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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. JEFFERSON B. SESSIONS,[1] et al., *Defendants*.	Case 3:10-cv-00750-BR **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION**

[1] In light of Jefferson B. Sessions' swearing in as Attorney General on February 9, 2017, he is automatically substituted as a Defendant in this action in place of Loretta E. Lynch. *See* Fed. R. Civ. P. 25(d)

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I. INTRODUCTION

In moving to dismiss Plaintiffs' claims, Defendants largely rehash arguments that the Ninth Circuit has already rejected. They continue to argue that the involvement of the Transportation Security Administration ("TSA") in the No Fly List redress process brings that process within the scope of 49 U.S.C. § 46110; that Plaintiffs' challenge to their continued placement on the No Fly List is only a challenge to TSA orders; and that under Section 46110, such orders are subject to review only in the courts of appeals. Instead of addressing Ninth Circuit law squarely rejecting those arguments, Defendants assert that their revisions to the No Fly List redress process strip this Court of jurisdiction over Plaintiffs' substantive claims.

Defendants fail to grapple with key factors that led the Ninth Circuit to conclude that it lacked jurisdiction over Plaintiffs' claims. Five years ago in this case, the Ninth Circuit reaffirmed that Section 46110 "does not grant the court of appeals direct and exclusive jurisdiction over every possible dispute" involving TSA, and that district courts "may retain jurisdiction over claims challenging TSA's orders when '§ 46110 does not explicitly allow us to hear them.'" *Latif v. Holder*, 686 F.3d 1122, 1127–28 (9th Cir. 2012) (quoting *Americopters, LLC v. FAA*, 441 F.3d 726, 735 (9th Cir. 2006)). The Ninth Circuit held that this Court had jurisdiction over Plaintiffs' substantive challenge because the Federal Bureau of Investigation's Terrorist Screening Center ("TSC") "actually compiles the list of names ultimately placed" on the No Fly List. *Id.* at 1127 (quoting *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1255 (9th Cir. 2008)). The Court of Appeals came to the same conclusion regarding Plaintiffs' procedural claims because they "require[d] judicial review of orders issued both by TSA, which

is named in § 46110, and by TSC, which is not," and because any remedy for those claims "must involve both TSA and TSC." *Id.* at 1128–29.

These factors continue to apply to Defendants' revised redress process, and they again dictate that jurisdiction over Plaintiffs' claims lies in this Court. TSC continues to control key determinations regarding initial and continued placement on the No Fly List that the Ninth Circuit found dispositive. It retains control over the No Fly List and material aspects of the revised redress process. Because Section 46110 does not apply to TSC, this Court has jurisdiction over Plaintiffs' remaining claims.

II. FACTUAL BACKGROUND

A. TSC's Role in Administering the No Fly List

TSC remains the hub of the government's watchlisting system. It maintains the Terrorist Screening Database ("TSDB"), of which the No Fly List is a subset. Joint Stipulations Regarding Jurisdiction ("Stip. Facts"), ECF No. 347 ¶ 1; Declaration of G. Clayton Grigg ("Grigg Decl."), ECF No. 253 ¶¶ 7, 20. TSC determines whether an individual should be placed on the No Fly List, which prohibits individuals from boarding aircraft flying to, from, or over the United States. Grigg Decl. ¶ 16; Stip. Facts ¶ 2. After an agency "nominates" an individual for placement on the No Fly List, it is TSC that evaluates the information and decides whether the individual meets the criteria for placement. Grigg Decl. ¶ 16.

If TSC decides to place an individual on the No Fly List, it creates a record for other agencies with access to the TSDB. *Id.* ¶ 20. That record contains only identifying information and does not include what TSC calls "substantive derogatory information" about the basis for placing the individual on the No Fly List. *Id.* Defendants' declarants state that TSC performs periodic audits of the TSDB, including records of U.S. persons on the No Fly list. *Id.* ¶ 28. If

during such audits TSC determines that an individual should no longer be included on the No Fly List, TSC removes the individual from the No Fly List. *Id.* ¶ 29.

B. The Revised No Fly List Redress Process

TSC also plays a primary role throughout the government's No Fly List redress process. Defendants revised that process in response to the Court's June 24, 2014 Opinion and Order concluding that the original process violated the Due Process Clause because it lacked adequate procedural safeguards. *See* ECF No. 136. The government gave notice of new procedures on April 13, 2015. *See* Notice Regarding Revisions to *DHS TRIP* Procedures, ECF No. 197.

The revised redress process is not formally codified. It has not been subject to a rule-making process and is not published in the Federal Register or the Code of Federal Regulations, nor is there a complete, publicly available description of the process. Stip. Facts ¶¶ 11–12. The government has publicly revealed details about the process only through court filings in lawsuits such as this one. *Id.* ¶ 12. The government may change the process at any time with no notice, and it has changed the process even recently. For example, the declarations filed concurrently with Defendants' motion to dismiss include descriptions of agencies' roles in the revised redress process that have not appeared in any prior government description of the process. *See* Supplemental Declaration of Deborah O. Moore ("Suppl. Moore Decl."), ECF No. 349 ¶¶ 9–13; Declaration of Timothy P. Groh ("Groh Decl."), ECF No. 350 ¶¶ 4–5.

The revised redress process has three phases, and TSC plays a determinative role in each. The first phase begins when a U.S. person who has been denied boarding applies for redress through DHS TRIP. If DHS TRIP determines that the individual matches an identity in the TSDB, it forwards the redress petition to the TSC Redress Office, which is responsible for

determining whether the individual is or should be on the No Fly List. Grigg Decl. ¶ 37; Stip. Facts ¶ 5.

After receiving information about the individual, TSC reviews the traveler's record. Declaration of Deborah O. Moore ("Moore Decl."), ECF No. 252 ¶ 7. It appears that if TSC determines at this stage that the individual should not be on the No Fly List, TSC removes the individual from the No Fly List.[2] *See* Ex. 2 to Joint Status Report at 1, *Tarhuni v. Holder*, 8 F. Supp. 3d 1253 (D. Or. 2014) (No. 3:13-cv-00001-BR), ECF No. 89 (informing the plaintiff that DHS TRIP "ha[d] been advised" that the plaintiff had been removed from the No Fly List).

If, on the other hand, TSC determines that the individual should remain on the No Fly List, the individual "will receive a letter stating that he or she is on the No Fly List and providing the option to receive or submit additional information." Grigg Decl. ¶ 37; Stip. Facts ¶¶ 6–7. If the individual submits a request for more information in response to the letter, the redress request proceeds through two additional phases of review.

During the second phase, DHS TRIP informs the TSC Redress Office of the individual's request for more information. Grigg Decl. ¶ 40. At this point "[t]he TSC Redress Office will provide DHS TRIP with the specific criterion or criteria under which the U.S. Person is included on the No Fly List, and, if applicable, the unclassified summary of information supporting the inclusion provided by the nominating agency and approved for disclosure to the person." *Id.*

[2] Although Defendants declined to stipulate whether TSC can unilaterally remove someone from the No Fly List during this phase of the redress process, their declarants have averred that TSC has the authority to do exactly that during periodic reviews of the TSDB and No Fly List. Grigg Decl. ¶¶ 28–29. That is, if TSC assesses during routine review and maintenance of the No Fly List that an individual should no longer be on the No Fly List, it implements "all appropriate modifications and removals" without the involvement of the TSA Administrator. *Id.* ¶ 29.

¶ 42. DHS TRIP then provides that information to the individual, who may thereafter submit information to DHS TRIP for the government's consideration. *Id.*

DHS TRIP forwards any information the individual submits to the TSC Redress Office, initiating the third phase of the redress process. *Id.* ¶ 43. TSC then undertakes a "comprehensive review" of the available information regarding the individual's placement on the No Fly List, Moore Decl. ¶ 14, and provides DHS TRIP with a recommendation from the TSC Principal Deputy Director to the TSA Administrator regarding whether the person should remain on the No Fly List and stating "the reasons for that recommendation." Grigg Decl. ¶ 43; Stip. Facts ¶ 17. If TSC's recommendation contains classified or law enforcement sensitive information, TSC will also inform the TSA Administrator of the "determination regarding whether and to what extent DHS TRIP is authorized to disclose such information when providing a final redress response." Moore Decl. ¶ 14.

TSC is not required to forward all information to the TSA Administrator. Stip. Facts ¶ 18. TSC determines what information should be included in the individual's record, which "does not necessarily include all information TSC has access to in its files about the individual." Groh Decl. ¶ 5. In deciding what to include in its recommendation, TSC considers which information is "material" and "sufficient" to support the recommendation. *See id.*

Defendants now state that the TSA Office of Intelligence and Analysis also reviews TSC's recommendation and informs DHS TRIP whether it agrees with the recommendation. Suppl. Moore Decl. ¶¶ 10, 12.

The TSA Administrator then reviews the record as it has been "presented to TSA." Defs.' Mem. in Supp. of Mot. to Dismiss, ECF No. 348 at 9. Following this review, the TSA Administrator will either issue a final order or ask TSC for more information. Grigg Decl. ¶ 44.

The TSA Administrator may make additional inquiries regarding the record presented to TSA. There is no indication that TSC is under any obligation to provide further information.

In the event that the TSA Administrator determines that the individual should be removed from the No Fly List, TSC implements that decision. Grigg Decl. ¶ 45. Only TSC has the authority to actually remove the individual's record from the TSDB and the duty to ensure that the removal is reflected in other agencies' screening systems. *See id.*

C. Plaintiffs' Requests for Redress

After this Court concluded that the previous redress process was unconstitutional, Defendants revised the process and reevaluated Plaintiffs' individual DHS TRIP inquiries. *See* Notice Regarding Revisions to *DHS TRIP* Procedures at 2. Defendants condensed the first two phases of the revised process, with each Plaintiff receiving a single letter containing the criteria or criterion under which he was placed on the No Fly List and an unclassified summary of the reasons for his continued placement. Stip. Facts ¶ 24. Each Plaintiff sought additional review, and "[t]he TSC and DHS TRIP then followed the revised DHS TRIP procedures" described in the December 20, 2016 Joint Stipulations Regarding Jurisdiction. *Id.* ¶ 25.

III. ARGUMENT

Five years ago, in 2012, the Ninth Circuit held that this Court had jurisdiction to hear challenges to the prior version of the No Fly List redress process. That decision was grounded in the central role that TSC plays in maintaining the No Fly List, and in the interplay between TSC and TSA in administering the No Fly List redress process. *See Latif*, 686 F.3d at 1127, 1129. Defendants now argue that the Ninth Circuit's previous ruling no longer applies to the revised redress process. But Defendants' changes do not alter the key factors that led the Ninth Circuit

to conclude that Section 46110 does not bar jurisdiction in this Court.[3] Rather, the revised process preserves TSC authority and control over information and decision making, which the Ninth Circuit found dispositive under the original process. Defendants' motion to dismiss should therefore be denied on the record before this Court.

A. The Ninth Circuit's jurisdictional analysis makes clear this Court has jurisdiction.

The Ninth Circuit held that this Court has jurisdiction over Plaintiffs' substantive and procedural claims, and it remanded the case "for such further proceedings as may be required to make an adequate record to support consideration" of those claims. *Latif*, 686 F.3d at 1127, 1129. In so holding, the Ninth Circuit relied primarily on three factors: (1) TSC determines who is placed on the No Fly List; (2) any review of a final determination to maintain an individual on the No Fly List necessarily requires review of both TSC and TSA orders because of the "unique relationship between TSA and TSC in processing traveler grievances"; and (3) any remedy would necessarily involve both TSA and TSC. *See id.* In *Ibrahim*, the Ninth Circuit considered the additional factor that the lack of a hearing before an administrative law judge or a public notice-and-comment period for the redress process means that the reviewing court should be one with the ability to take evidence. 538 F.3d at 1256.

The Ninth Circuit's holding and analysis of all four factors apply equally to Defendants' revised redress process.

[3] In relevant part, 49 U.S.C. § 46110(a) provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."

1. TSC determines who is placed on the No Fly List.

In ruling that this Court has jurisdiction over Plaintiffs' substantive due process challenge, the Ninth Circuit found one factor dispositive: that TSC "'actually compiles the list of names ultimately placed' on the List." *Latif*, 686 F.3d at 1127 (citation omitted); *see also Ibrahim*, 538 F.3d at 1255. It further concluded that, "[w]ith regard to the applicability of § 46–110, there is no meaningful difference between the 'initial placement' of a name on the List and 'continued placement' or 'removal.'" *Latif*, 686 F.3d at 1127 n.6.

TSC unquestionably continues to determine initial placement on the No Fly List, and, based on the undisputed record, TSC appears to determine "continued placement" as well. *See* Grigg Decl. ¶ 20 ("At the conclusion of the TSC's review, TSC personnel will either accept or reject the nomination for inclusion into the TSDB and, if appropriate, inclusion on either the Selectee List or No Fly List."). TSC also maintains the No Fly List, *see* Moore Decl. ¶ 7; Stip. Facts ¶ 1, and, according to Defendants' declarant, periodically reevaluates the records of the individuals on the No Fly List to determine if their continued placement is appropriate. *See* Grigg Decl. ¶ 28.

In their motion, Defendants rely heavily on the argument that under the revised redress process, the TSA Administrator now issues the final order to maintain an individual on the No Fly List. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 5–8. But that modification does not materially alter the jurisdictional outcome under the Ninth Circuit's analysis, because it is still TSC—not TSA—that makes the initial determination regarding placement on the No Fly List and has continuing authority to maintain or remove a person from the No Fly List outside of the redress process. *See* Grigg Decl. ¶¶ 20, 28–29. Further, as discussed below, the changes to the redress process do not shift the clear weight of decision-making authority, which remains with

TSC. TSA is still functionally an intermediary for virtually all decisions to place and maintain people on the No Fly List, and TSC controls the process leading up to any final determination by the TSA Administrator to maintain or remove a person from the No Fly List.[4]

2. Judicial review is necessarily of both TSC and TSA orders.

The second factor that the Ninth Circuit considered in concluding that Section 46110 did not preclude this Court's jurisdiction was the "unique relationship" between TSC and TSA, such that any judicial review of a final determination to maintain an individual on the No Fly List required review of both agencies' orders. *Latif*, 686 F.3d at 1129. Although Defendants have modified the redress process, TSC still largely controls the process and issues multiple orders that shape and dictate the scope of the TSA Administrator's review. The "unique" relationship between the two agencies still exists.

i. The TSA Administrator's order implicates multiple TSC orders.

As described above, at the end of the third phase of the No Fly List redress process, TSA issues a final determination concerning whether an individual shall remain on the No Fly List or

[4] Every other court of appeals that has addressed the issue of jurisdiction over challenges to placement on the No Fly List has concluded that Section 46110 does not bar jurisdiction in the district courts. *See, e.g.*, *Ege v. Dep't of Homeland Sec.*, 784 F.3d 791, 793 (D.C. Cir. 2015) (dismissing, for lack of standing, direct petition for review of DHS TRIP determination "because we have no jurisdiction under 49 U.S.C. § 46110 to issue an order binding the TSC"); *Mokdad v. Lynch*, 804 F.3d 807, 808 (6th Cir. 2015) (reversing the district court's holding that it did not have subject matter jurisdiction over the plaintiff's direct challenge to his placement on the No Fly List, "a placement that is made by [TSC]," and remanding for further proceedings); Order at 5, *Mohamed v. Holder*, No. 11-1924 (4th Cir. May 28, 2013) (granting motion to remand substantive claims challenging placement on the No Fly List to the district court because resolving this challenge "necessarily requires scrutiny of both the TSC's and the TSA's actions, and, should a remedy be required, it will likely involve both agencies"). Although these courts addressed the previous redress process, they are uniform in their conclusions, which reinforces TSC's pivotal role regarding the government's decision to place and continue to hold people on the No Fly List—a role that continues under the revised process.

be removed. Defendants focus their entire argument on this single point in time, disregarding the series of pivotal TSC decisions leading up to that point. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 10. Defendants' attempt to minimize TSC's role in the redress process is undercut by the clear facts establishing TSC's responsibility and authority over the TSDB and the No Fly List, and its role in the redress process.

Defendants' declarants repeatedly emphasize the critical and extensive role that TSC serves in the watchlisting system. *See, e.g.*, Grigg Decl. ¶ 27; Moore Decl. ¶ 14. Importantly, the TSA Administrator only considers an individual's application for redress if TSC first issues multiple orders or determinations placing and maintaining that individual on the No Fly List. Based on Defendants' declarations and stipulations of fact, it appears that the following must occur before the TSA Administrator has authority to issue an order: (1) TSC must order the individual's initial placement on the No Fly List, *see* Grigg Decl. ¶¶ 17, 20; (2) TSC must determine that the individual should remain on the No Fly List during any periodic review of TSDB and No Fly List records, *see id.* ¶ 28; and (3) TSC must determine during the first phase of the No Fly List redress process that continued placement of the individual on the No Fly List is proper, *cf. id.* ¶¶ 28–29, 37. TSA's ultimate order is thus dependent upon TSC determining at two or more previous points in time that the individual should remain on the No Fly List.

ii. TSC controls every phase of the redress process.

In addition to the TSC orders placing and maintaining each individual on the No Fly List, Defendants' declarations make clear that TSC controls every part of the redress process leading up to the TSA Administrator's order, s*ee* Grigg Decl. ¶¶ 37, 40–44, and that TSA's role is limited to reviewing the recommendation and analysis already completed by TSC.

TSC's control over the redress process begins immediately upon receipt of a redress petition. DHS TRIP forwards the petition to the TSC Redress Office, and, according to Defendants, a TSC Redress Analyst then researches and reviews the information available about the individual, gathering additional information as necessary. Grigg Decl. ¶¶ 33–34. After analyzing that information, TSC reaches a determination about whether the individual has been properly placed on the No Fly List. As discussed above, it appears that at this point TSC may unilaterally remove the individual from the No Fly List if it determines that continued placement would be inappropriate.

TSC likewise plays the dominant role during the second phase of the redress process. If an individual requests more information after receiving the first letter from DHS TRIP, the TSC Redress Office coordinates the preparation of the unclassified summary of information supporting the individual's placement on the No Fly List. Additionally, TSC is responsible for providing to DHS TRIP the specific criterion under which the individual was placed on the No Fly List. Grigg Decl. ¶ 42; Declaration of Michael Steinbach ("Steinbach Decl."), ECF No. 254 ¶ 21. At this stage, DHS TRIP merely serves as a pass-through for information from TSC to the individual seeking redress.

If, after receiving the second letter, the individual chooses to seek additional review, it is once again TSC that conducts the review of available information. DHS TRIP forwards directly to the TSC Redress Office any additional information the individual submits. Moore Decl. ¶ 14. TSC then conducts a "comprehensive review," and provides the TSA Administrator with a recommendation and corresponding reasons for that recommendation. *Id.*; Grigg Decl. ¶ 39. The TSC Principal Deputy Director authors this recommendation, which contains an additional "determination regarding whether and to what extent DHS TRIP is authorized to disclose"

information underlying the decision to maintain the individual on the No Fly List. Moore Decl. ¶ 14.

Notably, although Defendants now state for the first time that DHS TRIP forwards TSC's recommendation to TSA offices for review, *see* Suppl. Moore Decl. ¶¶ 9–12, the TSA offices only review the recommendation and record *compiled by TSC*. That means that during their review, these TSA offices may not have—and therefore do not consider—the full set of information that was available to TSC. Instead, they review only TSC's recommendation and the accompanying information that *TSC determined* was material to its conclusion and thus included in the record. Despite Defendants' attempt to frame this (heretofore undisclosed) layer of TSA review as independent and comprehensive, *see* Defs.' Mem. in Supp. of Mot. to Dismiss at 5, the process shows that TSC dictates the scope, and inevitably influences the outcome, of that review.

TSC also exercises significant control over the information relevant to an individual's placement on the No Fly List. It coordinates the compilation of any unclassified summary of reasons and includes a determination of what information, if any, can be disclosed to the petitioner in a final redress response. *See* Grigg Decl. ¶ 42; Moore Decl. ¶ 14. Defendants concede that in providing a recommendation, TSC is not required to forward all information to the TSA Administrator. Stip. Facts ¶ 18. Rather, TSC need only provide the TSA Administrator with "a summary of the information TSC relied on to make its determination regarding whether the individual should remain on the No Fly List, [which] does not necessarily include all underlying documentation." *Id.* Defendants state that "TSC exercises its judgment in deciding what to include in its memorandum to TSA." Defs.' Mem. in Supp. of Mot. to Dismiss at 9. It bears emphasis that Defendants refused to stipulate whether the TSA Administrator receives—or

can access upon request—all information that TSC considered when making its recommendation. Stip. Facts ¶ 18. Even though the government argues that the TSA Administrator is now the final decisionmaker, there can be no doubt that TSC heavily influences that decision by controlling the record presented to the TSA Administrator and the information disclosed to the petitioner.

Given TSC's control over the No Fly List, its extensive role in the revised redress process, and its authority to manage relevant information, it is difficult to avoid the conclusion that Defendants revised the redress process in an attempt to take advantage of a direct-review statute that can apply to TSA orders but that plainly does not apply to TSC orders. Nonetheless, the material aspects of the revised redress process and TSC's determinations regarding continued placement on the No Fly List differ little from those the Ninth Circuit concluded were reviewable in the district court. The same conclusion is warranted here.

3. Any remedy for Plaintiffs must involve both TSC and TSA.

The third factor the Ninth Circuit considered was that any remedy for Plaintiffs' substantive challenges would necessarily involve both TSC and TSA.[5] Despite Defendants' changes to their revised redress process, it would still be "futile" to "[o]rder[] TSA to tell Plaintiffs why they were included on the List and to consider their responses in deciding whether they should remain on it." *Latif*, 686 F.3d at 1129. This is so for four reasons.

First, TSA would be unable to conduct any proceedings without the recommendation and summary provided by TSC. The TSA Administrator has no control over the information underlying TSC's recommendation: TSC determines what information is relevant and should be

[5] Although Plaintiffs did not object to joinder of TSA, *see* Pls.' Mem. of Points and Authorities in Supp. of Opp'n to Defs.' Mot. to Dismiss, ECF No. 50 at 13, Defendants declined to join TSA as a party to this case.

included in the summary and documentation provided to the TSA Administrator. *See* Stip. Facts ¶ 18. There is no requirement that the TSA Administrator have the same information that TSC had when making its determination. *Id.* ¶¶ 18–19. And although TSC may provide the TSA Administrator with additional information upon request, it is not obligated to do so. *Id.*

Second, TSA plays at most a ministerial role in determining what information will be provided to the petitioner as part of the No Fly List redress process. To the extent that Plaintiffs challenge the withholding of relevant information, TSA has no authority to provide the relief Plaintiffs are seeking. *See* Moore Decl. ¶ 14.

Third, the remedy Plaintiffs seek would require modifying or setting aside TSC determinations. As described above, before the TSA Administrator can even consider an individual's application for redress involving the No Fly List, TSC must have issued a series of orders and determinations placing and maintaining that individual on the No Fly List. Defendants seek to place decisions by *both* TSC and TSA in the hands of the Court of Appeals, *see* Defs.' Mem. in Supp. of Mot. to Dismiss at 10, but that court has no jurisdiction to review TSC decisions directly, or to grant a remedy vis-à-vis TSC. *See Americopters*, 441 F.3d at 735 (citation omitted) (concluding that because the Court of Appeals does not have jurisdiction to grant remedies not provided for in Section 46110, "there are certain claims . . . over which the district court may have residual jurisdiction").

Finally, on a practical level, because TSC controls the No Fly List and the TSDB, any court order directing TSA to remove an individual from the No Fly List would necessarily require TSC action.

For these reasons, and contrary to Defendants' arguments, the Court of Appeals would "not be able to provide relief by simply amending, modifying, or setting aside TSA's orders or

by directing TSA to conduct further proceedings." *Latif*, 686 F.3d at 1129 (emphasis omitted); 49 U.S.C. § 46110(c). TSC is so bound up in every stage of the redress process that any "final" order issued, even if bearing the signature of the TSA Administrator, cannot fall within the scope of Section 46110.

4. This Court is the only court with the ability to take evidence.

In addition to the factors considered in *Latif*, the Ninth Circuit in *Ibrahim* considered another practical, "common sense" factor: the district court's ability to take evidence. 538 F.3d at 1256. The Court emphasized that an appellate court's ability to review an agency's decision to place an individual on the No Fly List would be hindered by the lack of a hearing before an administrative law judge or a notice-and-comment period. *Id.* It concluded that "if any court is going to review the government's decision to put [Plaintiff's] name on the No-Fly List, it makes sense that it be a court with the ability to take evidence." *Id.*

As with the original redress process, the revised redress process has not been subject to a notice-and-comment period. Nor are Plaintiffs or any other individuals who challenge their placement on the No Fly List provided a hearing before an administrative law judge. Stip. Facts ¶¶ 11–12. The concerns animating the Ninth Circuit's decision in *Ibrahim* thus still apply, and it "makes sense" that jurisdiction over these challenges would lie with the district court. *See Ibrahim*, 538 F.3d at 1256.

In *Ibrahim*, the Ninth Circuit also questioned the adequacy of any administrative record available for review by that court—a concern that remains under Defendants' revised redress process. *See id.* Although the revised process may (or may not) result in a more detailed administrative record than the original process did, that record is still largely confined to the information that TSC compiles and deems material to its recommendation to the TSA

Administrator. While Defendants attempt to characterize the final record for decision as "complete," on the very same page of their memorandum they acknowledge that the record need not include all information submitted to, and considered by, TSC in making its recommendation. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 9 & n.7.

Moreover, Plaintiffs' substantive claims go beyond a review of the accuracy of the administrative process. Those claims are grounded in substantive due process and will require the court to consider information outside of the administrative record compiled as to each individual. *Cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) ("[S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record.'"); *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013) (emphasizing that "the advantages of initial appellate review" occur when "the factfinding capacity of the district court is . . . unnecessary to judicial review of agency decisionmaking") (citation and quotation marks omitted).

The Ninth Circuit could not adequately adjudicate Plaintiffs' substantive claims based on the existing administrative record. Plaintiffs have had no opportunity to conduct discovery regarding the basis for their placement on the No Fly List or any determination that alternative security measures would be inadequate substitutes for placement on the No Fly List. Plaintiffs assert in their substantive claims that their placement on the No Fly List was incorrect because, even assuming that the criteria used to place individuals on the No Fly List are valid, the information Defendants used to justify placing each Plaintiff on the No Fly List does not satisfy

the criteria.[6] That is especially true in light of alternatives that would protect government interests but infringe on Plaintiffs' liberty to a far lesser extent. This Court is therefore the appropriate forum to hear Plaintiffs' substantive due process claims.

Defendants argue that "there is no express statutory authorization or framework under which judicial review of any classified information would proceed in district court." Defs.' Suppl. Mem. in Supp. of Mot. for Summ. J., ECF No. 319, at 7. However, the Ninth Circuit already effectively disposed of that argument in this case. The Court left "to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information," explicitly referencing the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16. *Latif*, 686 F.3d at 1130.

Despite the changes Defendants implemented, the revised redress process continues to satisfy all of the criteria that the Ninth Circuit considered in *Latif* and *Ibrahim*. The Ninth Circuit's previous jurisdictional analysis under Section 46110 is therefore controlling, and makes clear that this Court retains jurisdiction over this case.

B. Defendants misconstrue Section 46110 to apply when it does not.

Defendants dismiss the Ninth Circuit's previous holdings as no longer factually applicable, Defs.' Mem. in Supp. of Mot. to Dismiss at 7–8, and instead base their jurisdictional arguments on a flawed interpretation of the text of Section 46110. In arguing that the TSA Administrator's final sign-off is sufficient to give the Court of Appeals exclusive jurisdiction, Defendants misconstrue the statute to encompass TSC orders and orders that reflect the judgment of both TSC and TSA. *See id.* at 4. That is not what the statute does.

[6] Although Plaintiffs respectfully disagree with the Court's decision holding that the No Fly List criteria are not unconstitutionally vague, their argument here about the application of the criteria to each Plaintiff applies to the criteria as they currently exist.

Defendants' arguments skew Section 46110's meaning in two primary ways. First, in an effort to sweep TSC orders into the statute's scope, Defendants argue that Section 46110 provides "'exclusive' jurisdiction in the courts of appeal to review orders issued 'in whole or in part' by TSA." *Id.*; *see also* Defs.' Suppl. Mem. in Supp. of Mot. for Summ. J. at 1. In so arguing, Defendants imply that an order that is at least partly issued by TSA must be reviewed in a court of appeals.

That interpretation reorganizes the text of the statute and effectively rewrites it in a way that is inconsistent with its plain meaning. In reality, the text of the statute reflects something quite different: it vests exclusive jurisdiction in courts of appeals to review "order[s] issued by the Secretary of Transportation . . . *in whole or in part under* this part, part B, or subsection (l) or (s) of section 114." 49 U.S.C. § 46110(a) (emphasis added); *see Vill. of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006) (explaining that "Section 46110(a) of the AAIA provides that 'a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under . . . part B . . . may apply for review of the order by filing a petition in [this court]'") (alterations in original). A review of the statute's clauses in the order in which they appear in the text plainly shows that the "in whole or in part" qualifier refers to the statutory authority under which the order was issued, not the issuing agency. The statute does not contemplate that orders issued "in part" by TSA and "in part" by another unnamed agency would be exclusively reviewable in the courts of appeals. That reading is at odds with the Ninth Circuit's prior decision in this case, and with the plain meaning of the statute.

Second, Defendants argue that "Plaintiffs' challenges to other determinations, made by other agencies at other times, are, at a minimum, inextricably intertwined with TSA final orders."

Defs.' Mem. in Supp. of Mot. to Dismiss at 10. This argument plainly fails under the Ninth Circuit's holding in *Ibrahim*.

In *Ibrahim*, the Ninth Circuit considered whether an order issued by an agency not named in the statute may be reviewed under Section 46110. The Court distinguished between "*claims* that are inescapably intertwined with [its] *review* of an order" and *orders* of an agency not named in Section 46110 that are intertwined with an order of a named agency. 538 F.3d at 1255–56 (emphasis added). The court concluded that "[t]he government advances no good reason why the word 'order' should be interpreted to mean 'order or any action inescapably intertwined with it,'" and held that Section 46110 did not apply to TSC's actions. *Id.*; *see also Mokdad*, 804 F.3d at 814 ("[T]he government in effect urges that we find that a *direct challenge to one agency's order* is inescapably intertwined with *another agency's order* . . . . This would be an unprecedented departure from the doctrine of inescapable intertwinement as applied in other circuits.").

Because Plaintiffs are likewise challenging TSC's orders and other determinations here, just as in *Ibrahim*, this Court retains original jurisdiction.

IV. REQUEST FOR DISCOVERY

For the foregoing reasons, this Court should deny Defendants' motion to dismiss based on the record before it. If, however, the Court concludes that it lacks a sufficient basis to deny Defendants' motion, Plaintiffs respectfully request leave to conduct limited discovery for the two reasons set forth in their concurrently filed Motion for Leave to Conduct Limited Jurisdictional Discovery. First, Plaintiffs requested certain specific factual information relevant to the jurisdictional question, which Defendants refused to provide. Second, gaps and inconsistencies in Defendants' descriptions of the redress process among various declarations call into question

the accuracy and comprehensiveness of the information Defendants have provided. Because the revised No Fly List redress process is not formally codified in the Federal Register or the Code of Federal Regulations, but rather has been developed outside a formal rulemaking process, Plaintiffs and the Court only know what Defendants have been willing to share. There should be no presumption of regularity to such an unpublished and unvetted set of procedures, particularly given that they have apparently changed on multiple occasions with no prior notice to anyone outside the government. And because Defendants have refused to provide information regarding various aspects of the ad hoc and apparently ever-changing process, neither Plaintiffs nor this Court should be required to take Defendants' selective disclosures at face value.

At the very least, if the Court is unwilling to permit discovery, the Court should draw inferences against Defendants when determining where jurisdiction lies, because of Defendants' refusal to provide information relevant to jurisdiction through discovery or the process of negotiating stipulations with Plaintiffs.

V. CONCLUSION

For the foregoing reasons, this Court has jurisdiction over Plaintiffs' remaining claims. To the extent that the Court is not prepared to conclude that it has a sufficient basis to deny Defendants' motion to dismiss, Plaintiffs respectfully request that the Court grant leave to conduct limited discovery. In the event that the Court denies discovery, the Court should draw inferences against Defendants in ruling on their motion.

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CERTIFICATE OF SERVICE

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

s/Hina Shamsi
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