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Faith or Flight: A Religious Dilemma

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FAITH OR FLIGHT?: A RELIGIOUS DILEMMA

COLLEEN DEAL*

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I. INTRODUCTION

ONCE UPON A TIME, those traveling near and far merely needed to get permission to pass through a grey archway without setting off an alarm to continue on their way. Once upon a time, those traveling near and far merely needed to send their bags through an x-ray portal to set out on their journeys. Once upon a time, there were “happily ever after” endings to traveling tales; but nowadays, fairy tale travels are just that—fairy tales, folklore, and fables. Welcome to traveling with the Transportation Security Administration (TSA) in 2011—virtually strip or be frisked and fondled.¹

In a post-9/11 world, attitudes have changed, and Americans are far more willing to make sacrifices in the name of aviation safety.² In the months following that horrific day in September of 2001, commercial airline passengers agreed to take off their shoes, to travel without sharp objects, to leave their liquids at home, to deal with long security lines, and to comply with numerous other inconveniences.³ All while abiding with each and every new TSA security measure, travelers started to wonder: “Where will it end?”. Today, that very question looms even larger.

On a Christmas day flight in 2009, a young Nigerian man tried to detonate explosives he had sewn into his underwear.⁴ In response to the attempted “underwear bomber” attack, the TSA decided that it was not enough for airline passengers to go through airport security checkpoints shoeless, beltless, liquidless, and sharp-object-less; passengers needed to be virtually stripped and groped too.⁵ In 2010, the TSA implemented “new

¹ See *Privacy: Advanced Imaging Technology*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/approach/tech/ait/privacy.shtm> (last visited Feb. 15, 2011) [hereinafter *AIT Privacy*] (“Passengers who opt out of AIT screening will receive alternative screening, including a physical pat-down.”).

² Roger Clark, *The Inalienable Right to Fly*, 29 L.A. LAW. 60, 60 (2006) [hereinafter *Inalienable Right to Fly*] (“We now accept what is essentially a micro-police state in an airport [O]ur ‘societal expectations’ have become a casualty of the war on terrorism.”).

³ See *Prohibited Items*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/travelers/air-travel/prohibited/permitted-prohibited-items.shtm#4> (last visited Feb. 15, 2011).

⁴ Carol Pucci, *Lawmakers Jump Late into Airport-Scanner Uproar*, SEATTLE TIMES (Nov. 19, 2010), http://seattletimes.nwsources.com/html/travelwise/2013474414_trpucci19.html.

⁵ Zack Kaldveer, *A Hobson’s Holiday Travel Choice: Digital Strip Search or Get Groped?*, CAL. PROGRESS REP. (Nov. 17, 2010), <http://www.californiaprogressreport.com/site/?q=node/8392>.

security directives,”⁶ which included the introduction of advanced imaging technology (AIT) as a form of primary screening and the implementation of more aggressive pat-down procedures.⁷ These new measures “are part of a dynamic, threat-based aviation security system . . . to ensure the safety and security of the traveling public.”⁸ But, does this really mean that the government needs to photograph you naked or stick its hand down your pants? According to John Pistole, the Administrator of the TSA, it absolutely does.⁹ In fact, when questioned about the invasive pat-down policy, Pistole said that it was fine for a TSA agent’s hands to go inside a passenger’s pants and perfectly acceptable for an agent to feel a woman’s breasts.¹⁰ Such invasive screening has led to increasing backlash and outrage among airline passengers and advocacy groups who claim the new measures “go too far.”¹¹ Although the increased security measures are in place to prevent terrorism, critics argue that the TSA is actually *doing* the terrorizing with its virtual strip searches and enhanced pat-down procedures.¹² Commercial airline fliers called AIT screening “‘a disgusting violation of civil liberties and privacy,’ ‘for a bunch of peeping toms,’ ‘unconstitutional,’ ‘intrusive and ridiculous,’ and ‘a joke,’”¹³ but the government has no plans to slow down its deployment of full-body

⁶ *TSA Statement on New Security Measures for International Flights to the U.S.*, TRANSP. SEC. ADMIN. (Jan. 3, 2010), http://www.tsa.gov/press/happenings/010310_statement.shtm.

⁷ Press Release, Transp. Sec. Admin., Secretary Napolitano Announces New Measures to Strengthen Aviation Security (Apr. 2, 2010) [hereinafter Napolitano Announcement], *available at* <http://www.tsa.gov/press/releases/2010/0402.shtm>; Susan Stellin, *Pat-Downs at Airports Prompt Complaints*, N.Y. TIMES (Nov. 18, 2010), http://www.nytimes.com/2010/11/19/business/19security.html?_r=1.

⁸ Napolitano Announcement, *supra* note 7.

⁹ *See* Interview by Candy Crowley with John Pistole, Administrator, Transp. Sec. Admin., in Wash. D.C. (Nov. 21, 2010) [hereinafter Crowley Interview], *available at* <http://transcripts.cnn.com/TRANSCRIPTS/1011/21/sotu.01.html>.

¹⁰ *Id.*

¹¹ Stephen Clark, *‘Invasive’ Airport Screening Stirs Backlash Among Airline Passengers*, FOXNEWS.COM (Nov. 12, 2010), <http://www.foxnews.com/politics/2010/11/12/invasive-airport-screening-stirs-backlash-airline-passengers/>.

¹² *See* Steve Watson, *TSA’s Top Transgressions: Who Is Doing the Terrorizing?*, PRISON PLANET (Nov. 22, 2010), <http://www.prisonplanet.com/tsas-top-transgressions-who-is-doing-the-terrorizing.html>.

¹³ William Fisher, *Privacy Groups Challenge US Airport Body Scanners*, ANTI-WAR.COM (Apr. 23, 2010), <http://original.antiwar.com/fisher/2010/04/22/privacy-groups-challenge-us-airport-body-scanners/> (quotations omitted).

scanners in U.S. airports.¹⁴ With 500 units scheduled for deployment in 2011, the number of full-body scanners in American airports is set to double.¹⁵

While many have discussed and challenged AIT screening and new pat-down policies as violations of the Fourth Amendment, the invasive protocols may also infringe on other civil liberties, including the free exercise of religion.¹⁶ Devoutly religious commercial airline travelers are forced to decide between two distasteful alternatives.¹⁷ Simply put, their choice is between stripping down, albeit digitally, or opting out in favor of being felt up by an overly friendly TSA officer.¹⁸ Due to religious modesty laws, the TSA is essentially asking followers of Islam and Orthodox Judaism to violate the central tenants of their faith if they wish to fly.¹⁹ Evangelical Christians are faced with a similar dilemma.²⁰ Evangelical Christian groups, like conservative Southern Baptists, argue that although the Bible does not expressly forbid public nudity, their beliefs certainly stress modesty over exposure.²¹ In contrast, Sikhs, specifically Sikh men, are not opposed to the use of full-body scanners, but instead object to the mandatory additional screening procedures forced upon the followers of their faith who wear turbans.²² These compulsory secondary measures may even require turban removal, which for a Sikh is akin to a strip search.²³ Arguably, forcing religious adherents to abandon their sincerely held religious be-

¹⁴ See Brief for the Petitioner at 10, Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Security, No. 10-1157 (D.C. Cir. Nov. 1, 2010) [hereinafter EPIC Brief], available at http://epic.org/privacy/litigation/EPIC_Body_Scanner_OB_Final.pdf (stating that 492 units will be deployed in the United States by the end of 2010 and 500 additional units will be deployed by the end of 2011).

¹⁵ *Id.*

¹⁶ See Marc Rotenberg, *Body Scanners, Pat-Downs Violate Law and Privacy*, CNN OPINION (Nov. 17, 2010), http://articles.cnn.com/2010-11-17/opinion/rotenberg.scanners.privacy_1_body-scanners-pat-downs-federal-agency?_s=PM:OPINION.

¹⁷ Tara Bahrapour, *TSA Scanners, Pat-Downs Particularly Vexing for Muslims, Other Religious Groups*, WASH. POST (Dec. 23, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122202919.html>.

¹⁸ Rotenberg, *supra* note 16.

¹⁹ Bahrapour, *supra* note 17.

²⁰ *Id.*

²¹ *Id.*

²² See Adelle M. Banks, *Sikhs Call Airport Screening for Turbans 'Security Theater'*, HUFFINGTON POST (Nov. 8, 2010), http://www.huffingtonpost.com/2010/11/08/sikhs-call-airport-screen_n_780584.html.

²³ Bahrapour, *supra* note 17.

liefs in order to fly commercially is a constitutional dilemma and an insult to this country's history of religious freedom.²⁴

The purpose of this comment is to explore the current state of airport security law and determine how AIT and enhanced pat-down procedures fit within the confines of the constitutional assurance of free exercise of religion and the Religious Freedom Restoration Act of 1993 (RFRA). In order to evaluate the constitutionality of these newly implemented security measures, this comment begins with a survey of the case law surrounding airport searches and describes the security protocols utilized for primary screening until 2010. Part III discusses the creation and goals of the TSA and examines the constitutional implications of present-day security measures, including backscatter x-ray scanners, millimeter wave devices, and extensive pat-down procedures. Finally, Part IV analyzes full-body scanning and enhanced pat-downs under the RFRA compelling interest test and presents the strongest arguments for both the government and religious adherents on the issue of the constitutional validity of employing these new screening protocols at airport security checkpoints.

II. HISTORY AND CONSTITUTIONALITY OF AIRPORT SCREENING AND SEARCHES

The present-day airport security system has evolved over time.²⁵ Dating back to the earliest days of air transportation, terrorist acts involving aircraft, including airplane hijackings and bombings, threatened public safety.²⁶ In the late 1960s, commercial airliner hijackings reached an all time high, with twenty-two incidents in 1968 and forty incidents in 1969 in the United States alone.²⁷ Between 1949 and 1985, there were eighty-seven commercial airplane explosions caused by foul play.²⁸ In reaction to the astounding number of hijackings and bombings, the Federal Aviation Administration (FAA) ordered "searches of all carryon items and magnetometer screening of all [commercial airline] passengers [to] be instituted by January 5, 1973," as a

²⁴ See Rotenberg, *supra* note 16.

²⁵ *Gibson v. State*, 921 S.W.2d 747, 759 (Tex. App.—El Paso 1996, writ denied).

²⁶ See Jack H. Daniel III, Comment, *Reform in Airport Security: Panic or Precaution?*, 53 MERCER L. REV. 1623, 1624 (2002).

²⁷ *Id.* at 1625.

²⁸ *Id.* at 1626.

precondition to flying.²⁹ In an age where the need to deter hijackers was undoubtedly “grave and urgent,” the ultimate goal of the FAA’s ordered searches and screenings was prevention, rather than apprehension of hijackers.³⁰

Initially, carry-on searches and magnetometer screening faced resistance.³¹ Critics argued the security measures infringed on civil liberties and constituted unreasonable searches.³² Although the Supreme Court has yet to specifically hold that airport screenings are constitutionally reasonable administrative searches,³³ the Second, Third, and Ninth Circuits have expressly stated that “[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness.”³⁴ Still, to earn a “constitutionally reasonable” label, airport officials must conduct these searches in good faith, and the searches should be “‘no more extensive nor intensive than necessary . . . to detect the presence of weapons or explosives.’”³⁵ Another important factor in analyzing the constitutionality of administrative searches is determining whether the search is routine or non-routine, as routine searches are permissible even in the absence of suspicion.³⁶ Routine searches include searches of personal belongings—purses, wallets, and luggage—and searches of outer clothing.³⁷ On the other hand, non-routine searches, including strip searches and involuntary x-ray searches, are usually more invasive and, thus, require at least reasonable suspicion.³⁸ In *Tabbaa v. Chertoff*, border officials questioned, patted down, fingerprinted, and photographed attendees of a Reviving the Islamic Spirit Conference who were returning to the United States from Canada.³⁹ Focusing on the fact that “the government has broad

²⁹ *Inalienable Right to Fly*, *supra* note 2.

³⁰ *United States v. Davis*, 482 F.2d 893, 908, 910 (9th Cir. 1973), *overruled on other grounds by United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

³¹ *See Inalienable Right to Fly*, *supra* note 2.

³² *See, e.g., Tabbaa v. Chertoff*, 509 F.3d 89, 97–98 (2d Cir. 2007).

³³ *Aukai*, 497 F.3d at 959 n.2.

³⁴ *United States v. Hartwell*, 436 F.3d 174, 177 (3d Cir. 2006); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974); *see also Aukai*, 497 F.3d at 958.

³⁵ *Aukai*, 497 F.3d at 962 (citing *Davis*, 482 F.2d at 913).

³⁶ *Tabbaa*, 509 F.3d at 98 (citing *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006)).

³⁷ *Id.* (citing *United States v. Grotke*, 702 F.2d 49, 51–52 (2d Cir. 1983)).

³⁸ *See id.* (citing *Grotke*, 702 F.2d at 51–52).

³⁹ *Id.* at 94.

powers to conduct searches at the border,” the Second Circuit ultimately classified the search as routine; however, the court stated that the facts of this case serve as the high watermark of what is permissible absent “reasonable suspicion.”⁴⁰ Since an airport is viewed as the “functional equivalent of a border,” the search techniques employed by border officials in *Tabbaa* also serve as the high watermark for airport checkpoint screenings.⁴¹

Eventually, airline passengers came to accept magnetometer and pat-down searches as worthwhile airport security precautions.⁴² Travelers recognized that across-the-board screening was necessary to prevent the horrific catastrophes caused by airplane terrorists.⁴³ In a decade when hundreds of hijackers terrorized and jeopardized thousands of innocent passengers’ lives, the interest in stopping the “escalating criminal phenomenon” of the late-1960s and early-1970s outweighed the inconveniences of preboarding security searches.⁴⁴ Nonetheless, these “search[es] for weapons and explosives [still] must conform to constitutional requirements.”⁴⁵

A. MAGNETOMETERS

After the implementation of the FAA anti-hijacking program in 1973, the standard airport security screening for international and domestic travelers involved a passenger placing his carry-on luggage on a table where it would be either personally searched by a trained security officer or scanned by an x-ray machine, if available.⁴⁶ The passenger would then proceed through a magnetometer, a device activated only when it detects metal on the passenger’s person.⁴⁷ If the device sounded an alarm, security personnel would either ask the passenger to walk through again after removing something suspected to have sounded the alarm or direct the passenger to a designated area for a magnetometer wand search, conducted by waving a handheld magnetometer

⁴⁰ *Id.* at 98–99.

⁴¹ *Irving*, 452 F.3d at 123 (citing *United States v. Gaviria*, 805 F.2d 1108, 1112 (2d Cir. 1986)).

⁴² See *United States v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006) (“[S]creening procedures of this kind have existed in every airport in the country since at least 1974.”).

⁴³ *Id.* at 179–80.

⁴⁴ *United States v. Bell*, 464 F.2d 667, 670, 674 (2d Cir. 1972).

⁴⁵ *United States v. Roman-Marcon*, 832 F. Supp. 24, 26 (D.P.R. 1993) (citing *Wilkinson v. Forst*, 832 F.2d 1330, 1340 (2d Cir. 1987)).

⁴⁶ *United States v. Albarado*, 495 F.2d 799, 802–03 (2d Cir. 1974).

⁴⁷ *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir. 1972).

around the passenger's body to locate the metal's source.⁴⁸ If the magnetometer went off a second time, airport security personnel could subject the passenger to a physical pat-down "unless [the passenger] indicated that he no longer wished to board."⁴⁹

Courts found that an administrative search with a magnetometer did not amount to a constitutional violation and was justified.⁵⁰ A noninvasive magnetometer walkthrough allowed for a hands-off search with none of the indignities of pat-downs or fingerprinting.⁵¹ Judges determined magnetometer screening was reasonable since it required "an absolutely minimal invasion of privacy"⁵² and "[did] not annoy, frighten, or humiliate those who pass[ed] through it."⁵³ The wand magnetometer, also a hands-off method, served as a form of secondary screening and could be used even when passengers passed through the stationary unit without triggering an alarm or raising any suspicion.⁵⁴ It, too, was preferable over a pat-down because it involved no poking and prodding by security personnel.⁵⁵

B. PREVIOUS PAT-DOWN PROTOCOL

In 1974, airport personnel could resort to passenger pat-downs only as a last resort when less intrusive measures failed to resolve security anomalies.⁵⁶ A security officer would perform the traditional pat-down using only the back of his hands; he would pat a passenger's outer clothing, focusing primarily on the pockets, shoulders, and waist areas where a traveler would most likely conceal a weapon.⁵⁷ Courts classified these pat-downs as routine even when an officer requested that a person remove an article of clothing.⁵⁸ In the context of border

⁴⁸ *Roman-Marcon*, 832 F. Supp. at 26–27.

⁴⁹ *Id.*

⁵⁰ *United States v. Hartwell*, 436 F.3d 174, 181 (3d Cir. 2006); *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972); *Roman-Marcon*, 832 F. Supp. at 27.

⁵¹ *Albarado*, 495 F.2d at 806.

⁵² *Gibson v. State*, 921 S.W.2d 747, 758 (Tex. App.—El Paso 1996, writ denied).

⁵³ *Albarado*, 495 F.2d at 806.

⁵⁴ *See United States v. Aukai*, 497 F.3d 955, 957 (9th Cir. 2007).

⁵⁵ *Albarado*, 495 F.2d at 808.

⁵⁶ *Id.* at 809.

⁵⁷ *Id.* at 807; Brief for Petitioners at 5, *Durso v. Napolitano*, No. 10-02066 (D.C. Cir. Dec. 6, 2010), available at http://www.rutherford.org/pdf/2010/12-06-2010_Durso_Daniels_Nemphos_V_Napolitano_Pistole.pdf.

⁵⁸ *United States v. Nieves*, 609 F.2d 642, 646 (2d Cir. 1979).

searches,⁵⁹ pat-downs met the routine test when an officer physically removed a traveler's jacket,⁶⁰ lightly touched a traveler's back and lifted his shirt,⁶¹ and respectfully asked that a traveler remove his shoes.⁶² The potential indignities of such actions and requests paled in comparison to the much greater intrusions associated with a full strip search or body cavity search, and, thus, courts did not require reasonable suspicion for this type of pat-down.⁶³ In addition, in the 1970s, the stigma associated with a pat-down was less than it might be today because pat-downs were done in public view, which reduced the risk of overly intrusive and unnecessary touching.⁶⁴

These security measures of the past provided little opportunity for religious objection because magnetometers required no physical contact and pat-downs served only as a last resort, which involved little if any groping. The government's interest, deterring airplane hijackers from attempting to board commercial airliners, was self-evident and the FAA's ordered methodology was clearly successful in achieving that purpose,⁶⁵ as evidenced by the dramatic decrease in the number of successful hijackings from thirty-three in 1969 to only ten in 1972.⁶⁶ Widespread public approval likely grew out of these results so much so that today, one hardly even thinks about the invasiveness of walking through a magnetometer or of having a carry-on bag x-rayed. Modern technology and present-day airport security policies, however, go much further and risk civil liberty infringement to a much greater extent than the magnetometers and the pat-downs of the past.

III. THE NEW TECHNOLOGY AND PAT-DOWN POLICY AND THE RESULTING IMPLICATIONS ON TRAVEL AND RELIGION

The Department of Homeland Security's (DHS) primary mission is to "prevent terrorist attacks within the United States;

⁵⁹ "An airport is considered the functional equivalent of a border . . ." *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (citing *United States v. Gaviria*, 805 F.2d 1108, 1112 (2d Cir. 1986)).

⁶⁰ *United States v. Luc-Thirion*, 501 F. Supp. 875, 879 (E.D.N.Y. 1980).

⁶¹ *United States v. Charleus*, 871 F.2d 265, 268 (2d Cir. 1989).

⁶² *Nieves*, 609 F.2d at 646.

⁶³ *Charleus*, 871 F.2d at 268.

⁶⁴ *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974).

⁶⁵ *United States v. Bell*, 464 F.2d 667, 674 (2d Cir. 1972); *see also Albarado*, 495 F.2d at 804 n.10.

⁶⁶ *Albarado*, 495 F.2d at 804.

[and] reduce the vulnerability of the United States to terrorism.”⁶⁷ Unfortunately, on September 11, 2001, the U.S. “arguably suffered its worst failure” in homeland security in its history.⁶⁸ Before the attacks on 9/11, the FAA issued three warnings to airlines citing “unconfirmed reports that American interests may be the target of a terrorist threat from extremist groups.”⁶⁹ Security screeners at Washington Dulles International Airport apparently took the warnings lightly, conducting searches described in a 9/11 commission report as “marginal at best.”⁷⁰ On Flight 77, the flight that flew out of Dulles and crashed into the Pentagon, four out of the five hijackers set off airport magnetometers.⁷¹ In fact, two of these men set off the detectors repeatedly.⁷² Still, after conducting handheld magnetometer scans and discovering potential weapons, specifically utility knives, airport personnel allowed the men to pass through security without further questioning.⁷³ With all nineteen hijackers successfully passing through security screening and boarding their flights on that fateful day, aviation security was in need of reform to prevent such a blatant failure from happening again.⁷⁴ As with nearly all horrific events, political measures and legislative action swiftly followed.⁷⁵

Two months after the tragic 9/11 attacks, President George W. Bush signed the Aviation Transportation Security Act of 2001, which created the TSA.⁷⁶ Congress charged the TSA with ensuring the safety of the general public and the millions of passengers who board commercial aircraft in the United States each year.⁷⁷ Specifically, the TSA is “responsible for day-to-day Federal security screening operations for passenger air transpor-

⁶⁷ 6 U.S.C. § 111(b)(1)(A-B) (2006).

⁶⁸ See Corey J. Adamson, Comment, *Changing of the Guard: A United Nations Security Council Decision on a Uniform Airport Security Standard for Member Nations*, 24 PENN. ST. INT’L L. REV. 661, 662 (2006).

⁶⁹ *Sept. 11 Panel Criticizes Dulles Airport Security Screeners*, MSNBC.COM, http://www.msnbc.msn.com/id/5485376/ns/us_news-security/ (last updated July 22, 2004) [hereinafter *Dulles Airport Criticism*] (internal quotation marks omitted).

⁷⁰ *Id.*

⁷¹ Adamson, *supra* note 68.

⁷² *Dulles Airport Criticism*, *supra* note 69.

⁷³ Adamson, *supra* note 68.

⁷⁴ *Nightly News* (NBC television broadcast July 22, 2004), available at http://www.msnbc.msn.com/id/5485376/ns/us_news-security/.

⁷⁵ Daniel, *supra* note 26.

⁷⁶ Adamson, *supra* note 68, at 663.

⁷⁷ *United States v. Aukai*, 497 F.3d 955, 956 (9th Cir. 2007).

tation.”⁷⁸ In order to fulfill this responsibility, the TSA conducts airport-screening searches of each and every passenger who enters the secured airport areas, screening approximately two million passengers a day.⁷⁹ While striving to “continuously set the standard for excellence in transportation security through its people, processes, and technology,” the TSA has adopted a multilayered security strategy,⁸⁰ also known as a “strategy of a thousand cuts.”⁸¹ The TSA’s risk-based security measures include, among other things, explosive detection technology, canine teams, AIT devices, magnetometers, and deployment of behavior detection officers.⁸²

Further, under current TSA regulations, once a potential passenger arrives at a security checkpoint and places his belongings on the x-ray machine conveyor belt, that traveler may no longer revoke consent to the airport screening process.⁸³ This is a dramatic policy change considering that in just 2006 a passenger was free to decline a search, elect not to board the aircraft, and simply turn around and leave the airport.⁸⁴ More recently, courts have pointed out that allowing a prospective passenger to elect not to fly on the cusp of detection makes little practical sense in a post-9/11 world.⁸⁵ Such a policy would not only “constitute a one-way street for the benefit of a party planning airport mischief” and provide a secure exit for airline terrorists,⁸⁶ but it would also inform the enemy about “systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks.”⁸⁷ Today, the law provides no refuge for passengers that refuse to consent to TSA screening.⁸⁸

⁷⁸ 49 U.S.C. § 114(e)(1) (2006).

⁷⁹ *Aukai*, 497 F.3d at 957; Scott Shane, *Administration to Seek Balance in Airport Screening*, N.Y. TIMES (Nov. 21, 2010), <http://www.nytimes.com/2010/11/22/us/22tsa.html>.

⁸⁰ *Mission, Vision, and Core Values*, TRANSP. SEC. ADMIN., http://www.tsa.gov/who_we_are/mission.shtm (last visited June 6, 2011).

⁸¹ Shane, *supra* note 79.

⁸² *TSA Statement on Aviation Security Measures*, TRANSP. SEC. ADMIN. (Dec. 23, 2010), http://www.tsa.gov/press/happenings/122310_statement_on_aviation_security_measures.shtm [hereinafter *Statement on Aviation Security*].

⁸³ *Aukai*, 497 F.3d at 960–61.

⁸⁴ *Gilmore v. Gonzales*, 435 F.3d 1125, 1138–39 (9th Cir. 2006).

⁸⁵ *Aukai*, 497 F.3d at 960–61.

⁸⁶ *United States v. Hartwell*, 436 F.3d 174, 181 n.12 (3d Cir. 2006).

⁸⁷ *Aukai*, 497 F.3d at 961.

⁸⁸ See Rick Newman, *How to Navigate Body Scans and Pat-Downs*, U.S. NEWS (Nov. 22, 2010), <http://money.usnews.com/money/blogs/flowchart/2010/11/22/how-to-navigate-body-scans-and-pat-downs>.

The government can fine uncooperative travelers up to \$11,000 for resisting orders to virtually strip, turning down TSA agents' invites to step into a private room for some quality frisking, and leaving the checkpoint without permission.⁸⁹ Thus, although the TSA supposedly lacks "unbridled discretion" to do as it pleases,⁹⁰ it is nearly impossible to predict when the government will finally rein it in. The following section discusses the TSA's newly implemented airport security technology and policies and the constitutional implications of using full body scanners and enhanced pat-downs as forms of primary screening.

A. BODY SCANNERS AND ENHANCED PAT-DOWNS

"Hands up." "Strip down." "Time to feel you up." While it is true that a terrorist's arsenal is no longer confined to the cumbersome gun or easily detectable knife,⁹¹ who could have guessed that this is what airport security would come to? The DHS and the TSA claim the recently implemented methods are perfectly justified, as threats to the nation's security cannot be taken lightly.⁹² Critics, on the other hand, argue that less intrusive technology and policies are available that would fight aviation terrorism just as effectively without substantially infringing on civil liberties, including the right to freely exercise religion.⁹³ Before diving into the claims that the TSA's new protocols amount to "total destruction of inalienable rights and freedoms,"⁹⁴ it is critical to understand what current airport screening entails.

1. Backscatter and Millimeter Wave Technology

In 2007, using airline pilots as guinea pigs, the TSA began testing AIT scanners in limited field experiments.⁹⁵ By February of 2009, forty AIT units had arrived in U.S. airports, but solely

⁸⁹ *Id.*

⁹⁰ *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006).

⁹¹ *United States v. Moreno*, 475 F.2d 44, 49 (5th Cir. 1973) (explaining that modern technology has made it possible for terrorists to conceal explosives in something as small as a tube of toothpaste, which can then be set off by a detonator planted in a fountain pen).

⁹² *Advanced Imaging Technology-Yes It's Worth It*, TSA BLOG (Nov. 18, 2010), <http://blog.tsa.gov/2010/03/advanced-imaging-technology-yes-its.html> [hereinafter *AIT Worth It*].

⁹³ EPIC Brief, *supra* note 14, at 8.

⁹⁴ Watson, *supra* note 12.

⁹⁵ EPIC Brief, *supra* note 14, at 8.

for secondary screening purposes.⁹⁶ Three months later, the House of Representatives passed a bill forbidding the TSA from using AIT systems as a form of primary screening; however, the bill stalled in the Senate.⁹⁷ After the underwear bomber's attempted Christmas Day attack in 2009, the TSA essentially disregarded the House's stance on the scanners entirely, opting instead to accelerate full-body scanners deployment.⁹⁸ In fact, the TSA eventually plans for AIT systems to replace all stationary magnetometer units at the 2,000 airport checkpoints across the United States.⁹⁹

The TSA currently uses two types of full-body scanners, backscatter and millimeter wave, which capture the naked contours of a passenger's body and transmit the images to TSA personnel for evaluation of possible threats to aviation security.¹⁰⁰ The process for the passenger is essentially the same for both types of full-body scanners.¹⁰¹ Before entering the imaging booth, commercial airline passengers are instructed to empty their pockets.¹⁰² Once inside the portal, a TSA agent orders the passenger to strike a hands-above-the-head pose.¹⁰³ In less than a minute's time, the passenger is digitally undressed, checked out, and dismissed after resolution of any anomalies.¹⁰⁴ The difference between backscatter and millimeter wave systems is the technology and the resulting image each creates.¹⁰⁵ Backscatter devices project low-intensity x-ray beams over the passenger's body at a high rate of speed.¹⁰⁶ The reflection of the passenger's body, an image resembling a "chalk etching," is then displayed on a monitor in a remote location and analyzed by a TSA agent.¹⁰⁷ Millimeter wave systems bounce electromagnetic waves off a passenger's

⁹⁶ *Id.*

⁹⁷ Clark, *supra* note 11.

⁹⁸ Shane, *supra* note 79.

⁹⁹ Joe Sharkey, *Opt out of a Body Scan? Then Brace Yourself*, N.Y. TIMES (Nov. 1, 2010), <http://www.nytimes.com/2010/11/02/business/02road.html>.

¹⁰⁰ *How It Works: Advanced Imaging Technology*, TRANSP. SEC. ADMIN., http://www.tsa.gov/approach/tech/ait/how_it_works.shtm (last visited June 6, 2011) [hereinafter *How It Works*].

¹⁰¹ *See id.*

¹⁰² *Frequently Asked Questions: Advanced Imaging Technology*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/approach/tech/ait/faqs.shtm> (last visited Feb. 15, 2011) [hereinafter *FAQs*].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See How It Works*, *supra* note 100.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

body to generate a black and white, three-dimensional image.¹⁰⁸ This image, resembling a “fuzzy photo negative,” is also transmitted to a remote monitor for security assessment.¹⁰⁹

This new technology is both praised and condemned for the same reason—exposing that which is invisible to the naked eye. Backscatter x-ray and millimeter wave scanners are unlike any other primary screening device previously or currently deployed.¹¹⁰ On one hand, these machines’ unique ability to see through clothing in order to detect metallic and nonmetallic items has the TSA convinced that advanced imaging systems will help not only in combating terrorism, but also in staying ahead of ever-evolving threats to aviation security.¹¹¹ On the other hand, those who oppose the use of AIT as a form of primary security screening have dubbed the device “the Naked Machine.”¹¹² Although a “privacy algorithm” purportedly blurs passengers’ faces,¹¹³ the imaging system earned the nickname by leaving genitalia clearly defined.¹¹⁴

Religious groups take issue with the fact that the scanners reveal, in glaring detail, the most intimate parts of the human body.¹¹⁵ For example, the Fiqh Council of North America (FCNA) issued a fatwa in 2010 stating, “general and public use of such scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty.”¹¹⁶ The FCNA remains deeply concerned about the use of “nude body scanners” because Islamic teachings call for *haya* (modesty) and prohibit men and women from being seen naked

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.* (stating that AIT devices can detect “weapons, explosives and other objects concealed under layers of clothing”); *Innovation & Technology: Our Approach*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/approach/tech/index.shtm> (last visited June 6, 2011) [hereinafter *TSA Innovation*].

¹¹² Robyn Martins, *Exposed in the Name of Safety*, TIMESREPORTER.COM (Jan. 10, 2011), <http://www.timesreporter.com/opinion/columnists/x1724410464/Exposed-in-the-name-of-safety>.

¹¹³ *FAQs*, *supra* note 102.

¹¹⁴ David Hammer, *New Orleans Airport Installing Full-Body Scanners; Opponents Allege Invasion of Privacy*, NOLA.COM, http://www.nola.com/politics/index.ssf/2010/10/new_orleans_airport_installing.html (last visited June 6, 2011).

¹¹⁵ Bahrampour, *supra* note 17.

¹¹⁶ Press Release, Fiqh Council of N. Am., The Statement of the FCNA on the Use of Full Body Scanners for Security at the Airports and Other Places (Feb. 9, 2010) [hereinafter *FCNA Fatwa*], available at <http://www.fiqhcouncil.org/node/4>.

by other men and women.¹¹⁷ Similarly, leaders of Conservative and Orthodox Jewish communities claim that the scanners' ability to see through a passenger's clothing conflicts with Jewish modesty laws, known as *tzniut*, which require followers of the faith to cover their bodies.¹¹⁸ The Washington Office of Agudath Israel, an organization that represents observant American Orthodox Jewish communities, issued a statement describing full-body imaging as "offensive, demeaning, and far short of acceptable norms of modesty under the laws and practices of Judaism."¹¹⁹ Christians, too, may be troubled by the use of AIT screening.¹²⁰ Pope Benedict XVI spoke out against the utilization of body scanners, explaining to aviation industry representatives that even in the fight against terrorism, countries cannot forget that "it is above all essential to protect and value the human person in their integrity."¹²¹ Southern Baptist leaders have also challenged the new technology, calling it "a disgrace" and encouraging observant Christians to find alternatives to air travel.¹²² Fortunately, for religious travelers who are unwilling to have their naked bodies exposed, the TSA offers enhanced pat-downs;¹²³ however, for devoutly religious passengers, a frisk is hardly a meaningful alternative to full-body scanners.

2. *Enhanced Pat-Downs*

The TSA uses pat-downs to resolve potential threats at airport security checkpoints and to serve as primary screening when a passenger opts out of AIT.¹²⁴ On October 28, 2010, the TSA released a statement informing passengers that it is in the process of implementing "New Pat-[D]own Procedures."¹²⁵ The

¹¹⁷ *Id.*

¹¹⁸ Josh Nathan-Kazis, *How Modern Airport Security May Run Afoul of Jewish Law*, FORWARD.COM (Jan. 13, 2010), <http://forward.com/articles/123364/>.

¹¹⁹ *Id.*

¹²⁰ See generally Bahrapour, *supra* note 17.

¹²¹ *Pope Sounds Warning over Airport Body Scans*, CBC NEWS (Feb. 22, 2010), <http://www.cbc.ca/world/story/2010/02/22/pope-body-scan.html>.

¹²² See, e.g., Bahrapour, *supra* note 17.

¹²³ *Advanced Imaging Technology (AIT): Innovation & Technology*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/approach/tech/ait/index.shtm> (last visited Feb. 15, 2011) (stating "advanced imaging technology screening is optional to all passengers").

¹²⁴ *Pat-Downs: For Travelers*, TRANSP. SEC. ADMIN., http://www.tsa.gov/travelers/pat_downs.shtm (last visited Feb. 15, 2011) [hereinafter *Pat-Downs*].

¹²⁵ *TSA Statement on New Pat-Down Procedures: News & Happenings*, TRANSP. SEC. ADMIN., http://www.tsa.gov/press/happenings/102810_patdown.shtm (last visited Feb. 15, 2011).

statement, however, says nothing about what enhanced pat-down screening entails, essentially only explaining that new pat-down procedures are coming to an airport near you as part of the TSA's multi-layer security program.¹²⁶ The TSA officially confirms only three things regarding the actual pat-down process.¹²⁷ First, passengers have the right to request a private pat-down screening; second, the TSA permits passengers to have a travel companion with them to witness the pat-down process; third, same-gender officers conduct all pat-downs.¹²⁸ The TSA blog also fails to provide any enlightening information about what an "enhanced pat-down" involves.¹²⁹ Instead of supplying elucidating facts, the TSA simply states: "You shouldn't expect to see the same security procedures at every airport. Our security measures are designed to be unpredictable."¹³⁰ The TSA's silence on pat-down screening specifics is certainly intentional.¹³¹ John Pistole explained that he doesn't want to give terrorists a road map of how to defeat the system; yet, Pistole confirmed that the TSA authorizes officers to feel inside a passenger's pants around the beltline, to touch a man's groin, and to rub a woman's breasts.¹³² ABC News revealed that TSA agents will now use the fronts of their hands to conduct pat-down searches and that passengers can expect officers to touch "body parts that once were off limits."¹³³ The take away is that what used to be a pat-down is now a full-on frisk, a practice the Supreme Court describes as a "great indignity . . . not to be undertaken lightly."¹³⁴

Despite the TSA's claim that there is no "sexual assault taking place at airports," passengers who have experienced the pat-downs are not so sure.¹³⁵ Even pilots compare the invasive

¹²⁶ *Id.*

¹²⁷ See *Pat-Downs*, *supra* note 124.

¹²⁸ *Id.*

¹²⁹ See William Saletan, *Groping in the Dark: The Government's Secret Plan to Feel You up at Airports*, SLATE (Nov. 23, 2010), <http://www.slate.com/id/2275839/>.

¹³⁰ *Id.*

¹³¹ See Saletan, *supra* note 129 (describing the TSA's strategy: "Keep terrorists off balance by keeping the public confused").

¹³² Crowley Interview, *supra* note 9.

¹³³ Andrea Canning, *Pat Down or Full Body Scan? Security Gets More Personal at Airports*, ABC NEWS (Oct. 28, 2010), <http://abcnews.go.com/WN/tsa-pat-procedure-airports/story?id=11998304>.

¹³⁴ *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

¹³⁵ Clark, *supra* note 11 (citing passengers as having reported feeling humiliated by a search that involved TSA agents "'touching the face and hair, the groin area and buttocks, and in between and underneath breasts'"); Stellin, *supra* note

searches at their workplace to “sexual molestation.”¹³⁶ Not surprisingly, religious adherents, too, struggle with the TSA’s new pat-down procedure.¹³⁷ Although the “heavy petting” is certainly uncomfortable for some religious travelers, many complaints have come from Muslim women who wear hijabs or burqas and from Sikh men who wear turbans.¹³⁸ After the TSA announced its enhanced pat-down procedure, the Council on American-Islamic Relations (CAIR) issued a travel notice warning Muslim women that the new screening process violated Islamic teachings.¹³⁹ CAIR insisted that passengers wearing hijabs should only permit a TSA officer to pat-down the head and neck area and should refuse a full-body pat-down.¹⁴⁰ Unlike the concerns of Muslims, Sikhs are willing to submit to full-body screening, but are offended that they can expect an extra pat-down or magnetometer wand-down “‘100 percent of the time.’”¹⁴¹ Since present-day imaging technology is unable to see through the “‘bulky’” turbans worn by Sikh men, the TSA claims secondary screening is a necessary measure.¹⁴² Although Sikhs may pat down their own turbans and have their hands checked for chemical traces, the Sikh Coalition of New York argues that “[b]lindly singling out turbans . . . is unsafe and un-American.”¹⁴³ According to the Sikh Coalition, the TSA should only

7 (quoting a woman who said, “‘I didn’t really expect her to touch my vagina through my pants’”).

¹³⁶ Clark, *supra* note 11.

¹³⁷ See *id.*; see also CAIR Travel Advisory: New Airport Pat-Downs Called Invasive, Humiliating, CAIR COUNCIL ON AM.-ISLAMIC RELATIONS (Nov. 10, 2010), <http://www.cair.com/ArticleDetails.aspx?ArticleID=26681&&name=n&&currPage=1> [hereinafter *CAIR Press Release*].

¹³⁸ Bahrapour, *supra* note 17; Clark, *supra* note 11; Tomas Engle, *New Airport Security Measures Violate Passengers’ Privacy, Dignity*, THE DAILY ATHENAEUM (Nov. 15, 2010), <http://www.thedaonline.com/opinion/new-airport-security-measures-violate-passengers-privacy-dignity-1.1777937>.

¹³⁹ *CAIR Press Release*, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ Banks, *supra* note 22.

¹⁴² *Sikhs Warned of Additional Screening of Turbans at US Airports*, HINDUSTAN TIMES (Jan. 14, 2011), <http://www.hindustantimes.com/StoryPage/Print/650282.aspx> [hereinafter *Sikhs Warned of Additional Screening*] (claiming “‘[b]ecause the machine cannot see through [the] turban, [the] turban must first go through a pat-down’”); see also *TSA Adjusts Security Procedures for Bulky Clothing*, TRANSP. SEC. ADMIN. (Oct. 15, 2007), http://www.tsa.gov/press/happenings/sop_adjustments.shtm [hereinafter *Bulky Clothing Press Release*].

¹⁴³ Banks, *supra* note 22.

request turban removal in the most dire of circumstances, as a Sikh man without his turban is essentially naked.¹⁴⁴

According to John Pistole, despite these groups' legitimate religious concerns, airline passengers cannot avoid either AIT screening or enhanced pat-downs based on their religious objections.¹⁴⁵ Airlines must "refuse to transport"¹⁴⁶ a passenger who does not consent to TSA screening, as passenger compliance with these "security procedures is a mandatory precondition for boarding and flying."¹⁴⁷ There are no religious exemptions, no free rides, and no partial pat-downs for those who opt out of AIT screening.¹⁴⁸ As Pistole plainly put it when asked about passengers who object to full-body scanners and enhanced pat-downs, those passengers "will not be allowed on planes, even if they turned down the in-depth screening for religious reasons."¹⁴⁹

B. CONSTITUTIONAL IMPLICATIONS

Passengers fear that once they enter a security checkpoint, they are essentially forfeiting their constitutional rights.¹⁵⁰ The American Civil Liberties Union (ACLU) reiterated this concern in a press release stating: "[w]e need to ensure that the government enacts procedures that are effective and do not unnecessarily infringe upon our civil liberties."¹⁵¹ The DHS is specifically

¹⁴⁴ Bahrapour, *supra* note 17 (stating that for a Sikh, turban removal is "akin to a strip search"); see also *Religious and Cultural Needs: Travel Assistant*, TRANSP. SEC. ADMIN., http://www.tsa.gov/travelers/airtravel/assistant/editorial_1037.shtm (last visited Feb. 15, 2011) [hereinafter *Religious Needs*].

¹⁴⁵ *Religion Offers No Break on Airport Screening*, CBS NEWS (Nov. 16, 2010), <http://www.cbsnews.com/stories/2010/11/16/national/main7061203.shtml> [hereinafter *Religion Offers No Break*].

¹⁴⁶ 49 U.S.C. § 44902(a) (2006).

¹⁴⁷ Brief for Respondent at 8, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 10-1157 (D.C. Cir. Dec. 23, 2010) [hereinafter *DHS Brief*], available at http://epic.org/privacy/body_scanners/Body_Scan_DHS_Opposition_Brief.pdf.

¹⁴⁸ *TSA Myth or Fact: Leaked Images, Handcuffed Hosts, Religious Garb, and More!*, TSA BLOG (Nov. 18, 2010), <http://blog.tsa.gov/2010/11/tsa-myth-or-fact-leaked-images.html> [hereinafter *TSA Blog Myths*].

¹⁴⁹ *Religion Offers No Break*, *supra* note 145.

¹⁵⁰ Jim Barnett, *TSA to Phase in New Pat-Down Procedures at Airports Nationwide*, CNN TRAVEL (Oct. 28, 2010), http://articles.cnn.com/2010-10-28/travel/air-line.security.pat.down.1_pat-down-tsa-statement-random-screening?_s=PM:TRAVEL.

¹⁵¹ Press Release, Am. Civil Liberties Union, ACLU Submits Statement on Aviation Safety to Key Senate Committees (Jan. 20, 2010), available at <http://www.aclu.org/national-security-racial-justice-technology-and-liberty/aclu-submits-statement-aviation-security-key>.

charged with “ensur[ing] that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.”¹⁵² First, the newly implemented TSA protocols may violate “constitutional concepts of personal liberty . . . [that] require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”¹⁵³ Further, the DHS has all but abandoned one of its primary missions¹⁵⁴ by allowing the TSA to offer only two screening options at airport checkpoints, both of which are entirely unacceptable to certain religious passengers. Thus, for purposes of evaluating the TSA’s new screening methods, the two most important constitutional guarantees to understand are the right to travel and the right to freely exercise religion.

1. *Right to Travel*

The origin of the right to travel can be traced to “no less than ten separate places in the Constitution.”¹⁵⁵ The landmark case on the right to travel is *Kent v. Dulles*, a case regarding U.S. passport applications, where the Supreme Court held, “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived [Travel] may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”¹⁵⁶ Still, “the right to travel is not absolute.”¹⁵⁷ The Constitution neither guarantees the right to travel by a certain method nor promises the

¹⁵² 6 U.S.C. § 111(b)(1)(G) (2006).

¹⁵³ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

¹⁵⁴ *See id.* § 111(b)(1).

¹⁵⁵ Eric P. Haas, Comment, *Back to the Future? The Use of Biometrics, Its Impact on Airport Security, and How This Future Technology Should Be Governed*, 69 J. AIR L. & COM. 459, 472 (2004); *see also* Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court’s Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 314 (2000) (claiming that the right to travel is found in “the Commerce Clause, the Comity Clause, the First Amendment, the Due Process Clause of the Fifth Amendment, the Ninth Amendment, Implied Fundamental Rights, and the Citizenship, Privileges or Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment”).

¹⁵⁶ *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958). “The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.” *Id.* at 125.

¹⁵⁷ *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973), *overruled on other grounds by* *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007).

right to the most convenient mode of transportation.¹⁵⁸ Additionally, minor restrictions on one's ability to travel do not amount to deprivation of this fundamental right.¹⁵⁹

The right to travel is certainly relevant to the TSA's present-day screening methods. For example, when the TSA only offers passengers the choice of either succumbing to AIT screening or enduring an enhanced pat-down, religious travelers may have no alternative but to forego flying. Although these potential passengers may have other forms of transportation available to them, flying might not only be the most convenient method, it may be the only practical mode available.¹⁶⁰ The question then becomes: what remedies are available to religious Americans who refuse to breach the central tenants of their faith and, thus, are prevented from enjoying their constitutional right to travel?

2. *Right to Freely Exercise Religion*

a. Free Exercise Clause of the First Amendment

Forbidding governmental regulation of religious beliefs, the First Amendment to the U.S. Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁶¹ The Supreme Court further expresses the importance of religious freedom, stating, "[a]bhorrence of religious persecution and intolerance is a basic part of our heritage,"¹⁶² and, as such, the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities."¹⁶³ As a result of the TSA's limited and religiously unacceptable

¹⁵⁸ *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006) (stating a citizen "does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him").

¹⁵⁹ *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2d Cir. 2007).

¹⁶⁰ *See United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) (arguing that there are times when "it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all"). For instance, if a devoutly religious Muslim's mother is dying in a country abroad, is this U.S. citizen supposed to travel by train, boat, and automobile to reach the sick relative's side and risk not making it in time? Would this not constitute an unreasonable governmental restriction? *See Davis*, 482 F.2d at 912 (recognizing the constitutional assurance that every American citizen has the "freedom to travel at home and abroad without unreasonable governmental restriction").

¹⁶¹ U.S. CONST. amend. I.

¹⁶² *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

¹⁶³ *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

screening options, passengers forced to forego flying might hope to bring a claim under the Free Exercise Clause of the First Amendment; however, the success of such a claim is unlikely.

In *City of Boerne v. Flores*, the Supreme Court held “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.”¹⁶⁴ In other words, an individual is not free from the obligation to comply with a valid and neutral law of general applicability on the ground that the law stipulates conduct that his religion forbids.¹⁶⁵ Therefore, the Free Exercise Clause of the First Amendment only provides protection when the government passes a law or regulation targeting a specific religious practice or belief.¹⁶⁶

The TSA’s screening protocols appear to meet the *Employment Division Department of Human Resources v. Smith* and *Flores* tests, and, thus, a religious airline passenger’s claim under the Free Exercise Clause of the First Amendment will likely fall flat. First, the new TSA regulations are religion-neutral. For instance, even though the TSA requires turbaned Sikhs to undergo secondary screening, the regulation does not specifically single out the practice of wearing religious headwear.¹⁶⁷ Instead, the security procedure classifies turbans in the “overall category of bulky clothing” and clarifies that *all* passengers who refuse to remove such clothing articles will face secondary screening.¹⁶⁸ Next, the TSA’s regulations apply to the traveling public at large.¹⁶⁹ As the TSA Administrator explained, “[e]veryone is subject to the same screening.”¹⁷⁰ Fortunately for observant religious travelers, “the First Amendment is not the only potential refuge” for religion-based claims as Congress passed the RFRA to afford “religious exercise greater protection from intrusion by religion-neutral federal laws.”¹⁷¹

¹⁶⁴ *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 885 (1990)) (stating that the compelling interest test does not apply to free exercise challenges).

¹⁶⁵ *Smith*, 494 U.S. at 878–79.

¹⁶⁶ *See id.* at 881.

¹⁶⁷ *See* Bulky Clothing Press Release, *supra* note 142.

¹⁶⁸ *Id.*

¹⁶⁹ *See* DHS Brief, *supra* note 147 (explaining compliance with TSA security procedures is a “mandatory precondition to boarding and flying” for *all* commercial airline passengers).

¹⁷⁰ *TSA Blog Myths*, *supra* note 148.

¹⁷¹ *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008).

b. Religious Freedom Restoration Act

As Justice Douglas professed, “no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause,” and now, the RFRA.¹⁷² Congress enacted the RFRA in response to the Supreme Court’s holding in *Smith*, guaranteeing the application of “the compelling interest test . . . in all cases where free exercise of religion is substantially burdened.”¹⁷³ Specifically, the RFRA prohibits the federal government¹⁷⁴ from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability.”¹⁷⁵ There is only one exception to this rule, which requires the government to satisfy a heavy burden.¹⁷⁶ The government must demonstrate “that application of the burden to the [religious adherent] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁷⁷ Finally, the RFRA applies to any “branch, department, agency, instrumentality, and official” of the U.S. government, including the DHS and the TSA.¹⁷⁸ Thus, the RFRA provides those devoutly religious airline passengers the best opportunity to obtain relief against the federal government, specifically against the DHS and the TSA, for substantially burdening their sincerely held religious beliefs.¹⁷⁹

¹⁷² *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring).

¹⁷³ 42 U.S.C. § 2000bb(b)(1) (2006).

¹⁷⁴ The Supreme Court has held that the RFRA is unconstitutional as applied to state and local government actions. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *see also Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001). However, “without doubt,” the Act remains constitutionally enforceable against the federal government. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

¹⁷⁵ 42 U.S.C. § 2000bb-1(a).

¹⁷⁶ *See id.* § 2000bb-1(b); *United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007).

¹⁷⁷ 42 U.S.C. § 2000bb-1(b).

¹⁷⁸ *Id.* § 2000bb-2(1).

¹⁷⁹ *See id.* § 2000bb-1(c) (providing “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim . . . in a judicial proceeding and obtain appropriate relief against a government”).

IV. APPLYING THE RFRA COMPELLING INTEREST TEST TO THE TSA'S NEWLY IMPLEMENTED SECURITY DIRECTIVES

The federal government may permissibly burden the religious beliefs of commercial airline passengers only if its newly implemented airport security measures pass the RFRA compelling interest test.¹⁸⁰ Admittedly, the TSA has “a great deal of latitude” to do what it must in the name of aviation safety, but this in no way grants the executive branch a free pass to violate federal law.¹⁸¹ Although courts have yet to review the TSA’s present-day screening procedures and, thus, a court has never applied the RFRA compelling interest test to AIT screening and enhanced pat-downs, the Supreme Court makes clear that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁸² The TSA, an executive agency, might respond to airline passengers’ complaints and objections by throwing out words like “terrorism” and “9/11”;¹⁸³ however, in order for the government to meet its burden of proof under the RFRA, this alone will not suffice.¹⁸⁴ Still, before applying the compelling interest test, the religious adherent must prove that the regulation in question substantially burdens his or her religious beliefs.¹⁸⁵

A. SATISFYING THE THRESHOLD QUESTION

To have a cognizable RFRA claim, the potential passenger objecting to the absence of a TSA screening procedure reconcilable with the teachings of his faith must prove (1) the existence of a substantial burden (2) on his religious exercise.¹⁸⁶

1. *Substantial Burden*

An impermissible burden exists when a governmental regulation puts “substantial pressure on an adherent to modify his be-

¹⁸⁰ See *id.* § 2000bb-1(b).

¹⁸¹ Rotenberg, *supra* note 16.

¹⁸² *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (pronouncing “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”).

¹⁸³ Rotenberg, *supra* note 16.

¹⁸⁴ See 42 U.S.C. § 2000bb-1(b) (requiring that the government show its actions are (1) in furtherance of a compelling interest, (2) which is advanced in the least restrictive means).

¹⁸⁵ *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008).

¹⁸⁶ *Id.*

havior and to violate his beliefs"¹⁸⁷ or compels an adherent "to perform acts undeniably at odds with fundamental tenants of [his] religious beliefs."¹⁸⁸ The infringement may be substantial even if the pressure is unintentional or indirect.¹⁸⁹ For example, in *Sherbert v. Verner*, the government's unemployment regulations unmistakably pressured the plaintiff to work on the Sabbath and, thus, forego her religious beliefs.¹⁹⁰ The Supreme Court held that the government unlawfully burdened her faith by "forc[ing] her to choose between following the precepts of her religion and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other."¹⁹¹ The impermissible burden placed on the plaintiff in *Sherbert* is nearly indistinguishable from the burden placed on devoutly religious airline passengers today. Forcing travelers to choose either to abide by their religious teachings and forego the most expedient form of travel, on the one hand, or breach principles of their faith in order to fly commercially, on the other hand, certainly qualifies as a substantial burden on these potential passengers.

Furthermore, in *Sherbert*, the Supreme Court explained that although unemployment benefits may be classified as merely a privilege and not a right, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."¹⁹² This line of reasoning also applies to the right to travel by plane. American citizens may not have a constitutional right to the most convenient mode of transportation, but at the very least, this convenience is a privilege and a benefit and should not be denied to a religious adherent without thoughtful consideration.¹⁹³ Even in 1974, courts recognized that while "there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all."¹⁹⁴ There are times when flying commercially is in fact a

¹⁸⁷ *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

¹⁸⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

¹⁸⁹ *Thomas*, 450 U.S. at 717-18.

¹⁹⁰ *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

¹⁹¹ *Id.* at 404.

¹⁹² *Id.* at 405.

¹⁹³ See *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006) (stating a citizen "does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him").

¹⁹⁴ *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974).

necessity. To pressure a passenger to choose between that necessity and the right to the free exercise of religion “is coercion in the constitutional sense.”¹⁹⁵ Thus, it is likely that a religious adherent will have little trouble overcoming the first obstacle of bringing an RFRA claim.

2. *On Religious Exercise*

In addition to showing a substantial burden, a religious adherent must prove that his beliefs are both “rooted in” religion and “sincerely held” to invoke the RFRA.¹⁹⁶ Beliefs must be religious in nature and not simply based on “‘purely secular’ philosophical concerns”;¹⁹⁷ however, it is often “a difficult and delicate task” for a court to make such a determination.¹⁹⁸ For instance, a belief can be religious and merit protection without being “acceptable, logical, consistent, or comprehensible to others.”¹⁹⁹ Since a person’s religious beliefs may evolve based on life experiences, an individual is not limited to the religious teachings of his upbringing.²⁰⁰ Further, when it comes to determining whether one’s beliefs are sincerely held, judges do not play the role of “arbiters of scriptural interpretation” and cannot ask whether a particular belief is acceptable or true.²⁰¹ Nevertheless, courts are presumed capable of evaluating how dearly a person holds a certain conviction and rejecting those claims that are “clearly nonreligious in motivation.”²⁰²

In *Thomas v. Review Board*, there was no question that the plaintiff felt pressured to quit his job in order to avoid violating Jehovah’s Witness teachings.²⁰³ Since his employer no longer offered non-weapon labor and the plaintiff believed he could not work on weapons without abandoning the precepts of his faith, he had to quit his job and risk denial of unemployment benefits.²⁰⁴ Although another member of the same religious sect continued to work at the weapon manufacturing firm, the court still found in favor of the plaintiff, acknowledging that

¹⁹⁵ *Id.* at 807 n.14.

¹⁹⁶ *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007).

¹⁹⁷ *Id.* (quoting *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981)).

¹⁹⁸ *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

¹⁹⁹ *Id.*

²⁰⁰ *Zimmerman*, 514 F.3d at 853–54.

²⁰¹ *Thomas*, 450 U.S. at 716.

²⁰² *Callahan*, 658 F.2d at 686.

²⁰³ *Thomas*, 450 U.S. at 710, 712 n.6.

²⁰⁴ *Id.* at 710.

"[i]ntrafaith differences . . . are not uncommon among followers of a particular creed . . . and the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."²⁰⁵ It was significant that the plaintiff in *Thomas* looked into other employment opportunities at the firm that might not conflict with his faith.²⁰⁶ Likewise, religious adherents bringing claims against the TSA will need to show that their religious exercise is substantially burdened by *all* offered methods of airport screening.²⁰⁷ Thus, Muslim women who wear hijabs or burqas and Sikh men who wear turbans are the most likely to have cognizable RFRA claims because the TSA offers these groups only the "Hobson's choice" of either violating their beliefs or not traveling.²⁰⁸ For religious followers who wear "loose fitting garments" or "head coverings," full-body imaging will be accompanied by a pat-down for secondary screening purposes.²⁰⁹ Correspondingly, opting out of AIT screening will also land these adherents in a private room for a head-to-toe pat-down, which may even require removal of the clothing articles in question.²¹⁰ In either scenario, airline passengers dressed in religious garb will have to sacrifice their beliefs if they wish to fly. Unquestionably, the TSA's current regulations substantially burden the aforementioned religious sects, and as such, so long as these religious adherents can convince a court that their beliefs are sincerely held, they will successfully be able to invoke the RFRA.

B. COMPELLING INTEREST TEST

After satisfying the threshold question and showing that the government's regulation has substantially burdened the exercise of one's religious beliefs, it does not necessarily follow that the TSA must grant an exemption accommodating the religious

²⁰⁵ *Id.* at 715–16.

²⁰⁶ *Id.* at 710.

²⁰⁷ See *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (holding that some methods may intrude less on a plaintiff's sincerely held religious beliefs than do others and thus, the plaintiff must "show that the exercise of his sincerely held religious beliefs is substantially burdened by *all available means*" offered by the government (emphasis added)).

²⁰⁸ Kaldveer, *supra* note 5; see also Bahrapour, *supra* note 17; Clark, *supra* note 11; Engle, *supra* note 138; CAIR Press Release, *supra* note 137.

²⁰⁹ See *Religious Needs*, *supra* note 144; see also Bulky Clothing Press Release, *supra* note 142.

²¹⁰ See Bahrapour, *supra* note 17 (stating "Sikhs have been told to remove their turbans and put them through the x-ray scanners").

practice.²¹¹ The government “may justify an inroad on religious liberty” by proving that it is (1) the least restrictive means of achieving (2) the compelling governmental interest.²¹² This is not an easy burden of proof for the government to satisfy, as “[i]n this highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.’”²¹³ Thus, the government may go forward with its regulation, even though doing so will substantially infringe on the adherent’s sincerely held religious beliefs only after sufficiently demonstrating that both prongs of the compelling interest test are met.²¹⁴

1. *In Furtherance of a Compelling Interest*

When the government attempts to restrict a civil liberty, like the right to freely exercise religion, such action must be justified by a clear public interest.²¹⁵ The government has a duty to zealously protect religious values, “sometimes even at the expense of other interests of admittedly high social importance.”²¹⁶ Therefore, a mere rational connection between the governmental regulation and the evil it seeks to curb will not suffice.²¹⁷ “[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.”²¹⁸ The Supreme Court has not embraced the government’s arguments that cite uniform application of a particular program or fear of feigned religious objections as a compelling interest.²¹⁹ These are essentially unpersuasive “slippery slope” concerns, where the government contends that if it makes one exception, it will have to make numerous exceptions.²²⁰ Although uniformity and pre-

²¹¹ *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

²¹² *Id.*

²¹³ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007).

²¹⁴ *Zimmerman*, 514 F.3d at 855 (noting that the government must satisfy “its heavy burden” to go forward with any substantially burdensome law, regulation, or policy).

²¹⁵ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

²¹⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

²¹⁷ *Collins*, 323 U.S. at 530.

²¹⁸ *Wisconsin*, 406 U.S. at 215.

²¹⁹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–36 (2006); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963).

²²⁰ *Gonzales*, 546 U.S. at 436 (describing the “slippery slope” argument as one where the government contends, “if I make an exception for you, I’ll have to make one for everybody, so no exceptions”).

vention of spurious religious claims are legitimate governmental interests, "under RFRA, invocation of such general interests, standing alone, is not enough."²²¹

In the context of airport checkpoint screening, the Obama Administration claims it is sensitive to the criticisms that the newly implemented security procedures go too far; however, the Commander in Chief and his staff maintain that the measures currently employed by the TSA "are justified by the risks."²²² First, the government can certainly make a strong slippery slope argument. When news sources announced that Janet Napolitano, Secretary of the DHS, might exempt Muslim women from extensive full-body pat-downs, internet bloggers went wild with many vowing to claim the Islamic faith as their own and dress in burqas to avoid the invasive screening process.²²³ Such outrage drove John Pistole to address concerns and to separate fact from fiction on the TSA's blog, where he made clear that the TSA had yet to grant any religious exemptions.²²⁴ Nevertheless, although the incident proved fraudulent, claims would almost surely surface if the TSA was to make exceptions for devout religious groups; the government's interest in preventing such insincere objections, standing alone, fails to meet the first prong of the compelling interest test.²²⁵ However, the slippery slope argument is neither the solitary nor the most persuasive justification for the TSA's insistence on mandatory AIT or enhanced pat-down screening. Even before 9/11, and dating back to 1972, courts recognized that protecting air commerce and the lives of airline passengers are compelling governmental interests.²²⁶ Thus, if using AIT scanning and enhanced pat-down screening at airport checkpoints actually *advances* the compelling interest

²²¹ *Id.* at 438.

²²² Shane, *supra* note 79.

²²³ See Edward's Daughter, *Napolitano May Exempt Muslims from Airport Pat-Downs*, CORRUPTION CHRONS. (Nov. 22, 2010, 9:18 AM), <http://www.judicialwatch.org/node/10295/talk> (posting by Edward's Daughter, "We should all (male and female) wear a [b]urqa whenever flying. When thousands of [b]urqa clad Americans are observed in all the airports, . . . Napolitano will certainly get the idea that it is just as humiliating and invasive for non-Muslims as it is for true Muslims"); Jack Minor, *Napolitano Considering Allowing Muslim Women to Pat Themselves Down at Airports!*, GREELEY GAZETTE (Nov. 23, 2010, 9:16 AM), <http://www.greeleygazette.com/press/?p=6687> (posting by Daniel, "I'm just going to wear a hijab and claim I am a Muslim at the security gate").

²²⁴ *TSA Blog Myths*, *supra* note 148 (asserting "[e]verybody goes through the same process . . . whatever their ethnicity or religious beliefs").

²²⁵ See *Gonzales*, 546 U.S. at 438.

²²⁶ *United States v. Epperson*, 454 F.2d 769, 772 (4th Cir. 1972).

of securing our nation and protecting our homeland from acts of terrorism, these measures are likely valid.²²⁷ This means the government must still prove, as required by the only exception to the RFRA, that its action “is *in furtherance* of a compelling governmental interest.”²²⁸

Security officials assert that the TSA’s multilayer security system, which involves the utilization of AIT scanning, enhanced pat-downs, and other screening measures, is the only way to detect weapons, explosives, and other nonmetallic threats hidden under layers of clothing.²²⁹ The TSA calls full-body scanners and head-to-toe pat-downs “the last line of defense against terrorists who evade no-fly lists and the ‘behavior detection officers’ looking out for suspicious conduct at airports.”²³⁰ President Obama insists these measures are, “at this point,” the most effective in the prevention of threats like the one posed by the Christmas Day bomber in 2009.²³¹

The argument against these assertions is twofold. First, despite the TSA’s persistence that AIT can detect explosive material in the form of powders, liquids, and gels, most agree that the imaging technology now in place would not have caught the unsuccessful underwear bomber.²³² For example, the fact that the TSA subjects turbaned Sikhs, even those who submit to full-body scanning, to mandatory secondary screening calls into question the technology’s purported ability to see through “‘layers of clothing.’”²³³ Second, other critics describe the TSA’s new screening measures as “‘a knee-jerk reaction to failed terrorist

²²⁷ See 42 U.S.C. § 2000bb-1(b)(1) (2006).

²²⁸ See *id.* (emphasis added).

²²⁹ DEPT. OF HOMELAND SEC. OFFICE OF HEALTH AFFAIRS, FACT SHEET: ADVANCED IMAGING TECHNOLOGY (AIT) HEALTH & SAFETY 1–2 (2010), available at http://www.tsa.gov/assets/pdf/ait_fact_sheet.pdf; see also *Statement on Aviation Security*, *supra* note 82 (listing explosive detection technology, Visible Intermodal Prevention and Response teams, canine teams, AIT devices, magnetometers, pat-downs, and deployment of behavior detection officers as part of the TSA’s risk-based security measures).

²³⁰ Shane, *supra* note 79.

²³¹ *Id.*

²³² Zack Kaldveer, *Airport Body Scanner Update: DHS Answers EPIC, Nader/Paul, and Alternatives*, PRIVACY REVOLT! BLOG (Jan. 7, 2011), <http://consumercal.blogspot.com/2011/01/airport-body-scanner-update-dhs-answers.html> [hereinafter *Scanner Update*]. *TSA Blog Myths*, *supra* note 148; Although the Government Accountability Office (GAO) requested an independent study on this topic, the report’s results are not available to the public. EPIC Brief, *supra* note 14.

²³³ *Sikhs Warned of Additional Screening*, *supra* note 142.

attacks.’”²³⁴ Given the progression of security method implementation thus far and the fact that current methods cannot detect explosives inserted inside the body, political activist Ralph Nader argues it is only a matter of time before the TSA subjects American travelers to body cavity searches.²³⁵ Even John Pistole admits that “[t]he threats we face in the aviation sector are real and evolving;” however, with the TSA having already spent \$80 million on body scanners alone, it seems its funds are primarily spent on protecting against a particular terrorist plot of the past.²³⁶ For instance, “‘You have the shoe bomber, we take off our shoes. You have the Christmas bomber . . . so now we have these new scanner machines,’”²³⁷ but when “the number of terrorist ideas that can be hatched . . . is limitless,” every dollar spent on full-body scanners is a dollar not spent on developing new methods to prevent the sophisticated and more complex threats of the future.²³⁸

It may be “undisputed that the government’s interest in protecting the nation from terrorism constitutes a compelling [federal] interest,” but this is only the beginning of the inquiry.²³⁹ For a court to find that the TSA’s new measures are *in furtherance* of a compelling interest, the government will need to demonstrate that its procedures are genuinely effective, rather than simply creating a false sense of security.²⁴⁰ Only after providing such proof will the second prong of the compelling interest test come into play.

²³⁴ *Scanner Update*, *supra* note 232.

²³⁵ *Id.*

²³⁶ Press Release, Transp. Sec. Admin., DHS Achieves Major Aviation Security Milestone One Month Ahead of Schedule (Nov. 30, 2010), *available at* <http://www.tsa.gov/press/releases/2010/1130.shtm>; *TSA Spends Millions on Body Scanners, Sparking Competition Among Suppliers*, FOXNEWS.COM (Nov. 23, 2010), <http://www.foxnews.com/politics/2010/11/23/tsa-body-scanners-spend-millions-lobbying-reap-large-rewards/>; *see also The State of Aviation Security: Is Our Current System Capable of Meeting the Threat?: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. 73 (2010) (statement of Michael W. Macleod-Ball, Acting Director, American Civil Liberties Union) [hereinafter ACLU Statement], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&dodid=f:56411.pdf.

²³⁷ *Scanner Update*, *supra* note 232.

²³⁸ ACLU Statement, *supra* note 236; *TSA Innovation*, *supra* note 111.

²³⁹ *Tabbaa v. Chertoff*, 509 F.3d 89, 103 (2d Cir. 2007).

²⁴⁰ ACLU Statement, *supra* note 236, at 68.

2. *Advanced by the Least Restrictive Means*

According to the Supreme Court, even when the government has a legitimate interest in enacting a regulation, that interest “cannot be pursued by means that broadly stifle fundamental personal liberties when that end can be more narrowly achieved.”²⁴¹ While the government need not “refute every conceivable option in order to satisfy the least restrictive means prong,” it must at least thoughtfully consider whether there are other methods that would intrude less on religious beliefs and still advance the government’s compelling purpose.²⁴² For example, in *Kaemmerling v. Lappin*, an Evangelical Christian prisoner alleged that mandatory collection and analysis of his DNA substantially burdened the exercise of his religion.²⁴³ Noting that Congress stated that DNA profiling was “‘the most reliable forensic technique’” available and pointing out that DNA “is one identifying characteristic that criminals cannot change, disguise, or hide to avoid detection,” the court found no less restrictive alternative existed.²⁴⁴ Therefore, when *all* alternatives are less precise or less effective, thus “adversely affecting” the government’s compelling interests, the government may proceed with the contested regulation even though religious beliefs are substantially burdened.²⁴⁵

Applying the second prong of the RFRA compelling interest test to new airport screening protocols, it will be plainly incumbent upon the TSA to show that “no alternative forms of regulation would combat [terrorism] without infringing [the free exercise of religion].”²⁴⁶ While no single method of screening exists that can provide a perfect guarantee of threat detection, like the government argued in *Kaemmerling*, the DHS claims TSA counterterrorism experts have determined that AIT and enhanced pat-downs are vital to nonmetallic weapon detection, as magnetometers cannot serve this function.²⁴⁷ The DHS suggests that no other currently deployed procedure provides the same precision as AIT scanners or enhanced pat-downs, and, thus, us-

²⁴¹ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

²⁴² *Hamilton v. Schiro*, 74 F.3d 1545, 1556 (8th Cir. 1996).

²⁴³ *Kaemmerling v. Lappin*, 553 F.3d 669, 674 (D.C. Cir. 2008).

²⁴⁴ *Id.* at 684.

²⁴⁵ *Id.*

²⁴⁶ *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

²⁴⁷ *Kaemmerling*, 533 F.3d at 684; DHS Brief, *supra* note 147, at 3; *see also TSA Blog Myths*, *supra* note 148 (explaining pat-downs, too, are “designed to be thorough in order to detect any potential threats and keep the traveling public safe”).

ing other forms of screening would make it easier for those intent on harming this nation to evade exposure.²⁴⁸ Further, in *Tabbaa v. Chertoff*, the Second Circuit held that “interception and detection at international border crossings is likely the most effective way to protect the United States from terrorists and instruments of terrorism.”²⁴⁹ The court went on to explain that given the highly significant security intelligence that the Bureau of Customs and Border Protection (CBP) receives, “some measure of deference is owed to CBP’s administrative decisionmaking [sic].”²⁵⁰ Likening airport security checkpoints to border crossings, the TSA also receives daily intelligence reports and, thus, has unique expertise.²⁵¹ Accordingly, the TSA’s determination that its newly implemented screening procedures are “absolutely essential to address the threat we see today” also deserves “some measure of deference.”²⁵²

Nevertheless, the government will still fall short of meeting its burden of proof “‘unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.’”²⁵³ Arguably, since the TSA significantly accelerated its plans for AIT deployment after the attempted Christmas Day attack in 2009, the government could not have considered and rejected more than just a few less burdensome alternatives.²⁵⁴ In fact, there are numerous less intrusive alternatives available, including “passive millimeter wave technology and [software] filters that indicate potential threats on an avatar instead of an actual passenger image.”²⁵⁵ Passive millimeter wave technology, also known as Millivision, creates an image of a fully clothed passenger and transmits that image to security offi-

²⁴⁸ DHS Brief, *supra* note 147, at 16 (stating “[w]ith the exception of AIT, there are no currently deployed primary screening technologies that can detect concealed non-metallic items”); *cf. Kaemmerling*, 533 F.3d at 684 (finding that DNA profiling is “a dramatic new tool for the law enforcement,” and alternative methods would make it easier for offenders to evade identification).

²⁴⁹ *Tabbaa v. Chertoff*, 509 F.3d 89, 103 (2d Cir. 2007).

²⁵⁰ *Id.* at 106.

²⁵¹ *AIT Worth It*, *supra* note 92.

²⁵² *Tabbaa*, 509 F.3d at 106; *AIT Worth It*, *supra* note 92.

²⁵³ *Sample v. Lappin*, 424 F. Supp. 2d 187, 195 (D.D.C. 2006) (quoting *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 39 (D.D.C. 2002)).

²⁵⁴ See EPIC Brief, *supra* note 14. Other available screening technology includes thermal sensory imaging and trace portal detection. ACLU Statement, *supra* note 236, at 71; Etienne Lombard, Comment, *Bombing out: Using Full-Body Imaging to Conduct Airport Searches in the United States and Europe Amidst Privacy Concerns*, 19 TUL. J. INT’L & COMP. L. 337, 347 (2010).

²⁵⁵ EPIC Brief, *supra* note 14, at 8.

cials after highlighting potential threats in red.²⁵⁶ The federal courthouse in Washington D.C. has already implemented this technology that ensures modesty to those being screened.²⁵⁷ Like the full-body imaging technology currently employed by the TSA, passive millimeter wave devices also detect both metallic and nonmetallic “concealed weapons and other contraband hidden on the human body” and do so without doing any digital undressing.²⁵⁸ In adding passive millimeter wave detection to its multilayered security repertoire, the TSA would finally offer adherent travelers a meaningful alternative to full-body scanning. No longer would religious groups have to order followers of the faith to endure an extensive and offensive pat-down. No longer would religious passengers be faced with the distasteful choice to abandon their beliefs or abandon flying commercially. No longer would religious freedom be substantially burdened. Still, regardless of whether the TSA will adopt alternative technology, the fact that it has yet to do so may suggest that the TSA has failed to adopt the least restrictive means of advancing its compelling interest.²⁵⁹ At the same time, because Government Accountability Office (GAO) reports are not available to the public, a substantially burdened religious passenger will have to bring his RFRA claim to court for an answer as to whether the TSA genuinely considered and rejected the efficacy of the aforementioned less intrusive measures.²⁶⁰

V. CONCLUSION

Airport security checks have become an ingrained aspect of travel,

[b]ut it is the very ubiquitousness of airport security checks that calls for the greatest vigilance Because these checks touch the lives of so many, because they have become such an accepted part of our existence, they are capable of great abuse. Liberty—the freedom from unwarranted intrusion by the government—is as easily lost through insistent nibbles by government officials who

²⁵⁶ Samantha Murphy, *Lawsuit Filed over Airport Scanner Privacy, Health Concerns*, TECHNEWS DAILY (Aug. 6, 2010), <http://www.technewsdaily.com/lawsuit-filed-over-airport-scanner-privacy-health-concerns-0993/>.

²⁵⁷ *Id.*

²⁵⁸ *A Leader in Passive Millimeter Wave Detection*, MILLIVISION, <http://www.millivision.com/about.html> (last visited Feb. 15, 2011).

²⁵⁹ *See* *Sample v. Lappin*, 424 F. Supp. 2d 187, 195 (D.D.C. 2006).

²⁶⁰ *Id.*; EPIC Brief, *supra* note 14 (explaining that GAO reports regarding the efficacy of security screening measures are not available to the general public).

seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.²⁶¹

At some point, with the seemingly never ending roll out of constitutional infringements in the name of airport security, the terrorists will have won, that is, if they have not already. Terrorists have indirectly succeeded by driving the TSA to take actions that, in turn, substantially burden some of the most basic liberties constitutionally assured to American citizens, including the right to travel and the right to freely exercise religion. The TSA must develop "a long-term vision for aviation security screening" and stop the cycle of "endless reaction[s] to yesterday's threats."²⁶² At the very least, the TSA needs to reconsider adopting less intrusive alternatives so that religious adherents have the same freedom to fly as those whose beliefs are not offended by advanced imaging technology and enhanced pat-downs. It is time for the U.S. government to restore religious freedom and no longer force religious travelers to choose between faith and flight.

²⁶¹ United States v. \$124,570 U.S. Currency, 873 F.2d 1240, 1246 (9th Cir. 1989).

²⁶² Phil Gast, *Growing Backlash Against TSA Body Scanners, Pat-Downs*, CNN TRAVEL (Nov. 12, 2010), http://articles.cnn.com/2010-11-12/travel/travel.screening_1_body-scanners-pat-downs-travel-companies?_s=PM:TRAVEL.