Before the

TRANSPORTATION SECURITY ADMINISTRATION
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20590

Passenger Screening Using Advanced Imaging Technology	)))))))	TSA-2013-0004 (RIN 1652-AA67) **COMMENTS OF THE IDENTITY PROJECT (IDP)**

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

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The Identity Project (IDP) submits these comments in response to the Notice of Proposed Rulemaking (NPRM), "Passenger Screening Using Advanced [sic] Imaging Technology"[1], published at 78 *Federal Register* 18287-18302 (March 26, 2013), docket number TSA-2013-0004, RIN 1652-AA67, and the appendices and attachments published with that NPRM.

Regulations of the Transportation Security Administration (TSA) at 49 CFR § 1540.107 currently require would-be air travelers to "submit to screening", but neither define nor limit the meaning of "submit" or "screening". Under this NPRM, the TSA proposes to add a new paragraph (d) to § 1540.107, which would authorize the TSA to include "screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened" as part of the "screening" to which would-be passengers must "submit" (those terms remaining otherwise undefined and unlimited).

The proposed rule would require travelers to submit to virtual strip-searches and/or manual groping of their genitals, as a condition of the exercise of their right to travel by air by common carrier.

The Identity Project objects to the proposed rule on the following grounds:

1. The TSA fails to recognize that travel by air by common carrier is a right, not a privilege to be granted or denied by the government or subjected to arbitrary or unjustified conditions. As a condition on the exercise of a right, a requirement to submit to searches or other aspects of "screening" is subject to strict scrutiny. The burden is on the TSA to show that the current and proposed requirements will actually be effective for a permissible purpose within the jurisdiction of the TSA, and that they are the least restrictive alternative that will serve that purpose. The TSA has not attempted to asses the proposed rule according to this standard, and has not met this burden.

1 Our use in these comments of the Orwellian and conclusionary label applied by the TSA to this technology and this rulemaking is not intended, and should not be construed, as a concession that this technology is "advanced" in any way other than the advanced intrusiveness of the virtual strip-search it is designed and used to conduct, and the advanced degree of affront to personal dignity and other human rights which it entails.

2. The TSA errs in claiming that, "Individuals … are not included in the definition of a small entity" in the Regulatory Flexibility Act (RFA). Nothing in the statutory definition of "small entities" excludes individuals, and in fact many individual travelers affected by the proposed rule are "small entities" as that term is used in the RFA. The TSA must publish and allow comment on a new RFA analysis that takes into consideration the impact of the proposed rule on individuals in their capacity as "small entities". If the TSA fails to do so, OMB must disapprove the proposed rule, pursuant to the RFA.
3. In the absence of any definitions of "submit" or "screening", the current and proposed rules are unconstitutionally vague and overbroad. Travelers subject to the rules can't tell what is prohibited or what is required as a condition of travel by air by common carrier, or which actions at TSA checkpoints are and aren't subject to TSA civil penalties. The rules reach a significant amount of protected conduct by denying the right to travel to a significant number of individuals who pose no threat to aviation.

The proposed rule should be withdrawn, and the practices it would purport to authorize should be suspended. If the proposed rule is not withdrawn by the TSA, it should be rejected by the Office of Management and Budget (OMB) for failure to include the analysis required by the RFA. The TSA should open a notice-and-comment rulemaking to define "submit" and "screening", as those terms are used in 49 USC § 44901, 49 CFR § 1540.107, and 49 CFR § 1540.109, with sufficient specificity to enable prospective travelers to know what actions are required and what actions are proscribed.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities

curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. TRAVEL BY AIR AND BY COMMON CARRIER IS A RIGHT, AND CONDITIONS ON THE EXERCISE OF THIS RIGHT ARE SUBJECT TO STRICT SCRUTINY.

The right to travel is recognized in the First Amendment to the U.S. Constitution ("The right of the people... peaceably to assemble") and in Article 12 on freedom of movement of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. And the TSA, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking. Executive Order 13107, "Implementation of Human Rights Treaties," directs all executive departments and agencies to "maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully."[2]

Numerous treaties to which the U.S. is a party require airlines to be licensed by the U.S. government as common carriers, and to operate as common carriers. By definition, a common carrier is obligated to transport all would-be passengers willing to pay the fare in their published tariff. A common carrier cannot "reserve the right to refuse service" to anyone. The U.S. has treaty obligations to mandate that airlines transport all such passengers, and to respect those passengers' rights to transportation by air.

2 Among our previous submissions which have raised this issue with respect to TSA rulemakings, but were ignored when final rules were issued, see "Comments of the Identity Project, Secure Flight Program," TSA-2007-38572 (October 22, 2007), available at <http://hasbrouck.org/IDP/IDP-SecureFlight-comments.pdf>, and "Complaint of violations of Article 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights (ICCPR) by the Department of Homeland Security" (August 10, 2010), available at <http://papersplease.org/wp/wp-content/uploads/2010/08/tsa-ocrcl-10aug2010-attach.pdf>.

Express statutory language recognizes the right to travel by air and by common carrier, and specifically requires consideration of that right in rulemaking. 49 U.S. Code § 40103 provides that, "A citizen of the United States has a public right of transit through the navigable airspace." 49 USC § 40101 provides that, "the Administrator of the Federal Aviation Administration shall consider the following matters: … (2) the public right of freedom of transit through the navigable airspace."

Regulations which place conditions on the the exercise of rights protected by the First Amendment or the ICCPR, even if those rights were not (as they are here) expressly recognized by statute, are subject to strict scrutiny including a showing (a) that the proposed rules are the least restrictive available means of accomplishing a permissible government purpose, and (b) that they would in fact achieve that purpose. “[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

There is no mention of any "rights" in the NPRM, nor any consideration of the standards applicable to regulations which seek to impose conditions on the exercise of rights recognized by law. Nor has the right to travel by air and by common carrier been considered in any previous TSA rulemakings including in the promulgation of the current rule regarding submission to screening.

This rulemaking must start with recognition that travel by air and by common carrier is a right. The TSA must evaluate the proposed rule against the standard of justification applicable to rules that place conditions on the exercise of rights protected by the First Amendment, treaties, and Federal statutes.

Since the TSA has not yet put forward any such analysis, no rule can properly be finalized yet.

We reserve the right to comment on any purported justification of the proposed rule, within the terms of reference and against the standard applicable to conditions on the exercise of protected rights, if and when the TSA publishes any such proposal for comment, which it has not yet done.

III. THE TSA HAS FAILED TO CONSIDER THE IMPACT OF THE PROPOSED RULES ON INDIVIDUALS AS "SMALL ENTITIES".

The NPRM correctly notes that, "The Regulatory Flexibility Act (RFA) of 1980 requires that agencies consider the impacts of their rules on small entities" (78 FR at 18300).

But the NPRM goes on to claim, falsely, that, "Individuals … are not included in the definition of a small entity." And the attached "Initial Regulatory Impact Analysis" similarly claims, also falsely, that, "As defined by the RFA, an individual is not considered to be a small entity" (at 122).

These claims are false, and are entirely devoid of any support in the statutory definition. Nothing in the language of the RFA or the Small Business Act excludes or permits the exclusion of individuals from the definition of "small entities", if they otherwise satisfy the criteria in the statutory definition.

The RFA defines "small entity" at 5 USC § 601(6) as including any "small business" as defined in 5 USC § 601(3): "the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." No such definition(s) have been promulgated by the TSA.

Section 3 of the Small Business Act (15 USC § 632), provides that "a small-business concern … shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation." Additional criteria are permitted by the Small Business Act only after public notice and comment, and none have been promulgated with respect to any category of individuals.

Individuals are by definition "independently owned", and of course hardly any individuals are dominant in their fields of operation. Many individual travelers are, by this RFA and SBA definition, "small entities", including all self-employed individuals and sole proprietors and many others.

The TSA's erroneous exclusion of individuals from its consideration of "small entities", its RFA analysis, and its impact assessment is plain error, and requires the withdrawal of the NPRM or the publication of, and a new opportunity for comment on, a valid RFA analysis which takes into consideration those individuals who fit the RFA definition of "small entities". If the proposed rule is not withdrawn, and no new RFA assessment including consideration of impacts on individuals is published for comment, OMB must reject the proposed rule as not being accompanied by a valid RFA analysis.

We're not sure how the claim that "individuals are not small entities" came to be included in agency boilerplate for NPRMs and RFA assessments. Perhaps in 1980, when the RFA was enacted, a much smaller percentage of individuals were self-employed or sole proprietors. But it's time agencies to purge this language from their rulemaking templates, and for OMB to begin rejecting NPRMs or RFA assessments that exclude individuals from their consideration of impacts on "small entities".

Other DHS components and other Departments have conceded, in response to our comments on proposed rules, that individual travelers are in fact among "small entities" as that term is used in the RFA.

For example, in a 2008 joint rulemaking by U.S. Customs and Border Protection and the Department of State concerning passport rules, the agencies said (73 FR 18384 at 18403, April 3, 2008):

> Comment: One commenter noted several examples of individuals who would be considered small businesses, including sole proprietors, self-employed individuals, and freelancers.
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> Response: CBP agrees that these "sole proprietors" would be considered small businesses and could be directly affected by the rule if their occupation requires travel.... The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered "substantial."

It's odd that the SBA does not have data on numbers of sole proprietors, since the SBA itself says that, "A sole proprietorship is the … most common structure chosen to start a business."[3] Where proposed rules affect individuals, as with this NPRM, it's likely that most of the affected "small entities" will be individuals, and that the RFA assessment will primarily concern impacts on these individuals.

3 SBA, "Sole Proprietorship", at <http://www.sba.gov/content/sole-proprietorship-0>.

We urge the Small Business Administration (SBA) advocacy office to begin working with OMB to develop guidelines for agencies to use in estimating the numbers of individuals affected by proposed rules who are likely to constitute "small entities" as that term is used in the RFA.

IRS statistics on reporting of self-employment income, and data concerning numbers of sole proprietors, would be useful but not sufficient. Many professionals of varying sorts (including many physicians and lawyers, for example) are not technically "self-employed" or "sole proprietors" but are employees of personal corporations, which would still qualify as "small entities" under the RFA.

This isn't a travel-specific issue, but given the over-representation of self-employed people and freelancers among air travelers, this rulemaking would seem a good place for OMB and the SBA to start.

For the TSA, one of the Federal agencies which interacts directly – at the point of a gloved finger or its virtual equivalent in "advanced" imaging technology – with the largest numbers of individuals on a daily basis, a failure to routinely include impacts on individuals as "small entities" in RFA assessments is inexcusable. It's time for the TSA to stop lying about whether the RFA definition excludes individuals.

This is not a new issue or one with respect to which the TSA can plead ignorance. In addition to raising this issue in numerous written comments in TSA rulemakings (including those cited in footnote 2, supra), we testified and were questioned about this specific issue by the Administrator of the TSA at a hearing on "Secure Flight" in Washington, DC, on September 20, 2007.[4]

Once individuals are recognized as potentially being "small entities" for purposes of RFA assessments, the question (which the TSA has not yet asked, and which will require another comment period in which we reserve the right to submit further comments) is whether the proposed rule would have a "significant" economic impact on a "substantial" number of such small entities.

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4 See "Proposed Rules for the 'Secure Flight Program' (Docket TSA-2007-28572), Testimony of Edward Hasbrouck before the Department of Homeland Security, Transportation Security Administration", available at <http://hasbrouck.org/articles/SecureFlight-20SEP2007.pdf>, and the official transcript of the hearing including the colloquy on this issue available at <http://www.papersplease.org/_dl/sf/sf_public_meeting_transcript.pdf>.

A large percentage of business travelers are "small entities": self-employed individuals, sole proprietors, employees of personal corporations, and so forth. The percentages of leisure, visiting friends and relatives (VFR), and business travelers vary from route to route, but we believe that a conservative estimate would be that 20% of the roughly 1.8 million individual air travelers who undergo "screening" daily by the TSA and its contractors are "small entities" as that term is used in the RFA.

What is the impact of the proposed role on these individuals as "small entities"? The TSA will undoubtedly receive comments from members of the public concerning the impact on them of the practices which the proposed rule would purport to authorize. Both the TSA and OMB should consider these comments in assessing the significance of the economic impacts of the proposed rule.

A substantial number of individuals, including those who are defined as "small entities", suffer significant negative economic impacts from the practices which the proposed rule would purport to authorize. Many individuals have stopped traveling by airline because they are unable to bring themselves to submit to a virtual strip-search or manual groping of their genitals by strangers.

Many individual are psychologically unable to submit to "advanced imaging technology" or "enhanced pat-downs" as a result of past trauma. These individuals include many victims of physical or sexual abuse or assault, or military combat, for whom these TSA practices can trigger relapses of post-traumatic stress syndrome. As applied to these individuals, the proposed rules also raise issues of whether they provide adequate accommodation for persons with psychological disabilities, pursuant to the ADA.[5] And as applied to many others who are unable for religious reasons to comply with invasive TSA demands, the proposed rules would appear to implicate the Religious Freedom Restoration Act.

The economic impact on an individual "small entity" who is no longer able to travel by air for business purposes is in almost all cases "significant" by any measure, and often career-ending or a barrier

5 It is, of course, indicative of the moral failure of the TSA that in the face of the TSA's proposed rules and current practices, being unable to submit to involuntary imaging or groping of one's genitals by strangers might constitute a sign of a "disability" rather than a sign of sanity or at least of legitimate concern for privacy. We have no objection to nudity, nor should it be a basis for government sanctions, but it should be a matter of individual choice to what extent, and to whom, one exposes oneself or allows one's genitals to be touched.

to a desired career. Comments from such affected individuals as to the extent of the impact on them of the TSA's "advanced" screening practices should guide the TSA and OMB in this assessment.

We believe at least on the order of tens of thousands of individuals have stopped traveling by airline because they are unable or unwilling to submit to virtual strip-searches or manual groping of their genitals, and that $100,000 per person would be a reasonable initial estimate of the average career economic cost of being unable to travel by airline. Total economic impacts of the rule on individuals who no longer travel by airline are thus at least on the order of billions of dollars.

The TSA's screening practices also burden those who still travel by airline. Because of the (deliberate) uncertainty as to whether any individual traveler will be subjected to an "enhanced pat-down" (more thorough groping), all travelers must arrive at the airport early enough for the worst-case scenario.

Using the average time per passenger, as the TSA does in its assessment, when all passengers must arrive in time to be prepared for the worst-case scenario, results in a gross underestimate of the burden on travelers in wasted time. Any passenger who "opts out" of a virtual strip-search or has bodily "anomalies" visible to the imaging technology, for example, must arrive at the checkpoint in time to allow for the possibility that the "enhanced pat-down" might require as much as 30 minutes, including waiting time and time for any procedures that might be needed for "resolution" of any "anomalies".

The best available indications of this time burden on travelers are airlines' recommendations for how far before scheduled flight departure times passengers should arrive at the airport. Most airlines have increased these recommended times by at least 30 minutes, often more, in response to TSA practices.

For example, American Airlines, which before the creation of the TSA recommended arrival at U.S. airports at least 30 minutes before the scheduled departure of domestic flights, even when checking bags, now recommends that passengers not checking bags arrive at least 60 minutes before scheduled departure, and that passengers checking bags arrive at least 90 minuted before scheduled departure.[6]

6 AA.com, "Suggested Arrival Times" (retrieved May 29, 2013), <http://www.aa.com/i18n/travelInformation/checkingIn/arrivalTimes.jsp?anchorLocation=DirectURL&title=arrivaltimes>.

Taking an additional 30 minutes per passenger as a conservative estimate of the time burden, based on airlines' estimates of how much further in advance passengers need to arrive at airports, an average of approximately 1.8 million people "screened" each day, and the DOT valuation (also used by the TSA) of passengers' time at $43.57 per hour, the total burden on travelers of the TSA's "enhancement" of "screening" is approximately $39 million per day, or approximately $14 billion per year.

If we assume that 20% of those travelers are "small entities", this aspect of the impact on "small entities" is at least $2.8 billion per year – probably more, perhaps significantly so, because business travelers' time probably has a higher average opportunity cost value than the average for all travelers.

But it's not necessary to know the exact numbers – which will become more clear only after the TSA prepares, published, and allows a new opportunity for public comment on its own initial estimate – to recognize that the proposed rule would have a significant economic impact on a substantial number of "small entities", and that a full RFA assessment is therefore required.

The TSA has had ample time – more than two years – since having been ordered by the Court of Appeals to conduct this rulemaking, but has not chosen to conduct the required RFA assessment. The TSA should withdraw the proposed rule and suspend the practices that the proposed rule would purport to authorize until the TSA has conducted and published for comment the required RFA assessment.

IV. THE CURRENT AND PROPOSED RULES ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352 at 357 (1983).

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104 at 108-109 (1972), footnotes omitted.

These Supreme Court decisions perfectly describe the vagueness of both the proposed rule and the current rule, and why the proposed rule should be withdrawn and the TSA should conduct a new rulemaking to develop rules so that "ordinary people can understand what conduct is prohibited" at TSA checkpoints and to "provide explicit standards for those who apply them".

While the TSA's regulations are not criminal, violators are subject to civil penalties. More importantly, the TSA claims the authority to deprive alleged violators of TSA regulations of their right to travel by common carrier by air. This is a right protected by the First Amendment guarantee of "the right of the people… peaceably to assemble", by international treaties, and by express Federal statutory recognition of "the public right of transit by air". The rule at issue in this proceeding is precisely the sort which "abut[s] upon sensitive areas of basic First Amendment freedoms".

In the absence of any definitions of "submit" or "screening", the current and proposed rules are unconstitutionally vague and overbroad. Travelers subject to the rules can't tell what is prohibited or what

is forbidden as a condition of travel by air by common carrier, or which actions at TSA checkpoints are and aren't subject to TSA civil penalties.

For example, TSA checkpoint staff and contractors typically tell travelers to disrobe partially at checkpoints by removing some items of clothing, typically including shoes, belts, and jackets. But the TSA is currently proposing to assess civil penalties against a traveler who, in order to make it easier for the TSA to see that he was not carrying explosives or weapons, removed all his clothing.[7]

The TSA has never provided any public notice or guidance concerning required items of clothing. It's unclear whether there is a secret TSA checkpoint dress code specifying which items of clothing are prohibited and which other items of clothing are required, or whether determinations with respect to prohibited and required clothing (and thus of the imposition of civil penalties or denial of the right to travel) are at the discretion of TSA staff or TSA contractors, and if so according to what, if any, standards. The notice of proposed civil penalties and the remainder of the docket in this matter, which might provide some guidance to other travelers as to what actions at TSA checkpoints are prohibited or required, have been designated as Special Security Information exempt from disclosure to the public.[8]

The TSA has refused to disclose its Standard Operating Procedures (SOPs), even though it claims that they constitute "final orders" of the agency with which members of the public are required to comply.

It's impossible for travelers to know, with respect to any aspect of TSA checkpoint requirements or prohibitions, whether there are no rules or there are secret rules, or what, if any, guidelines there are for decision-making by TSA staff of contractors as to what constitutes "submission" or "screening".

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7 In the matter of John Brennan, Docket No. 12-TSA-0092. See the testimony of TSA staff at the formal hearing on May 14, 2013, at <http://www.papersplease.org/wp/2013/05/27/audio-in-the-matter-of-john-brennan/>.

8 Records of TSA's civil penalty enforcement actions represent the best available guidance to travelers as to the TSA's interpretations of "submit" and "screening". Our Freedom Of Information Act request to the TSA for these records, for which we requested expedited processing, are pending. Since the TSA has not, within the time required by the FOIA statute, produced the records responsive to this request which are needed for us to address this issue fully in these comments, we request that the deadline for comments in this rulemaking be extended until at least 30 days after the TSA produces all non-exempt records responsive to this FOIA request.

To make matters worse for travelers trying to figure out what is required and what is prohibited, the TSA's practices are deliberately subject to variation, and are deliberately unpredictable.

There is no way, in this situation, for travelers to distinguish authorized from unauthorized demands, or legitimate from illegitimate exercise of authority. It should be no surprise that petty tyranny and abuse of (claimed) authority are the most common complaints against TSA staff and contractors.

We can scarcely imagine imagine a situation more ripe for abuse of discretion than one where the rules (if there are any rules) are secret, the procedures are constantly changing and deliberately unpredictable, and members of the public can't even tell which specific actions or inactions have previously been deemed to be subject to civil penalties or, worse, denial of the right to travel.

This is a textbook case of a vague rule and of the reasons why such vagueness is prohibited. If there are to be any requirements or prohibitions on what travelers can and can't (or must) do, can and can't (or must) wear, or can and can't (or must) say at TSA checkpoints (other than those which would otherwise apply in such a public facility where travelers with tickets on common carriers have a statutory right of passage), the TSA needs to spell the rules out, publicly, so that travelers don't have to get arrested and contest criminal charges, or contest a proposed civil penalty, to find out whether something is or is not contrary to the TSA's secret orders or secret standards for traveler behavior.

The proposed rule and the current rule are also overbroad. A rule is overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 at 494 (1982). Both the proposed rule and the current rule reach a significant amount of protected conduct by permitting the TSA to sanction or deny the right to travel to a significant number of individuals who pose no threat to aviation. Rules which purport to authorize denial of the right to travel must be narrowly drafted to avoid interference with protected travel.

In the absence of any definition of "submit" or "screening", both the proposed rule and the current rule grant unfettered discretion to TSA employees and contractors to interfere with the exercise of the right to travel by anyone who they deem insufficiently "submissive", or who they allege to have violated the (secret) orders of the day – an allegation that the traveler is, of course, unable to contest as long as those orders or standards are secret. There has been no showing by the TSA that such a broad rule is necessary for any permissible TSA purpose.

As rules which directly condition protected conduct, both the current and proposed rules requiring would-be travelers to "submit" to "screening", without further definitions of those terms, are void for vagueness and overbreadth, and must be withdrawn. The TSA should open a new rulemaking to develop publicly-disclosed regulations for any checkpoint prohibitions or requirements.

V. CONCLUSIONS AND RECOMMENDATIONS

Before finalizing the proposed rule, the TSA must evaluate the impact of the proposed rule on the ability of U.S. citizens to exercise rights protected by the First Amendment, international treaties, and the explicit Federal statutory public right of transit by air, and conduct and publish for comment a full RFA assessment of the proposed rule including its economic affects on individuals as “small entities”. The current and proposed rule should be withdrawn. The practices they purport to authorize should be suspended unless and until the TSA promulgates a valid new rule which is neither vague nor overbroad and which meets the criteria of strict scrutiny for conditions on the exercise of legally recognized rights.

If the proposed rule is not withdrawn, it must be rejected by OMB as not being preceded by notice and comment on a valid economic impact assessment including consideration of the affect of the proposed rule on individuals as "small entities", as is required by the RFA.

Respectfully submitted,

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June 18, 2013