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**STATEMENT OF  
HARPER JEAN TOBIN, DIRECTOR OF POLICY  
NATIONAL CENTER FOR TRANSGENDER EQUALITY**

**HEARING ON  
“THE PUBLIC FACE OF TSA: EXAMINING THE AGENCY’S OUTREACH AND  
TRAVELER ENGAGEMENT EFFORTS”**

**HOUSE SUBCOMMITTEE ON TRANSPORTATION AND PROTECTIVE SECURITY**

**FEBRUARY 27, 2018**

Chairman Katko, Ranking Member Watson Coleman, and Members of the Subcommittee: My name is Harper Jean Tobin, and I am Director of Policy for the National Center for Transgender Equality—a role I have served in since 2009. Thank you for the opportunity to testify regarding the efforts of Transportation Security Administration (TSA) to engage the traveling public. The National Center for Transgender Equality (NCTE) is a nationwide, non-profit, non-partisan organization founded in 2003 to promote public understanding, opportunity, and well-being for the nearly two million Americans who are transgender.

In addition to conducting public education and ground-breaking national survey research, NCTE works with federal, state, and local agencies on a wide range of issues, and we have been in dialogue with the TSA during my entire nine-year tenure at the organization. While my testimony will focus on what I know best—the challenges facing transgender travelers, and engagement between TSA and LGBT communities—we see these particular concerns as part of a wide spectrum of privacy and other concerns that affect the traveling public more broadly, including particular problems face by travelers with disabilities and members of religious minorities.

While we recognize the importance of TSA’s mission of protecting lives, we believe that mission can be advanced without compromising the privacy, dignity, and personal liberty of the traveling public. As Hofstra Law School professor Irina Manta recently argued in the *NYU Journal of Legislation and Public Policy*, passenger screening must be based on a robust analysis of the privacy, dignity, and liberty costs and the actual security benefits of particular screening measures.<sup>1</sup> Traveler outreach and engagement should continually inform this analysis and drive improvement.

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<sup>1</sup> Irina D. Manta, *Choosing Privacy*, 20 N.Y.U. J. LEG. & PUB. POL. 649 (2017).

## Challenges faced by transgender travelers

Transgender travelers experience serious difficulties with the current approach to passenger screening. As TSA works to pursue innovation in passenger screening—including in screening technology—we strongly urge the agency to prioritize the privacy, civil rights, and civil liberties of passengers, including by making imaging technology gender-neutral and eliminating alarms caused solely by sensitive parts of the body—namely, the chest or genitals—or by undergarments, rather than any foreign object.

TSA's current Advanced Imaging Technology (AIT) seriously compromises the privacy and dignity of transgender travelers. In particular, transgender men routinely encounter alarms caused by their chest compression vests or by their chests themselves, while transgender women frequently encounter alarms caused solely by their private parts. These alarms and resulting additional screening—no matter how professionally conducted—are unnecessary, humiliating, and deeply concerning, especially for travelers who experience them again and again. That's true whether you're a trans woman like Shadi Petosky, who tearfully live-tweeted her TSA ordeal in Orlando in 2015,<sup>2</sup> or CNN commentator Angela Rye (who is not transgender), whose video of her genital pat-down in Detroit made for queasy viral viewing in late 2016.<sup>3</sup> Whether transgender or not, the screening process can be especially harrowing for children, and for survivors of sexual trauma. Some parents of transgender children are quite afraid of air travel because of the humiliation their child could face in the case of an alarm in a sensitive area, a pat-down, or being publicly mis-gendered.

In 2015 NCTE conducted a ground-breaking survey of nearly 28,000 transgender adults across all 50 states, and 53% of our respondents had gone through airport security in the previous year.<sup>4</sup> Of those, 43% reported at least one negative experience with passenger screening related to being transgender in the previous year. These negative experiences included being referred to as the wrong gender or verbally harassed by Transportation Security Officers; receiving additional screening including pat-downs because of gender-related clothing; being subjected to a pat-down by an officer of the wrong gender; being loudly questioned about their gender or their body parts at the checkpoint; and being asked to remove or lift clothing to show an undergarment or sensitive area of the body. Some respondents reported being detained for over an hour or missing their flight due to gender-related screening issues. Some reported having to go through scanners multiple times; receiving multiple pat-downs; having TSOs refuse to pat them down because they were transgender; being questioned about their gender in front of their children; and leaving the checkpoint in tears. Some said they were simply too afraid to fly, or wracked with nerves every time. Some demanded to speak to supervisors or filed complaints and felt TSA was very responsive to complaints about insensitive or harassing treatment, while others were told nothing could be done because their bad experience was inherent in the current screening procedures.

While our survey did not ask specifically about issues related to AIT, these are the most common issues NCTE hears about from travelers. The AIT currently in use require TSOs to input a traveler's gender, making it a part of their job to scrutinize and guess or ask the gender of every traveler. Many travelers—some who are transgender, and some who are not—find themselves having to correct TSOs

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<sup>2</sup> Katie Rogers, *TSA Defends Treatment of Transgender Air Traveler*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/us/shadi-petosky-tsa-transgender.html>.

<sup>3</sup> Angela T. Rye, *Dear TSA: The country is not safer because you grab vaginas*, CNN.com (Dec. 22, 2016), <https://www.cnn.com/2016/12/16/opinions/tsa-invasive-pat-down-rye/index.html>

<sup>4</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*, 221-22. Washington, DC: National Center for Transgender Equality.

and be scanned again. This not only delays travelers, it can be embarrassing. More concerning is the very common problem of alarms based on sensitive body parts, or on sensitive undergarments such as chest binders or personal prostheses that trans travelers may wear. Alarms lead to pat-downs, which many travelers find inherently humiliating. We have heard from many travelers that they routinely experience alarms in the chest or groin, pat-downs, and very uncomfortable conversations when they travel. I personally have experienced this many times, as have many NCTE staff and board members and our friends, colleagues, and family members. For example, one of our survey respondents told us the following:

Going through TSA, I am repeatedly asked to go back through the scan because there is an anomaly with my chest or groin. It is not resolved with a second scan, and I am subjected to a TSA agent's hands on my chest and up in my groin.<sup>5</sup>

One of NCTE's former board members, who is also a senior citizen, wrote to us the following just last month:

I flew from Baltimore-Washington International Airport (BWI) to San Francisco today for a [business] meeting. After I went through the scanner, TSA screeners pulled me out of line, and said there was an "anomaly in the groin area," and that they would have to pat me down. I was concerned about making my flight, so I said okay. I was then patted down (or groped) by two women, followed by one man -- buttocks, groin and legs. When they had finished, they made no further reference to the "anomaly," but said they would have to swab my hands; they did that, and after checking the swab, they sent me through.<sup>6</sup>

A colleague and personal friend, attorney Carl Charles, published an op-ed in October 2015 describing his traveling experiences as a transgender man.<sup>7</sup> Mr. Charles, then a law student traveling to D.C. for a summer internship, wrote that his excitement over the trip was quickly squelched when he heard a TSO shout, "We have anomalies in the chest and groin area. Private screening, female agent requested." Now, the agency has been responsive to complaints that about individual officers mis-gendering travelers, and we appreciate that. It has also since retired the term "anomaly" in favor of the term, "alarm"—leading to reports of TSOs stating, "There is something alarming in your groin." But the problem here is more basic than terminology or even who is conducting a pat-down. The next thing Mr. Charles was asked was told was, "Sir, we need to know what's in your pants."

As you can imagine, the conversation that followed was very uncomfortable—frankly, even more uncomfortable than my sitting here before a Congressional subcommittee discussing it. Because here we have a government agency that has made it its business to know what's in Americans' pants, every time they fly. And there has got to be a way to keep Americans safe without innocent travelers being asked questions about the contents of our underpants by government officials, or having our private parts touched by uniformed strangers every time we get on a plane.

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<sup>5</sup> Submitted to NCTE by a respondent to the 2015 US Transgender Survey.

<sup>6</sup> Personal correspondence, Jan. 26, 2018.

<sup>7</sup> Carl Charles, *Dear TSA, My Body Is Not an Anomaly*, *ADVOCATE* (Oct. 1, 2015), <https://www.advocate.com/commentary/2015/10/01/dear-tsa-my-body-not-anomaly>.

## TSA's engagement with the LGBT community

Improving the passenger experience has long been one of TSA's stated goals—one that was restated in 2016 when establishing the agency's Innovation Task Force.<sup>8</sup> We know that outreach and engagement with the traveling public through the Office for Civil Rights & Liberties, Ombudsman & Traveler Engagement (CRL/OTE)—including with NCTE and other LGBT community organizations—has been valuable. NCTE has consistently engaged with CRL/OTE for nearly a decade. Beginning in early 2010, we began meeting with CRL staff, briefing them on basic facts about transgender people—our lives, our bodies, and sensitive personal items that can raise issues during screening. We have also been regular participants in TSA stakeholder calls and conferences, together with representatives of other communities with heightened concerns around traveler screening.

However, this engagement has typically been limited to educating the public about current procedures, training personnel to better follow procedures, and addressing individual complaints about the conduct of TSOs. We believe most TSOs aren't interested in harassing travelers or invading their privacy, and many are uncomfortable with the invasive nature of some of their work. The staff of CRL/OTE have worked in earnest to engage the public and respond to complaints, but **the agency as a whole has never adequately addressed the privacy, civil rights, and civil liberties problems inherent in the current screening model and current scanner technology.**

In 2011, we joined with other LGBT organizations in sharing some of the troubling traveler stories we had had in a letter to Administrator Pistole and urged him to make improvements to the Traveler Civil Rights Policy, TSO training, and screening procedures to ensure passengers are not subjected to increased screening based on their gender or physical characteristics. A response from the Administrator promised efforts to improve TSO training, and we have offered suggestions to TSA many times over the years to incorporate into officer training, it has never been clear exactly what material made its way into new and ongoing officer training.

When TSA began introducing automated target recognition (ATR) into its scanners around this time, we hoped that a move away from human viewing of body scan images would be a huge improvement for travelers, but were immediately troubled by the use of pink and blue gender buttons that must be pressed for each traveler. It took years to get TSA to explicitly confirm what seemed obvious: the technology can't distinguish between human body parts and a potential threat object, and instead relies, in part, on assumptions about typical body contours for men and women.

In 2012, TSA posted for the first time a page of information for transgender travelers. NCTE provided input on this page, although the final product did not reflect all our input and left some of the most frequent traveler questions unanswered.

In 2013, we were among thousands of Americans who submitted comments on the agency's court-ordered rulemaking to govern the passenger screening program.<sup>9</sup> Along with many others, we recommended that the agency reconsider its reliance on body scanners and pat-downs as primary screening methods, in favor of a mix of other methods such as canines, explosive trace detection, and

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<sup>8</sup> See, e.g., Statement of Peter Neffenger, Administrator, Transportation Security Administration, U.S. Department of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs (June 7, 2016).

<sup>9</sup> Passenger Screening Using Advanced Imaging Technology, Notice of proposed rulemaking (NPRM), 78 Fed. Reg. 18,287 (Mar. 26, 2013).

traditional metal detectors, with more invasive techniques used on a random or secondary basis.<sup>10</sup> At a minimum, we urged the agency to codify in regulations critical passenger protections it already promises, such as an inclusive anti-discrimination policy, no storing or human viewing of body images, and no requiring passengers to life or remove clothing to reveal sensitive body areas or prosthetics.

In 2014 and 2015, NCTE helped provide web-based training for several hundred passenger support specialists. Before and since, TSA has occasionally solicited our feedback on critical elements for TSO training, and on a few occasions has asked us to help identify local community partners to make presentations to TSOs at airports. In 2015, shortly after the Shadi Petosky story was widely covered by national media, NCTE's Executive Director Mara Keisling met with then-Administrator Neffenger to discuss our concerns, and the agency tweeted about its "ongoing discussions" on screening trans travelers.

Even as we engaged in these discussions, NCTE sought and obtained a court order in 2015 to end the delay in issuing a final rule on passenger screening and AIT.<sup>11</sup> We were disappointed when in 2016 the agency adopted an essentially empty rule with no real traveler protections.<sup>12</sup> I stated publicly at that time:

As long as TSA relies on body scanners and prison-style pat-downs as its primary tools, there will be a cost to travelers' privacy and questions about whether that cost is paying off. While there will be some cost to all travelers, anyone who is perceived as different or whose body is not typical will bear the brunt of those invasions of privacy. The public deserves clear rules that address the effectiveness and the privacy impact of practices that affect millions of Americans every day.<sup>13</sup>

In 2017, we were invited to work with CRL/OTE to produce a segment for TSA TV on respectful screening of transgender travelers. But we also wrote to then-Acting Administrator Gowadia urging her to ensure that TSA moves beyond reliance on technologies that rely on gender stereotypes and can't tell a bomb from a traveler's own body.<sup>14</sup>

In April 2017, as part of its TSA Cares video series, TSA released a short video aimed at transgender travelers.<sup>15</sup> The video addressed some basic questions we see, such as clarifying that travelers should be treated based on the gender they present for screening purposes. But it also failed to answer other key questions travelers regularly ask us: *Will my body parts or my undergarments cause an alarm on AIT? Is there anything I can do to avoid this? If I sign up for TSA Pre-Check, will it help me avoid embarrassing pat-downs?* When NCTE tweeted at TSA about this, the agency responded to our tweets saying they "continue to push for technological improvement that will provide effective security w/o gender identification."<sup>16</sup>

<sup>10</sup> Comments of the National Center for Transgender Equality, Re: Docket No. TSA-2013-0004 Passenger Screening Using Advanced Imaging Technology (June 24, 2013).

<sup>11</sup> In re: Competitive Enterprise Institute, et al., No. 15-1224 (D.C. Cir. Oct. 23, 2015) (ordering TSA to produce "a schedule for the expeditious issuance of a final rule within a reasonable time").

<sup>12</sup> Passenger Screening Using Advanced Imaging Technology; Final Rule, 81 Fed. Reg. 11,364 (Mar. 3, 2016).

<sup>13</sup> NCTE, "NCTE Sues TSA to Compel New Privacy Protections for Travelers," Jul. 20, 2015, <https://transequality.org/blog/ncte-sues-tsa-to-compel-new-privacy-protections-for-travelers>.

<sup>14</sup> Letter to Acting Administrator Huban Gowadia from NCTE Executive Director Mara Keisling (Mar. 14, 2017).

<sup>15</sup> TSA Cares: Screening for Transgender Passengers (Apr. 20, 2017), <https://www.youtube.com/watch?v=0SLI3Q1bIrs>.

<sup>16</sup> <https://twitter.com/AskTSA/status/855604175765463042>.

We were somewhat encouraged to see in May 2017 that, as part of a Broad Agency Announcement for Innovative Demonstrations, TSA invited vendors to propose solutions to this problem.<sup>17</sup> However, we are not aware of whether anything concrete has come of this to date.

We appreciate the intent of some of the initiatives TSA has undertaken in recent years to improve the passenger experience, including the TSA Cares hotline, the use of Passenger Support Specialists, and the TSA Pre-Check programs. We know that these programs have been helpful for some passengers. But they also have not addressed the basic concerns transgender travelers have. The travelers we hear from don't just want to get to their gate more quickly, or make sure TSOs have a heads-up to expect someone whose body may cause an alarm, or have a kinder, gentler conversation with TSOs about their body parts or undergarments—**they want to get on a plane without discussing their private parts or having them touched by government officials, period.**

### **Public engagement must inform TSA policies, procedures, and technology**

TSA has more contact—very often personal, physical contact—with the public than just about any other government entity. That makes public engagement and input absolutely critical. Travelers need to know what to expect at the airport. Unfortunately, TSA's public education efforts are often unsatisfying because the information provided to travelers is often opaque, and hedged about with disclaimers about SSI and the need for unpredictability. For years, TSA has punted on basic questions, like: Will my body parts or my undergarments cause an alarm on AIT? Is there anything I can do to avoid this? If I sign up for TSA Pre-Check, will it help me avoid embarrassing pat-downs?

TSA's history of engagement with transgender travelers is representative of its engagement with other communities and the traveling public broadly: the staff of TSA's CRL/OTE office really want and try to improve the passenger experience, but in important respects they are hamstrung by the flaws of the current passenger screening model itself, with its reliance on questionably effective body scanners and embarrassing pat-downs. CRL/OTE often is unable to answer the most important questions travelers have because they are secret or unpredictable, and they are often unable to respond meaningfully to traveler concerns because they are baked into the system. **Public outreach, improved training, and investigating individual complaints are all necessary and important, and we commend CRL/OTE for doing those things, but they will not solve core problems. Public engagement in particular is of limited value if it is not used to inform policy, procedures, and technology acquisition.**

We understand that TSA is in the process of testing and demonstrating upgrades to the current AIT units. When it comes to innovation, we urge the agency to think big: is upgrading or replacing body scanner units as the primary passenger screening tools really the right move for security and for passengers? Can less invasive tools like canines and ETD take on a bigger role, with less reliance on scanners and pat-downs? How can the agency minimize false alarms and minimize its "touch rate"? And how can reaching out and hearing travelers' questions, concerns, and experiences inform TSA's approach on the front end, not just the back end?

NCTE will, of course, continue to engage with TSA—both CRL/OTE and, where we can, relevant operational and policymaking components of the agency—and encourage travelers to share their experiences and their complaints. We hope this engagement can lead to real improvements in the traveler experience.

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<sup>17</sup> Broad Agency Announcement HSTS04-17-R-BAA001: Innovative Demonstrations for Enterprise Advancement (IDEA) for Transportation Security (May 9, 2017), <https://www.fbo.gov/index?s=opportunity&mode=form&id=15dd92c36581f9d8b264897267b86333/>.

Thank you for your consideration of this important issue and for the opportunity to speak to you today.