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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

AYMAN LATIF, *et al.*, Plaintiffs, v. **ERIC H. HOLDER, JR.**, *et al.*, Defendants.	Case No.: 10-cv-750 (BR) **CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

This case challenges the constitutionality of the government's "No Fly List," the mechanism by which the government prohibits United States citizens and lawful residents from flying commercially to or from the United States or over U.S. airspace without providing any meaningful opportunity to object. This motion for preliminary injunctive relief, however, involves only a subset of the Plaintiffs and legal claims at issue in the litigation. While the claims of all of the Plaintiffs are urgent, the claims of these Plaintiffs—those who have been effectively banished from the United States by virtue of having been placed on the No Fly List while traveling abroad—are uniquely so.

Plaintiffs Ayman Latif, Faisal Nabin Kashem, Elias Mustafa Mohamed, Samir Mohamed Ahmed Mohamed, Abdullatif Muthanna, Saleh A. Omar, and Abdul Hakeim Thabet Ahmed ("Plaintiffs") are citizens and lawful permanent residents of the United States who traveled outside the country without incident, but have been unable to return home by virtue of their placement on the government's No Fly List. Each Plaintiff attempted to board an international flight to return to the United States; each was denied boarding and was informed by U.S. officials that he would not be permitted to fly to the United States or over U.S. airspace. And while each Plaintiff has submitted an application for "redress" through the only available government mechanism, none has been told why he is on the No Fly List or how he can get off of it.

Plaintiffs have thus been stranded in Egypt, Saudi Arabia, and Yemen—countries separated from the United States by vast oceans and thousands of miles of foreign territory—even though they are U.S. citizens and lawful permanent residents (LPRs) with constitutional and statutory rights to reside in the United States and to return home from

abroad. By preventing Plaintiffs from flying directly to the United States or over U.S. airspace, Defendants have effectively placed them into involuntary exile, barring them from returning home to their families, jobs, residences, and needed medical care in violation of their most basic rights. Plaintiffs have been unable to identify any practicable means of returning home other than flying. As a matter of law, the U.S. Citizen Plaintiffs' absolute right to reenter the country from abroad, and the LPR Plaintiffs' right to reside in the United States and not be excluded from the United States without a hearing, cannot be made contingent on the discretionary acquiescence of foreign governments to grant safe passage.

Plaintiffs seek a preliminary injunction ordering the Defendants to permit them to return to the United States by air subject to suitable screening procedures. Without interim relief, Plaintiffs Latif, Kashem, Elias Mustafa Mohamed, Samir Mohamed Ahmed Mohamed, and Muthanna will continue to suffer the irreparable harm of being prevented from returning to the United States, their country of citizenship, in violation of the Fourteenth Amendment. Without interim relief, Plaintiffs Omar and Abdul Hakeim Thabet Ahmed will continue to suffer the irreparable harm of being prevented from exercising their rights under the Immigration and Nationality Act and the Due Process Clause to reside continuously in the United States and not to be excluded from the United States without a removal hearing.

Plaintiffs are likely to prevail on their constitutional and statutory claims and continue to undergo irreparable and extreme hardship as a consequence of Defendants' actions. Moreover, because Plaintiffs are willing to subject themselves to thorough security screening procedures and because they present no threat to commercial aviation,

the government's interests will be amply protected. For the foregoing reasons and those described in detail below, Plaintiffs' motion for preliminary injunctive relief should be granted.

STATEMENT OF FACTS

The Plaintiffs in this action are U.S. citizens and lawful permanent residents who have attempted to board commercial flights in the United States and overseas only to find that they have been barred from commercial air travel to and from the United States or over U.S. airspace without any opportunity to confront or rebut the basis for their inclusion, or apparent inclusion, on a government watch list known as the "No Fly List." The Plaintiffs who bring this motion for preliminary relief are U.S. citizens and lawful permanent residents who have been placed on that list while traveling abroad and have thus found themselves stranded in foreign countries, without explanation or appropriate visas, unable to return home to their families, jobs, and needed medical care in the United States. Plaintiffs have suffered, and continue to suffer, from their inability to return to and reside in their country of citizenship or lawful permanent residence.

I. The No Fly List

In September 2003, Attorney General John Ashcroft established the Terrorist Screening Center to consolidate the government's approach to terrorism screening. First Amended Complaint ¶ 30 ("FAC"). The TSC, which is administered by the FBI, develops and maintains the federal government's consolidated Terrorist Screening Database (the "watch list"). *Id.* TSC's consolidated watch list is the federal government's master repository for suspected international and domestic terrorist records used for watch list-related screening. *Id.* TSC sends records from its terrorist watch list

to other government agencies that in turn use those records to identify suspected terrorists. *Id.* ¶ 31. For example, applicable TSC records are provided to the Transportation Security Administration ("TSA") for use by airlines in pre-screening passengers and to U.S. Customs and Border Protection ("CBP") for use in screening travelers entering the United States. *Id.* Thus, while the TSC maintains and controls the database of suspected terrorists, it is the front-line agencies like the TSA that carry out the screening function. *Id.* In the context of air travel, when individuals make airline reservations and check in at airports, the front-line screening agency, TSA, or the airline, conducts a name-based search of the individual to determine whether he or she is on a watch list. *Id.*

The TSC decides whether an individual meets the minimum requirements for inclusion into the watch list as a known or suspected terrorist and which screening systems will receive the information about that individual. FAC ¶ 32. Defendants have not stated publicly what standards or criteria are applied to determine whether an individual on the consolidated watch list will be placed on the No Fly List that is distributed to TSA. *Id.* ¶ 33.

Nor have Defendants provided travelers with a fair and effective mechanism through which they can challenge their inclusion on the No Fly List. FAC ¶ 37. An individual who has been barred from boarding an aircraft on account of apparent inclusion on the No Fly List has no clear avenue for redress, because no single government entity is responsible for removing an individual from the list. *Id.* ¶ 38. The TSC, which is administered by the FBI, does not accept redress inquiries directly from the public, nor does it directly provide final disposition letters to individuals who have

submitted redress queries. Rather, individuals who seek redress after having been prevented from flying must complete a standard form and submit it to the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). *Id.* The DHS TRIP Program provides each individual with a "Redress Control Number" associated with the individual's report. *Id.* Yet, it is the TSC that has responsibility for consulting with relevant agencies to determine whether an individual has been appropriately listed and should remain on the list. *Id.*

Once the TSC makes a determination regarding a particular individual's status on the watch lists, including the No Fly List, the front-line screening agency responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. FAC ¶ 39. The government does not provide the individual with any opportunity to confront, or to rebut, the grounds for his possible inclusion on the watch list. *Id.* Thus, the only "process" available to individuals who are prevented from boarding commercial flights is to submit their names and other identifying information to the Department of Homeland Security and hope that an unknown government agency corrects an error or changes its mind. *Id.*

II. U.S. Citizen Plaintiffs

Plaintiffs Faisal Nabin Kashem, Ayman Latif, Samir Mohamed Ahmed Mohamed, Elias Mustafa Mohamed, and Abdullatif Muthanna ("U.S. Citizen Plaintiffs") are United States citizens. Declaration of Faisal Nabin Kashem ¶ 2 ("Kashem Decl."); Declaration of Ayman Latif ¶ 2 ("Latif Decl."); Declaration of Elias Mustafa Mohamed ¶ 2 ("Elias Mohamed Decl."); Declaration of Samir Mohamed Ahmed Mohamed ¶ 2

("Samir Mohamed Decl."); Declaration of Abdullatif Muthanna ¶ 2 ("Muthanna Decl.").[1] Each of the U.S. Citizen Plaintiffs traveled abroad in order to work, study, or visit family members. Kashem Decl. ¶ 4; Latif Decl. ¶ 5; Elias Mohamed Decl. ¶¶ 3-4; Samir Mohamed Decl. ¶ 5; Muthanna Decl. ¶¶ 3-4. After purchasing tickets to travel by plane back to the United States and arriving at their respective airports, each of the U.S. Citizen Plaintiffs was denied boarding on his flight home. Kashem Decl. ¶ 7; Latif Decl. ¶ 7; Elias Mohamed Decl. ¶6; Samir Mohamed Decl. ¶ 7; Muthanna Decl. ¶ 7-8.

The U.S. Citizen Plaintiffs do not know why they were denied boarding on their flights. Kashem Decl. ¶ 21; Latif Decl. ¶¶ 38, 39; Elias Mohamed Decl. ¶¶ 11, 17; Samir Mohamed Decl. ¶¶ 15, 19; Muthanna Decl. ¶ 23. Each of the U.S. Citizen Plaintiffs has spoken multiple times with U.S. Embassy, U.S. Consulate, and federal law enforcement officials in attempt to discover the reason for their inability to fly home and to gain permission to do so. Kashem Decl. ¶¶ 11, 15-20; Latif Decl. ¶¶ 17-22, 27; Elias Mohamed Decl. ¶¶ 11-16; Samir Mohamed Decl. ¶¶ 10-16, 18; Muthanna Decl. ¶¶ 17-21. Each of the U.S. Citizen Plaintiffs has filed an online redress application with the Department of Homeland Security's Traveler Redress Inquiry Program (DHS TRIP). Kashem Decl. ¶ 14; Latif Decl. ¶ 16; Elias Mohamed Decl. ¶ 10; Samir Mohamed Decl. ¶ 17; Muthanna Decl. ¶ 22. No Plaintiff has received a response from DHS TRIP that sets forth any basis for his inclusion on the No Fly List, leaving Plaintiffs in the dark as to why they are not permitted to fly home. Kashem Decl. ¶ 21; Latif Decl. ¶¶ 38; Elias Mohamed Decl. ¶¶ 11, 17; Samir Mohamed Decl. ¶¶ 15, 19; Muthanna Decl. ¶ 23.

[1] Plaintiffs' counsel have been unable thus far to obtain original signatures on the declarations from the Plaintiffs who bring this motion. Defendants have consented to the filing of these declarations in this form. Plaintiffs will submit the declarations with Plaintiffs' original signatures as soon as practicable.

While the U.S. Citizen Plaintiffs have investigated alternate travel to the United States, they have been unable to surmount the significant financial and logistical difficulties in arranging for alternate travel to the United States. Kashem Decl. ¶ 24; Latif Decl. ¶ 40, 41; Elias Mohamed Decl. ¶ 20; Samir Mohamed Decl. ¶ 21; Muthanna Decl. ¶¶ 18, 25.

III. Lawful Permanent Resident Plaintiffs

Plaintiff Abdul Hakeim Thabet Ahmed is a citizen of Yemen and has been a lawful permanent resident of the United States since 1990. Declaration of Abdul Hakeim Thabet Ahmed ¶ 2 ("Ahmed Decl."). Plaintiff Saleh Omar is a citizen of Yemen and attained LPR status in 1996. Declaration of Saleh Omar ¶ 2 ("Omar Decl."). Since attaining LPR status, Mr. Ahmed and Mr. Omar ("LPR Plaintiffs") have resided continuously in the United States with no extended absences. Ahmed Decl. ¶ 4; Omar Decl. ¶ 3. The LPR Plaintiffs each meet the definitions for a finding of "good moral character" and are eligible to apply for naturalization as U.S. citizens. Ahmed Decl. ¶ 4; Omar Decl. ¶ 3. Mr. Ahmed traveled to Yemen in August 2009 to visit his family, including his wife and children, whom he had not seen for more than two years. Ahmed Decl. ¶ 5. Mr. Omar traveled to Yemen in December 2009 to visit his wife and children. Omar Decl. ¶ 5.

The LPR Plaintiffs were denied boarding on direct flights to the United States from abroad. Ahmed Decl. ¶ 7-8; Omar Decl. ¶ 6. They have since spoken multiple times to U.S. Consulate and Embassy officials. Ahmed Decl. ¶¶ 9-10, 13-16; Omar Decl. ¶¶ 10-12. Each of the LPR Plaintiffs has been told by U.S. government officials that he is barred from flying to the United States. Ahmed Decl. ¶¶ 13, 20; Omar Decl. ¶¶ 10, 12,

15. The LPR Plaintiffs have each filed online redress applications with the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Ahmed Decl. ¶ 18; Omar Decl. ¶ 13. Neither has received a response from DHS TRIP that sets forth any basis for his inclusion on the No Fly List, leaving LPR Plaintiffs in the dark as to why they are not permitted to fly home. Ahmed Decl. ¶¶ 13-16, 19; Omar Decl. ¶¶ 10, 12, 14, 20.

While each of the LPR Plaintiffs has investigated alternate travel to the United States, they have been unable to surmount the significant financial and logistical difficulties in arranging for alternate travel to the United States. Ahmed Decl. ¶ 21; Omar Decl. ¶ 17.

ARGUMENT

To obtain preliminary injunctive relief, Plaintiffs must demonstrate that they are likely to succeed on the merits of their claims; that they are likely to suffer irreparable harm in the absence of temporary relief; that the balance of equities tips in their favor; and that the injunction would further the pubic interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). Because Plaintiffs satisfy each of the four factors, the motion should be granted. Where an injunction seeks mandatory relief, the moving party must show that "the facts and law clearly favor" granting the injunction. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. The U.S. Citizen Plaintiffs Are Likely to Succeed on the Merits of Their Claim That Their Placement on the No Fly List and Resulting Inability to Fly Directly to the United States or Over U.S. Airspace Violates Their Fourteenth Amendment Right to Citizenship.

The Fourteenth Amendment guarantee of citizenship prohibits government action that abridges or restricts the citizenship rights of U.S. citizens. *See Afroyim v. Rusk*, 387 U.S. 253, 267 (1967); *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898). This protection extends to the absolute rights of U.S. citizens to reside in the United States and to return to their country of citizenship after traveling abroad—rights that are inherent in the concept of U.S. citizenship itself. *See Nguyen v. INS*, 533 U.S. 53, 67 (2001); *Balzac v. Porto Rico,* 258 U.S. 298, 308-09 (1922). The U.S. Citizen Plaintiffs are likely to succeed on the merits of their claim that the Defendants' inclusion of their names on the No Fly List impermissibly infringes upon their Fourteenth Amendment right to citizenship. Defendants' placement of these Plaintiffs on a government watch list that prohibits them from flying to the United States or over U.S. airspace has unlawfully conditioned their right of reentry into the United States upon the benevolence of foreign governments, whose permission is required for travel to the United States by land or by sea. Indeed, the government seeks to compel Plaintiffs to embark on potentially dangerous, prohibitively expensive, and circuitous journeys requiring them to transit through third countries with the hope that foreign governments will grant them safe passage. Defendants have effectively banished the U.S. Citizen Plaintiffs from their country of citizenship in violation of the Fourteenth Amendment.

i. A U.S. Citizen Has a Right to Reside in, and to Return to, the United States That Is Protected By The Fourteenth Amendment.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. The right to citizenship expressly conferred by the Fourteenth Amendment is "a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 158 (1963), and is "interpreted in light of pre-existing common-law principles governing citizenship." *Id.* at 159 n.10 (citing *Wong Kim Ark*, 169 U.S. at 654).

There is no more fundamental and enduring principle governing the right to citizenship than the principle that a citizen has a right to reside in his country of citizenship and to return to it after traveling abroad. "[I]t is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil. It is not to be wondered that the occasions for declaring this principle have been few." *Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964); *see also Nguyen*, 533 U.S. at 67 (conferral of citizenship necessarily includes "the absolute right to enter" the United States). The principle that U.S. citizenship affords a concomitant right to reside in the United States and to return to this country after traveling or residing abroad underlies numerous Supreme Court decisions issued in a variety of contexts and is codified in international legal authorities,

including the Universal Declaration of Human Rights, which provides that "[e]veryone has the right to leave any country, including his own, and to return to his country."[2]

The Supreme Court recognized that U.S. citizenship guarantees the right to reside in the United States in *Balzac v. Porto Rico,* 258 U.S. 298 (1922), a decision addressing the rights conferred upon Puerto Ricans when they were granted citizenship by the Organic Act of Porto Rico of March 2, 1917. U.S. citizenship enabled Puerto Ricans "to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political." *Id.* at 308. The Court observed, moreover, that the statute affording U.S. citizenship to Puerto Ricans was passed out of a "desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper. . . ." *Id.* at 311. The Ninth Circuit has characterized the right of a U.S. citizen to reside in the United States as "absolute." *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987).

The right to reside in the United States encompasses the right to return to the United States from abroad. The Supreme Court has expressly held that the conferral of U.S. citizenship entitles an individual "to the full protection of the United States, *to the absolute right to enter its borders*, and to full participation in the political process." *Nguyen*, 533 U.S. at 67 (emphasis added). Similarly, the Third Circuit has recognized

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[2] Universal Declaration of Human Rights, G.A. Res. 217A, art. 13, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *see also* American Convention on Human Rights, art. 22(5), Nov. 22, 1969, 1144 UNTS 123 (entered into force 18 July 1978) ("No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.").

that it is "the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel. It is the right to exercise a choice of residence." *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977) (internal citations omitted); *see also Hernandez v. Cremer*, 913 F.2d 230, 238 (5th Cir. 1990) ("The individual interest at stake—the right of a citizen to re-enter the United States after lawfully traveling abroad—is fundamental.").

Numerous decisions in the immigration context concerning the rights of U.S. citizens whose spouses or parents are deported confirm that citizens have a right to return to the United States from abroad. *See*, *e.g.*, *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984) (recognizing that U.S.-citizen children of deported noncitizen parents "will remain American citizens who have the right to return to this country at any time of their liking"); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) (per curiam) (noting that U.S.-citizen child of deported noncitizen parents will, "once she reaches the age of discretion, . . . be able to decide for herself where she will live, and at that time, she will be free to return and make her home in this country"). As one lower court has elaborated, "[t]he only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied entry." *United States v. Valentine*, 288 F. Supp. 957, 980 (D.P.R. 1968).

Accordingly, the U.S. Citizen Plaintiffs have an "absolute" right under the Fourteenth Amendment to return to the United States. Defendants have impermissibly interfered with that right through their operation of the No Fly List.

ii. Defendants' Inclusion of the U.S. Citizen Plaintiffs on the No Fly List Has Resulted in Their Effective Banishment From the United States in Violation of Their Fourteenth Amendment Rights.

The U.S. Citizen Plaintiffs have been prevented from returning home by the only available direct route: commercial flights to the United States. Any alternative means of making this journey are uncertain, indirect, infrequent, and prohibitively expensive; they require the consent of foreign countries and place Plaintiffs at risk of interrogation and detention by foreign authorities. The result is that the U.S. Citizen Plaintiffs have no practicable means of returning home and have thus been effectively banished from the United States in violation of the Fourteenth Amendment.[3]

Plaintiffs are in Egypt, Saudi Arabia, and Yemen. There are no passenger ships that embark from Egypt, Saudi Arabia, or Yemen to the United States. Declaration of Ben Wizner ¶ 4 ("Wizner Decl."). Accordingly, Plaintiffs have only two possible alternatives for reaching the United States without flying over U.S. airspace. First, they may attempt to fly to Mexico or Canada without crossing U.S. airspace and enter the United States over land. Second, they may attempt to travel to a third country from which they can board a transatlantic cruise ship or cargo freighter to the United States. Either way, the U.S. Citizen Plaintiffs must transit through foreign countries to return home. Because Defendants have not disclosed the standards or procedures by which the No Fly List operates, Plaintiffs cannot be certain that they will be permitted to fly to foreign countries or to enter them when they arrive, and the experiences of others on the

[3] The LPR Plaintiffs, who are stranded in Yemen, face precisely the same obstacles to returning home. Because they are not U.S. citizens, however, their effective banishment from the United States raises distinct legal claims, as discussed below. *See infra* I-B.

list strongly suggest that such efforts might fail. By placing Plaintiffs at the whim of foreign governments that may detain them, interrogate them, or refuse them entry, the Defendants have impermissibly burdened Plaintiffs' absolute right to return to the United States from abroad.

Plaintiffs' fears are far from speculative. The experiences of two Plaintiffs in this lawsuit, Raymond Knaeble and Steven William Washburn, illustrate the perils of attempting the journey home by alternate means, and demonstrate that the Plaintiffs are likely to be turned back should they undertake the risky—and costly—journey to the United States by means other than flying.

Mr. Knaeble discovered that he was on the No Fly List when he was denied boarding on a flight from Bogota, Colombia to Miami. Declaration of Raymond Knaeble ¶ 10 ("Knaeble Decl."). He thereafter attempted to travel to the United States by flying to Mexico and crossing the U.S.-Mexico border over land. *Id.* ¶ 21-22. However, when his flight arrived in Mexico City, he was detained by Mexican federal agents. *Id.* ¶ 22. Mexican authorities questioned Mr. Knaeble for more than three hours, detained him for fifteen hours, prevented from continuing on his journey to the U.S.-Mexico border, and put him on a flight back to Bogota the next day. *Id.* ¶¶ 22-23. Mr. Knaeble has never received reimbursement for the cost of his travel. *Id.* ¶ 46.

Mr. Washburn faced a similar ordeal. After being denied boarding on a flight from Dublin, Ireland to Boston, Mr. Washburn was advised by officials at the U.S. Embassy in Dublin to travel to the United States through Mexico. Declaration of Steven William Washburn ¶ 8 ("Washburn Decl."). He purchased airline tickets to travel from Dublin to Ciudad Juarez, Mexico, with changes of aircraft in London and Mexico City.

Id. ¶ 10. He planned to enter the United States by walking over a bridge located at the border between Ciudad Juarez and El Paso. *Id.* Approximately three and a half hours into his flight from London to Mexico City, the aircraft turned around and flew back to London without explanation. *Id.* ¶ 11. When the flight arrived, airport security and New Scotland Yard officials met Mr. Washburn at the gate, detained and interrogated him for more than nine hours, photographed and fingerprinted him, subjected him to a DNA test, and seized the life savings that he carried with him. *Id.* ¶ 12. Rather than permitting him to travel to the United States, British authorities escorted Mr. Washburn to another aircraft that took him back to Ireland, even though his visa for Ireland was about to expire in several days. *Id.* ¶¶ 12-13. Like Mr. Knaeble, Mr. Washburn has never obtained reimbursement for the cost of this ticket. *Id.* ¶ 28.

Thus, all of the Plaintiffs who bring this motion would likely face similar treatment that would prevent them from entering the United States by travel to Mexico or any other country near the United States.

Mr. Knaeble and Mr. Washburn have since returned to the United States by traveling through multiple countries and enduring harassment, detention, and interrogation by foreign authorities. Yet even these ultimately successful journeys underscore the impermissible burden that Defendants have imposed upon Plaintiffs' citizenship rights by placing them on the No Fly List. Mr. Washburn reached his home in New Mexico only after undertaking a journey that required him to travel by plane from Dublin to Frankfurt, Frankfurt to São Paulo, São Paulo to Lima, Lima to Mexico City, and Mexico City to Ciudad Juarez; subjected him to more than four hours of interrogation and twelve hours of detention by Mexican authorities; and required him to travel over

land from Ciudad Juarez to Las Cruces, New Mexico. *Id.* ¶¶ 18-23 At all times during this journey, Mr. Washburn feared that he might once again be turned back. *Id.* ¶¶ 19-20. Mr. Washburn was compelled to borrow a substantial sum of money to pay for his journey; other citizens abroad do not have that option. *Id.* ¶ 28.

Mr. Knaeble returned to the United States by traveling for more than twelve days, mostly over land, from Santa Marta, Colombia to Mexicali, California. Knaeble Decl. ¶¶ 28-39. Because the Defendants barred him from flying to the United States, he was forced to fly from Colombia to Panama and to travel by bus from Panama to Honduras, from Honduras to El Salvador, from El Salvador to Guatemala, from Guatemala to Tapachula, Mexico, and from Tapachula to the U.S.-Mexico border. *Id.* ¶ 28-31, 35-38. He thereafter crossed the border into the United States. *Id.* ¶ 39. During this journey, Honduran and Salvadoran authorities subjected Mr. Knaeble to detention, interrogation, and search on three occasions. *Id.* ¶¶ 31-34. In El Salvador, police, immigration, and drug enforcement officers removed Mr. Knaeble from a bus and searched all of his belongings. *Id.* ¶ 32. In Guatemala, he was followed and questioned. *Id.* ¶ 36. These experiences caused Mr. Knaeble to fear for his safety and his life. While Mr. Knaeble arrived home in California just days before this motion was to be filed, he endured a journey that was twelve days long and placed him at the mercy of foreign governments, simply because he sought to return to the country that he served honorably in the U.S. Army. While Plaintiffs Washburn and Knaeble eventually reached home from Europe and South America, the U.S. Citizen Plaintiffs who bring this motion are in the Middle East, significantly farther from the United States. Because Mr. Washburn's flight from London to Mexico City was turned around mid-flight, the Plaintiffs stranded in Egypt,

Saudi Arabia and Yemen have no assurance that they will be permitted to fly to Mexico or Canada, or indeed to any other country in the Western Hemisphere. Many such flights cross U.S. airspace, and the governments of many of the destination countries might prevent them from boarding or from entering. Indeed, Defendants have likely shared their No Fly List with Canada and Mexico, rendering such travel impossible.

All of the Plaintiffs, including the U.S. Citizen Plaintiffs, will face similar barriers if they seek to reach the United States by ship. Because there are no direct ships traveling from Egypt, Saudi Arabia, and Yemen to the United States, Wizner Decl. ¶ 4, Plaintiffs would be required to reach a different country in order to board a transatlantic ship carrying passengers. This option would require them to purchase tickets and, potentially, to procure visas to travel to one of the several European port cities from which transatlantic voyages depart: Southampton and Liverpool in the United Kingdom; Copenhagen, Denmark; Genoa, Italy; Antwerp, Belgium; or Hamburg, Germany. *See id.* Plaintiffs have reason to fear that their placement on a U.S. government terrorism watch list would interfere with their ability to travel to European countries in order to board ships bound for the United States. But even if they were secure in their ability to do so, the transatlantic ships that carry passengers depart infrequently, and the cost of passage on a cruise or cargo freighter, coupled with the cost of travel to these countries, is prohibitively high for most Plaintiffs.

Plaintiffs have tried desperately to identify timely and affordable alternatives to traveling by plane to the United States. From his location in rural southern Yemen, Mr. Samir Mohamed Ahmed Mohamed has researched the possibility of flying to the United Kingdom and traveling to the United States by boat, but he cannot find a ship with room

to take him on the transatlantic journey before October of 2010, even assuming it would ultimately allow him to board. Samir Mohamed Decl. ¶ 21. Mr. Kashem and Mr. Elias Mustafa Mohamed have researched the possibility of flying from Saudi Arabia to the United Kingdom and taking a transatlantic ship carrying passengers, but they cannot afford the cost of this journey, even if the various carriers would allow them to make the journey. Kashem Decl. ¶ 24; Elias Mohamed Decl. ¶ 20. Mr. Latif researched two companies that would provide transatlantic ship passage for him and his family, but the cost was more than $3000 per person for the ship alone—a price that he cannot pay, whether or not the ships would ultimately carry him. Latif Decl. ¶ 40. Mr. Muthanna has similarly been unable to find a way to travel home by boat. Muthanna Decl. ¶ 25.[4]

For all of these reasons, Defendants' placement of the U.S. Citizen Plaintiffs on the No Fly List has effectively placed them into exile. The Fourteenth Amendment prohibits the government from conditioning Plaintiffs' exercise of their absolute rights to reside in the United States and to return to this country from abroad on the benevolence of foreign governments. It also prohibits the government from effectively preventing U.S. Citizens from returning to the country by forcing them to resort to methods and routes of travel that are so infrequent and costly that they present no practical way to return home.

[4] The LPRs who bring this motion have also tried, without success, to find a way to return to the United States by boat. Ahmed Decl. ¶ 21; Omar Decl. ¶ 17.

B. The Lawful Permanent Resident Plaintiffs Are Likely to Succeed on Their Claim that Their Placement on the No Fly List Violates Their Constitutional and Statutory Rights to Reside in the United States and to Return to the United States From Abroad.

Like the U.S. Citizen Plaintiffs, Plaintiffs Saleh Omar and Abdul Hakeim Thabet Ahmed, who were visiting relatives in Yemen at the time of their placement on the No Fly List, have no practicable means of returning to the United States except by air. However, because they are not U.S. citizens, their effective banishment from the United States raises distinct legal claims.

i. A Lawful Permanent Resident Has a Right to Reside in and Return to the United States that the Government Cannot Take Away Without a Hearing.

Plaintiffs Omar and Ahmed are lawful permanent residents of the United States. As LPRs, they have both a statutory and a constitutional right to reside in the United States that cannot be taken from them without a hearing. Yet, the government has imposed their forced exile without any process whatsoever.

1. The Immigration and Nationality Act Requires the Government to Provide a Lawful Permanent Resident a Removal Hearing in Order to Terminate His Right to Reside in or Return to the United States.

A lawful permanent resident has the right to reside permanently in the United States under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1101(a)(20) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."). An LPR retains that right so long as he does not engage in conduct that renders him "deportable," or, in certain circumstances, "inadmissible" under the statute. *See id*. § 1227 (classes of deportable

aliens); *id*. § 1182(a) (somewhat broader classes of inadmissible aliens). To terminate the right of an LPR to reside in the United States, the government must not only charge him with grounds of deportability or inadmissibility, but also provide him a removal hearing on those charges before an immigration judge. *See id*. § 1229a(a)(2) (the government initiates removal proceedings by charging the individual with "any applicable ground of inadmissibility" or "deportability"); *id.* § 1229a(a)(1) (an immigration judge decides whether to find the LPR inadmissible or deportable). At that hearing, the LPR enjoys a number of procedural protections, including the right to examine the government's evidence, cross-examine the government's witnesses, present his own evidence, and obtain the assistance of an attorney (at his own expense). *See generally id*. § 1229a(b)(4).

An LPR returning from a trip abroad is entitled to the same right to a removal hearing as an LPR physically present in the United States. 8 U.S.C. § 1229a. Generally, immigration law treats a returning LPR as though he did not leave the United States, making him subject only to charges of deportability if placed in removal proceedings. But in certain limited circumstances that are specifically set forth in the statute—including if the LPR has been absent in excess of 180 days or has been convicted of certain crimes—the government may treat a returning LPR as an alien seeking admission and charge him with grounds of inadmissibility to initiate removal proceedings. *See id*. § 1101(a)(13)(C) (enumerating six circumstances under which the government can treat a returning LPR as an applicant for admission); *id*. § 1182(a) (defining the classes of aliens who are inadmissible). In either circumstance, a returning LPR is entitled to a removal hearing before he can be deprived of his right to reenter and reside in the United States. *See id*. § 1229a(a)(2) (removal proceedings may be initiated

by charges of inadmissibility or deportability); *id.* § 1225(b)(1)(C) (authorizing the "expedited removal" without a hearing of certain non-citizens seeking admission, but exempting those who claim to be lawful permanent residents); 8 C.F.R. § 1235.3(b)(5) (regulatory scheme implementing expedited removal, and again exempting lawful permanent residents).

Plaintiffs Omar and Ahmed are lawful permanent residents of the United States who traveled abroad only to find that the government had placed them on the No Fly List when they attempted to return. Ahmed Decl. ¶¶ 5-8; Omar Decl. ¶¶ 5-6. As a result, Plaintiffs Omar and Ahmed have been exiled abroad, and are unable to return to their homes in the United States where they have a legal right to reside. Ahmed Decl. ¶ 20; Omar Decl. ¶ 15.

By preventing the return of these two lawful permanent residents, the government has violated the substantive and procedural protections of the immigration laws. It has deprived them of their right to return to and reside in the United States even though they have not engaged in any conduct that would either render them deportable or inadmissible, and it has accomplished that deprivation without affording them any of the protections present in removal proceedings, including most importantly the right to a hearing where they can examine the government's evidence against them. Because the government has no authority to exile Plaintiffs Omar and Ahmed except for reasons specified by Congress, and because it cannot do so without first according them the process mandated by the statute, their effective banishment from the United States violates the immigration laws.

2. The Due Process Clause Requires That the Government Provide a Lawful Permanent Resident a Hearing Before It May Terminate His Right to Reside in or Return to the United States.

The government's banishment of Plaintiffs Omar and Ahmed also violates the Due Process Clause. The immigration statute's procedural requirements implement a constitutional command: the government may not terminate a lawful permanent resident's right to remain in or return to the United States without complying with the requirements of due process.

Once an individual becomes an LPR, "he becomes invested with the rights guaranteed by the Constitution to all people within our borders," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953), and "[t]he law therefore considers [that person] to be at home in the United States." *Demore v. Kim*, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part and dissenting in part); *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (finding that an LPR's interest in remaining in the United States is "without question, a weighty one."); *id.* at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

The Due Process Clause bars the government from terminating the benefits of lawful permanent residence without rigorous procedures, including a hearing. The Supreme Court held over fifty years ago that the government could not terminate an LPR's acquired right to reside in the United States without a hearing affording due process, even after the non-citizen took a trip abroad which, according to the government, raised national security concerns. *Kwong Hai Chew*, 344 U.S. at 601 (holding that

provision authorizing exclusion without a hearing on national security grounds did not apply to lawful permanent residents because "[an LPR's] status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him"). Similarly, the fact that a lawful permanent resident has apparently engaged in criminal activity while abroad does not authorize her exclusion without a hearing that affords her due process. *Landon,* 459 U.S. at 33 (holding that Due Process prohibited the exclusion without a hearing of a lawful permanent resident arrested at the border for alien smuggling because "the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him"). Thus, a returning LPR has a due process right to a hearing regardless of the statutory grounds for termination of his right to reside in the United States. *See Kwong Hai Chew*, 344 U.S. at 601 ("While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process."); *id*. at 600 ("From a constitutional point of view, [a returning resident alien] is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

Stranded in Yemen and unable to fly, Plaintiffs Omar and Ahmed have been "capriciously deprived" of their rights to reside in and return to the United States in violation of the Due Process Clause of the Fifth Amendment.

II. LIKELIHOOD OF IRREPARABLE HARM

A. U.S. Citizen Plaintiffs

The U.S. Citizen Plaintiffs have already suffered irreparable harms and will continue to do so in the absence of preliminary relief. Plaintiffs have experienced the irreparable injury of involuntary exile from their country of citizenship in violation of their Fourteenth Amendment rights. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore "will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (determining that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986) (finding violation of Fourth Amendment rights to cause irreparable harm); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (finding alleged violation of Fourth Amendment rights to demonstrate irreparable harm); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (finding alleged privacy violation to constitute an irreparable harm). Moreover, the U.S. Citizen Plaintiffs are vulnerable as foreigners stranded abroad, because a U.S. citizen "living abroad is not in a position to assert the vast majority of his component rights as an American citizen. If he wishes to assert those rights in any real sense he must return to this country." *Kennedy*, 372 U.S. at 184. For example, the U.S. government "may, by proper refusal to exercise its largely discretionary power to afford him diplomatic protection, decline to invoke its sovereign power on his behalf." *Id.* at 185.

Although these constitutional violations are sufficient in and of themselves to demonstrate irreparable harm, two of the U.S. Citizen Plaintiffs have also been denied needed medical care, which constitutes additional irreparable harm flowing from their effective banishment from the United States. *See Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1113 (9th Cir. 2010) ("[T]o show a risk of irreparable harm, plaintiffs may show . . . that enforcement of a proposed rule may deny them needed medical care . . . .") (internal quotations omitted); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (finding denial of needed medical care to constitute irreparable injury). Mr. Muthanna suffers from serious mental health and digestive conditions that require treatment by his general physicians and specialists, all of whom are located in New York. Muthanna Decl. ¶ 27. Stranded in Yemen since he was denied boarding on his June 3, 2010 flight to New York, Mr. Muthanna is unable to access the medical treatments, prescription medications, and check-up visits to adjust his medications that he would receive in the United States. *Id.* Moreover, the medications that he has been prescribed by doctors in Yemen have been detrimental to his health because they have been incorrect, ineffective, or expired, or have caused side effects that are worse than the conditions from which he suffers. *Id.*

Similarly, Mr. Latif suffers from disabilities, including cervical sprain/strain and degenerative disc disease in his lumbar spine, due to injuries he sustained to his neck, back, and hips as a member of the U.S. Marine Corps. Latif Decl. ¶¶ 3, 37. Since he was prevented from flying to Miami on April 13, 2010, Mr. Latif has been denied access to medical treatment that he would have received in Veterans Administration hospitals in the United States. *Id.* ¶ 45. Mr. Muthanna and Mr. Latif continue to suffer irreparable

injury each day that Defendants' placement of them on the No Fly List prevents them from returning home to get needed medical care that is unavailable to them in Egypt and Yemen.

Defendants' conduct has caused additional cognizable harms. Mr. Latif faces the termination of his disability benefits unless he can travel to the United States to attend a disability evaluation with the Veterans' Administration. Latif Decl. ¶ 37. Termination or even reduction of Mr. Latif's benefits, which support him and his entire family, *id.* ¶ 39, unquestionably would constitute irreparable injury. *See Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998) ("Numerous cases have held that reductions in [Aid to Families with Dependent Children] benefits, even reductions of a relatively small magnitude, impose irreparable harms on recipient families.") (internal quotation marks omitted). Shortly after he was denied boarding on his flights from Cairo to Miami via Madrid, Mr. Latif was notified by the Veterans' Administration that his monthly disability benefits would be reduced from $899 to $293 due to his failure to attend a disability evaluation that he had missed because he had been prevented from traveling to Florida as planned. Latif Decl. ¶ 23-25. In July 2010, Mr. Latif was notified by the Disabled American Veterans National Service Office that the evaluation of his disabilities had been reduced from "20 percent disabling" to zero percent, effective October 1, 2010. *Id.* ¶ 37. Mr. Latif fears that unless he is able to travel immediately to the United States for a rescheduled disability evaluation, his disability benefits will be completely terminated.

Finally, all the U.S. Citizen Plaintiffs suffer from serious emotional and psychological harms stemming from their inability to return to their homes, jobs, families, and lives in their country of citizenship—irreparable harms that support the

grant of a preliminary injunction. *See Chalk v. U.S. Dist. Ct. C.D. Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (requiring court to consider non-monetary deprivations, including immediate emotional and psychological injuries stemming from alleged discriminatory removal from employment and assignment to alternative work, as "substantial injuries" that would support grant of a preliminary injunction). Mr. Kashem and Mr. Elias Mustafa Mohamed have suffered emotionally from being separated from their families in the United States, whom they sought to visit during their summer vacation from language studies at the Islamic University of Al-Madinah Al-Munawwarah. Kashem Decl. ¶¶ 4, 6, 23; Elias Mohamed Decl. ¶¶ 3, 5, 19. Mr. Latif has also suffered from worry and stress due to his inability to return to the United States to ensure that his elderly and aging mother, who may soon pass away, receives proper care. Latif Decl. ¶ 44. Similarly, Mr. Muthanna and Mr. Samir Mohamed Ahmed Mohamed have experienced emotional and psychological injuries from being unable to provide for their families due to their inability to return to their jobs in the United States. Samir Mohamed Decl. ¶ 22; Muthanna Decl. ¶ 26.

The ongoing violation of the U.S. Citizens' Fourteenth Amendment right to return, the denial of Mr. Muthanna and Mr. Latif's access to needed medical care, the impending and certain termination of Mr. Latif's disability benefits, and the emotional and psychological distress suffered by all of the U.S. Citizen Plaintiffs constitute irreparable harms that require a grant of preliminary relief.

B. Lawful Permanent Resident Plaintiffs

Plaintiffs Saleh Omar and Abdul Hakeim Thabet Ahmed will suffer continued irreparable harm in the absence of preliminary relief to allow them to return home

immediately. Every day that they are barred from returning to the United States deprives them of their right to reside in the United States and the substantial ties they have built here. Both have well-established lives in the United States. Plaintiff Omar became an LPR in 1996 and has lived and worked in Detroit, Michigan for fourteen years; Plaintiff Ahmed became an LPR in 1990 and for twenty-one years has lived and worked in Rochester, New York. Ahmed Decl. ¶ 2; Omar Decl. ¶ 2.

In addition, Plaintiffs Omar and Ahmed fear that each day they remain in forced exile might legally impact their eligibility to naturalize as U.S. citizens. Ahmed Decl. ¶ 24; Omar Decl. ¶ 19. The INA provides that an LPR can apply for naturalization if, immediately preceding the date of filing of the application, he or she has resided continuously in the United States for at least five years after becoming an LPR, has been physically present for at least half of that time, and meets the statutory requirements for a person of "good moral character." 8 U.S.C. § 1427(a) (requirements of naturalization); 8 U.S.C. § 1101(f) (definition of a person who lacks good moral character). However, the INA also provides that absence from the United States for a continuous period of one year or more breaks the continuity of such residence. 8 U.S.C. § 1427(b). The statute provides no explicit exceptions to that rule, and at least one court has held, albeit without analysis, that this one-year bar is not excused by an LPR's involuntary absence from the United States due to his erroneous placement on the No Fly List. *See Gildernew v. Quarantillo*, 594 F.3d 131, 134 (2d Cir. 2010).

Prior to their departures from the United States in August and December of 2009, Mr. Omar and Mr. Ahmed were eligible to apply for naturalization. Ahmed Decl. ¶ 4; Omar Decl. ¶ 3. Mr. Ahmed became an LPR in 1990, Mr. Omar in 1996. Both have

resided continuously since then in the United States with no extended absences, and have met the statutory definitions for a finding of "good moral character." Ahmed Decl. ¶ 4; Omar Decl. ¶ 3. Due to his placement on the No Fly List, however, Mr. Omar has been forced to remain outside the United States for five months longer than he intended, resulting in his presence outside of the country for more than eight months. *See* Omar Decl. ¶ 6. He therefore has an urgent need to return to the United States before the expiration of one year, so as to ensure that he is not subject to the one-year absence bar and precluded from establishing his continuous residence in the United States. Mr. Ahmed has been in involuntary exile for more than six months, resulting in his stay out of the country for more than one year since he left to visit his family, so his situation is arguably even more dire. *See* Ahmed Decl. ¶ 7.

Plaintiffs Omar and Ahmed also fear that every day they remain in forced exile may impact their rights as returning LPRs. Ahmed Decl. ¶ 23; Omar Decl. ¶ 18. If an LPR continuously remains outside the United States in excess of 180 days, the government may treat that LPR as an applicant for admission when he seeks reentry and charge him with grounds of inadmissibility. 8 U.S.C. § 1101(a)(13)(C)(ii). Although Plaintiff Omar attempted to fly home to the United States three months after departing the United States, his placement on the No Fly List has thus far exiled him for eight months. Similarly, although Plaintiff Ahmed attempted to fly home less than six months after departing, his placement on the No Fly List has thus far exiled him for approximately one year. Plaintiffs Omar and Ahmed fear that the government may seek to exercise its discretion to treat them as applicants for admission when they finally return. Ahmed Decl. ¶ 23; Omar Decl. ¶ 18. Every day they remain in forced exile may further harm

their interest in not being treated as aliens seeking admission whenever they are finally permitted to return.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR AS PRELIMINARY RELIEF WOULD NOT SUBSTANTIALLY INJURE THE GOVERNMENT

The balance of equities tips sharply towards Plaintiffs, who have already suffered and will continue to suffer from acute injuries in the absence of preliminary relief allowing them to return to the United States via commercial flights. Preliminary relief will not substantially injure Defendants. The Plaintiffs who bring this motion do not pose a security threat to commercial aviation, nor do they know why their names have been included on the No Fly List. *See* Ahmed Decl. ¶ 13, 19; Kashem Decl. ¶ 21; Latif Decl. ¶¶ 38, 41; Elias Mohamed Decl. ¶¶ 10, 19; Samir Mohamed Decl. ¶¶ 15, 19; Muthanna Decl. ¶ 23; Omar Decl. ¶¶ 10, 12, 14, 20. Plaintiffs are willing to undergo any suitable screening procedures and in-flight security measures that the government may deem necessary.

It can hardly be disputed that the government is capable of safely ensuring that Plaintiffs can return to the United State by plane. Indeed, one U.S. official has suggested to Plaintiff Latif that he might be able to obtain a "one-time waiver" permitting him to fly to the United States. *See* Latif Decl. ¶¶ 31-32.[5] Moreover, the Plaintiffs, who have been prevented from flying on account of their inclusion on a terrorist watch list, have all been permitted—and in some cases actively encouraged by government officials—to visit U.S. embassies and consulates abroad in order to seek explanations for their inability to fly

[5] *See also*, Ian Shapira, *U.S. Citizen On No Fly List Discusses Being Stranded In Egypt and Talks With FBI*, Washington Post, July 27, 2010 (describing grant of one-time waiver to fly to U.S. citizen who had been placed on No Fly List and was stranded abroad).

home. *See* Latif Decl. ¶¶ 13, 20-22, 27 (U.S. embassies); Kashem Decl. ¶¶ 15-17 (U.S. consulates); Elias Mohamed Decl. ¶¶ 11-13 (same); Samir Mohamed Decl. ¶¶ 12-14, 16 (U.S. embassies); Muthanna Decl. ¶¶ 17, 20 (same); Omar Decl. ¶¶ 9-10, 12 (same); Ahmed Decl. ¶¶ 9-10, 13-14, 16 (U.S. embassies and consulates). In these circumstances, the government will be hard-pressed to articulate any hardship that would flow from allowing Plaintiffs to fly home subject to enhanced security screening or to provide evidence that Plaintiffs would actually or realistically threaten the security of commercial aviation if granted the ability to board flights on these terms. *See Sammartano v. First Judicial Dist. Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (finding that the "interest in keeping a government building accessible and safe is both legitimate and significant" but that "absent a showing in the record of actual (or realistic threat of) interference or disruption, the demonstrated hardship imposed upon [the Government] is minimal").

Any conceivable hardship deriving from additional expenditure of resources that might be required by heightened screening measures is significantly outweighed by the irreparable injuries that the Plaintiffs have suffered and will continue to suffer absent preliminary relief. *See Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("Faced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in favor of the latter.") (internal quotation marks omitted). At most, Defendants will be required to arrange seven secure flights in order to resolve this Motion. Absent injunctive relief, Plaintiffs will continue to suffer the litany of constitutional injuries and associated hardships described in detail above.

IV. THE PUBLIC INTEREST WOULD BE FURTHERED BY AN INJUNCTION ORDERING THE DEFENDANTS TO PERMIT PLAINTIFFS TO RETURN TO THE UNITED STATES BY AIR SUBJECT TO SUITABLE SCREENING PROCEDURES

Preliminary relief would advance the public interest by upholding rights guaranteed by the Fourteenth and Fifth Amendments. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (citing *Sammartano*, 303 F.3d at 974) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights."). All citizens and lawful permanent residents of the United States have an interest in ensuring that the executive branch does not violate the constitutional right of citizens to return home from abroad and the constitutional and statutory rights of LPRs to reside continuously in this country, to be eligible for naturalization, and to be treated as LPRs if and when they are able to return from abroad.

Any asserted public interest in national security is entirely speculative here, where Plaintiffs do not threaten the security of commercial aviation and have agreed to undergo suitable screening procedures prior to flying home to the United States. *See Stormans*, 586 F.3d at 1139 ("[T]he district court need not consider public consequences that are 'highly speculative,' . . . [only] the *likely* consequences of the injunction." (quoting *Golden Gate Rest. Ass'n*, 512 F.3d at 1126)) (emphasis in original); *Harris v. Bd. of Supervisors, LA County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding that district court did not abuse its discretion in determining that public interest favored plaintiffs' request for preliminary relief where defendants' "suggest[ed]" harms were "much more speculative" than the harms suffered by plaintiffs, including injuries stemming from delayed medical

treatment); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164, 172-73 (1951) (Frankfurter, J., concurring) (noting that, despite significant public interest in national security, the Government had not shown that individuals' requests for procedural relief would be "impractical or prejudicial to a concrete public interest" and that the Government is not "immune from the historic requirements of fairness" when acting "in the name of security"). Accordingly, the public interest would be furthered by the injunction Plaintiffs seek.

CONCLUSION

Having demonstrated their entitlement to preliminary injunctive relief, Plaintiffs seek an order requiring Defendants to permit them to return to the United States by air subject to suitable screening procedures. For the reasons stated above, Plaintiffs' motion for preliminary relief should be granted.

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