[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: COMPETITIVE ENTERPRISE INSTITUTE, NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE RUTHERFORD INSTITUTE, LAWSON BADER, and MARCSCRIBNER, Petitioners.	No. 15-1224

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

For the reasons set forth below, respondents Jeh Charles Johnson, Secretary of Homeland Security, and the Department of Homeland Security hereby oppose the petition for a writ of mandamus to enforce this Court's mandate of September 21, 2011, in *Electronic Privacy Information Center v. Department of Homeland Security*, No. 10-1157.

As the accompanying declaration of Eddie D. Mayenschein ("Mayenschein Decl.") establishes, respondents are complying diligently and in good faith with the Court's mandate to conduct notice-and-comment rulemaking with respect to the Advanced Imaging Technology ("AIT") program, and the stringent requirements for mandamus relief therefore are not satisfied. *See, e.g.*, Mayenschein Decl. ¶¶ 7, 18, 31 (emphasizing that TSA has consistently assigned the highest possible priority to the AIT rulemaking, in accordance with the Court's opinion). The

Court has previously denied three requests for mandamus relief in connection with this matter – at an earlier phase of the rulemaking proceedings, with respect to publication of the Notice of Proposed Rulemaking ("NPRM") – and the same result should obtain here, regarding the equally unjustified request for mandamus relief with respect to publication of the Final Rule, which is expected shortly.

In its last order denying mandamus relief with respect to publication of the NPRM, in *In re: Electronic Privacy Information Center*, No. 12-1307, ECF Doc. #1396406 (D.C. Cir. Sept. 25, 2012), the Court relied upon the government's representation regarding the projected publication date of the NPRM, and stated "we expect that the NPRM will be published before the end of March 2013." *Id*. The government met this expectation. *See* 78 Fed. Reg. 18287 (Mar. 26, 2013).

The comment period closed on June 24, 2013, and produced "over 5,000 submissions from interested parties." Mayenschein Decl. ¶ 19. Since that date, the government has been working assiduously to process the many comments and to complete the Final Rule for publication. As the Mayenschein Declaration establishes, however, the process is necessarily complicated and time-consuming, particularly in light of resource limitations, competing regulatory responsibilities, security concerns, and the sheer volume of data involved. Accordingly, the petition should be denied.

STATEMENT

1. In *Electronic Privacy Information Center v. DHS*, No. 10-1157 (D.C. Cir.), the petitioners filed a petition for review in July 2010 together with a motion to enjoin the use of AIT as a primary screening method at airport checkpoints pending this Court's review. The Court denied the motion, and, after briefing and oral argument, issued its decision on July 15, 2011. *See Electronic Privacy Information Center v. DHS*, 653 F.3d 1 (D.C. Cir. 2011) ("*EPIC*"). The Court rejected all of the petitioners' substantive challenges under the Fourth Amendment, the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, the Privacy Act 5 U.S.C. § 552a, the privacy protections in the Homeland Security Act, 6 U.S.C. § 142(a)(1), (4), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000b et seq. *EPIC*, 653 F.3d 1. The Court concluded, however, that TSA should address the use of AIT through notice-and-comment rulemaking pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and "remand[ed] this matter to the agency for further proceedings." *EPIC*, 653 F.3d at 8; *see also id.* at 3, 11. The Court further held that "[b]ecause vacating the present rule would severely disrupt an essential security operation, however, and the rule is, * * * otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." *Id.* at 8 (citation omitted); see also Judgment in No. 10-1157 (July 15, 2011) (ordering in

pertinent part that "the rule be remanded to TSA for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court also rejected the petitioners' request to "enjoin the Agency Rule until DHS undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) in No. 10-1157, 39.

On August 29, 2011, the *EPIC* petitioners sought en banc review. The Court denied the petition on September 12, 2011, and the mandate issued on September 21, 2011.

2. Five weeks after the issuance of the mandate, on October 28, 2011, the *EPIC* petitioners filed their first motion to enforce the mandate. The Court denied EPIC's motion on November 16, 2011. Five weeks after the Court's order issued, on December 23, 2011, the *EPIC* petitioners again asked the Court to enforce its mandate and to require issuance of a proposed rule by a date certain. The Court denied that motion on February 2, 2012. Thereafter, on July 17, 2012, EPIC filed its third request for mandamus relief in the eleven months since the issuance of the Court's mandate of September 21, 2011. *In re: Electronic Privacy Information Center*, No. 12-1307 (D.C. Cir.). By order of September 25, 2012, the Court relied upon the government's representation regarding the projected publication date of the NPRM, and stated "we expect that the NPRM will be published before the end of March 2013." *In re: Electronic Privacy Information Center*, No. 12-1307, ECF

Doc. #1396406 (D.C. Cir. Sept. 25, 2012). The government met this expectation, *see* 78 Fed. Reg. 18287 (Mar. 26, 2013), and on June 24, 2013, the 90-day comment period closed, after the submission of more than 5,000 comments. Mayenschein Decl. ¶ 19.

3. On July 15, 2015, petitioners filed the instant petition for a writ of mandamus to enforce the Court's mandate of September 21, 2011. They urged the Court to "issue a writ of mandamus to compel the Secretary of Homeland Security to complete TSA's rulemaking in the matter of passenger screening using advanced imaging technology within 90 days." Petition for a Writ of Mandamus to Enforce this Court's Mandate, at 22, No. 15-1224, ECF Doc. #1562694 (D.C. Cir.).

4. The Mayenschein Declaration fully sets forth the history and explains the complexities of the AIT rulemaking process, and demonstrates that "TSA has consistently assigned the AIT rulemaking the highest possible priority." Mayenschein Decl. ¶ 7 (citation omitted). As the Assistant Administrator for the Office of Security Policy and Industry Engagement, Mr. Mayenschein is intimately familiar with TSA's rulemaking process. *See* Mayenschein Decl. ¶¶ 3-9. Briefly, that process involves three phases: (1) development of the draft regulation at TSA; (2) review and concurrence by the Department of Homeland Security ("DHS"), TSA's parent agency; and (3) review by the Office of Management and Budget

("OMB"), which has 90 days to review a draft regulation. The same three-step process occurs with respect to development of the NPRM and promulgation of the Final Rule. *See* Mayenschein Decl. ¶¶ 8-14.

a. With respect to the NPRM, "TSA took its first steps towards issuance of the required NPRM within days of the issuance of this Court's opinion" of July 11, 2011. *Id.* at ¶ 13. Thereafter, although "the process necessary for TSA to issue a NPRM typically requires approximately three years, with longer timelines required for more complex rules," *id.*, TSA not only issued the NPRM less than two years after the Court's opinion, but also met the Court's express expectation that the NPRM would be published by the end of March 2013.

b. "In the time since the AIT NPRM was issued, TSA has continued with equal diligence toward an accelerated promulgation of the final rule." *Id.* at § 14. "Completion of a final rule regarding TSA's use of AIT has been and remains among the agency's highest regulatory priorities." *Id.* at ¶ 15. Nonetheless, the process is necessarily time-consuming, involving extensive review of comments and data, coordination with other governmental parties involved in the regulatory process, and balancing with other pressing regulatory assignments. *See id.* at ¶¶ 14-23.

Moreover, the accumulation of new data from the ongoing AIT program during the rulemaking process has made evaluation of program costs more

challenging, and has required continuous updating of the cost model and regulatory impact analysis. *See id.* at ¶¶ 24-27. "[A]dding a more quantitative analysis of the security benefits of AIT screening to the final rule, as requested by several, commenters[,]" has also proved challenging, *id.* at ¶ 28, and "[t]he prohibitions on the public disclosure of classified information and SSI [["Sensitive Security Information"] . . . have further complicated the process of applying a more quantitative approach to the security benefits of AIT." *Id.* at ¶ 29.

Nonetheless, "TSA has continually made progress towards issuing the final rule," and "[t]he AIT final rule is currently in intradepartmental review and concurrence." *Id.* at ¶ 30. It is expected to "enter final clearance for DHS leadership approval in the next few months," after which "DHS will formally submit the draft regulation to OMB for review under Executive Order 12866," *id.* at ¶ 30, a process that generally takes 90 days. *See* Mayenschein Decl. ¶ 9. The promulgation of the AIT Final Rule remains among the highest regulatory priorities of both TSA and DHS. *Id.* at ¶ 31.

REASONS FOR DENYING THE PETITION

1. Petitioners seek a writ of mandamus to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). The Court's consideration "'starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act.'" *In re*

Core Commc'ns, Inc., 531 F.3d 849, 857 (D.C. Cir. 2008) (quoting *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000)). Because mandamus is an extraordinary remedy, however, the Court requires "similarly extraordinary circumstances to be present before [it] will interfere with an ongoing agency process." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999).

"'The central question in evaluating a claim of unreasonable delay' is 'whether the agency's delay is so egregious as to warrant mandamus.'" *Core Commc'ns*, 531 F.3d at 855 (quoting *Telecomms. Research & Action Ctr. v. FCC* ("TRAC"), 750 F.2d 70, 79 (D.C. Cir. 1984)). "'There is no per se rule as to how long is too long to wait for agency action,'" *id.* (quoting *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)), and the "[t]he first and most important factor is that the time agencies take to make decisions must be governed by a 'rule of reason.'" *Id.* at 855 (quoting *TRAC*, 750 F.2d at 80)).[1]

[1] In *TRAC*, the Court identified six factors to provide "useful guidance in assessing claims of agency delay." 750 F.2d at 80. The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason[]"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statute may supply the content for the rule of reason; (3) delays that might be reasonable in

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In applying that rule of reason in *Core Communications*, the Court found a writ warranted when the Federal Communications Commission had been enforcing for seven years interim rules that were to last only three years, and the agency had not acted six years after the Court had held for the second time that the preferred legal justification was invalid. Similarly, in *In re People's Mojahedin of Iran*, 680 F/3d 832 (D.C. Cir. 2012) (*PMOI*), the Court issued a writ after concluding that "[w]e have been given no sufficient reason why the Secretary, in the last 600 days, has not been able to make a decision which the Congress gave her only 180 days to make." *Id.* at 838. On the other hand, the Court has also made clear that even a finding that the agency has violated a statutory deadline by some eight years "does not end the analysis. * * * Equitable relief, particularly mandamus, does not necessarily follow a finding of a [statutory] violation * * *." *United Mine Workers*

> the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by the delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Id. (internal citations omitted).

of Am. Int'l Union, 190 F.3d at 552 (alteration in original) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)).

The Court has imposed fixed deadlines for agency rulemaking only in rare circumstances involving significantly egregious delays and/or a significant risk of severe personal injury. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419 (a six-year delay in acting on a coalition of regulated organizations' petition to consult justified a 45-day deadline to comply); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (in view of "extraordinary circumstances," Court issued mandamus requiring FCC to rescind its personal attack and political editorial rules, where "the Commission has delayed final action for two decades" and also failed to respond appropriately to the Court's remand); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d1150, 1157-59 (D.C. Cir. 1983) ("Three years from announced intent to regulate to final rule is simply too long given the significant risk of grave danger [ethylene oxide] poses to the lives of current workers and the lives and well-being of their offspring."); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324-25, 345-46 (D.C. Cir. 1980) (in case involving challenge to tariff rates that FCC had found unjustified in 1976, but which the Commission nonetheless allowed to remain in effect for at least four years thereafter, Court ordered FCC to propose within thirty days "a schedule for the expeditious resolution of this controversy within a reasonable time"). In

contrast, the four-month deadline imposed in *PMOI* (which is featured in the mandamus petition, *see* Pet. 18), involved a remand requiring three discrete actions for which sole responsibility was assigned to the Secretary of State, *see* 680 F.3d at 833-34 (discussing 8 U.S.C. § 1189(a)),[2] rather than a rulemaking, which entails a deliberative, complex and sophisticated process that requires a series of review by different entities before completion.

2. Petitioners have identified no delay "so egregious as to warrant mandamus." *Core Commc'ns*, 531 F.3d at 857. Indeed, they have identified no delay at all and no reason for the Court to exercise its supervisory powers. Respondents have been proceeding conscientiously to produce the Final Rule for publication, and there is no basis for extraordinary relief in this case.

a. Petitioners' claim that the six *TRAC* factors support issuance of the writ of mandamus (*see* Pet. 12-17) is misguided. Each of the examples petitioners cite is flawed. We address them *seriatim*.

First, petitioners claim that "TSA has taken an unreasonably lengthy amount of time to complete its body scanner rulemaking in light of the circumstances[,]"

[2] This Court's opinion directed the Secretary of State to provide PMOI access to unclassified material relied on in support of the decision to maintain PMOI's listing as a Foreign Terrorist Organization, to "indicate in her administrative summary which sources she regards as sufficiently credible," and to "explain to which part of section 1189(a)(1)(B) the information she relies on relates." *PMOI*, 680 F.3d at 835 (internal quotations omitted).

comparing it to TSA's interim rulemaking process concerning passenger security service fees. Pet. 12-13. But petitioners' comparison is inapt: whereas the purpose of the current rulemaking effort is to provide a forum for public comment, the passenger security service fee interim rule was promulgated without notice and comment (consistent with specific statutory authorization to do so). When TSA subsequently engaged in a more formal notice-and-comment process for the passenger security fee rule, prior to issuance of the 2015 interim final rule, TSA only received "approximately 600 public submissions as part of that rulemaking[,] . . . less than one eighth the number of submissions received in response to the AIT NPRM." Mayenschein Decl. ¶ 21 (citation omitted). By contrast to both of these passenger fee rule efforts, TSA received more than 5,000 comments, including some that "offered elaborate and multifaceted challenges to TSA's use of AIT," in response to the AIT rulemaking this Court mandated. *See id.* at ¶ 23.

Second, petitioners mistakenly rely on statutory admonitions exhorting the Secretary to prioritize the development of AIT-type technology, and giving TSA a deadline to submit to Congress a "strategic plan" for doing so. Pet. 13-14. But these congressional exhortations, with which the government substantially complied years ago, have nothing to do with the APA rulemaking process at issue here, as petitioners explicitly acknowledge. *See id.* at 13 (recognizing that "Congress never specifically addressed the timetable by which TSA should

conduct APA rulemaking with respect to body scanners"). Certainly, "Congress viewed AIT as an important, time-sensitive priority," *id.*, and TSA responded accordingly. But that has nothing to do with the reasonableness of TSA's approach to the APA rulemaking process here.

Third, petitioners assert that "[t]his is a quintessential health-related regulation, as its direct objective is preventing loss of live aboard commercial airliners." Pet. 14. But petitioners' characterization of the "health-related" concern departs from the safety issue that animated this Court's conclusion that rulemaking was warranted. Indeed, the fact that the AIT system has already been superseded by the Automated Target Recognition ("ATR") screening system – an improvement on the original AIT system, in that it does not produce an image of the traveler's body, *see* 78 Fed. Reg. at 18293-94 – directly mitigates petitioners' two principal concerns (privacy and safety) that led this Court to conclude that a rulemaking was warranted. More specifically, with TSA's transition to a fleet of millimeter-wave-based AIT systems that use ATR exclusively, passengers no longer experience being screened by an AIT system that relies on ionizing radiation (the backscatter system) or requires a TSA employee to view an AIT-system-created image of a passenger's body. The health of the flying public is being well protected, even as its privacy is being respected.

More fundamentally, however, petitioners have not identified any "significant risk of grave danger" to human life or well-being directly precipitated by TSA's use of AIT. *See Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d at 1157-59. Petitioners' speculation that the AIT system does not provide adequate protection to the health of the traveling public does not rise to the level of a significant risk of grave danger, as this Court used that term in *Pub. Citizen Health Research Grp.v. Auchter*, *supra*. In that case, the Court relied upon evidence of harm from a known carcinogenic and mutagenic chemical to those exposed to it. Here, by contrast, the original petitioners for notice-and-comment rulemaking pointed to the concerns about ionizing radiation in the AIT systems that TSA was using as a primary screening device; since those backscatter systems are no longer present at TSA's airport checkpoints, the only appropriate health-related concern that the present petitioners can point to is substantially abated. Petitioners' more generalized example of a "health-related" concern – the danger posed by terrorist attacks on aviation – is of a different type and quality from the concerns that drive "quintessential health-related" regulations, and it too is further abated by the fact that to date, TSA has been doing a very effective job of protecting the traveling public against the myriad threats to its security.[3]

[3] The recent report cited by petitioners concerning the alleged inadequacy of

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Fourth, as for the risk of delaying a higher or competing priority, petitioners' reliance upon the size of TSA's workforce is misplaced. Contrary to petitioners' suggestion, TSA's resources in the rulemaking area are not vast, but in fact are very limited. *See* Mayenschein Decl. ¶ 7 ("TSA maintains a small staff of regulatory attorneys, economists, and analysts to support its rulemaking efforts," and "[t]his small staff must balance TSA's numerous outstanding regulatory priorities, including development and issuance of regulations required by statute."). Moreover, neither the number of TSA "support" employees tasked with "headquarters administration" (Pet. 15), nor the number of attorneys throughout the Department of Homeland Security sheds any light on the reasonableness of any particular rulemaking process, let alone the one at issue here. Rather, the Mayenschein Declaration shows that the AIT rulemaking has been, and continues to be, conducted in an expeditious fashion.

Fifth, there is no merit to the suggestion that the interests of airline passengers have been adversely affected by the AIT rulemaking process. Pet. 16. Travelers are being carefully screened, and the ATR system is safeguarding their

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the AIT screening process must be weighed against the absence of *any* actual, harmful lapses in the AIT system since TSA began using that system as a primary screening mechanism in 2010. Moreover, as petitioners concede, even if there have been lapses in TSA's overall security program, the most appropriate response would be for the agency to give them "careful consideration" (Pet. 22), not for the Court to impose an arbitrary deadline on this rulemaking.

privacy. They have suffered no cognizable injury warranting the extraordinary step of mandamus relief.

Sixth, petitioners' assertion that "TSA has clearly demonstrated its intent to ignore the law with respect to its use of AIT as primary screening" (Pet. 16) is untenable. Petitioners incongruously seek to measure the ostensible delay in the present rulemaking from a point that predates this Court's determination that a rulemaking was necessary. *See id.* at 19 ("[T]he EPIC-led coalition formally petitioned the Secretary to conduct rulemaking with respect to body scanners in April 2010."). It bears emphasis, however, that TSA did not initiate notice-and-comment rulemaking prior to this Court's decision on the merits because of its good-faith belief that it was not subject to that requirement under the APA – a position that this Court held to be "substantially justified" in its Order of February 15, 2012, ECF Doc. No. 1358453, denying the *EPIC* petitioners' application for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). *See also* Order of May 3, 2012, ECF Doc. No. 1372216 (denying request for reconsideration of order denying EAJA fees). Furthermore, the declarations TSA submitted in opposition to the mandamus requests that preceded issuance of the NPRM demonstrated that TSA was proceeding diligently under demanding circumstances, *see* Mayenschein Decl. ¶ 12, and persuaded this Court to deny three

requests for mandamus relief.[4] TSA then met the Court's expectation with respect to the timing of publication of the NPRM, and the government is now in the process of addressing more than 5,000 comments, and finalizing the rule. A complex, rigorous process is now nearing completion. The agency neither suffers from "unusually severe 'bureaucratic inefficiency,'" nor is it "deliberately avoiding compliance with this Court's mandate." Pet. 17 (citation omitted).

b. Finally, for the reasons already set forth, petitioners' contention that "TSA's failure to comply with this Court's mandate seriously injures the public interest" (*id.* at 20; capitalization and bolding omitted)) is equally wide of the mark. In a nutshell, TSA is complying with the Court's mandate and effectuating the public interest. That interest is served by allowing the rulemaking process to proceed to its natural terminus, which is now approaching, instead of artificially accelerating it.

[4] For the Court's convenience, we note that the earlier declarations – of John P. Sammon in No. 12-1307, and James Clarkson in No. 10-1157 – can be found at ECF Doc. No. 1392233 and ECF Doc. No. 1341159, respectively.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

/s/ Mark B. Stern
MARK B. STERN
(202) 514-5089

/s/ John S. Koppel
JOHN S. KOPPEL
(202) 514-2495
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7264
Washington, D.C. 20530

SEPTEMBER 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2015, I electronically filed the foregoing Response in Opposition to Petition for Writ of Mandamus with the Clerk of the Court by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

/s/ John S. Koppel
JOHN S. KOPPEL

UNITED STATES COURT OF APPEALS
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DECLARATION OF EDDIE D. MAYENSCHEIN
IN SUPPORT OF RESPONDENT'S OPPOSITION
TO PETITION FOR WRIT OF MANDAMUS

I, EDDIE D. MAYENSCHEIN, pursuant to 28 U.S.C. § 1746, hereby state and declare as follows:

1. I am over the age of 18 and provide this declaration based upon my personal knowledge and information available to me in my official capacity as the Assistant Administrator for the Office of Security Policy and Industry Engagement (OSPIE) at the Transportation Security Administration (TSA), a component agency of the United States Department of Homeland Security (DHS).

2. I have served as the Assistant Administrator for OSPIE since April 2014. Prior to becoming Assistant Administrator, I served as the Deputy Assistant Administrator of OSPIE from July 2013 to April 2014. Before becoming Deputy Assistant Administrator, I served as an aviation expert in OSPIE and as the Federal Security Director for Washington Dulles International Airport and the General Manager of Operations Performance in TSA's Office of Security Operations. I have been employed with TSA since February 2009. Before joining TSA, I had a career as an aviation industry executive and commercial, Coast Guard, and military pilot. I served as a pilot for US Airways for 21 years, and I have logged more than 20,000

accident and incident free hours piloting military and Coast Guard aircraft. In sum, I bring over 40 years of aviation and management experience to my current role as Assistant Administrator for OSPIE.

3. As Assistant Administrator for OSPIE, I lead a unified effort to protect and secure, through public-private networks, the Nation's transportation systems, including aviation, rail, transit, highway, and pipeline systems. OSPIE accomplishes this by developing risk-reducing security policies, plans, and procedures.

4. One of my responsibilities as Assistant Administrator for OSPIE is to assist in the support and coordination of TSA's rulemaking efforts. OSPIE has responsibility within TSA for the analysis of regulatory actions, including analysis required for the development and preparation of notices of proposed rulemaking (NPRMs) and final rules. OSPIE carries out this responsibility in coordination with other TSA offices, including the Office of Chief Counsel, the Office of Security Capabilities, and other program offices as appropriate depending on the subject matter of a particular regulatory action.

The Regulatory Process at TSA

5. As a result of performing my rulemaking support and coordination duties, I am well-acquainted with the requirements for notice-and-comment rulemaking and the various regulatory efforts that TSA currently has in progress.

6. I am also familiar with the process by which TSA develops and clears regulations. In general, an interdisciplinary group of subject-matter experts—including policymakers, security experts, attorneys, and economists—develops a regulation and any associated analyses, such as the economic analysis. For most regulations, as for the one at issue in this case, different TSA program offices are assigned primary responsibility for developing different parts of

necessary regulatory documents. TSA must vet all aspects of the documents for accuracy, legal sufficiency, compliance with requirements related to Sensitive Security Information (SSI), *see* 49 C.F.R. Part 1520, and concurrence by affected program offices, among other issues.

7. TSA maintains a small staff of regulatory attorneys, economists, and analysts to support its rulemaking efforts. This small staff must balance TSA's numerous outstanding regulatory priorities, including development and issuance of regulations required by statute. *See, e.g.*, Department of Homeland Security Agency Rule List for Spring 2015 Unified Agenda of Regulatory and Deregulatory Actions, *available at* http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600&Image58.x=72&Image58.y=18 (listing TSA's and DHS's ongoing regulatory actions). As described further below, TSA has consistently assigned the AIT rulemaking the highest possible priority. *See, e.g.*, Department of Homeland Security Fall 2014 Statement of Regulatory Priorities, *available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201410/Statement_1600.html (listing the AIT rulemaking as a TSA priority for fiscal year 2015); Department of Homeland Security Fall 2013 Statement of Regulatory Priorities, *available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201310/Statement_1600.html (listing the AIT rulemaking as a TSA priority for fiscal year 2014).

8. Once TSA leadership approves a draft regulation, TSA submits the regulation (and any associated documents such as the economic analysis) to DHS for intradepartmental review and concurrence. Intradepartmental review and concurrence involves review of policy and operational concerns from other components within DHS, followed by legal and economic

review of the document by DHS headquarters staff. DHS leadership then has an opportunity to review the draft regulation.

9. Following DHS leadership approval of a draft regulation, DHS submits the draft regulation to the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) for review under Executive Order 12866, *Regulatory Planning and Review*. Pursuant to executive order, OMB has 90 days to review a draft regulation. OMB's review can be shorter or longer, depending on the circumstances of a given regulation.

Development and Clearance of TSA's Proposed Advanced Imaging Technology (AIT) Rule

10. I am familiar with this Court's opinion in *Electronic Privacy Information Center, et al. v. DHS*, No. 10-1157, 653 F.3d 1, issued on July 15, 2011, which directed TSA to promptly begin a notice-and-comment rulemaking process regarding the use of AIT scanners to screen individuals at airport security checkpoints.

11. To comply with the Court's order, TSA diligently worked to publish a NPRM in the Federal Register on March 26, 2013. *See* 78 Fed. Reg. 18,287. The NPRM, titled "Passenger Screening Using Advanced Imaging Technology" (hereinafter, the "AIT NPRM"), proposed to amend TSA's regulations to "clarify that TSA may use advanced imaging technology (AIT) to screen individuals at security screening checkpoints," 78 Fed. Reg. at 18,287, by adding a new paragraph (d) to TSA's existing rule codified at 49 C.F.R. § 1540.107.

12. There were a number of substantial requirements that TSA had to observe and satisfy before issuing the AIT NPRM. Issuance of a NPRM is a complex deliberative process that requires significant time and resources. The details of TSA's efforts to issue the AIT NPRM, and the specific challenges and complications the agency faced along the way, are set forth in a declaration from former Assistant Administrator for OSPIE John P. Sammon dated

August 29, 2012, and filed with this Court in connection with *In re Electronic Privacy Information Center*, No. 12-1307, and a declaration from former OSPIE Intermodal Security Support Division Acting General Manager James Clarkson dated November 9, 2011, and filed with this Court in connection with a motion to enforce the Court's mandate in *Electronic Privacy Information Center, et al. v. DHS*, No. 10-1157.

13. TSA issued the AIT NPRM on March 26, 2013. As explained in the declaration of James Clarkson, the process necessary for TSA to issue a NPRM typically requires approximately three years, with longer timelines required for more complex rules. As Mr. Clarkson indicated, TSA took its first steps towards issuance of the required NPRM within days of the issuance of this Court's opinion, and TSA's ultimate completion of the AIT NPRM less than two years after the Court's mandate reflects the high priority given to the AIT rulemaking and is indicative of the agency's considerable efforts to overcome the challenges and complications of proposing a rule for a maturing technology.

Prioritization of the AIT Final Rule

14. In the time since the AIT NPRM was issued, TSA has continued with equal diligence toward an accelerated promulgation of the final rule. Preparing to issue a final rule requires taking many specific steps, including considering, summarizing, and responding to comments submitted by interested parties in response to the NPRM; conducting and, if necessary, updating required economic analyses; coordinating with DHS to facilitate intradepartmental and leadership concurrence; and coordinating with OMB to facilitate required review. The process set forth in the declarations of John Sammon and James Clarkson, and paragraphs 5 through 9 above, must again be followed to prepare the final rule. Under Executive Orders 12866 and 13563 and laws such as the Regulatory Flexibility Act, the required process

includes consideration of alternatives and a careful cost-benefit analysis; analysis of the economic impact of the rule; preparing a thorough explanation of the need for the rule; review by TSA's parent Executive Branch Department, DHS; and review by OMB.

15. Completion of a final rule regarding TSA's use of AIT has been and remains among the agency's highest regulatory priorities. Nevertheless, TSA cannot devote its limited rulemaking resources to the AIT NPRM to the exclusion of all others. Although TSA has, since AIT NPRM was issued, published three final rules and two interim final rules,[1] these other regulatory efforts were statutorily mandated, were necessary to respond to unforeseen statutory changes, or were necessary to address security vulnerabilities.

16. For example, the competing rulemaking effort regarding "Aircraft Repair Station Security," 79 Fed. Reg. 2,119 (Jan. 13, 2014), was prioritized to satisfy an outstanding congressional mandate and avoid potentially significant adverse effects on aviation security. Publication of this rule involved extensive regulatory development and analysis, including consideration of 177 public submissions received in response to an earlier NPRM, *id.* at 2,122, and substantial re-drafting and additional analysis as a result.

17. Another competing rulemaking effort, titled "Adjustment of Passenger Civil Aviation Security Service Fee," 79 Fed. Reg. 35,462 (Jun. 20, 2014), *as corrected by* 79 Fed. Reg. 36,432 (Jun. 27, 2014), was mandated by Congress in December 2013. *See* Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 601, 127 Stat. 1165, 1187-88 (Dec. 26, 2013).

[1] *See* Adjustment of Passenger Civil Aviation Security Service Fee, 80 Fed. Reg. 31,850 (Jun. 4, 2015) (interim final rule); Cessation of the Aviation Security Infrastructure Fee, 79 Fed. Reg. 56,663 (Sep. 23, 2014) (final rule); Adjustment of Passenger Civil Aviation Security Service Fee, 79 Fed. Reg. 35,462 (Jun. 20, 2014) (interim final rule), *as corrected by* 79 Fed. Reg. 36,432 (Jun. 27, 2014); Aircraft Repair Station Security, 79 Fed. Reg. 2,119 (Jan. 13, 2014) (final rule); Provisions for Fees Related to Hazardous Materials Endorsements and Transportation Worker Identification Credentials, 78 Fed. Reg. 24,353 (Apr. 25, 2013) (final rule).

Congress directed that TSA publish a regulatory change by July 2014, just seven months after the statute's enactment. *See id.* at § 601(d). Failure to meet this statutory deadline would have created problematic uncertainty about a major source of fee revenue for the federal government. TSA timely published an interim final rule on June 20, 2014.

18. At my direction and the direction of my predecessor and subordinates, publication of the AIT final rule has remained a top priority from the time the comment period closed through the date of this declaration. Although work on the above-referenced rulemaking efforts has unavoidably displaced work on the AIT rule for limited periods of time, TSA has consistently prioritized development and clearance of the AIT final rule consistent with the Court's opinion.

Development and Clearance of the AIT Final Rule

19. Following publication of the AIT NPRM, TSA had a three-month comment period, which closed on June 24, 2013. During that period, TSA received over 5,000 submissions from interested parties. This number is dramatically higher than the number of public submissions that TSA typically receives in response to a NPRM. For comparison, prior to the AIT NPRM, TSA's most recent significant rulemakings affecting all airline passengers were for the Secure Flight Program and the Adjustment of Passenger Civil Aviation Security Service Fee. These rulemakings involved only a small fraction of the number of public submissions received in response to the AIT NPRM.

20. The Secure Flight Program allows TSA to pre-screen individuals before they are issued a boarding pass allowing them to enter airport sterile areas or board aircraft. Through Secure Flight, TSA compares a passenger's or non-passenger airport companion's information to the No-Fly and Selectee List components of the federal government's consolidated and

integrated terrorist watchlist, and when warranted by security considerations, against other watchlists maintained by TSA or other federal agencies.[2] *See* Secure Flight Program, 73 Fed. Reg. 64,018 (Oct. 28, 2008) (final rule). TSA also uses the Secure Flight Program to implement the DHS Traveler Redress Inquiry Program (TRIP), which provides individuals with a unique redress number that they can use when making travel reservations to help avoid being misidentified as a person on a watchlist. To accomplish this, the program requires passengers to provide their full name, gender, and date of birth when making airline reservations in order to conduct the checks outlined above. *See* 49 C.F.R. § 1560.101(a)(1). TSA then uses the results of Secure Flight pre-screening in order to help determine the appropriate level of physical security screening that an individual should receive at an airport security checkpoint. Despite the central importance of the Secure Flight Program in every airline passenger's airline reservation and airport screening experience, TSA received fewer than 500 public submissions in response to the Secure Flight NPRM. *See* Secure Flight Program NPRM Docket Folder, *available at* http://www.regulations.gov/#!docketDetail;D=TSA-2007-28572.

21. The number of public submissions received in response to the AIT NPRM also dwarfs the number received as part of the Adjustment of Passenger Civil Aviation Security Service Fee rulemaking, which also affects all airline passengers and was the subject of widespread media coverage and a campaign by air carriers to encourage the public to submit comments. TSA received approximately 600 public submissions as part of the Security Service Fee rulemaking; this is less than one eighth the number of submissions received in response to

[2] One example would be when the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) has identified to the Department of Homeland Security (DHS) persons who should not be permitted to board an aircraft due to public health concerns.

the AIT NPRM. *See* Passenger Civil Aviation Security Service Fees Rulemaking Docket Folder, *available at* http://www.regulations.gov/#!docketDetail;D=TSA-2001-11120.

22. The very large number of comments received in response to the AIT NPRM has added time to the process of issuing a final rule. To assist with managing the high volume, TSA hired a contractor to help expedite review, consolidation, and summary of public comments. The contractor conducted its review over the course of two months and provided TSA with a summary of issues raised by commenters at the end of August 2013.

23. Overall, the comments TSA received in response to the AIT NRPM ran the gamut from expressions of support for TSA's use of AIT, to succinct demands that TSA be disbanded, to extensive attacks on TSA's proposed use of AIT raising numerous complicated issues. The breadth of issues raised by commenters overall has required TSA to leverage expertise from several different program offices in order to evaluate them, conduct research necessary to address certain issues raised, determine if a change in the proposed rule was warranted, and prepare the appropriate response. Additionally, some comments offered elaborate and multifaceted challenges to TSA's use of AIT. Attempting to account for both the sheer volume of comments as well as the complexity of some has led to the current working draft of the preamble (which contains the responses to comments) running to more than 100 pages.

24. Another factor adding time to the process of developing a final rule has been the difficulty of reevaluating the cost estimates for the required regulatory impact analysis. In a typical analysis, an agency provides economists with data and assumptions from which they can project future costs resulting from the rule. By contrast, because the Court permitted TSA to continue to use AIT while conducting the AIT rulemaking, economists had more extensive historical cost data on which to rely in order to project future costs. In order to proceed with the

final rulemaking effort, additional historical data from multiple sources, some of which were not available for the NPRM effort, had to be collected and aggregated in different ways.

25. Interpreting and incorporating this data into the regulatory analysis ultimately presented a significant challenge. For example, AIT was developed and deployed as part of TSA's Passenger Screening Program (PSP). Some historical PSP cost reporting did not itemize costs associated with particular screening technologies. Economists therefore had to invest substantial time delving into this cost reporting data to isolate the portion of the overall undifferentiated total cost that was attributable to AIT.

26. TSA's continued (and expanded) use of AIT since this Court's ruling and the issuance of the NPRM led to a second factor that complicated the regulatory impact analysis that had to be conducted before the rule could be issued. Because of the ongoing deployment of AIT, the economists working on the AIT rulemaking have had to continuously update and revise their analysis to remain consistent with the current PSP. These updates involve updating the cost model and regulatory impact analysis with new data as well as revising prior assumptions in light of real-world data. The updates are necessary in order to ensure that the regulatory impact analysis is accurate at the time the final rule is published. Modifying assumptions has added significant time to the analysis.

27. For example, the expected life cycle of an AIT unit was originally estimated at eight years, but performance from TSA's ongoing AIT screening operations at checkpoints indicated a longer life cycle. Based on this, TSA revised the assumed life cycle from eight years to ten years. Because the regulatory impact analysis used the duration of an AIT scanner's life cycle as its study period, revising the length of the life cycle required revising the entire analysis. Most significantly, the economists had to forecast costs for two additional years of operating an

AIT scanner. This forecasting required gathering additional data and re-making data tables. The change to the life-cycle assumption did not occur until several months after a regulatory impact analysis was already generally complete, and it was therefore a significant setback.

28. In addition to these data acquisition and management issues, economists have had to overcome multiple challenges posed by adding a more quantitative analysis of the security benefits of AIT screening to the final rule, as requested by several commenters. Economists had to research new data components and determine the assumptions to frame this analysis. In addition, one commenter offered its own quantitative analysis, which TSA's economists had to consider and respond to by evaluating the data and assumptions used by the commenter.

29. The prohibitions on the public disclosure of classified information and SSI, *see* 49 C.F.R. Part 1520, have further complicated the process of applying a more quantitative approach to the security benefits of AIT. Meaningfully describing how AIT benefits transportation security often requires discussing the exact capabilities of AIT and the limitations and weaknesses of other screening techniques that AIT supplements or replaces. The details of these capabilities, limitations, and weaknesses have often been best described in materials that are classified or have been designated as SSI. TSA economists cannot cite to these materials in a public regulatory impact analysis. They have therefore had to spend additional time and effort researching publicly available alternatives to describe security gaps at a higher level of generality. In addition, they have had to submit all of the unclassified security performance data they relied upon in quantifying a security benefit for review by TSA's SSI Branch to ensure that it is acceptable for public disclosure. Review by the SSI Branch can take considerable time due to its limited resources and competing time-sensitive review requests arising from litigation,

Freedom of Information Act requests, congressional information requests, and similar urgent matters.

30. Despite these challenges, TSA has continually made progress towards issuing the final rule, as evidenced by the passage of several milestones in the last year. The AIT final rule is currently in intradepartmental review and concurrence. I expect that the regulation will likely enter final clearance for DHS leadership approval in the next few months. Following DHS leadership approval, DHS will formally submit the draft regulation to OMB for review under Executive Order 12866.

31. As explained above, TSA has committed significant resources to issuing a final rule regarding AIT as quickly as possible and has placed the rule among its highest regulatory priorities. DHS is also committed to expediting this rulemaking, and it continues to be one of the Department's highest rulemaking priorities.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on September 16, 2015
Arlington, Virginia

EDDIE D. MAYENSCHEIN
Assistant Administrator
Office of Security Policy & Industry Engagement
Transportation Security Administration