

Exhibit B

NATIONAL SECURITY
PROJECT



December 16, 2014

VIA MAIL

Deborah O. Moore
U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

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Re: Mohamed Sheikh Abdirahman Kariye
Redress Control Number 2097225

Dear Ms. Moore:

On behalf of Imam Mohamed Sheikh Abdirahman Kariye, we submit this response to your letter dated November 26, 2014, in which you provided “an unclassified summary that includes reasons” for Imam Kariye’s placement on the No Fly List. DHS TRIP Letter, attached as Exhibit 1. Because the court in *Latif v. Holder*, Case No. 10-Civ-750-BR (D. Or.), has mandated that the Government conduct an administrative review of the inclusion on the No Fly List of the plaintiffs in that case “as soon as practicable,” Dkt. No. 152 at 2, we are submitting this response by December 16, as requested in your letter.

Nonetheless, the Government’s revised No Fly List administrative redress system remains inadequate, and your letter lacks information that is critical to Imam Kariye’s ability to respond meaningfully to the allegations in it. The court in *Latif* has emphasized that “Plaintiffs’ inclusion on the No Fly List constitutes a significant deprivation of their liberty interests” and imposes a “major burden” on those interests. Dkt. No. 136 at 30. The court ordered the Government to provide “a new process that satisfies the constitutional requirements for due process.” *Id.* at 61. The Government’s revised system does not provide Imam Kariye the process he is due under the Constitution or the court’s order, nor does it comply with the requirements of the Administrative Procedure Act. Among other defects, the substantive criteria cited for Imam Kariye’s inclusion on the No Fly List are overbroad and unconstitutionally vague, and the redress process fails to offer procedural protections that are necessary to vindicate Imam Kariye’s due process rights.

On December 5, 2014, we requested that counsel for the defendants in *Latif* provide essential procedural protections, additional information, and a constitutionally compliant substantive standard for the revised redress process. See Letter of December 5, 2014, attached as Exhibit 2. We have received no response to that letter.

Thus, Imam Kariye has not been given a “meaningful opportunity to respond” to the reasons for his inclusion on the No Fly List. See *Al Haramain v. U.S. Dep’t of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); see also *Latif*, Dkt. 136 at 62 (citing *Al Haramain*). Absent such a meaningful opportunity, Imam Kariye is hobbled in his ability to rebut the allegations, and any response from him is necessarily incomplete. We submit this response only subject to the objections and requests for further information set forth below, as well as those set forth in Exhibit 2, and reserve the right to supplement any record being created by the Government with such additional information that the Government provides in response to the requests in our letter of December 5, 2014, or to discovery requests or an order of the court in *Latif*, or that we discover through our own investigation.

I. The Redress System Remains Inadequate.

The Government’s revised No Fly List redress system does not comply with the Constitution or the court’s order for two primary reasons: it utilizes a substantive standard that is vague and overbroad, and it lacks necessary procedural protections, absent which Imam Kariye’s core due process rights cannot be upheld.

The DHS TRIP letter to Imam Kariye states:

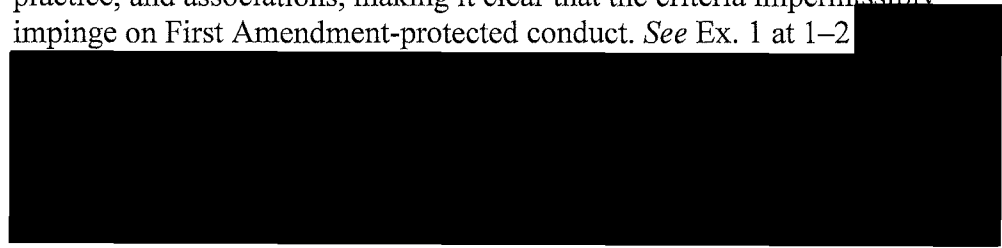
It has been determined that you are on the No Fly List because you have been identified as an individual who “may be a threat to civil aviation or national security.” 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

Ex. 1 at 1.

This standard is overbroad, in that it does not require any nexus to aviation security, lacks a meaningful temporal limitation, and is also

unconstitutionally vague, both on its face and as applied to Imam Kariye. *See* Ex. 2 at 6–7.

As applied to Imam Kariye, application of the standard also violates the First Amendment. *Id.* at 7. Indeed, the DHS TRIP letter to Imam Kariye includes allegations related to his speech or other expressive activity, religious practice, and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. *See* Ex. 1 at 1–2



Additionally, the standard fails to utilize the least restrictive means to mitigate the “threat” to which it is addressed. *See* Ex. 2 at 7–8. For example, nothing in the letter shows, or even attempts to show, that utilization of the procedures the Government employed to avoid litigation of the preliminary injunction motion filed by Imam Kariye and others in *Latif*—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

These defects render the substantive standard used to place Imam Kariye on the No Fly List unconstitutional. No one—Imam Kariye included—can meaningfully respond to allegations purporting to justify placement on the No Fly List when the standard for that placement is ambiguous and overbroad.

The second major defect in the revised redress system is that it lacks necessary procedural protections, absent which Imam Kariye’s due process rights cannot be upheld. The court in *Latif* ordered the Government to revise the redress system in large part because “the DHS TRIP process . . . contains a high risk of erroneous deprivation of Plaintiffs’ constitutionally-protected interests.” *See* Dkt. No. 136 at 39. That risk remains high under the revised system that the Government has applied to Imam Kariye.

First, the process does not provide for a hearing at which live witness testimony may be presented and tested under cross-examination. At any hearing, Imam Kariye would credibly testify that he presents no threat to aviation security and respond to any specific allegations made against him. However, without a hearing, Imam Kariye will have no ability either to establish his own credibility through live testimony or to challenge the testimony of the Government’s witnesses through cross-examination. *See* Ex. 2 at 3.

Second, the disclosure to Imam Kariye is incomplete. The DHS TRIP letter states that it “includes reasons supporting” his placement on the No Fly List, and that the Government is “unable to provide additional disclosures” beyond those in the letter.¹ Ex. 1 at 1–2. An incomplete statement makes it impossible for Imam Kariye to refute all of the Government’s bases for placing him on the List. Without a complete statement of reasons and a detailed statement of withheld evidence, Imam Kariye cannot meaningfully respond to the allegations in the letter. Nor can he take steps, such as the retention of counsel with security clearance, to deal with information withheld as classified because he does not know whether such withholdings have occurred. *See* Ex. 2 at 2–3 (citing Dkt. 136 at 61-62).

Third, the DHS TRIP letter contains no indication of what, if any, evidentiary standard the Government used to place Imam Kariye on the No Fly List, or to review that placement. As we have explained, the Constitution requires a “clear and convincing evidence” standard in this context. Ex. 2 at 3–4.

Fourth, the DHS TRIP letter fails to explain how the allegations in it satisfy appropriately narrow criteria for inclusion on the No Fly List. For

However, the letter fails to explain how, even if these contested allegations were true, they would suffice to explain how such conduct renders him a “threat” worthy of inclusion on the List today, particularly given that the

Moreover, even if every factual allegation in the DHS TRIP letter about his prior associations and conduct were true (which, again, Imam Kariye does not concede), those facts would still fail to justify barring him from boarding an airplane after booking in advance on U.S. carriers and submitting to heightened airport security measures.

As with the substantive standard, these procedural defects preclude Imam Kariye from meaningfully responding to the DHS TRIP letter, and they

¹ The letter also fails to notify Imam Kariye of the entity responsible for determining that he meets the standard for inclusion on the No Fly List. *See* Ex. 1 at 1 (“*it has been determined* that you represent a threat . . .”) (emphasis added). Imam Kariye therefore cannot assess the institutional competence of the deciding entity or identify specific policies, regulations, and statutes that may govern such a determination.

further underscore that the Government's revised redress system remains constitutionally deficient.

II. Imam Kariye Cannot Respond Meaningfully Without Further Information.

The allegations in the DHS TRIP letter reveal specific categories of information that the Government must provide to Imam Kariye in order to satisfy due process.

1. Witness information and statements. The DHS TRIP letter indicates that the Government is relying on the statements of several witnesses to support Imam Kariye's inclusion on the No Fly List, including statements

[REDACTED]

Ex. 1 at 2; *see also id.* (referring to "another witness"). The Government must therefore provide the names and contact information for any such witnesses; all reports relating to Imam Kariye prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating Imam Kariye, [REDACTED]; the statements of unidentified third parties [REDACTED]; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath. See Ex. 2 at 5–6.

2. Promises to witnesses. The Government must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for Imam Kariye's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local), including but not limited to any benefit offered to the CW. See *id.* at 6.

3. Exculpatory evidence. The Government must provide all evidence, including any statements by any person, tending to: contradict the evidence and allegations advanced in support of Imam Kariye's inclusion on the No Fly List; show that Imam Kariye does not meet the appropriate criteria for inclusion on the List; or otherwise establish that Imam Kariye does not merit inclusion on the List. See *id.*

4. Imam Kariye's prior statements. To the extent that the Government is relying on Imam Kariye's alleged statements in order to justify his inclusion on the No Fly List, he must be provided with all of his written or recorded statements, made to any persons at any time and place, and the

substance of any oral statements, if not embodied in a writing. If any statements are recorded, he should be given a transcript or audible copy of each recording. See Ex. 2 at 4.

5. Notice of surveillance techniques. To the extent that any information obtained or derived from surveillance activities forms any basis for Imam Kariye's inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceedings, Imam Kariye is entitled to notice of the surveillance and the information obtained or derived from it. He is also entitled to notice of information or evidence that is the product of unlawful surveillance. *See id.* at 4-5.

6. Additionally, to the extent that the Government is relying on any information, whether or not disclosed in the DHS TRIP letter, that does not fall under any of the preceding categories, such information must also be provided to Imam Kariye. For example, [REDACTED]

The failure to provide this information unfairly prejudices Imam Kariye's due process right to challenge his placement on the No Fly List.

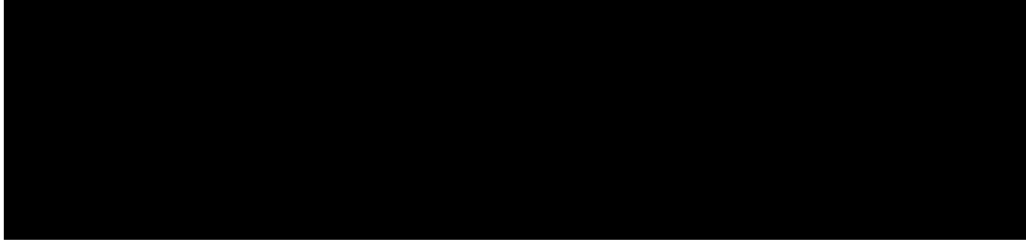
III. The Allegations Against Imam Kariye Do Not Justify His Continued Inclusion On The No Fly List.

For the foregoing reasons, the revised system the Government is using to review Imam Kariye's inclusion on the No Fly List is constitutionally inadequate. Nonetheless, because the court in *Latif* has directed the Government to complete its administrative review of the plaintiffs' DHS TRIP redress inquiries before the court considers substantive motions on the merits, we submit this disclosure of Imam Kariye's expected testimony on his behalf. We do so without waiving any of the objections to the legality or constitutionality of the revised redress process, and without conceding the adequacy of the notice and process afforded to Imam Kariye.

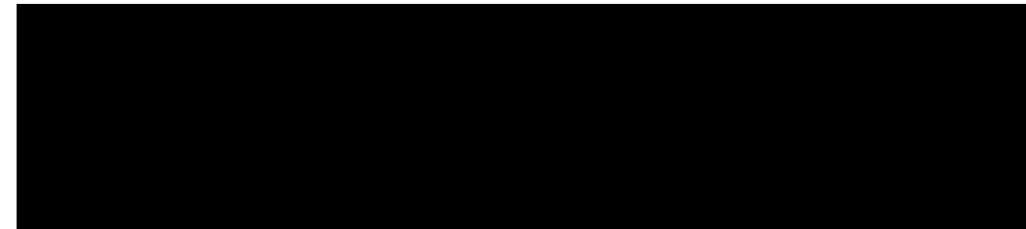
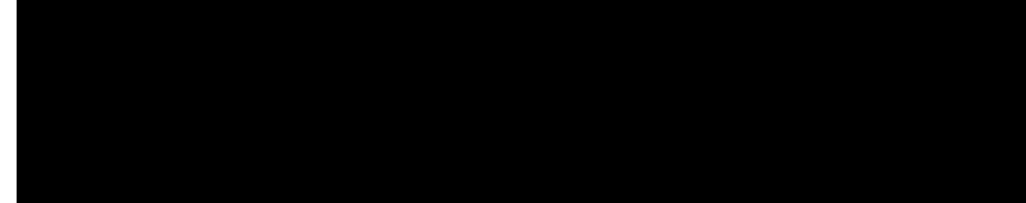
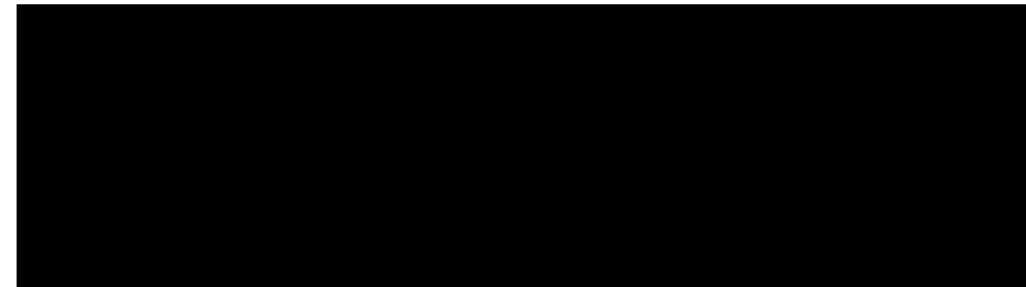
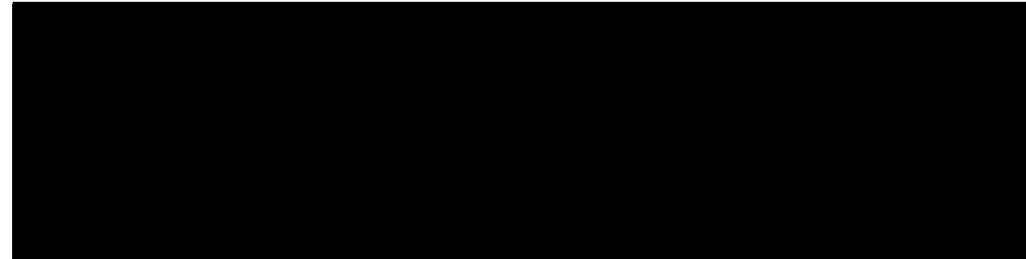
If called to testify at an evidentiary hearing regarding his placement on the No Fly List, we expect that Imam Kariye would state as follows:

1. Imam Kariye is not now, and has never been, a threat to U.S. Government facilities, personnel, or aviation security, within the borders of the U.S. or abroad. He has no intention of engaging in or providing support for any violence against the United States or any U.S. personnel anywhere in the world.

2. Imam Kariye is an important source of spiritual and moral leadership in his community. In addition to serving as imam of his mosque, he has provided counseling for members of his community for approximately twenty years, including for youth, for women who are victims of domestic violence, for married couples, and for the bereaved.



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Imam Kariye reserves the right to provide additional information upon receipt of further information as to the nature of the allegations against him, the sources of evidence on which the government has relied, and other information specified above. He also reserves the right to present evidence of his good moral character and opposition to violence through statements from his congregants and other witnesses, at the appropriate time.

For the foregoing reasons, Imam Kariye's placement on the No Fly List was in error, and he should promptly be removed from the No Fly List.

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Sincerely yours,

A handwritten signature in cursive script that reads "Hina Shamsi".

Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

Steven Wilker
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204

Exhibit 1

U.S. Department of Homeland Security

DHS Traveler Redress Inquiry Program (DHS TRIP)

601 South 12th Street, TSA-901
Arlington, VA 20598-6901



Homeland Security

November 26, 2014

Mr. Mohamed Sheikh Abdirahman Kariye
c/o Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

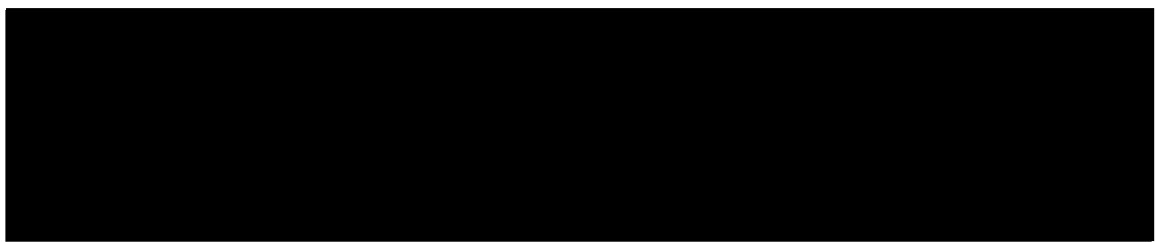
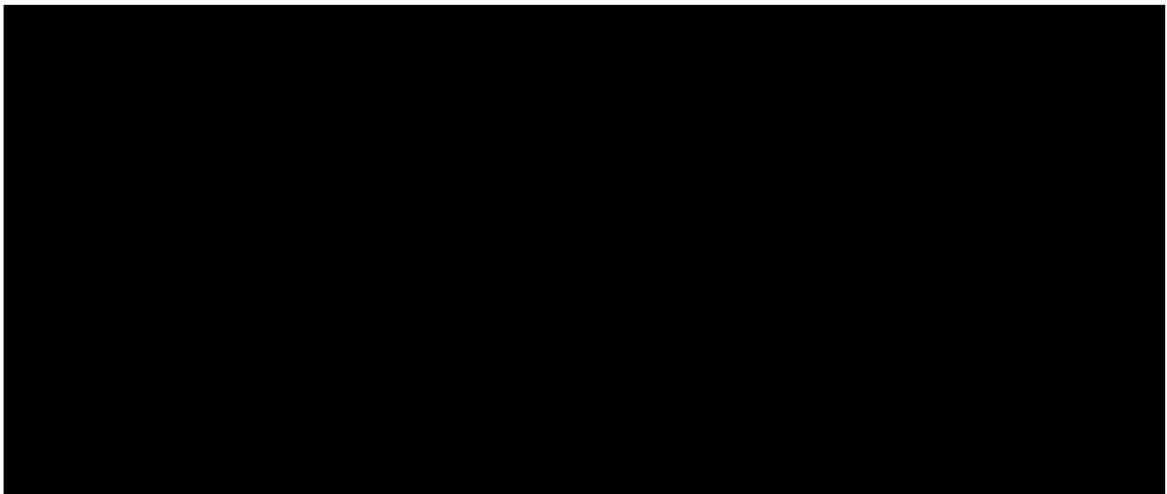
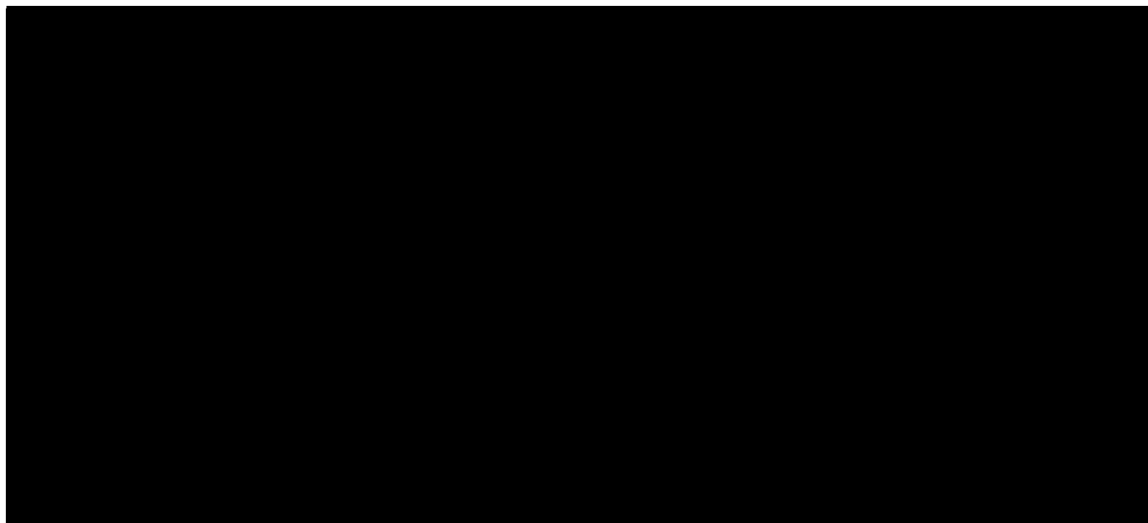
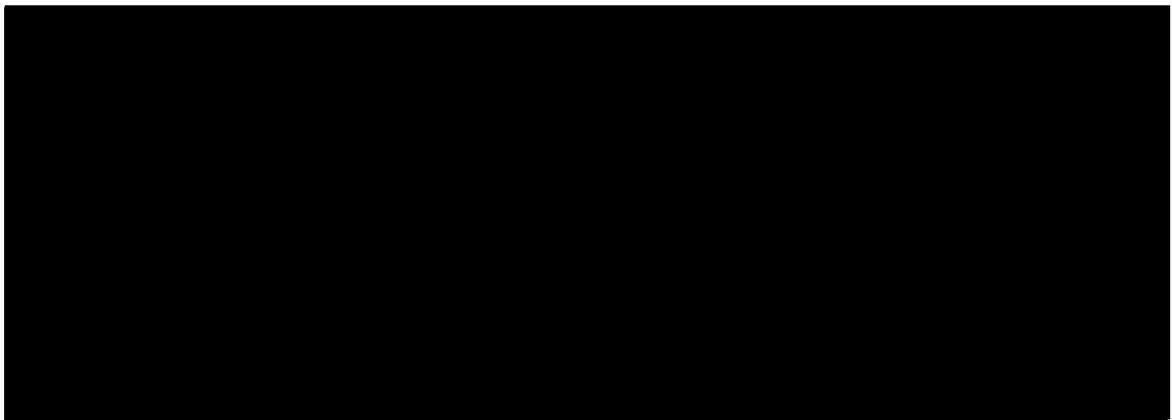
Redress Control Number: 2097225

Dear Mr. Kariye:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.





We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation with court-imposed deadlines, such information should be submitted by December 16, 2014. Information you submit will be considered before a final determination is made. The final determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Paul Meyer on behalf of

Deborah O. Moore
Director, DHS TRIP

Exhibit 2

NATIONAL SECURITY
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December 5, 2014

VIA EMAIL

Amy Powell
Brigham J. Bowen
Adam D. Kirschner
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Re: Latif v. Holder, Case No. 10-Civ.-750-BR

Dear Counsel:

After reviewing the DHS TRIP letters sent to the Plaintiffs in this case who remain on the No Fly List, we write to make three requests regarding the administrative process Defendants are using for these Plaintiffs.¹ First, we request that Defendants provide certain necessary procedural protections as part of the administrative process. Second and relatedly, we request that Defendants provide additional information related to the basis or bases for Plaintiffs' inclusion on the No Fly List. Third, we request that Defendants craft, apply, and disclose to Plaintiffs a constitutionally-compliant substantive standard for inclusion on the No Fly List. Such a standard must be narrower and more specific than the vague and over-broad standard that Defendants appear to be employing here.

In addition, as we discussed with Amy and Brigham before we received the DHS TRIP letters, we seek to enter into a stipulation and protective order to prevent public disclosure of the DHS TRIP letters and the additional information we are requesting. The need we anticipated for such a stipulation and protective order is confirmed by the inflammatory, piecemeal allegations in the letters. We will follow up with a call to discuss the content of the stipulation and protective order.

¹ It is our understanding that those Plaintiffs are Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble, Amir Meshal, Stephen Persaud, and Steven Washburn, because those are the only Plaintiffs for whom Defendants have provided DHS TRIP letters. If our understanding is incorrect, please inform us of that fact immediately.

As Defendants will recall, the Court's order of June 24, 2014 (Dkt. 136) reiterated that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests," *id.* at 30; held that inclusion on the No Fly List imposes a "major burden" on those interests, *id.*; and required Defendants to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The DHS TRIP letters sent to Plaintiffs, to which Defendants have asked Plaintiffs to respond by December 15 or 16, 2014, do not constitute process sufficient to satisfy due process and APA requirements under the Court's order. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); 5 U.S.C. §§ 555, 556 (governing procedures and production of evidence in administrative proceedings). In particular, the information Defendants have provided does not suffice to permit any of the six Plaintiffs a "meaningful opportunity to respond" to the reasons for their inclusion on the No Fly List. *Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *Kindhearts v. Geithner*, 647 F. Supp. 2d 857, 906 (N.D. Ohio 2009) (requiring "meaningful opportunity to be heard" by provision of a "post-deprivation hearing"); *see also* Dkt. 136 at 62 (citing *Al Haramain*).

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For that reason, we request the following additional procedures and categories of information (if in the possession of any branch of the federal government), each of which is necessary to comply with the Court's order:

I. Additional Procedural Protections

Compliance with the Court's order requires Defendants to provide the following procedural protections:

1. A *complete* statement of reasons. The DHS TRIP letters suggest that there may be reasons other than those Defendants have provided on which they are relying to justify Plaintiffs' inclusion on the No Fly List. The Court's order plainly requires the provision of "*the* reasons for" Plaintiffs' inclusion, Dkt. 136 at 61 (emphasis added), and an incomplete statement makes it impossible for Plaintiffs to refute all of Defendants' bases for placing Plaintiffs on the List.

2. A *complete* statement regarding withheld evidence and the basis for withholding any such evidence. The DHS TRIP letters suggest that there *may* be both undisclosed evidence on which the Government has relied to justify Plaintiffs' inclusion on the No Fly List and undisclosed claims of privilege used to justify the withholding of that evidence. However, the Court's order indicates that Plaintiffs must know when evidence has been withheld and on what grounds so that they may meaningfully respond, including by requesting "disclos[ure] [of] the classified reasons to properly-cleared counsel," Dkt. 136 at 61, and whether to seek judicial review of any privilege assertion. *Id.* at 62.

Obviously, Plaintiffs cannot take those steps without knowing at least in summary form what evidence Defendants have chosen to rely upon without disclosing it, and the reasons for any such withholding.

3. An explanation of how Defendants' allegations satisfy appropriately narrow criteria for inclusion on the No Fly List. The DHS TRIP letters fail to explain if and how the allegations made in them relate to the substantive criteria for inclusion on the No Fly List. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010) (requiring the Secretary of State to explain how information relied upon for designation as a terrorist organization related to specific portion of governing statute). Without such an explanation, Plaintiffs are left to guess as to how their alleged conduct satisfies the substantive standards for inclusion on the list.

4. A hearing at which live witness testimony may be presented and tested under cross-examination. Due process requires hearings in contexts in which far less is at stake than inclusion on the No Fly List. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 697, 99 S. Ct. 2545 (1979) (in social security context, paper review failed to satisfy due process because determination at issue "usually requires an assessment of the recipient's credibility"). Without a hearing, Plaintiffs have no ability either to establish their own credibility through live testimony or to challenge the testimony of Defendants' witnesses through cross-examination. Such live testimony is critical in situations, such as these, where credibility is central to any assessment of whether Plaintiffs may be deprived of their constitutionally protected liberty interest through inclusion on the No Fly List. *Cf. Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (holding that credibility determinations in deportation cases require a hearing because "[a]ll aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.").

5. Application of a "clear and convincing" standard of proof where Defendants bear the burden of establishing that inclusion on the No Fly List is warranted. The DHS TRIP letters contain no articulation of any standard or burden of proof. The "clear and convincing evidence" standard is "the normal burden of proof . . . in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (internal quotations omitted). As the Ninth Circuit has recognized, courts have applied the "clear and convincing" standard in a variety of contexts involving significant deprivations of liberty. *See id.* (collecting cases involving

competency to proceed, deportation, denaturalization, and civil commitment). *See also Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (holding in civil commitment context that “[i]t is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation.”). Given the comparably “significant deprivation of liberty” at stake here, Defendants must prove with clear and convincing evidence that Plaintiffs’ placement on the on the No Fly List is warranted.

II. Additional Information

Compliance with the Court’s order also requires Defendants to provide the following additional information in order to satisfy due process:

1. Plaintiffs’ prior statements. The DHS TRIP letters make clear that Defendants are relying upon some Plaintiffs’ alleged statements in order to justify their inclusion on the No Fly List. Defendants must provide all written or recorded statements of each Plaintiff, made to any persons at any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, please provide a transcript or audible copy of each recording. *See Dhiab v. Bush*, 2008 WL 4905489 at *2 (D.D.C. Nov. 17, 2008) (ordering, in habeas corpus proceeding brought by individual detained as alleged enemy combatants, disclosure of all statements made or adopted by the petitioner relating to the factual bases for his detention, as well as information regarding the circumstances of such statements) (citing *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) (“we presume counsel . . . has a ‘need to know’ all Government Information concerning his [or her] client”))).

2. Notice of surveillance techniques. The DHS TRIP letters suggest that some or all of the Plaintiffs were placed on the No Fly List based on information obtained or derived from surveillance activities. To the extent that any such information forms any basis for Plaintiffs’ inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Plaintiffs are entitled to notice of the surveillance and the information obtained or derived from it. *See, e.g.*, 50 U.S.C. § 1806(c) (FISA electronic surveillance); 50 U.S.C. § 1825(d) (FISA physical search); 50 U.S.C. § 1842(c) (FISA pen register); 18 U.S.C. § 2518(8)(d) (Title III). Due process also requires that the Plaintiffs be given notice of the surveillance techniques (including, but not limited to, surveillance under Executive Order 12,333) that led to their placement on the No Fly List so that they may seek review of the lawfulness of that surveillance and determine whether Defendants’ alleged basis or bases for including them on the No Fly List are derived from it. *See United States v. U.S. District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125 (1972). To that end, each Plaintiff hereby asserts his right to notice of information or evidence that

forms any basis for his inclusion on the No Fly List that is the product of unlawful surveillance or was obtained by the exploitation of any unlawful surveillance. *See* 18 U.S.C. § 3504(a). Defendants must therefore “affirm or deny the occurrence of” such surveillance. *See id.*

3. Witness information and statements. The DHS TRIP letters make clear that Defendants are relying on the statements of witnesses to support Plaintiffs’ inclusion on the No Fly List. Defendants must therefore provide the names, last known addresses, and telephone numbers of witnesses upon whose statements Defendants are relying. This witness information includes: government agents whose statements the letters describe as fact; all reports relating to Plaintiffs prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating any Plaintiff); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents’ rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath.

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Individuals facing government sanctions in comparable civil proceedings have a right to such evidence. *See, e.g., Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963) (holding in bar license revocation context that “procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood”); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 611 (N.D. Cal. 1992) (same for revocation of alcohol label certificate). Moreover, such information could prove critical in determining whether any of these witnesses have a history of providing inaccurate or contradictory testimony, or a motive to provide biased or misleading information to law enforcement. It is also necessary both to allow Plaintiffs’ counsel to contact such witnesses (in order to independently investigate their claims) and for counsel to determine whether the use of their hearsay statements would be fundamentally fair. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980) (to constitute substantial evidence to support administrative determination, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility, must have probative value and bear indicia of reliability; factors to be considered include independence or possible bias of declarant, type of hearsay materials submitted, whether statements are signed and sworn to, whether statements are contradicted by direct testimony, availability of declarant, credibility of declarant, and whether hearsay is corroborated); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681-82 (9th Cir. 2005) (holding, in deportation context, that “the government’s choice whether to produce a witness or to use a hearsay statement [is not] wholly unfettered” and requiring showing that “despite reasonable efforts, [the government] was unable to secure the presence of the witness at the hearing” prior to use of hearsay evidence); *see*

also *Dhiab*, 2008 WL 4905489 at *4 (requiring consideration of “whether provision of nonhearsay evidence would unduly burden the movant or interfere with the Government’s efforts to protect national security”).

4. Promises to witnesses. Defendants must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for any Plaintiff’s inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *Cf. Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (reaffirming that the failure to disclose evidence favorable to an accused upon request violates due process, and holding that this requirement extends to all witness impeachment evidence); *United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986) (affirming reversal of conviction where prosecution failed to disclose that witness received benefits in exchange for cooperation with government).

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5. Exculpatory evidence. Defendants must provide all evidence, including any statements by any person, tending to: contradict Defendants’ evidence in support of their inclusion of Plaintiffs on the No Fly List; show that Plaintiffs do not meet the appropriate criteria for inclusion on the No Fly List; or otherwise establish that Plaintiffs do not merit inclusion on the No Fly List. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (holding in deportation context that failure to disclose exculpatory documents in government file violated due process); *Dhiab*, 2008 WL 4905489 at *1 (ordering, in habeas corpus proceeding brought by alleged enemy combatant, that the government must “disclose to Petitioner all reasonably available evidence in its possession or that the Government can obtain through reasonable diligence that tends materially to undermine the information presented to support the Government’s justification”).

III. Application of Appropriate Substantive Standard

Finally, the substantive standard that Defendants appear to be using to assess whether each Plaintiff’s inclusion on the No Fly List is warranted does not satisfy constitutional requirements, for the reasons set forth below:

1. The criteria cited in the DHS TRIP letters are overbroad. As a threshold matter, they do not require any nexus to aviation security. *See, e.g., Aptheker v. Sec’y of State*, 378 U.S. 500, 517, 84 S. Ct. 1659, 12 L.Ed.2d 992 (1964) (law imposing complete travel ban for members of communist organizations was overbroad and unconstitutional on its face). Because of that, the criteria “sweep[] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment” and are “not . . . narrowly drawn to prevent the supposed evil.” *See id.* at 514. They mandate a significant penalty—inability to travel by air—that is untethered from the (undefined)

“threat” included in the criteria. Similarly, the criteria lack a meaningful temporal limitation. They fail to specify whether and to what extent past conduct can continue to satisfy the standard—whatever that may be—for placement on the No Fly List. They also lack any means for determining at what point, absent new information, an individual ceases to satisfy the criteria.

2. The criteria are unconstitutionally vague on their face and as applied to Plaintiffs. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (statute must be “sufficiently clear so as not to cause persons ‘of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application’”) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). In particular, terms such as “threat,” “represent,” and “pose” are undefined and vague, opening the door to subjective, arbitrary, and discriminatory interpretation of the criteria. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Such ambiguous terms easily encompass conduct that individuals could not have known would lead to their placement on the No Fly List. *See id.* (noting that the void-for-vagueness doctrine exists in part “to avoid punishing people for behavior that they could not have known was illegal”).

Greater certainty as to the meaning of such terms is especially necessary when, as here, a statute “might induce individuals to forego their rights of speech, press, and association” to avoid the risk of penalty. *Scull v. Com. of Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959). Indeed, most of the DHS TRIP letters include allegations related to Plaintiffs’ speech or other expressive activity and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. Defendants may not sanction Plaintiffs for engaging in activity that is itself constitutionally protected, whether by the First Amendment or any other constitutional provision. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982) (government may not penalize someone on the basis of association alone).

3. The criteria fail to utilize the least restrictive means to mitigate the “threat” to which they are addressed. No standard imposing an outright ban on air travel can comply with the Constitution if it is not the least restrictive means available to protect the Government’s interest in preventing threats to “civil aviation or national security” that could arise from permitting plaintiffs to fly. *See, e.g., Mohamed v. Holder*, 995 F. Supp. 2d 520, 530 (E.D. Va. 2014) (in a No Fly List case, citing *Aptheker* in refusing to conclude on record before the court that “there are no means less restrictive than an unqualified flight ban to adequately assure flight security”); *Jones v. Blanas*, 393 F.3d, 918, 932 (9th Cir. 2004) (striking down measures to incarcerate civil detainees because government’s procedures “[we]re employed to achieve objectives that could be accomplished in so many alternative and less harsh methods”). At a minimum, the Government must show why the utilization of the procedures it

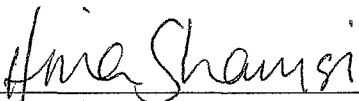
employed to avoid litigation of Plaintiffs' preliminary injunction motion—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

Plaintiffs request that Defendants craft new criteria that remedy these constitutional deficiencies, disclose those criteria to Plaintiffs, and apply those criteria to Defendants' factual allegations using a clear and convincing evidentiary standard.

Because Defendants have asked Plaintiffs to provide their responses to the DHS TRIP letters by December 15 or 16, 2014, the additional procedures and information we request should be provided to Plaintiffs no later than December 11, 2014. If Defendants agree to comply with the foregoing requests, Plaintiffs are willing to consider seeking a joint month-long extension of the January 16, 2015 deadline in the court's case management order, Dkt. No. 154 at 2, to accommodate hearings.

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Sincerely yours,



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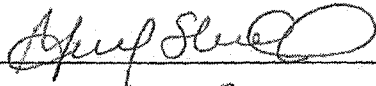
DEPARTMENT OF HOMELAND SECURITY
AUTHORIZATION TO RELEASE INFORMATION TO ANOTHER PERSON

Please complete this form to authorize the Department of Homeland Security (DHS) or its designated DHS Component element to disclose your personal information to another person. You are asked to provide your information only to facilitate the identification and processing of your request. Without your information DHS or its designated DHS Component element may be unable to process your request.

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Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above in Section I. I understand that falsification of this statement is punishable under the provisions of 18 U.S.C. §1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years, or both.

Signature 

Date 12/13/2014

PRIVACY ACT STATEMENT:

AUTHORITY: Title IV of the Intelligence Reform and Terrorism Prevention Act of 2004 authorizes DHS to take security measures to protect travel, and under Subtitle B, Section 4012(1)(G), the Act directs DHS to provide appeal and correction opportunities for travelers whose information may be incorrect.

PRINCIPAL PURPOSE(S): DHS will use this information in order to assist you with seeking redress in connection with travel.

ROUTINE USE(S): DHS will use and disclose this information to appropriate governmental agencies to verify your identity, distinguish your identity from that of another individual, such as someone included on a watch list, and/or address your redress request. Additionally, limited information may be shared with non-governmental entities, such as air carriers, where necessary for the sole purpose of carrying out your redress request.

DISCLOSURE: Furnishing this information is voluntary; however DHS may not be able to process your redress request without the information requested.