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No. 10-1157

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

THE ELECTRONIC PRIVACY INFORMATION CENTER,
CHIP PITTS, and BRUCE SCHNEIER
Petitioners,

v.

JANET NAPOLITANO, in her official capacity as Secretary of
the U.S. Department of Homeland Security and
MARY ELLEN CALLAHAN, in her official capacity as Chief Privacy Officer of
the U.S. Department of Homeland Security, and
THE U.S. DEPARTMENT OF HOMELAND SECURITY
Respondents.

PETITIONER'S SECOND MOTION TO ENFORCE THE COURT'S MANDATE

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GLOSSARY

DHS	U.S. Department of Homeland Security
EPIC	Electronic Privacy Information Center
WBI	Whole Body Imaging
TSA	Transportation Security Administration
APA	Administrative Procedure Act
OMB	Office of Management and Budget
GAO	Government Accountability Office

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INTRODUCTION

Petitioners, the Electronic Privacy Information Center ("EPIC"), et al., move to enforce this Court's mandate – requiring Respondents, Department of Homeland Security ("DHS"), et al., to "act promptly" to comply with this Court's order and "cure the defect in its promulgation" of the rule requiring the use of Whole Body Imaging ("WBI") technology in the agency's primary screening of air travelers.

On November 16, 2011, this Court issued a Per Curiam Order denying EPIC's first motion to enforce the mandate ("Order"). The Order was issued before EPIC had an opportunity to reply to DHS' Response in Opposition. The Order was also issued before the time to file a Petition for Writ of Certiorari expired. Since the time of the Court's initial Order, more evidence has established that the health risks associated with WBI screening of travelers are significant. The European Union has taken steps to prohibit the use of a category of WBI – backscatter x-ray devices – in EU airports. These devices remain in US airports.

In light of theses recent developments, this Court must give force to its mandate, and either order the agency to suspend further deployment of the WBI devices pending the rulemaking or direct the agency to begin a rulemaking at a date certain, preferably within 45 days.

The DHS has delayed for more than two years since the change in agency practice that gave rise to EPIC's original petition for public rulemaking, and its

recent response made clear that it may delay for at least three more years. The DHS has acknowledged that this Court's order and mandate require the agency to "act promptly" and "conduct notice and comment rulemaking." Yet, the DHS has failed to publish any public notice or state a date certain when it will comply with the Court's unambiguous order. The DHS must provide a date certain, or else suspend further deployment of WBI until it completes the rulemaking process.

JURISDICTION

This Court's power to enforce a prior mandate to an agency in response to a motion to enforce has been firmly established. *See Office of Consumers' Counsel v. FERC, 826 F.2d 1136,* 1140 (D.C. Cir. 1987). The DHS has no power to act contrary to "the letter or spirit of the mandate construed in the light of the opinion of" this Court. *City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977); accord *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990). A party always has recourse to the court to seek enforcement of its mandate. *Office of Consumers' Counsel*, 826 F.2d at 1140.

FACTUAL BACKGROUND

I. Recent Developments

A. There is Mounting Evidence of the Health Risks Associated with Backscatter WBI Technology

There is growing evidence that backscatter WBI machines pose health risks to travelers. Michael Grabell, *U.S. Government Glossed Over Cancer Concerns As*

It Rolled Out Airport X-Ray Scanners, ProPublica, Nov. 1, 2011.[1] Moreover, there is specific evidence that the DHS failed to conduct sufficient research on the safety implications of ionizing radiation produced by the backscatter devices. *Id.* A recent report details the agency's unwillingness to engage in proper oversight and the sort of rigorous testing usually required for machines that produce radiation. *Id.* The report reiterated previous statements by radiation experts: that the machines could increase the incidence of cancer in U.S. travelers and stated:

> But in the authoritative report on low doses of ionizing radiation, published in 2006, the National Academy of Sciences reviewed the research and concluded that the preponderance of research supported the linear link. It found 'no compelling evidence' that there is any level of radiation at which the risk of cancer is zero.

Id. The report is consistent with a letter that was sent by top radiation experts to Dr. John P. Holdren, the Assistant to the President for Science and Technology. Drs. John Sedat, David Agard, Marc Shuman, and Robert Stroud, *Letter of Concern to Dr. John P. Holdren, Assistant to the President for Science and Technology,* April 6, 2010. The experts called for further evaluation of the WBI technology, and identified several groups of people particularly endangered by the radiation produced by backscatter scanners. *Id*. at 2 (citing heightened risks to "older travelers," a portion of female travelers who are "especially sensitive to

[1] *Available at* http://www.propublica.org/article/u.s.-government-glossed-over-cancer-concerns-as-it-rolled-out-airport-x-ray/single.

mutagenesis-provoking radiation leading to breast cancer," "HIV and cancer patients," "children and adolescents," and "pregnant women.").[2]

The recent evidence of health risks expands upon previously published expert analysis concluding that WBI radiation can be especially harmful to some travelers. In one report, the Inter-Agency Committee on Radiation Safety said, "pregnant women and children should not be subject to scanning." *Airport Body Scanning Raises Radiation Exposure, Committee Says*, Jonathan Tirone, BLOOMBERG, Feb. 5, 2011.[3] The European Commission report called for a similar exception for pregnant women and children, stating "[s]pecial considerations might also be called for when it comes to passengers that are especially sensitive to ionizing radiation, primarily pregnant women and children." COMM'N TO THE EUROPEAN PARLIAMENT, COMMUNICATION ON THE USE OF SECURITY SCANNERS AT EU AIRPORTS 16 (June 15, 2010).[4] In his 2010 address to the Congressional Biomedical Caucus, Columbia Professor Dr. David Brenner agreed, stating that the dose of radiation delivered by WBI machines would be particularly risky for children and members of the population with a genetically higher sensitivity to radiation. David Brenner, *Congressional Biomedical Research Caucus: Airport*

[2] *Available at* http://www.npr.org/assets/news/2010/05/17/concern.pdf.
[3] *Available at* http://www.bloomberg.com/apps/news?pid=20601209&sid=aoG.YbbvnkzU
[4] *Available at* http://ec.europa.eu/transport/air/security/doc/com2010_311_security_scanners_en.pdf.

Screening: The Science and Risks of Backscatter Imaging (Coalition for the Life Sciences 2010).[5] Experts have also reported that body scanners may emit up to twenty times the reported amount of radiation. *Id.*

Dr. Agard and the other drafters of the letter to the Assistant to the President for Science and Technology called for a truly independent review of WBI technology because the true extent of the risk "can only be determined by a meeting of an impartial panel of experts that would include medical physicists and radiation biologists at which all of the available relevant data is reviewed." *Letter of Concern to Dr. John P. Holdren*, *supra*.

B. In Response to Public Comments and Mounting Evidence of WBI Health Risks, European Regulators Moved to Prohibit the Use of Backscatter WBI Technology in Airports

Because of the radiation and privacy issues raised by WBI, the European Union ("EU") has recently adopted strict new guidelines limiting the use of WBI at EU airports. EUROPEAN COMMISSION, AVIATION SECURITY: COMMISSION ADOPTS NEW RULES ON THE USE OF SECURITY SCANNERS AT EUROPEAN AIRPORTS (Press Release, Nov. 14, 2011).[6] Under the new guidelines, which occurred subsequent to the Court's determination on Petitioner's First Motion to Enforce, European Union member states may only deploy airport body scanners if they comply with new

[5] *Available at* http://blip.tv/file/3379880.
[6] *Available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1343&format=HTML&aged=0&language=EN&guiLanguage=en.

regulations that "ensure[] the uniform application of security rules at all airports and provide[] strict and mandatory safeguards to ensure compliance with fundamental rights and the protection of health." *Id.*

The European Commission guidelines forbid the storage, retention, copying, printing, and retrieval of WBI images. *Id.* The Commission has also prohibited unauthorized access and use of WBI images and required that the human reviewer analyzing the image shall be in a separate location and the image shall not be linked to the screened person. *Id.* Under the EU guidelines, passengers must be informed about what the WBI machines are and given the right to opt out of WBI screening. *Id.*

The European Commission also recognized the dangers posed by X-Ray WBI devices, and, as a result, backscatter x-ray devices are now effectively prohibited in airports in the European Union. *Id.* "In order not to risk jeopardizing citizens' health and safety, only security scanners which do not use backscatter X-ray technology are permitted for passenger screening at EU airports." *Id.*

These decisions followed wide-ranging public consultation with independent experts, the general public and others. It is this type of public consultation that the DHS has sought to avoid since the deployment of WBI technology at airports in the United States. This Court's order requires DHS to accept such public consultation, which EPIC first requested more than two years ago.

C. Since the Court Ruled on EPIC's First Motion to Enforce, Circumstances have Changed

This Court denied EPIC's First Motion to Enforce in a *Per Curiam* Opinion on November 15, 2011. Since that Opinion was issued, the deadline for Petition for Writ of Certiorari to Supreme Court has passed, the public health and privacy concerns over the use of WBI technology have grown, and the European Commission has prohibited the use of backscatter X-ray WBI debices at airports in the European Union. In DHS' Response in Opposition to EPIC's First Motion to Enforce, the agency proposed what appears to be at least a three-year delay before the issuance of a WBI rule. As petitioners have sought for more than two years to require the agency to undertake a rulemaking, the proposed DHS delay would more than double the amount of time since this WBI rule was first unlawfully implemented. In light of these developments, EPIC asks the Court to grant this Second Motion to Enforce.

II. Procedural Background

As the Court noted, "[i]n May 2009 more than 30 organizations, including the petitioner EPIC, sent a letter to the Secretary of Homeland Security, in which they objected to the use of AIT as a primary means of screening passengers." *EPIC v. DHS*, 653 F.3d 1, 4 (D.C. Cir. 2011). EPIC requested a "public rulemaking." *Id.* On June 19, 2009 the "TSA responded with a letter addressing the organizations' substantive concerns but ignoring their request for rulemaking." *Id.*

"Nearly a year later," *id.*, EPIC sent a formal § 553(e) petition to DHS, requesting suspension of the WBI program pending a public rulemaking. On May 28, 2010, the TSA responded to the petition, but failed to initiate a rulemaking.

On July 15, 2011, this Court held that the DHS's decision to implement the WBI program for primary airport screening without conducting an APA rulemaking was unlawful. *EPIC*, 653 F.3d at 8. The Court remanded the rule to the TSA with instructions to "promptly to proceed in a manner consistent with [the Court's] opinion." *Id.* at 12. Rather than comply with this Court's unambiguous order, the DHS has continued to create excuses and to delay formal rulemaking.

On September 21, 2011, this Court issued a mandate to the United States Department of Homeland Security "promptly to proceed in a manner consistent with" the Court's July 15th decision. The DHS has not contested, requested a stay from, or otherwise challenged the mandate before this Court.

On October 28, 2011, EPIC filed a motion to enforce the Court's mandate. In the motion, EPIC argued that DHS had not complied with the Court's unambiguous mandate because it had failed to "act promptly" to cure the defects in its promulgation of the WBI rule. On November 10, 2011, the DHS filed a Response in Opposition, arguing that the TSA had complied with the Court's mandate. *See* Exhibit 1 (Resp. Opp.) at 2. The DHS argued that the TSA's activities, described in the declaration of James S. Clarkson (Clarkson Decl.), were

sufficient to satisfy this Court's mandate. *Id*. The DHS' response suggested, given the complexity of the issue, staffing limitations, and the various other agency obligations, that it could be at least three years before the agency could begin a rulemaking for an ongoing agency program that this Court observed, "impose[s] [burdens] directly and significantly upon so many members of the public." Declaration of James S. Clarkson, TSA's Acting General Manager of ISSD. *See* Exhibit 1, Clarkson Decl. at ¶7; *EPIC v. DHS*, 653 F.3d at 9.

ARGUMENT

I. Legal Standard

A motion to enforce the court's mandate is appropriate where "an administrative agency plainly neglects the terms of a mandate." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). A court should grant a motion to enforce the court's mandate "when a prevailing plaintiff demonstrates that a defendant has not complied with a [mandate] entered against it …." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004) *aff'd sub nom. Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005). The court has a strong interest in "seeing that an unambiguous mandate is not blatantly disregarded by parties…." *Int'l Ladies' Garment Workers' Union*, 733 F.2d at 922.

II. DHS Has Made Clear That It Will Not Act Promptly to Obey This Court's Order; Instead, DHS Proposes to Further Delay the Process

The DHS did not respond to this Court's July 15th decision by promptly issuing a notice of proposed rulemaking and soliciting public comments. In its November 10 Response in Opposition to Petitioners' Motion, the DHS described "prompt" action as "being ready and quick to act as occasion demands." Resp. Opp. at *7 (citing http://www.merriam-webster.com/dictionary/promptly). Yet DHS' supporting declaration made clear that it was not "ready" and it will not act "quickly."

The Clarkson declaration described the OMB guidelines and TSA's difficulty with completing an economic analysis of the WBI program. This is a remarkable claim given that the Government Accountability Office has sought a cost-benefit analysis of the program from the agency for more than two years. *See Aviation Security: TSA Is Increasing Procurement and Deployment of the Advanced Imaging Technology, But Challenges to This Effort and Other Areas of Aviation Security Remain*, GAO-10-484T, Government Accountability Office, Highlights, March 17, 2010 ("GAO Highlights") at 1.[7] As the GAO explained: "In October 2009, GAO … recommended that TSA complete cost-benefit analyses for new passenger screening technologies … DHS concurred with our recommendation." *Id*. at 1,9. But "TSA has not conducted a cost-benefit analysis," despite the fact that the GAO stated "a cost-benefit analysis is important." *Id*.

[7] *Available at* http://www.gao.gov/products/GAO-10-484T.

The DHS' failure to conduct a rulemaking and suggestion that the agency may not conduct a rulemaking for several years are not consistent with the "letter or spirit," *City of Cleveland*, 561 F.2d at 346, of this Court's mandate, which called for "the [DHS] to act promptly." *EPIC*, 653 F.3d at 8. The DHS's delay highlights its continuing unwillingness to engage the public in the formal rulemaking process required by law. Nothing in the Court's July 15th decision suggests that it has excused the DHS on remand from complying with the APA's basic guarantee of notice and an opportunity for comment. *See* 5 U.S.C. § 553(b) (2006).

A party "always has recourse to the court to seek enforcement of its mandate." *Office of Consumers' Counsel v. F.E.R.C.*, 826 F.2d 1136, 1140 (D.C. Cir. 1987). EPIC seeks enforcement of the mandate against the DHS, including an order requiring the DHS to provide a date certain by which it will publish a public notice and rule, or else to suspend further deployment of WBI technology until it does so. The DHS' proposed delay of three years to comply with this Court's unambiguous order should be held facially unlawful. If the DHS refuses to "cure the defect in its promulgation" promptly then its rule should be set aside.

A. DHS Proposed Three-Year Delay is Unlawful; It Has Not Acted Promptly Given the Significant Health Risks and Critical Need for Public Comment

The DHS' supporting declaration acknowledges that this Court's Opinion requires the agency to "act promptly" to "conduct notice-and-comment

rulemaking" concerning the agency's rule implementing whole body imaging technology for primary screening. *See* Clarkson Decl. at ¶4. The declaration also makes clear that the DHS does not plan to issue a public rule or accept public comments until it has completed "approximately three years" of preparation. Such a delay is clearly not consistent with the "letter or spirit," *City of Cleveland,* 561 F.2d at 346, of this Court's order to "act promptly," regardless of the precise definition of the term.

The unreasonableness of the DHS' delay has become increasingly clear in light of the growing health concerns associated with backscatter WBI technology. This Court should take judicial notice of the fact that when the European Union undertook the type of public comment on the widespread deployment of WBI sought by petitioners in this matters, it determined that it would pose a risk to public safety and subsequently prohibited the use of the same devices that the DHS is currently installing and maintaining in US airports. If the agency had properly conducted a rulemaking before introducing this possibly harmful technology into the nation's airports, it likely would have received many responses by radiation and health experts that would have informed its decision about implementing WBI technology. Instead, in the absence of a proper rulemaking and public comment period, the DHS has placed the public's safety at risk.

In response to similar public concern, the European Union considered public comment and adopted strict guidelines on the use of WBI technology in EU airports. *See* EU Press Release, *supra* Factual Background I-B. These new EU guidelines represent the type of important health and privacy compromise that must be reached in the United States. But any compromise will be continually delayed by the DHS unless and until this Court enforces its mandate.

The Court's July 15, 2011 Opinion does not define "promptly," nor do the Federal Rules of Appellate Procedure or the D.C. Circuit Rules. The Merriam-Webster dictionary defines "promptly" as "performed readily or immediately." *Promptly Definition*, MERRIAM-WEBSTER DICTIONARY (online ed. 2011).[8] The caselaw of this Circuit does not define "promptly" in this context. However, this Court routinely enforces APA obligations by "compel[ling] agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006). At a minimum, the Court's July 15, 2011 Opinion requires the DHS to conduct notice-and-comment rulemaking without "unreasonable delay." *Id*. The DHS has made clear that it does not intend to do so.

This Circuit's inquiry into what constitutes "unreasonable delay" under the APA turns on the facts of each case. "There is no *per se* rule as to how long is too long to wait for agency action." *In re Core Communications, Inc.*, 531 F.3d 849,

[8] *Available at* http://www.merriam-webster.com/dictionary/promptly.

855 (D.C. Cir. 2008) (*citing In re American Rivers & Idaho Rivers United,* 372 F.3d 413, 419 (D.C. Cir. 2004)).

> That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part, as we have said, upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.

Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

In *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), this Circuit "outline[d] six factors relevant to the analysis." *Id*. at 80. "Those factors are not ironclad, but rather are intended to provide useful guidance in assessing claims of agency delay." *Core Communications*, 531 F.3d at 855 (internal quotations omitted). The court may find that an agency has unreasonably delayed action even in the absence of bad faith. *Id*. (noting "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.")

The "most important" factor requires that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id*.[9] Reason dictates that when, as here, an agency fails to respond to the Court's remand, the agency "has effectively nullified [the Court's] determination." *Id*. at 856. Such failure to act is

[9] Other factors include: statutory timetables; delays that impact human health; competing agency priorities; and the nature of the interests prejudiced by delay.

particularly unreasonable when the court held the agency rules unlawful but remanded the matter "without vacatur le[aving] those rules in place." *Id*. Further, this Circuit has recognized the "Court's own interest in seeing that its mandate is honored." *Id*. at 860.

"A reasonable time for agency action is typically counted in weeks or months, not years." *Am. Rivers and Idaho Rivers United,* 372 F.3d 413, 419 (D.C. Cir. 2004) (Henderson, J.) (*quoting Int'l Chem. Workers Union,* 958 F.2d 1144, 1149 (D.C. Cir. 1989)). In *Radio-Television News Directors Ass'n v. F.C.C.*, 229 F.3d 269 (D.C. Cir. 2000), this Circuit held a nine-month agency delay to be unreasonable. *Id*. at 272 (stating "if these circumstances do not constitute agency action unreasonably delayed, it is difficult to imagine circumstances that would). In *Antone v. Block*, 661 F.2d 230 (D.C. Cir. 1981), this Circuit noted a ten-month delay can be unreasonable. *Id*. at 234.

In *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009), the District Court for the Southern District of New York held that the DHS's two-and-a-half year delay on a §553(e) petition was unreasonable as a matter of law. *Id.* at 541. The court stressed that, "given the gravity of problems" outlined in the petition, it was "unreasonable for DHS to take years to decide whether it intends to commence rulemaking," and it ordered DHS to make a decision within 30 days. *Id.* This Court has recognized the importance of the

screening procedures at issue in this case, given their unique impact on the public at large. *EPIC*, 653 F.3d at 8. Given the unique and important impact that these procedures have on the public health and safety, DHS' proposed three-year delay should be held per-se unreasonable.

Here, the DHS has taken only preliminary steps to perform necessary economic analysis of the WBI program. The GAO has already requested that same economic analysis of the WBI program multiple times over the past two years, without success. *See* GAO Highlights at 1, 9. The DHS declaration indicates that a lack of economists and a dearth of other agency obligations will add to its delayed processing of the WBI rule. Yet, the DHS has continued to commit millions of dollars to the WBI program while failing to solicit the required public comments.

If the DHS is allowed to delay the public rulemaking process for another three years, after it improperly initiated the WBI program two years ago, then the DHS will have effectively nullified the Court's decision. The DHS' actions fail under its own proposed interpretation of "promptly" which it defines as "being ready and quick to act." Resp. Opp. at *7. The DHS' declaration makes clear that they are not "ready" to publish a WBI rule or submit comments, and that they are unable to act "quickly." This Court should find that the DHS has failed to "act promptly" in this case, and should require that the DHS set a date certain by which

it publish notice of its WBI rule, or else suspend further deployment of WBI technology until it does so.

B. The DHS' Arguments in Opposition to EPIC's First Motion to Enforce Do Not Justify Further Delay

In response to EPIC's First Motion to Enforce, the DHS argued that the TSA's response to this Court's mandate was sufficient given "the complexity of the necessary rulemaking, the agency's available resources, and the other substantial rulemaking assignments." Resp. Opp. at *3. The DHS proposed an alternative interpretation of the term "promptly" that it argued would be satisfied by its proposed three-year timeline. *Id.* at *7-8. The DHS argued that the Court should deny the motion because the proposed timeline was too short, and the deadline for Certiorari had not yet passed. *Id.* at *8. Finally, the DHS argued that, based on its previous good faith belief, the Court should measure its delay from the issuance of the Court's mandate on September 21, 2011. *Id.* at *11. None of these arguments justifies DHS' proposed delay of over three years.

The DHS cannot now claim that its prior obligations and limited resources prevent it from acting promptly, since the GAO already ordered the DHS to complete the necessary economic analysis of WBI screening multiple times over the past two years. *See* GAO Highlights. Now that the deadline for Certiorari has passed, and the Court can look forward to the DHS' compliance with its mandate,

it is clear that the proposed three-year timeline fails even the DHS' liberal interpretation of the term "promptly." *See*, *supra* Argument at II.A. Given the significant health risks and the critical importance of the airport screening issue to the public, DHS must provide public notice and seek comment through the most direct and immediate means possible.

C. DHS Has Routinely Ignored the Important Public Comment Process

This Court routinely affirms the important purpose of the APA's public comment requirement. *See, e.g., Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process."). It is especially important to solicit public comments where agency action imposes "directly and significantly upon so many members of the public" as this Court recognized the WBI program does in this case. *EPIC*, 653 F.3d at 8. The DHS has had ample opportunity to publish a rule and solicit public comments over the past two years, since it chose to make WBI the primary screening technique, but it has refused to do so. The DHS has also repeatedly refused to provide economic analysis of the WBI program, which it now admits is required to initiate the formal rulemaking process. *See* GAO Highlights. The agency's neglect is not a valid excuse for unreasonable delay.

This Court already granted the DHS substantial leeway when it declined to vacate the WBI program on remand. *EPIC,* 653 F.3d at 8. This Court should not allow the DHS to interpret this temporary relief as *carte blanche* to ignore the requirements of the APA and to substantially delay the public comment process required by law. This Court has already informed DHS "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *EPIC*, 653 F.3d at 5. The DHS has so far failed to solicit or otherwise avail itself of public comments related to its WBI program.

D. DHS Must Conduct Formal Rulemaking As Required By Law

The DHS has "advanced no justification for having failed to conduct notice-and-comment rulemaking." *EPIC*, 653 F.3d at 8. This Court found that the DHS's failure was based on "plain errors of law" and remanded to the agency. *Id*. at 5, 8.

In *Chrysler Corp. v. Brown*, the Supreme Court noted that "courts are charged with maintaining the balance: ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (citing H.R.Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946)). The Court emphasized that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in the Act." *Id*. This Court has endeavored in the past to ensure that agencies do not "make a mockery of the provisions of the

APA with impunity…." *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) *aff'd*, 488 U.S. 204 (1988). This Court should not allow the DHS to "make a mockery" of its mandate and the APA by failing to publish a proposed rule and to solicit public comments, which it is clearly capable of doing.

The DHS now attempts to use the "complexity" of the WBI rule as an excuse for further delay. Perhaps the DHS should have considered the complexities involved in the WBI program before implementing it, or in the time since EPIC's first petition. Instead, rather than focusing its resources on public notice and comment required by this Court's order, the DHS has committed $44.8 Million more in agency resources to expand the WBI program, which this Court identified was procedurally defective. TSA Announces $44.8 Million for Additional Advanced Imaging Technology at U.S. Airports, Transportation Security Administration, Press Release, Sept. 7, 2011.[10]

CONCLUSION

Because the DHS has violated this Court's order and the APA by implementing the WBI program without formal rulemaking, the Court should order the DHS to set a date certain when it will publish a notice of its WBI rule, or to suspend further deployment of the WBI technology until it does so.

[10] *Available at* http://www.tsa.gov/press/releases/2011/0907.shtm.

Respectfully submitted,

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Dated: December 23, 2011

RULE 32(A) CERTIFICATE

I hereby certify that the foregoing Second Motion to Enforce the Court's Mandate complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of Rule 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the 20-page limit of Rule 27(d)(2).

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The undersigned counsel certifies that on this 23rd day of December 2011, he caused one copy each of the foregoing Second Motion to Enforce the Court's Mandate to be served by ECF and US Mail on the following:

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