~~SENSITIVE SECURITY INFORMATION/FILED UNDER SEAL~~

No. 12-1392

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARY BETH RUSKAI,
Petitioner,

v.

JOHN S. PISTOLE, Administrator, Transportation Security Administration,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
TRANSPORTATION SECURITY ADMINISTRATION

CORRECTED PUBLIC, REDACTED VERSION OF FINAL BRIEF FOR THE RESPONDENT

STUART F. DELERY
Assistant Attorney General

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Regulations and Proposed Rules:

Rules:

Other Authorities:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1392

MARY BETH RUSKAI,
Petitioner,

v.

JOHN S. PISTOLE, Administrator, Transportation Security Administration,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
TRANSPORTATION SECURITY ADMINISTRATION

CORRECTED PUBLIC, REDACTED VERSION OF
FINAL BRIEF FOR THE RESPONDENT

STATEMENT OF JURISDICTION

The Transportation Security Administration ("TSA") responded to petitioner Mary Beth Ruskai's administrative complaint in a letter dated January 19, 2012, Administrative Record ("AR") 1895-97/Joint Appendix ("JA") 168-70,[1] and

[1] This brief includes citations to the Administrative Record for all documents appearing therein, and it includes parallel citations to the Joint Appendix or the sealed Supplemental Joint Appendix for documents reproduced therein.

transmitted February 3, 2012, *see* Ex. To Pet'r's Resp. To The Court's Order To Show Cause, *Ruskai v. Pistole*, No. 12-1392 (1st Cir.) (filed May 9, 2012). Ruskai filed a petition for review of TSA's letter on April 2, 2012, which was timely because it was filed within 60 days of the transmittal of the agency's letter. *See* 49 U.S.C. § 46110(a) (requiring petition for review to be filed within "60 days after the order is issued" unless there are "reasonable grounds for not filing by the 60th day"); *Americopters, LLC v. FAA*, 441 F.3d 726, 733 (9th Cir. 2006) (suggesting that 60-day period is triggered by sending of challenged letter); *see also Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 519-21 (D.C. Cir. 2011). This Court has jurisdiction under 49 U.S.C. § 46110.

STATEMENT OF THE ISSUES

When an air passenger triggers an alarm while walking through a metal detector at an airport security checkpoint, security personnel of the Transportation Security Administration conduct a patdown search of the passenger. The questions presented are:

1. Whether TSA's patdown procedures violate petitioner's Fourth Amendment rights.

2. Whether TSA's application of its patdown procedures to petitioner violates § 504 of the Rehabilitation Act, 29 U.S.C. § 794.

3. Whether TSA's response to petitioner's complaint about patdown procedures was arbitrary and capricious.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations—6 U.S.C. § 345; 29 U.S.C. § 794; 49 U.S.C. §§ 114(a)-(f), 44901(a)-(b), 44902, 44903(b), 44904, 46110; 6 C.F.R. §§ 15.3, 15.70; and 49 C.F.R. §§ 1540.105, 1540.107—are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The Transportation Security Administration, a component of the Department of Homeland Security, screens airplane passengers at security checkpoints to detect weapons, explosives, and other materials that pose a security threat. Since 2010, TSA has increasingly relied on "advanced imaging technology" or "AIT," which detects metallic and nonmetallic items. AR 1833/JA 136; AR 2698-701; AR 3363-75/Supplemental Joint Appendix ("Supp. JA") 251-63. Although TSA has determined that AIT should be the predominant means of conducting initial screening, *see* AR

5805/Supp. JA 373, many walk-through metal detectors also remain in service. These metal detectors, as their name suggests, do not detect nonmetallic objects. AR 1190/JA 49; AR 3494; AR 4170; Passenger Screening Using AIT, Initial Regulatory Impact Analysis, RIN: 1652-AA67, at 111, 118 (2013) ("Regulatory Analysis"), *available at* http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-0035. When a passenger triggers a metal detector alarm, a TSA officer conducts a patdown in accordance with the directives in TSA's Standard Operating Procedures. *See* AR 5153-63/Supp. JA 297-307.

Petitioner Mary Beth Ruskai is an air traveler with a metal knee implant that she states triggers alarms on airport metal detectors. She filed a complaint with the Department of Homeland Security asserting that, since February 2011, the patdown procedures used in conjunction with walk-through metal detectors have failed to make reasonable accommodation for her metal knee implant. AR 1851-60/JA 152-61. She urged that TSA should establish a procedure by which it would forego patdowns if a passenger produces medical documentation of a metal implant. She also contended that if TSA conducted an additional search, it should limit itself to use of a

metal-detecting "wand" followed by a patdown of areas where the wand alarms. AR 1852/JA 153; AR 1856/JA 157.

TSA's response to Ruskai's complaint explained that documentation that a passenger has a metal implant would not demonstrate that the passenger is not carrying other metal objects. *See* AR 1895-96/JA 168-69. It also explained that, for security reasons, it had discontinued use of the "wands," which would not be capable of detecting nonmetallic objects. AR 1895/JA 168.

Ruskai then filed this petition for review of TSA's response.

STATEMENT OF FACTS[2]

I. Statutory and Regulatory Background

Congress has charged the TSA Administrator with responsibility for civil aviation security, 49 U.S.C. § 114(d).[3] The Administrator must "assess current and

[2] The administrative record filed in this case includes materials filed under seal (Volumes 2-5 of the record and supplements thereto), some of which were filed *ex parte* and under seal (Volumes 4-5 of the record and supplements thereto). *See* 1st Cir. R. 11.0(d)(2).

[3] TSA was originally located in the Department of Transportation and was transferred to the Department of Homeland Security in 2002. *See* 6 U.S.C. §§ 203(2),

Cont'd on next page.

potential threats to the domestic air transportation system" and take "necessary actions to improve domestic air transportation security," including by providing for "the screening of all passengers and property" before boarding to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a)(1), 44904(a), (e); *see also id.* § 114(e); *id.* § 44903(b) (requiring the promulgation of "regulations to protect passengers and property on an aircraft" from "criminal violence or aircraft piracy"); 49 C.F.R. §§ 1540.105(a)(2), 1540.107(a).

TSA has established "Screening Checkpoint Standard Operating Procedures" ("SOPs") that govern the screening of passengers and property at airport security checkpoints. *See, e.g.*, AR 5130-274/Supp. JA 275-353[4]; *see also Redfern v. Napolitano*, __ F.3d __, 2013 WL 3470495, at *1 (1st Cir. 2013) (describing TSA's use of SOPs). The current SOP calls for the use of two types of technology for initial screening of passengers—"advanced imaging technology" ("AIT") and walk-through metal

---

551(d). Statutory references to the Under Secretary of Transportation for Security are thus deemed to refer to TSA and its Administrator. *See id.* §§ 552(d), 557.

[4] Supp. JA 275-353 reproduces a subset of the pages appearing at AR 5130-274.

detectors. *See* AR 5165-80/Supp. JA 309-24. AIT detects metallic and nonmetallic anomalies on a passenger's body, including explosives. *See* AR 1833/JA 136; AR 2698.[5] AIT reduces the need for follow-up patdown searches of passengers with metal joints, *see, e.g.*, AR 915/JA 43; AR 1587/JA 58; AR 1635/JA 66; AR 1849/JA 150, and Ruskai does not challenge AIT or the patdown procedures used to resolve AIT alarms, *see, e.g.*, Br. 12-13, 55; Affidavit of Pet'r Mary Beth Ruskai 9, Ex. To Pet'r's Mot. To Supplement R. Before Ct., *Ruskai v. Pistole*, No. 12-1392 (1st Cir.) (filed July 26, 2013) ("Aff.")/JA 222.

Ruskai's challenge is directed to the patdown procedures used in conjunction with walk-through metal detectors, which can detect only metallic items, AR 3494, 4170; Regulatory Analysis 111, 118. Individuals who trigger an alarm when walking

[5] *See also* http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait. In *Electronic Privacy Information Center v. United States Department of Homeland Security*, the D.C. Circuit rejected a Fourth Amendment challenge to the use of AIT but directed TSA to engage in notice-and-comment rulemaking on the use of AIT. 653 F.3d 1, 4-8, 10-11 (D.C. Cir. 2011). TSA has published a proposed rule, *see* 78 Fed. Reg. 18,287 (2013), and is in the process of issuing a final rule.

through a metal detector may remove objects or clothing that might be the cause of the alarm. AR 5166/Supp. JA 310. If an individual repeatedly continues to trigger the alarm, the SOP requires a patdown, AR 5166/Supp. JA 310, which generally must be conducted by an officer of the same gender as the passenger. AR 5147/Supp. JA 292; AR 5159-60/Supp. JA 303-04.[6] Before undertaking the patdown, the officer must describe the patdown process, including a "hands-off demonstration of the sensitive area search procedures." AR 5153/Supp. JA 297. The officer must then offer the individual private screening and must allow that screening to take place in the presence of a witness of the individual's choice. AR 5147/Supp. JA 292; AR 5153/Supp. JA 297. The standard patdown covers the full body, with screeners using the backs of their hands for sensitive areas. *See* AR 5154-57/Supp. JA 298-301.

[redacted]

[6] Opposite-gender patdowns may occur in certain "extraordinary circumstances" where a Federal Security Director determines, *inter alia*, that a "staffing shortage emergency" exists, but patdowns in those circumstances are more limited than the standard patdowns challenged here. AR 5147/Supp. JA 292; AR 5159/Supp. JA 303.

[redacted]. AR 5157-58/Supp. JA 301-02.

II. Prior Proceedings

Petitioner Mary Beth Ruskai is a regular air traveler who has a metal knee implant that she states triggers the alarm on TSA's walk-through metal detectors.[7] *See* AR 1852/JA 153; Aff. 2-3/JA 215-16. In April 2011, Ruskai sent TSA five emails complaining about four different patdowns that she received between February and April 2011 after setting off the alarms of walk-through metal detectors. AR 1837/JA 138; AR 1839/JA 140; AR 1841/JA 142; AR 1845/JA 146; AR 1847-48/JA 148-49. TSA responded to each email. AR 1838-42/JA 139-43; AR 1845-46/JA 146-47; AR 1848-49/JA 149-50. In one of those responsive emails, TSA explained that the increase in the frequency and thoroughness of patdowns is necessary, in part, to detect explosives concealed on the body, and it further suggested that an exception to the procedures for individuals with disabilities could cause a terrorist to "pos[e] as a

[7] Since filing her petition, Ruskai's hip and other knee have also been replaced, Aff. 6/JA 219, but the record does not make clear whether these joint implants are metallic.

person with [a] disability or us[e] people with disabilities to conceal prohibited items." AR 1849/JA 150.

Ruskai subsequently filed a "Civil Rights Complaint" with the Department of Homeland Security, stating that the four patdowns violated the Fourth Amendment and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. AR 1851-60/JA 152-61. The Department of Homeland Security responded in January 2012, explaining that it had found no basis for opening an investigation and had determined that Ruskai's concerns would be more appropriately addressed by TSA. AR 1894/JA 167.

Later in January 2012, TSA also responded to Ruskai's complaint. AR 1895-97/JA 168-70. TSA explained that the patdowns Ruskai described "do not appear to be inconsistent with our standard procedures," and it addressed Ruskai's concerns with those procedures. AR 1895/JA 168. TSA responded to Ruskai's suggestion that triggering an alarm should not necessitate a patdown if an individual has a visible surgical scar or can provide medical documentation of an implant. TSA explained that "[w]hen a walk-through metal detector alarms, it does not indicate where on the body the metal is located, so our officers must ensure that no metallic threats are present on

any part of the body." AR 1895/JA 168 (emphasis added). The agency further noted that "medical documentation is not sufficient to prove that a threat is not present on a passenger." AR 1896/JA 169.

TSA also responded to Ruskai's suggestion that screeners should use a hand-held metal detector rather than its current patdown procedures. The agency explained that hand-held metal detectors were discontinued in late 2010 "for security reasons." AR 1895/JA 168. It noted, however, that Ruskai may be able to avoid patdowns by requesting screening with AIT at any checkpoint that uses AIT. AR 1896/JA 169. According to Ruskai's complaint, the AIT option was available in two of the four instances about which she complained. *See* AR 1856/JA 157.

Ruskai subsequently petitioned for review.

SUMMARY OF ARGUMENT

Ruskai is an air traveler with a metal knee implant who objects to TSA's use of patdowns as a follow-up search after she triggers alarms on walk-through metal detectors at airport security checkpoints. Ruskai does not argue that the scope of the patdown is inherently unreasonable. Ruskai does not dispute that the patdowns are calculated to detect both metallic and nonmetallic objects, and she also does not

dispute that terrorists have increasingly relied on nonmetallic devices that will not trigger a metal detector's alarm.

The gravamen of Ruskai's complaint is that when a passenger triggers a metal detector alarm, TSA should confine subsequent procedures to a search for metallic objects. She argues that the scope of the patdown established in the current SOP is broader than necessary to accomplish this objective and also suggests that TSA should limit its follow-up procedure to the use of a hand-held metal detector and limited patdowns, at least for passengers with documentation of a metal implant. Ruskai claims that the failure to act in accordance with these suggestions violates the Fourth Amendment and the Rehabilitation Act.

Ruskai asks this Court to calculate to a nicety the precise scope of the search required to detect threats to air travel, and to set aside TSA's reasonable efforts to balance the requirements of security and passenger privacy. Ruskai correctly notes that a metal detector alarm indicates the presence of metallic objects on an individual undergoing screening. But it is uncontroverted that nonmetallic explosives currently pose the foremost threat to civil aviation, and it is similarly uncontroverted that

terrorists are likely to hide threat items in sensitive areas of their body to avoid detection during screening. When a metal detector alarms, the Fourth Amendment does not prohibit officials at an airport security checkpoint from conducting a search that is calibrated to detect such objects and hedged with privacy safeguards. Ruskai proposes alternatives that she claims are less intrusive, but she does not contend that they are capable of detecting nonmetallic devices hidden in sensitive areas. And while airport searches must be reasonable, they need not be the least intrusive possible procedures.

Ruskai's claims under § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), fail for similar reasons. Even assuming that Ruskai is an "individual with a disability" and that disparate impact liability is available under the statute, Ruskai has not been subjected to discrimination "solely by reason of her . . . disability," *id.* Ruskai already has meaningful access to TSA's security screening program, and requiring the adoption of her proposed accomodation would fundamentally alter the checkpoint screening program by precluding TSA from conducting patdowns designed to detect both metallic and nonmetallic devices. As this Court observed in the context of the

Americans with Disabilities Act, federal law "does not protect disabled individuals from all differences in treatment stemming from their disabilities, and it certainly does not require . . . officials to refrain from evaluating safety risks *because* an applicant appears to be disabled." *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998).

Ruskai also argues that TSA's response to her administrative complaint was arbitrary and capricious, although she does not contend that she is entitled to relief on this basis independent of the merits of her Fourth Amendment and Rehabilitation Act claims. In any case, the agency substantively responded to Ruskai's complaint. Ruskai takes issue with that response, and her disagreements form the basis of her constitutional and statutory claims.

STANDARD OF REVIEW

TSA's "[f]indings of fact . . . , if supported by substantial evidence, are conclusive." 49 U.S.C. § 46110(c). Because § 46110(c) is silent about the standard of review for non-factual matters, the standard for review is provided by the Administrative Procedure Act, which requires that questions of law be reviewed de novo and that agency action be upheld unless it is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). *See Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 717-20 (1st Cir. 1999).

ARGUMENT

I. TSA'S SCREENING PROCEDURES ARE CONSISTENT WITH THE FOURTH AMENDMENT.

Because the primary goal of airport screening is "not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack," airport screening is permissible under the Fourth Amendment without individualized suspicion so long as the government's interest in conducting screening outweighs the degree of intrusion on an individual's privacy. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) ("*EPIC*"); *see also City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (administrative search is permissible if scope of search is "reasonably related to [its] objectives" and "not excessively intrusive" (internal quotation marks omitted)); *United States v. Doe*, 61 F.3d 107, 109-10 (1st Cir. 1995). The "ultimate measure" of the constitutionality of such a search is whether it is reasonable. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

Recognizing the importance of the safety concerns at issue, and the deference to be accorded to expert judgments regarding screening methods, courts have regularly upheld routine airport screening procedures against constitutional challenge. *See, e.g.*, *EPIC*, 653 F.3d at 10-11; *United States v. Aukai*, 497 F.3d 955, 962-63 (9th Cir. 2007) (en banc); *United States v. Hartwell*, 436 F.3d 174, 179-81 (3d Cir. 2006); *United States v. Marquez*, 410 F.3d 612, 614-18 (9th Cir. 2005); *Doe*, 61 F.3d at 109-10; *Singleton v. Comm'r*, 606 F.2d 50, 51-52 (3d Cir. 1979); *United States v. Skipwith*, 482 F.2d 1272, 1275-77 (5th Cir. 1973). Ruskai identifies no reason to reach a different result here. As explained below, the patdown procedures Ruskai challenges were adopted after extensive testing designed to ensure that they address evolving terrorist threats, and TSA has implemented reasonable safeguards to protect passenger privacy.

A. The challenged patdowns serve a critical public safety function.

Ruskai does not dispute the paramount importance of adequate screening at airport security checkpoints, and courts have repeatedly recognized the overriding interests served by airport screening. *See, e.g.*, *Marquez*, 410 F.3d at 618 ("[i]t is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft," given that "the potential damage and destruction

from air terrorism is horrifically enormous"); *Singleton*, 606 F.2d at 52 (the government "unquestionably has the most compelling reasons," including "the safety of hundreds of lives and millions of dollars worth of private property[,] for subjecting airline passengers to a search for weapons or explosives").

Prior to late 2010, TSA checkpoints placed primary reliance on walk-through metal detectors. AR 2295-99/Supp. JA 48-52 (2008 SOP). Under those prior procedures, TSA typically resolved alarms on walk-through metal detectors by screening individuals with a hand-held metal detector and then conducting a limited patdown of only those areas of the body that triggered the alarm of the hand-held metal detector, [redacted].[8] AR 2296-98/Supp. JA 49-51 (2008 SOP); AR 3005/Supp. JA 61; AR 5745/Supp. JA 355.

Reliance on metal detectors and limited patdowns had two significant defects. First, extensive intelligence (much of which is classified) demonstrated that the

[8] This procedure was followed for any individual who triggered the alarm on a walk-through metal detector, regardless of whether he or she presented the TSA official with medical documentation of a metal implant. AR 2296-98/Supp. JA 49-51; AR 5745/Supp. JA 355.

foremost threat to civil aviation is currently posed by nonmetallic explosive devices.[9] Several well publicized incidents illustrate the nature of this threat. For example, in December 2001, Richard Reid attempted to detonate a nonmetallic bomb concealed in his shoe on an airplane bound for the United States. *See* 78 Fed. Reg. 18,287, 18,291 (2013). In 2004, two female suicide bombers destroyed two aircraft flying out of Moscow, apparently by detonating nonmetallic explosives concealed on their torsos. *Id.*; AR 79/JA 5; AR 1922-23/JA 183-84; AR 2269/Supp. JA 38; AR 2273/Supp. JA 40; Regulatory Analysis 22. In 2006, terrorists plotted to bomb multiple aircraft flying between the United Kingdom and the United States using liquid explosives. AR 95/JA 10; AR 159/JA 17; AR 2237/Supp. JA 6; AR 2239/Supp. JA 8; AR 2241/Supp. JA 10; AR 3104/Supp. JA 70; AR 3110/Supp. JA 76; 78 Fed. Reg. at 18,291. On December 25, 2009, an operative for Al Qaeda in the Arabian Peninsula

[9] *See, e.g.*, AR 1824/JA 132; AR 1922/JA 183; AR 1924/JA 185; AR 1925/JA 186; AR 3101/Supp. JA 67; 78 Fed. Reg. at 18,289, 18,291; *see also* AR 2235/Supp. JA 4; AR 2249/Supp. JA 18; AR 2254/Supp. JA 23; AR 2263/Supp. JA 32; AR 3108-11/Supp. JA 74-77 (improvised explosive devices are principal threat to aviation); Regulatory Analysis 32 (noting the "current trend of [improvised explosive] devices transitioning from devices with metallic components to being composed completely of non-metallic components in order to subvert [walk-through metal detectors]").

attempted to detonate a nonmetallic explosive device hidden in his underwear on a flight from Amsterdam to Detroit. 78 Fed. Reg. at 18,291; AR 1824/JA 132; AR 1922/JA 183; AR 2255/Supp. JA 24; AR 3102-03/Supp. JA 68-69; AR 3110/Supp. JA 76; AR 3153/Supp. JA 114. Similarly, in 2012, another nonmetallic explosive device developed by Al Qaeda in the Arabian Peninsula designed to be hidden in an individual's underwear was recovered by an undercover operative. *See* 78 Fed. Reg. at 18,291. *See also* AR 1923/JA 184; AR 2242-43/Supp. JA 11-12; AR 5392-93, 5445, 5478.

Second, limited patdowns are often inadequate to deal with the tactics of terrorists who, as the examples cited above illustrate, are likely to "exploit our social norms" by concealing weapons and explosives on culturally sensitive areas of the body, such as the groin, that are less likely to be searched at airport checkpoints, AR 1826/JA 134; *see also* AR 1731/JA 76; AR 1921-22/JA 182-83; AR 1924/JA 185; AR 1925/JA 186; AR 2242-43/Supp. JA 11-12; AR 5478. *See* AR 1223/JA 54; AR 1826/JA 134; AR 3003/Supp. JA 59; AR 3194/Supp. JA 146; AR 3203/Supp. JA 155; AR 3279/Supp. JA 231 (prior patdown procedures not thorough enough to detect

threat items like the one used in the December 25, 2009, attempted bombing); *see also* AR 158, 166/JA 16, 24 (2007 report by Government Accountability Office stating that covert testing revealed that components for improvised explosive devices could pass undetected through the screening procedures then in place).

To meet the evolving threats to air transportation security, TSA decided in 2010 that it would institute the use of AIT for conducting initial screening of passengers at numerous screening checkpoints. *See* AR 2698-701; AR 3363-75/Supp. JA 251-63. The use of AIT has significantly enhanced airport security because AIT is capable of detecting both metallic *and* nonmetallic threat items hidden anywhere on the body, *see, e.g.*, AR 1833/JA 136; AR 2698. Indeed, TSA has determined that "AIT currently offers the best opportunity to detect both metallic and non-metallic threat items concealed underneath clothing, such as the explosives [used in the December 25, 2009, bombing attempt] without physical contact." 78 Fed. Reg. at 18,293; AR 1824/JA 132. TSA has deployed more than 740 AIT machines at almost 160 airports[10] and anticipates deploying approximately 80 additional machines by 2015,

[10] *See* http://www.tsa.gov/ait-frequently-asked-questions.

Regulatory Analysis 15-17, by which time TSA expects to screen close to [redacted] of passengers using AIT, if not more. *See* AR 5805/Supp. JA 373. Ruskai raises no objections to the use of AIT or any patdowns necessary to resolve AIT alarms. *See, e.g.*, Br. 12-13, 55; Aff. 9/JA 222.

In addition to shifting its primary screening mechanism to AIT, TSA revised its standard patdown procedures to cover more areas of the body, and it mandated the use of those procedures on individuals who alarm walk-through metal detectors so as to better detect nonmetallic threat items, including those that may be hidden in sensitive areas of the body. *See* AR 3003-06/Supp. JA 59-62; AR 5745-46/Supp. JA 355-56; *see also* AR 3350-57, 3360/Supp. JA 238-45, 248 (2010 SOP); AR 5153-63, 5166/Supp. JA 297-307, 310 (current SOP). Under the current SOP, the standard patdown covers the full body, but particularly sensitive areas of the body are searched with the back of the hand, [redacted].[11] *See* AR 5154-57/Supp. JA 298-301. [redacted]

[11] Many of the elements of the current patdown procedures were in place prior to late 2010. *See* AR 3003-06/Supp. JA 59-62 (describing differences between procedures implemented in 2010 and those that preceded them).

[redacted] AR 5157/Supp. JA 301. [redacted] AR 5156/Supp. JA 300.[12]

TSA adopted the current patdown procedures after conducting testing of the effectiveness of various alternatives, *see, e.g.*, AR 3122-80/Supp. JA 83-141; AR 3190-3205/Supp. JA 142-57; AR 3237-77/Supp. JA 189-229; *cf.* AR 3206-36/Supp. JA 158-88; AR 1691-94/JA 68-71 (operational testing), and its changes were further informed by extensive covert testing of prior patdown procedures, *see* AR 1731/JA 76; AR

[redacted]

1750/JA 95; AR 1753/JA 98; AR 1819/JA 127; AR 1826/JA 134; AR 5394-428, 5486-555, 5559, 5561, 5568-69, 5595-96, 5693-733. Based on both of those types of testing and additional covert tests performed after implementation of the new procedures, TSA concluded that the revised patdown procedures are "significantly more effective than prior procedures at detecting non-metallic and concealed explosive devices and, as a result, enhancing aviation security." AR 1925/JA 186; *see, e.g.*, AR 1753/JA 98; AR 3203-04/Supp. JA 155-56; AR 3259-60/Supp. JA 211-12; AR 3265/Supp. JA 217; AR 5470-85, 5559, 5593-609, 5613-14, 5661, 5676; *compare, e.g.*, AR 5472 *with* AR 5595; *compare also, e.g.*, AR 5478-81, *with* AR 5602.

Ruskai is thus quite wrong to assert (Br. 38) that "TSA has not [demonstrated] and cannot demonstrate that the enhanced pat-down is an effective screening method" based on risk analysis. This argument relies solely on documents that do not address TSA's adoption of the patdowns (Br. 39-42) and disregards the basis on which the current patdown procedures were, in fact, adopted. As established above, it is TSA's expert judgment that the current patdown procedures are necessary to meet the threat posed by nonmetallic explosives and other items hidden in sensitive areas

of the body, and those procedures have proven effective at addressing evolving terrorist threats.

B. The intrusion on passengers imposed by the challenged patdowns is modest when compared to the safety interests in the balance.

In developing its screening procedures, TSA has sought to "maximize transportation protection and security" in a manner consistent with "protecting passengers' privacy." AR 1823/JA 131; *see also* AR 1739/JA 84; AR 1745/JA 90; AR 1753-54/JA 98-99; AR 1779/JA 109; AR 1784/JA 114; AR 1813/JA 121; AR 1826/JA 134; AR 1903-04/JA 172-73; AR 3494; *cf.* AR 92/JA 7.

As discussed, TSA has adopted AIT for use in conducting initial screening at airport security checkpoints, AR 5169/Supp. JA 313, and TSA expects to screen close to [redacted] of passengers (or more) using this technology by the end of 2015, *see* AR 5805/Supp. JA 373; Regulatory Analysis 15-17. AIT is able to detect both metallic and nonmetallic threat items using technology that is less physically intrusive than the

standard patdown,[13] and Ruskai does not challenge the use of AIT or the patdowns that take place after an AIT alarm is triggered, *see, e.g.*, Br. 12-13, 55; Aff. 9/JA 222. Passengers may opt to be screened with AIT rather than a walk-through metal detector at any screening checkpoint that uses AIT (as was the case for two of the four screenings at issue in Ruskai's administrative complaint, AR 1856/JA 157),[14] and AIT benefits individuals with metal implants because it reduces the likelihood that a follow-up patdown will be necessary. *See* AR 915/JA 43; AR 1258-59/JA 55-56; AR 1587/JA 58; AR 1599/JA 60; AR 1635/JA 66; AR 1728-29/JA 73-74; AR 1822/JA 130; AR 1849/JA 150; AR 1896/JA 169; AR 1934/JA 187; 78 Fed. Reg. at 18,296 n.62; Regulatory Analysis 111.

In addition to enhancing passenger privacy through the use of AIT, the agency has further addressed passenger privacy through the "TSA PreCheck" program. Participants in that program (including Ruskai, Aff. 6/JA 219) may qualify for

---

[13] *See, e.g.*, AR 713/JA 37; AR 715/JA 39; AR 1611/JA 62; AR 1753/JA 98; AR 2409; Regulatory Analysis 118-19; *cf. Redfern*, 2013 WL 3470495, at *2-3 (noting updates TSA has made to AIT to increase privacy protection).

[14] *See* AR 5170/Supp. JA 314; AR 5813/Supp. JA 378; AR 5815/Supp. JA 380; http://www.tsa.gov/traveler-information/metal-implants.

expedited screening in designated lanes if they have been cleared for such screening based on certain background checks conducted prior to their arrival at the airport checkpoint.[15] An individual who triggers an alarm on a walk-through metal detector in such a designated lane is subject to a more limited patdown than the standard patdown conducted to resolve such alarms in other lanes. *See* AR 5815-16/Supp. JA 380-81.

In addition, TSA has implemented numerous privacy safeguards to minimize the intrusiveness of the standard patdown used to resolve walk-through metal detector alarms. First, the patdown must be conducted by a same-gender officer, except in "extraordinary circumstances" where there is a staffing emergency, in which case a more limited patdown is conducted. AR 5147/Supp. JA 292; AR 5159/Supp. JA 303. Second, before beginning the patdown, the TSA officer provides a "hands-off

---

[15] *See* http://www.tsa.gov/tsa-precheck/tsa-precheck-expedited-screening; http://www.tsa.gov/tsa-precheck/tsa-precheck-how-it-works. The TSA PreCheck program is currently available at 40 airports (including Boston's Logan International Airport) for specified airlines. *See* http://www.tsa.gov/tsa-precheck/tsa-precheck-participating-airports. The agency plans to expand the program to a total of 100 airports by the end of 2013. *See* http://www.tsa.gov/press/releases/2013/09/04/tsa-precheck-expands-60-additional-airports.

demonstration" and offers private screening, which can be conducted in the presence of a witness of the individual's choice. AR 5147/Supp. JA 292; AR 5153/Supp. JA 297; *see also* AR 1730/JA 75; AR 1745/JA 90; AR 1771/JA 101; *cf.* AR 3176/Supp. JA 137 (noting that passengers involved in study of patdown procedures reported that a description of the patdown prior to the procedure made them feel more comfortable); AR 1693/JA 70 (similar). *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (advance notice "reduc[es] to a minimum any unsettling show of authority that may be associated with unexpected intrusions on privacy (internal quotation marks and citation omitted)); *see also Cassidy v. Chertoff*, 471 F.3d 67, 79-80 (2d Cir. 2006).

Third, as previously discussed, *see supra* pp. 21-22 & n.12, the patdown itself is reasonably limited in scope. [redacted]. *See* AR 3197/Supp. JA 149; *see also* AR 2692, 2694, 3195/Supp. JA 53, 55, 147 (describing the patdown that was rejected);

cf. AR 3151-52/Supp. JA 112-13 (describing other, more extensive patdowns that were tested but not adopted).[16]

TSA has thus gone to considerable lengths to ensure that its patdown procedures minimize the intrusion on privacy interests while still maintaining effective security at airports. *See also, e.g.*, AR 1691-94/JA 68-71, AR 3175/Supp. JA 136, AR 3262-63/Supp. JA 214-15, AR 3283/Supp. JA 235 (TSA research into how passengers feel about patdown procedures); *cf., e.g.*, AR 79/JA 5, AR 2268-69/Supp. JA 37-38, AR 3884-86/Supp. JA 268-70 (examples of prior modifications to patdown procedures based in part on privacy concerns).

16 [redacted]

Similarly, the agency has implemented a more limited patdown for certain circumstances that the agency has determined represent lower-threat situations, such as when screening individuals under 13 or over 74 years of age. *See* AR 5158-59/Supp. JA 302-03; AR 5235/Supp. JA 353; *see also* AR 3884-86/Supp. JA 268-70 (implementing limited patdown procedures for children and certain other groups based on reduced risk and/or privacy considerations). Again, TSA's recognition that limited patdowns may be appropriate in certain circumstances demonstrates the agency's reasonable approach to patdown procedures.

Ruskai relies (Br. 8-9, 22-23) on objections to patdowns raised by a limited number of other passengers. But the issue here is not whether TSA agents have ever deviated from the SOP when screening travelers, two million of whom are screened each day, AR 976/JA 47; AR 1204/JA 51. The only question before the Court is whether the procedures in the SOP are reasonable. *See* Br. 2, 16 (limiting challenge to SOP). Where, as here, TSA has implemented procedures designed to meet the current terrorist threat and has "taken [steps] to protect passenger privacy," the Fourth Amendment balancing "clearly favors the Government." *EPIC*, 653 F.3d at 10.[17]

---

[17] Although Ruskai contends (Br. 43 n.9) that the patdown here is "similar" to searches of Guantanamo Bay military detainees' groins that were recently struck down by a district court, the Guantanamo searches challenged are considerably more extensive. *See In re Guantanamo Bay Detainee Litig.*, __ F. Supp. 2d __, 2013 WL 3467134, at *3 (D.D.C. 2013) (noting, for example, that a guard must search a detainee's groin "by placing the guard's hand as a wedge between the . . . scrotum and thigh . . . and using [a] flat hand to press against the groin" (internal quotation marks omitted) (second and third alterations in original)), *appeals pending sub nom. Hatim v. Obama*, Nos. 13-5218, 13-5220, 13-5221 (D.C. Cir.). In any event, the Fourth Amendment was not at issue there, and the district court based its decision on numerous considerations not applicable here, including its conclusion that there had been no showing that detainees had previously concealed contraband in the groin area. *See id.* at *9-16. Moreover, the D.C. Circuit has granted a stay of the district court's order pending appeal. *See* Order of Aug. 15, 2013, *Hatim v. Obama*, Nos. 13-5218, 13-5220, 13-5221 (D.C. Cir.) (unpublished) (attached).

C. The Fourth Amendment does not require TSA to adopt Ruskai's proposed alternatives to TSA's screening procedures.

Ruskai invites this Court to set aside screening procedures that are calculated to discover concealed weapons, explosives, and other threats to airplane security. As the Supreme Court has emphasized, however, "the decision as to which among reasonable alternative . . . techniques should be employed to deal with a serious public danger" rests with "politically accountable officials," not courts engaging in Fourth Amendment analysis. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). *See also Cassidy*, 471 F.3d at 84-87 (holding that Coast Guard entitled to deference on its determination that certain vessels are at high risk of terrorist attacks and noting that the choice among reasonable alternatives rests with government officials, "who have a unique understanding of, and responsibility for, limited public resources" (internal quotation marks omitted)).

Nor would the Fourth Amendment authorize the Court to set aside the patdown procedures solely because it believed that less intrusive searches might achieve the government's national security objectives. The Supreme Court has "'repeatedly refused to declare that only the least intrusive search practicable can be

reasonable under the Fourth Amendment.'" *City of Ontario*, 130 S. Ct. at 2632 (quoting *Vernonia*, 515 U.S. at 663, and collecting cases). As the Supreme Court has explained, "[t]hat rationale could raise insuperable barriers to the exercise of virtually all search-and-seizure powers because judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." *Id.* (internal citation and quotation marks omitted). Applying these principles, the D.C. Circuit rejected a constitutional challenge to the use of AIT, emphasizing that there is no requirement that airport screening be "minimally intrusive to be consistent with the Fourth Amendment." *EPIC*, 653 F.3d at 11.

1. Ruskai nonetheless contends (Br. 32-34) that TSA should rely on hand-held metal detectors rather than patdowns to conduct a follow-up search when a passenger alarms a walk-through metal detector. But TSA discontinued the general use of these "wands" for follow-up screening because "more thorough screening" can be achieved with a standard patdown. AR 5745/Supp. JA 355. As TSA explained, unlike hand-held metal detectors, the standard patdown [redacted]

[redacted] provides an opportunity to detect metallic *and* nonmetallic threat items. AR 5745-46/Supp. JA 355-56; *see also* AR 1693/JA 70; AR 1895/JA 168; AR 3885/Supp. JA 269. *Cf. EPIC*, 653 F.3d at 10 (upholding use of AIT because, *inter alia*, "crucially," AIT can detect nonmetallic explosives, unlike metal detectors).

Ruskai does not dispute that the standard patdown is calculated to discover nonmetallic as well as metallic objects. She argues (Br. 27, 32-33), however, that because the walk-through metal detector has alerted TSA only to the presence of metal objects, TSA should direct its follow-up search exclusively to discovering metal objects. But the Fourth Amendment does not preclude TSA from conducting a follow-up search that is designed to discover the most dangerous current threats to airplane security—nonmetallic explosive devices. Indeed, *United States v. Albarado*, upon which Ruskai relies (Br. 26-27, 31), made this commonsense point explicit, noting that officers conducting additional screening after a metal detector has alarmed

are not barred from "investigat[ing] something which is not metallic." 495 F.2d 799, 809 (2d Cir. 1974).[18]

TSA reasonably performs patdowns where, as here, it has reason to believe that a passenger may be attempting to hide some type of prohibited object, whether metallic or nonmetallic. Although Ruskai draws a dichotomy between metallic and nonmetallic objects, improvised explosive devices—one of the primary threats to civil aviation today, *see supra* pp. 17-19 & n.9—can include both metallic and nonmetallic components. *See, e.g.*, AR 158/JA 16; AR 560/JA 33; AR 2296/Supp. JA 49; AR 3110/Supp. JA 76; AR 5148/Supp. JA 293; AR 5478-81; Regulatory Analysis 32. Ruskai argues (Br. 25-27) that it is unreasonable to infer from an alarm on a walk-through metal detector that she may have threat items concealed on her person because she presents TSA officials with documentation of a metal implant. But that documentation does not rule out the presence of additional metallic items on her

[18] Ruskai also cites *Albarado*'s statement that airport officials must "'exhaust the other efficient and available means'" for resolving an alarm on a walk-through metal detector before conducting a patdown. Br. 31 (quoting *Albarado*, 495 F.2d at 808). *Albarado* is no longer good law to the extent that it suggests that the least restrictive means must be used. *See Wilkinson v. Forst*, 832 F.2d 1330, 1340 n.13 (2d Cir. 1987).

body (not to mention nonmetallic items) and could, in any event, be falsified. *See* AR 1849/JA 150; AR 1895-96/JA 168-69. Accordingly, as TSA has explained, medical documentation is "not sufficient to prove that a threat is not present on a passenger." AR 1896/JA 169.

Ruskai is on no firmer ground in making the related argument that TSA's patdown procedures fail to comport with the Fourth Amendment because they are underinclusive. Ruskai correctly notes (Br. 25) that walk-through metal detectors, unlike AIT, will not detect nonmetallic objects and that TSA does not conduct a patdown for all persons screened by walk-through metal detectors. That a challenged search is not "optimally effective" does not render it impermissible under the Fourth Amendment. *Cassidy*, 471 F.3d at 85-86 (rejecting argument that screening policy for ferries violates the Fourth Amendment "because it is not sufficiently thorough"); *see also Von Raab*, 489 U.S. at 676 n.4; *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006). Instead, the appropriate inquiry is whether the government's search is a "reasonable method of deterring the prohibited conduct." *Cassidy*, 471 F.3d at 85 (internal quotation marks omitted). The patdown procedures might be even more effective if

employed universally for all passengers who pass through walk-through metal detectors. That TSA uses the procedures only for a subset of the passengers does not render those procedures ineffective or unreasonable.

Ruskai notes (Br. 33) that TSA still uses hand-held metal detectors in two limited circumstances—[redacted]. *See* AR 5182-83/Supp. JA 326-27. But unlike Ruskai's proposal, which would require TSA to clear any parts of the body that do not alarm the hand-held metal detector, TSA never relies solely on the lack of an alarm on a hand-held metal detector to clear [redacted].[19] Instead, even where a hand-held metal detector does not alarm when screening those items, [redacted]

[19] Although Ruskai similarly points (Br. 34 n.6) to the government's use of hand-held metal detectors in certain searches of military detainees at Guantanamo Bay, the searches cited likewise do not rely solely on hand-held metal detectors to clear an area or item. *See In re Guantanamo Bay Detainee Litig.*, 2013 WL 3467134, at *3 (noting that both a hand-held metal detector *and* a frisk are used to screen detainees). In addition, the potential threats present in a secure military detention facility are plainly different from the threats at issue here in the airport context.

[redacted].[20] AR 5182/Supp. JA 326. [redacted].[22]

2. Ruskai's additional arguments advocating modifications to TSA's screening procedures are similarly without merit. Ruskai argues (Br. 35) that the patdowns themselves could be changed so as to preclude the repeated touching of the same part

---

[20] [redacted], the SOP calls for further screening of the individual and his or her property. *See* AR 5230/Supp. JA 348; AR 5232/Supp. JA 350.

[21] *See* http://www.tsa.gov/traveler-information/religious-and-cultural-needs.

[22] Ruskai similarly argues (Br. 34 n.7) that TSA should use technology on walk-through metal detectors showing the zone of the body where metal was detected to direct targeted follow-up patdowns. As with the proposal above, such follow-up screening would not adequately detect nonmetallic threat items. [redacted] AR 5759/Supp. JA 369; TSA, Checkpoint Design Guide, Rev. 1, at 46 (Feb. 11, 2009), *available at* http://www.aci-na.org/static/entransit/OPT%20%20Checkpoint%20Design%20Guide%20(CDG)%202009.pdf.

of the body. Although the SOP mandates the use of [redacted] to ensure complete coverage of an individual," AR 5154/Supp. JA 298, [redacted], *see* AR 5154-57/Supp. JA 298-301. And the agency's use of [redacted] is plainly reasonably calibrated to "ensure complete coverage" while minimizing the intrusion into a passenger's privacy. AR 5154/Supp. JA 298.

Ruskai contends (Br. 35-36) that she should be permitted to lift her shorts to expose her unclothed inner thighs for visual, rather than physical, inspection. A passenger's lifting of his or her shorts in the manner depicted in the photos Ruskai submitted with her administrative complaint, *see* AR 1860/JA 161, does not, however, reveal the part of the thigh that meets the passenger's torso, and TSA's intelligence suggests that terrorists are particularly likely to attempt to hide threat items in this area, *see supra* p. 19. Moreover, the current patdown procedures require a TSA official [redacted]

[redacted], AR 5157/Supp. JA 301, [redacted]. *Cf.* AR 5604-05. The alternatives that Ruskai proposes thus do not effectively satisfy the government's interest in detecting and deterring threat items.[23]

Finally, Ruskai argues (Br. 37-38) that TSA should modify the TSA PreCheck program by eliminating the use of "enhanced" patdowns on program participants. But, as already explained *supra* on page 26, TSA already employs a more limited patdown when a walk-through metal detector is triggered at TSA PreCheck lanes. To the extent that Ruskai contends that she should be exempt from *any* patdown because she is a program participant, that argument fails. Although the program provides an additional layer of security by permitting the government to conduct background

[23] Although Ruskai correctly notes (Br. 36) that TSA uses more limited patdown procedures for certain groups of people, AR 5158-59/Supp. JA 302-03; AR 5235/Supp. JA 353, those procedures are used for lower risk groups (passengers under 13 or over 74 years old [redacted] or for groups for which there are heightened privacy interests (passengers screened by a TSA official of the opposite gender because no same-gender official is available). *See, e.g.*, AR 3884-86/Supp. JA 268-70. It does not follow that the limited patdown procedures should be applied more broadly.

screening of a passenger in advance of his or her flight, it does not obviate the need to screen for threat items. Where an individual in a designated program lane triggers the alarm on a walk-through metal detector, the agency reasonably requires a patdown, albeit one that is limited.

3. Ruskai also contends (Br. 28-30) that the government's current patdown procedures must be unnecessary because, when she travelled through the Calgary and Toronto airports, she was not subjected to a full-body patdown after she alarmed a walk-through metal detector. Ruskai argues that this difference is significant because the Calgary and Toronto airports are part of the U.S. Custom and Border Protection's "Preclearance" program (which allows U.S. officials to conduct immigration, customs, and agriculture inspections at participating airports abroad[24]), and Ruskai contends that TSA has "certified" that Preclearance airports provide an "equivalent level of protection" to that provided in the United States. Br. 29 (internal quotation marks omitted).

---

[24] *See* U.S. Customs and Border Protection, Fact Sheet: Preclearance Operations, *available at* http://www.cbp.gov/xp/cgov/toolbox/contacts/preclearance/.

The congressional testimony on which Ruskai relies (Br. 29), however, merely states that each Preclearance location "has been *or is scheduled to be* evaluated by TSA to confirm that preclearance airports are performing checkpoint screening procedures . . . comparable to those of domestic airports." AR 1912/JA 178 (emphasis added). Following the challenged changes to screening procedures at issue in this litigation, TSA received authority from the State Department to negotiate a "Memorandum of Cooperation" with Canada, the purpose of which would be to allow the countries to "work together to develop and implement mutually acceptable airport passenger and accessible property checkpoint screening standards for Canadian preclearance airports [and] to ensure that such standards provide a level of passenger and accessible property screening comparable to screening conducted at U.S. airports." AR 5784/JA 195; *see also* AR 5783/JA 194; AR 5788-90/JA 199-201; AR 5792/JA 203. No Memorandum of Cooperation has yet been signed, and TSA has not yet made a formal determination pursuant to such an agreement that Canada's airport screening is comparable to U.S. screening.

Moreover, determinations that a foreign airport's security screening procedures are "comparable" to TSA's procedures for purposes of the Preclearance program are inherently generalized in nature and do not reflect TSA's endorsement or approval of each specific security protocol in the foreign airport's screening procedures. The particulars of screening protocols at a Preclearance airport necessarily must be assessed as part of the whole, and in any event TSA does not purport to certify that participating foreign airports have procedures that are identical in every respect to those in use domestically, in part because the specific procedures in use abroad may have to be modified to conform to the legal and political exigencies applicable to the host nation or government.

To the extent that international practice is relevant to evaluating the constitutional reasonableness of TSA's patdown procedures, it weighs in favor of their constitutionality, inasmuch as the challenged changes to TSA's patdown procedures made them "more consistent with standard practices at other airports around the world." AR 1819/JA 127; *see also* AR 1731/JA 76; AR 1750/JA 95; AR 1925/JA 186.

II. TSA'S SCREENING PROCEDURES COMPLY WITH SECTION 504 OF THE REHABILITATION ACT.

Ruskai argues that TSA's use of patdown procedures violates § 504 of the Rehabilitation Act, which provides that:

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794(a).[25] Even assuming for purposes of this case that Ruskai is an "individual with a disability" within the meaning of § 504, TSA has not violated the Rehabilitation Act because Ruskai has not been "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination [during]" TSA screening "solely by reason of her . . . disability." *Id.*

Ruskai does not contend that TSA's facially neutral screening procedures at issue here constitute intentional discrimination. Ruskai nevertheless argues (Br. 50-57)

[25] Although there is no private right of action under the Rehabilitation Act for the claims asserted here, this Court may properly consider those claims as part of its review of the agency's actions under 49 U.S.C. § 46110 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *See Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 604-11 (1st Cir. 1989) (en banc).

that TSA's screening procedures violate the nondiscrimination mandate in § 504 because they have a disparate impact on individuals with metal joint implants, and that follow-up screening using a hand-held metal detector and a limited patdown would be a reasonable accommodation. Neither the Supreme Court nor this Court has decided whether § 504 prohibits "conduct that has an unjustifiable disparate impact" on qualified individuals with disabilities. *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (expressly not deciding that question); *cf. Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1031-34 (6th Cir. 1995) (noting question is open and rejecting disparate impact liability in at least some circumstances).[26] It is unnecessary to decide the

[26] Ruskai relies (Br. 50) on *Astralis Condominium Ass'n v. Secretary, United States Department of Housing & Urban Development*, 620 F.3d 62, 66 (1st Cir. 2010), but *Astralis* construed the Fair Housing Amendments Act, 42 U.S.C. § 3604(f), not § 504. Although courts interpreting § 504 sometimes seek guidance from case law interpreting other antidiscrimination statutes (and particularly Title II of the Americans with Disabilities Act, which has a similar nondiscrimination mandate, *see* 42 U.S.C. § 12132), relevant differences in statutory language must be taken into account. *See, e.g.*, *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999); *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997) (en banc); *Leary v. Dalton,* 58 F.3d 748, 752 (1st Cir. 1995). *Astralis* thus does not resolve the question whether disparate impact is actionable under § 504. *Cf. Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (S. Ct.) (pending case raising the question

Cont'd on next page.

question in this case, however, because Ruskai has not established any unlawful disparate impact even assuming that it would be actionable under § 504.

A facially neutral rule is not invalid merely because it has a statistically disproportionate impact on individuals with disabilities. To the contrary, the Supreme Court has made clear that there is no liability in those circumstances where otherwise qualified individuals with disabilities have "meaningful access" to the relevant program. *Choate*, 469 U.S. at 301.

Moreover, even if "meaningful access" is lacking, a violation of the statute occurs only if an individual has requested a "reasonable accommodation[]" that does not require a "fundamental alteration" of the program, *id.* at 300-01 & n.20 (internal quotation marks omitted), or impose an "undue financial and administrative burden[]" on the relevant entity, *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979). *See also, e.g.*, *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1197 (10th Cir. 2008); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1266-74 (D.C. Cir. 2008); *Crowder v. Kitagawa*, 81

---

whether disparate impact liability is available under the Fair Housing Act, 42 U.S.C. § 3604(a)).

F.3d 1480, 1484-85 (9th Cir. 1996); 6 C.F.R. § 15.3(e)(1)[27]; *cf. Choate*, 469 U.S. at 299 (emphasizing the importance of "keep[ing] § 504 within manageable bounds").

Ruskai's claim fails at each stage of the analysis. As an initial matter, Ruskai already has "meaningful access" to TSA's screening program used to regulate passage through airport security checkpoints. Although Ruskai contends (Br. 54) that the access she has been granted is inadequate because patdowns following an alarm on a walk-through metal detector are unduly intrusive, the patdowns are sufficiently protective of passengers' privacy, as explained *supra* on pages 24-29.[28] *See, e.g.*, *Moody ex*

[27] This regulation provides that the pertinent definition of a "[q]ualified individual with a disability" here is an "individual with a disability" who, *inter alia*, can "achieve the purpose of the program or activity without modifications in the program or activity that the Department can demonstrate would result in a *fundamental alteration* in the nature of the program." 6 C.F.R. § 15.3(e)(1) (emphasis added). As the Supreme Court explained in *Choate*, "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' . . . would seem to be two sides of a single coin; the ultimate question is the extent to which [an entity] is required to make reasonable modifications in its programs." 469 U.S. at 299 n.19.

[28] Ruskai argues (Br. 53) that TSA must provide her with the "least restrictive option" that allows her to participate in its screening program. It is not clear what Ruskai means by "least restrictive option" in this context, but the case law addressed above makes clear that the relevant standard is "meaningful access." The regulation upon which Ruskai relies (Br. 53), 6 C.F.R. § 15.30(b)(2), is not to the contrary. It provides only that to be "equally effective" within the meaning of the regulations,

Cont'd on next page.

rel. J.M. v. NYC Dep't of Educ., 513 Fed. App'x 95, 96 (2d Cir. 2013) (unpublished) (§ 504 does not require "optimal" accommodations to provide "meaningful access"); *Mason v. Corr. Med. Servs., Inc.*, 559 F.3d 880, 887-88 (8th Cir. 2009) (holding that prisoner had meaningful access to particular benefits because existing accommodations—which the prisoner contended were inadequate—were sufficient).

In any event, Ruskai's § 504 claim fails because the accommodation she seeks would work a "fundamental alteration" on TSA's screening program. TSA has sought to minimize the burden that its screening practices impose on individuals with metal implants by adopting AIT as a primary screening method and employing narrower patdown searches for passengers who are screened at TSA PreCheck lanes. *See supra* pp. 24-26; AR 915/JA 43; AR 1258-59/JA 55-56; AR 1587/JA 58; AR 1599/JA 60; AR 1635/JA 66; AR 1849/JA 150; AR 1934/JA 187; 78 Fed. Reg. at 18,296 n.62; Regulatory Analysis 111. Ruskai nevertheless argues (Br. 55-56 & n.11) that when individuals with metal implants alarm a walk-through metal detector, a TSA official

---

services are "not required to produce the identical result or level of achievement" but must afford individuals with disabilities an "equal opportunity" to obtain the same result in the "most integrated setting appropriate." *Id.*; *cf. Choate*, 469 U.S. at 305-06 & n.26 (interpreting materially identical regulation).

should conduct additional screening using a hand-held metal detector followed by a patdown limited to areas where the hand-held metal detector alarms. As established *supra* on pages 31-36, however, TSA has determined, based on an extensive record, that hand-held metal detectors and limited patdowns do not adequately address the potential threat posed by nonmetallic explosives hidden in sensitive areas of the body. Nor is the risk mitigated by requiring individuals to provide medical documentation to TSA officials. Such documentation does not rule out the possibility that passengers have additional metallic or nonmetallic threat items on their persons. AR 1895-96/JA 168-69. Moreover, it easy to imagine how a terrorist would take advantage of such an exception by falsifying medical documents or attempting to coopt an individual with such documents in an effort to introduce a prohibited item into the secure area of an airport without detection. *See* AR 1849/JA 150.

Ruskai's proposed accommodation is thus unreasonable because it would fundamentally alter TSA's security screening program by omitting screening measures that are critical to TSA's mission of protecting aviation safety. *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83 (2001) (modification to "an essential aspect" of a

program constitutes a "fundamental alteration"); *Jones v. City of Monroe*, 341 F.3d 474, 480-81 (6th Cir. 2003) (holding that waiver of a facially neutral rule was not reasonable because it would be "at odds" with the fundamental purpose of the rule); *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 461-63 (6th Cir. 1997) (en banc) (similar); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929-30 (8th Cir. 1994) (similar); *cf. Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998) ("[W]hen the safety of the public at large is implicated, public entities must be permitted some latitude in their judgments . . . ."); *Strathie v. Dep't of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (similar).

This case is similar in relevant respects to *Theriault v. Flynn*, where an individual with cerebral palsy sought to renew his driver's license for a hand-controlled car. 162 F.3d at 46. Because the state official reviewing his application was concerned that the plaintiff could not safely drive a car based on his limited control of his hands, a condition that was caused by his cerebral palsy, the official required the plaintiff to take a road test not typically required for license renewals. *Id.* at 47. This Court held that the use of this additional testing was permissible under Title II of the Americans

with Disabilities Act ("ADA") because the relevant cause of the additional screening for ADA purposes was a concern for public safety based on the plaintiff's limited use of his hands, not his disability. *Id.* at 49. Here, as in *Theriault*, TSA does not violate § 504 when it conducts a patdown on Ruskai as an additional layer of security after she has alarmed a walk-through metal detector because the relevant cause of the additional screening is a concern for public safety and the alarm on the metal detector, not Ruskai's metal implant and history of joint surgery.

Theriault also rejected the contention that the plaintiff should have been allowed to submit documentation of his safe driving record to the commission in lieu of a driving test. *Id.* As the Court explained, such information is inadequate because it "does not speak to an individual's present ability to drive safely." *Id.* Ruskai's proposed accommodation is likewise insufficient to establish that she may safely be admitted to the airport to board an airplane. As this Court explained in *Theriault*, the ADA (and, by analogy, § 504) "does not protect disabled individuals from all differences in treatment stemming from their disabilities, and it certainly does not

require licensing officials to refrain from evaluating safety risks *because* an applicant appears to be disabled." *Id.* at 50.

III. TSA'S RESPONSE TO RUSKAI'S ADMINISTRATIVE COMPLAINT WAS NOT ARBITRARY OR CAPRICIOUS.

Ruskai's final contention (Br. 57-62) is that TSA's response to her administrative complaint was arbitrary and capricious because the agency assertedly "fail[ed] to conduct any investigation" and its response was delayed. Br. 57. There is no need for this Court to address these claims because Ruskai does not request any independent remedy for the alleged deficiencies in the agency's response. *See* Br. 61-62.

In any event, Ruskai's arguments are without merit. The Department of Homeland Security is required to "investigate complaints" of civil rights abuses, 6 U.S.C. § 345(a)(6), and, in particular, the Department must "investigate" certain complaints alleging disability discrimination, 6 C.F.R. § 15.70(d)(2). Here, assuming Ruskai's complaint was sufficiently specific to trigger the application of these statutory and regulatory requirements, TSA satisfied any obligation to investigate the complaint because it looked into the challenged screening policies and provided a response

substantively addressing Ruskai's concerns in January 2012. *See* AR 1895-97/JA 168-70.

Ruskai appears to challenge (Br. 57) the agency's lack of investigation into the facts underlying the four screenings mentioned in the complaint, but the relevant statutory and regulatory provisions do not speak to the scope of the agency's "investigation." *See, e.g.*, *Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urban Dev.*, 170 F.3d 381, 386 n.8 (3d Cir. 1999) (rejecting challenge to scope of investigation under similar regulation, explaining that "the concept of an investigation is itself broad, and we see no reason why [the agency] cannot interpret that concept as including the [agency's] internal consideration of the information that it receives"); *Greer v. Chao*, 492 F.3d 962, 965-66 (8th Cir. 2007) (statute requiring "investigation" does not provide meaningful standard for judicial review of manner in which investigation carried out). In any event, where, as here, a complainant mounts a challenge to a policy of general applicability, *see* AR 1895/JA 168, an examination of specific information concerning particular screenings is unnecessary.

In addition, Ruskai's timeliness argument relies (Br. 57-61) on decisions addressing when courts may "compel agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1) or on mandamus review, but those cases are inapposite where, as here, an agency has acted by issuing a response to the complaint, AR 1895-97/JA 168-70. *See, e.g.*, *Towns of Wellesley, Concord & Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63, 67-68 (2004).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
s/ Sydney Foster
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

DECEMBER 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,493 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and this Court's rules.

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared using Microsoft Word 2010 in 14-point Garamond, a proportionally spaced font.

s/Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2013, I filed the foregoing brief with the Court by causing an electronic version on disk and nine paper copies to be sent to the Court by FedEx. I also certify that, on the same day, I served a copy of the foregoing on counsel for the petitioner listed below by e-mail (pursuant to agreement):

Inga S. Bernstein (ibernstein@zalkindlaw.com)
Monica R. Shah (mshah@zalkindlaw.com)
Naomi R. Shatz (nshatz@zalkindlaw.com)
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110

s/Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2013, I filed the foregoing "Corrected Public, Redacted Version Of Final Brief For The Respondent" with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I also certify that the following counsel of record are registered as CM/ECF filers and will be served by the CM/ECF system: Inga S. Bernstein, Monica R. Shah, and Naomi R. Shatz.

s/Sydney Foster
Sydney Foster

ADDENDUM

ADDENDUM: TABLE OF CONTENTS

Page

6 U.S.C. § 345. Establishment of Officer for Civil Rights and Civil Liberties

(a) In general

The Officer for Civil Rights and Civil Liberties, who shall report directly to the Secretary, shall--

(1) review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department;

(2) make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;

(3) assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;

(4) oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;

(5) coordinate with the Privacy Officer to ensure that--

(A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and

(B) Congress receives appropriate reports regarding such programs, policies, and procedures; and

(6) investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.

(b) Report

The Secretary shall submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report on the implementation of this section, including the use of funds appropriated to carry out this section, and detailing any allegations of abuses described under subsection (a)(1) of this section and any actions taken by the Department in response to such allegations.

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms

used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

49 U.S.C. § 114. Transportation Security Administration

(a) In general.--The Transportation Security Administration shall be an administration of the Department of Transportation.

(b) Under Secretary.--

(1) Appointment.--The head of the Administration shall be the Under Secretary of Transportation for Security. The Under Secretary shall be appointed by the President, by and with the advice and consent of the Senate.

(2) Qualifications.--The Under Secretary must--

(A) be a citizen of the United States; and

(B) have experience in a field directly related to transportation or security.

(3) Term.--The term of office of an individual appointed as the Under Secretary shall be 5 years.

(c) Limitation on ownership of stocks and bonds.--The Under Secretary may not own stock in or bonds of a transportation or security enterprise or an enterprise that makes equipment that could be used for security purposes.

(d) Functions.--The Under Secretary shall be responsible for security in all modes of transportation, including--

(1) carrying out chapter 449, relating to civil aviation security, and related research and development activities; and

(2) security responsibilities over other modes of transportation that are exercised by the Department of Transportation.

(e) Screening operations.--The Under Secretary shall--

(1) be responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935;

(2) develop standards for the hiring and retention of security screening personnel;

(3) train and test security screening personnel; and

(4) be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate Federal agencies and departments.

(f) Additional duties and powers.--In addition to carrying out the functions specified in subsections (d) and (e), the Under Secretary shall--

(1) receive, assess, and distribute intelligence information related to transportation security;

(2) assess threats to transportation;

(3) develop policies, strategies, and plans for dealing with threats to transportation security;

(4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government;

(5) serve as the primary liaison for transportation security to the intelligence and law enforcement communities;

(6) on a day-to-day basis, manage and provide operational guidance to the field security resources of the Administration, including Federal Security Managers as provided by section 44933;

(7) enforce security-related regulations and requirements;

(8) identify and undertake research and development activities necessary to enhance transportation security;

(9) inspect, maintain, and test security facilities, equipment, and systems;

(10) ensure the adequacy of security measures for the transportation of cargo;

(11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;

(12) require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel;

(13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations;

(14) work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation; and

(15) carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law.

* * *

49 U.S.C. § 44901. Screening passengers and property

(a) In general.--The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and shall be carried out by a Federal Government employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in section 44919 or 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.

(b) Supervision of screening.--All screening of passengers and property at airports in the United States where screening is required under this section shall be supervised by uniformed Federal personnel of the Transportation Security Administration who shall have the power to order the dismissal of any individual performing such screening.

* * *

49 U.S.C. § 44902. Refusal to transport passengers and property

(a) Mandatory refusal.--The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport--

(1) a passenger who does not consent to a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive refusal.--Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

(c) Agreeing to consent to search.--An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the passenger or property for a purpose referred to in this section is not given.

49 U.S.C. § 44903. Air transportation security

* * *

(b) Protection against violence and piracy.--The Under Secretary shall prescribe regulations to protect passengers and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violence or aircraft piracy. When prescribing a regulation under this subsection, the Under Secretary shall--

(1) consult with the Secretary of Transportation, the Attorney General, the heads of other departments, agencies, and instrumentalities of the United States Government, and State and local authorities;

(2) consider whether a proposed regulation is consistent with--

(A) protecting passengers; and

(B) the public interest in promoting air transportation and intrastate air transportation;

(3) to the maximum extent practicable, require a uniform procedure for searching and detaining passengers and property to ensure--

(A) their safety; and

(B) courteous and efficient treatment by an air carrier, an agent or employee of an air carrier, and Government, State, and local law enforcement personnel carrying out this section; and

(4) consider the extent to which a proposed regulation will carry out this section.

* * *

49 U.S.C. § 44904. Domestic air transportation system security

(a) Assessing threats.--The Under Secretary of Transportation for Security and the Director of the Federal Bureau of Investigation jointly shall assess current and potential threats to the domestic air transportation system. The assessment shall include consideration of the extent to which there are individuals with the capability and intent to carry out terrorist or related unlawful acts against that system and the ways in which those individuals might carry out those acts. The Under Secretary and the Director jointly shall decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system.

(b) Assessing security.--In coordination with the Director, the Under Secretary shall carry out periodic threat and vulnerability assessments on security at each airport that is part of the domestic air transportation system. Each assessment shall include consideration of--

(1) the adequacy of security procedures related to the handling and transportation of checked baggage and cargo;

(2) space requirements for security personnel and equipment;

(3) separation of screened and unscreened passengers, baggage, and cargo;

(4) separation of the controlled and uncontrolled areas of airport facilities; and

(5) coordination of the activities of security personnel of the Transportation Security Administration, the United States Customs Service, the Immigration and Naturalization Service, and air carriers, and of other law enforcement personnel.

(c) Modal security plan for aviation.--In addition to the requirements set forth in subparagraphs (B) through (F) of section 114(t)(3), the modal security plan for aviation prepared under section 114(t) shall--

(1) establish a damage mitigation and recovery plan for the aviation system in the event of a terrorist attack; and

(2) include a threat matrix document that outlines each threat to the United States civil aviation system and the corresponding layers of security in place to address such threat.

(d) Operational criteria.--Not later than 90 days after the date of the submission of the National Strategy for Transportation Security under section 114(t)(4)(A), the Assistant Secretary of Homeland Security (Transportation Security Administration) shall issue operational criteria to protect airport infrastructure and operations against the threats identified in the plans prepared under section 114(t)(1) and shall approve best practices guidelines for airport assets.

(e) Improving security.--The Under Secretary shall take necessary actions to improve domestic air transportation security by correcting any deficiencies in that security discovered in the assessments, analyses, and monitoring carried out under this section.

49 U.S.C. § 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be

filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

6 C.F.R. § 15.3. Definitions.

For purposes of this part:

(a) Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Department. For example, auxiliary aids useful for persons with impaired vision include readers, materials in Braille, audio recordings and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, notetakers, written materials and other similar services and devices.

(b) Complete complaint means a written statement that contains the complainant's name and address, and describes the Department's alleged discriminatory action in sufficient detail to inform the Department of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes of individuals with disabilities shall also identify (where possible) the alleged victims of discrimination.

(c) Facility means all or any portion of a building, structure, equipment, road, walk, parking lot, rolling stock, or other conveyance, or other real or personal property.

(d) Individual with a disability means any person who has a physical or mental impairment that substantially limits one or more of the individual's major life activities, has a record of such an impairment, or is regarded as having such an impairment. For purposes of this definition:

(1) Physical or mental impairment includes:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal;

special sense organs; respiratory, including speech organs, cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(2) Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the individual's major life activities.

(4) Is regarded as having an impairment means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Department as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (e)(1) of this section but is treated by the Department as having such an impairment.

(e) Qualified individual with a disability means:

(1) With respect to a Department program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or

activity that the Department can demonstrate would result in a fundamental alteration in the nature of the program; and

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) With respect to employment, an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(f) Section 504 means section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended. As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

6 C.F.R. § 15.70. Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs and activities conducted by the Department.

(b) The Department shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614.

(c) All other complaints alleging violations of section 504 may be sent to the Officer for Civil Rights and Civil Liberties, Department of Homeland Security, Washington, DC 20528. The Officer for Civil Rights and Civil Liberties shall be responsible for coordinating implementation of this section.

(d)(1) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself, or by his or her authorized representative, file a complaint. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint.

(2) The Department shall accept and investigate all complete complaints over which it has jurisdiction.

(3) All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate entity of the Federal government.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with disabilities.

(g)(1) Not later than 180 days from the receipt of a complete complaint over which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing:

(i) Findings of fact and conclusions of law;

(ii) A description of a remedy for each violation found; and

(iii) A notice of the right to appeal.

(2) Department employees are required to cooperate in the investigation and attempted resolution of complaints. Employees who are required to participate in any

investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant. The written agreement shall describe the subject matter of the complaint and any corrective action to which the parties have agreed.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant not later than 60 days after receipt from the Department of the letter required by paragraph (g)(1) of this section. The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Officer for Civil Rights and Civil Liberties, or designee thereof, who will issue the final agency decision which may include appropriate corrective action to be taken by the Department.

(j) The Department shall notify the complainant of the results of the appeal within 30 days of the receipt of the appeal. If the Department determines that it needs additional information from the complainant, it shall have 30 days from the date it received the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended for an individual case when the Officer for Civil Rights and Civil Liberties determines that there is good cause, based on the particular circumstances of that case, for the extension.

(l) The Department may delegate its authority for conducting complaint investigations to other Federal agencies and may contract with nongovernment investigators to perform the investigation, but the authority for making the final determination may not be delegated to another agency.

49 C.F.R. § 1540.105. Security responsibilities of employees and other persons.

(a) No person may:

(1) Tamper or interfere with, compromise, modify, attempt to circumvent, or cause a person to tamper or interfere with, compromise, modify, or attempt to circumvent any security system, measure, or procedure implemented under this subchapter.

(2) Enter, or be present within, a secured area, AOA, SIDA or sterile area without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas.

(3) Use, allow to be used, or cause to be used, any airport-issued or airport-approved access medium or identification medium that authorizes the access, presence, or movement of persons or vehicles in secured areas, AOA's, or SIDA's in any other manner than that for which it was issued by the appropriate authority under this subchapter.

(b) The provisions of paragraph (a) of this section do not apply to conducting inspections or tests to determine compliance with this part or 49 U.S.C. Subtitle VII authorized by:

(1) TSA, or

(2) The airport operator, aircraft operator, or foreign air carrier, when acting in accordance with the procedures described in a security program approved by TSA.

49 C.F.R. § 1540.107. Submission to screening and inspection.

(a) No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.

(b) An individual must provide his or her full name, as defined in § 1560.3 of this chapter, date of birth, and gender when--

(1) The individual, or a person on the individual's behalf, makes a reservation for a covered flight, as defined in § 1560.3 of this chapter, or

(2) The individual makes a request for authorization to enter a sterile area.

(c) An individual may not enter a sterile area or board an aircraft if the individual does not present a verifying identity document as defined in § 1560.3 of this chapter, when requested for purposes of watch list matching under § 1560.105(c), unless otherwise authorized by TSA on a case-by-case basis.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5218 **September Term, 2012**

1:05-cv-01429-UNA
1:06-cv-01766-RCL
1:07-cv-02338-RCL
1:12-mc-00398-RCL

Filed On: August 15, 2013

Saeed Mohammed Saleh Hatim, Detainee,
Camp Delta, et al.,

Appellees

v.

Barack Obama, et al.,

Appellants

Consolidated with 13-5220, 13-5221

BEFORE: Henderson, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the motion for stay pending appeal, the response thereto, and the reply; and the motion for leave to file a supplement to the response to the motion for stay and the lodged supplement, it is

ORDERED that the motion for leave to file a supplement be denied. The Clerk is directed to return the lodged supplement. It is

FURTHER ORDERED that the motion for stay be granted and the district court's order filed July 11, 2013, be stayed pending further order of the court. Appellants have satisfied the requirements for a stay pending appeal. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk