[ORAL ARGUMENT NOT YET SCHEDULED]
No. 16-1135, consolidated with No. 16-1139

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

COMPETITIVE ENTERPRISE INSTITUTE, et al.,
Petitioners,
v.

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

ON PETITION FOR REVIEW OF FINAL RULE OF
TRANSPORTATION SECURITY ADMINISTRATION

INITIAL BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The petitioners in No. 16-1135 are the Competitive Enterprise Institute; the Rutherford Institute; Iain Murray; and Marc Scribner. The petitioner in No. 16-1139 is the Electronic Privacy Information Center.

The respondents in No. 16-1135 are the U.S. Department of Homeland Security; the Transportation Security Administration; and Jeh Johnson, in his official capacity as the Secretary of the U.S. Department of Homeland Security. The respondents in No. 16-1139 are the U.S. Department of Homeland Security; the Transportation Security Administration; Jeh Johnson, in his official capacity as the Secretary of the U.S. Department of Homeland Security; and Peter Neffenger, in his official capacity as the Administrator of the Transportation Security Administration.

The amici curiae in Nos. 16-1135 and 16-1139 are the Freedom to Travel USA; the National Association of Airline Passengers; the Bill of Rights Defense Committee/Defending Dissent Foundation; and Consumer Watchdog.

B. Rulings Under Review.

The petitions challenge a final rule issued by the Transportation Security Administration: *Passenger Screening Using Advanced Imaging Technology*, 81 Fed. Reg. 11,364 (Mar. 3, 2016).

C. Related Cases.

The consolidated cases both challenge the same final rule. That final rule is also the subject of a separate petition for review, *Kidd v. TSA*, No. 16-1337 (filed Sept. 26, 2016).

This Court previously decided a challenge to passenger screening using advanced imaging technology, in a ruling that upheld the constitutionality of the Transportation Security Administration's use of advanced imaging technology as a primary screening method but ruled that the agency was required to conduct notice-and-comment rulemaking. *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

/s/ Sharon Swingle
Sharon Swingle

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GLOSSARY

AIT	Advanced Imaging Technology
AR	Administrative Record
DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
JA	Joint Appendix
TSA	Transportation Security Administration

STATEMENT OF JURISDICTION

The Transportation Security Administration (TSA) issued a final rule on March 3, 2016. *See* 81 Fed. Reg. 11,364. Petitioners filed timely petitions for review on May 2, 2016. Joint Appendix (JA) __. This Court has jurisdiction under 49 U.S.C. § 46110.

STATEMENT OF THE ISSUE

Whether TSA's challenged rule, which permits the use of Advanced Imaging Technology (AIT) as a primary screening method at airport security checkpoints, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

PERTINENT STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are reproduced as an addendum to this brief.

STATEMENT OF THE CASE

A. TSA's Authority and Its Initial Deployment of AIT as a Primary Screening Method

1. Congress has vested responsibility for civil aviation security in the TSA Administrator. 49 U.S.C. § 114(d). The Administrator must "assess current and potential threats to the domestic air transportation system," take action to protect the Nation from those threats, and improve transportation security in general. *Id.* §§ 44903(b), 44904(a), (e). As relevant here, the Administrator must ensure that

"all passengers and property" are screened before boarding, to prevent passengers from "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a).

"The Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public." *Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Security*, 653 F.3d 1, 3 (D.C. Cir. 2011) (*EPIC*). TSA has also "promulgated a blanket regulation barring any person from entering the so-called 'sterile area' of an airport, the area on the departure side of the security apparatus, 'without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such area[].'" *Id.* (alteration in original) (quoting 49 C.F.R. § 1540.105(a)(2)).

Non-metallic explosives and other non-metallic threats pose a significant danger to aviation security. *See Passenger Screening Using Advanced Imaging Technology*, 81 Fed. Reg. 11,364, 11,365 (Mar. 3, 2016) (final rule). In 2004, Congress directed TSA to "give a high priority to developing, testing, improving, and deploying," at airport screening checkpoints, new technologies that could detect such non-metallic threats and explosives. *See* 49 U.S.C. § 44925(a).

The danger posed by non-metallic threats received nationwide attention when, on December 25, 2009, a terrorist affiliated with Al Qaeda in the Arabian

Peninsula attempted to destroy a plane using a non-metallic explosive device hidden in his underwear. *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287, 18,299 (Mar. 26, 2013) (notice of proposed rulemaking); *see also id.* (describing similar attempts). The screening procedures then in effect, which included the use of metal detectors (or magnetometers) and pat-downs, did not detect the Christmas Day bomber's device. *See id.*

TSA addressed the threat posed by non-metallic objects by deploying AIT as a primary screening method at airport security checkpoints. *See EPIC*, 653 F.3d at 3. Unlike conventional metal detectors, AIT can detect both metallic and non-metallic objects concealed on a passenger's body or in a passenger's clothing. *See id.* at 10; *see also* 78 Fed. Reg. at 18,297 (listing examples of potentially dangerous items, including non-metallic threat items, that TSA has discovered using AIT). TSA has determined that AIT is the "most effective technology currently available" to repair this "critical weakness" in the Nation's security infrastructure. 81 Fed. Reg. at 11,365. There are two different types of AIT technology: millimeter wave, which uses radio frequency energy; and backscatter, which employs low-intensity X-ray beams. *See EPIC*, 653 F.3d at 3.

2. The AIT units that were deployed by TSA in 2010 displayed an individualized image of "the body contour[s] of the passenger." *Corbett v. TSA*, 767 F.3d 1171, 1175 (11th Cir. 2014); *see also EPIC*, 653 F.3d at 3 (AIT "is

designed to produce a crude image of an unclothed person"). TSA took steps to mitigate the effect on passenger privacy. "Each image produced by a scanner passe[d] through a filter to obscure facial features and [was] viewable on a computer screen only by an officer sitting in a remote and secure room." *EPIC*, 653 F.3d at 4. The image was deleted after being reviewed. *Id.*; *see also Corbett*, 767 F.3d at 1175 (AIT scanners "did not store, export, or print the images"). Passengers were also permitted to opt for a pat-down instead of being screened with AIT. *See EPIC*, 653 F.3d at 3.

B. PRIOR D.C. CIRCUIT LITIGATION AND SUBSEQUENT LEGAL AND FACTUAL DEVELOPMENTS

1. After unsuccessful efforts to persuade TSA to cease using AIT for primary screening or to conduct notice-and-comment rulemaking prior to any such use, the Electronic Privacy Information Center and two individuals petitioned for review in this Court. *See EPIC*, 653 F.3d at 2-3, 9. Petitioners in that earlier action argued that the use of AIT as a primary screening method at an airport security checkpoint violated various federal statutes and the Fourth Amendment. *See id.* at 2-3, 10. Petitioners also argued that TSA should have engaged in notice-and-comment rulemaking before using AIT as a primary screening method, given what petitioners believed were privacy and health risks of AIT. *See id.* at 3-4.

This Court held that TSA was required to undertake notice-and-comment rulemaking in order to deploy AIT as a primary screening method at airport

security checkpoints. *EPIC*, 653 F.3d at 5-6, 8. The Court recognized that the difference between a substantive rule for which rulemaking was required and a procedural rule that did not require rulemaking was "'one of degree' depending upon 'whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.'" *Id*. at 5-6 (quoting *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983)). The Court reasoned that TSA's decision to use AIT as a primary screening method implicated "the privacy interests at the heart of the petitioners' concern with AIT." *EPIC*, 653 F.3d at 6. The Court stated that "few if any regulatory procedures impose directly and significantly upon so many members of the public," and "it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not." *Id.* The Court also emphasized the "public concern and media coverage" about "issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments" in rulemaking. *Id.*

The Court declined, however, to vacate TSA's rule providing for the use of AIT as a primary screening method. The Court recognized that vacating the rule "would severely disrupt an essential security operation." *EPIC*, 653 F.3d at 8.

The Court also held that the rule was "otherwise lawful," rejecting petitioners' arguments that the use of AIT violated the Fourth Amendment and

various federal statutes. *EPIC*, 653 F.3d at 8-11. In ruling on the Fourth Amendment claim, the Court reasoned that the balancing of the degree to which a search intrudes upon an individual's privacy against the need for the promotion of legitimate governmental interests "clearly favors the Government." *Id.* at 10. The Court emphasized the government's "need to search airline passengers 'to ensure public safety,'" which the Court recognized could be "particularly acute." *Id.* quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000)). "[C]rucially," the Court recognized, "an AIT scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form." *EPIC*, 653 F.3d at 10.

The Court also acknowledged the steps TSA had taken "to protect passenger privacy, in particular distorting [facial features on] the image created using AIT and deleting [the image] as soon as the passenger has been cleared." *EPIC*, 653 F.3d at 10. And the Court noted that a passenger was permitted to "opt-out of AIT screening in favor of a patdown," allowing the passenger to decide which screening method he or she considered less invasive. *Id.* The Court also rejected claims that the use of AIT screening violated various other statutes. *Id.* at 8-10.

C. TSA RULEMAKING AND SUBSEQUENT FACTUAL DEVELOPMENTS

1. In compliance with this Court's mandate in *EPIC*, TSA issued a proposed rule regarding passenger screening using AIT on March 26, 2013. 78 Fed. Reg.

18,287. TSA proposed to amend existing regulations prohibiting individuals from passing beyond a security checkpoint and boarding a plane "without submitting to the screening and inspection of his or her person and accessible property in accordance with [TSA] procedures." 49 C.F.R. § 1540.107(a). The proposed rule clarified that "[t]he screening and inspection" procedures mandated by 49 C.F.R. § 1540.107(a) "may include the use of advanced imaging technology." 78 Fed. Reg. at 18,302.

As TSA explained in the preamble to the proposed rule, "[s]ince September 11, 2001, the nature of the threat to transportation security has evolved as terrorists continue to test [TSA] security measures in an attempt to find and exploit vulnerabilities." 78 Fed. Reg. at 18,291. TSA catalogued multiple recent instances of attempted and successful terrorist attacks that demonstrate that "non-metallic explosives have become one of the greatest threats to aviation security." *Id.*

On December 22, 2001, Richard Reid attempted to detonate a non-metallic bomb concealed inside his shoe on board a flight bound for the United States. 78 Fed. Reg. at 18,291. In 2004, terrorists successfully bombed two Russian passenger aircraft using explosives hidden on the torsos of two female passengers. *Id.* In 2006, terrorists in the United Kingdom attempted to use liquid explosives to construct and detonate an explosive device on board an aircraft. *Id.* On December 25, 2009, as noted above, a terrorist attempted to blow up a U.S. aircraft over the

United States using a non-metallic explosive device hidden in his underwear. *Id.* In October 2010, the terrorist organization Al Qaeda in the Arabian Peninsula attempted to destroy two airplanes in flight by using non-metallic explosives hidden in printer cartridges. *Id.* And in May 2012, Al Qaeda in the Arabian Peninsula developed another non-metallic explosive device that could be hidden in an individual's underwear and detonated while on board an aircraft, a device that was fortunately obtained by an undercover operative rather than a suicide bomber. *Id.*

TSA explained in the preamble to the proposed rule that, based on laboratory testing and field experience, the agency had found that AIT "provides the best opportunity to detect metallic and non-metallic anomalies concealed under clothing without the need to touch the passenger." 78 Fed. Reg. at 18,290; *see also id.* at 18,291 (explaining that AIT is a "proven technology for identifying non-metallic explosives during passenger screening"). TSA also noted that, during the time period that TSA had been using AIT to screen passengers, TSA had detected "many kinds of non-metallic items, small items, and items concealed on parts of the body that would not have been detected using" a walk-through magnetometer. *Id.* at 18,290. TSA described in detail some of the "hundreds of prohibited, dangerous, or illegal items concealed on passengers" that had been detected by AIT. *Id.* at 18,297.

The preamble also explained that TSA was providing even greater protection to passengers' privacy than it had during the initial deployment of AIT. *See* 78 Fed. Reg. at 18,290, 18,294. Specifically, automatic target recognition software was being installed on all millimeter-wave AIT units at airport security checkpoints. *See id.* at 18,294. "An AIT unit equipped with [automatic target recognition software] creates a generic outline, not an image of a specific individual, and eliminates the need for operator interpretation of an image." *Id.* at 18,289. In compliance with a congressional mandate, *see* 49 U.S.C. § 44901(*l*)(2)(A), TSA was removing all AIT units that were not equipped with automatic target recognition software from its checkpoints by May 31, 2013. *See* 78 Fed. Reg. at 18,289, 18,294; *see also Redfern v. Napolitano*, 727 F.3d 77, 84 (1st Cir. 2013). Because the manufacturer of the backscatter AIT units had been unable to develop effective automatic target recognition software, TSA discontinued its use of those machines at airport security checkpoints. *See* 81 Fed. Reg. at 11,368.

The preamble to the proposed rule stated that, under the TSA screening procedures then in place, "AIT screening is currently optional." 78 Fed. Reg. at 18,296. However, the proposed rule did not suggest that AIT screening would always be optional and did not establish a right to decline AIT screening, instead leaving open the possibility that it could be mandated at a future date.

Furthermore, TSA specifically invited comments "on the ability of passengers to opt-out of AIT screening." *Id.* at 18,294.

2. Over 5,500 comments were submitted to the agency on the proposed rule. *See* https://www.regulations.gov/docket?D=TSA-2013-0004 (select "View all documents and comments").

One set of comments addressed the possibility that AIT screening could be made mandatory under the proposed rule. Some commenters, including some of the petitioners in this action, complained that the proposed rule permitted the agency to make AIT screening mandatory. *See, e.g.*, Comments of the Competitive Enterprise Institute and Robert L. Crandall 5-6 (posted June 25, 2013) (urging that the proposed rule was ambiguous and failed to give adequate notice about whether AIT screening would be made mandatory in the future); Comment of the United States Justice Foundation 2 (posted July 2, 2013) (urging that the final rule should codify a right to opt out of AIT screening); Comments of Jim Harper, John Mueller, and Mark Stewart of the Cato Institute 8-10 (posted July 1, 2013) (complaining that the proposed rule fails to specify the specific screening methods to which passengers will be subject).

Commenters also objected specifically to mandatory AIT screening. *See, e.g.*, Comment of Freedom to Travel USA 18 (posted July 1, 2013) (complaining that TSA is trying to make AIT "a mandatory tool of airport screenings");

Comment of Marianne Cherrier Burns (May 29, 2013) (objecting to "the mandatory use" of AIT). Another commenter criticized the proposed rule for *not* making AIT screening mandatory. *See* Comment of James L. Bareuther (Apr. 17, 2013).

Many commenters objected to AIT on other grounds, including efficacy, privacy, health, cost, and civil liberties. *See* 81 Fed. Reg. at 11,367-68.

3. In December 2015, while the final rule was still under development, TSA publicly issued a Privacy Impact Assessment Update for TSA Advanced Imaging Technology. *See* Privacy Impact Assessment Update for TSA Advanced Imaging Technology (December 18, 2005) (available at https://www.regulations.gov/document?D=TSA-2013-0004-5584, Attachment 6). The Privacy Impact Assessment explained that TSA had changed its "operating protocol regarding the ability of individuals to * * * opt-out of AIT screening in favor of physical screening." *Id.* at 2.

"While passengers may generally decline AIT screening in favor of physical screening, TSA may direct mandatory AIT screening for some passengers as warranted by security considerations in order to safeguard transportation security." *Id.* at 3. Because "[t]his will occur in a very limited number of circumstances," the change in operating protocol will not affect the "vast majority of passengers." *See*

TSA, *Frequently Asked Questions*, http://www.tsa.gov/travel/frequently-asked-questions (search "decline AIT screening").

4. TSA promulgated its final rule regarding AIT screening on March 3, 2016. *See* 81 Fed. Reg. 11,364. Like the proposed rule, the final rule provides that screening and inspection at an airport security checkpoint "may include the use of [AIT]." *Id.* at 11,405.

TSA explained in the preamble to the final rule that AIT is "the most effective technology currently available to detect both metallic and non-metallic threat items concealed on passengers." 81 Fed. Reg. at 11,365. It concluded that AIT generates benefits by reducing security risks through its detection of metallic and non-metallic threat items, as well as by deterring would-be attackers from attempting to bring threat items into secure areas of airports and onboard aircraft. *Id.* at 11,365-66.

TSA made changes to the text of the proposed rule in response to comments and to subsequent legislative developments. First, TSA responded to comments that its earlier definition of AIT was too broad by adopting the definition used by Congress in the FAA Modernization and Reform Act of 2012: AIT is "a device used in the screening of passengers that creates a visual image of an individual showing the surface of the skin and revealing other objects on the body." *See* 81 Fed. Reg. at 11,366; 49 C.F.R. § 1540.107(d)(1); 49 U.S.C. § 44901(*l*)(1)(A).

TSA also responded to public comments about privacy considerations, as well as the congressional requirement to use automatic target recognition software, by codifying in the final rule the requirement that any AIT used for passenger screening must be equipped with and employ automatic target recognition software and any other requirements that TSA determines are necessary to address privacy concerns. *See* 81 Fed. Reg. at 11,366; 49 C.F.R. § 1540.107(d). The regulation adopts the statutory definition of automatic target recognition software: "software installed on an advanced imaging technology device that produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals." 81 Fed. Reg. at 11,366; 49 C.F.R. § 1540.107(d); 49 U.S.C. § 44901(*l*)(1)(C).

The preamble to the final rule discusses commenters' concerns that the proposed rule would permit TSA to require AIT screening without an alternative screening method, and explains that TSA has revised its description of current procedures to state that passengers "may generally opt-out of AIT screening." 81 Fed. Reg. at 11,366, 11,388-89.[1] However, TSA specifically declined to include an option to decline AIT screening in the text of the final rule, noting that the

[1] The preamble to the final rule states the regulatory impact analysis and the "final rule" have been amended to state that passengers "may generally opt-out of AIT screening." 81 Fed. Reg. at 11,366. The reference to the "final rule" appears to be to the preamble, rather than the regulatory text.

agency "may require AIT use, without the opt-out alternative, as warranted by security considerations in order to safeguard transportation security." *Id.* at 11,388-89. The preamble to the final rule expressly references the Privacy Impact Assessment, which recognizes that AIT screening can be mandatory for some passengers as warranted by security considerations, and notes that that description reflects "current DHS policy." *Id.* at 11,366.

The preamble to the final rule also addresses comments by individuals that oppose AIT, including comments that AIT is invasive of personal privacy and that TSA's use of AIT for airport security screening encourages individuals to avoid air travel, thereby leading to an increase in fatalities as a result of roadway traffic accidents. 81 Fed. Reg. at 11,367-68, 11,392. TSA noted that some commenters affirmatively support TSA's use of AIT. *Id.* at 11,367. Individuals with medical implants, metallic artificial joints, or prostheses, for example, commented that they support the use of AIT in preference to walk-through metal detectors, which result in alarms and the need for a pat-down. *See id.* Other commenters support TSA's use of AIT because of "the need to ensure the safety of airline passengers and other American targets against terrorist threats." *Id.*

Furthermore, TSA noted that many of the privacy concerns identified in the negative comments have been mitigated through the use of automatic target recognition software, as well as use of new risk-based policies under which lower-

threat populations undergo expedited screening that might not include the use of AIT. 81 Fed. Reg. at 11,368.

TSA also noted its disagreement "with statements that use of AIT has had a material impact on U.S. air travel," explaining that the comments "did not contain data in support" of that assertion and that the agency was "unable to find empirical evidence that air travel is reduced due to AIT." 81 Fed. Reg. at 11,368; *see also id.* at 11,392-93. TSA explained that it had reviewed the study relied on by commenters, which was published in 2007 (before AIT was deployed), and concluded that the "study's results appear to have been based on security measures well outside the scope of AIT, such as the federalization of passenger security screening at all U.S. commercial airports and the requirement to begin screening all checked baggage in 2002." *Id.* at 11,392. "TSA has not seen credible evidence" that AIT has had a measurable impact on commercial aviation demand. *Id.*

TSA also responded to comments that AIT screening and TSA's use of pat-downs constitute "sexual molestation" and could violate laws "protecting children from physical and sexual assault." 81 Fed. Reg. at 11,373. TSA defended its screening procedures, and specifically noted that its pat-down procedures "are designed to ensure that any touching of the body by a [Transportation Security Officer] is minimally intrusive while effectively screening for prohibited items."

Id. at 11,374. TSA also noted that "[s]exual molestation or inappropriate touching of a passenger by an employee is strictly prohibited," that "TSA has procedures in place to investigate any allegations of such conduct thoroughly," and that passengers who believed they have experienced unprofessional conduct at a security checkpoint may ask for a supervisor or submit a written complaint to TSA. *Id.* TSA noted several screening protocols that protect passengers' privacy interests, including providing that passengers will not ordinarily be asked to remove or lift any article of clothing to reveal a sensitive body area, and allowing a passenger to request that a pat-down be conducted in private or in the presence of another TSA screener or a companion of the passenger's choice. *Id.* at 11,384-85. TSA also noted that the agency's screening protocols for children ages 12 and under and adults ages 75 and over have been modified to be less intrusive. *Id.* at 11,374, 11,385, 11,387.

TSA responded to similar comments that its use of AIT requires passengers to reveal to TSA screeners "private medical conditions" or other "personal secrets that are not otherwise observable in public," such as "gender identity issues." 81 Fed. Reg. at 11,382. TSA noted one commenter's opinion that "TSA staff has become more respectful of individual passenger privacy," and also noted that the use of automatic target recognition software, as well as the ability of many passengers to decline AIT in favor of a pat-down, provide additional protections

for privacy interests. *Id.* at 11,382, 11,383. TSA also explained that its screeners "are trained to be courteous and respectful to all passengers," and that "TSA will make every effort to be respectful of passengers' concerns, including those who have particular sensitivities to physical touching and to accommodate a person's needs." *Id.* at 11,385.

TSA provided several responses to comments that AIT screening presents special difficulties for passengers with medical devices or medical conditions, and transgender passengers. First, TSA encouraged travelers with medical conditions to notify screeners or to contact TSA in advance, so that "disability experts at TSA * * * may arrange assistance at the airport, if necessary." 81 Fed. Reg. at 11,387. TSA noted that, if passengers do not wish to discuss their condition with a screener, they can "obtain a Notification Card" from TSA for discreet communication. *Id.* TSA noted that the Food and Drug Administration has found no observable effects from AIT millimeter wave units on a host of medical devices, and that AIT is a preferable technology for individuals with internal medical devices, such as a pacemaker or defibrillator. *Id.* TSA also noted that it was enhancing its training regarding screening of transgender passengers, and that a passenger can elect private screening at any point, as well as a screening in the presence of a witness or a companion of the passenger's choosing. *Id.*

Furthermore, for those passengers who do not alarm on the AIT, there is no need to resolve any alarm. *Id.*

TSA disagreed with comments that AIT is ineffective, as well as with complaints about high false-positive rates and the fact that AIT can be circumvented. 81 Fed. Reg. at 11,376-78. TSA noted that it could not fully address "the specific detection capabilities of AIT in the final rule, because much of the information is classified." *Id.* at 11,377. The agency affirmed, however, that AIT "must meet detection specifications and overall performance standards established by TSA" and that, based on TSA's operational experience and testing, "AIT provides the best opportunity currently available" to detect both metallic and non-metallic concealed threat items. *Id.* TSA also pointed to the deterrent value of its use of AIT. *Id.* And TSA concluded that the fact that AIT is not foolproof "does not mean that it is ineffective and should not be used at all." *Id.*

Finally, TSA disagreed with comments that it should use other forms of screening, such as explosives trace detection or pat-downs, instead of AIT. 81 Fed. Reg. at 11,395-96. TSA explained that using only pat-downs is "more physically intrusive than AIT, significantly increases the wait times and opportunity costs for the traveling public, and is more costly," and that AIT "provides a more consistent outcome over time." *Id.* at 11,395. TSA also noted that, although explosives trace detection is used in some instances, explosives trace detection "cannot detect other

dangerous items such as weapons and improvised explosive device components made of ceramics or plastics," and also would lead to increased delays for passengers and to false positives. *Id.* at 11,396.

SUMMARY OF ARGUMENT

One of the primary threats to aviation security is non-metallic explosives. Unlike metal detectors, AIT has the ability to detect both metallic and non-metallic threat items, including non-metallic explosives. AIT is the most effective technology currently available to detect these threats. AIT's detection capabilities also deter would-be attackers from trying to bring non-metallic threat items onto commercial aircraft.

TSA adequately considered the privacy impact on passengers in promulgating the final rule. Most, if not all, of the privacy effects previously considered by this Court are ameliorated by TSA's use of automatic target recognition software. TSA also reasonably concluded that AIT does not cause particular harm to passengers with medical conditions, and has adopted special procedures, such as screening in private, to protect the interests of passengers with special needs.

TSA also adequately considered the use of screening methods other than AIT for primary screening. The agency reasonably rejected the exclusive use of metal detectors because they do not detect non-metallic threats. The agency also

considered but rejected the use of explosives trace detection as a primary screening method because, while it is effective in tandem with other screening measures, it cannot identify threat items other than explosives and it is more time-consuming to perform than is AIT.

TSA reasonably concluded that there is inadequate empirical evidence to support the conclusion that its use of AIT will lead indirectly to greater fatalities by encouraging passengers to drive rather than fly.

Finally, TSA's proposed rule gave adequate notice that the agency might not require the agency to permit passengers to decline AIT in favor of an alternative screening method. The proposed rule did not codify any such option, specifically noting that AIT was "currently optional." Moreover, the agency expressly invited comments on the ability of passengers to opt out—and comments on that issue were submitted during the rulemaking. In any event, any minimal impact resulting from this plainly foreseeable change is not sufficiently substantive to require an additional round of notice-and-comment rulemaking.

In sum, TSA's final rule permitting the use of AIT as a primary screening method at airport security checkpoints was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STANDARD OF REVIEW

The challenged regulation must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Suburban Air Freight, Inc. v. TSA*, 716 F.3d 679, 681 (D.C. Cir. 2013). The scope of the Court's review is "narrow." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). The Court must uphold the challenged rule so long as "the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). The agency's findings of fact are upheld if they are supported by "substantial evidence." 49 U.S.C. § 46110(c); *Suburban Air*, 716 F.3d at 681.

ARGUMENT

TSA'S FINAL RULE IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW

A. TSA's Decision to Allow AIT as a Primary Screening Method at Airport Security Checkpoints Was Well-Reasoned and Supported by Substantial Evidence.

TSA's final rule, permitting the use of AIT to screen passengers at an airport security checkpoint, was based on the agency's examination of all relevant

considerations and was rationally connected to the facts found by the agency. TSA explained that the nature of the threat to aviation security has evolved, and that one of the most significant current threats to aviation security is non-metallic explosives. 81 Fed. Reg. at 11,365. Unlike the walk-through metal detectors previously used as the primary screening method at airport security checkpoints, AIT is able to detect both metallic *and* non-metallic threat items, including non-metallic explosives. *Id.* AIT is the most effective technology currently available to detect these threats. The use of AIT in tandem with other available screening methods reduces security risks both by detecting such threat items, and by deterring would-be attackers from attempting to bring them into secure areas of airports and onto aircraft. *Id.* at 11,365-66.

EPIC complains that TSA did not offer sufficient evidence to support its conclusion that AIT is an essential component of its airport security screening. EPIC Br. 40. EPIC questions whether TSA has provided sufficient evidence to support its conclusion that screening incorporating AIT is more effective at detecting threats than the use of other screening methods such as walk-through metal detectors, and further questions whether non-metallic threat items pose a significant risk. EPIC Br. 40-42.

As TSA explained in promulgating the final rule, the agency could not "fully address the specific detection capabilities of AIT in the final rule, because much of

the information is classified." 81 Fed. Reg. at 11,377. That information is available for this Court's review in the classified portion of the administrative record.

As that record shows, TSA has set mandatory specifications for detection rates and false positives for AIT, *see* Administrative Record Volume 5 (AR 5), at 37-43, and has conducted repeated tests, including covert tests, to confirm that AIT is effective. *See, e.g.,* AR 5, at 16-18, 20, 49-51, 82-96, 99-104, 108-114, 118-129, 133-164, 175-200, 209-10, 225-38, 259-66, 307-30, 380-81, 382-90. TSA has also conducted comparative tests to evaluate the effectiveness of AIT in detecting threats as compared to other screening methods. *See* AR 5, at 49-74, 141, 176, 180.

EPIC contends that "an independent analysis of a Rapiscan Secure 1000 found it to be 'ineffective as a contraband screening solution.'" EPIC Br. at 13 (quoting https://radsec.org/secure1000-sec14.pdf, at 13). But EPIC fails to acknowledge the report's ultimate conclusion: the authors could not reject TSA's claim that "AITs represent the best available tradeoff for airport passenger screening," https://radsec.org/secure1000-sec14.pdf, at 14.

Furthermore, TSA discovered in early testing of AIT (before the development and implementation of automatic target recognition software) that, in instances in which the threat item was not detected, the most common reasons for

the failure were the operator's inability to correctly interpret an image or to conduct adequate follow-up screening. *See* AR 5, at 61, 103, 113, 230, 274-75, 323-24. When TSA provided operators with additional training, the detection rate was improved. *See, e.g.,* AR 5, at 84-85. And more recently, TSA's implementation of automatic target recognition software reduces the potential for operator error.

Classified information before agency decisionmakers—as well as recent experience—confirmed the threat to aviation security posed by non-metallic explosive devices. *See* AR 5, at 45-46, 97-98. As this Court previously recognized, AIT, unlike a metal detector, "is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form." *EPIC*, 653 F.3d at 11. TSA was not arbitrary or capricious in permitting its use as a primary screening method at an airport security checkpoint.

Amici curiae argue that TSA failed to consider adequately the rate of false alarms in AIT screening. Amicus Br. 9. But TSA specifically addressed this concern in promulgating the final rule. TSA explained that it could not disclose publicly "the specific detection capabilities of AIT," but that "AIT equipment must meet detection specifications and overall performance standards established by TSA." 81 Fed. Reg. at 11,377. TSA acknowledged that in some instances AIT "may detect items that do not pose a threat," but it explained that follow-up

screening would be limited to the location "where the machine has indicated an anomaly." *Id.* TSA also noted that passengers could minimize the likelihood of a false alarm by avoiding "clothing with large metal embellishments and large metal jewelry" and by removing "all items in their pockets." *Id.* "Further, the fact that AIT, or any single security measure, may not be completely foolproof does not mean that it is ineffective and should not be used at all." *Id.* TSA's security efforts are multi-faceted, and TSA provided ample support for its conclusion that permitting the use of AIT as a primary screening method plays a critical and effective role in protecting aviation security.

B. TSA Adequately Considered the Privacy Impact of Its Final Rule.

EPIC asserts that TSA failed to adequately consider and protect the privacy concerns raised by commenters and recognized by this Court in its earlier decision. EPIC Br. 28-29. As TSA explained in promulgating its final rule, however, privacy concerns have been largely obviated by Congress's requirement that all AIT units used to screen passengers at airport security checkpoints must be equipped with automatic target recognition software. *See* 81 Fed. Reg. at 11,366; 49 U.S.C. § 44901(*l*). As a result of that mandate, the images displayed on AIT units show the location of potential threat items on a generic body figure instead of the passenger's own image. *See, e.g.,* Administrative Record Volume 4E (AR 4E), at 3326-27 (displaying figure). The concerns expressed by this Court about the

potential for AIT to intrude on personal privacy by producing an image of the unclothed passenger thus no longer apply. The statutory requirement to use automatic target recognition software is also codified in the final rule as well as the statutory definition that references the use of a generic image. *See* 49 C.F.R. § 1540.107(d).

TSA explained when issuing the final rule that transportation security officers "are not able to disable the software," and that "each AIT unit is delivered to the airport with software that precludes placing the unit into a mode that would allow TSOs to obtain unfiltered, passenger-specific images." 81 Fed. Reg. at 11,383. TSA also explained that "the equipment cannot store, transmit, or print individual images," and that transportation security officers "are not able to install or activate any such capability on the equipment." *Id.* TSA was not arbitrary or unreasonable in declining to give weight to passengers' claimed interest in not "hav[ing] their private areas scanned, even if an image is not shown to a security officer" or anyone else and cannot be displayed, stored, or transmitted. EPIC Br. 30.

EPIC nevertheless insists that AIT units must create an individualized image of each passenger's body even with automatic target recognition software because the regulatory definition of AIT is "a device used in the screening of passengers that creates a visual image of an individual showing the surface of the skin and

revealing other objects on the body." EPIC Br. 29 (quoting 81 Fed. Reg. at 11,366). But that regulatory definition is taken verbatim from the statutory definition of AIT used by Congress in 49 U.S.C. § 44901(*l*). It does not in any way undermine or modify the statutory requirement, codified in the final rule, that any AIT unit used to screen passengers must be "equipped with and employ[] automatic target recognition software," *i.e.*, "software installed on an [AIT] that produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals." 49 U.S.C. § 44901(*l*)(2)(A), (*l*)(1)(C); *see also* 81 Fed. Reg. at 11,405.

TSA also properly considered the privacy interests of passengers with medical conditions in promulgating the final rule. Contrary to EPIC's assertion (EPIC Br. 31-32), TSA does not oblige passengers to disclose sensitive medical information, but simply provides an opportunity to do so to facilitate screening. TSA explained in issuing its final rule that the Food and Drug Administration has tested the effect of millimeter-wave screening on personal medical electronic devices, and has "found that no effects were observed for any of the devices tested, including insulin pumps, pacemakers, neurostimulators, implantable cardiodefibrillators, and blood glucose monitors." 81 Fed. Reg. at 11,387. The Food and Drug Administration also found "that the risks that non-ionizing millimeter wave emissions could disrupt the function of the tested devices is very

low." *Id.* TSA procedures also provide that passengers with insulin pumps can disconnect their pumps before screening, or can typically choose to be screened by a pat-down. *See id.*; *see also* https://www.tsa.gov/travel/special-procedures (cited at 81 Fed. Reg. at 11,387). TSA explained that AIT is more protective of privacy for passengers with certain medical conditions, such as metal joints or metal implants, for whom screening with a walk-through metal detector would cause an alarm and a referral for secondary screening. *See* 81 Fed. Reg. at 11,393.

Finally, TSA adequately considered the privacy interests of transgender and gender-nonconforming passengers. TSA provided targeted information about screening procedures for transgender passengers, and explained that the agency "regularly meets with organizations representing the transgender community and works with them to discuss the screening process for transgender travelers." 81 Fed. Reg. at 11,387. TSA emphasized that transgender passengers can request a private screening with a companion of the passenger's choice. *Id.* TSA also noted that, for passengers who are sensitive to being physically touched, "the majority of passengers can be screened without a pat-down so long as there is no need to resolve alarms." *Id.* And TSA noted that the agency was "enhancing its training

regarding the screening of transgender individuals to ensure that screening is conducted in a dignified and respectful manner." *Id.* [2]

C. TSA Adequately Considered Alternative Screening Methods.

Petitioners' argument that TSA failed to adequately consider alternative screening methods is also incorrect.

1. Walk-through metal detectors. As noted, TSA explained that AIT is preferable to walk-through metal detectors as a primary screening method because AIT is capable of detecting not only metallic threat items but also non-metallic explosives and other non-metallic threat items. 81 Fed. Reg. at 11,365. Under this Court's "narrow" standard of review, *State Farm Mut.*, 463 U.S. at 43, this well-supported conclusion ought to be the end of the matter.

Petitioners argue that TSA failed to consider adequately whether the use of AIT causes delays in passenger screening as compared with walk-through metal detectors. EPIC Br. 33-35; CEI Br. 20-24. As TSA explained in the preamble to the final rule, however, "[o]verall passenger screening system times do not

[2] Amici curiae assert that AIT imposes a severe restriction on personal privacy, an argument they support with anecdotes of inappropriate screening conduct or screening involving pat-downs of minors, the elderly, the disabled, or other vulnerable passengers. Amicus Br. 11-20. But the challenge here is to a rule that permits the use of AIT screening, *not* a rule that permits pat-downs. Furthermore, most of the incidents identified involve procedures that are no longer in force, or misconduct by TSA screeners that is in violation of screening protocols.

increase with AIT," because the requirement to screen all passenger carry-on baggage and belongings by x-ray machines limits the speed of the overall screening experience. 81 Fed. Reg. at 11,391. TSA co-locates AIT units with metal detectors used to x-ray passenger baggage in order to maintain a passenger throughput rate of 300 passengers per hour. *See* TSA, Passenger Screening Using Advanced Imagine Technology: Regulatory Impact Analysis and Final Regulatory Flexibility Analysis 51, 62-63 (Feb. 18, 2016) (available at https://www.regulations.gov/document?D=TSA-2013-0004-5583) (Regulatory Impact Analysis). That throughput rate is no slower than the throughput rate using walk-through metal detectors to screen passengers. *See id.* Furthermore, although some individuals may cause AIT to alarm, other individuals who would have set off an alarm in a walk-through metal detector will not do so. *See* Regulatory Impact Analysis 51, 62. TSA's conclusion that overall passenger screening system times do not increase with AIT is not arbitrary and capricious.

EPIC asserts that the use of AIT must interfere with TSA's ability to timely screen passengers because, between 2008 and 2009, total passenger throughput dropped from 682 million to 627 million. EPIC Br. 34. But AIT was first widely deployed in 2010, not 2009. Regulatory Impact Analysis 50. Furthermore, TSA's analysis makes clear that the change from 2008 to 2009 resulted from a change in TSA's prior policy "to screen the [transportation security officers] every time they

left the sterile area of the checkpoint." Regulatory Impact Analysis 52 n.73. More generally, annual passenger throughput is dependent on a range of factors, most prominently the overall demand for commercial air travel, which increased between 2009 and 2015. *See* Regulatory Impact Analysis 52, Table 15 (showing passenger volumes). The reduction in the overall number of passengers screened between 2008 and 2009 shows nothing about the capacity of AIT units to screen passengers in a timely manner.

The Competitive Enterprise Institute also asserts that AIT screening must be slower than a walk-through metal detector because TSA uses walk-through metal detectors to screen certain populations that receive expedited screening, including children, the elderly, and members of TSA Pre√™ (a trusted traveler program). CEI Brief 23-24. But those populations, which have been identified as posing a reduced risk, are subject to different screening procedures altogether. For example, passengers ages 12 and under and those ages 75 and older are permitted to leave on their shoes and light jackets during screening. *See* https://www.tsa.gov/travel/special-procedures/screening-passengers-75-and-older; https://www.tsa.gov/travel/special-procedures/traveling-children (select "Screening your child"). Children are also subjected to modified screening procedures "that reduce the likelihood of a pat-down." https://www.tsa.gov/travel/special-procedures/traveling-children. TSA Pre√™ members similarly are not required to

remove their shoes, light jackets, belts, liquids, or laptops. *See* https://www.tsa.gov/precheck. The fact that these procedures result in expedited screening for the subject populations does not establish that TSA's use of AIT as a primary screening method imposes delays on passengers as compared to screening using walk-through metal detectors. And it certainly does not address Congress' and TSA's concerns about the efficacy of the exclusive use of walk-through metal detectors with respect to the general screening population.

Finally, EPIC asserts that "[p]assenger screening times have significantly increased since the introduction of body scanners," and suggests that AIT is the cause of those delays. EPIC Br. 34-35. But even assuming that there has been an increase in passenger screening times, that increase might more reasonably be attributed to any of a number of variables, including, for instance, increases in the total number of travelers, reductions in the total size of the TSA screener workforce, changes to airline carry-on baggage fees, and changes in other screening protocols. *See, e.g.*, Regulatory Impact Analysis 52, Table 15; "Frustrated Travelers: Rethinking TSA Operations to Improve Passenger Screening and Address Threats to Aviation," Hearing before the S. Comm. on Homeland Security & Governmental Affairs, 114th Cong. 4-5 (2016) (testimony of John Roth, Inspector General, U.S. Dept. of Homeland Security).

2. Explosives Trace Detection. EPIC's argument that TSA failed to consider adequately the use of explosives trace detection as an alternative primary screening method (EPIC Br. 35-40) is equally unfounded.

TSA explained in issuing its final rule that, although using explosives trace detection as the primary screening method at a checkpoint "would help reduce the risk of nonmetallic explosives being taken through the checkpoint," explosives trace detection, even if combined with walk-through metal detectors, could not "detect other dangerous items such as weapons and improved explosive device components made of ceramics or plastics." 81 Fed. Reg. at 11,395-96. In contrast, AIT is capable of detecting such threat items. *Id.* at 11,396. In addition, the process of explosives trace detection, from taking a swab to the final test results, requires approximately 20-30 seconds to complete. *See id.* Explosives trace detection also can result in false alarms, which would further impede throughput. *Id.* Making explosives trace detection the primary screening method could "slow passenger throughput levels below the current rate of 150 passengers per hour per lane," "possibly increasing passenger wait times and the associated opportunity cost." *Id.* And TSA noted that it would be required to keep sufficient materials to conduct the screening at the checkpoint, adding logistical concerns and costs. *Id.* TSA was not arbitrary or capricious in allowing the use of AIT as a primary screening method, notwithstanding the availability of explosives trace detection.

D. TSA Adequately Considered Whether the Use of AIT Will Cause Passengers to Drive Rather Than Fly.

The Competitive Enterprise Institute argues that TSA did not adequately consider the possibility that using AIT as a primary screening method will result in would-be passengers choosing to drive rather than fly, thus increasing travel risks. CEI Brief 9-14. But the agency specifically addressed this issue in response to comments on the proposed rule, explaining why that potential concern did not undermine the agency's rule. *See, e.g.*, 81 Fed. Reg. at 11,367-68, 11,392.

TSA found no "empirical evidence that air travel is reduced due to" the use of AIT as a primary screening device instead of walk-through metal detectors. 81 Fed. Reg. at 11,368; *see also id.* at 11,392-93. The only non-anecdotal support provided by commenters for their claim that AIT causes a shift from air to road travel was a study published in 2007—before AIT was deployed. That study evaluated the potential impact on air travel in the United States of two post-9/11 security measures: the requirement to begin screening all checked passenger baggage; and the requirement that screening be conducted by TSA employees rather than private screeners. *See* G. Blalock, *et al.*, "The Impact of Post 9/11 Airport Security Measures on the Demand for Air Travel," 50 J. Law & Econ. 731 (Nov. 2007). The authors found that "the federalization of passenger screening had little effect on passenger volume," and that "the introduction of baggage screening at U.S. airports reduced originating passenger volume by about 6 percent

at all airports and by about 9 percent at the nation's 50 busiest airports." *Id.* at 752. The authors also noted that they "would expect the demand to slowly return to preintervention levels as the TSA and airports invest in infrastructure to minimize the inconvenience of baggage screening." *Id.* at 753.

As TSA explained, the Blalock study did not provide any empirical evidence that the specific change in screening challenged here—the use of AIT as a primary screening method at some airport security checkpoints for some passengers—had any measurable impact on the demand for travel. The agency explained in the preamble to the final rule that the baseline from which to estimate the costs and benefits of the rule was "not 'no TSA screening' or 'no screening at all,"' but instead the costs and benefits of AIT compared to walk-through metal detectors as a primary screening tool. 81 Fed. Reg. at 11,392. "[I]n this case, TSA has not seen credible evidence" that AIT had a measurable impact on demand for commercial aviation. *Id.*

The Competitive Enterprise Institute points to anecdotal comments in the rulemaking docket by individuals who stated that they chose to drive or take a train rather than undergo screening using AIT, and insists that "TSA needed to point to something 'in the record'" to address "comments from travelers who were switching from planes to cars indicated the presence of a safety risk." CEI Br. 9-13, 17 (quoting *Competitive Enterprise Institute v. NHTSA*, 956 F.2d 321, 327

(D.C. Cir. 1992).[3] But TSA did exactly that. TSA acknowledged the anecdotal comments, but noted that it did not receive non-anecdotal support for a more-than-negligible impact on motor vehicle travel. 81 Fed. Reg. 11,392, 11,398. TSA also pointed to reasons to believe that AIT might encourage some passengers to fly rather than drive. Some commenters prefer AIT because its ability to detect non-metallic threat items provides greater security for the flying public. *See* 81 Fed. Reg. at 11,367. Other commenters prefer AIT for medical reasons because it does not alarm on metal medical devices or implants that would trigger an alarm in a walk-through metal detector. *See id.*

Furthermore, TSA made clear that its top priority is to "pursue the most effective security measures reasonably available" to reduce "the vulnerability of commercial air travel to terrorist attacks. *See* 81 Fed. Reg. at 11,395. Ultimately, TSA came to the commonsense conclusion that in light of the scant evidence of a "fly-drive tradeoff" associated with the AIT rulemaking, and the "substantial indirect effects and social costs" associated with a successful terrorist attack, an

[3] The Competitive Enterprise Institute claims that over 80 commenters stated that they would drive more rather than fly due to AIT, but even a review of those comments shows that many do not attribute the fly-to-drive tradeoff to AIT alone, and many refer to AIT without automatic target recognition—a type of AIT that TSA's rule does not permit. *See, e.g.*, Comments 4447 (objecting to "highly invasive" searches and pat-downs), 0114 (objecting to pat-downs and nude images), 0162 (objecting to lack of profiling), 0246 (objecting to "screening," including on trains).

attempt to numerically balance indirect safety costs against a panoply of direct and indirect benefits would be "'necessarily arbitrary [and] * * * seem, especially in a post-September 11 world, ridiculous.'" *Id.* at 11,394 (quoting F. Ackerman & L. Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* 136-137 (2004)).

The administrative record here is qualitatively different from the record in *Competitive Enterprise Institute v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992), on which the Competitive Enterprise Institute relies. There, the agency had not addressed historical and non-anecdotal evidence, which the agency and the Court had previously credited, that car manufacturers responded to lower fuel economy standards by continuing or expanding production of larger, heavier, and safer vehicles. *Id.* at 324-27. In this rulemaking, in contrast, commenters did not produce non-anecdotal evidence of a fly-drive tradeoff associated with use of AIT. No "independent analysts * * * came up with an annual death rate" associated with AIT, and neither this Court nor TSA has ever conceded that AIT with automatic target recognition, on its own, results in a "fly-drive tradeoff." *Id.* at 325-327. For these reasons, TSA's burden to "undermine the inference" of such a tradeoff, *id.* at 327, is comparatively low, if it exists at all. And given TSA's explicit consideration of this issue, including the fly-drive safety risks that would actually

follow from a successful terrorist attack, TSA has adequately considered the problem at hand.

For similar reasons, TSA was not arbitrary or capricious in considering the perceived privacy impacts of AIT, but declining to include in its cost-benefit analysis a quantified dollar value for such impact. *Cf.* CEI Brief 14-17. Notably, "TSA did not receive any public comments providing a methodology to be used on the economic valuation of how perceived privacy issues could be calculated," let alone weighed against the potential direct and indirect effects of a terrorist attack. 81 Fed. Reg. at 11,393.

E. TSA Gave the Public Adequate Notice That the Final Rule Might Not Require TSA to Permit Passengers to Decline AIT Screening.

EPIC asserts that TSA violated the Administrative Procedure Act by failing to give adequate advance notice in the rulemaking of the possibility that passengers would not be permitted to opt out of AIT. EPIC Br. 44-50. EPIC contends that interested parties were denied an opportunity for meaningful comment.

Contrary to EPIC's assertion, however, TSA specifically addressed the possibility in its proposed rule and accompanying preamble that AIT screening could be made mandatory. The preamble to the proposed rule explained that "AIT is currently optional." 78 Fed. Reg. at 18,296. But TSA left open the possibility that AIT screening could be mandated at a future date. Nothing in the proposed

rule codified any option to decline to undergo AIT screening, and TSA specifically invited comments "on the ability of passengers to opt-out of AIT screening." *Id.* at 18,294. This made clear to the public that the agency was contemplating the possibility of mandatory AIT screening.

As noted above (at pp. 10-11), in response to this invitation for comments regarding the ability to opt-out, TSA received multiple comments addressing the possibility that AIT screening could be made mandatory under the proposed rule, including comments from petitioner Competitive Enterprise Institute. The fact that commenters objected to the proposed rule on this ground confirms that TSA's notice-and-comment rulemaking encompassed the policy challenged by this petition for review. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998); *see also Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 700 (D.C. Cir. 2008) (noting that the logical outgrowth doctrine was satisfied by "adequate notice" that a party may receive via its participation in the rulemaking process).

In any event, petitioner has failed to show that TSA was required to promulgate a change to its opt-out procedures through notice-and-comment rulemaking. As this Court previously recognized, notice-and-comment rulemaking is required only if an agency's change in policy or practice constitutes a "substantive" rule. *EPIC*, 653 F.3d at 5-6. Before TSA adopted its current

screening protocols, TSA allowed passengers to forgo AIT screening in favor of a physical pat-down. Under the current protocols, passengers may be required to undergo AIT scanning without the ability to opt for a pat-down in a very small number of circumstances, as warranted by security considerations. *See also* AR 4E, at 3239, 3258-59, 3267-3269 (describing new screening protocol). AIT screening with automatic target recognition software presents no greater intrusion upon passenger privacy than the walk-through metal detectors previously deployed at airport checkpoints, and certainly no greater intrusion upon passenger privacy than the pat-down that passengers previously received upon opting out of AIT screening. Likewise, the safety and efficacy of the AIT units remain unchanged in light of current protocols. The "substantive effect" of the challenged policy is not "sufficiently grave" to transform the policy into a substantive rule for which notice-and-comment rulemaking is required. *See EPIC*, 653 F.3d at 5.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,129 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sharon Swingle
SHARON SWINGLE

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
SHARON SWINGLE

STATUTORY AND REGULATORY ADDENDUM

49 U.S.C.A. § 44901

(a) In general.--The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and shall be carried out by a Federal Government employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in section 44919 or 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.

* * *

(*l*) Limitations on use of advanced imaging technology for screening passengers.—
(1) Definitions.--In this subsection, the following definitions apply:

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

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

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

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

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

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

(C) Automatic target recognition software.--The term "automatic target recognition software" means software installed on an advanced imaging technology that produces a generic image of the individual being screened that

is the same as the images produced for all other screened individuals.

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

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

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

(3) Extension.--

(A) In general.--The Assistant Secretary may extend the deadline specified in paragraph (2), if the Assistant Secretary determines that--

(i) an advanced imaging technology equipped with automatic target recognition software is not substantially as effective at screening passengers as an advanced imaging technology without such software; or

(ii) additional testing of such software is necessary.

(B) Duration of extensions.--The Assistant Secretary may issue one or more extensions under subparagraph (A). The duration of each extension may not exceed one year.

49 U.S.C.A. § 44902

(a) Mandatory refusal.--The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport--

(1) a passenger who does not consent to a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive refusal.--Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

§ 44904. Domestic air transportation system security

(a) Assessing threats.--The Under Secretary of Transportation for Security and the Director of the Federal Bureau of Investigation jointly shall assess current and potential threats to the domestic air transportation system. The assessment shall include consideration of the extent to which there are individuals with the capability and intent to carry out terrorist or related unlawful acts against that system and the ways in which those individuals might carry out those acts. The Under Secretary and the Director jointly shall decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system.

* * *

(e) Improving security.--The Under Secretary shall take necessary actions to improve domestic air transportation security by correcting any deficiencies in that security discovered in the assessments, analyses, and monitoring carried out under this section.

§ 44925. Deployment and use of detection equipment at airport screening checkpoints

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

49 C.F.R. § 1540.105

(a) No person may:

* * * (2) Enter, or be present within, a secured area, AOA, SIDA or sterile area without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.

49 C.F.R. § 1540.107

(a) No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.

* * *

(d) The screening and inspection described in paragraph (a) of this section may include the use of advanced imaging technology. Advanced imaging technology used for the screening of passengers under this section must be equipped with and employ automatic target recognition software and any other requirement TSA deems necessary to address privacy considerations.

(1) For purposes of this section, advanced imaging technology

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

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

(2) For purposes of this section, automatic target recognition software means software installed on an advanced imaging technology device that produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals.