

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.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Respondents.

Petition for Review of a Final Rule of the
Transportation Security Administration as Part of the
U.S. Department of Homeland Security

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

**Freedom to Travel USA, National Association of Airline Passengers,
Bill of Rights Defense Committee/Defending Dissent Foundation,
& Consumer Watchdog**

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Certificate as to Parties, Rulings, and Related Cases

In accordance with Fed. R. App. P. 26.1 and D.C. Circuit Rule 28(a), the undersigned counsel hereby certifies as follows:

A. Parties and Amici

Except for the following amici curiae, all parties, intervenors, and amici appearing in this court are listed in the Opening Brief of Petitioners (Competitive Enterprise Institute, et al.) in No. 16-1135 and in the Brief for Petitioner (Electronic Privacy Information Center) in No. 16-1139:

- Freedom to Travel USA: An unincorporated non-profit non-partisan grassroots civic association. It has no parent corporation or shareholders subject to disclosure. Freedom to Travel has never issued debt securities to the public.
- National Association of Airline Passengers : A non-profit membership association established in 2010. The Association has no parent, subsidiary, or affiliate. The Association has never issued debt securities to the public.
- Bill of Rights Defense Committee/Defending Dissent Foundation: A nationwide non-profit organization. The Committee is not a publicly traded company, has no parent corporation, nor does any publicly traded company own more than a 10% share in it. The Committee has never issued debt securities to the public.
- Consumer Watchdog: Consumer Watchdog is a 501(c)3 California corporation that has no parent company, and no publicly-held company has any ownership interest in it. Consumer Watchdog has never issued debt securities to the public.

B. Rulings Under Review

All rulings under review are listed in the Opening Brief of Petitioners in No. 16-1135 and in the Brief for Petitioner in No. 16-1139.

C. Related Cases

Except for the following, all related cases are listed in the Opening Brief of Petitioners in No. 16-1135 and in the Brief for Petitioner in No. 16-1139. Douglas Kidd, the executive director of the National Association of Airline Passengers, has a separate, *pro se* petition pending before this Court that seeks review of the same TSA final passenger-screening rule at issue in this matter. *See Kidd v. TSA*, No. 16-1337 (filed Sept. 26, 2016).

Respectfully submitted,

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Glossary of Abbreviations

AIT	Advanced Imaging Technology
APA	Administrative Procedure Act
ATR	Automated Target Recognition
CEI	Competitive Enterprise Institute
DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
NYPD	New York Police Department
FAA	Federal Aviation Administration
GAO	Government Accountability Office
TSA	Transportation Security Administration

Amici Identity, Interest, & Authority to File

1. Identity of the Amici

Freedom to Travel USA is an unincorporated, nonpartisan grassroots civic association concerned with the privacy and dignity of every American who travels by air. Freedom to Travel routinely participates as *amicus curiae* in cases that concern TSA screening procedures. In this capacity, Freedom to Travel was granted permission by the First Circuit to participate at oral argument in *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013).

The National Association of Airline Passengers is a non-profit membership association organized in 2010 to protect the rights of airline passengers, crew, and airport personnel. The Association was a member of the FAA's Portable Electronic Devices Aviation Rulemaking Committee and was a member of the Aviation Security Advisory Committee's Passenger Advocacy Subcommittee in 2013. On October 6, 2015, the Association sponsored a Symposium on Airport Security.

The Bill of Rights Defense Committee/Defending Dissent Foundation is a national civil liberties organization guided by the Bill of Rights. The Committee is dedicated to the principle that the Bill of Rights was adopted

to limit the power of the state and to preserve basic individual rights for every person under U.S. jurisdiction or control – even in times of war or other national crises, and regardless of who holds elected power.

Consumer Watchdog is a nonprofit, tax-exempt consumer education, litigation, and advocacy organization with over 350,000 supporters nationwide. Established in 1985, Consumer Watchdog advocates on behalf of consumers before regulatory agencies, the legislature, and the courts.

2. Interest of the Amici

The Amici are interested in this case because they believe that judicial review of the TSA's decision to use body scans and pat-downs to screen airline passengers should be based on a full record – one that establishes the actual, real-world intrusiveness of these procedures.

3. Authority of the Amici to File

The Amici file this brief with the parties' consent. The Amici also affirm under Fed. R. App. P. 29(c)(5) that no party, nor counsel for any party, in this case: (1) wrote this brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only the Amici, including their members and counsel, have contributed money to fund the preparation and submission of this brief.

Summary of the Argument

The TSA's integrated use of body scans and pat-downs for passenger screening gives thousands of TSA screeners nationwide the power to place their hands on the bodies of over 740 million airline passengers every year. Given the magnitude of this reality, this Court should engage in a careful review of the TSA's final rule cementing these procedures.

In particular, the Court should recognize how much the factual landscape has changed since this Court first considered these procedures in *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (2011). Since that time, countless Americans have come forward and reported serious injuries caused by body scans and pat-downs. At the same time, government audits have revealed the TSA's indifference to passenger complaints as well as an astonishing tolerance for widespread employee misconduct.

This reality should guide the Court's review of the TSA's final-passenger screening rule. While the TSA makes a variety of assertions in this rule about the intrusiveness of body scans and pat-downs, the Court should not accept those assertions on faith. The Court should instead ask a variety of hard questions about these procedures — questions laid bare by the actual experience of Americans with these procedures.

Argument

1. **Any review of the TSA's final passenger-screening rule should be informed by the actual realities of this rule.**

The petitioners in this case have asked this Court to review the validity of a final TSA rule entitled *Passenger Screening Using Advanced Imaging Technology*, 81 Fed. Reg. 11363 (Mar. 3, 2016). This rule codifies the TSA's decision over seven years ago to stop using walk-through metal detectors to screen airline passengers and begin using an integrated regime of full-body scans and enhanced pat-downs. *See* EPIC Br. 5-6.

During those seven years, the TSA has subjected hundreds of millions of Americans to body scans and pat-downs. Many of these Americans have subsequently reported being injured and humiliated by these procedures. At the same time, TSA whistleblowers and federal investigations have revealed a striking pattern of neglect, misconduct, and abuse in the TSA's administration of these procedures.

These realities must be accounted for in any review of the TSA's final passenger-screening rule. At the heart of this rule is the TSA's conclusion that body scans are the "least intrusive means currently available to detect both metallic and non-metallic threats concealed under a person's

clothing.” 81 Fed. Reg. at 11367. In considering whether that conclusion is “arbitrary, capricious, [or] an abuse of discretion,” 5 U.S.C. § 706(2), this Court’s analysis must be “searching and careful.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Such analysis is not possible, however, without first appreciating the gravity of the TSA’s final passenger-screening rule. This rule gives several thousand TSA screeners the power to search the bodies of over 740 million passengers annually.¹ This is no ordinary search either. “[A] careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons” by definition entails “a serious intrusion upon the sanctity of the person.” *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968); *see also Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891) (“To compel anyone ... to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity....”).

The TSA’s final passenger-screening rule thus bears no resemblance to the mine-run of agency rules that this Court reviews on a regular basis. *See, e.g., Nat’l Fed’n of the Bland v. U.S. Dep’t of Transp.*, 827 F.3d 51, 52 (2016)

¹ See Hugo Martin, *Unhappy, Underpaid TSA Screeners Don’t Stick Around Long*, STAR TRIB., Aug. 20, 2016, <http://strib.mn/2b8yUAB>.

(reviewing agency rule on the purchase of ticket kiosks by air carriers). Instead, this rule raises concerns that are more on par with the NYPD's stop-and-frisk policy. *See generally Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). Under this policy, the NYPD searched the bodies of some 4.4 million people over 8 years in the name of public safety. *See id.* at 556. A federal district court, in turn, analyzed the intrusiveness of this policy under the Fourth Amendment based on millions of police reports and a 9-week trial at which 12 New Yorkers testified about the experience of being stopped-and-frisked. *See id.* at 572-76, 625-56.

No comparable factual record exists in this case on the intrusiveness of TSA body scans and pat-downs. Yet, the TSA's final rule seeks to cement the TSA's authority to scan and pat-down 740 million passengers every year – or 168 times the total number of people frisked by the NYPD – based on TSA assertions of minimal intrusiveness. *See* 81 Fed. Reg. at 11367.

Those assertions thus deserve close scrutiny, especially given what the last 7 years have revealed about how intrusive TSA body scans and pat-downs can be. In short, the Court should find that the TSA's final rule cannot be justified by mere reference to *EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011). We all know more now than we did then.

2. Body scans do not detect weapons – only anomalies, turning pat-downs into a primary mode of screening.

In considering the TSA's assertions about the intrusiveness of body scans, it is important to understand how body scans really work and why, as a result, their intrusiveness cannot be evaluated apart from the TSA's use of pat-downs. The TSA's final passenger-screening rule explains that the TSA's use of body scans (i.e., Advanced Imaging Technology or AIT) presently consists of "a millimeter wave imaging technology" that works by "bounc[ing] electromagnetic waves off the body to detect anomalies." 81 Fed. Reg. at 11365. The important word here is *anomaly*.

This sets body scans apart from walk-through metal detectors, which actually detect metal. Body scans do not detect explosives, firearms, or dangerous materials.² "All they are technologically capable of doing is calling attention to 'anomalies' on the person of the traveler."³ And when it comes to the kind of "anomalies" that will cause a body scan to alarm, this includes multiple layers of clothing, excess body fat, and even sweat:

² *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 Cate, Director, Center for Applied Cybersecurity Research, Indiana Univ.).

³ *Id.*

The problem of false alarms comes down to fundamental physics. Millimeter waves penetrate clothing and reflect off objects. But because of their frequency, millimeter waves also reflect off water, which can cause the scanner to mistake sweat for a potentially dangerous object, said Doug McMakin, the lead researcher who developed the millimeter-wave scanner at the Pacific Northwest National Laboratory. (X-rays, which operate at a higher frequency, pass through water more easily.) In addition, millimeter waves penetrate clothing materials differently, and layers of clothing can create a barrier, triggering a false alarm.⁴

A 2014 GAO report on the effectiveness of TSA body scans confirms this reality insofar as this report observes that “the false alarm rate for passengers with a normal [body mass index] was less than the false alarm rates for overweight and obese passengers.”⁵ Doctors have further observed that “[a] traveler with a bulge in their body from a cyst or hernia might get flagged for an invasive airport security screening.”⁶

⁴ Michael Grabell & Christian Salewski, *Sweating Bullets: Body Scanners Can See Perspiration as a Potential Weapon*, PROPUBLICA, Dec. 19, 2011, <https://www.propublica.org/article/sweating-bullets-body-scanners-can-see-perspiration-as-a-potential-weapon>.

⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-357, ADVANCED IMAGING TECHNOLOGY: TSA NEEDS ADDITIONAL INFORMATION BEFORE PROCURING NEXT-GENERATION SYSTEMS 14 (2014).

⁶ Lisa Rapaport, *When an Airport Scanner Sees a Cyst as a Security Threat*, REUTERS, Sept. 8, 2016, <http://www.reuters.com/article/us-health-cyst-airport-security-idUSKCN11E2VF>.

The end result is that body scans carry a “sometimes greater than 50 percent” rate of false alarms.⁷ All these false alarms then lead to pat-downs, which means that for many Americans, pat-downs are in effect a primary form of screening (i.e., given a person’s body weight, natural sweat, etc.). See 81 Fed. Reg. at 11365. Indeed, “[m]any travelers suffer ... indignities due to physical searches, triggered by AIT ‘anomaly’ detection, that reveal nothing about whether the ‘anomaly’ poses a threat.”⁸

Despite being aware of this problem, however, the TSA “is not analyzing AIT-ATR systems’ false alarm rate in the field using data that could help it monitor the number of false alarms that occur on AIT-ATR systems.”⁹ Instead, the TSA only reviews false-alarm rates “in a laboratory setting,” 81 Fed. Reg. at 11378, thus evincing a total failure “to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This failure also is not excusable insofar as it has resulted in countless American passengers being forced to undergo needless and often injurious secondary pat-downs.

⁷ Jacopo Prisco & Nick Glass, *New Airport Scanner Could Make Going Through Security a Breeze*, CNN, Oct. 1, 2014, <http://www.cnn.com/2014/10/01/tech/innovation/mci-alfa3-scanner/>.

⁸ *TSA Oversight Part I*, supra note 2, at 76.

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 5, at 11.

3. The TSA's use of body scans and pat-downs to screen passengers has injured countless Americans.

The high rate of false alarms for TSA body scans helps to show why the TSA's final passenger-screening rule must be reviewed as an integrated whole. In short, this rule is not just about body scans. It is also about the pat-downs made necessary because of a false alarm or because a passenger cannot be scanned (e.g., due to age). Once these two searches are viewed together, it then becomes clear that the TSA's use of body scans has directly and indirectly caused injury to countless Americans.

This is not a matter of a few isolated complaints. Rather, the stories are as "numerous" as they are "shocking."¹⁰ U.S. Representative Francisco Canseco describes his experience with a TSA pat-down in blunt terms: "[The TSA screener] touched me in my private parts and it hurt."¹¹ U.S. Senator Claire McCaskill has described her experience undergoing TSA pat-downs in similar terms.¹² "Attention must be paid. In particular, the

¹⁰ Daniel Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 3 & nn.4-8 (2013) (collecting stories).

¹¹ Keith Laing, *GOP Lawmaker: TSA Agent 'Hurt My Privates' During Pat-Down*, THE HILL, Apr. 26, 2012, <http://thehill.com/policy/transportation/224045-gop-lawmaker-tsa-pat-down-hurt-my-privates->.

¹² Aaron Blake, *Sen. Claire McCaskill on TSA Pat-Down: 'OMG'*, WASH. POST, Mar. 11, 2013, <http://wapo.st/15Ic9M2>.

Court should take note of how body scans and pat-downs have led to widespread sexual harassment, traumatized children, the humiliation of seniors and disabled persons, and even physical endangerment.

A. Sexual harassment

Male, female, and transgender passengers have all reported sexual harassment resulting from TSA body scans and pat-downs. No incident better captures this reality than the April 2015 revelation that two TSA screeners had for several months used the scan/pat-down procedure to “fondle male passengers as they came through a security checkpoint at Denver International Airport.”¹³ Here is how they did it:

One of the screeners, a man, signaled to a female colleague when a man he found attractive was coming through the scanning machine. The woman then pressed a touchscreen button indicating that the man being screened was actually a woman.... The scanner then alerted screeners that it had found an oddity in the area of the genitals, triggering a physical pat down of the passenger’s groin....¹⁴

Following revelation of this abuse, former TSA screener Jason Harrington disclosed that such flagrant sexual harassment “came as no

¹³ Tom McGhee, *TSA Screeners Accused of Groping Men During Checks at Denver Airport*, DENVER POST, Apr. 14, 2015, <http://dpo.st/2996Ema>.

¹⁴ *Id.*

surprise” to him.¹⁵ While working at O’Hare Airport from 2007 to 2013, Harrington routinely witnessed his fellow TSA screeners use terms like “Code Red” and “Fanny Pack, Lane 2” to harass women they found attractive while administering body scans and pat-downs.¹⁶ This reality has not been lost on female passengers either. A CBS News review of “more than 500 records of TSA complaints” at Dallas-Fort Worth Airport found a “pattern of women” complaining of sexual harassment.¹⁷

Transgender passengers have likewise reported being harassed through body scans and pat-downs. Take Shadi Petosky, for example. In September 2015, she was traveling through Orlando International Airport when a body scan registered an anomaly based on her male genitalia.¹⁸ Despite Petosky’s repeated efforts to explain that she was transgender, TSA screeners held her for over 40 minutes, patted her down twice, and

¹⁵ Jason Harrington, *Former TSA Agent: Groping Scandal Is Business as Usual*, TIME, Apr. 15, 2015, <http://ti.me/1ywhFUx>.

¹⁶ Jason Harrington, *Dear America, I Saw You Naked*, POLITICO MAGAZINE, Jan. 30, 2014, <http://www.politico.com/magazine/story/2014/01/tsa-screener-confession-102912.html>.

¹⁷ *Female Passengers Say They’re Targeted by TSA*, CBS NEWS – DALLAS-FORT WORTH AFFILIATE, Feb. 3, 2012, <http://dfw.cbslocal.com/2012/02/03/female-passengers-say-theyre-targeted-by-tsa/>.

¹⁸ See James Queally, *Transgender Woman Says TSA Detained, Humiliated Her Over Body ‘Anomaly*, L.A. TIMES, Sept. 22, 2015, <http://fw.to/c8PnFeL>.

disassembled her luggage.¹⁹ Petosky's experience subsequently prompted 32 members of Congress to admonish the TSA in a letter expressing "strong concerns regarding the [TSA's] treatment of transgender individuals."²⁰ In doing so, the members noted that Petosky's case was merely "the latest of a string of reports from travelers across the country."²¹

The harm done by such harassment cannot be understated. An April 2012 viral video taken at a Wisconsin airport puts this vividly: "During the pat-down, [a] woman can be heard sobbing and is visibly shaking while the TSA agent runs her hands down the woman's legs."²² Then there is ex-TSA-screener Jason Harrington's poignant observation that many victims of TSA sexual harassment "will likely never even know they were assaulted, since so many passengers have their private parts fondled when passing through the [body] scanners, anyway. It's difficult to tell where airport security ends and sexual assault begins these days."²³

¹⁹ *See id.*

²⁰ Letter from Adam B. Schiff, et al., Member of Congress, to Peter Neffenger, Administrator, Transp. Sec. Admin., at 1 (Oct. 8, 2014), <http://bit.ly/2cMauO4>.

²¹ *Id.*

²² *Video Captures Woman Sobbing Uncontrollably During TSA Pat Down*, CBS NEWS (D.C.), Apr. 16, 2012, <http://cbsloc.al/2dwQVxr>.

²³ Harrington, *supra* note 15.

B. Traumatized children

The TSA has declared that if a child of any age “is able to remain standing in the required position for 5 seconds, he or she may be screened through the advanced imaging technology.”²⁴ The TSA’s use of body scans thus creates a situation in which pat-downs often become a primary form of screening for children unable to stand for a body scan.

For Selena and Todd Drexel, this meant watching Anna, their six-year-old daughter, undergo a TSA pat-down at a New Orleans airport.²⁵ 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.”²⁶ Anna’s father later reported that while Anna was initially “confused” by the pat-down, Anna eventually “broke down into tears.”²⁷ Cf. *Safford Unified Sch. Dist. No. 1. v. Redding*, 557 U.S. 364, 366 (2009) (describing a strip search similar to Anna’s experience and then observing how “adolescent vulnerability intensifies the patent intrusiveness” of a strip search).

²⁴ *Traveling with Children (Screening Technology)*, TRANSP. SEC. ADMIN., <http://bit.ly/1KvSSUq> (last visited Oct. 3, 2016).

²⁵ See Andrew Springer, *Parents of 6-Year-Old Girl Pat Down at Airport Want Procedures Changed*, ABC NEWS: GOOD MORNING AMERICA, Apr. 13, 2011, <http://abcn.ws/2cLjQ1n>.

²⁶ *Id.*

²⁷ *Id.*

Neither Anna nor her parents are alone in what they experienced. Lori Croft was forced to watch as TSA screeners patted-down her 4-year-old granddaughter, Isabella, while “yelling and calling the crying girl an uncooperative suspect.”²⁸ Anne Schulte was likewise forced to watch as TSA screeners patted down her 3-year-old wheelchair-bound daughter, Lucy, reducing Lucy to tears.²⁹ And Kevin Payne was forced to watch as TSA screeners patted-down his 10-year-old daughter, Vendela, for two full minutes, leaving Vendela with a “blank stare” on her face.³⁰

Besides the immediate trauma that the TSA’s use of body scans and pat-downs entails for children, there is also a disturbing secondary effect. To “make children more comfortable during the pat-down process,” the TSA has attempted to refine this practice into “a game to play”³¹ – a move that risks making children more vulnerable to abuse.³² Given this reality,

²⁸ Roxana Hegeman, *TSA Defends Pat-Down of 4-Year-Old at Kan. Airport*, ASSOCIATED PRESS, Apr. 26, 2012.

²⁹ See Gio Benitez, *TSA Apologizes for Traumatizing Disabled Toddler*, ABC NEWS, Feb. 21, 2013, <http://abcn.ws/2dJ9cZA>.

³⁰ Elizabeth Chuck, *Father Outraged by ‘Uncomfortable’ TSA Pat-Down on 10-Year-Old Daughter*, NBC, Jan. 6, 2016, <http://nbcnews.to/1Ju6h0M>.

³¹ Daniel Tercer, *Exclusive: TSA Frisks Groom Children to Cooperate with Sex Predators, Abuse Expert Says*, RAW STORY, Dec. 1, 2010, <http://bit.ly/2cMnjrz> (quoting TSA Regional Security Director James Marchand).

³² See *id.*

the events depicted in a 2014 viral video of TSA screeners patting-down a 2-year-old child take on a new, disturbing light: “While he wriggles about, a male TSA agent pats down the child, feeling his legs and torso, then applauds him. ‘You did a good job!’ the agent tells the boy.”³³

C. Humiliation of seniors and the disabled.

For seniors and the disabled, flying is no picnic. While the TSA has made some token gestures towards these groups,³⁴ the TSA’s use of body scans still means that many seniors and disabled persons must submit to a TSA pat-down. This is because their age, a medical device, or a prosthetic makes it impossible for them to undergo a body scan.

In this regard, consider what Lenore Zimmerman (age 85), Ruth Sherman (age 88), and Linda Kallish (age 66) each reported experiencing when screened by the TSA.³⁵ Lenore actually requested a pat-down, fearing that a body scan might interfere with her defibrillator.³⁶ Lenore was guided

³³ Ryan Grenoble, *Video of TSA Patting Down Boy, 2, and Sister 6, Sparks Outrage*, HUFFINGTON POST, Apr. 24, 2014, <http://huff.to/1jVEYuC>.

³⁴ See, e.g., *Screening for Passengers 75 and Older*, TRANSP. SEC. ADMIN., <http://bit.ly/1RvBBgI> (last visited Oct. 3, 2016) (explaining that seniors 75 and older, may keep their shoes and jacket on while being screened).

³⁵ See Richard Esposito, et al., *Now Three Grandmas Say They Were Strip-Searched at JFK*, ABC NEWS, Dec. 6, 2011, <http://abcn.ws/2dSDiJL>.

³⁶ *Id.*

to a private room where TSA screeners ordered her “to pull down her slacks and underwear.”³⁷ Ruth was flagged for a pat-down as a result of her colostomy bag and was told to “drop her jogging pants.”³⁸ Linda received the same order due to her glucose monitor.³⁹ The TSA admitted fault for these incidents – but only after U.S. Senator Chuck Schumer and New York state senator Michael Gianaris intervened.⁴⁰

Ultimately, the essence of these types of incidents for seniors and disabled persons is captured by an ABC News headline: “Prosthetics Become Source of Shame at Airport Screenings.”⁴¹ For Tom Sawyer, a cancer survivor with a urostomy bag, this meant the following:

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.⁴²

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See TSA Admits Violations in Searches of Elderly Women*, WABC 7 EYEWITNESS NEWS, Jan. 18, 2012, <http://abc7ny.com/archive/8510128/>.

⁴¹ Jane E. Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS, Nov. 24, 2010, <http://abcn.ws/2dJmIwE>.

⁴² *Id.*

Sawyer received a personal apology from then-TSA Administrator John Pistole.⁴³ Less than nine months later, however, Sawyer went through the same humiliation again as TSA screeners *at the same airport* tore his urostomy bag during the course of a pat-down.⁴⁴ Thankfully, these events were not life-threatening. But as the next section demonstrates, the capacity of body scans and pat-downs to put the lives of passengers in physical danger has manifested itself on more than one occasion.

D. Physical endangerment

The case of Melinda Deaton reflects how a pat-down can be a life-or-death matter.⁴⁵ Melinda was traveling through Dallas-Love Field airport when the TSA forced her to undergo an pat-down due to her feeding tube.⁴⁶ Despite Melinda's medical bracelet, TSA screeners removed her clothing and handled her feeding tube, risking its sterility and thus her life.⁴⁷ The TSA later declared that it had done nothing wrong.⁴⁸

⁴³ See *Man Says He's Mishandled By Airport Screener Again*, CBS NEWS (DETROIT), July 23, 2011, <http://cbsloc.al/2dxdddit>.

⁴⁴ See *id.*

⁴⁵ See *Omar Villafranca, TSA Agents Allegedly Strip-Search Woman, Fiddle with Feeding Tube*, NBC (DALLAS), July 19, 2012, <http://bit.ly/2dk1VjL>.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

Now consider Savannah Barry – a diabetic teenager whose life is tied to a \$10,000 insulin pump.⁴⁹ On her way home to Denver, Savannah approached a TSA screener “with a letter from her physician in hand.”⁵⁰ Despite the letter and Savannah’s efforts to point out her insulin pump, however, the screener directed Savannah to submit to a body scan.⁵¹ After the scan, Savannah “felt something was wrong” and called home.⁵² Savannah soon learned that her insulin pump was likely broken and that she would need insulin shots the minute her plane landed.⁵³ Research in the journal of *Diabetes Technology & Therapeutics* confirms in turn that “[t]he full-body scanners now in use at many U.S. airports can damage insulin pumps and continuous glucose monitoring (CGM) devices.”⁵⁴

And then there is Hannah Cohen. Flying home from St Jude’s Hospital after receiving final treatment for a brain tumor,⁵⁵ Hannah was

⁴⁹ See *Teen Blames TSA for Broken Insulin Pump*, ABC NEWS (DENVER), May 8, 2012, <http://bit.ly/2cWQbQY>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ David Gutierrez, *Beware, Diabetics: Airport Scanners Damage Insulin Pumps*, NATURAL NEWS, Nov. 21, 2012, <http://bit.ly/2dosKqg>.

⁵⁵ Matt Teague, *Disabled Cancer Patient Slammed to the Ground by TSA Guards, Lawsuit Claims*, GUARDIAN, July 2, 2016, <http://bit.ly/29mxcQD>.

“blind in one eye, deaf in one ear and partially paralyzed.”⁵⁶ A myriad of surgeries since Hannah’s youth had also served to render Hannah “easily confused and frightened in unfamiliar situations” – a state of mind that took hold when a body scanner false-alarmed on her sequined shirt.⁵⁷ Hannah’s mother pleaded with TSA screeners to exercise restraint, but to no avail: guards slammed Hannah “to the ground ... smashing her face into the floor,” leaving Hannah bloodied and bruised.⁵⁸

Taken together, these cases show that the intrusiveness of body scans and pat-downs is not easily generalized. Savannah Barry makes this clear in observing that her “life is pretty much in the[] [TSA’s] hands when [she] walk[s] through a body scan.”⁵⁹ This reality deserves to be factored into any review of the TSA’s conclusions about intrusiveness. So, too, does the impact of TSA’s own internal practices and culture.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* The extent of Hannah Cohen’s injuries drew nationwide attention. *See, e.g., Disabled Teen Sues TSA, Memphis Airport After Bloody Scuffle*, CBS NEWS, July 4, 2016, <http://cbsn.ws/29eRF5k>; Nina Golgowski, *Video Shows Airport Security Tackling Cancer Patient With Disability*, HUFFINGTON POST, July 11, 2016, <http://huff.to/2aNoc1R>; Travis Gettys, *Disabled Woman Beaten Bloody by TSA Agents After Becoming Confused and Afraid at Security Checkpoint*, RAW STORY, July 1, 2016, <http://bit.ly/29c8KxD>.

⁵⁹ *Teen Blames TSA for Broken Insulin Pump*, *supra* note 49.

4. TSA practices and culture have increased the likelihood of Americans being injured by body scans and pat-downs.

A. TSA privacy measures are discretionary.

In the wake of all the injuries that body scans and pat-downs have caused, the TSA's chief response has been to emphasize its adoption of "privacy measures" to protect passengers' dignity. For example, the TSA's final passenger-screening rule highlights that the TSA "offers passengers who must undergo a pat-down the opportunity to have the pat-down conducted in a private screening location that is not visible to the traveling public."⁶⁰ 81 Fed. Reg. at 11378. Such assertions, however, obscure a critical reality: while the TSA "voluntarily applies a number of privacy measures ... U.S. law does not specifically require these actions."⁶¹

In practical terms, this means that TSA screeners are free to deny these privacy measures at any time for any reason without suffering any

⁶⁰ The use of private rooms may actually make pat-downs more intrusive by making it easier for abusive pat-downs to occur. Jamelyn Steenhoek's experience with a TSA pat-down in a private room speaks to this reality. See *TSA Pat-Down at DIA Leads to Sex Assault Investigation*, CBS NEWS (DENVER), Jan. 15, 2014, <http://cbsloc.al/1gNugFl>; see also *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006) (Alito, J.) (observing with respect to metal-detector screenings at airports that "the possibility for abuse is minimized by the public nature of the search").

⁶¹ BART ELIAS, CONG. RESEARCH SERV., R42750, AIRPORT BODY SCANNERS: THE ROLE OF ADVANCED IMAGING TECHNOLOGY at i (2012) ("Summary").

legal consequences. Dying cancer patient Michelle Dunaj experienced this reality first-hand when she “asked for privacy and was turned down” after her feeding tubes triggered a pat-down.⁶² Cindy Gates experienced the same phenomenon when her prosthetic breast triggered a pat-down: ““The [TSA] agent wanted to do a pat down but I asked for a private screening and she said ‘no.’ She then started feeling my breast.””⁶³

The best evidence of the TSA’s absolute discretion over its privacy measures, however, may be seen in its recent decision to withdraw the core privacy measure on which this Court’s decision in *EPIC* centrally relied: that “any passenger may opt-out of AIT screening in favor of a patdown.” 653 F.3d at 10. On December 18, 2015, the U.S. Department of Homeland Security (DHS) issued a Privacy Impact Assessment Update “to reflect a change to the operating protocol regarding the ability of individuals to opt out of AIT screening in favor of physical screening.”⁶⁴ The DHS declared

⁶² Joel Moreno, *Dying Woman Humiliated by Revealing TSA Pat-Down*, KOMO NEWS, Oct. 9, 2012, <http://bit.ly/2dE6NLM>.

⁶³ Angie Holdsworth, *Phoenix Woman Says She Was ‘Humiliated’ by TSA at Sky Harbor Airport*, ABC NEWS (ARIZ.), May 24, 2012, reproduced at <http://bit.ly/2d8JKrV>.

⁶⁴ DEP’T OF HOMELAND SECURITY, DHS/TSA/PIA-032(d), PRIVACY IMPACT ASSESSMENT UPDATE FOR TSA ADVANCED IMAGING TECHNOLOGY 1 (Dec. 18, 2015), <http://bit.ly/2dll44R>.

that the TSA would “direct mandatory AIT screening for some passengers” even if these passengers chose to opt out of such screening.⁶⁵

B. Passenger complaints are not collected.

In 2012, the GAO reviewed the TSA’s procedures on passenger complaints.⁶⁶ What the GAO found was that: (1) the TSA lacks any “policy to guide airports’ efforts to receive air passenger complaints”; (2) the TSA does not require its personnel to “collect ... the screening complaints that air passengers submit in person”; and (3) the TSA does not even ensure that comment cards are accessible to passengers in all airports.⁶⁷

The on-site observations behind these findings are telling. For example, the GAO found at two airports that “neither customer comment cards nor information about the cards was on display.”⁶⁸ Instead, TSA personnel provided comment cards “only to [those] air passengers who specifically ask[ed] for the cards ... or who request[ed] to speak with a screening supervisor or manager.”⁶⁹ The GAO then aptly recognized that

⁶⁵ *Id.*

⁶⁶ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-43, AIR PASSENGER SCREENING: TSA COULD IMPROVE COMPLAINT PROCESSES (2012).

⁶⁷ *Id.* at 23–24.

⁶⁸ *Id.* at 23.

⁶⁹ *Id.* at 29.

passengers worried “about being late for their flight or about appearing uncooperative may be reluctant to ask for [comment] cards.”⁷⁰

As troubling as the GAO’s observations about the TSA’s lackadaisical approach toward passenger complaints are, even more troubling are the GAO’s observations about the TSA’s disregard for the complaints that it does receive. As the GAO notes, the “TSA does not have a process to use all the information it currently collects ... to inform the public of the nature and extent of air passenger screening complaints.”⁷¹ The TSA also takes no steps to “monitor air passenger satisfaction with screening operations” or “identify patterns and trends in screening complaints to help improve screening operations and customer service.”⁷² It is only when a passenger complaint has “the potential to attract the attention of the media” that the TSA takes steps to learn more about the complaint.⁷³

C. TSA employee misconduct is widespread.

Unfortunately, the TSA’s indifference towards passenger complaints appears to be part-and-parcel of a larger indifference towards employee

⁷⁰ *Id.* at 24.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 24 n.36.

misconduct. A July 2016 report by the Homeland Security Committee of the U.S. House of Representatives makes this reality clear:

The [Homeland Security] Committee is alarmed by the longstanding dysfunction at TSA and the serious examples of misconduct that appear to exist at all levels of the organization. During the course of this investigation, it became clear to the Committee that TSA has not taken all the necessary steps to ensure that employees follow policies and that misconduct is properly addressed.⁷⁴

The most damning observations contained in the Homeland Security Committee's report include the points that: (1) the total "number of misconduct allegations filed against TSA employees increased by 28.5% from fiscal year 2013 to 2015"; (2) "TSA employees have been criminally charged for using cocaine on the job, facilitating large scale drug and human smuggling [operations], and engaging in child pornography activities"; and (3) the "TSA does not have mechanisms in place to ensure that employees follow headquarters policies and guidance."⁷⁵

These observations do not inspire confidence in the TSA's decision to afford its employees a vast amount of virtually unchecked power to handle

⁷⁴ REP. SCOTT PERRY & REP. JOHN KALKO, HOMELAND SEC. COMM., U.S. HOUSE OF REPRESENTATIVES, MISCONDUCT AT TSA THREATENS THE SECURITY OF THE FLYING PUBLIC 20 (2016), <http://bit.ly/29RVePM>.

⁷⁵ *Id.* at 8, 17.

the bodies of hundreds of millions of passengers through body scans and pat-downs. These observations also belie any assumption that the litany of screening abuses detailed in this brief are unlikely to recur. *See supra* Part 3. On this score, it is worth considering that the only penalty that the TSA imposed on the two screeners at Denver International Airport who groped numerous unsuspecting male passengers was job termination.⁷⁶ There is no indication that the TSA ever urged the Department of Justice to prosecute the screeners' abuses under federal law, and no criminal charges were ever filed against these screeners by state prosecutors.⁷⁷

5. The realities of body scans and pat-downs call for judicial review of the TSA's final passenger-screening rule based on a more thorough administrative record.

In its final rule on the use of body scans and pat-downs to screen over 740 million passengers every year, the TSA does not sufficiently address many of the actual realities of these procedures, as revealed by the preceding analysis. *See* 81 Fed. Reg. at 11364–405. To be sure, the TSA offers many conciliatory general comments meant to placate the public, like stating that “it trains its officers to be courteous and to treat passengers

⁷⁶ *See* Alex Johnson, *No Charges for Denver TSA Screeners Accused of Groping Attractive Men*, NBC, July 7, 2015, <http://nbcnews.to/1NQ0hNN>.

⁷⁷ *See id.*

with dignity and respect” and that passengers are encouraged to file complaints when they are mistreated. *Id.* at 11387.

But the TSA’s passenger-screening rule does not provide any hard information on the extent to which body scans produce false alarms, leading to needless pat-downs. Nor does the TSA provide any statistical account of the last seven years in terms how many passengers have reported being injured as a result of the scan/pat-down procedure or how many passengers found the TSA’s privacy measures effective in mitigating these injuries. And while the TSA emphasizes that travelers should report screening abuses to the TSA immediately, *see* 81 Fed. Reg. at 11387, the TSA provides no description of what procedures it has implemented to ensure that such complaints are actually heard – a glaring deficiency given the GAO’s past determination that no such procedures exist.⁷⁸

Taken together, these kinds of omissions underscore how much more the TSA needs to say in order to justify a rule giving its employees extraordinary (and virtually unchecked) power over the bodies of over 740 million people every year – people whose sensitivities vary greatly based on gender, age, and disability. In conducting a “searching and careful”

⁷⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 66, at 24.

review of the TSA's rulemaking, this Court now bears the responsibility of asking the hard questions that are capable of eliciting this key information.

Overton Park, 401 U.S. at 416. Such hard questions include:

- How many body scans have resulted in false alarms? How many of these false alarms have led to needless or improper pat-downs?
- How many reports of physical and emotional injuries has the TSA received from passengers regarding body scans and pat-downs over the last seven years since implementing these procedures?
- How many instances of abuse has the TSA identified, investigated, settled, and/or apologized for with respect to the administration of body scans and pat-downs?
- How many TSA screeners have been disciplined for misconduct related to the administration of body scans or pat-downs?
- How many times has the TSA denied or refused to afford the discretionary privacy measures that it claims to offer passengers (e.g., screening in a private area)?

There is no indication that answers to the above questions are to be found in the administrative record before the Court. This is in no small part due to the fact that the TSA has not made any real effort to gather the kind of information necessary to answer these questions. Indeed, the TSA has failed to conduct in-the-field tests of false-alarm rates (*see supra* Part 2) and failed to adopt policies that capitalize on passenger feedback (*see supra* Part 4.B). The questions outlined above nevertheless still need an answer — at

least so long as TSA's assertions about the intrusiveness of body scans and pat-downs are to be subjected to meaningful judicial review.

Such review, in turn, is essential because the TSA's final passenger-screening rule trenches upon one of the most sacred rights protected by the Constitution: the right to be free of unreasonable searches of one's body. *See Terry*, 392 U.S. at 16–17. This rule authorizes a “serious intrusion upon the sanctity of the person” – or rather some 740 million people annually. *See id.* It is therefore “improper to rely heavily on the ... conclusions of an interested agency in a case ... involving delicate and complex matters of an individual's constitutional right against the government.” *Porter v. Califano*, 592 F.2d 770, 772 (5th Cir. 1979) (relying on *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969)). Simply put, taking the TSA's assertions on faith means placing key rights “at the mercy of administrative officials.” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936).

Finally, it must be observed that this Court's review of the TSA's final passenger-screening rule will undoubtedly influence whether body scans and pat-downs appear in many other places in our society. As the *Conde Nast Traveler* reports, “a new bill making its way through Congress seeks to expand TSA's reach onto buses, trains, and ferries, known collectively as

surface transportation.”⁷⁹ It is thus vital that *all* the facts that have come to light about the actual intrusiveness of body scans and pat-downs be considered, including those facts that the TSA does not care to study. Put differently, “the life of the law is experience,” and that should include the actual experiences of countless Americans injured by TSA body scans and pat-downs. *Eskin v. Bartee*, 262 S.W.3d 727, 734 (Tenn. 2008).

Conclusion

TSA body scans and pat-downs affect over 740 million people every year and entail unique intrusions for women, children, seniors, and the disabled. The TSA’s final passenger-screening rule seeks to legitimize this reality based on assertions about these procedures’ intrusiveness that raise more questions than the TSA’s final rule answers. This Court should not hesitate to ask those questions – and demand clear answers.

Respectfully submitted,

Dated: October 3, 2016

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⁷⁹ Sebastian Modak, *TSA May Start Securing Trains, Buses, and Ferries*, CONDE NAST TRAVELER, Sept. 29, 2016, <http://bit.ly/2dTy2Wg>.

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The undersigned certifies under Federal Rule Appellate Procedure 32(a)(7)(C) that this *amici curiae* brief complies with all the applicable type-volume limitations, and typeface and type-style requirements set forth under Rule 32(a). This brief was prepared using a proportionally spaced font (Book Antiqua). Exclusive of portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(III), this brief contains 6,332 words, according to the word-count function of the word processor (Microsoft Word 2010) that was used to prepare this brief.

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Certificate of Service

The undersigned certifies that on October 3, 2016, he caused the foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF System. The System will send notice to counsel for all parties. The undersigned also certifies that counsel for all parties are registered ECF Filers, and thus will be served by the System.

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