APPENDIX

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ELECTRONIC PRIVACY INFORMATION CENTER, et al., Petitioners

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Respondents.

No. 10–1157.

United States Court of Appeals, District of Columbia Circuit.

Argued March 10, 2011.

Decided July 15, 2011.

Rehearing En Banc Denied Sept. 12, 2011.

Background: Organization and two individuals petitioned for review of a decision by the Transportation Security Administration (TSA) to screen airline passengers by using advanced imaging technology (AIT) instead of magnetometers.

Holdings: The Court of Appeals, Ginsburg, Circuit Judge, held that:

(1) TSA rule constituted a substantive legislative rule subject to notice-and-comment rulemaking requirements, and

(2) screening of airline passengers by use of AIT constituted an administrative search that did not violate Fourth Amendment.

Petition granted in part; remanded.

1. Aviation ⚿223

Fact that relief actually sought by petitioners was the immediate suspension of Transportation Security Administration (TSA)'s program to screen airline passengers using advanced imaging technology (AIT) did not preclude petitioners' challenge to TSA's failure to engage in notice-and-comment rulemaking on ground that their petition did not seek "issuance, amendment, or repeal of a rule." 5 U.S.C.A. § 553(e).

2. Administrative Law and Procedure ⚿797

An agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference given to agency action under arbitrary and capricious review. 5 U.S.C.A. § 706(2)(A).

3. Administrative Law and Procedure ⚿382.1, 394

In general, a "procedural rule" not subject to notice-and-comment rulemaking requirements does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency. 5 U.S.C.A. § 553(b)(3)(A).

See publication Words and Phrases for other judicial constructions and definitions.

4. Aviation ⚿223

Transportation Security Administration (TSA) rule allowing screening of airline passengers by use of advanced imaging technology instead of magnetometers constituted a substantive legislative rule subject to notice-and-comment rulemaking requirements; rule could not be characterized as a procedural rule, an interpretative rule, or a general statement of policy not subject to rulemaking requirements since the change substantively affected the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking, and substantially changed the experience of airline passengers and therefore not merely "interpretative" either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures. 5 U.S.C.A. § 553(b)(3)(A); 49 U.S.C.A. § 44925.

5. Administrative Law and Procedure ⚿382.1, 394

Practical question inherent in the distinction between legislative rules subject to

notice-and-comment rulemaking requirements and interpretive regulations not subject to those requirements is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime. 5 U.S.C.A. § 553(b)(3)(A).

6. Administrative Law and Procedure ⚿394

An agency pronouncement will be considered binding as a practical matter, and thus subject to notice-and-comment rulemaking requirements, if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding; it is enough for the agency's statement to "purport to bind" those subject to it, that is, to be cast in mandatory language so the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences. 5 U.S.C.A. § 553(b)(3)(A).

7. Disorderly Conduct ⚿123

Video Voyeurism Prevention Act (VVPA) did not apply to Transportation Security Administration's (TSA) screening of airline passengers by use of advanced imaging technology instead of magnetometers; TSA's screening fell within Act's exemption for "lawful law enforcement, correctional, or intelligence activity." 18 U.S.C.A. § 1801(c).

8. Searches and Seizures ⚿72

Transportation Security Administration's (TSA) screening of airline passengers by use of advanced imaging technology (AIT) instead of magnetometers constituted an administrative search that did not violate Fourth Amendment; need to search airline passengers to ensure public safety was particularly acute, an AIT scanner, unlike a magnetometer, was capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form, and any passenger could opt-out of AIT screening in favor of a patdown, which allowed him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive was least invasive. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⚿79

An administrative search does not require individualized suspicion. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⚿79

Whether an administrative search is "unreasonable" within the condemnation of the Fourth Amendment is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. U.S.C.A. Const. Amend. 4.

On Petition for Review of an Order of the U.S. Department of Homeland Security.

Marc Rotenberg argued the cause for petitioners. With him on the briefs was John Verdi.

Beth S. Brinkmann, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for respondents. On the briefs were Douglas N. Letter and John S. Koppel, Attorneys.

Before: GINSBURG, HENDERSON and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The Electronic Privacy Information Center (EPIC) and two individuals petition for review of a decision by the Transportation Security Administration to screen airline passengers by using advanced imaging

technology instead of magnetometers. They argue this use of AIT violates various federal statutes and the Fourth Amendment to the Constitution of the United States and, in any event, should have been the subject of notice-and-comment rulemaking before being adopted. Although we are not persuaded by any of the statutory or constitutional arguments against the rule, we agree the TSA has not justified its failure to issue notice and solicit comments. We therefore grant the petition in part.

I. Background

By statute, anyone seeking to board a commercial airline flight must be screened by the TSA in order to ensure he is not "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. §§ 44901(a), 44902(a)(1). The Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public. In addition to the SOPs, the agency has promulgated a blanket regulation barring any person from entering the so-called "sterile area" of an airport, the area on the departure side of the security apparatus, "without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such area[ ]." 49 C.F.R. § 1540.105(a)(2). The Congress did, however, in 2004, direct the TSA to "give a high priority to developing, testing, improving, and deploying" at airport screening checkpoints a new technology "that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms." Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. No. 108–458, § 4013(a), 118 Stat. 3719 (codified at 49 U.S.C. § 44925(a)).

The TSA responded to this directive by contracting with private vendors to develop AIT for use at airports. The agency has procured two different types of AIT scanner, one that uses millimeter wave technology, which relies upon radio frequency energy, and another that uses backscatter technology, which employs low-intensity X-ray beams. Each technology is designed to produce a crude image of an unclothed person, who must stand in the scanner for several seconds while it generates the image. That image enables the operator of the machine to detect a nonmetallic object, such as a liquid or powder—which a magnetometer cannot detect—without touching the passengers coming through the checkpoint.

The TSA began to deploy AIT scanners in 2007 in order to provide additional or "secondary" screening of selected passengers who had already passed through a magnetometer. In 2009 the TSA initiated a field test in which it used AIT as a means of primary screening at a limited number of airports. Based upon the apparent success of the test, the TSA decided early in 2010 to use the scanners everywhere for primary screening. By the end of that year the TSA was operating 486 scanners at 78 airports; it plans to add 500 more scanners before the end of this year.

No passenger is ever required to submit to an AIT scan. Signs at the security checkpoint notify passengers they may opt instead for a patdown, which the TSA claims is the only effective alternative method of screening passengers. A passenger who does not want to pass through an AIT scanner may ask that the patdown be performed by an officer of the same sex and in private. Many passengers nonetheless remain unaware of this right, and some who have exercised the right have complained that the resulting patdown was unnecessarily aggressive.

The TSA has also taken steps to mitigate the effect a scan using AIT might have upon passenger privacy: Each image produced by a scanner passes through a filter to obscure facial features and is viewable on a computer screen only by an officer sitting in a remote and secure room. As soon as the passenger has been cleared, moreover, the image is deleted; the officer cannot retain the image on his computer, nor is he permitted to bring a cell phone or camera into the secure room. In addition to these measures to protect privacy, the agency has commissioned two studies of the safety of the scanners that use backscatter technology, each of which has found the scanners emit levels of radiation well within acceptable limits. Millimeter wave scanners are also tested to ensure they meet accepted standards for safety.

The petitioners, for their part, have long been unsatisfied with the TSA's efforts to protect passengers' privacy and health from the risks associated with AIT. In 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. They asked that the TSA cease using AIT in that capacity pending "a 90–day formal public rulemaking process." The TSA responded with a letter addressing the organizations' substantive concerns but ignoring their request for rulemaking.

Nearly a year later, in April 2010, the EPIC and a slightly different group of organizations sent the Secretary and her Chief Privacy Officer a second letter, denominated a "petition for the issuance, amendment, or repeal of a rule" pursuant to 5 U.S.C. § 553(e). They argued the use of AIT for primary screening violates the Privacy Act; a provision of the Homeland Security Act requiring the Chief Privacy Officer upon the issuance of a new rule to prepare a privacy impact assessment; the Religious Freedom Restoration Act (RFRA); and the Fourth Amendment. In May the TSA again responded by letter, clarifying some factual matters, responding to the legal challenges, and taking the position it is not required to initiate a rulemaking each time it changes screening procedures. In July, the EPIC, joined by two members of its advisory board who travel frequently and have been subjected to AIT screening by the TSA, petitioned this court for review.

II. Analysis

The petitioners focus their opening brief upon their substantive challenges to the TSA's decision to use AIT for initial screening. They raise all the legal claims foreshadowed in their request for rulemaking, as well as a claim under the Video Voyeurism Prevention Act. As explained below, however, our attention is most drawn to their procedural argument that the TSA should have engaged in notice-and-comment rulemaking.

A. Notice and Comment

[1] In their opening brief, the petitioners argue the TSA "refus[ed] to process" and "effectively ignored" their 2010 letter, which was "explicitly marked as a 'petition' " for rulemaking under § 553. The TSA responds that the petitioners did not petition "for the issuance, amendment, or repeal of a rule," as authorized by § 553(e), because "the relief actually sought [was] . . . the immediate suspension of the AIT program." A construction of § 553(e) that excludes any petition with a goal beyond mere process is dubious at best, and the agency offers no authority for it. The petitioners were clearly seeking "amendment[ ] or repeal of a rule"; that their aim was expressed in terms of

the substance of the rule surely does not work against them. Indeed, we would be surprised to find many petitions for rulemaking that do not identify the substantive outcome the petitioner wants the agency to reach.*

[2] Anticipating this conclusion, the TSA next argues it responded appropriately to the petition by denying it. We will set aside an agency's decision to deny a petition for rulemaking only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Moreover, "an agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference we give to agency action under our arbitrary and capricious review." *Defenders of Wildlife v. Gutierrez,* 532 F.3d 913, 919 (D.C.Cir.2008) (internal quotation marks omitted). Here, however, the TSA denied the petition on the ground it "is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures." Because this position rests upon an interpretation of the Administrative Procedure Act, the crux of our review turns upon our analysis of that statute. *See Am. Horse Prot. Ass'n, Inc. v. Lyng,* 812 F.2d 1, 5 (D.C.Cir.1987) (court may overturn decision to deny petition for rulemaking if based upon "plain errors of law" (internal quotation marks omitted)).

We turn, then, to § 553(b) and (c) of the APA, which generally require an agency to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal. *See U.S. Telecom Ass'n v. FCC,* 400 F.3d 29, 34 (D.C.Cir.2005) ("This court and many commentators have generally referred to the category of rules to which the notice-and-comment requirements do apply as 'legislative rules' "). As the TSA points out, however, the statute does provide certain exceptions to this standard procedure; in particular, as set forth in § 553(b)(3)(A), the notice and comment requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." The TSA argues its decision to use AIT for primary screening comes within all three listed categories and therefore is not a "legislative rule" subject to notice and comment.

1. Procedural Rule

[3, 4] We consider first the TSA's argument it has announced a rule of "agency organization, procedure, or practice," which our cases refer to as a "procedural rule." In general, a procedural rule "does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.' " *Chamber of Commerce of U.S. v. DOL,* 174 F.3d 206, 211 (D.C.Cir.1999) (quoting *Batterton v. Marshall,* 648 F.2d 694, 707 (D.C.Cir. 1980)). That is, the rule does "not impose new substantive burdens." *Aulenback, Inc. v. Fed. Highway Admin.,* 103 F.3d 156, 169 (D.C.Cir.1997). As we have noted before, however, a rule with a "substantial impact" upon the persons subject to it is not necessarily a substantive rule under § 553(b)(3)(A). *See Pub. Citizen v. Dep't of State,* 276 F.3d 634, 640–41 (2002). Further, the distinction between substantive and procedural rules is "one of degree" depending upon "whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the

* We have no need to reach petitioners' claim the TSA unreasonably delayed in responding to their 2009 letter; our remand to the agency of their 2010 petition for rulemaking gives them all the relief they would obtain in any event.

policies underlying the APA." *Lamoille Valley R.R. Co. v. ICC,* 711 F.2d 295, 328 (D.C.Cir.1983). Those policies, as we have elsewhere observed, are to serve "the need for public participation in agency decision-making," *Chamber of Commerce,* 174 F.3d at 211, and to ensure the agency has all pertinent information before it when making a decision, *Am. Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1044 (1987). In order to further these policies, the exception for procedural rules "must be narrowly construed." *United States v. Picciotto,* 875 F.2d 345, 347 (D.C.Cir.1989).

Of course, stated at a high enough level of generality, the new policy imposes no new substantive obligations upon airline passengers: The requirement that a passenger pass through a security checkpoint is hardly novel, the prohibition against boarding a plane with a weapon or an explosive device even less so. But this overly abstract account of the change in procedure at the checkpoint elides the privacy interests at the heart of the petitioners' concern with AIT. Despite the precautions taken by the TSA, it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not. Therefore, regardless whether this is a "new substantive burden," *see Aulenback,* 103 F.3d at 169, the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking. *Cf. Pickus v. Bd. of Parole,* 507 F.2d 1107, 1113–14 (D.C.Cir.1974) (rules governing parole hearings not procedural because they went "beyond formality and substantially affect[ed]" prisoners' liberty). Indeed, few if any regulatory procedures impose directly and significantly upon so many members of the public. Not surprisingly, therefore, much public concern and media coverage have been focused upon issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments had the TSA seen fit to solicit comments upon a proposal to use AIT for primary screening. To confirm these issues were relevant to the TSA's deliberations about AIT, we need look no further than its assurances to that effect in its response to the petitioners' 2010 letter: "AIT screening has proven effective in addressing ever-changing security threats, and numerous independent studies have addressed health concerns. TSA has carefully considered the important ... privacy issues." For these reasons, the TSA's use of AIT for primary screening has the hallmark of a substantive rule and, therefore, unless the rule comes within some other exception, it should have been the subject of notice and comment.

2. Interpretive Rule

The TSA next tries to justify having proceeded without notice and comment on the ground that it announced only an "interpretative" rule advising the public of its current understanding of the statutory charge to develop and deploy new technologies for the detection of terrorist weapons. For their part, the petitioners argue the rule is legislative rather than interpretive because it "effectively amends a prior legislative rule," *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C.Cir.1993), to wit, the secondary use of AIT only to back-up primary screening performed with magnetometers. *See also Sprint Corp. v. FCC,* 315 F.3d 369, 374 (D.C.Cir.2003) ("an amendment to a legislative rule must itself be legislative" (internal quotation marks omitted)).

[5] The practical question inherent in the distinction between legislative and interpretive regulations is whether the new rule effects "a substantive regulatory

change" to the statutory or regulatory regime. *U.S. Telecom Ass'n,* 400 F.3d at 34–40 (FCC effected substantive change when it required wireline telephone carriers to permit customers to transfer their telephone numbers to wireless carriers). For the reasons discussed in Part II.A.1, we conclude the TSA's policy substantially changes the experience of airline passengers and is therefore not merely "interpretative" either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures. Although the statute, 49 U.S.C. § 44925, does require the TSA to develop and test advanced screening technology, it does not specifically require the TSA to deploy AIT scanners let alone use them for primary screening. Concededly, there is some merit in the TSA's argument it has done no more than resolve an ambiguity inherent in its statutory and regulatory authority, but the purpose of the APA would be disserved if an agency with a broad statutory command (here, to detect weapons) could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation (here, requiring passengers to clear a checkpoint) and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations.

3. General Statement of Policy

[6] Finally, the TSA argues notice and comment is not required because, rather than promulgating a legislative rule, the agency, in announcing it will use AIT for primary screening, made a "general statement[ ] of policy." The question raised by the policy exception "is whether a statement is . . . of present binding effect"; if it is, then the APA calls for notice and comment. *McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1320 (D.C.Cir. 1988). Our cases "make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA,* 290 F.3d 377, 383 (D.C.Cir.2002) (internal citation omitted); *see also Chamber of Commerce,* 174 F.3d at 212–13. It is enough for the agency's statement to "purport to bind" those subject to it, that is, to be cast in "mandatory language" so "the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Gen. Elec.,* 290 F.3d at 383–84 (internal quotation marks omitted).

The TSA seems to think it significant that there are no AIT scanners at some airports and the agency retains the discretion to stop using the scanners where they are in place. More clearly significant is that a passenger is bound to comply with whatever screening procedure the TSA is using on the date he is to fly at the airport from which his flight departs. 49 C.F.R. § 1540.105(a)(2) (no passenger may enter the "sterile area" of an airport "without complying with the systems, measures, or procedures being applied to control access to" that area). To be sure, he can opt for a patdown but, as the TSA conceded at oral argument, the agency has not argued that option makes its screening procedures nonbinding and we therefore do not consider the possibility. We are left, then, with the argument that a passenger is not bound to comply with the set of choices presented by the TSA when he arrives at the security checkpoint, which is absurd.*

* The TSA's argument it has not promulgated a "rule" also fails because the question at issue is again whether the agency's pronouncement is or purports to be binding. *Cf. Amoco Prod.*

In sum, the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking. We therefore remand this matter to the agency for further proceedings. Because vacating the present rule would severely disrupt an essential security operation, however, and the rule is, as we explain below, otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation. *See Allied–Signal, Inc. v. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C.Cir.1993).

The agency asks us to "make clear that on remand, TSA is free to invoke the APA's 'good cause' exception" to notice-and-comment rulemaking, 5 U.S.C. § 553(b)(B) (exception "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"). We have no occasion to express a view upon this possibility other than to note we do not reach it.

B. Substantive Claims

We turn next to the statutory and constitutional claims raised by the petitioners. None of their arguments, as we explain below, warrants granting relief.

1. Statutory Claims

[7] The petitioners argue first that capturing images of passengers is unlawful under the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, a claim the TSA urges should be dismissed because it was not raised before the agency. *See* 49 U.S.C. § 46110(d) ("court may consider an objection to an order ... only if the objection was made in the proceeding conducted by the [agency] or if there was a reasonable ground for not making the objection in the proceeding"). As the petitioners argue, however, § 46110(d) presupposes there was an agency "proceeding" where the party could advance its argument in the first instance, the absence of which is the very matter at issue here. The TSA more helpfully reminds us the VVPA "does not [apply to] any lawful law enforcement, correctional, or intelligence activity." 18 U.S.C. § 1801(c). Because the only "unlawfulness" the petitioners claim in order to get around that exception is the alleged violation of the Fourth Amendment, which we reject below, and their argument the TSA does not engage in "law enforcement, correctional, or intelligence activity" borders upon the silly, we conclude the exception applies here.

The petitioners next argue the TSA's use of AIT violates the Privacy Act, 5 U.S.C. § 552a, a statute that applies only insofar as the Government maintains a "system of records" from which it can retrieve a record by using an individual's name or other identifying information, *see id.* § 552a(a)(5), (e)(4); *Maydak v. United States,* 363 F.3d 512, 515 (D.C.Cir.2004). Here the TSA points out it does not maintain data from AIT scanners in a "system of records" linked to names or any other identifier. Even if, as the petitioners speculate, the TSA has the ability to combine various sources of information and then to link names to the images produced using AIT, their Privacy Act claim still fails because they offer no reason to believe the TSA has in fact done that. *See Henke v. Dep't of Commerce,* 83 F.3d 1453, 1460–61 (D.C.Cir.1996) ("retrieval capability is not sufficient to create a system of records").

The petitioners also claim the Chief Privacy Officer of the DHS failed to discharge her statutory duties generally to "assur[e] that the use of technologies" does not "erode[ ] privacy protections"

Co. v. Watson, 410 F.3d 722, 732 (D.C.Cir. 2005).

and, more specifically, to make an assessment of the rule's impact upon privacy. *See* 6 U.S.C. § 142(a)(1), (4). The CPO has, however, prepared three privacy impact assessments of the AIT program. Although, as the petitioners point out, the CPO made those assessments before the agency decided to extend the use of AIT from primary screening at six airports and secondary screening at selected others to primary screening at every airport, she also explained she would update the assessments "as needed." Mary Ellen Callahan, *Privacy Impact Assessment Update for TSA Whole Body Imaging* 10 (July 23, 2009). We infer from the absence of any subsequent assessment a determination by the CPO that her prior efforts remain sufficient to cover the impact upon privacy of the expanded use of AIT, *see Lichoulas v. FERC,* 606 F.3d 769, 780 n. 8 (D.C.Cir. 2010) (presumption of regularity attaches to actions by administrative officials); the petitioners have failed to show that determination is arbitrary or capricious, *see* 5 U.S.C. § 706(2)(A). As for the broad claim under § 142(a)(1) that the CPO has not done enough to safeguard privacy, the petitioners make no more specific objection that would enable us to disturb the CPO's conclusion that the privacy protections built into the AIT program are sufficiently "strong." Therefore this argument fails as well.

Last, the petitioners claim the use of AIT violates the RFRA, 42 U.S.C. § 2000bb *et seq.,* because revealing a person's naked body "offends the sincerely held beliefs of Muslims and other religious groups." The TSA argues that Nadhira Al–Khalili, the only person the petitioners assert has any religiously founded objection to AIT, is not a proper party because she is not named in the petition for review, *see* FED. R.APP. P. 15(a) (petition must "name each party seeking review"); indeed, she first appeared as a purported party in the petitioners' opening brief. The petitioners respond that their opening brief should be treated as a complaint is treated in the district court, that is, as the appropriate document in which to list the complaining parties. They provide no reasoning to support this assertion and the case they cite actually says something quite different: " 'A petition for review . . . is analogous to a complaint[,] in which all parties must be named.' " *Elkins Carmen v. STB,* 170 F.3d 1144, 1145 (D.C.Cir.1999) (quoting FED. R.APP. P. 15(a) advisory committee's note).

Next, the petitioners contend their claims and Al–Khalili's should be considered as one because she is legal counsel for an organization that was a party to their 2010 letter, the TSA's response to which is here under review. The case they cite for support, *Rampengan v. Gonzales,* 206 Fed.Appx. 248, 252 (4th Cir.2006), concerned a family of four who had jointly applied for asylum and, having been treated in an administrative proceeding as a single party under the husband's name, listed only his name in their petition for review of the administrative decision. Al–Khalili, in contrast, claims no familial or agency or other formal relationship with any other petitioner; her employer, despite having joined the letter to the TSA, did not petition for review. Accordingly, neither Al–Khalili nor her employer is before us and, there being no actual petitioner with standing to assert a religious injury cognizable under the RFRA, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (no standing absent an injury-in-fact fairly traceable to the challenged conduct and likely to be redressed by a favorable decision); *see also Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (litigant "generally must assert his own legal rights and interests, and cannot

rest his claim to relief on the legal rights or interests of third parties"), that claim must be dismissed.

2. Fourth Amendment Claim

[8] Finally, the petitioners argue that using AIT for primary screening violates the Fourth Amendment because it is more invasive than is necessary to detect weapons or explosives. In view of the Supreme Court's "repeated[ ] refus[al] to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment," *City of Ontario v. Quon*, —— U.S. ——, 130 S.Ct. 2619, 2632, 177 L.Ed.2d 216 (2010) (internal quotation marks omitted), and considering the measures taken by the TSA to safeguard personal privacy, we hold AIT screening does not violate the Fourth Amendment.

[9, 10] As other circuits have held, and as the Supreme Court has strongly suggested, screening passengers at an airport is an "administrative search" because the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack. *See United States v. Aukai*, 497 F.3d 955, 958–63 (9th Cir.2007) (en banc) (passenger search at airport checkpoint); *United States v. Hartwell*, 436 F.3d 174, 178–81 (3d Cir.2006) (Alito, J.) (same); *United States v. Edwards*, 498 F.2d 496, 499–501 (2d Cir.1974) (Friendly, J.) (carry-on baggage search at airport); *see also Illinois v. Lidster*, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004) (police set up checkpoint to obtain information about earlier crash); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (sobriety checkpoint). An administrative search does not require individualized suspicion. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 47–48, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (individualized suspicion required when police checkpoint is "primarily [for] general crime control," that is, "to detect evidence of ordinary criminal wrongdoing" unlike "searches at places like airports . . . where the need for such measures to ensure public safety can be particularly acute"). Instead, whether an administrative search is "unreasonable" within the condemnation of the Fourth Amendment "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118–19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (internal quotation marks omitted).

That balance clearly favors the Government here. The need to search airline passengers "to ensure public safety can be particularly acute," *Edmond*, 531 U.S. at 47–48, 121 S.Ct. 447, and, crucially, an AIT scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form. On the other side of the balance, we must acknowledge the steps the TSA has already taken to protect passenger privacy, in particular distorting the image created using AIT and deleting it as soon as the passenger has been cleared. More telling, any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.

Contrary to the EPIC's argument, it is not determinative that AIT is not the last step in a potentially escalating series of search techniques. In *Hartwell*, from which the petitioners tease out this argument, the Third Circuit upheld an airport search that started with a walk-through magnetometer, thence to scanning with a

hand-held magnetometer and, when the TSA officer encountered a bulge in the passenger's pocket, progressed (according to the passenger) to the officer's removing a package of crack cocaine from that pocket. 436 F.3d at 175–76. The court noted, however, that its opinion, while describing the search at issue there as "minimally intrusive," did "not purport to set the outer limits of intrusiveness in the airport context." *Id.* at 180 & n. 10. Nothing in *Hartwell*, that is, suggests the AIT scanners must be minimally intrusive to be consistent with the Fourth Amendment.

III. Conclusion

To sum up, first, we grant the petition for review insofar as it claims the TSA has not justified its failure to initiate notice-and-comment rulemaking before announcing it would use AIT scanners for primary screening. None of the exceptions urged by the TSA justifies its failure to give notice of and receive comment upon such a rule, which is legislative and not merely interpretive, procedural, or a general statement of policy. Second, we deny the petition with respect to the petitioners' statutory arguments and their claim under the Fourth Amendment, except their claim under the RFRA, which we dismiss for lack of standing. Finally, due to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it, and instruct the agency promptly to proceed in a manner consistent with this opinion.

So ordered.

Moath Hamza Ahmed AL ALWI, Detainee, Appellant

v.

Barack OBAMA, President of the United States, et al., Appellees.

No. 09–5125.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 4, 2010.

Decided July 22, 2011.

Background: Alien detained at United States Naval Station at Guantanamo Bay, Cuba, as an enemy combatant, petitioned for writ of habeas corpus. The United States District Court for the District of Columbia, 593 F.Supp.2d 24, denied the petition. Alien appealed.

Holdings: The Court of Appeals, Garland, Circuit Judge, held that:

(1) alien was "part of" al Qaeda or the Taliban, justifying his detention under the Authorization for Use of Military Force (AUMF);

(2) district court did not abuse its discretion in denying alien's motion for a continuance; and

(3) district court did not abuse its discretion by refusing to issue further discovery orders.

Affirmed.

1. Habeas Corpus ⚿842, 843, 846

A court of appeals reviews a district court's findings of fact for clear error, its habeas determination de novo, and any challenged evidentiary rulings for abuse of discretion.

2. Habeas Corpus ⚿842

Whether a detainee's alleged conduct justifies his detention under the Authoriza-

ARGUED MARCH 10, 2011; DECIDED JULY 15, 2011
REHEARING DENIED SEPTEMBER 12, 2011
MANDATE ISSUED SEPTEMBER 21, 2011

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.

PETITIONERS' MOTION TO ENFORCE THE COURT'S MANDATE

MARC ROTENBERG
JOHN VERDI
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

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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

INDEX OF EXHIBITS

INTRODUCTION

Petitioners move to enforce this Court's mandate – requiring Respondents to "act promptly" to comply with this Court's decision and "cure the defect in its promulgation" of the rule requiring the use of whole body imaging as primary screening for air travelers. As set forth below, Respondents have delayed for more than two years since the change in agency practice that gave rise to the original petition requesting a public rulemaking. The time for delay has passed, and Respondents must, as this Court ordered, "act promptly" to seek public comment.

On July 15, 2011, this Court granted in part the Electronic Privacy Information Center ("EPIC"), Chip Pitts, and Bruce Schneier's Petition for Review in the present case. This Court held that implementation of the Whole Body Imaging ("WBI") program by Respondent Transportation Security Administration ("TSA"), a Department of Homeland Security ("DHS") component, was a substantive, legislative rule subject to the notice and comment requirements of 5 U.S.C. § 553 (2006). This Court stated that "few if any regulatory procedures impose directly and significantly upon so many members of the public" as TSA's airport screening procedures. *EPIC v. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011). The public is entitled, as a matter of law, to comment on this program.

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); *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). 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). This Court has made clear that it has the authority to "grant relief enforcing the terms of its earlier mandate." *Int'l Ladies' Garment Workers' Union*, 733 F.2d at 922. "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

Petitioners' Motion to Enforce the Court's Mandate in this matter asks the Court to set a prompt schedule, 45 days, for the Respondent DHS to comply with the Court's order and initiate formal rulemaking for its WBI program. The TSA implemented the WBI program prior to the initiation of this matter, but failed to make public the text of the rule or its date, and failed to solicit public comment.[1]

[1] The first public note of the change in TSA policy appeared in an April 6, 2009 newspaper article. Joe Sharkey, "Whole-Body Scans Pass First Airport Tests," N.Y. TIMES, Apr. 6, 2009 at B6 ("In a shift, the Transportation Security

I. EPIC's Petition for Formal Rulemaking; DHS's Refusal to Initiate

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*, 653 F.3d at 4. EPIC and the groups ceased using WBI for primary screening pending 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.,* on April 21, 2010, EPIC and 30 organizations sent a formal § 553(e) petition to DHS Secretary Napolitano and Chief Privacy Officer Mary Ellen Callahan, requesting suspension of the TSA's WBI program pending further review and public rulemaking. On May 28, 2010, the TSA responded to the petition and asserted that it was not required under the APA to initiate rulemaking procedures related to the WBI program.

II. This Court's July 15, 2011 Decision

On July 15, 2011, this Court held that the DHS's decision to implement the WBI program for primary airport screening was a legislative rule subject to APA notice and comment requirements, and that the DHS "has advanced no justification

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Administration plans to replace the walk-through metal detectors at airport checkpoints with whole-body imaging machines — the kind that provide an image of the naked body.")

for having failed to conduct notice-and-comment rulemaking." *EPIC*, 653 F.3d at 8. This Court rejected the various DHS arguments that its decision fell within the three categories of exempted rules in 5 U.S.C. § 553(b)(3)(A) (2006) (notice and comment requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). First, this Court found that the DHS's decision to implement the WBI program was a substantive rule and not a "procedural rule" (meaning "rules of agency organization, procedure, or practice"). 652 F.3d at 6. Second, this Court found that the DHS's decision was not an "interpretive rule" because it "effects a substantive regulatory change." *Id.* at 6-7 (citation omitted). Finally, this Court found that the DHS's decision was not a "general statement of policy" because it would be "absurd" to argue that a "passenger is not bound to comply with the set of choices presented by the DHS when he arrives at the security checkpoint." *Id.* at 7.

The implementation of the WBI program was, as this Court recognized, a rule requiring formal APA rulemaking procedures. The Court remanded the rule to the TSA with instruction "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 delay formal rulemaking.

III. This Court's September 12, 2011 Decision

On September 12, 2011, this Court denied EPIC's petition for rehearing and rehearing en banc in this case, and finalized its prior decision. At this point more than two years had passed since the DHS first instituted its WBI program without conducting formal rulemaking. Nearly two months had passed since this Court's decision, which clearly established that the DHS's implementation of the WBI program was a rule subject to the APA's formal rulemaking requirements. During the entire course of EPIC's petition process, the DHS has refused to undertake the formal rulemaking procedures that, as this Court held, are required by law. The DHS has continued to drag its heels even after this Court's unambiguous mandate was issued.

IV. This Court's September 21, 2011 Mandate

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. This Court's decision made clear to the DHS that it was required to "cure the defects" of its rulemaking procedures, but the DHS has failed to do so promptly.

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, even if the noncompliance was due to misinterpretation…." *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). Where an agency decision is remanded to the agency, the court will determine whether the agency adequately complied with the court's order. *Id.* (citing *Sec. & Exch. Comm'n v. Hermil, Inc.,* 838 F.2d 1151, 1153 (11th Cir. 1988)). The court has a strong interest in "seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies' Garment Workers' Union*, 733 F.2d at 922.

II. DHS Has Failed to Act Promptly and Comply with the Court's Mandate

The DHS did not respond to this Court's July 15th decision by promptly issuing a notice of proposed rulemaking and soliciting public comments. Instead, the DHS took no action. Even after this Court issued the mandate on September 21st, the agency has given no indication that it intends to "proceed in a manner

consistent with" the Court's decision. Clearly such inaction is not consistent with the "letter or spirit," *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), 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 its formal rulemaking process as 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 before the issuance of a final rule. *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 publish a proposed rule and engage in the public comment process within 45 days, or to justify its failure to do so. *See, e.g., Bldg. & Const. Trades Dept. AFL-CIO v. Dole,* No. 86-1359, 1989 WL 418934 (D.C. Cir. Oct. 30, 1989) (ordering OSHA to comply within 45 days or to explain its inaction to the court and the parties).

The lack of response to this Court's unambiguous order should be recognized, and the DHS should be afforded no further leeway in the rulemaking process required by the APA. If the DHS refuses to "cure the defect in its

promulgation" then its actions must be set aside, or the APA requirements must be otherwise enforced by this Court.

A. DHS Has Not Conducted Formal Rulemaking As Required by Law

The Administrative Procedure Act ("APA") generally requires "an agency to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal." *EPIC*, 653 F.3d at 5 (referring to 5 U.S.C. § 553(b) and (c)). As this Court made clear in its July 15, 2011 decision, the DHS has "advanced no justification for having failed to conduct notice-and-comment rulemaking." *Id.* at 8. The DHS denied EPIC's original petition for rulemaking under §553, relying on its interpretation of the APA requirements. *Id.* at 5. This Court found that the DHS's denial was based on "plain errors of law" and remanded to the agency for further proceedings. *Id.* at 5, 8. The DHS has not conducted further proceedings or otherwise complied with this Court's order.

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 has published more than seventy notices related to more than twenty proposed rules ("NPRM") since the July 15, 2011 Order. This is all the more remarkable considering the far-reaching impact of the airport screening program on the American public, as noted by the Court in its opinion, *id*. at 8, as compared with the matters in which the agency seeks public comment. For example, on August 3, 2011, the DHS published a NPRM seeking comment on the agency's ammonium nitrate security program. Notice of Proposed Rule, 76 Fed. Reg. 46907 (Aug. 3, 2011). On September 8, 2011, the DHS published a proposed rule seeking comment on the treatment of aliens subject to EB-5 petitions. Notice of Proposed Rule, 76 Fed. Reg. 59927 (Sept. 28, 2011). Clearly the DHS is capable and willing to engage in formal rulemaking procedures in other contexts. However, in contravention of this Court's order, DHS has not initiated formal rulemaking procedures for the WBI rule. Instead, it 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.[2]

B. DHS Has Not Solicited Public Comment, Even After This Court Recognized That Few Programs Impose so "Directly and Significantly Upon" the Public

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 over the past two years since it chose to make WBI the primary screening technique to publish a rule and solicit public comments, but it has refused to do so.

This Court already granted the DHS substantial leeway when it declined to vacate the WBI program on remand. *Id.* 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 deny the public comment process required by law. This Court has

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

already informed DHS that "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 refused to solicit or otherwise avail itself of public comments related to its WBI program.

C. DHS Has Not Acted Promptly as Ordered by This Court

The Court's July 15, 2011 Opinion requires the agency to "promptly … initiate notice-and-comment rulemaking" concerning the agency's rule implementing whole body imaging technology for primary screening. Jul. 15, 2011 Memorandum Opinion at 18; Jul. 15, 2011 Judgment (ordering "the rule be remanded to TSA for *prompt proceedings*, in accordance with the opinion of the court filed herein this date.") (emphasis added).

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).[3] The caselaw of this Circuit does not define "promptly" in the context of court orders requiring agencies to comply with APA obligations. 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

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

15, 2011 Opinion requires the DHS to conduct notice-and-comment rulemaking without "unreasonable delay." *Id*.

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, 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*.[4] 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 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.

"Although there is no *per se* rule as to how long is too long to wait for agency action, 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)) (*citing Midwest Gas Users Ass'n. v. FERC,* 833 F.2d 341, 359 (D.C. Cir. 1987)). 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

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

delay "in implementing food stamp program reforms" can be unreasonable. *Id*. at 234 (citing *Rios v. Butz*, 427 F.Supp. 534 (N.D. Cal. 1976).

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.

Here, the DHS has delayed the formal rulemaking procedures necessary to "cure the defects" in its WBI rule for an unreasonable amount of time. The DHS has refused to publish a rule and solicit comments during the more than two years since the substantial change in agency action that gave rise to EPIC's first petition regarding the WBI program. The DHS has not taken any action for more than three months to "proceed in a manner consistent" with this Court's July 15, 2011 Opinion. The DHS has failed to act even though this Court remanded the matter without vacating the challenged rule. The DHS has not responded or complied with this Court's September 21, 2011 mandate, and has effectively nullified the Court's

decision. The DHS has even failed to abide by its own promise to "stand ready, willing and able to meet any reasonable … schedule the Court sets." Opposition to Emergency Motion for Injunctive Relief at 3, *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011) (No. 10-1157). This Court should find that the DHS has failed to "act promptly" in this case, and should require that the DHS publish in the Federal Register and solicit public comments within 45 days.

III. DHS Has Not Justified Its Failure to Initiate Formal Rulemaking

The APA provides a number of exclusions and exceptions to the formal rulemaking requirements under § 553(b), but the DHS has failed to justify its lack of formal rulemaking under any exception. As this Court held in its July 15, 2011 decision, the DHS decision to implement the WBI program was a substantive legislative rule, not a "procedural rule," "interpretive rule," or "general statement of policy." *EPIC*, 653 F.3d at 6-8. Furthermore, the DHS has failed to justify its lack of formal rulemaking under the "good cause" exception, 5 U.S.C. § 553(b)(B) (2006). If it was the agency's intent to invoke the "good cause" exception, it should have done so promptly to provide an opportunity for the parties to brief that claim before this Court. Indeed, the Court expressly refused to grant the agency's request that it "make clear that on remand, TSA is free to invoke the APA's 'good cause' exception" to notice- and-comment rulemaking," noting simply that the Court has "no occasion to express a view upon this possibility other than to note

we do not reach it." *EPIC*, 653 F.3d at 8. To allow the agency to now assert that exception would be to reward it for failing to act promptly in response to the order of the Court.

Even after this Court substantial alleviated the DHS's regulatory burden by not vacating the WBI rule, the DHS has not complied with this Court's order to "act promptly on remand to cure the defect in its promulgation." The DHS has not cured its defects, and any justification offered at this late juncture should be seen as a further attempt by the DHS to unjustly delay the public comment process required by law.

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 publish a proposed rule in the Federal Register within 45 days and to engage in the public comment process.

Respectfully submitted,

/s/ Marc Rotenberg

MARC ROTENBERG
JOHN VERDI
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

Dated: October 28, 2011

RULE 32(A) CERTIFICATE

I hereby certify that the foregoing 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).

/s/ Marc Rotenberg
MARC ROTENBERG
JOHN VERDI
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 28th day of October, 2011, he caused one copy each of the foregoing Motion to Enforce the Court's Mandate to be served by ECF and US Mail on the following:

John S. Koppel, Attorney
Email: john.koppel@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Beth S. Brinkmann, Esquire
Direct: 202-353-8679
Email: Beth.Brinkmann@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Room 3135
(see above)

Douglas N. Letter, Esquire, Attorney
Email: douglas.letter@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
(see above)

/s/ Marc Rotenberg
MARC ROTENBERG
JOHN VERDI
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

May 31, 2009

Secretary Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano,

We the undersigned privacy, consumer rights, and civil rights organizations are writing to you regarding the Transportation Security Administration's announced plan to deploy Whole Body Imaging as the primary means of screening airline passengers in the United States. We strongly object to this change in policy and urge you to suspend the program until the privacy and security risks are fully evaluated.

Whole Body Imaging systems, such as backscatter x-ray and millimeter wave, capture a detailed image of the subject stripped naked. In this particular application, your agency will be capturing the naked photographs of millions of American air travelers suspected of no wrongdoing.

Moreover, the privacy problems with these devices have still not been adequately resolved. Even though a "chalk line" image is displayed to an operator in a remote location and even though the TSA undertook a Privacy Impact Assessment and said that the image-recording feature would be disabled, it is obvious that the devices are designed to capture, record, and store detailed images of individuals undressed.

If the public understood this, they would be outraged -- many on religious grounds -- by the use of these devices by the US government on US citizens. "The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, in impelled by elementary self-respect and personal dignity," said the U.S. Ninth Circuit Court of Appeals in 1958. The law of privacy, according to a federal judge in California in 1976, "encompasses the individual's regard for his own dignity; his resistance to humiliation and embarrassment; his privilege against unwanted exposure of his nude body and bodily functions." Both courts were discussing dignity in prisons, even though other rights of privacy are not accorded inmates.

Further, the TSA repeatedly stated that these systems would only be used for secondary screening of passengers and only as a voluntary alternative to a pat-down search. The fact that the TSA reversed itself on the central question of whether these systems would be voluntary makes obvious the risk that the TSA will later reverse itself on the retention of images.

More must be known about the use of these devices. The American public is directly impacted by the planned use of these systems and should be given an opportunity to express its views.

We ask that the use of "Whole Body Imaging" technology undergo a 90-day formal public rulemaking process to receive public input on the agency's use of "Whole Body Imaging"

technologies.

In the interim, the agency should suspend the use of Whole Body Imaging to screen all travelers. Individuals who are asked to undergo secondary screening must be fully informed of their right to alternative secondary screening options. Not native English speaking passengers must be informed via multi-lingual oral and written formats that include an image comparable to the size of the image that will be produced by the Whole Body Image technology. Passengers should also have alternatives to the Whole Body Imaging option for secondary screening such as a pat down, or physical search of carry-on bags.

The TSA should also investigate less invasive means of screening airline passengers. The expense of the technology to taxpayers should be considered in light of other less costly means of creating a secure air travel experience.

Finally, we seek a full investigation of the medical and health implications of repeated exposure to Whole Body Imaging technology. The frequency of air travel, medical conditions such as pregnancy, and chronic health conditions, and repeated exposure of TSA and airport personnel stationed in the vicinity of the technology should be assessed. Age, gender, pre-existing medical conditions, and other factors should be evaluated and medical recommendations developed regarding the use of any Whole Body Imaging system.

Sincerely,

American Association of Small Property Owners
American Civil Liberties Union
Americans for Democratic Action
Calegislation
Center for Democracy and Technology
Center for Digital Democracy
Center for Financial Privacy and Human Rights
Constitution Project
Consumer Action
Consumer Federation of America
Consumer Travel Alliance
Consumer Watchdog
Cyber Privacy Project
Discrimination and National Security Initiative
Electronic Privacy Information Center
Fairfax County Privacy Council
Feminists for Free Expression
Gun Owners of America
Identity Project (PapersPlease.org)
Liberty Coalition
National Center for Transgender Equality
National Workrights Institute
Pain Relief Network

Patient Privacy Rights
Privacy Activism
Privacy Journal
Privacy Rights Clearinghouse
Privacy Times
The Multiracial Activist
The Rutherford Institute
Transgender Law Center
U.S. Bill of Rights Foundation
Woodhull Freedom Foundation
World Privacy Forum

Office of the Assistant Secretary

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 22202-4220

Transportation Security Administration

JUN 19 2009

Ms. Lillie Coney
Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave, NW
Suite 200
Washington, DC 20009

Dear Ms. Coney:

Thank you for your letter of May 31, 2009, to Secretary Janet Napolitano on behalf of 24 groups regarding privacy concerns associated with the Transportation Security Administration (TSA) Whole Body Imaging (WBI) program. I would like to take this opportunity update you on TSA's WBI program and the privacy protections that are accompanying the deployment of WBI equipment.

As you know, whole body imaging is an umbrella term used to describe a number of technologies that enable TSA to detect prohibited items that may be concealed under clothing without a physical search of a passenger. WBI is a key component of TSA efforts to address evolving security threats, including non-metallic threat items. To date, 19 airports across the nation are using WBI technology, and at six of those airports, WBI is being used in primary screening. At all locations, individuals who do not want to go through WBI screening may decline in favor of a pat-down, whether in primary or secondary screening.

TSA is committed to preserving privacy in its security programs and believes strongly that the WBI program accomplishes that through a screening protocol that ensures complete anonymity for the individual undergoing the WBI scan. This is achieved by physically separating the officer viewing the image from the person undergoing the scan. This officer sits in a windowless room that is separated from the checkpoint. The WBI scanned images cannot be stored or retained, pursuant to a factory setting that cannot be changed by the operator. Cameras and cell phones are not allowed in the viewing room under any circumstances. Further anonymity protection is achieved by a filter on the scanned image that blurs the face of the individual who was scanned. TSA has not deviated from these operational protocols, first published in the Privacy Impact Assessment for WBI in January 2008 prior to the first devices being operated in the WBI pilot. While we believe that these privacy protections are robust, we also believe that improvements in WBI technology will allow us to add even more privacy protections in the future while continuing to maintain the effectiveness of these systems to detect threat items.

From the outset of the WBI program, TSA has worked to inform the public on WBI screening and to listen to public reaction to the technology. These efforts are not static:

we continue to listen to the public, and we constantly look for ways to improve our outreach and education. TSA outreach has included briefings to the Privacy Coalition in March 2007 and again in December 2008. Indeed, it was a comment specifically from you at the March 2007 meeting that prompted signage being placed directly on the WBI devices instead of only being made available in a brochure. Recently, we improved the signage at the entrance to the passenger screening queue. In the near future, we also will be adding WBI information on the video screens at checkpoints with WBI screening. In October 2007, TSA offered demonstrations of the technology to news organizations and to privacy groups, including three groups that signed your letter (American Civil Liberties Union, EPIC, and Center for Democracy and Technology). The TSA web site has information on WBI screening at www.tsa.gov/approach/tech/body_imaging.shtm. The TSA blog, one of the most heavily trafficked blogs in the Federal government (third behind only the White House and the Congressional Budget Office blogs), has made repeated posts on the WBI program, and TSA considered views expressed in several hundred comments to the posts as well as reaction to articles in the news and travel media. TSA also considered international reaction to the deployment of WBI by other governments at foreign airports.

Finally, with respect to health concerns, the energy (both x-ray and millimeter wave) generated by the WBI devices are only a small fraction of the energy that individuals are exposed to every day. The x-ray energy is equivalent to 2 minutes of flight at altitude, or the energy that every living thing is exposed to in a single day at ground level, while the millimeter wave energy is equivalent to 1/100,000 of the energy permitted by the FCC for cell phones.

We appreciate hearing the concerns expressed in your letter and hope this information is helpful. If you need additional assistance, please contact Peter Pietra, Director, Privacy Policy & Compliance, at TSAprivacy@dhs.gov.

Sincerely yours,

Gale D. Rossides

Gale D. Rossides
Acting Administrator

April 21, 2010

Secretary Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, DC 20528

Chief Privacy Officer Mary Ellen Callahan
The Privacy Office
U.S. Department of Homeland Security
Washington, DC 20528

Re: Petition for Suspension of TSA Full Body Scanner Program

Dear Secretary Napolitano and Ms. Callahan,

We the undersigned privacy, consumer rights, and civil rights organizations hereby petition[1] the Department of Homeland Security ("DHS") and its component, the Transportation Security Administration ("TSA") to suspend the ongoing deployment of the TSA's Full Body Scanner ("FBS") program. The TSA program uses FBS devices (also called "whole body imaging" machines) to screen air travelers in the United States.

We strongly object to the TSA's use of full body scanners as primary, mandatory screening at security checkpoints. On May 31, 2009, twenty-four privacy and civil liberties groups[2] wrote to the DHS requesting, *inter alia*, that the DHS conduct "a 90-day formal public rulemaking process to receive public input on the agency's use of 'Whole Body Imaging' technologies."[3] The DHS failed to initiate a rulemaking. Instead, the TSA recently announced its intent to deploy approximately one thousand additional FBS devices to American airports.[4] Although the TSA failed to conduct a formal rulemaking, it is clear that the TSA has established a rule mandating the use of body scanners at airport checkpoints as primary screening. EPIC petitions the TSA to repeal that rule, and suspend the Full Body Scanner program.

The deployment of Full Body Scanners in US airports, as currently proposed, violates the U.S. Constitution, the Religious Freedom Restoration Act ("RFRA"), the Privacy Act of 1974 ("Privacy Act"), and the Administrative Procedures Act ("APA"). As described below, the FBS program effectively subjects all air travelers to unconstitutionally intrusive searches that are disproportionate and for which the TSA lacks any suspicion of wrongdoing. The FBS Program also violates the RFRA because it requires those of sincerely held religious beliefs to be subject

[1] The undersigned file this petition pursuant to 5 U.S.C. § 553(e), which requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."
[2] The May 31, 2009 letter signatories include many of the undersigned groups.
[3] Letter from EPIC and thirty-three organizations to Secretary Janet Napolitano, U.S. Dep't. of Homeland Security (May 31, 2009), *available at* epic.org/privacy/airtravel/backscatter/Napolitano_ltr-wbi-6-09.pdf.
[4] U.S. Government Accountability Office, Testimony Before the House Subcommittee on Transportation Security and Infrastructure Protection, *TSA is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to this Effort and Other Areas of Aviation Security Remain*, Mar. 17, 2010 at 1 *available at* http://www.gao.gov/new.items/d10484t.pdf.

to offensive intrusions by government officials. The program violates the Privacy Act because the system gathers personally identifiable information—a detailed and unique image of the human body easily associated with a particular airline ticket—yet the TSA failed to publish a System of Records Notice. The TSA Chief Privacy Office violated its statutory obligations to ensure that new technologies "sustain and do not erode" the privacy of Americans when it effectively approved the program.

Further, 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 airliner bombing. The full body scanning program is enormously expensive, costing taxpayers at least $2.4 billion dollars. There are less intrusive and less costly techniques available to address the risk of concealed explosives on aircrafts. For example, last week, U.S. Senators asked the DHS to evaluate alternative technologies that could "address many of the privacy concerns raised by the scanners DHS is currently testing."[5]

I. The Agency is Undertaking an Aggressive Plan to Deploy Full Body Scanners in US Airports without regard to Effectiveness, Traveler Complaints, Privacy Risks, or Religious Objections

A) The Plan to Deploy Approximately One Thousand Full Body Scanners to American Airports

The TSA operates Full Body Scanners at airports throughout the United States.[6] The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.[7] Both types of FBS devices can capture, store, and transfer[8] detailed, three-dimensional images of individuals' naked bodies.[9] Experts have described full body scans as "digital strip searches."[10] The images captured by FBS devices can uniquely identify individual air travelers. The TSA uses FBS devices to search air travelers as they pass through the TSA's airport security checkpoints.[11]

FBS devices are currently deployed at: Albuquerque International Sunport Airport, Boston Logan International Airport, Chicago O'Hare International Airport, Cincinnati/Northern Kentucky International Airport, Hartsfield-Jackson Atlanta International Airport, Baltimore/Washington International Thurgood Marshall Airport, Denver International Airport,

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[5] Letter from Sen. Susan Collins, Sen. Saxby Chambliss, and Sen. Jon Kyl to Secretary Janet Napolitano, U.S. Dep't. of Homeland Security (Apr. 12, 2010) *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=f8689ee7-5056-8059-767f-091debe8eae4.

[6] TSA, *TSA: Imaging Technology*, http://www.tsa.gov/approach/tech/imaging_technology.shtm (last visited Apr. 15, 2010).

[7] *Id*.

[8] TSA Office of Security Technology System Planning and Evaluation, *Procurement Specification for Whole Body Imager Devices for Checkpoint Operations*, Sept. 23, 2008 ("TSA Procurement Specifications Document") at 5, *available at* http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf (stating "When in Test Mode, the WBI: shall allow exporting of image data in real time; … shall provide a secure means for high-speed transfer of image data; [and] shall allow exporting of image data (raw and reconstructed)").

[9] *E.g.* Wikipedia, Backscatter X-ray, http://en.wikipedia.org/wiki/Backscatter_X-ray; L3, L3 Composite, http://www.sds.l-3com.com/products/i/L-3%20composite%20300dpi.jpg.

[10] Privacy Coalition, *Stop Digital Strip Searches*, http://www.stopdigitalstripsearches.org/.

[11] *Supra* note 5.

Dallas/Fort Worth International Airport, Detroit Metro Airport, Indianapolis International Airport, Jacksonville International Airport, Kansas City International Airport, McCarran International Airport, Los Angeles International Airport, Miami International Airport, Phoenix Sky Harbor International Airport, Raleigh-Durham International Airport, Richmond International Airport, Ronald Reagan Washington National Airport, San Francisco International Airport, Salt Lake City International Airport, Tampa International Airport, and Tulsa International Airport.[12]

In March 2010, the TSA began deploying additional FBS devices in American airports.[13] In March 2010, the TSA announced its decision to further deploy approximately one thousand additional FBS devices to American airports.[14] As a matter of pattern, practice and policy, the TSA requires air travelers to submit to FBS searches once they have entered the security zone in airports equipped with FBS devices.[15] As a matter of pattern, practice and policy, the TSA employs FBS searches as a primary search of air travelers in airports equipped with FBS devices.[16] As a matter of pattern, practice and policy, the TSA does not offer air travelers a meaningful alternative to FBS searches in airports equipped with FBS devices.[17] As a matter of pattern, practice and policy, the TSA does not offer air travelers with religious objections to Full Body Scanning a meaningful alternative to FBS searches in airports equipped with FBS devices.[18]

B) The TSA's Full Body Scanner Program Collects and Retains Detailed Personal Information About Air Travelers

The TSA requires air travelers to disclose their full name, birth date, and gender when purchasing a ticket.[19] The TSA obtains additional information about air travelers from airlines, government agencies, and other third parties. The TSA collects and stores this information, linking it to air travelers' itineraries. The TSA requires air travelers to submit to searches of their

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[12] *Supra* note 5.
[13] U.S. Government Accountability Office, Testimony Before the House Subcommittee on Transportation Security and Infrastructure Protection, *TSA is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to this Effort and Other Areas of Aviation Security Remain*, Mar. 17, 2010 at 1 *available at* http://www.gao.gov/new.items/d10484t.pdf.
[14] *Id*.
[15] Air Traveler Complaints to the TSA at 45, http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf (air traveler stated that "when he requested an alternative screening, the TSA screeners interrogated and laughed at him."); at 53 (air traveler "was told to go in this machine and … was not told that this machine would do a full body scan. I did not know what I went thru[*sic*] until today, when I read the article on line.").
[16] *Id*. at 67 ("I am outraged and angry that what was supposed to be a 'pilot' for the millimeter scan machines has now become MANDATORY at SFO. I have transited through the International A terminal boarding area several times over the past few months and TSA has shut down all lanes other than the scanner.") (emphasis in original).
[17] *Id*. at 62, ("I was picked to go through the new body scanner machine … When I looked around, I noticed that there were only women who were 'told' to go through this machine, there were no men. I would have refused, but didn't realize that I could until I read up on the scanner."); at 65 ("I was asked/forced into this [body scanner] at BWi airport on 6/30/09"); at 69 ("the TSA guard sent my wife and I through the new X-Ray machine … A guard did not give us a choice."); at 69 ("I am 70 years old. [At BWI, I] went through the metal detector … with apparently no problems, I proceeded to collect my belongings … but was stopped [for a body scan]. I was never told why I had to do this, had no idea what was being done."); at 72 ("[I] decided to opt out [of a FBS scan]. My family and I were then subjected to a punitive pat-down search (they went over me three times) that would have been considered sexual assault in any other context.").
[18] *Id*. at 92 (describing mandatory body scan and subsequent patdown of devout Muslim air traveler).
[19] TSA, *Secure Flight Update*, Jul. 15, 2009, http://www.tsa.gov/blog/2009/07/secure-flight-update.html

bodies and carry-on luggage at TSA airport security checkpoints.[20] The TSA requires that air travelers present a boarding pass and government-issued photo identification card at airport security checkpoints.[21] The boarding pass displays air travelers' full names, travel itineraries, and bar codes containing machine-readable versions of travelers' personal information.[22] As a matter of pattern, practice and policy, the TSA visually matches air travelers' photo ID cards with their boarding passes when travelers pass through airport security checkpoints.[23] As a matter of pattern, practice and policy, the TSA scans air traveler's boarding passes, collecting air travelers' personal information, when travelers pass through airport security checkpoints that are equipped with paperless boarding pass scanners.[24]

As described above, the TSA employs full body scanners to search air travelers at airport security checkpoints.[25] As described above, FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies.[26] As a matter of pattern, practice, and policy, the TSA requires air travelers to possess and often display boarding passes contemporaneous with FBS searches. The TSA is therefore able to associate a specific FBS image with the full name, birth date, gender, and travel itinerary of the scanned traveler. The TSA failed to publish a "system of records notice" concerning the FBS Program in the Federal Register.

C) The TSA Misrepresents the Full Body Scan Program

The TSA claims that FBS devices cannot capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies.[27] In fact, the FBS devices employed by the TSA can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies, as per the TSA's own requirements.[28] The TSA claims that FBS searches are "optional."[29] In fact, as a matter of pattern, practice and policy, the TSA does not offer air travelers a meaningful alternative to FBS searches in airports equipped with FBS devices.[30]

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[20] TSA, *TSA Travel Assistant*, http://www.tsa.gov/travelers/airtravel/screening/index.shtm; TSA, *3-1-1 on Air Travel*, http://www.tsa.gov/311/index.shtm.
[21] TSA, *The Screening Experience*, http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm.
[22] Wikipedia, *Boarding Pass*, http://en.wikipedia.org/wiki/Boarding_pass; *see also* Wikipedia, *Bar Coded Boarding Pass*, http://en.wikipedia.org/wiki/Bar_Coded_Boarding_Pass
[23] TSA, *TSA Announces Enhancements to Airport ID Requirements to Increase Safety*, Jun. 23, 2008, http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm.
[24] TSA, *Paperless Boarding Pass Pilot*, http://www.tsa.gov/approach/tech/paperless_boarding_pass_expansion.shtm.
[25] *Supra* note 5.
[26] *Supra* notes 7-8.
[27] *Supra* note 5 (claiming "The image cannot be stored, transmitted or printed, and is deleted immediately once viewed.").
[28] *Supra* notes 7-8.
[29] *Supra* note 5 (claiming "Advanced imaging technology screening is **optional for all passengers**."[emphasis in original]).
[30] *Supra* note 16; *see also supra* note 5 (stating "passengers who do not wish to utilize this screening will receive an equal level of screening, including a physical pat-down.").

In 2007, the TSA stated that FBS searches would not be mandatory for passengers, but rather "a voluntary alternative to a pat-down during secondary screening."[31] In fact, as a matter of pattern, practice and policy, the TSA employs FBS searches as a primary search of air travelers in airports equipped with FBS devices.[32] The TSA has claimed that "a security algorithm will be applied to the image to mask the face of each passenger."[33] In fact, the FBS devices employed by the TSA can capture images without any security algorithm and without masking the face of each passenger.[34]

The TSA claims that air travelers prefer FBS searches.[35] In fact, hundreds of air travelers have lodged objections with the TSA, alleging a host of law and policy violations arising from the TSA's FBS searches.[36] Air travelers object to the invasiveness of the FBS searches.[37] Air travelers state that they are not informed when they undergo a FBS search, or of a pat-down alternative.[38] Air travelers object to the use of FBS devices to search vulnerable individuals, including children and pregnant women.[39] Pregnant air travelers objected to the TSA's FBS search after the TSA scanned them without identifying the machine or informing them of how it operates.[40]

D) Full Body Scanner Technology is Flawed

The FBS devices employed by the TSA are not designed to detect powdered explosives.[41] The FBS devices employed by the TSA are not designed to detect powdered pentaerythritol

[31] *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Transportation Security Administration, October 11, 2007 *available at* http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm; *see also X-Ray Backscatter Technology and Your Personal Privacy*, http://web.archive.org/web/20080112014635/http://www.tsa.gov/research/privacy/backscatter.shtm (archived January 12, 2008) (stating "Backscatter is a voluntary option for passengers undergoing secondary screening as an alternative to the physical pat down procedures").

[32] *Supra* note 15.

[33] TSA, *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Oct. 11, 2007, http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm.

[34] TSA Systems Engineering Branch, *Operational Requirements Document, Whole Body Imager Aviation Applications*, July 2006, ("TSA Operational Requirements Document") at 8 *available at* http://epic.org/open_gov/foia/TSA_Ops_Requirements.pdf (stating "the WBI shall provide ten selectable levels of privacy."); TSA Procurement Specifications Document at 5 (Enabling and disabling of image filtering shall be modifiable by users as defined in the User Access Levels and Capabilities appendix).

[35] *Supra* note 5 (claiming "Many passengers prefer advanced imaging technology. In fact, over 98 percent of passengers who encounter this technology during TSA pilots prefer it over other screening options.").

[36] Air Traveler Complaints to the TSA *available at* http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf, http://epic.org/privacy/airtravel/backscatter/EPIC2.pdf, http://epic.org/privacy/airtravel/backscatter/EPIC3.pdf, http://epic.org/privacy/airtravel/backscatter/EPIC4.pdf, http://epic.org/privacy/airtravel/backscatter/EPIC5.pdf.

[37] Air Traveler Complaints to the TSA at 19, 24, 27, 28, 37 *available at* http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf (complaints stating that body scanners are "a disgusting violation of civil liberties and privacy," "for a bunch of peeping toms," "unconstitutional," "intrusive and ridiculous" and "a joke.").

[38] *Supra* note 16.

[39] *E.g.* TSA Traveler Complaints at 14, 21, 25, 85.

[40] TSA Traveler Complaints at 159; TSA Traveler Complaints at 11-12, *available at* http://epic.org/privacy/airtravel/backscatter/EPIC2.pdf.

[41] TSA Procurement Specifications Document at 4 (requiring body scanners to detect liquid, but not powdered, material.); *see also* Jane Merrick, *Are Planned Airport Scanners Just a Scam?*, The Independent (UK), Jan. 3 2010

tetranitrate ("PETN")—the explosive used in the attempted December 25, 2009 bombing of Northwest Airlines flight 253.[42] The FBS devices employed by the TSA have profound technical flaws that allow the machines to be breached and create the risk that sensitive traveler images could be leaked.

The FBS devices employed by the TSA run Windows XPe, which contains security vulnerabilities.[43] The FBS devices employed by the TSA are designed to transfer information via highly transportable and easily concealable USB devices.[44] The FBS devices employed by the TSA are equipped with Ethernet network interfacing capabilities that are vulnerable to security threats.[45] The FBS devices employed by the TSA permit TSA employees to disable built-in "privacy safeguards."[46]

II. The Plan to Deploy Full Body Scanners is Widely Opposed, Violates the Fourth Amendment, and Several Federal Acts, including the Religious Freedom and Restoration Act, The Administrative Procedures Act, and the Privacy Act

A) Religious Leaders Object to Full Body Scanners

On February 20, 2010, Pope Benedict XVI objected to FBS searches because they fail to preserve the integrity of individuals.[47] Agudath Israel, an Orthodox Jewish umbrella group, objects to FBS searches, calling the devices "offensive, demeaning, and far short of acceptable norms of modesty" within Judaism and other faiths.[48] On February 9, 2010, The Fiqh Council of North America objected to body scanners, announcing that "general and public use of such

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available at http://www.independent.co.uk/news/uk/home-news/are-planned-airport-scanners-just-a-scam-1856175.html (noting that body-scanners "have been touted as a solution to the problem of detecting … liquids, chemicals or plastic explosive. But Ben Wallace, the Conservative MP, who was formerly involved in a project by a leading British defence research firm to develop the scanners for airport use, said trials had shown that such low-density materials went undetected.").

[42] *Id*; *see also* Kenneth Chang, *Explosive on Flight 253 Is Among Most Powerful*, N.Y. Times, Dec. 27, 2009 *available at* http://www.nytimes.com/2009/12/28/us/28explosives.html?_r=1.

[43] TSA Contract HSTS04-06-R-CTO046 with L3 ("TSA Contract with L3") at 27 *available at* http://epic.org/open_gov/foia/TSA_Millwave_Contract.pdf; *See* Konstantin Morozov, White Paper, *Best Practices for Protecting Windows XP Embedded Devices* at 4, *available at* http://www.dsta.com.au/DSTeupload/protectingxpedevices.pdf ("In general, malware does not affect Windows Mobile devices, such as Smartphone and Pocket PCs, and other devices based on Windows CE, as much as it impacts devices running Windows XP Embedded. This is because Windows XP Embedded is based on the same feature binaries as Windows XP Professional and thus has similar vulnerabilities that can be exploited."); Brian Krebs, *Windows Security Flaw is 'Severe*,' Washington Post, Dec. 29, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901456.html.

[44] TSA Procurement Specifications Document at 10 ("the WBI shall provide capabilities for data transfers via USB devices.").

[45] TSA Procurement Specifications Document at 7; TSA Operational Requirements Document at 10-11.

[46] TSA Procurement Specifications Document at 5 (Enabling and disabling of image filtering shall be modifiable by users as defined in the User Access Levels and Capabilities appendix).

[47] Catholic News Agency, *Benedict XVI Urges Airports to Protect Integrity of Travelers*, Feb. 20, 2010, http://www.catholicnewsagency.com/news/benedict_xvi_calls_for_airports_to_protect_integrity_of_travelers/.

[48] Omar Sacirbey, *Jews, Muslims Worry Body Scanners Violate Religious Laws*, Mar. 3, 2010, http://www.religionnews.com/index.php?/rnstext/jews_muslims_say_body_scanners_violate_religious_laws/.

scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty."[49]

American air travelers have filed objections with the TSA on religious grounds.[50] On February 19, 2010, two Muslim women refused to submit to a body scan at the Manchester Airport, forfeiting their tickets to Pakistan rather than undergo the scan.[51] In March 2010, a six-member Pakistani parliamentary delegation from the Federally Administered Tribal Areas refused to submit to full body scanning at the Washington Dulles International Airport, stating it was an insult to parliamentarians of a sovereign country.[52] Instead, they ended their visit to the US and returned to Pakistan.[53]

B) The TSA's Full Body Scanner Program Violates the Fourth Amendment and the RFRA

The TSA's FBS program subjects air travelers to unreasonable searches. The program requires air travelers to submit to a uniquely invasive search without any suspicion that particular individuals have engaged in wrongdoing. Courts have upheld some invasive airport checkpoint searches, but typically on the basis that the searches are part of a progressively escalating series of screenings.[54] Full Body Scanners are part of no such program. Instead, they employ the intrusive, degrading digital strip search as mandatory, primary screening.

The TSA program particularly burdens devout air travelers. As noted above, many religious leaders condemn digital strip searches as incompatible with religious tenets. Yet the TSA's practice of requiring Full Body Scans as mandatory, primary screening leaves religious travelers without a meaningful alternative. The program violates RFRA because the TSA's interest in conducting a Full Body Scan is limited, particularly given that the scanners' are not designed to detect powdered explosives. Further, Full Body Scanners are not the least restrictive means of furthering the TSA's interest in safeguarding air travel.[55]

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[49] Fiqh Council of North America, *Home*, http://www.fiqhcouncil.org/ (last visited April 15, 2010) (stating "a general and public use of such scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty.").

[50] *E.g.* Air Traveler Complaints to the TSA *available at* http://epic.org/privacy/airtravel/backscatter/3-2_Interim_Response.pdf.

[51] Will Pavia, *Muslim Woman Refuses Body Scan at Airport*, Mar. 3, 2010, The Times (UK) *available at* http://www.timesonline.co.uk/tol/travel/news/article7048576.ece.

[52] Press TV, *Pakistan MPs End US Visit to Protest Body Scanners*, Mar. 7, 2010 http://www.presstv.ir/detail.aspx?id=120286&sectionid=351020401.

[53] *Id*.

[54] *E.g. United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006) (finding airport searches reasonable because they "were well-tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search. The search began when Hartwell simply passed through a magnetometer. … Only after Hartwell set off the metal detector was he screened with a wand. … And only after the wand detected something solid on his person, and after repeated requests that he produce the item, did the TSA agents … reach into his pocket.").

[55] *Supra* note 5 (observing that passive scanners "incorporate auto-detection technology that addresses many of the privacy concerns raised by the scanners DHS is currently testing, while also appearing to provide a highly effective scan.")

C) The TSA's Full Body Scanner Program Violates the Privacy Act

As described above, the TSA's Full Body Scanner Program creates a group of records containing air travelers' personally-identifiable information. The group of records is under the control of the TSA, and the TSA can retrieve information about air travelers by name or by some identifying number, symbol, or other identifying particular assigned to the individual. The TSA's FBS program has created and/or revised a "system of records" under the Privacy Act. The TSA unlawfully failed to publish a "system of records notice" in the Federal Register, and otherwise failed to comply with its Privacy Act obligations concerning the FBS Program.

D) The TSA's Full Body Scanner Program Violates the Administrative Procedures Act

The DHS Chief Privacy Officer has a statutory obligation to "assur[e] that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information."[56] The DHS Chief Privacy Officer has a statutory obligation to "assur[e] that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974."[57] The DHS Chief Privacy Officer has a statutory obligation to "conduct[] a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected."[58]

The DHS Chief Privacy Office prepared an inadequate Privacy Impact Assessment of the TSA's FBS test program.[59] The inadequate assessment, which was subsequently revealed through Freedom of Information Act litigation, failed to identify numerous privacy risks to air travelers. The DHS Chief Privacy Office failed to prepare any Privacy Impact Assessment concerning the TSA's current FBS program. The TSA's current FBS program is materially different from the TSA's FBS test program. The TSA's use of full body scanners fails to comply with the Privacy Act. The program erodes, and does not sustain, privacy protections relating to the use, collection, and disclosure of air traveler's personal information.

III. Petition for Relief: Suspend Purchase, Deployment, and Operation of Full Body Scanners

The undersigned hereby request and petition the DHS and TSA for relief. As set forth above, the TSA's Full Body Scanner program violates the Fourth Amendment, the RFRA, the Privacy Act, and the APA. We request that the DHS and TSA immediately suspend purchase and deployment of Full Body Scanners to American airports. In addition, we request that the DHS and TSA cease operation of already-deployed Full Body Scanners as primary screening.

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[56] 6 U.S.C. § 142(1) (2009).
[57] 6 U.S.C. § 142(2) (2009).
[58] 6 U.S.C. § 142(4) (2009).
[59] DHS, *Privacy Impact Assessment for TSA Whole Body Imaging* (Oct. 17, 2008) *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbi.pdf; *see also* DHS, *Privacy Impact Assessment Update for TSA Whole Body Imaging* (Jul. 23, 2009) *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbiupdate.pdf.

Sincerely,

Electronic Privacy Information Center
American Civil Liberties Union
American Policy Center
Asian American Legal Education and Defense Fund
Bill of Rights Defense Committee
Calegislation
Campaign for Liberty
Center for Financial Privacy and Human Rights
Center for the Study of Responsive Law
Citizen Outreach
Consumer Federation of America
Consumer Travel Alliance
Consumer Watchdog
Council on American Islamic Relations
Cyber Privacy Project
Essential Information
Government Accountability Project
The Identity Project
Liberty Coalition
Muslim Legal Fund of America
National Center for Transgender Equality
National Workrights Institute
Patient Privacy Rights
Privacy Activism
Privacy Rights Clearinghouse
Public Citizen Litigation Group
Republican Liberty Caucus
Rutherford Institute
U.S. Bill of Rights Foundation
World Privacy Forum

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598

Transportation Security Administration

MAY 28 2010

Electronic Privacy Information Center, *et al.*
c/o Mr. Mark Rotenberg
1718 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20009

Dear Mr. Rotenberg:

Thank you for the letter of April 21, 2010, to Department of Homeland Security (DHS) Secretary Janet Napolitano and Chief Privacy Officer Mary Ellen Callahan from 30 organizations regarding the Transportation Security Administration's (TSA's) use of advanced imaging technology (AIT) to screen passengers for security purposes at our Nation's airports.[1] I am responding on behalf of Secretary Napolitano and Chief Privacy Officer Callahan, and request that you forward this letter to the other organizations who signed the April 21 letter. We appreciate the opportunity to address the important issues the 30 organizations have raised regarding AIT.

Statutory Mandate. In your letter, you question TSA's authority to install and operate AIT machines for passenger screening at airports absent the initiation of a formal public rulemaking process under the Administrative Procedure Act (APA). However, TSA is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures. Current regulations require passengers and others to comply with TSA's procedures before entering airport sterile areas and other secured portions of airports.[2]

Moreover, since 9/11, Congress has mandated that TSA invest in technologies to strengthen the efficiency and security of aviation. The emphasis on developing new technologies to address transportation security is codified at 49 U.S.C. § 44925(a):

> 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

[1] While you footnote that your letter is a Petition for Rulemaking under 5 U.S.C. §553, the relief actually sought is specified instead to be the immediate suspension of the AIT program. Accordingly, TSA does not interpret your letter to seek a rulemaking or to constitute a petition under 5 U.S.C. §553.

[2] *See* 49 CFR 1540.105(a)(2) and 1540.107.

> conditions the types of weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft.

The Secretary also is required under 49 U.S.C. § 44925(b) to develop a strategic plan for deploying explosive detection equipment, such as AIT machines, at airport screening checkpoints.

AIT equipment addresses this Congressional and national security mandate by safely screening airline passengers for both metallic and nonmetallic threats, including weapons, explosives and other objects concealed under layers of clothing. TSA, DHS, the White House, and the Congress are pursuing AIT for airport checkpoint security because it is a key component of TSA's layered approach to security that addresses the evolving threats faced by airline travelers. As Secretary Napolitano stated in January 2010:

> In and of itself, no one technology, no one process, no one intel agency is the silver bullet here. It's layer, layer, layer, layer. . . . [AIT is] good technology with behavior detection officers, with canines, with explosives detection equipment, with the right watch lists, with the right names on it and the right intel behind it. . . . [A]ll of these things have a role to play.[3]

Beyond the general mandate from Congress to deploy technology capable of screening airline passengers for nonmetallic and other evolving threats, DHS has communicated to and discussed with the Congress TSA's specific AIT deployment plans. For example, Secretary Napolitano recently announced deployments of AIT units purchased with American Recovery and Reinvestment Act (ARRA) funds to 28 additional airports, which will increase to 44 the number of airports with AIT equipment.[4] In addition, over the past several months, Secretary Napolitano and TSA Acting Administrator Gale Rossides have testified at Congressional hearings about AIT deployment plans and requests for funding for additional AIT deployment.

- "The . . . Recovery Act funds provided to TSA for checkpoint . . . screening technology have enabled TSA to greatly . . . accelerate deployment of Advanced Imaging Technology to provide capabilities to identify materials such as those used in the attempted December 25 attack, and we will encourage foreign aviation security

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[3] Hearing on "The State of Aviation Security - Is Our Current System Capable of Meeting the Threat?," before the Senate Committee on Commerce, Science, and Transportation, January 20, 2010.

[4] *See* "Secretary Napolitano Announces Additional Deployments of Recovery Act-Funded Advanced Imaging Technology," May 14, 2010, at www.dhs.gov/ynews/releases/pr_1273850925050.shtm. *See also* Secretary Napolitano's March 5, 2010 announcement of 11 airports that will receive AIT units using ARRA funds at www.dhs.gov/ynews/releases/pr_1267803703134.shtm.

authorities to do the same. TSA currently has 40 machines deployed at nineteen airports throughout the United States, and plans to deploy at least 450 additional units in 2010."[5]

- The President's FY 2011 funding request will result in "total AIT coverage at 75 percent of Category X airports and 60 percent of the total lanes at Category X through II airports."[6]
- "TSA is aggressively pursuing the deployment of enhanced screening technology to domestic airports and encouraging our international partners to do the same. While no technology is guaranteed to stop a terrorist attack, a number of technologies, when employed as part of a multi-layered security strategy, can increase our ability to detect dangerous materials. To this end, TSA is accelerating deployment of AIT units to increase capabilities to identify materials such as those used in the attempted Dec. 25, 2009 attack. These efforts are already well underway. . . . The President's FY 2011 budget requests . . . an additional 500 AIT units at checkpoints, . . . [and a]n additional . . . 5,355 TSO positions to operate these AIT machines at their accelerated deployment pace."[7]

As this discussion illustrates, TSA not only has ample, clear authority to install and operate AIT machines for passenger screening at airports, but has been directed by the Congress to pursue screening technology solutions that are capable of detecting nonmetallic and other dangerous devices under realistic operating conditions. DHS and TSA have communicated regularly with the Congress on TSA's AIT deployment efforts and recommendations. AIT machines offer the best current option for meeting these statutory directives and security imperatives.

AIT Screening is Optional. Your letter also states that AIT screening subjects all air travelers to intrusive searches that are disproportionate and for which TSA lacks any suspicion of wrongdoing. Your letter, however, misstates the facts.

TSA has made clear from its earliest AIT deployment that **use of AIT screening is optional for all passengers**,[8] and TSA makes every effort to address any AIT complaints or concerns.

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[5] Written statement of Secretary Janet Napolitano for a hearing entitled "The State of Aviation Security - Is Our Current System Capable of Meeting the Threat?," before the Senate Committee on Commerce, Science, and Transportation, January 20, 2010.

[6] Written statement of Secretary Napolitano for a hearing on the DHS Budget Submission for FY 2011, before the Senate Committee on Homeland Security and Governmental Affairs, February 24, 2010, and before the House Homeland Security Committee, February 25, 2010.

[7] Written statement of TSA Acting Administrator Gale Rossides for a hearing on the TSA FY 2011 Budget before the House Appropriations Subcommittee on Homeland Security, March 4, 2010. *See also* Department of Homeland Security, Transportation Security Administration, Fiscal Year 2011 Congressional Justification for Aviation Security, pages AS-4, AS-13, and AS-22, and the written statement of Acting Administrator Rossides for a hearing entitled "The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening," before the Senate Committee on Homeland Security and Governmental Affairs, Wednesday, March 10, 2010.

[8] *See* www.tsa.gov/approach/tech/imaging_technology.shtm.

For those passengers who express concerns or decline AIT screening, TSA employs alternative screening techniques, such as use of a hand-held metal detector coupled with a pat down. The notion of alternative screening methods is consistent with TSA's screening practices over the years and is not a new feature that was introduced with the implementation of AIT. For example, TSA offers the pat down option to passengers who elect not to undergo screening by a walk-through metal detector (WTMD), and offers screening guidance for airline passengers with certain medical devices who may not wish to be screened by WTMD.[9] Not surprisingly, passengers with implanted knee and hip joints have welcomed AIT screening; these passengers alarm a WTMD and require a pat-down to resolve the alarm, but are able to use the AIT without alarming it.[10]

Similarly, options for alternative screening also are offered to those passengers for whom there are religious or cultural considerations. These passengers also may request an alternative personal search (pat-down inspection) performed by an officer of the same gender, and in private.[11]

In addition to being optional, AIT screening is widely accepted by the traveling public. For example, a *USA Today*/Gallup poll found that 78 percent of U.S. air travelers approve of the use of AIT screening in U.S. airports as a measure to prevent terrorists from smuggling explosives or other dangerous objects onto airplanes.[12] This result is consistent with TSA's experience with passenger acceptance rates for AIT machines at airport checkpoints. Only a small fraction of the millions of passengers screened using AIT, approximately 600 individuals, have expressed complaints or concerns about AIT since the inception of the program. This small number equates to less than .015 percent of the millions of airline passengers screened with AIT.

Effectiveness of AIT Screening. In your letter, you also express concern about the effectiveness of AIT devices, including whether they are capable of exposing the emerging threats to aviation such as powdered explosives, and state that there are less intrusive and costly techniques to address the risk of concealed explosives on aircraft. TSA continually searches for effective technologies and methods to detect explosives to meet the constantly evolving threats to transportation security. Clearly, walk-through metal detectors are not effective in detecting the kind of powdered explosive that you identified, and TSA's experience is that AIT provides the best, current tool for detecting this and other non-metallic threats. TSA's web site includes

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[9] *See* www.tsa.gov/travelers/airtravel/specialneeds/editorial_1374.shtm#1. For example, for passengers with pacemakers, TSA recommends that individuals ask the TSO to conduct a pat-down inspection rather than using the walk-through the metal detector. TSA also recommends that passengers advise the Transportation Security Officer (TSO) if they have implanted pacemakers or other medical devices and where that implant is located so that a private screening can be offered. *Id.*

[10] *See* www.tsa.gov/approach/tech/imaging_technology.shtm.

[11] See www.tsa.gov/travelers/airtravel/assistant/editorial_1037.shtm.

[12] *See* "In U.S., Air Travelers Take Body Scans in Stride," Jan. 11, 2010, found at www.gallup.com/poll/125018/Air-Travelers-Body-Scans-Stride.aspx.

examples of the kind of materials that have been uncovered using AIT machines at U.S. airports, including bags of powder.[13]

Your letter also references a letter from Senator Collins and others to Secretary Napolitano about the use of AIT with automated target recognition (ATR) capabilities. Some machines with this feature currently are in use at Schiphol International Airport in Amsterdam. As the Secretary's response states,[14] TSA has worked closely with Dutch authorities and AIT manufacturers to evaluate ATR capabilities, and has established ATR requirements and provided them to AIT manufacturers. TSA is evaluating the effectiveness of ATR with respect to improved threat detection capabilities; should our evaluation show that ATR is effective in high-volume U.S. airport environments, TSA will seek to deploy this technology on AIT machines at U.S. airports.

TSA's experience, and that of other governments, clearly supports the effectiveness of AIT machines in exposing emerging threats to aviation, and this capability may be enhanced in the future by ATR, which TSA has been evaluating for some time. Your letter offers no other suggestions for alternative devices or practices that are less intrusive and less costly, yet equally effective, in addressing the risks to aviation security.

AIT Screening and Health Concerns. Your letter cited concerns about health issues related to AIT use involving children and pregnant women. TSA has relied on independent studies to address health concerns related to this technology to ensure the technology conforms to national consensus standards. Current AIT machines deployed by TSA use two different technologies: backscatter x-ray machines use ionizing radiation, and millimeter-wave machines use radio frequency energy.

AIT backscatter scanners use a narrow, low-level x-ray beam that scans the surface of the body at a high speed. The machines then generate an image resembling a chalk etching with a privacy filter applied to the entire body. Unlike a traditional x-ray machine that relies on the transmission of x-ray through the object material, backscatter x-ray detects the radiation that reflects back from the object to form an image.

Over the past several years, various backscatter scanners have been independently evaluated by the Food and Drug Administration (FDA) Center for Devices and Radiological Health (CDRH), and by the National Institute for Standards and Technology (NIST) on behalf of TSA. The backscatter scanner deployed by TSA, the Rapiscan Secure 1000 Single Pose, was independently evaluated by the Johns Hopkins University Applied Physics Laboratory (APL). The APL results confirm that radiation doses to the general public are well below those limits specified by standards established by the American National Standards Institute and through the Health

[13] See http://blog.tsa.gov/2009/07/blog-post-archives.html. It is unclear how you conclude that AIT cannot detect explosives in powder form. The TSA acquisition documents you cite to specify that AIT detects explosives, including liquids, solids, and powders.

[14] *See* Secretary Napolitano's April 27, 2010 letter to Senator Collins, attached to this letter (identical letters were sent to Senators Kyl and Chambliss).

Physics Society (ANSI/HPS) and published in ANSI/HPS N43.17-2009, entitled "Radiation Safety for Personnel Security Screening Systems Using X-ray or Gamma Radiation." The dose limits were set with the understanding that the general public includes individuals who may be more susceptible to radiation-induced health effects, such as pregnant and potentially pregnant women, children, and persons receiving radiation treatment for medical conditions. The amount of radiation from the backscatter screening equipment currently deployed by TSA is less than ten microrem, or the amount of radiation dose one would receive in less than two minutes of flight time on an airplane at flight altitude, or during one hour standing on the earth with normal exposure to naturally-occurring background radiation at sea level.

Millimeter wave AIT scanners use radio frequency energy in the millimeter wave spectrum to generate a three-dimensional computer image of the body based on the energy reflected from the body. The energy projected by millimeter wave technology is thousands of times less than the energy projected from a cell phone transmission, and far below the standards set by the Institute of Electrical and Electronics Engineers (IEEE) and the International Commission on Non-Ionizing Radiation Protection (ICNIRP).[15] TSA requires that millimeter wave AIT equipment be tested by independent, third-party labs to assure that the equipment meets the IEEE and ICNIRP standards for safety.

In summary, AIT scanning has been assessed by independent scientific entities that have found the technology conforms to national consensus standards.

Constitutional and Legal Issues. The deployment of AIT machines responds to the Congressional and national security mandate to screen airline passengers for both metallic and nonmetallic threats. Despite widespread public acceptance of AIT screening, TSA also provides alternative screening methods. AIT screening has proven effective, and numerous independent studies have addressed health concerns related to AIT screening.

In addition to this objective, factual support for the use of AIT screening, TSA has carefully considered the important Constitutional and statutory concerns raised in your letter as it developed AIT deployment plans. We disagree with your assertions that TSA's deployment of AIT equipment violates the Constitution and various laws, as addressed below.

The Fourth Amendment. TSA strongly disagrees with the statements in your letter that TSA's deployment of AIT machines violates the Fourth Amendment and subjects air travelers to unreasonable searches. Case law supports TSA's analysis.

TSA screening protocols at airport checkpoints have been upheld by the courts as "special needs searches" or "administrative searches" under the Fourth Amendment. *See, e.g., United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (*en banc*); *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006) (Alito, J.); and *Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002). A lawful special

[15] See Institute of Electrical and Electronics Engineers (IEEE), C95.1 – 2005, Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz, revision of C95.1-1991 (Active), and International Commission on Non-Ionizing Radiation Protection (ICNIRP), Guidelines for Limiting Exposure to Time-Varying Electric, Magnetic, and Electromagnetic Fields (Up to 300 GHz). Health Physics 74 (4): 494-522, April 1998.

needs search requires no warrant and no suspicion of wrongdoing. As long as the search serves a special public need beyond law enforcement and is conducted in a reasonable fashion, it will be found to be permissible under the Fourth Amendment. As stated by the Supreme Court:

> Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. *NTEU v. Von Raab*, 489 U.S. 656, 668 (1989).

Although the Supreme Court has not had occasion to rule directly on airport security screening, it has referenced security screening favorably in several cases:

> The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive... When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of its success. *Von Raab*, 489 U.S. at 675, n.3.

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" – for example, searches now routine at airports and at entrances to courts and other official buildings. *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

The Federal appellate courts that have directly considered the lawfulness of airport security screening have had little difficulty concluding that screening is a special needs search that serves a compelling public interest:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice...so that he can avoid it by choosing not to travel by air. *U.S. v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

> First, there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance. Second, airport checkpoints also "advance[] the public interest" ...As this Court has held, "absent a search, there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane." *U.S. v. Hartwell*, 436 F.3d at 179-80.

Because airport security screening serves the compelling public interest of aviation security, it is a valid special needs search and a particular screening method will be lawful as long as it is reasonable.

> A particular airport security screening search is constitutionally reasonable provided that it is "no more extensive or intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [] [and] that it is confined in good faith to that purpose." (citation omitted)...The search procedures used in this case were neither more extensive nor more intensive than necessary to rule out the presence of weapons or explosives. *Aukai*, 497 F.3d at 962.

In assessing the lawfulness of a particular search, it is important to note that the standard is whether it is reasonable, not whether it is the "least restrictive means:"

> [T]he choice among such reasonable alternatives remains with the governmental officials who have the responsibility for limited public resources. ("[T]he effectiveness inquiry involves only the question of whether the [search] is a 'reasonable method of deterring the prohibited conduct;' the test does not require that the [search] be 'the most effective measure.'")...Thus, our task is to determine not whether LCT's ASP [the screening plan at issue] was optimally effective, but whether it was reasonably so. (citations omitted) *Cassidy v. Chertoff*, 471 F.3d 67, 85 (2d Cir. 2006) (Sotomayor, J.) (upholding screening of ferry passengers).

Turning to the use of AIT, it is clear from the case law that this screening process is a lawful special needs search that strikes the appropriate balance between the interests of aviation security and individual privacy. As made clear by the attempted attack on December 25, 2009, the threat of nonmetallic explosives is real. Also, the nonmetallic threat is not limited to explosives. It is essential for aviation security to have screening methods in use that are capable of detecting threats in the form of powders, liquids, and other nonmetallic materials. The need for AIT also is illustrated by the fact that Congress has mandated TSA to deploy screening methods that are capable of detecting explosives and other nonmetallic threats. See 49 U.S.C. § 44925(a), quoted above. When compared to the substantial risk presented by the threat of terrorist acts against aviation, the impact on individual privacy of AIT screening is minimal. AIT screening has been appropriately tailored to minimize the impact on individual privacy while still providing an effective means of detecting concealed nonmetallic threats. Given the nature of the threats we face today, AIT screening is "no more extensive or intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives." *Aukai*, 497 F.3d at 962.

The Privacy Act. Contrary to your assertions, TSA has not violated the Privacy Act in its AIT deployment. The Privacy Act applies to systems of records in which the records are retrieved by the name or personal identifier of the individual. 5 U.S.C. §552a(a)(5). All Privacy Act requirements, including publication of a system of records, are linked to the agency maintaining a system of records. AIT does not collect and retrieve information by a passenger's name or other identifying information assigned to that individual, nor do we link any AIT images to any personally identifying information about the individual, such as name or date of birth. Indeed, images are not retained and all images are immediately deleted after AIT screening is complete. Consequently, since TSA does not maintain a system of records by using AIT, none of the obligations outlined under section 552a(e), "Agency requirements," apply to TSA.

TSA and DHS, including the DHS Chief Privacy Officer, evaluated the privacy considerations associated with AIT very carefully before TSA deployed the technology. As a result, TSA incorporated robust privacy protections into the program. These protections are reflected in the publicly available Privacy Impact Assessment (PIA), which was published two years ago under the authority given to the Chief Privacy Officer to assess the impacts of technology on privacy, in advance of the deployment of AIT at airports.[16] The PIA outlines a number of measures that TSA has implemented to ensure passenger privacy, and reflects extensive consideration of informal comments from a wide variety of sources, including some of the groups that have signed your letter. Relevant operating protocols include:

- The TSO viewing the images is located remotely from the individual being screened to preserve anonymity and modesty.
- To resolve an anomaly, the TSO viewing the image communicates via radio to direct the TSO at the checkpoint to the location on the individual's body where a threat item is suspected.
- The images are immediately deleted once AIT screening of the individual is complete.
- The image storage functions are disabled by the manufacturer before the AIT equipment is placed in an airport. This function cannot be activated by the TSOs operating the equipment. Your claims regarding storage of images by AIT used in TSA test facilities are irrelevant to the operation of the devices in the airports. As stated in the AIT PIA, "While the equipment has the capability of collecting and storing an image, the image storage functions will be disabled by the manufacturer before the devices are placed in an airport and will not have the capability to be activated by operators."
- Images cannot be downloaded in operating mode, and the equipment is not networked.
- TSOs are prohibited from bringing any cameras, cell phones, or other recording devices into the image viewing rooms.
- Passengers may opt out of AIT screening and undergo alternate screening procedures.
- Signs at TSA screening checkpoints that utilize AIT advise individuals that AIT screening is optional and that they may request alternate screening.

These operating protocols, coupled with the fact that TSA does not retain or in any way link AIT images to passenger records, provide ample support of TSA's compliance with both the letter and the spirit of the Privacy Act.

Religious Freedom Restoration Act (RFRA). TSA's use of AIT does not violate the RFRA.[17] As an initial matter, TSA's decision to employ AIT would not implicate the RFRA unless it is deemed to substantially burden an individual's exercise of religion.[18] But the very fact that

[16] See Privacy Impact Assessment - http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbiupdate.pdf (July 23, 2009), updating the original PIA dated October 17, 2008.

[17] 42 U.S.C. § 2000bb, *et seq.*

[18] *See, e.g., Navajo Nation v. U.S. Forest Svc.*, 535 F.3d 1058, 1068 (9th Cir. 2008).

passengers are not required to undergo AIT screening – as noted above – necessarily means that its use at airports does not constitute a substantial burden under the RFRA.[19] Because passengers may request a pat-down as an alternative to AIT screening, TSA's use of the technology does not "force[] them to engage in conduct that their religion forbids or . . . prevent[] them from engaging in conduct their religion requires."[20] Indeed, some of the very authorities cited in your letter note that while some religious organizations have expressed concern about AIT, they also acknowledge TSA's effort to accommodate that concern by providing the option for a pat-down.[21]

Courts have long recognized that the government has a compelling interest in maintaining national security and public safety.[22] When requirements predicated on concerns of this type (*e.g.*, prison grooming requirements prohibiting long hair or beards that may facilitate smuggling of contraband, gang identity, etc., and thereby undermine prison security) are pitted against religious precepts (such as the prohibition in Rastafarian or Sunni Muslim traditions that prohibit the cutting of hair or beards), courts have consistently concluded that the requirement may in appropriate circumstances be upheld as the least restrictive means of achieving the compelling government interest.[23]

In light of these considerations, TSA's use of AIT—which serves a compelling governmental interest in security—does not implicate the RFRA. TSA's web site provides further information about how the agency addresses religious and cultural needs at the checkpoint, including the ability of travelers to request alternative, private screening by a TSO of the same gender.[24]

* * * * *

AIT machines, coupled with TSA's layered approach to security, respond to the statutory mandate and the national security imperative to screen airline passengers for both metallic and nonmetallic threats. There is widespread public acceptance of AIT screening, and TSA also provides alternative screening methods. AIT screening has proven effective in addressing ever-

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[19] *See id.*, at 1069-70.

[20] *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001) (collecting cases).

[21] *E.g.*, your letter at notes 48 and 49.

[22] *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *see also United States v. Acevedo-Delgado*, 167 F. Supp. 2d 477, 481 (D. Puerto Rico 2001) (noting that, in an era in which "the relative peace enjoyed by all citizens of the United States is being challenged more and more frequently by our enemies and terrorists alike," courts considering RFRA challenges "cannot simply zoom in on the concerns of [one person or group(s) of United States citizens] but it must pan back and keep the larger picture in focus [taking into account the concerns of] ALL United States citizens, citizens who are entitled to a well-trained military and national security" (internal quotations omitted)).

[23] *Jackson v. District of Columbia*, 89 F. Supp. 2d 48 (D.D.C. Mar 21, 2000) (collecting authority), *overruled on other grounds*, 254 F.3d 262 (D.C. Cir. 2001).

[24] *See* www.tsa.gov/travelers/airtravel/assistant/editorial_1037.shtm.

changing security threats, and numerous independent studies have addressed health concerns related to AIT screening. TSA has carefully considered the important Constitutional, statutory, and privacy issues associated with the deployment of AIT systems, and has taken numerous steps to address those issues in a manner that protects the rights of travelers.

We appreciate hearing the concerns expressed in your letter and hope this information is helpful.

Sincerely yours,

Francine J. Kerner

Francine J. Kerner
Chief Counsel

Attachment

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

April 27, 2010

The Honorable Susan Collins
United States Senate
Washington, DC 20510

Dear Senator Collins:

Thank you for your April 12, 2010 letter regarding the imaging technology demonstrated at Amsterdam's Schiphol International Airport.

Transportation Security Administration (TSA) officials have had extensive discussions with their Dutch counterparts related to the current and future state of Advanced Imaging Technology (AIT) systems and the available automated target recognition (ATR) functionality. TSA representatives have made several visits to Schiphol to discuss the capabilities, operational effectiveness, and suitability of AIT systems—both with and without currently available ATR functionality. The Dutch have also shared testing results with us, including detection and false alarm rates for the currently deployed ATR-enabled AIT systems, and TSA has used the lessons learned from Schiphol to evaluate the use of the AIT in primary screening and determine ATR requirements for U.S. nationwide deployment. Our discussion and technical evaluation sessions with the Dutch about the current and future possibilities for ATR are ongoing,

To give you further insight, the AIT system *without* ATR functionality that is in use at Schiphol is listed on TSA's AIT Qualified Products List, and the AIT system *with* ATR functionality that is in use at Schiphol will be evaluated in a pilot. TSA has provided ATR requirements to manufacturers; once their systems are fully tested and proven to meet these requirements, TSA plans to upgrade all currently deployed systems with this new functionality.

Thank you again for your letter. I value your views on these emerging technologies, and I look forward to working with you on this and other homeland security issues. Senators Kyl and Chambliss, who co-signed your letter, will receive separate, identical responses. Should you need additional assistance, please do not hesitate to contact me at (202) 282-8203.

Yours very truly,

Janet Napolitano

ARGUED ON MARCH 10, 2011; DECIDED ON JULY 15, 2011;
REHEARING AND REHEARING EN BANC DENIED ON SEPTEMBER 12, 2011; MANDATE ISSUED ON SEPTEMBER 21, 2011

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

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE

Respondents Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, et al., hereby oppose petitioners' motion, filed on October 28, 2011, to enforce this Court's mandate of September 21, 2011.

In this case, this Court rejected the merits of petitioners' attacks against the use of Advanced Imaging Technology (AIT) as a primary screening method at airport checkpoints in order to protect air travel security. However, the Court held that the

Transportation Security Administration (TSA) had failed to provide a valid justification for not engaging in notice-and-comment rulemaking before adopting a new practice concerning use of AIT. Because of the Court's recognition that TSA's use of AIT is "an essential security operation," the Court left in place TSA's system of utilizing AIT for screening airline passengers, but remanded the matter to TSA "to act promptly on remand to cure the defect in [the agency's] promulgation [of the AIT policy]." Petitioners now ask this Court to find that TSA has unreasonably delayed in complying with the Court's mandate, and order the agency to publish a new proposed rule in the Federal Register within 45 days and engage in a public comment process.

The attached declaration of James S. Clarkson (Clarkson Decl.), the Acting General Manager of the Intermodal Security Support Division in TSA's Office of Transportation Sector Network Management, makes clear that TSA is fully compliant with this Court's direction for prompt administrative proceedings, and responded by expediting the highly complex rulemaking process here. Mr. Clarkson states in his declaration that "[i]n recognition of this Court's directive in the Opinion in this appeal . . . TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest priorities." Clarkson Decl. ¶ 20.

The Government has not disregarded the Court's instructions. To the contrary, TSA is responding reasonably and expeditiously given the complexity of the necessary rulemaking, the agency's available resources, and the other substantial rulemaking assignments that are by law on the agency's agenda. In such circumstances, petitioners' view that TSA is not applying this Court's mandate is wrong, and petitioners' motion should be denied.

STATEMENT

The history of this action is set forth in the Court's opinion. *Electronic Privacy Information Center v. Department of Homeland Security*, 653 F.3d 1, 3-4 (D.C. Cir. 2011) (*EPIC*). Briefly, on July 2, 2010, petitioners filed their petition for review, along with an Emergency Motion to enjoin the use of AIT as a primary screening method at airport checkpoints, pending disposition of the petition for review. The Government opposed the motion, but stated that "although there is no emergency here, we nevertheless stand ready, willing and able to meet any reasonable expedited briefing and argument schedule the Court sets." Opposition to Emergency Motion for Injunctive Relief (Govt. Opp.), 3 (filed on July 15, 2010). On September 1, 2010, the Court denied petitioners' request for injunctive relief pending disposition of the petition for review, and thereafter the case was duly briefed and argued.

On July 15, 2011, the Court issued its opinion, in which it rejected all of petitioners' substantive legal challenges to AIT (resting upon the Fourth Amendment, the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, the Privacy Act 5 U.S.C. § 552a, the privacy protections in the Homeland Security Act, 6 U.S.C. § 142(a)(1), (4), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000b *et seq.*). *EPIC*, 653 F.3d 1.

With respect to petitioners' procedural claim under the Administrative Procedure Act (APA), 5 U.S.C. § 553, however, the Court held that TSA "has advanced no justification for having failed to conduct a notice-and-comment rulemaking," and the Court therefore "remand[ed] this matter to the agency for further proceedings." *EPIC*, 653 F.3d at 8; *see also id.* at 3, 11. The Court further held that "[b]ecause vacating the present rule would severely disrupt an essential security operation, however, and the rule is, . . . otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." *Id.* at 8 (citation omitted); *see also id.* at 11 ("Finally, due to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it, and instruct the agency promptly to proceed in a manner consistent with this opinion."); Judgment, July 15, 2011 (ordering in pertinent part that "the rule be remanded to TSA

for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court rejected petitioners' request that it "enjoin the Agency Rule until [the Department of Homeland Security] undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) 39.

On August 29, 2011, petitioners filed a rehearing petition, which this Court denied on September 12, 2011.[1] The Court's mandate issued on September 21, 2011.

The attached Clarkson Declaration fully explains the legal requirements concerning the initiation of the TSA rulemaking process, as well as the actions already undertaken by the agency to comply with the mandate. *See* Clarkson Decl, ¶¶ 3-16. In particular, this declaration states that TSA "initiated its internal rulemaking process on July 25, 2011," and "had an initial, very preliminary draft prepared by August 11, 2011" (*id.* at ¶ 14); that the agency "has committed significant resources to comply with this Court's opinion," including "several economists, attorneys, and subject matter experts," in light of "the importance of this issue" (*id.* at ¶ 16); and that TSA "has prioritized the rulemaking directed by the Opinion[.]" *Id.* at ¶ 18. The declaration also explains the challenges of rulemaking in this area, which involves both classified information and nonpublic sensitive security

[1] Accordingly, the time to petition for certiorari does not expire until December 12, 2011.

information ("SSI"). *Id.* at ¶ 17. Mr. Clarkson sums up the situation by unequivocally explaining that, "[i]n recognition of this Court's directive in the Opinion in this appeal . . . TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest priorities." *Id.* at ¶ 20.

ARGUMENT

In this situation, where this Court's mandate did not issue until September 21, 2011, and TSA is committing substantial resources to comply promptly with this Court's instructions, petitioners' motion to enforce that mandate is meritless and should be denied.

1. In its opinion, the Court remanded the matter to TSA for further proceedings with respect to APA rulemaking, but left in place the continued use of AIT as a primary screening mechanism, stating that "we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." 653 F.3d at 8; *see also id.* at 11 (Court "instruct[s] the agency promptly to proceed in a manner consistent with this opinion"); Judgment, July 15, 2011 (Court orders "the rule be remanded to TSA for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court did not impose a specific deadline on TSA, notwithstanding petitioners' request that the Court "enjoin the Agency Rule until [the

Department of Homeland Security] undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) 39.

Petitioners acknowledge in their Motion that the term "promptly" entails no necessary or inherent time frame – there is no further elaboration in this Court's Opinion, the Federal Rules of Appellate Procedure, the Rules of this Court, or this Court's prior decisions, as to a specific deadline dictated by the use of that term. Pet. Mot. 11. Petitioners' effort to impute their own meaning to the Court's directive by recourse to the dictionary definition of promptly elides the initial definition provided by petitioners' own selected source: "being ready and quick to act *as occasion demands*." *See id.* & n.3 (adding emphasis to alternative definition). In light of this Court's directive – and as demonstrated below – TSA has already begun the process of curing the defect of promulgation identified in the Court's Opinion in a prompt manner, with the participation of various agency experts and as agency rulemaking requires. Given the extensive preparation required before a Notice of Proposed Rulemaking (NPRM) may issue, TSA's actions in the immediate wake of the Court's Opinion demonstrate that the agency has been "quick to act as [the] occasion demands." The Clarkson Declaration explains the requirements for initiating the regulatory process (Clarkson Decl. ¶¶ 3-16), and establishes that TSA is acting promptly on remand given these substantial preliminary requirements. *See id.* at ¶¶

14, 16, 18, 20 (noting that TSA took affirmative steps by July 25, 2011, to initiate the required internal NPRM process). This declaration further explains that the two recently-published NPRMs cited by petitioners (*see* Pet. Mot. 9) have been in the works for a long time, and "were initiated several years" before their issuance. Clarkson Decl. ¶ 21. TSA is indeed acting promptly in this matter by any reasonable definition of the term, and the rulemaking examples cited by petitioners only reinforce the complexity and time-consuming nature of the federal rulemaking process.

Petitioners cite no case where an agency has been held to have engaged in "unreasonable delay" based upon a failure to publish a proposed rule roughly five weeks after the effective date of a judicial decree requiring the agency to act, and while the period in which to petition for certiorari remains open. The delays in the cases cited by petitioners typically involved at least many months, if not years, of inaction.[2] Moreover, the very case cited by Petitioners in support of their own

[2] *See, e.g., In re Core Commc'ns , Inc.,* 531 F.3d 849, 856 (D.C. Cir. 2008) (holding unreasonable "agency's failure – for six years – to respond to our own remand"); *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (holding unreasonable a nine-month delay in responding to judicial remand); *Antone v. Block*, 661 F.2d 230, 234 (D.C. Cir. 1981) (indicating that a ten-month delay can be unreasonable); *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009) (holding two-and-a-half year delay unreasonable as a matter of law). Other decisions of this Court finding unreasonable delay generally (continued...)

proposed 45-day deadline for action actually directed the agency "to publish appropriate notices of proposed rulemaking" within 120 days of the order on the motion to enforce, rather than within 45 days, and did so only after twenty-one months had passed since this Court had issued its underlying decision directing remedial agency action. *See Building & Constr. Trades Dep't, AFL-CIO v. Dole*, No. 86-1359, 1989 WL 418934, at *2 (D.C. Cir. Oct. 30, 1989) (unpublished order);[3] *Building & Constr. Trades Dep't, AFL-CIO v. Dole*, 838 F.2d 1258 (D.C. Cir. Feb 2, 1988).

In *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), this Court set forth the methodology for analyzing "unreasonable delay" claims under the APA. The Court identified six factors, stating that they are not "ironclad," but are designed to provide "useful guidance in assessing claims of

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[2](...continued)
involve periods of seeming inactivity measured in years, rather than weeks. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding "nothing less than egregious" agency's six-year failure to respond to a petition); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (holding unreasonable five-year agency delay in responding to judicial remand); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980) (finding agency's four-year delay unreasonable).

[3] The regulatory actions that were assigned a 45-day period for completion were clarifications of existing regulations as directed by the opinion, rather than notices of proposed rulemakings. 1989 WL 418934, at *1.

agency delay."[4] *Id.* "The first and most important factor is that 'the time agencies take to make decisions must be governed by a "rule of reason."'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008), citing *TRAC*, 750 F.2d at 80. The Clarkson Declaration demonstrates that there has been no unreasonable delay since issuance of the Court's mandate until now under such a rule of reason.

Petitioners, however, assert that quite apart from the Court's mandate, TSA "has refused to publish a rule and solicit comments during the more than two years since the substantial change in agency action that gave rise to" petitioners' May 2009 request for rulemaking. Pet. Mot. 14. But as this Court recognized that TSA only

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[4] The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason[]" ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (internal citations omitted).

"decided in early 2010 to use the scanners everywhere for primary screening."[5] 653 F.3d at 3. The "substantial change in agency action" thus had not even occurred in May 2009.[6]

Even more significantly, TSA did not initiate notice-and-comment rulemaking under the APA because of its good faith belief that it was not required to do so, as a matter of law. In its July 2011 opinion, the Court rejected TSA's position with respect to the applicability of the APA but did not suggest any lack of good faith (and also left open the question of the agency's possible invocation of the "good cause" exception to APA rulemaking). The Court's ruling became final and legally binding with the issuance of the mandate on September 21, 2011 – after the denial of petitioners' rehearing en banc petition on September 12, 2011. Although the Court has held that it "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 80 (citation and internal quotation marks omitted), the absence of any such impropriety

[5] The Government's brief in this case explained that that decision was implemented through a subsequent revision to the agency's Standard Operating Procedures. *See* Corrected Final Br. for Resp'ts 28-29, 40.

[6] Furthermore, the Court held that it did not "need to reach petitioners' claim the TSA unreasonably delayed in responding to their 2009 letter," because "our remand to the agency of their 2010 petition for rulemaking gives them all the relief they would obtain in any event." *See* 653 F.3d at 5 n*.

should be entitled to weight in the "unreasonable delay" calculus. Moreover, TSA began the process of drafting a rule shortly after this Court's Opinion of July 15, 2011, and well before the issuance of the mandate in September 21, 2011.

Finally, through the use of an ellipsis, petitioners attempt to support their motion by distorting a representation that the Government made in July 2010, in its Opposition to petitioners' Emergency Motion. Petitioners claim that the Government "has even failed to abide by its own promise to 'stand ready, willing and able to meet any reasonable . . . schedule the Court sets.'" Pet. Mot. 15, quoting Govt. Opp. 3. Read in full context, however, the Government's opposition stated that "although there is no emergency here, we nevertheless stand ready, willing and able to meet any reasonable *expedited briefing and argument* schedule the Court sets." Govt. Opp. 3 (emphasis added). This statement obviously had nothing to do with this Court's remand order, issued many months later. The Government is neither acting inconsistently with its prior representation nor engaging in dilatory conduct here.

2. Petitioners' request that the Court now expressly prohibit TSA from invoking the APA's "good cause" exception (*see* Pet. Mot. 15-16), should also be rejected. The Clarkson Declaration makes clear that TSA does not contemplate invoking the "good cause" exception. *See* Clarkson Decl. ¶ 14 (stating that TSA staff "had an initial, very preliminary draft prepared by August 11, 2011"). Thus, an order by the Court on this point is unwarranted.

CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

/s/ Douglas Letter
DOUGLAS LETTER
(202) 514-3602
Douglas.Letter@usdoj.gov

/s/ John S. Koppel
JOHN S. KOPPEL
(202) 514-2495
John.Koppel@usdoj.gov
Attorneys, Appellate Staff
Civil Division, Rm. 7264
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2011, I caused the foregoing Response in Opposition to Petitioners' Motion to Enforce Mandate to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery on that same date. On the same date, service will also be made automatically upon the following CM/ECF participants:

Marc Rotenberg, Esquire (CM/ECF participant)
John Verdi, Esquire (CM/ECF participant)
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, NW
Suite 200
Washington , DC 20009

/s/ John S. Koppel
JOHN S. KOPPEL
Attorney

ARGUED MARCH 10, 2011; DECIDED JULY 15, 2011;
PETITIONS FOR REHEARING & REHEARING EN BANC DENIED
SEPTEMBER 12, 2011; MANDATE ISSUED SEPTEMBER 21, 2011

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

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

DECLARATION OF JAMES S. CLARKSON IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO ENFORCE THE COURT'S MANDATE

I, James S. Clarkson, an employee of the U.S. Department of Homeland Security ("DHS"), Transportation Security Administration ("TSA"), 601 South 12th Street, Arlington, VA 20598-6002, declare as follows:

1. I am over the age of eighteen (18) and provide this declaration based on my personal knowledge and information gained in my official capacity.

2. I am the Acting General Manager of the Intermodal Security Support Division ("ISSD") in TSA's Office of Transportation Sector Network Management ("TSNM"). In this role, I oversee the regulatory process and the analyses of various proposed regulatory actions, including notices of proposed rulemaking (NPRM), among other policy and operational responsibilities. I have worked for TSA in a variety of management positions since joining the agency in 2003. My roles have included Senior Policy Advisor for Transportation Security, Acting General Manager for the Freight Rail Division, Acting Assistant Administrator for intermodal programs, and General Manager for maritime.

3. Based on my experience, I am well acquainted with the process and procedures for initiating rulemaking under the Administrative Procedure Act, including the issuance of NPRMs.

4. I am aware of this Court's opinion in this case of July 15, 2011, which directs TSA "to conduct notice-and-comment rulemaking" regarding TSA's use of Advanced Imaging Technology ("AIT") ("Opinion"). The rulemaking of the type contemplated by the Opinion requires extensive preparation, including in-depth economic analysis, that is generally measured in months.

5. I am familiar with Executive Order 12866 and Executive Order 13563 directing agencies to follow certain principles in rulemaking, such as consideration

of alternatives and careful analysis of benefits and costs before a notice of proposed rulemaking is issued.

6. Executive Order 12866 requires the Office of Management and Budget ("OMB") to review all proposed regulatory actions before they are published in the *Federal Register* or otherwise issued to the public. The Executive Order also requires agencies to provide an explanation of the need for the regulatory action and an assessment of potential costs and benefits.

7. In particular, Executive Order 12866 of September 30, 1993, Regulatory Planning and Review (58 Fed. Reg. 51735, October 4, 1993), states that agencies in developing a regulation "shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Beyond this, other laws – such as the Regulatory Flexibility Act and the Unfunded Mandates Reform Act – require agencies to evaluate the costs and benefits of certain rulemakings.

8. To assist agencies in crafting proposed regulatory action that will meet these standards, OMB has promulgated a 48-page guidance on best practices for regulatory analysis. Specifically, OMB's Circular A-4, entitled "Regulatory

Analysis" and released in September 2003, sets forth in some detail the particular analyses that agencies must undertake before issuing a proposed regulatory action.

9. Circular A-4 is designed to assist regulatory agencies by defining good regulatory analysis and by standardizing the measurement and reporting of the benefits and costs of Federal regulatory actions.

10. Circular A-4 sets forth the extensive analyses that must precede submission of proposed regulatory action to OMB, including an analysis of the proposed regulation's economic impact, as well as an analysis of its costs and benefits.

11. Once a component agency like TSA has completed its drafting of the proposed regulatory action and conducted the required regulatory analyses, it must submit that proposal to its parent Department, in this case DHS, for further review.

12. Once DHS has reviewed and approved the proposed regulatory action, it is submitted to OMB for its review. OMB has 90 days to complete this review, although OMB may extend that review period by an additional 30 days at its discretion.

13. Significantly, Executive Order 13563, entitled Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011), entails a more extensive economic analysis of proposed regulatory action than was required by Executive Order 12866.

14. In accordance with the foregoing requirements, TSA initiated its internal rulemaking process on July 25, 2011, when members of my staff met with agency counsel to discuss the rulemaking required under the Opinion. Further, the staff responsible for drafting the proposed rule indicated to me that they had an initial, very preliminary draft prepared by August 11, 2011, and are available to assist the economists and subject matter experts with their analyses.

15. TSA continues to gather information and data regarding AIT for inclusion in the preamble to the rule.

16. The agency has committed significant resources to comply with this Court's Opinion. Given the importance of this issue, the agency has dedicated several economists, attorneys, and subject matter experts to provide the necessary background information, research, analysis, and general support required to engage in the rulemaking mandated by the Court.

17. Among the challenges facing the agency is the sensitive nature of the information gathered and relied upon by the agency in considering use of AIT. This information includes classified information as described in Executive Order 13526 and its antecedents, as well as Sensitive Security Information ("SSI") as set forth in 49 C.F.R. part 1520. Like classified information, SSI cannot be included in the economic analysis made available to the public and may necessitate preparation of a second analysis containing this information.

18. While TSA has prioritized the rulemaking directed by the Opinion, TSA has many important rulemakings in progress, many of them required by statute. The list includes the following rulemaking actions required by the Implementing the Recommendations of the 9/11 Commission Act of 2007 (Pub. L. No. 110–53, 121 Stat. 266 (2007):

- regulations to require security training programs for public transportation agency frontline employees. *Id.* at § 1408, 121 Stat. at 409-10;
- regulations to require security training programs for railroad frontline employees. *Id.* at § 1517, 121 Stat. at 439-41;
- regulations to require security training programs for over-the-road bus frontline employees. *Id.* § 1534, 121 Stat. at 461;
- regulations to define security-sensitive materials. *Id.* at § 1501(13), 121 Stat. at 423;
- regulations to require vulnerability assessments and security plans for railroad carriers. *Id.* at § 1512, 121 Stat. at 429-33;
- regulations to require vulnerability assessments and security plans for over-the road bus operators. *Id.* at § 1531, 121 Stat. at 454-57;
- regulations to require aircraft repair stations to implement security measures. *Id.* at § 1616, 121 Stat. at 488;
- conducting security background checks on frontline employees of public transportation agencies, which TSA has determined requires a regulation to accomplish. *Id.* at §§ 1411, 1414, 121 Stat. at 413, 419-22;

- conducting security background checks on frontline employees of railroads, which TSA has determined requires a regulation to accomplish. *Id.* at §§ 1520, 1522, 121 Stat. at 444, 448-50.

19. At this time, TSA does not have a full complement of economists available to conduct the analyses required in connection with the multiple proposed regulations being promulgated by the agency. The agency is addressing this deficiency by filling the three current vacancies for economists (out of a total of eleven positions) in the very near future.

20. On average, and absent the challenges noted above or unanticipated circumstances, the process within TSA that is necessary to issue a NPRM entails a timeframe of approximately three years, with longer timelines for more complex rules. In recognition of this Court's directive in the Opinion in this appeal, however, TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest rulemaking priorities.

21. In reviewing Petitioners' Motion to Enforce the Court's Mandate, I noted Petitioners' claim that DHS had issued more than seventy notices relating to more than twenty proposed rules since the Opinion in this appeal issued on July 15, 2011. The two particular NPRMs described in Petitioners' Motion, however (involving an ammonium nitrate security program and the treatment of aliens subject to EB-5 petitions), were initiated several years before the issuance of a NPRM. Indeed, the ammonium nitrate NPRM was the result of a rulemaking that

began as a result of the Fiscal Year 2008 Department of Homeland Security Appropriations Act, 76 Fed. Reg. 46908 (Aug. 3, 2011), and was based on an Advance Notice of Proposed Rulemaking issued on October 29, 2008 (73 Fed. Reg. 64280). The EB-5-related rulemaking first was in the DHS Unified Agenda in 2003 (68 Fed. Reg. 30280, 30282, 30322 (May 27, 2003)).

///

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 09, 2011.
Arlington, Virginia

James S. Clarkson
Acting General Manager
Intermodal Security Support Division
Transportation Security Administration
U.S. Department of Homeland Security

ARGUED MARCH 10, 2011; DECIDED JULY 15, 2011
REHEARING DENIED SEPTEMBER 12, 2011
MANDATE ISSUED SEPTEMBER 21, 2011

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

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL*
ALAN BUTLER*
Electronic Privacy Information
Center

* Ms. McCall is admitted to practice in Pennsylvania. Admission to the District of Columbia bar pending.
* Mr. Butler is admitted to practice in California.

1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

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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

INDEX OF EXHIBITS

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,

/s/ Marc Rotenberg

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

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).

/s/ Marc Rotenberg

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

CERTIFICATE OF SERVICE

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:

John S. Koppel, Attorney
Email: john.koppel@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Beth S. Brinkmann, Esquire
Direct: 202-353-8679
Email: Beth.Brinkmann@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Room 3135
(see above)

Douglas N. Letter, Esquire, Attorney
Email: douglas.letter@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
(see above)

/s/ Marc Rotenberg
MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

ARGUED ON MARCH 10, 2011; DECIDED ON JULY 15, 2011;
REHEARING AND REHEARING EN BANC DENIED ON SEPTEMBER 12, 2011; MANDATE ISSUED ON SEPTEMBER 21, 2011

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

ELECTRONIC PRIVACY INFORMATION CENTER, *ET AL.*,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, *ET AL.*,	)	
Respondents.	)	

OPPOSITION TO PETITIONERS' SECOND MOTION TO ENFORCE MANDATE

Respondents Janet Napolitano, *et al.*, hereby oppose petitioners' second motion to enforce this Court's mandate of September 21, 2011.

Petitioners Electronic Privacy Information Center ("EPIC"), *et al.*, filed their first motion to enforce the mandate of this Court within 37 days of the issuance of that mandate. This Court denied EPIC's motion on November 16, 2011. A little over a month later, EPIC has now filed a repeat motion, once more asking this Court to

enforce the mandate by ordering the Government to issue new rulemaking within a specified, short period. For the reasons set out below, this renewed motion should be denied, like its predecessor; no relevant facts have changed since the last denial, and EPIC ignores the point that the Government assured this Court just a short time ago that it is already committing its resources to expediting the rulemaking in this matter in accordance with the Court's mandate requiring "prompt proceedings" on remand.

REASONS FOR DENYING EPIC'S RENEWED MOTION

A. EPIC Presents No New Evidence.

EPIC's new motion is based on its contention that "recent developments" underscore the urgency of notice and comment rulemaking in this matter. *See* Petitioners' Second Motion to Enforce the Court's Mandate (" Mot. II") 2-7. None of the items identified by petitioners – from the alleged "mounting evidence" consisting of various preexisting reports and letters, *see id.* at 2-5, to the "strict new guidelines" adopted by the European Commission, *see id.* at 5-6 – justifies revisiting now this Court's November 16, 2011 order denying EPIC's first motion to enforce the mandate. Contrary to EPIC's claim, circumstances have not materially changed since the Court denied that motion.[1]

[1] EPIC asserts that new guidelines prohibiting the use of backscatter x-ray technology were adopted by the European Commission "subsequent to the Court's (continued...)

1. EPIC Has Not Identified or Presented a Body of "Growing Evidence."

EPIC's motion implies that a body of "growing evidence" has developed since this Court's denial of its prior motion regarding health concerns attendant to backscatter advanced imaging technology ("AIT") systems, or that the Transportation Security Administration ("TSA") failed to adequately test the safety of its backscatter system. Mot. II 2-3. In support, however, EPIC cites a single article that summarizes concerns that were generally available at the time EPIC filed the underlying petition for review – and were certainly well known by the time it filed the prior motion to enforce. Rather than constituting new evidence of a growing safety concern, the article actually summarizes various contributions to the discussion regarding safety that, according to the article, were made between 1998 and 2006, without developing any new considerations that have come to light since EPIC filed its initial motion to enforce the Court's mandate.[2]

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[1](...continued)
determination on Petitioner's [*sic*] First Motion to Enforce." Mot. II 5. The European Commission guidelines were issued on November 14, 2011, however, whereas this Court denied the first motion to enforce two days later, on November 16, 2011.

[2] One source quoted in the article, Dr. Rebecca Smith-Bindman, appears to draw on an article she published in the American Medical Association's Archives of Internal Medicine in late March 2011. The abstract of Dr. Smith-Bindman's article indicates that "using the only available models, the risk would be extremely small,
(continued...)

2. EPIC Misrepresents the Decision by European Regulators Regarding Backscatter Technology.

EPIC's presentation regarding a decision by European regulators on November 14, 2011 likewise misrepresents its significance. That decision, as reflected in the press release cited in EPIC's motion, does not purport to be based on "public comments and mounting evidence of [AIT] health risks" as EPIC asserts. Mot. II 5, citing http://europa.eu/raipd/pressReleasesAction.do?reference=IP/11/1343&format=HTML&aged=0&langauge=EN&guiLanguage=en). Rather, that press release – which signals the regulators' approval of AIT systems for use as a general matter and recommends that users follow the various protocols that TSA has already adopted in an effort to mitigate privacy concerns – offers no rationale for the decision regarding backscatter systems apart from an apparent policy choice to avoid any possible risk to health and safety, no matter how small.

Indeed, neither EPIC nor the press release points to a new study of the risks attendant to backscatter technologies that would have precipitated this decision. As such, the European regulators' decision constitutes one datum among many that may be considered once the comment period on the forthcoming rule begins, rather than

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[2](...continued)
even among frequent flyers," and that "there is no significant threat of radiation from the scans." http://archinte.ama-assn.org/cgi/content/abstract/171/12/1112 (last visited Jan. 12, 2012).

a new development that militates in favor of departing from the expedited rulemaking process in which TSA is already engaged.

B. EPIC Mischaracterizes TSA's Efforts to Comply With The Court's Mandate.

More critically, in response to EPIC's first motion asking this Court to force TSA to act by a particular date, respondents submitted the declaration of James C. Clarkson, a TSA official who oversees the regulatory process and analyses of various agency programs and regulatory actions.[3] That declaration provided the Court with the necessary backdrop concerning the complexity of TSA rulemaking, particularly in this matter, which involves both classified material and Sensitive Security Information.

Notably, Mr. Clarkson reported that TSA "has committed significant resources to comply with this Court's opinion. Given the importance of this issue, the agency has dedicated several economists, attorneys, and subject matter experts to provide the necessary background information, research, analysis, and general support required to engage in the rulemaking mandated by the Court." Clarkson Decl. ¶ 16. Mr. Clarkson further informed this Court that, "[i]n recognition of this Court's direction in the Opinion in this appeal, * * * ***TSA has committed to significantly expediting***

[3] EPIC has filed as attachments to its current motion a copy of respondents' earlier opposition and the Clarkson Declaration. Accordingly, respondents are not attaching that declaration here anew.

the AIT rulemaking process and has placed this proposed rule among its highest rulemaking priorities." *Id.* at ¶ 20 (emphasis added).

Mr, Clarkson further detailed for the Court the other important rulemaking responsibilities the agency is currently carrying out pursuant to various statutory requirements imposed in 2007, including:

- regulations concerning security training for frontline public transportation agency, railroad, and over-the-road bus employees;
- regulations to define security-sensitive materials;
- regulations to require railroads and over-the-road bus operators to produce security plans and vulnerability assessments;
- regulations to require implementation of security measures in aircraft repair stations; and
- regulations for conducting security background checks on frontline employees of public transportation companies and railroads.

See id. at ¶ 18.

Producing all of these regulations takes substantial agency time, resources, coordination, and staffing. Nevertheless, as noted above, TSA has already committed to this Court that it is expediting the rulemaking here. That commitment has not wavered.

In light of these assurances, the Court concluded two months ago that EPIC's initial motion to enforce the mandate did not merit relief. Indeed, as shown in respondents' initial opposition, the period that generally must pass before the Court grants a motion mandating action on a required rulemaking is considerably longer than EPIC posits. Thus, for example, this Court held unreasonable an "agency's failure – for six years – to respond to our own remand" to articulate a valid legal justification for the regulations at issue in a particular case. *In re Core Commc'ns , Inc.,* 531 F.3d 849, 856 (D.C. Cir. 2008). In that case, the initial decision issued in March 2000, and *five years later* the Court denied an initial request to order compliance "'without prejudice to refiling in the event of *significant additional delay*.'" *Id.* at 850 (emphasis added). In contrast, here EPIC has filed two such motions within less than six months of the underlying decision.

Furthermore, when the Court has agreed that action is required after the passage of mere months, the Court has done so in egregious situations such as that in *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 271 (D.C. Cir. 2000) where the agency had deferred the petitioner's requested relief for a period "exceeding twenty years" from the date relief was initially sought, *see id.* at 270 – and even then, only after the agency acknowledged the need to act expeditiously on remand but nevertheless "failed to advise the court that it had acted, much less

commenced a proceeding and petitioners advised that no such action has been taken." *Id*. "In these extraordinary circumstances," after a delay of more than twenty years and an additional nine months of regulatory inaction, the Court held that immediate relief was warranted. *See id.* at 272. Similarly, the Court has held that a six-year delay in acting on a coalition of regulated organizations' petition to consult justified a 45-day deadline to comply. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). In contrast to these decisions, TSA has already assured this Court that it began taking steps to comply with this Court's decision within days and is proceeding as expeditiously as possible. Clarkson Decl. ¶¶ 14, 16, 18, 20.

Undaunted by TSA's representations regarding its efforts to comply with this Court's opinion and the jurisprudence applicable to this sort of request, EPIC's second motion to enforce mischaracterizes the Clarkson Declaration, incorrectly suggesting that TSA expects the notice and comment rulemaking process here to take three years. That understanding is erroneous. Rather, ¶ 20 of the Clarkson Declaration indicates that "on average" the notice-and-comment rulemaking process at the Department of Homeland Security takes three years. But Mr. Clarkson further emphasized in that same paragraph that the Government is committed to expediting the process here, with the agency devoting substantial resources to that end. *See also id.* at ¶ 16.

Consequently, while the Clarkson Declaration described the average duration for the rulemaking process, Mr. Clarkson stated unequivocally that the Government has accelerated the process here. Thus, in light of this Court's order, TSA has made this matter ***not*** the average one, which takes three years.

In sum, as TSA has already explained, the agency is fully engaged in utilizing its finite resources to carry out its myriad simultaneous responsibilities, while meeting this Court's mandate in this matter on an expedited basis. In making its repeat motions here, EPIC has shown a naive understanding of how serious and complicated Federal Government rulemaking works. The agency charged by Congress with carrying out the law with respect to both this matter and other important transportation security issues is expertly attempting to fulfill its numerous missions with the tools provided by Congress.

The relief sought by EPIC demands that this Court put itself in the place of the TSA Administrator and reorder the agency's priorities, without any indication that the agency has been in any way dilatory in its response to this Court's directive. Given the fact that the agency has already made clear that it heard and understands this Court's prior ruling and is working in an expedited manner to carry out that ruling, EPIC's latest motion advances no justification to overturn the agency's implementation plan and substitute EPIC's preferred remedy, and necessarily

disregards the competing demands on TSA's capabilities previously identified in Mr. Clarkson's Declaration. Such unfounded repetitive motions needlessly consume the resources of the Court and the parties, while distracting the agency from its task and thereby hindering accomplishment of the very outcome petitioners seek.

CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

/s/ Douglas Letter
DOUGLAS LETTER
(202) 514-3602
Douglas.Letter@usdoj.gov

/s/ John S. Koppel
JOHN S. KOPPEL
(202) 514-2495
John.Koppel@usdoj.gov
Attorneys, Appellate Staff
Civil Division, Rm. 7264
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2012, I caused the foregoing Response in Opposition to Petitioners' Second Motion to Enforce Mandate to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery on that same date. On the same date, service will also be made automatically upon the following CM/ECF participants:

Marc Rotenberg, Esquire (CM/ECF participant)
John Verdi, Esquire (CM/ECF participant)
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, NW
Suite 200
Washington , DC 20009

/s/ John S. Koppel
JOHN S. KOPPEL
Attorney

ARGUED MARCH 10, 2011; DECIDED JULY 15, 2011
REHEARING DENIED SEPTEMBER 12, 2011
MANDATE ISSUED SEPTEMBER 21, 2011

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.

REPLY IN SUPPORT OF PETITIONER'S SECOND MOTION TO ENFORCE THE COURT'S MANDATE

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL*
ALAN BUTLER*
Electronic Privacy Information

* Ms. McCall is admitted to practice in Pennsylvania. Admission to the District of Columbia bar pending.
* Mr. Butler is admitted to practice in California.

Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

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SUMMARY OF ARGUMENT

Petitioner the Electronic Privacy Information Center ("EPIC") filed a Second Motion to Enforce this Court's Mandate following the recent decision of European lawmakers to prohibit the use of backscatter x-ray Whole Body Imaging ("WBI") devices because of health and safety concerns. The same backscatter devices are currently operated by respondent the Department of Homeland Security ("DHS") in airports across the United States. Remarkably, respondent DHS argues in its opposition that "circumstances have not materially changed" and that there are no "new considerations" that would justify any action by this Court to enforce its mandate. DHS has further assured the Court that it is acting "expeditiously" while simultaneously setting out new justifications for further delay.

For the reasons set out below, EPIC respectfully urges this Court to enforce its mandate and to set a date certain by which the DHS must publish a notice of its WBI rule, or to suspend further deployment of the WBI technology until it does so.

ARGUMENT

I. THE DHS FAILS TO ACKNOWLEDGE THE SIGNIFICANCE OF THE RECENT ACTION BY THE EUROPEAN COMMISSION; THE COMMISSION'S ACTION WOULD JUSTIFY A DECISION BY THIS COURT IN SUPPORT OF PETITIONER

A. The DHS Opposition

The DHS alleges that "EPIC Presents No New Evidence" that would justify any further action by the Court in this matter. Resp't Opp'n at 2. The DHS contends that "circumstances have not materially changed" since the Court denied the EPIC's first motion to enforce the Court's mandate and that EPIC has not developed "any new considerations" that would justify a different result regarding EPIC's second motion. Resp't Opp'n at 2-3.The agency concludes that EPIC "advances no justification" for any action by the Court. Resp't Opp'n at 9.

The DHS opposition entirely disregards the extraordinary action recently taken by the European Commission to block deployment of backscatter WBI devices, which is central to the concern that the Petitioner EPIC has pursued before this Court.

B. The Action of the European Commission to Safeguard Air Travelers

EPIC filed its first motion to enforce the Court's Mandate on October 28, 2011.[1] On November 14, 2011, the European Commission effectively prohibited

[1] EPIC concedes that the European Commission guidelines were issued prior to the Court's decision on the first motion. *See* Resp't Opp'n at 2 n.1. However, the

the use of all backscatter x-ray devices in European airports, finding that this particular type of airport body scanner posed a health risk to the public. EUROPEAN COMMISSION, AVIATION SECURITY: COMMISSION ADOPTS NEW RULES ON THE USE OF SECURITY SCANNERS AT EUROPEAN AIRPORTS (Press Release, Nov. 14, 2011).[2] *Forbes* magazine reported:

> The European Union issued a ruling this week that bans x-ray body scanners in all European airports. According to the European Commission, the agency charged with enforcing the ruling across the EU's 27 member nations, the prohibition is necessary "in order not to risk jeopardizing citizens' health and safety."

David DiSalvo, *Europe Bans Airport Body Scanners For "Health and Safety" Concerns*, Forbes, Nov. 15, 2011; *see also* Meredith Melnick, *Europe Bans Airport X-Ray Scanners. Should the U.S. Follow Suit? Time*, Nov. 21, 2011 ("In its new airport security policy, the European Commission announced on Nov. 14 that it would ban the controversial 'backscatter' x-ray machines, which emit ionized radiation, from all airports in the European Union's 27 member nations . . ."); Leon

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relevant date for the Court's consideration of EPIC's second motion to enforce is the filing of EPIC's first motion - October 28, 2011. The arguments set out in the second motion to enforce contain material facts that arose subsequent to the first motion to enforce. Moreover, the decision of the European Commission issued on November 14, 2011 and was reported on November 15, 2011. The Court's decision on EPIC's first motion to enforce issued on November 16, 2011. In no respect would it be fair to contend that the Court's earlier motion considered the significance of the recent decision concerning the decision of the European Commission.

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

Watson, *Airport Scanners that 'Strip' Passengers Naked are Banned over Fears that They Cause Cancer*, Mail Online, Nov. 17, 2011 ("Europe has banned controversial airport strip-search scanners over fears the X-ray technology could cause cancer.").

The DHS describes the European decision as "one datum among many that may be considered once the comment period on the forthcoming rule begins." Resp't Opp'n at 4. In other words, the agency contends that the European Commission's recent decision to effectively prohibit the operation of devices because of health and safety risks may be worth noting but adds nothing to Petitioner's claim that that the Court should act to enforce its mandate. The agency's argument underestimates the import of the European Commission action. A respected, impartial government entity barred operation of backscatter WBI devices. The Commission's decision is more than "one datum among many that may be considered" by the agency. It is an indictment of the DHS's failure to take account of comments from experts and the public concerning radiation risks.

Separately, and subsequent to the filing of EPIC's first motion to enforce, radiation experts expressed concern about the use of the same backscatter x-ray devices at border crossings. "Society will pay a huge price in cancer because of this," according to John Sedat, professor of biochemistry and biophysics at the University of California at San Francisco. Declan McCullagh, *DHS X-ray*

Scanners Could be Cancer Risk to Border Crossers, CNET, Jan. 12, 2012. Professor Sedat was describing a device that uses backscatter x-ray – the same radiation that the DHS currently deploys against air travelers in US airports.

Even the DHS itself appears concerned about the risk of radiation exposure. According to a report published after EPIC's first motion to enforce:

> The Transportation Security Administration (TSA) is looking to monitor the levels of radiation that its employees are exposed to from X-ray technology, including airport body scanners, a document from the agency says.
>
> In the document, the TSA said it plans to start performing radiation measurements using "personal dosimeters," which are devices worn on the body that measure a person's exposure to radiation, at certain airports. Such devices are used by people who work near sources of radiation such as hospital and nuclear power plant employees.

Rachael Rettner, *Airport Screeners to be Monitored for Radiation, TSA Says*, MyHealthDailynews, Jan. 9, 2012.[3] From the agency's website:

> The Transportation Security Administration (TSA) is issuing this Sources Sought Notice - Request for Information to improve its understanding of market capabilities and identify qualified vendors that are capable of providing radiation dosimetry services to the TSA Office of Occupational Safety, Health, and Environment (OSHE) in order to perform hazard assessments in accordance with DHS and TSA policy.

[3] *Available at* http://www.myhealthnewsdaily.com/2091-airport-security-screening-personal-radiation-monitoring.html

Department of Homeland Security, Sources Sought Notice - RADIATION DOSIMETRY SERVICES, Solicitation Number: HSTS01-12-SSN-OSH999, Dec. 29, 2011.[4]

C. EPIC's First Petition

At the outset, EPIC and the thirty organizations that joined in the petition to Secretary Napolitano urged the agency to consider the health impact of WBI devices. "[W]e seek a full investigation of the medical and health implications of repeated exposure to Whole Body Imaging technology." Letter from Electronic Privacy Information Center, et al. to Secretary Janet Napolitano (May 31, 2009) at 2.[5] Then in response to the government's characterization of the safety of the devices, EPIC warned "the decision of the agency not to conduct a formal rulemaking meant that the agency could disregard contradictory evidence as well as the possible risks resulting from the malfunctioning of these devices." Pet'rs' Reply Br. at 6.

Almost three years later, as the evidence of the health risks mount, the agency has still not begun the public rulemaking Petitioners sought and this Court mandated last summer.

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[4] *Available at* https://www.fbo.gov/index?s=opportunity&mode=form&id=34ca34f51cfdbb16652a5c6643e51e00&tab=core&tabmode=list

[5] *Available at* http://epic.org/privacy/body_scanners/EPIC_Body_Scan_DHS_Petition_05_31_09.pdf

II. THE DHS CLAIMS "EXPEDITION" WHILE SIMULTANEOUSLY ALLUDING TO FURTHER DELAY

The DHS states several times that it is acting "expeditiously" to undertake the rulemaking required by this Court. Resp't Opp'n at 2, 5-6, 8-9. Yet respondents also lay the groundwork for continued delay. The DHS notes the alleged "complexity of TSA rulemaking . . ." Resp't Opp'n at 5. The agency cites "many other important rulemaking responsibilities" and claims that "[p]roducing all of these regulations takes substantial agency time, resources, coordination, and staffing." Resp't Opp'n at 6. The agency describes as well "its finite resources to carry out its myriad simultaneous responsibilities . . ." Resp't Opp'n at 9.

But in none of those other rulemakings is the agency under an order by the Court to "act promptly" to begin a rulemaking. Moreover, the DHS appears to have it both ways in its characterization of the expected time for this particular rulemaking. The Clarkson declaration indicated that an "average" rulemaking by the agency takes three years. Declaration of James S. Clarkson, TSA's Acting General Manager of ISSD. *See* Clarkson Decl. at ¶20 (attached to Respondents' Opposition to EPIC's First Motion to Enforce). The Clarkson Declaration also suggests that this particular rulemaking may take even longer. *Id*. at ¶¶17, 20.

Now, the agency contends that this is not an average rulemaking because it has "accelerated the process here." Resp't Opp'n at 9. Yet all of the factors identified by the DHS in opposition to Petitioner's motion would argue for further

delay. If the agency intended to assure the Court it was indeed acting promptly, it could have provided further evidence in its opposition to EPIC's motion. It could have set a reasonable date certain. The DHS did not. Instead, the agency merely gave more reasons for delay.

III. THE *TRAC* ANALYSIS SUPPORTS EPIC'S SECOND MOTION TO ENFORCE

In the widely followed *TRAC* analysis, this Court set out the factors to consider for unreasonable agency delay. *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). As to the first factor, the Court said that "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)). Yet the DHS opposition continues to argue for delay that is more likely measured in years, not months or weeks. Nothing in the DHS opposition suggests that the agency is prepared to begin a rulemaking on this matter in the next several months.

As to the second factor, regarding Congressional intent, Congress has not spoken directly to the timeline for this rulemaking; however, Senator Collins, the ranking member of the Senate Committee on Homeland Security and Governmental Affairs, has expressed specific concern about the failure of the DHS to undertake an independent evaluation of the health risks of airport body scanners,

as EPIC has urged a public rulemaking would enable. Following a commitment from TSA Administrator John S. Pistole to "initiate an independent study of the health effects backscatter" and the subsequent decision of the TSA Administrator to rely instead on an internal agency report, Senator Collins wrote:

> My understanding is that the IG report will examine whether or not TSA is doing an adequate job of inspecting maintaining, and operating AIT machines. This is not the same as conducting an independent study of the those AIT machines emitting ionizing radiation. Further, the European Commission announced last week that, "in order not to risk jeopardizing citizens' health and safety," it would only authorize the use of passenger scanners in the European Union that "do no use x-ray technology." This prohibition gives even more impetus to the need for an independent study of the safety of such AIT machines.

Letter from Senator Susan M. Collins to John S. Pistole, Administrator, TSA (Nov. 23, 2011).[6]

As with the decision of the European Commission, the recent statements of health and radiation experts, and the DHS's solicitation for dosimeters to assess radiation risk to DHS employees, Senator Collin's statement is also subsequent to EPIC's first motion to enforce.

As to the third factor and the associated fifth factor of the *TRAC* analysis, "concerns for human health and welfare are undeniably at stake." *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009). The evidence

[6] *Available at* http://www.propublica.org/documents/item/sen.-susan-collins-letter-to-tsa-re-ait-and-inspector-general-report

is provided by independent experts, the recent decision of the European Commission, the ranking Senator on the relevant oversight committee, and the agency itself. The agency cites a wide range of responsibilities, but where the health and safety of the American public is at issue, prioritization is required. As this Court held, "few if any regulatory procedures impose directly and significantly upon so many members of the public." *Electronic Privacy Information Center v. Dept. of Homeland Security*, 653 F.3d 1, 9 (D.C. Cir. 2011).

As the fourth factor speaks to an "agency activity of a higher or competing authority" and the agency has cited only the "complexity of rulemaking," the "many other important rulemaking responsibilities," and its "myriad simultaneous responsibilities," the DHS' further delay is not permissible. The DHS must offer something more than its routine, ongoing responsibilities to justify further delay.

CONCLUSION

For the reasons set out above, EPIC respectfully urges this Court to enforce its mandate and to set a date certain by the DHS must publish a notice of its WBI rule, or to suspend further deployment of the WBI technology until it does so.

Respectfully submitted,

/s/ Marc Rotenberg

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

Dated: January 17, 2012

RULE 32(A) CERTIFICATE

I hereby certify that the foregoing Reply in Support of Petitioners' 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 10-page limit of Rule 27(d)(2).

/s/ Marc Rotenberg

MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 17th day of January 2012, 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:

John S. Koppel, Attorney
Email: john.koppel@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Beth S. Brinkmann, Esquire
Direct: 202-353-8679
Email: Beth.Brinkmann@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Room 3135
(see above)

Douglas N. Letter, Esquire, Attorney
Email: douglas.letter@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
(see above)

/s/ Marc Rotenberg
MARC ROTENBERG
JOHN VERDI
GINGER MCCALL
ALAN BUTLER
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
Counsel for Petitioners

FEDERAL REGISTER

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Part IX

Department of Homeland Security

Semiannual Regulatory Agenda

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Chs. I and II

[DHS Docket No. OGC–RP–04–001]

Unified Agenda of Federal Regulatory and Deregulatory Actions

AGENCY: Office of the Secretary, DHS.

ACTION: Semiannual regulatory agenda.

SUMMARY: This regulatory agenda is a semiannual summary of all current and projected rulemakings, existing regulations, and completed actions of the Department of Homeland Security (DHS) and its components. This agenda provides the public with information about DHS's regulatory activity. DHS expects that this information will enable the public to be more aware of, and effectively participate in, the Department's regulatory activity. DHS invites the public to submit comments on any aspect of this agenda.

FOR FURTHER INFORMATION CONTACT:

General

Please direct general comments and inquiries on the agenda to the Regulatory Affairs Law Division, U.S. Department of Homeland Security, Office of the General Counsel, 245 Murray Lane, Mail Stop 0485, Washington, DC 20528–0485.

Specific

Please direct specific comments and inquiries on individual regulatory actions identified in this agenda to the individual listed in the summary of the regulation as the point of contact for that regulation.

SUPPLEMENTARY INFORMATION: DHS provides this notice pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, Sep. 19, 1980) and Executive Order 12866 "Regulatory Planning and Review" (Sep. 30, 1993) as incorporated in Executive Order 13563 "Improving Regulation & Regulatory Review" (Jan. 18, 2011), which require the Department to publish a semiannual agenda of regulations. The regulatory agenda is a summary of all current and projected rulemakings, as well as actions completed since the publication of the last regulatory agenda for the Department. DHS's last semiannual regulatory agenda was published on July 7, 2011, at 76 FR 40074.

Beginning in fall 2007, the Internet became the basic means for disseminating the Unified Agenda. The complete Unified Agenda is available online at *www.reginfo.gov*.

As part of the Unified Agenda, Federal agencies are also required to prepare a Regulatory Plan of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year. As in past years, for fall editions of the Unified Agenda, the entire Regulatory Plan and agency regulatory flexibility agendas, in accordance with the publication requirements of the Regulatory Flexibility Act, are printed in the **Federal Register**.

The Regulatory Flexibility Act (5 U.S.C. 602) requires federal agencies to publish their regulatory flexibility agenda in the **Federal Register**. A regulatory flexibility agenda shall contain, among other things, "a brief description of the subject area of any rule which is likely to have a significant economic impact on a substantial number of small entities." DHS's printed agenda entries include regulatory actions that are in the Department's regulatory flexibility agenda. Printing of these entries is limited to fields that contain information required by the agenda provisions of the Regulatory Flexibility Act. Additional information on these entries is available in the Unified Agenda published on the Internet.

The semiannual agenda of the Department conforms to the Unified Agenda format developed by the Regulatory Information Service Center.

Dated: September 9, 2011.

Christina E. McDonald,

Associate General Counsel for Regulatory Affairs.

OFFICE OF THE SECRETARY—PROPOSED RULE STAGE

Sequence No.	Title	Regulation Identifier No.
373	Secure Handling of Ammonium Nitrate Program (**Reg Plan Seq No. 53**)	1601–AA52
374	Homeland Security Acquisition Regulation, Subcontractor Labor Hour Rates Under Time and Materials Contracts.	1601–AA65

References in boldface appear in The Regulatory Plan in part II of this issue of the **Federal Register**.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES—FINAL RULE STAGE

Sequence No.	Title	Regulation Identifier No.
375	Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Aliens Subject to Numerical Limitations.	1615–AB71

U.S. CITIZENSHIP AND IMMIGRATION SERVICES—COMPLETED ACTIONS

Sequence No.	Title	Regulation Identifier No.
376	Commonwealth of the Northern Mariana Islands Transitional Worker Classification	1615–AB76

U.S. Coast Guard—Prerule Stage

Sequence No.	Title	Regulation Identifier No.
377	Claims Procedures Under the Oil Pollution Act of 1990 (USCG–2004–17697)	1625–AA03

U.S. Coast Guard—Proposed Rule Stage

Sequence No.	Title	Regulation Identifier No.
378	Marine Transportation-Related Facility Response Plans for Hazardous Substances	1625–AA12
379	Numbering of Undocumented Barges	1625–AA14
380	Inspection of Towing Vessels	1625–AB06
381	Updates to Maritime Security	1625–AB38
382	MARPOL Annex 1 Update	1625–AB57

U.S. Coast Guard—Final Rule Stage

Sequence No.	Title	Regulation Identifier No.
383	Implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification, and Watchkeeping (STCW) for Seafarers, 1978 (**Reg Plan Seq No. 64**).	1625–AA16
384	Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters	1625–AA32
385	Nontank Vessel Response Plans and Other Vessel Response Plan Requirements (**Reg Plan Seq No. 66**)	1625–AB27

References in boldface appear in The Regulatory Plan in part II of this issue of the **Federal Register**.

U.S. Coast Guard—Long-Term Actions

Sequence No.	Title	Regulation Identifier No.
386	Commercial Fishing Industry Vessels	1625–AA77

U.S. Customs and Border Protection—Final Rule Stage

Sequence No.	Title	Regulation Identifier No.
387	Importer Security Filing and Additional Carrier Requirements (**Reg Plan Seq No. 69**)	1651–AA70

References in boldface appear in The Regulatory Plan in part II of this issue of the **Federal Register**.

Transportation Security Administration—Proposed Rule Stage

Sequence No.	Title	Regulation Identifier No.
388	General Aviation Security and Other Aircraft Operator Security (**Reg Plan Seq No. 73**)	1652–AA53

References in boldface appear in The Regulatory Plan in part II of this issue of the **Federal Register**.

Transportation Security Administration—Final Rule Stage

Sequence No.	Title	Regulation Identifier No.
389	Aircraft Repair Station Security (**Reg Plan Seq No. 77**)	1652–AA38

References in boldface appear in The Regulatory Plan in part II of this issue of the **Federal Register**.

DEPARTMENT OF HOMELAND SECURITY (DHS)

Office of the Secretary (OS)

Proposed Rule Stage

373. Secure Handling of Ammonium Nitrate Program

Regulatory Plan: This entry is Seq. No. 53 in part II of this issue of the **Federal Register**.
RIN: 1601–AA52

374. • Homeland Security Acquisition Regulation, Subcontractor Labor Hour Rates Under Time and Materials Contracts

Legal Authority: 5 U.S.C. 301; 5 U.S.C. 302; 41 U.S.C. 418b(a); 41 U.S.C. 418b(b); 41 U.S.C. 414; 48 CFR part 1, subpart 1.3; DHS Delegation Number 0700
Abstract: The Department of Homeland Security (DHS) is proposing to amend its Homeland Security Acquisition Regulation (HSAR) parts 3016 and 3052 to require DHS contracts for time and material or labor hours (T&M/LH) to include separate labor hour rates for subcontractors and a description of the method that will be used to record and bill for labor hours for both contractors and subcontractors.
Timetable:

Action	Date	FR Cite
NPRM	03/00/12	
NPRM Comment Period End.	05/00/12	

Regulatory Flexibility Analysis Required: Yes.
Agency Contact: Jeremy F. Olson, Senior Procurement Analyst, Department of Homeland Security, Office of the Chief Procurement Officer, Washington, DC 20528, *Phone:* 202 447–5197, *Fax:* 202 447–5310, *Email: jerry.olson@dhs.gov.*
RIN: 1601–AA65

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Citizenship and Immigration Services (USCIS)

Final Rule Stage

375. Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Aliens Subject to Numerical Limitations

Legal Authority: 8 U.S.C. 1184(g)
Abstract: The Department of Homeland Security will finalize its regulations governing petitions filed on behalf of alien workers subject to annual numerical limitations. This rule proposes to establish an electronic registration program for petitions subject to numerical limitations for the H–1B nonimmigrant classification. This action is necessary because the demand for H–1B specialty occupation workers by U.S. companies may exceed the numerical limitation. This rule is intended to allow USCIS to more efficiently manage the intake and lottery process for these H–1B petitions.
Timetable:

Action	Date	FR Cite
NPRM	03/03/11	76 FR 11686
NPRM Comment Period End.	05/02/11	
Final Rule	10/00/12	

Regulatory Flexibility Analysis Required: Yes.
Agency Contact: Susan Arroyo, Chief of Staff, Department of Homeland Security, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue NW., Washington, DC 20529, *Phone:* 202 272–1094, *Fax:* 202 272–1543, *Email: susan.arroyo@dhs.gov.*
RIN: 1615–AB71

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Citizenship and Immigration Services (USCIS)

Completed Actions

376. Commonwealth of the Northern Mariana Islands Transitional Worker Classification

Legal Authority: Pub. L. 110–229
Abstract: On October 27, 2009, the Department of Homeland Security published an interim rule creating a new, temporary, Commonwealth of the Northern Mariana Islands (CNMI)-only transitional worker classification (CW classification) in accordance with title VII of the Consolidated Natural Resources Act of 2008 (CNRA). The CW classification is intended to provide for an orderly transition from the CNMI permit system to the U.S. Federal immigration system under the immigration laws of the United States, including the Immigration and Nationality Act (INA). This final rule implements the CW classification and establishes that a CW transitional worker is an alien worker who is ineligible for another classification under the INA and who performs services or labor for an employer in the CNMI during the five-year transition period. CNMI employers may now petition for such workers. The rule also establishes employment authorization incident to CW status.
Timetable:

Action	Date	FR Cite
Interim Final Rule	10/27/09	74 FR 55094
Interim Final Rule Comment Period End.	11/27/09	
Interim Final Rule Comment Period End Extended.	12/09/09	74 FR 64997
Interim Final Rule Comment Period End.	01/08/10	
Final Rule	09/07/11	76 FR 55502
Final Rule Effective.	10/07/11	
Final Rule Correction.	11/08/11	76 FR 69119

Regulatory Flexibility Analysis Required: Yes.
Agency Contact: Kevin J. Cummings, Chief of Business and Foreign Workers Division, Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, *Phone:* 202 272–1470, *Fax:* 202 272–1480, *Email: kevin.cummings@dhs.gov.*
RIN: 1615–AB76

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Coast Guard (USCG)

Prerule Stage

377. Claims Procedures Under the Oil Pollution Act of 1990 (USCG–2004–17697)

Legal Authority: 33 U.S.C. 2713 and 2714
Abstract: This rulemaking implements section 1013 (Claims Procedures) and section 1014 (Designation of Source and Advertisement) of the Oil Pollution Act of 1990 (OPA). An interim rule was published in 1992, and provides the basic requirements for the filing of claims for uncompensated removal costs or damages resulting from the discharge of oil, for the designation of the sources of the discharge, and for the advertisement of where claims are to be filed. The interim rule also includes the processing of natural resource damage (NRD) claims. The NRD claims, however, were not processed until September 25, 1997, when the Department of Justice issued an opinion that the Oil Spill Liability Trust Fund (OSLTF) is available, without further appropriation, to pay trustee NRD

claims under the general claims provisions of OPA 90, 33 U.S.C. 2712(a)(4). This rulemaking supports the Coast Guard's broad role and responsibility of maritime stewardship.

Timetable:

Action	Date	FR Cite
Interim Final Rule	08/12/92	57 FR 36314
Correction	09/09/92	57 FR 41104
Interim Final Rule Comment Period End.	12/10/92	
Notice of Inquiry	11/01/11	76 FR 67385
Notice of Inquiry Comment Period End.	01/30/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Benjamin White, Project Manager, National Pollution Funds Center, Department of Homeland Security, U.S. Coast Guard, NPFC MS 7100, United States Coast Guard, 4200 Wilson Boulevard, Arlington, VA 20598–7100, *Phone:* 202 493–6863, *Email: benjamin.h.white@uscg.mil.*

RIN: 1625–AA03

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Coast Guard (USCG)

Proposed Rule Stage

378. Marine Transportation-Related Facility Response Plans for Hazardous Substances

Legal Authority: 33 U.S.C. 1321(j); Pub. L. 101–380; Pub. L. 108–293

Abstract: This project would implement provisions of the Oil Pollution Act of 1990 (OPA 90) that require an owner or operator of a marine transportation-related facility transferring bulk hazardous substances to develop and operate in accordance with an approved response plan. The regulations would apply to marine transportation-related facilities that, because of their location, could cause harm to the environment by discharging a hazardous substance into or on the navigable waters or adjoining shoreline. A separate rulemaking, under RIN 1625–AA13, was developed in tandem with this rulemaking and addresses hazardous substances response plan requirements for tank vessels. This project supports the Coast Guard's broad roles and responsibilities of maritime safety and maritime stewardship by reducing the consequence of pollution incidents. This action is considered significant because of substantial public and industry interest.

Timetable:

Action	Date	FR Cite
ANPRM	05/03/96	61 FR 20084
Notice of Public Hearings.	07/03/96	61 FR 34775
ANPRM Comment Period End.	09/03/96	
NPRM	03/31/00	65 FR 17416
NPRM Comment Period End.	06/29/00	
Notice To Reopen Comment Period.	02/17/11	76 FR 9276
Comment Period End.	05/18/11	
Notice of Availability.	01/00/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: CDR Michael Roldan, Project Manager, CG–522, Department of Homeland Security, U.S. Coast Guard, 2100 Second Street SW., STOP 7126, Washington, DC 20593–7126, *Phone:* 202 372–1420, *Email: luis.m.roldan@uscg.mil.*

RIN: 1625–AA12

379. Numbering of Undocumented Barges

Legal Authority: 46 U.S.C. 12301

Abstract: Title 46 U.S.C. 12301, as amended by the Abandoned Barge Act of 1992, requires that all undocumented barges of more than 100 gross tons operating on the navigable waters of the United States be numbered. This rulemaking would establish a numbering system for these barges. The numbering of undocumented barges will allow identification of owners of barges found abandoned. This rulemaking supports the Coast Guard's broad role and responsibility of maritime stewardship.

Timetable:

Action	Date	FR Cite
Request for Comments.	10/18/94	59 FR 52646
Comment Period End.	01/17/95	
ANPRM	07/06/98	63 FR 36384
ANPRM Comment Period End.	11/03/98	
NPRM	01/11/01	66 FR 2385
NPRM Comment Period End.	04/11/01	
NPRM Reopening of Comment Period.	08/12/04	69 FR 49844
NPRM Comment Period End.	11/10/04	
Supplemental NPRM.	01/00/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Denise Harmon, Project Manager, Department of Homeland Security, U.S. Coast Guard, National Vessel Documentation Center, 792 T.J. Jackson Drive, Falling Waters, WV 25419, *Phone:* 304 271–2506.

RIN: 1625–AA14

380. Inspection of Towing Vessels

Legal Authority: 46 U.S.C. 3103; 46 U.S.C. 3301; 46 U.S.C. 3306; 46 U.S.C. 3308; 46 U.S.C. 3316; 46 U.S.C. 3703; 46 U.S.C. 8104; 46 U.S.C. 8904; DHS Delegation No 0170.1

Abstract: This rulemaking would implement a program of inspection for certification of towing vessels, which were previously uninspected. It would prescribe standards for safety management systems and third-party auditors and surveyors, along with standards for construction, operation, vessel systems, safety equipment, and recordkeeping.

Timetable:

Action	Date	FR Cite
NPRM	08/11/11	76 FR 49976
Notice of Public Meetings.	09/09/11	76 FR 55847
NPRM Comment Period End.	12/09/11	
Final Rule	To Be Determined	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Michael Harmon, Program Manager, CG–5222, Department of Homeland Security, U.S. Coast Guard, 2100 Second Street SW., STOP 7126, Washington, DC 20593–7126, *Phone:* 202 372–1427, *Email: michael.j.harmon@uscg.mil.*

RIN: 1625–AB06

381. Updates to Maritime Security

Legal Authority: 33 U.S.C. 1226; 33 U.S.C. 1231; 46 U.S.C. ch 701; 50 U.S.C. 191 and 192; EO 12656; 3 CFR 1988 Comp p 585; 33 CFR 1.05–1; 33 CFR 6.04–11; 33 CFR 6.14; 33 CFR 6.16; 33 CFR 6.19; DHS Delegation No 0170.1

Abstract: The Coast Guard proposes certain additions, changes, and amendments to 33 CFR, subchapter H. Subchapter H is comprised of parts 101 through 106. Subchapter H implements the major provisions of the Maritime Transportation Security Act of 2002. This rulemaking is the first major revision to subchapter H. The proposed changes would further the goals of domestic compliance and international cooperation by incorporating requirements from legislation implemented since the original publication of these regulations, such as the SAFE Port Act, and including

international standards such as STCW security training. This rulemaking has international interest because of the close relationship between subchapter H and the International Ship and Port Security Code (ISPS).

Timetable:

Action	Date	FR Cite
NPRM	09/00/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: LCDR Loan O'Brien, Project Manager, Department of Homeland Security, U.S. Coast Guard, Commandant, (CG–5442), 2100 Second Street SW., STOP 7581, Washington, DC 20593–7581, *Phone:* 202 372–1133, *Email: loan.t.o'brien@uscg.mil.*

RIN: 1625–AB38

382. Marpol Annex 1 Update

Legal Authority: 33 U.S.C. 1902; 46 U.S.C. 3306

Abstract: In this rulemaking, the Coast Guard would amend the regulations in subchapter O (Pollution) of title 33 of the CFR, including regulations on vessels carrying oil, oil pollution prevention, oil transfer operations, and rules for marine environmental protection regarding oil tank vessels, to reflect changes to international oil pollution standards adopted since 2004. Additionally, this regulation would update shipping regulations in title 46 to require Material Safety Data Sheets, in accordance with international agreements, to protect the safety of mariners at sea.

Timetable:

Action	Date	FR Cite
NPRM	03/00/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Michael Harmon, Program Manager, CG–5222, Department of Homeland Security, U.S. Coast Guard, 2100 Second Street SW., STOP 7126, Washington, DC 20593–7126, *Phone:* 202 372–1427, *Email: michael.j.harmon@uscg.mil.*

RIN: 1625–AB57

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Coast Guard (USCG)

Final Rule Stage

383. Implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification, and Watchkeeping (STCW) for Seafarers, 1978

Regulatory Plan: This entry is Seq. No. 64 in part II of this issue of the **Federal Register.**

RIN: 1625–AA16

384. Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters

Legal Authority: 16 U.S.C. 4711

Abstract: This rulemaking adds performance standards to 33 CFR part 151, subparts C and D, for discharges of ballast water. It supports the Coast Guard's broad roles and responsibilities of maritime safety and maritime stewardship. This project is economically significant.

Timetable:

Action	Date	FR Cite
ANPRM	03/04/02	67 FR 9632
ANPRM Comment Period End.	06/03/02	
NPRM	08/28/09	74 FR 44632
Public Meeting	09/14/09	74 FR 46964
Public Meeting	09/22/09	74 FR 48190
Public Meeting	09/28/09	74 FR 49355
Notice—Extension of Comment Period.	10/15/09	74 FR 52941
Public Meeting	10/22/09	74 FR 54533
Public Meeting Correction.	10/26/09	74 FR 54944
NPRM Comment Period End.	12/04/09	74 FR 52941
Final Rule	01/00/12	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Mr. John C. Morris, Project Manager, Department of Homeland Security, U.S. Coast Guard, 2100 Second Street SW., STOP 7126, Washington, DC 20593–7126, *Phone:* 202 372–1433, *Email: john.c.morris@uscg.mil.*

RIN: 1625–AA32

385. Nontank Vessel Response Plans and Other Vessel Response Plan Requirements

Regulatory Plan: This entry is Seq. No. 66 in part II of this issue of the **Federal Register.**

RIN: 1625–AB27

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Coast Guard (USCG)

Long-Term Actions

386. Commercial Fishing Industry Vessels

Legal Authority: 46 U.S.C. 4502(a) to 4502(d); 46 U.S.C. 4505 and 4506; 46 U.S.C. 6104; 46 U.S.C. 10603; DHS Delegation No. 0170.1(92)

Abstract: This rulemaking would amend commercial fishing industry vessel requirements to enhance maritime safety. Commercial fishing remains one of the most dangerous industries in America. The Commercial Fishing Industry Vessel Safety Act of 1988 (the Act, codified in 46 U.S.C. chapter 45) gives the Coast Guard regulatory authority to improve the safety of vessels operating in that industry. Although significant reductions in industry deaths were recorded after the Coast Guard issued its initial rules under the Act in 1991, we believe more deaths and serious injury can be avoided through compliance with new regulations in the following areas: Vessel stability and watertight integrity, vessel maintenance and safety equipment including crew immersion suits, crew training and drills, and improved documentation of regulatory compliance.

Timetable:

Action	Date	FR Cite
ANPRM	03/31/08	73 FR 16815
ANPRM Comment Period End.	12/15/08	
NPRM	To Be Determined	

Regulatory Flexibility Analysis Required: Yes.

Agency Contact: Jack Kemerer, Project Manager, CG–5433, Department of Homeland Security, U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593, *Phone:* 202 372–1249, *Email: jack.a.kemerer@uscg.mil.*

RIN: 1625–AA77

DEPARTMENT OF HOMELAND SECURITY (DHS)

U.S. Customs and Border Protection (USCBP)

Final Rule Stage

387. Importer Security Filing and Additional Carrier Requirements

Regulatory Plan: This entry is Seq. No. 69 in part II of this issue of the **Federal Register.**

RIN: 1651–AA70

DEPARTMENT OF HOMELAND SECURITY (DHS)

Transportation Security Administration (TSA)

Proposed Rule Stage

388. General Aviation Security and Other Aircraft Operator Security

Regulatory Plan: This entry is Seq. No. 73 in part II of this issue of the **Federal Register.**

RIN: 1652–AA53

DEPARTMENT OF HOMELAND SECURITY (DHS)

Transportation Security Administration (TSA)

Final Rule Stage

389. Aircraft Repair Station Security

Regulatory Plan: This entry is Seq. No. 77 in part II of this issue of the **Federal Register.**

RIN: 1652–AA38

[FR Doc. 2012–1648 Filed 2–10–12; 8:45 am]

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