~~SENSITIVE SECURITY INFORMATION~~
~~FILED *EX PARTE* AND UNDER SEAL~~

No. 15-15717-D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JONATHAN CORBETT,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

On Petition for Review of an Order of the Transportation Security Administration

---

PUBLIC REDACTED BRIEF FOR RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1, the undersigned counsel certifies that, to the best of his knowledge, the following constitutes a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

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STATEMENT REGARDING ORAL ARGUMENT

Respondent, the Transportation Security Administration, does not request oral argument because it believes that the facts and legal arguments are adequately presented in the briefs and in the record, and because this case involves several types of restricted information (including classified information and Sensitive Security Information) to which petitioner has not been given access. Should the Court deem oral argument appropriate, however, respondent respectfully requests the opportunity to participate, and further requests that appropriate safeguards be implemented to guard against public disclosure of restricted information.

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STATEMENT OF JURISDICTION

On December 28, 2015, petitioner Jonathan Corbett filed this petition for review pursuant to 49 U.S.C. § 46110. That statute permits a person "disclosing a substantial interest" in an order issued by the Transportation Security Administration (TSA) to obtain judicial review of that order in the courts of appeals.[1] *Id.* Such a petition "must be filed not later than 60 days after the order is issued." *Id.* The petition for review is timely because TSA issued the challenged order on December 20, 2015. Supplemental Appendix ("SA") 51. However, as explained more fully below, the Court lacks subject-matter jurisdiction over the petition because petitioner does not have standing to bring it. For the same reasons, petitioner has failed to allege facts "disclosing a substantial interest" in the challenged order, and thus cannot satisfy the statutory predicate for a petition for review under § 46110.

[1] Section 46110 applies to orders issued by "the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary . . . in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114." 49 U.S.C. § 46110(a). When TSA was created, Congress appointed the Under Secretary of Transportation for Security as the head of TSA. *Id.* § 114(b)(1). In 2002, the functions of TSA and the Under Secretary of Transportation for Security were transferred to the Department of Homeland Security. 6 U.S.C. §§ 203(2), 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.

STATEMENT OF THE ISSUE

This petition for review challenges a TSA order that requires certain airline passengers, as warranted by security considerations, to pass through scanners equipped with advanced imaging technology (AIT). Such passengers may not decline AIT screening in favor of an alternate screening method, such as a pat-down.

The issues presented are:

(1) Whether petitioner, who has never been compelled to undergo AIT screening under the policy, has standing to challenge it;

(2) Whether the policy violates the Fourth Amendment;

(3) Whether the policy is a substantive rule subject to the Administrative Procedure Act's notice-and-comment requirements; and

(4) Whether the policy is arbitrary or capricious.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Congress vests responsibility for civil aviation security in the TSA Administrator. 49 U.S.C. § 114(d). The Administrator must "assess current and potential threats to the domestic air transportation system," take action to protect the Nation from those threats, and improve transportation security in general. *Id.* §§ 44903(b), 44904(a), (e). Specifically, the Administrator must ensure that "all

passengers and property" are screened before boarding, to prevent passengers from "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a).

Nonmetallic explosives and other nonmetallic threats pose a significant danger to aviation security. *See Passenger Screening Using Advanced Imaging Technology*, 81 Fed. Reg. 11,364, 11,365 (Mar. 3, 2016) (final rule); *see also* 49 U.S.C. § 44925(a) (directing TSA to "give a high priority" to the development of new technologies to detect such threats). This danger received nationwide attention when, on Christmas Day, 2009, a terrorist affiliated with Al Qaeda in the Arabian Peninsula attempted to destroy a plane using a nonmetallic explosive device hidden in his underwear. *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287, 18,299 (Mar. 26, 2013) (notice of proposed rulemaking); *see also id.* (describing similar attempts). The screening procedures then in effect, which included the use of metal detectors and pat-downs, did not detect the Christmas Day bomber's device. *Id.*

TSA moved quickly to address the threat posed by nonmetallic objects. In October 2010, TSA began using AIT scanners as a primary screening method at airport security checkpoints. *Corbett v. TSA*, 767 F.3d 1171, 1174-75 (11th Cir. 2014). Unlike conventional metal detectors, AIT scanners can detect both metallic and nonmetallic objects concealed on a passenger's body or in a passenger's clothing. *Id.*;

see 78 Fed. Reg. at 18,297 (listing examples of potentially dangerous items, including nonmetallic threat items, that TSA has discovered using advanced imaging technology). TSA has determined that AIT scanners are the "most effective technology currently available" to repair this "critical weakness" in the Nation's security infrastructure. 81 Fed. Reg. at 11,365.

2. The AIT scanners that were then available for use by TSA displayed an image of "the body contour of the passenger" but "did not store, export, or print the images." *Corbett*, 767 F.3d at 1175. The D.C. Circuit held that the use of such scanners, in addition to the use of physical pat-downs of passengers who refused AIT screening, was lawful under the Fourth Amendment. *See Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10-11 (D.C. Cir. 2011) (hereinafter "*EPIC*").

AIT scanners now protect passengers' privacy to an even greater extent than the scanners whose use the D.C. Circuit deemed constitutional. After the D.C. Circuit decided *EPIC*, Congress mandated that all AIT scanners used for passenger screening must incorporate "automatic target recognition" ("ATR") software. 49 U.S.C. § 44901(*l*)(2)(A). This software "produces a generic image of the individual being screened that is the same as the images produced for all other screened individuals." *Id.* By May 2013, TSA had replaced or upgraded all AIT scanners at airport checkpoints with updated machines with ATR capability. *See Redfern v.*

Napolitano, 727 F.3d 77, 84 (1st Cir. 2013). Consequently, AIT scanners no longer display the body contour of scanned passengers. Each scanner instead notifies TSA agents about potential concealed threats by highlighting those areas on a generic outline of a person, which image is temporarily shown on an attached monitor. *See Corbett*, 767 F.3d at 1175; SA 37 (example image). The scanners in use at airports do not collect any personally identifiable information, do not display an individualized image every time a passenger passes through them, and are not configured to store or to transmit any passenger-specific images. *See* 81 Fed. Reg. 11,373-82; *see* AR 4,237.

This Court has held that AIT scanners equipped with ATR software "effectively reduce the risk of air terrorism" while "pos[ing] only a slight intrusion on an individual's privacy." *Corbett*, 767 F.3d at 1181. The use of such scanners, the Court concluded, is "a reasonable administrative search under the Fourth Amendment." *Id.* at 1179.

3. TSA initially deployed AIT scanners as a primary screening method without public rulemaking, *see EPIC*, 653 F.3d at 4, but the D.C. Circuit held that notice-and-comment rulemaking was required, *id.* at 8. That court remanded the matter to TSA but did not enjoin TSA's use of AIT scanners, citing TSA's "obvious need . . . to continue its airport security operations without interruption." *Id.* at 11. The D.C. Circuit pointed to the Supreme Court's observation in *City of Indianapolis v. Edmond*,

531 U.S. 32 (2000), of the "particularly acute" need for searches at airports to ensure public safety, and further recognized that "an AIT scanner, unlike a magnetometer, is capable of detecting" and "deterring[] attempts to carry aboard airplanes explosives in liquid or powder form." EPIC, 653 F.3d at 10. As a result, TSA continued to use AIT scanners at checkpoints while it undertook notice-and-comment rulemaking.

B. Factual Background and TSA Notice-and-Comment Rulemaking on AIT Screening

TSA issued a notice of proposed rulemaking on March 26, 2013. *See* 78 Fed. Reg. 18,287. The proposal was designed to "codif[y] the use of AIT to screen individuals at aviation security screening checkpoints." *Id.* at 18,289. TSA proposed to amend existing regulations prohibiting individuals from passing beyond a security checkpoint and boarding a plane "without submitting to the screening and inspection of his or her person and accessible property in accordance with [TSA] procedures." 49 C.F.R. § 1540.107(a). The proposed rule clarified that "[t]he screening and inspection" procedures mandated by 49 C.F.R. § 1540.107(a) "may include the use of advanced imaging technology." 78 Fed. Reg. at 18,296.

The preamble to the proposed rule explained that "AIT screening [was] currently optional" for all passengers, but that passengers would "receive a pat-down" should they decline to undergo such screening. 78 Fed. Reg. at 18,296. However, the

preamble to the proposed rule specifically invited public comments on "the ability of passengers to opt-out of AIT screening" under the proposed rule, thereby notifying the public that TSA was considering mandatory AIT screening. *Id.* at 18,294.

Over 5,500 comments were submitted to the agency on the proposed rule. *See* https://www.regulations.gov/docket?D=TSA-2013-0004 (select "View all documents and comments"). Some commenters complained that the proposed rule permitted the agency to make AIT screening mandatory. *See, e.g.*, Comments of the Competitive Enterprise Institute and Robert L. Crandall 5-6 (June 24, 2013); Comment of the United States Justice Foundation 2 (June 24, 2013); Comment of Freedom to Travel USA 18 (June 23, 2013); Comments of Jim Harper, John Mueller and Mark Stewart of the Cato Institute 8-10 (June 21, 2013); Comment of Marianne Cherrier Burns (May 29, 2013). One commenter criticized the proposed rule for *not* making AIT screening mandatory. *See* Comment of James L. Bareuther (Apr. 17, 2013); *cf. Ruskai v. Pistole*, 775 F.3d 61, 81 (1st Cir. 2014) (describing petitioner's argument that TSA should be required to use AIT scanners instead of metal detectors).

In December 2015, while notice-and-comment rulemaking was underway, TSA publicly issued a Privacy Impact Assessment Update for TSA Advanced Imaging Technology. *See* Administrative Record ("AR") 1900-06. The Privacy Impact Assessment explained that TSA had changed its "operating protocol regarding the

ability of individuals to . . . opt-out of AIT screening in favor of physical screening." AR 1901. "While passengers may generally decline AIT screening in favor of physical screening, TSA [now] direct[s] mandatory AIT screening for some passengers as warranted by security considerations in order to safeguard transportation security." AR 1903. Because "[t]his will occur in a very limited number of circumstances," the change in operating protocol will not affect the "vast majority of passengers." *See* TSA, *Frequently Asked Questions*, http://www.tsa.gov/travel/frequently-asked-questions (search "decline AIT screening") (last visited Oct. 19, 2016).

TSA promulgated its final rule regarding AIT screening in March 2016. *See* 81 Fed. Reg. 11,364. Like the proposed rule, the final rule provides that screening and inspection at an airport security checkpoint "may include the use of [AIT]." *Id.* at 11,405. The preamble to the final rule expressly references the Privacy Impact Assessment, which recognizes that AIT screening will be mandatory for some passengers as warranted by security considerations, noting that it reflects "current DHS policy." *Id.* at 11,366.

The preamble to the final rule discusses commenters' concerns that the proposed rule permits TSA to require AIT screening without a right to opt-out, and explains that TSA has revised language in the proposed rule and in the regulatory impact analysis to state that passengers "may generally opt-out of AIT screening." 81

Fed. Reg. at 11,366, 11,388-89. However, TSA explicitly declined to codify a right to opt-out of AIT screening in the text of the final rule, noting that the agency "may require AIT use, without the opt-out alternative, as warranted by security considerations in order to safeguard transportation security." *Id.* at 11,388-89. It is that policy that petitioner challenges.

As indicated by the portion of the administrative record containing Sensitive Security Information (SSI),[2] the challenged AIT screening policy applies only to individuals who have been issued a boarding pass with an "SSSS" notation indicating that they have been selected for enhanced screening. *See* SA 70. This notation generally means that the passenger in question is a "selectee." selectees are individuals who are "[k]nown or suspected [t]errorists" or who have been "identified as [posing a] higher risk" to airline security "based on intelligence SA 90 (enumerating categories of selectees). Additionally, as of July 2016,

[2] Congress has directed TSA to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if [TSA] decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1)(C). In response to that directive, TSA has defined a set of information as Sensitive Security Information (SSI) that may not be disclosed except in certain limited circumstances. 49 C.F.R. § 1520.5 (describing information that constitutes SSI); *id.* § 1520.9(a)(2) explaining that SSI may generally be disclosed only to "covered persons who have a need to know"); *id.* § 1520.7 (defining "[c]overed persons"); *id.* § 1520.11 (defining "need to know").

TSA has instituted a policy under which [redacted] airline passengers—are randomly designated as selectees for the purpose of a particular trip. SA 106. TSA designed this policy to create the public perception that "enhanced screening is conducted on a random basis," thus deterring "[u]nknown terrorists" without significantly impeding checkpoint operations. SA 105.[3]

A 2015 security review, conducted by the Office of Inspector General within the Department of Homeland Security, uncovered weaknesses in the screening procedures TSA was then applying to selectees. *See* SA 13, 16, 19; *see also* Classified Supplement to the Administrative Record ("CS") 99-100 (classified report); *id.* 55-56 (TSA response). [redacted] Covert tests also suggested that selectees could [redacted] opting out of AIT screening in favor of a pat-down. *See* SA 14. These test results, in conjunction with "the intensified volume

3 [redacted]

of and violence in the propaganda and guidance being circulated worldwide by our terrorist adversaries," convinced TSA to adapt its selectee-screening procedures to the evolving security threat. SA 24-25. Indeed, at least one terrorist organization actively counsels individuals seeking to smuggle an explosive device aboard an aircraft to avoid checkpoints with AIT. SA 62.

TSA addressed these vulnerabilities in two principal ways. First, TSA determined that selectees should no longer be permitted to opt for a pat-down in lieu of undergoing AIT screening. SA 52. Second, TSA established more comprehensive pat-down procedures for responding to an alert from an AIT scanner [redacted] [redacted]. SA 50. After several months of iterative testing in which these procedures were revised and refined, *see* SA 22-23, 53, TSA noted marked improvement in detection rates for threat items concealed on the body relative to the then-existing baseline. SA 20-21. TSA implemented the new procedures nationwide on December 20, 2015. SA 51; *see* SA 27-49 (new procedures).

C. Prior Proceedings

This petition for review marks *pro se* petitioner Jonathan Corbett's third challenge to some aspect of TSA's AIT screening procedures.[4] Petitioner initially

[4] In 2012, Corbett also sued TSA and a host of other defendants for 21 alleged statutory and constitutional violations arising from an encounter at an airport

sued the United States in federal district court to challenge TSA's use of AIT scanners as a primary screening method at airport security checkpoints, and moved for a nationwide injunction to prevent TSA from implementing AIT screening. *See* Order Granting Mot. to Dismiss, *Corbett v. United States*, No. 10-cv-24106, 2011 WL 2003529 (S.D. Fla. Apr. 29, 2011). The district court denied his motion and dismissed the action for want of jurisdiction because the procedures he sought to challenge constituted a TSA "order" pursuant to 49 U.S.C. § 46110. Petitioner appealed and moved for interim injunctive relief. This Court denied that motion, *see* Order, *Corbett v. United States*, No. 11-12426 (11th Cir. July 27, 2011), and affirmed the district court's judgment, *see Corbett v. United States*, 458 F. App'x 866, 871 (11th Cir. 2012). The Supreme Court denied certiorari. *Corbett v. United States*, 133 S. Ct. 161 (2012).

Petitioner then filed a petition for review in this Court, again challenging TSA's use of AIT scanners as a primary screening method at airport security checkpoints, and again requesting interim injunctive relief. The Court denied that second motion because it "fail[ed] to meet the applicable standard for granting injunctive relief." *See* Order, *Corbett v. TSA*, No. 12-15893 (11th Cir. Apr. 4, 2013). The Court then

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checkpoint. The district court dismissed nineteen of his claims and granted summary judgment to defendants on the remaining two. *See Corbett v. TSA*, 568 F. App'x 690, 692 (11th Cir. 2014) (per curiam). This Court affirmed. *Id.*

dismissed the petition as untimely, and, in the alternative, denied the petition "because the challenged screening procedure does not violate the Fourth Amendment." *Corbett*, 767 F.3d at 1184. Petitioner again petitioned for a writ of certiorari, which the Supreme Court again denied. *Corbett v. TSA*, 135 S. Ct. 2867 (2015).

Petitioner's latest petition for review challenges TSA's decision to mandate AIT screening for certain travelers as warranted by security considerations. *See* Pet. for Review 1, *Corbett v. TSA*, No. 15-15717 (11th Cir. filed Dec. 28, 2015). The petition alleges that this screening policy violates the Fourth Amendment and the Administrative Procedure Act. Petitioner simultaneously moved for a nationwide injunction to bar TSA from implementing the policy. *See* Mot. to Stay Order, *Corbett*, No. 15-15717 (Dec. 28, 2015). This Court denied petitioner's motion, *see* Order, *Corbett*, No. 15-15717 (Feb. 22, 2016), and the government's subsequent motion for summary disposition of the petition, *see* Order, *Corbett*, No. 15-15717 (June 6, 2016).

D. Standard of Review

This Court's review of the challenged TSA order is governed by 49 U.S.C. § 46110(c) and the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). The 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 nonfactual matters, the standard is supplied by the APA. *See Penobscot Air Servs., Ltd. v.*

FAA, 164 F.3d 713, 717-18 (1st Cir. 1999). The APA requires 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).

SUMMARY OF ARGUMENT

1. The petition for review concerns a TSA order requiring certain airline passengers to undergo AIT screening without a right to opt-out in favor of a pat-down as warranted by security considerations. The petition should be dismissed for lack of subject-matter jurisdiction because petitioner lacks Article III standing to challenge TSA's screening policy. Petitioner has never been compelled to undergo AIT screening under the policy, and he cannot show that he faces an imminent threat of being compelled to undergo such screening in the future. He has therefore failed to meet his burden to demonstrate that he has suffered an injury-in-fact cognizable under Article III.

Petitioner's brief and supporting affidavit are devoid of any suggestion that he has ever been required to pass through an AIT scanner under the policy he challenges. The only justification he offers for why he might be one of the small number of passengers to whom the policy applies is his status as a frequent flyer who intends to fly frequently. Petitioner surmises that, because TSA has allegedly selected him for heightened screening in the past, it is likely that he will be subjected to the challenged

policy before one of his future flights. But the Supreme Court foreclosed this theory of standing in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which rejected an identical argument as too speculative to constitute a legally cognizable injury-in-fact.

2. In the alternative, the petition should be denied because none of its three claims has merit.

First, petitioner claims that TSA's AIT screening policy violates the Fourth Amendment. But this Court has already upheld the constitutionality of TSA's use of AIT scanners in a previous case brought by petitioner. *See Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014). The Court concluded that "[t]he jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane outweighs the slight intrusion of a generic body scan." *Id.* at 1182 (quotation marks omitted). That holding controls this case.

Petitioner resists this conclusion on the theory that, because AIT scanning and a physical pat-down are equally effective at detecting dangerous threats, it is irrational for TSA to screen certain passengers using the former technique when the latter technique will suffice. This argument proceeds from the untenable premise that an AIT scanner provides exactly the same level of security as a physical pat-down. And it is in any event disproved by the administrative record, which confirms that the policy of mandating AIT screening for certain passengers as warranted by security

considerations is more effective at detecting potential threats than the opt-out policy that it replaced.

Second, petitioner claims that TSA's AIT screening policy is a substantive rule that must be promulgated through notice-and-comment rulemaking. But TSA has already concluded notice-and-comment rulemaking with respect to the use of AIT scanners—a rulemaking that expressly addressed the question whether TSA could make AIT screening mandatory for certain passengers and that culminated in a final rule permitting such screening. In any event, petitioner cannot reasonably contend that the challenged screening policy, which has a *de minimis* impact on only a small subset of the traveling population, substantially modifies affected passengers' overall screening experience as to require the change to be promulgated using notice-and-comment in the first place.

Finally, petitioner claims that the challenged policy is so lacking in justification as to be arbitrary and capricious under the Administrative Procedure Act. This argument—identical in all salient respects to petitioner's constitutional argument—is disproved by the administrative record as well.

ARGUMENT

I. Petitioner Lacks Standing To Challenge TSA's Policy Mandating AIT Screening for Certain Passengers as Warranted by Security Considerations.

As the party invoking this Court's jurisdiction, petitioner bears the burden of proving his standing. *See Legal Envtl. Assistance Found., Inc. v. EPA*, 400 F.3d 1278, 1281 (11th Cir. 2005). To satisfy that requirement, which derives from Article III of the U.S. Constitution, petitioner must demonstrate "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quotation marks omitted). As relevant here, petitioner must show that the challenged agency action has inflicted an "injury in fact" upon him: that is, an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks, citations, and footnote omitted). Although the "risk of real harm" can "satisfy the requirement of concreteness," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013)), such risk may not be premised on a "speculative chain of possibilities," *see Clapper*, 133 S. Ct. at 1147-48 (cited by *Spokeo*, 136 S. Ct. at 1549). And although threatened injuries can satisfy the requirement of imminence, such threats "must be *certainly impending*"; "[a]llegations of *possible* future

injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quotation marks omitted). Because petitioner has failed to prove that he faces a "certainly impending" threat of mandatory AIT screening, the petition for review should be dismissed.

A. Petitioner Cannot Show that He Has Ever Been or Will Imminently Be Subject to the Policy He Challenges.

Petitioner has not alleged that he has ever been subjected to mandatory AIT screening under TSA's policy. Nor can petitioner establish an injury-in-fact on the basis of speculation that he might be subject to mandatory screening in the future. Petitioner has supplied no evidence suggesting that he represents a heightened security risk sufficient to trigger application of the policy to him. *Cf. Clapper*, 133 S. Ct. at 1148. Petitioner alleges merely that he "regularly gets the 'full treatment'" from TSA because TSA has randomly subjected him to "selectee" screening on "at least 3 occasions" and to an unspecified form of "elevated screening" on "several more occasions." *See* Pet. Br. 1-2. Because petitioner is a frequent flyer who intends to continue flying frequently, he hypothesizes that "it is likely that [he] will be a selectee passenger in the near future." *See id.*; *id.* Exh. B, at 3-4.

Petitioner's theory of standing does not meet the standards established in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In that case, plaintiff Adolph Lyons sought to enjoin Los Angeles police officers from using a certain chokehold technique to render

arrestees unconscious. *Id.* at 97-98. Lyons alleged that he had been personally subjected to the challenged technique in the past, and that Los Angeles police officers "routinely appl[ied] chokeholds in situations where they are not threatened by the use of deadly force." *Id.* at 105. The Supreme Court held that Lyons lacked standing to sue. As the Court explained, the fact that Lyons "may have been illegally choked by the police" in the past "does nothing to establish a real and immediate threat that he would again be . . . illegally choke[d]" in the future. *Id.* The Court reached that conclusion despite its recognition that, "among the countless encounters between the police and the citizens of . . . Los Angeles, there will be certain instances in which strangleholds will be illegally applied." *Id.* at 108. For "it is . . . no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of [the] chokehold" technique that Lyons challenged. *Id.*

Petitioner's theory that, because he was randomly selected for heightened screening in the past, he is likely to be subject to heightened screening in the future, is just as speculative as the standing theory rejected in *Lyons*. Although the "countless encounters between" TSA agents and airline passengers may well give rise to "certain instances in which" the mandatory-AIT-screening policy will be applied, that fact does not make petitioner's claim any less conjectural. *See Lyons*, 461 U.S. at 108. As TSA

has explained, the policy does not affect the "vast majority" of airline passengers. TSA, *Frequently Asked Questions*, http://www.tsa.gov/travel/frequently-asked-questions (last visited Oct. 19, 2016); *see supra* pp. 8-9 (explaining that, under the selectee-designation regime currently in effect, no more than [redacted] airline passengers are randomly designated as selectees to whom the challenged policy would apply). Such "odds" are not "sufficient to make out a federal case for equitable relief." *See Lyons*, 461 U.S. at 108.

For the same reasons, petitioner has also failed to satisfy the statutory predicate for a petition for review filed under 49 U.S.C. § 46110. That statute requires him to allege facts "disclosing a substantial interest" in the TSA order he is challenging. The term "substantial interest" encompasses the constitutional standing requirement derived from Article III. *See Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 371-72 (7th Cir. 1997) (holding that a "substantial interest" is, "[a]t a minimum," a "palpable, ideally a measurable" harm to a "concrete, individual, nonideological, in short weighty, interest" that results from a TSA order). Because petitioner has failed to demonstrate an injury-in-fact for purposes of Article III, he has correspondingly failed to show a "substantial interest" in TSA's challenged screening policy for purposes of § 46110.

B. Petitioner's Theories of Standing Lack Merit.

Petitioner has advanced several theories of standing in the course of this litigation, most of which he has abandoned by failing to raise them in his opening brief. *See* Resp't's Mot. To Dismiss 11-15, *Corbett*, No. 15-15717 (Feb. 19, 2016) (listing and rebutting four alternative theories); Resp't's Reply in Supp. of Mot. to Dismiss 2-6, *Corbett*, No. 15-15717 (Mar. 14, 2016) (listing and rebutting five additional alternative theories). The three alternatives that he continues to assert all lack merit.

First, petitioner suggests (Pet. Br. 2) that he has standing because he has "conducted substantial scholarly research regarding issues surrounding the challenged order." But the injury-in-fact requirement cannot be satisfied by the assertion of "academic interest" in a policy when that policy has not inflicted an injury-in-fact upon the interested person in question. *See Lujan*, 504 U.S. at 566-67.

Second, petitioner suggests (Pet. Br. 2) that he has Article III standing because he has demonstrated a "substantial interest" in the challenged screening policy as required by 49 U.S.C. § 46110. This argument misperceives the relationship between Article III's injury-in-fact requirement and § 46110's substantial-interest requirement. As noted, the latter "at a minimum" encompasses the former. *See Hinson*, 122 F.3d at

371-72. Petitioner's failure to meet Article III's injury-in-fact requirement thus means he cannot satisfy § 46110's substantial-interest requirement either.

Finally, petitioner suggests (Pet. Br. 2) that, because he had standing to challenge TSA's policy of using AIT as a primary screening method at airport security checkpoints, *see Corbett v. TSA*, 767 F.3d 1171 (11th Cir. 2014), he must also have standing to challenge TSA's policy mandating AIT screening for a small number of passengers as warranted for security considerations. But petitioner's previous challenge targeted a screening policy TSA applied to *all* passengers at checkpoints with AIT scanners. Petitioner asserted that TSA "security officers ha[d] denied him access three times because he refused to consent to the searches prescribed by the procedure," and that he expected to be repeatedly subjected to the same screening methods in future travel. *Id.* at 1175. Petitioner's current challenge, by contrast, targets a policy that "will not . . . affect[]" the "vast majority of passengers," and petitioner has failed to demonstrate that it will imminently affect him. *See* TSA, *Frequently Asked Questions*. That distinction makes the jurisdictional difference.

II. TSA's AIT Screening Policy Is Constitutionally and Procedurally Sound.

Even if petitioner has standing to challenge TSA's policy making AIT screening mandatory for certain passengers, his petition for review should still be denied. Neither his constitutional nor his procedural claim has merit.

A. The Challenged Screening Policy Does Not Violate the Fourth Amendment.

TSA's challenged screening policy does not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. As this Court and every other circuit to consider the question has held, airport-checkpoint screenings are a form of administrative search. *See Corbett*, 767 F.3d at 1179 (listing cases). Because the primary purpose of such searches is to "ensure public safety" and not to "detect criminal wrongdoing," they may be conducted without "individualized suspicion" or a warrant. *Id.* at 1179-80. Their reasonableness turns on "the gravity of the public concerns served by the [search], the degree to which the [search] advances the public interest, and the severity of the interference with individual liberty." *Id.* at 1180 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

Applying this doctrine, this Court has already rejected—in an action brought by this very petitioner—the constitutional claim at the core of the current petition: that the Fourth Amendment bars TSA from requiring certain passengers to pass through

an AIT scanner at an airport checkpoint as warranted by security considerations. *See Corbett*, 767 F.3d 1171. The previous petition concerned TSA's policy of requiring all passengers to submit either to AIT scanning or to a pat-down. The Court considered—and upheld—the constitutionality of both screening procedures in turn.

This case is controlled by the Court's holding as to the constitutionality of AIT scanning. The Court deemed it "clear" that AIT screening constitutes "a reasonable administrative search" under the Fourth Amendment. *Corbett*, 767 F.3d at 1179-80, 1182. The Court explained that "the scanners effectively reduce the risk of air terrorism" by enabling TSA agents to identify nonmetallic threat objects that ordinary metal detectors cannot detect. *Id.* at 1180-81. And the Court determined that any hypothetical privacy concerns arising from AIT screening—already "slight" when TSA first introduced AIT screening—have been "greatly diminishe[d]" by the reality that "[t]he scanners now create only a generic outline of an individual." *Id.* at 1181. The Court concluded that "[t]he jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane outweighs the slight intrusion of a generic body scan." *Id.* at 1182 (quotation marks omitted).

The same conclusion applies here. As the Court observed when it denied petitioner's previous petition, "[t]he Fourth Amendment does not compel [TSA] to employ the least invasive procedure or one fancied by [petitioner]." *Corbett*, 767 F.3d

at 1182. The Fourth Amendment also does not compel TSA to agree with petitioner's assertions as to which screening methods are effective. *Id.* The choice of how best to "'deal with a serious public danger' . . . should be left to those with 'a unique understanding of, and a responsibility for, limited public resources.'" *Id.* at 1181 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453, 454 (1990)). Where, as here, TSA has concluded that certain passengers pose enough of a security risk to warrant mandatory AIT screening, this Court "need only determine whether the [policy] is a reasonably effective means of addressing the government interest in deterring and detecting a terrorist attack" at airports. *Id.* Here, as there, "[c]ommon sense" reinforces TSA's reasonable conclusion that security considerations may sometimes weigh in favor of preventing certain passengers from opting out of AIT screening. *Id.*

There is no constitutional significance to the fact that, unlike TSA's general AIT-screening policy, the challenged screening policy does not permit passengers to opt out of AIT screening in favor of a pat-down. *Corbett* did not hold that the use of AIT scanners comports with the Fourth Amendment only if accompanied by the ability to opt out of AIT scanning. Indeed, in holding AIT scanning to be constitutional, the Court did not once refer to the existence (or nonexistence) of the pat-down as an alternative option. Its analysis turned solely on the "self-evident"

power of AIT scanners to "reduce the risk of air terrorism" at minimal cost to privacy. *Corbett*, 767 F.3d at 1181. Thus, *Corbett*'s constitutional holding cannot be distinguished from this case.

Petitioner's brief does not attempt to distinguish *Corbett* on any ground. Nor does it analyze the administrative-search doctrine that applies to claims such as this one. Petitioner's constitutional argument depends entirely on his allegation that TSA's challenged screening policy does not "bear[] a rational relation to some legitimate end." *See* Pet. Br. 11. Petitioner argues that, because (in his view) AIT screening and physical pat-downs are equally effective at detecting dangerous threats, it is irrational for TSA to screen certain passengers using the former technique when the latter technique will suffice. To support this asserted equivalence, petitioner misinterprets TSA's previous statement that the pat-down component of its general AIT screening policy is "the only effective alternative method of screening passengers." *See EPIC v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1,3 (D.C. Cir. 2011); Pet. Br. 13.

The factual premise of petitioner's argument—that an AIT scanner provides exactly the same level of security as a physical pat-down—is misplaced. Far from equating AIT screening with the pat-down technique in terms of effectiveness, TSA's recognition that a pat-down is "the only effective alternative method of screening

passengers" simply reflects the agency's judgment that, when used to screen to the general population of airline passengers, the pat-down technique provides an acceptable minimum level of security. That does not preclude TSA from determining that security considerations may sometimes justify exceeding the baseline established by the pat-down technique by requiring certain passengers to undergo *both* AIT screening *and* a pat-down—two screening methods that provide distinct benefits when used in tandem.

The administrative record further refutes petitioner's argument. Empirical studies confirm that the challenged policy mandating AIT screening plus a pat-down is superior to a pat-down alone in detecting concealed threat items. Under the previous screening regime, selectees could choose to be screened either by an AIT scanner or by a pat-down. SA 52. [redacted] *See* SA 13, 16, 19, 25; *see also* CS 99-100 (classified report). Under TSA's current operating protocols, selectees must pass through an AIT scanner, after which selectees are patted down with particular attention to regions where an AIT alert occurs. SA 52. TSA observed [redacted] increase in detection rates when it tested these changes in the field. SA 17. [redacted] this increase yielded definitive information that the

performance [was] related *Id.*

These empirical findings supply ample justification for TSA's decision to require selectees to be screened using both AIT scanners and a pat-down, without the ability to opt for a pat-down alone.

Petitioner's suggestion (Pet. Br. 11 n.7) that TSA's challenged screening policy might violate the constitutional right to travel is also wrong. Because the Constitution does not guarantee travelers the "right to the most convenient form of travel," *see City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982), "burdens on a single mode of transportation do not implicate" any constitutional right to travel, *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999).

B. The Challenged AIT Screening Policy Does Not Violate the Administrative Procedure Act.

Petitioner's Administrative Procedure Act (APA) claims are also without merit. Although petitioner insists that TSA's challenged screening policy can only be implemented through the notice-and-comment rulemaking process, TSA has already promulgated a final rule governing AIT screening that permits the screening policy challenged here and explicitly considers and rejects arguments against mandatory AIT screening. In any event, petitioner cannot reasonably contend that the policy to

require mandatory AIT screening for certain passengers as warranted by security considerations—which has a *de minimis* impact on a small subset of the traveling population—substantially affects passengers' overall screening experience so as to require notice-and-comment rulemaking in the first place. And petitioner is wrong to suggest that the challenged policy is so devoid of justification that it must be reversed as arbitrary and capricious.

1. TSA has completed notice-and-comment rulemaking with respect to AIT screening policies that encompasses the specific screening policy challenged here.

TSA has already concluded notice-and-comment rulemaking that encompasses the screening policy that is challenged here. The notice-and-comment process TSA undertook with respect to its generally applicable AIT screening policy, which began in 2013 and has culminated in a final rule, specifically addressed the possibility that AIT screening could be made mandatory. *See* 78 Fed. Reg. 18,287 (2013) (notice of proposed rulemaking); 81 Fed. Reg. 11,364 (2016) (final rule). Contrary to petitioner's assertions (Pet. Br. 16), the notice of proposed rulemaking expressly invited comment on "the ability of passengers to opt-out of AIT screening," 78 Fed. Reg. at 18,294, and several commenters accepted TSA's invitation, *see supra* p. 7. The fact that commenters objected to the proposed rule on this ground confirms that TSA's now-

completed notice-and-comment process encompassed the policy challenged by this petition for review. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998).

Furthermore, TSA issued its Privacy Impact Assessment Update for TSA Advanced Imaging Technology while the rulemaking was pending, explaining that TSA was making AIT screening mandatory for certain passengers as warranted by security considerations, without giving those passengers the option to select a pat-down instead of AIT. *See* AR 1900-06. The final rule explicitly endorses that policy, describing it as "current DHS policy" and explaining that the regulatory impact analysis and final rule are being revised to reflect it. 81 Fed. Reg. at 11,366.

The preamble also addresses commenters' concerns that the proposed rule, whose preamble stated that "AIT screening is *currently* optional" and whose text did not guarantee that AIT screening would be optional, would permit "TSA [to] impose mandatory AIT screening for all passengers in the future." 81 Fed. Reg. at 11,387 (emphasis added). TSA declined to guarantee that AIT screening would be optional in the text of the final rule. *Id.* at 11,366, 11,387-88. Instead, the preamble to the final rule explained that TSA "may require AIT use, without the opt-out alternative, as warranted by security considerations in order to safeguard transportation security." *Id.* at 13,388-89. Petitioner cannot show that TSA's challenged screening policy

should be enjoined when a rulemaking encompassing that very policy—in which he himself participated, *see* Comment of Jonathan Corbett (June 23, 2013)—has produced a final rule.

2. The challenged screening policy is not a substantive rule that must be promulgated using notice-and-comment because it does not have a substantial impact on the few passengers to whom it applies.

In any event, petitioner has failed to show that TSA was required to promulgate the challenged AIT screening policy using the notice-and-comment procedure. The APA's notice-and-comment provisions do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). Nor do they apply "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). Petitioner's only argument as to why notice-and-comment is required turns on his belief that the challenged policy constitutes a "substantive rule." *See* Pet. Br. 14-15.

This belief is mistaken. A substantive rule is one that places "new substantive burdens" on the people it affects. *See EPIC*, 653 F.3d at 5. But a rule does not result in a "substantive burden[]" simply because it has a "substantial impact" on the public. *Id.* The inquiry is "one of degree" that depends on "whether the [rule's] substantive

effect is sufficiently grave so that notice and comment are needed." *Id.* (quotation omitted).

The substantive effect of TSA's challenged screening policy is minimal. Before the policy took effect, TSA allowed airline passengers to forgo AIT screening in favor of a physical pat-down. After the policy took effect, airline passengers may be required to undergo AIT scanning without the ability to opt for a pat-down in a very small number of circumstances. Mandatory AIT screening, as this Court has previously observed, "pose[s] only a slight intrusion on an individual's privacy" because the scanners currently deployed to airport checkpoints "create only a generic outline of an individual." *See Corbett*, 767 F.3d at 1181. As such, AIT screening presents no greater intrusion upon passenger privacy than the walk-through metal detectors previously deployed at airport checkpoints, and certainly no greater intrusion upon passenger privacy than the pat-down to which passengers were previously subjected upon opting out of AIT screening. The "substantive effect" of the challenged policy is not "sufficiently grave" to transform the policy into a substantive rule for which notice-and-comment rulemaking is required. *See EPIC*, 653 F.3d at 5.

Petitioner resists this conclusion (Pet. Br. 14-15) by citing the D.C. Circuit's decision in *EPIC*, *supra*. The *EPIC* court held that TSA could not use two now-

defunct models of AIT scanners for primary screening of passengers nationwide without engaging in notice-and-comment because the scanners "produc[ed] an image of [an] unclothed passenger" that a TSA agent would view. 653 F.3d at 4, 5-6. The court concluded that the defunct models of AIT scanners "substantively affect[ed] the public to a degree sufficient to implicate" passengers' personal privacy. *Id.* at 6. "Indeed, few if any regulatory procedures impose[d] directly and significantly upon so many members of the public." *Id.* By contrast, the AIT screening policy challenged in this petition applies in a very limited number of circumstances, and the only model of AIT scanners now in use does not generate "passenger-specific images" and display only "a generic body contour." *Corbett*, 767 F.3d at 1175. Because the policy at issue here is of much narrower applicability, and because privacy concerns animating *EPIC* no longer exist, the D.C. Circuit's reasoning in *EPIC* does not support the conclusion that the "substantive effect [of the policy] is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *See* 653 F.3d at 5-6 (citation omitted).

3. Requiring certain passengers to undergo AIT screening as warranted by security concerns is neither arbitrary nor capricious.

Petitioner also challenges TSA's AIT screening policy as arbitrary, capricious, and not supported by substantial evidence. As explained above, however, *see supra*

pp. 27-28, the administrative record fully supports TSA's decision to require certain passengers to undergo AIT screening as warranted by security considerations without permitting such passengers to opt for a pat-down.

Petitioner's contrary arguments both miss the mark. Petitioner reiterates (Pet. Br. 13) his view that TSA is barred from determining that mandatory AIT screening is superior to a pat-down in light of TSA's previous representation that pat-downs are "the only effective alternative method of screening passengers." This argument is as unavailing in the APA context as it is in the constitutional context. *See supra* pp. 26-27. Petitioner additionally asserts (Pet. Br. 16-17) that TSA cannot justify the challenged policy in terms of a threat to aviation security because TSA did not promulgate the policy using the APA's good-cause exception to notice-and-comment rulemaking. *See* 5 U.S.C. §§ 553(b)(3)(B). As explained, however, the policy was encompassed by the existing AIT rulemaking, and in any event is not subject to the APA's notice-and-comment requirements. TSA's decision not to explicitly invoke the good-cause exception at the time it issued the challenged policy (and while the rulemaking was underway) does not support the inference that the policy is not targeted at a real security threat.[5]

[5] Even if petitioner is correct as to either of his APA claims, he is not entitled to the relief he seeks: that is, an order vacating the challenged screening policy and

CONCLUSION

For these reasons, the petition for review should be dismissed for want of subject-matter jurisdiction, or, in the alternative, denied.

Respectfully submitted,

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remanding it to TSA for notice-and-comment proceedings. *See* Pet. Br. 17-18. Rather, as the D.C. Circuit recognized when it held that TSA's AIT screening policy must be promulgated using notice-and-comment, the appropriate remedy is to remand the rule to TSA without vacating it "due to the obvious need for . . . TSA to continue its airport security operations without interruption." *EPIC*, 653 F.3d at 11. Preventing TSA from requiring certain passengers posing a heightened security risk to undergo AIT scanning would undermine national security and jeopardize public safety.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 7,772 words.

/s/ Michael Shih
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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, I filed the foregoing brief with the Clerk of the Court by electronic delivery. I served the following party with the foregoing brief by electronic delivery:

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ADDENDUM

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49 U.S.C. § 46110 .... A1

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.

~~WARNING: This record contains Sensitive Security Information that is controlled under 49 CFR parts 15 and 1520. No part of this record may be disclosed to persons without a "need to know", as defined in 49 CFR parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Secretary of Transportation. Unauthorized release may result in civil penalty or other action. For U.S. government agencies, public disclosure is governed by 5 U.S.C. 552 and 49 CFR parts 15 and 1520.~~