inspected item." NYPD Training Presentation (Docket No. 10, Ex. C at 2). Officers are to conduct such searches in open view to avoid the appearance of singling out a selected passenger, they do not search containers too small to contain explosives, such as wallets and purses, and officers specifically are instructed not to "[i]ntentionally look for other contraband or read or attempt to read any written or printed material." *Id*. at 5. In addition, the searches are exceedingly brief, lasting just seconds, not minutes. NYPD Training Presentation (Docket No. 10, Ex. C at 4). *See also* Deposition of Brendan MacWade, dated Aug. 25, 2005 ("MacWade Dep.") at 42 (annexed to Frankel Aff. as Ex. S) (search lasted "[m]aybe 30, maybe 40 seconds…. [The officer] only briefly made me stop and open the bag[;] it did not effect my ability to get uptown."). Even Plaintiff Murphy, who stated he "dislike[s] . . . having checkpoints anywhere" and noted his view that "they're not very useful," was able to avoid a search when he simply refused to provide consent. Deposition of Norman Murphy, dated Aug. 25, 2005 ("Murphy Dep.") at 16, 37 (annexed to Frankel Aff. as Ex. T).

ARGUMENT

I. INDIVIDUALIZED SUSPICION OF WRONGDOING IS NOT REQUIRED UNDER THE NYPD BAG INSPECTION PROGRAM

Plaintiffs and their counsel have suggested that law enforcement may *never* conduct inspections at New York City subways absent individualized suspicion. To the extent they are seriously pursuing that argument, it should be firmly rejected. Under the Fourth Amendment, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Although the

Fourth Amendment generally requires the police to have individualized suspicion of wrongdoing before they are permitted to search an individual for general law enforcement purposes, there are well-established exceptions to the general rule. Under the "special needs" doctrine, "[w]here a Fourth Amendment intrusion serves special governmental needs, 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) (clarifying that its holding invalidating a traffic checkpoint designed primarily for general law enforcement purposes "does not affect 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").

In addition to searches at airports and governmental offices, the special needs doctrine has been applied to permit DUI roadblocks,[8] drug testing of students,[9] government employees[10] and railway employees,[11] searches of probationers,[12] DNA sampling of incarcerated

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[8] *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

[9] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

[10] *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

[11] *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

[12] *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

sex offenders,[13] and administrative trespass on private property.[14] In the context of anti-terrorism programs, courts have specifically upheld searches and inspections on ferries,[15] on highways inside military installations,[16] and indeed on subways and buses.[17] This Court should firmly reject any suggestion that the special needs doctrine does not apply here or—the effect of such a ruling—that law enforcement cannot inspect bags or packages for explosive devices at mass transportation facilities at all absent individualized suspicion of wrongdoing.

First, the Bag Inspection Program clearly serves "special governmental needs beyond the normal need for law enforcement." *Sitz*, 496 U.S. at 449-50 (internal quotation marks and citations omitted). While suspicionless searches are generally not permitted where the purpose of the search program is "primarily for the ordinary enterprise of investigating crimes," *Edmond*, 531 U.S. at 44, here there has been no suggestion that the Program was either designed or is being used for ordinary law enforcement or crime prevention purposes. The Program was implemented shortly after the London subway bombings as part of the City's special effort to deter and detect terrorism. *See* NYPD Subway Search Directive (Docket No. 10, Ex. B). The Bag Inspection Program guidelines make clear that the sole purpose of the inspections is to deter

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13 *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999).

14 *Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004), *petition for cert. filed*, No. 05-175 (Aug. 10, 2005).

15 *Cassidy v. Ridge*, No. 1: 04 CV 258, at 7-8 (D. Vt. Feb. 16, 2005) (annexed to Frankel Aff. as Ex. U), *appeal docketed sub nom.*, *Cassidy v. Chertoff*, No. 05-1835-CV (2d Cir. Apr. 13, 2005).

16 *United States v. Green*, 293 F.3d 855, 859 (5th Cir. 2002).

17 *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").

and detect terrorist attacks using explosive devices, not to gather other evidence of criminal activity.

Second, it would be impractical to require a warrant or individualized suspicion in the context of detecting explosives capable of being carried onto an urban mass transportation system. *Sitz*, 496 U.S. at 449-50. As described more fully above, the New York City passenger rail system is the largest in the United States and one of the largest in the world. Approximately 1.4 billion passengers ride the subways every year—4.5 million passengers or more ride it every weekday. In addition, as demonstrated by the 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. And 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.[18] It is *precisely* for these reasons that mass transportation facilities present such a vulnerable target. Requiring individualized suspicion would not just be impractical—it would completely undermine the ability of law enforcement to safeguard against terrorist attacks on subways or other forms of mass transportation.

Finally, 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 (1989) ("[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently

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[18] For example, video of the four men believed to be responsible for the recent London bombings show that while each carried small bags when they entered the underground, none otherwise displayed any particularly suspicious activity. *See* BBC News, *Image of Bombers' Deadly Journey* (July 17, 2005) (available at *http://news.bbc.co.uk/1/hi/uk_politics/4689739.stm*) (annexed to Frankel Aff. as Ex. V).

compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."). No one can seriously dispute that the Bag Inspection Program is intended to combat a real threat to public safety. Indeed, the threat here is compelling, as the consequences of a terrorist attack on rail or mass transportation facilities would be potentially catastrophic. An attack could not only result in significant loss of life, but it could cripple the transportation infrastructure in and around New York City, have potentially devastating economic consequences and inflict psychological harm on the City and the nation. *See supra*, pp. 3-7. The government's interest in deterring and preventing a subway attack is certainly no *less* acute than the need to prevent individual cases of drunk driving, drug use, probation violations, trespass or any of the other governmental interests that the Supreme Court has held fall within the special needs doctrine. *See Edmond*, 531 U.S. at 47; *Chandler*, 520 U.S. at 323.

II. THE FOURTH AMENDMENT DOES NOT REQUIRE COURTS TO SCRUTINIZE THE EFFICACY OF PROGRAMS INTENDED TO DETER AND PREVENT A TERRORIST ATTACK

Courts "generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests." *Earls*, 536 U.S. at 829. Where, as here, a Fourth Amendment intrusion serves special governmental needs beyond the normal need for law enforcement, reasonableness 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. *Id.*; *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004), *cert. denied*, No. 05-175 __ U.S.__, 2005 WL 2493921 (Oct. 11, 2005). The central thrust of Plaintiffs' challenge appears to be the alleged lack of effectiveness of the NYPD's Bag Inspection Program. However, nothing in the Fourth

Amendment requires the Court to undertake a searching examination of the efficacy of the Program. 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 United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) (upholding secondary screening of passengers when "procedure is geared towards detection and deterrence of airborne terrorism"); *United States v. Green*, 293 F.3d 855, 859-60 (5th Cir. 2002) (holding traffic checkpoint to protect military installation in part from domestic and international terrorism constitutional); *Cassidy v. Ridge*, No. 1: 04 CV 258, at 7-8 (D. Vt. Feb. 16, 2005) (upholding searches of ferry passengers that further goal of deterring terrorism), *appeal docketed sub nom.*, *Cassidy v. Chertoff*, No. 05-1835-CV (2d Cir. Apr. 13, 2005); *American-Arab Anti-Discrimination Comm. v. Massachusetts Bay Transp. Auth.*, No. 04-11652-GAO, 2004 U.S. Dist. LEXIS 14345, at *6-*10 (D. Mass. July 28, 2004) (upholding bag searches on mass transit during Democratic National Convention after examining "whether the privacy intrusion is reasonable in its scope and effect, given the nature and dimension of the public interest to be served").

There is good reason for courts to avoid imposing any strict "effectiveness" requirement in the context of anti-terror programs in which the primary goal is deterrence. Assessing the effectiveness of any deterrent 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.") *Legal Aid Society of Orange County v. Crosson*, 784 F. Supp. 1127, 1130-32 (S.D.N.Y. 1992) (upholding magnetometer searches of juveniles at courthouse based on "the existence of the potential for violent incidents" that had occurred in other courthouses, notwithstanding that there had been no record of juvenile weapon possession or violent incidents at the courthouse at issue) *see also Marquez*, 410 F.3d at 617-18. It is no surprise, therefore, that 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., 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) *American-Arab*, 2004 U.S. Dist. LEXIS 14345 (upholding subway and bus searches without any analysis of effectiveness) *Cassidy,* No. 1: 04 CV 258 (same upholding automobile and bag searches of ferry passengers under anti-terror program).

Second, the Supreme Court has 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. Reviewing the issue of effectiveness, the Supreme

Court noted that the so-called "effectiveness" requirement arose from decisions like *Brown v. Texas*, 443 U.S. 47, 51 (1979), in which the Court had determined the reasonableness of a search or seizure by balancing the degree to which the seizure advanced the public interest. The Court explained in *Sitz* that this language

> was 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). Consequently, the Court held that "the searching examination of 'effectiveness' undertaken by" the Michigan courts was improper and that the program was sufficiently effective to pass constitutional muster. *Id*. *Accord Mollica,* 229 F.3d at 370 (the Supreme Court has "emphasized the need to defer to governmental officials' decisions regarding resource allocation in evaluating the efficacy of a checkpoint") *Green*, 293 F.3d at 862 (deferring to military's security concerns when upholding traffic checkpoint inside military installation) *Cassidy*, No. 1: 04 CV 258, at 7-8 (upholding random searches of ferry passengers to deter terrorist attacks).

This case illustrates well why deference to law enforcement professionals and public officials is particularly warranted. Although the Plaintiffs seem to complain that there are too *few* police officers conducting bag inspections on too *few* people and that less intrusive means might be available (such as magnetometer searches), clearly it would require significant resources to conduct inspections or install metal detectors at every one of the 468 subway stations throughout the City, or to subject millions of individuals to inspections or magnetometer searches. This would divert resources away from other areas where police are needed, cost money that is not readily available, and interfere with the rapid movement of passengers that

mass transportation provides and that people depend upon. 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.

Moreover, contrary to Plaintiffs' suggestion, the appropriate inquiry has never been whether the program is "maximally" effective or the most effective.[19] Rather, 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)). Detailed scrutiny of the program's effectiveness is neither required nor appropriate, and the requisite threshold has always been quite low. For example, border checks have been upheld under the Fourth Amendment where the ratio of illegal aliens detected to vehicles stopped was only 0.12 to 0.5 percent. *See Sitz*, 496 U.S. at 455 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543,

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[19] Plaintiffs have previously cited *United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004), for the proposition that a special needs program must be "maximally effective" to comply with the Fourth Amendment. *Lifshitz* held no such thing. That case involved the reasonableness of computer monitoring imposed as a probationary condition on a felon convicted of receiving child pornography. After reviewing special needs cases, the court stated that "the search program at issue must seek a minimum of intrusiveness coupled with maximal effectiveness so that the searches 'bear a close and substantial relationship' to the government's 'special needs.'" *Id.* at 186. The court's focus was on the relationship between the program and the government's need there was no actual finding in the case that the program at issue was particularly ineffective, but rather such questions were posed for the district court on remand. Here, there is no question that the Bag Inspection Program has been implemented solely to further the NYPD's interest in deterring and preventing a terrorist attack on subways. Moreover, although the court was purporting to summarize, in *dicta*, prior cases when it stated that those cases seemed to require "maximal effectiveness," in fact, none of the cases even remotely stands for such a proposition. That should come as no surprise given that the courts have long held that the test is "reasonable" effectiveness under the circumstances. *Cf. Mollica v. Volker*, 229 F.3d 366, 370 (2d Cir. 2000) *Maxwell v. City of New York*, 102 F.3d 664, 667 (2d Cir. 1996).

554 (1976)); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629-30 (1989) (citing "railroad industry's experience . . . and common sense" for the proposition that toxicity tests would deter on-the-job substance abuse).

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 ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' . . . ."); *accord Von Raab*, 489 U.S. at 674-5 & 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."); *Crosson*, 784 F. Supp. at 1130-32 (upholding magnetometer searches of juveniles at courthouse based on "the existence of the potential for violent incidents" that had occurred in other courthouses, notwithstanding that there had been no record of juvenile weapon possession or violent incidents at the courthouse at issue). Although "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose, . . . in determining whether individualized suspicion is required, [courts] must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 42-43.

Here, if even one subway bombing is prevented as a result of the Bag Inspection Program, that would potentially prevent the loss of hundreds 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.[20]

Plaintiffs argue that the Bag Inspection Program is ineffective because the searches are random, most subway entrances are not being searched at any one time, people are provided advance notice about the searches and people are allowed to walk away and refuse to be searched. The Plaintiffs' contentions are refuted by the NYPD professionals who are experts in such matters. "Security checkpoints have been in effect around the world in a wide range of settings for well over two decades, and in some locations longer. Experience with them has shown that they are effective in deterring [terrorist] attacks." Declaration of NYPD Deputy Commissioner David Cohen, dated Aug. 12, 2005 ("Cohen Dec.") ¶ 12 (Docket No. 6). Because the Al Qaeda terrorist organization advises its members to avoid checkpoints and security checks, *id.*, and, as other NYPD witnesses will testify, to avoid targets unless there is a very low risk of detection, it is rational to conclude that a bag inspection program conducted at random locations on random subjects will have a deterrent effect. The random nature of inspections not only conserves limited resources, but "[i]t provides a gauntlet, random as it is, that persons bent on mischief must traverse." *Green*, 293 F.3d at 862 & n.40.

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[20] 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).

Of course, the NYPD Bag Inspection Program could be even more effective if additional resources were devoted to it. There may be even better ways to keep explosive devices out of the subways than the Bag Inspection Program. For example, the Program might be more effective if officers targeted bags carried by individuals who fit an appropriately designed terrorist profile rather than individuals chosen purely at random.[21] The Program would certainly be more effective if, as Plaintiffs appear to be suggesting, inspections were conducted on everyone at every subway station, without notice, and people were not permitted to walk away and refuse to be searched (although the subway system itself might not be effective and the inspections would be more prone to a constitutional attack).

Nonetheless, even if the NYPD conducted random inspections at only one subway station entrance in the entire system, that might not be particularly effective, but it would not be irrational, and it certainly would not be unconstitutional. At the end of the day, the NYPD Bag Inspection Program should be upheld so long as the program is a rational means of furthering the

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[21] By "appropriately designed terrorist profile," *amici* do not suggest a profile in which race is the sole factor. *Cf*. Department of Justice Racial Profiling Guidelines Fact Sheet, at 5 (available at *http://www.tsa.gov/interweb/assetlibrary/DOJ_racial_profiling.pdf*) (June 17, 2003) ("Given the incalculably high stakes involved in such investigations, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, alienage, and other relevant factors" provided they are not based upon generalized stereotypes.) (annexed to Frankel Aff. as Ex. W). For purposes of this case, it is unnecessary for the Court to engage in any analysis of the constitutionality of a hypothetical program in which some form of racial profiling is used. In their complaint, Plaintiffs contend that the Bag Inspection Program is improper because of the "potential" for impermissible racial profiling. *See, e.g.*, Complaint ¶ 3. Plaintiffs do not contend that the NYPD is engaged in racial profiling in connection with the Bag Inspection Program. In fact, the numerical formula method selected by the NYPD to ensure that the searches are random actually *precludes* profiling. No plaintiff has been singled out based on his race. Nor is there any allegation that the NYPD's "facially neutral . . . policy . . . has been applied in an intentionally discriminatory manner" or "has an adverse effect and that it was motivated by discriminatory animus." *Brown v. Oneonta*, 221 F.3d 329, 337 (2d Cir. 1999), *reh'g en banc denied*, 235 F.3d 769 (2d Cir. 2001). Because there is no ripe issue of racial profiling that has been raised in this case, the Court need not address the issue.

government's interest in preventing and deterring a terrorist attack on the City's subways. A "rational means" test is appropriate under the facts of this case given: (1) the impracticality of imposing any significant efficacy requirement in the context of anti-terror special needs programs aimed at deterrence, (2) the deference that must be afforded law enforcement professionals and public officials, (3) the low level of "success" that courts have upheld in other contexts when considering the efficacy of a special needs program, (4) the potentially catastrophic nature of the threat that the Bag Inspection Program is designed to address, and (5) the immediacy of that threat as evident from recent history and publicly available information. *See Cassidy*, No. 1: 04 CV 258, at 7-8 (holding "random searches are reasonable in that they are conducted in a manner no more intrusive than is necessary to achieve the compelling governmental interest of protecting the safety of passengers and deterring terrorist attacks on maritime vessels"). The Bag Inspection Program clearly meets that test.

III. THE GOVERNMENT'S INTEREST IN DETERRING TERRORIST ATTACKS OUTWEIGHS THE MINIMAL INTRUSION INVOLVED IN THE BAG SEARCH PROGRAM

Although the Bag Inspection Program is sufficiently effective for purposes of the Fourth Amendment, to pass constitutional muster 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 appear to be contesting the nature and immediacy of the City's concerns that are being addressed by the Bag Inspection Program. Nor could they. As discussed above, recent history makes clear that the threat to urban mass transportation systems is considerable and immediate.

Plaintiffs do, however, seem to overstate the privacy interests at stake and the character of the intrusion that the Bag Inspection Program imposes. By proffering five Plaintiffs

who have particularly acute sensitivities to police officers and/or voluntary bag inspections, Plaintiffs appear to be attempting to incorporate a variation of the tort doctrine of the "eggshell plaintiff" into constitutional law. As discussed below, the Bag Inspection Program does not unreasonably interfere with the privacy interests at stake nor does it utilize an unduly intrusive means of furthering the important governmental interests at issue.

A. The Privacy Interest Allegedly Compromised By The Bag Search Program Is Minimal

Whatever privacy interest New York City mass transit riders have in their bags is diminished when they enter the subway system. An individual's expectation of privacy must be subjectively exhibited and *objectively* reasonable. *Palmieri*, 392 F.2d at 81. New Yorkers, and most Americans, are used to having to submit to bag inspections as a condition to enter a variety of public and private places.[22] *See*, *e.g.*, *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (noting reasonable expectation of privacy diminished in airports and schools); *Chandler*, 520 U.S. at 323 ("We reiterate . . . that where the risk to public safety is substantial and real, blanket suspicionless calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings."). In this day and age, given the nature and immediacy of the threat involved, passengers that choose the convenience offered by mass transportation facilities should not have a reasonable expectation that they can carry bags into subways free from inspection. The privacy interests at stake are certainly no greater than those that exist in airports, courthouses and offices in and around the city.

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[22] The American Civil Liberties Union of Vermont conceded this simple fact in its appellate brief in *Cassidy v. Chertoff*, No. 05-1835-cv (2d Cir. 2005), at 29 (annexed to Frankel Aff. as Ex. X), 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*." (emphasis added).

B. The Intrusion Caused By A Bag Inspection Is Minimal

The potentially catastrophic consequences of a terrorist attack outweighs the minimal intrusiveness of a brief[23] voluntary bag inspection. Indeed, the search required before a member of the public can fly on an airplane or enter the United States Courthouse in Foley Square is more extensive than the brief bag inspection at issue here. The inspection involves nothing more than a quick visual inspection of the carry-on bag to confirm that there are no explosive devises. According to NYPD documents discussed above, the inspections are carried out pursuant to strict procedures set forth in a written policy. Those procedures 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,"[24] 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.[25] Subway passengers also possess the ultimate ability to decline to cooperate with the

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[23] Mr. MacWade testified the inspection lasted "[m]aybe 30, maybe 40 seconds. . . . It's [*sic*] only briefly made me stop and open the bag it did not effect my ability to get uptown." MacWade Dep. at 42.

[24] NYPD Subway Search Directive (Docket No. 10, Ex. B). *Compare* MacWade Dep. at 42 (describing search as lasting 30 to 40 seconds) *with Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (holding a "brief" stop lasting "a very few minutes at most" constitutional and noting that three-to-five minute stops have been held to be constitutional).

[25] Moreover, passengers have been notified of the possibility of random searches through the media and signs posted in subway stations, which mitigates the intrusiveness of the searches. *See American-Arab*, 2004 U.S. Dist. LEXIS 14345, at *8-*9. Notice and a written policy are two factors distinguishing the searches at issue from those enjoined by Judge Sweet in his recent decision in *Stauber v. City of New York*, Nos. 03 Civ. 9162, 9163, 9164 (RWS), 2004 U.S. Dist. LEXIS 13350, at *87-*88 (S.D.N.Y. July 16, 2004), *corrected by* 2004 U.S. Dist. LEXIS 14191 (S.D.N.Y. July 27, 2004). The *Stauber* court was not persuaded by generalized evidence of elevated terrorist threats at political demonstrations that suspicionless bag searches at those demonstrations was constitutional. *Id*. at *88-*90. Regardless of whatever threat that may be associated with political demonstrations, the evidence relating to the terrorist threat at mass transportation facilities is compelling.

officers altogether and end the encounter and leave the station if they so choose. While Plaintiffs suggest that the inspections are more intrusive than magnetometer searches, even if true, the existence of less intrusive means does not render otherwise permissible searches unconstitutional, *see Earls*, 536 U.S. at 837 (noting "reasonableness under the Fourth Amendment does not require employing the least intrusive means"), and magnetometers would not detect lethal plastic explosives.

The presence of police officers in the subway system is a cause of comfort to most law-abiding citizens. Not to these Plaintiffs, however. Mr. Murphy, for example, apparently does not believe in security checkpoints at all, including those in airports, courthouses, office buildings, and even DUI checkpoints. Murphy Dep. at 37, 56-57, 59. Mr. Gehring not only had the right to walk away and refuse to be searched if asked, but *he was not even asked* if the police could inspect his bags.

Mr. Gehring is a practicing lawyer who must make the contents of his bags available for inspection every time he goes to court, every time he flies an airplane and every time he enters countless other public areas in which bags are subject to inspection. Nonetheless, the mere sight of police officers standing outside the turnstiles allegedly caused Mr. Gehring such concern that they *might* ask to inspect his bags, that he changed his route of travel and now claims to be "extremely anxious" when he sees police officers in the subway system. *See* Complaint ¶ 36. The "extreme anxiety" Mr. Gehring claims to experience might be contrasted with the absolute horror experienced by Mr. Wade, and the other survivors of the London subway bombings, or families of those who did not survive those attacks. The point is that intrusiveness must be balanced against the threat that law enforcement is attempting to combat.

As noted above, the Plaintiffs' subjective expectations of privacy must be objectively reasonable, and even if reasonable they can be diminished. *Palmieri*, 392 F.3d at 81-

83. Here, the Plaintiffs' privacy expectations were both objectively unreasonable and diminished, given the minimal and brief nature of the bag inspections, the advanced notice given to passengers, the right to refuse the inspections, the severe nature of the threat at issue and the fact that similar inspections have long been common place in similar contexts such at airports, courthouses, government and other office buildings throughout New York City and elsewhere. In this day and age, the potentially catastrophic consequences of a terrorist attack must outweigh the minimal intrusiveness of a voluntary bag inspection. While the threat of terrorism should not be used as justification to eliminate important civil liberties, the constitutionality of a search cannot turn on the particular sensitivities of the plaintiff who decides to challenge those searches. Put differently, the minimally intrusive searches at issue in this case cannot be subject to any stricter constitutional standard simply by virtue of the fact that the Plaintiffs here have such strongly held fear and distrust of law enforcement efforts to combat terrorism.

CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' application for an injunction.

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Respectfully submitted,

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Attorneys for amici curiae Washington Legal Foundation, Families of September 11, Inc., Allied Educational Foundation; United States Representatives Peter T. King and Ginny Brown-Waite; New York State Senator Martin J. Golden; New York State Assemblymen Vincent M. Ignizio and Matthew Mirones; New York City Council Member James S. Oddo; and Stephen M. Flatow

Appendix A

Amici Curiae

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).

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 search 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 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 search 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 search 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 search 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.