

~~SENSITIVE SECURITY INFORMATION~~

FILED UNDER SEAL

No. 12-1392

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MARY BETH RUSKAI,

Petitioner,

v.

JOHN S. PISTOLE, Administrator
Transportation Security Administration,

Respondent.

Petition for Review of Final Decision by the Transportation Security Administration

BRIEF FOR PETITIONER MARY BETH RUSKAI

Inga S. Bernstein (First Circuit Bar No. 43157)
Monica R. Shah (First Circuit Bar No. 1154639)
Naomi R. Shatz (First Circuit Bar No. 1157995)
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

TABLE OF CONTENTS

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD1

JURISDICTIONAL STATEMENT.....2

STATEMENT OF ISSUES2

STATEMENT OF CASE2

STATEMENT OF FACTS.....3

 A. Background Related to Petitioner.....3

 B. The 2010 Changes to the Screening Checkpoint SOPs.....5

 C. The Application of the Enhanced Pat-Down to Petitioner10

SUMMARY OF ARGUMENT14

STANDARD OF REVIEW16

ARGUMENT.....17

 A. The TSA’s Standard Operating Procedures Violate Petitioner’s Right
 to be Free from Unreasonable Searches Under the Fourth Amendment.....17

 1. Legal Standard for Airport Checkpoint Searches.....17

 2. Application of Balancing Test to Ruskai.....21

 a) The Enhanced Pat-Down Constitutes a Dramatic Invasion of
 Ruskai’s Liberty and Privacy21

 b) The Enhanced Pat-Downs of Persons with Metal Implants is Not
 Reasonably Calibrated to Meet the Government’s Goal of Detecting
 Weapons and Explosives24

 i. The Enhanced Pat-Downs Fail to Target or Detect High-Risk
 Threats.....25

 ii. The Absence of Enhanced Pat-Downs at Foreign Preclearance
 Airports Shows that Pat-Downs Are Not Necessary to Achieve
 the Government’s Security Objectives and are Therefore
 Unreasonable.....28

 iii. There Are Less Intrusive and Equally or More Effective

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Screening Alternatives30

1) Handheld Metal Detectors32

2) Modifying the Pat-Down Procedures35

3) Modifying the Pre-Check Program.....36

iv. Respondent Cannot Demonstrate Based on Statutorily-Mandated Risk Analysis that Enhanced Pat-Downs Are an Effective Screening Method38

B. The TSA’s Standard Operating Procedures Discriminate Against Petitioner on the Basis of Her Disability44

1. Petitioner is a person with a disability.....45

2. Respondent’s Security Screening is a Program Covered by the Rehabilitation Act.....49

3. Respondent Discriminated Against Ruskai on the Basis of her Disability50

C. The TSA Acted Arbitrarily and Capriciously by Delaying and Failing to Investigate Petitioner’s Complaints57

D. The Petition for Review of the TSA’s Decision was Timely Under 49 U.S.C. § 46110(a).....62

CONCLUSION.....64

CERTIFICATE OF COMPLIANCE66

CERTIFICATE OF SERVICE66

ADDENDUM

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN RUSKAI v. PISTOLE, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

TABLE OF AUTHORITIES

CASES

Alexander v. Choate,
469 U.S. 287 (1985).....52

Americopters, LLC v. F.A.A.,
441 F.3d 726 (9th Cir. 2006)63

Astralis Condo. Assn v. Sec’y, U.S. Dep’t of Hous. & Urban Dev.,
620 F.3d 62 (1st Cir. 2010).....50

Avia Dynamics, Inc. v. F.A.A.,
641 F.3d 515 (D.C. Cir. 2011).....63

Bercovitch v. Baldwin Sch., Inc.,
133 F.3d 141 (1st Cir. 1998).....45

Blackburn v. Snow,
771 F.2d 556 (1st Cir. 1985).....31

Calero-Cerezo v. U.S. Dep’t of Justice,
355 F.3d 6 (1st Cir. 2004)..... 45, 53

Camara v. Mun. Court of City & County of San Francisco,
387 U.S. 523 (1967).....18

Carcieri v. Kempthorne,
497 F.3d 15 (1st Cir. 2007).....16

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Chandler v. Miller,
520 U.S. 305 (1997)..... 17, 20, 40

City of Ontario, Cal. v. Quon,
130 S. Ct. 2619 (2010)..... 30, 31

Cousins v. Sec’y of the U.S. Dept. of Transp.,
880 F.2d 603 (1st Cir. 1989).....16

Crowder v. Kitagawa,
81 F.3d 1480 (9th Cir. 1996)52

Durso v. Napolitano,
795 F. Supp. 2d 63 (D.D.C. 2011)..... 5, 7, 8, 64

Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.,
653 F.3d 1 (D.C. Cir. 2011)19

Enica v. Principi,
544 F.3d 328 (1st Cir. 2008).....55

Faiola v. APCO Graphics, Inc.,
629 F.3d 43 (1st Cir. 2010).....48

Field v. Napolitano,
663 F.3d 505 (1st Cir. 2011).....49

Harnett v. Fielding Graduate Inst.,
400 F. Supp. 2d 570 (S.D.N.Y. 2005)53

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Harty v. City of Sanford,
6:11-CV-1041-ORL-31, 2012 WL 3243282 (M.D. Fla. Aug. 8, 2012)..... 47, 48

Howard v. Pennsylvania Dep’t of Pub. Welfare,
CIV.A. 11-1938, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013).....48

Illinois v. Lidster,
540 U.S. 419 (2004).....18

In re Guantanamo Bay Detainee Litig.,
12-MC-398 RCL, 2013 WL 3467134 (D.D.C. July 11, 2013)..... 34, 43

Jaros v. Illinois Dep’t of Corr.,
684 F.3d 667 (7th Cir. 2012)46

Lloyd v. Hous. Auth. of the City of Montgomery,
857 F. Supp. 2d 1252 (M.D. Ala. 2012)47

McDonough v. Donahue,
673 F.3d 41 (1st Cir. 2012)..... 45, 46

Molina v. DSI Renal, Inc.,
840 F. Supp. 2d 984 (W.D. Tex. 2012)48

Nat’l Air Transp. Ass’n v. McArtor,
866 F.2d 483 (D.C. Cir. 1989).....64

Nat’l Treasury Emps. Union v. Von Raab,
489 U.S. 656 (1989).....18

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Norris v. Premier Integrity Solutions, Inc.,
641 F.3d 695 (6th Cir. 2011)31

Norton v. Southern Utah Wilderness Alliance,
542 U.S. 55 (2004).....58

Redfern v. Napolitano,
No. 11–1805, 2013 WL 3470495 (1st Cir. July 11, 2013)27

Reed v. LePage Bakeries, Inc.,
244 F.3d 254 (1st Cir. 2001)55

Roberts v. State of R.I.,
239 F.3d 107 (1st Cir. 2001).....31

Telecomm. Research & Action Ctr. v. FCC,
750 F.2d 70 (D.C. Cir.1984).....59

Terry v. Ohio,
392 U.S. 1 (1968)..... 22, 26

Towns of Wellesley, Concord, and Norwood, Mass. v. FERC,
829 F.2d 275 (1st Cir. 1987)..... 59, 60

United States v. Albarado,
495 F.2d 799 (2d Cir. 1974)..... 17, 21, 26, 31

United States v. Aukai,
497 F.3d 955 (9th Cir. 2007)19

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

United States v. De Los Santos Ferrer,
999 F.2d 7 (1st Cir. 1993).....19

United States v. Doe,
61 F.3d 107 (1st Cir. 1995)..... 17, 18, 19

United States v. Hartwell,
296 F. Supp. 2d 596 (E.D. Pa. 2003)32

United States v. Hartwell,
436 F.3d 174 (3d Cir. 2006)..... 17, 20, 21, 32

United States v. Skipwith,
482 F.2d 1272, 1275 (5th Cir. 1973)21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV passim

STATUTES

5 U.S.C. § 105.....49

5 U.S.C. § 706.....16

5 U.S.C. § 706(1) 16, 57

5 U.S.C. § 706(2) 16, 57

5 U.S.C. § 706(2)(A)..... 16, 43, 57

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

5 U.S.C. § 706(2)(b).....43

6 U.S.C. § 111(b)(G).....54

6 U.S.C. § 345(a)(6).....58

29 U.S.C. § 705(20)(B).....45

29 U.S.C. § 794(a)44

42 U.S.C. § 12102(1)45

42 U.S.C. § 12102(4)(B).....47

49 U.S.C. § 4490150

49 U.S.C. § 449256

49 U.S.C. § 46110..... 2, 3, 16, 62

49 U.S.C. § 46110(c)16

ADA Amendments Act of 2008 (ADAAA),
 Pub. L. No. 110–325, § 2(b)(1)–(6), 122 Stat. 3553 (2008)..... 46, 47

Aviation and Transportation Security Act (ATSA),
 Pub. L. 107-71, 115 Stat. 597 (2001)..... 49, 50

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Consolidated Appropriations Act, 2012,
Pub. L. 112-74, 125 Stat. 78649

REGULATIONS

6 C.F.R. § 15.3(d)45

6 C.F.R. § 15.3(d)(1)(i)46

6 C.F.R. § 15.30(b)(2).....53

6 C.F.R. § 15.30(b)(4).....51

6 C.F.R. § 15.70(c).....58

6 C.F.R. § 15.70(e).....58

6 C.F.R. § 15.70(g)(1).....58

29 C.F.R. § 1630.2(j)(1)(i).....47

29 C.F.R. § 1630.2(j)(1)(ii).....47

29 C.F.R. § 1630.2(j)(1)(iii).....47

29 C.F.R. § 1630.2(j)(1)(v).....46

29 C.F.R. § 1630.2(j)(5)(I).....46

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

SENSITIVE SECURITY INFORMATION

OTHER AUTHORITIES

4.5 million Americans over 50 have artificial knees – What’s behind high rates?, CBS News, (Feb. 10, 2012, 1:26pm), http://www.cbsnews.com/8301-504763_162-57374800-10391704/4.5-million-americans-over-50-have-artificial-knees-whats-behind-high-rates/ 26, 51

Advanced Imaging Technology (AIT), <http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait> (last visited July 15, 2013).....7

Department of Homeland Security Office for Civil Rights and Civil Liberties, *Fiscal Year 2011 Annual and 4th Quarter Report to Congress* (June 25, 2012).....58

Bart Elias, Cong. Research Serv., *RL32541, Aviation Security-Related Findings and Recommendations of the 9/11 Commission* (2005)6, 7

Bart Elias, Cong. Research Serv., *R41502, Changes in Airport Passenger Screening Technologies and Procedures: Frequently Asked Questions* (2011) 5, 6, 7, 8

Bart Elias, Cong. Research Serv., *R42750, Airport Body Scanners: The Role of Advanced Imaging Technology in Airline Passenger Screening* (2012)7

Brian A. Jackson, et al., *Assessing the security benefits of a trusted traveler program in the presence of attempted attacker exploitation and compromise*, 5 J. Transp. Security 1 (2012)38

~~SENSITIVE SECURITY INFORMATION~~

Sheldon H. Jacobson, et al., *Designing for flexibility in aviation security systems*, 2 J. Transp. Security 1 (2009)38

Interview by Liz Ahlberg with Sheldon Jacobson, professor of computer science, University of Illinois at Urbana-Champaign (September 8, 2011), <http://cs.illinois.edu/news/2011/Sep8-01>41

Sheldon Jacobson, *Watching Through the “I”s of Aviation Security*, 5 J. Transp. Security 35 (2012)42

Adrian J. Lee, et al., *Protecting air transportation: a survey of operations research applications to aviation security*, 1 J. Transp. Security 160 (2008)38

Letters Received by the Transportation Security Administration (TSA) complaining about revised pat-down airline security procedures, 2010, Government Attic (Sept. 3, 2012), http://www.governmentattic.org/6docs/TSA-PatDownComplaints_2010.pdf 9, 22, 23, 35, 51

National Research Council, *Protecting Individual Privacy in the Struggle Against Terrorists: A Framework for Program Assessment* (2008)41

National Research Council, *Review of the Department of Homeland Security’s Approach to Risk Analysis* (2010)40

Preclearance Operations, U.S. Customs and Border Protection, http://www.cbp.gov/linkhandler/cgov/toolbox/contacts/preclearance/preclearance_factsheet.ctt/preclearance_factsheet.pdf29

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

SENSITIVE SECURITY INFORMATION

President Barack Obama, *Presidential Memorandum Regarding 12/25/09 Attempted Terrorist Attack* (Jan. 7, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack>54

Public Comment to Passenger Screening Using Advanced Imaging Technology, Notice of Proposed Rulemaking, 78 Fed. Reg. 19287 (March 26, 2013), <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=TSA-2013-0004> 23, 51

Securing our Nation’s Transportation System: Oversight of the Transportation Security Administration’s Current Efforts, Before the S. Comm. on Commerce, Science, and Transportation, 112th Cong. 29 (2011)8, 9

Transportation Security Administration – Resources for Risk-Based Security, Before the H. Comm. on Appropriations, 113th Cong. 4 (2013)37

Transportation Security Administration, *Checkpoint Design Guide* (Feb. 11, 2009), available at [http://www.aci-na.org/static/entransit/OPT%20%20Checkpoint%20Design%20Guide%20\(CDG\)%202009.pdf](http://www.aci-na.org/static/entransit/OPT%20%20Checkpoint%20Design%20Guide%20(CDG)%202009.pdf)34

Transportation Security Administration, *Remarks Prepared for Delivery TSA Deputy Administrator John W. Halinski 6th Annual SARMA Conference, Arlington, VA* (December 11, 2012), <http://www.tsa.gov/press/speeches/>37

Transportation Security Administration, RIN: 1652-AA67, *Passenger Screening Using AIT Initial Regulatory Impact Analysis* (2013), available at <http://www.regulations.gov/contentStreamer?> 27, 40

SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)

SENSITIVE SECURITY INFORMATION

WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.

SENSITIVE SECURITY INFORMATION

TSA Pre-check How it Works,
<http://www.tsa.gov/tsa-precheck/tsa-precheck-how-it-works>4

U.S. Gov't Accountability Office, GAO-13-43, Air Passenger
 Screening: Transportation Security Administration Could Improve
 Complaint Processes (2012)61

Robert Weisman, *Can Surgery Help you Stay in the Game?*,
 boston.com (February 26, 2012),
http://www.boston.com/business/personalfinance/articles/2012/02/26/demand_for_knee_and_hip_replacement_growing_among_class_of_young_actives/51

What to Expect when Getting a New TSA Pat-Down, American Civil
 Liberties Union (Nov. 21, 2010),
<http://www.aclu.org/technology-and-liberty/what-expect-when-getting-new-tsa-pat-down>8

SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)

SENSITIVE SECURITY INFORMATION

WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.

~~SENSITIVE SECURITY INFORMATION~~

GLOSSARY OF TERMS

AIT	Advanced Imaging Technology
CBP	Customs and Border Protection
CRCL	Civil Rights and Civil Liberties
DHS	Department of Homeland Security
DMD	Disability and Multicultural Division
GAO	Government Accountability Office
HHMD	Handheld Metal Detector
NIPP	National Infrastructure Protection Plan
SOP	Standard Operating Procedure
TSA	Transportation Security Administration
WTMD	Walk-Through Metal Detector

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument should be heard because this petition presents novel claims that have yet to be fully considered by the federal courts, and the resolution of this case will have widespread impact for disabled people with metal implants who engage in air travel within the United States. Specifically, this petition addresses the enhanced pat-down procedures employed by the Transportation Security Administration (“TSA”) as applied to Petitioner Mary Beth Ruskai (“petitioner” or “Ruskai”), a 69-year-old disabled woman who has metal implants in her body, when she sets off or “alarms” the TSA’s metal detectors as she goes through screening for air travel. These searches—which are intensively invasive and do not effectively address the TSA’s security concerns—violate her rights under the Fourth Amendment to the United States Constitution and the Rehabilitation Act. Because the case involves complex factual and legal issues, oral argument would aid the Court in the consideration of Petitioner’s claims.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

JURISDICTIONAL STATEMENT

Ruskai, a resident of Massachusetts, seeks review of a final order of the TSA refusing to investigate her complaints of civil rights violations and upholding its Standard Operating Procedures (SOPs) for security checks at airports as applied to her. Pursuant to 49 U.S.C. § 46110(a) exclusive jurisdiction for review of such orders is granted to the United States Courts of Appeal.

STATEMENT OF ISSUES

1. Whether the TSA's use of enhanced pat-downs on Ruskai violates her rights under the Fourth Amendment to the United States Constitution.
2. Whether the TSA's use of enhanced pat-downs on Ruskai violates her rights under Section 504 of the Rehabilitation Act.
3. Whether the TSA engaged in arbitrary and capricious agency action by refusing to investigate Ruskai's complaints of civil rights violations.
4. Whether Ruskai's claim in this Court was filed within the 60-day statute of limitations under 49 U.S.C. § 46110(a).

STATEMENT OF CASE

This case involves a challenge to the TSA's SOPs that require passengers who alarm walk through metal detectors (WTMDs) to undergo an invasive manual

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

pat-down of their entire bodies, including the breast and groin areas. Ruskai, a 69-year-old disabled woman who lives in Massachusetts but travels regularly for her work as a professor of mathematics, is forced to undergo such pat-downs after the metal implants in her body set off WTMDs, which are in use at Boston Logan Airport and hundreds of other airports around the country. Following her initial experiences with these intrusive and degrading pat-downs, Ruskai filed internal complaints with the TSA and Department of Homeland Security (DHS) in April 2011. On February 3, 2012 the TSA issued a final order stating that it would not investigate her complaints and upholding its SOPs as they applied to her. On April 2, 2012 Ruskai filed this petition pursuant to 49 U.S.C. § 46110(a), seeking review of the TSA's final order.

STATEMENT OF FACTS¹

A. Background Related to Petitioner

Ruskai is a 69-year-old scientist and research professor who travels frequently by air for work. Affidavit of Petitioner Ruskai ("Ruskai Aff.") at ¶¶ 3-7

¹ Pursuant to First Circuit L.R. 11.0(d)(2), petitioner notes that there is Sensitive Security Information (SSI) on select pages of this brief.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

(Addendum at 1).² She suffers from osteoarthritis, which required her to have her right knee replaced with a metal joint in 2008 and her left knee replaced in 2012. *Id.* ¶¶ 8-11, 32. She also developed avascular necrosis of her right femur, which caused its rapid deterioration necessitating replacement of her right hip with a metal joint in 2012. *Id.* ¶ 31.

Ruskai presents no threat to public safety. In fact, she has been cleared for Trusted Traveler status by the Customs and Border Protection (CBP) division of the DHS. *Id.* ¶¶ 27-28. This required a background check and makes her eligible for expedited screening through the TSA's PreCheck program, *id.*, which allows certain passengers who have previously provided the TSA with personal information to avoid having to remove their shoes, belts, or light jackets from their persons and their laptop computers or liquids from their bags. AR 1911; *TSA Pre-check How it Works*, <http://www.tsa.gov/tsa-precheck/tsa-precheck-how-it-works> (last visited July 15, 2013).

² Concurrent with the filing of this brief, petitioner has filed a motion to supplement the record with her affidavit, which is currently pending before this Court. The parties' joint motion to file a deferred appendix was granted by this Court on July 26, 2013, which requires the parties to file a joint deferred appendix within 21 days of the filing of respondent's brief.

~~SENSITIVE SECURITY INFORMATION~~

TSA screening did not always require the invasive pat-down that is now conducted. Following her first knee replacement surgery, the metal from Ruskai's knee implant would alarm the WTMD when she underwent security screening at airports. Ruskai Aff. ¶ 15. Following the alarm, Ruskai would notify the screening agent that she had a knee implant and produce medical documentation verifying her condition, including a photocopy of an x-ray of her knee showing the presence of a metal joint. *Id.* ¶¶ 17-18. In 2009 and 2010, a female screener would then use a handheld metal detector (HHMD) to confirm that the only metal on her body was in her knee. *Id.* at 18. The screener would then pat down only the area of her body that alerted the HHMD. *Id.* Following this limited pat-down, Ruskai would be permitted to enter the secure area of the terminal. *Id.*

B. The 2010 Changes to the Screening Checkpoint SOPs

In late 2010, the TSA made substantial changes to its Screening Checkpoint SOPs, including implementing Advanced Imaging Technology (“AIT scanners”) at select airport checkpoints and replacing HHMDs with enhanced pat-downs at all lanes equipped with a WTMD. *See Durso v. Napolitano*, 795 F. Supp. 2d 63, 65 (D. D.C. 2011); Bart Elias, Cong. Research Serv., *R41502, Changes in Airport Passenger Screening Technologies and Procedures: Frequently Asked Questions* 1

~~SENSITIVE SECURITY INFORMATION~~

(2011) [“Elias 2011”]. These changes were made in response to the 9/11 Commission’s recommendations, which included “that TSA give priority attention to implementing technologies and procedures for screening passengers for *explosives*.” Elias 2011, *supra* (emphasis added); *see also* 49 U.S.C. § 44925 (requiring TSA to finalize new checkpoint screening plan focused on detecting non-metallic weapons and explosives by end of 2007).

Until these revisions were made in late 2010, consistent with Ruskai’s past experience, the TSA relied on WTMDs as its primary passenger screening tool, and HHMDs for secondary screening. Bart Elias, Cong. Research Serv., *RL32541, Aviation Security-Related Findings and Recommendations of the 9/11 Commission* 5 (2005) [“Elias 2005”]; AR 85.³ Specifically, “[p]assengers whose carry-on baggage alarm[ed] the X-ray machine, who alarm[ed] the walk-through metal detector, or who [were] designated as selectees . . . to receive additional screening—[were] screened by hand-wand or pat-down” AR 85. However, “the inability of walk-through metal detectors to screen for explosives [was] seen as a critical weakness in aviation security.” Elias 2011, *supra*.

³ Citations to the Administrative Record are designated with the prefix “AR.”

~~SENSITIVE SECURITY INFORMATION~~

Various technologies and screening methods aimed at improving screening abilities to detect non-metallic explosives on passengers were considered by the TSA. Elias 2005, *supra*, at 5-6. The TSA chose to employ AIT scanners as its primary screening tool to increase the ability of screeners to detect non-metallic explosives on passengers. Bart Elias, Cong. Research Serv., *R42750, Airport Body Scanners: The Role of Advanced Imaging Technology in Airline Passenger Screening* 1 (2012) [“Elias 2012”]; Elias 2011, *supra*.

A September 2010 revision to the SOPs directed that AIT scanners be used “as part of TSA’s standard security screening procedures.” *Durso*, 795 F. Supp. 2d at 65. Despite the TSA’s significant investment in AIT technology, however, it never intended to have AIT scanning available at all of its roughly 750 security checkpoints in U.S. airports. Elias 2012, *supra*, at 11. According to the TSA’s website, as of July 2013, 700 AIT scanners have been deployed at fewer than 160 airports, *Advanced Imaging Technology (AIT)*, <http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait> (last visited July 15, 2013) [“AIT website”], meaning that at least 290 airports, and more than 290 checkpoints, screen passengers only with WTMDs. Even at those airports that do have AIT scanners, such as Logan Airport, scanners are not at every

~~SENSITIVE SECURITY INFORMATION~~

~~SENSITIVE SECURITY INFORMATION~~

checkpoint and are not always operational. Ruskai Aff. ¶¶ 20, 34; *Securing our Nation's Transportation System: Oversight of the Transportation Security Administration's Current Efforts, Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 29 (2011) (Statement of Sen. Claire McCaskill) [“McCaskill 2011 Statement”].

In late 2010, the TSA also revised its pat-down procedures. *Durso*, 795 F. Supp. 2d at 65. The new procedures involve “a more detailed tactile inspection of areas higher on the thigh and in the groin area. . . . [and] routinely involve touching of buttocks and genitals.” Elias 2011, *supra*, at 5; AR 3229. The agent is required to run the hand up the inside of the passenger's thighs until reaching the groin twice on each leg—from the front and back. AR 1837, 1841, 3229. The agent also must insert the hand into the passenger's waistband around the entire waist, and, for female passengers, around the breasts. *What to Expect when Getting a New TSA Pat-Down*, American Civil Liberties Union (Nov. 21, 2010), <http://www.aclu.org/technology-and-liberty/what-expect-when-getting-new-tsa-pat-down>; Ruskai Aff. ¶ 21. As Respondent Pistole has conceded, this pat-down technique is much more intrusive than prior versions of the pat-down. AR 1739 (“[Y]es, it is clearly more invasive.”).

~~SENSITIVE SECURITY INFORMATION~~

Not surprisingly, many passengers—including the nation’s lawmakers—have found this invasive touching to be uncomfortable, painful, and offensive. AR 1728-29, 1753, 1771; *Letters Received by the Transportation Security Administration (TSA) complaining about revised pat-down airline security procedures, 2010*, Government Attic, 9, 17, 20, 36, 42, 50, 65, 67, 73, 80, 88, 109, 145 (Sept. 3, 2012), http://www.governmentattic.org/6docs/TSA-PatDownComplaints_2010.pdf [“Government Attic”]. Senator Claire McCaskill, who, like Ruskai, has an artificial joint that triggers the WTMD, requiring her to endure the enhanced pat-downs frequently, has told Respondent: “I try to avoid the pat-down at all costs. . . . I’ve got to tell you, they are, sometimes they are just unbelievably invasive, and very painful for me to endure. . . . There are many times that women put hands on me in a way that, if it was your daughter or your sister or your wife, you would be upset.” *McCaskill 2011 Statement, supra*, at 29-31.

Shortly after revising the SOPs to require the use of AIT technology the TSA also replaced HHMDs with the enhanced pat-down. AR 1895. The TSA made this policy change with no notice to the public.⁴ The TSA’s current protocol is that

⁴ Respondent’s counsel has confirmed to petitioner’s counsel that the TSA did not

~~SENSITIVE SECURITY INFORMATION~~

when a passenger alerts a WTMD, rather than using a HHMD to determine where on the body the metal may be located, a TSA agent “must perform a pat-down procedure of the parts of the body that are covered by clothing.” AR 1895.

C. The Application of the Enhanced Pat-Down to Petitioner

Between February and April 2011, Ruskai was subjected to enhanced pat-downs four times after alarming WTMDs. On February 12, 2011, Ruskai was subjected to an enhanced pat-down wherein the TSA agent conducting the pat-down touched her crotch after she set off the WTMD. AR 1845. On March 8, 2011, a TSA agent conducted a full-body pat-down of Ruskai, and when Ruskai questioned the need to have her inner thighs touched twice in the same spot, a supervisor required that she undergo a second enhanced pat-down by a different agent. AR 1837. On March 26, 2011, Ruskai wore lightweight running shorts to attempt to avoid the extremely invasive inner-thigh and groin pat-downs she had experienced two weeks earlier. AR 1839. Ruskai lifted her shorts so her legs were visible and asked the agent to conduct a visual inspection rather than a pat-down, which the agent agreed to do. *Id.* On April 2, 2011, Ruskai again wore shorts and, though she objected to having her legs patted down when they were visible to the TSA

issue any kind of public notice or announcement regarding its decision to eliminate HHMDs. *See also* Ruskai Aff. ¶ 23.

~~SENSITIVE SECURITY INFORMATION~~

agent, a supervisor required the agent to conduct an extensive pat-down that included touching the inside each of Ruskai's thighs twice. AR 1841.

Ruskai finds these pat-downs extremely uncomfortable, invasive, and emotionally stressful. Ruskai Aff. ¶¶ 22, 25. She finds the repeated touching of the intimate groin area particularly upsetting. *Id.* ¶ 22. She feels violated, upset, and degraded that she is targeted for this extremely unpleasant experience solely because she has artificial joints that alarm WTMDs. *Id.* ¶ 25.

Ruskai filed a complaint with the TSA about each of these incidents on April 5, 2011. AR 1837-45. The responses Ruskai received were labeled "templates," and alternately discussed the TSA policy on random screening and baggage searches, AR 1838, provided a form apology for insensitivity in screening, AR 1839-42, and apologized if the TSA's standards for courtesy were not met, AR 1843-44. None of the responses addressed the concerns Ruskai raised. On April 12, 2011, Ruskai again contacted the TSA asking for information about the TSA policy for passengers with metal implants, complaining that the searches she had been subjected to were "unnecessarily invasive," and asking that passengers with metal implants be screened by HHMDs. AR 1847. The template response did not

~~SENSITIVE SECURITY INFORMATION~~

address Ruskai's questions regarding HHMDs nor did it fully address her complaints about the nature of the pat-downs. AR 1848-49.

On April 22, 2011, Ruskai filed a complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL) detailing her concerns about the pat-downs and stating that she believed these pat-downs violated her rights under the Fourth Amendment and discriminated against her on the basis of disability. AR 1850-64. CRCL did not answer that complaint until January 6, 2012, when Ruskai was informed that CRCL declined to conduct an investigation and referred her to the TSA's Office of Disability Policy and Outreach. AR 1894. In a letter that was mailed to Ruskai on or after February 3, 2012, the TSA's Disability and Multicultural Division ("DMD") concluded that it was unable to conduct an effective investigation regarding her complaints because ten months had passed since the specific incidents to which she referred. AR 1895. DMD nonetheless stated that the pat-downs Ruskai described in her complaints were consistent with the TSA's SOPs, which require agents to pat down "the parts of the body that are covered by clothing" when an individual alarms the WTMD. *Id.* The letter further informed Ruskai that the use of HHMDs was discontinued in November 2010, the first time Ruskai had been informed of such a policy change. *Id.*

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Ruskai continues to travel frequently through U.S. airports. Ruskai Aff.

¶¶ 6-7. Because she finds these pat-downs extremely intrusive, Ruskai now attempts to schedule her travel through airports or terminals that employ AIT scanners rather than WTMDs. *Id.* ¶ 34. Despite these efforts, Ruskai often must go through checkpoints that only employ WTMDs, and therefore must undergo this invasive pat-down any time she travels through one of those checkpoints in the United States. *Id.* ¶¶ 20, 26.

In contrast to her experiences in the United States, Ruskai has never been subjected to a pat-down that involves the touching of her groin in any foreign airport while flying into the United States, including from Preclearance airports, which have security procedures that are certified by the TSA as providing an equivalent level of protection as domestic airports. *Id.* ¶ 35; AR 1912. When being screened for entry onto U.S.-bound flights at foreign airports, including Preclearance airports, Ruskai is subjected to secondary screening that consists of either a limited pat-down with no touching of her groin or an HHMD with a targeted pat-down of the areas of her body that contain metal implants. Ruskai Aff. ¶¶ 36-39.

~~SENSITIVE SECURITY INFORMATION~~

SUMMARY OF ARGUMENT

Ruskai, a 69-year-old disabled woman who poses no threat to public safety, is deprived of her Fourth Amendment right to be free from unreasonable searches and seizures, and is discriminated against in violation of the Rehabilitation Act, when she is subjected to enormously invasive enhanced pat-down procedures simply because the metal implants in her body set off the WTMD when she goes through airport screening.

The TSA's use of enhanced pat-downs to resolve WTMD alarms on passengers with metal implants violates the Fourth Amendment to the United States Constitution because these searches are not "reasonable"—the extreme intrusiveness of the search (repeated touching of the groin, breasts, inner thigh and waist) is not calibrated to the risk presented by a passenger whose joint implants alarm a WTMD. The enhanced pat-downs that follow an alarmed WTMD by a person with a metal implant divert TSA screening resources to a low risk population without affording any meaningful security enhancement. The TSA has other available effective and less-invasive means of resolving such WTMD alarms including secondary screening with HHMDs and targeted pat-downs (a TSA-approved procedure utilized at certain foreign airports), modified pat-down

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

procedures, and adaptation of the TSA's Pre-Check program to streamline screening for this low-risk population. Moreover, the TSA's utilization of its current procedures are not supported by risk assessment analyses that would justify them and, indeed, any meaningful risk assessment would likely conclude that repetitive screening of low risk individuals like Ruskai inappropriately diverts screening resources that would be far more meaningfully utilized to screen those who genuinely pose some real threat to security. *See* discussion *infra* Part A.

These enhanced pat-down searches disproportionately target persons with certain disabilities, who are subject to invasive enhanced pat-downs solely because their implants alarm the WTMD. This discriminatory disparate impact violates the Rehabilitation Act, as does the TSA's refusal to provide Ruskai with a reasonable accommodation to avoid the enhanced pat-down at security checkpoints using WTMDs. *See* discussion *infra* Part B.

The TSA was arbitrary and capricious and acted unlawfully in failing to conduct a timely investigation of Ruskai's complaints of civil rights violations despite agency policy requiring it to do so. *See* discussion *infra* Part C.

Ruskai timely filed her petition for review, in filing the instant action within 60 days of the mailing of the challenged order. *See* discussion *infra* Part D.

~~SENSITIVE SECURITY INFORMATION~~

STANDARD OF REVIEW

The Court's review of this petition is governed by 49 U.S.C. § 46110 and the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). The standard of review for Ruskai's claims under the Fourth Amendment and the Rehabilitation Act is de novo. *See Carcieri v. Kempthorne*, 497 F.3d 15, 25 (1st Cir. 2007) (en banc), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009) (in APA appeal under 5 U.S.C. § 706, "[c]onstitutional claims are reviewed de novo"); *Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989) (noting that deference not afforded when petition involves "a statute [the agency] is not charged with administering and in respect to which it has no special expertise"). The standard of review for Ruskai's claims the agency failed to investigate her complaint is whether "the agency's actions, findings, and conclusions are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2)(A). Findings of fact by the TSA administrator are only conclusive "if supported by substantial evidence." 49 U.S.C. § 46110(c). This court has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." *Id.*

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN RUSKAI v. PISTOLE, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

ARGUMENT

A. The TSA's Standard Operating Procedures Violate Petitioner's Right to be Free from Unreasonable Searches Under the Fourth Amendment

The TSA's application of its SOPs to Ruskai violates her rights under the Fourth Amendment by requiring government agents to engage in unreasonably invasive searches of her body. While warrantless, suspicionless searches may be permissible under the administrative exception to the Fourth Amendment's warrant requirement, the TSA's enhanced pat-down procedure goes beyond what is allowed.

1. Legal Standard for Airport Checkpoint Searches

Airport security checkpoint screenings are searches under the Fourth Amendment. *United States v. Doe*, 61 F.3d 107, 109 (1st Cir. 1995) (applying Fourth Amendment law to an airport search); *see also United States v. Hartwell*, 436 F.3d 174, 177 (3d Cir.), *cert denied* 127 S. Ct. 111 (2006) (recognizing that "an airport pre-boarding security screening is a search"); *United States v. Albarado*, 495 F.2d 799, 803 (2d Cir. 1974) ("[T]he unintrusive magnetometer walk-through is a search in that it searches for and discloses metal items within areas most intimate to the person where there is a normal expectation of privacy.").

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

305, 313 (1997). The Supreme Court has held, however, that in limited circumstances a search may still be considered “reasonable” under the Fourth Amendment absent individualized suspicion. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989). The Court has noted that this exception is applicable, for example, where the government seeks to prevent hazardous conditions from developing. *Id.* The determination of whether such a suspicionless search is “reasonable” under the Fourth Amendment requires “balancing the need to search against the invasion which the search entails.” *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 537 (1967); *see also Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (“[I]n judging reasonableness, we look to ‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’” (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979))).

This Court has never considered when an airport screening of a passenger’s person passes constitutional muster. However, in the baggage screening context, this Court has found that “[r]outine security searches at airport checkpoints pass constitutional muster because the compelling public interest in curbing air piracy generally outweighs their limited intrusiveness.” *Doe*, 61 F.3d at 109-10.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

However, such searches are deemed reasonable under the Fourth Amendment only for “[the] limited—and exigent—purpose” of detecting “weapons and explosives.” *United States v. De Los Santos Ferrer*, 999 F.2d 7, 9 (1st Cir. 1993) (citing *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989)); *Doe*, 61 F.3d at 109-10 (recognizing that administrative search exception for carry-on luggage is narrow in scope).

Courts in other circuits have applied similar balancing tests to airport security screening of passengers’ persons. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (“[W]hether an administrative search is ‘unreasonable’ within the condemnation of the Fourth Amendment ‘is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001)); *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en banc) (“A particular airport security screening search is constitutionally reasonable provided that it ‘is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives [] [and] that it is confined in good faith to that purpose.’” (quoting *United States v. Davis*,

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

482 F.2d 893, 913 (9th Cir. 1973)); *Hartwell*, 436 F.3d at 178-81 (relying on test set forth in *Lidster*, 540 U.S. 419 and *Brown*, 443 U.S. 47). The Supreme Court has also noted in dicta that “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk *may* rank as “reasonable”—for example, searches now at airports” *Chandler*, 520 U.S. at 323 (emphasis added).

Although in other contexts, the TSA has acknowledged and taken steps to tailor screening to balance Fourth Amendment privacy interests with security interests, it has utterly failed to do so here. When adopting AIT scanners, for instance, the TSA took a number of steps to safeguard privacy and liberty. *See, e.g.*, AR 38, 57 (“The goal of the [AIT Operational] requirements is to conform to the 4th Amendment[.]”); AR 152 (“For privacy reasons, the officer attending the passenger will not view the image.”); AR 155 (“We are committed to testing technologies that improve security while protecting passenger privacy[.]”); AR 183 (“It’s important to keep the public safe, but it’s equally important to protect the public’s privacy[.]”); *see also* AR 171, 450, 701, 1798 (reflecting regularly updated privacy impact assessments of AIT technology). In stark contrast, the TSA completely failed to consider or address the privacy and liberty implications of

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

altering its procedures regarding resolution of WTMD alarms. As set forth below, the enhanced pat-downs, as applied to Ruskai, fail to pass constitutional muster.

2. Application of Balancing Test to Ruskai

The TSA cannot meet its burden of demonstrating that the suspicionless searches it conducted on Ruskai are reasonable because these extremely intrusive searches of the most intimate areas of her body are not reasonably calibrated to achieve the government's goal of preventing passengers from carrying weapons or explosives onto airplanes.³

a) The Enhanced Pat-Down Constitutes a Dramatic Invasion of Ruskai's Liberty and Privacy

The enhanced pat-down procedure is undeniably invasive, substantially impinges on air travelers' liberty and privacy, and causes injury to many who are forced to undergo the pat-downs. As the Supreme Court noted in *Terry v. Ohio*, the right to "possession and control" of one's own body is the most "sacred" right

³ In addressing challenges to airport screenings of passengers, circuits have split on the question of whether these screenings constitute one search or a series of searches. See *Hartwell*, 436 F.3d 174 at 177 (noting circuit split, and using the single search approach); compare *Albarado*, 495 F.2d at 805-807 (treating a WTMD screening and pat-down as two separate searches) with *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973) (treating all aspects of airport security checkpoint searches as one search). Under either view of airport security searches, the enhanced pat-downs violate Ruskai's Fourth Amendment rights.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

protected by our laws. 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). It is this right that is compromised by the TSA's use of the enhanced pat-down. Ruskai has undergone approximately ten such searches, and describes them as invasive and stressful, particularly when TSA agents insist on repeatedly touching the same intimate areas of Ruskai's body. Ruskai Aff. ¶¶ 22, 25-26. The TSA itself acknowledges that "[m]annual pat-downs are time-consuming, potentially ineffective, and can cause passengers embarrassment and stress resulting from being physically touched by a stranger," AR 3495, 3499, and that TSA agents physically touching passengers compromises passengers' "privacy and dignity," AR 3495. The TSA has received numerous complaints from passengers about the humiliating, degrading, distressing and offensive nature of the enhanced pat-down. See Government Attic, *supra*, at 9 ("It was one of the most degrading, humiliating, repulsive experiences of my nearly 70 years"), 17 ("I felt violated. If any other person had done this to me it would constitute sexual assault"), 36 ("I began shaking and felt completely violated, abused and assaulted by the TSA agent"), 73 ("It is now over a week since I endured the following incident at Denver airport and I am still in total shock and intensely sickened that a situation like this can occur at any U.S. airport"), 145 ("I was reduced to tears – it was an

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

utterly humiliating experience”); *Public Comment to Passenger Screening Using Advanced Imaging Technology, Notice of Proposed Rulemaking*, 78 Fed. Reg. 19287 (March 26, 2013), <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=TSA-2013-0004> [“Public Comment”] at 3089 (“These assaults traumatize me”), 0522 (“As a survivor of sexual violence, I find the ‘enhanced’ pat-downs completely terrifying and invasive”), 2660 (“every time I travel, which is at least once or twice a month, I must go through the humiliating pat-down procedure, which in ANY other context would be termed as sexual harassment, or as several of my pat down experiences have been, sexual assault”), 5054 (“you’re forced to submit to a prison-level patdown, which seems to be reserved in its most humiliating forms for the aged and infirm”). These complaints describe pat-downs in which TSA agents roughly touch and prod passengers’ breasts and genitalia, and put their hands inside passengers’ clothes to feel their bodies. Government Attic, *supra*; Public Comment, *supra*. Passengers, flight attendants, and pilots liken these searches to sexual assault, and have reported physical injury, severe emotional distress, and insomnia as a result of these searches. *See* Government Attic, *supra* at 26, 31, 36, 61, 67, 80, 184, 197, 203; Public Comment, *supra* at 0301, 1577, 3657, 4313, 4654, 5186.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

b) The Enhanced Pat-Downs of Persons with Metal Implants is Not Reasonably Calibrated to Meet the Government's Goal of Detecting Weapons and Explosives

The enhanced pat-downs that follow WTMD alarms are not reasonably calibrated to achieve the government's goals as set forth more fully in the sections that follow. Most importantly, because they target individuals who alarm the WTMDs for entirely benign reasons (their metal implants), the enhanced pat-downs fail to target high-risk threats and instead focus substantial TSA resources on low-risk individuals like Ruskai who pose no threat to national security. *See infra* Part A(2)(b)(i). That enhanced pat-downs are not necessary to security is demonstrated by the fact that they are not used on passengers boarding flights to the United States from certain foreign airports that are inspected by the TSA and comply with U.S. screening standards, including the Canadian airports from which Ruskai frequently travels. *See infra* Part A(2)(b)(ii). The existence of known, less-intrusive methods that are equally or more effective demonstrate also that the enhanced pat-downs are unreasonable. *See infra* Part A(2)(b)(iii). Finally, the TSA cannot demonstrate that the enhanced pat-downs, relative to these less-intrusive methods, are an effective means to achieve the government's objective

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

of preventing passengers from carrying weapons and explosives on aircraft. *See infra* Part A(2)(b)(iv).

i. The Enhanced Pat-Downs Fail to Target or Detect High-Risk Threats

Through its exclusive use of WTMDs at many checkpoints, the TSA fails to detect all non-metallic weapons or explosives on passengers. At a checkpoint that uses only a WTMD, any person who does not alarm the WTMD is allowed to proceed to his or her aircraft without further screening.⁴ The enhanced pat-down procedures therefore sweep too narrowly by failing to capture the very individuals the TSA is concerned may be terrorist threats: People who are carrying non-metallic explosives or weapons, who would not alarm a WTMD.

The enhanced pat-down procedure is also overinclusive: Any person who, like Ruskai, has metal implants will always set off the WTMD and, as a result, will be forced to undergo an enhanced pat-down every time he or she goes through security checkpoints that use only WTMDs. While a WTMD alarm may lead to some suspicion that a passenger possesses a metal weapon or metallic component of

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

an explosive, that is not a reasonable inference in Ruskai's case. Ruskai always notifies TSA agents when she travels that she has metal joint implants in her body.

Ruskai Aff. ¶ 18. She travels with documentation describing those implants. *Id.*

¶ 17. The fact that she alarms WTMDs simply confirms that she has the metal implants her documentation describes. It does not raise a reasonable suspicion that she, or any of the other 4.5 million Americans with artificial knees the majority of whom, like Ruskai, are over 65, possesses weapons or explosives. *4.5 million Americans over 50 have artificial knees – What's behind high rates?*, CBS News, (Feb. 10, 2012, 1:26pm), http://www.cbsnews.com/8301-504763_162-57374800-10391704/4.5-million-americans-over-50-have-artificial-knees-whats-behind-high-rates/ ["CBS News"]. Indeed, this demographic would seem to present little security risk that would necessitate enhanced screening.

Even if further screening is justified to resolve the WTMD alarm, the enhanced pat-down Ruskai is forced to undergo is not "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. As the Second Circuit held in *United States v. Albarado*, "any further investigation after activation of the magnetometer is for the metal which did the activation; activating the magnetometer is not a general license to search for

~~SENSITIVE SECURITY INFORMATION~~

anything” 495 F.2d at 808. The metal that alarms the WTMD when Ruskai is screened is in her hip and knees, yet during each enhanced pat-down a TSA agent repeatedly touches her breasts, buttocks, inner thighs, groin, and puts her fingers in Ruskai’s waistband; this search far exceeds what is necessary to determine what set off the WTMD.

Furthermore, to the extent the enhanced pat-down is meant to detect non-metallic items, *Redfern v. Napolitano*, No. 11–1805, 2013 WL 3470495, * 1 (1st Cir. July 11, 2013), simply because a passenger has metal on her body does not mean she is carrying a non-metallic weapon or explosive that could be discovered through an enhanced pat-down. Indeed the TSA itself has noted the incongruence of using a pat-down to resolve a WTMD alarm. When assessing whether to employ AIT scanners, the TSA discussed whether to leave the security screening system as it was, stating: “WTMDs do not screen passengers specifically for non-metallic items under this alternative. While a pat-down may detect a non-metallic threat, this alternative uses a pat-down to resolve an alarm triggered by metallic objects.”

Transportation Security Administration, RIN: 1652-AA67, *Passenger Screening Using AIT Initial Regulatory Impact Analysis* 108 (2013), available at

<http://www.regulations.gov/contentStreamer?>

~~SENSITIVE SECURITY INFORMATION~~

objectId=0900006481259cad&disposition=attachment&contentType=pdf

[“Passenger Screening Using AIT]. The enhanced pat-down is thus not reasonably related in scope to the reasons that justify the search—namely the knowledge that the passenger has metal on her body—and therefore sweeps too broadly, affecting an entire class of people who present no security risk, yet are subjected to highly invasive, time-consuming, and unnecessary searches of their bodies solely because their metal implants trigger the WTMD.⁵

ii. The Absence of Enhanced Pat-Downs at Foreign Preclearance Airports Shows that Pat-Downs Are Not Necessary to Achieve the Government’s Security Objectives and are Therefore Unreasonable

The enhanced pat-downs are not employed at certain foreign airport checkpoints that comply with U.S. screening standards. On her flights from Canadian airports to U.S. airports, for example, Ruskai regularly has been required to pass through WTMDs in both Calgary and Toronto. Ruskai Aff. ¶¶ 38-39.

When her metal joints set off the WTMD, she is screened by an HHMD to confirm

⁵ The TSA has admitted that manual pat-downs are “potentially ineffective.” AR 3495, 3499. In fact, the HHMD more readily and reliably locates metal that activates WTMDs than do enhanced pat-downs. For example, if a passenger has metal concealed in a body cavity, that metal would alarm the WTMD and only a secondary screening with an HHMD, not a pat-down, would allow the TSA to locate that metal.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

that it is her knees and hip that alarm the WTMD, and the agents follow up with a pat-down of just her knees and outer hip. *Id.* Ruskai has never had a pat-down in Canadian airports in which her inner and upper thigh, groin area, or breasts were touched. *See id.* ¶¶ 35,39.

Canadian airports, including those located in Calgary and Toronto, are part of the U.S. Customs and Border Protection Preclearance program, which means that the TSA has certified that those airports are “performing checkpoint screening procedures of passengers and accessible property comparable to those of domestic airports and are providing an equivalent level of protection.” AR 1912.

Accordingly, passengers who are admitted to the United States from a Preclearance location are not subject to further security screening when they land at a U.S. port. *Preclearance Operations*, U.S. Customs and Border Protection, http://www.cbp.gov/linkhandler/cgov/toolbox/contacts/preclearance/preclearance_factsheet.ctt/preclearance_factsheet.pdf (last visited July 15, 2013). Among the “key objectives” of the Preclearance program are to “[p]revent terrorists, terrorist instruments and other national security threats from gaining access to the United States.” *Id.*

~~SENSITIVE SECURITY INFORMATION~~

~~SENSITIVE SECURITY INFORMATION~~

The fact that enhanced pat-downs are not used at these Preclearance locations, which “provide[] an equal level of protection” to methods employed at domestic airports, demonstrates that the TSA has determined that such pat-downs are not necessary to achieve their security objectives of preventing terrorist threats from traveling or gaining access to the United States. Notwithstanding that determination, Ruskai and other passengers are subjected to enhanced pat-downs when leaving the United States. Nothing in the record justifies the more invasive screening employed in domestic airports.⁵

iii. There Are Less Intrusive and Equally or More Effective Screening Alternatives

The unreasonableness of the TSA’s protocol at the hundreds of airport checkpoints around the country that only employ WTMDs is further supported by the fact that there are a number of far less intrusive searches available that would achieve the same objectives.⁶ This Court well knows that the existence of

⁵ Although European airports are not part of the Preclearance program, it is worth noting that Ruskai has also never experienced an enhanced pat-down on flights from Europe to the United States. Ruskai Aff. ¶¶ 35-37.

⁶ The Supreme Court has stated that the Fourth Amendment’s reasonableness requirement does not *demand* that the government use only the “least intrusive search practicable.” *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2632 (2010) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)). The Court has justified this position by noting that such a requirement could, in some cases,

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN RUSKAI v. PISTOLE, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

equally-effective but less-intrusive alternatives to a challenged search is indicative of the search's unreasonableness. *See, e.g., Roberts v. State of R.I.*, 239 F.3d 107, 112 (1st Cir. 2001) (pointing out less intrusive and equally effective searches that could be used); *Blackburn v. Snow*, 771 F.2d 556, 566 (1st Cir. 1985) (finding relevant "the existence of other adequate security measures"); *see also Norris v. Premier Integrity Solutions, Inc.*, 641 F.3d 695, 701 (6th Cir. 2011) (considering whether there were less intrusive means available before upholding a search).

There are various other simple, cost-effective, already-tested screening methods short of the enhanced pat-down that the TSA could employ that would be equally if not more effective at detecting and identifying metal on passengers, and that would be significantly less intrusive. *See Albarado*, 495 F.2d at 808 ("The rule is easy to state: exhaust the other efficient and available means, if any, by which to discover

"raise insuperable barriers to the exercise of virtually all search-and-seizure powers," or 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.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 557, n.12 (1976) and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 629 n.9 (1989)). These concerns are not in play here because, as set forth above, the enhanced pat-down as applied to Ruskai is not an effective means to meet the government's objectives. Further, as discussed *infra*, the TSA in fact uses alternative, less intrusive methods that it considers equally effective. The alternatives in this case are not hypothetical; they are procedures and policies that the TSA uses or has used to screen passengers.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

the location and identity of the metal activating the magnetometer before utilizing the frisk.”); *United States v. Hartwell*, 296 F. Supp. 2d 596, 603 (E.D. Pa. 2003) *aff’d*, 436 F.3d 174 (3d Cir. 2006) (finding search appropriate where “the Government used the least intrusive means reasonably available to resolve the alarm” by attempting to resolve the alarm on a WTMD with a HHMD). Indeed, the TSA currently uses or has used many of these less intrusive methods as alternatives to the enhanced pat-down.

1) Handheld Metal Detectors

One reasonable alternative to the current enhanced pat-down procedure is to return to the pre-2010 method of utilizing HHMDs as secondary screening devices at those security lanes that employ WTMDs. AR 1895. As the Third Circuit has noted, a search by a HHMD is a “less intrusive substitute for a physical pat-down.” *Hartwell*, 436 F.3d at 180. Passengers would use the WTMD, and if the WTMD is alarmed, a TSA agent could follow up with scanning by a HHMD. If necessary, once the metal is located TSA agents could follow up with a targeted pat-down of just the portion of the passenger’s body where the metal has been detected to determine whether the metal poses a security risk.

The TSA informed Ruskai that the HHMDs had been eliminated for “security

~~SENSITIVE SECURITY INFORMATION~~

reasons,” AR at 1895, *see also* AR 3385 (“the increased level of security in Revision 9 does not allow for HHMD of individuals as additional screening”). The only document in the record that directly relates to the decision to eliminate the HHMDs does note that enhanced pat-downs can find non-metallic items that HHMDs cannot, AR 5744-46, though it does not explain why such a search should be used to resolve an alarm indicating the presence of metal on a passenger. The memorandum regarding elimination of the HHMDs indicates, without explaining, that a key reason for the removal appears to be “keeping procedures streamlined and effective.” AR 3063, 5746. This justification is supported by other statements in the record—for example, in a request for approval to conduct an evaluation of the revised pat-down procedures, it is stated that the objectives of the evaluation are to determine whether the new procedures reduce “cycle time” relative to past procedures and the impact on “throughput and resource availability.” AR 3206. There is nothing in the record that indicates any security concerns with the HHMD or its ability to locate metal to resolve WTMD alarms. [REDACTED]

[REDACTED] AR 3376-77, [REDACTED]

[REDACTED] AR 3378. Moreover, as set forth above, foreign airports that comply with U.S. screening standards employ HHMDs. Thus, the government’s current

~~SENSITIVE SECURITY INFORMATION~~

~~SENSITIVE SECURITY INFORMATION~~

practice is to permit use of the HHMDs to resolve WTMD alarms at some airports.⁶

This efficiency justification proffered (though not proved) is insufficient to warrant the repeated use of the enhanced pat-down on an extremely low-risk segment of the traveling public.⁷

⁶ The U.S. government also continues to use HHMDs to search prisoners suspected of terrorism held at Guantanamo Bay. *In re Guantanamo Bay Detainee Litig.*, 12-MC-398 RCL, 2013 WL 3467134, *3 (D. D.C. July 11, 2013). Presumably if there were serious concerns about the efficacy of this screening device the government would not rely on it to search individuals actually held for terrorism.

⁷ It is also worth noting that the WTMDs the TSA uses have multi-zone detection capability, meaning that the lights on the machine indicate the area of the passenger's body where the metal is located. AR 5751. TSA agents are already trained and explicitly ordered to use this technology. AR 3359-60. Although Respondent has produced one study suggesting that the multi-zonal capabilities may not be fully effective, the study was limited to one model of WTMDs. AR5759. The TSA currently has three WTMD models in operation in airports across the country. Transportation Security Administration, Checkpoint Design Guide 46 (Feb. 11, 2009), available at [http://www.aci-na.org/static/entransit/OPT%20%20Checkpoint%20Design%20Guide%20\(CDG\)%202009.pdf](http://www.aci-na.org/static/entransit/OPT%20%20Checkpoint%20Design%20Guide%20(CDG)%202009.pdf). Further, respondent has not provided petitioner with all available documents referencing the WTMD's capabilities. The WTMD procurement specifications are classified documents to which petitioner's counsel is not cleared for access and respondent may produce additional documents following the filing of this brief. Those records, coupled with publicly-available information, may indicate that the TSA could use this technology to reduce the need for full-body pat-downs of passengers who alarm the WTMD.

~~SENSITIVE SECURITY INFORMATION~~

2) Modifying the Pat-Down Procedures

Even if the TSA could establish—and petitioner believes it cannot—that in order to determine what metal a passenger who has alerted a WTMD has on her person the TSA must conduct a physical pat-down of the passenger's entire body, the pat-downs Ruskai has been subjected to have far exceeded what is reasonable. First, each time Ruskai has had her inner thighs and groin patted down, the TSA agents conducting the pat-down have run their hands along each of her inner thighs multiple times. AR 1837, 1841, 1867. *See also* Government Attic, *supra* at 10, 17, 51, 85, 86, and 108 (passengers report repeated touching of the same body part). There can be no justification, once an agent has physically touched a portion of a passenger's body, to repeat the same invasive, uncomfortable touching a second time unless some anomaly is detected.

The pat-down should also be modified to permit visual inspection of any unclothed areas. When Ruskai has worn shorts through security and lifted her shorts to expose her inner thighs, she has at times been allowed to proceed with a visual inspection, at times has been patted down once on each thigh, and at times has been patted down twice on each thigh. AR 1839, 1841; Ruskai Aff. ¶ 24. [REDACTED]

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~


~~SENSITIVE SECURITY INFORMATION~~



The fact that a modified pat-down can be acceptable is demonstrated by the fact that the TSA has already created modified pat-down procedures to be used in a number of different situations: On passengers under the age of twelve or over the age of seventy-five, where an agent of the same gender is not available to conduct the pat-down, and for random pat-downs. AR 4022, 4873, 5149, 5161.

Thus, even the enhanced pat-down procedure could be modified to permit



. While this option remains unduly intrusive, in light of effective alternatives, it is at least marginally less so without any loss to security.

3) Modifying the Pre-Check Program

Even if the TSA could establish some reason why it cannot reemploy the HHMD or modify its pat-down procedures, there is no justification for continuing to

~~SENSITIVE SECURITY INFORMATION~~

~~SENSITIVE SECURITY INFORMATION~~

use the enhanced pat-down on passengers that the TSA has already determined pose little risk to national security. The TSA could readily eliminate use of the enhanced pat-down on passengers who are members of the Pre-Check program, which, as described above, streamlines screening for certain passengers.

Ruskai is already a member of the Pre-Check program. The TSA recognizes that those passengers who gain admittance to the Pre-Check program are lower security risks than other passengers. AR 1911-12; *Transportation Security Administration – Resources for Risk-Based Security, Before the H. Comm. on Appropriations*, 113th Cong. 4 (2013) (Statement of John Pistole, Administrator, Transportation Administration). By virtue of this fact alone, she is part of a low-risk group that should not be subject to the enhanced pat-down. However, given that the Pre-Check program is already in operation and accepts personal information about each of its members, it could readily accept proof of Ruskai's medical condition, verify that she has metal implants, and direct agents to allow her to proceed without this particularly invasive form of secondary screening when she sets off the WTMD. This would be a modification to a program that would further the TSA's purported goal of expediting screening for low-risk groups. See Transportation Security Administration, *Remarks Prepared for Delivery TSA*

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN RUSKAI v. PISTOLE, No. 12-1392 (1st Cir.)~~~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Deputy Administrator John W. Halinski 6th Annual SARMA Conference, Arlington, VA (December 11, 2012), <http://www.tsa.gov/press/speeches/remarks-prepared-delivery-tsa-deputy-administrator-john-w-halinski-6th-annual-sarma>; AR1910 (recognizing that Pre-Check is part of TSA’s purported effort to “mov[e] away from a one-size-fits-all security model,” and toward a more risk-based approach to security screening.).

In short, there are a number of less intrusive but equally or more effective measures the TSA could use to determine why a passenger has alarmed a WTMD, demonstrating that the current WTMD screening process is constitutionally invalid.

iv. Respondent Cannot Demonstrate Based on Statutorily-Mandated Risk Analysis that Enhanced Pat-Downs Are an Effective Screening Method

The unreasonableness of the enhanced pat-down procedures is further underscored by the fact that the TSA has not and cannot demonstrate that the enhanced pat-down is an effective screening method.⁸

⁸ This Court may wish to solicit expert input regarding any risk assessment underlying the screening options available to the TSA; there are a number of aviation security experts who have researched and published on the issues that are at the center of this analysis. *See generally* Sheldon H. Jacobson, et al., *Designing for flexibility in aviation security systems*, 2 J. Transp. Security 1 (2009); Adrian J. Lee, et al., *Protecting air transportation: a survey of operations research applications to aviation security*, 1 J. Transp. Security 160 (2008); Brian A. Jackson, et al.,

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Pursuant to statute and policy, the TSA “should apply risk-based principles to inform [its] decision making regarding allocating limited resources and prioritizing security activities.” AR 383 (citing 49 U.S.C. § 114(t); The 9/11 Commission Report); AR 749. According to the DHS’s National Infrastructure Protection Plan (“NIPP”), “security strategies should be informed by, among other things, a risk assessment that includes threat, vulnerability, and consequence assessments, information such as cost-benefit analyses to prioritize investments, and performance measures to assess the extent to which a strategy reduces or mitigates the risk of a terrorist attack.” AR 737.

However, evidence in the record demonstrates that the TSA has not made security-related decisions consistent with the NIPP’s directive. For example, in a highly critical report, the Government Accountability Office (“GAO”) found that the TSA’s 2008 strategic plan and underlying strategy for the deployment of passenger checkpoint screening technology “are not risk informed” because they failed “to incorporate some key risk management principles – a risk assessment, cost-benefit analysis, and performance measures.” AR 740. The GAO further noted, “TSA has relied on technologies in day-to-day airport operations that have

Assessing the security benefits of a trusted traveler program in the presence of attempted attacker exploitation and compromise, 5 J. Transp. Security 1 (2012).

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

not been demonstrated to meet their functional requirements in an operational environment,” and indicated that “without retaining existing screening procedures until the effectiveness of future technologies has been validated, TSA officials cannot be sure that checkpoint security will be improved.” AR 749; *see also* National Research Council, *Review of the Department of Homeland Security’s Approach to Risk Analysis* 2-3 (2010) (concluding that generally “DHS risk analysis capabilities and methods [] are [not] yet adequate for supporting DHS decision making [and] it is not yet clear DHS is on a trajectory for development of methods and capability that is sufficient to ensure reliable risk analyses”).

While the TSA, more than two years after making its policy changes, did engage in an analysis of whether *AIT scanners* were preferable to other screening methods, Passenger Screening Using AIT, *supra*, at 108-113, it does not appear to have conducted any risk analysis or tests of the changes in the policy with respect to WTMD screening. Despite the fact that airport searches must be “calibrated to the relevant risk,” *Chandler*, 520 U.S. at 323, and the TSA must conduct risk assessment pursuant to statute and DHS policy, the TSA appears to have conducted no such assessment prior to modifying its SOPs for WTMD screenings to replace HHMDs with enhanced pat-downs.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Nor can the TSA collect the necessary data to determine the performance of the enhanced pat-down procedures relative to the HHMDs. If a passenger alarms a WTMD, the TSA now performs only an enhanced pat-down, which by itself cannot identify the source of the alarm. Without the HHMD, the agent cannot identify with specificity where the metal is located, and certainly cannot identify sources of metal inside the passenger's body. As a result, the TSA cannot collect the kind of data it needs to measure the efficacy of the enhanced pat-down procedures in resolving WTMD alarms, and therefore cannot identify and track when WTMD alarms are due to weapons or explosives and when they are due to other types of metal.

As noted earlier, the TSA's current policies repeatedly subject low-risk groups (e.g. persons with metal implants) to high rates of secondary screening in a non-randomized manner. These repeated searches of non-dangerous travelers result in substantial costs to the system. National Research Council, *Protecting Individual Privacy in the Struggle Against Terrorists: A Framework for Program Assessment* 40-41 (2008); Interview by Liz Ahlberg with Sheldon Jacobson, professor of computer science, University of Illinois at Urbana-Champaign (September 8, 2011), <http://cs.illinois.edu/news/2011/Sep8-01> ("We have spent

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~~~SENSITIVE SECURITY INFORMATION~~~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

billions of dollars since 9/11, with a significant portion of that being spent to screen frequent business travelers, grandmothers, and other passengers who pose no threat to the system. And if we use security resources on them, we're basically diverting away from the people who really require greater [sic]. . . ."); Sheldon Jacobson, *Watching Through the "I"s of Aviation Security*, 5 J. Transp. Security 35, 37 (2012) (recognizing that "data analysis [] may lead to 60%-70% of passengers being safely exempt from advanced imaging technology screening and enhanced pat-downs" and concluding that "the one-size-fits all approach to passenger and baggage screening must be replaced with a system that directs technologies and procedures more judiciously"). Furthermore, every time a low-risk individual is subjected to an enhanced pat-down, she is deprived of her rights to liberty and privacy.

The TSA's decision to replace HHMDs with enhanced pat-downs is unreasonable because it failed to take into account these costs and conduct a thorough risk-assessment despite statutory mandate and policy (not to mention constitutional imperatives) directing it to conduct such analysis. Simply put, without such an analysis, the TSA cannot prove the enhanced pat-down is a necessary and effective means to detect weapons and explosives when used as a secondary screening method to resolve WTMD alarms.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

In sum, although the TSA undoubtedly has an interest in protecting against terrorism in air travel, it cannot justify use of the enhanced pat-down to resolve all WTMD alarms. The enhanced pat-down that Ruskai and similarly situated passengers must endure after their metal implants trigger the WTMD does not effectively address the government's objective of detecting weapons or explosives on airline passengers and is not reasonable, in light of other equally effective and less intrusive screening methods, to justify the extreme privacy invasion it entails.⁹ The use of the enhanced pat-down on Ruskai therefore violates both her rights under the Fourth Amendment and the Administrative Procedure Act (APA), because the TSA engages in conduct that violates the Constitution and because the TSA's decision to implement the enhanced pat-down policy constitutes arbitrary and capricious action. *See* 5 U.S.C. § 706(2)(a)-(b).

⁹ Indeed, a federal court recently found that even under the deferential legal standard applied in the prison context, a search focused on Guantanamo Bay prisoners' groins that is similar to the enhanced pat-down to which Ruskai is subjected is illegal where that search infringes on the prisoners' constitutional rights. *In re Guantanamo Bay Detainee Litig.*, 2013 WL 3467134 at *16. If such a search is illegal when applied to detainees at Guantanamo Bay when it infringes on their constitutional rights (in that case the right to counsel), certainly such a search is illegal when it infringes on the rights of non-incarcerated U.S. citizens to liberty and privacy.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

B. The TSA's Standard Operating Procedures Discriminate Against Petitioner on the Basis of Her Disability

Respondent's use of the SOPs to screen Ruskai discriminates against her on the basis of her osteoarthritis and avascular necrosis. Respondent discriminated against Ruskai by employing a policy that has a disparate impact on disabled persons with joint implants, fully aware of the impact of the policy on disabled persons, AR 5746, and by refusing to grant her a reasonable accommodation for her disability.

Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability . . . 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. . . ." 29 U.S.C. § 794(a). To state a claim under Section 504 Ruskai must establish: (1) that she is disabled; (2) that the entity she alleges to have discriminated against her receives federal funding or is a program or activity conducted by an executive

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

agency; and (3) that the covered entity discriminated against her on the basis of her disability. *Id.*⁷

1. Petitioner is a person with a disability

This Court applies a three-part test to determine whether an individual has a disability under the ADA or Rehabilitation Act, which is defined in the law as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment” 29 U.S.C. § 705(20)(B), *incorporating* 42 U.S.C. § 12102(1); *see also* 6 C.F.R. § 15.3(d) (Department of Homeland Security Regulations implementing Section 504 of the Rehabilitation Act). “First, the plaintiff must establish that she suffers from an impairment. Next, the plaintiff must show that the impairment affects a major life activity, and third, that the impairment substantially limits the major life activity.” *McDonough v. Donahue*, 673 F.3d 41, 47 (1st Cir. 2012). Ruskai has or has had a record of

⁷ The Rehabilitation Act and the Americans with Disabilities Act (ADA) impose the same requirements, *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 151 n.13 (1st Cir. 1998), and therefore cases applying the ADA are also used as guidance in Rehabilitation Act claims. *See, e.g., Calero-Cerezo v. U.S. Dep’t of Justice*, 355 F.3d 6, 19 (1st Cir. 2004) (“the case law construing the ADA generally pertains equally to claims under the Rehabilitation Act”); *McDonough v. Donahue*, 673 F.3d 41, 48 (1st Cir. 2012) (applying ADA cases to a Rehabilitation Act claim).

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

having two impairments, osteoarthritis and avascular necrosis. Ruskai Aff. ¶¶ 9, 31.⁸ See *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 669, 67 (7th Cir. 2012) (holding that osteoarthritis and vascular necrosis that made walking difficult and painful, and required the petitioner to use a cane constituted a disability under the Rehabilitation Act); 6 C.F.R. § 15.3(d)(1)(i) (DHS regulations implementing the Rehabilitation Act stating that covered disabilities include physiologic disorders affecting the musculoskeletal system). These impairments affect various major life activities, including walking. *McDonough*, 673 F.3d at 47 (“Walking is considered a major life activity.”).

In 2008 Congress passed the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110–325, § 2(b)(1)–(6), 122 Stat. 3553 (2008) [“ADAAA”]. The implementing regulations now make clear that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures,” 29 C.F.R. § 1630.2(j)(1)(v), which include “prosthetics including limbs and devices.” *Id.* § 1630.2(j)(5)(I). See also

⁸ At the time of the searches at issue in this case Petitioner suffered only from osteoarthritis. Ruskai Aff. ¶ 9. Since that time she developed avascular necrosis, which required her to receive a hip replacement in her right hip. *Id.* ¶ 31. She has also undergone surgery for a knee replacement in her left knee due to osteoarthritis. *Id.* ¶ 32.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Lloyd v. Hous. Auth. of the City of Montgomery, 857 F. Supp. 2d 1252, 1263 (M.D. Ala. 2012) (“In effect, these provisions require courts to look at a plaintiff’s impairment in a hypothetical state where it remains untreated”); *Harty v. City of Sanford*, 6:11-CV-1041-ORL-31, 2012 WL 3243282 (M.D. Fla. Aug. 8, 2012) (same). This Court should therefore determine whether Ruskai’s osteoarthritis and avascular necrosis would constitute a disability had she not had the surgery to replace her knee with an artificial joint.

The ADAAA expressly relaxed the standard for what it means to be “substantially impaired in a major life activity.” ADAAA, *supra*, at § 2; 42 U.S.C. § 12102(4)(B). The EEOC regulations implementing the ADAAA note, “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “‘Substantially limits’ is not meant to be a demanding standard.” 29 C.F.R. § 1630.2(j)(1)(i); *see also id.* § 1630.2(j)(1)(ii). The regulations caution that the threshold question of whether an impairment substantially limits a major life activity should not be a major focus of analysis under the ADA, instead the analysis should focus on “whether covered entities have complied with their obligations and whether discrimination has occurred.” *Id.* § 1630.2(j)(1)(iii).

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

Because the ADAAA does not apply retroactively, *Faiola v. APCO Graphics, Inc.*, 629 F.3d 43, 48 n.4 (1st Cir. 2010), Courts of Appeal have not yet had the opportunity to apply its broader definition of “substantially limits.” As one district court noted: “Few courts have had occasion to consider the effects of the ADAAA. Those that have, apply it broadly to encompass disabilities that previously might have been excluded.” *Harty*, 2012 WL 3243282 at *5; *see also Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 995-96 (W.D. Tex. 2012) (finding, on a motion for summary judgment, that plaintiff had presented sufficient facts for a jury to conclude she was disabled under ADAAA standards where she had intermittent severe pain in her back and legs which could be aggravated by walking); *Howard v. Pennsylvania Dep’t of Pub. Welfare*, CIV.A. 11-1938, 2013 WL 102662, *11 (E.D. Pa. Jan. 9, 2013) (finding a plaintiff’s ability to walk substantially limited where she testified that she had difficulty walking when her ankles and hips were “flaring” and where her husband testified that she had difficulty walking for long periods of time in certain weather).

Ruskai’s impairments substantially limit and limited her ability to walk. Before having her knee replacement surgeries, Ruskai could not walk without severe pain because of the osteoarthritis. Ruskai Aff. ¶¶ 9-10, 30. Eventually Ruskai

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

required the use of a walking stick in order to walk. *Id.* ¶ 10. Ruskai's avascular necrosis also caused her significant pain when she engaged in day-to-day activities and would have eventually made walking impossible. *Id.* ¶¶ 29, 31. Because Ruskai's impairments substantially limit and limited her ability to engage in the major life activity of walking prior to employing the mitigating measures of artificial joints, Ruskai is disabled and has a record of being disabled.

2. Respondent's Security Screening is a Program Covered by the Rehabilitation Act

The TSA is both a federally-funded program, *see, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. 112-74, 125 Stat. 786, 950-51, and is a program run by an executive Agency, the Department of Homeland Security. 5 U.S.C. § 105. Although this Court has held that the statute creating the TSA expressly exempted the TSA from compliance with the Rehabilitation Act with respect to its employment of security screeners, that decision was limited to its facts. *Field v. Napolitano*, 663 F.3d 505, 510 (1st Cir. 2011). This Court noted that Section 111(d) of the Aviation and Transportation Security Act (ATSA), Pub. L. 107-71, 115 Stat. 597 (2001), expressly overrode other federal laws that might have applied to the TSA's employment practices. *Id.* at 511-12. There is no similar language in the ATSA's discussion of screening practices that indicates any Congressional

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

intent to exempt the TSA's security screening of passengers from the requirements of other federal laws, including civil rights laws. *See ATSA, supra*, at § 110, *amending* 49 U.S.C. § 44901. The TSA is therefore an entity covered by the Rehabilitation Act, and must comply with its requirements with respect to its treatment of passengers.

3. Respondent Discriminated Against Ruskai on the Basis of her Disability

Respondent discriminated against Ruskai on the basis of her disability by enforcing a policy that has a disparate impact on persons with Ruskai's disabilities and by failing to grant her a reasonable accommodation to allow her to pass through security without automatically having an enhanced pat-down. *See Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urban Dev.*, 620 F.3d 62, 66 (1st Cir. 2010) (recognizing that the FHAA and ADA are to be interpreted the same and noting that there are three theories of liability under the FHAA including disparate impact and reasonable accommodation).

The DHS regulations implementing Section 504 of the Rehabilitation Act make clear that “[t]he Department may not . . . utilize criteria or methods of administration the purpose or effect of which would: (i) Subject qualified individuals with a disability to discrimination on the basis of disability.” 6 C.F.R.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

§ 15.30(b)(4). Yet these screening policies do just that, and the TSA understood this discriminatory impact at the time it adopted them. AR 5746.

Respondent's SOPs related to WTMD screening have a significant disparate impact on disabled people who rely on auxiliary aides or mitigating measures that contain metal. More specifically, a large and growing number of Americans, like Ruskai, have conditions that negatively affect their joints, requiring them to obtain full or partial joint replacements. Robert Weisman, *Can Surgery Help you Stay in the Game?*, boston.com (February 26, 2012), http://www.boston.com/business/personalfinance/articles/2012/02/26/demand_for_knee_and_hip_replacement_growing_among_class_of_young_actives/; CBS News, *supra*. Around 900,000 Americans require joint-replacement surgeries each year to mitigate the symptoms of these disabilities. Weisman, *supra*. Many of these people, like Ruskai, will alarm WTMDs when they pass through them solely because of their prosthetic joints. *See* Government Attic, *supra*, at 9, 17, 19, 20, 25, 29, 49, 64, 67, 80, 86, 104, 113, 133, 142, 144, 163, 182; Public Comment, *supra* at 1494, 627, 1577, 829, 651, 743, 659, 1520, 5473, 5481, 5129, 2446, 2249, 1577, 1205, 1041. For those people who are compelled to walk through WTMDs at the hundreds of checkpoints only equipped with WTMDs, this will mean being forced to undergo the invasive and

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

uncomfortable enhanced pat-down in order to allowed to board their planes when they choose to travel by air.

Unlike most other air travelers, persons with joint implants are required to go through an unpleasant and intrusive secondary screening every single time they go through security where the TSA uses only WTMDs. The TSA's SOPs regarding the use of enhanced pat-downs to resolve WTMD alarms therefore discriminates against a class of disabled persons in violation of the Rehabilitation Act. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 & n.1 (9th Cir. 1996) (in case involving discrimination on basis of disabled person's "auxiliary aid," holding that policy that "burdens [disabled] persons in a manner different and greater than it burdens others . . . discriminates against the plaintiffs by reason of their disability").

The TSA could alleviate this burden by granting Ruskai an accommodation she has requested, but it has failed to do so. Under the Rehabilitation Act, Respondent must grant disabled passengers reasonable accommodations to allow them meaningful access to the programs the TSA provides. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Once a passenger has requested a reasonable accommodation, the TSA must make the accommodation "unless it can show that

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

the proposed accommodation would pose an undue hardship.” *Calero-Cerezo*, 355 F.3d at 23.

The contours of what constitutes a “reasonable accommodation” are fact-specific, but case law and federal regulations offer some guidance in making that determination. The purpose of the Rehabilitation Act is to provide for similar benefits and services for the disabled as their non-disabled counterparts enjoy. *See, e.g., Harnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) *aff’d*. 198 F. App’x 89 (2d Cir. 2006) (“The relevant statutes ‘ . . . mandate[] reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled.’” (quoting *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003))). As the DHS has recognized in its own regulations implementing the Rehabilitation Act, its “services, to be equally effective, . . . must afford individuals with a disability equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual’s needs.” 6 C.F.R. § 15.30(b)(2). The accommodation must therefore not only be effective, but it must be the least restrictive option to allow the disabled person to participate in the government program in the most “integrated setting” possible.

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

In the instant case, Respondent manages a program to screen passengers before they board airplanes in the United States. Consistent with the U.S. Constitution, the DHS authorizing statute, and at least one Presidential directive, the TSA must ensure that its screening programs do not unduly intrude upon passengers' civil rights and liberties. *See* 6 U.S.C. § 111(b)(G), President Barack Obama, *Presidential Memorandum Regarding 12/25/09 Attempted Terrorist Attack* (Jan. 7, 2010), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack>. Because of her disability, Ruskai is denied access to a screening program that is respectful of her civil rights, and instead is frequently subjected to significant invasions of her privacy and bodily autonomy. Ruskai therefore has requested an accommodation to allow her to be screened in a less-intrusive way, in order to be put on a level playing field with non-disabled passengers.

This court has developed a two-part test to determine whether a covered entity has failed to provide a reasonable accommodation. First, the disabled party must show “not only that the proposed accommodation would enable her to [participate in the relevant program], but also that, at least on the face of things, it is feasible for the [covered entity] under the circumstances.” *Reed v. LePage Bakeries, Inc.*, 244 F.3d

~~SENSITIVE SECURITY INFORMATION~~

254, 259 (1st Cir. 2001). Second, the person requesting the accommodation “must prove that the request was sufficiently direct and specific so as to put the [covered entity] on notice of the need for an accommodation.” *Enica v. Principi*, 544 F.3d 328, 338 (1st Cir. 2008).

In her April 2011 complaints to the TSA and DHS, Ruskai stated that she was being discriminated against because of her disability, and requested that at security checkpoints where the TSA has decided only to use WTMDs rather than AIT scanners, passengers with joint implants be allowed to undergo secondary screening with a HHMD rather than being subjected to an enhanced pat-down. AR 1847, AR 1856. Although the TSA did not respond directly to these requests, it did state in its response that the HHMD had been eliminated and therefore were not available for use on Ruskai. AR 1895. The TSA was therefore on notice of the requested accommodation, and refused it.¹⁰

¹⁰ In her April 2011 complaints to the TSA Ruskai also requested that agents conduct a visual inspection where her legs were unclothed in lieu of touching her legs. AR 1856. The TSA did not respond to this portion of Ruskai’s complaint, but did state that the policy was for agents to pat down all clothed areas of passengers’ bodies, suggesting that its agents should accommodate requests for visual inspections of unclothed parts of the body in lieu of pat-downs. It is not clear if this is the official policy of the TSA. *See* AR 5155-57.

~~SENSITIVE SECURITY INFORMATION~~

The accommodation Ruskai requested would both enable her to participate in respondent's screening program on an equal footing with non-disabled passengers, and is a feasible option for the Respondent to offer. Ruskai asks that she be allowed to undergo secondary screening by HHMD to verify that the only metal on her is in her artificial joints, which, as explained *supra*, was the method of secondary screening used for WTMD alarms before November 2010 and is the TSA-approved procedure that continues to be used at foreign airports in the Preclearance program.¹¹ This accommodation would require very little change to the TSA's current program. The TSA continues to use HHMDs at U.S. airports for multiple types of screening, and therefore has the necessary equipment and its agents are trained to use it. AR 3376-78. Ruskai already travels with medical documentation of her implants and notifies the TSA agents at the security checkpoints that she has artificial joints. AR 1837, 1839, 1843, 1847. With this accommodation when Ruskai travels through a security checkpoint where the only option is to be screened by a WTMD, the agent at the checkpoint would simply have to follow up after she alerts the WTMD with a

¹¹ To the extent that the TSA determines that once a HHMD has located the metal on Petitioner's person it is necessary for the agent to conduct a brief pat-down limited to the clothed areas of her body that contain the metal, Petitioner does not object to this tertiary screening as long as it is only as invasive as necessary to determine that the metal in the location that alarmed the HHMD is not a weapon or explosive.

~~SENSITIVE SECURITY INFORMATION~~

HHMD rather than the enhanced pat-down. Indeed this accommodation would result in a screening that is likely no more time-consuming, is less intrusive, and is better at locating the metal on Petitioner's body than the current enhanced pat-down procedure. The requested accommodation therefore imposes no burden on the TSA, and will not in any way compromise the TSA's ability to ensure that the metal on Ruskai's body is not a weapon or explosive.

The TSA's discrimination against Ruskai on the basis of her disability and its refusal to grant her a reasonable accommodation violates the Rehabilitation Act and constitutes arbitrary and capricious action and "action otherwise not in accordance with the law," in violation of the APA. 5 U.S.C. § 706(2)(a).

C. The TSA Acted Arbitrarily and Capriciously by Delaying and Failing to Investigate Petitioner's Complaints

The TSA acted arbitrarily and capriciously by delaying and ultimately failing to conduct any investigation of Ruskai's complaints regarding the enhanced pat-down procedures. The APA authorizes courts to "compel agency action [that is] unlawfully withheld or unreasonably delayed" and hold unlawful and set aside agency action that is contrary to law or unconstitutional. *See* 5 U.S.C. § 706(1)-(2). In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court explained, "when an agency is compelled by law to act within a certain time period, . . . a court

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

can compel the agency to act, [even when] it has no power to specify what the action must be.” 542 U.S. 55, 65 (2004). Section 706(1) suits can be maintained “where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is required to take.” *Id.* at 64.

By statute CRCL is required to “investigate complaints and information indicating possible abuses of civil rights or civil liberties.” 6 U.S.C. § 345(a)(6). As part of this statutory mandate, CRCL formally refers complaints regarding pat-down procedures to TSA, as documented in its annual report to Congress. *See* Department of Homeland Security Office for Civil Rights and Civil Liberties, *Fiscal Year 2011 Annual and 4th Quarter Report to Congress* 51-58 (June 25, 2012). With respect to disability claims, in particular, agency regulations require all non-employment related complaints to be handled by CRCL. 6 C.F.R. § 15.70(c). If CRCL receives a complaint over which it does not have jurisdiction, it must “promptly” notify the complainant and refer her to the appropriate federal agency. *Id.* § 15.70(e). No later than 180 days from receipt of the complaint, CRCL must notify the complainant of the results of its investigation, including findings of fact and conclusions of law and proposed remedies if violations are found. *Id.* § 15.70(g)(1).

~~SENSITIVE SECURITY INFORMATION~~

Here, Ruskai filed multiple complaints with the TSA soon after the incidents at issue, AR 1837-48, and when she received inadequate responses from the TSA, she made a formal complaint to CRCL on April 22, 2011. AR 1850-60. CRCL did not respond to Ruskai's complaint until January 6, 2012, and simply referred her matter to the TSA, which ultimately sent Ruskai a letter order stating that it could not investigate her complaints because too much time had passed. AR 1894-97. Based on statutory and regulatory authority, TSA, through delegation by CRCL, had an obligation to investigate her complaint and provide her with a response in a prompt manner; it did not.

In order to determine whether agency action was unlawfully delayed, many courts rely on the so-called TRAC factors, which were first articulated by the D.C. Circuit and have been endorsed by the First Circuit. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir.1984) ("TRAC ") (articulating factors); *Towns of Wellesley, Concord, and Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (applying TRAC factors to petitioner's claims of unreasonable delay by federal agency). The TRAC guidelines provide that:

- 1) a "rule of reason" governs the time agencies take to make decisions;
- 2) delays where human health and welfare are at stake are less tolerable than delays in the economic sphere;
- 3) consideration should be given to the effect of ordering agency action on agency activities of a competing

~~SENSITIVE SECURITY INFORMATION~~

~~SENSITIVE SECURITY INFORMATION~~

or higher priority; 4) the court should consider the nature of the interests prejudiced by delay; and 5) the agency need not act improperly to hold that agency action has been unreasonably delayed.

Town of Wellesley, 829 F.2d at 277 (citing TRAC, 750 F.2d at 80).

Each of these factors weighs in favor of finding that Respondent unreasonably delayed and withheld investigation of Ruskai's complaints. The ten months between the time CRCL received Ruskai's complaint and the time it referred the complaint to the TSA was not reasonable. Ruskai's civil rights and disability complaint was directly related to her welfare, specifically her ability to travel by air without having to be subjected to an invasive and degrading pat-down solely due to her metal implants. Ruskai was also highly prejudiced by the delay and ultimate failure to investigate her claims. Ruskai continues to be subjected to the unlawful enhanced pat-down every time she must pass through a WTMD. To this day, Ruskai does not have clarity regarding whether the procedures to which she is subjected are compliant with the TSA's SOPs or whether they are due to poorly trained or non-compliant agents.¹⁰ As a result, she undergoes significant stress and

¹⁰ Indeed, although petitioner's counsel has obtained access to the SOPs relevant to this case, requests to allow petitioner herself access have been denied by the TSA because it constitutes SSI. Thus, petitioner has not had access to the content of the SOPs, nor has she been permitted to review this brief because it contains references to SSI.

~~SENSITIVE SECURITY INFORMATION~~

anxiety prior to being screened because she does not know to what screening she will be subjected, in addition to the distress associated with the screening itself.

Indeed, the GAO has conducted a review of the TSA's handling of complaints about air passenger screening, and determined the "TSA does not have agencywide policy, consistent processes, or an agency focal point to guide the receipt of these complaints or to use complaint information to inform management about the nature and extent of the screening complaints to help improve screening operations and customer service." U.S. Gov't Accountability Office, GAO-13-43, *Air Passenger Screening: Transportation Security Administration Could Improve Complaint Processes* 14 (2012). It further found that "TSA's complaint resolution processes do not fully conform to standards of independence established to help ensure that these types of processes are fair, impartial, and credible." *Id.* at 31. It appears that the agency's failure to investigate Ruskai's complaints is part of a larger pattern of the TSA failing to develop and implement appropriate policies to address passenger complaints.

At this stage, over two years after the filing of her administrative complaints, compelling the TSA to conduct an investigation would result in continued bureaucratic delay and will not remedy the continued harm to Ruskai. Given that

~~SENSITIVE SECURITY INFORMATION~~

the Court has the full record before it and has the authority to conduct de novo review of her legal claims, Ruskai requests that the Court take immediate action and order elimination or modification of the enhanced pat-down procedures applied to Ruskai.

D. The Petition for Review of the TSA’s Decision was Timely Under 49 U.S.C. § 46110(a)¹²

Ruskai’s petition is timely because she filed her petition within 60 days of the issuance of the letter order for which she seeks judicial review. In the alternative, should the Court determine that the petition is untimely, Ruskai has reasonable grounds that excuses the failure to file within the applicable statute of limitations.

This petition arises under 49 U.S.C. § 46110, which provides, in relevant part, that “a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review . . . in the court of appeals of the United States for the circuit in which the person resides.” 49 U.S.C. § 46110(a). A petition for review of such an order “must be filed not later than 60 days after the order is issued.” *Id.* “The court may allow the

¹² In a December 4, 2012 order, the Court directed the parties to brief the issue of whether Petitioner’s petition was timely filed under 49 U.S.C. § 46110(a).

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN RUSKAI v. PISTOLE, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.” *Id.*

Ruskai’s petition is timely because the letter for which she seek judicial review was not mailed until on or after February 3, 2012. Pet’r Resp. to Order to Show Cause, Ex. A (May 9, 2012) (Addendum at 24). The date on the letter, which is January 19, 2012, is not the operative date for determining the date of issuance because it was not issued until it was sent and its contents disclosed outside the TSA. *See Americopters, LLC v. F.A.A.*, 441 F.3d 726, 733 (9th Cir. 2006) (suggesting that 60-day filing deadline under § 46110(a) calculated from date challenged letter from F.A.A. was sent); *Avia Dynamics, Inc. v. F.A.A.*, 641 F.3d 515, 519 (D.C. Cir. 2011) (concluding that “filing period [under § 46110(a)] begins to run on the date the order is officially made public”). The envelope in which the letter was mailed was date-stamped February 3, 2012 by a postal meter and, thus, was not sent until at least that date or afterwards. Ruskai filed her petition on April 2, 2012, which is within 60 days of February 3, 2012, therefore falling within the statute of limitations under § 46110(a).

In the alternative, the filing deadline may be tolled due to inadequate notice. *See Americopters*, 441 F.3d at 733 n.5 (recognizing that 60-day filing deadline

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAI v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A ‘NEED TO KNOW,’ AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~

~~SENSITIVE SECURITY INFORMATION~~

would be tolled because petitioner was not given notice of e-mail containing challenged order until ten days after it was submitted); *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 485 (D.C. Cir. 1989 (holding that defect in notice by FAA “do[es] no more than toll the statutory time limit”); *see also Durso*, 795 F. Supp. 2d at 69 (“[I]f an order is kept secret, the sixty-day period will be tolled until plaintiffs receive some notice of the order’s contents or effect.”). Because Ruskai could not have received notice of the letter until after it was mailed on February 3, 2012, the date of the mailing, at a minimum, tolls the statutory deadline. Further, Ruskai was out of the country between February 6, 2012 and March 3, 2012, and did not receive the letter until she returned home on March 3, 2012. Pet’r Resp. to Order to Show Cause, Ex. B (May 9, 2012) (Addendum at 25). That she did not receive any notice of the letter until March 3, 2012 provides reasonable grounds for any failure to file within the statutory deadline.

CONCLUSION

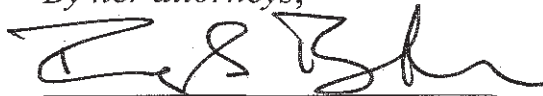
For the foregoing reasons, Ruskai asks the Court to find that the TSA’s application of its SOPs to her violate her rights under the Fourth Amendment and the Rehabilitation Act, that its decision to require enhanced pat-downs of all travelers that alarm WTMDs was arbitrary and capricious, and that the TSA’s failure to

~~SENSITIVE SECURITY INFORMATION~~

investigate her complaints of civil rights violations constitutes arbitrary and capricious action. As Ruskai has demonstrated, there are other procedures the TSA could employ to resolve WTMD alarms for passengers with joint implants or other medical devices that are less intrusive and more effective than the enhanced pat-down. Petitioner requests that this Court order the TSA to cease using the enhanced pat-down in order to resolve alarms on the WTMD, or in the alternative, to grant passengers with joint implants or other medical devices a reasonable accommodation that excuses them from receiving an enhanced pat-down every time they pass through a WTMD.

July 26, 2013

Respectfully submitted,
Mary Beth Ruskai, Petitioner
By her attorneys,



Inga S. Bernstein (First Circuit Bar No. 43157)
Monica R. Shah (First Circuit Bar No. 1154639)
Naomi R. Shatz (First Circuit Bar No. 1157995)
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

~~SENSITIVE SECURITY INFORMATION~~

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font and contains 13,970 words.



Monica R. Shah
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

July 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013, I sent a copy of the foregoing to Sydney Foster, Esq. and Sharon Swingle, Esq., Civil Division Appellate Staff, U.S. Department of Justice, 950 Pennsylvania Ave. NW room 7258, Washington, D.C. 20530, via electronic mail in a password-protected document, by agreement.



Monica R. Shah

~~SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *RUSKAY v. PISTOLE*, No. 12-1392 (1st Cir.)~~

~~SENSITIVE SECURITY INFORMATION~~

~~WARNING: THIS RECORD MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PT. 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PT. 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.~~