ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1135
(Consolidated with No. 16-1139)

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

COMPETITIVE ENTERPRISE INSTITUTE,
THE RUTHERFORD INSTITUTE, IAIN MURRAY, and MARC SCRIBNER,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY ADMINISTRATION, and JEH JOHNSON,
in his official capacity as Secretary of the U.S. Department of Homeland Security,

Respondents.

On Petition for Review of an
Order of the Department of Homeland Security

REPLY BRIEF OF PETITIONERS

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GLOSSARY

AIT	Advanced Imaging Technology
APA	Administrative Procedure Act
CEI	Competitive Enterprise Institute
DHS	United States Department of Homeland Security
EPIC	Electronic Privacy Information Center
FAA	Federal Aviation Administration
FMCSA	Federal Motor Carrier Safety Administration
FRIA	Final Regulatory Impact Analysis (full title: "Final Rule: Regulatory Impact Analysis and Final Regulatory Flexibility Analysis")
JA	Joint Appendix
NHTSA	National Highway Traffic Safety Administration
NPRM	Notice of Proposed Rulemaking
Opening Br.	Opening Brief of Petitioners Competitive Enterprise Institute (CEI) *et al.*
Resp. Br.	Brief for Respondents
TSA	Transportation Security Administration
WTMD	Walk-through metal detector

SUMMARY OF ARGUMENT

TSA's body scanner rule causes travel deaths by leading some passengers to choose to drive rather than fly. TSA totally avoids this issue. It is not because the agency assessed the number of passengers who might do so and found the fatality risk to be nonexistent. Nor is it because the agency determined that the risk is outweighed by the alleged life-saving benefits of scanners. Instead, TSA simply declares that the evidence on this risk is "anecdotal," and thus can be disregarded.

In fact, the evidence cannot be so easily dismissed. As shown in CEI's Opening Brief, when the comments in the record are analyzed, they demonstrate a serious fatality risk from this travel substitution. That risk, moreover, is amply confirmed by polling data in the record, some of it cited by TSA itself.

TSA's analysis of this issue is no analysis at all, but rather is an arbitrarily illegal evasion. TSA's rule should be remanded, and the agency ordered to undertake an honest evaluation of a question that it would, understandably, rather not confront.

ARGUMENT

I. TSA Has Utterly Failed to Justify Its Disregard of the Documented Risk That a Sizable Number of Passengers Will Switch from Flying to Driving

A. The Agency's Dismissal of Relevant Comments as "Anecdotal" Is Groundless

As CEI discussed in its opening brief, the vast majority of comments submitted in this rulemaking were opposed to body scanners. Opening Br. 9 & n.14. More importantly, a sizable number of commenters stated that having to be screened by scanners would cause them to drive rather than fly, exposing them to a substantially higher fatality risk due to the fact that driving is far less safe than flying. This risk differential is large enough to negate all, or at least a significant part of, TSA's projected life-saving benefits for body scanners. *Id.* at 9–20.

TSA dismisses this issue. It does not dispute the fly-drive safety tradeoff, but instead characterizes the comments cited by CEI as merely "anecdotal." Resp. Br. 35. That is the entirety of TSA's treatment of this issue.

But facts are not to be disregarded merely because they come in anecdotal form, especially when they reveal "concrete, nonspeculative harm." *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627–29 (1995) ("The anecdotal record mustered by the Bar is noteworthy…In light of this showing-which respondents at no time refuted, save by the conclusory assertion that the Rule lacked 'any factual basis,'…we do not read our case law to require that empirical

data come to us accompanied by a surfeit of background information"); *Georgia Aquarium v. Pritzker*, 135 F.Supp.3d 1280, 1311, 1306 (N.D. Ga. 2005) (agency properly relied on "anecdotal" evidence of mortality to deny request to import beluga whales under Marine Mammal Protection Act). Here, the commenters established such harm by specifically attesting to their substitution of more dangerous travel by road, for safer travel by air.

Even if the comments were not so specific, this Court's rulings make clear that an agency cannot ignore comments just because they do not satisfy some specific metric. *See Sorenson Communications, Inc. v. FCC*, 765 F.3d 37, 50 (D.C. Cir. 2014) (fact that petitioner's comment did not provide a specific or concrete cost figure did not mean the agency could disregard it).

TSA also failed to even mention, let alone acknowledge, CEI's showing that these drive-rather-than-fly comments had major implications for TSA's projected safety benefits for its scanners. Even if one assumed that these comments were unrepresentative, and that the true rate of substituting driving for flying was far lower than these comments suggested, CEI's brief demonstrated that the quantity of these comments indicated a loss of life that exceeded TSA's break-even analysis of scanners. Opening Br. 18-19.[1] However, hiding behind its invocation of the term

[1] CEI's brief reduced the rate of substitution (1.5%) indicated by these comments by a factor of eight in order to err on the side of caution. *Id.* at 19. But in fact the number of comments submitted may well have underrepresented the

"anecdotal" as if it were some exculpatory talisman, TSA does not even mention, let alone try to rebut, this analysis.

B. The Importance of the Comments on Changed Travel Plans Are Supported by the Very Polls Cited by TSA

In any event, the record contains not only anecdotal evidence of travel substitution, but statistical evidence as well. That evidence is found in the very polls cited by TSA in its rule.

TSA claimed that "independent polling on AIT acceptance shows strong public support for and understanding of the need for AIT." Final Rule, 81 Fed. Reg. at 11368 col. 3. This was apparently based on a comment that stated "National ABC and CBS news polls indicated that the majority of poll participants favored full body scanners at airports." *Id.*

But for purposes of the travel substitution issue, the issue is not whether a majority of travelers favor scanners. The real issue is how many travelers are so opposed to scanners that they might drive instead of fly. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 487 (D.C. Cir. 1987) (upholding agency decision

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percentage of the public that drives rather than flies due to body scanners, since TSA never called for comment on this issue in its NPRM, or suggested to commenters that it would view the subject as being relevant. *Cf.* Charlie Cook, *Trump gets bounce from convention and now it's Clinton's Turn*, Nat'l Journal, July 26, 2016 (analyst notes that a "poll understates" support for additional options respondents must "come up with" on their own) (available in Westlaw).

not to require non-detachable seat belts, where surveys found that "10 to 20 percent of the public would be likely to" disable them; agency properly considered this "serious adverse public reaction," since an agency "cannot fulfill its statutory responsibility unless it considers popular reaction") (citations omitted).

As CEI's brief demonstrates, even if the latter constitute a small minority, they can still tip the scales of TSA's break-even analysis. A mere 1.5 percent of passengers switching to cars, for example, could produce 184 additional road deaths per year, far outweighing TSA break-even estimate of 20 to 21 lives saved annually by scanners. Opening Br. 18–19.

By comparison, the ABC poll cited by TSA found a far higher percentage than 1.5; it found that *20% of respondents said they would be "less likely" to fly due to body scanners. See* Washington Post Poll (the ABC poll), http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_11222010.html.[3]

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[3] "This Washington Post-ABC News poll was conducted by telephone Nov. 21, 2010" and asked, "7. Do these rules make you more likely to fly on a commercial airplane, less likely to fly, or would they make no difference in your decision to travel by airplane?" to which the responses were

"More likely	Less likely	No diff.	No opin."
10	20	71	–

In citing this poll, TSA was alluding to the comments of Sola Egunyomi, April 22, 2013, at pg. 4 (https://www.regulations.gov/document?D=TSA-2013-0004-0740), JA__ ("a majority of Americans support the presence and use of these scanners…An example of these polls is a CBS poll. . .Another Washington Post-

That percentage is over thirteen times as large as the 1.5 percent figure discussed in CEI's opening brief. Instead of 184 fatalities, this higher percentage translates to over 2400 annual fatalities.

Another poll in the record suggests an even larger potential substitution of driving for flying, and actually undercuts TSA's claim of majority support for scanners. A November Zogby 2010 poll found that "48% said they would probably seek alternatives to flying because of the new measures" and "61% of likely voters oppose the newly enhanced security measures at the country's airports."[6] This 48 percent figure means that even more lives are at risk than those indicated by the ABC poll discussed above.

ABC poll also conducted in 2010 stated that nearly two-thirds of Americans support the new full-body security-screening machines at the country's airports").

[6] Hugo Martin, *Poll finds 61% oppose new airport security measures*, Los Angeles Times, Nov. 23, 2010 (http://latimesblogs.latimes.com/money_co/2010/11/new-poll-says-61-oppose-new-airport-security-measures.html).

This Zogby poll is cited in a comment to a TSA blog post thread contained in the record. *See* NPRM- Footnote 62 (supporting and related materials), third attachment, *NPRM- Opt Out Turns Into Opt In* , https://www.regulations.gov/document?D=TSA-2013-0004-0024, pg. 7 of 52 (*The TSA Blog: Opt Out Turns Into Opt In*, 11.24.2010, comment of Anonymous, Nov. 24, 2010 6:53 PM ("how does TSA respond to: http://latimesblogs.latimes.com/money_co/2010/11/new-poll-says-61-oppose-new-airport-security-measures.html. 61% of Americans oppose new security measures."), JA___.

It should be noted that those polls almost certainly understate opposition to the screening provided for in TSA's final rule, because they were taken before TSA decided, in its final rule, to make AIT screening mandatory rather than optional. *See* Resp. Br. 11 (noting that TSA changed its "operating protocol regarding the ability of individuals to … opt-out of AIT screening in favor of physical screening.").

By contrast, at the time of the surveys passengers could opt out of AIT screening and instead choose a pat-down. *See* NPRM, 78 Fed. Reg. at 18293.

C. This Court Should Reject the Agency's Attempt to Dodge the Safety Implications of This Evidence

Contrary to TSA's claims, petitioners' allegedly anecdotal evidence demonstrated that scanners could lead to a significant fatality risk even if the number of lives at issue were, by some measures, statistically "negligible." Superficially negligible changes in overall travel patterns can nonetheless cost lives. The loss of individual human lives matters even if the loss is tiny or "negligible" in comparison to the overall U.S. population. *See Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) ("costs" an agency must consider include "harms that" a rule "might do to human health."). In any event, as explained in the preceding section, the polls and the comments *do* suggest a statistically significant degree of modal substitution and related mortality.

If TSA were genuinely concerned that petitioners' individual comments were too "anecdotal" to assess the degree of modal substitution, the proper response would be to at least review the *full* results of the publicly available surveys on whether travelers would change their travel modes, rather than treat this as a *de minimis* issue. *See FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 519 (2009) (it is appropriate "to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained."); *Gas Appliance Mfrs. Ass'n v. Department of Energy*, 998 F.2d 1041, 1047 (D.C. Cir. 1993) ("An important, easily testable hypothesis should not remain untested."); *Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985) (agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties.").

A candid consideration of the travel substitution factor may or may not have changed TSA's Final Rule. That issue is not before this Court, however, because TSA failed to undertake such an analysis in the first place.

II. TSA Has Failed to Justify its Hyping of the Alleged Virtues of AIT

In its rule, TSA characterized scanners as "the most effective and least intrusive means currently available." 81 Fed. Reg. at 11367. It claimed, for example, that AIT "reduces the need for a pat-down."

As discussed in CEI's Opening Brief, this was an exaggeration aimed at reducing public opposition to scanners and thus, among other things, reducing the prospect of passengers shifting to car travel. Opening Br. 7-8, 22. TSA's brief only confirms these charges.

For example, rather than sticking to its original claim of fewer pat-downs, TSA now suggests that there may be no overall reduction: "although some individuals may cause AIT to alarm, other individuals who would have set off an alarm in a walk-through metal detector will not do so." Resp. Br. 30.

CEI argued that the absence of scanners from TSA's procedures for screening certain special passenger populations, such as the elderly, children and frequent, trusted travelers, demonstrated that scanners were not as passenger-friendly as TSA claimed. Opening Br. 23–24. In response, TSA claims that its use of walk-through metal detectors for these special populations is irrelevant to the alleged advantages of scanners. Resp. Brief 31. But if scanners are really less intrusive, then they should be ideal for such populations—children and the elderly, for example, are more likely to be irritated by intrusive screening than other passengers. And TSA's use of metal detectors rather than scanners for the elderly is inexplicable, because the agency itself notes that scanners allow "individuals with metal, medical implants—such as a pacemaker or a knee replacement—[to] avoid a pat-down which would have been required if they had been screened by a

WTMD." FRIA at 51, https://www.regulations.gov/document?D=TSA-2013-0004-5583, JA__. The elderly, of course, are the very passengers most likely to have such implants.[8]

As for preferred travelers, if they did not find walk-through metal detectors preferable based on factors such as speed and non-intrusiveness, TSA would not tout WTMD as a key selling point for preferred traveler programs such as TSA Pre√™.

Finally, CEI pointed out that the "assume the position" aspect of scanning—something totally absent from metal detector screening--was especially troublesome to many passengers. Opening Br. 23. This issue was totally ignored in TSA Final Rule, and it is totally ignored in its brief as well.

CONCLUSION

For the foregoing reasons, TSA's body scanner rule should be remanded and the agency ordered to properly evaluate the question of whether its rule will result in travel deaths due to passengers switching from flying to driving.

Respectfully submitted this 13th day of December, 2016,

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[8] Agency for Healthcare Research and Quality (AHRQ), *Components of Cost Increases for Inpatient Hospital Procedures*, 1997-2009 (Statistical Brief #133), May 2012, Table 2, http://hcup-us.ahrq.gov/reports/statbriefs/sb133.jsp (twenty times higher rate – 6.3 versus 0.3 stays per 1,000 population – of hospital stays among the elderly for implantation of "pacemaker or cardioverter/ defibrillator" or related surgery).

/s/ Hans Bader

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, because this brief contains 2,351 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 13th day of December 2016, I filed the foregoing brief with the Court. I further certify that on this 13th day of December 2016, I served the foregoing brief on all counsel of record through the Court's CM/ECF system.

Respondent's counsel, who have appeared, will be automatically served by the CM/ECF system, as will petitioners' counsel in the consolidated case, including:

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