NO. 12-1307

In The
United States Court of Appeals
For The District of Columbia Circuit

IN RE ELECTRONIC PRIVACY INFORMATION CENTER,
Petitioner.

On Petition for a Writ of Mandamus
to Enforce This Court's Mandate

BRIEF *AMICI CURIAE* OF THE COMPETITIVE ENTERPRISE INSTITUTE, ROBERT L. CRANDALL, NATIONAL ASSOCIATION OF AIRLINE PASSENGERS, ELECTRONIC FRONTIER FOUNDATION, CENTER FOR INDIVIDUAL FREEDOM, CYBER PRIVACY PROJECT, CENTER FOR FINANCIAL PRIVACY AND HUMAN RIGHTS, DIGITAL LIBERTY, LIBERTY COALITION, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS TO ENFORCE THIS COURT'S MANDATE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

None of the movants is owned by a publicly-held entity or has any members who have issued shares or debt securities to the public. No publicly-held entity owns more than 10% of their stock. The movants, who seek to become *amici curiae*, include: Competitive Enterprise Institute (CEI); Robert L. Crandall; National Association of Airline Passengers (NAAP); Electronic Frontier Foundation (EFF); Center for Individual Freedom (CFIF); Center for Financial Privacy and Human Rights (CFPHR); Cyber Privacy Project (CPP); Digital Liberty (DL); Liberty Coalition (LC); and The Rutherford Institute (RI). Except for the entities listed in the preceding sentence, all parties, intervenors, and amici are listed in the Petition for Mandamus's Certificate of Parties, Rulings, and Related Cases, so movants otherwise adopt that Certificate as their own. Robert L. Crandall is an individual. NAAP is a non-profit membership organization. CEI, CPP, CFIF, EFF, and RI are nonprofit 501(c)(3) organizations. LC is a nonprofit. CFPHR is part of the Liberty and Privacy Network, a nonprofit 501(c)(3) organization. DL is a project of Americans for Tax Reform, a nonprofit 501(c)(4).

Dated: July 19, 2012

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INTEREST OF THE *AMICI CURIAE*

The *amici* include non-profit public interest organizations and associations dedicated to goals relevant to this case, such as protecting the rights of airline passengers and promoting airport safety; protecting constitutional rights to privacy and interstate travel; and promoting government accountability and the rule of law.[1] The *amici* also include one individual: Robert L. Crandall, the former Chairman and CEO of AMR and American Airlines, and a current frequent flier. The *amici* and their interests are described in greater detail in their motion to file this brief.

ARGUMENT

I. The TSA's Airport Screening Policies Affect Millions of Americans, Yet Passengers Still Have No Opportunity to Participate in TSA Rulemaking.

Every day, 1.8 million Americans board a commercial flight in a U.S. airport, and each passenger is screened by the Transportation Security Administration ("TSA"). *Is TSA's Planned Purchase of CAT/BPSS a Wise Use of Taxpayer Dollars? Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 112TH CONG. 1 (Jun. 19, 2012) (statement of Kelly Hoggan, Asst.

[1] Pursuant to D.C. Cir. Rule 29(c)(1), no party or entity other than *amici curiae* and their counsel authored this brief in whole or in part or made any monetary contribution intended to fund this brief's preparation or submission.

Administrator for the Ofc. of Sec. Capabilities, Transp. Sec. Admin). A substantial portion of these passengers are screened by the TSA's Advanced Imaging Technology ("AIT") scanners, of which 700 are currently operating at nearly 190 U.S. airports. *Id.* at 4. In the last half decade, as millions of Americans have undergone AIT screening, none have been afforded an opportunity to comment on or participate in the TSA's decision-making regarding AIT scanners.

In July 2011, this Court ruled that the TSA impermissibly failed to engage in notice-and-comment rulemaking regarding the agency's use of AIT scanners in airports. *EPIC v. DHS*, 653 F.3d 1, 12 (D.C. Cir. 2011). This Court ordered the TSA to "promptly" commence notice-and-comment rulemaking regarding the use of AIT scanners in airports, but declined to vacate the agency's rule pending such rulemaking. *Id.*

Promulgated without public participation and input, the TSA's rules regarding AIT scanners violate the notice and comment requirement of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553. This statute reflects Congress's judgment that "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown,* 441 U.S. 281, 316 (1979); *Paulsen v. Daniels*, *see also* 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.").

II. The TSA's Failure to Promptly and Meaningfully Progress Toward Complying With This Court's Mandate Constitutes "Unreasonable Delay."

The APA empowers this Court to, among other things, "compel agency action unlawfully withheld or *unreasonably delayed*." 5 U.S.C. § 706(1) (emphasis added). Whether an agency's relay is reasonable is governed by six factors. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) [hereinafter *TRAC*].

The TSA assured this Court in a November 2011 filing that it "had an initial, very preliminary draft [rule] prepared by August 11, 2011." Respondents' Response in Opposition to Motion to Enforce Mandate, at 5 [hereinafter Opp. I]. The TSA further stated in January 2012 that it "has committed to significantly expediting the AIT rulemaking process . . . ." Respondents' Opposition to Petitioners' Second Motion to Enforce Mandate, at 5-6 [hereinafter Opp. II].

Since the TSA initiated its rulemaking process in July 2011, however, the agency appears to have made no meaningful progress toward compliance with this Court's mandate, nor has the agency offered a concrete timetable for the commencement of rulemaking. *Cf. United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1119 (D.C. Cir. 1986) (holding OSHA's delay in promulgating statutory rule was not "facially unreasonable" following OSHA's filing of 14-month rulemaking timetable). The TSA explains its sluggishness here by arguing, among other things, that complying with this Court's

order necessitates substantial "resources, coordination, and staffing." Opp. II at 6. If the TSA were acting reasonably to "promptly" comply with this Court's mandate, the agency's nearly year-old preliminary rule, *see* Opp. I at 5, would presumably have materialized by now in the form of a Notice of Proposed Rulemaking.

If the TSA is unable to manage its budget of nearly $8 billion in a manner that enables it to follow well-established laws, this Court should compel the agency to do so. Judicial vigilance is especially critical where, as here, the court has remanded *without vacating* a rule, pending an agency's commencement of APA rulemaking. *See, e.g., In re Core Comm'ns, Inc.*, 531 F.3d 849, 855-856 (D.C. Cir. 2008) (finding that when agency failed to respond to Court's remand without vacatur, it "effectively nullified [the Court's] determination that [the agency's] interim rules are invalid," impermissibly insulating the rules from legal challenge).

The obstacles responsible for the TSA's delayed rulemaking here have not forestalled the agency's aggressive deployment of AIT scanners in airports nationwide. In September 2011, two months *after* this Court's July 2011 ruling, the TSA purchased 300 additional AIT devices, which were expected to be in operation by the end of 2011. JOINT MAJORITY STAFF REPORT, 112TH CONG., A DECADE LATER: A CALL FOR TSA REFORM 17 (Nov. 16, 2011). The TSA plans to continue buying AIT scanners through 2013, by which time taxpayers will have spent a

cumulative $500 million on the scanners. *Id.* This course of conduct belies the agency's claim that it is so starved for resources that it cannot comply with this Court's mandate. Moreover, the TSA's purchase of hundreds of new scanners after this Court's July 2011 decision in *EPIC* suggests the agency intends to continue doing as it pleases without regard to public input or duly enacted laws.

The TSA also explains its delay here by pointing to its need to "fill[] three current vacancies for economists" prior to commencing formal rulemaking. Declaration of James S. Clarkson in Support of Respondents' Opposition to Petitioners' Motion to Enforce the Court's Mandate ¶ 19. Such personnel limitations, while real, should be considered in the context of the agency's overall capacity. "At more than 65,000 employees, TSA would rank as the 12th largest cabinet agency and is larger than the Departments of Labor, Energy, Education, Housing and Urban Development, and State, combined." JOINT MAJORITY STAFF REPORT, 112TH CONG., *supra*, at 6-7. The vast majority of the TSA's nearly $8 billion in annual appropriations is discretionary. *See* U.S. DEP'T OF HOMELAND SEC., FY 2013, BUDGET IN BRIEF 108 (2012). The TSA's 2012 annual budget exceeds that of the entire Federal Judiciary. *See Budget Hearing - The Judiciary: Hearing Before the H. Comm. on Appropriations,* 112TH CONG. 9 (2012) (statement of the Hon. Julia S. Gibbons, Chair, Comm. on the Budget of the Judicial Conference of the U.S.) (stating that the Federal Judiciary will spend $6.97 billion in

2012). While a handful of vacancies at the TSA may have reasonably justified a few months' delay in rulemaking, a multi-billion dollar agency with enough staffers to fill a mid-size city should be able to publish a notice of rulemaking on a matter of significant national importance within one year's time.

This Court should evaluate the TSA's delay here under an objective reasonableness standard. *See TRAC*, 750 F.2d at 80 (noting that "impropriety" need not "lurk[] behind agency lassitude in order to hold that agency action is unreasonably delayed"). Even if TSA is not acting in bad faith, its inability to do so is best explained by "bureaucratic inefficiency." *See Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 628-29 (D.C. Cir. 1987) (holding that "bureaucratic inefficiency" may constitute "unreasonable delay" under 5 U.S.C. § 706). While an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), an agency may not treat its legal obligations as afterthoughts. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to *disregard statutory responsibilities*.") (emphasis added).

III. In Creating the TSA, Congress Intended That the Agency Promptly Commence APA Rulemaking Regarding Explosive Detection Equipment at Airports.

In determining whether an agency has "unreasonably delayed" rulemaking, this Court considers, among other factors, whether "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute." *TRAC*, 750 F.2d at 80. The TSA's 2001 enabling statute required the agency to "submit to the appropriate congressional committees a strategic plan to promote the optimal utilization and deployment of explosive detection equipment at airports" "[n]ot later than 90 days after the date of enactment of this section." 49 U.S.C. § 44925(b); s*ee also* H.R. CONF. REP. 107-296, 58-59 (2001) ("Conferees want new, state-of-the-art security equipment installed at airports on an *expedited basis* . . . .") (emphasis added). Thus, Congress expected that the TSA would act swiftly, but not without notice. Had Congress intended for the TSA to deploy explosive detection equipment *before* engaging in notice-and-comment rulemaking, Congress could have exempted the TSA from APA rulemaking provisions. *See Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995) ("Although Congress could conceivably exempt certain components of a rule from the APA's rulemaking requirements, Congress did not do so here.").

When Congress enacted the TSA's enabling statute in 2001, it did not refer to the APA's rulemaking provisions. *See generally* Aviation

and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597. Nevertheless, as this Court held, the TSA is still subject to APA requirements, which generally govern federal administrative agencies. *See EPIC*, 653 F.3d at 7. In evaluating EPIC's petition, this Court should assume that Congress intended for the sense of urgency embodied in the TSA's enabling statute, *see* 49 U.S.C. § 44925(b), to be construed in conjunction with the APA's notice-and-comment rule-making provision, 5 U.S.C. § 553. *See* 2B Norman Singer, Sutherland Statutory Construction § 51:2 (7th ed.) ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter."); *Willapoint Oysters v. Ewing*, 174 F.2d 676, 686 (9th Cir. 1949) (because APA and the Food and Drug Act are *in pari materia*, the statutes should be read together in interpreting FDA's authority). Here, the TSA's lackadaisical approach to fundamental APA requirements is at odds with Congress's intent.

IV. Members of Congress Have Repeatedly Expressed Concerns About the TSA's Policies Regarding the Use of AIT Scanners for Passenger Screening.

This Court noted in *TRAC* that agency "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake," and that "the court should also take into account the nature and extent of the interests prejudiced by delay . . . ." 750 F.2d at 80. Here, the breadth of the interests at stake is

unusually significant, as are the practical human impacts of AIT scanners. From frequent flyers, who encounter AIT scanners in most major airports, to taxpayers, who will spend a half of a *billion* dollars on the scanners, *see* JOINT MAJORITY STAFF REPORT, 112TH CONG., *supra* at 17, the TSA's use of AIT scanners stands out among federal regulations for its substantial impact on the general public.

The gravity of public concerns about AIT scanners has been demonstrated by the widespread opposition they have provoked, especially in Congress. In 2009, when a bill to reauthorize the TSA reached the floor of the House of Representatives, over 300 Members voted for an amendment by Rep. Jason Chaffetz to bar the TSA from using "whole-body imaging technology" to screen passengers "unless another method of screening . . . demonstrates cause for preventing such passenger from boarding an aircraft." *See* H.R. REP. NO. 111-127, at 16-17 (2009); H. AMDT. 172 to H.R. 2200, 111TH CONG. (2009).

More recently, as AIT scanners have proliferated in U.S. airports, many members of Congress have expressed concern about of the scanners. In 2011, Rep. John Mica, a coauthor of the TSA's enabling statute and Chairman of the House Committee on Transportation and Infrastructure, stated "I've had [the AIT scanners] tested [by the Government Accountability Office], and to me [they are] not acceptable. If we could reveal the failure rate, the American public would be outraged." Michael Grabell, *Just How Good Are the TSA's Body*

Scanners?, PROPUBLICA, http://www.propublica.org/article/just-how-good-are-the-tsas-body-scanners (Dec. 22, 2011).

Rep. Mike Rogers, Chairman of the House Permanent Select Committee on Intelligence, told TSA Administrator John Pistole in a June 2012 congressional hearing that "[p]rogress at TSA has come at a snail's pace and in some ways has gone backwards … the American people need to see immediate changes that impact them." *TSA's Efforts to Fix Its Poor Customer Service Reputation and Become a Leaner, Smarter Agency: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 112TH CONG. 1-2 (Jun. 7, 2012) (statement of Rep. Mike Rogers). In the same hearing, Rep. Bennie Thompson, Ranking Member of the House Committee on Homeland Security, chastised the agency's responses to questions about the effectiveness of AIT scanners, suggesting that "we ought to have a fresh set of eyes [on the agency]." Corbett B. Daly, *Lawmakers lash out at TSA chief John Pistole over airport screening*, CBS NEWS (Jun. 7, 2012). Notice-and-comment rulemaking would supply just that.

This bipartisan congressional opposition to the TSA's deployment of AIT scanners underscores the "nature and extent of the interests prejudiced by delay" and its implications for "human health and welfare." *See TRAC*, 750 F.2d at 80. Concerns about the effectiveness of AIT scanners also militate against the TSA's delays, as public rulemaking may well reveal that AIT scanners *are not* an effective means of

screening passengers for explosives. If the TSA continues to buy AIT scanners while delaying rulemaking, the potential error-costs of the agency's decision-making will only grow.

CONCLUSION

For the reasons set forth above, *Amici* respectfully urge that a Writ of Mandamus be granted. In order to effectuate this Court's ruling in *EPIC v. DHS*, an order should be entered directing the TSA to commence rulemaking on the use of AIT scanners within 60 days. Absent such an order, the TSA will be able to continue to evade judicial review, leaving the public with no meaningful recourse.

Dated: July 19, 2012

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RULE 32(A) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(b) because this brief contains 2,469 words, excluding the parts of the brief exempted by Rule 32(a)(7)(b)(iii), as counted by Microsoft Word 2007, the word processing software used to prepare this brief.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type size requirements of Rule 32(a)(6) because this brief has been prepared in 14pt. Century Schoolbook, a proportionally spaced roman typeface, using Microsoft Word 2007, the word processing software used to prepare this brief.

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