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Elizabeth Windham

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**THE TSA OPTING-OUT OF OPT-OUTS: THE NEW TSA FULL-BODY SCANNER GUIDELINES AND TRAVELERS' RIGHT TO PRIVACY**

*Elizabeth Windham\**

**I. INTRODUCTION**

Imagine—your taxi arrives at the airport terminal, you quickly check your bags, and then join hundreds of other passengers in line for security screening. The line seems to be moving even more slowly than usual, and you glare ahead when you notice the hold up—Transportation Security Administration (“TSA”) officials removing snakes and tortoises from a passenger’s pants. This bizarre scenario made headlines in 2011 after a traveler attempted to sneak seven exotic reptiles onto his plane<sup>1</sup> and full-body scanners discovered the snakes at the TSA checkpoint.<sup>2</sup> Full-body scanners not only uncover snakes, skulls,<sup>3</sup> and chastity belts,<sup>4</sup> but

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\* J.D. Candidate, University of North Carolina School of Law, 2017. The author would like to thank the NC Jolt staff and editors for their thoughtful feedback and encouragement, particularly James Potts, Charlotte Davis, Cameron Neal, and Chelsea Weiermiller.

<sup>1</sup> See Todd Wright, *Man Tries to Sneak Snakes on a Plane: TSA*, NBC MIAMI (Aug. 29, 2011), <http://www.nbcmiami.com/news/weird/Man-Tries-to-Sneak-Snakes-on-a-Plane-128615648.html>; Casey Glynn, *TSA: Man Arrested in Miami Trying to Smuggle Snakes, Turtles in His Pants*, CBS NEWS (Aug. 30, 2011, 2:17 PM), <http://www.cbsnews.com/news/tsa-man-arrested-in-miami-trying-to-smuggle-snakes-turtles-in-his-pants/>.

<sup>2</sup> Caitlin Morton, *The Strangest Things People Have Brought Through Airport Security*, CONDE NAST TRAVELER (Mar. 10, 2015), <http://www.cntraveler.com/stories/2015-03-10/strangest-things-people-have-brought-through-airport-security-tsa-blog>.

<sup>3</sup> See *id.* (“While TSA agents were checking baggage at Fort Lauderdale in 2013, they came across clay pots containing fragments of an actual human skull . . . [t]he security lines were slowed down tremendously as the area had to be treated as a crime scene.”)

<sup>4</sup> See *id.* (“In 2012, a body scanner detected a metal chastity belt on a passenger, who was eventually allowed to pass through and board the plane.”)

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also firearms and other dangerous items.<sup>5</sup> In 2014, more than two thousand firearms were successfully discovered at TSA checkpoints.<sup>6</sup> However, in 2015 a leaked TSA report suggested that, “TSA screeners missed 95 percent of mock explosives and banned weapons smuggled through checkpoints by screeners testing the systems.”<sup>7</sup> While TSA critics repeated their calls to reform or disband the agency,<sup>8</sup> the TSA responded with a different solution. Six months after this information came to light, the TSA reformed regulations surrounding full body scanners. Full-body scanners, or Advanced Imaging Technology (“AIT”), are already used in most United States airports. On December 18, 2015, the United States Department of Homeland Security issued a Privacy Impact Assessment Update for TSA AIT.<sup>9</sup> Under the new regulations, TSA officers may require AIT screening for some passengers in order to maintain transportation security.<sup>10</sup>

The decision to make AIT screening mandatory for some travelers not only breaks a promise the TSA made when introducing the full-body scanners in 2007,<sup>11</sup> but it also contradicts its own argument in a 2011 D.C. Circuit case discussing AIT.<sup>12</sup> In

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<sup>5</sup> Bob Burns, *TSA 2014 Year in Review*, THE TSA BLOG (Jan. 23, 2015, 7:42 AM), <http://blog.tsa.gov/2015/01/tsa-2014-year-in-review.html>.

<sup>6</sup> *See id.*

<sup>7</sup> Christopher Elliott, *The TSA Has Never Kept You Safe: Here's Why*, FORTUNE (June 2, 2015, 12:30 PM), <http://fortune.com/2015/06/02/the-tea-airport-security-problems/>.

<sup>8</sup> *See id.*

<sup>9</sup> DEP'T OF HOMELAND SEC., DHS/TSA/PIA-032(d), PRIVACY IMPACT ASSESSMENT UPDATE FOR ADVANCED IMAGING TECHNOLOGY (2015).

<sup>10</sup> *See id.* TSA spokesman, Bruce Anderson, stated, “[m]ost people will be able to opt-out. Some passengers will be required to undergo advanced-imaging screening if their boarding pass indicates that they have been selected for enhanced screening, in accordance with TSA regulations, prior to their arrival at the security checkpoint. This will occur in a very limited number of circumstances.” Christopher Elliott, *What Does the TSA's New Scanner Rules Mean for Your Next Flight?*, HUFFPOST TRAVEL (Jan. 4, 2016), [http://www.huffingtonpost.com/christopher-elliott/what-do-the-tsas-new-scan\\_b\\_8907774.html](http://www.huffingtonpost.com/christopher-elliott/what-do-the-tsas-new-scan_b_8907774.html).

<sup>11</sup> Elliott, *supra* note 7.

<sup>12</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 1 (D.C. Cir. 2011).

*Electronic Privacy Information Center v. Department of Homeland Security*,<sup>13</sup> the TSA had premised the use of AIT on passengers' ability to opt-out and receive a pat-down instead.<sup>14</sup> As a result, the TSA's most recent rule mandating AIT for some passengers unduly departs from the *EPIC v. DHS* opinion, offending travelers' right to privacy and constitutional Fourth Amendment rights.

This Recent Development argues that the TSA's decision to make AIT mandatory for some passengers breaks a promise the TSA made when introducing AIT, but that national security interests still outweigh passengers' privacy interests. Part II provides a background of the TSA and AIT. Part III introduces *EPIC v. DHS* and the D.C. Circuit's opinion. Part IV analyzes the D.C. Circuit's ruling in light of the TSA's newest procedure, mandatory AIT screening. Part V provides recommendations for judicial and congressional review of the TSA, as well as recommendations for concerned citizens and passengers forced to undergo AIT screening. Part VI concludes.

## II. THE TRANSPORTATION SECURITY ADMINISTRATION AND ADVANCED IMAGING TECHNOLOGY SCREENING

As an agency in the Department of Homeland Security ("DHS"), the TSA is responsible for keeping the United States' transportation systems secure. Background of the TSA's history, goals, and mission offers insight into the different security measures the TSA employs. Review of AIT and TSA's Privacy Impact Assessment's ("PIA") reveals a pattern of changes in TSA procedure.

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

<sup>14</sup> Bob Burns, *Opting Out of AIT (Body Scanners)*, THE TSA BLOG (Nov. 19, 2012, 1:43 PM), <http://blog.tsa.gov/2012/11/opting-out-of-ait-body-scanners.html> ("If you choose to opt out, simply let the officer know you would like to opt out of the full-body scanner, and you will receive a pat-down instead."). Other TSA publications explained, "[i]f you cannot or choose not to be screened by advanced imaging technology or walk-through a metal detector, you will undergo a pat-down procedure instead." *Security Screening*, TRANSP. SECURITY ADMIN., <https://www.tsa.gov/travel/security-screening> (last visited Feb. 18, 2016).

A. *The Transportation Security Administration*

DHS aims to reduce the United States' vulnerability to terrorism.<sup>15</sup> In 2002, the Homeland Security Act established DHS to organize national security efforts.<sup>16</sup> Together, twenty-two different federal departments are unified within DHS to prevent terrorist attacks within the United States.<sup>17</sup>

The TSA, which joined DHS in 2004,<sup>18</sup> is responsible for keeping transportation systems secure across the United States.<sup>19</sup> The TSA aims to secure transportation systems while maintaining freedom of movement for people and commerce.<sup>20</sup> In 2014, the TSA was responsible for screening more than 653 million passengers<sup>21</sup> utilizing the United States' mass transit systems, freight and passenger rail, highways, pipelines and ports, and commercial and general aviation.<sup>22</sup> Most notably, the TSA is responsible for the security of airports throughout the United States, screening both airline passengers and their baggage.<sup>23</sup>

Enacted after the September 11, 2001, attacks, the Aviation and Transportation Security Act ("ATSA") directs the TSA to conduct "research, development, testing and evaluation of threats carried on

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<sup>15</sup> Homeland Security Act of 2002, 6 U.S.C § 101 (2012).

<sup>16</sup> *Creation of the Department of Homeland Security*, DEP'T OF HOMELAND SECURITY (Sept. 24, 2015), <http://www.dhs.gov/creation-department-homeland-security>.

<sup>17</sup> *History*, DEP'T OF HOMELAND SECURITY (Nov. 2, 2015), <http://www.dhs.gov/history>.

<sup>18</sup> *TSA at a Glance*, TRANSP. SECURITY ADMIN. [https://www.tsa.gov/sites/default/files/resources/tsaatglance\\_factsheet.pdf](https://www.tsa.gov/sites/default/files/resources/tsaatglance_factsheet.pdf) (last visited Feb. 17, 2016).

<sup>19</sup> *Transportation Security*, DEP'T OF HOMELAND SECURITY (Dec. 2, 2015), <http://www.dhs.gov/topic/transportation-security>. "TSA employs a risk-based strategy to secure U.S. transportation systems, working closely with transportation sector stakeholders, as well as the partners in the law enforcement and intelligence community." *Id.*

<sup>20</sup> *Transportation Security Overview*, DEP'T OF HOMELAND SECURITY (Sept. 10, 2015), <http://www.dhs.gov/transportation-security-overview>.

<sup>21</sup> Burns, *supra* note 5. "TSA screens approximately 1.1 million checked bags for explosives and other dangerous items daily." *Security Screening*, *supra* note 14.

<sup>22</sup> *TSA at a Glance*, *supra* note 18.

<sup>23</sup> *Transportation Security Overview*, *supra* note 20.

persons boarding aircraft or entering secure areas, including detection of weapons, explosives, and components of weapons of mass destruction.”<sup>24</sup> In 2004, Congress further directed the TSA to develop, test, and deploy technology for airport security checkpoints that detect all forms of weapons and explosives.<sup>25</sup>

Currently, to screen each passenger, TSA officers use “risk-based security measures to identify, mitigate, and resolve potential threats at the airport security checkpoint.”<sup>26</sup> These measures include: checked bag screening, pat-down screening,<sup>27</sup> and screening technology.<sup>28</sup> TSA screening technology incorporates metal detectors and AIT.<sup>29</sup>

### B. *History of Advanced Imaging Technology*

AIT uses millimeter-wave technology,<sup>30</sup> in which non-ionizing radio frequency energy in the millimeter wave spectrum generates an “image based on the energy reflected from the body.”<sup>31</sup> In other words, non-ionizing radiation bombards the body and waves bounce off of objects on the body.<sup>32</sup> Next, AIT records the waves that bounce off of objects and creates a three-dimensional image of the body and any objects on the body.<sup>33</sup> The three-dimensional image of the body is then displayed on a remote monitor for analysis.<sup>34</sup>

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<sup>24</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032, PRIVACY IMPACT ASSESSMENT UPDATE FOR ADVANCED IMAGING TECHNOLOGY (2008).

<sup>25</sup> Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011).

<sup>26</sup> *Security Screening*, *supra* note 14.

<sup>27</sup> *Id.* (“You may . . . undergo a pat-down procedure if you alarm the screening equipment and/or at random.”)

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032, *supra* note 24.

<sup>31</sup> *Id.*

<sup>32</sup> Jessica Hoff, *Enhancing Security While Protecting Privacy: The Rights Implicated By Supposedly Heightened Airport Security*, 2014 MICH. ST. L. REV. 1609, 1618 (2014).

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

<sup>34</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032, *supra* note 24.

Previously, the image produced by AIT was passenger-specific and produced an outline of each passenger's body.<sup>35</sup> Initial privacy arguments called AIT a "virtual strip-search" because the images portrayed personal details of passengers,<sup>36</sup> such as surgical scars and genitalia.<sup>37</sup> Now, after the installation of automated target recognition software ("ATR"), passenger-specific images have been eliminated and AIT displays the same outline for all passengers.<sup>38</sup> Areas that pose a possible threat are highlighted on the generic outline for that passenger and specify the area for the TSA to search further.<sup>39</sup> However, even though ATR produces a generic outline, AIT with ATR still marks amputations, prostheses, implants, piercings, and medical devices on the body.<sup>40</sup>

Figure 1. A sample image from AIT using ATR<sup>41</sup>

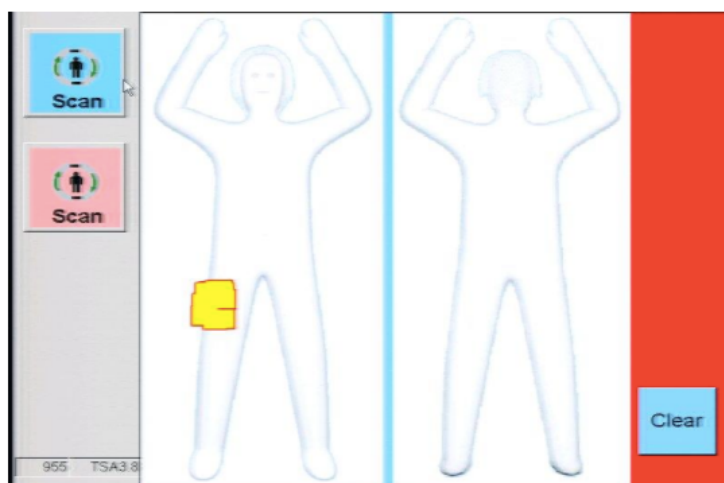


Figure 2. A sample image from AIT without ATR<sup>42</sup>

<sup>35</sup> Hoff, *supra* note 32, at 1618.

<sup>36</sup> Madison Taylor, *Bending Broken Rules: The Fourth Amendment Implications of Full-Body Scanners in Preflight Screening*, 17 RICH. J.L. & TECH. 4, 15–22 (2010).

<sup>37</sup> Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy*, 74 OHIO ST. L.J. 1263, 1273–74 (2013).

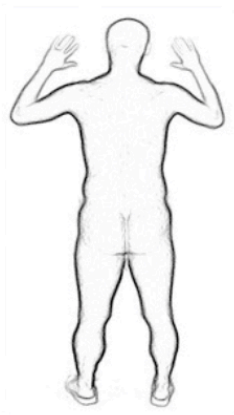
<sup>38</sup> Hoff, *supra* note 32, at 1618.

<sup>39</sup> *Id.*

<sup>40</sup> Tirosh & Birnhack, *supra* note 37, at 1273–74.

<sup>41</sup> DEP'T OF HOMELAND SEC., DHS/TSA/PIA-032(d), *supra* note 9.

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**Backscatter image**



**Millimeter wave image**

The TSA has introduced Privacy Impact Assessments (“PIA”) over the past nine years to identify and mitigate different privacy risks associated with AIT. The PIAs issued in 2008, 2009, and 2011 reflect changes made in AIT procedures. First, in January 2008, the PIA indicated that AIT was in the initial pilot phase.<sup>43</sup> At that time, AIT was used as a secondary screening procedure, or additional screening due to “a compelling need for further investigation after an initial reading showing metal” on the X-ray machine.<sup>44</sup> Passengers were given the option of undergoing the normal secondary screening pat-down procedure or screening by an AIT device.<sup>45</sup> Additionally, in January 2008, the PIA clarified that an individual exercises participation and informed consent

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<sup>42</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032(b), PRIVACY IMPACT ASSESSMENT UPDATE FOR ADVANCED IMAGING TECHNOLOGY (2008).

<sup>43</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032, *supra* note 24.

<sup>44</sup> Taylor, *supra* note 36, at 8–9.

<sup>45</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032, *supra* note 24. During this time advanced imaging technology was referred to as Whole Body Imaging (WBI). *Id.* Secondary Security Screening is used on selective passengers for additional inspection. *Id.*



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when they select the screening method and no individual was required to use AIT for screening.<sup>46</sup>

Ten months later, in a subsequent PIA, the TSA announced a second phase to evaluate AIT during primary screening,<sup>47</sup> which is the first preflight screening of passengers.<sup>48</sup> In October 2008, the TSA specified again that no individual was required to use AIT for primary screening.<sup>49</sup> In July 2009, the TSA issued another PIA to establish that the TSA was continually evaluating both backscatter and millimeter wave technologies to help TSA officers identify objects during security scans.<sup>50</sup> Again, the TSA explained that no individual was required to undergo screening using AIT devices.<sup>51</sup> In January 2011, the TSA announced AIT screening had moved from pilot operations to normal screening operations.<sup>52</sup> The January 2011 AIT PIA also announced that the TSA would test ATR software to alter images viewed by the image operator, specifically testing if the existing images of the passenger could be replaced by more generic images.<sup>53</sup> However, even with ATR software potentially creating more generic images, the PIA still specified no individual is required to use AIT screening.<sup>54</sup>

This policy was altered in December 2015, and now AIT screening is mandatory for some passengers. At the time the newest AIT policy was introduced, the TSA's only justification was that mandated screening was warranted by security

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<sup>46</sup> *Id.* (“Consent is informed by the availability of brochures that explain the technology and show a sample image.”).

<sup>47</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032(b), *supra* note 42.

<sup>48</sup> Taylor, *supra* note 36, at 8–9.

<sup>49</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032(b), *supra* note 42.

<sup>50</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032(a), PRIVACY IMPACT ASSESSMENT UPDATE FOR ADVANCED IMAGING TECHNOLOGY (2009).

<sup>51</sup> *Id.*

<sup>52</sup> DEP’T OF HOMELAND SEC., DHS/TSA/PIA-032(c), PRIVACY IMPACT ASSESSMENT UPDATE FOR ADVANCED IMAGING TECHNOLOGY (2011).

<sup>53</sup> *Id.* The 2011 AIT PIA also reflected the name change to Advanced Imaging Technology (AIT). *Id.*

<sup>54</sup> *Id.* (“Individual participation and consent is exercised by the individual’s selection of the screening method.”).

considerations.<sup>55</sup> Specifically, at a time of heightened concern about aviation security,<sup>56</sup> AIT could improve detection of metallic and nonmetallic threats that pat-down screening may miss.<sup>57</sup>

### III. OVERVIEW OF *ELECTRONIC PRIVACY INFORMATION CENTER V. DEPARTMENT OF HOMELAND SECURITY*

The District of Columbia Circuit Court of Appeals case, *EPIC v. DHS*, is the prevailing case involving AIT and alternative pat-down procedures<sup>58</sup> and establishes the constitutionality of AIT screening practices.<sup>59</sup> In 2007, the TSA introduced AIT screening, and, in 2009, the TSA established AIT as a primary screening method. Each time the TSA failed to abide by administrative procedure rules for agency rulemaking. After the TSA ignored EPIC's petition for formal public rulemaking, EPIC petitioned the D.C. Circuit to review the TSA's use of AIT.

#### A. *Procedural Background of Electronic Privacy Information Center v. Department of Homeland Security*

The TSA's blatant disregard of administrative procedure—when introducing AIT in 2007 and establishing AIT as a primary screening method in 2009—laid the foundation for *EPIC v. DHS* in 2010. The TSA's initial actions, EPIC's request, and the TSA's subsequent response established the need for judicial review of the TSA's AIT rulemaking.

The Administrative Procedure Act § 553 specifies that (1) the agency should provide “notice of proposed rule making” and (2) “the agency shall give interested persons an opportunity to participate in the rule making.”<sup>60</sup> In 2009, the TSA announced AIT would become the primary screening method for passengers in the

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<sup>55</sup> Rene Marsh, *TSA Changes Rules for Who Must Go Through Body Scanner*, CNN (Dec. 23, 2015, 4:29 PM), <http://www.cnn.com/2015/12/23/travel/tsa-airport-screening-change/>.

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

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

<sup>58</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011).

<sup>59</sup> *Id.*

<sup>60</sup> Rule Making, 5 U.S.C. § 553 (2012).

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United States.<sup>61</sup> On May 31, 2009, and April 21, 2010, EPIC submitted Administrative Procedure Act § 553(e) petitions to DHS, requesting DHS undertake a formal public rulemaking process to review the TSA's primary use of AIT.<sup>62</sup> DHS failed to respond to both requests for formal public rulemaking on AIT.<sup>63</sup>

As a result, in 2010, EPIC and three frequent flyers filed a petition for review in the District of Columbia Court of Appeals for review of the TSA's failure to act on the petitions requesting formal public rulemaking process of AIT.<sup>64</sup> At that time, EPIC also petitioned the court to review the TSA's use of AIT in airports throughout the United States.<sup>65</sup> Specifically, EPIC filed a motion for emergency stay, requesting the Court of Appeals to shut down the use of AIT scanners.<sup>66</sup> DHS quickly opposed the motion.<sup>67</sup> The court ruled in favor of DHS in July 2011.

*B. D.C. Circuit Rulings in Electronic Privacy Information Center v. Department of Homeland Security*

In 2010, EPIC petitioned the court to review the TSA's decision to screen passengers through AIT instead of magnetometers,<sup>68</sup> arguing AIT violates the Fourth Amendment and various federal statutes.<sup>69</sup> EPIC also alleged procedural challenges that the TSA should have engaged in notice-and-comment

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<sup>61</sup> Letter from Electronic Privacy Information Center to Janet Napolitano, Secretary of the Department of Homeland Security (May 31, 2009), [https://epic.org/privacy/litigation/EPIC\\_v\\_DHS\\_Petition.pdf](https://epic.org/privacy/litigation/EPIC_v_DHS_Petition.pdf).

<sup>62</sup> Brief for Petitioner at 2, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (No. 10-1157) [hereinafter *Brief for Petitioner*].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1–2.

<sup>65</sup> *EPIC v. DHS: Suspension of Body Scanner*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/litigation/apa/tsa/bodyscanner/> (last visited Feb. 18, 2016).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011). AIT imaging enables the “operator of the machine to detect a nonmetallic object, such as a liquid or powder- which a magnetometer cannot detect- without touching the passengers coming through the checkpoint.” *Id.*

<sup>69</sup> *Id.* at 2.

rulemaking and failed to do so.<sup>70</sup> The D.C. Circuit addressed both procedural and substantive challenges.

i. *Procedural Ruling*

Administrative Procedure Act § 553(b) requires United States agencies to publish notice of a proposed rule in the Federal Register and consider public comments in its proposal.<sup>71</sup> The Administrative Procedure Act lists four exceptions to the notice-and-comment requirement: (1) interpretative rules,<sup>72</sup> (2) general statements of policy, (3) rules of agency organization, procedure, or practice, and (4) rules for which the agency finds notice is impracticable, unnecessary, or contrary to public interest.<sup>73</sup> The D.C. Circuit found that the TSA's AIT screening procedure was a substantive rule,<sup>74</sup> not merely interpretative,<sup>75</sup> and not a general

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<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.* at 5 (“The statute does provide certain exceptions to this standard procedure; in particular, as set forth in § 553(b)(3)(A), the notice and comment requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. The TSA argues its decision to use AIT for primary screening comes within all three listed categories and therefore is not a legislative rule subject to notice and comment.”).

<sup>72</sup> Courts have explained that “interpretative rules for the purposes of 5 U.S.C. § 553 are those that clarify, interpret, or explain existing law, state and administrative officer’s understanding of a statutory or regulatory term, and/or remind affected parties of their responsibilities under existing law, or some similar language.” Elizabeth Williams, *What Constitutes “Interpretative Rule” of Agency so as to Exempt Such Action from Notice Requirements of Administrative Procedure Act*, 126 A.L.R. FED 347 (1995).

<sup>73</sup> 5 U.S.C. § 553(b) (2012).

<sup>74</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 2. (“AIT screening has proven effective in addressing ever-changing security threats, and numerous independent studies have addressed health concerns. TSA has carefully considered the important . . . privacy issues. For these reasons, the TSA’s use of AIT for primary screening has the hallmark of a substantive rule, and therefore, unless the rule comes within some other exception, it should have been the subject of notice and comment.”).

<sup>75</sup> The court stated, “[f]or the reasons discussed in Part II.A.1, we conclude that TSA’s policy substantially changes the experience of airline passengers and is therefore not merely “interpretative” either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures.” *Id.*

statement of policy,<sup>76</sup> and held that there was no justification for the TSA's failure to conduct a notice-and-comment rulemaking.<sup>77</sup> However, the court did not vacate the TSA AIT rules because "vacating the present rule would severely disrupt an essential security operation."<sup>78</sup> The court remanded the matter to the TSA with the expectation that the TSA would promptly conduct notice-and-comment rulemaking.<sup>79</sup>

ii. *Statutory Rulings*

EPIC petitioned the court to review the TSA's decision to screen passengers through AIT, arguing that such screening violates three federal statutes: the Video Voyeurism Prevention Act ("VVPA")<sup>80</sup>, the Privacy Act,<sup>81</sup> and the Religious Freedom Restoration Act ("RFRA").<sup>82</sup> The D.C. Circuit considered each of the federal statutes, ultimately finding the TSA did not violate VVPA or the Privacy Act. The Court of Appeals dismissed the RFRA claim because no petitioner with standing had a religious injury.<sup>83</sup>

The VVPA establishes knowingly and intentionally capturing the image of an individual's private area as a crime if (1) the individual did not consent and (2) the individual has a reasonable expectation of privacy.<sup>84</sup> However, the VVPA does not apply to "lawful law enforcement, correctional, or intelligence activity."<sup>85</sup> The D.C. Circuit held that the TSA engages in "law enforcement,

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<sup>76</sup> *Id.* at 7 ("We are left, then, with the argument that a passenger is not bound to comply with the set of choices presented by the TSA when he arrives at the security checkpoint, which is absurd.").

<sup>77</sup> *Id.* at 8.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2012).

<sup>81</sup> Privacy Act of 1974, 5 U.S.C. § 552(a) (2012).

<sup>82</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012); *see also Elec. Privacy Info. Ctr.*, 653 F.3d at 8–11.

<sup>83</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 9. The Religious Freedom Restoration Act (RFRA) was enacted to protect individuals whose religious exercise is "substantially burden[ed] by government." 42 U.S.C. § 2000bb (2012).

<sup>84</sup> 18 U.S.C. § 1801.

<sup>85</sup> 18 U.S.C. § 1801(c).

correctional, or intelligence activity” and therefore the exception applies.<sup>86</sup>

The Privacy Act establishes fair information practices to govern “the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.”<sup>87</sup> The statute is only applicable if the government can retrieve a record by identifying information, such as an individual’s name. The D.C. Circuit held that the TSA does not link names to the images produced by AIT and thus does not violate the Privacy Act.<sup>88</sup>

iii. *Fourth Amendment Ruling*

EPIC alleged that AIT screening violated the Fourth Amendment because “it is more invasive than is necessary to detect weapons or explosives.”<sup>89</sup> The Fourth Amendment protects individuals against unreasonable searches and seizures.<sup>90</sup> However, screening airport passengers is classified as an administrative search because the screening purpose is to protect the public, not to determine if the individual has committed a crime.<sup>91</sup> Therefore, an administrative search is only unreasonable when the degree to which it invades passengers’ privacy exceeds the degree the screening promotes legitimate government interests.<sup>92</sup> After balancing a passenger’s privacy interests against the government’s interest, the D.C. Circuit held that AIT scanners are consistent with the Fourth Amendment.<sup>93</sup> However, the Court considered passengers’ option to opt-out of AIT screening during their analysis. Specifically, the Court noted, “[m]ore telling, any passenger may opt-out of AIT screening in favor of a pat-down,

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<sup>86</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 8.

<sup>87</sup> *Privacy Act of 1974*, U.S. DEP’T OF JUST. (July 17, 2015), <http://www.justice.gov/opcl/privacy-act-1974>.

<sup>88</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 8.

<sup>89</sup> *Id.* at 10.

<sup>90</sup> U.S. CONST. amend. IV.

<sup>91</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 11.

which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.”<sup>94</sup>

Overall, the D.C. Circuit instructed the TSA “promptly to proceed” to complete notice-and-comment rulemaking,<sup>95</sup> denied EPIC’s statutory arguments, and denied EPIC’s Fourth Amendment claim.

#### **IV. THE TSA’S DEPARTURE FROM *ELECTRONIC PRIVACY INFORMATION CENTER V. DEPARTMENT OF HOMELAND SECURITY***

After the TSA announced the new AIT guidelines in December 2015, EPIC President Marc Rotenberg argued, “the last minute announcement by the TSA is troubling and appears contrary to the agency’s previous representations about the program and to the decision of the D.C. Circuit in *EPIC v. DHS*.”<sup>96</sup> Specifically, in *EPIC v. DHS*, the government represented that passengers could opt-out of AIT scanning and elect for a pat-down because the body scanner program was optional.<sup>97</sup> The D.C. Circuit relied on these representations made by the government.<sup>98</sup> The *EPIC v. DHS* opinion notes, “No passenger is ever required to submit to an AIT scan. Signs at the security checkpoint notify passengers they may opt instead for a pat-down, which the TSA claims is the only effective alternative method of screening passengers.”<sup>99</sup> The newest TSA guideline governing mandatory AIT screening can be analyzed under the D.C. Circuit’s procedural ruling, substantive ruling, and Fourth Amendment ruling.

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<sup>94</sup> *Id.* at 10.

<sup>95</sup> *Id.* at 11.

<sup>96</sup> Lisa Brownlee, *TSA Body Scan? Just Say ‘No,’ Leading Expert Says*, FORBES (Dec. 24, 2015, 9:04 AM), <http://www.forbes.com/sites/lisabrownlee/2015/12/24/tsa-body-scan-just-say-no-leading-expert-says/#28b3f891789a>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 3 (“Many passengers nonetheless remain unaware of this right, and some who have exercised the right have complained that the resulting pat-down was unnecessarily aggressive.”).

A. *Procedural Ruling Departure*

The TSA failed to complete notice-and-comment rulemaking before announcing AIT for primary screening.<sup>100</sup> In 2011, the D.C. Circuit instructed the TSA “promptly to proceed” to complete notice-and-comment rulemaking.<sup>101</sup> Nearly five years later, on March 3, 2016, the TSA submitted a Final Rule for AIT in the Federal Register, noting that the purpose of the Final Rule was to comply with the D.C. Circuit’s ruling in *EPIC v. DHS*.<sup>102</sup> The TSA published a Notice of Proposed Rulemaking on March 26, 2013, in order to receive public comments on using AIT for passenger screening.<sup>103</sup> The deadline for comments was June 24, 2013.<sup>104</sup> There is a distinct difference between the Notice of Proposed Rulemaking issued by the TSA on March 26, 2013, and the Final Rule issue by the TSA on March 3, 2016.

In the Notice of Proposed Rulemaking, the TSA stated that it “proposing to amend its regulations to specify that screening and inspection of an individual conducted to control access to the sterile area of an airport or to an aircraft *may* include the use of advanced imaging technology (AIT).”<sup>105</sup> Throughout the Notice the TSA explains that passengers may opt-out of AIT screening in favor of pat-down screening.<sup>106</sup> Three years later, the Final Rule explains, “AIT screening generally is optional” and “TSA . . . may require AIT use, without the opt-out alternative, as warranted by security considerations.”<sup>107</sup> The first time the TSA mentioned AIT was mandatory for a passenger was December 2015, nearly two-and-a-half years after the deadline for comments on the TSA’s proposed rule for AIT.

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<sup>100</sup> *Id.* at 11.

<sup>101</sup> *Id.*

<sup>102</sup> Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,364, 11,364 (Mar. 3, 2016) (to be codified at 49 C.F.R. pt. 1540).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287, 18,289 (proposed Mar. 2013).

<sup>106</sup> *Id.*

<sup>107</sup> Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. at 11,364.



The TSA effectively slid mandatory AIT into the Final Rule published in the Federal Register without giving the public the opportunity to comment on this part of the rule. As the Federal Register explains, “[i]f an agency decides to amend or revoke a rule, it must use the notice-and-comment process to make the change.”<sup>108</sup> The TSA did not provide the public with the opportunity to comment on the change to the TSA procedure that requires certain passengers to undergo AIT screening and violated the Administrative Procedure Act.

### B. *Statutory Ruling Departure*

In *EPIC v. DHS*, EPIC argued that AIT violated three federal statutes: the VVPA,<sup>109</sup> the Privacy Act,<sup>110</sup> and the RFRA.<sup>111</sup> The D.C. Circuit held that the TSA did not violate the VVPA or the Privacy Act.<sup>112</sup> The newest TSA guidelines governing mandatory AIT screening can be reanalyzed under the VVPA and the Privacy Act to determine if the TSA departed from the *EPIC v. DHS* holding. Additionally, the D.C. Circuit held that the RFRA claim lacked standing because no petitioner experienced religious injury. The newest TSA guidelines governing mandatory AIT screening should be analyzed under RFRA because it is possible that future petitioners will sustain religious injuries if forced to undergo AIT screening.

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<sup>108</sup> *A Guide to the Rulemaking Process*, THE OFFICE OF THE FEDERAL REGISTER, [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>109</sup> Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2012).

<sup>110</sup> Privacy Act of 1974, 5 U.S.C. § 552a (2012).

<sup>111</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012); *see also* Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 8–11 (D.C. Cir. 2011).

<sup>112</sup> 653 F.3d at 9. The Religious Freedom Restoration Act (“RFRA”) was enacted to protect individuals’ whose religious exercise is “substantially burden[ed] by government.” 42 U.S.C. § 2000bb.

i. *Reanalysis of the Video Voyeurism Prevention Act and the Privacy Act under the TSA's New AIT Guidelines*

In *EPIC v. DHS*, the Court denied EPIC's petitions with respect to the VVPA and the Privacy Act.<sup>113</sup> First, the Court held that an exception to the VVPA applies because the TSA is engaged in "law enforcement, correctional, or intelligence activity."<sup>114</sup> The TSA's recent change in procedure requiring some individuals to undergo AIT screening does not depart from this analysis of the Court's opinion. Specifically, the newest change in the TSA procedure does not impact the Court's analysis that TSA officials are engaged in "law enforcement, correctional, or intelligence activity."<sup>115</sup> As a result, though an individual is unable to opt-out of AIT screening, he or she would still not have a claim under the VVPA.

Second, the *EPIC* Court held that the Privacy Act was not applicable because the TSA did not link passengers' names with the images produced by AIT screening.<sup>116</sup> Although the TSA's newest rule impacts the TSA procedures for conducting AIT screening, the restrictions on opting-out do not involve passengers' names. Therefore, based on the D.C. Circuit's 2011 *EPIC* holding, the Privacy Act is not applicable to mandatory AIT screening.

ii. *Analysis of the Religious Freedom Restoration Act under the TSA's Newest AIT Guidelines*

EPIC purported that, "Revealing a person's naked body 'offends the sincerely held beliefs of Muslims and other religious groups'" and therefore violated the RFRA.<sup>117</sup> The D.C. Circuit dismissed the RFRA claim because no petitioner with standing sustained a religious injury under the RFRA.<sup>118</sup> As a result, the Court did not complete a substantive review of the RFRA claim. However, with the newest the TSA regulations, if a passenger were required to undergo AIT screening, the RFRA could be implicated.

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<sup>113</sup> 653 F.3d at 9.

<sup>114</sup> *Id.* at 8.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 9.

<sup>118</sup> *Id.*

The RFRA applies to agencies within the United States government, including the DHS and the TSA.<sup>119</sup> The RFRA provides that, “governments should not substantially burden religious exercise without compelling justification.”<sup>120</sup> The government would “substantially burden religious exercise” if a passenger’s religious beliefs were offended by AIT producing an image of the passenger’s body and the TSA officials viewing the image.<sup>121</sup> If an individual had standing, the Court would apply the compelling interest test to balance religious liberty against competing governmental interests.<sup>122</sup>

The compelling interests test for religious liberty was referenced in the Supreme Court case, *Department of Human Resources of Oregon v. Smith*.<sup>123</sup> In *Smith*, Justice Scalia explained, “[t]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts.”<sup>124</sup> However, the Supreme Court concluded that an individual must still comply with valid laws prohibiting conduct, despite the individual’s religious beliefs.<sup>125</sup> Congress enacted the RFRA in response to the *Smith* holding, in order to guarantee the application

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<sup>119</sup> Colleen Deal, *Faith or Flight: A Religious Dilemma*, 76 J. AIR L. & COM. 525, 546 (2011).

<sup>120</sup> 42 U.S.C. § 2000bb (2012).

<sup>121</sup> Deal, *supra* note 119, at 546 (“[T]he RFRA provides those devoutly religious airline passengers the best opportunity to obtain relief against the federal government, specifically against the DHS and the TSA, for substantially burdening their sincerely held religious beliefs.”)

<sup>122</sup> *Id.*

<sup>123</sup> *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 872 (1990). In *Smith*, the claimants were dismissed from employment based on their religious use of peyote and disqualified from unemployment compensation benefits. *Id.* The Supreme Court reviewed the claimants religious use of peyote and held that “The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use.” *Id.*

<sup>124</sup> *Id.* at 877.

<sup>125</sup> *Id.* at 879 (citing Justice Frankfurter’s 1940 opinion: “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”).

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of the compelling interest test in religious liberty cases.<sup>126</sup> The Act protects individual's religious exercise and prohibits the United States government from "substantially burdening" an individual's exercise of religion "even if the burden results from a rule of general applicability."<sup>127</sup> An exception to the RFRA exists if: (1) the government's adherence is furthering a compelling government interest, and (2) the rule is the least restrictive means to further the government's interest.<sup>128</sup>

The compelling interest test established in RFRA is similar to the compelling interest test the court employed in *EPIC v. DHS* to balance individuals' privacy against governmental interest.<sup>129</sup> Under that analysis, the court gave heavy weight to the government's interest "to ensure public safety."<sup>130</sup> Future claims would consider the effect of mandatory AIT screening on religious liberty by analyzing (1) whether AIT screening substantially burdened the passenger's religious beliefs, (2) whether the TSA had a compelling government interest, and (3) whether mandatory AIT was the least restrictive means of achieving the compelling government interest.<sup>131</sup>

First, before the compelling interest test is applied, the passenger must prove that mandatory AIT substantially burdened his or her religious beliefs.<sup>132</sup> This involves two elements: (1) a substantial burden and (2) religious exercise.<sup>133</sup> A substantial burden exists if a government regulation places pressure on an individual to perform acts in conflict with the fundamentals of his or her religious beliefs.<sup>134</sup> For example, in *Sherbert v. Verner*,<sup>135</sup>

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<sup>126</sup> Deal, *supra* note 119, at 546.

<sup>127</sup> 42 U.S.C. § 2000bb (2012).

<sup>128</sup> Deal, *supra* note 119, at 546.

<sup>129</sup> Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10 (D.C. Cir. 2011).

<sup>130</sup> *Id.*

<sup>131</sup> Deal, *supra* note 119, at 546.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 547.

<sup>134</sup> *Id.* at 547–48.

<sup>135</sup> In *Sherbert v. Verner*, the appellant, a Seventh-day Adventist, was fired from her job because she could not work on Saturday, the Sabbath Day in the Seventh-day Adventist Church. The appellant filed for unemployment

South Carolina's unemployment benefits regulations forced the appellant to choose between following the precepts of her Seventh-day Adventist faith and observe the Sabbath on Saturday or abandon her faith to accept work.<sup>136</sup> The Supreme Court held that the government could not burden an individual's faith by forcing her to choose between adhering to her religion and forfeiting benefits or abandoning her religion in favor of benefits.<sup>137</sup> Similarly, the TSA AIT screening places a substantial burden on devoutly religious passengers.<sup>138</sup> Specifically, some passengers may be forced to choose between following their religious beliefs and foregoing the fastest form of travel or abandoning some principles of their faith in order to pass through the TSA security and fly commercially.<sup>139</sup> As a result, a religious adherent with standing would likely meet the substantial burden element of proving that the TSA AIT substantially burdened his or her religious beliefs.<sup>140</sup>

Next, the religious adherent must show that his or her beliefs are (1) rooted in religion<sup>141</sup> and (2) sincerely held.<sup>142</sup> The reviewing court would evaluate whether the passenger's claims were religiously motivated and how closely the individual held certain religious convictions.<sup>143</sup> Previously, passengers were able to select AIT screening or pat-down screening. In practice, pat-down screening could be more offensive to religious followers' beliefs than AIT screening. A passenger with sincerely held religious

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compensation benefits in South Carolina and was denied benefits because she restricted her availability to not work on Saturdays. The Supreme Court held that it was unconstitutional for South Carolina to apply unemployment compensation eligibility provisions based on her religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 398 (1963).

<sup>136</sup> Deal, *supra* note 119, at 547–48.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 548.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 549.

<sup>141</sup> *Id.* (“Beliefs must be religious in nature and not simply based on purely secular philosophical concerns; however, it is often a difficult and delicate task for a court to make such a determination.”).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 548.

beliefs is more likely to be offended by head-to-toe-pat-downs and removal of religious clothing articles. Specifically, pat-down screening could require Muslim women to remove hijabs or Sikh men to remove turbans.<sup>144</sup> As a result, if the TSA screening required these passengers to remove their religious garments in order to fly, the passengers' religious beliefs would be substantially burdened. Alternatively, in order for a passenger to invoke the RFRA under mandatory AIT screening, the passenger must convince a court that their religious beliefs were substantially burdened by the full-body image produced during AIT screening. The RFRA argument for AIT screening would likely be more difficult to prove than the RFRA argument for pat-down screening<sup>145</sup> and courts would likely spend more time evaluating if the claims were nonreligious in motivation.<sup>146</sup>

If the passenger was able to prove mandatory AIT screening substantially burdened the exercise of his religious beliefs then the government must prove that AIT screening is the least restrictive means of achieving the compelling government interest.<sup>147</sup> The

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<sup>144</sup> Ehsan Zaffar, *What Are Your Rights At Screenings And Checkpoints?*, 30 No. 3 GPSOLO 34, 37 (2013).

<sup>145</sup> Deal, *supra* note 119, at 549. A Sikh man traveling was required to remove his Turban at the TSA checkpoint and walk across the terminal to a bathroom in order to reapply his turban in private. He stated, "appearing in public without a turban is similar to being undressed as a Sikh man" and "[a] lot of Sikh men hold a lot of value to the turban . . . . It's a representation of our ideals, our strength, our courage." Jack Jenkins, *TSA Agents Force Sikh Man to Remove Turban, Make Him Walk Across the Terminal to Put It Back On*, THINK PROGRESS (Feb. 23, 2016, 4:37 PM), <http://thinkprogress.org/justice/2016/02/23/3752807/sikh-turban-tsa/>. "Many members of the Sikh community have objected to the practice of frisking turbans, calling it unnecessary in a world with machines for body scanning and metal detection." Peter Orsi, *Sikh Man Barred from Mexico Flight Sees 'Small Victory'*, THE SEATTLE TIMES (Feb. 9, 2016, 9:09 PM), <http://www.seattletimes.com/nation-world/sikh-man-barred-from-mexico-flight-sees-small-victory/>. "When a Sikh man or woman dons a turban, the turban ceases to be just a piece of cloth and becomes one and the same with the Sikh's head." THE SIKH COALITION, *Sikh Theology Why Sikhs Wear a Turban*, <http://www.sikhcoalition.org/sikh-theology-why-sikhs-wear-a-turban>.

<sup>146</sup> Deal, *supra* note 119, at 549.

<sup>147</sup> *Id.* at 551.

executive branch argues that the TSA procedures “are justified by the risks.”<sup>148</sup> Since 1972,<sup>149</sup> and certainly after September 11, 2001, the courts have recognized protecting air travel and passengers as compelling government interests.<sup>150</sup> However, the TSA must show that mandatory AIT screening “is in furtherance of a compelling governmental interest.”<sup>151</sup> The TSA argues that AIT scanning paired with pat-downs and other screening measures is necessary to detect weapons, especially nonmetallic threats, which can be hidden under clothing.<sup>152</sup> However, opponents question AIT’s actual ability to detect explosive materials.<sup>153</sup> For example, Sikhs wearing turbans that undergo AIT screening are still subjected to secondary screening, calling into question AIT’s ability to see through multiple layers of clothes.<sup>154</sup> The compelling interest test is only met if the government can prove that AIT screening is effective, not simply used to create a false sense of security.<sup>155</sup>

Lastly, the Supreme Court has held that “even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>156</sup> Under the RFRA, the TSA must show that there are no available alternatives to mandatory AIT screening that would provide sufficient security without infringing on passengers’ religious liberties.<sup>157</sup> Since its inception, AIT remained optional, and passengers could select pat-down screening as an alternative. Now, the TSA regulation making AIT mandatory for certain

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<sup>148</sup> *Id.* at 552.

<sup>149</sup> *United States v. Epperson*, 454 F.2d. 769, 771–72 (4th Cir. 1972) (“It is difficult to imagine a more frightening and dangerous event than armed piracy of a passenger aircraft in flight . . . it is clear to us that to innocent passengers the use of a magnetometer to detect metal on those boarding an aircraft is not a resented intrusion of privacy, but, instead, a welcome reassurance of safety.”)

<sup>150</sup> *Deal*, *supra* note 119, at 551.

<sup>151</sup> 42 U.S.C. § 2000bb-1(b)(1) (2012).

<sup>152</sup> *Deal*, *supra* note 119, at 553.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 554.

<sup>156</sup> *Shelton v. Tucker*, 81 U.S. 247, 252 (1960).

<sup>157</sup> *Deal*, *supra* note 119, at 555.

passengers can be compared to past regulations listing AIT as optional. The TSA meets its burden if it “actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.”<sup>158</sup> Mandatory AIT may not be the least intrusive measure to screen passengers for potential security threats and other procedures could be followed that would not substantially burden religious liberties. However, the TSA’s unique expertise and intelligence reports require some measure of deference to their decision to implement mandatory AIT.<sup>159</sup> Because AIT was optional for years prior to the newest TSA regulation, it is assumed the TSA did consider and reject less restrictive measures such as optional AIT screening.

### C. *Fourth Amendment Ruling Departure*

The Fourth Amendment of the United States Constitution provides the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”<sup>160</sup> Typically, the Fourth Amendment prohibits searches and seizures unless the individual is suspected of wrongdoing.<sup>161</sup> However, courts have established that administrative searches are held to a different standard under the Fourth Amendment and do not require warrants or an individual’s consent.<sup>162</sup> In *United States v. Davis*, the defendant was convicted of attempting to board an airplane while carrying a weapon and appealed, alleging the search

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<sup>158</sup> *Gastrell v. Ashcroft*, 191 F. Supp. 2d 23, 39 (2002).

<sup>159</sup> *Deal*, *supra* note 119, at 555.

<sup>160</sup> U.S. CONST., amend. IV; *see also* Victoria Sutton, *Asking the Right Questions: Body Scanners, Is Salus Poul Supreme Lex The Answer?*, 22 HEALTH MATRIX 443, 448 (2013).

<sup>161</sup> *See* Brittany Stancombe, *Fed Up With Being Felt Up: The Complicated Relationship Between the Fourth Amendment and TSA’s “Body Scanners and “Pat Downs,”* 42 CUMB. L. REV. 181, 203–04 (2011-2012).

<sup>162</sup> *Id.*; *see also* *New York v. Burger*, 107 U.S. 2636, 2642–44 (1987) (“A business owner’s expectation of privacy in commercial property is attenuated with respect to commercial property employed in a closely regulated industry. Where the owner’s privacy interests are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises, if it meets certain criteria, is reasonable within the meaning of the Fourth Amendment.”).



of his luggage violated his Fourth Amendment rights.<sup>163</sup> The Davis court established the appropriate standard for evaluating airport searches in three steps: (1) classifying airport screening as an administrative search, (2) stating the test of reasonableness for administrative searches, and (3) providing the exception for intrusiveness.<sup>164</sup>

First, the Ninth Circuit established airport screening as an administrative search, explaining that, “screening searches of airline passengers are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, . . . [and] may be permissible under the Fourth Amendment.”<sup>165</sup>

Second, the Ninth Circuit listed the underlying test of constitutionality for administrative searches. The *Davis* Court explained administrative searches, including airport screening, must meet the Fourth Amendment’s standard of reasonableness.<sup>166</sup> While there is not an established test for determining the reasonableness of airport screening, the key is to balance the “need of the search against the invasion the search entails.”<sup>167</sup> Since the *Davis* opinion, courts have specifically weighed the degree TSA screening intrudes upon a passenger’s privacy against TSA screening’s necessity in promoting legitimate government interests.<sup>168</sup> Additionally, administrative searches are given deference if they are conducted pursuant to a valid statute.<sup>169</sup>

Third, the Ninth Circuit stressed one caveat to the test of reasonableness for administrative searches<sup>170</sup>: minimal intrusiveness. Specifically, administrative screening “must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.”<sup>171</sup> However, in *City of Ontario v. Quon*,<sup>172</sup> the

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<sup>163</sup> *United States v. Davis*, 482 F.2d 893, 893 (9th Cir. 1973).

<sup>164</sup> *Id.* at 908–11.

<sup>165</sup> *Id.* at 908.

<sup>166</sup> *Id.* at 910.

<sup>167</sup> *Id.*

<sup>168</sup> *Stacombe*, *supra* note 161, at 207.

<sup>169</sup> *Id.* at 203–04.

<sup>170</sup> *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973).

<sup>171</sup> *Id.*

Supreme Court clarified that a search is not necessarily unreasonable even if there are less intrusive ways of conducting the search.<sup>173</sup>

In *EPIC v. DHS*, the court balanced passengers' Fourth Amendment rights against the government's legitimate interest of ensuring public safety.<sup>174</sup> However, the newest TSA regulations prevent some passengers from opting out of AIT screening, shifting the balance between the government's interests and passengers' privacy interests. The respective government and passenger interests should be reanalyzed to consider the government's additional interest for mandatory AIT screening and the impact this has on passengers' right to privacy. Conducting the Fourth Amendment balancing test for AIT screening under the TSA's newest regulations is essential to understanding the nature of privacy violations in current TSA procedures and the ultimate balance of national security and passenger privacy under current law. Additionally, the TSA's newest rule for AIT screening is in direct contradiction with statements the agency made and the court relied on during *EPIC v. DHS*. Analysis of the TSA's argument and the D.C. Circuit's opinion concerning optional AIT screening illustrates the TSA's newest rule departs from the *EPIC v. DHS* opinion. The analysis for mandatory AIT considers: (1) the departure from the *EPIC v. DHS* opinion, (2) legitimate

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<sup>172</sup> In *Quon v. City of Ontario*, a police officer for the city brought an action against the city's police department alleging the department's review of his text messages violated the Fourth Amendment. The Court of Appeals opinion listed a variety of means that were less intrusive than the audit required by the police department. However, the Supreme Court held a search is not necessarily unreasonable even if there is a less intrusive way of conducting the search. The Supreme Court concluded the search of Quon's text messages was reasonable and reversed the Ninth Circuit holding. *City of Ontario, California v. Quon* 139 U.S. 2619, 2619 (2010).

<sup>173</sup> *Id.* ("That rationale could raise insuperable barriers to the exercise of virtually all search-and-seizure powers, because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished.")

<sup>174</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011).

government interests for requiring AIT screening for certain passengers, and (3) privacy interests of passengers forced to undergo AIT screening.

i. *The New TSA Rule Contradicts Argument and Opinion in EPIC v. DHS*

Since 2007, DHS informed passengers that AIT screening was optional. More importantly, in 2011, DHS presented to the D.C. Circuit that passengers' Fourth Amendment rights were protected because they had the option to opt out of AIT screening in favor of pat-down screening. The D.C. Circuit gave weight to this argument when balancing the TSA's interests against passengers' privacy interests and held that the balance favored the government. Now, the TSA's diversion from their eight-year standard of optional AIT screening is in conflict with the DHS argument and the D.C. Circuit's opinion in *EPIC v. DHS*.

Mandatory AIT screening for certain passengers significantly departs from the claims that DHS made in *EPIC v. DHS* and the resulting opinion produced by the D.C. Circuit. Specifically, in the Final Brief for Respondents,<sup>175</sup> DHS references passengers' ability to opt out of AIT or optional AIT screening over fifteen times,<sup>176</sup> specifically arguing, "Passengers are given the opportunity to determine for themselves which procedure they consider less invasive and more consistent with personal dignity."<sup>177</sup> Furthermore, the DHS brief contains a section to specifically address "Opting Out of AIT Screening" when describing AIT.<sup>178</sup>

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<sup>175</sup> Final Brief for Respondents, Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10 (D.C. Cir. 2011) (No. 10-1157).

<sup>176</sup> See generally *id.* ((1) "Opting out of AIT screening," (2) "Optional screening procedure," (3) "Passengers may opt-out," (4) "Option to decline," (5) "Opting out of AIT screening," (6) "AIT screening is optional," (7) "Travelers who opt out of AIT," (8) "The physical pat down given to passengers who opt out of AIT," (9) "The optional nature of AIT screening," (10) "AIT screening and its optional nature," (11) "Allows passenger to opt-out in favor of alternative screening procedures," (12) "Right to opt-out of AIT screening," (13) "Passengers can opt out of AIT," (14) "May opt-out of the primary screening procedure," (15) "Alternative options.").

<sup>177</sup> *Id.* at 50.

<sup>178</sup> *Id.* at 10.

In the *EPIC* opinion, the D.C. Circuit parallels the language used in DHS's brief concerning optional AIT screening, stating, "[m]ore telling, any passenger may opt-out of AIT screening in favor of a pat-down, which allows him to decide which of the two options . . . is least invasive."<sup>179</sup> This direct reference to DHS's consideration of optional AIT reveals that the court accepted DHS's argument concerning optional AIT and factored it into the final decision. Furthermore, the court only listed three steps that the TSA has taken to protect passenger privacy.<sup>180</sup> Given the court only specified these three steps to protect passenger privacy, significant weight was given to the ability of passengers to opt-out of AIT screening. Moreover, the court's language and qualifier "more telling"<sup>181</sup> when referring to optional AIT screening suggests that this factor carried more weight in the court's decision. Academic analysis of the *EPIC v. DHS* decision lists passengers' ability to opt out of AIT screening as crucial to the court's decision.<sup>182</sup>

While the overall balance of security interests and privacy interests may still weigh in favor of the government, the TSA's departure from its own argument suggests a need for oversight and an additional analysis of the privacy violations that occur under the new TSA regulation.

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<sup>179</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Andrea Simbro, *The Sky's the Limit: A Modern Approach to Airport Security*, 56 ARIZ. L. REV. 559, 576 (2014) ("The court justified its decision on the grounds that passengers are not required to submit to a body scan and may opt instead for a pat-down . . . The D.C. Circuit reasoned that offering pat-downs as an alternative allows passengers to decide."); see also Jennifer Ellison & Marc Pilcher, *Advanced Imaging Technology (AIT) Deployment: Legal Challenges and Responses*, 24 NO. 4 AIR & SPACE LAW 4, 6 (2012) ("Another consideration is whether passengers are afforded a choice in being screened." And "In this respect the introduction of AIT—and the concomitant right to opt for the alternative of a pat-down—affords greater choice."); see also R. Gregory Israelsen, *The D.C. Circuit's Epic Failure in Electronic Privacy Information Center v. United States Department of Homeland Security*, 78 J. AIR L. & COM. 711, 734 (2013) ("Another logical failure committed by the D.C. Circuit in support of its privacy argument was that the passenger could decide how to be violated.").

ii. *Legitimate Government Interests for Requiring AIT Screening*

Early in the analysis of the TSA's legitimate interest for requiring AIT screening, the *EPIC* court concludes that, "the balance clearly favors the government."<sup>183</sup> The court offers three related government interests for AIT screening: (1) "to protect the public from a terrorist attack;" (2) "to ensure public safety;" and (3) AIT scanners are capable of detecting liquid or powder explosives and therefore deter passengers from carrying these items aboard airplanes.<sup>184</sup> Additionally, in *EPIC v. DHS*, the government argued, "AIT enables TSA screeners to efficiently identify both metallic and nonmetallic items concealed beneath layers of clothing, reducing the need for a more time-consuming pat-down search."<sup>185</sup> These considerations are still relevant to the legitimate interests that the TSA has for requiring AIT screening for certain passengers.

The 2015 Privacy Impact Assessment for AIT specifies that, the "TSA may direct mandatory AIT screening for some passengers as warranted by security considerations in order to safeguard transportation security."<sup>186</sup> This update restates the government's legitimate security interests, but fails to specify why preventing passengers from opting out of AIT screening is a better procedure than optional AIT screening.

When comparing past and current TSA regulations, procedures requiring passengers to undergo AIT screening are more intrusive than procedures offering passengers the option to undergo AIT screening. The new TSA regulation preventing passengers from opting out of AIT is more intrusive than past regulations without offering rationale or additional security interests that the new procedure protects. However, the *EPIC* court explained that AIT scanners do not have to be minimally intrusive to be consistent with the Fourth Amendment.<sup>187</sup> Therefore, this conclusion would

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<sup>183</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

<sup>184</sup> *Id.*

<sup>185</sup> Final Brief for Respondents, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (No. 10-1157).

<sup>186</sup> DEP'T OF HOMELAND SEC., DHS/TSA/PIA-032(d), *supra* note 9.

<sup>187</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

likely extend to the procedure surrounding AIT screening, and the TSA's newest regulation does not need to be minimally intrusive to be consistent with the Fourth Amendment.

iii. *Privacy Interests of Passengers Forced to Undergo AIT Screening*

AIT critics have expressed privacy and Fourth Amendment concerns since AIT pilot operations were announced in 2007.<sup>188</sup> Privacy concerns are still relevant despite the TSA providing some privacy protections through ATR and disabling AIT's capacity to save detailed images of passengers.<sup>189</sup> Concerned passengers and advocacy organizations have illustrated three main privacy harms that occur when AIT screening is mandatory: (1) steps taken by the TSA to protect passengers' privacy and security may not be enough, (2) AIT exposes personal body traits for some passengers, and (3) passengers are unable to determine which procedure is least invasive for them.

First, the three previous privacy violations in EPIC's 2011 argument were (1) the steps taken by the TSA to obscure AIT images could be undone, (2) the TSA officer could possibly identify the individual being screened with the image, and (3) it is possible AIT could actually store images.<sup>190</sup>

Second, AIT still produces an image based off the scan of the passenger and identifies areas of the passenger's body that need to be searched further.<sup>191</sup> As a result, "scanners not only expose

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<sup>188</sup> DEP'T OF HOMELAND SEC., DHS/TSA/PIA-032, *supra* note 24. On January 2, 2008, the United States Department of Homeland Security issued a Privacy Impact Assessment for TSA Whole Body Imaging. The TSA announced, "pilot operations to evaluate the use of various Whole Body Imaging Technologies, including backscatter x-ray and millimeter wave devices." *Id.*

<sup>189</sup> Hoff, *supra* note 32, at 1618. Additionally, "TSA agents are not allowed to bring photographic devices, including phones, with them into the screening room." *Id.*

<sup>190</sup> *Brief for Petitioner*, *supra* note 62, at 4. Each of these alleged privacy violations are in direct contradiction with the TSA's 2011 argument and past Privacy Impact Assessments. As a result, the court would likely rule in favor of AIT screening after balancing legitimate government interests against passengers' privacy interests.

<sup>191</sup> *Id.*

nonmetallic objects that can be used as weapons, but also benign objects and bodily traits that passengers often wish to keep to themselves.”<sup>192</sup>

Third, passengers are unable to personally determine which procedure “is least invasive and consistent with personal dignity.”<sup>193</sup> Identifying passengers’ loss of choice and control is essential to understanding changes in TSA procedures over time. As TSA procedures continue to change, opponent Ralph Nader argues, “it is only a matter of time before the TSA subjects American travelers to body cavity searches.”<sup>194</sup> Although this argument may be a bit extreme, it illustrates that eventually intrusive TSA procedures could tip the balance and passengers’ privacy interests could outweigh government security interests.

Currently, the government national security interest likely continues to outweigh passengers’ privacy interest. The TSA has implemented several procedures to help protect passengers’ privacy and there is no evidence or indication that these systems and actions could be undone or store images of passengers.

However, the current approach to balancing government and passenger interests should be reconsidered. Judicial and academic discussion of TSA screening frequently assumes that AIT violates privacy, and then turns to balancing privacy concerns against national security.<sup>195</sup> For example, in *EPIC v. DHS*, the court balanced an assumed harm to privacy against national security interest, and quickly concluded that governmental measures outweigh the harm to individual privacy.<sup>196</sup> In the future, “it is important to understand the nature of privacy violations even if the ultimate outcome of balancing between national security and

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<sup>192</sup> Tirosh & Birnhack, *supra* note 37, at 1256. “The machines with the ATR, namely millimeter wave scanners that produce a generic image, mark amputations, prostheses, implants, piercings, and medical devices that are attached to the body. While the machines without the ATR, namely the backscatter scanners, show all of the above, plus surgery scars and genitalia.” *Id.*

<sup>193</sup> Final Brief for Respondents at 51, *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011) (No. 10-1157).

<sup>194</sup> *See Deal, supra* note 119, at 554.

<sup>195</sup> *See Tirosh & Birnhack, supra* note 37, at 1265–66.

<sup>196</sup> *Id.*

privacy would grant more weight to national security.”<sup>197</sup> In order to identify when passenger privacy interests outweigh national security interests, it is necessary to continually review changes in TSA procedure, the privacy interests that the changes implicate, and any resulting shifts in the Fourth Amendment balancing test.

## V. RECOMMENDATIONS FOR REVIEW OF THE TRANSPORTATION SECURITY ADMINISTRATION’S USE OF ADVANCED IMAGING TECHNOLOGY

On March 3, 2016 the TSA formally amended its security regulations specifying that it may use AIT to screen passengers at airport security checkpoints.<sup>198</sup> Although the TSA’s announcement of the formal rule in the Federal Register eliminates the main procedural arguments against the TSA, substantive arguments are still available for citizens opposed to mandatory AIT screening. Recommendations for review of the TSA’s use of AIT screening proceed in three parts: (1) recommendations for United States citizens, (2) recommendations for judicial review, and (3) recommendations for congressional review.

### A. *Recommendations for Passengers Flying in the United States*

Passengers flying commercially in the United States are now faced with two options: (1) fly with the possibility of being forced to undergo mandatory AIT screening, or (2) do not fly. For many Americans, work requirements, time restraints, and other considerations eliminate not flying as an option. United States citizens needing to utilize commercial flights should consider the following before entering security at the airport.

First, passengers should be aware that the TSA’s newest regulation specifies AIT screening could be mandatory for some passengers, but not all. This means that under the newest regulation many passengers are still able to choose between AIT screening and pat-down screening. Passengers should become

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<sup>197</sup> *Id.* at 1266.

<sup>198</sup> Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11364, 11364 (March 3, 2016) (to be codified at 49 C.F.R. pt. 1540).



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aware of the pros and cons of AIT and pat-down screening<sup>199</sup> before flying in order to effectively choose between the two options at the security checkpoint. The TSA provides a national hotline to assist passengers with disabilities, medical conditions, or other circumstances before flying and entering the screening process.<sup>200</sup> Passengers concerned about how AIT could affect their screening process should call TSA Cares before their flight for information on what to expect during screening.<sup>201</sup>

Second, if a passenger decides that pat-down screening is the best screening procedure for them they should inform the TSA official at the security checkpoint. In most instances the passenger will be allowed to opt-out of AIT screening in favor of pat-down screening, but this is not guaranteed. If the TSA official does not allow an individual to opt-out of AIT screening, the individual can request to talk to a supervisor.<sup>202</sup>

Third, if the TSA supervisor requires the passenger to undergo AIT screening in order to fly, the passenger should be aware of his or her options and rights. Interfering with the screening process can result in lofty civil fines from the TSA.<sup>203</sup> Passengers can be

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<sup>199</sup> With pat-down screening, passengers have the right to have a pat-down by someone of the same gender and in private. Additionally, passengers have the right to have the pat-down witnessed by someone of his or her choice.

<sup>200</sup> Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. at 11364.

<sup>201</sup> TSA Cares is a helpline number provided by TSA to assist passengers with disabilities and medical conditions. Passengers can call 1-855-787-2227 prior to getting to the airport with questions about screening and what to expect at the security checkpoint. *See TSA Announces Launch of TSA Cares Toll Free Helpline for Travelers with Disabilities and Medical Needs*, TRANSP. SECURITY ADMIN. (Dec. 22, 2011), <https://www.tsa.gov/news/releases/2011/12/22/tsa-announces-launch-tsa-cares-toll-free-helpline-travelers-disabilities>.

<sup>202</sup> *For Employees*, TRANSP. SECURITY ADMIN., <https://www.tsa.gov/for-employees> (“The Ombudsman Division provides confidential, independent, impartial, and informal problem-resolution services to the public, employees and stakeholders. The division promotes fair and equitable treatment in matters involving TSA. The office assists in many ways including explaining policies and procedures, coaching individuals on how to constructively deal with problems, facilitating dialogue and mediating disputes.”).

<sup>203</sup> *Civil Enforcement*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/travel/civil-enforcement>.

fined up to \$3,500 dollars for non-physical interference and up to \$5,000 for physical interference.<sup>204</sup> Therefore, after entering the security checkpoint, if a passenger decides not to fly because they do not want to undergo mandatory AIT screening, then they could be issued a fine by the TSA. If passengers are faced with this dilemma, they can file a complaint with the DHS and the TSA.<sup>205</sup> The TSA offers several outlets for passengers to issue complaints, including writing to the TSA Contact Center, filing complaints with the TSA Office of Civil Rights and Liberties, and submitting an online complaint.

Additionally, a passenger who encounters mandatory AIT screening should contact his or her Senators or Representatives to inform them of the situation. Electronic Privacy Information Center (EPIC) and the American Civil Liberties Union (ACLU) also offer an outlet for passengers to share their experiences concerning AIT and the TSA.<sup>206</sup> Submitting a Body Scanner Incident Report to EPIC or the ACLU could allow passengers to be a part of the larger movement and solution for the appropriate use of AIT.

#### B. *Recommendations for Judicial Review*

Within a week of the TSA announcing the new AIT procedures, Jonathan Corbett, a concerned traveler, filed suit against the TSA.<sup>207</sup> Specifically, Corbett, believing that the TSA order making AIT mandatory is unconstitutional, requested that the court to stay the TSA's rule removing the opt-out option.<sup>208</sup> In the

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<sup>204</sup> *Id.* "Repeat violations will result in higher penalties." *Id.*

<sup>205</sup> *Know Your Rights*, AMERICAN CIVIL LIBERTIES UNION <https://www.aclu.org/know-your-rights/what-do-if-your-rights-are-violated-when-traveling>.

<sup>206</sup> *EPIC Body Scanner Incident Report*, ELECTRONIC PRIVACY INFORMATION CENTER, [https://epic.org/privacy/airtravel/backscatter/incident\\_report/](https://epic.org/privacy/airtravel/backscatter/incident_report/).

<sup>207</sup> Bart Jansen, *Law Student Sues to Overturn New TSA Full-body Policy*, USA TODAY (Dec. 24, 2015), <http://www.usatoday.com/story/news/2015/12/24/court-challenge-tsa-change-full-body-scans/77873878/>.

<sup>208</sup> *Id.* "Individuals and corporate entities may go into courts to make a claim that they have been or will be, damaged or adversely affected in some manner by a regulation." A Guide to the Rulemaking Process, OFFICE OF THE FEDERAL REGISTER, [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) at 11. The reviewing courts considers claims that a rule is: (1) unconstitutional,

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Opposition to Petitioner's Motion to Stay Order the TSA argued that (1) Corbett lacked standing to show that the TSA policy threatens him with irreparable harm, and (2) granting Corbett's motion is against the balance of equities.<sup>209</sup>

Corbett's petition did not demonstrate that he was subjected to mandatory AIT screening in the past or faced imminent threat of mandatory AIT screening in the future.<sup>210</sup> Corbett did not identify future travel plans that would suggest he would undergo AIT screening.<sup>211</sup> As a result, the Eleventh Circuit will likely dismiss Corbett's claim as a matter of standing. In the future, courts should save judicial resources and eliminate frivolous lawsuits against the TSA quickly.

However, the TSA's second argument that Corbett's motion is against the balance of equities should not always be accepted at face value. If and when future petitioners with standing bring claims before the court, national security interest should be balanced against passenger interests, specifically religious interests and privacy interests.

The Religious Freedom Restoration Act (RFRA) was not analyzed in *EPIC v. DHS*. In the future, if a passenger with religious injury has standing, the court should consider AIT screening's harm on the passenger's religious liberties. Additionally, *EPIC v. DHS* did not consider mandatory AIT screening in the D.C. Circuit's analysis and should be reconsidered in the privacy balance.

The TSA's future changes to AIT screening procedure should be continually reviewed by the appropriate court, in order to protect travelers' interests and hold the TSA accountable. Even if the ultimate outcome of balancing between national security

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(2) beyond the agency's legal authority, (3) implemented without notice-and-comment, or (4) arbitrary, capricious, or an abuse of discretion. *Id.*

<sup>209</sup> Respondent's Opposition to Petitioner's Motion to Stay Order at 3, Corbett v. TSA No. (11th Cir. filed Jan. 7, 2016) (No. 15-15717), <https://tsaoutofourpants.files.wordpress.com/2016/01/corbett-v-tsa-iv-opp-to-motion-for-pi.pdf>.

<sup>210</sup> *Id.* at 11.

<sup>211</sup> *Id.*

interests and passengers' religious and privacy interests would grant more weight to national security,<sup>212</sup> courts should not quickly assume that governmental measures outweigh the harm to individuals' privacy or religion. Thorough and consistent balance when passengers present new interests will offer insight into the nature of the privacy or religion violation and will help courts quickly identify when the TSA's procedures become too intrusive.

*C. Recommendations for Congressional Review*

Although it is unlikely that a court will enjoin the TSA's use of AIT scanners to screen passengers, various organizations have recently teamed together to appeal to the United States Congress over the TSA's new body scan procedures. Since the TSA instituted the no opt-out body scan procedures in December 2015, twenty-five civil liberties, human rights, and non-profit organizations have teamed together to fight against the TSA's new procedures.<sup>213</sup> The coalition, headed by EPIC,<sup>214</sup> wrote to Congress requesting a hearing to assess the TSA's conduct, including the regulation requiring certain passengers to undergo AIT screening.<sup>215</sup> Marc Rotenberg, EPIC's President, stated that "the new procedures were contrary to law and that it was within passengers' legal rights to refuse a body scan if one was demanded

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<sup>212</sup> *Id.* at 1266.

<sup>213</sup> Lisa Brownless, *Growing List of Privacy Advocates Condemns TSA's New Body Scan Policy*, FORBES (Jan. 14, 2016), <http://www.forbes.com/sites/lisabrownlee/2016/01/14/growing-list-joins-tsa-body-scan-fight/#2715e4857a0b34ff49a26919>.

<sup>214</sup> The Electronic Frontier Foundation (EFF), the American Civil Liberties Union (ACLU), and the anti-biometrics group Constitutional Alliance joined EPIC in the coalition. *Id.*

<sup>215</sup> *Id.* ("Specifically, the coalition wrote to Representative Jason Chaffetz, Chairman, and Representative Elijah Cummings, Ranking Member of the U.S. House of Representatives Committee on Oversight and Government Reform.... In addition to asking for hearings to address TSA's conduct, the coalition asked for: suspension of funding for whole body scanners until the public rulemaking has been completed, TSA to be required to publish all de facto regulations, TSA to be required to evaluate the cost (including lost time to passengers) of screening procedures using whole body scanners, and amendment of relevant regulations to ensure that TSA orders are subject to judicial review as are other government actions.").

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by the TSA.”<sup>216</sup> The coalition requests that Congress convene a hearing to assess the agency’s conduct, suspend funding for whole body scanners,<sup>217</sup> require the TSA to publish all de facto regulations, require the TSA to evaluate the cost of screening procedures, and ensure that TSA orders are subject to judicial review.<sup>218</sup>

Now that the TSA’s final rule for AIT screening has been published in the Federal Register, Congress has three main avenues to exercise its oversight over the TSA’s use of AIT screening.<sup>219</sup> Congress can hold hearings and pose questions to agency heads, enact new legislation, or impose funding restrictions.<sup>220</sup> Suspending funding for AIT scanners does not encourage thoughtful analysis and balance of national security and passenger interests. However, posing questions to TSA officials and enacting new legislation can help hold the TSA accountable and protect passenger privacy interests.

Congress posing questions to the DHS and the TSA could further inform the House and Senate on changes to AIT screening regulations and allow Congress to analyze how this impacts passengers’ privacy and religious interests. However, posing questions to agency heads would likely present a biased view of AIT screening and its impact on passengers. This reiterates the

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<sup>216</sup> *Id.* Shahid Buttar, Director of Grassroots Advocacy of EFF, argued “TSA’s latest attempt to erode passenger rights makes it even more clear the agency demands congressional oversight.” *Id.*

<sup>217</sup> Specifically, the coalition wants Congress to “suspend funding for whole body scanners until the public rulemaking has been completed.” In *EPIC v. DHS* (2011), the court ordered the agency to “act promptly to conduct a public rulemaking. But the TSA has still not issued a final rule more than four years after the D.C. Circuit’s ruling.” Letter from Electronic Privacy Information Center to U.S. House of Representatives Committee on Oversight and Government Reform (Jan. 13, 2016), <http://privacycoalition.org/TSA-Congressional-Oversight-Letter.pdf>.

<sup>218</sup> *Id.*

<sup>219</sup> *Office of the Federal Register, A Guide to the Rulemaking Process*, FED. REGISTER (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf). Before new final rules can take effect they must be sent to Congress and the Government Accountability Office for review. *Id.*

<sup>220</sup> *Id.*

importance of concerned passengers writing to their congressmen or representatives about AIT screening. Doing so will encourage Congress to ask the TSA meaningful questions about AIT and require the TSA to evaluate the costs of AIT screening procedures.

After learning more from the DHS, the TSA, and American citizens Congress should consider enacting new legislation to control TSA procedures. Per EPIC's recommendation, requiring the TSA to publish all de facto regulations and ensuring that TSA orders are subject to judicial review will help protect passenger's privacy interests.

Going forward, congressional review of the TSA's actions and future regulations could be helpful. For years, the TSA failed to provide individuals and organizations with the opportunity to comment on AIT regulations. Future congressional review of the TSA's conduct could hold the TSA accountable and ensure they continue to meet the requirements of the Administrative Procedure Act.

## VI. CONCLUSION

In conclusion, the TSA's decision to make AIT mandatory for some passengers breaks a promise that the TSA made when introducing AIT,<sup>221</sup> the argument that the DHS made to the D.C. Circuit,<sup>222</sup> and the court's opinion in *EPIC v. DHS*.<sup>223</sup> The *EPIC* court ruled on both procedural and substantive grounds, including analysis for statutory and Fourth Amendment claims.<sup>224</sup>

First, in 2011 the D.C. Circuit ordered the TSA to promptly conduct a notice-and-comment rulemaking.<sup>225</sup> Five years later, the TSA issued a final rule for AIT screening and included mandatory AIT screening in the final rule. Because the deadline for comment ended over two years before the TSA mentioned that AIT could be

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<sup>221</sup> Elliott, *supra* note 7.

<sup>222</sup> Final Brief for Respondents, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (No. 10-1157).

<sup>223</sup> *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011).

<sup>224</sup> *See supra*, Part III.

<sup>225</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 10.

mandatory, the public never had the opportunity to comment on this portion of the rule.

Second, the D.C. Circuit analyzed AIT screening in light of the VVPA, the Privacy Act, and the RFRA.<sup>226</sup> Although an individual may no longer be able to opt out of AIT screening, they still do not have a claim under VVPA or the Privacy Act.<sup>227</sup> *EPIC v. DHS* did not analyze AIT screening under RFRA because no petitioner had standing.<sup>228</sup> Under the compelling interest test for religious liberties, a religious passenger would prove that mandatory TSA AIT screening substantially burdened his or her religious beliefs. However, the government would likely be able to prove that AIT screening is effective. Furthermore, while mandatory AIT screening is not the least intrusive method, the TSA could prove that it was considered against less restrictive measures. As a result, if a passenger had standing for a RFRA action in the future, the compelling interest test would likely go in favor of the TSA and the use of mandatory AIT screening.

Third, although the Fourth Amendment balancing test for mandatory AIT screening shifts towards passengers' privacy interests, the resulting test would likely still align with the *EPIC v. DHS* decision. While the TSA failed to specifically introduce new government interests for mandatory AIT screening, the government interests analyzed in *EPIC v. DHS* are still relevant to TSA procedures requiring passengers to undergo AIT screening. Furthermore, the only additional interest for passengers required to undergo AIT screening is the loss of choice or ability to decide the least intrusive screening method. Considering both legitimate government interests and passengers' privacy interests, the overall balance still weighs in favor of the government.

However, the TSA's departure from their own argument in *EPIC v. DHS* and a trend of increasing privacy intrusions suggests that TSA procedures need continual monitoring and analysis. Specifically, identifying passenger's loss of choice between AIT screening and pat-down screening is essential to understanding

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<sup>226</sup> See *supra*, Part III.

<sup>227</sup> See *id.*

<sup>228</sup> *Elec. Privacy Info. Ctr.*, 653 F.3d at 6.

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changes in TSA procedures over time. Eventually, changes in TSA procedures, such as requiring AIT screening, could tip the balance and passengers' privacy interests could outweigh government security interests. In order to identify when that point occurs, it is necessary to continually review changes in TSA procedure, the privacy interests implicated, and any resulting shifts in the Fourth Amendment balance test. Constant monitoring of TSA policies and screening methods will allow for early identification of severely intrusive procedures and quicker relief for passengers.