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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.	No. 3:10-cv-750-BR

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

At this stage of the proceedings, the Court has before it a simple but critically important question: After the U.S. government has placed U.S. citizens on a watch list on the basis of secret evidence, branded them suspected terrorists, and publicly prevented them from boarding planes, may the government lawfully deny them *any* information about the reasons for its actions, or a hearing to clear their names? The answer is no.

The Constitution affords U.S. citizens a right to fair procedures when the government bans them from air travel. Defendants' arguments to the contrary mischaracterize Plaintiffs' claims and are premised on doctrinal confusion. Defendants rely on *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), and other inapplicable cases involving the fundamental right to interstate travel and substantive due process—claims that Plaintiffs do not bring and which correspond to remedies not at issue here—to argue that Plaintiffs must show, as a matter of law, the existence of a fundamental right to fly or, as a matter of fact, that No Fly List inclusion entirely forecloses all travel. Ninth Circuit precedent makes clear, however, that Plaintiffs need only demonstrate the deprivation of a liberty interest, and that government infringements on travel deprive that interest even when they do not entirely foreclose all travel. Because the undisputed record shows that inclusion on the No Fly List imposes such an infringement—regardless of the availability of any alternative modes of transportation—Plaintiffs have shown that the government has deprived them of a liberty interest.

Governing procedural due process doctrine thus requires Defendants to afford Plaintiffs at least the constitutional minimum: post-deprivation notice of the reasons for their placement on the list, and a hearing at which they can respond to the government's specific allegations and evidence. But the stipulated record establishes that because of their "Glomar" policy,

Defendants categorically refuse to provide, through the only available redress mechanism—the DHS Traveler Redress Inquiry Program ("DHS TRIP")—*any* of these basic safeguards. It is worth underscoring the extremity of this position: Defendants insist that they can afford U.S. citizens banned from flying absolutely *no* notice and, therefore, *no* meaningful process, without causing harm to national security. In no other context has the government invoked a categorical refusal to confirm or deny information in response to requests for redress from U.S. citizens deprived of constitutionally-protected liberties.

This Court should not be swayed by Defendants' sweeping arguments. The undisputed record and governing case law soundly refute Defendants' overbroad assertions that providing Plaintiffs the most basic notice will cause harm to national security. The Ninth Circuit has rejected such claims, requiring the government to provide substantially more notice and more process in the analogous context of U.S. charities seeking to clear their designation as terrorist organizations. And Defendants fail to show any reason why the government cannot provide Plaintiffs notice or process as it routinely does in cases involving both lesser and greater private interests—including in cases involving national security.

This Court should thus grant Plaintiffs' motion for partial summary judgment.

ARGUMENT

I) Defendants' Placement of Plaintiffs on the No Fly List Deprives Them of Constitutionally-Protected Liberties.

Plaintiffs have established, and Defendants' arguments do not refute, what governing Supreme Court and Ninth Circuit precedent makes clear: once the government deprives Plaintiffs of their constitutionally-protected liberty interests in travel and reputation by placing them on the No Fly List, it must provide them a fair and meaningful process to challenge the deprivation,

correct error, and clear their names. The parties do not dispute that Americans have constitutionally-protected liberty interests in both travel and reputation, and the facts in the record, viewed in light of the correct law, confirm that inclusion on the No Fly List deprives both of those liberties.

A) Defendants' Placement of Plaintiffs on the No Fly List Deprives Them of Their Liberty Interest in Travel.

Defendants concede that the Constitution protects a "general liberty interest in international and interstate travel." Defs.' Memo in Opp. to Pls.' Cross-Mot. for Part. Summ. J. ("Defs.' Opp.") 6. And they do not dispute that procedural due process protections apply when government action deprives Americans of this liberty interest. *See* Defs.' Opp. 6–10. The undisputed facts establish that placement on the No Fly List bans Plaintiffs from all flights to or from the United States, or over U.S. airspace, Decl. of Cindy A. Coppola ("Coppola Decl.") ¶ 13; Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. K at 3, and therefore infringes their ability to travel. *See* Am. Memo. in Supp. of Pls.' Cross-Mot. for Part. Summ. J. ("Pls.' Cross-Mot.") 12–15. Thus, Plaintiffs have shown the deprivation of liberty required to assert a right to procedural due process. Nevertheless, Defendants incorrectly maintain that only a *complete* restriction on travel triggers fairer process.

In defending their constitutionally inadequate procedures, Defendants veer into doctrinal confusion by mischaracterizing Plaintiffs' procedural due process claim—which is based on the liberty interest in travel—as one invoking a purported constitutional "right to fly" or a fundamental right to interstate travel. Based on that mischaracterization, Defendants insist that Plaintiffs have not shown the deprivation of a liberty interest. *See* Defs.' Opp. 6. Defendants are incorrect both in their premise and in their conclusion, because their argument is predicated on an inapplicable line of cases.

In order to clear up any confusion caused by Defendants' arguments, it helps to lay out again the two doctrinally distinct types of "right to travel" claims, each of which asserts a different right and seeks a different remedy.[1] The first involves claims brought under the fundamental right to interstate travel or substantive due process; in this line of cases, a plaintiff asks the court to invalidate entirely government restrictions on travel. *See* Pls.' Cross-Mot. 15 & n.29 (citing cases).

The paradigmatic example of the first kind of claim—which Plaintiffs do *not* bring—is found in the case on which Defendants primarily rely, *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006). *See* Defs.' Opp. 6–7. In *Gilmore*, the plaintiff invoked the fundamental right to interstate travel to challenge a TSA policy requiring passengers to present identification or submit to an enhanced search before boarding flights. *Gilmore*, 435 F.3d at 1130–32. Mr. Gilmore argued that TSA's identification policy was "an impermissible federal condition" on his right to travel and asked the court to entirely invalidate the policy. *Id.* at 1136. The Ninth Circuit rejected his request because it concluded that there is no "*fundamental right* to travel by airplane" and that the burden established by an identification policy was not "unreasonable." *Id.* at 1137 (emphasis added).[2] It was in this context that the Ninth Circuit discussed the mode of travel and examined whether alternatives were available. Critically for this Court's purposes, in *Gilmore*, the Ninth Circuit did not address—because Mr. Gilmore did not raise—any procedural

[1] To be sure, there are few cases in which courts have considered the travel issues at stake here. But the scarcity of such case law is due *not* to the novelty of Plaintiffs' claim; rather, it reflects the unprecedented nature of Defendants' actions.

[2] Had the court found a violation of the fundamental right to interstate travel, it would have required the government to show that the TSA policy furthered a compelling state interest. *See Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (plurality opinion) (requiring heightened scrutiny of laws that "infringe constitutionally protected fundamental rights").

due process claim or whether the TSA policy had deprived Mr. Gilmore's *liberty interest* in travel.[3] Neither *Gilmore* nor other cases concerning claims to invalidate government travel restrictions under the fundamental right to interstate travel or substantive due process address these issues or are on point. *See* Pls.' Cross-Mot. 15 & n.29.

Plaintiffs bring the second type of right to travel claim, invoking procedural due process and seeking fairer procedures when the government restricts travel. In this line of cases, a plaintiff does not argue that travel restrictions are *per se* unconstitutional, but only that the government has deprived a liberty interest in travel and that greater process is due.[4] Under controlling Ninth Circuit precedent, to establish a deprivation of the liberty interest in travel for the purpose of a procedural due process claim, Plaintiffs need only show that No Fly List inclusion "infringe[s] upon [their] ability to travel . . . ." *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992). Plaintiffs have indisputably made this showing. *See* Pls.' Cross-Mot. 12–15; *Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006) ("Procedural due process is not limited to interests which are 'fundamental.'").

Under this second line of cases, courts have determined that a government restriction deprives the liberty interest in travel even when it imposes a *partial* infringement or burden on travel, and the restriction does not entirely foreclose *all* travel. *See, e.g.*, *Hernandez v. Cremer*,

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[3] Mr. Gilmore's briefs to the Ninth Circuit nowhere mention a liberty interest in travel claim. *See* Appellant John Gilmore's Opening Br. at 9–22, *Gilmore v. Ashcroft*, No. 04-15736, 2004 WL 2202856 (9th Cir. Aug. 16, 2004); Appellant John Gilmore's Reply Br. at 15–18, *Gilmore v. Ashcroft*, No. 04-15736, 2004 WL 2919533 (9th Cir. Aug. 16, 2004). Separately, in its decision, the Ninth Circuit noted that Mr. Gilmore had pre-deprivation notice of the policy he challenged. *Gilmore*, 435 F.3d at 1135.

[4] Defendants' assertion that Plaintiffs apply an "overbroad understanding of the liberty interests that attach to travel" reflects a failure to grasp this distinction. Defs.' Opp. 6. Defendants' citation to *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), is therefore also inapposite because it concerned substantive due process—not procedural due process. *Id*. at 768.

913 F.2d 230, 234, 238 (5th Cir. 1990) (finding deprivation of liberty interest when government restricted plaintiff's ability to "travel to and from Mexico"); *Agee v. Baker*, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing deprivation of liberty interest in travel when government restricted travel from the United States to foreign countries but left plaintiff free to travel from foreign countries to the United States).

Because Defendants apply the reasoning from an inapplicable line of cases—those invoking a fundamental right to travel and seeking to invalidate a government restriction—they wrongly assert that Plaintiffs must show an infringement that extends to all modes of travel. The Ninth Circuit's paradigmatic case adjudicating a procedural due process claim involving the liberty interest in travel, *DeNieva v. Reyes,* 966 F.2d 480, shows why that reasoning is incorrect. In *DeNieva*, the Ninth Circuit's determination that the government deprived the plaintiff's liberty interest in travel was not premised, as Defendants contend, on a finding that the challenged action entirely extinguished her ability to travel. Defs.' Opp. 7–8. Instead, the Ninth Circuit recognized that even if the government's retention of Ms. DeNieva's passport left her able to "travel internationally only with great difficulty," it sufficiently infringed upon her ability to travel, deprived her of liberty, and required procedural due process protections. *DeNieva*, 966 F.2d at 485. That is precisely what Plaintiffs have shown here.

The error in Defendants' reliance on the wrong line of cases is perhaps best illustrated by a simple and analogous hypothetical: the government's maintenance of a "No Drive List" of people banned from driving cars. Inclusion in this list would deprive people of their liberty interest in travel even if they remained free to travel by foot, bicycle, subway, bus, cab, and train. It cannot be seriously disputed that the government would have to afford people on a "No Drive List" meaningful notice, a statement of reasons, and an opportunity to be heard even in the

absence of a fundamental right to drive.[5] Yet, according to Defendants' logic, listed persons could not show a deprivation of the liberty interest in travel because alternative modes of travel would still be available, and the Constitution would not require additional procedural safeguards because it does not afford a fundamental right to drive. This example underscores what Defendants misunderstand: while deprivations of the liberty interest in travel may vary in severity, Plaintiffs are only required to demonstrate a more than de minimis deprivation to establish a right to meaningful procedural due process. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975) (recognizing that the "severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, is not decisive of the *basic right* to a hearing of some kind") (quotation marks omitted) (emphasis supplied); *cf. Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972) ("[S]ome form of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be characterized as de minimis.'") (internal citation omitted).

Similarly, Defendants' contention that Plaintiffs overstate the infringement that No Fly List placement imposes on U.S. citizens' ability to travel by means other than flights over U.S. airspace is beside the point. *See* Defs.' Opp. 8–9 (asserting that No Fly List inclusion does not bar Plaintiffs from sailing on ships and that foreign governments' use of list does not deprive the liberty interest in travel). Because No Fly List inclusion bars Plaintiffs from flights over U.S.

[5] The government may promote public safety by requiring people to obtain driver's licenses. Because even these regulations implicate the liberty interest in travel, states are required to afford notice and an opportunity to be heard to protect against erroneous deprivations. *Cf. Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that "[s]uspension of issued [driver's] licenses . . . involves state action that adjudicates *important interests* of the licensees" and therefore requires procedural due process) (emphasis added); *see, e.g.*, Oregon Department of Motor Vehicles, Administrative Hearing, *available at* http://1.usa.gov/147udhu (detailing rights to administrative hearing concerning Department of Motor Vehicle Actions).

airspace, it imparts far more than a de minimis deprivation of their liberty interest. *See* Pls.' Cross-Mot. 12–15. Indeed, the fact that the record demonstrates that placement on the list may also result in the denial of passage on ships and boarding on flights that do not cross U.S. airspace simply heightens the severity of the deprivation of Plaintiffs' liberty and shows the need for greater procedural safeguards to prevent an erroneous deprivation.[6]

Finally, Defendants seek to trivialize the burden that No Fly List placement imposes on travel by noting that the Plaintiffs who were stranded abroad were eventually able to return to the United States. *See* Defs.' Opp. 8. The undisputed facts, however, show that because Defendants prohibited these Plaintiffs from flying, they could return home only with extraordinary difficulty, and that certain Plaintiffs could do so only after a preliminary injunction motion filed in this case led Defendants to grant them one-time waivers to fly.[7] The undisputed facts also establish that

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[6] Defendants do not dispute that the Terrorist Screening Center shares the list with foreign governments. *See* Defs.' Opp. 9. And they have not raised a question of material fact as to whether No Fly List inclusion imparts these additional infringements on Plaintiffs' ability to travel abroad or that it in fact did so in the case of Plaintiff Muthanna.

Defendants also concede that U.S. Customs and Border Protection ("CBP") vets ship passengers against the No Fly List, but argue that decisions to deny passage are made by vessel operators and are not attributable to inclusion on the No Fly List. Defs.' Opp. 8. Whether CBP or vessel operators make that final decision, however, is irrelevant. CBP's statements concerning its regulations make clear that No Fly List inclusion results in the denial of passage on ships (regardless of who makes the final decision) because the very purpose of CBP vetting is to deny passage to watch-listed persons. *See* Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-64, 72 Fed. Reg. 48,320, 48,325 (Aug. 23, 2007) (codified at 19 C.F.R. pts. 4 & 122) ("CBP determined that the appropriate level of security for vessels departing from the United States is to *prevent such a departure* with a high-risk passenger or crew member onboard (a known or suspected terrorist identified by vetting against the terrorist watch list)." (emphasis added)). Defendants have submitted no evidence to show that there was any other reason for Plaintiff Muthanna's denial of passage on ships. *See* Choudhury Decl. Ex. L ¶¶ 19–21 (Decl. of Abdullatif Muthanna ("Muthanna Decl.")).

[7] *See* Ghaleb Decl. ¶¶ 6, 9–11; Kashem Decl. ¶¶ 10–11; Knaeble Decl. ¶ 18; Latif Decl. ¶¶ 7, 16–17; Mohamed Decl. ¶ 10–11; Choudhury Decl. Ex. L ¶ 10 (Muthanna Decl.); M. Rana Decl. ¶ 8; Washburn Decl. ¶¶ 7, 12, 13–14.

Plaintiff Muthanna's attempt to travel from the United States to Yemen by ship was unsuccessful, *see id*. at 13 & n.25, and that other Plaintiffs seeking to travel from the continental United States to Hawaii or abroad were unable to even make such attempts, *see id*. at 13–14 & nn.24, 26. Because No Fly List inclusion leaves Plaintiffs able to travel "only with great difficulty," *DeNieva*, 966 F.2d at 485, Defendants have deprived Plaintiffs of their liberty interest in travel and must afford them far greater procedural due process.

B) No Fly List Placement Deprives Plaintiffs of their Liberty Interest in Freedom from False Governmental Stigmatization.

Defendants do not dispute that their branding of Plaintiffs as suspected terrorists meets the stigma prong of the stigma-plus test. *See* Defs.' Opp. 10–11. They argue instead that Plaintiffs do not meet the "plus" prong because, in Defendants' view, Plaintiffs have not shown that No Fly List inclusion has deprived them of a federal or state law right, or that any deprivation is connected to their reputational harm. *See id*.[8] According to Defendants, inclusion on the No Fly List cannot satisfy the plus prong, even though it denies Plaintiffs the ability to travel by commercial air, because "there is no right to travel by plane." *Id*. at 10.

Defendants misstate the law. Ninth Circuit precedent makes clear that the plus prong is satisfied when evidence establishes the alteration of legal status, even if no right is extinguished. *See Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1188 (9th Cir 2009) ("[S]tigma-plus applies when a right or status is altered *or* extinguished." (emphasis in original) (quotation marks omitted)), *overruled in part on other grounds*, 131 S. Ct. 447 (2010). Plaintiffs are only required

[8] Defendants' brief appears to argue that the "plus" prong is met only by showing the alteration or denial of a state law right or status. Defs.' Opp. 10 (citing *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968 (9th Cir. 2002), and *Miller v. California*, 355 F.3d 1172 (9th Cir. 2004)). Under Ninth Circuit law, however, the alteration of a status or right protected by state *or* federal law is sufficient. *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991). Nor would such a distinction make any sense in light of the fact that both the state and federal governments are bound by the restraints imposed by the Due Process Clause—whether in the Fifth or Fourteenth Amendments.

to show that "once listed, [they] legally could not do something that [they] could otherwise do." *See Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)); *Humphries*, 554 F.3d at 1187–88 (recognizing that plus factor is established when plaintiffs are "legally disabled by the listing . . . alone from doing anything they otherwise could do" (quotation marks omitted)). Plaintiffs have indisputably shown that No Fly List inclusion alters their legal status because they cannot, by operation of law, board commercial flights, which they otherwise would be able to do. *See* Pls.' Cross-Mot. 17–18; Pls.' Am. Memo in Opp. to Defs.' Mot. for Partial Summ. J. ("Pls.' Opp.") 17 & n.28.[9] Because Defendants have failed to raise any genuine question of material fact on this point, Plaintiffs have established the elements of their stigma-plus claim.

Defendants further argue that Plaintiffs fail to show the required connection between their reputational harm and Defendants' alteration of Plaintiffs' legal status, because alternative forms of transportation are available. *See* Defs.' Opp. 10–11. But the availability of alternative modes of travel is irrelevant to the question of whether Plaintiffs have shown a change in legal status. The record shows that the same government action caused both the stigma *and* the plus: No Fly List placement branded Plaintiffs as "suspected terrorists" *and* altered their legal status so that they can no longer fly. As a consequence, not only do the stigma and plus "appear connected," which is all that the stigma-plus test requires Plaintiffs to show, *Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005), but they in fact *are* connected.

[9] For that reason, and contrary to Defendants' assertion, Defs.' Opp. 10, there is no inconsistency between the plus factor that Plaintiffs establish and their allegation in their complaint that placement on the No Fly List alters their "right to travel on the same terms as other travelers." Third Am. Compl. ¶ 141.

Finally, contrary to Defendants' argument, the district court's analysis in *Green v. Transportation Security Administration* supports Plaintiffs' stigma-plus claim. *See* Defs.' Opp. 11 (citing *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005)). The district court dismissed *Green* because the plaintiffs had failed to allege *any* alteration in legal status: none were denied boarding, missed flights, or suffered any "impediments different than the general traveling public," even though they alleged that their names were on the No Fly List. *Green*, 351 F. Supp. 2d at 1122, 1130. In contrast, Plaintiffs' evidence—which Defendants do not dispute—shows that Defendants caused a tangible alteration in their legal status by placing them on the No Fly List and preventing them from boarding flights.[10]

* * *

The undisputed facts viewed under the correct law therefore establish that No Fly List inclusion has deprived Plaintiffs of their liberty interests in both travel and reputation.

II) DHS TRIP Fails to Provide Constitutionally-Adequate Notice and a Hearing.

Because inclusion on the No Fly List deprives Plaintiffs of their protected liberties, Defendants must afford them the most basic requirements of due process: (1) post-deprivation notice setting forth the government's reasons for placing Plaintiffs on the No Fly List, in "sufficient detail" so that Plaintiffs can put forward a defense to the government's most "critical" arguments, *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) (quotation marks omitted); and (2) "*some* kind of hearing . . . at *some* time" at which Plaintiffs can meaningfully contest that placement, *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (emphasis added)

[10] Defendants misconstrue Plaintiffs' argument when they describe it as distinguishing *Green* on the basis that the plaintiffs in that case were "mistakenly believed to be on the No Fly List" whereas Plaintiffs believe they are "actually on the [No Fly] list." Defs.' Opp. 11. The salient distinction is that the *Green* plaintiffs were able to board their flights; Plaintiffs were not.

(quotation marks omitted). Due process may be "flexible." *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 320 (1985). But Defendants cannot show that their redress procedures, which are governed by a Glomar policy that categorically refuses to provide U.S. citizens on the No Fly List any notice, any statement of reasons, or any hearing, could satisfy even the most basic constitutional minimums. *See* Defs.' Opp. 16, 20, 28–29.

Defendants fail to point to a single case in which U.S. citizens deprived of constitutionally-protected liberties were not afforded *some* notice of the reason for the deprivation and *some* kind of a hearing, even where the government asserted a national security interest. *See DeNieva*, 966 F.2d at 485 ("[U]nder no circumstances has the Supreme Court permitted a state to deprive a person of a life, liberty, or property interest under the Due Process Clause without any hearing whatsoever."). They ask this Court to be the first to uphold the government's categorical refusal to afford even the most basic of due process protections. The Court should reject the request.

Plaintiffs refute in detail below each of Defendants' arguments against providing Plaintiffs with meaningful notice and a hearing. But it is worth highlighting now the fallacy of an overarching argument on which Defendants heavily rely: They contend that Plaintiffs must specify, at this point in the proceedings, what a constitutionally-adequate process would look like, in order for this Court to determine whether Defendants' redress process is inadequate. Defs.' Opp. 16. They are incorrect both as a matter of law and procedural posture.

The stipulated and undisputed facts before this Court allow it to determine whether Defendants' redress process violates procedural due process requirements. Should this Court conclude that this process violates the Fifth Amendment, as Plaintiffs urge, it need not decide immediately the content of the notice or the precise hearing procedures required to satisfy due

process. The appropriate remedy can be established by Congress (through legislation), by Defendants (through regulation), or, in this case, by the Court at a later stage after additional briefing from the parties. *See, e.g., United States v. U.S. Dist. Court for East. Dist. of Mich., South. Div.*, 407 U.S. 297, 323–24 (1972) (holding that Fourth Amendment required prior judicial approval for domestic security surveillance at issue, but declining "to detail the precise standards for domestic security warrants" so that Congress could devise a remedy); *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904, 919 (N.D. Ohio 2009) (holding that Treasury Department violated U.S. charity's procedural due process rights by failing to provide prompt post-deprivation notice and hearing after provisionally designating it as a suspected terrorist organization, but waiting to determine remedy); *see also, e.g., Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 653, 660 (N.D. Ohio 2010) (devising remedy for Fifth Amendment violation after the parties' briefing on the issue). At this point, all that is necessary for this Court to decide is whether the current process is constitutionally adequate. As Plaintiffs have shown in their opening motion and below, it is not.

A) Defendants' Provision of Notice to Plaintiffs Will Not Harm Government Interests.

Defendants seek to justify their refusal to afford Plaintiffs any notice of the reasons for their No Fly List inclusion by: (1) requesting deference to the assertions of harm in their declaration, Defs.' Opp. 19–20, even though contrary evidence undermines the basis for judicial deference; (2) straining to distinguish analogous cases in which courts have required the government to provide far more notice than Defendants do here to organizations branded as suspected terrorists, Defs.' Opp. 22–23; and (3) arguing that the notice Plaintiffs seek would necessarily disclose classified or otherwise sensitive information, Defs.' Opp. 24–28, despite the fact that courts have routinely fashioned procedures to protect the government's secrecy interests

while affording individuals constitutionally-required notice in similar contexts. This Court should reject each of these arguments for the reasons discussed in greater detail below.

Defendants overstate any potential harm that might result from their provision of the *post*-deprivation—not *pre*-deprivation—notice that Plaintiffs seek. According to Defendants, affording Plaintiffs "official" notice of the reasons for their No Fly List inclusion or the bases for those reasons will subvert active terrorism investigations by officially confirming watch-list status and the government's investigative interest in Plaintiffs. *See* Defs.' Opp. 20–21; Coppola Decl. ¶¶ 27, 36–37 (detailing purported harms). While official disclosure *before* denial of boarding and FBI questioning *might* tip individuals off to information of which they were not already aware, evidence establishes that Plaintiffs have already been publicly denied boarding on planes, questioned extensively by the FBI, and told by government officials that they are on the No Fly List. Pls.' Cross-Mot. 27 & nn.42–43.[11] It defies common sense to conclude that any person who has been informed by the government that he or she is under investigation and on a watch list of suspected terrorists (although Plaintiffs vigorously contest that label) would wait for "official confirmation" through a redress process before taking steps to avoid further investigation. Evidence and logic thus directly undercut Defendants' overbroad assertions of harm, and this Court should not defer to them as Defendants request.[12]

[11] Defendants assert, without support, that "[a]llegations that an individual Plaintiff was told by some unnamed government official of his watchlist status do not diminish the risks of official disclosure." Defs.' Opp. 21 n.7. Plaintiffs have not made "allegations"; they have submitted evidence. *See* Pls.' Cross-Mot. 27 & nn.42–43. Defendants have not submitted any evidence to rebut the facts that U.S. officials told Plaintiffs that they are on the No Fly List and that Plaintiffs' believe that they are on the No Fly List and are the subjects of FBI investigations.

[12] Arguing for deference, Defendants are able to muster only an entirely inapposite case upholding a Glomar response in the Freedom of Information Act ("FOIA") context. *See* Defs.' Opp. 20 (citing *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)). The deference the judiciary may provide to the executive branch in the statutory FOIA context has no bearing on the

Evidence in the record also contradicts the Coppola Declaration's assertion that providing Plaintiffs notice would harm ongoing investigations and strengthen terrorist recruitment by confirming that individuals are *not* on the watch list. *See* Coppola Decl. ¶¶ 33–36; Defs.' Opp. 22. Defendants argue that rejection of an applicant from the Global Entry trusted traveler program does not necessarily disclose that person's inclusion in the watch list because there may be another basis for denial. *See* Defs.' Opp. 21 n.7. But Defendants miss the point: the government's *acceptance* of members in Global Entry routinely discloses that these individuals are *not* on the watch list. Defendants' Glomar policy cannot be absolutely necessary to protect national security when Defendants themselves routinely flout it for their own purposes. *See* Pls.' Cross-Mot. 27–28.

Defendants have failed to distinguish directly analogous cases from the Ninth Circuit and other courts requiring notice, a statement of reasons, and the record supporting those reasons, to U.S. charities that the government suspects of terrorism and seeks to designate as terrorist organizations. *See* Pls.' Opp. 20 (discussing, among other cases, *Al Haramain Islamic Foundation, Inc. v. Department of Treasury (A.H.I.F.)*, 686 F.3d 965, 983, 986 (9th Cir. 2012)). Defendants contend that these cases are of "limited value" because "the designations are publicly announced," "there is no operational harm in confirming the existence of the designation," and those cases involve greater private interests than those present here. Defs.' Opp. 23. But the very fact that the government publicly announces its designation of suspected terrorist organizations—even while investigations are pending—and that courts have required it to

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deference due when citizens' constitutional rights are at stake; here that deference is not warranted. Moreover, the logic that notice would cause harm by officially acknowledging information is inapplicable here because the record establishes that government officials have *already* disclosed Plaintiffs' No Fly List status to them. *See* Pls.' Cross-Mot. 27 & n.41.

provide those organizations with a statement of reasons and evidentiary support underscores that providing Plaintiffs similar notice will not harm terrorism investigations. *See Kindhearts*, 647 F. Supp. 2d at 904 (holding that Treasury Department provided organization constitutionally inadequate notice before blocking its assets during course of investigation). And the liberty interests of U.S. citizens in travel and freedom from government stigmatization as suspected terrorists are at least as serious as the property interests of U.S. charities subject to economic sanctions. *Cf.* Pls.' Cross-Mot. 13–14 & nn.23–27 (detailing devastating personal and financial harms to Plaintiffs as a result of their placement on the No Fly List).

Defendants have cited no authority—and Plaintiffs have found none—to support their claim that the Constitution permits U.S. citizens to be deprived of notice categorically simply because of the *possibility* that discrete pieces of classified or sensitive information supporting the government's reasons for depriving liberty may be permissibly withheld. *See* Defs.' Opp. 24–28. Concerns about the harm that might result from release of specific evidence supporting Plaintiffs' inclusion on the No Fly List are appropriately handled in the course of individual proceedings, just as they routinely are in terrorist designation cases and other contexts where the government seeks to deprive liberty in the name of national security. *See* Pls.' Opp. 22–23 (discussing *A.H.I.F.*, 686 F.3d at 983–84, and *Kindhearts*, 710 F. Supp. 2d at 657–60); *see also* Pls.' Opp. 23 n.37 (additional contexts); Pls.' Cross-Mot. 29–30 (same).[13]

[13] Defendants rely on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), for the broad proposition that protective orders and other tools that courts routinely use to safeguard classified and other sensitive information may not be employed to afford Plaintiffs notice. *See* Defs.' Opp. 22 n.8. But the question of whether protective orders may be used when plaintiffs seek information to establish standing is entirely irrelevant to the question before this court: whether such tools may effectively safeguard government interests when the Constitution requires the government to provide information to U.S. citizens deprived of protected liberties.

Defendants' specific argument that notice would necessarily disclose classified information is undercut by national security cases in which exactly the opposite has proven to be true. For example, Defendants concede, as they must, that in *Al Haramain Islamic Foundation v. Department of the Treasury*, the Ninth Circuit applied the *Mathews v. Eldridge* factors and found that due process required the government to provide meaningful notice and a statement of reasons to a U.S. charity designated as a suspected terrorist. Defs.' Opp. 23 n.9. Indeed, there the court of appeals required the government to mitigate the harm to the charity that would result from judicial review of classified information ex parte and in camera, and identified procedures to provide meaningful notice while protecting the government's secrecy interests. *A.H.I.F.*, 686 F.3d at 983–84 (deciding that government could provide the charity with unclassified summaries of classified information or provide the charity's security-cleared counsel with access to properly classified information).[14] That Congress explicitly approved the use of similar procedures in criminal proceedings in the Classified Information Procedures Act, 18 U.S.C. app., provides yet another example of tools readily available to courts adjudicating due process claims involving classified information.

Defendants' argument that the government may seek to invoke the law enforcement privilege over certain information also does not categorically foreclose notice. Defs.' Opp. 26. As Defendants concede, this privilege is "qualified," Defs.' Opp. 26, and Plaintiffs may obtain

[14] Defendants further argue that notice (and a hearing) is foreclosed because security clearance decisions are "committed to the Executive branch." Defs.' Opp. 25. But courts are empowered to review executive determinations with regard to security clearances where constitutional rights are at stake. *See* Pls.' Cross-Mot. 29 & n.48. Even the cases Defendants cite support this proposition, and *Department of the Navy v. Egan*, 484 U.S. 518, 520 (1988), are not to the contrary. *See* Pls.' Cross-Mot. 29 n.48; *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) ("[F]ederal courts may entertain colorable constitutional challenges to security clearance[s] . . . ."). The important point is that alternatives are available, and notice and a hearing are not categorically foreclosed.

evidence over which Defendants assert this privilege, as has another plaintiff challenging her inclusion on the No Fly List. *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 (WHA), 2009 WL 5069133, at *15–16 (N.D. Cal. Dec. 17, 2009) (ordering disclosure of certain documents despite government's assertion of law enforcement privilege), *vacated on other grounds*, 669 F.3d 983, 998 (9th Cir. 2012).[15]

Moreover, Defendants' assertion that their possible reliance on Sensitive Security Information ("SSI") weighs against notice for Plaintiffs in all instances similarly fails. *See* Defs.' Opp. 25–27. Contrary to Defendants' characterization, the text of the statute governing SSI explicitly provides a procedure by which civil litigants who have a "substantial need of relevant SSI in the preparation of the party's case" and are "unable without undue hardship to obtain the substantial equivalent of the information by other means" can apply for access for themselves and/or their attorneys. Department of Homeland Security Appropriations Act, Pub. L. No. 109-295 § 525(d), 120 Stat. 1355, 1382 (2007).[16] That Congress created this process

[15] Additionally, Defendants' successful invocation of the law enforcement privilege would result in removal of the privileged evidence from the case. *See Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975) ("Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties . . . ."); *cf. United States v. Reynolds*, 345 U.S. 1, 10–12 (1953) (upholding invocation of the "state secrets" privilege and remanding for further proceedings absent the privileged evidence). The mere possibility that the government may seek to rely on evidence that may ultimately be excluded from the case provides no basis for Defendants to evade their constitutional obligation to provide notice.

[16] The purpose of Section 525(d) was to provide "a mechanism for SSI to be used in civil judicial proceedings if the judge determines that [it] is needed" and that "a party will be able to demonstrate undue hardship to the judge if equivalent information is not available in one month's time." H.R. Conf. Rep. No. 109-699, at 170 (2006), *reprinted in* 2006 U.S.C.C.A.N. 884, 945.

underscores that even Defendants' asserted "likely" reliance on SSI in individual proceedings, Defs.' Opp. 25, should not preclude them from providing Plaintiffs notice.[17]

Finally, Defendants urge this Court to find that the No Fly List context is exceptional because the calibrated tools routinely used in Guantánamo habeas litigation and criminal cases to afford meaningful notice to those deprived of liberty while protecting government's secrecy interests are, according to Defendants, simply not applicable here. Defs.' Opp. 27–28. Defendants essentially ask this Court to carve out a space where the government can accuse a U.S. citizen of being a suspected terrorist without any notice of the accusations against him as long as the deprivation of liberty falls short of indefinite detention or criminal charge. But this is antithetical to the most basic concepts of due process. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."). While it is true that Plaintiffs are not detained indefinitely in a military facility, it is equally true that they are U.S. citizens who have been deprived of their liberty interest in travel and branded as suspected terrorists without even the most rudimentary notice of the accusations against them. And

[17] Defendants' broad assertion that Plaintiffs can never "overcome the government's substantial interest in protecting information that is classified, SSI, or protected by the law enforcement privilege" is incorrect. Defs.' Opp. 26. Even in a case involving a non-citizen's challenge to her No Fly List inclusion, the district court rejected government attempts to withhold information as privileged or as SSI, and has required the government to show cause why classified information cannot be disclosed. Order Granting in Part and Denying in Part Pl.'s Mot. to Compel at 2, *Ibrahim v. Dep't of Homeland Sec.*, No. 06-00545 (N.D. Cal. Apr. 19, 2013), ECF No. 461 (rejecting government assertion of law enforcement privilege and SSI as basis for withholding documents and ordering disclosure to plaintiff's counsel); Order Regarding Pl.'s Mot. to Compel at 2–3, *Ibrahim v. Dep't of Homeland Sec.*, No. 06-00545 (N.D. Cal. Apr. 19, 2013), ECF No. 462 (ordering government to show cause why nine documents that asserted to be classified should not be disclosed).

Defendants' attempt to distinguish this case from the criminal context on the ground that the government is the defendant, rather than the prosecutor, again fails to address directly analogous cases requiring notice even when the government is sued by suspected terrorist organizations seeking to clear their names and regain their assets. *See supra* 15–16. This Court should squarely reject Defendants' request to make the No Fly List a No Man's Land where the government can deprive U.S. citizens' liberty while affording them no meaningful post-deprivation notice at all.

B) Defendants' Provision of a Hearing to Plaintiffs Will Not Harm Government Interests.

Defendants have not pointed to any legal authority to support their categorical refusal to provide Plaintiffs an in-person hearing that would permit them to confront and rebut the government's basis for banning them from planes and smearing them as suspected terrorists—one of the most reprehensible labels of our time. *See* Defs.' Opp. 28-31. Defendants' failure to afford Plaintiffs even the limited relief of a post-deprivation hearing violates due process. *See Kindhearts*, 647 F. Supp. 2d at 904, 907–08 (requiring "prompt" and "meaningful" hearing for U.S. charity with blocked assets and provisional designation as terrorist organization).

In arguing against the obligation to provide Plaintiffs a hearing, Defendants principally rely on cases that did not involve the deprivation of U.S. citizens' protected liberty or property interests. *See* Defs.' Opp. 28 (citing *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004) and *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996)). Those cases are legally and factually inapposite. *See* Pls.' Opp. 32 n.52.

Defendants' fall-back position is to insist that even if their placement of Plaintiffs on the No Fly List deprives Plaintiffs of their liberties, due process does not require "the same" procedural safeguards afforded to detainees or those facing "some other fundamental loss of

liberty." Defs.' Opp. 29. But Plaintiffs do not make such a request. What Plaintiffs seek is constitutionally-required, but limited: a post-deprivation, in-person hearing permitting them to "to prove or disprove" the facts that are "relevant" to the government's decision to place them on the No Fly List. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). Defendants fail to show why this Court cannot require them to provide Plaintiffs this limited relief when other courts have required at least that much, if not more, to designated terrorist entities seeking to recover their property. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (requiring notice to organization concerning impending designation as foreign terrorist organization); *Kindhearts*, 647 F. Supp. 2d at 904, 907–08 (failure to provide prompt post-deprivation hearing violated due process).

Defendants next attempt unsuccessfully to distinguish the overwhelming authority from the Supreme Court, Ninth Circuit, and lower courts requiring the government to provide an in-person hearing to U.S. citizens and entities deprived of their liberty. *See* Defs.' Opp. 29–30. They ultimately argue that the No Fly List context is simply "incomparable" to any other. *Id*. at 30. But that argument amounts to a tautology: the No Fly List context is distinguishable because it is distinguishable. Courts uniformly require an in-person hearing permitting confrontation and rebuttal both in contexts where the private interests are less weighty than those of Plaintiffs, *and* in contexts where the private interests are greater and the government asserts significant national security interests. *See* Pls.' Cross-Mot. 22–23, 28–30 (citing cases); *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (requiring in-person hearing permitting confrontation and cross-examination of adverse witnesses prior to termination of welfare benefits); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (plurality opinion) (requiring meaningful post-deprivation opportunity for alleged enemy combatant to rebut legal and factual bases of charges against

him). Defendants' arguments boil down to a request for this Court to be the first to create an exception to the constitutional floor for due process claims established by courts over decades. The overwhelming weight of this case law is against Defendants.

C) DHS TRIP Creates an Extraordinarily High Risk of Erroneous Deprivation.

Defendants stipulate that under their Glomar policy, they categorically refuse to provide Plaintiffs any post-deprivation statement of reasons for their No Fly List inclusion, or the facts supporting any of those reasons. Joint Statement Stip. Facts ¶¶ 11, 14. As a matter of law, this undisputed fact establishes that Defendants' redress process creates a significant risk of erroneous deprivation. *See A.H.I.F.*, 686 F.3d at 986 (where an individual or entity can only "*guess*" about "the reasons for the investigation, the risk of erroneous deprivation [is] high." (emphasis in original)); *Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997) (lack of notice of reasons and factual bases for deprivation prevents the redress seeker from "rebut[ting] erroneous inferences"); *Kindhearts*, 647 F. Supp. 2d at 904 (lack of notice "necessarily enhances, if it does not entirely ensure, the likelihood of erroneous deprivation"); *see also* Pls.' Cross-Mot. 24–25. Defendants also stipulate that they do not provide any post-deprivation hearing permitting Plaintiffs to confront and rebut the bases for their No Fly List inclusion—whether in person or in writing. *See* Joint Statement Stip. Facts ¶¶ 6–11, 14. As a matter of law, the lack of a hearing also compounds the high risk of error resulting from the failure to afford notice. *See* Pls.' Cross-Mot. 24–25. The probable value of the notice and hearing Plaintiffs seek is clear.

Defendants entirely fail to address—let alone distinguish—due process doctrine concerning the risk of error. Defendants' contention that DHS TRIP corrects error because the Terrorist Screening Center (TSC) reviews information in response to complaints, Defs.' Opp. 12, is not the error correction that due process demands. *See, e.g.*, *Gete*, 121 F.3d at 1297 (notice

facilitates correction of government misunderstandings, factual errors and erroneous inferences). No amount of TSC review of government information can correct for information it lacks, such as Plaintiffs' explanation of why government information is false or incomplete. Defendants' Glomar policy similarly cripples redress seekers from identifying errors to any court conducting judicial review of DHS TRIP determinations. *Cf. Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171 (adversarial process reduces risk of error because "[s]ecrecy is not congenial to truth-seeking").[18] Defendants do not show how, in the face of their Glomar policy, Plaintiffs can even begin to discern what misunderstandings or errors lead to their inclusion on the No Fly List, much less to provide arguments, evidence, and their own good characters in their defense at any point in the redress process. *See* Pls.' Cross-Mot. 24–25; *Barnes*, 980 F.2d at 579 (government must provide reasons in "sufficient detail" to permit a "responsive defense" to the government's most "critical" arguments).

Defendants insist, as a factual matter, that they have improved their front-end watchlisting procedures by conducting more frequent updates and audits. Defs.' Opp. 12–14. They concede, however, as common sense requires, that front-end procedures cannot "ensure

[18] The government's submission of an administrative record for judicial review of a DHS TRIP determination in one instance is irrelevant. *See* Defs.' Opp. 13 & n.5 (citing *Arjmand v. DHS*, No. 12-71748 (9th Cir. filed June 4, 2012), ECF No. 34). The petitioner in that case does not challenge placement on the No Fly List, but referral to CBP secondary screening upon return from travel abroad on two occasions—private interests that are not as weighty as the liberty interests of Plaintiffs that Defendants deprive in this case. Moreover, the government's mere submission of an administrative record in that case, largely for in camera and ex parte review, does not establish that Plaintiffs can meaningfully identify and correct any government misunderstandings or errors in a petition for judicial review of their own DHS TRIP determination letters because, under Defendants' Glomar policy, these letters expressly do not communicate the reasons or bases for Plaintiffs' inclusion on the No Fly List. *Cf. Wiener v. FBI*, 943 F.2d 972, 977–78 (9th Cir. 1991) (recognizing that adversarial testing enables "effective judicial review" and that trial judge cannot be expected "to do as thorough a job of illumination and characterization as would a party interested in the case").

that the database contains only individuals who are properly placed there." *Id.* at 12; *see id.* at 14 (recognizing that "any database" contains error); *cf.* U.S. Gov't Accountability Office, GAO-12-476, Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions Since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts (2012) ("2012 GAO Report") 26–28, *available at* http://www.gao.gov/assets/600/591312.pdf (reporting that no entity routinely assesses the impact of "increasing volumes of information and related challenges in processing this information" on the watch list, including any resulting errors). More fundamentally, improvements in front-end procedures are not just incapable of eliminating all error, they cannot eliminate errors resulting from Defendants' misunderstanding of information about Plaintiffs, or lack of Plaintiffs' explanation or evidence.

Finally, Defendants misread the factual record Plaintiffs have provided to this Court, which establishes evidence of error in the consolidated terrorism watch list; they also overstate the import of any post-2010 improvements on the risk that Plaintiffs were incorrectly placed on the No Fly List. Defendants have not conclusively rebutted government audits documenting their own errors in properly updating and removing records in the consolidated terrorism watch list. Plaintiffs cited a 2009 Department of Justice Office of the Inspector General ("DOJ OIG") audit, which concluded that the FBI failed to properly update or remove watch list records as it was required to do, based on the Inspector General's robust analysis of terrorism investigation case files and associated watch list information. Pls.' Cross-Mot. 25–26; Choudhury Decl., Ex. F at iv–vi. Defendants contend that this 2009 report is "outdated" and cite a 2012 Government Accountability Office report describing changes made in 2010 to watchlisting nominations procedures and the impact of these changes on agencies. Defs.' Opp. 13 (citing 2012 GAO

Report).[19] But the portions of the 2012 GAO Report that Defendants cite address the actions of DHS—an agency that neither controls nor updates the watch list. And the 2012 GAO Report did not reach any conclusions about the problems the 2009 report identified. It did not find that the FBI improved upon the dismal performance documented by the 2009 DOJ OIG audit, nor did it study whether the FBI properly updated watch list records to reflect developments in terrorism case files.

Defendants assert that the 2009 DOJ OIG Report and other evidence of error in the watch list are not relevant because these reports were issued before Plaintiffs were denied boarding. Defs.' Opp. 14. But Defendants have not submitted evidence to rebut the conclusion of the 2009 DOJ OIG Report that the FBI failed to appropriately update and remove watch list records associated with terrorism investigations opened or closed from 2006 to 2008. While Plaintiffs were denied boarding later, earlier errors could certainly have contributed to any historical TSC information that led to Plaintiffs' incorrect placement on the No Fly List. Defendants do not provide specific information to show otherwise.

Finally, Defendants emphasize the purported error-correction value of the Secure Flight program. Defs.' Opp. 15. But that program does not correct the wrongful inclusion of individuals on the No Fly List; it simply reduces errors that may result from the *matching* of

[19] Defendants note that the 2012 GAO Report indicates that since 2010, DHS conducts frequent checks of "cleared individuals" against the watch list and that "redress applicants are provided additional information regarding the resolution of their cases." Defs.' Opp. 15 (citing 2012 GAO Report 45). Neither finding demonstrates a decreased risk of error. Whether DHS conducts frequent checks against the watch list has no bearing on the 2009 DOJ OIG report's conclusion that the FBI failed to appropriately update or remove watch list records. Although the 2012 GAO Report does not explain what "additional information" has been provided to redress seekers since 2010, there is no dispute that it does not include notice of the reasons for No Fly List inclusion, which, as discussed above, is required for true error correction. Conclusively, for this Court's purposes, the 2012 GAO Report explicitly noted that it "did not review the effectiveness" of the DHS TRIP process. 2012 GAO Report 46.

airline passenger names against TSC's watch list during airport security screening. Plaintiffs are concerned less with name-matching mistakes at the aircraft gate; they are far more concerned that Defendants have erroneously placed them on the No Fly List in the first place. Secure Flight does nothing to correct this error.

* * *

The stipulated and undisputed facts thus show that the *Mathews v. Eldridge* factors—the private interests at stake, the risk of erroneous deprivation, and the government's interests, *see* 424 U.S. 319, 335 (1976)—weigh decisively in favor of Plaintiffs. Defendants' redress procedures for U.S. citizens on the No Fly List fail to satisfy the most minimal requirements of procedural due process.

III) Defendants' Failure to Provide Plaintiffs Notice and a Hearing Violates the Administrative Procedure Act.

Defendants argue that the redress process for U.S. citizens on the No Fly List satisfies the Administrative Procedure Act ("APA") because it satisfies constitutional standards and reasonably carries out Congress's directives. Defs.' Opp. 31–34. The stipulated record reflects, however, that it does neither**.**

Contrary to Defendants' assertion, Plaintiffs do not argue that APA Section 706(2)(B) requires anything more than the Fifth Amendment's requirement of procedural due process does. *See* Defs.' Opp. 31; Pls.' Cross-Mot. 30–31; 5 U.S.C. § 706(2)(B) (barring agency action that is "contrary to constitutional right, power, privilege, or immunity"). According to Defendants' own stipulations and the applicable law, Defendants offer an entirely one-sided and secret redress process that fails to afford meaningful notice and a hearing to Plaintiffs. Because those procedures violate Plaintiffs' due process rights, they necessarily violate APA Section 706(2)(B).

Defendants' argument that their redress procedures satisfy APA Section 706(2)(A)'s bar against "arbitrary [and] capricious" agency action are premised on a request for highly deferential judicial review. 5 U.S.C. § 706(2)(A); Defs.' Opp. 31–32. There is no dispute that courts review agency action under Section 706(2)(A) for a "rational connection between the facts found and the [agency] choice made." *Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). But that review, contrary to Defendants' characterizations, is not entirely deferential; rather, it is "searching and careful." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quotation marks omitted); *see also U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[D]eference to an agency decision is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions.").

Defendants' arguments that their redress policies meet the Section 706(2)(A) standard suffer from three additional flaws. First, they focus on the wrong directives. Defendants ask this Court to evaluate their redress procedures in light of Congress's charge that DHS prevent terrorist attacks. Defs.' Opp. 32. Although that directive might be the proper focus of a Section 706(2)(A) claim challenging Defendants' creation or maintenance of the No Fly List (a claim Plaintiffs do not raise), the inquiry this Court must make is whether DHS TRIP executes Congress's directive to afford "fair" and effective redress for individuals wrongly excluded from air travel. *See* Pls.' Cross-Mot. 32. To that end, Defendants themselves concede that the Intelligence Reform and Terrorism Prevention Act of 2004 directed the government to establish an appeals process for travelers denied boarding that permits them to "correct information in the system." Defs.' Opp. 32–33 (citing 49 U.S.C. § 44903(j)(2)(C)(iii)).

Second, the stipulated record and Plaintiffs' undisputed facts show that Defendants fail to execute Congress's directive to afford fair and effective redress. Defendants assert that their refusal to provide notice of the reasons and bases for inclusion on the No Fly List has no bearing on whether they satisfied Section 706(2)(A), because Congress did not explicitly direct the government to provide such notice. Defs.' Opp. 33. Defendants miss the point. While Congress may have provided Defendants some leeway in fashioning redress procedures, the process Defendants established—an entirely secret, one-sided DHS TRIP process that is unfair and ineffective—violates Congress's explicit directives. *See* 49 U.S.C. § 44926(a); 49 U.S.C. § 44903(j)(2)(C)(iii); *see Wash. Toxics Coal. v. U.S. Dep't of Interior, Fish and Wildlife Serv.*, 457 F. Supp. 2d 1158, 1185–86 (W.D. Wash. 2006) (EPA screening model arbitrary and capricious because it produced known errors that were "uncorrected and unverified"); *see also* Pls.' Cross-Mot. 31–32.

Third, Defendants have no response to Plaintiffs' argument that their redress procedures are arbitrary and capricious because Defendants' Glomar policy and failure to provide notice and a meaningful process make it impossible, as a matter of law, for Plaintiffs to ensure their compliance with Defendants' rules. *See* Pls.' Cross-Mot. 32; *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bur. of Land Mgmt.*, 273 F.3d 1229, 1250-51 (9th Cir. 2001); *see Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039 (9th Cir. 2007) (regulatory standard "must not be so general" as to prevent compliance). This Court should grant Plaintiffs summary judgment on the APA claim on this basis alone.

CONCLUSION

For the reasons stated above, this Court should grant Plaintiffs' cross-motion for partial summary judgment and deny Defendants' motion for partial summary judgment.

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