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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA LYNCH, et al., *Defendants*.	**DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION** **ORAL ARGUMENT REQUESTED**

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants submit this motion to dismiss Plaintiffs' remaining substantive challenges to their presence on the No Fly List. As grounds for this motion, the above defendants submit their concurrently filed memorandum in support.

Pursuant to Local Rule 7-1, the undersigned conferred with counsel for Plaintiffs over the course of multiple conversations, and counsel indicated that Plaintiffs oppose the motion.

Dated: January 18, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA LYNCH, et al., *Defendants*.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION**

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INTRODUCTION

Plaintiffs' remaining claims (Counts II (substantive due process) and III (Administrative Procedure Act)) challenge the merits of the Government's decision to maintain each Plaintiff on the No Fly List — a decision made by the Transportation Security Administration (TSA) pursuant to revised Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) redress procedures. For each Plaintiff, the final determination that he should remain on the No Fly List was made by the Acting TSA Administrator and is embodied in a final TSA order. Under 49 U.S.C. § 46110, such orders may be challenged solely through petitions for review in the courts of appeal. Plaintiffs seek to evade the intent and effect of that statute by framing their claims as challenges to the original determinations by the Terrorist Screening Center (TSC), but the fact remains that the determinations preventing them from boarding aircraft and giving rise to their alleged harms are final orders issued by TSA. This Court lacks jurisdiction over Plaintiffs' claims and this action should now be dismissed.

BACKGROUND

The Transportation Security Administration has the primary responsibility for securing all modes of transportation, with a particular focus on preventing terrorist attacks against the aviation industry and other methods of transportation. *See* 49 U.S.C. § 114(d). TSA is responsible for the day-to-day federal security screening operations for passenger air transportation, *id.* § 114(e)(1), and for developing "policies, strategies, and plans for dealing with threats to transportation security," *id.* § 114(f)(3). TSA may "issue ... such regulations as are necessary to carry out [its] functions," *id.* § 114(l)(1), as well as "prescribe regulations to protect passengers and property on an aircraft," *id.* § 44903(b).

Congress assigned TSA the authority and obligation to make determinations related to the No Fly List. TSA is required to engage in information-sharing concerning "individuals identified on Federal agency databases who may pose a risk to transportation or national security" and to establish policies and procedures in order to prevent individuals who present such risks from boarding aircraft. 49 U.S.C. § 114(h). Congress likewise directed TSA 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." *Id* § 44903(j)(2)(C)(iii)(I); *see also id.* § 44903(j)(2)(G)(i) (directing TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to the [TSA] the determination and correct any erroneous information"); *id.* § 44926(b)(1) (directing the Department of Homeland Security to "implement, coordinate, and execute the process" for correcting erroneous information related to the No Fly List).

Pursuant to these authorities, TSA (1) through the No Fly List, ensures that individuals identified as threats to aviation and national security are prevented from boarding aircraft, and (2) in coordination with other agencies, provides administrative redress relating to aviation security, including for individuals on the No Fly List. Under the revised DHS TRIP procedures, when a U.S. person on the No Fly List files an inquiry with DHS TRIP regarding a denial of boarding, the ultimate decision on the individual's No Fly List status is vested in TSA. This revised process reflects Congress's intent that TSA provide the administrative appeal process contemplated by Section 44903 and furthers the interests of due process. The result, in cases in which TSA determines that an individual should remain on the No Fly List, is a final TSA order. *See*, *e.g.*, Dkts.

175-3, 176-3, 177-3, 178-3, 180-3; Stipulations (Dkt. 347) ¶¶ 20–21; Moore Decl. (Dkt. 252) ¶ 15; Groh Decl. ¶¶ 3, 12.[1]

In determining a U.S. person's No Fly List status under the revised DHS TRIP process for U.S. persons, final TSA orders issue after the TSA Administrator reviews a record prepared through the DHS TRIP process. This record includes, at a minimum, (1) disclosure letters issued to the individual, identifying their status on the No Fly List, the applicable criteria for inclusion on the No Fly List, and an unclassified summary of information regarding the reasons for such inclusion;[2] (2) any information the individual has provided in support of his or her DHS TRIP submission; (3) a recommendation memorandum from TSC, explaining TSC's reasons for the individual's No Fly List status; and (4) a memorandum from DHS TRIP. The recommendation memoranda may include classified or otherwise sensitive information that is not disclosed to the individual. After considering the entire record, the Administrator then makes a determination and issues a final TSA order, which is provided to the individual. Stipulations ¶¶ 20–21; Grigg Decl. (Dkt. 253) ¶¶ 39–40; Moore Decl. ¶¶ 15–18; Suppl. Moore Decl. ¶ 6; Groh Decl. ¶¶ 5, 7, 12.

[1] Defendants filed a number of declarations in support of their prior motions for summary judgment, the factual contents of which Plaintiffs did not contest. Defendants now supplement these declarations (and the parties' stipulations) with declarations from Deborah Moore, Branch Manager of the Transportation Security Redress Branch in the Office of Civil Rights & Civil Liberties, Ombudsman and Traveler Engagement at TSA (Suppl. Moore Decl.), and from Timothy P. Groh, Deputy Director for Operations of the TSC (Groh Decl.).

[2] As the Court is aware, a DHS TRIP letter will include an unclassified summary of information supporting the individual's No Fly List status, to the extent feasible, consistent with the national security and law enforcement interests at stake. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. In some circumstances, an unclassified summary cannot be provided without compromising the national security and law enforcement interests at stake. Dkt. 197 at 2; Grigg Decl. ¶ 41; Moore Decl. ¶¶ 13, 16; Stipulations ¶ 15; Groh Decl. ¶ 12.

As the parties have now stipulated, the TSA Administrator may determine, after review of the record before the Administrator and any appropriate interagency consultation, that the individual should not be on the No Fly List, notwithstanding the TSC's recommendation that the individual remain on the No Fly List. In such a case, the Administrator may issue an order determining that the individual should not be on the No Fly List and the individual will be removed. Stipulations ¶ 22; *see also* Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39–40; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 7. If the TSA Administrator determines that the individual should be maintained on the No Fly List, then the administrative process is complete. Moore Decl. ¶ 17.

If the individual wishes to challenge their No Fly List status at this point, their challenge is, by definition, a challenge to a final order of TSA that may be heard only in the U.S. courts of appeal. 49 U.S.C. § 46110. Accordingly, Plaintiffs' claims brought in this Court must be dismissed for lack of jurisdiction. Fed. R. Civ. P. 12(b)(1); *cf.* Third Am. Compl., Dkt. 83, Counts II (substantive due process), III (APA).

ARGUMENT

I. UNDER THE REVISED DHS TRIP PROCESS, PLAINTIFFS' CLAIMS NECESSARILY CHALLENGE, "IN WHOLE OR IN PART," FINAL ORDERS OF TSA, AND THEREFORE MAY BE HEARD ONLY IN THE COURT OF APPEALS.

Section 46110 provides for "exclusive" jurisdiction in the courts of appeal to review orders issued "in whole or in part" by TSA, including claims "inescapably intertwined" with TSA orders. *See* 49 U.S.C. § 46110(a), (c); *Americopters, LLC* v. *FAA*, 441 F.3d 726, 736 (9th Cir. 2006); *Gilmore* v. *Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006); *see also Ligon v. LaHood*, 614 F.3d 150, 154–57 (5th Cir. 2010) (discussing the "inescapably intertwined" doctrine in reference to 49 U.S.C. § 46110 and collecting cases). An "order" under Section 46110 includes any agency decision that "provides a definitive statement of the agency's position, has a direct and immediate effect on the day-to-day

business of the party asserting wrongdoing, and envisions immediate compliance with its terms," because such an order "has sufficient finality to warrant the appeal offered by section 46110." *Gilmore*, 435 F.3d at 1132 (internal citation omitted); *accord Safe Extensions, Inc.* v. *FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007).

At the conclusion of the revised DHS TRIP process, the TSA Administrator issues an order based on review of the DHS TRIP file, including a recommendation from TSC and a separate recommendation from DHS TRIP. Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39–40; Stipulations ¶¶ 18–23; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 12. The DHS TRIP recommendation will include input from the TSA Office of Intelligence and Analysis, based on that office's review of TSC's recommendation and any other relevant available information. Suppl. Moore Decl. ¶¶ 9–13. The memorandum will recommend whether the TSA Administrator should remand the case back to TSC with a request for additional information or clarification, or issue a final order removing the individual from or maintaining the individual on the No Fly List. *Id.* The Administrator has final authority to issue an order maintaining such an individual on, or removing such an individual from the No Fly List, even if that order rejects TSC's recommendation. Stipulations ¶ 22; Moore Decl. ¶¶ 15–16; Grigg Decl. ¶ 39; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 7.

In this case, at the conclusion of the revised redress process, the TSA Administrator issued final orders concerning each of the Plaintiffs pursuant to TSA's statutory authority. *See*, *e.g.*, Dkts. 175-3,176-3,177-3, 178-3, 180-3; Moore Decl. ¶ 18; Groh Decl. ¶ 12. Each order is captioned "Decision and Order" and is signed by the Acting TSA Administrator. Because each order retains an individual on the No Fly List, each order is a "definitive statement" and has a "direct and immediate effect" on the individual's ability to board a commercial aircraft. *See Gilmore*, 435 F.3d at

1132. The orders reflect the Acting TSA Administrator's consideration of the basis for listing and the Plaintiffs' submissions.[3]

Plaintiffs' challenges to the decisions to retain each of them on the No Fly List are therefore challenges to orders of TSA, namely, the decisions by the Acting TSA Administrator to retain them on the No Fly List at the conclusion of the DHS TRIP process. These orders are issued pursuant to TSA's plain statutory authorities governing redress and assessing risks to transportation or national security. *See* 49 U.S.C. § 44903(j)(2)(C)(iii)(I) (directing TSA 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"); *id.* § 44903(j)(2)(G)(i) (directing TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to the [TSA] the determination and correct any erroneous information"); 49 U.S.C. § 114(h) (requiring TSA to engage in information-sharing concerning ("individuals identified on Federal agency databases who may pose a risk to transportation or national security" and to establish policies and procedures in order to prevent individuals who present such risks from boarding aircraft).

Moreover, the TSA orders reflect the exercise of independent decisionmaking authority about No Fly List status. Indeed, under the revised DHS TRIP process, TSA may overrule TSC's continued recommendation that an individual remain on the No Fly List. Stipulations ¶ 22; Grigg

[3] Additionally, each order reflects a considered decision, reached through interagency consultation, that more information could not be made available to the Plaintiff because additional disclosures would risk harm to national security or jeopardize law enforcement activities. *See*, *e.g.*, Dkts. 175-3 at 3, 176-3 at 3, 177-3 at 3; 178-3 at 3; 180-3 at 3.

Decl. ¶ 39; Suppl. Moore Decl. ¶ 13; Groh Decl. ¶ 7. Thus, there is no longer any doubt that Plaintiffs' substantive claims are directed at final TSA orders under Section 46110.[4]

II. THE NINTH CIRCUIT'S PANEL HOLDING DOES NOT APPLY TO TSA ORDERS ISSUED PURSUANT TO THE REVISED DHS TRIP PROCESS.

The Ninth Circuit previously held that Plaintiffs' challenges could proceed in district court because "TSC actually compiles the list of names ultimately placed" on the List. *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012); *see also Arjmand v. DHS*, 745 F.3d 1300 (9th Cir. 2014); *Ibrahim v. DHS*, 538 F.3d 1250, 1255 (9th Cir. 2008). With respect to the prior DHS TRIP process, the Ninth Circuit reasoned that "TSA simply passes grievances along to TSC and informs travelers when TSC has made a final determination" and that any "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." *Latif*, 686 F.3d at 1128–29. The court therefore held that the exclusive jurisdiction provisions of Section 46110 did not apply and that jurisdiction was appropriate in district court.[5]

The Government respectfully continues to disagree with the Ninth Circuit's conclusions regarding the prior DHS TRIP orders, but in any event, those conclusions are not applicable to the TSA orders generated by the revised redress process. TSA now explicitly makes the final determination and does in fact have the information and the full authority to effectuate the relief

[4] Because Section 46110 divests this Court of jurisdiction to hear any challenge to the No Fly List determinations at issue here, both Plaintiffs' constitutional and APA claims are subject to dismissal. 5 U.S.C. § 702 (forbidding courts "to grant relief" under the provisions of the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"); *id.* § 704 (permitting review of final agency action "for which there is no other adequate remedy in a court").

[5] This is the same basis for the holding in *Arjmand*, where the plaintiff had completed the prior version of DHS TRIP. The court in *Arjmand* held that, like the *Latif* plaintiffs, the plaintiff there was seeking "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," and that Section 46110 did not provide remedies against TSC. 745 F.3d at 1302. In *Ibrahim*, the Ninth Circuit held that original placement on the No Fly List was not reviewable in the Court of Appeals because it did not involve an order of TSA. 538 F.3d at 1255.

Plaintiffs are seeking. *See* Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39–40; Suppl. Moore Decl. ¶¶ 12–13; Groh Decl. ¶ 7. Moreover, the court of appeals may provide effective relief through judicial review: The court would have jurisdiction "to affirm, amend, modify, or set aside any part of the order and may order the ... Administrator to conduct further proceedings." 49 U.S.C. § 46110(c).

III. UNDER THE REVISED DHS TRIP PROCESS, TSA ACTS AS FINAL DECISIONMAKER AND ISSUES A BINDING ORDER THAT IS SUBJECT TO REVIEW ONLY IN THE COURT OF APPEALS.

As set forth in the declarations and stipulations before the Court, it is undisputed that, under the new process, TSA is the final decisionmaker, not a mere pass-through for the decisions of TSC.[6] TSA receives a recommendation from TSC regarding the disposition of the individual's appeal. This recommendation is conveyed in a memorandum from TSC to TSA that provides the reasons for the recommendation, as well as the material information related to the initial No Fly List determination. Moore Decl. ¶ 14; Grigg Decl. ¶¶ 39–41. In most cases, the memorandum will include classified or otherwise sensitive information that has not been disclosed to the individual in the initial DHS TRIP correspondence. Steinbach Decl. (Dkt. 254) ¶ 23 *et seq.* As is ordinarily the case when recommendations are passed from one agency to another for purposes of a determination by the receiving agency, the TSC recommendation may not convey or duplicate all information in TSC's

[6] The revised redress process also addresses similar concerns raised by other courts of appeal. *See Ege v. DHS*, 784 F.3d 791, 795 (D.C. Cir. 2015) (challenge to alleged placement on the No Fly List was not proper in the court of appeals because TSC, not TSA, determines whether to remove a person from the No Fly List); *Mohamed v. Holder*, No. 11-1924, Dkt. No. 86 (4th Cir. May 28, 2013) (same); *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015) (same); *but see also id.* (challenge to the adequacy of the TSA redress process must be brought in the court of appeals). The district court in *Mohamed* recently noted the existence of "substantial issues" regarding judicial review of the revised TRIP redress process and suggested that upon completion of the revised process, the Court of Appeals could consider its jurisdiction to hear a petition for review. *See Mohamed v. Holder*, No. 1:11-CV-50, 2015 WL 4394958, at *13 & n.16 (E.D. Va. July 16, 2015); *see also Mohamed v. Holder*, No. 1:11-CV-50, Order at 7–8 (denying Plaintiff's motion for reconsideration on this point) (E.D. Va. Dec. 18, 2015), Dkt. 204.

files, or in any nominating agency's files. Rather, TSC's recommendation is conveyed through its recommendation memorandum that summarizes the basis for its determination and material supporting information. Moore Decl. ¶ 14; Grigg Decl. ¶¶ 39–41; Groh Decl. ¶ 5.[7]

As decisionmaker, the TSA Administrator is fully empowered to scrutinize the record presented to TSA. The TSA Administrator may make additional inquiries regarding the information presented to TSA, the scope of the information presented to TSA and/or to the individual, the basis for the recommendation, or any other relevant topic.[8] Stipulations ¶¶ 19, 22; Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39, 45; Suppl. Moore Decl. ¶¶ 9–13; Groh Decl. ¶ 6. And, as is typical when agencies interact in a decisionmaking process, any questions or concerns raised by TSA would be addressed and resolved through interagency consultation and through additional or supplemental submissions, if necessary. Moore Decl. ¶ 15; Grigg Decl. ¶¶ 39, 45; Stipulations ¶ 19; Groh Decl. ¶¶ 5–7. TSA may also remand the case to TSC with a request for additional information or clarification. Grigg Decl. ¶¶ 39, 45; Moore Decl. ¶ 15; Suppl. Moore Decl. ¶ 13.

Once the record for decision is complete and any questions or concerns from TSA have been resolved, TSA prepares and issues a determination. Inherent to this decisionmaking authority — and undisputed in the record before the Court — is the ability to concur with, reserve judgment on, or reject TSC's recommendation, and to grant or deny the individual's appeal of his or her No Fly List status. Moore Decl. ¶ 15, Grigg Decl. ¶¶ 39, 45; Stipulations ¶ 22; Suppl. Moore Decl. ¶ 13;

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[7] The fact that, as a matter of process, under DHS TRIP procedures, TSC exercises its judgment in deciding what to include in its memorandum to TSA — a matter of procedure not at issue at this stage — does nothing to alter the fact that the final determination is made by TSA, and not TSC.

[8] Such consultation would not be limited to TSC. Questions about whether information may be disclosed to an individual, or regarding why information was withheld, for example, would typically be directed to the agency controlling such information, rather than to TSC. Grigg Decl. ¶ 41; Groh Decl. ¶¶ 4, 11. Similarly, questions about the basis for listing may involve or be directed to the nominating agency or other agencies with equities in the information at issue. *Id.*

Groh Decl. ¶ 7. If TSA does not accept TSC's recommendation to maintain an individual on the No Fly List, TSA will grant the individual's appeal, and the resulting TSA order will result in the removal of the individual from the No Fly List. *Id.*

Plaintiffs attempt to cabin their challenge only to initial TSC determinations made prior to or in conjunction with the DHS TRIP administrative process. But Plaintiffs present no basis to ignore the substantive and procedural outcome that the operative orders are issued by TSA. Plaintiffs' challenges to other determinations, made by other agencies at other times, are, at a minimum, inextricably intertwined with TSA final orders.

Additional considerations also weigh in favor of the Government's position that review of substantive challenges to No Fly determinations by TSA should be heard in the courts of appeal. Those considerations, which include the lack of an express statutory authorization or framework under which judicial review of classified information would proceed in district court, are discussed in Defendants' prior supplemental submission concerning jurisdiction, and are incorporated herein by reference. *See* Dkt. 327.

CONCLUSION

Plaintiffs' substantive claims (Counts II and III) unavoidably challenge final orders issued by TSA. For the foregoing reasons, Plaintiffs' claims should be dismissed for lack of jurisdiction.

Dated: January 18, 2017

Respectfully Submitted,

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I hereby certify that a copy of the foregoing memorandum 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 applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) and this Court's Order (Dkt. 346) because it contains fewer than 35 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
Brigham J. Bowen