SCHEDULED FOR ORAL ARGUMENT ON MARCH 10, 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 Homeland Security; MARY ELLEN CALLAHAN, in her official capacity as Privacy Officer of the U.S. Department of Homeland Security; and THE U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE U.S. DEPARTMENT OF HOMELAND SECURITY

INITIAL BRIEF FOR RESPONDENTS

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS AND RELATED CASES UNDER LOCAL RULE 28(a)(1)

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

A. Parties.

Petitioners in this Court are The Electronic Privacy Information Center ("EPIC"), Chip Pitts, and Bruce Schneier (the status of a putative fourth petitioner, Nadira Al-Khalili, who neither appeared on the petition for review nor filed her own petition for review, is contested). Respondents are Janet Napolitano, Secretary of Homeland Security (sued in her official capacity); Mary Ellen Callahan, Privacy Officer of the U.S. Department of Homeland Security (sued in her official capacity); and the U.S. Department of Homeland Security.

B. Rulings under Review.

The ruling under review is set forth in the letter of May 28, 2010, from Francine J. Kerner, Chief Counsel, Transportation Security Administration, U.S. Department of Homeland Security, to counsel for petitioner EPIC.

C. Related Cases.

This case has not previously been before the Court and, as far as counsel for respondents are aware, is not related to any pending cases in this Court or any other court of appeals. *Roberts v. Napolitano*, No. 10cv1966 (D.D.C.), and *Durso v. Napolitano*, No. 10cv2066 (D.D.C.), are related cases in the United States District Court for the District of Columbia.

/s/John S. Koppel
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GLOSSARY

Abbreviation	Definition
AIT	Advanced Imaging Technology
ANSI	American National Standards Institute
APA	Administrative Procedure Act
AR	Administrative Record
DHS	U.S. Department of Homeland Security
EPIC	Electronic Privacy Information Center
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FERC	Federal Energy Regulatory Commission
NIST	National Institutes for Standards and Technology
PSP	Passenger Screening Program
RFRA	Religious Freedom Restoration Act
SOP	Standard Operation Procedure
TSA	Transportation Security Administration

STATEMENT OF JURISDICTION

On July 2, 2010, petitioners Electronic Privacy Information Center ("EPIC"), Chip Pitts, and Bruce Schneier filed a petition for review, seeking review of a letter dated May 28, 2010, from Francine J. Kerner, Chief Counsel of the Transportation Security Administration ("TSA"), Department of Homeland Security ("DHS") to petitioner EPIC, denying petitioner's request for the agency to engage in notice and comment rulemaking. Administrative Record ("AR") 125.001-011. The petition was timely, and the Court has jurisdiction over it pursuant to 49 U.S.C. § 46110(a).

When petitioners filed their opening brief on November 1, 2010, however, without any explanation they simply added Nadhira Al-Khalili as a petitioner listed on the brief. Al-Khalili had neither been included as a petitioner on the petition for review filed on July 2, 2010, nor filed a petition for review of TSA's letter of May 28, 2010, within sixty (60) days of that letter, as required by 49 U.S.C. § 46110(a). Accordingly, respondents have filed a motion to strike petitioners' opening brief (as well as the accompanying Al-Khalili Declaration), and to order petitioners to refile their opening brief with all references to Al-Khalili removed. A motions panel of this Court referred respondents' motion to the merits panel, and the motion remains pending.

STATEMENT OF THE ISSUES

1. Whether TSA acted arbitrarily and capriciously in rejecting petitioners' request for notice and comment rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, with respect to respondents' decision to deploy Advanced Imaging Technology ("AIT") as a primary screening device at airport security checkpoints.

2. Whether TSA has issued a rule subject to the APA's notice and comment rulemaking requirements.

3. Whether TSA's utilization of AIT as a primary screening mechanism violates the Fourth Amendment to the U.S. Constitution.

4. Whether deployment of AIT as a primary screening method violates any or all of the following statutes: the Video Voyeurism Prevention Act, 18 U.S.C. § 1801; the Privacy Act, 5 U.S.C. § 552a; the Homeland Security Act, 6 U.S.C. § 142(a)(1); and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

TSA was created by Congress in the wake of the September 11, 2001 attacks with a mission to strengthen the security of the nation's transportation systems. To that end, TSA and its parent agency, DHS, have striven to maximize protection and security for millions of air travelers daily while minimizing, to the extent possible, passenger inconvenience and impacts on privacy interests. Since September 11, terrorist threats to air travel have continued to arise, and in light of recent events TSA's responsibility to protect the traveling public from these threats is as important as ever.

Indeed, threats to aviation security constantly change and become more sophisticated; of late, these threats have increasingly involved non-metallic objects, powders, and liquids. TSA counter-terrorism experts have determined that AIT is essential as a primary screening mechanism to detect non-metallic items because metal detectors cannot serve this function. Moreover, as technology continues to evolve, TSA is committed to harnessing advancements to provide the highest feasible levels of protection with the least possible disruption and intrusion on privacy.

As explained in more detail below, Congress has mandated that TSA prioritize the development and deployment of new technologies to keep pace with

ever-evolving terrorist tactics. TSA has responded to this mandate in part by developing, with private vendors, AIT to deter and detect, without physical contact, both metallic and nonmetallic threats concealed under layers of airplane passenger clothing. In 2007 and 2008, TSA began deploying AIT units in limited field trials as secondary screening units. In 2009, TSA continued deployment of additional AIT units and began field testing AIT machines as a primary screening mechanism in some locations. In January 2010, TSA made the decision to broadly deploy AIT as a method of primary screening. At all times, TSA's policy has presented AIT as an optional screening procedure, from which passengers may opt out in favor of a physical pat-down; signs provide notice of the technology, showing the images created and informing people of the health impact, as well as the option to decline. AIT screening is conducted by uniformed personnel in heavily trafficked areas, and typically takes only a few seconds.

In May 2009, petitioners EPIC and various other organizations wrote to DHS Secretary Janet Napolitano, objecting to the utilization of AIT as a primary screening procedure and requesting a 90-day formal public rulemaking by the agency, with a suspension of use of AIT. Within a month, TSA responded to petitioners' letter, correcting petitioners' misconceptions and addressing petitioners' concerns regarding safety and privacy issues. In April 2010,

petitioners sent a second letter to DHS Secretary Napolitano, alleging violations of the Fourth Amendment, the Religious Freedom Restoration Act ("RFRA"), the Privacy Act of 1974 ("Privacy Act"), and the Administrative Procedure Act ("APA"). Petitioners requested that TSA repeal its decision to use AIT as a means of primary screening, and suspend the use of AIT as a primary screening method. TSA responded by letter of May 28, 2010, again correcting petitioners' misconceptions, as well as explaining the basis for TSA's decision in January 2010 to widely use AIT, and addressing the substance of petitioners' constitutional and statutory claims.

Subsequently, petitioners EPIC, Chip Pitts and Bruce Schneier filed in this Court a petition for review of agency action, challenging AIT pursuant to 49 U.S.C. § 46110, as well as a motion styled as an "emergency motion" to halt the use of AIT as a primary screening method. The Court denied petitioners' emergency motion. Petitioners thereafter filed their opening brief, including without explanation Nadhira Al-Khalili as one of the petitioners, long after the time to add new petitioners validly had expired. Respondents accordingly moved to strike petitioners' opening brief and the Al-Khalili Declaration; the motions panel referred that motion to the merits panel, and the motion remains pending.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Framework.

As part of TSA's mission to protect the security of the nation's transportation system, Congress has mandated that the agency prioritize the development and deployment of new technologies to detect all types of terrorist weapons at airport screening checkpoints:

> The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property. The Secretary shall ensure that the equipment alone, or as part of an integrated system, can detect under realistic operating conditions the types of weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft.

49 U.S.C. § 44925(a). Furthermore, TSA is specifically required to develop a "strategic plan" for deploying weapon and explosive detection equipment at security screening checkpoints, including walk-through explosive detection portals, shoe scanners, and backscatter x-ray scanners. *Id.* § 44925(b).

These statutory provisions are part of a larger security program; the federal government protects against airline hijacking and similar threats through a comprehensive statutory and regulatory scheme. As Secretary Napolitano stated in testimony before the Senate Commerce, Science and Transportation Committee

on January 20, 2010, there is no single technology or process that represents a "silver bullet" against evolving terrorist threats. AR 067.048. Innovative screening technology is just one layer among many that TSA is implementing to fulfill its statutory mandate. AR 049.007, 049.052.

First, federal law renders unlawful certain conduct that is threatening or dangerous to airline security and safety, such as engaging in "aircraft piracy," 49 U.S.C. § 46502(a), or taking any action that poses an imminent threat to the safety of the aircraft or other individuals on board, *id.* § 46318. Likewise, federal law prohibits interference with the duties of a flight crew member or a flight attendant, *id.* § 46504, and makes it a crime to have a concealed weapon, loaded firearm, or explosive device on one's person or in one's property while on board, or attempting to board, an aircraft, *id.* § 46505(b).

Second, Congress has mandated certain preventive measures designed to stop such threats before they happen. For instance, federal law requires "the screening of all passengers and property . . . before boarding," *id.*§ 44901(a), in order to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance," *id.* § 44902(a).

In this regard, the Senate Appropriations Committee has specifically acknowledged the importance of AIT as part of TSA's screening technology. S.

Rep. No. 110-396, at 60 (2008). The Committee directed TSA to continue to allocate resources for AIT and encouraged TSA to expand the technology to additional airports. *Ibid*.

Third, Congress has charged the Administrator of TSA with overall responsibility for airline security, and has conferred on him authority to carry out that responsibility. 49 U.S.C. § 114(d). Together with the Director of the FBI, the Administrator must "assess current and potential threats to the domestic air transportation system," and "decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system." *Id.* § 44904(a). The Administrator must take "necessary actions to improve domestic air transportation," *id.* § 44904(c), which he can carry out under his authority to "prescribe regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy," *id.* § 44903(b).

Finally, passenger compliance with security procedures is a mandatory precondition for boarding and flying. Airlines must "refuse to transport" a passenger who does not consent to a search of his person or baggage, 49 U.S.C. § 44902(a), and are authorized to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," *id.*§ 44902(b). Furthermore, if the TSA Administrator determines that "a particular threat cannot be addressed in

a way adequate to ensure . . . the safety of passengers and crew of a particular flight or series of flights," he "shall cancel the flight or series of flights." *Id.* § 44905(b). And applicable TSA regulations require passengers and others to comply with TSA's procedures before entering airport "sterile areas" and other secured portions of airports.[1/] *See* 49 C.F.R. §§ 1540.105(a)(2), 1540.107. These regulations are implemented through TSA's Standard Operating Procedures ("SOPs"), which are approved by the TSA Administrator, and which set forth the mandatory procedures that passengers must follow and that TSA screening officers must apply in screening passengers.

B. Advanced Imaging Technology.

At the outset, we stress that AIT is merely one component of TSA's broader Passenger Screening Program ("PSP"), which provides for multilayered security to protect against terrorist threats involving aviation. *See generally* AR 041 (providing overview of PSP as of July 2009); AR 049 (showing life-cycle of the technology development process and placing AIT in the context of evolving technology solutions); *id.* at 049.032 (summarizing PSP). As such, it should not

[1] This "sterile area" is defined as the portion of an airport "that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA, or by an aircraft operator . . . or a foreign air carrier . . . through the screening of persons and property." 49 C.F.R. § 1540.5.

be regarded as a discrete, stand-alone entity, but rather as part of a dynamic, constantly evolving whole. *See id.* at 049.008 (chart showing layers of security), 049.009 (showing how current technology relates to various threats, and projecting evolution).

In accordance with its statutory mandate, TSA began deploying state-of-the-art AIT in 2007, as a major improvement over existing screening technologies. AR 084.006. AIT can detect a wide range of threats, including both metallic and nonmetallic objects concealed under layers of clothing, without physical contact, and in a matter of seconds. *Ibid*.

TSA currently uses two types of AIT systems, millimeter wave and backscatter. AR 071.001.[2] Millimeter wave systems use radio frequency energy to create a black and white three-dimensional image. *Id.* at 071.002. The images produced by millimeter wave technology resemble fuzzy photo negatives. *Ibid*.; *see also id.* at 071.006. Backscatter systems project narrow, low-intensity X-ray beams over the body to create a reflection of the body displayed on a monitor. *Id*. at 071.002. The images produced by backscatter technology resemble chalk etchings. *Ibid*.; *see also id.* at 071.007. In both cases, AIT enables TSA screeners

[2] Sample images generated by both AIT systems are reproduced at AR 071.002, 071.006-.007.

to efficiently identify both metallic and nonmetallic items concealed beneath layers of clothing, reducing the need for a more time-consuming pat-down search.

1. Opting Out of AIT Screening.

TSA communicates and provides a meaningful alternative to AIT screening. TSA posts signs at security checkpoints clearly stating that AIT screening is optional, and TSA includes the same information on its website. AR 071.003. Those travelers who opt out of AIT screening must undergo an equal level of screening, consisting of a physical pat-down to check for metallic and nonmetallic weapons or devices. *Ibid*.

A physical pat-down is currently the only effective alternative method for screening individuals for both metallic and nonmetallic objects that might be concealed under layers of clothing. The physical pat-down given to passengers who opt out of AIT screening is the same as the pat-down given to passengers who trigger an alarm on a walk-through metal detector or register an anomaly during AIT screening. Passengers may request that physical pat-downs be conducted by same gender officers. AR 132.001. Additionally, all passengers have the right to request a private screening. *Ibid*. More than 98% of passengers selected for AIT screening proceed with it rather than opting out. AR 071.003.

2. AIT Privacy Safeguards.

Pursuant to 6 U.S.C. § 142, DHS conducted Privacy Impact Assessments ("PIAs") dated January 2, 2008, and October 17, 2008, to ensure that the use of AIT does not erode privacy protections. AR 011.001-.009, 025.001-.010. The second PIA was updated on July 23, 2009 and lays out several privacy safeguards tied to TSA's use of AIT. AR 043.001-010.

First, AIT images do not show sufficient detail to be used for personal identification. In operation, the transportation security officer who views AIT images during the screening process is always located remotely from the individual being screened, and within a walled and locked room. *Id.* at 043.005. Thus, there is no possibility that the transportation security officer will be able to connect the image on the screen to any individual being screened.

Second, the AIT that is deployed in airports cannot store images.[3] *Id.* at 043.004. Storage capabilities are disabled prior to deployment, and individual operators are not able to activate the image retention capability. *Id.* at 043.008. Operators are also prohibited from bringing electronic devices, such as cell phones or cameras, into the remote screening room where AIT images are viewed. *Id.* at

[3] While it is necessary that AIT have the capability to store images when used for training purposes at TSA's training facilities, this capability is always disabled when the technology is deployed in use at an airport.

043.004. AIT images are deleted as soon as any anomaly is resolved and they cannot be saved or transmitted for any purpose. *Ibid*.

Third, AIT images are transmitted securely between the system and the remote screening room, so they cannot be lost, modified, or disclosed. *Id.* at 043.009. For backscatter systems, the images are encrypted during transmission, whereas millimeter wave systems transmit data in a proprietary format than can only be viewed with proprietary technology. *Ibid*. Images are transmitted via landline to the remote viewing room, and both physical and software controls prevent the computers on both ends from being compromised. *Ibid*.

3. AIT Safety Evaluations.

At TSA's request, the safety risks associated with AIT have been independently evaluated jointly by the Food and Drug Administration ("FDA") and the National Institutes for Standards and Technology ("NIST"), as well as by the Johns Hopkins University Applied Physics Laboratory. AR 071.002. These studies have confirmed that the exposures from both backscatter and millimeter wave technologies are well below the safety standards issued through the American National Standards Institute ("ANSI"), *see* AR 001, 046, and the Institute of Electrical and Electronics Engineers (*see* AR 004), respectively. *See* AR 071.002.

A single scan using backscatter technology delivers less radiation than that received from 2 minutes of airline flight. *Ibid*. Working with a consensus group that included government regulators, product manufacturers, and product users, ANSI formally sets limits on radiation exposure for personnel security screening systems such as AIT systems. AR 121.001. Third-party testing of the only TSA-qualified backscatter system found that it met the consensus standards for reference effective dose per screening. *Id.* at 121.002. The National Council on Radiation Protection and Measurements has set an annual dose limit of 0.25 mSv from one venue over a 12-month period. AR 001.016. In a third-party safety evaluation, Johns Hopkins reported that an individual would have to receive over 15,822 screenings in a 12-month period, equivalent to 43 screenings per day over 365 days per year, in order to exceed the annual effective dose limit set by ANSI. AR 057.004.

Millimeter wave technology is also low-risk, especially as compared to most individuals' daily use of cellular phone technology. The energy projected by millimeter wave technology is 10,000 times less than a cell phone transmission. AR 071.002. Based on these evaluations of the minimal safety risks associated with AIT, TSA has concluded that AIT is safe for all passengers, including children, pregnant women, and individuals with medical implants.

C. Efficacy of AIT.

In order to ensure that AIT systems represent an improvement over metal detectors, AR 012.002, TSA's procurement specifications for AIT have consistently required that any AIT system meet certain detection thresholds with respect to the detection of weapons, explosives, liquids, and other anomalies concealed under a passenger's clothing. AR 023.010; AR 050.010; AR 051.010; AR 088.010. While the detection requirements of AIT are classified, *see* AR 42.001, the procurement specifications require that any approved system be at least sensitive enough to detect smaller items, such as a pager, wallet, or small bottle of contact lens solution. *See, e.g.*, AR 088.010. Ultimately, TSA did not approve the two AIT systems currently deployed for screening purposes until testing demonstrated that these systems met the relevant detection requirements in the AIT procurement specifications. AR 053.00 1-.002, .005, .016, .030; AR 054.001-.002, .005, .019.[4/]

Operational use of AIT provided further confirmation that these approved systems are capable of detecting small, non-metallic items concealed on a passenger's body. In the first five months following TSA's decision to utilize AIT

[4] The testing report confirming that the particular AIT systems deployed by TSA met those specifications is classified. AR 40.001.

as a primary screening device, AIT systems detected non-metallic concealed substances that were present in quantities of less than an ounce. AR 122.001-.002, .004. In one instance, an AIT system detected at least one passenger attempting to conceal a substance in his underwear, as was the case in the bombing attempt of Christmas Day 2009. *Id*. at 121.002.

Threats to aviation safety are dynamic and increasingly involve non-metallic threat objects and liquids concealed on individuals. AR 084.006. With the exception of AIT, there are no currently deployed primary screening technologies that can detect concealed non-metallic items. *Id.* While TSA has not proclaimed that any single screening device or procedure can provide a 100 percent guarantee of security, AR 089.001, pre-procurement testing and initial operational use of AIT indicates that the deployed systems are indeed capable of detecting small quantities of non-metallic items that passengers have concealed on their persons.

D. Implementation of AIT.

In order to fulfill its statutory mandate to develop new technologies to deter and detect terrorist threats to the air transportation system, TSA began exploring the use of AIT screening in 2006. In February 2007, TSA began using a backscatter screening system as a secondary screening alternative to physical pat-downs (*i.e.*, as additional screening for passengers who set off an alarm when

going through a walk-through metal detector) at one airport, AR 008.001; throughout 2007 and 2008, AIT systems were deployed by TSA in limited field trials as secondary screening units. AR 084.006. In 2009, TSA began evaluating the use of AIT systems as primary screening units. *Ibid*. As of June 2009, TSA had deployed AIT systems at 19 airports, and in six of those airports, AIT was being utilized in primary screening. AR 039.001. In January 2010, TSA made the decision to use AIT as a primary screening device. AR 061. TSA planned to deploy 450 AIT units at 68 airports across the country in 2010. AR 071.001. TSA exceeded its goal for that year, as there are currently 486 AIT units in use at 78 airports. *See* www.TSA.gov/approach/tech/ait/index.shtm (last accessed on December 23, 2010). TSA's budget for Fiscal Year 2011 also includes plans for an additional 500 AIT units. AR 093.008.

Several independent polls have confirmed that the majority of the general public endorses TSA's deployment of AIT as part of the screening process. In January 2010, as TSA was accelerating the broader deployment of AIT, a USA Today/Gallup Poll showed that 78% of respondents said they approved of using AIT. AR 063.001; AR 125.004. As recently as November 15, 2010, a CBS News Poll showed that 81% of Americans approve of airports using AIT machines, while only 15% said that airports should not use the technology. *Poll: 4-in-1*

Support Airport Body Scanners (last accessed on December 16, 2010), http://cbsnews.com/8301-503544_162-20022876-503544.html.

E. Proceedings Below.

1. Agency Action: TSA's Decision to Utilize AIT Broadly, EPIC's Letters and TSA's Responses.

On May 31, 2009, EPIC and various organizations wrote to DHS Secretary Janet Napolitano, objecting to TSA's plan to utilize AIT as a primary means of screening airline passengers. AR 039.003-.005. Specifically, the letter requested a 90-day formal public rulemaking and suspension of AIT in the interim, investigation into less invasive screening procedures, and investigation into the medical and health effects of repeated AIT exposure. *Id.* at 039.003-.004. The letter acknowledged that images will not be recorded and stored, but expressed concern that TSA will later reverse its decision to not retain images. *Id.* at 039.003.

By letter dated June 19, 2009, TSA responded to EPIC's letter, updating petitioners on AIT, correcting petitioners' misconceptions, and detailing the AIT privacy protections. *Id.* at 039.001-.002. TSA emphasized the optional nature of AIT screening. *Id.* at 039.001. TSA's letter also highlighted the many privacy protocols in place to ensure complete anonymity for the traveler undergoing an

AIT scan: the TSO officer viewing the image sits in a windowless room separate from the traveler being scanned; a factory setting, which cannot be changed by the operator, prevents the image from being stored; cameras and cell phones are prohibited in the viewing room; and the face on the scanned image is blurred. *Ibid*. Moreover, TSA described the various ways it has educated the public and garnered public reactions to AIT, including multiple briefings and/or demonstrations to groups who signed the May 31 letter. *Id.* at 039.001-.002. Finally, TSA explained that the energy (both x-ray and millimeter wave) generated by AIT machines comprises only a small fraction of the energy that individuals are exposed to daily. *Id.* at 039.002.

On April 21, 2010, EPIC and other organizations sent a second letter to Secretary Napolitano, seeking notice and comment rulemaking and alleging that AIT screening violates the Fourth Amendment, the Religious Freedom Restoration Act ("RFRA"), the Privacy Act of 1974 ("Privacy Act"), and the Administrative Procedure Act ("APA"). AR 125.012.-.020. The letter requested that TSA repeal its decision to use AIT as a means of primary screening and suspend the use of AIT. *Id.* at 125.012, .019.

On May 28, 2010, TSA answered EPIC's second letter, declining to engage in rulemaking, clarifying a number of misconceptions, and responding to diverse

legal challenges. *Id.* at 125.001-.011. In defending the agency's January 2010 decision to widely deploy AIT, TSA stated that it is "not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures." *Id.* at 125.001. Use of AIT, the letter explained, is part of Congress' mandate that TSA invest in technologies to strengthen the efficiency and security of aviation. *Id.* at 125.001-.002. The letter emphasized the effectiveness of AIT screening and its optional nature. *Id.* at 125.003-.005. Moreover, TSA's letter cited independent studies that have evaluated and confirmed the safety of AIT. *Id.* at 125.005-.006.

The letter addressed EPIC's constitutional and statutory claims. *Id.* at 125.006-.011. TSA refuted the contention that AIT violates the Fourth Amendment, emphasizing that the screening process is "no more extensive or intensive than necessary" and "strikes the appropriate balance between the interests of aviation security and individual privacy." *Id.* at 125.008. Furthermore, since TSA does not maintain a system of records by using AIT, none of the obligations outlined under the Privacy Act applies to TSA. *Ibid*. Finally, TSA explained that its decision to employ AIT does not implicate RFRA because travelers are not required to undergo AIT screening and thus AIT does not substantially burden travelers' exercise of religion. *Id.* at 125.009-.010.

2. Petition for Review of Agency Action and Motion for Emergency Stay.

On July 2, 2010, petitioners EPIC, Chip Pitts, and Bruce Schneier filled in this Court a petition for review of agency action, challenging AIT pursuant to 49 U.S.C. § 46110.[5/] On the same day, the three named petitioners also filed in this Court a motion styled as an emergency motion to halt the use of AIT as a primary screening method, pending this Court's review. The Court denied petitioners' emergency motion on September 1, 2010.

When petitioners filed their opening brief, they newly included, without any explanation, Nadhira Al-Khalili as one of the petitioners. Respondents therefore moved to strike petitioners' opening brief and the Al-Khalili Declaration.

STANDARD OF REVIEW

The applicable standard of review for action by the TSA Administrator is provided by 49 U.S.C. § 46110(c) and the APA, 5 U.S.C. § 706(2)(A). Under 49 U.S.C. § 46110(c), "[f]indings of fact by the . . . [TSA Administrator], if supported by substantial evidence, are conclusive." Because Section 46110(c) is silent as to the standard for reviewing nonfactual matters, the standard of review for such matters is provided by the APA, *see Public Citizen, Inc. v. FAA*, 988 F.2d 186,

[5] Only petitioner Schneier provided a declaration clarifying the basis for his standing as an individual petitioner.

196-97 (D.C. Cir. 1993), under which the Court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.§ 706(2)(A); *see also Boca Airport, Inc. v. FAA*, 389 F.3d 185, 189 (D.C.Cir. 2004). Moreover, under 49 U.S.C. § 46110(d), all issues must be raised at the administrative level, absent "reasonable ground" for failure to do so. *Id*.

SUMMARY OF ARGUMENT

Petitioners allege that TSA improperly processed their requests for rulemaking, that TSA failed to undertake a required public rulemaking when implementing AIT machines as a primary screening technology, and that TSA's use of AIT screening violates constitutional and statutory requirements. None of these allegations has merit.

First, TSA properly processed petitioners' letters to DHS, determining correctly that neither of petitioners' letters constituted a petition for rulemaking under 5 U.S.C. § 553. Petitioners should not even be heard to complain with respect to TSA's first letter, because their claim comes too late -- they failed to file a petition for review within sixty days of TSA's June 19, 2009 letter, as required under 49 U.S.C. § 46110(a). Moreover, even if petitioners' letters constituted petitions under the APA, TSA properly responded to both petitions in a timely

fashion and provided a rational explanation for its refusal to engage in rulemaking. The law requires no more.

Second, TSA adopted AIT screening procedures properly, without employing APA notice and comment rulemaking procedures. Contrary to petitioners' allegations, TSA's January 2010 decision to use already deployed AIT as primary screening procedure is not a "rule" under the APA, and therefore TSA is not required to initiate formal rulemaking. Instead, TSA was simply implementing, through its SOPs, the existing regulations that require passengers to submit to screening before entering a "sterile area" of an airport. 40 C.F.R. §§ 1540.105(a)(2), 1540.107. Moreover, even if TSA had issued a rule here, that rule would be exempt from notice and comment rulemaking as an interpretative rule, a general statement of policy, and/or an agency rule of organization, procedure, or practice. *See* 5 U.S.C. § 553(b)(A).

Third, AIT is fully consistent with both constitutional and statutory requirements. Courts have invariably upheld airport screening procedures as "special needs searches" or "administrative searches" under the Fourth Amendment. AIT screening procedures satisfy the test of reasonableness articulated in *Illinois v. Lidster,* 540 U.S. 419, 427 (2004), and TSA's many privacy safeguards ensure that AIT is appropriately tailored and minimally

intrusive. Therefore, AIT screening constitutes a reasonable search under the Fourth Amendment.

Petitioners' statutory claims are also without merit. Not only did petitioners fail to raise their Video Voyeurism Prevention Act claim with TSA, as required under 49 U.S.C. § 46110(d), but that Act provides an express exception for lawful law enforcement, correctional, or intelligence activities. Because TSA's use of AIT neither creates nor is part of a system of records, AIT screening also does not implicate the Privacy Act, and the DHS Privacy Officer has fully discharged her statutory obligations under the Homeland Security Act by monitoring implementation of AIT and conducting several Privacy Impact Assessments. Finally, petitioners lack standing to raise a Religious Freedom Restoration Act claim -- and even if petitioners were able to establish standing, such a claim fails on its merits, because AIT does not substantially burden an individual's exercise of religion and allows all passengers to opt out in favor of alternative screening procedures.

ARGUMENT

I. PETITIONERS' APA RULEMAKING CLAIMS ARE MERITLESS.

A. TSA Properly Processed Petitioners' Petitions For Rulemaking.

Under the APA, "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Petitioners claim that their letters of May 31, 2009, and April 21, 2010, constituted petitions for rulemaking, and that TSA improperly processed those petitions. Petitioners are mistaken.

First, only one of the two challenged TSA orders is properly before this court under 49 U.S.C. § 46110. Section 46110 applies to final agency action such as TSA's responses to EPIC's letters. *See, e.g., City of Dania Beach, Fla. V. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007) (stressing that term "order" in Section 46110 should be read "expansively"). Petitioners did not seek review of TSA's letter of June 19, 2009, within 60 days of its issuance, as required by 49 U.S.C. § 46110(a), and have provided no "reasonable grounds" for their failure to do so. *See id*. Accordingly, that letter is not properly before this Court for review.

Second, TSA correctly determined that petitioners' letters to DHS do not constitute petitions under 5 U.S.C. § 553. AR 125.001 n.1 ("While [petitioners] footnote that [their] 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."); *see also* AR 039.001-.002. Petitioners' request that TSA stop utilizing AIT is not a "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C § 553(e). As such, TSA's disposition is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918-19 (D.C. Cir. 2008) (providing standard of review).

More importantly, however, even if petitioners' letters constituted petitions under the APA, 5 U.S.C. § 551, 553-59, TSA properly responded in a timely and appropriate fashion.[6] As the *Attorney General's Manual on the Administrative Procedure Act* (1947) explains, "the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rulemaking proceedings." *Id.* at 38. Thus, TSA is not required to engage in rulemaking simply because petitioners requested it.

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[6] Less than one month following petitioners' first letter dated May 31, 2009, TSA responded in kind on June 19, 2009. TSA's letter addressed petitioners' concerns by updating petitioners on the deployment of AIT and detailing the relevant privacy protections. Similarly, TSA responded to petitioners' second letter dated April 21, 2010 with equal speed, replying in a little over a month on May 28, 2010.

Instead, TSA is only required to provide a rational explanation for its decision not to engage in rulemaking, which is subject to review "under the deferential arbitrary-and-capricious standard." *See Hadson Gas Systs., Inc. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996); *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 3-5 (D.C. Cir. 1987)*; see also Attorney General's Manual on the Administrative Procedure Act* at 70 (requiring that a denial to a petition be "accompanied by a simple statement of procedural or other grounds . . . . advis[ing] the party of the general basis of the denial"). In its letter dated May 28, 2010, TSA did precisely this, denying petitioners' request on the ground that "TSA is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures." AR 125.001. TSA further explained at considerable length why petitioners' concerns about AIT are unfounded. *Id.* at 125.001-.011.

Petitioners should not be heard to claim, simply because they are dissatisfied with TSA's denial, that TSA has "failed to act" or "refus[ed] to process" their petitions. *See* Pet. Br. 29-30. "Where the denial is self-explanatory or affirms a previous denial, it need not be accompanied by a statement of reasons." *Attorney General's Manual on the Administrative Procedure Act* at 70. Accordingly, TSA exceeded its required duty to petitioners when it explained at

length both its rulemaking denial and its decision regarding the deployment of AIT, in a letter that spanned over ten pages. AR 125.001-.011. TSA thus plainly did not abuse its discretion in declining to engage in rulemaking on this matter.

B. TSA Has Not Issued Any "Rule" As Defined In The Administrative Procedure Act.

Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

Contrary to petitioners' intimation, there is no "rule" at issue here, and thus TSA was not required to initiate rulemaking under the APA. The addition of AIT to TSA's multi-level screening process is merely the implementation of TSA's regulation that requires all passengers to be screened prior to entering the sterile area. *See* 49 C.F.R. § 1540.105. TSA implements these measures through its

SOPs,[7] which are the mandatory procedures that both the transportation security officers and passengers must follow in order for a passenger to enter the sterile area of the airport.[8] In January 2010, TSA determined that AIT should be deployed as part of its primary screening process, and that the SOP for AIT be adopted in primary screening. AR 038, 061.

Thus, as TSA informed petitioners, the agency "is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures," especially given the agency's statutory mandate under 49 U.S.C. § 44925 to develop and deploy technologically advanced screening equipment. AR 125.001. *A fortiori*, the more widespread use of the already-deployed, but more effective screening equipment at issue here does not fall within the APA rulemaking framework.

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[7] SOPs are final orders that can be reviewed in the Court of Appeals pursuant to 49 U.S.C. § 46110.

[8] SOPs are revised as needed and often upon short notice to account for necessary changes to security procedures in response to terrorist threats. The most well-known public examples of this would be: (1) following the liquid explosives terrorist plot originating in the United Kingdom in 2006, when the SOP was changed almost immediately to include the ban on liquids in carry-on luggage; and (2) following the 2004 attack on two domestic Russian passenger aircraft using explosives that were concealed on two female passengers, when the SOP was changed to revise the pat-down procedures.

TSA's decision to deploy AIT for security purposes as a primary airport checkpoint screening method therefore is akin to a decision by the Secret Service to more widely deploy upgraded surveillance equipment to monitor the White House perimeter, or a decision by the Marshals Service to place better metal detectors (or AIT machines, for that matter) at the entrances to federal courthouses. It is not a "rule" subject to APA notice and comment rulemaking. Rather, it is merely a decision by TSA to more widely deploy a necessary upgrade to its existing security screening equipment as part of TSA's statutorily mandated security screening program.

By way of illustration, in *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1033-34 (D.C. Cir. 2007), this Court held that EPA did not issue a rule under the APA when it entered into consent agreements with animal feeding operations to bring those operations into eventual compliance with statutory requirements, given that "EPA has not bound itself in a way that reflects 'cabining' of its prosecutorial discretion because it imposed no limit on its general enforcement discretion if the substantive statutory standards are violated." *Id.* at 1033-34. The Court therefore agreed with EPA's position that "the Agreement is an exercise of enforcement discretion rather than a rule." *Id.* at 1030-31.

Although the definition of the term "rule" for APA purposes unquestionably is "broad," *see, e.g., Central Texas Tel. Co-Op, Inc. v. FCC*, 402 F.3d 205, 211 (D.C. Cir. 2007), it is not all-encompassing. *See Sugar Cane Growers Co-op v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) ("We have recognized that notwithstanding the breadth of the APA's definition an agency pronouncement that lacks the firmness of a proscribed [sic] standard -- particularly certain policy statements -- is not a rule.") (citing *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 93-94 (D.C. Cir. 1997), and comparing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-22 (D.C. Cir. 2000), with *Tozzi v. HHS*, 271 F.3d 301, 312-13 (D.C. Cir. 2001) (Silberman, J., concurring)).

Here, TSA's letter explaining the agency's January 2010 decision to embrace AIT as a primary screening method "'is not an agency rule at all, legislative or otherwise, because it does not purport to, nor is it capable of, binding the agency.'" *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2007) (citing *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1257 (D.C. Cir. 1996)). Nor can TSA's underlying decision regarding the use of AIT be characterized as a "rule," for the same reasons. As in *Ass'n of Irritated Residents, supra*, TSA's decision to utilize AIT to augment machines that employ older, less effective

technology is an exercise of enforcement discretion under an existing security program rather than an imposition on itself of a binding rule.

C. Assuming Arguendo That TSA Has Issued A Rule, That Rule Is Exempt From Notice And Comment Rulemaking.

Even assuming *arguendo* that TSA's decision to more widely implement an existing security measure constituted a rule, it still would not be subject to notice and comment rulemaking. Under the APA, the issuance of substantive, "legislative" rules must be preceded by the opportunity for public notice and comment. *See* 5 U.S.C. § 553(b), (c). The APA, however, exempts from this requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* at § 553(b)(A). If this Court determines that TSA has issued a rule here, that rule would constitute an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. Therefore, TSA's decision to deploy AIT as a primary screening method at airports is exempt from mandatory rulemaking.

1. If It Is a Rule, TSA's Decision to Implement AIT More Widely, And to Utilize It As A Primary Screening Method, Constitutes an Interpretative Rule.

The Supreme Court construes 5 U.S.C. § 553(b)(A), the APA provision exempting interpretative rules from rulemaking, in accord with its plain language:

"[i]nterpretative rules do not require notice and comment." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995). To distinguish substantive rules from interpretative rules, the *Attorney General's Manual on the Administrative Procedure Act, supra*, observes that substantive rules have "the force and effect of law," whereas interpretative rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* at 30 n.3; *see also Central Texas Tel. Co-Op, Inc. v. FCC*, 402 F.3d at 212, and cases cited therein. As such, interpretative rules "do not have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

Further, the agency's characterization of the rule is relevant to the determination of whether a rule is interpretive. *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*). Finally, "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties," whereas "if by its action the agency intends to create *new* law, rights or duties, the rule is properly considered to be a legislative rule." *Id*. (emphasis added; internal quotations omitted). Further emphasizing the distinction between formal rules and the type of agency action at issue here, interpretative rules need not be formal, published statements by the agency. Thus, for example, a regional FAA office's refusal to

apply portions of FAA regulations to a category of pilots, even though the regional office "never set forth its interpretation . . . in a written statement," was sufficient to constitute an interpretative rule as to that category of pilots. *See Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1031-32 (D.C. Cir. 1999). Likewise, an advisory posted on an agency website and clarifying that certain reporting requirements extended to additional categories of individuals can constitute an interpretive rule. *Warshauer v. Solis*, 577 F.3d 1330, 1333-34, 1337 (11th Cir. 2009).

In the instant case, TSA's January 2010 decision to deploy AIT as part of the Passenger Screening Program simply reflects TSA's construction of Congress' mandate that TSA prioritize the development and deployment of new technologies to detect all types of terrorist weapons at airport screening checkpoints, and also implements TSA's regulations. *See* 49 U.S.C. § 44925(a), (b). In other words, TSA's decision to more widely implement an existing, effective screening procedure, and to utilize it as a primary screening method, fits neatly into the "classic" definition of an interpretative rule: a clarification as to "what the administrative officer thinks the statute or regulation means." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952). Here, deployment of AIT reflects the Secretary's considered judgment that AIT "equipment alone, or as part of an

integrated system, can detect under realistic operating conditions the types of weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft." 49 U.S.C. § 44925(a).

Additionally, use of AIT scanners as a primary method of screening satisfies the four factors for an interpretative rule set forth in this Court's leading precedent, *American Mining Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993). In *American Mining Congress*, the Court focused on "whether the agency *needs* to exercise legislative power," either "to provide a basis for enforcement actions or agency decisions conferring benefits." *Id.* at 1110. If the rule is needed for the exercise of "legislative power," it is substantive; if not, it is interpretative. *See id.* at 1109-12. An agency pronouncement must be treated as a "legislative" rule subject to notice and comment rulemaking if: (1) in the absence of the rule there would not be adequate legislative basis for enforcement action; (2) the rule is published in the Code of Federal Regulations; (3) the agency has explicitly invoked its general legislative authority; or (4) the rule effectively amends a prior legislative rule. *Id.* at 1112. The second and third factors are easily satisfied, as TSA has neither published this action in the Code of Federal Regulations nor explicitly invoked its legislative authority.

Accordingly, petitioners' APA claim turns on the first and fourth prongs of the *American Mining* standard: whether the action establishes new bases for an enforcement action or amends a prior legislative rule. *Ibid*. TSA has used AIT scanners as a means of secondary screening since 2007. AR 84 at 2. Thus, a decision to use AIT scanners as a means of primary screening does not create any new bases for enforcement action. In short, enforcement is not contingent on the existence of this alleged rule. AIT is merely one method of implementing the regulation that requires passengers to be screened, and more broadly utilizing that method as part of the screening process is not a basis for a notice and comment rulemaking.

Finally, TSA's decision to more widely deploy AIT as a primary screening mechanism does not amend a prior legislative rule or pre-existing interpretative rule. No prior practice involving AIT procedures was embodied in any rule -- either legislative or interpretative. Instead, as discussed previously, TSA simply determined that AIT was a valuable component to effectively carry out the statutory mandate to develop and implement screening technologies that detect terrorist weapons at airports. *See* 49 U.S.C. § 44925. And the agency's decision to use AIT as a primary screening mechanism is not a "legislative rule," even though the practical effect of that decision has a "substantial impact" upon the

traveling public. *See, e.g., American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *American Postal Workers Union v. U.S. Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Cabais v. Egger*, 690 F.2d 234, 237-38 (D.C. Cir. 1982).

In short, TSA's decision to deploy AIT as a primary screening method simply reflects the agency's interpretation of an existing statute, 49 U.S.C. § 44925, and implementation of existing agency regulations. Such interpretations do not require notice and comment rulemaking.

2. TSA's Decision Regarding Use of AIT Screening Procedures Reflects a General Statement of Policy.

By the same token, the alleged substantive rule cited by petitioners (*i.e.*, the decision to roll out AIT as a primary screening method) may be characterized accurately as a "general statement[] of policy" exempt from APA rulemaking requirements. 5 U.S.C. § 553(b)(A). A general statement of policy "is one that first, does not have a present-day binding effect, that is, it does not impose any rights and obligations, and second, genuinely leaves the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (internal quotation marks omitted); *see also Catawba County, N.C. v. EPA*, 571 F.3d 20, 33-34 (D.C. Cir. 2009); *Nat'l*

Ass'n of Broadcasters v. FCC, 569 F.3d 416, 425-26 (D.C. Cir. 2009). These factors overlap, and thus, the central inquiry becomes "whether a statement is a rule of present binding effect." *McClouth*, 838 F.2d at 1320.

"[T]he answer depends on whether the statement constrains the agency's discretion." *Ibid*. A pronouncement may be binding on an agency as a practical matter, if it either (1) appears on its face to be binding, or (2) is applied in such a manner that indicates that it is binding. *See Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 243 (D.C. Cir. 2007). TSA's January 2010 decision to increase deployment of AIT as a primary screening mechanism constitutes a general statement of policy because it reflects TSA's policy determination that AIT scanners are necessary to address the current threat environment. AR 084.006. At present there are only 486 AIT units located at 78 airports nationwide. *TSA: Frequently Asked Questions*, Transportation Security Administration (last accessed on December 23, 2010), www.TSA.gov/approach/tech/ait/index.shtm. The majority of airports still use metal detectors and will continue to do so for the indefinite future. And as technology develops further, undoubtedly AIT will be complemented or enhanced with a new and better type of mechanism for detecting explosives and other kinds of weapons.

The non-binding nature of TSA's decision is further highlighted by the fact that the agency has the discretion to determine whether and where to deploy AIT units, and at what rate to do so. TSA has not cabined its discretion on this subject, and remains free to use any combination of AIT, metal detectors, pat-down searches, or other security devices and measures that it chooses at airport checkpoints, on the basis of its expert judgment. Rather than being the type of "mandatory, definitive language" suggestive of a binding norm, *Community Nutrition Inst. v. Young,* 818 F.2d 943, 947 (D.C. Cir. 1987), TSA's determination was "self-qualifying." *Ibid*; *see also State of Alaska v. DOT,* 868 F.2d 441, 447 (D.C. Cir. 1989) (explaining that administrative discretion is narrowed by a directive that "set[s] forth bright-line tests to shape and channel agency enforcement"). These are hallmarks of a "general statement of policy" under the APA.

3. TSA's Decision Regarding Use of AIT Screening Procedures Represents A Rule of Agency Organization, Procedure, or Practice.

TSA's decision regarding the use of AIT also may readily be characterized as a "rule of agency organization, practice, or procedure" exempt from notice and comment rulemaking. 5 U.S.C. § 553(b)(A). This Court has emphasized that "enforcement plans developed by agencies to direct their enforcement activity

warrant considerable deference." *American Hosp. Ass'n v. Bowen*, 834 F.2d at 1050. In *American Hosp. Ass'n*, the Court characterized such plans as "procedural rule[s] providing directions to [enforcement agents] to target the frequency and focus of their enforcement efforts." *Id.* at 1051.

The January 2010 decision to use AIT as a primary screening method fits comfortably within the *American Hosp. Ass'n* framework. It is simply an addition to TSA's procedures, which discharge both its statutory mandate of protecting the public by detecting and deterring the threats to aviation security, and the broad agency regulation carrying out that mandate. Because the public has long been required pursuant to statutory mandate and regulations to be screened before entering the sterile area, the use of AIT does not itself create any new substantive standards. *See JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994). Instead, it is part of the SOP that Transportation Security Officers must follow in conducting security screening, much like the enforcement plans at issue in *American Hosp. Ass'n*.

It is undoubtedly true that this procedural decision, coupled with the statutory and regulatory regime that mandates the screening of passengers, has a substantial impact on the traveling public, but this Court has long recognized -- in the "general statement of policy" context as well as the "interpretative rule"

context -- that such an impact is not determinative of a rule's status. *See, e.g., Public Citizen v. U.S. Dep't of State*, 276 F.3d 634, 641-42 (D.C. Cir. 2002); *James V. Hurson Assocs, Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties").

4. Assuming Arguendo that the Case Is Remanded For Further Proceedings, The Court Should Not Prohibit Use of AIT As a Prmiary Screening Mechanism While The Matter Is Pending Before the Agency.

This Court has stressed that an order directing the Secretary to engage in rulemaking "is appropriate 'only in the rarest and most compelling circumstances.'" *American Horse Protection Ass'n*, 812 F.2d at 7 (citation omitted). This is plainly not such a case. Assuming *arguendo* that the Court nevertheless holds that TSA must conduct further proceedings with respect to this matter, the Court nonetheless should allow TSA to continue to utilize AIT as a primary screening mechanism during the pendency of the remand. Considerations of national security dictate this course. As the administrative record here establishes, AIT is a crucial means of protecting the traveling public from catastrophic harm, and the well-being of millions of passengers should not be compromised by an order preventing TSA from employing this vital tool simply

because of a procedural error in not responding appropriately to petitioners' request for APA rulemaking.

The Court has ample case law allowing a procedurally flawed rule to remain in effect while the agency complies on remand with the requirements of the APA. *See, e.g., North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *Fox Television Stations, Inc. v.* FCC, 280 F.3d 1027, 1047-49 (D.C. Cir. 2002); *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997). That course is plainly warranted here, given the manifest threat to aviation security that would flow from *vacatur*. The Court should not put the public at risk by restricting use of AIT.

Nor is there any basis to order a "formal 90-Day rulemaking procedure," as petitioners demand. Pet. Br. 39. It is unclear exactly what petitioners mean by this request, but it is insupportable in any event. If anything, the Secretary would only have to conduct informal rulemaking under the APA, rather than formal rulemaking, because there certainly is no statutory requirement for formal, "on the record" APA rulemaking (which would involve a formal hearing) in this case. *See Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1149 n.45 (D.C. Cir. 1981) (distinguishing between formal and informal rulemaking); *Laminators Safety Glass Ass'n v. Consumer Prod. Safety Commission*, 578 F.2d 406, 409 (D.C. Cir.

1978) (same); 5 U.S.C. § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.").

Similarly, there is no justification for imposing a 90-day limit on the remand procedure, despite petitioners' insistence. If informal APA rulemaking is undertaken here, it should not be constrained in this fashion. TSA has not engaged in unreasonable delay in this matter, so there is no basis for the extraordinary relief of a court-imposed deadline. *See, e.g., Int'l Union, UMW v. U.S. Dep't of Labor*, 554 F.3d 150, 155 (D.C. Cir. 2009) (declining to impose a deadline on remand); *Sierra Club v. Thomas*, 821 F.2d 783 (D.C. Cir. 1987) (declining to impose deadline on agency rulemaking proceeding); 5 U.S.C. § 706(1) (establishing "unreasonable delay" standard in APA action).

Finally, the Court should make clear that on remand, TSA is free to invoke the APA's "good cause" exception, 5 U.S.C. § 553(b)(B), if it chooses to do so. Under that provision, notice and comment rulemaking is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Ibid.*; *see, e.g., Jifry v. FAA*, 370 F.3d 1174, 1179-80 (D.C. Cir. 2004), *cert. denied*, 543 U.S.

1146 (2005) (upholding use of "good cause" exception regarding regulations concerning revocation of airman certificates for security reasons). Particularly given the vital security issues involved here, the agency should be able to avail itself of this exception, in the event that it determines that such a course would be appropriate.

Ultimately, it bears emphasis that the very type of rulemaking contemplated by petitioners would undermine the agency's ability to perform its mission. TSA cannot be expected to respond to dynamic and constantly evolving threats, AR 084.006, as influenced by intelligence gathering and other efforts, if the agency must publicly identify the vulnerabilities it has identified and the steps it plans to take in order to remedy them.

II. AIT IS FULLY CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

Petitioners incorrectly contend that AIT screening violates the Fourth Amendment. Under the Fourth Amendment, the "ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Although reasonableness usually requires a warrant and particularized suspicion, the Supreme Court has repeatedly endorsed the constitutionality of suspicionless searches of airline passengers. *See*

City of Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000) ("Our holding does not affect the validity of . . . searches at places like airports . . . where the need for such measures to ensure public safety can be particularly acute."); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("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. . ."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) ("The point [of valid suspicionless searches] is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airlines. . . without any basis for suspecting any particular passenger of an untoward motive.") (citations omitted). Moreover, airport searches have been upheld as constitutionally reasonable even absent passenger consent. *See United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (en banc).

Specifically, courts have upheld airport screening procedures as "special needs searches" or "administrative searches" under the Fourth Amendment. *See id.*; *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); *Torbei v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002); *see also United States v. Rendon,* 607 F.3d 982, 989 (4th Cir. 2010) (recognizing special needs exception to Fourth Amendment's warrant requirement); *Cassidy v. Chertoff*, 471 F.3d 67, 82-84 (2d

Cir. 2006) (Sotomayor, J.) (upholding random searches of ferry passenger vehicles and carry-on baggage for counter terrorism purposes); *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006) ("[Where] a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need."). As such, suspicionless checkpoint searches are permissible when a favorable balance is struck between "'the gravity of the public concerns served the by seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" *Illinois v. Lidster,* 540 U.S. 419, 427 (2004) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *see also Von Raab*, 489 U.S. at 674 (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) ("When the risk is the jeopardy to hundreds of human lives . . . inherent in the . . . 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 . . . damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.")).

Moreover, it is well settled that the executive branch has the discretion, "for purposes of Fourth Amendment analysis," to determine which reasonable techniques should be used given its "unique understanding of, and a responsibility

for, limited public resources." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). Such expert TSA determinations are obviously entitled to significant deference by this Court. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Indeed, in both *MacWade, supra*, and *Cassidy, supra*, where it upheld random, suspicionless searches, the Second Circuit relied heavily upon the expertise of government security experts.

Here, the AIT screening procedures satisfy the test articulated in *Lidster*. First, it is indisputable that preventing terrorist attacks on airplanes is a vitally important public concern. *See United States v. Marquez*, 410 F.3d 612, 618 (9th Cir. 2005) ("It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous."); *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) ("[T]he events of September 11, 2001 only emphasize the heightened need to conduct searches at this nation's international airports."); *Singleton v. Comm'r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979) ("The government unquestionably has the most compelling reasons [--] the safety of hundreds of lives and millions of dollars worth of private property [--] for subjecting airline

passengers to a search for weapons or explosives that could be used to hijack an airplane."). Since 9/11, attempted terrorist attacks against airlines have evolved to become even more sophisticated, including the use of nonmetallic explosives as well as other potential threats in the form of powders, liquids, and other nonmetallic materials. AR 84 at 6. Second, AIT screening procedures advance the public interest in preventing terrorist attacks. *See Marquez*, 410 F.3d at 616 ("Little can be done to balk the malefactor after weapons or explosives are successfully smuggled aboard, and as yet there is no foolproof method of confining the search to the few who are potential hijackers.") (internal quotation marks, bracket, and citations omitted). As terrorist threats continue to evolve, the most effective available means of deterring and preventing terrorist attacks requires screening for both metallic and nonmetallic weapons and explosives prior to boarding. AR 084.006. As the experts at TSA have determined, when implemented along with several other layers of security screening, AIT represents a key layer of defense against terrorist threats. AR 111.001.

Third, the severity of AIT screening procedures' interference with individual liberty is limited. As the en banc Ninth Circuit held in *Aukai, supra*, airport searches are reasonable where, as here, they are "neither more extensive nor more intensive than necessary under the circumstances to rule out the presence

of weapons or explosives." 497 F.3d at 962. AIT is being deployed as a primary screening mechanism precisely because metal detectors are not adequate to detect non-metallic explosives and weapons that may be concealed underneath clothing. The AIT scanners identify concealed objects and flag anomalies for further inspection. Nick Barber, *TSA Installs Full-Body Scanners to Screen Air Travelers*, IDG News (March 5, 2010), http://www.pcworld.com/article/190939/tsa_installs_fullbody. To resolve an anomaly, the transportation security officer viewing the image communicates to the transportation security officer at the checkpoint via radio, allowing the officer at the checkpoint to undertake additional screening focused on the particular location of the anomaly. *Ibid*.

Contrary to petitioners' claim, searches are not reasonable only if they escalate after a lower level of screening. In making this argument, petitioners selectively quote from *Hartwell,* which does not stand for this proposition. Further, arguing that AIT is more invasive than metal detectors is truly an "apples versus oranges" comparison -- a metal detector provides a less inclusive search that will reveal only metallic objects, whereas AIT assures a more comprehensive search that will detect both metallic and non-metallic items. Thus, it is hardly surprising that then-Judge Alito expressly stated in *Hartwell* that his opinion did

"not purport to set the outer limits of intrusiveness in the airport context. . . . Nor do we devise a bright-line test to implement the [] standard in all future cases." *See Hartwell*, 436 F.3d at 180 n.10.

Moreover, although TSA is not required to employ "the least intrusive means," *MacWade*, 460 F.3d at 273 (citation omitted), the privacy safeguards incorporated into the implementation of AIT ensure that AIT screening is appropriately-tailored and minimally intrusive. As explained earlier in this brief, the images produced by either type of AIT do not show enough detail to be used for personal identification, AR 043.004, and the TSA officer viewing the scanned images sits in a walled-off room located remotely from the individual being scanned in order to preserve the latter's anonymity. *Id.* at 043.005. Additionally, the technology's capability for storing images is disabled by the manufacturer prior to being deployed and cannot be activated by the transportation security officers on site, *id.* at 043.004, 043.008, and images are only available as long as each individual is being screened and are deleted from the system as soon as the next individual is screened. *Id.* at 043.004. And transportation security officers are also prohibited from bringing electronic recording devices into the screening room. *Ibid*.

Several additional factors make AIT screening as minimally intrusive as possible to effectively detect the threat. Since every passenger is subject to AIT

screening, there is virtually no "stigma attached to being subjected to search at a known, designated airport search point." *See Hartwell*, 426 F.3d at 180 (quoting *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973)). Furthermore, the public nature of the scan limits the possibility for abuse. *See ibid.*; *Skipwith*, 482 F.2d at 1276 ("Unlike searches conducted on dark and lonely streets at night where often the officer and the subject are the only witnesses, these searches are made under supervision and not far from the scrutiny of the traveling public."). As then-Judge Alito wrote for the Third Circuit, airport searches are "less offensive -- if not less intrusive -- because air passengers are on notice that they will be searched." *Hartwell*, 436 F.3d at 180. Wherever AIT is deployed, TSA requires that signs clearly notify travelers about the screening process, even including examples of the images produced. AR 071.003. Posted signs also inform travelers of their right to opt out of AIT screening in favor of an alternate screening procedure. *Ibid*. Passengers thus are given the opportunity to determine for themselves which procedure they consider less invasive and more consistent with personal dignity.

Finally, it is noteworthy that the Supreme Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2632

(2010) (quoting *Vernonia Sch. Dist.*, 515 U.S. at 663); *see also MacWade*, 460 F.3d at 273. Given the demonstrated ability of AIT to deter and detect nonmetallic explosives and other threats in a minimally-invasive manner (*see* pp. 15-16, *supra*), AIT screening constitutes a reasonable search under the Fourth Amendment.

III. PETITIONERS' STATUTORY CLAIMS ARE EQUALLY UNFOUNDED.

A. Petitioners Cannot Raise A Video Voyeurism Prevention Act Claim, And In Any Event Such A Claim Is Meritless.

Petitioners claim that AIT violates the Video Voyeurism Prevention Act, 18 U.S.C. § 1801. This claim comes too late, however, and in any event is without merit.

Petitioners raised this claim for the first time in this Court, in their reply in support of their unsuccessful emergency motion to halt the use of AIT as a primary screening device. Notwithstanding the clear direction of 49 U.S.C. § 46110(d), which requires a party to raise an issue with the agency before raising that issue on judicial review, petitioners thus failed to raise their Video Voyeurism Prevention Act claim with TSA. Nor is there any "reasonable ground" for their tardiness. *See id.*; *Cronin v. FAA*, 73 F.3d 1126, 1133 & n.7 (D.C. Cir. 1996). Therefore,

petitioners should not be allowed to raise a Video Voyeurism Prevention Act claim at this time.

Furthermore, even if petitioners had timely objected to AIT on this ground, their argument that AIT violates the Video Voyeurism Prevention Act is without merit. That Act contains an explicit exception for "any lawful law enforcement, correctional, or intelligence activity," 18 U.S.C. § 1801(c). As we have already demonstrated in section II, *supra*, AIT screening procedures are fully consistent with constitutional requirements, and as such fall within the Act's exception for lawful law enforcement and/or intelligence activity.

B. AIT Does Not Run Afoul Of Statutory Privacy Protections.

Petitioners further allege that AIT violates the Privacy Act and the privacy protection component of the Homeland Security Act, 6 U.S.C. § 142(a)(1). Both of these claims are groundless.

The Privacy Act, 5 U.S.C. § 552a, regulates federal agencies in the collection, maintenance, use, and dissemination of a "record" contained in a "system of records," 5 U.S.C. § 552a(b), whereby the record is retrieved by the name or personal identifier of the individual. 5 U.S.C. § 552a; *see generally Maydak v. United States*, 363 F.3d 512, 519-20 (D.C. Cir. 2004); *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1460 n.12 (D.C. Cir. 1996). As TSA has

explained, however, the Privacy Act does not come into play here, because all Privacy Act requirements "are linked to the agency maintaining a system of records," and "TSA does not maintain a system of records by using AIT." AR 125.008.

Far from being part of a "system of records" for Privacy Act purposes, as the TSA Chief Counsel explained to petitioners, "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"; moreover, "images are not retained and all images are immediately deleted after AIT screening is complete." *Ibid*. Thus, TSA does not store any of the images as part of the AIT screening process beyond the time it takes for each individual to be screened, and the images or information gathered from the images are also not tied to any records or identifying data which could be later retrieved. *Id.* at AR 043.004.

AIT thus is not part of a "system of records," and therefore does not implicate the Privacy Act. Furthermore, there is no additional Privacy Act concern implicated by the decision to deploy AIT as a primary screening device, as the Privacy Impact Assessments ("PIAs") completed for AIT by DHS's Chief Privacy

Officer each contemplate the use of AIT as a primary screening device. *See, e.g.*, AR 011.003 ("By using passenger imaging technology, TSA expects to be able to quickly, and without physical contact, screen passengers *during primary or secondary inspection* for prohibited items."); AR 025.003 (same); AR 043.003 (same).

Petitioners' contention that AIT images can be linked to passenger data, Pet. Br. 12-13, betrays either a fundamental misapprehension or a willful mischaracterization of the screening process. While TSA is in the process of deploying a system that relies on bar-coded boarding passes to verify that the boarding pass is valid when presented to the Travel Document Checker, TSA neither requires passengers to remain in an ordered queue from that point, nor requires that an individual again present his/her boarding pass for scanning immediately prior to entering the AIT machine. As a result, there is no possible way to link an image -- which cannot be preserved in any event -- with passenger data, as petitioners contend, and indeed the record supports no conclusion or inference to that effect.

Finally, the privacy implications of the unrelated program that petitioners erroneously seek to link to AIT have been thoroughly examined in a separate PIA. *See* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf.

By the same token, petitioners' claim that DHS's Chief Privacy Officer failed to fulfill the statutory mandate to protect privacy set forth in 6 U.S.C. § 142(a)(1) is equally wide of the mark. While AIT does not use, collect, or disclose personal information (and as discussed above is not subject to APA rulemaking requirements), the DHS Chief Privacy Officer prepared an initial PIA dated January 2, 2008 (AR 011.001-.009), a subsequent PIA dated October 17, 2008 (AR 025.001-.010), and a PIA Update dated July 23, 2009 (AR 043.001-.010), concerning the technology at issue here. As the latter document demonstrates, the DHS Chief Privacy Officer has continued to monitor this subject and has also striven for maximum transparency in notifying the public with respect to changes regarding use of AIT. *See id.* at 043.001 ("Reasons for this Update" section). That the DHS Privacy Officer reached a different conclusion than petitioners does not mean that she has been derelict regarding this important matter.

C. Petitioners' Religious Freedom Restoration Act Claim Is Baseless.

1. Petitioners Lack Standing to Raise a Religious Freedom Restoration Act Claim.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, prohibits the government from substantially burdening an individual's right to religious exercise except when its regulation is the least restrictive means of

furthering a compelling government interest. 42 U.S.C. § 2000bb-1(a), (b). To assert a claim under the RFRA, petitioners must satisfy Article III standing requirements -- injury, causation, and redressability. 42 U.S.C. § 2000bb-1(c).

Petitioners,[9] a secular organization and two individuals who do not assert a personal religious objection to AIT screening, have failed to prove they have personally suffered or imminently will suffer an injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 95 (1983) ("[A] plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct, and the injury or threat of injury must be "real and immediate," not "conjectural" or "hypothetical.") (citations omitted). None of the three petitioners listed on the petition for review argues that AIT screening substantially burdens a *personal* exercise of religion.

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[9] As we have observed earlier, without any explanation, petitioners' opening brief identified Nadhira Al-Khalili as one of the petitioners, and the brief discusses her religious objections to AIT. Al-Khalili is a stranger to this litigation, having neither filed a timely petition for review (or even an untimely petition for review, for that matter) nor been included in the petition filed on July 1, 2010. Respondents therefore filed a motion to strike petitioners' opening brief and the Al-Khalili declaration on November 4, 2010; petitioners opposed that motion, respondents filed a reply, and by order of November 30, 2010, the motions panel referred the motion to the merits panel. As we showed in our motion and reply, Al-Khalili should not be considered a petitioner in this case, because she did not seek review of TSA's letter of May 28, 2010, within 60 days of the issuance of that letter, as required by 49 U.S.C. § 46110(a), nor has she ever provided any "reasonable grounds" (*ibid.*) for her failure to do so.

Instead, petitioners focus their RFRA claim on the rights and interests of others. *See* Pet. Br. 33-34 ("The use of [AIT] at the airport violates the RFRA because [it] . . . offends the sincerely held beliefs of Muslims and other religious groups."); *id.* at 34 ("[T]he government substantially burdens the devout air travelers' religious exercise."). Absent their own injury, petitioners cannot simply and broadly assert the rights of all Muslims and other religious groups. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (reiterating "the general prohibition on a litigant's raising another person's legal rights"); Warth *v. Seldin*, 422 U.S. 490, 499 (1975)("[A] plaintiff 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."); *American Immigration Lawyers' Ass'n v. Reno*, 199 F.3d 1352, 1357-64 (D.C. Cir. 2000). It is well settled that "the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).

Moreover, petitioners do not argue that they are entitled to present the claims of a devout air traveler based on any of the exceptions to the prohibition against third-party standing, nor would they succeed had they done so. It is

unlikely that there are substantial obstacles preventing religious travelers from litigating on their own behalf. *See Singleton*, 428 U.S. at 116 (observing that the Supreme Court has generally required the existence of "some genuine obstacle" to an individual's assertion of his or her own rights before it will allow them to be asserted by a third party, because only then does the individual's "absence from court los[e] its tendency to suggest that his right is not truly at stake, or truly important to him"); *Goodman v. FCC*, 182 F.3d 987, 992 (D.C. Cir. 1999) (holding that party lacked standing to represent receivership licensee where "[h]e does not represent the parties who sustained the injuries of which he complains, nor is there anything preventing the parties who were injured from themselves protecting their rights").

Nor is there a close relationship between petitioners and the allegedly injured third party -- after all, petitioners are asserting the rights of *any* religious traveler objecting to AIT screening. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (affording a parochial school standing to challenge an Oregon law requiring all children to attend public school due to the close relationship between the school and parents and because the school was part of the regulated activity of providing parochial education).

Furthermore, even if petitioners were able to show that they should be granted third-party standing under one of the exceptions, petitioners must still meet the constitutional standing requirements of injury, causation, and redressability. As described above, petitioners have not demonstrated a cognizable personal injury (and it logically follows that absent a showing of injury, petitioners also fail to prove causation , and redressability). *See Young America's Foundation v. Gates*, 573 F.3d 797, 799-801 (D.C. Cir. 2009) (holding that nonprofit organization lacked standing to compel withholding of funds from university that barred military recruiters).

Lastly, EPIC cannot establish standing either based on injuries to itself (*i.e.*, "organizational standing," *see, e.g., Truckers United for Safety v. Mead*, 251 F.3d 183, 188 (D.C. Cir. 2001)) or based on injuries to its members (*i.e.*, "representational standing," *see id.* at 188-189). An organization's mere concern about a problem is not enough to meet the constitutional injury-in-fact requirement. Instead, the organization has standing only if it or its members would be adversely affected in a tangible way. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that the national environmental protection organization lacked standing to sue to halt the construction of a ski resort in a national park because it failed to allege harm to itself or that any of its members

ever had used the park); *American Trucking Ass'ns v. U.S. Dep't of Transp.*, 166 F.3d 374, 386 (D.C. Cir. 1999) (holding that truckers' organization lacked standing to challenge safety rating system, because it failed to allege harm to itself or its members).

Again, EPIC has not demonstrated injury beyond mere concern for "the devout air travelers' religious exercise." Pet. Br. 34. Certainly, EPIC would not satisfy the three-part test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), and applied by this Court in *Abigail Alliance for Better Access to Drugs v. HHS*, 469 F.3d 129, 133-34 (D.C. Cir. 2006). First, it is not readily apparent that the religious exercise of EPIC members would be substantially burdened such that members would have standing to sue in their own right. *Hunt*, 432 U.S. at 343. Second, as a secular organization devoted to protecting privacy, EPIC's organizational purpose does not appear to be germane to protecting the rights of religious travelers. *Ibid*. It is therefore irrelevant that EPIC may satisfy the third requirement of *Hunt,* namely that neither the claim asserted nor the relief requested requires the participation of individual members. *Ibid*.

2. Petitioners' Religious Freedom Restoration Act Claim Fails on the Merits.

Assuming *arguendo* that petitioners were able to establish standing, their RFRA claim would still fail on the merits. First, TSA's decision to deploy AIT does not substantially burden an individual's exercise of religion and thus does not implicate the RFRA. *See* 42 U.S.C. § 2000bb-1(a). Passengers can opt out of AIT screening in favor of a pat-down search, and TSA informs passengers of this fact, by means of signs at the airport as well as information on its website. AR 071.003. Passengers also can use alternate means of transportation; it is axiomatic that there is no constitutional right to travel by any particular means, including air. *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) ("[T]ravelers do not have a constitutional right to the most convenient form of travel"); *Gilmore v. Gonzales*, 435 F.3d 1125, 1136-37 (9th Cir. 2006) (there is no right to air travel, even when that is the most convenient means); *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (same). Like the plaintiff in *Boardley v. U.S. Department of Interior*, 605 F. Supp. 2d 8 (D.D.C. 2009), therefore, religious travelers have alternate means and thus are not substantially burdened. *See id.* at 14 (holding that requiring a permit did not substantially burden the

religious rights of a distributor of religious pamphlets because there were other means to distribute his religious message).

The TSA website offers additional guidance for addressing religious and cultural needs in the screening process. In addition to reminding individuals that they may opt out of the primary screening procedure, TSA also reminds passengers that they may request their alternate screening be held in a private screening area and executed by a TSO of the same gender. AR 132.001. Given these alternative options, the AIT does not substantially burden an individual's exercise of religion and therefore does not implicate the RFRA.

Furthermore, even assuming *arguendo* that AIT imposes a substantial burden on religious exercise, it utilizes the least restrictive means of furthering a compelling government interest. Given the government's compelling interest in protecting travelers from acts of terrorism, it would not be reasonable to allow travelers to bypass necessary security screening measures simply by invoking the RFRA. Offering religious observers a minimally-invasive screening process with alternate screening procedures represents the least restrictive means to protecting travelers from terrorist threats.

Finally, although courts have not specifically addressed whether various airport screening procedures violate the RFRA, the courts have upheld under the

RFRA suspicionless searches of American Muslims at the border. *Tabbaa v. Chertoff*, 509 F.3d 89, 105-06 (2d Cir. 2007) (finding that the Bureau of Customs and Border Protection's searches and detentions of American Muslims at the border while returning from an Islamic conference in Canada constituted the least restrictive means of protecting the nation from terrorism). Under the circumstances, AIT --which does not single out Muslims or people of any other faith, but rather applies equally to all airline passengers at the airports in which it is deployed -- plainly does not violate the RFRA.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,[10/]

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[10] The Department of Justice gratefully acknowledges the assistance of Teresa Yeh, a student at Cornell University School of Law, in the preparation of this brief.

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Initial Brief for Respondents complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in 14-point proportional typeface, Times New Roman font. As calculated by the Corel WordPerfect X4 word processing software, the brief contains 13,913 words.

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CERTIFICATE OF SERVICE

I certify that on December 23, 2010, I caused a copy of the foregoing brief to be filed electronically with the Court via the Court's CM/ECF system, and also caused eight copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made automatically upon the following CM/ECF participants, and by first-class mail upon the *pro se* petitioner identified below:

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ADDENDUM

5 U.S.C. § 551(4) defines a "rule" as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 552a(b) in pertinent part generally bars disclosure of:

> any record which is contained in a system of records . . . .

5 U.S.C. § 553(b)(A) exempts from notice and comment rulemaking:

> interpretative rules, general statements of policy, and agency rules of organization, procedure, or practice.

5 U.S.C. § 553(e) states:

> Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

6 U.S.C. § 142(a)(1) requires the DHS Privacy Officer to "assume primary responsibility for privacy policy, including --":

> assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information[.]

18 U.S.C. § 1801(c) states that:

> This section does not prohibit any lawful law enforcement, correctional, or intelligence activity.

42 U.S.C. § 2000bb-1 states that:

> (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

49 U.S.C. § 44925(a) states:

> The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property. The Secretary shall ensure that the equipment alone, or as part of an integrated system, can detect under realistic operating conditions the types of weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft.

49 U.S.C. § 46110(a) states in pertinent part that:

> The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

49 U.S.C. § 46110(d) states that:

> In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator, or if there was a reasonable ground for not making the objection in the proceeding.