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PETITION FOR RULEMAKING

Dear Counsel:

This is a rulemaking petition requesting that Department of Homeland Security's (DHS) Transportation Security Administration (TSA) conduct notice-and-comment rulemaking regarding its ban on "large electronic devices" in aircraft passenger cabins.¹ Such devices include, among other things, laptops, tablets, cameras, e-readers, and portable DVD players.² On March 21, 2017, the ban was applied to flights from ten airports in the Middle East and North Africa.³ According to press reports, this ban will soon apply to "trans-Atlantic flights to the United States," including flights from Europe.⁴ At least one major airline has already begun implementing it.

This petition seeks to have TSA conduct notice-and-comment rulemaking on the ban to enable public input and a more informed decision-making process about whether the ban is truly needed and whether its benefits outweigh its costs. Even if the ban is justifiable as applied to the ten specific airports, we question whether it is appropriate for all transatlantic flights or for those from most of Europe.

¹ See 5 U.S.C. § 553(e) (granting any "interested person the right to petition for the issuance, amendment, or repeal of a rule"); 6 C.F.R. Part 3 (authorizing petitions for rulemaking to DHS and TSA); *EPIC v. TSA*, 653 F.3d 1 (D.C. Cir. 2011) (overturning TSA's denial of petition for rulemaking).

² See *Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States*, Department of Homeland Security, March 21, 2017 <https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports>.

³ See *Fact Sheet, supra* (listing the covered airports as "Queen Alia International Airport (AMM), Cairo International Airport (CAI), Ataturk International Airport (IST), King Abdul-Aziz International Airport (JED), King Khalid International Airport (RUH), Kuwait International Airport (KWI), Mohammed V Airport (CMN), Hamad International Airport (DOH), Dubai International Airport (DXB), and Abu Dhabi International Airport (AUH).").

⁴ Kim Hjelmgaard & Doug Stanglin, *In-cabin ban on laptops, tablets on flights from Europe to U.S. appears inevitable*, USA Today, May 12, 2017 ("A U.S. ban on in-cabin laptops and tablets on trans-Atlantic flights to the United States appeared highly likely Friday after Department of Homeland Security officials briefed European governments on a proposal that would affect millions of passengers.") (<https://goo.gl/OF6HMG>).

Given the security issues that TSA cites as warranting the ban, we do not request that the agency necessarily vacate or suspend the ban during this notice and comment period.⁵ The immediacy of emerging threats should allow for what has come to be known as “interim final rulemaking,” but it does not waive the requirements of the Administrative Procedure Act.

INTEREST OF PETITIONERS

The Competitive Enterprise Institute (CEI) is a think-tank and nonprofit 501(c)(3) organization that studies the effect of regulations (including transportation-related regulations) on the economy. Many CEI staffers and Board members travel overseas for various purposes, including to attend scholarly gatherings, conduct business, or visit family in Europe and elsewhere. CEI has long been involved in transportation issues, including public-interest litigation over agency regulations and practices such as TSA security screening.⁶

Joining CEI in bringing this petition are three individuals who regularly bring laptops and other electronic devices on nonstop flights to the United States departing from airports in Europe and/or the Middle East: Iain Murray, CEI’s Vice President for Strategy; Theodore H. Frank, Director of CEI’s Center for Class Action Fairness; and Ryan Radia, CEI Research Fellow and Regulatory Counsel.

NOTICE AND COMMENT IS NEEDED ON THE ELECTRONICS BAN

The Department is obligated to conduct notice-and-comment rulemaking in order to issue this large-scale, indefinite ban on laptops or large electronic devices of the sort covered by DHS’s March 21 fact sheet. Banning such devices has as large and burdensome an effect on travelers as other policies that the D.C. Circuit Court of Appeals has ruled must be accompanied by notice-and-comment rulemaking, such as the use of advanced imaging technology to screen airline passengers. *See EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011).⁷ Moreover, the ban is likely to apply to a vast number of travelers.⁸

Banning laptops and tablets in aircraft cabins seriously impedes travelers’ ability to work and conduct business while flying, since they cannot review files, read or draft documents, or use typical office productivity applications without access to their laptops.

Banning laptops and tablets also results in financial losses, because it forces travelers to carry them in checked baggage, where these fragile electronic devices can be lost, stolen, or damaged due to baggage handling and other causes. Such damage to electronic devices in checked baggage is sufficiently common in air travel that one family canceled its flight through Morocco when the ten-airport ban went into effect, even though there

⁵ *See EPIC v. DHS*, 653 F.3d 1, 11 (D.C. Cir. 2011) (citing “need for the TSA to continue its airport security operations without interruption”).

⁶ *See, e.g., In re Competitive Enterprise Institute*, no. 15-1224, Order (D.C. Cir. Oct. 23, 2015) (ordering DHS to “submit to the court a schedule for the expeditious issuance of a final rule” regarding TSA’s passenger screening using advanced imaging technology, after TSA delayed in issuing such a rule); *CEI v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992) (overturning agency’s failure to consider the safety implications of its fuel-economy rules for cars); *CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (finding agency director’s emails were subject to CEI’s FOIA request despite being in a private email account).

⁷ The fact that the laptop ban does not apply everywhere is not a reason to dispense with the notice-and-comment process required by the Administrative Procedure Act and the D.C. Circuit’s *EPIC* decision. *See EPIC v. DHS*, 653 F.3d 1, 7 (D.C. Cir. 2011) (fact that “there are no AIT scanners at some airports and the agency retains the discretion to stop using the scanners where they are in place” was not a reason to dispense with notice-and-comment rulemaking, where “a passenger is bound to comply with whatever screening procedure the TSA is using”).

⁸ Kim Hjelmgaard & Doug Stanglin, *In-cabin ban on laptops, tablets on flights from Europe to U.S. appears inevitable*, USA Today, May 12, 2017 (ban “would impact routes that carry as many as 65 million people a year on over 400 daily flights”).

was a cancellation fee of \$200 per person, because the family viewed that as “cheaper than replacing broken/stolen laptops and cameras.”⁹

Bans like this obviously do not fall within exemptions to the Administrative Procedure Act’s notice-and-comment requirement for procedural or interpretive rules, or general statements of policy, for the reasons explained in the D.C. Circuit’s *EPIC* decision. It is not a mere procedural rule, because it imposes “new substantive burdens” on travelers and because it “substantively affects” the public “directly and significantly.” *EPIC v. DHS*, 653 F.3d 1, 506 (D.C. Cir. 2011). The ban on such devices “substantially changes the experience of airline passengers and is therefore not merely ‘interpretative,’” a reality buttressed by the fact that the statutes covering the TSA do “not specifically require” such a ban even if it is permitted or contemplated by those statutes. *EPIC*, 653 F.3d at 6–7. And it is not merely a “general statement of policy” because “a passenger is bound to comply” with the ban to board an airplane. *EPIC*, 653 F.3d at 7. Moreover, the ban is indefinite in duration and applies to all nonstop flights to the United States from at least ten airports, and may soon encompass many more airports.

The degree of harm to the traveling public from the ban is revealed by the fact that several airlines in the Middle East have begun offering business class and first class passengers courtesy tablets and laptops for in-flight use on long-haul flights to the United States. The decision by multiple airlines to undergo this considerable expense strongly suggests that passengers perceive the laptop ban to be a major inconvenience.¹⁰

The questionable safety justification for the ban is illustrated by the fact that Canada, Australia, and several European Union member countries have opted not to implement a cabin electronics ban, despite having access to the same security intelligence, as the head of the International Air Transport Association has observed.¹¹

Moreover, the ban itself may increase safety risks. Authorities such as the Federal Aviation Administration and the National Transportation Safety Board have emphasized in recent years that lithium-ion batteries, when left unattended in an airplane’s cargo hold, could overheat and result in a rapidly spreading fire capable of overpowering fire-suppression systems. *See, e.g., Nat’l Transp. Safety Bd., NTSB Issues Safety Recommendations About Lithium Batteries as Cargo on Aircraft*, Feb. 19, 2016, available at <https://www.ntsb.gov/news/press->



Delta posted this sign at the Cincinnati/Northern Kentucky International Airport on or about May 12, 2017. Gary Leff, *Delta Already Has Signs for Electronics Ban on Flights to US from Europe, Says Ban Started Today*, View from the Wing (May 12, 2017), <https://goo.gl/ALKFcf>.

⁹ See Cynthia Drescher, *Laptop ban: What it's going to cost you*, CNN, March 24, 2017 (<https://goo.gl/5Uqh17>). Businesses also view such damage as frequent and commonplace in air travel, meaning that a laptop ban is likely to lead to reduced business travel to the U.S. and losses in tourism-related revenue for the U.S. *See* Justin Bachman & Michael Sasso, *Brace for Chaos If U.S. Expands Airline Laptop Ban*, Bloomberg News, May 15, 2017 (“The threat of laptop loss—be it theft, damage, or misplacement as checked luggage—is likely to make some companies consider whether some meetings can be conducted via Skype or other virtual methods...”) (<https://goo.gl/P9AcAY>).

¹⁰ See Reuters, *Emirates Joins Etihad, Qatar in U.S. Cabin Laptop Ban Workaround*, Apr. 5, 2017, <https://goo.gl/8VaDaz>.

¹¹ Alanna Petroff, *U.S. laptop ban could hit 350 flights a day from Europe*, CNNMoney, May 11, 2017, <http://money.cnn.com/2017/05/11/news/flights-electronics-laptop-ban-europe-us/>.

[releases/Pages/PR20160209.aspx](https://www.faa.gov/newsroom/releases/Pages/PR20160209.aspx) (noting that “[l]ithium batteries carried as cargo can be ... [a] fire and explosion ignition source[,] ... [a] source of fuel to an existing fire[,] ... [and] [s]ubjected to overheating that can create an explosive condition”).¹² “Most laptops, tablets and e-readers are powered by lithium batteries which, when faulty or short-circuited, can ignite.”¹³

A pilot and former aviation official noted that:

We have had numerous incidents of devices with lithium batteries suddenly bursting into flames. If that is in the aircraft cabin, it can be dealt with. If in the aircraft hold, the fire-suppression systems are unlikely to be able to contain it and there is a lot of material to exacerbate such fires including other baggage, the aircraft structure, fuel and systems in an area which is inaccessible in flight. The consequences could be catastrophic.¹⁴

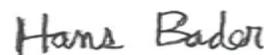
As the United Kingdom’s *Independent* newspaper, which quoted the above official, reported: “The warning was echoed by the British Airline Pilots’ Association (BALPA), which believes the danger of a blaze spreading in the aircraft hold could be greater than the security risk posed by electronic devices in the cabin.”¹⁵

To date, DHS has failed to explain how its ban can be reconciled with these risks. Moreover, the agency has not explained why the security risks of laptops in passenger cabins are greater than the risks of those laptops in checked luggage.

For the foregoing reasons, we in this petition request that the TSA conduct notice-and-comment rulemaking regarding its ban on large electronic devices in aircraft passenger cabins.

Dated: May 16, 2017.

Sincerely,



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¹² See also Barbara Peterson, *The FAA Is Freaked Out About Lithium-Ion Batteries on Planes*, Popular Mechanics, Oct. 19, 2015, <http://www.popularmechanics.com/flight/a17824/faa-lithium-ion-batteries/> (“Lithium-ion powers our phones, our computers, and even our cars. But on a moving aircraft they could be deadly, the agency said this month. The risk is that, if left unattended, the batteries could overheat and burst into flames, and that in the confines of a cargo hold a battery fire could spread so quickly that it could overpower existing fire-suppression systems.”).

¹³ Simon Calder, *Donald Trump’s Laptop Ban Could Lead to ‘Catastrophic’ Fire on Flight, Airline Pilots Say*, UK Independent, May 15, 2017 (<https://goo.gl/nl268d>).

¹⁴ Calder, *supra* (quoting Laurie Price, pilot and former government Aviation Advisor).

¹⁵ Calder, *Donald Trump’s Laptop Ban Could Lead to ‘Catastrophic’ Fire on Flight, Airline Pilots Say* (quoting Laurie Price).