

April 21, 2010

Secretary Janet Napolitano  
Department of Homeland Security  
U.S. Department of Homeland Security  
Washington, DC 20528

Chief Privacy Officer Mary Ellen Callahan  
The Privacy Office  
U.S. Department of Homeland Security  
Washington, DC 20528

**Re: Petition for Suspension of TSA Full Body Scanner Program**

Dear Secretary Napolitano and Ms. Callahan,

We the undersigned privacy, consumer rights, and civil rights organizations hereby petition<sup>1</sup> the Department of Homeland Security (“DHS”) and its component, the Transportation Security Administration (“TSA”) to suspend the ongoing deployment of the TSA’s Full Body Scanner (“FBS”) program. The TSA program uses FBS devices (also called “whole body imaging” machines) to screen air travelers in the United States.

We strongly object to the TSA’s use of full body scanners as primary, mandatory screening at security checkpoints. On May 31, 2009, twenty-four privacy and civil liberties groups<sup>2</sup> wrote to the DHS requesting, *inter alia*, that the DHS conduct “a 90-day formal public rulemaking process to receive public input on the agency’s use of ‘Whole Body Imaging’ technologies.”<sup>3</sup> The DHS failed to initiate a rulemaking. Instead, the TSA recently announced its intent to deploy approximately one thousand additional FBS devices to American airports.<sup>4</sup> Although the TSA failed to conduct a formal rulemaking, it is clear that the TSA has established a rule mandating the use of body scanners at airport checkpoints as primary screening. EPIC petitions the TSA to repeal that rule, and suspend the Full Body Scanner program.

The deployment of Full Body Scanners in US airports, as currently proposed, violates the U.S. Constitution, the Religious Freedom Restoration Act (“RFRA”), the Privacy Act of 1974 (“Privacy Act”), and the Administrative Procedures Act (“APA”). As described below, the FBS program effectively subjects all air travelers to unconstitutionally intrusive searches that are disproportionate and for which the TSA lacks any suspicion of wrongdoing. The FBS Program also violates the RFRA because it requires those of sincerely held religious beliefs to be subject

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<sup>1</sup> The undersigned file this petition pursuant to 5 U.S.C. § 553(e), which requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

<sup>2</sup> The May 31, 2009 letter signatories include many of the undersigned groups.

<sup>3</sup> Letter from EPIC and thirty-three organizations to Secretary Janet Napolitano, U.S. Dep’t. of Homeland Security (May 31, 2009), *available at* [epic.org/privacy/airtravel/backscatter/Napolitano\\_ltr-wbi-6-09.pdf](http://epic.org/privacy/airtravel/backscatter/Napolitano_ltr-wbi-6-09.pdf).

<sup>4</sup> U.S. Government Accountability Office, Testimony Before the House Subcommittee on Transportation Security and Infrastructure Protection, *TSA is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to this Effort and Other Areas of Aviation Security Remain*, Mar. 17, 2010 at 1 *available at* <http://www.gao.gov/new.items/d10484t.pdf>.

to offensive intrusions by government officials. The program violates the Privacy Act because the system gathers personally identifiable information—a detailed and unique image of the human body easily associated with a particular airline ticket—yet the TSA failed to publish a System of Records Notice. The TSA Chief Privacy Office violated its statutory obligations to ensure that new technologies “sustain and do not erode” the privacy of Americans when it effectively approved the program.

Further, substantial questions have been raised about the effectiveness of the devices, including whether they could detect powdered explosives—the very type of weapon used in the December 25, 2009 attempted airliner bombing. The full body scanning program is enormously expensive, costing taxpayers at least \$2.4 billion dollars. There are less intrusive and less costly techniques available to address the risk of concealed explosives on aircrafts. For example, last week, U.S. Senators asked the DHS to evaluate alternative technologies that could “address many of the privacy concerns raised by the scanners DHS is currently testing.”<sup>5</sup>

*I. The Agency is Undertaking an Aggressive Plan to Deploy Full Body Scanners in US Airports without regard to Effectiveness, Traveler Complaints, Privacy Risks, or Religious Objections*

*A) The Plan to Deploy Approximately One Thousand Full Body Scanners to American Airports*

The TSA operates Full Body Scanners at airports throughout the United States.<sup>6</sup> The TSA uses two types of FBS devices: backscatter x-ray and millimeter wave.<sup>7</sup> Both types of FBS devices can capture, store, and transfer<sup>8</sup> detailed, three-dimensional images of individuals’ naked bodies.<sup>9</sup> Experts have described full body scans as “digital strip searches.”<sup>10</sup> The images captured by FBS devices can uniquely identify individual air travelers. The TSA uses FBS devices to search air travelers as they pass through the TSA’s airport security checkpoints.<sup>11</sup>

FBS devices are currently deployed at: Albuquerque International Sunport Airport, Boston Logan International Airport, Chicago O’Hare International Airport, Cincinnati/Northern Kentucky International Airport, Hartsfield-Jackson Atlanta International Airport, Baltimore/Washington International Thurgood Marshall Airport, Denver International Airport,

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<sup>5</sup> Letter from Sen. Susan Collins, Sen. Saxby Chambliss, and Sen. Jon Kyl to Secretary Janet Napolitano, U.S. Dep’t. of Homeland Security (Apr. 12, 2010) *available at* [http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord\\_id=f8689ee7-5056-8059-767f-091debe8eae4](http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=f8689ee7-5056-8059-767f-091debe8eae4).

<sup>6</sup> TSA, *TSA: Imaging Technology*, [http://www.tsa.gov/approach/tech/imaging\\_technology.shtm](http://www.tsa.gov/approach/tech/imaging_technology.shtm) (last visited Apr. 15, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> TSA Office of Security Technology System Planning and Evaluation, *Procurement Specification for Whole Body Imager Devices for Checkpoint Operations*, Sept. 23, 2008 (“TSA Procurement Specifications Document”) at 5, *available at* [http://epic.org/open\\_gov/foia/TSA\\_Procurement\\_Specs.pdf](http://epic.org/open_gov/foia/TSA_Procurement_Specs.pdf) (stating “When in Test Mode, the WBI shall allow exporting of image data in real time; ... shall provide a secure means for high-speed transfer of image data; [and] shall allow exporting of image data (raw and reconstructed)”).

<sup>9</sup> E.g. Wikipedia, Backscatter X-ray, [http://en.wikipedia.org/wiki/Backscatter\\_X-ray](http://en.wikipedia.org/wiki/Backscatter_X-ray); L3, L3 Composite, <http://www.sds.l-3com.com/products/i/L-3%20composite%20300dpi.jpg>.

<sup>10</sup> Privacy Coalition, *Stop Digital Strip Searches*, <http://www.stopdigitalstripsearches.org/>.

<sup>11</sup> *Supra* note 5.

Dallas/Fort Worth International Airport, Detroit Metro Airport, Indianapolis International Airport, Jacksonville International Airport, Kansas City International Airport, McCarran International Airport, Los Angeles International Airport, Miami International Airport, Phoenix Sky Harbor International Airport, Raleigh-Durham International Airport, Richmond International Airport, Ronald Reagan Washington National Airport, San Francisco International Airport, Salt Lake City International Airport, Tampa International Airport, and Tulsa International Airport.<sup>12</sup>

In March 2010, the TSA began deploying additional FBS devices in American airports.<sup>13</sup> In March 2010, the TSA announced its decision to further deploy approximately one thousand additional FBS devices to American airports.<sup>14</sup> As a matter of pattern, practice and policy, the TSA requires air travelers to submit to FBS searches once they have entered the security zone in airports equipped with FBS devices.<sup>15</sup> As a matter of pattern, practice and policy, the TSA employs FBS searches as a primary search of air travelers in airports equipped with FBS devices.<sup>16</sup> As a matter of pattern, practice and policy, the TSA does not offer air travelers a meaningful alternative to FBS searches in airports equipped with FBS devices.<sup>17</sup> As a matter of pattern, practice and policy, the TSA does not offer air travelers with religious objections to Full Body Scanning a meaningful alternative to FBS searches in airports equipped with FBS devices.<sup>18</sup>

*B) The TSA's Full Body Scanner Program Collects and Retains Detailed Personal Information About Air Travelers*

The TSA requires air travelers to disclose their full name, birth date, and gender when purchasing a ticket.<sup>19</sup> The TSA obtains additional information about air travelers from airlines, government agencies, and other third parties. The TSA collects and stores this information, linking it to air travelers' itineraries. The TSA requires air travelers to submit to searches of their

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<sup>12</sup> *Supra* note 5.

<sup>13</sup> U.S. Government Accountability Office, Testimony Before the House Subcommittee on Transportation Security and Infrastructure Protection, *TSA is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to this Effort and Other Areas of Aviation Security Remain*, Mar. 17, 2010 at 1 available at <http://www.gao.gov/new.items/d10484t.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> Air Traveler Complaints to the TSA at 45, <http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf> (air traveler stated that “when he requested an alternative screening, the TSA screeners interrogated and laughed at him.”); at 53 (air traveler “was told to go in this machine and ... was not told that this machine would do a full body scan. I did not know what I went thru[sic] until today, when I read the article on line.”).

<sup>16</sup> *Id.* at 67 (“I am outraged and angry that what was supposed to be a ‘pilot’ for the millimeter scan machines has now become MANDATORY at SFO. I have transited through the International A terminal boarding area several times over the past few months and TSA has shut down all lanes other than the scanner.”) (emphasis in original).

<sup>17</sup> *Id.* at 62, (“I was picked to go through the new body scanner machine ... When I looked around, I noticed that there were only women who were ‘told’ to go through this machine, there were no men. I would have refused, but didn’t realize that I could until I read up on the scanner.”); at 65 (“I was asked/forced into this [body scanner] at BWi airport on 6/30/09”); at 69 (“the TSA guard sent my wife and I through the new X-Ray machine ... A guard did not give us a choice.”); at 69 (“I am 70 years old. [At BWI, I] went through the metal detector ... with apparently no problems, I proceeded to collect my belongings ... but was stopped [for a body scan]. I was never told why I had to do this, had no idea what was being done.”); at 72 (“[I] decided to opt out [of a FBS scan]. My family and I were then subjected to a punitive pat-down search (they went over me three times) that would have been considered sexual assault in any other context.”).

<sup>18</sup> *Id.* at 92 (describing mandatory body scan and subsequent patdown of devout Muslim air traveler).

<sup>19</sup> TSA, *Secure Flight Update*, Jul. 15, 2009, <http://www.tsa.gov/blog/2009/07/secure-flight-update.html>

bodies and carry-on luggage at TSA airport security checkpoints.<sup>20</sup> The TSA requires that air travelers present a boarding pass and government-issued photo identification card at airport security checkpoints.<sup>21</sup> The boarding pass displays air travelers' full names, travel itineraries, and bar codes containing machine-readable versions of travelers' personal information.<sup>22</sup> As a matter of pattern, practice and policy, the TSA visually matches air travelers' photo ID cards with their boarding passes when travelers pass through airport security checkpoints.<sup>23</sup> As a matter of pattern, practice and policy, the TSA scans air traveler's boarding passes, collecting air travelers' personal information, when travelers pass through airport security checkpoints that are equipped with paperless boarding pass scanners.<sup>24</sup>

As described above, the TSA employs full body scanners to search air travelers at airport security checkpoints.<sup>25</sup> As described above, FBS devices can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies.<sup>26</sup> As a matter of pattern, practice, and policy, the TSA requires air travelers to possess and often display boarding passes contemporaneous with FBS searches. The TSA is therefore able to associate a specific FBS image with the full name, birth date, gender, and travel itinerary of the scanned traveler. The TSA failed to publish a "system of records notice" concerning the FBS Program in the Federal Register.

*C) The TSA Misrepresents the Full Body Scan Program*

The TSA claims that FBS devices cannot capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies.<sup>27</sup> In fact, the FBS devices employed by the TSA can capture, store, and transfer detailed, three-dimensional images of individuals' naked bodies, as per the TSA's own requirements.<sup>28</sup> The TSA claims that FBS searches are "optional."<sup>29</sup> In fact, as a matter of pattern, practice and policy, the TSA does not offer air travelers a meaningful alternative to FBS searches in airports equipped with FBS devices.<sup>30</sup>

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<sup>20</sup> TSA, *TSA Travel Assistant*, <http://www.tsa.gov/travelers/airtravel/screening/index.shtm>; TSA, *3-1-1 on Air Travel*, <http://www.tsa.gov/311/index.shtm>.

<sup>21</sup> TSA, *The Screening Experience*, [http://www.tsa.gov/travelers/airtravel/assistant/editorial\\_1044.shtm](http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm).

<sup>22</sup> Wikipedia, *Boarding Pass*, [http://en.wikipedia.org/wiki/Boarding\\_pass](http://en.wikipedia.org/wiki/Boarding_pass); *see also* Wikipedia, *Bar Coded Boarding Pass*, [http://en.wikipedia.org/wiki/Bar\\_Coded\\_Boarding\\_Pass](http://en.wikipedia.org/wiki/Bar_Coded_Boarding_Pass)

<sup>23</sup> TSA, *TSA Announces Enhancements to Airport ID Requirements to Increase Safety*, Jun. 23, 2008, [http://www.tsa.gov/press/happenings/enhance\\_id\\_requirements.shtm](http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm).

<sup>24</sup> TSA, *Paperless Boarding Pass Pilot*, [http://www.tsa.gov/approach/tech/paperless\\_boarding\\_pass\\_expansion.shtm](http://www.tsa.gov/approach/tech/paperless_boarding_pass_expansion.shtm).

<sup>25</sup> *Supra* note 5.

<sup>26</sup> *Supra* notes 7-8.

<sup>27</sup> *Supra* note 5 (claiming "The image cannot be stored, transmitted or printed, and is deleted immediately once viewed.").

<sup>28</sup> *Supra* notes 7-8.

<sup>29</sup> *Supra* note 5 (claiming "Advanced imaging technology screening is **optional for all passengers.**"[emphasis in original]).

<sup>30</sup> *Supra* note 16; *see also supra* note 5 (stating "passengers who do not wish to utilize this screening will receive an equal level of screening, including a physical pat-down.").

In 2007, the TSA stated that FBS searches would not be mandatory for passengers, but rather “a voluntary alternative to a pat-down during secondary screening.”<sup>31</sup> In fact, as a matter of pattern, practice and policy, the TSA employs FBS searches as a primary search of air travelers in airports equipped with FBS devices.<sup>32</sup> The TSA has claimed that “a security algorithm will be applied to the image to mask the face of each passenger.”<sup>33</sup> In fact, the FBS devices employed by the TSA can capture images without any security algorithm and without masking the face of each passenger.<sup>34</sup>

The TSA claims that air travelers prefer FBS searches.<sup>35</sup> In fact, hundreds of air travelers have lodged objections with the TSA, alleging a host of law and policy violations arising from the TSA’s FBS searches.<sup>36</sup> Air travelers object to the invasiveness of the FBS searches.<sup>37</sup> Air travelers state that they are not informed when they undergo a FBS search, or of a pat-down alternative.<sup>38</sup> Air travelers object to the use of FBS devices to search vulnerable individuals, including children and pregnant women.<sup>39</sup> Pregnant air travelers objected to the TSA’s FBS search after the TSA scanned them without identifying the machine or informing them of how it operates.<sup>40</sup>

#### *D) Full Body Scanner Technology is Flawed*

The FBS devices employed by the TSA are not designed to detect powdered explosives.<sup>41</sup> The FBS devices employed by the TSA are not designed to detect powdered pentaerythritol

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<sup>31</sup> *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Transportation Security Administration, October 11, 2007 available at [http://www.tsa.gov/press/releases/2007/press\\_release\\_10112007.shtm](http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm); see also *X-Ray Backscatter Technology and Your Personal Privacy*, <http://web.archive.org/web/20080112014635/http://www.tsa.gov/research/privacy/backscatter.shtm> (archived January 12, 2008) (stating “Backscatter is a voluntary option for passengers undergoing secondary screening as an alternative to the physical pat down procedures”).

<sup>32</sup> *Supra* note 15.

<sup>33</sup> TSA, *TSA Tests Second Passenger Imaging Technology at Phoenix Sky Harbor Airport*, Oct. 11, 2007, [http://www.tsa.gov/press/releases/2007/press\\_release\\_10112007.shtm](http://www.tsa.gov/press/releases/2007/press_release_10112007.shtm).

<sup>34</sup> TSA Systems Engineering Branch, *Operational Requirements Document, Whole Body Imager Aviation Applications*, July 2006, (“TSA Operational Requirements Document”) at 8 available at [http://epic.org/open\\_gov/foia/TSA\\_Ops\\_Requirements.pdf](http://epic.org/open_gov/foia/TSA_Ops_Requirements.pdf) (stating “the WBI shall provide ten selectable levels of privacy.”); TSA Procurement Specifications Document at 5 (Enabling and disabling of image filtering shall be modifiable by users as defined in the User Access Levels and Capabilities appendix).

<sup>35</sup> *Supra* note 5 (claiming “Many passengers prefer advanced imaging technology. In fact, over 98 percent of passengers who encounter this technology during TSA pilots prefer it over other screening options.”).

<sup>36</sup> Air Traveler Complaints to the TSA available at <http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf>, <http://epic.org/privacy/airtravel/backscatter/EPIC2.pdf>, <http://epic.org/privacy/airtravel/backscatter/EPIC3.pdf>, <http://epic.org/privacy/airtravel/backscatter/EPIC4.pdf>, <http://epic.org/privacy/airtravel/backscatter/EPIC5.pdf>.

<sup>37</sup> Air Traveler Complaints to the TSA at 19, 24, 27, 28, 37 available at <http://epic.org/privacy/airtravel/backscatter/EPIC1.pdf> (complaints stating that body scanners are “a disgusting violation of civil liberties and privacy,” “for a bunch of peeping toms,” “unconstitutional,” “intrusive and ridiculous” and “a joke.”).

<sup>38</sup> *Supra* note 16.

<sup>39</sup> *E.g.* TSA Traveler Complaints at 14, 21, 25, 85.

<sup>40</sup> TSA Traveler Complaints at 159; TSA Traveler Complaints at 11-12, available at <http://epic.org/privacy/airtravel/backscatter/EPIC2.pdf>.

<sup>41</sup> TSA Procurement Specifications Document at 4 (requiring body scanners to detect liquid, but not powdered, material.); see also Jane Merrick, *Are Planned Airport Scanners Just a Scam?*, *The Independent* (UK), Jan. 3 2010

tetranitrate (“PETN”)—the explosive used in the attempted December 25, 2009 bombing of Northwest Airlines flight 253.<sup>42</sup> The FBS devices employed by the TSA have profound technical flaws that allow the machines to be breached and create the risk that sensitive traveler images could be leaked.

The FBS devices employed by the TSA run Windows XPe, which contains security vulnerabilities.<sup>43</sup> The FBS devices employed by the TSA are designed to transfer information via highly transportable and easily concealable USB devices.<sup>44</sup> The FBS devices employed by the TSA are equipped with Ethernet network interfacing capabilities that are vulnerable to security threats.<sup>45</sup> The FBS devices employed by the TSA permit TSA employees to disable built-in “privacy safeguards.”<sup>46</sup>

## *II. The Plan to Deploy Full Body Scanners is Widely Opposed, Violates the Fourth Amendment, and Several Federal Acts, including the Religious Freedom and Restoration Act, The Administrative Procedures Act, and the Privacy Act*

### *A) Religious Leaders Object to Full Body Scanners*

On February 20, 2010, Pope Benedict XVI objected to FBS searches because they fail to preserve the integrity of individuals.<sup>47</sup> Agudath Israel, an Orthodox Jewish umbrella group, objects to FBS searches, calling the devices “offensive, demeaning, and far short of acceptable norms of modesty” within Judaism and other faiths.<sup>48</sup> On February 9, 2010, The Fiqh Council of North America objected to body scanners, announcing that “general and public use of such

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available at <http://www.independent.co.uk/news/uk/home-news/are-planned-airport-scanners-just-a-scam-1856175.html> (noting that body-scanners “have been touted as a solution to the problem of detecting ... liquids, chemicals or plastic explosive. But Ben Wallace, the Conservative MP, who was formerly involved in a project by a leading British defence research firm to develop the scanners for airport use, said trials had shown that such low-density materials went undetected.”).

<sup>42</sup> *Id.*; see also Kenneth Chang, *Explosive on Flight 253 Is Among Most Powerful*, N.Y. Times, Dec. 27, 2009 available at [http://www.nytimes.com/2009/12/28/us/28explosives.html?\\_r=1](http://www.nytimes.com/2009/12/28/us/28explosives.html?_r=1).

<sup>43</sup> TSA Contract HSTS04-06-R-CTO046 with L3 (“TSA Contract with L3”) at 27 available at [http://epic.org/open\\_gov/foia/TSA\\_Millwave\\_Contract.pdf](http://epic.org/open_gov/foia/TSA_Millwave_Contract.pdf); See Konstantin Morozov, White Paper, *Best Practices for Protecting Windows XP Embedded Devices* at 4, available at <http://www.dstacom.au/DSTeupload/protectingxpdevices.pdf> (“In general, malware does not affect Windows Mobile devices, such as Smartphone and Pocket PCs, and other devices based on Windows CE, as much as it impacts devices running Windows XP Embedded. This is because Windows XP Embedded is based on the same feature binaries as Windows XP Professional and thus has similar vulnerabilities that can be exploited.”); Brian Krebs, *Windows Security Flaw is ‘Severe,’* Washington Post, Dec. 29, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901456.html>.

<sup>44</sup> TSA Procurement Specifications Document at 10 (“the WBI shall provide capabilities for data transfers via USB devices.”).

<sup>45</sup> TSA Procurement Specifications Document at 7; TSA Operational Requirements Document at 10-11.

<sup>46</sup> TSA Procurement Specifications Document at 5 (Enabling and disabling of image filtering shall be modifiable by users as defined in the User Access Levels and Capabilities appendix).

<sup>47</sup> Catholic News Agency, *Benedict XVI Urges Airports to Protect Integrity of Travelers*, Feb. 20, 2010, [http://www.catholicnewsagency.com/news/benedict\\_xvi\\_calls\\_for\\_airports\\_to\\_protect\\_integrity\\_of\\_travelers/](http://www.catholicnewsagency.com/news/benedict_xvi_calls_for_airports_to_protect_integrity_of_travelers/).

<sup>48</sup> Omar Sacirbey, *Jews, Muslims Worry Body Scanners Violate Religious Laws*, Mar. 3, 2010, [http://www.religionnews.com/index.php?/rnstext/jews\\_muslims\\_say\\_body\\_scanners\\_violate\\_religious\\_laws/](http://www.religionnews.com/index.php?/rnstext/jews_muslims_say_body_scanners_violate_religious_laws/).

scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty.”<sup>49</sup>

American air travelers have filed objections with the TSA on religious grounds.<sup>50</sup> On February 19, 2010, two Muslim women refused to submit to a body scan at the Manchester Airport, forfeiting their tickets to Pakistan rather than undergo the scan.<sup>51</sup> In March 2010, a six-member Pakistani parliamentary delegation from the Federally Administered Tribal Areas refused to submit to full body scanning at the Washington Dulles International Airport, stating it was an insult to parliamentarians of a sovereign country.<sup>52</sup> Instead, they ended their visit to the US and returned to Pakistan.<sup>53</sup>

*B) The TSA's Full Body Scanner Program Violates the Fourth Amendment and the RFRA*

The TSA's FBS program subjects air travelers to unreasonable searches. The program requires air travelers to submit to a uniquely invasive search without any suspicion that particular individuals have engaged in wrongdoing. Courts have upheld some invasive airport checkpoint searches, but typically on the basis that the searches are part of a progressively escalating series of screenings.<sup>54</sup> Full Body Scanners are part of no such program. Instead, they employ the intrusive, degrading digital strip search as mandatory, primary screening.

The TSA program particularly burdens devout air travelers. As noted above, many religious leaders condemn digital strip searches as incompatible with religious tenets. Yet the TSA's practice of requiring Full Body Scans as mandatory, primary screening leaves religious travelers without a meaningful alternative. The program violates RFRA because the TSA's interest in conducting a Full Body Scan is limited, particularly given that the scanners' are not designed to detect powdered explosives. Further, Full Body Scanners are not the least restrictive means of furthering the TSA's interest in safeguarding air travel.<sup>55</sup>

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<sup>49</sup> Fiqh Council of North America, *Home*, <http://www.fiqhcouncil.org/> (last visited April 15, 2010) (stating “a general and public use of such scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty.”).

<sup>50</sup> *E.g.* Air Traveler Complaints to the TSA *available at* [http://epic.org/privacy/airtravel/backscatter/3-](http://epic.org/privacy/airtravel/backscatter/3-2_Interim_Response.pdf)

[2\\_Interim\\_Response.pdf](http://epic.org/privacy/airtravel/backscatter/3-2_Interim_Response.pdf).

<sup>51</sup> Will Pavia, *Muslim Woman Refuses Body Scan at Airport*, Mar. 3, 2010, *The Times (UK) available at* <http://www.timesonline.co.uk/tol/travel/news/article7048576.ece>.

<sup>52</sup> Press TV, *Pakistan MPs End US Visit to Protest Body Scanners*, Mar. 7, 2010 <http://www.presstv.ir/detail.aspx?id=120286&sectionid=351020401>.

<sup>53</sup> *Id.*

<sup>54</sup> *E.g. United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006) (finding airport searches reasonable because they “were well-tailored to protect personal privacy, escalating in invasiveness only after a lower level of screening disclosed a reason to conduct a more probing search. The search began when Hartwell simply passed through a magnetometer. ... Only after Hartwell set off the metal detector was he screened with a wand. ... And only after the wand detected something solid on his person, and after repeated requests that he produce the item, did the TSA agents ... reach into his pocket.”).

<sup>55</sup> *Supra* note 5 (observing that passive scanners “incorporate auto-detection technology that addresses many of the privacy concerns raised by the scanners DHS is currently testing, while also appearing to provide a highly effective scan.”)

*C) The TSA's Full Body Scanner Program Violates the Privacy Act*

As described above, the TSA's Full Body Scanner Program creates a group of records containing air travelers' personally-identifiable information. The group of records is under the control of the TSA, and the TSA can retrieve information about air travelers by name or by some identifying number, symbol, or other identifying particular assigned to the individual. The TSA's FBS program has created and/or revised a "system of records" under the Privacy Act. The TSA unlawfully failed to publish a "system of records notice" in the Federal Register, and otherwise failed to comply with its Privacy Act obligations concerning the FBS Program.

*D) The TSA's Full Body Scanner Program Violates the Administrative Procedures Act*

The DHS Chief Privacy Officer has a statutory obligation to "assur[e] that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information."<sup>56</sup> The DHS Chief Privacy Officer has a statutory obligation to "assur[e] that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974."<sup>57</sup> The DHS Chief Privacy Officer has a statutory obligation to "conduct[] a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected."<sup>58</sup>

The DHS Chief Privacy Office prepared an inadequate Privacy Impact Assessment of the TSA's FBS test program.<sup>59</sup> The inadequate assessment, which was subsequently revealed through Freedom of Information Act litigation, failed to identify numerous privacy risks to air travelers. The DHS Chief Privacy Office failed to prepare any Privacy Impact Assessment concerning the TSA's current FBS program. The TSA's current FBS program is materially different from the TSA's FBS test program. The TSA's use of full body scanners fails to comply with the Privacy Act. The program erodes, and does not sustain, privacy protections relating to the use, collection, and disclosure of air traveler's personal information.

*III. Petition for Relief: Suspend Purchase, Deployment, and Operation of Full Body Scanners*

The undersigned hereby request and petition the DHS and TSA for relief. As set forth above, the TSA's Full Body Scanner program violates the Fourth Amendment, the RFRA, the Privacy Act, and the APA. We request that the DHS and TSA immediately suspend purchase and deployment of Full Body Scanners to American airports. In addition, we request that the DHS and TSA cease operation of already-deployed Full Body Scanners as primary screening.

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<sup>56</sup> 6 U.S.C. § 142(1) (2009).

<sup>57</sup> 6 U.S.C. § 142(2) (2009).

<sup>58</sup> 6 U.S.C. § 142(4) (2009).

<sup>59</sup> DHS, *Privacy Impact Assessment for TSA Whole Body Imaging* (Oct. 17, 2008) available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_tsa\\_wbi.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbi.pdf); see also DHS, *Privacy Impact Assessment Update for TSA Whole Body Imaging* (Jul. 23, 2009) available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_tsa\\_wbiupdate.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_wbiupdate.pdf).



Sincerely,

Electronic Privacy Information Center  
Asian American Legal Education and Defense Fund  
Bill of Rights Defense Committee  
Calegislation  
Campaign for Liberty  
Center for Financial Privacy and Human Rights  
Center for the Study of Responsive Law  
Citizen Outreach  
Consumer Federation of America  
Consumer Travel Alliance  
Consumer Watchdog  
Council on American Islamic Relations  
Essential Information  
Government Accountability Project  
The Identity Project  
Liberty Coalition  
Muslim Legal Fund of America  
National Center for Transgender Equality  
National Workrights Institute  
Patient Privacy Rights  
Privacy Activism  
Privacy Rights Clearinghouse  
Public Citizen Litigation Group  
Republican Liberty Caucus  
U.S. Bill of Rights Foundation  
World Privacy Forum