No. 17-35634

In the United States Court of Appeals for the Ninth Circuit

MOHAMED SHEIKH ABDIRAHMAN KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD,

Plaintiffs-Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation; CHARLES H. KABLE IV, Director, Terrorist Screening Center,

Defendants-Appellees.

PLAINTIFF-APPELLANTS' EXCERPTS OF RECORD VOLUME I OF IV

On Appeal from the United States District Court for the District of Oregon
Portland Division
Case: 3:10-cv-00750-BR

Hina Shamsi
hshamsi@aclu.org
Hugh Handeyside
hhandeyside@aclu.org
Anna Diakun
adiakun@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
T. 212.549.2500
F. 212.549.2654

(Additional Counsel on Inside Cover)

Ahilan T. Arulanantham
aarulanantham@aclu-sc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth St.
Los Angeles, CA 90017
T. 213.977.9500
F. 213.977.5297

Steven M. Wilker
steven.wilker@tonkon.com
TONKON TORP LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204
T. 503.802.2040
F. 503.972.3740
Cooperating Attorney for the ACLU
Foundation of Oregon

Attorneys for Plaintiffs Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble IV, and Amir Meshal

Richard M. Steingard
rsteingard@steingardlaw.com
LAW OFFICESOF RICHARD M. STEINGARD
800 Wilshire Blvd., Suite 1050
Los Angeles, CA 90017
T. 213. 260.9449
F. 213.260.9450

Joel Leonard
joel@eoplaw.com
ELLIOTT, OSTRANDER & PRESTON, PC
707 SW Washington Street, Suite 1500
Portland, OR 97205
T. 503. 224.7112
F. 503.224.7819

Attorneys for Plaintiff Stephen Persaud

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(UNDER SEAL)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF, *et al*,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III,[1]
***et al.*,**

Defendants.

3:10-cv-00750-BR

FINAL JUDGMENT

BROWN, Judge.

This matter comes before the Court on entry of Final Judgment as to all Claims contained in Plaintiffs' Third Amended Complaint (#83).

BACKGROUND

The Third Amended Complaint, filed January 11, 2013, included claims for violation of procedural due process (Claim

[1] The Court substitutes Jefferson B. Sessions III as Attorney General of the United States, who was sworn in on February 29, 2017.

One), substantive due process (Claim Two), and the Administrative Procedure Act (APA) (Claim Three) on behalf of 13 Plaintiffs. The Court now enters Final Judgment as to all of these claims.

In an Opinion and Order (#110) issued August 28, 2013, the Court held that all Plaintiffs have a constitutionally protected liberty interest in the right to travel internationally by air and a constitutionally protected liberty interest in their reputations, each of which is adversely affected by placement on the No Fly List. Consistent with its August 28, 2013, Opinion and Order, the Court issued another Opinion and Order (#136) on June 24, 2014, in which it granted Plaintiffs' Motion (#91) for Partial Summary Judgment with respect to Claim One and the procedural due-process aspect of Claim Three, and denied Defendants' Motion (#85) for Partial Summary Judgment. The Court held that the then-existing (now superseded) Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) process was constitutionally inadequate and violated the APA because it did not provide Plaintiffs with meaningful procedures for challenging their placement on the No-Fly List.

Following a revision of the DHS TRIP process by the government after the Court's June 24, 2014, Opinion and Order (#136) and its October 3, 2014, Case Management Order (#152), the Court entered a non-final Judgment (#228) on April 24, 2015, as to Claim One and Claim Three in favor of the Plaintiffs who had

been advised that they were not on the No Fly List as of October 10, 2014: Ayman Latif, Elias Mustafa Mohamed, Nagib Ali Ghaleb, Abdullatif Muthanna, Ibraheim Y. Mashal, Salah Ali Ahmed, and Mashaal Rana. In the Order (#227) that accompanied the entry of the non-final Judgment, the Court dismissed without prejudice Claim Two (substantive due process) as to these Plaintiffs, and clarified that there were no remaining unadjudicated claims for these Plaintiffs. Later, by Order (#337) issued October 6, 2016, the Court also dismissed as moot the claims of Steven Washburn, following his death.

After the parties moved for partial summary judgment again with respect to the procedural claims, by Opinion and Order (#321) issued March 28, 2016, the Court granted in part and denied in part Defendants' Cross-Motion as to Plaintiffs Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble, Amir Meshal, and Stephen Persaud collectively, denied Plaintiffs' collective Motion, and deferred ruling on the parties' Cross-Motions as to the individual Plaintiffs in order to permit supplementation of the record. The Court adhered to its June 24, 2014, Opinion and Order (#136) as to the standard that Defendants must satisfy with respect to providing Plaintiffs with notice, and concluded that the revised DHS TRIP process satisfied in principle most of the procedural due-process requirements that the Court set out in that Order.

On October 6, 2016, following Defendants' submission of *ex parte*, *in camera* materials to supplement the record with respect to whether information was properly withheld during the administrative process (#321, #323), the Court granted summary judgment as to the remaining procedural due-process claims of the remaining Plaintiffs. *See* Order (#337). This Order granted Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs and denied Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment.

By Opinion and Order (#356) issued April 21, 2017, the Court denied Plaintiffs' February 10, 2017, Motion (#352) for Leave to Conduct Limited Jurisdictional Discovery. The Court also held that jurisdiction over the remaining Plaintiffs' substantive due-process claims lies exclusively in the Ninth Circuit Court of Appeals pursuant to 49 U.S.C. § 46110. Accordingly, the Court, treating Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction as a motion for summary judgment, granted the Motion and dismissed the remaining substantive claims.

FINAL JUDGMENT

On this record, therefore, the Court now hereby **ENTERS** Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

The Court **ENTERS** Final Judgment in favor of Plaintiffs Ayman Latif, Elias Mustafa Mohamed, Nagib Ali Ghaleb, Abdullatif Muthanna, Ibraheim Y. Mashal, Salah Ali Ahmed, and Mashaal Rana with respect to Claim One and Claim Three in accordance with the previous Order (#227) and non-final Judgment (#228).

The Court **DISMISSES without prejudice** Claim Two of Ayman Latif, Elias Mustafa Mohamed, Nagib Ali Ghaleb, Abdullatif Muthanna, Ibraheim Y. Mashal, Salah Ali Ahmed, and Mashaal Rana in accordance with its previous Order (#227) and non-final Judgment (#228).

The Court **DISMISSES with prejudice** all claims of Steven Washburn as moot. *See* Order (#337).

The Court **ENTERS** Judgment for Defendants with respect to Claim One and the procedural due process aspect of Claim Three of the remaining Plaintiffs: Mohamed Sheikh Abdirahman Kariye, Raymond Earl Knaeble IV, Faisal Nabin Kashem, Amir Meshal, Stephen Durga Persaud. *See* Opinion and Order (#321); Order (#337).

The Court **DISMISSES** Claim Two and the substantive due-process aspect of Claim Three of the remaining Plaintiffs because the Court lacks jurisdiction with respect to these claims. *See* Opinion and Order (#356).

The Court having now resolved all claims of all parties, this **JUDGMENT** shall constitute the final judgment of this Court.

IT IS SO ORDERED.

DATED this 9th day of June, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF; MOHAMED SHEIKH ABDIRAHMAN KARIYE; RAYMOND EARL KNAEBLE IV; NAGIB ALI GHALEB; ABDULLATIF MUTHANNA; FAISAL NABIN KASHEM; ELIAS MUSTAFA MOHAMED; IBRAHEIM Y. MASHAL; SALAH ALI AHMED; AMIR MESHAL; STEPHEN DURGA PERSAUD; and MASHAAL RANA,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III,[1] in his official capacity as Attorney General of the United States; JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation; and CHRISTOPHER M. PIEHOTA, in his official capacity as Director of the FBI Terrorist Screening Center,

Defendants.

3:10-cv-00750-BR

OPINION AND ORDER

STEVEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Suite 1600
Portland, OR 97204-2099
(503) 802-2040

[1] The Court substitutes Jefferson B. Sessions III as Attorney General of the United States, who was sworn in on February 29, 2017.

HINA SHAMSI
HUGH HANDEYSIDE
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

AHILAN ARULANANTHAM
CATHERINE A. WAGNER
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-9500

ALAN L. SCHLOSSER
JULIA HARUMI MASS
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

MITCHELL P. HURLEY
JUSTIN H. BELL
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1011

Attorneys for Plaintiffs Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Mohamed Meshal, and Steven Washburn

WILLIAM GENEGO
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

JOEL P. LEONARD
Elliot, Ostrander & Preston, P.C.
Union Bank of California Tower
707 S.W. Washington Street, Suite 1500
Portland, OR 97205
(503) 224-7112

Attorneys for Plaintiff Stephen Persaud

JEFFERSON B. SESSIONS III
United States Attorney General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Branch Director
AMY ELIZABETH POWELL
BRIGHAM J. BOWEN
SAMUEL M. SINGER
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20001
(202) 514-9836

BILLY J. WILLIAMS
United States Attorney
JAMES E. COX, JR.
Assistant United States Attorney
District of Oregon
1000 S.W. Third Avenue, Ste. 600
Portland, OR 97204
(503) 727-1026

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction and Plaintiffs' Motion (#352) for Leave to Conduct Limited Jurisdictional Discovery. The Court concludes the record on these Motions is sufficiently developed such that oral argument would not be helpful. For the reasons that follow, the Court **GRANTS** Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction and **DENIES** Plaintiffs' Motion (#352) for Leave to Conduct Limited Jurisdictional Discovery.

BACKGROUND

The Court set out the complete factual background of this case in its Opinion and Order (#321) issued March 28, 2016, and Opinion and Order (#136) issued June 24, 2014. The Court sets out herein only the factual background necessary to resolve the parties' Motions.

I. No-Fly List and Original DHS TRIP Procedures

Plaintiffs instituted this action on June 30, 2010, challenging their alleged placements on the No-Fly List and the procedures that the government provided under the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) to challenge placements on the No-Fly List. Plaintiffs seek only prospective relief in this action.

Individuals who are placed on the No-Fly List are prohibited from boarding any commercial flight that will pass through or over United States airspace. The No-Fly List is a subset of the consolidated Terrorist Screening Database (TSDB), which is maintained by the Terrorist Screening Center (TSC). The TSC is administered by the Federal Bureau of Investigation (FBI) and is staffed by multiple agencies. Although the TSC is responsible for maintaining the TSDB (including the No-Fly List), nominations to the TSDB are made by multiple law-enforcement and national-security agencies.

At the time Plaintiffs instituted this action a traveler

who was denied boarding a commercial airline could submit an application for redress through DHS TRIP. DHS TRIP would determine whether the traveler is an exact or near match to an individual in the TSDB and, if so, would forward the request to the TSC. On receipt of the inquiry the TSC would double-check to ensure the traveler was an exact match to an identity in the TSDB and, if so, determine whether the traveler should continue to be in the TSDB.

After the TSC completed its review, it would notify DHS TRIP of its determination and DHS TRIP would send a determination letter advising the traveler that DHS TRIP had completed its review. Notably, the DHS TRIP determination letter did not confirm or deny whether the traveler was in the TSDB or on the No-Fly List and did not provide any further details about why the traveler may or may not have been in the TSDB or on the No-Fly List. Moreover, pursuant to these original procedures, the DHS TRIP determination letters did not provide assurances about the traveler's ability to undertake future travel nor any meaningful opportunity to contest or to correct the record on which any such determination was based. In some cases the DHS TRIP determination letter advised the traveler that he or she could pursue an administrative appeal of the determination with the Transportation Security Administration (TSA) or could seek judicial review in a United States court of appeals pursuant to

49 U.S.C. § 46110.

II. Jurisdiction Over Plaintiffs' Claims Challenging Placement on the No-Fly List and the DHS TRIP Process

On May 3, 2011, this Court dismissed this action on the grounds that Plaintiffs failed to join the TSA, an indispensable party, and that jurisdiction over Plaintiffs' challenges to their placements on the No-Fly List and the DHS TRIP procedures rested in the Ninth Circuit Court of Appeals pursuant to 49 U.S.C. § 46110(a). *See Latif v. Holder*, No. 3:10-cv-00750-BR, 2011 WL 1667471 (D. Or. May 3, 2011).

On November 19, 2012, the Ninth Circuit Court of Appeals held Plaintiffs' claims did not challenge a TSA order, and, therefore, § 46110(a) did not vest jurisdiction over this action in the Court of Appeals. *See Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012). Accordingly, the Ninth Circuit reversed and remanded the case back to this Court.

III. This Court's Opinion and Order issued June 24, 2014

On June 24, 2014, this Court denied Defendants' Cross-Motion (#85) for Partial Summary Judgment and granted Plaintiffs' Cross-Motion (#91) for Partial Summary Judgment as to Plaintiffs' related procedural due-process and Administrative Procedure Act (APA) claims in which Plaintiffs asserted the DHS TRIP procedures were constitutionally deficient. *See Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). The Court held the DHS TRIP procedures fell "far short of satisfying the requirements of due

process" *Id.* at 1161. The Court found due process required Defendants to provide Plaintiffs "with notice regarding their status on the No-Fly List and the reasons for placement on that List" and that such notice "must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." *Id.* at 1162. Nevertheless, the Court concluded it could not "foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security." *Id.* The Court, however, held any such determination must be made on a case-by-case basis and must, at a minimum, consider "(1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges." *Id.*

IV. Revised DHS TRIP Procedures and Reconsideration of Plaintiffs' DHS TRIP Inquiries

Following this Court's Opinion and Order issued June 24, 2014, and pursuant to the Court's Case-Management Order (#152) issued October 3, 2014, Defendants disclosed on October 10, 2014, that seven of the Plaintiffs were not on the No-Fly List at that time. In addition, Defendants revised the DHS TRIP procedures to address the deficiencies that the Court identified in its June 24, 2014, Opinion and Order.

Under the new procedures DHS TRIP sent to each of the remaining Plaintiffs a notification letter that confirmed they were on the No-Fly List at that time, identified the applicable substantive criteria, and provided an unclassified summary that included at least some reasons for placement of each individual on the No-Fly List.[2] Although the unclassified summaries varied in length and detail, the letters did not disclose all of the reasons or information on which Defendants relied to maintain each Plaintiff's placement on the No-Fly List because, according to Defendants, they were unable to provide additional disclosures. The November 2014 DHS TRIP notification letters invited each Plaintiff to submit a written response by December 15, 2014, and each of the remaining Plaintiffs responded to the notification letters.

Pursuant to the revised procedures, if an individual timely responds to the second letter and requests additional review, DHS TRIP forwards the response and any enclosed information to the

[2] In the ordinary course, this notification would be split into two steps. First, DHS TRIP (as noted, in consultation with TSC) would send to the traveler a notification letter that only indicates whether the traveler was on the No-Fly List. If the traveler is on the No-Fly List and requests additional information, the revised procedures call for DHS TRIP (in consultation with the TSC) to send the traveler a second notification letter that identifies the applicable substantive criteria and contains the unclassified summary of the reasons for the traveler's placement on the List. Because of the procedural posture of this litigation, however, Defendants combined these two steps for the remaining Plaintiffs.

TSC for consideration. Upon completion of TSC's review of materials submitted to DHS TRIP, the TSC provides a written recommendation to the TSA Administrator as to whether the individual should be removed from or remain on the No-Fly List and the reasons for that recommendation. The information that the TSC provides to the TSA Administrator may be a summary of the information that the TSC relied on to make its determination regarding whether the individual should remain on the No-Fly List and does not necessarily include all underlying documentation. The TSC's recommendation to the TSA Administrator may contain classified and/or law-enforcement sensitive information. In addition, DHS TRIP also provides the traveler's complete DHS TRIP file to the TSA Administrator, including all information submitted by the traveler.

The revised DHS TRIP procedures also provide that after review of the record provided by TSC and DHS TRIP, the TSA Administrator may request additional information or consult with the TSC and/or other relevant agencies (including any nominating agency) regarding concerns that may arise from the recommendation or the record before the Administrator. The TSA Administrator may either adopt or reject the TSC's recommendation. If the TSA Administrator issues a final order maintaining an individual on the No-Fly List, the order will state the basis for the decision to the extent possible without compromising national security or

law-enforcement interests. If the TSA Administrator determines the traveler should not remain on the No-Fly List, the Administrator would then issue an order removing the traveler from the No-Fly List. The TSA Administrator is vested with the authority to determine whether the traveler will remain on or be removed from the No-Fly List and is not bound by the recommendation of the TSC. Upon issuance of the final order by the TSA Administrator, DHS TRIP provides TSC and the traveler with a copy of the final order.

In late 2014, pursuant to these revised procedures, Defendants reconsidered the DHS TRIP inquiries of the remaining six Plaintiffs (Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Meshal, Steven Washburn, and Stephen Persaud),[3] but the TSA Administrator concurred with the TSC's recommendation to keep each Plaintiff on the No-Fly List. The TSA Administrator then issued orders to that effect.

Plaintiffs, nevertheless, contended the revised DHS TRIP process still violated their rights to procedural due process, and, therefore, on March 17, 2015, Plaintiffs filed Motions for Partial Summary Judgment on their procedural due-process claims (both collectively and as to each individual Plaintiff).

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[3] On April 12, 2016, Plaintiffs filed a Notice (#324) of the Death of a Party in which it notified the Court that Plaintiff Steven William Washburn had passed away. Accordingly, five Plaintiffs remain actively involved in these proceedings.

Defendants filed Cross-Motions for Summary Judgment as to all Plaintiffs collectively and as to each Plaintiff individually in which Defendants contended the revised DHS TRIP process were constitutionally sufficient.

V. Plaintiffs' Procedural Due-Process Claims as to the Revised DHS TRIP Process

On March 28, 2016, the Court granted in part and denied in part Defendants' Cross-Motion as to the Plaintiffs collectively, denied Plaintiffs' collective Motion, and deferred ruling on the parties' Cross-Motions as to the individual Plaintiffs. *See Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 WL 1239925 (D. Or. Mar. 28, 2016). The Court adhered to its ruling in the June 24, 2014, Opinion and Order and found the revised DHS TRIP process to be generally consistent with the standards the Court set out in that Order. The Court, however, also found the record was not sufficiently developed to permit the Court to determine whether Defendants provided each Plaintiff with the requisite notice and opportunity to be heard through the revised DHS TRIP procedures because the record did not identify the information that Defendants withheld from the notification letters sent to each Plaintiff. Accordingly, the Court directed Defendants to supplement the record (*ex parte* and *in camera* if necessary to protect sensitive national-security information) with a summary of the material information that Defendants withheld from the notice letters sent to each Plaintiff together with a

justification for withholding that information.

On May 5, 2016, Defendants filed their Supplemental Memorandum together with a Notice indicating they had filed additional materials *ex parte* and *in camera*. On July 7, 2016, the Court directed Defendants to make an additional supplemental filing that could, if necessary, be filed *ex parte* and under seal. Defendants made their second supplemental submission on August 29, 2016.

Based on its consideration of the entirety of the record, the Court on October 6, 2016, granted Defendants' Cross-Motions for Partial Summary Judgment as to the individual Plaintiffs and denied Plaintiffs' individual Motions for Summary Judgment. In particular, the Court found "Defendants have provided sufficient justifications for withholding additional information in response to each of the Plaintiffs' revised DHS TRIP inquiries." Order (#337) at 5-6. Accordingly, the Court concluded the revised DHS TRIP procedures satisfied Plaintiffs' rights to procedural due process.

DISCUSSION

Defendants now move to dismiss this action on the basis that the Court of Appeals has jurisdiction over Plaintiffs' remaining claims pursuant to § 46110 because those claims directly challenge the TSA Administrator's recent orders to keep

Plaintiffs on the No-Fly List under the revised DHS TRIP procedures. Plaintiffs, on the other hand, contend their claims still do not fall within the scope of § 46110 despite the revised DHS TRIP procedures, and, therefore, this Court continues to have jurisdiction pursuant to the Ninth Circuit's previous mandate in this case.

Because Defendants' Motion relies on factual developments that occurred after the filing of Plaintiffs' Third Amended Complaint and that are not contained within the Third Amended Complaint, the Court construes Defendants' Motion as a motion for summary judgment. *See* Fed. R. Civ. P. 12(d).

I. Standards

Section 46110(a) "'grants exclusive jurisdiction to the federal courts of appeals to 'review' the 'order[s]' of a number of agencies, including the Transportation Security Administration.'" *Arjmand v. United States Dep't of Homeland Sec.*, 745 F.3d 1300, 1302 (9th Cir. 2014)(quoting *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254 (9th Cir. 2008)). "Section 46110 does not, however, grant circuit courts jurisdiction to review orders issued by TSC." *Arjmand*, 745 F.3d at 1302.

The Ninth Circuit has considered the relationship between challenges to placement on the No-Fly List and § 46110(a) on three occasions.

A. *Ibrahim v. Department of Homeland Security*

In *Ibrahim* the plaintiff was placed on the No-Fly List and brought an action in the district court under the APA "for an injunction directing the government to remove her name from the No-Fly List and to cease certain policies and procedures implementing the No-Fly List." 538 F.3d at 1254. The district court in *Ibrahim* determined the TSC "actually compiles the list of names ultimately placed on the No-Fly List" and that the TSC is not part of the TSA or any other agency named in § 46110. *Id.* at 1254-55. The Ninth Circuit concluded "[b]ecause putting Ibrahim's name on the No-Fly List was an "order" of an agency *not* named in section 46110, the district court retains jurisdiction to review that agency's order under the APA." *Id.* at 1255.

The government in *Ibrahim* also argued the court of appeals had jurisdiction over Ibrahim's claim because it was "inescapably intertwined" with a TSA order. *Id.* The Ninth Circuit, however, noted the "inescapably intertwined" doctrine only "refer[s] to *claims* that are inescapably intertwined with [the court's] *review* of an order." *Id.* at 1255-56 (emphasis in original). The Ninth Circuit, therefore, found Ibrahim's claim challenging the order placing her on the No-Fly List was not inextricably intertwined with an order under § 46110 because the challenged order was issued by an agency other than one named in § 46110. *Id.* at 1256.

Finally, the Ninth Circuit also noted the lack of any administrative record further suggested review should be by the district court because "it would make sense that [review] be in a court with the ability to take evidence." *Id.*

B. *Latif v. Holder*

As noted, this Court initially dismissed this action for lack of subject-matter jurisdiction because the Court initially held the court of appeals had jurisdiction over Plaintiffs' claims pursuant to § 46110. The Ninth Circuit, however, reversed and remanded on the ground that this Court has subject-matter jurisdiction over both Plaintiffs' substantive and procedural claims. The Ninth Circuit reasoned § 46110 does not apply to Plaintiffs' substantive claims "[b]ecause TSC 'actually compiles the list of names ultimately placed' on the [No-Fly] List." *Latif*, 686 F.3d at 1127 (quoting *Ibrahim*, 538 F.3d at 1255).

With respect to Plaintiffs' procedural due-process claims, however, the Ninth Circuit noted those claims "undoubtedly require[] at least some review of TSA's orders, namely, the policies and procedures implementing DHS TRIP." *Latif*, 686 F.3d at 1127. In addition to direct challenges to orders by agencies explicitly listed in § 46110, the Ninth Circuit noted "[t]he district court lacks jurisdiction to hear damages claims that are 'inextricably intertwined with a review of the procedures and merits surrounding the agency's order.'" *Id.* at 1228 (quoting

Americopters, LLC v. Fed. Aviation Admin., 441 F.3d 726, 736 (9th Cir. 2006)). The court explained the "'inextricably intertwined' doctrine 'prevents plaintiffs from crafting constitutional tort claims either as a means of relitigat[ing] the merits of the previous administrative proceedings, or as a way of evading entirely established administrative procedures.'" *Latif*, 686 F.3d at 1128 (quoting *Americopters*, 441 F.3d at 736).

In particular, the Ninth Circuit found "Plaintiffs' procedural challenge requires judicial review of orders issued both by TSA, which is named in § 46110, and by TSC, which is not." *Id.* at 1128. The Ninth Circuit, however, described the relationship between TSA and TSC as follows:

> TSA's implementation of DHS TRIP is at issue, but TSA is merely a conduit for a traveler's challenge to inclusion on the List. TSA simply passes grievances along to TSC and informs travelers when TSC has made a final determination. TSC — not TSA — actually reviews the classified intelligence information about travelers and decides whether to remove them from the List. And it is TSC — not TSA — that established the policies governing that stage of the redress process.

Id. Thus, the Ninth Circuit found "[i]f Plaintiffs are entitled to judicial relief, any remedy must involve both TSA and TSC," and to the extent that Plaintiffs want to know why they were included on the No-Fly List and to have an opportunity to meaningfully respond, "[s]uch relief must come from TSC – the sole entity with both the classified intelligence information Plaintiffs want and the authority to remove them from the List."

Id. at 1129. The court, therefore, concluded: "[B]ecause we would not be able to provide relief simply by amending, modifying, or setting aside TSA's orders or by directing TSA to conduct further proceedings, we lack jurisdiction under § 46110 to address Plaintiffs' procedural challenge." *Id.*

C. *Arjmand v. United States Department of Homeland Security*

The Ninth Circuit again revisited the issue in *Arjmand*. In *Arjmand* the plaintiff was twice subjected to additional screening procedures before boarding flights. 745 F.3d at 1301. Arjmand submitted a DHS TRIP inquiry that was processed according to the original DHS TRIP procedures described above. *Id.* After DHS TRIP sent the plaintiff his notification letter, the plaintiff filed a petition for review in the Ninth Circuit "seeking disclosure of his watchlist status, a meaningful opportunity to contest inclusion on any watchlist, and removal from all government watchlists." *Id.*

The Ninth Circuit relied on *Latif* and summarized its ruling in *Latif as* follows:

> The basis of our holding was straightforward. Because TSC administers the TSDB, a court needs jurisdiction over TSC to grant meaningful relief to a plaintiff seeking removal from the TSDB. Thus, since § 46110 does not grant circuit courts jurisdiction to review TSC orders, the statute cannot grant jurisdiction over claims seeking removal from the TSDB. Therefore, under *Latif*, we lack original jurisdiction over Arjmand's claims.

Arjmand, 745 F.3d at 1302 (internal citations omitted). The

Arjmand court rejected the government's attempt to distinguish *Latif* on the basis that, unlike the *Latif* Plaintiffs, Arjmand pursued his constitutional claims through the DHS TRIP process. The court reasoned:

> Even though Arjmand has pursued those claims through a petition challenging his DHS TRIP determination letter, the *relief* he seeks is confirmation of his watchlist status and, if present on the TSDB, removal from the list or a meaningful opportunity to contest his inclusion on the list. *Latif* holds that jurisdiction over claims seeking this relief does not exist under § 46110. Thus, the difference in procedural posture is not relevant, because our "lack of jurisdiction under § 46110 . . . arises from the unique relationship between TSA and TSC in processing traveler grievances," not from the formal mechanism a traveler uses to pursue claims challenging the administration of the TSDB.

Id. (quoting *Latif*, 686 F.3d at 1129)(emphasis and ellipses in original). Thus, the Ninth Circuit concluded "the fundamental problem remains that Arjmand cannot be granted relief without reviewing and modifying TSC orders, which cannot be done under § 46110." *Id.* at 1303.

II. Analysis

Defendants contend the revised DHS TRIP procedures now place litigation of Plaintiffs' substantive claims squarely within the types of claims that must be brought in the court of appeals pursuant to § 46110. Defendants contend *Ibrahim*, *Latif*, and *Arjmand* are distinguishable because under the new DHS TRIP procedures the TSA Administrator is unquestionably the only authority responsible for issuing the final order maintaining a

traveler on the No-Fly List. Defendants emphasize the TSA Administrator has both the discretion to adopt or to reject the recommendation of TSC and, if necessary, to consult with or to request additional information from TSC or other relevant agencies. Thus, because the TSA Administrator is the ultimate decision-maker as to whether a traveler remains on the No-Fly List, Defendants contend Plaintiffs' substantive challenges to their continued presence on the No-Fly List must be addressed by the court of appeals.

Plaintiffs, on the other hand, contend jurisdiction remains in this Court because TSA does not have complete control over placement on the No-Fly List and the DHS TRIP process, and, therefore, Plaintiffs' claims do not require review of a TSA order under § 46110. In particular, Plaintiffs point out that TSC and the nominating agencies determine who is placed on the No-Fly List in the first instance, and TSC retains a key role in determining the information that is conveyed to the traveler in the unclassified summary and in the final redress response; the information that is conveyed to the TSA Administrator; and, therefore, the information that forms the basis of the Administrator's ultimate decision. Finally, Plaintiffs contend jurisdiction must rest in a court that is capable of receiving evidence because Plaintiffs' substantive claims necessitate considering more than the administrative record.

At the outset the Court notes this is an issue of first impression. Although the Ninth Circuit and other courts have considered whether claims arising from the No-Fly List and the original DHS TRIP procedures must be brought in the courts of appeals pursuant to § 46110, no court has considered where jurisdiction lies for a claim seeking review of an order denying removal from the No-Fly List following the completion of the revised DHS TRIP procedures and the issuance of a TSA order determining a traveler should be maintained on the No-Fly List for sufficient, disclosed reasons. Although the Court finds some force in each of the parties' opposing arguments, the Court concludes in the unique procedural posture of this case that jurisdiction over Plaintiffs' remaining substantive claims explicitly lies in the Ninth Circuit Court of Appeals pursuant to § 46110. In any event, if this Court retains the matter erroneously to adjudicate the remaining issues in this case, the parties will be delayed by several more months and will incur significant unnecessary expense. Thus, in light of the unique procedural posture of this case, the Court finds the most prudent course forward is to permit this jurisdictional question to be reviewed without delay by the Ninth Circuit Court of Appeals to ensure the last issues in this prolonged litigation are first resolved by the proper court.

The Court notes the "fundamental problem" identified in

Arjmand and *Latif* no longer exists in this case as a result of the intervening revisions to the DHS TRIP procedures and, in particular, because the TSA Administrator now is clearly the authority to remove from or to maintain DHS TRIP applicants on the No-Fly List. In addition, when reviewing the issues under § 46110, the Ninth Circuit would now have the benefit of the evidentiary and procedural record developed in this Court and on which the TSA Administrator acted and can now "grant[] relief without reviewing and modifying TSC orders." This is so because the TSA issued the final order maintaining Plaintiffs on the No-Fly List pursuant to the revised procedures and the TSA has the unfettered authority to remove Plaintiffs from the No-Fly List in the event the Ninth Circuit determines Plaintiffs should be removed. *See Arjmand*, 745 F.3d at 1302.

A. TSC Responsibility for Initial Placement on the No-Fly List

Plaintiffs, nevertheless, contend their substantive claims still implicate TSC orders because TSC is the agency responsible for the initial placement of individuals on the No-Fly List and has the ongoing responsibility for reviewing and, if necessary, removing individuals from the List outside of the DHS TRIP process. Plaintiffs, however, are not acting outside of the DHS TRIP process, and, by seeking only prospective relief, Plaintiffs are merely attempting to redress their ongoing placement on the No-Fly List. After employing the revised DHS TRIP process,

therefore, the TSA Administrator's order is the proximate reason why Plaintiffs remain on the No-Fly List and reversal of the TSA orders as to the remaining Plaintiffs would completely satisfy their requests for relief. A district court, however, does not have jurisdiction to do so under § 46110.

B. TSC's Role in Disclosures to Plaintiffs and Compilation of Record for the TSA Administrator

Plaintiffs, as noted, also contend jurisdiction over their substantive claims remains in this Court because of TSC's role in determining the information that is conveyed to the traveler and the information that is ultimately conveyed to the TSA Administrator. With respect to TSC's role in determining the information that may be released to the traveler, this Court has already determined that Defendants properly identified the information that could be released and the information that must be withheld when the Court granted summary judgment to Defendants on Plaintiffs' procedural claims. *See* Order (#337) issued Oct. 6, 2016. Plaintiffs' argument regarding TSC's control over the information that is released to the traveler, therefore, is an argument that goes to this Court's jurisdiction over the already-adjudicated procedural claims rather than the Court's jurisdiction over the purely substantive claims that remain.[4]

[4] The Court notes this consideration may effectively limit this Court's rationale to the facts of this case. In the

Moreover, Plaintiffs are incorrect that TSC exercises exclusive control over selecting the information that is provided to the TSA Administrator. As noted, it is undisputed that the TSA Administrator may request additional information from TSC and/or the nominating agency, and the Administrator could reject TSC's recommendation and order the traveler removed from the No-Fly List if the Administrator is not satisfied with the information provided by TSC. Ultimately, therefore, the fact that TSC plays a role in determining the information that can be disclosed to the traveler and in providing a record and recommendation to the TSA Administrator does not change the fact that the TSA Administrator is the ultimate decision-maker with respect to whether Plaintiffs are to remain on the No-Fly List. Accordingly, as noted, the reviewing court can now "grant[] relief without reviewing and modifying TSC orders." *See Arjmand*, 745 F.3d at 1302.

C. Necessity of a Court Capable of Receiving Evidence

Finally, Plaintiffs contend their substantive claims require

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ordinary course, judicial review of a DHS TRIP determination will involve both procedural and substantive aspects because the reviewing court must determine both whether the Defendants provided sufficient information to the traveler and whether the TSA Administrator's substantive decision is supported by the record. Because only Plaintiffs' substantive claims remain pending in this case, however, this Court cannot determine whether the hybrid nature of an ordinary judicial review of a DHS TRIP determination would lead to a different result.

a forum in a court that is capable of receiving evidence. Plaintiffs, in particular, assert their substantive claims are grounded in substantive due process, and, therefore, the Court will be required to consider information outside of the administrative record as to each individual Plaintiff. This argument stems from the Ninth Circuit's discussion in *Ibrahim* in which the court observed:

> Our interpretation of section 46110 is consistent not merely with the statutory language but with common sense as well. Just how would an appellate court review the agency's decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government's decision to put Ibrahim's name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.

Ibrahim, 538 F.3d at 1256.

The landscape as to this issue in this case, however, has changed significantly since *Ibrahim*. The revised DHS TRIP procedures generated an administrative record for the court of appeals to review, and that record includes all information material to the traveler remaining on the No-Fly List as well as any information that the traveler chooses to submit after being provided notice of the reasons for his or her inclusion on the No-Fly List and an unclassified summary of the evidence supporting those reasons. Moreover, to the extent that Plaintiffs contend their constitutional claims (as opposed to

their claims under the Administrative Procedure Act) challenging the merits of their ongoing placement on the No-Fly List would implicate information beyond the administrative record, the court of appeals would, nonetheless, have jurisdiction over such claims because they are "inextricably intertwined" with the TSA order. *See Latif*, 686 F.3d at 1128 ("The 'inescapably intertwined' doctrine 'prevents plaintiffs from crafting constitutional tort claims either as a means of relitigat[ing] the merits of the previous administrative proceedings, or as a way of evading entirely established administrative procedures.'")(quoting *Americopters*, 441 F.3d at 736).

In any event, as a practical matter a civil plaintiff's constitutional claim is unlikely to be decided on a record materially different from the administrative record because a civil plaintiff could not likely obtain through discovery the type of sensitive, national-security information that Defendants are entitled to withhold during the administrative process under the revised DHS TRIP procedures. *See Latif*, 28 F. Supp. 3d at 1162 (holding although Defendants must provide Plaintiffs with notice of the reasons for their placement on the No-Fly List that is "reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List," such disclosures by Defendants "may be limited or withheld altogether because any such disclosure would

create an undue risk to national security."). In light of the fact that Plaintiffs already have had an opportunity to submit responsive information during the revised DHS TRIP process that will be available to the reviewing court as part of the administrative record (*see id.*), the record on which a court would decide the substantive due-process claims would be materially similar to the administrative record.

Ultimately Plaintiffs seek an up-or-down determination of their substantive claims regarding whether Defendants have sufficient justification to maintain Plaintiffs on the No-Fly List. The Court concludes such a determination falls squarely within the scope of the final orders issued by the TSA Administrator at the conclusion of the revised DHS TRIP process. Because § 46110 "'grants exclusive jurisdiction to the federal courts of appeals to 'review' the 'order[s]' of a number of agencies, including the Transportation Security Administration,'" this Court concludes jurisdiction over Plaintiffs' remaining substantive claims lies in the Ninth Circuit Court of Appeals. *See Arjmand*, 745 F.3d at 1302 (quoting *Ibrahim*, 538 F.3d at 1254).

Accordingly, on this record the Court **GRANTS** Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction.

PLAINTIFFS' MOTION (#352) FOR LEAVE TO CONDUCT LIMITED JURISDICTIONAL DISCOVERY

Plaintiffs move for leave to conduct jurisdictional discovery before resolution of Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction. In particular, Plaintiffs seek discovery of information regarding (1) TSC's control over and access to information; (2) TSC decision-making and actions leading up to its recommendation to the TSA Administrator; and (3) conduct by TSC and TSA specific to Plaintiffs' DHS TRIP inquiries.

I. TSC's Control Over and Access to Information

In the first category of proposed jurisdictional discovery, Plaintiffs seek details about the procedures under which TSC provides information to the TSA Administrator, including whether TSC is required to provide to the Administrator all information that TSC considered, including information inconsistent with the decision.

In this regard the parties stipulated as follows:

> The information the TSC provides to the TSA administrator may be a summary of the information TSC relied on to make its determination regarding whether the individual should remain on the No Fly List, and does not necessarily include all underlying documentation. The TSC's recommendation to the TSA Administrator may contain classified and/or law enforcement sensitive information.

Joint Stipulations (#347) Regarding Jurisdiction at ¶ 18. To the extent that the record is unclear or insufficient, however, the TSA Administrator has the authority to request additional information from either TSC or a nominating agency. *Id.* at ¶ 19.

Moreover, to the extent that information is material (either inculpatory or exculpatory) to the Defendants' No-Fly List determination, that information must be in the administrative record provided to the reviewing court because Defendants are required either (a) to provide that information to each Plaintiff "in order to permit such Plaintiff to respond meaningfully to the reasons he has been placed on the No-Fly List" or (b) to explain to the reviewing court why that information could not be disclosed to the Plaintiff. *See Latif*, 2016 WL 1239925, at *15-*16.

Ultimately, however, the Court concludes Plaintiffs' requested discovery is not relevant to Defendants' Motion for a more fundamental reason: The TSA Administrator now has the authority to seek additional information and, in any event, makes the final decision regarding whether the traveler remains on the No-Fly List. The mere fact that TSC plays a role in providing information and a recommendation to the TSA Administrator does not mean the court of appeals could not "grant[] relief" on Plaintiffs' purely substantive claims "without reviewing and modifying TSC orders." *See Arjmand*, 745 F.3d at 1302.

Accordingly, the Court concludes discovery as to TSC's control over and access to information is not necessary to resolve the jurisdictional question at issue in Defendants' Motion.

II. TSC Decision-Making and Actions Before Issuing its Recommendation to the TSA Administrator

In their second category of requested jurisdictional discovery, Plaintiffs seek information regarding (1) TSC's authority to remove individuals unilaterally from the No-Fly List before issuing a recommendation to the TSA Administrator and (2) TSC's role in determining or providing the relevant criteria relevant to the Plaintiffs' placement on the No-Fly List.

The Court finds Plaintiffs' arguments regarding TSC's authority to remove individuals unilaterally from the No-Fly List are speculative and unpersuasive. Moreover, this case is not about individuals who have been removed from the No-Fly List, but instead is about the remaining Plaintiffs who have been maintained on the No-Fly List. In other words, if TSC unilaterally removed an individual from the No-Fly List, there would not be any basis for judicial review in circumstances such as those raised here, and, therefore, the ability of the court of appeals to provide relief under § 46110 would not be implicated. Thus, TSC's authority does not affect a reviewing court's ability to grant relief to a traveler who remains on the No-Fly List without the court reviewing and modifying TSC orders.

Finally, the Court concludes how TSC determines the applicable criteria is not relevant to the reviewing court's substantive consideration of whether the TSA Administrator properly concluded those criteria were satisfied by the record.

Again, the ability of the court of appeals to "grant[] relief" on Plaintiffs' purely substantive claims "without reviewing and modifying TSC orders" is unaffected by the details of how TSC determines the criteria that are applicable. *See Arjmand*, 745 F.3d at 1302.

III. Plaintiff-Specific Information

Finally, Plaintiffs seek information regarding the handling of each of Plaintiffs' DHS TRIP inquiries by TSC and TSA. In particular, Plaintiffs seek information as to whether TSC provided the TSA Administrator with all of the information on which it relied in making its recommendation; whether the TSA Administrator requested additional information; and, if so, whether TSC provided that information.

Again, the Court concludes this information is not relevant to the fundamental issue of whether a reviewing court can "grant[] relief without reviewing and modifying TSC orders." *See id.* With respect to Plaintiffs' substantive claims, the sole responsibility of the reviewing court would be to determine whether the TSA Administrator's determination is sufficiently supported by the already-developed record.

On this record, therefore, the Court concludes the jurisdictional discovery that Plaintiffs seek is not relevant to the jurisdictional question presented by Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction, and, therefore, the

Court **DENIES** Plaintiffs' Motion (#352) for Leave to Conduct Limited Jurisdictional Discovery.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion (#348) to Dismiss for Lack of Jurisdiction, which the Court construes as a Motion for Summary Judgment, and **DENIES** Plaintiffs' Motion (#352) for Leave to Conduct Limited Jurisdictional Discovery.

The Court directs the parties to confer and to submit to the Court **no later than May 12, 2017,** a proposed form of judgment that summarizes the Court's disposition of all issues litigated to date and that separately identifies those as to which the Court concludes it lacks jurisdiction to proceed. After the Court enters its concluding judgment, the Court will then consider any petition(s) for attorneys' fees.

IT IS SO ORDERED.

DATED this 21st day of April, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF; MOHAMED SHEIKH ABDIRAHMAN KARIYE; RAYMOND EARL KNAEBLE, IV; NAGIB ALI GHALEB; ABDULLATIF MUTHANNA; FAISAL NABIN KASHEM; ELIAS MUSTAFA MOHAMED; IBRAHEIM Y. MASHAL; SALAH ALI AHMED; AMIR MESHAL; STEPHEN DURGA PERSAUD; and MASHAAL RANA,	3:10-cv-00750-BR
Plaintiffs,	ORDER
v.	
LORETTA E. LYNCH, in her official capacity as Attorney General of the United States; JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation; and CHRISTOPHER M. PIEHOTA, in his official capacity as Director of the FBI Terrorist Screening Center,	
Defendants.	

BROWN, Judge.

This matter comes before the Court on the parties' remaining Cross-Motions for Summary Judgment. Those Motions are:

1. Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment; and

2. Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs.

On March 28, 2016, the Court issued an Opinion and Order (#321), *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *15 (D. Or. Mar. 28, 2016), in which it granted in part and denied in part Defendants' Combined Cross-Motion (#251) for Partial Summary Judgment; denied Plaintiffs' Renewed Combined Motion (#206) for Partial Summary Judgment; and deferred ruling on Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs and Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment to permit Defendants to supplement the record as the Court directed with sufficient information for the Court to complete its analysis and rule on those Motions. In particular, the Court concluded in its Opinion and Order that it could not completely resolve the parties' Cross-Motions as to procedural due-process because it could not "determine from this record whether the unclassified summaries of Defendants' reasons for placing Plaintiffs on the No-Fly List conveyed sufficient material information to Plaintiffs to satisfy procedural due-process standards because the record does not

reflect what information Defendants withheld or the reasons for withholding such information." *Latif*, 2016 WL 1239925, at *15.

Accordingly, the Court directed Defendants to

> submit to the Court as to each Plaintiff the following: (1) a summary of any material information (including material exculpatory or inculpatory information) that Defendants withheld from the notice letters sent to each Plaintiff and (2) an explanation of the justification for withholding that information, including why Defendants could not make additional disclosures.

Id., at 20. The Court stated:

> Defendants' supplemental submission may be in the form of declarations or other statements from an officer or officers with personal knowledge of the No-Fly List determinations as to each Plaintiff. If necessary to protect sensitive national security information, Defendants may make such submissions *ex parte* and *in camera*. If Defendants submit any materials *ex parte* and *in camera*, however, Defendants must also make a filing on the public record that memorializes the submission and provides as much public disclosure of the substance of Defendants' submission as national security considerations allow.

Id. As noted, this matter is now back before the Court on those still unresolved Cross-Motions for Summary Judgment.[1]

Since the Court's March 28, 2016, Opinion and Order, Plaintiffs filed on April 12, 2016, a Notice (#324) of the Death of a Party, Steven William Washburn. Because Washburn only sought prospective relief, Plaintiffs concede all claims as to

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[1] The Court incorporates herein the factual background and legal analysis in its March 28, 2016, Opinion and Order (#321), *see Latif*, 2016 WL 1239925, and will not restate those matters in this Order.

Washburn may now be dismissed as moot. Accordingly, the Court **DISMISSES with prejudice** Plaintiff's Third Amended Complaint as to Washburn.

On May 5, 2016, after obtaining an extension of time to file their supplemental materials, Defendants filed a Second Supplemental Memorandum (#327) in Support of their Motion for Summary Judgment together with a Notice (#328) of Lodging *Ex Parte, In Camera* Materials in which Defendants publicly stated it had lodged "with the Department of Justice's Classified Information Security Officer ("CISO") the classified declaration of Michael Steinbach" for secure storage and transmission to the Court. On May 26, 2016, Plaintiffs filed a Response (#329) to Defendants' Second Supplemental Memorandum in Support of their Motion for Summary Judgment.

On July 7, 2016, the Court issued the following Order (#330):

> The Court makes this record to give notice to Plaintiffs that the Court has by separate *Ex Parte* Order filed with the Classified Information Security Officer directed Defendants to make a supplemental filing, *ex parte* and under seal if necessary, no later than August 1, 2016, regarding the materials referenced in Defendants' Notice (#328) of Lodging *Ex Parte, In Camera* Materials. After the Court considers that filing, the Court will determine whether the record is then sufficient for the Court to resolve the parties' pending cross-motions and will inform the parties accordingly.

On July 19, 2016, Defendants filed a Motion (#331) for Extension of Time to File Supplemental Submission. On July 25, 2016,

Plaintiffs opposed Defendants' Motion and requested "further information for the public record about the subject matter of the supplemental filing that Defendants have been directed to submit, including the basis for making that filing ex parte and in camera." Pls.' Opp'n (#333) to Defs.' Mot. for Extension of Time to File Supplemental Materials. On August 3, 2016, the Court granted Defendants' Motion for Extension of Time and concluded it was "unable to provide any additional explanation on the record." Order (#334) (issued Aug. 3, 2016).

On August 29, 2016, Defendants filed a Notice (#335) of Lodging *ex Parte, in Camera* Materials in response to the Court's Order (#330).

Having reviewed and considered all of the material Defendants submitted in response to the Court's March 28, 2016, Opinion and Order (#321) and the Court's July 7, 2016, Order (#330), the Court is satisfied that the materials filed by Defendants sufficiently address the issues raised in the Court's *Ex Parte* Order filed with the CISO on July 7, 2016.

In addition, after a thorough review of the materials submitted with Defendants' Notice (#328) of Lodging *Ex Parte, In Camera* Materials filed in response to the Court's March 28, 2016, Opinion and Order (#321), the Court concludes Defendants have provided sufficient justifications for withholding additional information in response to each of the Plaintiffs' revised DHS

TRIP inquiries.

Accordingly, based on the Court's Opinion and Order (#321) and this Order, the Court now **GRANTS** Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs and **DENIES** Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment.

CASE-MANAGEMENT ORDER

Consistent with the Court's March 28, 2016, Order (#321), the Court directs the parties to submit a single, joint status report **no later than October 20, 2016,** with a proposed expedited briefing schedule for the Court to consider Defendants' argument that the revisions in the DHS TRIP procedures "effectively abrogate the Ninth Circuit's holdings that this Court has jurisdiction to continue to adjudicate Plaintiffs' remaining claims." Opinion and Order (#321) at 61-62; *Latif*, 2016 WL 1239925, at *20.

IT IS SO ORDERED.

DATED this 6th day of October, 2016.

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF; MOHAMED SHEIKH ABDIRAHMAN KARIYE; RAYMOND EARL KNAEBLE, IV; STEVEN WILLIAM WASHBURN; NAGIB ALI GHALEB; ABDULLATIF MUTHANNA; FAISAL NABIN KASHEM; ELIAS MUSTAFA MOHAMED; IBRAHEIM Y. MASHAL; SALAH ALI AHMED; AMIR MESHAL; STEPHEN DURGA PERSAUD; and MASHAAL RANA,

Plaintiffs,

v.

LORETTA E. LYNCH,[1] in her official capacity as Attorney General of the United States; JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation; and CHRISTOPHER M. PIEHOTA, in his official capacity as Director of the FBI Terrorist Screening Center,

Defendants.

3:10-cv-00750-BR

OPINION AND ORDER

[1] The Court substitutes Loretta E. Lynch as Attorney General of the United States, who was sworn in on April 27, 2015.

STEVEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Suite 1600
Portland, OR 97204-2099
(503) 802-2040

HINA SHAMSI
HUGH HANDEYSIDE
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ALEXANDRA F. SMITH
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103-0566
(505) 266-5915

AHILAN ARULANANTHAM
CATHERINE A. WAGNER
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-9500

ALAN L. SCHLOSSER
JULIA HARUMI MASS
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

MITCHELL P. HURLEY
JUSTIN H. BELL
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036-6745
(212) 872-1011

Attorneys for Plaintiffs Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Mohamed Meshal, and Steven Washburn

WILLIAM GENEGO
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

JOEL P. LEONARD
Elliot, Ostrander & Preston, P.C.
Union Bank of California Tower
707 S.W. Washington Street, Suite 1500
Portland, OR 97205-3532
(503) 224-7112

Attorneys for Plaintiff Stephen Persaud

LORETTA E. LYNCH
United States Attorney General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Branch Director
ADAM D. KIRSCHNER
AMY ELIZABETH POWELL
BRIGHAM J. BOWEN
SAMUEL M. SINGER
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Suite 5377
Washington, DC 20010
(202) 514-9836

BILLY J. WILLIAMS
United States Attorney
JAMES E. COX, JR.
Assistant United States Attorney
District of Oregon
1000 S.W. Third Avenue, Ste. 600
Portland, OR 97204
(503) 727-1026

Attorneys for Defendants

BROWN, Judge.

This "No-Fly List" case was filed nearly six years ago,[2] has been before this Court on remand from the Ninth Circuit for nearly three years, and now comes before the Court on various Motions for Partial Summary Judgment as enumerated below. Although other courts[3] have addressed issues related to the No-Fly List, the parties' current Motions raise difficult issues of first impression involving only Plaintiffs' claims for violation of procedural due-process and the Administrative Procedure Act (APA), 5 U.S.C. § 706. This Opinion and Order, therefore, does not address Plaintiffs' substantive due-process claims as to their placement on the No-Fly List or the statutory judicial review of the Transportation Security Administration's (TSA) administrative determination that Plaintiffs should remain on the No-Fly List, issues that are necessarily reserved for later proceedings.

The current Motions before the Court are:

1. Plaintiffs' Renewed Combined Motion (#206) for Partial

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[2] The six Plaintiffs still in this action (Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Meshal, Steven Washburn, and Stephen Persaud) have remained on the List at least since then.

[3] *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA (N.D. Cal.); *Mohamed v. Holder*, No. 1:11-CV-50 (AJT/TRJ) (E.D. Va.); *Tarhuni v. Holder*, No. 3:13-cv-00001-BR (D. Or.); *Fikre v. Fed. Bureau of Investigation*, No. 3:13-cv-00899-BR (D. Or.); *Mokdad v. Holder*, No. 13-12038 (E.D. Mich.).

Summary Judgment;

2. Defendants' Combined Cross-Motion (#251) for Partial Summary Judgment;

3. Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment; and

4. Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs.

In their Motions Plaintiffs seek a ruling that the revised Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) procedures that Defendants implemented following this Court's Opinion and Order (#136) issued June 24, 2014, (June 2014 Opinion) violate procedural due process and the APA because:

1. The reasonable-suspicion standard that Defendants employed when placing an individual on the No-Fly List is insufficiently rigorous, and Defendants should only be permitted to place an individual on the No-Fly List if there is clear and convincing evidence to support such listing.

2. Defendants failed to provide Plaintiffs with a full statement of the reasons for each Plaintiff's placement on the No-Fly List;

3. Defendants failed to provide Plaintiffs with all material evidence concerning their placement on the No-Fly List;

4. Defendants failed to provide Plaintiffs with all

exculpatory evidence concerning their placement on the No-Fly List;

5. Defendants failed to provide Plaintiffs with a live hearing before a neutral decision-maker at which Plaintiffs could confront and cross-examine witnesses; and

6. Defendants failed to provide Plaintiffs with additional disclosures using procedures similar to those under the Classified Information Procedures Act (CIPA), which include making disclosures to counsel who have security clearances, issuing protective orders, and presenting unclassified summaries of classified information.

Defendants, on the other hand, contend they applied revised DHS TRIP procedures that satisfy procedural due-process standards to each of the six remaining Plaintiffs, and, therefore, Plaintiffs' Motions should be denied and Defendants' Motions should be granted.

The Court heard oral argument on the parties' Motions on December 9, 2015, and, after the parties filed supplemental memoranda, took the matter under advisement on January 8, 2016, to resolve the primary issue whether Defendants' revised DHS TRIP procedures provided the remaining six Plaintiffs with sufficient notice of the reasons for placing and retaining them on the No-Fly List and a meaningful opportunity to challenge those reasons consistent with procedural due process.

After thoroughly considering these Motions on the record as a whole, the Court concludes Defendants' revised DHS TRIP procedures satisfy in principle most of the procedural due-process requirements that the Court set out in its June 2014 Opinion. *See Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). The Court, nevertheless, concludes the record is not sufficient to resolve whether such procedures were, in fact, constitutionally sufficient as to each Plaintiff because the record does not identify the information that Defendants withheld from Plaintiffs or the reasons for withholding that information.

In particular and for the reasons that follow, the Court concludes:

1. Due process does not require Defendants to apply the clear and convincing evidence standard to the No-Fly List determinations that Defendants made as to these Plaintiffs nor to provide original evidence to support such determinations. The reasonable-suspicion standard does not violate procedural due process when applied to a particular Plaintiff as long as Defendants provide such Plaintiff with (1) a statement of reasons that is sufficient to permit such Plaintiff to respond meaningfully and (2) any material exculpatory or inculpatory information in Defendants' possession that is necessary for such a meaningful response.

2. In some instances, however, Defendants may limit

or withhold disclosures altogether in the event that such disclosures would create an undue risk to national security. In such instances Defendants must implement procedures to minimize the amount of material information withheld. In particular, Defendants must determine whether the information can be summarized in an unclassified summary and/or whether additional disclosures can be made to Plaintiffs' counsel who have the appropriate security clearances. When possible, Defendants must do so. When it is not possible, Defendants must so certify through a competent witness with personal knowledge of the reasons for Defendants' conclusion that they cannot make such additional disclosures.

3. Procedural due process in this context does not require Defendants to provide Plaintiffs with a live hearing before a neutral decision-maker at which Plaintiffs could confront and cross-examine witnesses.

4. Defendants' revised DHS TRIP procedures satisfy in principle most of the procedural due-process requirements that the Court set out in its June 2014 Opinion, but the Court cannot determine on this record whether Defendants provided to each Plaintiff notice that was actually sufficient to permit each Plaintiff to respond meaningfully. In particular, the record does not contain information that is essential to adjudicate Plaintiffs' individual procedural due-process claims; *i.e.*, what

information, including material exculpatory or inculpatory information, that Defendants did not disclose to Plaintiffs or the reasons for withholding that information; which mitigating measures Defendants considered as to such nondisclosures; and whether any Plaintiff is represented by counsel who have the appropriate security clearance to review any such withheld information.

Accordingly, and for the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Defendants' Combined Cross-Motion (#251) for Partial Summary Judgment; **DENIES** Plaintiffs' Renewed Combined Motion (#206) for Partial Summary Judgment; and **DEFERS RULING** on Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs and Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment until Defendants supplement the record as directed herein with sufficient information for the Court to rule on those Motions.

BACKGROUND[4]

Plaintiffs, all of whom are United States citizens, challenge their placement on the No-Fly List and the procedures

[4] The Court incorporates herein the complete statement of the factual background of each Plaintiff and the administrative procedures at issue as stated in its June 2014 Opinion. *See Latif*, 28 F. Supp. 3d 1134, 1140-46.

afforded to them to contest that placement.

I. The No-Fly List

The Terrorist Screening Center (TSC) develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB), which is administered by the Federal Bureau of Investigation (FBI) and staffed by multiple agencies. The TSC provides identity information concerning known or suspected terrorists from the TSDB to other government agencies that use the information for screening purposes.

TSC accepts nominations to the TSDB as long as two requirements are met: (1) the biographical information associated with the nomination contains sufficient identifying data so that a person being screened can be matched to or disassociated from a watchlisted person in the TSDB and (2) the nomination is supported by information that amounts to a reasonable suspicion that the individual is a known or suspected terrorist. This reasonable-suspicion standard "requires articulable intelligence or information which, taken together with rational inferences from those facts, reasonably warrant the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities." Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs (#173) at 4.

The TSDB contains multiple sublists, each of which has its own additional substantive criteria. The No-Fly List is one of the sublists within the TSDB. Any nomination to the No-Fly List must meet at least one of the following additional substantive derogatory criteria:

1) A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of air piracy, or threat to an airline, passenger, or civil aviation security); or

2) A threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland; or

3) A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. § 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or

4) A threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs (#173) at 5. Individuals who are placed on the No-Fly List are prohibited from boarding any commercial flight that will pass through or over United States airspace.

II. Original Redress Procedures

A traveler who is denied boarding on a commercial airline may submit an application for redress through DHS TRIP. The traveler submits to DHS TRIP an inquiry that provides the

traveler's identification and their contact information. DHS TRIP then determines whether that traveler is an exact or near match to an individual in the Terrorist Screening Database (TSDB).

If DHS TRIP determines the traveler is an exact or near match for an individual within the TSDB, DHS TRIP forwards the inquiry to the TSC. On receipt of the inquiry the TSC again determines whether the traveler is an exact match to an identity in the TSDB and, if so, whether the traveler should continue to be in the TSDB.

Pursuant to procedures in place at the time this action was filed (original procedures), DHS TRIP would send a determination letter after TSC finished its review advising the traveler that DHS TRIP had completed its review. That DHS TRIP determination letter neither confirmed nor denied whether the traveler was in the TSDB or on the No-Fly List and did not provide any further details about why the traveler may or may not have been in the TSDB or on the No-Fly List. Moreover, pursuant to such original procedures, the DHS TRIP determination letters did not provide assurances about the traveler's ability to undertake future travel nor any meaningful opportunity to contest or to correct the record on which any such determination was based. In some cases a DHS TRIP determination letter would advise the traveler that he or she could pursue an administrative appeal of the

determination with TSA or could seek judicial review in a United States court of appeals pursuant to 49 U.S.C. § 46110.

In the event that the traveler sought judicial review, the government then provided to the reviewing court (but not to the traveler) the administrative record that contained all of the information the agency relied on to maintain the listing as well as any information submitted by the petitioner during the administrative process. If the court determined after review that the administrative record supported the petitioner's inclusion on the No-Fly List, the court would deny the petition for review.

III. Plaintiffs' Lawsuit and the Court's June 2014 Opinion

Plaintiffs filed their Complaint in this action on June 30, 2010, and alleged the DHS TRIP procedures available to them violated their rights to procedural and substantive due-process under the Fifth Amendment to the United States Constitution and violated the APA. After this matter was remanded from the Ninth Circuit on jurisdictional grounds, the parties filed cross-motions (#85, #91) for partial summary judgment as to Plaintiffs' procedural due-process and APA claims.

On June 24, 2014, the Court issued the June 2014 Opinion in which it held the DHS TRIP procedures in effect at the time violated Plaintiffs' rights to procedural due process. As a result the Court directed Defendants to fashion new procedures to

reconsider Plaintiffs' DHS TRIP inquiries. The Court required Defendants to provide each Plaintiff with notice regarding their status on the No-Fly List and the reasons for any Plaintiff's placement on the List that was reasonably calculated to permit each such Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List. *See Latif*, 28 F. Supp. 3d at 1161-62. Recognizing there could be instances in which Defendants could not provide a full statement of reasons because doing so would create an undue risk of disclosing sensitive, national security information, the Court directed Defendants in such circumstances to use procedures to minimize the withholding that "could include, but are not limited to, the procedures identified by the Ninth Circuit in *Al Haramain* [*Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 984 (9th Cir. 2012)]; that is, Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel." *Latif*, 28 F. Supp. 3d at 1162. The Court did not foreclose the possibility that in some cases the disclosures made to an individual Plaintiff "may be limited or withheld altogether because any such disclosure would create an undue risk to national security." The Court indicated any such determination must be made on a case-by-case basis, however, and must be subject to judicial review. *Id.*

IV. Revised Procedures and Reconsideration of Plaintiffs' DHS Trip Inquiries

As a result of the Court's June 2014 Opinion and pursuant to the Court's Case-Management Order (#152) issued October 3, 2014, Defendants disclosed on October 10, 2014, that seven of the Plaintiffs were not then on the No-Fly List. In addition, Defendants reported they had reconsidered each of the DHS TRIP inquiries of the remaining six Plaintiffs (Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Meshal, Steven Washburn, and Stephen Persaud) pursuant to newly-formulated procedures.

On November 24 and 26, 2014, DHS TRIP sent to each of the remaining six Plaintiffs a notification letter that identified the applicable substantive criteria and provided an unclassified summary that included some reasons for placement of each individual on the No-Fly List. Although the unclassified summaries varied in length and detail, the letters did not disclose all of the reasons or information on which Defendants relied to maintain each Plaintiff's placement on the No-Fly List. Defendants stated they were "unable to provide additional disclosures." Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs (#173) at 6. The November 2014 DHS TRIP notification letters invited each Plaintiff to submit a written response by December 15, 2014.

By letter dated December 5, 2014, counsel for Plaintiffs

wrote to counsel for Defendants seeking additional information and procedures. Defendants declined to provide any additional disclosures or procedures.

Plaintiffs Faisal Kashem, Raymond Knaeble, and Steven Washburn responded to their DHS TRIP notification letters on December 15, 2014; Plaintiff Sheikh Abdirahman Kariye responded on December 16, 2014; Plaintiff Amir Meshal responded on December 18, 2014; and Plaintiff Stephen Persaud responded on January 8, 2015.

Pursuant to a procedural change instituted after the Court's June 2014 Opinion, the Acting Administrator of the TSA conducted his own review of the information available regarding each Plaintiff's placement on the No-Fly List, including the information submitted by Plaintiffs. The Acting Administrator issued final determinations as to Plaintiffs Kashem, Kariye, Knaeble, Meshal, and Washburn on January 21, 2015, and issued a final determination as to Plaintiff Persaud on January 28, 2015. The TSA Acting Administrator concluded each of the six Plaintiffs should remain on the No-Fly List.

STANDARDS

Summary judgment is appropriate when there is not a "'genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Washington Mut., Inc.*

v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011)(quoting Fed. R. Civ. P. 56(a)). The moving party must show the absence of a dispute as to a material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). *See also Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of general issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

A dispute as to a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9th Cir. 1982)).

A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant of summary judgment." *Deering v. Lassen Cmty. Coll. Dist.*, No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at *2 (E.D. Cal., Jan. 20, 2011)(citing *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1987)). *See also Moore v. Potter*, 701 F. Supp. 2d 1171 (D. Or. 2010). When the nonmoving party's claims are factually implausible, that party must "'come forward with more persuasive evidence than otherwise would be necessary.'" *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009)(quoting *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

Plaintiffs move for summary judgment both collectively and individually on their procedural due-process and APA claims on the basis that the new DHS TRIP procedures do not provide Plaintiffs with a sufficient opportunity to contest their placement on the No-Fly List. Plaintiffs' collective Motion addresses those issues that are common to all Plaintiffs. In

their individual Motions each Plaintiff contends the DHS TRIP procedures were constitutionally deficient as applied to them.

Defendants, on the other hand, move for summary judgment on the basis that there is not any genuine dispute of material fact as to the constitutionality of the revised DHS TRIP procedures. Defendants filed a collective Motion regarding the issues common to all Plaintiffs and separate Cross-Motions as to each individual Plaintiff.

I. Procedural Due-Process Claims

A. Procedural Due-Process Standards

"The Due Process Clause of the Fourteenth Amendment imposes procedural constraints on governmental decisions that deprive individuals of liberty or property interests." *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1190 (9th Cir. 2015). "Due process protections extend only to deprivations of protected interests." *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015). "Thus, the first question in any case in which a violation of procedural due process is alleged is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Nozzi*, 806 F.3d at 1190-91.

After the plaintiffs have established they have been deprived of a protected property or liberty interest, the question becomes "'what process is due to protect [the]

plaintiffs' . . . interest.'" *Id.* at 1192 (quoting *Nozzi v. Hous. Auth. of City of Los Angeles*, 425 F. App'x 539, 542 (9th Cir. 2011)). "Which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake." *Nozzi*, 806 F.3d at 1192.

"[I]n *Mathews v. Eldridge*, the Supreme Court set forth a three-part inquiry to determine whether the procedures provided to protect a liberty or property interest are constitutionally sufficient." *Id.* at 1192 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). "First, courts must look at the nature of the interest that will be affected by the official action, and in particular, to the 'degree of potential deprivation that may be created.'" *Nozzi*, 806 F.3d at 1192-93 (quoting *Mathews*, 424 U.S. at 341). "Second, courts must consider the 'fairness and reliability' of the existing procedures and the 'probable value, if any, of additional procedural safeguards.'" *Nozzi*, 806 F.3d at 1193 (quoting *Mathews*, 424 U.S. at 343). Third, courts must consider "the Government's interest, including the function involved" (*Mathews*, 424 U.S. at 335) as well as "the public interest, which 'includes the administrative burden and other societal costs that would be associated with' additional or substitute procedures." *Nozzi*, 806 F.3d at 1193 (quoting *Mathews*, 424 U.S. at 347).

"In 'balancing' the *Mathews* factors, [the court is] mindful

that 'the requirements of due process are flexible and call for such procedural protections as the particular situation demands.'" *Vasquez v. Rackauckas*, 734 F.3d 1025, 1044 (9th Cir. 2013)(quoting *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005)). It is fundamental, however, that "[d]ue process requires notice and an opportunity to be heard." *Carpenter v. Mineta*, 432 F.3d 1029, 1036 (9th Cir. 2005).

B. Analysis Regarding the Parties' Collective Cross-Motions (#206, #251) for Partial Summary Judgment

As noted, the parties make largely mirror-image arguments in their cross-motions related to all Plaintiffs. Plaintiffs contend under the *Mathews* analysis that the revised DHS TRIP procedures do not satisfy the requirements of procedural due process. Defendants, on the other hand, contend the revised procedures are constitutionally sufficient. Accordingly, the Court addresses the issues raised in the parties' collective cross-motions through the *Mathews* analysis.

1. Protected Liberty Interest

In its June 2014 Opinion the Court held "Plaintiffs have constitutionally-protected liberty interests in traveling internationally by air, which are significantly affected by being placed on the No-Fly List." *Latif*, 28 F. Supp. 3d at 1149. In addition, the Court held the record on summary judgment sufficiently implicated Plaintiffs' "constitutionally-protected liberty interests in their reputations." *Id.* at 1150.

The current record as to the implication of Plaintiffs' constitutionally-protected liberty interests is materially the same as it was at the time of the June 2014 Opinion. Accordingly, on this record the Court adheres to its conclusion in the June 2014 Opinion as to Plaintiffs' constitutionally-protected liberty interests.

2. The *Mathews* Three-Part Balancing Test

Because the Court has determined placement on the No-Fly List implicates Plaintiffs' constitutionally-protected liberty interests in international travel and reputation, the Court must determine "'what process is due to protect [the] plaintiffs' . . . interest'" under the *Mathews* factors. *See Nozzi*, 806 F.3d at 1192. The Court first considers the nature of the private interests involved, and then the Court considers the governmental and public interests at stake before turning to the risk of erroneous deprivation and the probative value of additional procedural safeguards.

a. Nature of the Private Interests

As they have throughout the course of these proceedings, Plaintiffs contend placement on the No-Fly List implicates their protected liberty interests in (1) international travel and (2) freedom from false governmental stigmatization under the "stigma-plus" doctrine.

(1) Right to International Travel

As noted, in its June 2014 Opinion the Court concluded "Plaintiffs' inclusion on the No-Fly List constitutes a significant deprivation of their liberty interests in international travel." *Latif*, 28 F. Supp. 3d at 1150. The Court pointed out that "[o]ne need not look beyond the hardships suffered by Plaintiffs to understand the significance of the deprivation of the right to travel internationally," which may include long-term separation from spouses and children, the inability to participate in important religious rites, lost business and employment opportunities, and the inability to attend important personal and family events. *Id.* at 1149. There can be no doubt, therefore, that in these modern times the deprivation of the right to international travel can seriously impact an individual's life.

Nonetheless, "the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation." *Haig v. Agee*, 453 U.S. 280, 306 (1981). In *Agee* the Secretary of State revoked Agee's passport because he had conducted a "continuous campaign to disrupt the intelligence operations of the United States" by exposing Central Intelligence Agency operatives working clandestinely abroad. 453 U.S. at 283-87. Agee filed a lawsuit contending, among other things, that he was entitled to notice and a hearing before the Secretary revoked

his passport. In light of the "substantial likelihood of 'serious damage' to national security or foreign policy" as a result of Agee's activities, the Court held "[t]he Constitution's due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing." *Id.* at 309-10.

The revocation of an individual's passport is a deprivation of the right to international travel at least as significant as placement on the No-Fly List. Accordingly, just as in *Agee*, "the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations," and the DHS TRIP procedures must be upheld as long as they constitute "reasonable government regulation." *Id.* at 306.

(2) Stigma-Plus

"To prevail on a claim under the stigma-plus doctrine, Plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law." *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005)(citing *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002), and *Paul v. Davis*, 424 U.S. 693, 701, 711 (1976)).

As the Court noted in its June 2014 Opinion,

"Plaintiffs' private interests at the heart of their stigma-plus claim are not as strong" as the interests involved in their international travel claim because "the limited nature of the public disclosure in this case mitigates Plaintiffs' claims of injury to their reputations." *Latif*, 28 F. Supp. 3d at 1150. Aside from the incidental public disclosure that may occur at the airport when an individual is denied boarding in that public space, the government does not generally disclose to the public an individual's placement on the No-Fly List. *See id.* at 1150-51.

Nonetheless, Plaintiffs contend their reputational interests are strong because even though Defendants do not disclose publicly Plaintiffs' status on the No-Fly List, their status on the List is disclosed to other governmental agencies such as state and local law-enforcement agencies.[5] The Court, however, is not persuaded because "disclosures of stigmatizing information internally within or between government agencies is not a 'public' disclosure." *Cleavenger v. Univ. of Oregon*, No. 13-cv-01908-DOC, 2015 WL 4663304, at *17 (D. Or. Aug. 6, 2015)(citing *Wenger v. Monroe*, 282 F.3d 1068, 1075 (9th Cir. 2002)).

[5] The Court notes the record does not presently reflect the degree to which information concerning any Plaintiff's No-Fly List status has been publicly disclosed as a result of that Plaintiff's voluntary actions.

Accordingly, although Plaintiffs have constitutionally-protected reputational interests that may in some circumstances be implicated by placement on the No-Fly List, the Court concludes on this record that those interests do not weigh heavily in Plaintiffs' favor and are less significant than Plaintiffs' interests in their right to international travel.

b. Governmental and Public Interests

As the Court noted in its June 2014 Opinion, "the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). *See also Latif*, 28 F. Supp. 3d at 1154. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307 (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)). As the *Al Haramain* court noted, courts "owe unique deference to the executive branch's determination that we face 'an unusual and extraordinary threat to the national security' of the United States." 686 F.3d at 980 (quoting Exec. Order No. 13,224, 66 Fed. Reg. 49079, 49079 (Sep. 23, 2001)). The No-Fly List indisputably serves this interest because commercial aviation remains a frequent target of terrorism and preventing known and suspected terrorists from boarding commercial airliners is a reasonable method of ensuring commercial aviation security.

The government also has a "'compelling interest' in withholding national security information from unauthorized persons." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)). "Certainly the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001). "[T]he Constitution certainly does not require that the government take actions that would endanger national security." *Al Haramain*, 686 F.3d at 980. As this Court stated in its June 2014 Opinion, "[o]bviously, the Court cannot and will not order Defendants to disclose classified information to Plaintiffs." *Latif*, 28 F. Supp. 3d at 1154.

As the Court previously found, therefore, the government interests in ensuring the safety of commercial aviation, combating terrorism, and protecting classified information are compelling. The question, nonetheless, remains whether the Due Process Clause requires the government to provide additional procedural safeguards to protect Plaintiffs' private interests while serving these compelling governmental and public interests or, on the other hand, whether the revised DHS TRIP procedures provided to Plaintiffs strike a constitutionally

adequate balance.

c. Risk of Erroneous Deprivation and Probative Value of Additional Procedural Safeguards

Plaintiffs contend the revised DHS TRIP procedures carry with them an unacceptable risk of erroneous deprivation of their liberty interests and that additional procedural safeguards are necessary.

(1) Risk of Erroneous Deprivation

Plaintiffs contend the risk of erroneous deprivation of their liberty interests inherent in the revised DHS TRIP procedures is unacceptably high because the reasonable-suspicion standard of proof is insufficiently rigorous, the No-Fly List criteria are impermissibly vague, and the "predictive judgments" that inform placements on the No-Fly List are inherently unreliable.

(a) Reasonable Suspicion Standard

Plaintiffs contend the revised DHS TRIP procedures carry with them an unacceptable risk of erroneous deprivation because the reasonable-suspicion standard of proof in combination with arguably insufficient procedural protections create an impermissibly high possibility that an individual may be placed on the No-Fly List when that individual, in fact, does not pose any risk of committing an act of terrorism or present any risk to commercial aviation. *See Latif*, 28 F. Supp. 3d at 1161 (noting the failure to provide sufficient notice under the

previous DHS TRIP procedures was "especially important in light of the low evidentiary standard required to place an individual in the TSDB in the first place."). Rather than the reasonable-suspicion standard that Defendants use to place individuals in the TSDB and on the No-Fly List, Plaintiffs contend the government must apply a clear and convincing evidence standard of proof to No-Fly List determinations in order to satisfy due process. *See Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011).

In *Singh* the Ninth Circuit held in the context of bond determinations in deportation proceedings that the government must prove by clear and convincing evidence that an alien is a flight risk or will be a danger to the community. *Id.* at 1203-04. The *Singh* court noted due process also requires the government to apply the clear and convincing standard in other civil contexts including civil commitment, deportability of an alien, and setting aside a naturalization decree. *Id.* at 1204. Accordingly, the court concluded "[f]or detainees like Singh, who face years of detention before resolution of their removability, the individual interest at stake is without doubt 'particularly important and more substantial than mere loss of money,' and therefore a heightened standard of proof is warranted." *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)).

Plaintiffs' analogy to *Singh*, however, is unconvincing. Unlike *Singh*, which involved the possibility of "years of detention" as a result of the denial of bond in deportation proceedings, or the cases cited by *Singh* that involved greater infringements on an individual's liberty interests like revocation of citizenship, deportation, and civil commitment, the deprivation involved in No-Fly List cases is considerably less. *See Singh*, 638 F.3d at 1203-04. Although the inability to travel internationally by air can certainly have a profound impact on the lives of some, the Court concludes such an infringement on liberty is not on a comparable footing to confinement or the revocation of citizenship.

Similarly, the Court finds unpersuasive Plaintiffs' arguments that placement on the No-Fly List is sufficiently comparable to deportation to support a conclusion that the DHS TRIP procedures do not satisfy due process. Although Plaintiffs' placement on the No-Fly List in some circumstances can, like deportation, result in separation from family, lost business and educational opportunities, and other common practical consequences, noncitizens who are deported from the United States are functionally stripped of all rights guaranteed by the Constitution unlike those who are placed on the No-Fly List. Because the deprivation of liberty interests that results from placement on the No-Fly List is not substantially

equal or substantively comparable to the deprivation inherent in deportation, the Court concludes the rigorous procedural protections required in the deportation context are not directly applicable to those required when an individual is placed on the No-Fly List.

Nonetheless, as the Court found in its June 2014 Opinion, "[w]hen only an *ex parte* showing of reasonable suspicion supported by 'articulable facts . . . taken together with rational inferences' is necessary to place an individual in the TSDB, it is certainly possible, and probably likely, that 'simple factual errors' with 'potentially easy, ready, and persuasive explanations' could go uncorrected." *Latif*, 28 F. Supp. 3d at 1161 (quoting *Al Haramain*, 686 F.3d at 982). Although the review of No-Fly List determinations by a neutral judicial officer provides an important layer of procedural protection, the low standard of proof applicable to placements on the No-Fly List is a relevant factor for a court to consider when determining whether Plaintiffs have been provided "meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List." *Latif*, 28 F. Supp. 3d at 1161.

Accordingly, the Court concludes procedural due process does not require Defendants to apply the clear and convincing standard to the No-Fly List determinations as to any Plaintiff. Although the relative sufficiency of the

reasonable-suspicion standard to make No-Fly List determinations is an important factor that the Court must take into account when it considers whether the procedural protections in the DHS TRIP process are constitutionally adequate, the Court, nevertheless, concludes on this record that the use of the reasonable-suspicion standard alone does not run afoul of due process.

(b) Vagueness of the No-Fly List Criteria

Plaintiffs also contend the No-Fly List criteria violate procedural due process because they are unconstitutionally vague. In particular, Plaintiffs contend (1) the criteria lack any nexus to aviation security, (2) the criteria do not set a standard that provides "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" (*Jordan v. De George*, 341 U.S. 223, 231-32 (1951)), and (3) the notification letters provided to Plaintiffs do not sufficiently explain how the stated reasons for their placement on the No-Fly List satisfy the substantive criteria.

At the outset the Court notes it is unclear from Plaintiffs' briefing whether they intend to raise a distinct claim that the No-Fly List criteria are void for vagueness or whether Plaintiffs instead contend the vagueness of the No-Fly List criteria renders the Defendants' notice constitutionally defective. *See Hotel & Motel Ass'n of Oakland*

v. City of Oakland, 344 F.3d 959, 968-73 (9th Cir. 2003) (analyzing a procedural due-process claim separately from a void-for-vagueness claim). Because Plaintiffs' first two vagueness arguments concern the No-Fly List criteria, the Court considers those contentions at this point as part of the "vagueness" analysis and concludes Plaintiffs' third argument is best assessed with the remainder of Plaintiffs' notice arguments. *See infra* § I(B)(2)(c)(2)(a)-(c).

"A statute fails under the Due Process Clause of the Fourteenth Amendment 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .'" *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014)(quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966)). "A statute is vague on its face when 'no standard of conduct is specified at all. As a result, [people] of common intelligence must necessarily guess at its meaning.'" *Id.* (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). In addition, "[a] statute is impermissibly vague if it 'fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement.'" *Arce v. Douglas*, 793 F.3d 968, 988 (9th Cir. 2015)(quoting *United States v. Mincoff*, 574 F.3d 1186, 1201 (9th Cir. 2009)). "Although most often invoked in the context of

criminal statutes, the prohibition on vagueness also applies to civil statutes." *Dimaya v. Lynch*, 803 F.3d 1110, 1113 (9th Cir. 2015). The standard for whether a provision is void for vagueness, however, is less stringent when the challenged provision contains "civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). *See also Hess v. Bd. of Parole and Post-Prison Supervision*, 514 F.3d 909, 914 (9th Cir. 2008).

As noted, Plaintiffs first contend the No-Fly List criteria fail to provide "fair notice of conduct that is forbidden" because they lack any nexus to aviation security. *Fed. Commc'ns Comm'n v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012). The Court finds this argument lacks merit.

As noted, the additional substantive derogatory criteria that an individual must meet to be placed on the No-Fly List are:

> 1) A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of air piracy, or threat to an airline, passenger, or civil aviation security); or
>
> 2) A threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland; or
>
> 3) A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1))

against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. § 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or

4) A threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Each of these criteria relate to violent terrorism. Because commercial aviation has been a common target of individuals who have planned, attempted, and/or completed violent acts of terrorism both in the United States and abroad, the Court concludes the No-Fly List substantive derogatory criteria bear the requisite nexus to commercial aviation and place individuals on reasonable notice of the forbidden conduct.

The Court also concludes the criteria themselves are not unconstitutionally vague. Defendants correctly point out that courts have held similar provisions are not unconstitutionally vague. *See, e.g.*, *Humanitarian Law Project*, 561 U.S. at 20-21 (holding a statute that prohibited providing "material support or resources" to certain foreign organizations that engage in terrorist activity was not unconstitutionally vague because applying those terms does not require "untethered, subjective judgments"); *Humanitarian Law Project v. United States Treasury Dep't*, 578 F.3d 1133, 1144-47 (9th Cir. 2009); *Khan v. Holder*, 584 F.3d 773, 785-86 (9th Cir.

2009). To the contrary, the violent acts of terrorism that underpin the criteria are well-defined and readily understandable by individuals of "common intelligence." *See Desertrain*, 754 F.3d at 1155. Moreover, the threat-assessment nature of the No-Fly List criteria does not render those criteria unconstitutionally vague because any such threat must specifically relate to the well-defined violent acts of terrorism.

Accordingly, on this record the Court concludes the No-Fly List substantive derogatory criteria are not unconstitutionally vague.

(c) Use of Predictive Judgments

Finally, Plaintiffs contend the No-Fly List criteria inherently present an unacceptable risk of error because those criteria implicate predictive judgments about uncertain future conduct. In particular, Plaintiffs contend these predictive judgments are inherently unreliable, are not based on any scientific or reasoned methodology, and, therefore, are likely to sweep onto the No-Fly List many individuals who will never commit a violent act of terrorism.

The Court concludes Plaintiffs' arguments miss the mark. Although No-Fly List determinations certainly involve threat assessment, that assessment must be made based on "articulable intelligence or information which, taken

together with rational inferences from those facts, reasonably warrant the determination" that an individual meets at least one of the substantive derogatory criteria. Accordingly, No-Fly List determinations are not merely "predictions of a future threat of dangerousness" as Plaintiffs contend, but are threat assessments that must be based on presently-known, articulable facts. In other words, No-Fly List determinations are not and cannot be a mere exercise in profiling or guesswork, but must be based on concrete information that, together with rational inferences, create a reasonable suspicion that an individual meets at least one of the No-Fly List substantive derogatory criteria.

Accordingly, on this record the Court concludes the "predictive judgments" do not negatively affect the No-Fly List criteria beyond the uncertainty already inherent in the reasonable-suspicion standard. As noted in its June 2014 Opinion, the Court, nevertheless, must consider that inherent uncertainty when it considers the sufficiency of the revised DHS TRIP procedures as a whole.

(2) Utility of Additional Procedural Safeguards

Plaintiffs also contend the revised DHS TRIP procedures are constitutionally deficient because Plaintiffs were not provided with (1) a full statement of the reasons for their placement on the No-Fly List; (2) all of the evidence that supported the reasons for their placement on the No-Fly List;

(3) all material and exculpatory evidence in Defendants' possession; (4) a live hearing before a neutral decision-maker together with an opportunity to confront and to cross-examine live witnesses; and (5) additional procedures based on the CIPA, including the use of protective orders, unclassified summaries of classified information, and additional classified disclosures to Plaintiffs' counsel with security clearances.

Defendants, in turn, contend Plaintiffs' proposed additional procedural safeguards are not necessary to pass due-process muster, and the revised DHS TRIP procedures provide Plaintiffs with sufficient notice and an opportunity to be heard and to challenge their placement on the No-Fly List.

(a) Full Statement of Reasons

Plaintiffs first contend the revised DHS TRIP procedures are inadequate because Defendants did not provide Plaintiffs with a full statement of the reasons that justified placement on the No-Fly List. As noted, each Plaintiff received letters that provided an unclassified summary of some of the reasons he was placed on the No-Fly List and that also indicated Defendants were "unable to provide additional disclosures" regarding that Plaintiff's placement on the No-Fly List. Plaintiffs, therefore, contend they cannot have a meaningful opportunity to respond to the reasons for their placement on the No-Fly List unless they are provided with notice of all of those

reasons.

Plaintiffs rely on *Al Haramain* for the premise that constitutionally-sufficient notice must be complete and precise and that a failure to provide a full list of reasons for placement on the No-Fly List is a due-process violation. *See* 686 F.3d at 986 ("because [plaintiff] AHIF-Oregon could only guess (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high."). *See also Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014)("the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are essential components of due process.").

In its June 2014 Opinion the Court recognized this principle and noted the *Al Haramain* court's holding that "'[i]n the absence of national security concerns, due process requires [defendant] OFAC to present the entity with, at a minimum, a timely statement of reasons for the investigation.'" *Latif*, 28 F. Supp. 3d at 1160 (quoting *Al Haramain*, 686 F.3d at 987). The Court also pointed out, however, that the *Al Haramain* court qualified the defendants' duty to provide a full statement of reasons as follows:

> As to national security concerns about providing a statement of reasons for the deprivation or permitting counsel with security clearance to view the classified information, the [*Al Haramain*] court "recognize[d] that

> disclosure may not always be possible" and that the agency may in some cases withhold such mitigating measures after considering "at a minimum, the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges."

Latif, 28 F. Supp. 3d at 1160 (quoting *Al Haramain*, 686 F.3d at 983-84). Accordingly, this Court held:

> Because due process requires Defendants to provide Plaintiffs . . . with notice regarding their status on the No-Fly List and the reasons for placement on that List, it follows that such notice must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List.

Latif, 28 F. Supp. 3d at 1162. Although this Court declined to formulate the specific procedures by which Defendants could provide sufficient notice to Plaintiffs when national security concerns prevented full disclosure, the Court acknowledged such procedures "could include, but are not limited to, the procedures identified by the Ninth Circuit in *Al Haramain*; that is, Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly cleared counsel." *Id.* The Court also found it could not "foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security." *Id.* Under such circumstances, however, Defendants were required to "make

such a determination on a case-by-case basis including consideration of, at a minimum, the factors outlined in *Al Haramain*; *i.e.*, (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges." *Id.* Finally, the Court emphasized any such "determination must be reviewable by the relevant court." *Id.*

After reviewing the parties' arguments in the context of this more fully-developed record, the Court adheres to its June 2014 Opinion as to the standard that Defendants must satisfy with respect to providing Plaintiffs with notice of the reasons for their placement on the No-Fly List; that is, Defendants must provide each Plaintiff with a statement of reasons that is sufficient to permit such Plaintiff to respond meaningfully. Applying that standard, the Court concludes the revised DHS TRIP procedures as to this issue appear facially adequate because the notice letters sent to Plaintiffs "provided an unclassified summary that included reasons for the placement of each individual on the No-Fly List." Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs (#173) at 6. Significantly, however, the Court cannot conclude on this record whether the statement of reasons that Defendants provided to each Plaintiff was constitutionally sufficient because the current

record does not reflect what information Defendants withheld or the reasons for withholding such information.

Accordingly, the Court concludes the record is insufficient for the Court to make any ruling as to the constitutional sufficiency of the specific disclosures made to each of the six remaining Plaintiffs.

(b) Evidence Supporting the Reasons for Placement on the No-Fly List

Plaintiffs also contend they are entitled to know what evidence underlies Defendants' reasons for placing Plaintiffs on the No-Fly List. Plaintiffs contend even though the notice letters that Defendants sent to Plaintiffs made reference to evidence such as recordings of conversations with third parties, memorialized statements that were made by Plaintiffs, and transcripts or recordings of conversations with confidential informants, Defendants did not provide Plaintiffs with any of this evidence. Again, to support their position Plaintiffs largely rely on deportation cases in which courts have "acknowledg[ed] the importance of the right to confront evidence and cross-examine witnesses in immigration cases." *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009). Plaintiffs assert under the revised DHS TRIP procedures they were not provided with any of the evidence (classified or unclassified) that Defendants relied on to place Plaintiffs on the No-Fly List, and, therefore, Plaintiffs contend those procedures do not satisfy due process.

Defendants, on the other hand, contend the unclassified summaries provided to Plaintiffs are sufficient to permit Plaintiffs to respond meaningfully, and, therefore, the revised procedures satisfy the standard that the Court set out in its June 2014 Opinion and the requirements of due process.

In its June 2014 Opinion the Court held Defendants were required to provide notice of the reasons for Plaintiffs' placement on the No-Fly List and that the notice "must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." *Latif*, 28 F. Supp. 3d at 1162. The Court, however, did not specifically address whether due process requires Defendants to provide to Plaintiffs the actual evidence as opposed to a summary of the reasons subject to withholding information for national security reasons. *Id.*

As the *Al Haramain* court held and this Court noted in its June 2014 Opinion, "subject to the limitations discussed below, the government may use classified information, without disclosure, when making designation determinations." *Al Haramain*, 686 F.3d at 982. *See also Latif*, 28 F. Supp. 3d at 1154 ("Obviously, the Court cannot and will not order Defendants to disclose classified information to Plaintiffs."). Accordingly, procedural due process does not require Defendants to provide to Plaintiffs classified information.

Moreover, the Court concludes procedural due process does not require Defendants to provide to Plaintiffs the actual evidence supporting Defendants' reasons for placing Plaintiffs on the No-Fly List as long as Defendants provide Plaintiffs with sufficient information to permit them to respond meaningfully to the reasons that Defendants are able to disclose. Requiring Defendants to provide such evidence in its original form raises significant and likely insoluble practical difficulties because, unlike the context of ordinary civil litigation, separating unclassified information from protected national security information is exceedingly complicated in the national security context.[6]

Nonetheless, the principles that set the constitutional standard and that the Court applied in its June 2014 Opinion remain: Subject to Defendants' duty not to disclose classified information, Plaintiffs must be provided with sufficient notice of the reasons for their placement on the No-Fly List to permit them to have a meaningful opportunity to respond to those reasons. Defendants, therefore, need not present the information in any particular form (*i.e.*, original evidence). Moreover, to the extent that Defendants rely on

[6] For example, a report may contain material, unclassified information regarding an individual placed on the No-Fly List interspersed with classified information that may or may not be material to the No-Fly List determination.

sensitive national security information to maintain any Plaintiff's placement on the No-Fly List, Defendants must consider and implement procedures (for example, unclassified summaries or disclosures made to counsel with the appropriate security clearances) that would permit Plaintiffs to respond meaningfully without creating an undue risk to national security. As noted, if Defendants determine information must be withheld because its disclosure would create an undue risk to national security, Defendants

> must make such a determination on a case-by-case basis including consideration of, at a minimum, the factors outlined in *Al Haramain*; *i.e.*, (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges.

Latif, 28 F. Supp. 3d at 1162 (citing *Al Haramain*, 686 F.3d at 984).

Although the Court concludes Defendants' revised DHS TRIP procedures in principle are not inconsistent with this requirement, the Court again notes it cannot determine from this record whether the unclassified summaries of Defendants' reasons for placing Plaintiffs on the No-Fly List conveyed sufficient material information to Plaintiffs to satisfy procedural due-process standards because the record does not reflect what information Defendants withheld or the reasons for withholding such information.

In summary, on this record the Court concludes Defendants must provide Plaintiffs with sufficient material information in Defendants' possession to permit Plaintiffs to respond meaningfully to the reasons that Defendants placed Plaintiffs on the No-Fly List. That disclosure, however, need not take the form of original evidence, and Defendants may withhold information when disclosure would create an undue risk to national security subject to Defendants' obligation to implement appropriate procedures to minimize the amount of material information withheld. Defendants' decision to withhold material information must itself be subject to judicial review. *See Latif*, 28 F. Supp. 3d at 1162. Thus, if Defendants determine any Plaintiff should remain on the No-Fly List and if Defendants withhold information from that Plaintiff during the DHS TRIP process, upon judicial review Defendants must identify for the appropriate court the information that was withheld, provide justification for withholding that information, and explain why they could not make additional disclosures to that Plaintiff. Defendants must accomplish these disclosures by including in the administrative record submitted to the appropriate court an affidavit or declaration from a competent witness with personal knowledge of the No-Fly List determination. Defendants' revised

DHS TRIP procedures appear to meet this standard in principle,[7] but the record is currently insufficient for the Court to rule on the adequacy of the specific disclosures made to each of the six remaining Plaintiffs.

(c) Disclosure of Exculpatory Information

Plaintiffs contend the DHS TRIP procedures do not satisfy due process because Defendants must disclose to Plaintiffs all exculpatory information. This contention, however, is resolved in the same manner as Plaintiffs' contentions that Defendants must disclose all material information because exculpatory information is, by definition, material. *See Skinner v. Switzer*, 562 U.S. 521, 537 (2011)("*Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment."). In any event, if Defendants possess exculpatory information that cannot be disclosed, Defendants must bring that information to the attention of the court reviewing the administrative record that documents the No-Fly List designation.

Accordingly, on this record the Court concludes Defendants' obligation to disclose exculpatory information is the same as Defendants' obligation to provide

[7] The Court notes the revised DHS TRIP procedures provided to the Court do not include the procedures to be used during judicial review.

other material information; *i.e.*, as long as disclosure of the information would not create an undue risk to national security, Defendants must provide sufficient material information, whether exculpatory or inculpatory, to each Plaintiff in order to permit such Plaintiff to respond meaningfully to the reasons he has been placed on the No-Fly List. As noted, however, this record is insufficient for the Court to determine whether the information provided to each Plaintiff satisfies this standard.

(d) Live Hearing Before a Neutral Decision-Maker and Right to Confront Witnesses

Plaintiffs also contend the revised DHS TRIP procedures are insufficient because they do not provide Plaintiffs with the opportunity to appear at a live hearing before a neutral decision-maker and to confront and to cross-examine live witnesses. Plaintiffs again analogize to deportation cases to support their position that due process requires Defendants to provide Plaintiffs with a live hearing. *See Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013). As noted, Plaintiffs contend "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *See also Cinapian*, 567 F.3d at 1074-76. Plaintiffs contend a live hearing with confrontation of witnesses is especially important

in this context because, as some of the notice letters provided to Plaintiffs reveal, No-Fly List determinations often turn on the credibility of witnesses, contested facts, and hearsay evidence.

Defendants, on the other hand, assert due process does not require a live or adversarial hearing in this context. The Court agrees. As Defendants point out, courts have approved procedures that do not contain a live hearing in several circumstances, including the use of classified information in the designation of Specially Designated Global Terrorists (SDGT). *See Al Haramain*, 686 F.3d at 1001. *See also Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003)). Defendants emphasize live, adversarial hearings are particularly inappropriate in this context because agencies that initially nominate individuals for the No-Fly List may rely on reporting from a wide variety of sources including foreign governments and confidential informants. Defendants contend subjecting such sources to cross-examination would risk exposing protected national security information in the unpredictable environment of a live hearing and hamper the government's ability to gather intelligence from a variety of counterterrorism sources.

Again, the Court does not find persuasive Plaintiffs' analogy of this case to deportation cases.

The balance of interests with regard to placement on the No-Fly List is, however, similar to designation as an SDGT. As the Ninth Circuit explained in *Al Haramain*, the private party's property interests were "significant" because designation as an SDGT "completely shutters all domestic operations of an entity," freezes all of the entity's assets, prohibits any person or organization from conducting "any business whatsoever with the entity," and imposes civil and criminal penalties on those who violate the prohibitions. 686 F.3d at 980. "In sum, designation is not a mere inconvenience or burden on certain property interests; designation indefinitely renders a domestic organization financially defunct." *Id.* Thus, although the nature of the private interests involved are different because an SDGT designation implicates the property interests of organizations whereas placement on the No-Fly List primarily implicates the liberty interests of individuals,[8] the weight of those interests in a procedural due-process context are both on balance similarly significant. In light of the substantive similarity and the challenges inherent in the use of classified information, the Court finds *Al Haramain* and the other SDGT cases helpful.

[8] Although designation as an SDGT only directly impacts an organization's interest, it undoubtedly affects individuals indirectly through, for example, lost employment, investments, and/or donations.

Although the Ninth Circuit in *Al Haramain* did not directly address whether a live, adversarial hearing was constitutionally necessary, the Court notes the Ninth Circuit ultimately found only harmless notice errors in the SDGT-designation process, a procedure that did not include any live, adversarial hearing. *Id.* at 979-90. Accordingly, the Court concludes nothing in *Al Haramain* suggests a live, adversarial hearing is required in this context and, in fact, *Al Haramain* suggests a document-based hearing would be sufficient.

The Court, nevertheless, recognizes there are some differences between the nature of the evidence involved in *Al Haramain* and the evidence that may be needed to support No-Fly List designations for Plaintiffs. In particular, because the SDGT designation at issue in *Al Haramain* involved an organization, the evidence appears to have been document-oriented.[9] *See id.* at 976-79. Placement of individuals on the No-Fly List, on the other hand, arguably presents a stronger need for a live, adversarial hearing because the evidence is more likely to be testimonial and intelligence-based. Nonetheless, the Court agrees with Defendants that a live, adversarial hearing is not a viable procedure in this context in light of the

[9] The Court notes the Ninth Circuit, in any event, considered a classified record when it determined whether the government properly designated the plaintiff as an SDGT because of the plaintiff's support for "designated persons as a branch office of AHIF-Saudi Arabia." *Al Haramain*, 686 F.3d at 979.

sensitive nature of much of the evidence; the inherent unpredictability of a live, adversarial hearing; and the potential chilling effect that exposing sources of intelligence to cross-examination may have on intelligence-gathering. *See Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1904 (2011)(noting a deposition with counsel on both sides having security clearances, nonetheless, resulted in inadvertent, unauthorized disclosure of military secrets).

In summary, on this record the Court concludes the revised DHS TRIP procedures are not constitutionally deficient because of the fact that Defendants did not provide Plaintiffs with the opportunity to participate in a live, adversarial hearing with witnesses subject to cross-examination.

(e) Use of CIPA-like Procedures

Finally, Plaintiffs contend the revised DHS TRIP procedures are deficient because the process does not include procedures inspired by CIPA, including the use of protective orders, unclassified summaries of classified information,[10] and additional, classified disclosures to counsel

[10] The Court notes the DHS TRIP procedures provided to Plaintiffs permit the use of unclassified summaries of classified information and that Defendants provided unclassified summaries to at least some of the Plaintiffs.

who have the appropriate security clearances.[11] *See* 18 U.S.C. App. 3, § 6. Plaintiffs argue such additional procedures would allow Plaintiffs to respond to Defendants' reasons for placing them on the No-Fly List more meaningfully without creating any additional risk to national security. Although Plaintiffs acknowledge CIPA does not directly apply in the civil context, Plaintiffs point out that courts have looked to CIPA as a helpful guide in civil cases, including in the Ninth Circuit's 2012 opinion regarding this case. *See Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012).

Defendants, on the other hand, maintain CIPA applies only to criminal matters and is not applicable to civil and administrative matters. Moreover, Defendants contend CIPA is particularly inapplicable here because the government's ultimate remedy under CIPA is to dismiss the criminal charges if it cannot employ an alternative means of disclosing classified information. In a civil case such as this one, however, the government cannot unilaterally end the lawsuit. 18 U.S.C. App. 3, § 6(e)(2)(A).

Moreover, Defendants contend a federal district court is not empowered to compel the Executive Branch to

[11] Plaintiffs do not contend Defendants must provide Plaintiffs' counsel with security clearances or that due process requires Defendants to provide Plaintiffs with lawyers that have such security clearance.

disclose classified information to any other individual because the decisions to grant security clearances and to disclose classified information are within the sole discretion of the Executive Branch. *See, e.g.*, *Egan*, 484 U.S. at 527-28; *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007). In any event, Defendants contend as a practical matter that disclosures to counsel who have security clearances would also implicate a threat to national security because such disclosures can still result in inadvertent, unauthorized disclosures. *See Gen. Dynamics Corp.*, 131 S. Ct. at 1904.

The Court notes the Ninth Circuit in *Al Haramain* considered similar arguments and concluded: "To the extent that an unclassified summary could provide helpful information, such as the subject matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable." 686 F.3d at 982-83. The Ninth Circuit, accordingly, found "a lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance." *Id.* at 983. The Ninth Circuit, however, did not foreclose the possibility that in some circumstances the government "might have a legitimate interest in shielding the

materials even from someone with the appropriate security clearance." *Id.* Nonetheless, the Ninth Circuit concluded "[i]n many cases . . . some information could be summarized or presented to a lawyer with a security clearance without implicating national security." *Id.*

As this Court found in its June 2014 Opinion, Defendants can use procedures in the context of this case similar to those approved by the Ninth Circuit in *Al Haramain*. *See Latif*, 28 F. Supp. 2d at 1162 (noting procedures for mitigation of withholding information for national security purposes "could include, but are not limited to, the procedures identified by the Ninth Circuit in *Al Haramain*; that is, Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel."). Although the Court notes the utility of making additional disclosures to counsel with appropriate security clearances may be limited because counsel will often be prohibited from sharing that information with their clients, "limited utility is very different from no utility." *Al Haramain*, 686 F.3d at 983 n.10.

Accordingly, on this record the Court adheres to its June 2014 Opinion and, applying the principles expressed in *Al Haramain*, the Court concludes to the extent that

Defendants withhold information from any Plaintiff because the disclosure would create an undue risk to national security, Defendants must implement procedures to minimize the amount of material information withheld. When possible, Defendants must determine whether the information can be summarized in an unclassified summary and/or whether additional disclosures can be made to Plaintiffs' counsel who have the appropriate security clearances. The Court, however, cannot conclude on this record whether the revised DHS TRIP procedures that Defendants provided to these Plaintiffs satisfied this requirement because the record does not reflect what information Defendants withheld or Defendants' reasons for withholding that information. Moreover, the record does not reflect whether any Plaintiff is represented by counsel with an appropriate security clearance.

3. Summary Conclusion

For these reasons, the Court adheres to the conclusion that Defendants must provide to each Plaintiff (1) a statement of reasons for that Plaintiff's placement on the No-Fly List that is sufficient to permit such Plaintiff to respond meaningfully to those reasons and (2) any material exculpatory or inculpatory information in Defendants' possession that is necessary for such a meaningful response. Defendants may limit or withhold disclosures altogether in the event such disclosures would create an undue risk to national security. In such instances

Defendants, nevertheless, must implement procedures to minimize the amount of material withheld. When possible, Defendants must determine whether the information can be summarized in an unclassified summary and/or whether additional disclosures can be made to Plaintiffs' counsel who have the appropriate security clearances. When possible, Defendants must do so. When it is not possible, Defendants must so certify through a competent witness with personal knowledge.

When a Plaintiff seeks substantive judicial review of Defendants' determination that the Plaintiff must remain on the No-Fly List, Defendants must include with the administrative record submitted to the appropriate court an affidavit or declaration from a competent witness with personal knowledge of the No-Fly List determination that identifies for the court the information that was withheld, provides justification for withholding that information, and explains why Defendants could not make additional disclosures.

Accordingly, on this record the Court denies Plaintiffs' Renewed Combined Motion (#206) for Partial Summary Judgment and grants in part and denies in part Defendants' Combined Cross-Motion (#251) for Partial Summary Judgment.

C. Analysis of Parties' Individual Cross-Motions for Partial Summary Judgment

As noted, in addition to the Renewed Combined Motions for Partial Summary Judgment, each Plaintiff also moves for summary

judgment on their procedural due-process claim as to the revised DHS TRIP procedures applied to them. Defendants, in turn, separately move for summary judgment as to each individual Plaintiff.

After reviewing the individual cross-motions, the Court concludes the same analysis used to resolve the collective cross-motions applies to the individual cross-motions. To the extent that Plaintiffs assert they have not been provided with sufficient notice of the reasons for their placement on the No-Fly List or provided with the evidence supporting those reasons (and, conversely, to the extent that Defendants assert they provided sufficient notice to Plaintiffs), the Court cannot enter summary judgment for any party because the record does not reflect what information Defendants withheld nor the reasons for withholding that information. Moreover, to the extent that Plaintiffs contend Defendants did not adequately employ procedures designed to minimize the amount of information withheld (*i.e.*, unclassified summaries or additional disclosures to counsel with security clearances), the record is currently insufficient to permit the Court to enter summary judgment in any party's favor for the same reason in addition to the fact that the record does not reflect whether any Plaintiff is represented

by counsel who have the appropriate security clearance. All other issues raised in the parties' individual cross-motions are resolved in the same manner that the Court resolved those issues as to the collective cross-motions.

Accordingly, on this record the Court defers ruling as to Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment and Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs.

II. Administrative Procedure Act Claims

As noted, the parties each move for summary judgment both collectively and individually on Plaintiffs' APA claim under 5 U.S.C. § 706(2)(A) and § 706(2)(B), and, as noted in the Court's June 2014 Opinion, Plaintiffs' APA claims mirror their procedural due-process claims. *See Latif*, 28 F. Supp. 3d at 1162-63. Accordingly, the Court resolves the parties' cross-motions concerning Plaintiffs' APA claims using the same analysis that the Court applied to Plaintiffs' procedural due-process claims.

CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Combined Cross-Motion (#251) for Partial Summary

Judgment; **DENIES** Plaintiffs' Renewed Combined Motion (#206) for Partial Summary Judgment; and **DEFERS RULING** on Defendants' Cross-Motions (#241, #242, #247, #248, #249, #250) for Partial Summary Judgment regarding individual Plaintiffs and Plaintiffs' individual Renewed Motions (#210, #212, #214, #216, #218, #220) for Partial Summary Judgment until Defendants supplement the record with sufficient information to rule on the individual cross-motions.

CASE-MANAGEMENT ORDER

Before the parties and the Court can move forward on other issues in this action, including the substantive due-process question whether any of the six remaining Plaintiffs are properly placed on the No-Fly List, the Court must complete adjudication of the pending Motions on which it has deferred ruling. Accordingly, **no later than April 18, 2016**, the Court directs Defendants to submit to the Court as to each Plaintiff the following: (1) a summary of any material information (including material exculpatory or inculpatory information) that Defendants withheld from the notice letters sent to each Plaintiff and (2) an explanation of the justification for withholding that information, including why Defendants could not make additional disclosures.

Defendants' supplemental submission may be in the form of declarations or other statements from an officer or officers with personal knowledge of the No-Fly List determinations as to each Plaintiff. If necessary to protect sensitive national security information, Defendants may make such submissions *ex parte* and *in camera*. If Defendants submit any materials *ex parte* and *in camera*, however, Defendants must also make a filing on the public record that memorializes the submission and provides as much public disclosure of the substance of Defendants' submission as national security considerations allow.

To the extent that Plaintiffs wish to respond to Defendants' next submissions as set out above, Plaintiffs must do so **no later than May 9, 2016**, when the Court will again take this issue under advisement without further briefing or oral argument.

After the Court completes its consideration of Plaintiffs' procedural due-process and APA claims on the supplemented record, the Court will set an expedited briefing schedule to consider Defendants' recent contention that revisions in their administrative procedures (under which the Acting Administrator of the TSA is now responsible for issuing a final determination regarding DHS TRIP inquiries) effectively abrogate the Ninth Circuit's holdings that this Court has jurisdiction to continue

to adjudicate Plaintiffs' remaining claims. *See Latif*, 686 F.3d 1122. *See also Arjmand v. United States Dep't of Homeland Sec.*, 745 F.3d 1300 (9th Cir. 2014).

IT IS SO ORDERED.

DATED this 28th day of March, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHM KARIYE, RAYMOND EARL KNAEBLE IV, STEVEN WILLIAM WASHBURN, NAGIB ALI GHALEB, ABDULLATIF MUTHANNA, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, STEPHEN DURGA PERSAUD, and MASHAAL RANA,

Plaintiffs,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation; and CHRISTOPHER M. PIEHOTA, in his official capacity as Director of the FBI Terrorist Screening Center,

Defendants.

3:10-cv-00750-BR

OPINION AND ORDER

STEVEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Ste. 1600
Portland, OR 97204
(503) 802-2040

HINA SHAMSI
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

KEVIN DIAZ
American Civil Liberties Union
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

ALEXANDRA F. SMITH
LAURA SCHAUER IVES
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
(505) 266-5915

AHILAN ARULANANTHAM
JENNIFER PASQUARELLA
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-5211

ALAN L. SCHLOSSER
JULIA HARUMI MASS
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

CHRISTOPHER M. EGLESON
JUSTIN H. BELL
MITCHELL P. HURLEY
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1039

REEM SALAHI
Salahi Law
429 Santa Monica Boulevard, Ste. 550
Santa Monica, CA 90401
(510) 225-8880

Attorneys for Plaintiffs

DEVIN N. ROBINSON
Stewart Shadduck & Robinson LLC
6110 N. Lombard Street, Ste. B
Portland, OR 97203
(503) 228-7020

RITA M. SIEMION
637 Kenyon Street NW
Washington, DC 20010
(703) 655-1467

Attorneys for *Amicus Curiae* The Constitution Project

ERIC H. HOLDER, JR.
United States Attorney General
AMY ELIZABETH POWELL
United States Department of Justice
Civil Division
20 Massachusetts Avenue N.W., Suite 5377
Washington, DC 20010
(202) 514-9836

S. AMANDA MARSHALL
United States Attorney
JAMES E. COX, JR.
Assistant United States Attorney
District of Oregon
1000 S.W. Third Avenue, Ste. 600
Portland, OR 97204
(503) 727-1026

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Defendants' Motion (#85) for Partial Summary Judgment and Plaintiffs' Cross-Motion

(#91) for Partial Summary Judgment. The parties each seek summary judgment on Plaintiffs' Claim One of the Third Amended Complaint (#83) (that Defendants violated Plaintiffs' right to procedural due process under the Fifth Amendment to the United States Constitution) and Claim Three (that Defendants violated Plaintiffs' rights under the Administrative Procedure Act (APA), 5 U.S.C. § 706). In their claims Plaintiffs specifically challenge the adequacy of Defendants' redress procedures for persons on the No-Fly List (sometimes referred to as "the List"). In addition to the parties' briefs, the record includes an Amicus Curiae Brief (#99) in Support of Plaintiffs' Cross-Motion filed by The Constitution Project.

On June 21, 2013, after the Court first heard oral argument on the parties' Motions, the Court took these issues under advisement. On August 28, 2013, the Court issued an Opinion and Order (#110) granting in part Plaintiffs' Cross-Motion, denying in part Defendants' Motion, and deferring ruling on the remaining portions of the pending Motions to permit additional development of the factual record and supplemental briefing. In that Opinion and Order the Court concluded Plaintiffs established the first factor under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), because Plaintiffs had protected liberty interests in their rights to travel internationally by air and rights to be free from false governmental stigmatization that were affected by

their inclusion on the No-Fly List. The Court, however, found the record was not sufficiently developed to balance properly Plaintiffs' protected liberty interests on the one hand against the procedural protections on which Defendants rely, the utility of additional safeguards, and the government interests at stake in the remainder of the *Mathews* analysis. *See id.*

After the parties filed a Third Joint Statement of Stipulated Facts (#114) and completed their respective supplemental briefing, the Court heard oral argument on March 17, 2014, and again took the Motions under advisement.

For the reasons that follow,[1] the Court **GRANTS** Plaintiffs' Cross-Motion (#91)[2] and **DENIES** Defendants' Motion (#85).

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[1] In order to complete the procedural due-process analysis in this Opinion and Order that the Court began in its August 28, 2013, Opinion and Order (#110), the Court repeats and summarizes herein many of the facts and analyses from the prior Opinion and Order to ensure a clear and comprehensive record.

[2] Plaintiffs also seek a declaratory judgment that Defendants' policies, practices, and customs violate the Fifth Amendment of the United States Constitution and the APA and also seek an injunction requiring Defendants (1) to remedy such violations, including removal of Plaintiffs' names from any watch list or database that prevents them from flying; (2) to provide Plaintiffs with notice of the reasons and bases for their inclusion on the No-Fly List; and (3) to provide Plaintiffs with the opportunity to contest inclusion on the List. Although the Court concludes Plaintiffs are entitled to summary judgment on the bases described herein, the issues concerning the substance of any declaratory judgment and/or injunction remain for further development

PLAINTIFFS' CLAIMS

Plaintiffs are citizens and lawful permanent residents of the United States (including four veterans of the United States Armed Forces) who were not allowed to board flights to or from the United States or over United States airspace. Plaintiffs believe they were denied boarding because they are on the No-Fly List, a government terrorist watch list of individuals who are prohibited from boarding commercial flights that will pass through or over United States airspace. Federal and/or local government officials told some Plaintiffs that they are on the No-Fly List.

Each Plaintiff submitted applications for redress through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Despite Plaintiffs' requests to officials and agencies for explanations as to why they were not permitted to board flights, explanations have not been provided and Plaintiffs do not know whether they will be permitted to fly in the future.

Plaintiffs allege in their Third Amended Complaint (#83), Claim One, that Defendants have violated Plaintiffs' Fifth Amendment right to procedural due process because Defendants have not given Plaintiffs any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No-Fly List. In Claim Three Plaintiffs assert Defendants'

actions have been arbitrary and capricious and constitute "unlawful agency action" in violation of the APA.

PROCEDURAL BACKGROUND

Plaintiffs filed this action on June 30, 2010. On May 3, 2011, this Court issued an Order (#69) granting Defendants' Motion (#43) to Dismiss for failure to join the Transportation Security Administration (TSA) as an indispensable party and for lack of subject-matter jurisdiction on the ground that the relief Plaintiffs sought could only come from the appellate court in accordance with 49 U.S.C. § 46110(a). Plaintiffs appealed the Court's Order to the Ninth Circuit. *See Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012).

On July 26, 2012, the Ninth Circuit issued an opinion in which it reversed this Court's decision and held "the district court . . . has original jurisdiction over Plaintiffs' claim that the government failed to afford them an adequate opportunity to contest their apparent inclusion on the List." *Id.* at 1130. The Court also held "[49 U.S.C.] § 46110 presents no barrier to adding TSA as an indispensable party." *Id.* The Ninth Circuit issued its mandate on November 19, 2012, remanding the matter to this Court.

As noted, the parties subsequently filed Motions for Partial Summary Judgment.

FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted:

I. The No-Fly List

The Federal Bureau of Investigation (FBI), which administers the Terrorist Screening Center (TSC), develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB or sometimes referred to as "the watch list"). The No-Fly List is a subset of the TSDB.

TSC provides the No-Fly List to TSA, a component of the Department of Homeland Security (DHS), for use in pre-screening airline passengers. TSC receives nominations for inclusion in the TSDB and generally accepts those nominations on a showing of "reasonable suspicion" that the individuals are known or suspected terrorists based on the totality of the information. TSC defines its reasonable-suspicion standard as requiring "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual 'is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.'" Joint Statement of Stipulated Facts (#84) at 4.

The government also has its own "Watchlisting Guidance" for internal law-enforcement and intelligence use, and the No-Fly

List has its own minimum substantive derogatory criteria. The government does not release these documents.[3]

II. DHS TRIP Redress Process

DHS TRIP is the mechanism available for individuals to seek redress for any travel-related screening issues experienced at airports or while crossing United States borders; *i.e.*, denial of or delayed airline boarding, denial of or delayed entry into or exit from the United States, or continuous referral for additional (secondary) screening.

A. Administrative Review

Travelers who have faced such difficulties may submit a Traveler Inquiry Form to DHS TRIP online, by email, or by regular mail. The form prompts travelers to describe their complaint, to produce documentation relating to the issue, and to provide identification and their contact information. If the traveler is an exact or near match to an identity within the TSDB, DHS TRIP deems the complaint to be TSDB-related and forwards the traveler's complaint to TSC Redress for further review.

On receipt of the complaint, TSC Redress reviews the available information, including the information and

[3] The Court has reviewed the minimum substantive derogatory criteria for the No-Fly List and a summary of the guidelines contained within the Watchlisting Guidance submitted to the Court by Defendants *ex parte* and *in camera*. Because this information constitutes Sensitive Security Information, the Court does not refer to its substance in this Opinion and Order.

documentation provided by the traveler, and determines (1) whether the traveler is an exact match to an identity in the TSDB and (2) whether the traveler should continue to be in the TSDB if the traveler is an exact match. When making this determination, TSC coordinates with the agency that originally nominated the individual to be included in the TSDB. If the traveler has been misidentified as someone who is an exact match to an identity in the TSDB, TSC Redress informs DHS of the misidentification. DHS, in conjunction with any other relevant agency, then addresses the misidentification by correcting information in the traveler's records or taking other appropriate action.

When DHS and/or TSC finish their review, DHS TRIP sends a determination letter advising the traveler that DHS TRIP has completed its review. A DHS TRIP determination letter neither confirms nor denies that the complainant is in the TSDB or on the No-Fly List and does not provide any further details about why the complainant may or may not be in the TSDB or on the No-Fly List. In some cases a DHS TRIP determination letter advises the recipient that he or she can pursue an administrative appeal of the determination letter with TSA or can seek judicial review in

a United States court of appeals pursuant to 49 U.S.C. § 46110.[4]

Determination letters, however, do not provide assurances about the complainant's ability to undertake future travel. In fact, DHS does not tell a complainant whether he or she is in the TSDB or a subset of the TSDB or give any explanation for inclusion on such a list at any point in the available administrative process. Thus, the complainant does not have an opportunity to contest or knowingly to offer corrections to the record on which any such determination may be based.

B. Judicial Review

When a final determination letter indicates the complainant may seek judicial review of the decisions represented in the letter, it does not advise whether the complainant is on the No-Fly List or provide the legal or factual basis for such inclusion. If the complainant submits a petition for review to the appropriate court, the government furnishes the court (but not the petitioner) with the administrative record.

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[4] 49 U.S.C. § 46110(a) provides in part: "[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." When the relief sought from judicial review of a DHS TRIP inquiry requires review and modification of a TSC order, original jurisdiction lies in the district court. *Arjmand v. United States Dep't of Homeland Sec.*, 745 F.3d 1300, 1302-03 (9th Cir. 2014).

If the administrative DHS TRIP review of a petitioner's redress file resulted in a final determination that the petitioner is not on the No-Fly List, the administrative record will inform the court of that fact. If, on the other hand, the administrative DHS TRIP review of a petitioner's redress file resulted in a final determination that the petitioner is and should remain on the No-Fly List, the administrative record will include the information that the government relied on to maintain that listing. The government may have obtained this information from human sources, foreign governments, and/or "signals intelligence." The government may provide to the court *ex parte* and *in camera* information that is part of the administrative record and that the government has determined is classified, Sensitive Security Information, law-enforcement investigative information, and/or information otherwise privileged or protected from disclosure by statute or regulation.

The administrative record also includes any information that the petitioner submitted to the government as part of his or her DHS TRIP request, and the petitioner has access to that portion of the record. As noted, at no point during the judicial-review process does the government provide the petitioner with confirmation as to whether the petitioner is on the No-Fly List, set out the reasons for including petitioner's name on the List,

or identify any information or evidence relied on to maintain the petitioner's name on the List.

For a petitioner who is on the No-Fly List, the court will review the administrative record submitted by the government in order to determine whether the government reasonably determined the petitioner satisfied the minimum substantive derogatory criteria for inclusion on the List. If after review the court determines the administrative record supports the petitioner's inclusion on the No-Fly List, it will deny the petition for review. If the court determines the administrative record contains insufficient evidence to satisfy the substantive derogatory criteria, however, the government takes the position that the court may remand the matter to the government for appropriate action.

III. Plaintiffs' Pertinent History

Solely for purposes of the parties' Motions (#85, #91) presently before the Court, Defendants do not contest the following facts as asserted by Plaintiffs:[5]

[5] As a matter of policy, the United States government does not confirm or deny whether an individual is on the No-Fly List nor does it provide any other details as to that issue. Accordingly, Defendants have chosen not to refute Plaintiffs' allegations that they are on the No-Fly List for purposes of these Motions only. The Court, therefore, assumes for purposes of these Motions only that Plaintiffs' assertions regarding their inclusion on the No-Fly List are true.

Plaintiffs are thirteen United States citizens who were denied boarding on flights over United States airspace after January 1, 2009, and who believe they are on the United States government's No-Fly List. Airline representatives, FBI agents, or other government officials told some Plaintiffs that they are on the No-Fly List.

Each Plaintiff filed DHS TRIP complaints after being denied boarding and each received a determination letter that does not confirm or deny any Plaintiff's name is on any terrorist watch list nor provide a reason for any Plaintiff to be included in the TSDB or on the No-Fly List.

Many of these Plaintiffs cannot travel overseas by any mode other than air because such journeys by boat or by land would be cost-prohibitive, would be time-consuming to a degree that Plaintiffs could not take the necessary time off from work, or would put Plaintiffs at risk of interrogation and detention by foreign authorities. In addition, some Plaintiffs are not physically well enough to endure such infeasible modes of travel.

While Plaintiffs' circumstances are similar in many ways, each of their experiences and difficulties relating to and arising from their alleged inclusion on the No-Fly List is unique as set forth in their Declarations filed in support of their Motion and summarized briefly below.

Ayman Latif: Latif is a United States Marine Corps veteran and lives in Stone Mountain, Georgia, with his wife and children. Between November 2008 and April 2010 Latif and his family were living in Egypt. When Latif and his family attempted to return to the United States in April 2010, Latif was not allowed to board the first leg of their flight from Cairo to Madrid. One month later Latif was questioned by FBI agents and told he was on the No-Fly List. Because he was unable to board a flight to the United States, Latif's United States veteran disability benefits were reduced from $899.00 per month to zero as the result of being unable to attend the scheduled evaluations required to keep his benefits. In August 2010 Latif returned home after the United States government granted him a "one-time waiver" to fly to the United States. Because the waiver was for "one time," Latif cannot fly again, and therefore, he is unable to travel from the United States to Egypt to resume studies or to Saudi Arabia to perform a *hajj*, a religious pilgrimage and Islamic obligation.

Mohamed Sheikh Abdirahm Kariye: Kariye lives in Portland, Oregon, with his wife and children. In March 2010 Kariye was not allowed to board a flight from Portland to Amsterdam, was surrounded in public by government officials at the airport, and was told by an airline employee that he was on a government watch list. Because Kariye is prohibited from boarding flights out of

the United States, he could not fly to visit his daughter who was studying in Dubai and cannot travel to Saudi Arabia to accompany his mother on the *hajj* pilgrimage.

Raymond Earl Knaeble IV: Knaeble is a United States Army veteran and lives in Chicago, Illinois. In 2006 Knaeble was working in Kuwait. In March 2010 Knaeble flew from Kuwait to Bogota, Colombia, to marry his wife, a Colombian citizen, and to spend time with her family. On March 14, 2010, Knaeble was not allowed to board his flight from Bogota to Miami. Knaeble was subsequently questioned numerous times by FBI agents in Colombia. Because Knaeble was unable to fly home for a required medical examination, his employer rescinded its job offer for a position in Qatar. Knaeble attempted to return to the United States through Mexico where he was detained for over 15 hours, questioned, and forced to return to Bogota. Knaeble eventually returned to the United States in August 2010 by traveling for 12 days from Santa Marta, Colombia, to Panama City and then to Mexicali, California. United States and foreign authorities detained, interrogated, and searched Knaeble on numerous occasions during that journey.

Faisal Nabin Kashem: In January 2010 Kashem traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program and eventually to enroll in a four-year Islamic studies program. In June 2010 Kashem attempted

to fly from Jeddah, Saudi Arabia, to New York for summer vacation; was denied boarding; and was told by an airline employee that he was on the No-Fly List. FBI agents later questioned Kashem and told him that he was on the No-Fly List. After Kashem joined this lawsuit, the United States government offered him a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Elias Mustafa Mohamed: In January 2010 Mohamed traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program. In June 2010 Mohamed attempted to fly from Jeddah, Saudi Arabia, to his home in Seattle, Washington, via Washington, D.C., but he was not allowed to board his flight and was told by an airline employee that he was on the No-Fly List. FBI agents later questioned Mohamed and told him that he was on the No-Fly List. After joining this lawsuit, the United States government offered Mohamed a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Steven William Washburn: Washburn is a United States Air Force veteran and lives in New Mexico. In February 2010 Washburn

was not allowed to board a flight from Ireland to Boston. He later attempted to fly from Dublin to London to Mexico City. Although he was allowed to board the flight from Dublin to London, on the London to Mexico City flight the aircraft turned around 3½ hours after takeoff and returned to London where Washburn was detained. On numerous later occasions FBI agents interrogated Washburn. In May 2010 Washburn returned to New Mexico by taking a series of five flights that eventually landed in Juarez, Mexico, where he crossed the United States border on foot. During this trip Mexican officials detained and interrogated Washburn. In June 2012 an FBI agent told Washburn that the agent would help remove Washburn's name from the No-Fly List if he agreed to speak to the FBI. Since May 2010 Washburn has been separated from his wife who is in Ireland because she has been unable to obtain a visa to come to the United States and Washburn is unable to fly to Ireland.

Nagib Ali Ghaleb: Ghaleb lives in Oakland, California. In February 2010 Ghaleb attempted to travel from Yemen where his wife and children were living to San Francisco via Frankfurt. Ghaleb was not allowed to board his flight from Frankfurt to San Francisco. FBI agents later interrogated Ghaleb and offered to arrange to fly him back to the United States if he agreed to tell them who the "bad guys" were in Yemen and San Francisco and to provide names of people from his mosque and community. The

agents threatened to have Ghaleb imprisoned. In May 2010 Ghaleb again attempted to return to the United States. He was able to fly from Sana'a, Yemen, to Dubai, but he was not allowed to board his flight from Dubai to San Francisco. In July 2010 Ghaleb accepted a "one-time waiver" offered by the United States government to return to the United States. Because Ghaleb cannot fly, he cannot go to Yemen to be with his ill mother or to see his brothers or sisters.

Abdullatif Muthanna: Muthanna lives in Rochester, New York. In June 2009 Muthanna left Rochester to visit his wife and children who live in Yemen. In May 2010 Muthanna was to return to the United States on a flight from Aden, Yemen, to New York via Jeddah, Saudi Arabia, but he was not allowed to board his flight from Jeddah to New York. In September 2010 Muthanna accepted a "one-time waiver" offered by the United States government to return home. In June 2012 Muthanna wanted to be with his family and attempted to fly to Yemen, but he was not allowed to board a flight departing from New York. In August 2012 Muthanna attempted a journey of thirty-six days over land and by ship from Rochester to Yemen, but a ship captain refused to let Muthanna sail on a cargo freighter departing from Philadelphia on the recommendation of United States Customs and Border Protection. Muthanna was not allowed to board flights on

four separate occasions before he finally boarded a flight from New York to Dubai in February 2013.

Mashaal Rana: Rana moved to Pakistan to pursue a master's degree in Islamic studies in 2009. In February 2010 Rana was not allowed to board a flight from Lahore, Pakistan, to New York. An FBI agent later interrogated Rana's brother, who lives in the United States. In October 2012 Rana was six-months pregnant and again attempted to return to New York to receive needed medical care and to deliver her child. Rana's brother worked with United States officials to clear Rana to fly. Rana received such clearance, but five hours before her flight was to depart she received notice that she would not be allowed to board. Rana was not able to find a safe alternative to travel to the United States before the birth of her child. In November 2010 the United States government offered Rana a "one-time waiver," which she has not used because she fears she would not be able to return to Pakistan to be with her husband.

Ibraheim Y. Mashal: Mashal is a United States Marine Corps veteran. Mashal was not allowed to board a flight from Chicago, Illinois, to Spokane, Washington, and was told by an airline representative that he was on the No-Fly List. FBI agents later questioned Mashal and told him that his name would be removed from the No-Fly List and he would receive compensation if he helped the FBI by serving as an informant. When Mashal asked to

have his attorney present before answering the FBI's questions, the agents ended the meeting. Mashal owns a dog-training business. Because he is unable to fly, he has lost clients; had to turn down business; and has been prevented from attending his sister-in-law's graduation in Hawaii, the wedding of a close friend, the funeral of a close friend, and fundraising events for the nonprofit organization that he founded.

Salah Ali Ahmed: Ahmed lives in Norcross, Georgia. In July 2010 Ahmed attempted to travel from Atlanta to Yemen via Frankfurt and was not allowed to board the flight in Atlanta. FBI agents later questioned Ahmed. Because he is unable to fly, Ahmed was unable to travel to Yemen in 2012 when his brother died and is unable to travel to Yemen to visit his extended family and to manage property that he owns in Yemen.

Amir Meshal: Meshal lives in Minnesota. In June 2009 Meshal was not allowed to board a flight from Irvine, California, to Newark, New Jersey. FBI agents told Meshal that he was on a government list that prohibits him from flying. In October 2010 FBI agents offered Meshal the opportunity to serve as a government informant in exchange for assistance in removing his name from the No-Fly List. Because Meshal is unable to fly, he cannot visit his mother and extended family in Egypt.

Stephen Durga Persaud: Persaud lives in Irvine, California. In May 2010 Persaud was not allowed to board a flight from

St. Thomas to Miami. An FBI agent told Persaud that he was on the No-Fly List, interrogated him, and told him the only way to get off the No-Fly List was to "talk to us." In June 2010 Persaud took a five-day boat trip from St. Thomas to Miami and a four-day train ride from Miami to Los Angeles so he could be home for the birth of his second child. Because he cannot fly, Persaud cannot travel to Saudi Arabia to perform the *hajj* pilgrimage.

STANDARDS

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). *See also* Fed. R. Civ. P. 56(a). The moving party must show the absence of a dispute as to a material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. *Id.* "This burden is not a light one. . . . The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citation omitted). A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant of summary judgment." *Deering v. Lassen Cmty. Coll. Dist.*, No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at *2 (E.D. Cal., Jan. 20, 2011) (citing *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989)). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009)(citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

As noted, Plaintiffs allege Defendants have violated Plaintiffs' Fifth Amendment rights to procedural due process because Defendants have not provided Plaintiffs with any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No-Fly List. Plaintiffs also allege Defendants violated Plaintiffs' rights under the APA.

I. Claim One: Procedural Due-Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332. *See also MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See also Villa-Anguiano v. Holder*, 727 F.3d 873, 881 (9th Cir. 2013). Due process, however, "'is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). *See also Wynar v. Douglas Cnty. School Dist.*, 728 F.3d 1062, 1073 (9th Cir. 2013).

The court must weigh three factors when evaluating the sufficiency of procedural protections: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. *See also Vasquez v. Rackauckas*, 734 F.3d 1025, 1044 (9th Cir. 2013).

A. First Factor: Private Interest

Plaintiffs contend the first factor under *Mathews* weighs in their favor because Defendants' inclusion of Plaintiffs on the No-Fly List has deprived Plaintiffs of their constitutionally-protected liberty interests in travel and reputation.

1. Right to Travel

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). *See also Eunique v. Powell*, 302 F.3d 971, 976-77 (9th Cir. 2002). "[T]he [Supreme] Court has consistently treated the right to *international* travel as a liberty interest that is protected by the Due Process Clause of the Fifth Amendment."

DeNieva v. Reyes, 966 F.2d 480, 485 (9th Cir. 1992)(emphasis added). *See also Eunique*, 302 F.3d at 973.

Relying primarily on *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), and *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005), Defendants argue there is not a constitutional right to travel by airplane or by the most convenient form of travel. Defendants, therefore, contend Plaintiffs' rights to travel are not constitutionally burdened because the No-Fly List only prohibits travel by commercial aviation.

As the Court found in its Opinion and Order (#110), *Gilmore* and *Green* are distinguishable from this case for a number of reasons. First, those cases involve burdens on the right to *interstate* as opposed to *international* travel. Although there are viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with Defendants' contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons that an individual may have for wanting or needing to travel overseas quickly such as the birth of a child, the death of a loved one, a business opportunity, or a religious obligation. In *Ibrahim v. Department of Homeland Security* the court rejected an argument similar to the one that Defendants make in this case:

> While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for *international* travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive. . . . Decisions involving *domestic* air travel, such as the *Gilmore* case, are not on point.

No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012). Other cases Defendants cite are similarly distinguishable. *See, e.g., Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)(restrictions on interstate travel as it relates to the right to drive); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38 (2d Cir. 2007)(restrictions on interstate travel as it relates to riding ferries); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991)(restrictions on interstate air service to one airport).

Second, the burdens imposed by the restrictions on the plaintiffs in *Green* and *Gilmore* are far less than the alleged burdens in this matter. *Gilmore* involved the requirement that passengers present photo identification before boarding a commercial flight and *Green* involved passengers being subjected to enhanced security screening because they had been mistakenly identified as being on a terrorist watch list. Unlike the security-screening restrictions in *Green* and *Gilmore*, Plaintiffs' placement on the No-Fly List operates as a complete and indefinite ban on boarding commercial flights.

The Court also disagrees with Defendants' assertion that *all* modes of transportation must be foreclosed before any infringement of an individual's due-process right to international travel is triggered. In *DeNieva* the Ninth Circuit found the plaintiff's protected liberty interest in her right to international travel had been infringed in that "retention of [her] passport infringed upon her ability to travel internationally" because "[w]ithout her passport, she could travel internationally *only with great difficulty, if at all.*" *DeNieva*, 966 F.2d at 485 (emphasis added). In other words, her protected liberty interest in international travel had been infringed even though she may not have been completely banned from traveling.

As Plaintiffs' difficulties with international travel demonstrate, placement on the No-Fly List is a significant impediment to international travel. It is undisputed that inclusion on the No-Fly List completely bans listed persons from boarding commercial flights to or from the United States or over United States airspace. In addition, the realistic implications of being on the No-Fly List are far-reaching. For example, TSC shares watch-list information with 22 foreign governments, and United States Customs and Border Protection makes recommendations to ship captains as to whether a passenger poses a risk to transportation security. Thus, having one's name on the watch

list can also result in interference with an individual's ability to travel by means other than commercial airlines as evidenced by some Plaintiffs' experiences as they attempted to travel internationally or return to the United States by sea and by land. In addition, the ban on air travel has exposed some Plaintiffs to extensive detention and interrogation at the hands of foreign authorities. With perhaps the exception of travel to a small number of countries in North and Central America, a prohibition on flying turns routine international travel into an odyssey that imposes significant logistical, economic, and physical demands on travelers. Thus, while the nature of the deprivation in this case may be different from the retention of the plaintiff's passport in *DeNieva*, placement on the No-Fly List, as noted, results in an individual being able to "travel internationally only with great difficulty, if at all." *Id.*

Accordingly, the Court concludes on this record that Plaintiffs have constitutionally-protected liberty interests in traveling internationally by air, which are significantly affected by being placed on the No-Fly List.

The first step of the *Mathews* inquiry, however, does not end with mere recognition of a liberty interest. The Court must also weigh the liberty interest deprived against the other factors. *See Wilkinson v. Austin*, 545 U.S. 209, 225 (2005).

As noted, placement on the No-Fly List renders most international travel very difficult or impossible. One need not look beyond the hardships suffered by Plaintiffs to understand the significance of the deprivation of the right to travel internationally. Due to the major burden imposed by inclusion on the No-Fly List, Plaintiffs have suffered significantly including long-term separation from spouses and children; the inability to access desired medical and prenatal care; the inability to pursue an education of their choosing; the inability to participate in important religious rites; loss of employment opportunities; loss of government entitlements; the inability to visit family; and the inability to attend important personal and family events such as graduations, weddings, and funerals. The Court concludes international travel is not a mere convenience or luxury in this modern world. Indeed, for many international travel is a necessary aspect of liberties sacred to members of a free society.

Accordingly, on this record the Court concludes Plaintiffs' inclusion on the No-Fly List constitutes a significant deprivation of their liberty interests in international travel.

2. Stigma-Plus - Reputation

Plaintiffs also assert the first factor under *Mathews* has been satisfied because Plaintiffs have been stigmatized "in

conjunction with their right to travel on the same terms as other travelers." First Am. Compl. ¶ 141.

Under the "stigma-plus" doctrine, the Supreme Court has recognized a constitutionally-protected interest in "a person's good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). *See also Miller v. Cal.*, 355 F.3d 1172, 1178-79 (9th Cir. 2004). "To prevail on a claim under the stigma-plus doctrine, Plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; *plus* (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law." *Green*, 351 F. Supp. 2d at 1129 (emphasis added)(citing *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002), and *Paul v. Davis*, 424 U.S. 693, 701, 711 (1976)). "'The plus must be a deprivation of a liberty or property interest by the state that directly affects the [Plaintiffs'] rights.'" *Green*, 351 F. Supp. 2d at 1129 (quoting *Miller*, 355 F.3d at 1178). Under the "plus" prong, a plaintiff can show he has suffered a change of legal status if he "legally [cannot] do something that [he] could otherwise do." *Miller*, 355 F.3d at 1179 (discussing *Constantineau*, 400 U.S. 433 (1971)).

Plaintiffs contend, and Defendants do not dispute, that placement on the No-Fly List satisfies the "stigma" prong because

it carries with it the stigma of being a suspected terrorist that is publicly disclosed to airline employees and other travelers near the ticket counter. According to Defendants, however, Plaintiffs cannot meet the "plus" prong of the test because (1) Plaintiffs do not have a right to travel by commercial airline and (2) there is not a "connection" between the stigma and the "plus" in light of the fact that Plaintiffs have alternative means of travel.

As noted, the Court has concluded Plaintiffs have constitutionally-protected liberty interests in the right to travel internationally by air. In addition, the Court concludes Plaintiffs have satisfied the "plus" prong because being on the No-Fly List means Plaintiffs are legally barred from traveling by air at least to and from the United States and over United States airspace, which they would be able to do but for their inclusion on the No-Fly List. Thus, Plaintiffs have suffered a change in legal status because they "legally [cannot] do something that [they] otherwise could do." *Miller*, 355 F.3d at 1179. The Court, therefore, concludes on this record that Plaintiffs have constitutionally-protected liberty interests in their reputations.

On the other hand, Plaintiffs' private interests at the heart of their stigma-plus claim are not as strong. Although placement on the No-Fly List carries with it the significant

stigma of being a suspected terrorist and Defendants do not contest the fact that the public disclosure involved may be sufficient to satisfy the stigma-plus test, the Court notes the limited nature of the public disclosure in this case mitigates Plaintiffs' claims of injury to their reputations. Because the No-Fly List is not released publicly, the "public" disclosure is limited to a relatively small group of individuals in the same area of the airport as the traveler when the traveler is denied boarding. Notwithstanding the fact that being denied boarding an airplane and, in some instances, being arrested or surrounded by security officials in an airport is doubtlessly stigmatizing, the Court notes the breadth and specificity of the public disclosure in this case is more limited than in the ordinary "stigma-plus" case. *See, e.g., Paul v. Davis*, 424 U.S. 693, 694-96 (1976)(distribution of a list and mug shots of "active shoplifters" to approximately 800 merchants); *Constantineau*, 400 U.S. at 435-36 (posting a list of the identities of those who have caused harm "by excessive drinking" in all retail liquor outlets); *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 973 (9th Cir. 2002)(filing of an adverse action report with the California Medical Board and the National Practitioner Data Bank detailing the reasons why a psychologist relinquished his privileges at a hospital). Nevertheless, the Court concludes the injury to Plaintiffs' reputations is sufficient to implicate

Plaintiffs' constitutionally-protected interests in their reputations.

On this record the Court concludes Plaintiffs' claims raise constitutionally-protected liberty interests both in international air travel and in reputation, and, therefore, the first factor under the *Mathews* test weighs heavily in Plaintiffs' favor.

B. Second Factor: Risk of Erroneous Deprivation

As noted, in the second *Mathews* factor the Court weighs "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. *See also Vasquez*, 734 F.3d at 1044.

1. Risk of Erroneous Deprivation

When considering the risk of erroneous deprivation, the Court considers both the substantive standard that the government uses to make its decision as well as the procedural processes in place. *See Santosky v. Kramer*, 455 U.S. 745, 761-64 (1982).

As noted, nominations to the TSDB are generally accepted based on a "reasonable suspicion" that requires "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an

individual" meets the substantive derogatory criteria.[6] Joint Statement of Stipulated Facts (#84) ¶ 16. This "reasonable suspicion" standard is the same as the traditional reasonable suspicion standard commonly applied by the courts. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968)(permitting investigatory stops based on a reasonable suspicion supported by "articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."). *See also Ramirez v. City of Buena Park*, 560 F.3d 1012, 1020-21 (9th Cir. 2009). "The reasonable-suspicion standard is not a particularly high threshold to reach." *United States v. Valdez-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013). Although reasonable suspicion requires more than "a mere 'hunch,'" the evidence available "need not rise to the level required for probable cause, and . . . falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002)(quoting *Terry*, 392 U.S. at 27).

It is against the backdrop of this substantive standard that the Court considers the risk of erroneous deprivation of the protected interests; *i.e.*, the risk that travelers will be placed

[6] As noted, the Court has reviewed *in camera* and considered the additional substantive derogatory criteria for the No-Fly List, but the Court does not refer to the substance of those criteria or the Watchlisting Guidance.

on the No-Fly List under Defendants' procedures despite not having a connection to terrorism or terrorist activities.

Defendants argue there is little risk of erroneous deprivation because the TSC has implemented extensive quality controls to ensure that the TSDB includes only individuals who are properly placed there. Defendants point out that the TSDB is updated daily and audited for accuracy and currentness on a regular basis and that each entry into the TSDB receives individualized review if the individual files a DHS TRIP inquiry. Finally, Defendants argue judicial review of the DHS TRIP determination further diminishes the risk of erroneous deprivation.

Plaintiffs, in turn, cite a 2007 report by the United States Government Accountability Office and a 2009 report by the Department of Justice Office of the Inspector General that concludes the TSDB contains many errors and that the TSC has failed to take adequate steps to remove or to modify records in a timely manner even when necessary. In addition, Plaintiffs maintain the lack of notice of inclusion on the No-Fly List or the reasons therefor forces aggrieved travelers to guess about the evidence that they should submit in their defense and, by definition, creates a one-sided and insufficient record at both the administrative and judicial level that does not provide a

genuine opportunity to present exculpatory evidence for the correction of errors.

Defendants point out that the information on which Plaintiffs rely to support their contention that the TSC has failed to modify adequately or to remove records when necessary is outdated and that the 2009 report indicated significant progress in maintenance of the TSDB. Although Defendants are correct that the TSC appears to have made improvements in ensuring the TSDB is current and accurate, Plaintiffs' contention that the TSDB carries with it a risk of error, nevertheless, carries significant weight. This point was recently reinforced in *Ibrahim* where the plaintiff was nominated to the No-Fly List in 2004 as a consequence of human error despite the fact that she did not pose a threat to national security. *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA (#682)(N.D. Cal. Jan. 14, 2014) at 9. Although Ibrahim was taken off the No-Fly List shortly after the 2004 listing, the mistake itself was not discovered until 2013 and Ibrahim continued to experience substantial difficulties through the date of the order in which Judge William Alsup ultimately ordered the government to purge references to the erroneous 2004 nomination in all of its databases. *Id.* at 16-25, 38. The fact that the TSDB could still contain erroneous information more than nine years after commission of the error

belies Defendants' argument that the TSDB front-end safeguards substantially mitigate the risk of erroneous deprivation.

In any event, the DHS TRIP process suffers from an even more fundamental deficiency. As noted, the reasonable suspicion standard used to accept nominations to the TSDB is a low evidentiary threshold. This low standard is particularly significant in light of Defendants' refusal to reveal whether travelers who have been denied boarding and who submit DHS TRIP inquiries are on the No-Fly List and, if they are on the List, to provide the travelers with reasons for their inclusion on the List. "Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations." *Al Haramain Islamic Found., Inc. v. United States Dep't of Treasury*, 686 F.3d 965, 982 (9th Cir. 2012).

The availability of judicial review does little to cure this risk of error. While judicial review provides an independent examination of the existing administrative record, that review is of the same one-sided and potentially insufficient administrative record that TSC relied on in its listing decision without any additional meaningful opportunity for the aggrieved traveler to submit evidence intelligently in order to correct anticipated

errors in the record.[7] Moreover, judicial review only extends to whether the government reasonably determined the traveler meets the minimum substantive derogatory criteria; *i.e.*, the reasonable suspicion standard. Thus, the fundamental flaw at the administrative-review stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judicial-review stage.

Accordingly, on this record the Court concludes the DHS TRIP redress process, including the judicial review of DHS TRIP determinations, contains a high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests.

2. Utility of Substitute Procedural Safeguards

In its analysis of the second *Mathews* factor, the Court also considers the probative value of additional procedural safeguards. *Mathews*, 424 U.S. at 335. Plaintiffs contend due process requires Defendants to provide post-deprivation notice of their placement on the No-Fly List; notice of the reasons they have been placed on the List; and a post-deprivation, in-person hearing to permit Plaintiffs to present exculpatory evidence. Notably, Plaintiffs argue these additional safeguards are only necessary after a traveler has been denied boarding. Defendants,

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[7] Because the risk of erroneous deprivation arises from the insufficiency of the administrative record rather than the reviewing court's analysis, the Ninth Circuit's holding in *Arjmand* is inapplicable. 745 F.3d at 1302-03.

in turn, assert the current procedures are sufficient in light of the compelling government interests in national security and protection of classified information.

Clearly, additional procedural safeguards would provide significant probative value. *See Mathews*, 424 U.S. at 335. In particular, notice of inclusion on the No-Fly List through the DHS TRIP process after a traveler has been denied boarding would permit the complainant to make an intelligent decision about whether to pursue an administrative or judicial appeal. In addition, notice of the reasons for inclusion on the No-Fly List as well as an opportunity to present exculpatory evidence would help ensure the accuracy and completeness of the record to be considered at both the administrative and judicial stages and, at the very least, would provide aggrieved travelers the opportunity to correct "simple factual errors" with "potentially easy, ready, and persuasive explanations." *See Al Haramain Islamic Found.*, 686 F.3d at 982. Thus, the Court concludes additional procedural safeguards would have significant probative value.

In summary, on this record the Court concludes the DHS TRIP process presently carries with it a high risk of erroneous deprivation in light of the low evidentiary standard required for placement on the No-Fly List together with the lack of a meaningful opportunity for individuals on the No-Fly List to provide exculpatory evidence in an effort to be taken off of the

List. Moreover, the Court finds additional procedural safeguards would have significant probative value in ensuring that individuals are not erroneously deprived of their constitutionally-protected liberty interests. Accordingly, the Court concludes the second *Matthews* factor weighs heavily in favor of Plaintiffs.

C. The Government's Interest

When considering the third *Mathews* factor, the Court weighs "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. *See also Vasquez*, 734 F.3d at 1044.

"[T]he Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981)(quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)). *See also Al Haramain*, 686 F.3d at 980 ("[T]he government's interest in national security cannot be understated.").

"[T]he Constitution certainly does not require that the government take actions that would endanger national security." *Al Haramain*, 686 F.3d at 980. Moreover, the government has a

"'compelling interest' in withholding national security information from unauthorized persons." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988)(quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)). "Certainly the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001)(*NCORI*). Obviously, the Court cannot and will not order Defendants to disclose classified information to Plaintiffs.

On this record the Court concludes the governmental interests in combating terrorism and protecting classified information are particularly compelling, and, viewed in isolation, the third *Mathews* factor weighs heavily in Defendants' favor.

D. Balancing the *Mathews* Factors

"'[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)(quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961)). *See also Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013). "'[D]ue process is flexible and calls for

such procedural protections as the particular situation demands.'" *Gilbert v. Homar*, 520 U.S. at 930 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)). *See also Ching*, 725 F.3d at 1157.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)(quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). *See also In re Rains*, 428 F.3d 893, 903 (9th Cir. 2005). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314. *See also Circu v. Gonzalez*, 450 F.3d 990, 993 (9th Cir. 2006). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *Id.* *See also Al Haramain*, 686 F.3d at 980 ("[T]he Constitution [requires] that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests.").

1. Applicable Caselaw

Although balancing the *Mathews* factors is especially difficult in this case involving compelling interests on both sides, the Court, fortunately, does not have to paint on an empty canvass when balancing such interests. Indeed, several other courts have done so in circumstances that also required balancing a plaintiff's due-process right to contest the deprivation of important private interests with the government's interest in protecting national security and classified information. *See, e.g., Al Haramain*, 686 F.3d 965; *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174 (D.C. Cir. 2004); *NCORI*, 251 F.3d 192 (D.C. Cir. 2001); *Ibrahim*, No. C 06-00545 WHA (#682); *KindHearts for Charitable and Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

a. Ibrahim v. Department of Homeland Security

As noted, the plaintiff in *Ibrahim* was placed on the No-Fly List in November 2004 as a result of human error. *Ibrahim*, No. C 06-00545 WHA (#682), at 16. Nonetheless, Ibrahim's student visa was revoked in January 2005 because of "law enforcement interest in her as a *potential* terrorist." *Id.* at 17-18 (emphasis added). Even though Ibrahim was taken off of the No-Fly List shortly after her initial listing and the government had determined by February 10, 2006, that she had "no nexus to terrorism," she remained in the TSDB until September 18,

2006. *Id.* at 16-18. Shortly after her removal from the TSDB, Ibrahim was placed back in the TSDB before once again being removed at the end of May 2007. *Id.* at 18-19. On October 20, 2009, however, Ibrahim was again nominated to the TSDB pursuant to a secret exception to the reasonable-suspicion standard. She was not, however, placed on the No-Fly List. *Id.* at 19.

When Ibrahim applied for a visa in 2009, her application was denied pursuant to 8 U.S.C. § 212(a)(3)(B), which is a section of the Immigration and Nationality Act that relates to terrorist activities. The word "Terrorist" was handwritten on the letter informing her of the denial. *Id.* at 20-22. Although Ibrahim again applied for a visa in 2013, it was denied even though the government conceded during litigation that Ibrahim did not pose a threat to national security. *Id.* at 18, 19-24.

In 2013 Ibrahim's daughter, a United States citizen, was not permitted to board a flight to the United States because her name was in a section of the TSDB in which travelers' admissibility to enter the United States is evaluated. Within six minutes, however, United States Customs and Border Patrol discovered the error and corrected it the next day, and Ibrahim's daughter was removed from the TSDB. *Id.* at 24-25.

The *Ibrahim* court applied the *Mathews* factors to Ibrahim's procedural due-process challenge and found:

(1) Ibrahim's presence on the No-Fly List and subsequent events

infringed on her right to travel, right to be free from incarceration, and right to be free from the stigma associated with her public denial of boarding an airplane and subsequent incarceration; (2) there was not merely the *risk* of erroneous deprivation, but an *actual* erroneous deprivation; and (3) the government interest was low because the government conceded Ibrahim did not pose a threat to national security. *Id.* at 27. The court ordered the defendants to purge from government databases all references to the erroneous 2004 listing and ordered the government to give Ibrahim the opportunity to apply for a discretionary waiver of visa ineligibility. After reviewing classified information, however, the court refused to overturn Ibrahim's visa denial. *Id.* at 27-28, 31-34.

b. ***National Council of Resistance of Iran (NCORI) v. Department of State***

In *NCORI* two organizations sought review of the Secretary of State's actions designating them as "foreign terrorist organizations" under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1189. 251 F.3d at 195-96. Such a designation under AEDPA results in the blocking of all funds that the organization has on deposit in United States banks, bans certain members and representatives of the organization from entry into the United States, and forbids all persons within the United States "from 'knowingly providing material support or resources' to the organization." *Id.* at 196

(quoting 18 U.S.C. § 2339B(a)(1)). During the administrative review of the State Department's determination, the Secretary of State "compiles an 'administrative record,'" but the Secretary does not provide the target organizations with notice of the materials used against them in that record, the opportunity to comment on such materials, or the opportunity to develop the administrative record further. *Id.* The administrative record may contain classified materials. *Id.* Judicial review is available, but it is based solely on the administrative record and the classified portion of the record that the government submits to the court *ex parte* and *in camera*. *Id.* at 196-97.

When analyzing the procedural due-process claim, the District of Columbia Circuit found the plaintiffs were deprived of their property interests and a stigma-plus liberty interest by their designation as foreign terrorist organizations. *Id.* at 203-05. After considering the risk of erroneous deprivation and the government's interests, the court held the Secretary must provide the organizations with "'notice of the action sought,' along with the opportunity to effectively be heard." *Id.* at 208 (quoting *Mathews*, 424 U.S. at 334). Accordingly, the court held the Secretary must (1) afford the target organizations *pre-deprivation* notice that they are under consideration for designation; (2) provide the organizations with notice of the unclassified portions of the administrative record

on which the Secretary will rely in making the designation determination; and (3) provide the organizations with some "opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations." *Id.* at 208-09. Notably, however, the court left open "the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made." *Id.* at 208.

c. *KindHearts for Charitable Humanitarian Development v. Geithner*

In *KindHearts* the plaintiff challenged the Office of Foreign Assets Control's provisional designation of KindHearts as a Specially Designated Global Terrorist (SDGT). 647 F. Supp. 2d at 864. On February 19, 2006, the Office of Foreign Assets Control (OFAC) sent notice to KindHearts that OFAC had frozen all of Kindhearts's assets and property pending investigation into whether KindHearts was subject to designation as an SDGT. *Id.* at 866-67. The "blocking notice" reflected KindHearts was being investigated "for being controlled by, acting for or on behalf of, assisting in or providing financial or material support to, and/or otherwise being associated with Hamas." *Id.* at 867.

After ignoring a responsive letter from KindHearts and its request for a copy of the administrative record relied on in the investigation, OFAC provisionally designated KindHearts as an SDGT on May 25, 2007, more than a year after the initial asset freeze. *Id.* With that letter OFAC included 35 unclassified and nonprivileged documents; "acknowledged it also relied on other 'classified and privileged documents'" and provided a three-page summary of the classified evidence; and informed KindHearts that it could present any evidence or other information for OFAC's consideration in making the final determination. *Id.* at 868. After unsuccessfully requesting access to the full classified and unclassified record, KindHearts sent OFAC a 28-page preliminary submission on June 25, 2007, together with 1,369 pages of evidence to address OFAC's concerns to the best of Kindhearts' ability. *Id.* OFAC later misplaced Kindhearts' submission. *Id.* at 868 n.4.

KindHearts filed a lawsuit in which it argued, among other things, that "OFAC provided inadequate post-deprivation process" by failing "to specify any objective criteria for blocking KindHearts' assets" and by failing to provide either pre- or post-deprivation process. *Id.* at 899. While finding other issues unripe for review on the merits, the court addressed the sufficiency of the procedural protections associated with the initial freeze of Kindhearts' assets.

In a summary of the notice provided to KindHearts, the court noted "KindHearts remains largely uniformed about the basis for the government's actions." *Id.* at 904. The government's failure to provide notice was particularly important in that "[n]otice is to come from the government because it alone knows what *it* believes, and why what it believes justifies its action." *Id.* at 904 n.25 (emphasis in original). Accordingly, after weighing the *Mathews* factors, the court found OFAC failed to provide KindHearts with proper notice, and, therefore, "violated KindHearts' fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations." *Id.* at 906. In addition to the notice deficiencies, the court found OFAC "failed to provide a meaningful hearing, and to do so with sufficient promptness to moderate or avoid the consequences of delay." *Id.* at 907-08.

d. *Jifry v. Federal Aviation Administration*

In *Jifry* the Federal Aviation Administration (FAA) revoked the airman certificates of Jifry and Zarie on the ground that the two pilots "presented 'a security risk to civil aviation or national security.'" *Jifry*, 370 F.3d at 1176-77. Jifry and Zarie were both nonresident alien pilots who used their FAA certificates to pilot aircraft abroad, but they had not piloted

commercial aircraft in the United States for four and nine years respectively. *Id.* at 1177.

The airman certificate-revocation process involved both the TSA and FAA. *Id.* When the TSA finds a pilot poses a security threat, TSA issues an Initial Notification of Threat Assessment (Initial Notice) to the individual and serves that determination on the FAA. *Id.* The pilot may request "releasable materials upon which the Initial Notice was based." *Id.* On receipt of the releaseable materials, the pilot has 15 days to submit a substantive response to the Initial Notice. *Id.* The TSA Deputy Administrator then reviews the record *de novo* and issues a Final Notification of Threat Assessment (Final Notice) if he finds the pilot poses a security threat, and the FAA revokes the pilot's certificate. *Id.* The pilot may appeal to the National Transportation Safety Board and then to the court of appeals. *Id.* at 1177-78.

Jifry and Zarie received the Initial Notice and requested the releaseable materials. The materials that TSA provided, however, did not include the factual basis for TSA's determination because it was based on classified information. *Id.* at 1178. Jifry and Zarie stated in their written response that "the 'lack of evidence and information about the basis for the determination contained in the TSA's response' made it impossible for them to specifically rebut the TSA's allegations,

and [they denied] that they were security threats." *Id.* The TSA Deputy Administrator issued a Final Notice, and the FAA subsequently revoked the pilots' certificates. *Id.*

Jifry and Zarie argued the procedures for revoking their certificates violated their rights to due process. After assuming Jifry and Zarie were entitled to constitutional protections as nonresident alien pilots with FAA certificates, the court found the balance of the *Mathews* factors favored the FAA. The court noted the pilots' interest in possessing FAA airman certificates to fly foreign aircraft outside of the United States "pales in significance to the government's security interests in preventing pilots from using civil aircraft as instruments of terror." *Id.* at 1183. The court also noted "whatever the risk of erroneous deprivation, the pilots had the opportunity to file a written reply to the TSA's initial determination and [the] independent *de novo* review of the entire administrative record by the Deputy Administrator of the TSA . . . and *ex parte, in camera* judicial review of the record" and that "substitute procedural safeguards may be impracticable" in light of the government's interest in protecting classified information. The court relied on *NCORI* for the proposition that the government needed to "'afford to the entities under consideration notice that the designation is impending,' . . . and 'the opportunity to present, at least in written form, such

evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.'" *Id.* at 459-60 (quoting *NCORI*, 251 F.3d at 208-09). The court found the TSA and FAA's procedures satisfied this standard. *Id.* at 460.

e. *Al Haramain Islamic Foundation v. United States Department of the Treasury*

The issues in *Al Haramain* are similar to those in this case. In *Al Haramain* the Ninth Circuit addressed the sufficiency of the procedural safeguards in OFAC's investigation and designation of AHIF-Oregon as an SDGT. On February 19, 2004, OFAC issued a press release stating it had blocked the assets of AHIF-Oregon pending an investigation concerning the potential designation of AHIF-Oregon as an SDGT. *Al Haramain*, 686 F.3d at 973. OFAC did not provide notice before blocking AHIF-Oregon's assets nor did the press-release reveal the reasons for the investigation. OFAC and AHIF-Oregon exchanged "voluminous documents on a range of topics," the bulk of which concerned AHIF-Oregon's possible connections to and financial support of Chechen terrorism. *Id.* On September 9, 2004, OFAC issued a press-release declaring that it had designated AHIF-Oregon as an SDGT because of direct links between AHIF-Oregon and Osama bin Laden, violations of tax and money-laundering laws, attempts to conceal the movement of funds intended for Chechnya by falsely

representing that those funds were for the purpose of purchasing a prayer house in Missouri, and re-appropriation of funds donated for the purpose of humanitarian relief to support mujahideen in Chechnya. *Id.* at 973-74.

On September 16, 2004, OFAC sent a letter advising AHIF-Oregon that it had been designated as an SDGT and that it could request administrative reconsideration. *Id.* at 974. In early 2005 AHIF-Oregon submitted additional documents for the administrative record and requested reconsideration of the designation. AHIF-Oregon asserted it did not have a connection to terrorism and provided a detailed explanation of its Chechen donation. *Id.* Thereafter it repeatedly sought an explanation for its designation and a determination of its request for reconsideration, but OFAC did not respond. *Id.* AHIF-Oregon then filed a lawsuit in which it asserted the procedural protections provided by OFAC violated AHIF-Oregon's procedural due-process rights under the United States Constitution.

In November 2007 after the commencement of AHIF-Oregon's lawsuit and more than three years after the letter informing AHIF-Oregon of its designation, OFAC sent AHIF-Oregon a letter advising that OFAC provisionally intended "to 'redesignate'" AHIF-Oregon and offering AHIF-Oregon a final opportunity to submit documentation for OFAC's consideration. *Id.* AHIF-Oregon again submitted nearly 1,000 pages of documents.

Id. On February 6, 2008, OFAC sent AHIF-Oregon a letter stating OFAC had determined AHIF-Oregon continued to meet the criteria for designation as an SDGT and specified three reasons for the designation: (1) two designated persons owned or controlled AHIF-Oregon; (2) AHIF-Oregon acted for or on behalf of those designated persons; and (3) AHIF-Oregon operated as a branch office of the Al Haramain Islamic Foundation, an international charity that provided support for al-Qaeda and other SDGTs. *Id.*

The court found the procedural protections afforded to AHIF-Oregon did not satisfy due process. Applying the *Mathews* factors, the court found AHIF-Oregon's "property interest is significant" because the designation "completely shutters all [of AHIF-Oregon's] domestic operations" indefinitely. *Id.* at 979-80. On the other hand, the court found "the government's interest in national security cannot be understated." *Id.* at 980.

"[W]ith respect to the use of classified information without disclosure," the court observed "'[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations.'" *Id.* (quoting *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995)). As to the probative value of additional procedural safeguards, the court found "[t]o the extent that an unclassified summary could provide helpful information, such as the subject

matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable." *Id.* at 982-83.

The Al *Haramain* court noted the Ninth Circuit held in *Gete v. Immigration and Naturalization Services*, 121 F.3d 1285, 1287-91 (9th Cir. 1997), that in the context of the government's seizure of vehicles from aliens who allegedly transported unauthorized aliens into the country, "[d]ue [p]rocess required the INS to disclose the 'factual bases for seizure[]' and 'the specific statutory provision allegedly violated.'" *Al Haramain*, 686 F.3d at 987 (quoting *Gete*, 121 F.3d at 1298). The court specifically rejected the defendants' argument that *NCORI* and a subsequent District of Columbia Circuit case, *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003), stood for the proposition that the agency need not provide a statement of reasons for its investigation. The Ninth Circuit observed the District of Columbia Circuit did not address whether the agency was required to provide notice of the reasons for the deprivation in either *NCORI* or *Holy Land Foundation*. *Al Haramain*, 686 F.3d at 987-88. To the extent that *NCORI* and *Holy Land Foundation* could be interpreted as permitting the agency to avoid providing a statement of reasons for the deprivation, the *Al Haramain* court

explicitly stated those cases were inconsistent with the Ninth Circuit's precedent in *Gete*. *Id.* at 988. Accordingly, the court held: "In the absence of national security concerns, due process requires OFAC to present the entity with, at a minimum, a timely statement of reasons for the investigation." *Id.* at 987. As to national security concerns about providing a statement of reasons for the deprivation or permitting counsel with security clearance to view the classified information, the court "recognize[d] that disclosure may not always be possible" and that the agency may in some cases withhold such mitigating measures after considering "at a minimum, the nature and extent of the classified information, the nature and extent of the threat to national security, and the possible avenues available to allow the designated person to respond more effectively to the charges." *Id.* at 983-84.

2. Application to the DHS TRIP Process

As noted, the Court finds Plaintiffs here have significant protected liberty interests at stake. Plaintiffs' interests in traveling internationally by air are substantially greater than the interest "in possessing FAA airman certificates to fly foreign aircraft outside the United States" as in *Jifry*. Although the private interests involved in *Al Haramain, KindHearts*, and *NCORI* are somewhat different from Plaintiffs' individual interests, the analysis in those three cases

(particularly in *Al Haramain*) is more closely applicable to this case.

As in *Al Haramain*, "the government's interest in national security cannot be understated" in this case. *Id.* at 980. Nevertheless, the Ninth Circuit in *Al Haramain* found additional probative procedural protections were possible without jeopardizing the government's interest in national security. The adequacy of current procedures and potential additional procedures, however, affect the weight given to the governmental interest. *See Al Haramain*, 686 F.3d at 983 ("In many cases, though, some information could be summarized or presented to a lawyer with a security clearance without implicating national security."). Thus, while the government's interest in national security in this case weighs heavily, the sufficiency of the DHS TRIP redress process ultimately turns on the procedural protections provided to Plaintiffs.

A comparison of the procedural protections provided in this case with those provided in *Al Haramain*, *Jifry*, *KindHearts*, and *NCORI* reveals the DHS TRIP process falls far short of satisfying the requirements of due process. In *Al Haramain*, *Jifry*, and *KindHearts* the defendants provided the plaintiffs with some materials relevant to the respective agencies' reasons for the deprivation at some point in the proceedings. In *KindHearts* the initial notice of the asset freeze advised the plaintiff that

the investigation concerned connections between KindHearts and Hamas and a later, provisional designation notice included the unclassified administrative record and a three-page summary of the classified evidence. 647 F. Supp. 2d at 866-68. In *Jifry* TSA provided the pilots with the Initial Notice and, upon request, the "releaseable materials" before issuing the Final Notice. 370 F.3d at 1177. Finally, in *Al Haramain* during the months after AHIF-Oregon's assets were initially frozen, OFAC and AHIF-Oregon "exchanged voluminous documents," the "bulk" of which "concerned AHIF-Oregon's possible connections to Chechen terrorism in Russia." *Al Haramain*, 686 F.3d at 973.

Unlike the plaintiffs in *Al Haramain*, *KindHearts*, and *Jifry*, however, Plaintiffs in this case were not given any notice of the reasons for their placement on the No-Fly List nor any evidence to support their inclusion on the No-Fly List. Indeed, the procedural protections provided to Plaintiffs through the DHS TRIP process fall substantially short of even the notice that the courts found insufficient in *KindHearts* and *Al Haramain*. In this respect, this case is similar to *NCORI* in which the plaintiffs were not afforded "notice of the materials used against [them], or a right to comment on such materials or [to develop the] administrative record." *NCORI*, 251 F.3d at 196.

Defendants' failure to provide any notice of the reasons for Plaintiffs' placement on the No-Fly List is

especially important in light of the low evidentiary standard required to place an individual in the TSDB in the first place. When only an *ex parte* showing of reasonable suspicion supported by "articulable facts . . . taken together with rational inferences" is necessary to place an individual in the TSDB, it is certainly possible, and probably likely, that "simple factual errors" with "potentially easy, ready, and persuasive explanations" could go uncorrected. *See Al Haramain*, 686 F.3d at 982. Thus, without proper notice and an opportunity to be heard, an individual could be doomed to indefinite placement on the No-Fly List. Moreover, there is nothing in the DHS TRIP administrative or judicial-review procedures that remedies this fundamental deficiency. The procedures afforded to Plaintiffs through the DHS TRIP process are wholly ineffective and, therefore, fall short of the "elementary and fundamental requirement of due process" to be afforded "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *See Mullane*, 339 U.S. at 314.

Accordingly, on this record the Court concludes the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process.

3. Due-Process Requirements

Although the Court holds Defendants must provide a new process that satisfies the constitutional requirements for due process, the Court concludes Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security.

Because due process requires Defendants to provide Plaintiffs (who have all been denied boarding flights and who have submitted DHS TRIP inquiries without success) with notice regarding their status on the No-Fly List and the reasons for placement on that List, it follows that such notice must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List. In addition, Defendants must include any responsive evidence that Plaintiffs submit in the record to be considered at both the administrative and judicial stages of review. As noted, such procedures could include, but are not limited to, the procedures identified by the Ninth Circuit in *Al Haramain;* that is, Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel.

Although this Court cannot foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security, Defendants must make such a determination on a case-by-case basis including consideration of, at a minimum, the factors outlined in *Al Haramain; i.e.*, (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges. *See Al Haramain*, 686 F.3d at 984. Such a determination must be reviewable by the relevant court.

II. Claim Three: Administrative Procedure Act

Plaintiffs also raise claims under 5 U.S.C. §§ 706(2)(A) and 706(2)(B) of the APA.

A. Section 706(2)(A)

Under Section 706(2)(A) the court will only set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency rule is arbitrary and capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

When prescreening passengers, Congress instructed the Executive to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination *and correct information contained in the system.*" 49 U.S.C. § 44903(j)(2)(C)(iii)(I)(emphasis added). *See also* 49 U.S.C. § 44903(j)(2)(G)(i)(the Executive "shall establish a timely and fair process for individuals identified as a threat . . . to appeal to the [TSA] the determination and correct any erroneous information.").

As discussed herein at length, the DHS TRIP process does not provide a meaningful mechanism for travelers who have been denied boarding to correct erroneous information in the government's terrorism databases. A traveler who has not been given any indication of the information that may be in the record does not have any way to correct that information. As a result, the DHS TRIP process "entirely fail[s] to consider an important aspect" of Congress's instructions with respect to travelers denied boarding because they are on the No-Fly List. *See Motor Veh. Mfrs. Ass'n*, 463 U.S. at 43.

Accordingly, on this record the Court concludes the DHS TRIP process violates § 706(2)(A) of the APA.

B. Section 706(2)(B)

Under 5 U.S.C. § 706(2)(B) the court must set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity." As noted, the Court has concluded the DHS TRIP process violates Plaintiffs' rights to procedural due process under the United States Constitution. Accordingly, Plaintiffs' claim under § 706(2)(B) merely mirrors Plaintiffs' procedural due-process claim.

Because the Court has already concluded the DHS TRIP process violates Plaintiffs' procedural due-process rights, the Court also concludes the DHS TRIP process violates § 706(2)(B) of the APA.

C. Remedy

As noted, Plaintiffs' APA claims are closely related to Plaintiffs' procedural due-process claims, and the substantive deficiencies in the DHS TRIP redress process are the same under the APA as they are under procedural due process. Accordingly, the substitute procedures that Defendants select to remedy the violations of Plaintiffs' due-process rights, if sufficient, will also remedy the violations of Plaintiffs' rights under the APA.

CONCLUSION

For these reasons, the Court **DENIES** Defendants' Motion (#85) for Partial Summary Judgment and **GRANTS** Plaintiffs' Cross-Motion (#91) for Partial Summary Judgment as to Claims One and Three in Plaintiffs' Third Amended Complaint (#83).

The Court directs the parties to confer as to the next steps in this litigation and to file no later than July 14, 2014, a Joint Status Report with their respective proposals and schedules. The Court will schedule a Status Conference thereafter at which primary counsel for the parties should plan to attend in person.

IT IS SO ORDERED.

DATED this 24th day of June, 2014.

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHM KARIYE, RAYMOND EARL KNAEBLE IV, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, STEPHEN WILLIAM WASHBURN, ABDULLATIF MUTHANNA, NAGIB ALI GHALEB, MASHAAL RANA, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, and STEPHEN DURGA PERSAUD,	**3:10-CV-00750-BR**
Plaintiffs,	**OPINION AND ORDER**
v.	
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the UNITED STATES; ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and TIMOTHY J. HEALY, in his official capacity as Director of the Terrorist Screening Center,	
Defendants.	

STEPHEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Ste. 1600
Portland, OR 97204
(503) 802-2040

HINA SHAMSI
BEN WIZNER
NUSRAT JAHAN CHOUDHURY
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7876
(212) 549-2500

KEVIN DIAZ
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

AHILAN ARULANANTHAM
JENNIFER PASQUARELLA
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-5211

ALAN L. SCHLOSSER
JULIA HARUMI MASS
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

LAURA SCHAUER IVES
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
(505) 243-0046

REEM SALAHI
Salahi Law
429 Santa Monica Blvd, Suite 550
Santa Monica, CA 90401
(510) 225-8880

MITCHELL P. HURLEY
CHRISTOPHER M. EGLESON
JUSTIN H. BELL
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1011

Attorneys for Plaintiffs

ERIC HOLDER
United States Attorney General
DIANE KELLEHER
LILY S. FAREL
AMY ELIZABETH POWELL
SCOTT A. RISNER
United States Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 514-4775

S. AMANDA MARSHALL
United States Attorney
JAMES E. COX, JR.
Assistant United States Attorney
District of Oregon
1000 S.W. Third Ave.
Suite 600
Portland, OR 97204
(503) 727-1026

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Defendants' Motion (#85) for Partial Summary Judgment and Plaintiffs' Cross-Motion (#91) for Partial Summary Judgment. The parties seek summary judgment on Plaintiffs' claims for procedural due process under

the Fifth Amendment of the United States Constitution[1] and the Administrative Procedures Act (APA), 5 U.S.C. § 706, in which Plaintiffs challenge the adequacy of Defendants' redress procedures for persons on the United States government's "No Fly List." The Constitution Project (TCP) filed an Amicus Curiae Brief (#99) in Support of Plaintiffs' Cross-Motion.

The Court heard oral argument on June 21, 2013. At the conclusion of oral argument the Court requested Defendants to submit additional briefing as to whether any appellate courts have issued opinions on the merits of a challenge brought by a plaintiff who sought review of a final agency decision received through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Defendants filed their Notice of Response (#107) to the Court's Inquiry During Summary Judgment Hearing on July 3, 2013. The Court took the Cross-Motions under advisement on July 3, 2013.

For the reasons that follow, the Court **GRANTS in part** Plaintiffs' Cross-Motion (#91) as to Plaintiffs' liberty interests in international air travel and reputation and **DENIES in part** Defendants' Motion (#85) as to the same issues. The Court, however, **DEFERS** ruling on the remaining parts of the

[1] Plaintiffs have also asserted a claim under the Fifth Amendment for violation of substantive due process, which is not at issue for purposes of these Cross-Motions.

pending Motions for the reasons set out herein and directs the parties to submit supplemental briefing in light of the Court's rulings.

PLAINTIFFS' CLAIMS

Plaintiffs are citizens and lawful permanent residents of the United States (including four veterans of the United States Armed Forces) who were not allowed to board flights to or from the United States or over United States air space. Plaintiffs believe they were denied boarding because they are on a government watch list known as the "No Fly List." Plaintiffs allege some of them have been told by federal and/or local government officials that they are on the No Fly List. Each Plaintiff has submitted applications for redress through DHS TRIP. Despite Plaintiffs' requests to officials and agencies for explanations as to why they were not permitted to board flights, none has been provided and Plaintiffs do not know whether they will be permitted to fly in the future.

In their Third Amended Complaint Plaintiffs allege Defendants have violated Plaintiffs' Fifth Amendment right to procedural due process because Defendants have not given Plaintiffs any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No Fly List. Plaintiffs also assert Defendants' actions have been arbitrary and capricious and constitute "unlawful agency action"

in violation of the APA. Plaintiffs seek a declaratory judgment that Defendants' policies, practices, and customs violate the Fifth Amendment of the United States Constitution and the APA and an injunction requiring Defendants (1) to remedy such violations, including removal of Plaintiffs' names from any watch list or database that prevents them from flying; (2) to provide Plaintiffs with notice of the reasons and bases for Plaintiffs' inclusion on the No Fly List; and (3) to provide Plaintiffs with the opportunity to contest such inclusion.

PROCEDURAL BACKGROUND

Plaintiffs filed this action on June 30, 2010. On May 3, 2011, this Court issued an Order (#69) granting Defendants' Motion (#43) to Dismiss for failure to join the Transportation Security Administration (TSA) as an indispensable party and for lack of subject-matter jurisdiction on the ground that the relief sought by Plaintiffs could only come from the appellate court in accordance with 49 U.S.C. § 46110(a). Plaintiffs appealed the Court's order to the Ninth Circuit. *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012).

On July 26, 2012, the Ninth Circuit issued an opinion in which it reversed this Court's decision, holding "the district court . . . has original jurisdiction over Plaintiffs' claim that the government failed to afford them an adequate opportunity to

contest their apparent inclusion on the List." 686 F.3d at 1130. The Court also held "49 U.S.C. § 46110 presents no barrier to adding TSA as an indispensable party." *Id.* The Ninth Circuit issued its mandate on November 19, 2012, remanding the matter to this Court.

As noted, the parties filed Cross-Motions for Partial Summary Judgment, and the Court heard oral argument on June 21, 2013.

BACKGROUND

The following facts are undisputed unless otherwise noted:

I. The No Fly List

The Terrorist Screening Center (TSC), which is administered by the Federal Bureau of Investigation (FBI), develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB or sometimes referred to as the watch list). The No Fly List is a subset of the TSDB.

TSC provides the No Fly List to TSA, a component of the Department of Homeland Security (DHS), for use in pre-screening airline passengers. TSC accepts nominations for inclusion in the TSDB, which are generally accepted by TSC because of a "reasonable suspicion" that the individuals are known or suspected terrorists based on the totality of the information reviewed. The federal government does not release its minimum,

substantive, derogatory criteria for placement on the No Fly List nor the "Watchlisting Guidance" created for internal use by intelligence and law-enforcement communities.

II. DHS TRIP Redress Process

DHS TRIP is the mechanism available for individuals to seek redress for any travel-related screening issues experienced at airports or while crossing United States borders; *i.e.*, denial of or delayed airline boarding, denial of or delayed entry into or exit from the United States, or continuous referral for additional (secondary) screening. DHS TRIP allows travelers who have faced such difficulties to submit a "Traveler Inquiry Form" online, by email, or by regular mail. The form prompts travelers to describe their complaint, to produce documentation relating to the issue, and to provide identification and their contact information.

If the traveler is an exact or near match to an identity within the TDSB, DHS TRIP deems the complaint to be TSDB-related and the traveler's complaint is forwarded to TSC Redress for further review. Upon receipt of the complaint, TSC Redress reviews the available information, including the information and documentation provided by the traveler, and determines (1) whether the traveler is an exact match to an identity in the TSDB and (2) if an exact match, whether the traveler should continue to be in the TSDB. In making this determination, TSC

coordinates with the agency that originally nominated the individual to be included in the TSDB. If the traveler is not an exact match to an identity in the TSDB but has been misidentified as someone who is, TSC Redress informs DHS of the misidentification. DHS, in conjunction with any other relevant agency, then addresses the misidentification by correcting information in the traveler's records or taking other appropriate action.

When the review is completed DHS TRIP then sends a determination letter to the traveler advising that DHS TRIP has completed its review. A DHS TRIP determination letter neither confirms nor denies that the complainant is in the TSDB or on the No Fly List and does not provide any further details about why the complainant may or may not be in the TSDB or on the No Fly List. In some cases a DHS TRIP determination provides that the recipient can pursue an administrative appeal of the determination letter with TSA or can seek judicial review in a United States court of appeals pursuant to 49 U.S.C. § 46110.[2]

Determination letters, however, do not provide assurances

[2] 49 U.S.C. § 46110(a) provides in part: "[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."

about the complainant's ability to undertake future travel. In fact, at no point in the available administrative process is a complainant told whether he or she is in the TSDB or a subset of the TSDB or given any explanation for his or her inclusion on such a list. Accordingly, there is also not any opportunity for a complainant to contest or to offer corrections to the record on which any such determination may be based.

III. Plaintiffs

Solely for purposes of the parties' Cross-Motions (#85, #91) presently before the Court, Defendants do not contest[3] the following facts as asserted by Plaintiffs:

Plaintiffs are thirteen United States citizens who were denied boarding on flights over United States air space after January 1, 2009, and who believe they are on the United States government's No Fly List. Some Plaintiffs were actually told by airline representatives, FBI agents, or other government officials that they are on the No Fly List.

Each Plaintiff filed DHS TRIP complaints after being denied boarding and received a determination letter. None of the

[3] As a matter of policy, the United States government does not confirm or deny whether an individual is on the No Fly List nor does it provide any other details as to that issue. Defendants have accordingly chosen not to refute Plaintiffs' allegations that they are on the No Fly List for purposes of these Motions only. The Court, therefore, assumes as true Plaintiffs' assertions that they are on the No Fly List only for purposes of these Cross-Motions.

determination letters that Plaintiffs received confirm or deny the existence of any terrorist watch list that includes them nor do any of the letters provide a reason for including the individual in the TDSB or on the No Fly List.

Many of these Plaintiffs cannot travel overseas by any way other than air because such journeys by boat or by land would be cost-prohibitive, would be time-consuming to a degree that Plaintiffs could not take the necessary time off from work, or would put Plaintiffs at risk of interrogation and detention by foreign authorities. In addition, some Plaintiffs are not physically well enough to endure such infeasible modes of travel.

While Plaintiffs' circumstances are similar in many ways, each of their experiences and difficulties relating to and arising from their alleged inclusion on the No Fly List is unique as set forth in their Declarations filed in support of their Cross-Motion and summarized briefly below.

Amayan Latif: Latif is a United States Marine Corps veteran and lives in Stone Mountain, Georgia, with his wife and children. Between November 2008 and April 2010 Latif and his family were living in Egypt. In April 2010 Latif and his family attempted to return to the United States. Latif was not allowed to board the first leg of their flight from Cairo to Madrid. One month later Latif was questioned by FBI agents and told he was on the No Fly List. Because he was unable to board a flight to the United

States, Latif's United States veteran disability benefits were reduced from $899.00 per month to zero because he could not attend the scheduled evaluations required to continue his benefits. In August 2010 Latif returned home after the United States government granted him a "one-time waiver" to fly to the United States. Because he cannot fly, Latif is unable to travel from the United States to Egypt to resume studies or to Saudi Arabia to perform a *hajj*, a religious pilgrimage and Islamic obligation.

Mohamed Sheikh Abdirahman Kariye: Kariye lives in Portland, Oregon with his wife and children. In March 2010 Kariye was not allowed to board a flight from Portland to Amsterdam, surrounded in public by government officials at the airport, and told by an airline employee that he was on a government watch list. Because Kariye is prohibited from boarding flights out of the United States, he could not fly to visit his daughter who was studying in Dubai and cannot travel to Saudi Arabia to accompany his mother on the *hajj* pilgrimage.

Raymond Earl Knaeble IV: Knable is a United States Army veteran and lives in Chicago, Illinois. In 2006 Knable was working in Kuwait. In March 2010 Knaeble flew from Kuwait to Bogota, Columbia, to marry his wife, a Columbian citizen, and to spend time with her family. On March 14, 2010, Knaeble was not allowed to board his flight from Bogota to Miami. Knaeble was

subsequently questioned numerous times by FBI agents in Columbia. Because Knaeble was unable to fly home for a required medical examination, his employer rescinded its job offer for a position in Quatar. Knaeble attempted to return to the United States through Mexico, where he was detained for over 15 hours, questioned, and forced to return to Bogota. Knaeble eventually returned to the United States in August 2010 by traveling for 12 days from Santa Marta to Panama City and then to Mexicali, California. He was detained, interrogated, and searched by foreign authorities on numerous occasions during that journey.

Faisal Nabin Kashem: In January 2010 Kashem traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program. In June 2010 Kashem attempted to fly from Jeddah, Saudi Arabia, to New York; was denied boarding; and was told by an airline employee that he was on the No Fly List. Kashem was later questioned by FBI agents who also told him he was on the No Fly List. After joining this lawsuit, the United States government offered Kashem a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Elias Mustafa Mohamed: In January 2010 Mohamed traveled from the United States to Saudi Arabia to attend a two-year Arabic language-certification program. In June 2010 Mohamed

attempted to fly from Jeddah, Saudi Arabia, to Washington, D.C., but he was not allowed to board his flight and was told by an airline employee that he was on the No Fly List. He was later questioned by FBI agents who also told him he was on the No Fly List. After joining this lawsuit, the United States government offered Mohamed a "one-time waiver" to return to the United States, which he has so far declined because United States officials have refused to confirm that he will be able to return to Saudi Arabia to complete his studies.

Steven William Washburn: Washburn is a United States Air Force veteran and lives in New Mexico. In February 2010 Washburn was not allowed to board a flight from Ireland to Boston. He later attempted to fly from Dublin to London to Mexico City. Although he was allowed to board the flight from Dublin to London, the aircraft turned around 3 ½ hours after takeoff and returned to London where Washburn was detained. Washburn was subsequently interrogated by FBI agents on numerous occasions. In May 2010 Washburn returned to New Mexico by taking a series of five flights that eventually landed in Juarez, Mexico, where he crossed the United States border on foot. Washburn was subsequently detained and interrogated by Mexican officials. In June 2012 an FBI agent told Washburn that the agent would help remove Washburn's name from the No Fly List if he agreed to speak to the FBI. Since May 2010 Washburn has been separated from his

wife who is in Ireland because she has been unable to obtain a visa to come to the United States and Washburn is unable to fly to Ireland.

Nagib Ali Ghaleb: Ghaleb lives in Oakland, California. In February 2010 Ghaleb was traveling from Yemen where his wife and children were living to San Francisco via Frankfurt. Ghaleb was not allowed to board his flight from Frankfurt to San Francisco. Ghaleb was later interrogated by FBI agents who offered to arrange to fly Ghaleb back to the United States if he agreed to tell them who the "bad guys" were in Yemen and San Francisco and to provide names of people from his mosque and community. The agents threatened to have Ghaleb imprisoned. In May 2010 Ghaleb again attempted to return to the United States. He was able to fly from Sana'a, Yemen, to Dubai, but he was not allowed to board his flight from Dubai to San Francisco. In July 2010 Ghaleb accepted a "one-time wavier" offered by the United States government to return to the United States. Because Ghaleb cannot fly, he cannot go to Yemen to be with his ill mother or to see his brothers or sisters.

Abdullatif Muthanna: Muthanna lives in Rochester, New York. In June 2009 Muthanna left Rochester to visit his wife and children, who live in Yemen. In May 2010 Muthanna was to return to the United States on a flight from Aden, Yemen, to New York via Jeddah, Saudi Arabia, but he was not allowed to board his

flight from Jeddah to New York. In September 2010 Muthanna accepted a "one-time waiver" offered by the United States government to return home. In June 2012 Muthanna wanted to be with his family and attempted to fly to Yemen, but he was not allowed to board a flight departing from New York. In August 2012 Muthanna attempted a thirty-six-day journey over land and by ship from Rochester to Yemen, but a ship captain refused to let Muthanna sail on a cargo freighter departing from Philadelphia on recommendation of United States Customs and Boarder Protection. Muthanna was not allowed to board fights on four separate occasions before finally being able to board a flight from New York to Dubai in February 2013.

Mashaal Rana: Rana moved to Pakistan for school in 2009. In February 2010 Rana was not allowed to board a flight from Lahore, Pakistan, to New York. Rana's brother, who lives in the United States, was subsequently interrogated by an FBI agent. In October 2012 Rana was six-months pregnant and again attempted to return to New York to receive needed medical care and to deliver her child. Rana's brother worked with United States officials to clear Rana to fly. Rana received such clearance, but five hours before her flight was to depart she received notice that she would not be allowed to board. Rana was not able to find a safe alternative to travel to the United States prior to the birth of her child. In November 2010 the United States government offered

Rana a "one-time waiver," which she has not used because she fears she would not be able to return to Pakistan to be with her husband.

Ibraheim (Abe) Mashal: Mashal is a United States Marine Corps veteran. Mashal was not allowed to board a flight from Chicago, Illinois, to Spokane, Washington, and was told by an airline representative that he was on the No Fly List. Mashal was subsequently questioned by FBI agents and told his name would be removed from the No Fly List and he would receive compensation if he helped the FBI by serving as an informant. When Mashal asked to have his attorney present before answering the FBI's questions, the agents ended the meeting. Mashal owns a dog-training business. Because he is unable to fly, he has lost clients; had to turn down business; and has been prevented from attending his sister-in-law's graduation, the wedding of a close friend, the funeral of a close friend, and fundraising events for the nonprofit organization that he founded.

Salah Ali Ahmed: Ahmed lives in Norcross, Georgia. In July 2010 Ahmed was traveling from Atlanta to Yemen via Frankfurt and was not allowed to board the flight in Atlanta. Ahmed was subsequently questioned by FBI agents. Because he is unable to fly, Ahmed was unable to travel to Yemen in 2012 when his brother died and is unable to travel to Yemen to visit his extended family and to manage property he owns there.

Amir Meshal: Meshal lives in Minnesota. In June 2009 Meshal was not allowed to board a flight from Irvine, California, to Newark, New Jersey. Meshal was told by an FBI agent that he was on a government list that prohibits him from flying. In October 2010 FBI agents offered Meshal the opportunity to serve as a government informant in exchange for assistance in removing his name from the No Fly List. Because Meshal is unable to fly, he cannot visit his mother and extended family in Egypt.

Stephen Durga Persaud: Persaud lives in Irvine, California. In May 2010 Persaud was not allowed to board a flight from St. Thomas to Miami. An FBI agent told Persaud that he was on the No Fly List, interrogated him, and told him the only way to get off the No Fly List was to "talk to us." In June 2010 Persaud took a five-day boat trip from St. Thomas to Miami and a four-day train ride from Miami to Los Angeles so he could be home for the birth of his second child. Because he cannot fly, Persaud cannot travel to Saudi Arabia to perform the *hajj* pilgrimage.

STANDARDS

Summary judgment is appropriate when there is not a "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). *See also* Fed. R.

Civ. P. 56(a).

The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9th Cir. 1982)).

DISCUSSION

As noted, Plaintiffs allege Defendants have violated Plaintiffs' Fifth Amendment right to procedural due process because Defendants have not given Plaintiffs any post-deprivation notice nor any meaningful opportunity to contest their continued inclusion on the No Fly List.

I. Plaintiffs' Procedural Due-Process Claims

The fundamental requirement of due process is "the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1979). The Supreme Court has set forth a three-factor balancing test for courts to use when evaluating whether the government has provided due process:

> (1) the private interest that will be affected by the official action;
> (2) the risk of an erroneous deprivation of such interest through the procedures used,

> and the probable value, if any, of additional or substitute procedural safeguards; (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

A. First Factor: Private Interest

Plaintiffs contend the first factor under *Mathews* has been satisfied because Plaintiffs have a constitutionally-protected liberty interest in travel and reputation. Plaintiffs assert they have been deprived of both by their inclusion on the No Fly List.

1. Right to Travel

Plaintiffs contend the government has deprived them of their protected liberty interest in travel. In *Kent v. Dulles*, 357 U.S. 116 (1958), the Supreme Court held "[t]he right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.

As noted by the Ninth Circuit, "the [Supreme] Court has consistently treated the right to *international* travel as a liberty interest that is protected by the Due Process Clause of the Fifth Amendment." *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992)(emphasis added)(citing *Aptheker v. Sec'y of*

State, 378 U.S. 500, 505-08 (1964), and *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978)). In DeNieva the plaintiff brought a claim under 42 U.S.C. § 1983 after her passport was seized by government officials. The Ninth Circuit held the plaintiff had a right under the Fifth Amendment to travel internationally, and that right could not be deprived without a post-deprivation hearing. 966 F.2d. at 485.

Although Defendants do not dispute the United States Constitution affords procedural due-process protection to an individual's liberty interest in travel, Defendants rely heavily on *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), and *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005), to support their position that there is not a constitutional right to travel by airplane or to access the most convenient form of travel. In *Gilmore* the plaintiff challenged the government's airline passenger identification policy as unconstitutional, alleging the policy violated his right to travel because he could not travel by commercial airline without presenting identification. The Ninth Circuit rejected plaintiff's argument because "the Constitution does not guarantee the right to travel by any particular form of transportation." 435 F.3d at 1136. The court also found the "burden" imposed by the challenged identification policy was not unreasonable. *Id.* at 1137. The plaintiffs in *Green* alleged they were innocent

passengers without links to terrorist activity, but they had names similar or identical to names on the No Fly List and had been mistakenly identified by airport personnel as the individuals whose names appeared on that list. As a result, the plaintiffs were subjected to enhanced security screening. None of the plaintiffs ever missed a flight or were subjected to heightened screening for more than an hour. 351 F. Supp. 2d at 1122. The court denied the plaintiffs' procedural due-process claim and held the plaintiffs did not have a right to travel throughout the United States "without any impediments whatsoever." *Id.* at 1130.

The Court finds *Green* and *Gilmore* are distinguishable from this case for a number of reasons. These cases involve burdens on the right to *interstate* travel as opposed to *international* travel. Although there are perhaps viable alternatives to flying for domestic travel within the continental United States such as traveling by car or train, the Court disagrees with Defendants' contention that international air travel is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation. In *Ibrahim v. Department of Homeland Security* the Northern District

of California recently rejected an argument similar to the one made by Defendants here:

> While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for international travel, air transport in these modern times is practically the only form of transportation, travel by ship being prohibitively expensive. . . . . Decisions involving domestic air travel, such as the *Gilmore* case, are not on point.

No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal., Dec. 20, 2012). Other cases cited by Defendants on this issue are similarly distinguishable. *See, e.g., Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)(restrictions on interstate travel as it relates to the right to drive); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38 (2d Cir. 2007)(restrictions on interstate travel as it relates to riding ferries); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991)(restrictions on interstate air service).

In addition, the burdens imposed by the restrictions on the plaintiffs in *Green* and *Gilmore* are far less than the alleged burdens at issue here. While the plaintiffs in *Green* and *Gilmore* faced obstacles before being able to board their flights, they were not completely banned from flying like Plaintiffs in this case. Having to show identification to board a commercial aircraft and undergoing enhanced security screening for less than

an hour does not rise to the same level of deprivation as being denied boarding on any flight for the indefinite future. Although Plaintiffs concede the deprivation at issue in this matter may not be as great as that in cases such as *DeNieva* involving the seizure of one's passport, the Court, nevertheless, finds passport-revocation cases more analogous and helpful to the Court's analysis of Plaintiffs' specific circumstances than those cases cited by Defendants in support of their position.

Finally, the bases of the claims asserted in *Green* and *Gilmore* are different than the claims at issue here. In *Green* and *Gilmore* the plaintiffs sought to invalidate the challenged government restriction as *per se* unconstitutional. Here Plaintiffs do not contend the restriction is unconstitutional, but merely assert the burden imposed by the challenged restriction requires a fairer process.

Thus, the Court concludes to the extent that Defendants argue all modes of transportation must be foreclosed before an individual's due-process rights are triggered, such an argument is unsupported. For example, in *DeNieva* the Ninth Circuit found the plaintiff had a protected liberty interest in her right to travel not because she was completely banned from traveling, but rather because "retention of DeNieva's passport infringed upon her ability to travel internationally." 966 F.2d. at 485. The court reasoned: "Without her passport, she could

travel internationally *only with great difficulty*, if at all." *Id.* (emphasis added). *See also Hernandez v. Cremer*, 913 F.2d 230, 234, 238 (5th Cir. 1990)(deprivation of a liberty interest occurred when the United States government restricted the plaintiff's ability to travel to and from Mexico).

Here it is undisputed that inclusion on the No Fly List completely bans listed persons from boarding commercial flights to or from the United States or over United States air space. Thus, Plaintiffs have shown their placement on the No Fly List has in the past and will in the future severely restrict Plaintiffs' ability to travel internationally. Moreover, the realistic implications of being on the No Fly List are potentially far-reaching. For example, TSC shares watchlist information with 22 foreign governments and United States Customs and Boarder Protection makes recommendations to ship captains as to whether a passenger poses a risk to transportation security, which can result in further interference with an individual's ability to travel as evidenced by some Plaintiffs' experiences as they attempted to travel abroad by boat and land and were either turned away or completed their journey only after an extraordinary amount of time, expense, and difficulty.

Accordingly, the Court concludes on this record that Plaintiffs have a constitutionally-protected liberty interest in traveling internationally by air, which is affected by being

placed on the No Fly List.

2. Stigma-Plus - Reputation

Plaintiffs also assert the first factor under *Mathews* has been satisfied because Plaintiffs have been stigmatized "in conjunction with their right to travel on the same terms as other travelers." First Am. Compl. ¶ 141.

Under the "stigma-plus" doctrine, the Supreme Court has recognized a constitutionally-protected interest in "a person's good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (U.S. 1971). "To prevail on a claim under the stigma-plus doctrine, Plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; *plus* (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law." *Green*, 351 F. Supp. 2d at 1129 (emphasis added)(citing *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002), and *Paul v. Davis*, 424 U.S. 693, 701, 711 (1976)). "The plus must be a deprivation of a liberty or property interest by the state . . . that directly affects the [Plaintiffs'] rights." *Id.* (quoting *Miller v. Cal.*, 355 F.3d 1172, 1178 (9th Cir. 2004)). Under the "plus" prong, a plaintiff can show he has suffered a change of legal status if he "legally [cannot] do something that [he] could otherwise do." *Miller*, 355 F.3d at 1179 (discussing

Constantineau, 400 U.S. 433 (1971)).

Plaintiffs contend, and Defendants do not dispute, placement on the No Fly List carries with it a stigma of being a suspected terrorist. Defendants, however, argue Plaintiffs cannot meet the "plus" part of the test because (1) Plaintiffs do not have a right to travel by airplane and (2) there is no "connection" here between the stigma and the plus because Plaintiffs have alternative means of travel available.

As noted, the Court disagrees and has concluded Plaintiffs have a constitutionally-protected liberty interest in the right to travel internationally by air. In addition, Plaintiffs have shown the "plus" because being on the No Fly List means Plaintiffs are legally banned from traveling by air at least to and from the United States and over United States air space, which they would be able to do but for their inclusion on the No Fly List.

Because the Court concludes Plaintiffs have constitutionally-protected liberty interests both in international air travel and reputation, the Court concludes the first factor under the *Mathews* test weighs in Plaintiffs' favor.

B. Second factor: Risk of Erroneous Deprivation

Because Plaintiffs have protected liberty interests under the first *Mathews* factor, the issue becomes whether the current process available to Plaintiffs to contest placement on

the No Fly List creates the risk of erroneous deprivation of those interests.

1. Notice and Hearing

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)(internal citations and quotations omitted).

Notice is insufficient when an individual does not have adequate information and an opportunity to correct any errors that may have led to the deprivation. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 982 (9th Cir. 2012)("Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations."). *See also KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 905 (N.D. Ohio 2009)(risk of erroneous deprivation existed when government failed to provide information about the basis for blocking the plaintiff corporation's assets, which rendered the invitation to submit a letter challenging the action futile because the challenge could be neither comprehensive nor

successful); *Gete v. I.N.S.*, 121 F.3d 1285, 1298 (9th Cir. 1997)(INS procedures following vehicle seizures violated procedural due process when INS did not provide post-seizure its legal and factual basis for the seizure, "copies of [the] evidence to be used against [the plaintiffs]," and "statements of the reasons for its denials of relief.").

In some cases a post-deprivation hearing may be sufficient to satisfy the hearing requirement, but "under no circumstances has the Supreme Court permitted a state to deprive a person of a life, liberty, or property interest under the Due Process Clause without any hearing whatsoever." *DeNieva*, 966 F.2d at 485 (citations omitted).

Plaintiffs argue the redress process available here is insufficient and does not provide the basic process that is due. Plaintiffs contend they are entitled to (1) a post-deprivation notice setting forth the government's reasons for placing Plaintiffs on the No Fly List in sufficient detail to allow Plaintiffs to put forward a defense and (2) a post-deprivation hearing at which Plaintiffs can meaningfully contest their placement on the No Fly List.

It is undisputed that a DHS TRIP complainant is never informed of the specific reasons for inclusion on the No Fly List. In fact, Defendants acknowledge the government's policy is never to confirm or to deny an individual's placement

on the No Fly List. It is also undisputed that the current process does not provide a hearing at which an individual can present evidence to contest his or her inclusion on the No Fly List. Plaintiffs assert this process is constitutionally deficient and creates a high risk of "erroneous deprivation" of their constitutional rights because they cannot provide the evidence necessary to clear up any errors without knowing why they are on the No Fly List. Plaintiffs contend this risk is compounded by the fact that they are not permitted to have a hearing to confront and to rebut the bases for their inclusion on the No Fly List.

As noted, Defendants do not dispute the notice sought by Plaintiffs is neither given before an individual is placed on the No Fly List nor after the individual seeks redress through DHS TRIP. Defendants instead contend the DHS TRIP process is all that Plaintiffs are due in light of the government's interest in national security. Defendants argue they are not required to provide Plaintiffs with information about their alleged status on the No Fly List or an opportunity to contest that placement because providing such information would require Defendants to reveal classified information, which they cannot do. Defendants also assert they are not required to provide an opportunity for Plaintiffs to confront or to rebut the grounds for inclusion on the No Fly List because confrontation

and rebuttal are not absolute requirements for all government proceedings, especially in cases where the information at issue is highly sensitive to national security. *See Jifry v. F.A.A.*, 370 F.3d 1174, 1183 (D.C. Cir. 2004)("In light of the governmental interests at stake and the sensitive security information, substitute procedural safeguards may be impracticable, and in any event, are unnecessary under our precedent.").

Defendants contend the current redress process is a "suitable substitute" for an evidentiary hearing because DHS TRIP allows a complaint to be filed, the complaint to be reviewed, and judicial review by the court of appeals for those who are dissatisfied with the results. Defendants argue this process achieves an appropriate balance by providing an opportunity for review of any alleged delay or denial of boarding on a flight without requiring the government to reveal sensitive or classified information.

2. Accuracy and Quality Assurances

Defendants contend the current redress process is adequate because there is little risk of erroneous deprivation of an individual's constitutional rights as a result of the quality controls in place to monitor the contents of the TSDB and the names included on the No Fly List. For example, (1) the TSDB is updated daily, (2) the TSDB is reviewed and audited on a regular

basis to comply with quality-control measures, and (3) nominations to the No Fly List are reviewed by TSC personnel to ensure they meet the required criteria.

Plaintiffs and TCP counter Defendants' contentions by arguing the adequacy of the DHS TRIP front-end procedures is disputed by government reports and audits that document errors on the watch list from which the No Fly List is compiled. For example, in a 2009 audit report, the Department of Justice Office of Inspector General (DOJ OIG) concluded the "FBI did not update or remove watch list records as required." Choudhury Decl., Ex. F at iv. In that report DOJ OIG also found the FBI failed to (1) timely remove records in 72 percent of cases where it was necessary, (2) modify watch-list records in 67 percent of cases where it was necessary, and (3) remove terrorism case classifications in 35 percent of cases where it was necessary. *Id.* at iv-vi.

In *Ibrahim v. Department of Homeland Security*, the Ninth Circuit reviewed other governmental reports regarding the TSDB and noted similarly troubling deficiencies:

> In theory, only individuals who pose a threat to civil aviation are put on the No-Fly and Selectee Lists, but the Justice Department has criticized TSC for its "weak quality assurance process." . . . Tens of thousands of travelers have been misidentified because of misspellings and transcription errors in the nomination process, and because of computer algorithms that imperfectly match travelers against the names on the list. TSA

> maintains a list of approximately 30,000 individuals who are commonly confused with those on the No-Fly and Selectee Lists. One major air carrier reported that it encountered 9,000 erroneous terrorist watchlist matches every day during April 2008.

669 F.3d 983, 990 (9th Cir. 2012)(citations omitted).

Citing to government reports from 2007 and 2012,[4] Defendants argue the reports relied on by Plaintiffs and TCP are outdated and not an accurate portrayal of the current TSDB process as recent improvements have helped reduce the amount of errors associated with the process. Plaintiffs and TCP contend, however, even these more recent improvements have not addressed or corrected the risk shown here; *i.e.*, being placed on the No Fly List in error.

3. Availability of Judicial Review

Defendants argue judicial review by a court of appeals under 49 U.S.C. § 46110 is adequate due process for those who are dissatisfied with the DHS TRIP redress process as it sufficiently balances the government's interest in security and an individual's constitutional rights. Plaintiffs, however, argue because of the lack of information contained in the DHS

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[4] *See* United States Department of Justice, Office of the Inspector General, Audit Division, Audit Report 07-41, *Follow-Up Audit of the Terrorist Screening Center* (2007); United States Government Accountability Office, GAO-12-476, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions Since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (2012).

TRIP determination letters, they "do not know what to appeal, whether to appeal, or how best to advocate for themselves on appeal." Pls.' Am. Memo. in Opp'n (#98-2) to Defs.' Mot. for Partial Summ. J. at n.37. Although this issue was raised by the parties in their briefing, it was not addressed in detail.

At oral argument Defendants explained the government files an administrative record and other materials *ex parte* and *in camera* with the appellate court as part of the judicial-review process. This Court does not have any other information about the review process such as what specifically would be in the administrative record submitted to the appellate court, what other materials might be submitted, or the nature of the record or materials that deems them sensitive and/or classified so they cannot be revealed to anyone other than the appellate court.

At oral argument the Court requested Defendants to submit additional briefing as to whether any appellate courts have issued opinions on the merits of a challenge brought by a plaintiff who sought review of a final agency decision reached through the DHS TRIP process. Defendants advise "no appellate court has issued a decision on the merits of such a challenge," but Defendants note there are currently three such cases pending in the Ninth Circuit and the District of Columbia Circuit: *Arjmand v. TSA*, No. 12-71748 (9th Cir.); *Ege v. DHS*, No. 13-1110

(D.C. Cir.); and *Kadirov v. TSA*, No. 10-1185 (D.C. Cir.).

As noted, the DHS TRIP process, at least through the determination-letter step, does not provide Plaintiffs with either post-deprivation notice nor a hearing. Plaintiffs have not been officially provided with any information about why they are not allowed to board commercial flights; they have not been officially informed whether they are on the No Fly List; if they are on the No Fly List, they have not been provided with an opportunity to contest their placement on the list; and they have not been provided with an in-person hearing. The question remains, however, whether, as Defendants contend, judicial review of the record on which the government acted as to each Plaintiff is sufficient to satisfy the requirements of due process and to avoid the risk of erroneous deprivation. The Court concludes the current record in this case is not sufficiently developed as to the judicial-review process for the Court to resolve this question on the parties' Cross-Motions or on this record.

C. Third Factor: Government's Interest

The third and final *Mathews* factor requires the Court to weigh the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Defendants again argue the DHS TRIP process, including

the availability of judicial review, is adequate in light of the government's "paramount interest in ensuring that TDSB information can be broadly shared across the government to maximize the nation's security, without fear that such information will be disclosed whenever anyone cannot travel as he or she might choose." Defs.' Reply Memo. (#102) in Supp. of Defs.' Mot. for Summ. J. at 19.

Because the record is not sufficiently developed for the Court to assess fully the second factor of the *Mathews* balancing test with respect to the judicial-review process, the Court is unable to evaluate the third factor as well. In other words, the Court does not yet have a sufficiently developed record to weigh the government's interests against the current review process that is available to Plaintiffs in order to determine whether additional or alternative procedural requirements are necessary or possible.

II. Plaintiffs' APA Claims

Plaintiffs also challenge Defendants' actions under the APA on two separate theories: (1) Defendants' failure to afford United States citizens on the No Fly List meaningful notice and a hearing violates due process and is "contrary to constitutional right, power, privilege, or immunity" under APA § 706(2)(B) and (2) Defendants' redress procedures are arbitrary and capricious under APA § 706(2)(A).

In light of the Court's ruling as to Plaintiffs' procedural due-process claims, the Court defers ruling on the parties' Cross-Motions as to Plaintiffs' APA claims at this time because the Court is not yet able to resolve on the current record whether the judicial-review process is a sufficient, post-deprivation process under the United States Constitution or the APA.

CONCLUSION

For these reasons, the Court **GRANTS in part** Plaintiffs' Cross-Motion (#91) as to Plaintiff's liberty interests in international air travel and reputation, **DENIES in part** Defendants' Motion (#85) as to the same issue, and **DEFERS** ruling on the remaining parts of the pending Cross-Motions.

The Court also directs the parties to confer and to submit a joint status report no later than September 9, 2013, setting out their recommendation as to the most effective process to better develop the record so that the Court may complete its consideration of the still-pending Motions (#91, #85) and specifically setting out any additional issues that the parties believe need to be resolved on the existing Cross-Motions in

light of the Court's rulings herein.

IT IS SO ORDERED.

DATED this 28th day of August, 2013.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHM KARIYE, RAYMOND EARL KNAEBLE IV, NAGIB ALI GHALEB, SAMIR MOHAMED AHMED MOHAMED, ABDULLATIF MUTHANA, SALEH A. OMAR, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, ABDUL HAKEIM THABET AHMED, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, STEPHEN DURGA PERSAUD, and STEPHEN WILLIAM WASHBURN,	**10-CV-750-BR**
Plaintiffs,	**OPINION AND ORDER**
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the UNITED STATES; ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and TIMOTHY J. HEALY, in his official capacity as Director of the Terrorist Screening Center,	
Defendants.	

STEPHEN M. WILKER
Tonkon Torp LLP
888 S.W. 5th Avenue, Ste. 1600
Portland, OR 97204
(503) 802-2040

BEN WIZNER
Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-2500

KEVIN DIAZ
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

AHILAN ARULANANTHAM
JENNIFER PASQUARELLA
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-5211

ALAN L. SCHLOSSER
JULIA HARUMI MASS
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

LAURA SCHAUER IVES
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
(505) 243-0046

REEM SALAHI
Salahi Law
429 Santa Monica Blvd, Suite 550
Santa Monica, CA 90401
(510) 225-8880

MITCHELL P. HURLEY
CHRISTOPHER M. EGLESON
JUSTIN H. BELL
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
(212) 872-1011

Attorneys for Plaintiffs

ERIC H. HOLDER, JR.
United States Attorney General
TONY WEST
Assistant United States Attorney General
SANDRA M. SCHRAIBMAN
Deputy Branch Director
Federal Programs Branch
DIANE KELLEHER
AMY POWELL
United States Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 514-4775

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on that part of Defendants' Motion (#43) to Dismiss in which Defendants seek dismissal of this action because the Transportation Security Administration (TSA) "is an indispensable party that cannot be joined, and this Court lacks jurisdiction over Plaintiffs' challenges to the DHS Trip Redress Process."[1]

[1] DHS TRIP stands for the Department of Homeland Security's Traveler Redress Inquiry Program. *See Scherfen v. DHS*, 08-CV-1554, 2010 WL 456784, at *6 (M.D. Pa. Feb. 2, 2010).

For the reasons that follow, the Court **GRANTS** Defendants' Motion.

INTRODUCTION

Fifteen Plaintiffs, including United States citizens and lawful permanent residents, allege Defendant Terrorist Screening Center (TSC) placed their names on a "No Fly List," and, thereafter, Plaintiffs were not allowed to board international flights leaving or returning to the United States and, in one case, to board a domestic flight. Despite Plaintiffs' requests to officials and agencies for explanations as to why they were not permitted to board the flights, none has been provided and Plaintiffs do not know whether they will be permitted to fly in the future.

Plaintiffs allege Defendants have violated Plaintiffs' Fifth Amendment right to due process because Defendants have not given Plaintiffs any post-deprivation notice and hearing nor any meaningful opportunity to contest their continued inclusion on any No Fly List. Plaintiffs also assert Defendants' actions have been arbitrary and capricious and constitute "unlawful agency action" in violation of the Administrative Procedure Act, 5 U.S.C. § 702.

Plaintiffs seek a declaratory judgment and injunction "to remedy the[se] constitutional and statutory violations" and "to

provide Plaintiffs with a legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion" on such List.

PROCEDURAL BACKGROUND

On November 17, 2010, Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint in which Defendants raised indispensable-party and jurisdictional issues and also made an alternative Motion for Summary Judgment. As to dismissal, Defendants argued "TSA is a necessary and indispensable party which cannot be joined, and this Court lacks jurisdiction over Plaintiffs' challenges to the DHS Trip Redress Process."

On January 21, 2011, the Court held a hearing limited to the indispensable-party and jurisdictional issues. During the hearing and before taking this part of Defendants' Motion under advisement, the Court granted Plaintiffs leave to file a Second Amended Complaint that plainly and concisely sets forth the jurisdictional and elemental bases of Plaintiffs' claims in light of *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Accordingly, on February 4, 2011, Plaintiffs filed their Second Amended Complaint (#64). Defendants then gave Notice

(#66) of Withdrawal of their alternative Motion for Summary Judgment and specifically withdrew Parts II-V of their original Memorandum (#44) of Law.

Thus, the Court now addresses as against Plaintiffs' Second Amended Complaint only the remaining indispensable-party and jurisdictional issues raised in Defendants' original Motion to Dismiss and developed further at oral argument and in Part I of Defendants' original Memorandum (#44), Defendants' Supplemental Reply Memorandum (#65), Plaintiffs' original opposition Memorandum (#50), and Plaintiffs' Supplemental Memorandum (#67).

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs assert two claims for relief in their Second Amended Complaint:

1. Defendants have failed to provide Plaintiffs with any post-deprivation notice and hearing in violation of Plaintiffs' Fifth Amendment due-process rights (after allegedly placing their names on a No Fly List) and

2. Defendants' actions have been arbitrary and capricious and constitute "unlawful agency action" in violation of the Administrative Procedure Act, 5 U.S.C. § 702.

In particular, Plaintiffs allege:

> Each Plaintiff has sought explanations from the Department of Homeland Security, but no government official or agency has offered any

> explanation for Plaintiffs' apparent placement on the No Fly List or any other watch list that has prevented them from flying. Nor has any government official or agency offered any of the Plaintiffs any meaningful opportunity to contest his or her placement on such a list.

Second Am. Compl. at ¶¶ 2, 3.

> The government entities and individuals involved in the creation and maintenance, support, modification, and enforcement of the No Fly List . . . have not provided travelers with a fair and effective mechanism through which they can challenge the TSC's decision to place them on the No Fly List.

Id. at ¶ 37.

> An individual who has been barred from boarding an aircraft on account of apparent placement on the No Fly list has no avenue for redress with the TSC, the government entity responsible for maintaining an individuals inclusion on, or removing an individual from, the list. The TSC does not accept redress inquiries directly from the public, nor does it directly provide final orders or disposition letters to individuals who have submitted redress inquiries.

Id. at ¶ 38.

> [I]ndividuals who seek redress after being prevented from flying must complete a standard form and submit it to the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). DHS TRIP transmits traveler complaints to the TSC, which determines whether any action should be taken. The TSC has provided no publicly available information about how it makes its decision. The TSC is the final arbiter of whether an individual's name is retained on or removed from the list.

Id. at ¶ 39.

> Once the TSC makes a final determination regarding a particular individual's status on the watch lists, including the No Fly List, the TSC advises DHS that it has completed its process. DHS TRIP then responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. The letters do not set forth the bases for any inclusion in a terrorist watch list, do not say how the government has resolved the complaint at issue, and do not specify whether an individual will be permitted to fly in the future.

Id. at ¶ 40.

Finally, Plaintiffs allege "each of [them] made at least one redress request through DHS TRIP [and] received a letter as described in paragraph 40." *Id.* at ¶ 41.

By way of remedy, Plaintiffs seek a declaratory judgment that Defendants have violated both their statutory and constitutional rights and an injunction that

> a. requires Defendants to remedy the constitutional and statutory violations identified above including the removal of Plaintiffs from any watch list or database that prevents them from flying; or
>
> b. requires Defendants to provide Plaintiffs with a legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List.

Id. at ¶ 29.

In particular, Plaintiffs seek the Court to compel through

this action a legal mechanism other than the one now available under TSA's DHS TRIP to have their names removed from any No Fly List.

DEFENDANTS' MOTION TO DISMISS

In their Second Amended Complaint, Plaintiffs name three officials in their official capacities as Defendants in this action: Attorney General Eric H. Holder, FBI Director Robert S. Mueller, and TSC Director Timothy J. Healy. Plaintiffs do not name the Director of the Transportation Security Administration (TSA) as a defendant, but, as noted, Defendants contend TSA is an indispensable party who cannot be joined and whose absence from this action requires its dismissal. Defendants also seek dismissal on the ground that the district court lacks subject-matter jurisdiction over Plaintiffs' challenges through DHS TRIP to their continued inclusion on any No Fly List.

STANDARDS

I. Nonjoinder of Indispensable Party.

Federal Rule of Civil Procedure Rule 19(b) provides: "If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."

When determining whether an absent party is indispensable within the meaning of Rule 19 and, accordingly, whether the action can proceed in that party's absence, the court must first consider whether the nonparty should be joined under Rule 19(a). *E.E.O.C. v. Peabody Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). If the court concludes the nonparty should be joined pursuant to Rule 19(a), the nonparty is considered a necessary party and the court must next determine whether joinder is feasible. *Peabody*, 400 F.3d at 779.

If joinder is not feasible, the court must determine whether the action can proceed without the absent party or whether that party is an "indispensable party." *Id.* If the court concludes the absent party is indispensable but cannot be joined, the action must be dismissed. *Id.*

Parties are indispensable under Rule 19(b) if they "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or without leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999).

II. TSA Final Orders.

A final order issued by TSA may only be challenged in United States appellate courts. 49 U.S.C. § 46110(a) states:

> [A] person disclosing a substantial interest in an *order* issued by the [TSA] may apply for review of the order by filing a petition for review *in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides* or has its principal place of business.

Emphasis added.

A TSA "order" is a "decision which imposes an obligation, denies a right, or fixes some legal relationship." *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006)

DISCUSSION

DHS TRIP is the statutory redress "process" for "individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongfully identified as a threat under the regimes utilized by the [TSA], United States Customs Service and Border Protection, or any other office or component of the Department of Homeland Security." 49 U.S.C. § 44926(a). Because TSA administers DHS TRIP, Defendants assert TSA is an indispensable party. At the same time, Defendants maintain TSA cannot be joined in this district court action because, subject to exceptions not relevant here, TSA's final orders pertaining to DHS TRIP are reviewable only in United States appellate courts. *See* 49 U.S.C. § 46110(a). Thus, Defendants argue this action must be dismissed.

More specifically, Defendants argue "Plaintiff's procedural due-process claim centers on the alleged inadequacies of DHS TRIP, to which they have all submitted complaints related to their denials of boarding." Defs.' Mem. at 16. Defendants emphasize "Plaintiffs are not challenging their purported original placement on the No Fly List" by TSC. Instead Defendants contend Plaintiffs "are challenging the validity" of the DHS TRIP procedures administered by TSA. Defs.' Supplemental Mem. at 3 (citing comments made by counsel for Plaintiffs during oral argument). Indeed, as noted, the specific relief that Plaintiffs seek includes an injunction requiring Defendants to provide Plaintiffs with "a meaningful opportunity to contest their continued inclusion on the No Fly List." Pls.' Second Am. Compl. at ¶ 9. According to Defendants, however, that relief can only be obtained through DHS TRIP, which, as noted, is administered solely by TSA.

In *Ibrahim* the Ninth Circuit addressed similar jurisdictional issues and distinguished TSC's role in placing names on a No Fly List from TSA's role as administrator of challenges to any such List:

> *Placement of Ibrahim's name on the No-Fly List.* The district court determined, based on undisputed facts, that an agency called the Terrorist Screening Center "actually compiles the list of names ultimately placed on the No-Fly List." And the Terrorist Screening Center isn't part of the

> Transportation Security Administration or any other agency named in section 46110; it is part of the Federal Bureau of Investigation, as the government concedes. . . . *See* Homeland Security Presidential Directive 6 (Sept. 16, 2003)(ordering the Attorney General to establish an organization to consolidate the Government's approach to terrorism screening). Because putting Ibrahim's name on the No-Fly List was an order of an agency *not* named in section 46110, the district court retains jurisdiction to review that agency's order under the APA.

Id. at 1255 (italics in original; underlining added). Thus, as to the placement of Ibrahim's name on a No Fly List, the court rejected the government's argument that the district court was divested of jurisdiction under 49 U.S.C. § 46110(a) and upheld the district court's ruling that the placement of a name on a No Fly List was not a TSA final order over which circuit courts have exclusive subject-matter jurisdiction. In particular, the court summarily rejected the government's argument that TSC's decision to place a name on a No Fly List was so "inescapably intertwined" with TSA's final orders as to be reviewable only under § 46110(a):

> [T]he statute provides jurisdiction to review an "order,"- it says nothing about "intertwining," inescapable or otherwise. The government advances no good reason why the word "order" should be interpreted to mean "order or any action inescapably intertwined with it."

Id. at 1255.

Notwithstanding its holding that Ibrahim had the right to challenge in the district court TSC's placement of his name on a No Fly List, the Ninth Circuit rejected Ibrahim's argument that the district court also retained jurisdiction to address TSA's policies and procedures in implementing such List. Specifically, the court held the "Security Directive" in implementing a No Fly List was a TSA § 46110(a) order that was reviewable only in the appellate court.

After the Ninth Circuit's decision in *Ibrahim*, a district court in Pennsylvania faced similar questions in *Scherfen v. DHS*, 08-CV-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010). Among other things, the plaintiffs in *Scherfen* sought removal of their names from a No Fly List. The district court, *inter alia*, held it lacked subject-matter jurisdiction to consider the case because the final DHS TRIP determination letters were final orders of TSA.

Defendants' Motion to Dismiss in this matter requires this Court to resolve whether Plaintiffs' claims for relief would require the Court to address TSA's policies and procedures in implementing any No Fly List, including DHS TRIP (in which case TSA is an indispensable party and this Court lacks jurisdiction) or whether Plaintiffs' two claims for relief are more like Ibrahim's claims that were connected to TSC's placement of names on any No Fly List (in which case this action may proceed without

TSA and this Court has jurisdiction to proceed). As noted, the overarching theme throughout Plaintiffs' Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have Plaintiffs' names removed from any No Fly List and not the *placement* of their names on such List, which is the only basis for district court jurisdiction recognized in *Ibrahim*.

The Court concludes the relief Plaintiffs seek is a matter that Congress has delegated to TSA, which is responsible for administering the DHS TRIP procedures. Thus, the Court agrees with Defendants that TSA is an indispensable party without whose presence this action cannot proceed.

The Court also concludes any "order" through DHS TRIP that might cause the names of any or all Plaintiffs to remain on or to be removed from any No Fly List would have to be issued by TSA pursuant to § 46110(a). Accordingly, this Court does not have jurisdiction to provide the relief Plaintiffs seek in their Second Amended Complaint; *i.e.*, to require TSC to "provide [Plaintiffs] with a legal mechanism," presumably more transparent and effective than DHS TRIP, to remove their names from any No Fly List and to require Defendants to give Plaintiffs "notice of the reasons and bases for their inclusion on the No Fly List and a meaningful opportunity to contest their continued inclusion" on

such List. Instead the relief Plaintiffs seek can only come from the appellate court in accordance with 49 U.S.C. § 46110(a).

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion (#43) to Dismiss this action for failure to join an indispensable party and for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

DATED this 3rd day May, 2011.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing volume of the Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 15, 2017

/s/ Hina Shamsi
Hina Shamsi