

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1139

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

ELECTRONIC PRIVACY INFORMATION CENTER

Petitioner,

v.

The TRANSPORTATION SECURITY ADMINISTRATION, PETER NEFFENGER, in his official capacity as Administrator of the Transportation Security Administration, and JEH JOHNSON, in his official capacity as Secretary of the Department of Homeland Security,

Respondents.

**On Appeal from an Order of the
Transportation Security Administration**

REPLY BRIEF

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GLOSSARY

AIT	Advanced Imaging Technology
Alternative 3	An alternative method of passenger screening where TSA continues to use WTMDs as the primary passenger screening technology and performs an ETD screening on randomly selected passengers.
APA	Administrative Procedure Act
ATR	Automated Target Recognition
DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
ETD	Explosives Trace Detection Devices
NPRM	Notice of Proposed Rulemaking
TSA	Transportation Security Administration
WBI	Whole Body Imaging
WTMD	Walk Through Metal Detector

SUMMARY OF THE ARGUMENT

Despite widespread opposition from U.S. travelers, a lack of evidence demonstrating effectiveness, and a decision from this Court establishing the “pat-down” option, the TSA contends that it can require all travelers to go through airport “body scanners.” This Court previously held that the agency’s failure to conduct rulemaking on the deployment of body scanners in U.S. airports violated the APA. After numerous delays, the TSA undertook a rulemaking. At no time did the agency present substantial evidence that body scanners are more effective than a more economical, more widely used, and less-intrusive alternative that was also under consideration. The Court should vacate the Order and remand for a determination consistent with this Court’s earlier opinion *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011).

The arguments set out by the TSA in opposition should be rejected, and EPIC’s Petition for Review should be granted, for four reasons. First, the TSA has not provided evidence to support the critical assumption underlying the agency’s rule: that body scanners are more effective than Explosive Trace Detection devices (“ETDs”) used in conjunction with Walk Through Metal Detectors (“WTMDs”) (“Alternative 3”). Second, the TSA has not meaningfully responded to evidence that body scanner screening will significantly impact the privacy of many passengers. Third, the TSA failed to conduct a detailed comparison between body

scanner screening and the most logical, reasonable, and least-intrusive proposal: Alternative 3. And fourth, the TSA failed to give fair notice of the change to the passenger opt out rule.

ARGUMENT

Under the APA, the agency’s final rule must be “the product of reasoned decisionmaking,” *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 753 (D.C. Cir. 2015), and any findings of fact must be based on “substantial evidence.” 49 U.S.C. § 46110(c). This Court has made clear that an agency order that fails “to respond meaningfully to the evidence” is arbitrary and capricious. *Petro Star Inc. v. Fed. Energy Regulatory Comm’n*, 835 F.3d 97, 99 (D.C. Cir. 2016). The TSA’s final rule appears to be nothing more than a post-hoc rationalization, the type of “barren exercise of supplying reasons to support a pre-ordained result” that this Court must reject. *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

I. TSA has not provided substantial evidence to show that body scanners are more effective than reasonable alternatives.

The TSA has failed to demonstrate that the final rule is supported by substantial evidence. First, the TSA repeats its prior mistake of comparing body scanners with WTMDs alone without considering WTMD screening with random secondary ETD screening, which is the widely-used procedure in airports across the United States. Resp’t Br. 22. Second, the TSA tries to justify a lack of evidence

by arguing that “much of the information” about body scanner detection capabilities “is classified.” Resp’t Br. 22–23. Third, the TSA attempts to rebut an independent report highlighting the ineffectiveness of body scanners with quotes taken out of context while ignoring the actual recommendations of the report. Resp’t Br. 23. And finally, the TSA again confuses the detection of non-metallic *explosives* with the detection of *anomalies*. Resp’t Br. 8, 24.

The agency has simply not provided evidence that devices designed to detect physical anomalies are more effective at detecting explosives than the devices specifically designed to detect explosives, “Explosive Trace Detection” devices, which the agency failed to meaningfully consider.

The TSA asserts that the agency has examined “all relevant considerations” and found that body scanners are “the most effective technology currently available” to detect threatening items, including non-metallic explosives. Resp’t Br. 22. The agency simply fails to provide the evidence necessary to support such a broad conclusion. Instead, the agency only seriously compares body scanners with “walk-through metal detectors previously used as the primary screening method at airport security checkpoints.” Resp’t Br. 22. Thus, the agency adopts body scanners and rejects WTMDs. This is a purposeful misrepresentation of the options because it ignores Alternative 3—WTMDs, combined with ETDs—which was

described by the agency in the NPRM, favored by those who reviewed the rule, and is the logical choice.

As the agency acknowledged, ETDs are designed to detect trace explosives. ETDs combined with WTMDs can detect both metallic and non-metallic threats. TSA, *Passenger Screening Using Advanced Imaging Technology: Regulatory Impact Analysis and Final Regulatory Flexibility Analysis* 115 (2016) [hereinafter *Final RIA*], JA _____. Yet the agency offers no actual evidence that body scanners are more effective than this alternative (Alternative 3), other than to assert in vague terms that the agency “conducted comparative tests” to evaluate body scanners “compared to other screening methods.” Resp’t Br. 23. Such a statement does not support the agency’s factual claim that body scanners are the “most effective” available technology to detect explosives.

The TSA also cannot rely on classified “specifications” and tests to support the claim that body scanners are “an essential component” or are “more effective” than other screening methods. Resp’t Br. 22–23. The record only shows that the agency has adopted some minimum standards for body scanners. The agency has not discussed what type of testing standards were used, or given any indication about the relative performance of body scanners and ETDs on these metrics. Even if the agency can’t reveal specific numerical standards to the public (as they claim), they must at least establish that they have evidence to support their claim of

relative efficacy. No such evidence exists, and the TSA's analysis appears to be no more than "a barren exercise of supplying reasons to support a pre-ordained result." *Food Mktg. Inst.*, 587 F.3d at 1290.

The agency has also failed to meaningfully respond to evidence that body scanners are not effective at detecting explosives. Contrary to the TSA's assertion, Resp't Br. 23, the independent Rapiscan review did not conclude that body scanners were an effective means of detecting explosives. In fact, the report said exactly the opposite. In the sentences following the one quoted in TSA's brief, the report concluded that "what is clearly needed, with or without AITs, is a robust means for detecting explosives." Keaton Mowery et al., *Security Analysis of a Full Body Scanner*, 23 Proc. USENIX Sec. Symp. 14 (Aug. 2014). The report directly undercuts the TSA's conclusion that body scanners are the "most effective technology" available. The report also raised significant questions about the efficacy of body scanners "as a contraband screening solution." *Id.* at 13. For example, the researchers were able to get dangerous metal items, *which would likely have been detected by WTMDs*, through body scanners. *Id.* The researchers also found that body scanners were primarily effective against "naïve" adversaries and not "adaptive" adversaries. *Id.* at 6, 13. Ultimately, the report recommended use of a screening technology targeted to detect explosives. *Id.* at 14.

Not only did the TSA fail to put forth evidence to support its efficacy claim, or meaningfully respond to contrary evidence in the independent report, the agency's analysis of body scanner effectiveness is fundamentally flawed. The primary justification TSA offers for using body scanners is that they are "able to detect both metallic and non-metallic threat items." Resp't Br. 22. But the agency acknowledges at the outset that the purpose of the new screening procedure is to detect "non-metallic explosives," which are "the most significant current threats to aviation security." Resp't Br. 22. The flaw in this logic should be obvious; body scanners do not serve the purpose of the rule because they are not designed to detect explosives, they are designed "to detect metallic and non-metallic *anomalies*." Resp't Br. 8 (emphasis added).

It is certainly possible that explosives might be detected as anomalies, but the TSA has not offered any explanation for why detecting anomalies is the best way to address the threat from explosives. Indeed the independent Rapiscan review found that body scanners were not well suited to detect explosives. The report found that by effectively molding and placing explosive simulants on the body, researchers were able to make the simulant explosives undetectable to the body scanners and were able to hide metallic detonators designed to mimic different parts of the body. Mowery et al., *supra*, at 6–8. A WTMD would have detected some of these components, but researchers were able to evade detection by the

body scanner. *Id.* Given the poor performance of body scanners in independent security testing, it is inexplicable that TSA did not conduct a thorough review or a break-even analysis comparing body scanner screening with ETD screening methods.

II. TSA has not adequately addressed the privacy impact of the body scanner screening program.

The TSA's claims that the agency "adequately considered" the privacy impact of body scanner screening is not supported by the record and is based largely on the flawed premise that Congress "largely obviated" all privacy issues presented by body scanners in 49 U.S.C. § 44901(l). Neither of the agency's claims are true, and both are contradicted by evidence on the record to which the TSA has failed to meaningfully respond.

The TSA itself concedes that "many" of the 5,500 comments submitted in response to the NPRM "addressed concerns related to privacy." 81 Fed. Reg. at 11382, JA __. Yet the agency failed to adequately address privacy issues raised by airline passengers who are forced to reveal sensitive personal information in order to go through TSA checkpoints—passengers with medical conditions and passengers who are transgender and gender non-conforming—and passengers who object to the scanning of their bodies. Passenger privacy concerns are not alleviated under the TSA's revised definition of body scanners in the final rule, which defines scanners as a screening technology that "creates a visual image of an

individual showing the surface of the skin” 81 Fed. Reg. at 11366, JA __. The TSA ultimately declined in the final rule to adopt any new protective measures to mitigate the privacy impact of body scanners, and failed to consider reasonable and less invasive alternatives.

A. TSA has not addressed the impact of body scanner screening on passengers who are forced to reveal private medical and gender identity information.

Individuals who depend on non-metallic medical devices, such as an insulin pump or colostomy bag, are forced to disclose medical information in order to avoid a body scanner alert, and WTMD screening does not pose the same problem. The TSA argues that the agency does not “oblige passengers to disclose sensitive medical information, but simply provides an opportunity to do so to facilitate screening.” Resp’t Br. 27. Still, passengers will be forced to disclose their medical condition at some point during the screening process. The TSA’s offhand reference to FDA tests about the effects on certain medical devices will also provide little comfort or guidance to passengers whose clinicians have recommended that they avoid such scanning. See EPIC Br. 32 (quoting *A Message for Travelers With Insulin Pumps: Call “TSA CARES” For Help*, The Naomi Berrie Diabetes Center (Dec. 2, 2013)).

The TSA’s claim that body scanners are “more protective” of passengers with certain medical conditions also misses the point. First, passengers with metal

implants will still be subject to additional screening because those implants could also appear as “anomalies” in the body scanners. Second, although metal implants may set off the alarm of WTMDs, this is not a new issue, and it has traditionally been quickly and easily resolved with a secondary screening with a hand-held metal detector. This type of screening is less invasive than the pat-down that is required for any anomaly that sets off the alarm of a body scanner. The agency also failed to do any comparative analysis of the impact of body scanners vs. WTMDs on those with medical devices that may alert a scanning machine. So, there is no evidence to support the agency’s claim.

Similar privacy issues are also present for transgender and gender non-conforming passengers who would be compelled to disclose their gender status in order to avoid a pat-down or false alarm. The fact that TSA “regularly meets with organizations representing” these groups does not “adequately” address the privacy impact of the final rule. Resp’t Br. 28. As EPIC has explained, body scanners look at the anatomy of men and women differently and officers must determine if the passenger is a man or a woman based on how the passenger presents themselves. *See* EPIC Br. 30–31. Passengers are therefore forced to either disclose their biological sex or risk the possibility of a false alarm (and an invasive pat-down) based on an incorrect identification by the TSO. The TSA’s screening procedures that allow transgender and gender non-conforming passengers to request a private

screening also fail to address the main privacy issue. Transgender and gender non-conforming passengers have a non-choice to either disclose their gender status upfront or be subjected to a pat-down where their status could also be revealed.

The TSA again misses the point when it states that “the majority of passengers can be screened without a pat-down *so long as there is no need to resolve alarms.*” Resp’t Br. 28. (quoting 81 Fed. Reg. at 11387) (emphasis added). In other words, if the body scanner alarm does not go off, most passengers will not require a pat-down. The problem is that transgender and gender non-conforming passengers who do not disclose their biological sex are more likely to set off the alarm and be forced to undergo a pat-down.

B. TSA has not addressed whether or not body scanners capture a nude image of each passenger.

The TSA offers no explanation for why the body scanners should be defined to “create[] a visual image” of the passenger and why the agency cannot incorporate hardware restrictions to ensure that no image is captured. The TSA actually seems perplexed as to why EPIC would insist that body scanners create a visual image of each passenger just because the definition adopted by the agency says as much. *See* Resp’t Br. at 27. Instead of addressing the TSA’s definition of body scanners, the agency deflects by blaming the congressional definition and pointing to the automatic target recognition software on current body scanners. The TSA chose to adopt this particular definition, and the agency has not explained

why the decision to do so was not arbitrary and capricious. Here again the TSA misses the key point made in many of the comments: passengers do not want the TSA to record an image of their naked bodies. *See* 81 Fed. Reg. at 11383, JA ___; *Comment of Christopher L. Rankin, Passenger Screening Using Advanced Imaging Technology* (Jun. 24, 2013) (noting that whether “the image is viewed by a computer algorithm or human eyes, the process of generating this image in the first place remains just as intrusive”).

The TSA has created more confusion by failing to state directly whether body scanners ever create a visual image of airline passengers. The definition of body scanners used by agency clearly states that a visual image is created, but the TSA’s remarks in the final rule are inconsistent and confusing. The TSA states that body scanners come “with software that precludes placing the unit into a mode that would allow TSOs to *obtain unfiltered, passenger-specific images.*” 81 Fed. Reg. at 11383, JA ___ (emphasis added). In apparent contradiction to this statement, the TSA claims that current body scanners “do not have the capability to create an image.” *Id.* The difference is not trivial. Do body scanners merely have software preventing access to passenger-specific images?² Software that could be vulnerable

² The hardware/software distinction is particularly important in light of previous representations by the TSA that body scanners could not record, store, or transmit unfiltered images. A Freedom of Information Act lawsuit by EPIC revealed that

to being compromised? Or, do body scanners lack the capability to actually create a passenger-specific image? The TSA's contradictory response does not adequately address the privacy impact of body scanner screening on passengers.

Specifically, the TSA has failed to state why recording images of naked passengers is necessary or in the alternative clearly state that no visual image is created. Either (1) the body scanners create a visual image of each passenger when they are scanned as the definition suggests; or (2) the TSA NPRM set out an inaccurate definition of how the body scanners function. In scenario (1) the agency did not adequately address the privacy concerns of the traveling public. In scenario (2) the agency failed to provide fair notice so that the public could meaningfully reply to the TSA's NPRM. In either scenario, the TSA made an arbitrary and capricious decision. The agency either ignored the privacy concerns regarding the creation of images of naked travelers or failed to give adequate notice of the capabilities of body scanners.

the nude images could be stored on the machines, and that scanners ran a standard operating system that made them vulnerable to unauthorized access. *See* Memorandum from EPIC to Interested Persons (Jan. 11, 2010), *available at* http://epic.org/privacy/body_scanners/EPIC_WBI_Memo_Final_Edit.pdf.

III. TSA failed to consider responsible alternative screening techniques

The TSA's claims about substantial evidence, Resp't Br. 21, and privacy impacts, Resp't Br. 25, suffer from the same flaw: the agency failed to consider reasonable alternatives that would be less invasive and more effective, and did not give a reasoned justification for its rejection of such alternatives. As this Court recently held in *American Radio Relay League*, an agency order that neglects to consider alternatives, or provide a reasoned justification for rejecting them, is arbitrary and capricious and violates the APA. *Am. Radio Relay League v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008). But instead of responding to these points, the TSA in its brief misrepresents EPIC's position and misreads the evidence presented in the agency's own regulatory impact analysis.

First, and most importantly, the TSA fails to address the most reasonable alternative screening method that EPIC and other commentators have repeatedly recommended: using WTMDs for primary screening and randomized ETD screening as a secondary method. *See* 81 Fed. Reg. at 11,395, JA ___; *Comments of EPIC*, Passenger Screening Using Advanced Imaging Technology, June 24, 2013, at 2, JA ___. This proposal was identified as "Alternative 3" in the TSA's Final RIA, Final RIA 115, JA ___, but the agency only discussed the method in a passing, conclusory fashion. In the Respondent Brief, the TSA seems to not even understand the proposal or EPIC's argument. The TSA states that it did not fail to

consider “adequately the use of explosives trace detection as an *alternative primary screening* method.” Resp’t Br. 33. (emphasis added). But no one proposed that the agency use ETDs for primary screening. Alternative 3, which the agency listed in its own RIA, involves using WTMDs for primary screening and ETDs for *secondary* screening.

The TSA also failed to offer a reasoned justification for rejecting the ETD screening proposal. In the brief and the Final RIA, the agency refers briefly to possible issues with ETD screening, Resp’t Br. 33, but none of these issues are discussed in detail and the agency refused to conduct a break-even analysis or evaluate the costs and benefits of the proposal relative to the body scanner rule.

First, the TSA notes that ETDs cannot detect non-explosive items “made of ceramics or plastics.” Final RIA at 122; Resp’t Br. 33. But there is no evidence that such items pose a significant threat and the TSA repeatedly stressed that non-metallic *explosives* pose “the greatest threats to aviation security.” Resp’t Br. 7. Congress agrees. See 49 U.S.C. § 44925(a). Neither the TSA nor Congress has found that non-explosive ceramic or plastic items pose a significant threat to airport security. So the TSA’s first reason for refusing to consider Alternative 3 is not rationally related to the basic premise of the rulemaking.

Second, the TSA claims that “Making explosives trace detection the primary screening method could slow passenger throughput levels.” Resp’t Br. 33.

But again, the Alternative 3 proposal does not rely on ETDs for primary screening, so this logic is flawed. Furthermore, the TSA did not include any evidence of ETD throughput in the Final Rule or the Final RIA. In fact, the TSA conceded that body scanners are not currently able “to handle the throughput of two x-ray machines,” so the agency has deployed them “in modsets with two x-ray machines and a co-located WTMD.” Final RIA 43. There is no analysis in the Final RIA of what impact, if any, use of ETDs as a secondary screening measure would have on passenger throughput, but it is clear that use of WTMDs for primary screening would increase throughput as compared to body scanners. Final RIA 51. Without offering any evidence about throughput under Alternative 3, the TSA cannot reasonably justify rejecting that proposal based on reduced throughput.

Finally, the TSA claims that use of ETDs would add “logistical concerns and costs.” Resp’t Br. 33. Because the agency “did not perform a break-even analysis” on Alternative 3, Final RIA 122, there is no evidence about the relative cost or complexity of the proposal. Without any evidence to show that Alternative 3 would be more expensive or logistically difficult than the body scanner rule, the TSA has no reasonable basis to justify rejecting the proposal. In practice, Alternative 3, WTMDs and ETD, are widely used today in U.S. airports and are likely more reliable than the body scanners, which are frequently out of service.

The TSA's decision to conduct a break-even analysis of Alternative 2 (use of WTMDs for primary screening supplemented with random pat-downs) is even more inexplicable than the agency's failure to consider Alternative 3. The agency dedicated five pages of the regulatory impact analysis to quantifying the potential costs and benefits of a strategy that is much less likely to detect non-metallic explosives than body scanners or ETDs. *See* Final RIA 117–122. The Alternative 2 “randomized pat-down” technique is not only more invasive than the other alternatives, it has no clear benefit over Alternative 3. Unlike ETDs, pat-downs are not designed to detect explosives and the agency offers no evidence of their relative effectiveness. Pat-downs are also just as likely, if not more likely, to reduce passenger throughput, as the TSA concedes in the break-even analysis. Final RIA 118. The agency also estimates that supplemental pat-downs would be significantly more expensive than the other options. Final RIA 120. Yet, despite all of these drawbacks, the TSA concluded it was necessary to conduct a detailed break-even analysis of Alternative 2, but not necessary for Alternative 3. When an agency fails to “answer[] objections that on their face appear legitimate, its decision can hardly be said to be reasoned.” *Petro Star Inc.*, 835 F.3d at 102–103.

IV. TSA's revised opt out was not a logical outgrowth of the proposed rule

The TSA does not make a serious attempt to rebut EPIC's argument that the agency violated the APA's logical outgrowth rule when it significantly altered the

passenger opt out in the final rule. In three short paragraphs, the agency manages to misread comments and other statements on the record, cite two cases that do not even support the agency's argument, and deny any obligation to conduct notice-and-comment rulemaking. Resp't Br. 38–40. The agency never gave any indication in the proposed rule or subsequent comments that it planned to modify the opt out provision, and commenters were not on notice of such a change. This is hardly surprising as this Court relied upon the agency's representation that "No passenger is ever required to submit to an AIT scan" in *EPIC v DHS*, 653 F.3d 1, 3 (D.C. Cir. 2011). As a result, the two cases cited in the TSA's brief are easily distinguishable. The court must reject the final opt out rule because it was not a logical outgrowth of the proposed rule.

As EPIC previously explained, the TSA has repeatedly stated that passengers can choose to opt out of body scanner screening. EPIC Br. 47–49. In fact, the TSA relied on the ability of passengers to opt out in briefs filed with this Court to justify the program in response to EPIC's prior Fourth Amendment challenge. *See* Initial Brief for Respondents at 2, *EPIC v. DHS*, 653 F.3d 1 (No. 10-1157). The agency's proposal to remove passengers' right to opt out is contrary to this Court's prior holding. As the Court explained, the TSA's use of invasive body scanner screening techniques was only permissible because "any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide"

between the two screening options. *EPIC v. DHS*, 653 F.3d at 10. The Court made clear that the right to opt out was a necessary step “taken to protect passenger privacy.” *Id.*

The TSA cannot seriously argue now that the agency “made clear to the public” that it was “contemplating the possibility of mandatory AIT screening.” Resp’t Br. 39. These claims are entirely inconsistent with the text of the NPRM and agency statements.

The only part of the NPRM that the TSA cites in the brief does not support the conclusion that the opt out restriction was a logical outgrowth of the proposed rule. In fact, the paragraph of the NPRM cited by the agency states at the outset that “To give further effect to the Fair Information Practice Principles that are the foundation for privacy policy and implementation at DHS, individuals may opt-out of the AIT in favor of physical screening.” 78 Fed. Reg. at 18,294. The fact that a few commentators object to the idea of “mandatory” body scanner screening, Resp’t Br. 10–11, is not an indication that the restricted opt out rule was a logical outgrowth of the NPRM. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311–12 (D.C. Cir. 1991) (“The fact that some commenters actually submitted comments suggesting the creation of administrative exemptions is of little significance. Commenting parties cannot be expected to monitor all other comments submitted to an agency.”); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d

506, 555 (D.C. Cir. 1983) (“[T]he agency itself must provide fair notice of what it plans to do. Having failed to do this, EPA cannot bootstrap notice from a comment.”).

Both cases cited by the TSA are easily distinguishable. The court in *Appalachian Power* found that a final rule that approved the use of a specific type of boiler was a logical outgrowth where the NPRM solicited comments on a variety of boiler types, even though that specific model had not been mentioned in the NPRM. *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998). But, unlike in *Appalachian Power*, this case does not involve an agency’s choice of one type from a range of proposed options. The opt out change was the TSA’s explicit reversal of a previous position without any notice that such a change was being considered. The court in *National Mining Association* similarly upheld a final rule approving the use of hardened rooms for mine safety even where the initial NPRM had only posed several open-ended questions about mine safety. *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699–700 (D.C. Cir. 2008). But the court in that case found that fair notice was provided by subsequent agency statements, which explicitly solicited comments (and extended the comment period) to gauge the viability of a specific proposal. *Id.* Unlike in *National Mining Association*, the TSA never solicited comments in this proceeding or made any statements about limiting passenger opt outs. Indeed, what the TSA

did in this case is more akin to the agency reversals that were overturned in *United Mine Workers* and *Environmental Integrity Project*. See EPIC Br. 49–50.

The TSA’s final argument—that changing the opt out provision was not a “substantive rule” requiring notice-and-comment rulemaking—fares no better. As this Court has explained, the very essence of procedural rule is that it “does not itself alter the rights or interests of parties” or “impose new substantive burdens.” *EPIC v. DHS*, 653 F.3d at 5. But that is the undeniable effect of a regulation which turns an “optional” screening into a “mandatory” one. Resp’t Br. 38. By virtue of the TSA’s final rule, a passenger no longer enjoys a consistent right to opt out of body scanner screening—a choice that the agency repeatedly promised her in the past—and may be forced into screening entirely at the TSA’s discretion.

The TSA protests that it will only use this power in a “very small number of circumstances.” Resp’t Br. 40. Yet this is nothing more than a *post hoc* assurance: the final rule contains no such limiting principle. Further, by eliminating the opt out, the TSA has already proven itself willing to backtrack on prior promises to passengers and to this Court. However “certain[.]” the TSA may feel about the degree of “intrusion upon passenger privacy” caused by body scanners, the agency cannot duck the “the need for public participation” in a rule change of this magnitude. *EPIC v. DHS*, 653 F.3d at 6. “Indeed, few if any regulatory procedures impose directly and significantly upon so many members of the public.” *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Review, vacate the TSA Order, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e) because it contains 4,883 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Marc Rotenberg
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 13th day of December 2016, he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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