

No. 11-1805

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**In the United States Court of Appeals  
for the First Circuit**

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JEFFREY H. REDFERN, et al.,

*Plaintiffs-Appellants,*

v.

JANET NAPOLITANO, in her official capacity as  
Secretary of Homeland Security, et al.

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Massachusetts

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**BRIEF OF *AMICUS CURIAE* FREEDOM TO TRAVEL USA**  
in Support of Plaintiffs-Appellants' on the Merits

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## Corporate Disclosure Statement

In accordance with Federal Rule of Appellate Procedure 26.1, counsel for Freedom to Travel USA certifies that Freedom to Travel USA is an unincorporated non-partisan grassroots civic association, and thus has no parent corporation or shareholders who are subject to disclosure.

Dated: November 5, 2012

\_\_\_\_\_/s\_\_\_\_\_

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# Table of Contents

Table of Authorities .....	v
Amicus Identity, Interest, & Authority to File.....	1
1. Identity of Freedom to Travel USA .....	1
2. Interest of Freedom to Travel USA.....	2
3. Authority of Freedom to Travel USA to File.....	4
Summary of the Argument.....	5
Argument .....	6
1. Constitutional review of any government search must properly account for the search’s intrusiveness .....	6
A. The intrusiveness of a search critically determines whether the search is constitutional.....	6
B. The validity of a search of a person’s body especially depends on the search’s level of intrusiveness.....	8
C. The more intrusive an administrative search is, the more calibrated the search must be to survive review.....	9

2.	The well-reported experience of Americans with TSA body scans and pat-downs (“the TSA searches”) indicates these searches are grossly intrusive.....	13
A.	Numerous passengers report feeling abused and humiliated when subjected to the TSA searches.....	13
(1)	Hobson’s Choice: Nude Scan or Pat-Down.....	13
(2)	Nude Body Scans.....	15
(3)	Full-Body Pat-Downs.....	19
B.	Women report being sexually harassed and violated when subjected to the TSA searches .....	24
C.	Parents report seeing their children traumatized and confused when subjected to the TSA searches .....	26
D.	Seniors and disabled persons report their lives being degraded and threatened when subjected to the TSA searches .....	28
3.	This Court’s review of the TSA searches should allow for full recognition of these searches’ gross intrusiveness.....	32

A.	This Court should engage in original review of the TSA searches, which are categorically distinct from other airport searches .....	32
B.	This Court should not rely on the TSA’s incomplete administrative record as a basis for gauging the intrusiveness of the TSA searches .....	33
C.	This Court should order fact-finding to determine the full intrusiveness of the TSA searches .....	35
Conclusion.....		37
Certificate of Compliance .....		38
Certificate of Service .....		39

# Table of Authorities

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<i>Blackburn v. Snow</i> , 771 F.2d 556 (1st Cir. 1985).....	2, 10-13, 21-23, 32, 33
<i>Bull v. City &amp; Cnty. of San Francisco</i> , 595 F.3d 964 (9th Cir. 2010).....	6
<i>Chandler v. Miller</i> , 520 U.S. 305, 323 (1997) .....	10
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# **Amicus Identity, Interest, and Authority to File**

## **1. Identity of Freedom to Travel USA**

Freedom to Travel is an unincorporated, non-partisan grassroots civic association. It is concerned with the many documented violations of personal privacy and dignity that have occurred – and continue to occur – as a result of the Transportation Security Administration’s (“TSA”) decision over the last decade to adopt progressively intrusive screening procedures for airline passengers. With hundreds of members nationwide, Freedom to Travel believes that air travel in America should be free not only from security risks but also from the risk of unreasonable searches, as provided under the Fourth Amendment to the U.S. Constitution.

Freedom to Travel thus advocates for airline passenger screening procedures that have already proven effective, are of limited intrusiveness, and enable the dignified treatment of passengers with special needs like seniors and disabled persons. Freedom to Travel has advanced this goal via a public website ([fttusa.org](http://fttusa.org)), informational materials, and coordination with federal and state legislators like Alaska State Representative Sharon Cissna who share Freedom to Travel’s constitutional concerns.

## 2. Interest of Freedom to Travel USA

Freedom to Travel is interested in this case because it believes that federal courts should be informed about the manner in which the TSA's current regime for screening airline passengers has unjustly humiliated and degraded countless Americans. Freedom to Travel is also greatly concerned about the legal burdens that airline passengers like Appellants face when they assert their Fourth Amendment rights in court. These burdens stem from a "reasonableness standard" for airport searches that scholars have noted is "too deferential to the government."<sup>1</sup>

This Court, however, has demonstrated a strong commitment to close analysis of every Fourth Amendment claim, no matter the context. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 562 (1st Cir. 1985) (striking down prison visitor strip search policy). Hence, in performing such analysis of Plaintiffs-Appellants' Fourth Amendment claim here, this Court would be aided by Freedom to Travel's amicus brief, which "illustrates the realities" of the TSA's new airport screening procedures for everyday passengers. *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 89 (1st Cir. 2010).

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<sup>1</sup> Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 296 (2011).

This is a perspective that was missing in *EPIC v. U.S. Department of Homeland Security*, 653 F.3d 1, 2, 10-11 (D.C. Cir. 2011)—a case in which the D.C. Circuit rejected a Fourth Amendment challenge to TSA nude body scans and full-body pat-downs without ever analyzing the intrusiveness of these procedures. *See id.* at 10-11. The most the court had to say in this regard was that “some . . . have complained that the . . . pat-down [is] unnecessarily aggressive.” *Id.* at 3. But this idle conclusion is belied by the multitude of Americans who have publicly attested to being humiliated by these screening procedures—especially women, children, seniors, disabled persons, and persons with sensitive medical conditions.

Freedom to Travel thus seeks to help this Court understand the experience of these Americans and how this experience should guide review of Appellants’ Fourth Amendment claim. Such insight is especially important in a case like this where public safety concerns can obscure the “policy arguments which may be made on both sides . . . .” *Hatch v. Trail King Indus.*, 656 F.3d 59, 70 (1st Cir. 2011). As such, Freedom to Travel submits this amicus curiae brief so the Court may benefit from “the illumination provided [by Freedom to Travel] on this point.” *Id.*



### **3. Authority of Freedom to Travel USA to File**

Freedom to Travel respectfully asks this Court for leave to file this Brief, based on the argument presented herein, and the Motion for Leave to File an Amicus Curiae Brief submitted together with this Brief.

Additionally, as required by Federal Rule of Appellate Procedure 29(c)(5), Freedom to Travel states that no party nor counsel for any party in this case wrote this amicus brief in part or in whole. Nor did any party or counsel for any party contribute money intended to fund the preparation or submission of this brief. And no person other than Freedom to Travel – which includes its members and counsel – has contributed money intended to fund the preparation or submission of this brief.

## Summary of the Argument

The intrusive TSA screening procedures for airplane passengers that Appellants challenge affect the constitutional rights and personal dignity of every American who travels by air. These screening procedures require Americans to submit either to a nude body scan or a full-body pat-down as a condition of exercising their freedom to travel by air.

Many Americans have reported experiencing humiliation, fear, and a total loss of dignity when subjected to these screening procedures. This reality should guide the Court's review. In particular, the experience of traveling Americans related herein shows why this Court, before deciding Appellants' Fourth Amendment claim, should first perform a fact-intensive review of the TSA searches' unprecedented level of intrusiveness.

This task should ultimately lead the Court to: (1) distinguish airport screening cases dealing with far less intrusive passenger screening methods (e.g., metal detectors); (2) refuse to defer to the TSA's administrative record; and (3) order necessary fact-finding, as the District Court dismissed Appellants' case before any substantial discovery occurred.

## Argument

1. **Constitutional review of any government search must properly account for the search's intrusiveness.**
  - A. **The intrusiveness of a search critically determines whether the search is constitutional.**

The Fourth Amendment guarantees “[t]he right of the people to be secure . . . against unreasonable searches.” To determine if a government search is unreasonable, “an inquiring court must consider . . . the [search’s] particular intrusion into the searched individual’s privacy.” *Spencer v. Roche*, 659 F.3d 142, 146 (1st Cir. 2011). The intrusiveness of a search is thus a critical determinant of whether the search is constitutional.

The constitutionality of a given search depends in large part on the search’s intrusiveness because “[n]ot all searches are created equal. The Fourth Amendment differentiates between more and less intrusive searches, and requires varying levels of need to justify different kinds of searches.” *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 993 (9th Cir. 2010) (Thomas, J., dissenting). Additionally, “a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.” *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968).

Hence, courts must first engage in a “careful perscrutation of the specific facts” related to a given search’s intrusiveness *before* attempting to ascertain the search’s constitutionality. *Spencer*, 659 F.3d at 146.

Such careful perscrutation is especially required in cases involving searches conducted via new, sense-enhancing technologies whose erosive effect on “the privacy guaranteed by the Fourth Amendment” may not be clear. *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001). For example, in reviewing the constitutionality of a warrantless thermal scan of a home, the Ninth Circuit promptly sought an evidentiary hearing on the intrusiveness of this technology. *United States v. Kyllo*, 37 F.3d 526, 531 (9th Cir. 1994). The facts revealed by the hearing ultimately enabled the Supreme Court, on later review, to find that warrantless thermal scans were intrusive searches that violated the Fourth Amendment. *See Kyllo*, 533 U.S. at 37-38.

TSA nude body scans and full-body pat-downs are warrantless and technologically novel “intrusion[s] upon the sanctity of the person.” *Terry* 392 U.S. at 17. Thus, in reviewing these searches, this Court must first perform a careful analysis of these searches’ intrusiveness *before* reaching any final conclusions about these searches’ validity.

**B. The validity of a search of a person’s body especially depends on the search’s level of intrusiveness.**

The Fourth Amendment explicitly protects “persons” from unreasonable government searches. Hence, “[i]t is a piece of constitutional bedrock that individuals have a reasonable expectation of privacy regarding their bodies.” *Spencer*, 659 F. 3d at 146. And as a bodily search’s intrusiveness increases, the likelihood of the search being constitutional greatly decreases absent “a particularly robust justification” or probable cause. *Id.*

The Supreme Court’s decision in *Safford Unified School District No. 1. v. Redding* demonstrates why the constitutionality of a bodily search is closely linked to the search’s level of intrusiveness. 129 S. Ct. 2633 (2009). In *Safford*, the Court struck down the decision of school officials to strip search a 13-year-old girl, Savana Redding, to locate medical contraband that they suspected she was hiding. *See id.* at 2637. The Court reached this conclusion based on a detailed account of how intrusive Savana’s strip search was—objectively and subjectively—thus revealing the gross extent to which the search was unconstitutional. *See id.* at 2641-42.

As the Court explained:

**The very fact of Savana's pulling her underwear away from her body . . . necessarily exposed her**

**breasts and pelvic area** to some degree, and **both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct**, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent **in her account of it as embarrassing, frightening, and humiliating**. The reasonableness of her expectation . . . is indicated by **the consistent experiences of other young people similarly searched . . . .**

*Id.* at 2641-42 (emphasis added).

As bodily searches, TSA nude body scans and full-body pat-downs are a “quantum leap [in airport security] from [a search of] outer clothes . . . to exposure of intimate parts.” *Safford*, 129 S. Ct. at 2643. Accordingly, constitutional review of the TSA searches must focus on this extraordinary leap and all of the objective and subjective facts concerning it.

**C. The more intrusive an administrative search is, the more calibrated the search must be to survive review.**

The administrative search exception to the Fourth Amendment enables the government to engage in warrantless searches for “certain administrative purposes without particularized suspicion of misconduct, **provided that those searches are appropriately limited.**” *Indianapolis v.*

*Edmond*, 531 U.S. 32, 37 (2000) (emphasis added). In this regard, Fourth Amendment reasonableness remains the final measure of whether a given administrative search adopted to meet a safety risk is properly limited, and only “blanket suspicionless searches calibrated to the risk may rank as ‘reasonable.’” *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

Under this calibration principle, the more intrusive an administrative search is, the more calibrated the search must be to survive constitutional review. This Court’s decision in *Blackburn v. Snow* illustrates this principle at work. 771 F. 2d 556, 564 (1st Cir. 1985). In *Blackburn*, this Court reviewed the constitutionality of a county prison’s decision to require “that all men, women and children wishing to visit inmates at the institution submit to a strip search before doing so.” *Id.* at 559. The plaintiff in the case, Ruth Blackburn, was forced to endure such a strip search on three separate visits to the prison to see her incarcerated brother. *Id.* at 559-60. The strip search Ruth endured on each occasion included being escorted to a private room where she was forced to disrobe and then be inspected by a “female matron . . . [who] among other things, examin[ed] [Ruth’s] armpits, lift[ed] [Ruth’s] breasts and crouch[ed] to view [Ruth’s] anus.” *Id.* at 560.

This Court’s analysis of the prison strip search policy—and the facts related to the searches that Ruth experienced—proceeded on the basis that “free citizens entering a prison, as visitors, retain a legitimate expectation of privacy, albeit one diminished by the exigencies of prison security.” *Id.* at 563. This Court then explained that constitutional review of the prison’s policy required interest balancing that seriously weighed “the intrusion entailed by a strip search” to prison visitors like Ruth. *Id.* at 564. This Court thus rejected “the claim that a policy requiring all visitors to be strip searched can satisfy the strictures of reasonableness solely because [the prison] has incanted the words ‘institutional security.’” *Id.* at 567.

Instead, this Court first considered the intrusiveness of the searches that Ruth endured—searches that involved “the manual spreading of buttocks and lifting of breasts” and that left Ruth feeling “sick to her stomach.” *Id.* at 564. This Court then found that because of the grave intrusiveness of this search—and because the prison was committed to strip searching every visitor, regardless of suspicion—the prison had to prove this policy was highly calibrated to meet some “unusual need.” *Id.*



The only need cited by the prison in this regard was the need to “check the flow of drugs and contraband into the institution.” *Id.* at 565.

But this Court found the strip search policy was not calibrated to meet this risk in two major ways. First, the intrusiveness of the searches far exceeded the few incidents of visitor-transported contraband in recent years at the prison. *Id.* at 566. Second, the less intrusive security measures used by the prison before adopting the strip search policy had already proven “more than adequate to address the minimal visitor contraband danger present.” *Id.* Hence, this Court struck down the strip search policy, observing in the process that: “While the fit between security requirements and privacy invasion need not be perfect, we believe that the Constitution requires that the fit be closer than it was here.” *Id.* at 566 n.6.

As putative administrative searches, TSA nude body scans and full-body pat-downs are also subject to this observation: there must be a “fit” between their intrusiveness and the security needs driving their adoption. *See id.* at 566 n.6. Gauging this “fit” in turn requires detailed knowledge of how intrusive these searches are—and, consequently, how well-calibrated these searches must be to survive review. *See id.* at 566 & n.6. Hence, this

Court's analysis of the TSA searches' intrusiveness must be rigorous and fact-intensive, thereby ensuring "the interest balancing required by the Fourth Amendment [does not become] a *per se* rule upholding any search, of any person, thought 'necessary' by [TSA] officials." *Id.* at 567.

**2. The well-reported experience of Americans with TSA body scans and pat-downs ("the TSA searches") indicates these searches are grossly intrusive.**

**A. Numerous passengers report feeling abused and humiliated when subjected to the TSA searches.**

**(1) *Hobson's Choice: Nude Scan or Pat-Down***

The TSA screens more than two million airline passengers a day at more than 450 airports.<sup>2</sup> To manage this task, the TSA has adopted policies requiring all airline passengers to make a Hobson's choice between two highly revealing searches of their entire body: (1) a nude body scan that is reviewed by a TSA agent for physical anomalies;<sup>3</sup> or (2) a full-body pat-down by a TSA agent—a procedure the TSA has never formally defined,

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<sup>2</sup> *Racial Profiling at US Airports? Here's an App for That*, AGENCE FR. PRESSE, April 30, 2012.

<sup>3</sup> See generally BART ELIAS, CONG. RESEARCH SERV., R42750, AIRPORT BODY SCANNERS: THE ROLE OF ADVANCED IMAGING TECHNOLOGY 1-4 (2012), available at <http://www.fas.org/sgp/crs/homsec/R42750.pdf>.

but which passengers have described as the manual, intense probing of one's "entire body, including the posterior, crotch, and chest."<sup>4</sup>

Additionally, regardless of whatever choice is elected by a passenger between these two screening methods, TSA agents may still subject a passenger to a full-body pat-down if "an anomaly is detected during screening" or as a matter of "random screening."<sup>5</sup> TSA agents may also opt to subject a passenger to a less intrusive screening procedure, like a metal detector inspection or an explosive trace detection test.<sup>6</sup> Passengers, in turn, may not ask for "a less invasive standard pat-down or metal detection inspection." *Redfern*, 2011 U.S. Dist. LEXIS 49321, at \*3. Nor may passengers leave a TSA checkpoint without facing an \$11,000 fine.<sup>7</sup>

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<sup>4</sup> CNN Wire Staff, *A Primer on the New Airport Security Procedures*, CNN (Nov. 23, 2010, 12:58 PM), <http://www.cnn.com/2010/TRAVEL/11/23/tsa.procedures.primer/index.html>.

<sup>5</sup> Transportation Security Administration, *Enhanced Pat-Downs*, THE TSA BLOG (Aug. 27, 2010, 4:29 PM), <http://blog.tsa.gov/2010/08/enhanced-pat-downs.html>.

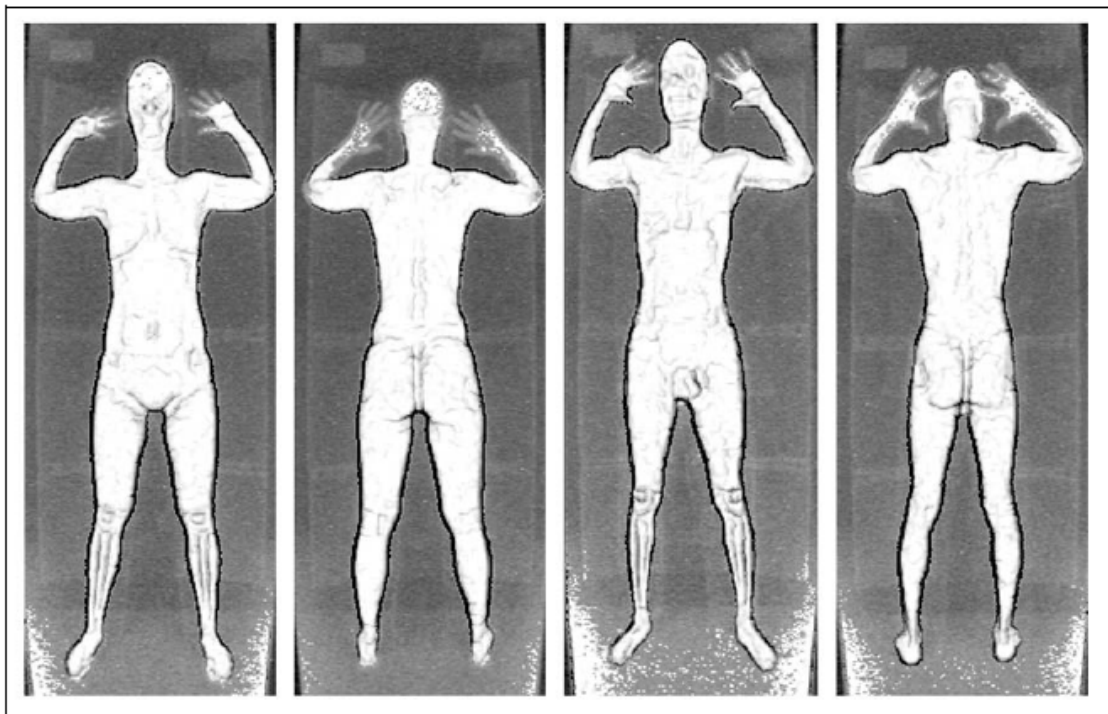
<sup>6</sup> See Press Release, Transp. Sec. Admin., *TSA Expands Use of Explosive Trace Detection Technology at Airports Nationwide* (Feb. 17, 2010), available at <http://www.tsa.gov/press/releases/2010/02/17/tsa-expands-use-explosive-trace-detection-technology-airports-nationwide>.

<sup>7</sup> Susanna Kim, *Airport Pat-Downs: TSA Says It Can Fine You for Backing Out*, ABC NEWS, Nov. 23, 2010, <http://abcnews.go.com/Business/walking-airport-security-lead-11000-fine/story?id=12215171>; see also 45 C.F.R. § 1503.401(a), (b)(1) (2012) (TSA civil penalties provision).

## (2) *Nude Body Scans*

The TSA uses two types of nude body scans: X-ray backscatter and millimeter wave.<sup>8</sup> X-ray backscatters produce a nude image of the body.<sup>9</sup> The TSA has implemented software to “blur” these images, but as shown by Figure 1 below – derived from a recent Congressional Research Service report – the backscatter images are still revealing in nature.<sup>10</sup>

**Figure 1. Typical X-Ray Backscatter Images of a Female (Left) and Male (Right) with Privacy Algorithm Applied**



Source: Transportation Security Administration.

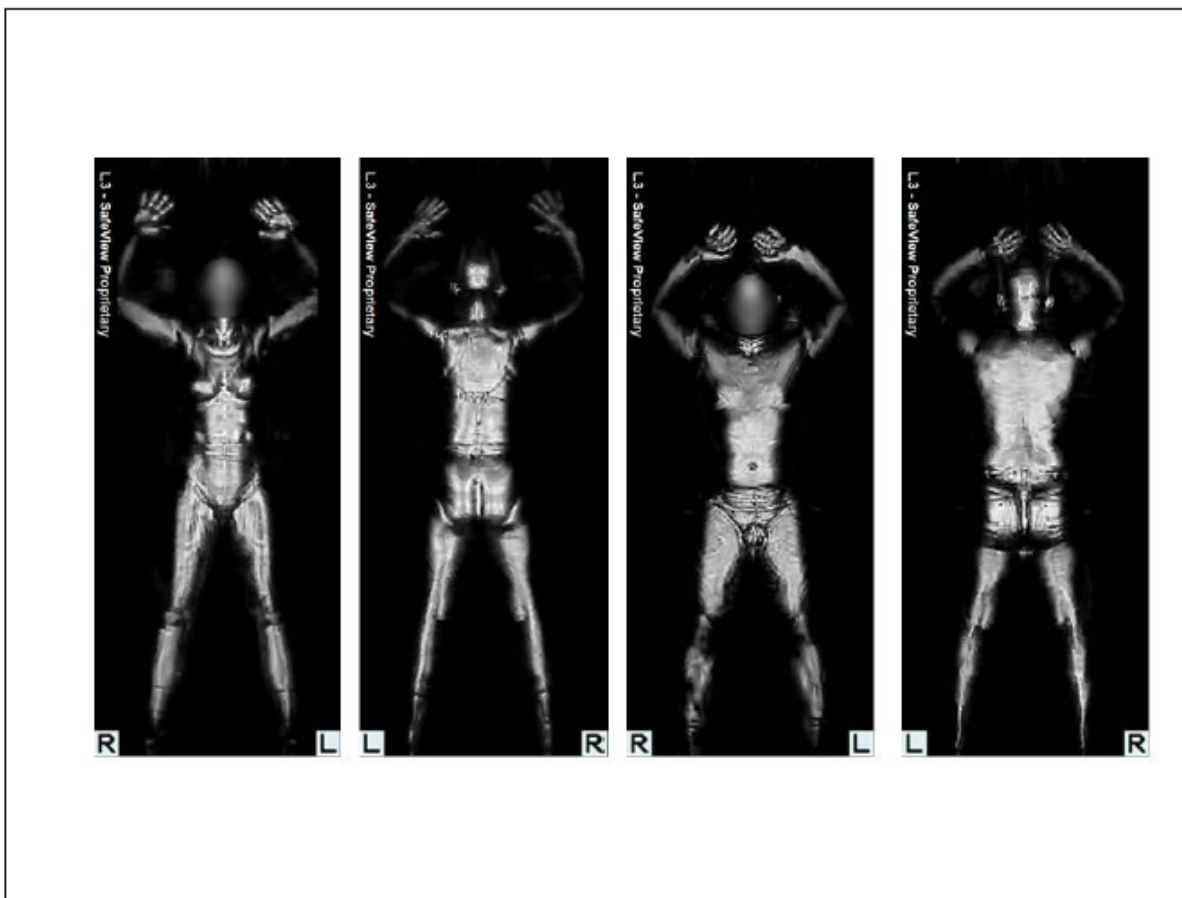
<sup>8</sup> See ELIAS, *supra* note 3, at 2-3.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

Millimeter waves “render images of what lies directly underneath clothing and near the skin.”<sup>11</sup> The TSA has since implemented the use of automated target recognition software to eliminate human inspection of these images.<sup>12</sup> Nevertheless, as Figure 2 below shows (derived from the same CRS report), millimeter wave images are quite revealing.<sup>13</sup>

**Figure 2. Typical Millimeter Wave Images of a Female (Left) and Male (Right) with Facial Blurring Applied**



Source: Transportation Security Administration.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 2-3.

<sup>13</sup> *Id.* at 3.

The TSA plans to have 1,800 body scanners in operation by the end of 2014.<sup>14</sup> The TSA further estimates “more than 99 percent of passengers” undergo nude body scans.<sup>15</sup> This means that hundreds of millions of Americans every year are forced to submit their unclothed body for TSA inspection in order to travel by air. And while one might initially presume this intrusion is brief and inconvenient, the reality is that nude body scans still expose intimate body details to TSA agents, including “evidence of mastectomies, colostomy appliances, penile implants and catheter tubes” as well as the size of breasts and genitals.<sup>16</sup> *Cf. Safford*, 129 S. Ct. at 2641 (finding a strip search had occurred because of exposure of the body in a “categorically distinct” way that required extra justification).

Thus, many Americans have reported the experience of a nude body scan as a humiliating one. Consider Donna D’Errico, who reported the following ordeal in submitting to a body scan at Los Angeles International Airport in late 2010: “[A]fter the search, I noticed that the male TSA agent who had pulled me out of line was smiling and whispering with two other

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<sup>14</sup> *See id.* at 3.

<sup>15</sup> *Id.*

<sup>16</sup> Stuart F. Brown, *Body Scanners: Weapons Revealed*, SCI. AM., Mar. 27, 2008, <http://www.scientificamerican.com/article.cfm?id=weapons-revealed>.

TSA agents . . . . I was outraged.”<sup>17</sup> Or consider Ellen Terrell, who was flying out of Dallas-Fort Worth Airport in late 2011 when “TSA agents repeatedly asked her to step back into a body scanning machine.”<sup>18</sup> A TSA agent later told Ellen “[y]ou just have such a cute figure.”<sup>19</sup>

Similar reports exist of male passengers being subjected to the same humiliating treatment. Journalist Jeffrey Goldberg recounts that during a trip through Baltimore-Washington International Airport, he spoke to TSA agents who repeatedly referred to the airport’s backscatter scanner as “The Dick-Measuring Device.”<sup>20</sup> Even one of the TSA’s own agents has felt this reality as a result of being scanned during a training exercise.<sup>21</sup>

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<sup>17</sup> Melissa Castellanos, *Donna D’Errico, Former “Baywatch” Babe, Still Fuming Over TSA Body Scan*, CBS NEWS, Dec. 8, 2010, [http://www.cbsnews.com/8301-31749\\_162-20025011-10391698.html](http://www.cbsnews.com/8301-31749_162-20025011-10391698.html).

<sup>18</sup> *Female Passengers Say They’re Targeted by TSA*, CBS NEWS – DALLAS-FORT WORTH LOCAL AFFILIATE, Feb. 3, 2012, <http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/>.

<sup>19</sup> *Id.*

<sup>20</sup> Jeffrey Goldberg, *For the First Time, the TSA Meets Resistance*, THE ATLANTIC, Oct. 29, 2010, <http://www.theatlantic.com/national/archive/2010/10/for-the-first-time-the-tsa-meets-resistance/65390/>.

<sup>21</sup> See Willard Shepard & Brian Hamacher, *Suspicious Package: TSA Worker Jailed After Junk Joke*, NBC NEWS – MIAMI (May 7, 2010, 10:02 AM), <http://www.nbcmiami.com/news/local/TSA-Fracas-After-Body-Scanner-Reveals-TMI-92971929.html>.

Beyond the inherently embarrassing bodily exposures made possible by nude body scans, many American passengers must confront a further, unique humiliation at airports because of these scans: the need to submit to a follow-up, full-body pat-down. This is because unlike metal detectors which actually detect metal on the body, nude body scans do not detect explosives, firearms, or dangerous materials: “All they are technologically capable of doing is calling attention to ‘anomalies’ on the person of the traveler.”<sup>22</sup> But such anomalies are natural and common for many law-abiding passengers.<sup>23</sup> Accordingly, “[m]any travelers suffer . . . indignities due to physical searches, triggered by AIT ‘anomaly’ detection, that reveal nothing about whether the ‘anomaly’ poses a threat.”<sup>24</sup>

### **(3) *Full-Body Pat-Downs***

As previously explained, American passengers may be subjected to a TSA full-body pat-down if: (1) they refuse to undergo a nude body scan; (2)

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<sup>22</sup> *TSA Oversight Part I – Whole Body Imaging: Hearing Before the Subcomm. on Nat’l Sec., Homeland Defense, & Foreign Operations of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 73–74 (2011) (statement of Fred H. Cate, Director, Center for Applied Cybersecurity Research, Indiana University) (emphasis added).

<sup>23</sup> *See id.* at 75.

<sup>24</sup> *Id.* at 76.



they undergo a nude body scan that reveals a physical anomaly; or (3) because of a random screening.<sup>25</sup> The TSA has never publicly defined what a full-body pat-down constitutes in terms of identifying what body parts may be touched, with what intensity, and for what duration.<sup>26</sup>

Instead, the TSA has downplayed the significance of such pat-downs, emphasizing that “only 3% of passengers” are subjected to them under the aforementioned circumstances.<sup>27</sup> But if the TSA screens about two million passengers a day<sup>28</sup>—making for a total of about 730 million passengers every year—then somewhere between 21 and 29 million passengers must undergo TSA full-body pat-downs every year. And even this number is imprecise given its failure to convey the discriminatory reality faced by those Americans for whom such pat-downs are an almost mandatory affair by virtue of prosthetics or medical devices that make it impossible to go through a body scanner without being flagged for a pat-down.<sup>29</sup>

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<sup>25</sup> See *supra* pp. 13-14.

<sup>26</sup> See CNN Wire Staff, *New Airport Security Procedures*, *supra* note 4.

<sup>27</sup> CNN Wire Staff, *TSA Stands by Officers After Pat-Down of Elderly Woman in Florida*, CNN (June 28, 2011, 12:07 PM), <http://www.cnn.com/2011/US/06/26/florida.tsa.incident/index.html>.

<sup>28</sup> See *Racial Profiling at US Airports?*, *supra* note 2.

<sup>29</sup> See *TSA Oversight Part I* (statement of Fred Cate), *supra* note 22, at 76.

What do these 21 to 29 million passengers experience during a TSA full-body pat-down? In broad, physical terms, passengers have reported that TSA agents “probed their entire body, including the posterior, crotch, and chest.”<sup>30</sup> But this description necessarily fails to capture the intense humiliation and degradation inflicted by this procedure.

In this regard, CNN employee Rosemary Fitzpatrick’s report of the full-body pat-down that she underwent at Orlando International Airport in 2010 provides greater insight.<sup>31</sup> Rosemary reports that after her “underwire bra set off a metal detector,” she was taken to a private area and then searched by “a female screener [who] ran her hands around her breasts, over her stomach, buttocks and her inner thighs, and briefly touched her crotch.”<sup>32</sup> Cf. *Blackburn*, 771 F. 2d at 560 (describing the strip-search that Ruth Blackburn endured as one that took place in private room where a female matron touched Ruth’s armpits, breasts, and posterior).

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<sup>30</sup> CNN Wire Staff, *New Airport Security Procedures*, *supra* note 4.

<sup>31</sup> Jim Barnett, *TSA to Phase in New Pat-Down Procedures at Airports Nationwide*, CNN, Oct. 28, 2010, [http://articles.cnn.com/2010-10-28/travel/airline.security.pat.down\\_1\\_pat-down-tsa-statement-random-screening](http://articles.cnn.com/2010-10-28/travel/airline.security.pat.down_1_pat-down-tsa-statement-random-screening).

<sup>32</sup> *Id.*

The pat-down profoundly affected Rosemary: “I felt helpless, I felt violated, and I felt humiliated.”<sup>33</sup> *Cf. id.* at 560 (“[Ruth] testified that she . . . felt nervous and humiliated during the [strip search].”). Reduced to tears “for most of the search process,” Rosemary later told the TSA that she had “never experienced a more traumatic and invasive travel event!”<sup>34</sup>

Rosemary’s experience is not isolated. To the contrary, following the TSA’s decision in late 2010 to screen passengers using full-body pat-downs, the American Civil Liberties Union reports having “received over 1,000 complaints from travelers in the United States about the TSA’s new pat-downs . . . . These complaints came from men, women and children who reported feeling humiliated and traumatized by these searches, and, in some cases, comparing their psychological impact to sexual assaults.”<sup>35</sup> The ACLU further reports several “recurring themes” among all of these passenger-reported experiences with TSA full-body pat-downs:<sup>36</sup>

- Reports of “intense feelings of violation and humiliation”;
- Reports of passengers “being physically hurt by the searches”;

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Passengers’ Stories of Recent Travel*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/passengers-stories-recent-travel> (last visited Oct. 28, 2012).

<sup>36</sup> *Id.*

- Reports of passengers “feel[ing] their searches [were] punitive”;
- Reports of “gawking by [TSA] agents”;
- Reports of “unnecessary repeated touching of intimate areas.”<sup>37</sup>

The TSA’s response to such reports has generally been that full-body pat-downs are tempered by three privacy-protecting limitations:

- that pat-downs “are conducted by same gender officers”;
- that passengers have the “right to request a private screening”;
- that passengers have the “right to have a traveling companion present” during a private screening.<sup>38</sup>

But as a practical and legal matter, these limits do not ameliorate the underlying problem. For example, with respect to the TSA’s “same gender officers”-limitation, Rosemary Fitzpatrick was humiliated by the pat-down that she underwent (*see supra* pp. 21-22) *regardless* of the fact that it was a female TSA agent who did the pat-down. *See also Safford*, 129 S. Ct. at 2638–41 (finding administrative strip search unconstitutional even though search was done by same gender officials); *Blackburn*, 771 F. 2d at 564 (same).

As for the TSA’s rights “to request a private screening” and “to have a traveling companion present,” neither of these limits matter to the extent

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<sup>37</sup> *Id.*

<sup>38</sup> Transportation Security Administration, *New TSA Pat-Down Procedures*, THE TSA BLOG (Nov. 11, 2010, 7:48 PM), <http://blog.tsa.gov/2010/11/new-tsa-pat-down-procedures.html>.

the TSA may deny them at any time. This is what cancer patient Michelle Dunaj experienced at Seattle-Tacoma International Airport this October. Forced to undergo a full-body pat-down because of her feeding tubes, “Dunaj says she asked for privacy and was turned down [by the TSA].”<sup>39</sup> These “rights” also do nothing to lessen the physical invasiveness of a pat-down, which for many passengers is the most degrading aspect of the procedure. These “rights” are also of no legal consequence, since their existence is merely the product of *voluntary* TSA policies that the TSA may change at any time.<sup>40</sup> Consider this in contrast to the Fifth Amendment “right to silence,” which upon invocation must be “scrupulously honored” by the government. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

**B. Women report being sexually harassed and violated when subjected to the TSA searches .**

As the reports of Donna D’Errico and Ellen Terrell show (*see supra* pp. 17-18), women now must face a greater threat of sexual harassment at airports because of nude body scans. And while the TSA apparently has no

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<sup>39</sup> Joel Moreno, *Dying Woman Humiliated by Revealing TSA Pat-Down*, KBOI2.COM (Oct. 9, 2012, 8:15 AM), <http://www.kboi2.com/news/local/173291181.html>.

<sup>40</sup> See ELIAS, *supra* note 3, at i (“Summary”).

statistics to offer on sexual harassment incidents related to body scans – or the number of TSA agents disciplined for harassment—a February 2012 CBS News investigation found a “pattern of women” complaining of such harassment among “more than 500 records of TSA complaints.”<sup>41</sup>

Worse yet, like Rosemary Fitzpatrick (*see supra* pp. 21-22), many women report not only being sexually harassed as a result of the TSA searches but also losing their sense of bodily integrity. The essence of this violation is regrettably captured in an April 2012 viral video of a woman subjected to a TSA pat-down at a Wisconsin airport: “During the pat-down, the woman can be heard sobbing and is visibly shaking while the TSA agent runs her hands down the woman’s legs.”<sup>42</sup> This violation may also be seen in a recent report by the *Chicago Sun Times* describing how “the extra scrutiny of black women’s hair has been going on for a while.”<sup>43</sup>

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<sup>41</sup> *Female Passengers Say They’re Targeted by TSA*, CBS NEWS – DALLAS-FORT WORTH AFFILIATE (Feb. 3, 2012, 8:12 AM), <http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/>.

<sup>42</sup> *Video Captures Woman Sobbing Uncontrollably During TSA Pat Down*, CBS NEWS-D.C. LOCAL (Apr. 16, 2012, 12:03 PM), <http://washington.cbslocal.com/2012/04/16/video-captures-woman-sobbing-uncontrollably-during-tsa-pat-down/>.

<sup>43</sup> Mary Mitchell, *When the TSA Wants to Check Your Afro for Security Reasons*, CHICAGO SUN-TIMES (Oct. 20, 2012, 1:45 AM), <http://www.sunti>

**C. Parents report seeing their children traumatized and confused when subjected to the TSA searches.**

Under current TSA policy, children of almost any age may be put through a nude body scan or a full-body pat-down.<sup>44</sup> Numerous reports consequently exist of parents watching the psychological harm done to their children as their children submit to these procedures.

For Selena and Todd Drexel, this meant watching Anna, their six-year-old daughter, undergo a severe pat-down at a New Orleans airport in April 2011.<sup>45</sup> Video of the event shows a “TSA agent rubbing [Anna’s] inner thighs and running her fingers inside the top of [Anna’s] blue jeans.”<sup>46</sup> *Cf. Safford*, 129 S. Ct. at 2638 (“Savana was told to pull her bra out . . . and to pull out the elastic on her underpants . . .”). Todd Drexel further reports that while Anna was initially “confused” by the pat-down, she later “broke

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[mes.com/news/mitchell/15852017-452/when-the-tsa-wants-to-check-you-r-afro-for-security-reasons.html](http://www.mes.com/news/mitchell/15852017-452/when-the-tsa-wants-to-check-you-r-afro-for-security-reasons.html).

<sup>44</sup> See *Traveling with Children*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/traveling-children> (last revised Oct. 11, 2012) (stating any passenger – including a child – who can stand in an AIT scanner for 5 seconds is subject to body scan, and any child who meets this standard but opts out of the scan will be given “a thorough pat-down”).

<sup>45</sup> Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, <http://abcnews.go.com/GMA/parents-year-girl-pat-airport-procedures-changed/story?id=13363740#.UH9TRWfj1Hs>.

<sup>46</sup> *Id.*

down into tears.”<sup>47</sup> *Cf. id.* at 2641 (“[A]dolescent vulnerability intensifies the patent intrusiveness of [a strip search]”).

Unfortunately, Anna’s experience is not an isolated one. To the contrary, in April 2012, Lori Croft watched her four-year-old granddaughter, Isabella “forced to undergo a pat-down . . . [at a Kansas airport] with security agents yelling and calling the crying girl an uncooperative suspect.”<sup>48</sup> That same month, Dr. Joseph Frank reported watching his disabled seven-year-old daughter, Dina, forced to undergo an aggressive pat-down at JFK International Airport by TSA agents—a pat-down unnecessarily spurred by Dina’s crutches and leg braces.<sup>49</sup>

Now, besides the psychological trauma described above, the TSA’s apparent ongoing willingness to subject children of any age to nude body scans and full-body pat-downs raises a host of disturbing secondary issues. First, “for adults who were assaulted as children, watching their children go through either invasive photographs or excessive pat-downs can be

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<sup>47</sup> *Id.*

<sup>48</sup> Roxana Hegeman, *TSA Defends Pat-Down of 4-Year-Old at Kan. Airport*, ASSOCIATED PRESS, Apr. 26, 2012.

<sup>49</sup> Noreen O’Donnell, *Exclusive: Does This Girl Look Like a Terrorist?*, THE DAILY, Apr. 25, 2012, <http://www.thedaily.com/page/2012/04/25/042512-news-tsa-complaint-1-3/>.



traumatic as well.”<sup>50</sup> Second, pat-downs of uncooperative children have led the TSA to try to refine this practice into “a game to play” with children<sup>51</sup> — a move that child abuse experts have rightly condemned as “mak[ing] it easier for sexual offenders to prey on . . . children.”<sup>52</sup>

**D. Seniors and disabled persons report their lives being degraded and threatened when subjected to the TSA searches.**

For seniors and the disabled, the realities of the TSA searches are just as harsh as they are for children. While the TSA has made some token efforts to meet these groups’ special needs,<sup>53</sup> it is still virtually impossible for many seniors and disabled persons to fly without going through a TSA full-body pat-down made necessary by a medical device or prosthetic.

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<sup>50</sup> Kate Dailey, *For Survivors of Sexual Assault, New TSA Screenings Represent a Threat*, THE DAILY BEAST (Nov. 17, 2010, 5:45 PM), <http://www.thedailybeast.com/newsweek/2010/11/17/tsa-screenings-worry-sexual-assault-survivors.html>.

<sup>51</sup> Daniel Tercer, *Exclusive: TSA Frisks Groom Children to Cooperate with Sex Predators, Abuse Expert Says*, THE RAW STORY (Dec. 1, 2010, 10:39 PM), <http://www.rawstory.com/rs/2010/12/01/airport-patdowns-grooming-children-sex-predators-abuse-expert/> (quoting TSA Regional Security Dir. James Marchant).

<sup>52</sup> *Id.* (quoting child sex abuse educator and activist Ken Wooden).

<sup>53</sup> See *Screening for Passengers 75 and Older*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/screening-passengers-75-and-older> (last updated Sept. 28, 2012) (explaining that seniors 75 and older, may keep their shoes and jacket on while at a security checkpoint).

Indeed, consider what seniors Lenore Zimmerman (age 85), Ruth Sherman (age 88), and Linda Kallish (age 66) each reported experiencing upon being screened by TSA agents at JFK Airport in November 2011.<sup>54</sup> Lenore actually requested a pat-down, fearing a body scan might interfere with her defibrillator.<sup>55</sup> Lenore was subsequently guided to a private room where TSA agents ordered her “to pull down her slacks and underwear.”<sup>56</sup> Ruth reports a similar experience: flagged for a full-body pat-down over her colostomy bag, Ruth was subsequently ordered by TSA agents to “drop her jogging pants.”<sup>57</sup> And Linda received the same order after her glucose monitor and insulin pump set off a metal detector.<sup>58</sup> The TSA ultimately admitted fault for these incidents—but only following inquiries from Sen. Chuck Schumer and N.Y. state senator Michael Gianaris.<sup>59</sup>

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<sup>54</sup> Richard Esposito & Alicia Tejada, *Now Three Grandmas Say They Were Strip-Searched at JFK*, ABC NEWS, Dec. 6, 2011, <http://abcnews.go.com/Travel/now-grandmas-strip-searched-jfk/story?id=15095796>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *TSA Admits Violations in Searches of Elderly Women*, WABC 7 EYEWITNESS NEWS, Jan. 18, 2012, [http://abclocal.go.com/wabc/story?section=news/local/new\\_york&id=8510128](http://abclocal.go.com/wabc/story?section=news/local/new_york&id=8510128).

In this regard, a recent *ABC News* headline captures the essence of these incidents for seniors and disabled persons when they fly: “Prosthetics Become Source of Shame at Airport Screenings.”<sup>60</sup> And for Tom Sawyer – a cancer survivor with a urostomy bag – this meant the following:

On Nov. 7, [2010] Sawyer was en route from Detroit Metropolitan Airport to a wedding in Orlando, Fla., when a TSA agent performed a pat-down that broke the seal on Sawyer's urine bag, allowing urine to run down his shirt, pants and leg.

Sawyer said he tried to warn the agent to be careful with the device, but his words were ignored. He was left with wet urine stains on his clothing. “I was so embarrassed and so petrified of going out into the airport and people would see me and ‘smell me.’” Sawyer said.<sup>61</sup>

While Sawyer ultimately received a personal apology from TSA Administrator John Pistole over the incident, less than nine months later,

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<sup>60</sup> Jane E. Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS, Nov. 24, 2010, <http://abcnews.go.com/Health/Depression/tsa-medical-humiliations-extra-pain-airports-people-prosthetic/story?id=12227882>.

<sup>61</sup> *Id.*

Sawyer suffered the same humiliation again when TSA agents *at the same airport* tore his urostomy bag during a full-body pat-down.<sup>62</sup>

And then there are the life-threatening risks made possible by full-body pat-downs. Consider the case of Melinda Deaton, who has a four-inch medical tube in her stomach.<sup>63</sup> Melinda was traveling through Dallas Love Field Airport in July 2012 with her husband, John, when the TSA put her through a full-body pat-down despite her “wearing a medical bracelet.”<sup>64</sup> During the pat-down, TSA agents stripped Melinda and then “physically handled” her medical tube, risking the tube’s sterility and thus Melinda’s life.<sup>65</sup> The TSA’s only response to this report was to declare that an internal investigation of the incident had revealed no wrongdoing.<sup>66</sup>

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<sup>62</sup> See *Man Says He’s Mishandled By Airport Screener Again*, CBS NEWS – DETROIT LOCAL AFFILIATE (July 23, 2011, 2:06 PM), <http://detroit.cbslocal.com/2011/07/23/man-says-hes-mishandled-by-airport-screener-again/>.

<sup>63</sup> Omar Villafranca, *TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC NEWS – DALLAS FORT-WORTH (July 19, 2012, 2:10 PM), <http://www.nbcdfw.com/news/local/TSA-Agents-Allegedly-Strip-Search-Woman-Fiddle-With-Feeding-Tube-162985046.html>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *id.*

- 3. This Court's review of the TSA searches should allow for full recognition of these searches' gross intrusiveness.**
- A. This Court should engage in original review of the TSA searches, which are categorically distinct from other airport searches.**

The passenger experiences related herein evince a critical reality: TSA body scans and pat-downs are “categorically distinct” searches from the less intrusive metal detector screenings affirmed by courts in other airport security cases. *Safford*, 129 S. Ct. at 2641; *cf. United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (affirming search via airport metal detectors); *United States v. Hartwell*, 436 F.3d 174, 180 (3d. Cir. 2006) (same).

Thus, in reviewing Appellants' Fourth Amendment claim, this Court should take care to distinguish TSA nude body scans and full-body pat-downs from simple metal detector searches. Of course, the metal detector cases do provide some valuable guidance on how Fourth Amendment review of airport searches should generally proceed. But the metal detector cases are no substitute for the kind of original, factual analysis that the Fourth Amendment requires of TSA body scans and pat-downs.

The need for this Court to perform such analysis is particularly heightened by the D.C. Circuit's recent decision in *EPIC v. Department of*

*Homeland Security*, 653 F.3d 1, 2, 10-11 (D.C. Cir. 2011). The *EPIC* court found the TSA searches constitutional without performing any factual analysis of these searches' intrusiveness. *See id.* Instead, the *EPIC* court found that any passenger privacy concerns related to TSA nude body scans were sufficiently mitigated by the fact that the TSA allows passengers to "opt-out of [this] screening in favor of a pat-down." *Id.* at 10.

But the *EPIC* court never proceeded to analyze the intrusiveness of these pat-downs or the Hobson's choice they create. In fact, all the *EPIC* court noted in this regard was that "some . . . have complained that the . . . patdown[s] [are] unnecessarily aggressive." *Id.* at 3. But this observation does not reflect a "careful perscrutation of the specific facts" related to TSA pat-downs—an inquiry whose importance cannot be understated given the passenger experiences related herein. *Spencer*, 659 F.3d at 146.

**B. This Court should not rely on the TSA's incomplete administrative record as a basis for gauging the intrusiveness of the TSA searches.**

The TSA may argue that the administrative record it has furnished in this case provides sufficient information for this Court to measure the intrusiveness of nude body scans and full-body pat-downs. Not so. Indeed,

this record is likely devoid of passenger experiences with these searches since the TSA never solicited or considered public comments on its new search procedures before implementing them. *See EPIC*, 653 F.3d at 5. The D.C. Circuit has since ordered the TSA to hold a public comment period, but the TSA has stated that it does not intend to comply with this order until February 2013. *See id.*; *EPIC*, No. 12-1307 (D.C. Cir. Sept. 25, 2012) (order accepting TSA’s promise to hold hearings by February 2013).

Because the TSA’s administrative record is incomplete, it deserves no deference. Moreover, in gauging the intrusiveness of the TSA searches, this Court must recognize that constitutional review is by definition broader—both factually and legally—than judicial review of an agency action. *Compare Town of Winthrop v. F.A.A.*, 535 F.3d 1, 14 (1st Cir. 2008) (“In considering whether an agency action was arbitrary and capricious, the focal point for judicial review should be the administrative record.”), *with Spencer*, 659 F.3d at 146 (“[D]etermining the constitutionality of a search . . . requires careful perscrutation of the specific facts [of the search].”).

**C. This Court should order fact-finding to determine the full intrusiveness of the TSA searches.**

Appellants' Fourth Amendment claim raises a host of unanswered factual questions about the TSA searches. The answers to these questions, in turn, may be pivotal to this Court's determination of how intrusive the TSA searches are—and, consequently, whether these searches meet the Fourth Amendment calibration principle for administrative searches that this Court applied in *Blackburn*. These unanswered questions stem from the reality that “an administrative search scheme has long term implications. Therefore, in determining whether the scheme is valid, the Court should consider the entire class of searches permissible under the scheme, rather than focusing on the facts of the case before it.” *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998). These unanswered questions include:

- How many reports of physical and emotional injuries has the TSA received from passengers regarding body scans and pat-downs?
- How many times have passengers invoked the discretionary rights afforded by the TSA (e.g., private screenings) and been denied?
- How many “false positives” from nude body scans have resulted in unnecessary or improper TSA full-body pat-downs?
- How effective have nude body scans and full-body pat-downs proven to be as compared to previous metal detector searches?



Accordingly, given the importance of these questions and the very limited factual record present in this case, this Court should remand to the District Court for an evidentiary hearing on the intrusiveness of these TSA searches. *See Redfern*, 2011 LEXIS 49321, at \*25-26. In the alternative, this Court should appoint a special master to enable this inquiry. *See id.* Such fact-finding would be consistent with other Fourth Amendment cases involving new search methods. *See, e.g., Kyllo*, 37 F.3d at 531.

Such fact-finding would also enable the Court to address the urgency of the privacy concerns represented by Appellants' Fourth Amendment claim. The TSA currently plans to have nearly 1,800 nude body scanners operating at airports by the end of 2014.<sup>67</sup> Yet, each new scanner that the TSA adds only threatens to increase the number of passengers subjected to the humiliating experiences described herein. Of course, the TSA may argue that there is no cause for concern here given the agency's promised public comment period in February 2013. But the TSA should not dictate the timetable for protection of Appellants' Fourth Amendment rights—or the concomitant rights of every American who travels by air.

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<sup>67</sup> *See ELIAS, supra* note 3, at 3.

## Conclusion

No one disputes the need for effective airport security. Nevertheless, “the Fourth Amendment issue [presented by Appellants is] a difficult one.” *United States v. De Los Santos Ferrer*, 999 F.2d. 7, 9 (1st Cir. 1993). This Court recognizes “indiscriminate extensions of warrantless search authority may eventually undermine the case for legitimate exceptions.” *Id.* Consistent with this concern and the experience of those traveling Americans stated herein, this Court should remand to the District Court for an evidentiary hearing on the intrusiveness of the TSA searches, thus enabling fair and efficient resolution of Appellants’ Fourth Amendment claim.

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Respectfully submitted,

Dated: October 30, 2012

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## Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with all of the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and the applicable typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6). This brief was prepared using a proportionally spaced font (Book Antiqua). Exclusive of portions exempted by Fed. R. App. P. 32(a)(7)(B)(III), this brief contains 6,955 words (including picture captions), according to the word-count function of the word processor (Microsoft Word 2010) used to prepare this brief.

Dated: October 30, 2012

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I hereby certify that on October 30, 2012, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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