ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1139

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Petitioner,

v.

The TRANSPORTATION SECURITY ADMINISTRATION, PETER NEFFENGER, in his official capacity as Administrator of the Transportation Security Administration, the UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and JEH JOHNSON, in his official capacity as Secretary of the Department of Homeland Security,
Respondents.

On Appeal from an Order of the
Transportation Security Administration

FINAL BRIEF FOR PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), Appellant certifies as follows:

I. Parties and Amici

The principal parties in this case are Petitioner the Electronic Privacy Information Center ("EPIC") and Respondents the Transportation Security Administration ("TSA"), Administrator Peter Neffenger, the U.S. Department of Homeland Security ("DHS"), and Secretary Jeh Johnson. EPIC is a 501(c)(3) non-profit corporation. EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. The TSA is a subcomponent of the DHS. Peter Neffenger is the Administrator of the TSA. Jeh Johnson is the U.S. Secretary of Homeland Security.

II. Ruling Under Review

Petitioner seeks review of the Order issued on March 3, 2016, by the Administrator of the TSA in the final rule concerning "Passenger Screening Using Advanced Imaging Technology," 81 Fed. Reg. 11,364 (Mar. 3, 2016) (to be codified at 49 C.F.R. pt. 1540).

III. Related Cases

This case has been consolidated with *Competitive Enterprise Institute, et al. v. United States Department of Homeland Security, et al.*, No. 16-1135 (D.C. Cir. Filed May 2, 2016). Petitioner is not aware of any other pending challenge to this Order.

IV. Corporate Disclosure Statement

EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

/s/ Marc Rotenberg
MARC ROTENBERG

Dated: September 26, 2016

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TABLE OF AUTHORITIES[1]

Cases

[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes

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GLOSSARY

AIT	Advanced Imaging Technology
Alternative 3	An alternative method of passenger screening where TSA continues to use of WTMDs as the primary passenger screening technology and performs an ETD screening on a randomly selected population of passengers after WTMD screening.
APA	Administrative Procedure Act
ATR	Automated Target Recognition
DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
ETD	Explosives Trace Detection Devices
FAA	Federal Aviation Administration
GAO	Government Accountability Office
NPRM	Notice of Proposed Rulemaking
TSA	Transportation Security Administration
WBI	Whole Body Imaging
WTMD	Walk Through Metal Detector

JURISDICTIONAL STATEMENT

Any person with "a substantial interest" in an order "of the Under Secretary of Transportation for Security with respect to security duties and powers" may "apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a). The head of the TSA "shall be the Under Secretary of Transportation." 49 U.S.C. § 114. The federal courts of appeals therefore have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA] to conduct further proceedings." 49 U.S.C. § 46110(c); *Tooley v. Napolitano*, 556 F.3d 836, 840–41 (D.C. Cir. 2009).

The TSA issued a final order on March 3, 2016, in 81 Fed. Reg. 11,364. JA 1–44. EPIC filed a timely Petition for Review on May 2, 2016. *See* Dkt. #2 at 1; 49 U.S.C. § 46110 (providing sixty days for petition).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the Final Order is arbitrary, capricious, or an abuse of discretion within the meaning of the Administrative Procedure Act;

2. Whether the Final Order is otherwise contrary to law.

PERTINENT STATUTORY PROVISIONS

The full text of the pertinent federal statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

At issue in this case is the TSA's final rule concerning airline passenger screening using airport body scanners, also known as Whole Body Imaging ("WBI") or Advanced Imaging Technology ("AIT"). The use of body scanners for passenger screening affects millions of U.S. travelers who oppose this intrusive screening technique. The agency has not provided an adequate justification for the use of airport body scanners as compared with alternative passenger screening techniques, or addressed the impact of body scanners on the privacy of passengers and the high costs associated with their continued use. The final rule should be vacated and the matter remanded so that agency regulation complies with the Administrative Procedures Act and the record in this case.

In 2009 the TSA unilaterally decided to deploy body scanners for primary screening of passengers in U.S. airports, which violated the APA as this Court held in *EPIC v. DHS*, 653 F.3d 1, 11 (D.C. Cir. 2011). Nearly five years after the Court ordered the TSA to "promptly" submit a proposed rule for public comment, the agency finally issued a Notice of Proposed Rulemaking ("NPRM"), received public comments, and issued a final rule. The final rule is now before this Court along with extensive comments showing overwhelming public opposition to the use of body scanners.

I. The TSA continues to disregard the views of the public regarding the deployment of body scanners in U.S. airports.

In 2007, the TSA began to test body scanners, known at the time as WBI devices, for use at security checkpoints in three airports as an "optional method for screening selectees and other individuals requiring additional screening" in accordance with an Act of Congress to undertake a pilot program. Memorandum from TSA Acting Administrator Gale D. Rossides to DHS Secretary Janet Napolitano (Feb. 27, 2009), JA 216; TSA, Imaging Technology Airport Brief, slide 6 (July 2009), JA 222. Until February 2009, only forty body scanner units had been deployed in U.S. airports, and all of them were used for secondary screening. *Id*., JA 216.

On January 2, 2008 the TSA published a Privacy Impact Assessment ("PIA") for the body scanner program that failed to address the risk of exposure of nude images of passengers, which were generated by scanners with network connectivity, USB access, and hard disk storage. *See* DHS, *Privacy Impact Assessment for TSA Whole Body Imaging* (Jan. 2, 2008), JA 203–11. Instead, the TSA concluded in the PIA that allowing "isolated" Transportation Security Officers ("TSOs") to routinely view the nude images of travelers would "mitigate the privacy risk" associated with body scanners. *Id*. at 2, JA 204.

In the spring of 2009, the TSA, without any further authorization by Congress, unilaterally decided to deploy body scanners for primary screening of

passengers in U.S. airports. *See* TSA, *Pilot Program Tests Millimeter Wave for Primary Passenger Screening*, The TSA Blog (Feb. 20, 2009), JA 212–14. At no point prior to or during the deployment of body scanners did the TSA seek public comment on the substantial change in agency practice.

Following the TSA announcement, EPIC and thirty organizations petitioned DHS Secretary Janet Napolitano to "suspend the program until the privacy and security risks are fully evaluated" and to conduct a public rulemaking as required under the APA. Letter from EPIC *et. al.* to Secretary Janet Napolitano 1 (May 31, 2009) [hereinafter First WBI Petition], JA 217. The Petitioners urged the DHS to consider "less invasive means of screening airline passengers." *Id*. at 2, JA 218.

On June 19, 2009, the Acting Administrator of TSA, Gale D. Rossides, sent a letter in response to the First WBI Petition, stating that "TSA's screening protocol" would "preserv[e] privacy" and "ensures complete anonymity for passengers undergoing AIT scans." *Id*. at 1, JA 220. Administrator Rossides assured the Petitioners in the letter that body scanners are not able to store, export, print, or transmit images. *Id*., JA 220. The letter did not address the Petitioners' request to conduct a public rulemaking, and the agency chose not to initiate a notice or solicit public comment.

On April 21, 2010, EPIC and thirty privacy, consumer, and civil rights organizations sent a second petition to DHS Secretary Napolitano, this time also

addressing DHS Chief Privacy Office Mary Ellen Callahan. Letter from EPIC *et al.*, to Secretary Janet Napolitano and Chief Privacy Office Mary Ellen Callahan (Apr. 21, 2010) [hereinafter Second WBI Petition], JA 236–44. The Petitioners, including many privacy, civil liberties, religious freedom, transgender rights, and consumer rights groups, made clear that they "strongly object" to the TSA's use of WBI machines and that DHS had "failed to initiate a rulemaking" as required under the APA. *Id.* at 1, JA 236. Petitioners argued that deployment of body scanners "violates the U.S. Constitution, the Religious Freedom Restoration Act, the Privacy Act of 1974, and the Administrative Procedure Act." *Id.* at 1, JA 236. Petitioners further noted that "substantial questions have been raised about the effectiveness of the devices, including whether they could detect powdered explosives – the very type of weapon used in the December 25, 2009 attempted airline bombing." *Id.* at 2, JA 237.

The next month, TSA responded to the Second WBI Petition. Letter from Francine J. Kerner, TSA Chief Counsel to EPIC *et al.* (May 28, 2010) [hereinafter 2010 TSA Response], JA 246–56. In the letter, the TSA asserted that was "not required to initiate APA rulemaking procedures" for the body scanner program. *Id*. at 1, JA 246. The agency also stated that it did not "interpret" the Petition "to constitute a petition under 5 U.S.C. § 553." *Id*. at 1, JA 246. The TSA emphasized in the letter that "**AIT Screening is Optional**", and stated that "TSA has made

clear from its earliest AIT deployment that **use of AIT screening is optional for all passengers**." *Id*. at 3, JA 248. In response to the questions raised about body scanner effectiveness, the TSA stated that the machines had "uncovered" certain "materials" at U.S. airports "including bags of powder." *Id.* at 5, JA 250.

On July 2, 2010, after the TSA failed to conduct a public rulemaking in response to either the First WBI Petition or the Second WBI Petition, EPIC sued the agency. *EPIC v. DHS*, 653 F.3d 1, 2–3 (D.C. Cir. 2011). On July 15, 2011, this Court held that the TSA violated the APA when it failed to conduct notice-and-comment rulemaking prior to deploying body scanners for primary screening of passengers in U.S. airports. *Id*. at 11. The Court found that "the TSA has not justified its failure to issue notice and solicit comments." *Id.* The Court also said that the agency practice imposed a substantial burden on the public. According to the Court, "few if any regulatory procedures impose directly and significantly upon so many members of the public." *Id.* at 6.

This Court ordered the TSA to "promptly" conduct a public rulemaking on the body scanner rule "to cure the defect in its promulgation." *Id*. at 8. The Court declined to vacate the rule as unconstitutional, relying upon the agency's representation that "any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of the two options . . . is least intrusive." *Id*. at 10. The agency had emphasized in its opening brief that "under

agency operating protocols, petitioners may opt out of AIT screening and undergo an alternative screening method." *See* Initial Brief for Respondents at 2, *EPIC v. DHS*, 653 F.3d 1 (No. 10-1157).

After two years of agency delay, the TSA finally issued a notice of the proposed body scanner rule and solicited public comments. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (proposed March 26, 2013), JA 416–31. In the proposed rule, the TSA again stressed that "To give further effect to the Fair Information Practice Principles that are the foundation of privacy policy and implementation at DHS, individuals may opt-out of the AIT in favor of physical screening." *Id*. at 18,294, JA 423. The TSA also proposed to adopt a broad regulatory authorization to use body scanners without clearly defining their operations or limitations on their use. The proposed regulation stated "The screening and inspection described in (a) may include the use of advanced imaging technology. For the purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened." *Id*. at 18,302 (to be codified at 49 C.F.R. § 1540.107), JA 431. *See also* EPIC, Comment Letter on NPRM: Passenger Screening Using Advanced Imaging Technology 10 (June 24, 2013) (TSA-2013-0004-4479) [hereinafter EPIC Comments].

The TSA's repeated failures to give the public notice and an opportunity to respond to significant changes in agency screening practices was subsequently exacerbated in a Privacy Impact Assessment, published a few months before the final rule, which stated for the first time that "TSA may direct mandatory AIT screening for some passengers." DHS, *Privacy Impact Assessment Update for TSA Advanced Imaging Technology* 1 (Dec. 18, 2015), JA 768. Contrary to countless objections from the public, contrary to prior statements made by the agency before this Court, and contrary to concerns that gave rise to Congress' privacy amendments in 2012, the TSA eliminated passengers' right opt-out in the Final Rule. Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,388–89 (Mar. 3, 2016) (to be codified at 49 C.F.R. pt. 1540), JA 26–27. The TSA's decision to remove the opt-out right is not only unprecedented, it is offered without any explanation or justification and it was promulgated without any prior notice that would have enabled the public to meaningfully comment.

II. The TSA has not provided any evidence that body scanners are necessary to secure airport checkpoints.

The TSA concludes in the final rule that body scanners are "an essential component of TSA's comprehensive security system," 81 Fed. Reg. at 11,366, JA 4, and that body scanners are the "best method currently available" to screen airline passengers, *Id*. at 11,369, JA 7. The agency does not offer any evidence or facts to support the conclusion that body scanners are "essential" or even that they

are necessary. The only evidence that the agency offers in support of the claim that body scanners are the "best method" of screening passengers is a minimalist, conclusory "analysis of alternatives" that is contradicted by the agency's own evidence. *See* TSA, *Passenger Screening Using Advanced Imaging Technology: Regulatory Impact Analysis and Final Regulatory Flexibility Analysis* 114–16 (2016) [hereinafter *Final RIA*], JA 157–59. The TSA only offers an in-depth or "break-even" analysis comparing body scanner screening with mandatory pat down screenings for all passengers. *Id.* at 121, JA 164.

The only other facts established by the TSA in the final rule related to the effectiveness of body scanners are that "Prior to deployment, the machines are tested in the laboratory and in the field to certify that the detection standards are met," 81 Fed. Reg. at 11,377, JA 15, and the fact that body scanners can "detect both metallic and nonmetallic explosives and other dangerous items concealed under clothing," *Id*. at 11,368, JA 6. But, as TSA made clear in the NPRM, body scanners are only designed to detect "anomalies," and are not specifically designed to detect explosives. 78 Fed. Reg. at 18,302, JA 431. In contrast, Explosive Trace Detection Devices ("ETDs") are specifically designed to "screen for nonmetallic explosives." 81 Fed. Reg. at 11,369, JA 7.

As the TSA notes in the Final Rule, "many" commenters "expressed support for Alternative 3 (combination of WTMD and ETD screening)," suggesting that

the alternative would be "more effective, less costly, and less intrusive." *Id*. at 11,395, JA 33. Yet, despite these comments, the TSA refused to even conduct a break-even analysis comparing the body scanner screening method with Alternative 3. First, the TSA concludes that Alternative 3 is not "viable" because ETDs cannot detect "other dangerous items" that are nonmetallic, Final RIA, *supra*, at 122, JA 165, even though there is no evidence that such items pose a significant threat, *see* 49 U.S.C. § 44925(a). Second, the TSA concludes that ETDs would "slow passenger throughput," Final RIA, *supra*, at 122, JA 165, even though the TSA concedes that body scanners also slow passenger throughput, *id*. at 51, JA 94; and (3) the throughput "depends on the reliability and mechanical consistency of these machines" including "alarms" which "can occur from some innocuous products," *id*. at 122, JA 165, even though body scanners raise the same reliability and false alarm concerns. The TSA does not mention in its discussion of Alternative 3 that ETDs are the *only* passenger screening devices specifically designed to detect explosives, which Congress identified as a primary threat to airport security.

The TSA should have closely scrutinized the effectiveness of its screening methods given the agency's history of ineffective screening technologies. The DHS Inspector General recently testified before the House Oversight Committee that the TSA has developed a culture "which resisted oversight and was unwilling

to accept the need for change in the face of an evolving and serious threat." *TSA: Security Gaps: Hearing Before the H. Comm. on Oversight and Government. Reform*, 114th Cong. 2 (2015) (statement of John Roth, Inspector General for the Department of Homeland Security), JA 741. This previously manifested after backscatter body scanners, which have been removed from U.S. airports due to privacy concerns, were widely criticized as ineffective. An independent analysis of a Rapiscan Secure 1000 found it to be "ineffective as a contraband screening solution." Keaton Mowery et al., *Security Analysis of a Full-Body Scanner*, 23 Proc. USENIX Sec. Symp. 13 (Aug. 2014).[2] The academic researchers "were able to conceal knives, firearms, plastic explosive simulants, and detonators" from the backscatter body scanner. *Id*. Given the significant concerns about the effectiveness of body scanner screening and the viability of Alternative 3, the TSA has offered little support for the conclusions in the final rule that body scanners are "essential" to airport security.

III. Passengers oppose the use of body scanners because they are invasive and unnecessary.

The public has consistently opposed the use of body scanners since their implementation in U.S. airports. EPIC obtained hundreds of complaints from air travelers that detail the public objections to TSA's body scanner program. *See, e.g.*, *TSA Traveler Complaints Regarding Whole Body Imaging Part Two,* EPIC ("I am

[2] https://radsec.org/secure1000-sec14.pdf.

ALL for safety. BUT, I am very, deeply concerned about you using full body scanners . . . I do not want myself or anyone in my family to be exposed to any form of unnecessary radiation . . . . As a frequent air traveler in the U.S. I just strongly oppose your plan to implement the use of full body scanners . . . . Besides the intrusion of privacy…there is too little scientific data on what the long term effects from these scans might be for an individual's health. . . . I am writing to air the indignation that my entire family and myself feels after learning of your decision to install those body scanners in airports. What makes you people believe that seeing and recording citizens naked bodies . . . is going to keep everybody safer?").[3]

Congress made clear its dissatisfaction with TSA when the agency began to extend the airport body scanner program. In June 2009, following the TSA's unilateral decision to use body scanners for primary screening, Congress approved a bill that would limit the use of body scanners in U.S. airports. H.R. 2200, 111th Cong., *as amended by* H. Amend. 172 (1st Sess. 2009). Congressman Jason Chaffetz (R-UT) sponsored the bill that would prohibit the use of the devices as the sole or primary method of screening aircraft passengers; require that passengers be provided information on the operation of the technology and offered a patdown

[3] https://epic.org/privacy/airtravel/backscatter/EPIC2.pdf.

search in lieu of body scanner screening; and prohibit the storage of an image of a passenger after a boarding determination has been made. *Id.*

Senators and Representatives, in many public communications with TSA, have also made known their concerns about the program. On January 20, 2010, Senators Coburn (R-OK), and Akaka (D-HI) of the Senate Committee on Homeland Security and Government Affairs questioned then DHS Secretary Janet Napolitano about the body scanners' inability to detect small amounts of explosives. *See Intelligence Reform: The Lessons and Implications of the Christmas Day Attack: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. (Post-Hearing Questions Submitted to the Honorable Janet A. Napolitano from Senator Daniel K. Akaka), JA 223–26; *see also Intelligence Reform: The Lessons and Implications of the Christmas Day Attack: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. (Post-Hearing Questions Submitted to the Honorable Janet A. Napolitano from Senator Tom Coburn), JA 227–33. They also inquired about the lack of operational testing before body scanners were deployed. *Id*.

In 2010, the Chairman of the House Committee on Homeland Security, Representative Bennie G. Thompson, wrote on the Committee's behalf to inquire about the "apparent contradiction" between the TSA's representations to the public and the technical capabilities which allow its body scanner devices to "erode

individual privacy protections." *See* Letter from Rep. Bennie G. Thompson to Gail Rossides, TSA Acting Administrator (Jan. 21, 2010), JA 234–35. Chairman Thompson demanded to know the TSA's reasoning for requiring body scanner devices to store, print, record, and export images, and the circumstances under which TSA employees can use these capabilities in airport settings. *Id*. The Chairman also asked if the TSA requested the Chief Privacy Officer to amend or update previous Privacy Impact Assessments. *Id*.

On November 15, 2012, Representative Davis (D-IL) noted how the House Transportation Security Subcommittee has followed the body scanner technology closely through several Congresses and have called into question "both the effectiveness of the technology and the cost of the machines." *TSA Recent Scanner Trouble: Real Strategy or Wasteful Smokescreen: Hearing Before the Subcomm. On Transportation Security the Comm. of the Homeland Security*, 114th (2012) (statement of Rep. Danny Davis on behalf of Ranking Member Sheila Jackson Lee), JA 264. Davis went on to note that "few issues have caused us as much concern as whether these machines undermine the fundamental right of privacy." *Id.*

The public's opposition led to changes to the body scanner program. Congress, as a result of passengers objections to the nude images generated by the body scanners, required the TSA to remove all body scanners from U.S. airports

that could not be programmed to use a generic human outline rather than a nude image. 49 U.S.C. § 44901(l)(2)(B). The TSA was subsequently forced to remove all backscatter body scanners because they could not satisfy the Congressional mandate.

The public's opposition to the body scanners did not end with the removal of the backscatter scanners. Indeed, the public comments to the NPRM demonstrated that privacy is still very much a concern of the public despite the removal of the backscatter body scanners and efforts by TSA to add "privacy-enhancing" software and procedures. The overwhelming majority of public comments in response to TSA's body scanner NPRM cited privacy as an issue. *See e.g., Comments of Donna Ellis*, Passenger Screening Using Advanced Imaging Technology (Dec. 16, 2015) (TSA-2013-0004-5580) ("I am deeply concerned that the TSA's proposed rule does nothing to protect passenger privacy and merely expands the agency's power. Transgender travelers especially are put in fear of being outed, humiliated, and facing additional screening because of their appearance, physical characteristics, or necessary personal items."), JA 721; *Comments of Anonymous*, Passenger Screening Using Advanced Imaging Technology (July 10, 2013) (TSA-2013-0004-5498) ("I should not have to choose between risking the health of my unborn child with new and risky technology and my right not to have a strangers

hands on my breasts and between my legs. The technology itself is invasive; the opt-out option is worse."); 78 Fed. Reg. at 18,287–302, JA 416–31.

The public comments also demonstrated a very strong preference for an alternative, less evasive screening procedure, namely the use of metal detectors along with explosive trace detection. *See e.g., Comments of Darian Turner*, Passenger Screening Using Advanced Imaging Technology (July 10, 2013) (TSA-2013-0004-5489) ("The AIT system is invasive, as are the enhanced pat downs that are currently the only other option. . . . I strongly support a metal detector/explosive detection alternative."), JA 719; *Comments of Anonymous,* Passenger Screening Using Advanced Imaging Technology (July 2, 2013), (TSA-2013-0004-5215) ("I consider the AIT search extremely abusive towards the public, and useless in the fight against explosives and [weapons], especially when compared to alternative technology."), JA 704; *Comments of Gillian Conway*, Passenger Screening Using Advanced Imaging Technology (June 24, 2013) (TSA-2013-0004-5270) ("The AIT technology is no more effective at locating and deterring suspicious activity than a regular metal detector and wastes time in airports. The alternative of a pat down is degrading…especially when an alternative (metal detectors) is more effective."), JA 707.

IV. Despite the lack of evidence, congressional skepticism, and the strong opposition of airline passengers and privacy groups, the TSA adopted the final rule and effectively made body scanner screening mandatory for all passengers.

In 2009 the TSA unilaterally decided to make body scanners the primary screening tool at U.S. airports. Since then the public has repeatedly expressed its opposition to the body scanners; EPIC along with dozens of groups petitioned the agency to conduct a public rulemaking and analyze the effectiveness as well as the health and privacy risks; lawmakers have repeatedly expressed their concern over the effectiveness, cost, and privacy invasiveness of the body scanners; and EPIC prevailed in a lawsuit to force the TSA to conduct a public rulemaking on body scanners.

Nearly five years after the D.C. Circuit ordered the TSA to conduct a public rulemaking, the agency released the final rule. In that rule, the agency dismissed years of opposition, a lack of the evidence that body scanners are effective, an overwhelming number of comments in favor of an alternative screening procedures, and the significant privacy impact on airline passengers, and decided stick with its original decision—a unilateral decision made by agency in 2009 without public comment or any robust scrutiny of the technology. Additionally, the agency took the extraordinary step in the final rule to take away from passengers the affirmative right to opt out of body scanner screening.

This Court should to set aside TSA's Final Order and remand to the agency to conduct further proceedings consistent with this Court's July 2011 Order.

SUMMARY OF THE ARGUMENT

When this Court first considered the TSA's use of body scanners for passenger screening in 2011 it found that "few if any regulatory procedures impose directly and significantly upon so many members of the public." *EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. 2011). The Court ordered the TSA to "promptly" conduct notice-and-comment rulemaking. Now more than five years later, the agency has published a final rule. But despite widespread opposition from the public to the continued scanning of the naked bodies of passengers travelling through U.S. airports, the TSA has concluded that it will not modify its screening procedures or consider reasonable alternative techniques for primary passenger screening.

What's worse, the agency does not appear to have learned from its past mistakes. The record contains no evidence showing that body scanners are essential to deterring the types of threats Congress charged the TSA with addressing. The agency has dismissed reasonable alternatives without serious consideration, even as the DHS Inspector General has warned the Congress and the public about fundamental flaws in the TSA's screening processes. The agency refused to alter its practices despite the availability of more effective and less intrusive alternatives. The agency has also disregarded the earlier determination of this Court and denied the right of passengers to opt-out of body scanners. The agency's final rule is arbitrary and capricious and should be vacated.

STANDING

EPIC has standing under Article III of the Constitution of the United States. An association has standing to sue on behalf of its members if (1) at least one of its members would have individual standing to sue in his or her own right, (2) the interests the association seeks are germane to its purpose; neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *Sierra Club et al. v. EPA et al.*, 292 F.3d 895, 896–97 (D.C. Cir. 2002) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). "Because [the organizations'] claims and requested relief are germane to their organizational purposes and do not require any individual member to participate in the lawsuit, the organizations have standing to sue on behalf of those members." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).

Regarding the first element, Respondent should readily concede that EPIC's members will be subject to TSA's airport screening procedures, as any person traveling by air in the United States is subject to these procedures. The second element of EPIC's standing is also manifestly satisfied. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has a specific interest in the TSA body scanner rule, as made clear in EPIC's two prior petitions, EPIC's suit against DHS, and EPIC's comments on the TSA's

proposed rule, in addition to a long-standing interest in DHS and TSA practices implicating the privacy rights of travelers. Therefore, this claim does not require the participation of an individual member of the organization.

ARGUMENT

The TSA has consistently failed to provide proper notice to the public concerning the use of body scanners, to properly justify the need to use invasive screening techniques, and to provide the public with an opportunity to respond to the denial of the passenger opt-out right. Instead, the agency relies on conclusory statements in the final rule to justify a decision that it already made nearly eight years ago. This Court has previously recognized

> the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review.

Food Mktg. Inst. v. ICC, 587 F.2d 1285, 1290 (D.C. Cir. 1978). The TSA final rule is just such a result, and the Court should accordingly vacate and remand for further proceedings.

I. TSA violated the APA by failing to adequately consider alternative screening methods that are more effective and less invasive than body scanners.

An agency action challenged under the APA "must be set aside" if it is "arbitrary [and] capricious." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971). A regulation will only survive arbitrary and capricious review if it is "the product of reasoned decisionmaking." *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 753 (D.C. Cir. 2015).

Although this standard of review is "fundamentally deferential," *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012), the court must "insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). This entails a "thorough, probing, in-depth review of the agency's asserted basis for decision, ensuring that the agency . . . [has] examine[d] the relevant data and [has] articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1498 (D.C. Cir. 1988) (internal quotation marks omitted). Here the TSA did not examine, or even offer, relevant data to support the conclusion that body scanners are necessary for passenger screening and more effective than less intrusive alternatives.

This Court has previously overturned TSA orders when the agency "sa[id] too little" and provided the court with "no basis" to decide whether an order was "the product of reasoned decisionmaking." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1346 (D.C. Cir. 2014). An agency action "supported with *no* explanation is the epitome of arbitrary and capricious decisionmaking." *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (emphasis in original) (internal quotation marks omitted). Here the TSA failed to present evidence of the effectiveness of body scanners relative to less intrusive alternative screening techniques, and therefore did not provide the court with a basis to evaluate the agency's decision.

An agency order is also arbitrary and capricious where the agency fails "to respond meaningfully to the evidence." *Petro Star Inc. v. Fed. Energy Regulatory Comm'n*, No. 15-1009, 2016 WL 4525273, at *4 (D.C. Cir. Aug. 30, 2016); *see also Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action[.]"). When an agency fails to "answer[] objections that on their face appear legitimate, its decision can hardly be said to be reasoned." *Petro Star Inc.*, No. 15-1009, 2016 WL 4525273, at *4.

Further, a regulation is arbitrary and capricious if the agency has neglected "to consider responsible alternatives to its chosen policy and to give a reasoned

explanation for its rejection of such alternatives." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008). Though an agency need not respond to "every . . . alternative raised by the comments, no matter how insubstantial," *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013), it must weigh "significant and viable" and "obvious" ones. *Id*. Here the TSA refused to conduct a "break even" analysis of Alternative 3—screening with WTMDs supplemented by ETDs—despite the fact that it was the only screening technique designed to detect explosives and that many commentators noted that it was a more effective and less intrusive screening technique.

Finally, a regulation that represents an "unexplained departure from long-standing [agency] policy" is arbitrary and capricious. "[A]n agency changing its course must supply a reasoned analysis[.]" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57. In particular, when a "new policy rests upon factual findings that contradict those which underlay its prior policy; or when [an agency's] prior policy has engendered serious reliance interests that must be taken into account," it would be "arbitrary or capricious to ignore such matters." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). Here the TSA arbitrarily changed the definition of AIT to include the capability of generating a "visual image" of passengers, contrary to prior agency policy and contrary to the statutory requirement that body scanners use a "generic image."

Where, as here, an agency regulation comes before the Court a second time following a remand, the Court must also "recognize the danger that [the] agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues[.]" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 217 n.8 (D.C. Cir. 2013). To avoid this, "[t]he agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review." *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978). The TSA order relies on conclusory assertions regarding the necessity and relative effectiveness of body scanners, and is clearly the product of post-hoc rationalization from an agency that has already invested both monetary and political capital in these techniques over the last eight years.

A. TSA failed to account for the full impact that invasive body scanner screening has on airline passengers.

TSA concedes that "many" of the more than 5,500 comments submitted in response to the NPRM "included statements of opposition to the continued use of AIT." 81 Fed. Reg. at 11,367, JA 5. These statements in opposition to the body scanner rule highlighted problems with "efficacy, privacy, health, cost, and civil liberties." *Id*. at 11,367–368, JA 5–6. Yet despite this strong opposition, the TSA

has authorized the use of broadly-defined body scanning techniques in the final rule and has failed to adequately address the impact on airline passengers.

Privacy concerns, in particular, have been the key focal point for groups and individuals opposed to the deployment of body scanners since they were first introduced by the TSA. *See* First WBI Petition, *supra*, at 1–3, JA 217–19 (listing thirty groups and nonprofits petitioning for the suspension of TSA's body scanner program). The D.C. Circuit found that "few if any regulatory procedures impose directly and significantly on so many members of the public," and required that the TSA seek public comment on the use of body scanners for passenger screening. *EPIC*, 653 F.3d at 6. Subsequently, in response to privacy concerns, Congress required the TSA to configure body scanners with software that would "produce a generic image of the individual being screened." FAA Modernization and Reform Act of 2012, Pub. L. 112-95, 49 U.S.C. § 44901(l).

Yet, despite the fact that the agency has been directed by Congress, this Court, and the public to limit the use of invasive body scanners on airline passengers, the agency has nonetheless chosen to continue using the scanners for primary screening. The TSA's final rule even contradicts the agency's proffered justification for dismissing privacy complaints, and puts passengers at risk.

The TSA states it has installed "software on all [body scanner] units" in an effort "to address privacy concerns" and claims that "[n]o specific image of an

individual is created." 81 Fed. Reg. at 11,368, JA 6. But the TSA's own rule "defines AIT as 'a device used in the screening of passengers that *creates a visual image* of an individual showing the surface of the skin and revealing other objects on the body." *Id*. at 11,366 (emphasis added), JA 4. The TSA later notes that the "equipment must produce a generic image of the individual being screened that is the same as the images produced for all other screened individuals," but does not explain why it is necessary for the device to create a visual image of the passenger. *Id*. at 11,371, JA 9.

According the agency's description, the *software* installed on the body scanners produces a generic image used by TSA screening officers, but the agency's definition of the devices themselves only raises further questions about what happens to the nude images created by the body scanners. The TSA later states that the "units do not have the ability to store, print, or transmit any images," 81 Fed. Reg. at 11,373, JA 11, which confirms that the devices do "create" individualized images (contrary to the TSA's earlier statement). But the agency again contradicts itself when it says that "[i]nitial versions of [body scanners] were manufactured with storage and transmittal functions that TSA required manufacturers to disable prior to installation at airports." 81 Fed. Reg. at 11,383, JA 21. The TSA also states that "the current versions of [body scanners] do not

have the capability to create an image; rather, they create internal code of the passenger using proprietary software." *Id*., JA 21.

The TSA offers no explanation for why the body scanners should be defined as "creating a visual image" of the passenger, and why the agency could not simply incorporate hardware restrictions into the definition to ensure, as Congress intended, that no image would be captured. The agency has failed to address concerns raised by passengers who do not wish to have their private areas scanned, even if an image is not shown to a security officer. The TSA's dismissal of passenger privacy concerns is internally contradictory and not based on reasoned decisionmaking or a thorough review of the evidence.

The agency has also chosen to use body scanner screening techniques despite the special burdens those techniques impose on passengers with certain medical conditions and passengers who are transgender and gender non-conforming persons. The TSA's use of body scanners for primary screening causes these passengers to disclose sensitive personal and medical information that they would normally keep private, as the TSA has conceded. Body scanners use software "that looks at the anatomy of men and women differently," and the TSA trains its officers to "press[] a button designating a gender (male/female) based on how you present yourself." *Transgender Passengers*, Transportation Security

Administration.[4] As a result, transgender and gender non-conforming persons may have no choice but to disclose to screening officers their gender or biological sex. The possibility of incorrect identifications by TSA officers also raises the risk that transgender and gender non-conforming individuals will be subjected to pat-downs at a higher rate. Although such pat-downs are conducted "by an officer of the same gender as you present yourself," *id.*, this again compels passengers to disclose their sensitive personal information to security officers. As many commenters observed during TSA's rulemaking, *see* 81 Fed. Reg. at 11,386–87, JA 24–25, "Transgender travelers especially are put in fear of being outed, humiliated, and facing additional screening because of their appearance, physical characteristics, or necessary personal items," *e.g.*, Kathy Huff, *Comment on NPRM: Passenger Screening Using Advanced Imaging Technology* (Jun. 28, 2013), TSA-2013-0004-4761, JA 617.

Body scanners also heighten the burden of disclosure for persons who rely on certain life-sustaining medical devices. TSA instructs travelers to "[i]nform the TSA officer if you have a bone growth stimulator, spinal stimulator, neurostimulator, port, feeding tube, insulin pump, ostomy or other medical device attached to your body and where it is located before the screening process begins."

[4] https://www.tsa.gov/transgender-passengers (last visited Sept. 26, 2016).

Disabilities and Medical Conditions, Transportation Security Administration.[5] Many diabetes experts and producers of insulin pumps also advise users not to take the devices through body scanners, recommending pat-downs instead. *See, e.g.*, *Travel*, Medtronic, ("You need to remove your insulin pump and CGM (sensor and transmitter) while going through an airport body scanner. If you do not wish to remove your devices, you may request an alternative pat-down screening process.");[6] *A Message for Travelers With Insulin Pumps: Call "TSA CARES" For Help*, The Naomi Berrie Diabetes Center (Dec. 2, 2013) ("Manufacturers and clinicians alike recommend to people with pumps that they disconnect from their pump, pass it to an agent for inspection and then go through the body scanner. If you don't want to disconnect from your pump, the other option is to ask for what the TSA refers to as a 'walk through' or a 'pat down.'");[7] *Important Safety Information - t:slim Insulin Pump*, Tandem Diabetes Care ("Newer full body scanners used in airport security screening are also a form of X-ray and your pump should not be exposed to them.").[8] Thus, for those who depend on insulin pumps and non-metallic medical devices, TSA's use of body scanners in lieu of WTMDs creates an additional obligation to disclose sensitive medical information. Rather

[5] https://www.tsa.gov/travel/special-procedures (last visited Sept. 26, 2016).
[6] http://www.medtronicdiabetes.com/customer-support/traveling-with-an-insulin-pump-or-device (last visited Sept. 26. 2016).
[7] http://nbdiabetes.org/news/message-travelers-insulin-pumps.
[8] https://www.tandemdiabetes.com/important-safety-information (last visited Sept. 26, 2016).

than consider alternative screening methods that are less intrusive and more effective, the TSA has chosen to stick with body scanners.

A regulation is arbitrary and capricious if the agency has neglected "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008). An agency must weigh "significant and viable" and "obvious" alternatives, especially those that come to light during the notice and comment process. *Nat'l Shooting Sports Found., Inc.*, 716 F.3d at 215. The TSA has fundamentally failed in this case to consider the most obvious alternative to mitigate the privacy concerns associated with body scanners—not using body scanners to screen passengers.

The TSA's failure to address the impact of its screening methods on passengers also extends to the agency's lack of reasoned analysis of the "passenger opportunity cost" associated with the more invasive screening procedure. 81 Fed. Reg. at 11,391, JA 29. Initially, the only passenger costs that the TSA identified were those associated with passenger opt-outs, and the agency entirely ignored the costs associated with longer security lines based on the unsubstantiated assertion that "[p]assengers using AIT screening will not experience any increase in wait times as a result of [the] technology." TSA, *Passenger Screening Using AIT: Initial Regulatory Impact Analysis* 49 (2013) [hereinafter *NPRM RIA*], JA 313.

The agency, likely recognizing that such an unsupported claim could not survive review, amended the regulatory analysis in the final rule but failed to adjust its conclusion to match the evidence. The TSA concludes in the final rule that "[o]verall passenger screening system times do not increase with AIT." 81 Fed. Reg. 11,391, JA 29. Yet the agency acknowledges in the discussion of "changes to the screening checkpoint" that Walk Through Metal Detectors ("WTMDs") can "maintain a sufficient throughput rate to support two x-ray machines," but body scanners only "provid[e] sufficient throughput to handle the throughput of one x-ray machine." Final RIA, *supra*, at 43, JA 86. The "Past and Estimated Passenger Throughput" data included in the analysis also shows clearly that the number of passengers decreased significantly with the introduction of body scanners, *id*. at 52, JA 95 (showing an estimated 682 million passengers screened in 2008 compared to 627 million screened in 2009 and slowly increasing to 649 million in 2014). In an attempt to proffer a possible way that passenger throughput could remain the same despite these factors, the TSA provides an example where two x-ray machines are paired with two scanners (one body scanner and one WTMD), *id*. at 62, JA 105, but the agency simply ignores the fact that its example relies on WTMD for the *majority* of the passenger screening throughput.

The TSA only offers assurance that overall passenger screening times will not increase if it continues to use WTMDs for the majority of the passenger

screening. But as most airline passengers have discovered, this is not the case. Passenger screening times have significantly increased since the introduction of body scanners, and the problem has gotten so bad recently that in May of this year the Secretary of Homeland Security issued a public statement about the need to address the problem: "TSA Administrator Admiral Neffenger and I are acutely aware of the significant increase in travelers and longer wait times at airports, and their projected growth over the summer." *See* Statement by Secretary Jeh C. Johnson on the Transportation Security Administration (May 4, 2016).[9]

B. TSA failed to adequately consider the use of explosive trace detection screening as an alternative to body scanners.

The TSA's final rule is precisely the type of post-hoc rationalization that this Court warned of in *Food Marketing Institute*, 587 F.2d 1285, and *Muwekma Ohlone Tribe*, 708 F.3d 209. There is no evidence that the TSA has engaged in a genuine reconsideration necessary to show that the agency made a reasoned decision to use body scanners as a primary screening method for airport passengers. Instead, TSA has treated the outcome in this matter as preordained—that body scanners would be used for primary screening—and presented conclusory arguments to support the status quo.

[9] https://www.dhs.gov/news/2016/05/04/statement-secretary-johnson-transportation-security-administration.

The core premise of the TSA's rule is that body scanners are "an essential tool to address [the] threat" to airport security, 81 Fed. Reg. at 11,368, JA 6. But these statements, along with the TSA's claims that body scanners are the "best" or "most effective" detection devices, are not actually based on any evidence on the record or a fair comparison with reasonable alternatives. Nor does the TSA provide a logical connection between the body scanner function of detecting "anomalies" on a person and the stated threat of a "non-metallic explosive" device. *Id*. at 11,365, JA 3.

In fact, the TSA's regulatory impact analysis does not even include a detailed comparison between body scanners and the one screening method—Explosives Trace Detection Devices ("ETDs")—that was actually designed to identify non-metallic explosives. Absent some showing of the relative security benefit of body scanners, the TSA has failed to offer any evidence to support the conclusion that body scanners are necessary or essential. An agency conclusion offered without any supporting evidence is "the epitome of 'arbitrary and capricious' decisionmaking." *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (emphasis in original).

The TSA's regulatory analysis is fundamentally flawed because the agency does not evaluate the body scanners or regulatory alternatives based on their ability to address the primary risk factors identified by Congress. As the agency notes in

the final rule "one of the principal concerns" that the TSA faces is the "migration to more nonmetallic threats such as liquid and plastic explosives." 81 Fed. Reg. at 11,370, JA 8; *see also id*. at 11,378, JA 16 (noting that body scanners were used for primary screening because of "the need to address the threat from nonmetallic explosives."). This concern was expressed by Congress when it directed TSA to "give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals in in their personal property." 49 U.S.C. § 44925(a). It is clear from the record that body scanners do not address these priorities and are not in fact "essential" to airport security.

The TSA's conclusion that body scanners are "essential" is unreasonable given that the devices are only designed to detect "non-metallic potential threats concealed under clothing." Final RIA, *supra*, at 129, JA 172. As EPIC and other commentators have noted, the agency must evaluate screening methods based on the ability to identify the various types of weapons and explosives identified by Congress, and body scanners were not designed to detect explosives. *See* EPIC Comments, *supra*, at 8; 81 Fed. Reg. at 11,369, JA 7. TSA made clear in the NPRM that body scanners are only designed to detect "anomalies." 78 Fed. Reg. at 18,302, JA 431. In contrast, Explosive Trace Detection Devices ("ETDs") are

specifically designed to "screen for nonmetallic explosives." 81 Fed. Reg. at 11,369, JA 7. Thus when the TSA combines WTMDs with ETDs it can identify metallic items (such as weapons and explosives) and non-metallic explosives. *See* 81 Fed. Reg. at 11,373, JA 11. That screening process, which the TSA identified as "Alternative 3", 81 Fed. Reg. at 11,395, JA 33, would be both less expensive and less intrusive than body scanners, *see* EPIC Comments, *supra*, at 2; 81 Fed. Reg. at 11,395 ("Commenters suggested that the use of ETDs and WTMDs are more effective, less costly, and less intrusive."), JA 33.

The TSA does not adequately respond to these comments or address the evidence that Alternative 3 provides a more effective and less invasive screening process than body scanners. In the final Regulatory Impact Analysis, the TSA only prepared a "break even" analysis for one screening process: Alternative 2 (WTMDs with randomized pat-downs). Final RIA, *supra*, at 114, JA 157. The TSA refused to conduct an in-depth analysis of Alternative 3 because it did not consider it a "viable alternative" to the body scanners. *Id*. at 122, JA 165. The TSA's reasons for dismissing this responsible alternative screening method are implausible and inconsistent with the logic behind the rule. First, the TSA concludes that Alternative 3 is not "viable" because ETDs cannot detect "other dangerous items" that are nonmetallic, *id*., JA 165, even though there is no evidence that such items pose a significant threat, *see* 49 U.S.C. § 44925(a).

Second, the TSA concludes that ETDs would "slow passenger throughput," Final RIA, *supra*, at 122, JA 165, even though the TSA concedes that body scanners also slow passenger throughput, *id*. at 51, JA 94. And third, the throughput "depends on the reliability and mechanical consistency of these machines" including "alarms" which "can occur from some innocuous products," *id*. at 122, JA 165, even though body scanners raise the same reliability and false alarm concerns. Even more damning is the TSA's failure to mention that ETDs are the *only* devices considered that are actually designed to detect explosives, which Congress identified as a primary threat to airport security.

The TSA's analysis of the body scanner proposal, in turn, does not provide a fair assessment of the disadvantages and costs associated with the devices. The TSA also offers no evidence to support the purported "advantage" of using body scanners because it does not offer data to compare passenger throughput of body scanners as compared to random ETD screenings. Final RIA, *supra*, at 124, JA 167. The only other "advantage" identified by TSA is actually a *disadvantage*, the invasive nature of the image captured by the body scanner. *Id*., JA 167. The TSA attempts to characterize this as an "advantage" because new software has "eliminated observation" of the nude image, *id*., JA 167, even though no nude image would be created in the first place if the body scanners were not deployed. The disadvantages of using body scanners are clear: "cost and complexity of

testing and evaluating" the machines, high acquisition costs and integration costs, high training costs, and the invasiveness of the screening process as well as "negative public perception." *Id*., JA 167.

On balance, the only evidence offered by the TSA shows that there are significant disadvantages to the use of body scanners and no measurable advantages compared to Alternative 3. The TSA's conclusion that body scanners are the "best" screening method available is therefore not based on "a genuine reconsideration of the issues." *Muwekma Ohlone Tribe*, 708 F.3d at 217 n.8. The TSA has failed "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," and the agency's conclusions are arbitrary and capricious. *Am. Radio Relay League, Inc.*, 524 F.3d at 242.

C. TSA failed to provide evidence to support the conclusion that body scanners are "essential" to airport security.

The TSA offers no evidence to support its conclusion that body scanners are an "essential component" of the airport security system. 81 Fed. Reg. at 11,393, JA 31. Indeed, most of the evidence discussed by the agency tends to show just the opposite. Body scanners are one way to detect "non-metallic anomalies concealed under clothing," which are not clearly identified as a primary threat to airport security. *Id*., JA 31. The fact that TSA refuses to consider reasonable alternative screening methods is especially troubling given the conclusion reached by the DHS

Inspector General last year that the agency has developed a culture "which resisted oversight and was unwilling to accept the need for change in the face of an evolving and serious threat." *TSA: Security Gaps: Hearing Before the H. Comm. on Oversight and Government. Reform*, 114th Cong. 2 (2015) (statement of John Roth, Inspector General for the Department of Homeland Security), JA 741. The lack of evidence on the record concerning the effectiveness of the body scanners speaks volumes; the TSA's rulemaking process was arbitrary and capricious because it merely "suppli[ed] reasons to support a pre-ordained result." *Food Mktg. Inst.*, 587 F.2d at 1290.

This Court has previously overturned TSA orders when the agency "sa[id] too little" and provided the court with "no basis" to decide whether an order was "the product of reasoned decisionmaking." *Amerijet Int'l*, 753 F.3d at 1346. By extension, an agency action "supported with *no* explanation is the epitome of arbitrary and capricious decisionmaking." *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (emphasis in original) (internal quotation marks omitted).

Here the TSA has provided no basis to evaluate whether the regulation is the product of reasoned decisionmaking. The agency has only explained that the body scanners "detect anomalies" on individual passengers by "bounc[ing] electromagnetic waves off the body," and that a TSA screening officer will

conduct "a pat-down of the area where the anomaly is located" to "determine if a threat is present." 81 Fed. Reg. 11,365, JA 3. The claimed benefit of body scanners is that they are "capable of detecting both metallic and non-metallic" objects. *Id*., JA 3. But there is simply no evidence that body scanners play a "vital rule in decreasing the vulnerability of civil aviation." *Id*. at 11,366, JA 4.

The key question raised in the rulemaking is whether the use of body scanners for passenger screening increases security compared to the alternative screening methods available—whether body scanners are the "best" method for primary screening of passengers. Unfortunately, the TSA provides nothing more than a few anecdotal examples of items that have been discovered since body scanners were deployed in 2009, and most of these examples are either (1) metallic items that would have been detected by a WTMD, or (2) small items that do not pose a major threat to airport security. *See* Final RIA, *supra*, at 129–31, JA 172–73; EPIC Comments, *supra*, at 18. The TSA also fails to offer any comparison between the benefits offered by the use of randomized ETD testing versus the use of body scanners for primary screening.

What is clear from the TSA's "layered security approach," Final RIA, *supra*, at 39, JA 82, is that body scanners cannot, by definition, be "essential" to airport security. The TSA concedes that "the most effective means to address" threats to airport security is with a "comprehensive security system" that includes ETD and

other screening methods. 81 Fed. Reg. at 11,375, JA 13. The TSA also concedes that "most passengers do not pose a risk to aviation security." *Id*. at 11,376, JA 14. That is, in fact, the agency's entire justification for TSA Pre-Check, which allows certain travelers to pass through a minimal security checkpoint that does not rely on body scanners or other enhanced screening rules. *Id*., JA 14. And according to the TSA even passengers who are not screened through TSA Pre-Check are allowed to bypass the body scanners on a regular basis—the agency claims that "[m]ost AIT machines are co-located with a WTMD and service passengers from two x-ray machines" in order to maintain sufficient passenger throughput. Final RIA, *supra*, at 43, JA 86. The fact that the TSA relies on WTMDs to screen passengers during "overflow" periods, *id*. at 46, JA 89, shows that primary screening by body scanner is not essential to airport security.

A court should only uphold an order under arbitrary and capricious review where the agency examined the relevant data and articulated a satisfactory explanation for its action and made a rational connection between the facts found and the choice made. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In reviewing the agency's explanation the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Bowman Transp. Inc. v.*

Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park*, 401 U.S. at 416.

In this case, the agency has not offered facts that support its decision to use body scanners for primary screening of airport passengers. Given the agency's history of quickly deploying body scanners without sufficient testing or APA review, and the high costs associated with changing screening procedures, it appears that TSA had already determined it would continue to use body scanners for passenger screening, and simply sought to supply "reasons to support a pre-ordained result." *Food Mktg. Inst.*, 587 F.2d at 1290.

The agency has offered no explanation for why body scanners are essential to airport security or how they could be better suited to addressing vulnerabilities than the ETDs that were specifically designed to detect explosives. Furthermore, the agency has failed to consider a reasonable alternative that avoids the invasion of passenger privacy through the creation of nude images and the exposure of sensitive medical conditions.

II. TSA violated the APA by denying passengers right to opt out in the final rule without providing notice in the NPRM.

Even if the TSA had engaged in a reasoned decisionmaking process regarding the use of body scanners on airline passengers, the final rule should still be overturned because it is not a logical outgrowth of the agency's prior proposal. Under 5 U.S.C. § 553(b)(3), an agency seeking to issue a rule is required to give

advance notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved." That notice must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (citing *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)). The adequacy of the agency's notice depends on the "relationship between the proposed regulation and the final rule." *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991).

Though the agency's final rule "need not be identical" to the Notice of Proposed Rulemaking, *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009), the agency "may promulgate a rule that differs from a proposed rule only if the final rule is a 'logical outgrowth' of the proposed rule." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) (citing *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012)). This is known as the "logical outgrowth test." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016). The test asks whether "the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed," *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994), such that "the purposes of notice and comment have been

adequately served.'" *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

A final rule that differs from a proposed rule satisfies the logical outgrowth test only "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX*, 584 F.3d at 1079–80 (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)). A rule fails the logical outgrowth test, however, if "interested parties would have had to 'divine [the agency's] unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule." *CSX*, 584 F.3d at 1080 (citing *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259–60 (D.C. Cir. 2005)). This occurs, for instance, "where the proposed rule gave no indication that the agency was considering a different approach, and the final rule reveal[s] that the agency ha[s] completely changed its position." *Id.* at 1081.

In *United Mine Workers*, this Court found that a final rule imposing a new air velocity cap on coal mining belts was not a logical outgrowth of a proposed rule that had promised just the opposite: "that it did not include a maximum velocity air cap." 407 F.3d at 1260. Though the agency had invited commentary on related subjects—such as *minimum* air velocity—it had given no indication that it "would consider abandoning [its] proposed regulatory approach" on maximum velocity. *Id.*

Similarly, in *Environmental Integrity Project v. EPA*, this Court found that a final rule declaring two different regulatory standards to be interchangeable was not a logical outgrowth of a proposed rule that had insisted the two standards were distinct. 425 F.3d 992, 997–98 (D.C. Cir. 2005). "Whatever a 'logical outgrowth' of this proposal may include," the Court wrote, "it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Id.* at 998.

In declaring that it can subject travelers to whole body scanners without an opt-out alternative, TSA has done what *United Mine Works* and *Environmental Integrity Project* forbid. TSA made clear in its NPRM—three times—that passengers have the right to choose physical screening over a body scanner. First, TSA quoted with approval this Court's ruling in *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011):

> The Court also pointed out that passengers are not required to go through the AIT screening process. The Court stated "no passenger is ever required to submit to an AIT scan * * * [and] signs at the security checkpoint notify passengers they may opt instead for a patdown."

78 Fed. Reg. 18,293 (quoting *EPIC*, 653 F.3d at 3), JA 422. The Court, in so writing, had relied on TSA's representations in its briefing and argument:

> TSA communicates and provides a meaningful alternative to AIT screening. TSA posts signs at security checkpoints clearly stating that AIT screening is optional, and TSA includes the same information on its website.

Initial Brief for Respondents at 11, *EPIC*, 653 F.3d 1 (No. 10-1157).

Next, under the heading of "Privacy Safeguards for AIT," TSA reiterated that passengers can decline to be screened using body scanners:

> [I]ndividuals may opt-out of the AIT in favor of physical screening. TSA provides notice of the use of AIT and the opt-out option at the checkpoint so that individuals may exercise an informed judgment on AIT. Signs are posted that explain the technology and state ''use of this technology is optional. If you choose not to be screened by this technology you will receive a thorough pat down."

78 Fed. Reg. 18,294, JA 423. The opt-out alternative exists "to give further effect to the Fair Information Practice Principles that are the foundation for privacy policy and implementation at DHS," the agency emphasized. *Id.*

Finally, if the point were not yet clear, TSA made it once more under the "AIT Procedures at the Checkpoint" heading:

> AIT screening is currently optional, but when opting out of AIT screening, a passenger will receive a pat-down. When TSA deploys AIT equipment at a screening lane, a sign is posted to inform the public that AIT may be used as part of the screening process prior to passengers entering the machine so that each passenger may exercise an informed decision on the use of AIT.

78 Fed. Reg. 18,296, 425.

Far from being a logical outgrowth of the NPRM, TSA's final rule departs radically from its earlier assurances of a right to opt out. Without "the merest hint," *Kooritzky*, 17 F.3d at 1513, that the agency might jettison an essential privacy

safeguard—one that it had trumpeted to the Court and to parties interested in its rulemaking—TSA did exactly that in its final rule:

> TSA also notes that it may require AIT use, without the opt-out alternative, as warranted by security considerations in order to safeguard transportation security. Thus, TSA has not codified an opt-out alternative in this rule.

81 Fed. Reg. 11,388–89, JA 26–27.

Though the TSA "request[ed] comment . . . on the ability of passengers to opt-out of AIT screening," 78 Fed. Reg. 18,294, JA 423, the agency gave no indication that it might strip travelers of their right to opt out of body scanners ("no passenger is ever required to submit to an AIT scan") and replace it with a lurking requirement to use them ("[TSA] may require AIT use, without the opt-out alternative"). To the contrary, TSA characterized the opt-out alternative as central to "privacy policy and implementation at DHS," *id.*, and to travelers' "informed decision on the use of AIT." *Id.* at 18,296, JA 425. The agency thus "allayed any fears" that the policy was "on the table." *Kooritzky*, 17 F.3d at 1513.

Just as the agencies did in *United Mine Works* and *Environmental Integrity Project*, TSA performed an about-face, presenting one rule concerning privacy and ultimately "adopt[ing] its inverse." *Envtl. Integrity Project*, 425 F.3d at 997–98. The notice requirement of 5 U.S.C. § 553(b)(3) exists to prevent agencies from pulling such a "surprise switcheroo" in rulemaking. *Envtl. Integrity Project*, 425 F.3d at 996. In failing to alert interested parties that the agency might "adopt[] a

rule different than the one proposed," *Kooritzky*, 17 F.3d at 1513, TSA frustrated "the purposes of notice and comment," *Fertilizer Institute*, 935 F.2d at 1311, and left interested parties to "divine [the agency's] unspoken thoughts" about the opt-out alternative. *United Mine Workers*, 407 F.3d at 1259–60. TSA's final body scanner rule therefore fails the logical outgrowth test.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Review, vacate the TSA Order, and remand for further proceedings.

Respectfully submitted,

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Dated: December 19, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e) because it contains 11,173 words, excluding parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Marc Rotenberg
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 19th day of December 2016, he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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STATUTORY AND REGULATORY ADDENDUM

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5 U.S.C. § 553 – Rulemaking

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

* * *

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

49 U.S.C. § 114 – Transportation Security Administration

(a) In General.—The Transportation Security Administration shall be an administration of the Department of Transportation.

(b) Under Secretary.—

(1) Appointment.—The head of the Administration shall be the Under Secretary of Transportation for Security. The Under Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

49 U.S.C. § 44901 – Screening passengers and property

(a) In General.—The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and

shall be carried out by a Federal Government employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in section 44919 or 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.

* * *

(l) Limitations on Use of Advanced Imaging Technology for Screening Passengers.—

(1) Definitions.—In this subsection, the following definitions apply:

(A) Advanced imaging technology.—The term "advanced imaging technology"—

(i) means a device used in the screening of passengers that creates a visual image of an individual showing the surface of the skin and revealing other objects on the body; and

(ii) may include devices using backscatter x-rays or millimeter waves and devices referred to as "whole-body imaging technology" or "body scanning machines".

(B) Appropriate congressional committees.—The term "appropriate congressional committees" means—

(i) the Committee on Commerce, Science, and Transportation and the Committee on Homeland Security and Governmental Affairs of the Senate; and

(ii) the Committee on Homeland Security of the House of Representatives.

(C) Automatic target recognition software.— The term "automatic target recognition software" means software installed on an advanced imaging technology that produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals.

(2) Use of advanced imaging technology.—Beginning June 1, 2012, the Assistant Secretary of Homeland Security (Transportation Security Administration) shall ensure that any advanced imaging technology used for the screening of passengers under this section—

(A) is equipped with and employs automatic target recognition software; and

(B) complies with such other requirements as the Assistant Secretary determines necessary to address privacy considerations.

49 U.S.C. § 44925 – Deployment and use of detection equipment at airport screening checkpoints

(a) Weapons and Explosives.—The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property. The Secretary shall ensure that the equipment alone, or as part of an integrated system, can detect under realistic operating conditions the types of weapons and

explosives that terrorists would likely try to smuggle aboard an air carrier aircraft.

49 U.S.C. § 46110 – Judicial review

(a) Filing and Venue.—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.