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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

AYMAN LATIF, et al.,	Case 3:10-cv-00750-BR
v. <i>Plaintiffs,</i>  LORETTA E. LYNCH, et al.,  <i>Defendants.</i>	<b>DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS- MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF KARIYE</b>

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR  
PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF KARIYE**

**INTRODUCTION**

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Mohamed Sheikh Abdirahman Kariye. As explained in the opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Kariye is, “in the generality of cases,” reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court concludes that it is, the only question remaining with respect to Mr. Kariye is whether he in fact received the benefit of that process. With respect to that question, the Government has provided Mr. Kariye with his status on the No Fly List, the reason for which he was listed, and an unclassified summary of information supporting his No Fly List status, to the extent feasible without unduly harming national security. In particular, the Government has concluded that Mr. Kariye poses a continuing threat to civil aviation or national security, in part because of his military experience as a fighter in Afghanistan, his association with convicted terrorists, his provision of financial support to individuals intending to travel to Afghanistan to fight against American troops, his membership on the board of a Specially Designated Global Terrorist organization, and his expressed support for violent jihad. The only question before the Court at this time is whether the revised redress process is constitutionally adequate. Plaintiff disagrees with the conclusions reached by the Government, but presents no plausible argument that he received anything short of the complete process when he sought redress with DHS TRIP. DHS TRIP, as applied to Mr. Kariye, fully satisfies the requirements of due process. The Court should grant Defendants’ motion for summary judgment.

## ARGUMENT

### I. Plaintiffs' Arguments About Error Rates Are Misplaced.

Echoing arguments made in Plaintiffs' consolidated brief, Mr. Kariye faults the Government for not incorporating scientific methods in its decision-making process and contends that the predictive judgments underlying his placement on the No Fly List amount to "guessing" at the possibility that he may one day commit an act of terrorism. Dkt. 272, at 2. As a preliminary matter, this line of argument is best reserved for resolution on the parties' consolidated briefs. As the Government has argued, the watchlisting system is reliable and consistent with due process without the benefit of a scientific model, and Mr. Kariye has no claim for special treatment. *See* Defs. Reply at Part I.

Plaintiff otherwise tries to bootstrap putative expert analysis into substantive arguments about the merits of his listing, but these arguments are both irrelevant and wrong. Setting aside the unpersuasiveness of Mr. Kariye's arguments, they do not address or support his due process claim. The possibility of alternative interpretations of facts does not mean that the Government's acted unreasonably or that the process was unfair. Indeed, it does not suggest anything at all about the process, which is the only question currently before the Court.

The examples of "error" Plaintiff cites are not procedural errors, and are not tied to the issues raised by Plaintiffs' declarants. For example, Mr. Kariye notes that many people discuss "jihad" and "frustration over U.S. foreign policy" without engaging in violent acts of terrorism. Dkt. No. 272, at 3. But the Government is aware that there are other usages of the word "jihad" and does not watch-list individuals solely because they discuss "jihad" or express frustration over U.S. foreign policy. This plainly was not the basis for placing Mr. Kariye on the No Fly List. Rather, in the context of an individual providing financial support and encouragement to the Portland Seven, it is reasonable for the government to conclude that Mr.

Kariye may have been supporting violent jihad. Dkt. 175-1. Similarly, Mr. Kariye says it is “self-evident” that fighting the Soviets in Afghanistan in the 1990s “would not establish a desire to harm American forces.” But this was just one factor in the Government’s determination, and it reasonably supports the conclusion. His experience in Afghanistan demonstrates that Mr. Kariye’s support for jihad includes support for violent jihad, that he has longstanding involvement with violent jihad, and that he has a background and training that would make him capable of planning or committing attacks on American forces overseas. Considered alongside his participation in a scheme to attack American forces overseas, and his founding membership in Global Relief Foundation, *see generally Global Relief Found. v. Snow*, No. 02-cv-00674, Order on Mot. to Dismiss [Dkt. No. 124, at 9] (N.D. Ill. May 31, 2007) (describing GRF’s involvement with terrorists “from its inception”), Mr. Kariye’s experience fighting in Afghanistan is relevant and supports the Government’s determination.

In any event, Mr. Kariye’s substantive objections do not illustrate a substantive or procedural deficiency in the redress decision. On the contrary, it is plain that Mr. Kariye has sufficient basis to understand the allegations and has offered no meaningful substantive response. And the examples do not illustrate the so-called “error rate” described by Plaintiffs’ declarants, who have not opined on any of the specific listing determinations. Moreover, there is no reason to believe that Plaintiffs’ alleged “errors” show any “cognitive bias” or that Defendants were unaware of the facts put forward by Plaintiff here. Indeed, the record shows that Defendants are in fact aware of such counterarguments, because the Government specifically considered Mr Kariye’s submissions. *See* Dkt 175-3.<sup>1</sup> Plaintiff’s disagreement with the Government’s substantive conclusions does not demonstrate substantive or procedural error.

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<sup>1</sup> Plaintiff improperly relies on the absence of criminal charges as evidence that there is no “factual basis” for the Government’s conclusions. The exercise of prosecutorial discretion depends on numerous

## II. Plaintiff’s Vagueness Argument Is Baseless.

As discussed in Defendants’ opening brief and consolidated reply brief, Mr. Kariye cannot demonstrate that the No Fly List criteria are impermissibly vague. *See* Defs’ Reply at Part II. The Government has found that there is a reasonable basis to believe that Mr. Kariye is a known or suspected terrorist who represents a threat to civil aviation or national security. The Government made that determination applying a clear and specific No Fly List criterion to Mr. Kariye’s conduct and after considering his response to the reasons the Government provided. *See* Dkt. 239. His conduct as described in the notice letter fits well within the criterion applied to him — that he represents a threat of committing an act of international terrorism against any U.S. Government facility abroad. Indeed, the Government had a reasonable basis to believe that he has previously participated in an attempted attack on Americans overseas by funding the Portland Seven, and that he has the experience, capability and desire to plan or conduct such attacks again. Moreover, because Mr. Kariye engaged in conduct that is “clearly proscribed” by the criteria, he cannot sustain a vagueness challenge based on its hypothetical applications. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010).

Mr. Kariye presents no grounds for concluding that the Government’s No Fly List determination was based merely on his “associations” or other protected First Amendment activity. The Government’s determination was based in part on the fact that he has actively participated in a plot to attack Americans overseas by providing funds to the Portland Seven. And the mere fact that speech related activities might be considered does not render the criteria impermissible. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Virginia v. Hicks*, 539 U.S. 113,

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factors, including the availability of alternative means to neutralize threats to national security, such as, for example, denaturalization and deportation.

124 (2003) (stating that “[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech”); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer “may decide to arrest the suspect because his speech ... suggests a potential threat”); *cf. Wayte v. United States*, 470 U.S. 598, 612-613 (1985) (recognizing that letter of protest written to Secret Service can be relevant “evidence of the nonregistrant’s intent not to comply,” an element of the crime).

### **III. The Revised DHS TRIP Process Provides Meaningful Notice And An Opportunity To Be Heard.**

As described in Defendants’ reply brief, the revised DHS TRIP process comports with the requirements of due process, and the procedures were properly applied to Mr. Kariye. *See* Defs. Summ. J. Reply at Part III. Mr. Kariye was provided sufficient information to understand the nature of the information provided and was given ample opportunity to challenge the basis for his listing. Additional procedures are not required, and his attempt to obtain more information about sensitive sources and methods should fail.<sup>2</sup> *See* Dkt. 239.

For example, Mr. Kariye demands disclosure of the recordings by the cooperating witness and other information about any witnesses against him. But these concerns all go to the sufficiency of the information, not the adequacy of notice. Even more compellingly, Mr. Kariye has not denied the allegations based on those recordings — that he provided funds for the Portland Seven in support of their efforts to attack American forces overseas; he only denies

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<sup>2</sup> Mr. Kariye also states that he is willing to undergo additional airport security screening. This appears to be related to Plaintiffs’ substantive argument that the Government imposed an incorrect security measure on the Plaintiffs because more intrusive screening would account for the Government’s interests. As described in Defendants’ main brief, the appropriateness of TSA’s security screening measures is irrelevant to the due process consideration and beyond the jurisdiction of the Court. *See* Defs.’ Summ. J. Reply at Part IV.

having done so with criminal intent.<sup>3</sup> But a No Fly List determination does not impose a criminal penalty and compromising a witness under these circumstances is unwarranted.

Mr. Kariye also complains that he received less information in this proceeding than he will receive in a separate proceeding in which he is a defendant. *See United States v. Kariye*, 3:15-cv-1343 (D. Or.). But that argument mixes apples and oranges. The United States has brought a separate action against Mr. Kariye to revoke his naturalization because it was illegally obtained by willful misrepresentation and concealment of material facts during his naturalization proceedings. Namely, Mr. Kariye repeatedly made false statements to the government in order to obtain naturalization, including lying about his employment history, sources of income, unlawful acts, fraudulent use of a social security number, and association with certain terrorist organizations and the Portland Seven defendants. Because the denaturalization complaint alleges that Mr. Kariye made false statements about his terrorist activity, there are some similar factual issues between the two sets of allegations, but the issues arise in connection with a different proceeding, under a different legal standard and relying on different evidence. Any unclassified, non-public information that was relied upon in connection with Mr. Kariye's redress inquiry has been provided to him, and nothing in the denaturalization complaint changes that analysis.

Plaintiff also demands a particular form of evidentiary hearing to rebut the agency's prediction of future threats to national security, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by

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<sup>3</sup> Even if the Court agreed that the Government was required to disclose investigative information, this is also a good example of how Plaintiffs' demands for disclosure or a privilege assertion during the administrative process are meritless. *See* Defs' Reply at Part III.C Defendants are not required to surrender their privileges during the administrative process. Defendants, of course, object to the disclosure of privileged information in the context of a No Fly List determination, but the Court would need to consider that issue only when and how it became necessary in the context of a substantive review of the decision.

law, would add little value to the process, and reasonably would be expected to harm national security. *See* Defs.' Summ. J. Mem. Part V.C.; Defs' Reply Part III.D.

#### **IV. The Harmless Error Doctrine Warrants Judgment For Defendants.**

To the extent that the Court finds any error at all in the process provided to Mr. Kariye, he must show substantial prejudice as a result of the specific error found. *See* Defs Reply at Part V. The notice provided to Mr. Kariye was particularly robust in describing the unclassified, non-privileged information about his support for terrorism. Mr. Kariye's response is noteworthy for failing to refute the facts alleged by the Government. For example, he does not deny that he fought in Afghanistan or that he expresses support for jihad or even that he provided financial support to the Portland Seven. Notably, he does not even deny having actual knowledge of their plans. He denies only that his intent was criminal in funding the Portland Seven, and denies remembering any discussion of their criminal plans. In the face of this response, the Government quite reasonably determined that his contentions were insufficient to counter the finding of reasonable suspicion. Given Mr. Kariye's failure to deny the central allegations against him, Mr. Kariye cannot establish substantial prejudice from his inability to obtain more notice or a hearing. *See Al Haramain Islamic Found. Inc. v. Dep't of Treasury*, 686 F.3d 965, 998-90 (9th Cir. 2012) (conducting a harmless error analysis).

#### **V. Plaintiff's Claims Under The Administrative Procedure Act Should Be Rejected.**

Judgment should also be entered for Defendants on Plaintiff's Administrative Procedure Act Claims for the same reasons set forth in Defendants' opening brief.

### **CONCLUSION**

For the foregoing reasons, the Court should deny Mr. Kariye's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.



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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing filing was delivered to all counsel of record via the Court's ECF notification system.

*s/ Brigham J. Bowen*  
Brigham J. Bowen

**CERTIFICATE OF COMPLIANCE**

This brief complies with the Court's order concerning page length, as it comprises fewer than seven pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

*s/ Brigham J. Bowen*  
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