No. 11-35407

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AYMAN LATIF, et al.,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR. et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLEES

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GLOSSARY

DHS	Department of Homeland Security
DHS TRIP	Department of Homeland Security Traveler Redress Inquiry Program
FBI	Federal Bureau of Investigation
OTSR	Office of Transportation Security Redress
TSA	Transportation Security Administration
TSC	Terrorist Screening Center
TSDB	Terrorist Screening Database

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. See Excerpts of Record (ER) 29.[1] On May 5, 2011, the district court entered a final judgment dismissing plaintiffs' claims. ER 1-2. On May 12, 2011, plaintiffs filed a timely notice of appeal. ER 19-24. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly dismissed plaintiffs' claims for lack of subject matter jurisdiction and failure to join a required party under Federal Rule of Civil Procedure 19.

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[1] Plaintiffs also claimed jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702, see ER 29, but the APA is not a basis for subject matter jurisdiction. United States v. Park Place Assoc., 563 F.3d 907, 929 n.15 (9th Cir. 2009).

STATEMENT OF THE CASE

The Transportation Security Administration administers a program known as the Department of Homeland Security Traveler Redress Inquiry Program, otherwise known as "DHS TRIP." That program includes an avenue for redress to certain travelers who believe that their boarding of a commercial aircraft was incorrectly denied because their name is on the No Fly List. Plaintiffs are fifteen U.S. citizens or lawful permanent residents who have applied for redress under DHS TRIP, and received DHS TRIP determination letters from TSA. Plaintiffs filed a district court complaint contending that the government violated their Due Process rights because, in the redress process, plaintiffs are not provided with notice of the evidence allegedly used against them, nor are they provided with a meaningful opportunity to contest that evidence.

The district court dismissed the complaint. The court held that under Fed. R. Civ. P. 19, plaintiffs had failed to join TSA - the agency that established the procedures governing DHS TRIP, administers those procedures, and issued the DHS TRIP determination letters to plaintiffs - and TSA was a required party to the action. The court further held that TSA could not feasibly be joined in the district court because Congress expressly barred review of TSA orders except under 49 U.S.C. § 46110 via a petition filed in the court of appeals. Thus, the

court found that the action should be dismissed for failure to join a required party. Plaintiffs' timely appeal followed.

STATEMENT OF FACTS

I. LEGAL BACKGROUND.

The federal government maintains a consolidated terrorist watchlist, known as the Terrorist Screening Database or TSDB, of which the No Fly List is a subset. ER 123-126, 142. The creation of the consolidated terrorist watchlist was driven by the 9/11 Commission's conclusion that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the Nation's security. ER 124.

Two federal agencies are responsible for establishing and implementing the No Fly List and the redress procedures available to individuals who believe they have experienced denial or delay of boarding on a commercial aircraft because of placement on the list. As explained below, the Terrorist Screening Center (TSC), a multi-agency center administered by the Federal Bureau of Investigation (FBI), maintains the No Fly List. TSC participates in the DHS TRIP redress process by reviewing certain requests for redress referred to it by DHS TRIP and determining whether a record should remain in the TSDB, or have its TSDB status modified or removed.

The Transportation Security Administration (TSA), an agency within the Department of Homeland Security (DHS), implements the

No Fly List. Pursuant to statutory authority conferred by Congress, TSA conducts the watchlist matching function (previously performed by the airlines) through its Secure Flight program, which requires aircraft operators to submit passenger data that is compared to the No Fly List. Also pursuant to Congressional mandate, TSA establishes the policies and procedures that an individual must follow to apply for redress through DHS TRIP if he or she believes that placement on the No Fly List has resulted in a denial of airplane boarding.

A. The No Fly List.

Federal law requires the Administrator of TSA to provide for "the screening of all passengers and property, * * * that will be carried aboard a passenger aircraft operated by an air carrier * * * before boarding," 49 U.S.C. § 44901(a), to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance," 49 U.S.C. § 44902(a)(1).[2] The Administrator of TSA must also "share * * * data on individuals identified on Federal agency databases who may pose a risk to transportation or national security," "notif[y] . . . airport or

[2] TSA was formerly an agency within the Department of Transportation, and thus the Administrator was referred to in the statute as the "Under Secretary of Transportation for Security." See also 49 C.F.R. § 1500.3 (the Administrator of TSA "means the Under Secretary of Transportation for Security"). TSA's functions were subsequently transferred to the Department of Homeland Security, 6 U.S.C. § 203(2), and the Administrator is now also known as the "Assistant Secretary of Homeland Security for TSA," see, e.g., 49 U.S.C. § 44925(b)(1).

airline security officers of the identity of [such] individuals," and "establish policies and procedures requiring air carriers [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. § 114(h)(1)-(3); see also 49 U.S.C. § 44903(j)(2)(C) (requiring TSA to develop the passenger pre-screening program now known as Secure Flight and "begin to assume the performance of the passenger prescreening function of comparing passenger information to the * * * no fly list[] * * * .").

TSA implements the above provisions through the Secure Flight program, which is codified at 49 C.F.R. parts 1540, 1544, and 1560. The Secure Flight program was fully implemented for all covered aircraft operators in November 2010. See Press Release, TSA, DHS Achieves Major Aviation Security Milestone One Month Ahead of Schedule (Nov. 30, 2010), available at http://www.tsa.gov/press/releases/2010/1130.shtm. Covered aircraft operators, as defined by 49 C.F.R. § 1560.3, request the full name, gender, date of birth and (if applicable) DHS TRIP Redress Number, of passengers traveling on domestic flights and international flights to, from, and overflying the United States. 49 C.F.R. § 1560.101(a)(1). Covered aircraft operators must submit this Secure Flight Passenger Data to TSA prior to the scheduled departure of each covered flight. 49 C.F.R. § 1560.101(b). TSA uses these data to perform the watchlist

matching functions previously conducted by aircraft operators. See 49 C.F.R. § 1560.1(b)-(c); 49 C.F.R. § 1560.105(a). Covered aircraft operators must not issue a boarding pass until TSA has informed them of the results of the watchlist matching. 49 C.F.R. § 1560.105(b). If TSA sends a covered aircraft operator a boarding pass printing result that requires a passenger to be placed on an inhibited status, the covered aircraft operator must not issue a boarding pass and must not allow him or her to enter the sterile area of the airport or board an aircraft. 49 C.F.R. § 1560.105(b)(1).

Previously, TSA ensured that passengers who matched identities on the No Fly List were prevented from boarding an aircraft by issuing Security Directives that appended the No Fly List and directed air carriers to take particular security measures with respect to individuals matched to identities on the No Fly List. See generally Ibrahim v. DHS, 538 F.3d 1250, 1256-57 (9th Cir. 2008).

Thus, under the previously-existing system, "the Transportation Security Administration's Security Directive[s] implement the No-Fly List," and TSA "establishes other 'policies and procedures' to be followed [by air carriers] if they find a passenger's name on the list." Ibrahim v. DHS, 538 F.3d 1250, 1256-57 (9th Cir. 2008). TSA continues to establish the policies and procedures implementing the No Fly List, although TSA now

does this through the Secure Flight system described above.

While TSA establishes the procedures to implement the No Fly List, another federal agency is responsible for maintaining the No Fly List and providing it to TSA for use in TSA's pre-screening of airline passengers. The Terrorist Screening Center (TSC) is a multi-agency center administered by the FBI which receives support from, and is staffed by, officials from multiple agencies including TSA. ER 57, 123, 142. TSC maintains the federal government's consolidated Terrorist Screening Database (TSDB). The No Fly List is a subset of the TSDB. ER 126, 142.

Nominations to the TSDB begin with terrorist identity information being sent to TSC from two sources, the National Counterterrorism Center, which provides information about known or suspected international terrorists, and the FBI, which provides information about known or suspected domestic terrorists. TSC personnel, which includes subject matter experts from TSA, review the nominations to determine if they are supported by the minimum substantive derogatory criteria for inclusion in the TSDB, as well as the additional derogatory requirements for inclusion on the No Fly List. ER 130-32.[3]

Thus, TSC is responsible for maintaining the No Fly List,

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[3] Although TSC personnel review the underlying information supporting a nomination, that so-called "derogatory information" is not itself stored in the TSDB. Rather, only identifying information (e.g., name, date of birth) is stored in the TSDB. See ER 130-132.

while TSA is responsible for its implementation in the context of commercial air travel.

B. DHS TRIP Redress Process.

Congress directed TSA to "establish a timely and fair process for individuals identified as a threat * * * to appeal to the Transportation Security Administration the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i); see also 49 U.S.C. § 44903(j)(2)(C)(iii)(I) (TSA must "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding because the advanced passenger prescreening system determined that they might pose a security threat * * * to appeal such determination * * * ."). Congress also required TSA, as part of that process, to "include the establishment of a method by which [it] will be able to maintain a record of air passengers and other individuals who have been misidentified and have corrected erroneous information." Id. § 44903(j)(2)(G)(ii).

Congress further directed that the Secretary of Homeland Security "shall establish a timely and fair process for individuals who believe that they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration * * * ." 49 U.S.C. § 44926(a). Specifically, the Secretary "shall establish in the

Department an Office of Appeals and Redress to implement, coordinate, and execute the process established by the Secretary" for such redress, including a "process" to "maintain a record of air carrier passengers and other individuals who have been misidentified and have corrected erroneous information." Id. § 44926(b)(1), (2). The Secretary is similarly directed to "establish a timely and fair process" for redress with respect to international passengers, and "shall * * * maintain a record of air passengers and other individuals who have been misidentified and have corrected erroneous information," which records shall be maintained by the Secretary "[t]o prevent repeated delays of misidentified passengers and other individuals." Id. § 44909(c)(6)(B)(i), (ii).

Pursuant to this statutory authority, the Administrator of TSA established the Office of Transportation Security Redress (OTSR) and the Secretary of DHS, in turn, designated the OTSR as the Office of Appeals and Redress required by 49 U.S.C. § 44926. See ER 55-56.[4] OTSR acts as the lead agent managing the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). Ibid. DHS TRIP is a program through which

[4] Some of the above-described statutory authority is vested in the Secretary of DHS who, in turn, has delegated that authority to the Administrator of TSA. See ER 55. Thus TSA's authority governing DHS TRIP flows both directly from its own statutory authority, e.g., 49 U.S.C. § 44903, and from statutory authority delegated to it by the Secretary of DHS, e.g., 49 U.S.C. § 44926.

individuals may request redress if they believe, inter alia, they have been unfairly delayed or prohibited from boarding an aircraft as a result of TSA's watchlist matching program. See 49 C.F.R. § 1560.205(a); ER 55-56, 135, 142.

Travelers who seek redress for such complaints must submit a complaint to the DHS TRIP office. 49 C.F.R. § 1560.205(b); ER 56, 142. If TSA requires further information from the individual in order to resolve the request for redress, TSA will so notify the individual in writing and the individual can provide that additional information. 49 C.F.R. § 1560.205(c). If the traveler is an exact or near match to an identity in the TSDB, then TSA, via DHS TRIP, refers the matter to the Terrorist Screening Center's Redress Unit. ER 57, 143.

The TSC Redress Unit reviews the record in consultation with other agencies, as appropriate. ER 57. If TSC determines the traveler is an exact match to an identity in the TSDB, including its subset the No Fly List, TSC works with the agency that originally nominated the individual to be included in the TSDB to determine whether the complainant's current status in the TSDB is suitable based on the most current, accurate, and thorough information available. ER 136. After reviewing the available information and considering any recommendation from the nominating agency, TSC determines whether the record should remain in the TSDB as is, in a modified status, or be removed.

ER 136.[5]

After TSC completes its review, it notifies DHS TRIP as to the outcome of the review. ER 57, 137. When the complaint involves actions taken as a result of the Secure Flight program, DHS TRIP, in conjunction with TSA OTSR, then "maintains a record of the steps it has * * * taken in each individual's case," ER 57, "addresses [any] misidentification by correcting information in the traveler's records or taking other appropriate action," ER 143, and issues a determination letter to the complainant, ER 57, 143.

Thus, TSC is responsible for determining whether a record should remain in the TSDB or have its status modified or removed. TSA, however, is responsible for implementing the No Fly List and establishing the policies and procedures that govern the redress process Congress mandated be available to those who believe their names have wrongly been included in the No Fly List.

TSA is also responsible for issuing the DHS TRIP determination letters that provide the redress applicant who has alleged status on the No Fly List with as much information as possible as to steps taken in response to the redress complaint,

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[5] The TSDB is also periodically reviewed and audited "to guarantee the integrity of the information" and agencies that nominated an identity for the TSDB have "an ongoing responsibility * * * to notify * * * TSC of any changes that could affect the validity or reliability of th[e] information" relating to its nomination. ER 132.

without violating the government's "Glomar" policy. ER 57, 137, 143.[6] TSA's determination letters also inform an applicant that he or she "may file a request for administrative appeal with the Transportation Security Administration," and that in such an appeal the applicant "may provide any information * * * that you believe will be helpful to TSA," ER 60-61.

II. FACTUAL ALLEGATIONS AND PRIOR PROCEEDINGS.

A. Factual Allegations.

Plaintiffs are fifteen U.S. citizens or lawful permanent residents. ER 26-28. Each plaintiff believes he or she is on the No Fly List, ER 26, 48, and between January and August, 2010, each was denied boarding on a commercial aircraft to or from the United States, or experienced other difficulties while flying or attempting to fly, ER 33-47. Each plaintiff filed an application for redress under DHS TRIP. ER 26, 32, 47. Each received a determination letter from TSA as described above. ER 32, 47. The determination letters were issued to the plaintiffs between July 15 and November 17, 2010. See ER 60-121.[7]

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[6] Under the federal government's current "Glomar" policy, watchlist status can neither be confirmed nor denied because of concerns that revealing this information may have national security implications. ER 57. See also ER 133-134 (explaining national security concerns). For the origin of the term "Glomar," see, e.g., Pickard v. Department of Justice, 653 F.3d 782, 784 n.1 (9th Cir. 2011).

[7] An earlier letter (ER 111) was sent on June 22, 2010 to a plaintiff named in the original and first amended complaints, ER 161, 252, but who is not a named party in the second amended

Plaintiffs suggest that some of them are "stranded in foreign countries," Br. 4, but they later concede that those plaintiffs who wished to return to the United States did so, Br. 8 n.2.

B. District Court Decision.

1. On June 30, 2010, eight plaintiffs filed the instant complaint in the district court, with the seven other plaintiffs joining on August 6, 2010. ER 48. Plaintiffs' complaint names as defendants the Attorney General of the United States, the Director of the FBI, and the Director of the Terrorist Screening Center. Plaintiffs did not name the TSA or the Administrator of the TSA as parties to the action.

Plaintiffs' complaint alleges that the defendants "have not provided travelers with a fair and effective mechanism through which they can challenge the TSC's decision to place them on the No Fly List." ER 31 ¶ 37. Specifically, they assert two claims for relief. In the first, plaintiffs contend that the defendants violated their Fifth Amendment Due Process rights in "refusing to provide Plaintiffs with the reasons or bases for their placement on the No Fly List and in refusing to provide Plaintiffs with a meaningful opportunity to challenge their continued inclusion on the No Fly List." ER 49 ¶ 147. In the second claim for relief, plaintiffs allege that the defendants act in an arbitrary and

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complaint.

capricious manner – and thus violate the Administrative Procedure Act – by failing "to provide Plaintiffs * * * with a constitutionally adequate mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List." ER 50 ¶ 154.

2. On May 3, 2011, the district court dismissed plaintiffs' claims for failure to join a required party and for lack of subject matter jurisdiction. ER 3-18.

The district court began by noting that Fed. R. Civ. P. 19 governs whether a case should be dismissed for failure to join a required party. Under that Rule, the court must decide whether the non-party (here, TSA) is a required party that should be joined to the action. Parties are required under Rule 19, the court noted, if they "not only have an interest in the controversy, but an interest of such a nature that the final decree cannot be made without either affecting that interest or without leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." ER 12. If the non-party is required, the court must then decide whether joinder of that party is feasible. If not, then the court must decide if the action can proceed without the required party and, if it cannot, the action must be dismissed. ER 12 (citing EEOC v. Peabody Coal Co., 400 F.3d 774,

779 (9th Cir. 2005)).

To determine whether TSA is a required party to this action, the court examined the precise nature of plaintiffs' challenge and the relief sought. The court observed that plaintiffs brought a "procedural due-process claim center[ing] on the alleged inadequacies of DHS TRIP." ER 14. Significantly, plaintiffs "are not challenging their purported original placement on the No Fly List," but instead are "challenging the validity of the DHS TRIP procedures administered by TSA." ER 14. As the court succinctly put it, "the overarching theme throughout Plaintiffs' Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have Plaintiffs' names removed from any No Fly List and not the placement of their names on such List." ER 17. The court also noted that the "specific relief that Plaintiffs seek includes an injunction requiring Defendants to provide Plaintiffs with a meaningful opportunity to contest their continued inclusion on the No Fly List," but "that relief can only be obtained through DHS TRIP, which, as noted, is administered solely by TSA." ER 14.

Thus, the court concluded, plaintiffs' challenge to the DHS TRIP procedures is a challenge to "a matter that Congress has delegated to TSA, which is responsible for administering the DHS TRIP procedures." ER 17 (emphasis added). And because plaintiffs' claim (as well as the relief they seek) targeted the

DHS TRIP procedures for which TSA is statutorily responsible, TSA is a required party to this action. ER 17.

The district court found support in this Court's decision in Ibrahim v. DHS, 538 F.3d 1250 (9th Cir. 2008). As the district court noted, Ibrahim "distinguished TSC's role in placing names on the No Fly List," ER 14, from TSA's responsibility over "policies and procedures in implementing such List," ER 16. Ibrahim held that a challenge to the alleged placement of a name on the No Fly List was properly directed at TSC (which was responsible for the challenged action), whereas a challenge to the policies and procedures for carrying out the No Fly List was properly directed at TSA (which was responsible for the policies and procedures implementing the No Fly List). ER 15-16. Because plaintiffs' claims in this case are directed at "the inadequacy of TSA's trip procedures * * * and not at the placement of their names on such List," Ibrahim instructs that plaintiffs' claims are properly directed at TSA, not at TSC. ER 17.

Under 49 U.S.C. § 46110, review of TSA orders of the kind at issue here are within the exclusive jurisdiction of the courts of appeals. Accordingly, the district court held that TSA cannot feasibly be joined to this action in district court, and plaintiffs' claims must be dismissed. ER 17-18.

3. The district court entered a final judgment on May 5, 2011, ER 1-2, and plaintiffs timely appealed, ER 19-24.

SUMMARY OF ARGUMENT

The district court correctly held that plaintiffs' claims should be dismissed under Rule 19 for failure to join a required party. Plaintiffs in this case present a wholly procedural challenge. They do not attack the alleged underlying decision to put them on the No Fly List, nor do they direct their challenge to the substantive outcome of their DHS TRIP application. Rather, plaintiffs here contend only that they have been denied notice of the evidence allegedly used against them, and a meaningful opportunity to contest that evidence before the agency. And the relief plaintiffs seek is also wholly procedural, namely, an order requiring a purportedly legally adequate alternative to DHS TRIP procedures.

TSA is the only government agency vested with the statutory responsibility for establishing procedures governing the DHS TRIP process. Thus, any challenge to the DHS TRIP procedures necessarily requires TSA involvement, given that any relief that might be granted would be directed at the TSA policies and procedures implemented at Congress's express direction. It follows, therefore, that TSA is a required party to this action.

That result is entirely consistent with Ibrahim, which held that a challenge to the policies and procedures for implementing the No Fly List was properly directed at TSA. If the rule in Ibrahim were applied here, plaintiffs' challenge to the policies

and procedures for implementing DHS TRIP would likewise be properly directed at TSA, and thus TSA is a required party to the action. Furthermore, Ibrahim addressed a challenge to the alleged original placement on the No Fly List, not a challenge to the DHS TRIP redress program. Ibrahim's bifurcation of jurisdiction - some claims to be brought against TSA and some against TSC - is limited to the narrow context of that case, and does not apply to the wholly different context involving a challenge only to DHS TRIP. Rather, all challenges to DHS TRIP are properly directed at TSA, and thus TSA is a required party for such actions. Accordingly, whether or not the law of this Circuit in Ibrahim applies here, the result in this case is the same - plaintiffs' case must be brought against TSA, and that can be done only in the court of appeals, not a district court.

Although it is a required party, TSA cannot be feasibly joined in the district court. Plaintiffs' challenge requires review of TSA orders implementing DHS TRIP, but exclusive review of TSA orders lies in the courts of appeals pursuant to 49 U.S.C. § 46110. Plaintiffs incorrectly argue that TSA's actions are not "orders" under Section 46110 because TSA has not set a fixed, final or definite position with respect to their claims. But there is no doubt that TSA has implemented DHS TRIP procedures without the exact procedural features plaintiffs believe necessary, that TSA's establishment of those procedures is a

final agency decision, and that it fixes a legal relationship between TSA and a DHS TRIP applicant. Whether that decision derives from TSA's regulations or from the DHS TRIP determination letters issued by TSA, there is no doubt that it is a fixed and final TSA decision that constitutes an "order" under Section 46110.

It is true that the determination letters plaintiffs received do not disclose the substantive outcome of the DHS TRIP process or the plaintiffs' current watchlist status because of the government's "Glomar" policy, but that is irrelevant to whether TSA has issued a final, definitive order. Plaintiffs do not challenge the substantive outcome of the DHS TRIP process or the government's "Glomar" policy, so the extent to which TSA has issued a final definitive order on those subjects is irrelevant. And in any event, whether or not TSA disclosed its final determination, it still made that determination. This Court has already held that a sufficiently definitive and final agency action can constitute an "order" under Section 46110 even if it its contents are not disclosed to the plaintiff or the court.

Because TSA is a required party to plaintiffs' action and cannot be feasibly joined to an action in district court, the district court did not abuse its discretion in dismissing the action under Rule 19. Plaintiffs provided no argument for why the action should, "in equity and good conscience," proceed

notwithstanding the inability to join a required party. Fed. R. Civ. P. 19(b). Nor, for reasons discussed below, can this Court transfer the district court complaint to itself as if it were a petition for review under Section 46110.

STANDARD OF REVIEW

A district court's dismissal for failure to join a required party is reviewed for an abuse of discretion, but the underlying legal conclusions are reviewed de novo. Lyon v. Gila River Indian Community, 626 F.3d 1059, 1067 (9th Cir. 2010).

ARGUMENT

Dismissal for failure to join a required party under Fed. R. Civ. P. 19 is governed by a three-party inquiry: (1) whether the party in question is required to be joined; (2) if so, whether that party can feasibly be joined; and (3) if not, whether the action "in equity and good conscience" should proceed with the existing parties or be dismissed. See generally Paiute-Shoshone Indians v. Los Angeles, 637 F.3d 993, 997 (9th Cir. 2011). The district court correctly concluded that TSA is a required party to plaintiffs' action, but could not feasibly be joined in district court and that the action should therefore be dismissed.

I. TSA IS A "REQUIRED PARTY" UNDER RULE 19(a)(1).

It is undisputed that plaintiffs did not name TSA as a party to this action. The central issue in this appeal is whether TSA is a "required party" under Rule 19(a)(1). Federal Rule of Civil

Procedure 19(a)(1) defines a "required party," in relevant part, as "[a] person who * * * in that person's absence, the court cannot accord complete relief among the existing parties." Fed. R. Civ. P. 19(a)(1).[8]

A. Plaintiffs Challenge Only the Procedures Implementing DHS TRIP.

Whether a court could accord "complete relief" on plaintiffs' claims depends, by definition, on the nature of those claims. It is crucial, therefore, to identify precisely the nature of the claims in this case and what the "practical effect" of any judicial relief would be. Manybeads v. United States, 209 F.3d 1164, 1166 (9th Cir. 2000). As the district court found, plaintiffs are not challenging their alleged original placement on the No Fly List. Nor do plaintiffs contend that, following their DHS TRIP applications, the government reached the wrong substantive conclusion as to whether their alleged status on the No Fly List should be changed.

Instead, plaintiffs raise only procedural challenges, contending that the federal government has not "provided travelers with a fair and effective mechanism through which they

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[8] The government and federal agencies are considered "persons" under Rule 19. Carson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975).

Although the wording to Rule 19 changed in 2007, the changes were intended to be stylistic and not substantive. Accordingly, cases interpreting the earlier language are still relevant. EEOC v. Peabody Western Coal Co., 610 F.3d 1070, 1077 & n.1 (9th Cir. 2010).

can challenge the TSC's decision to place them on the No Fly List." ER 31 ¶ 37 (emphasis added). Specifically, plaintiffs argue that the federal government acted unlawfully in failing to give them notice of the evidence allegedly used to put them on the No Fly List and in failing to give them a meaningful opportunity to contest that evidence. Even more specifically, plaintiffs disavow any right to see the evidence or have a hearing before they are (allegedly) put on the No Fly List or before they are denied boarding (allegedly) because of the No Fly List. See Supplemental Excerpts of Record (SER) 10 (plaintiffs' counsel disclaiming any argument as to pre-deprivation notice or opportunity to contest). Rather, as noted by the district court, ER 6, 8, plaintiffs claim a right to "post-deprivation notice," that is, a right to have notice of the evidence and an opportunity to contest that evidence sometime after they have been denied boarding because of their alleged inclusion on the No Fly List, see SER 11-12, but before the government makes a final decision on their DHS TRIP applications.

Plaintiffs made clear in their complaint, over and over, that their challenge was exclusively procedural, seeking access to evidence and a right to a hearing. Plaintiffs' complaint presents only two claims (for violating the Due Process Clause and the Administrative Procedure Act), and in each instance plaintiffs complain only that they "are entitled to a

constitutionally adequate legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List." ER 50 ¶ 151 (emphasis added).[9]

Plaintiffs repeatedly stressed the procedural nature of their claims at the hearing before the district court. See SER 18 ("[T]he constitutional minimum would be a process that gives them some meaningful notice of the reason for the Government's decision that they can't board a plane."); id. at 24 ("Meaningful notice of the basis for the deprivation. * * * But, at a minimum, they need to know why the Government is not allowing them to fly. And they need to know that well enough so that they have an opportunity to say either, That's not me, That's not true, or I can explain that. * * * It's a procedural due process claim.");

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[9] See also ER 26 ¶ 4 ("[N]o government official or agency has offered any explanation for Plaintiffs' apparent placement on the No Fly List or any other watch list that has prevented them from flying. Nor has any government official or agency offered any of the Plaintiffs any meaningful opportunity to contest his or her placement on such a list."); ER 49 ¶ 147 (noting refusal "to provide Plaintiffs with the reasons or bases for their placement on the No Fly List" and failure "to provide Plaintiffs with a meaningful opportunity to challenge their continued inclusion on the No Fly List"); ER 50 ¶ 151 ("Plaintiffs * * * are entitled to a constitutionally adequate legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List."); ER 50 ¶ 154 (government failed "to provide Plaintiffs * * * with a constitutionally adequate mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List").

id. at 27 ("The problem is they're not told what they should submit that evidence in response to, and they don't know what it's about.").

And in their appellate brief, plaintiffs once again reiterate the procedural nature of their claims: "Plaintiffs alleged that Defendants violated their Fifth Amendment right to due process and rights under the Administrative Procedure Act by failing to afford them a meaningful opportunity to contest their inclusion on the 'No Fly List.'" Br. 2.[10]

These allegations - a failure to give notice of the relevant evidence and the lack of a meaningful opportunity to contest that evidence - are quintessentially procedural claims that challenge the adequacy of the government's processes, rather than the ultimate substantive decision reached under those processes. The district court therefore correctly concluded that "the overarching theme throughout Plaintiffs' Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have

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[10] See also Br. 3 ("without providing any meaningful opportunity to object"); Br. 4 ("[N]o government official or agency has offered any explanation for Plaintiffs' apparent placement on the No Fly List or offered any of the Plaintiffs a meaningful opportunity to confront or rebut the basis for their inclusion, or apparent inclusion, on such a list."); Br. 7-8 ("failing to afford them a meaningful opportunity to contest their inclusion on the No Fly List following their denial of boarding on commercial flights"); Br. 9 ("At no point in the available administrative process has any Plaintiff been told whether he is on the No Fly List or the basis for his inclusion on the list, let alone been given an opportunity to contest such inclusion.").

Plaintiffs' names removed from any No Fly List and not the placement of their names on such List." ER 17.[11]

B. TSA Establishes the Procedures Challenged by Plaintiffs and Therefore TSA is a Required Party.

As explained in detail above, supra at 7-8, Congress mandated that TSA "establish a timely and fair process" for individuals attempting to "correct any erroneous information" about the No Fly List. 49 U.S.C. § 44903(j)(2)(G)(i). See also id. § 44903(j)(2)(C)(iii)(I) (TSA must "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding because the advanced passenger prescreening system determined that they might pose a security threat * * * to appeal such determination * * * ."); id. § 44926(a) (DHS "shall establish a timely and fair process for individuals who believe that * * * they were wrongly identified as a threat"); id. § 44909(c)(6)(B)(i) (DHS must "establish a timely and fair process" for redress with respect to international passengers).

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[11] At times, plaintiffs attempt to argue that their claims are not directed at DHS TRIP procedures, but instead at TSC's substantive decision under that procedure. See Br. 27 ("Plaintiffs' claims contest the validity of the Terrorist Screening Center's decisions."); see also Br. 10 ("Plaintiffs' claims challenge their placement on the No Fly List"); Br. 11 (complaint "is a challenge to TSC's decision to prevent them from flying"); Br. 16 (plaintiffs "contend that their names were improperly placed on the No Fly List"); Br. 26 (plaintiffs "challenge only their watch list status"). But as discussed above, plaintiffs have made the exclusively procedural nature of their claims abundantly clear in their complaint, at the district court hearing, and in their appellate briefs. They cannot now claim to alter the nature of their entire suit at this late date.

Pursuant to this statutory authority, TSA established the procedures that govern how a traveler can seek redress if the traveler believes he or she has been denied boarding onto a commercial aircraft because of placement on the No Fly List. 49 C.F.R. § 1560.205; see supra at 9-10.

It necessarily follows that plaintiffs' claims challenging the adequacy of those procedures - asserting that the procedures are unlawful because at the administrative level they do not provide notice of certain evidence and do not provide an opportunity to contest the evidence - are directed at procedures established by TSA. It likewise follows that TSA is a "required party" under Rule 19(a). If the entire gravamen of plaintiffs' claims is directed at the DHS TRIP procedures, and those procedures are established and administered by TSA, then TSA is unquestionably a "required party."

As noted above, Rule 19(a)(1)(A) defines a "required party," in relevant part, as "[a] person who * * * in that persons' absence, the court cannot accord complete relief among the existing parties." Fed. R. Civ. P. 19(a)(1)(A). To grant plaintiffs the relief they seek - a declaratory judgment that the DHS TRIP procedures are inadequate and an injunction requiring the government to provide a legally adequate process for redress, ER 10-11, 51; SER 23 - would necessarily require TSA as a party. Any court-ordered relief requiring different procedures must be

directed at TSA, the government entity vested with the statutory authority to establish those procedures. If TSA were not a party to the action, TSA could not and would not be bound by any declaratory or injunctive relief relating to the DHS TRIP procedures. See, e.g., Paiute-Shoshone Indians v. City of Los Angeles, 637 F.3d 993, 998 (9th Cir. 2011). Accordingly, the district court could not have entered any meaningful relief at all concerning the DHS TRIP procedures without joining TSA as a party.[12]

C. Ibrahim Supports the District Court's Judgment.

Contrary to plaintiffs' argument, Br. 14-16, the district court's conclusion that plaintiffs' claims are directed at TSA rather than TSC is fully consistent with this Court's decision in Ibrahim v. DHS, 538 F.3d 1250 (9th Cir. 2008). The government continues to disagree, in part, with this Court's decision in

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[12] If the TSA were bound to alter its DHS TRIP procedures by virtue of any judgment issued by the district court, then TSA would be a required party under Rule 19(a)(1)(B). Under that provision, a person is a required party if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B). TSA obviously has "an interest" relating to the challenged DHS TRIP procedures it establishes and implements. And if TSA were bound by a district court judgment even if it were not a party to the action, that would "impair or impede" TSA's ability to protect that interest, because it would require the agency to comply with injunctive relief ordering alteration of the agency's own DHS TRIP procedures even though it was not a party to the action challenging TSA's procedures.

Ibrahim. For present purposes, however, we recognize it as the law of this Circuit, and it supports the decision below.[13]

In Ibrahim, the plaintiff brought two challenges, one to the alleged "placement of her name on the No-Fly List" and the other to "the government's policies and procedures implementing the No-Fly List." 538 F.3d at 1254. With respect to the first claim, this Court held that "the Terrorist Screening Center actually compiles the list of names ultimately placed on the No-Fly List," id. at 1255, and thus a challenge to the alleged placement of her name on the No Fly List was actually a claim against the TSC, ibid. With respect to the second claim – a challenge to the policies and procedures implementing the No Fly List – this Court reached a different conclusion. The Court found that TSA (not TSC) issues the "Security Directive implementing the No-Fly List * * * and establish[ing] other 'policies and procedures' to be followed if they find a passenger's name on the list," 538 F.3d at 1256-57, and thus the plaintiff's second challenge to those policies and procedures was a claim against the TSA, not TSC, ibid.

Assuming Ibrahim's distinction between placing names on the No Fly List and implementing the No Fly List applies here, that distinction supports the district court's holding in this case.

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[13] The government reserves its right to urge that Ibrahim be overruled should this case proceed to review before an en banc Court or the Supreme Court.

As we have explained, plaintiffs here, unlike the plaintiff in Ibrahim, do not challenge the alleged placement of their names on the No Fly List, or even the alleged continued placement of their names on the No Fly List following a DHS TRIP application. Instead, plaintiffs here challenge the policies and procedures governing the DHS TRIP redress program and whether those procedures must provide notice of the evidence and an opportunity to contest that evidence. TSA is the federal agency that Congress mandated to establish the policies and procedures governing the DHS TRIP redress program, and thus a challenge to those procedures must be a claim against TSA. Just as Ibrahim's argument that "the agency didn't give her an 'opportunity to contest'" was properly directed at TSA, 538 F.3d at 1256, so too is plaintiffs' challenge that they are denied "a meaningful opportunity to contest their continued inclusion on the No Fly List," ER 50 ¶ 154, properly directed at TSA. As in Ibrahim, TSA is responsible for the procedures and policies under attack, and thus plaintiffs' claims are directed at TSA.

The court in Scherfen v. DHS, 2010 WL 456784 (M.D. Pa. 2010), reached essentially the same conclusion. There, the court faced a plaintiff's challenge to "the sufficiency of the process provided" in the DHS TRIP redress program. Id. at *10. While the court was not bound by Ibrahim and disagreed with its holding, id. at *12-*13, the court nonetheless held that under

Ibrahim's logic, a challenge to the sufficiency of the DHS TRIP procedures was a challenge directed at a TSA order, not a challenge directed at TSC, because DHS TRIP procedures are established by TSA (not TSC), pursuant to an express grant of statutory authority from Congress. Id. at *11. The court explained that "the existence of TRIP determination letters in this case means that, unlike Ibrahim, there are orders issued by an agency named with[in] § 46110," that "by way of contrast [with Ibrahim], TRIP was established under 49 U.S.C. § 44926, a statute encompassed by the jurisdictional grant conferred by § 46110" and that the DHS TRIP determination letters too "are orders of an agency identified in 46110(a)." Ibid. "Accordingly," the Scherfen court concluded, "Plaintiffs properly invoked the exclusive jurisdiction of the Third Circuit when they petitioned for review of the TRIP determination letters in December of 2008, and this Court lacks the authority to proceed in this matter." See also Mohamed v. Holder, 2011 WL 3820711 at *8 (E.D. Va. 2011) (concluding that plaintiff's challenge "may bear on whether the DHS TRIP provides adequate process" and thus it "implicate[s] a TSA order under Section 46110" over which the district court "does not have subject matter jurisdiction").

Plaintiffs contend that the district court here erred when, relying on Ibrahim, it supposedly drew a "false distinction" between placement of a name on the No Fly List and removal of

that name. Br. 17. But the district court actually drew a distinction between the substantive decision to place a name on the No Fly List and the policies and procedures for implementing the No Fly List. ER 17. As noted above, that is precisely the distinction this Court drew in Ibrahim. Whether or not this Court was correct in drawing that distinction, applying it here can only support the judgment below.

D. Ibrahim Does Not Apply and All Challenges to DHS TRIP Must be Made in the Court of Appeals.

Although this Court could affirm the judgment below even assuming that Ibrahim's bifurcated jurisdictional holding applies to this case, this Court could also affirm on the alternative ground that Ibrahim is limited to the facts before it, has no bearing on a challenge to DHS TRIP (a challenge not raised in Ibrahim), and that all challenges to DHS TRIP must be brought in the court of appeals.

As noted above, Ibrahim involved a challenge to the plaintiff's alleged original placement on the No Fly List. And unlike this case, there was no challenge in Ibrahim to the DHS TRIP procedure.

That difference is critical. Congress has never provided any express statutory mechanism for a traveler who wishes to challenge her alleged original placement on the No Fly List. In the absence of an express statutory redress procedure assigned by Congress to a particular agency, this Court concluded that any

such challenge must be directed at TSC.

But a challenge to the alleged continued placement on the No Fly List after filing a DHS TRIP application is a different matter. Congress expressly provided, in the statutory authority discussed above, supra at 8-9, that TSA is responsible for implementing a redress procedure and that requests for redress should be channeled through TSA. Unlike the specific challenge brought in Ibrahim, the plaintiffs here seek redress in the face of statutes expressly providing for that redress, vesting TSA with authority for implementing the redress program, and channeling the provision of redress relief through TSA. Furthermore, the culmination of that redress process for the plaintiffs here is a DHS TRIP determination letter issued by TSA, whereas the alleged original placement of a name on the No Fly List (the specific subject at issue in Ibrahim) did not result in any such final letter being issued by TSA. Accordingly, any challenge to the DHS TRIP redress process finds no analog in the Ibrahim case and is therefore outside the scope of that case. Instead, any challenge to the DHS TRIP redress program is necessarily directed at TSA, and can only be brought via a petition for review filed in an appropriate court of appeals under 49 U.S.C. § 46110.

E. Complete Relief Cannot Be Accorded Absent TSA.

Plaintiffs argue that TSA is not a "required party" under

Rule 19(a) because plaintiffs can be accorded relief without joining TSA. Specifically, plaintiffs point to the prayer for relief of their complaint. See Br. 5, 16, 18. The prayer for relief seeks an injunction ordering changes to DHS TRIP that address the asserted constitutional flaws in the currently existing procedures. ER 51. But, as an alternative remedy, plaintiffs suggest that the court could issue an injunction ordering the government to remove plaintiffs from any watch list. Ibid. Plaintiffs apparently contend that the court could accord such relief against TSC alone, and thus TSA is not a required party to this action.

Plaintiffs' reliance on this alternative form of relief is misplaced. Rule 19(a)'s reference to the inability of a court to order "complete relief among existing parties" is "concerned with consummate rather than partial or hollow relief as to those already parties." Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983). Thus, where a court could issue one form of relief (money damages) against existing parties but not other relief (declaratory and injunctive relief) against existing parties, this Court found the absent person to be required under Rule 19. EEOC v. Peabody Western Coal Co., 400 F.3d 774, 780 (9th Cir. 2005).

More fundamentally, however, plaintiffs' requested alternative relief is not available in this action. As noted

numerous times above, plaintiffs' claims assert that the existing DHS TRIP procedures are unlawful because they fail to give plaintiffs notice of the evidence or a meaningful opportunity to contest that evidence. Assuming plaintiffs were to prevail based on their allegations, the appropriate relief would be an order directing a new and adequate process. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 573 & n.12 (1972) ("due process would accord an opportunity to refute the charge" but "the purpose of such notice and hearing is to provide the person an opportunity" to contest the evidence, not to guarantee a particular substantive outcome). Thus, even if plaintiffs were to eventually succeed on the merits of their claims, the proper relief would not be removal of their names that are allegedly on the No Fly List, but an order concluding that DHS TRIP is inadequate and requiring the formulation of new policies and procedures to provide redress. However, any such order must necessarily be directed at TSA, the only government entity charged by Congress to establish those policies and procedures governing DHS TRIP.[14]

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[14] In the district court, plaintiffs seemingly conceded this point. See SER 19-20 ("But if the Court were to agree that the existing redress process were unconstitutional, ideally the agency would respond by creating a process that met those constitutional minimums. * * * But we certainly don't disagree with the Government, that the agency should have a chance, in the first instance, to create a process that meets those constitutional safeguards, as they do in many, many other circumstances.").

Plaintiffs' suggestion (Br. 28-29) that the district court could order TSC to establish new DHS TRIP procedures fails to explain how a court would have the authority to direct TSC to establish DHS TRIP procedures when Congress has very clearly assigned that responsibility to TSA. Plaintiffs do not cite any cases - and we are aware of none - in which a federal court, having found that an agency's procedures are inadequate, directed another federal agency to formulate new procedures despite the fact that Congress has vested authority to establish those procedures in a different federal agency.

II. TSA CANNOT FEASIBLY BE JOINED TO THIS ACTION.

As discussed above, TSA is a required party to this action. The next question under Rule 19 is whether TSA can be feasibly joined. The district court correctly held that TSA could not be joined because the courts of appeals have exclusive jurisdiction, under 49 U.S.C. § 46110, to review the TSA orders implementing the DHS TRIP redress process. ER 17-18.

A. TSA's Regulations Governing the DHS TRIP Process Are Orders Subject to the Exclusive Jurisdiction of the Court of Appeals.

Under the relevant statutory authorities discussed above, supra at 8-9, TSA is responsible for establishing and implementing the DHS TRIP procedures at issue here and has done so through regulation at 49 C.F.R. part 1560. Pursuant to that regulation, "[i]f an individual believes he or she has been

properly or unfairly delayed or prohibited from boarding an aircraft * * * the individual may seek assistance through the redress process established under this section." Id. § 1560.205(a). The individual may do so by "obtain[ing] the forms and information necessary to initiate the redress process on the DHS TRIP Web site * * * or by contacting the DHS TRIP office by mail." Id. § 1560.205(b). The individual must then send to DHS TRIP his or her name, address and other identifying information to trigger the redress review process. Id. § 1560.205(c), (d).

TSA's regulations establishing DHS TRIP constitute an "order" under 49 U.S.C. § 46110. Section 46110 applies to orders issued by the Under Secretary of Transportation for Security (i.e., the Administrator of the TSA, see supra note 2), and the DHS TRIP regulations are in fact issued by TSA. Section 46110 also applies to orders issued "in whole or in part under this part," i.e., United States Code, Title 49, Subtitle VII, Part A, which includes 49 U.S.C. §§ 40101-46507. All the provisions that vest TSA with authority to promulgate the final rule that included the regulations regarding DHS TRIP (49 U.S.C. §§ 114, 40113, 44901, 44902, 44903, 44909, 44926) are located in the relevant part of Title 49.

TSA's regulations are likewise sufficiently definitive and final, and thus come within this Court's "broad construction" of

what constitutes an "order" under Section 46110. Gilmore v. Gonzales, 435 F.3d 1125, 1132 (9th Cir. 2006) (an order under § 46110 includes "any agency decision which imposes an obligation, denies a right, or fixes such legal relationship"). There is no doubt that TSA's regulations are final, see 73 Fed. Reg. 64018, 64065 (Oct. 28, 2008) (announcing a final rule including DHS TRIP procedures), and the product of agency rulemaking is sufficiently final to qualify as an "order" under Section 46110, see, e.g., Sima Products Corp. v. McLucas, 612 F.2d 309 (7th Cir. 1980) (the term "order" "should be construed more expansively" to include the "product of informal rulemaking").

And with specific reference to plaintiffs' claims - that the government does not provide a traveler with notice of the alleged evidence against him or an opportunity to contest that evidence before his DHS TRIP application involving alleged No Fly List status is acted upon by the government - there is also no doubt that TSA has established those procedures without the features plaintiffs believe necessary, that TSA's establishment of those procedures is a final agency decision, and that it fixes a legal relationship between TSA and a DHS TRIP applicant. In other words, there is no doubt that TSA does not afford plaintiffs the procedural rights to which they claim a constitutional entitlement. Thus, TSA's regulations are an "order" within the

meaning of Section 46110 because they "provide[] a definitive statement of the agency's position," Gilmore, 435 F.3d at 1132 (quoting Crist v. Leippe, 138 F.3d 801, 804 (9th Cir. 1998)).[15]

Any judicial order modifying the redress procedures available to those who believe they have been denied boarding because of placement on the No Fly List would require TSA to alter its regulations. However, because TSA's regulations establishing the DHS TRIP procedures qualify as an "order" under 49 U.S.C. § 46110, the constitutional adequacy of those regulations can only be reviewed in the court of appeals under Section 46110, and district courts lack jurisdiction over such a claim. And because the district court would lack jurisdiction over such a challenge, TSA could not feasibly be joined to this action under Rule 19.

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[15] Plaintiffs here challenge the adequacy of the agency procedures, claiming a right to see the alleged evidence against them and to have a meaningful hearing before the agency to contest that evidence. That issue is entirely different from the question of the adequacy of any federal court review of the agency's decision. That is, the fact that plaintiffs are not afforded the agency procedures to which they claim a right says nothing about whether a federal court could examine the same evidence (in whole or in part ex parte and in camera) and review the lawfulness of the agency's final determination in light of that evidence. The federal government agrees that such judicial review in an appropriate federal court is available. But plaintiffs here are not arguing that federal judicial review would be inadequate; instead, plaintiffs argue only that the process they get before the agency is constitutionally inadequate.

B. Plaintiffs' DHS TRIP Determination Letters Are Orders Subject to the Exclusive Jurisdiction of the Court of Appeals.

At times in this litigation – in their complaint, ER 32 ¶ 40, at the district court hearing, SER 20, 27, 52, and in their appellate brief, Br. 7, 8 – plaintiffs focused on the perceived inadequacy of the DHS TRIP determination letters.[16] Those determination letters received by plaintiffs also constitute "orders" under Section 46110.

DHS TRIP determination letters received by plaintiffs were issued by TSA, and are issued pursuant to the statutory authority (49 U.S.C. § 44903, 44909, 44926) located in the part of Title 49 enumerated in Section 46110. Plaintiffs do not contend otherwise. Moreover, the DHS TRIP determination letters received by plaintiffs, which communicate the resolution of plaintiffs' redress complaints with the confines of the "Glomar" policy, are

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[16] Yet plaintiffs have sometimes asserted that their claims are not directed at the DHS TRIP determination letters at all. See Pls.' Supp. Mem. at 6 ("Plaintiffs Do Not Seek Review of DHS TRIP Letters."), Latif v. Holder (D. Or. Case No. 3:10-cv-750) (Mar. 4, 2011) (docket entry # 67). The nature of plaintiffs' claims – that they are entitled to notice and an opportunity to contest after they have had their boarding denied or delayed but before their redress application is resolved – also suggests that their claim is not in fact directed at the DHS TRIP determination letters received by plaintiffs. If plaintiffs are not in fact challenging their determination letters, then their argument that the DHS TRIP letters they received are not "orders" under Section 46110 is irrelevant. The only thing that matters is that the TSA regulations (49 C.F.R. § 1560.205) discussed above – which set forth the procedures governing DHS TRIP applications and are therefore the true subject of plaintiffs' claims – are "orders" within the meaning of Section 46110.

final and definitive, and thus constitute "orders" under Section 46110. As noted earlier, plaintiffs claim a right to have the DHS TRIP procedures provide them with notice of the evidence against them regarding alleged No Fly List status and an opportunity to be heard before the agency, and as also discussed above, supra at 37-38, there is no doubt that the absence of those procedures exists, is final, and fixes a legal relationship between TSA and a DHS TRIP applicant. Whether it is the DHS TRIP determination letter received by plaintiffs or the DHS TRIP regulations that preclude plaintiffs from seeing the alleged evidence against them or having a hearing before the agency, either way there is no doubt that TSA takes a final, definitive position that plaintiffs are not afforded the procedural rights plaintiffs contend they are entitled to have. That is all the finality and definitiveness an "order" requires under Section 46110.

Plaintiffs observe, however, that the DHS TRIP determination letters they received do not disclose their watchlist status or the substantive decision reached by the government in response to their applications for redress. Br. 19. Plaintiffs argue, therefore, that the determination letters they received cannot be "orders" under Section 46110, because they do not provide a definitive answer to what decision the government reached and do not tell the recipient what his or her current watchlist status

is. Br. 19-20.

The premise underlying plaintiffs' argument is that an agency action cannot constitute an "order" under Section 46110 unless the government discloses everything about the agency action. But this Court's precedents say the opposite. In Gilmore, this Court found a TSA security directive to be an order under Section 46110 even though the security directive was never disclosed to the plaintiff and was reviewed by this Court only in camera and under seal. Gilmore, 435 F.3d at 1133. The same was true in Ibrahim, where this Court held that a TSA security directive is an order under Section 46110 despite the fact that "[t]he precise policies and procedures mandated by the Security Directive are not known to Ibrahim or to us because the Security Directive is 'sensitive security information' that the government maintains may not be disclosed to the public or in open court." 538 F.3d at 1257 & n.10.

Moreover, plaintiffs' argument ignores the nature of their own claims. Their challenge is not directed at the substantive decision reached by TSC in the redress process, or at the government's "Glomar" position (see supra at 11-12 & note 6) which prevents the letters from informing redress applicants of their status on the No Fly List. Rather, plaintiffs' challenge is directed at the procedures governing DHS TRIP, namely, the failure to give notice of the evidence allegedly supporting

placement on the No Fly List, and the lack of an opportunity to contest that evidence. And as discussed above, TSA has announced with sufficient finality and definitiveness that plaintiffs are not afforded the exact procedures before the agency to which they claim an entitlement. See supra at 37-38.

Plaintiffs also argue (Br. 21-22) that DHS TRIP determination letters they received cannot be TSA "orders" under Section 46110 because there is no administrative record for a court to review. But this Court has noted that "[a]n adequate record" for purposes of Section 46110 "may consist of 'little more' than a letter," Gilmore, 435 F.3d at 1133, and plaintiffs offer no reason why that should be any different for the DHS TRIP determination letters they received (or for the TSA's regulations governing the DHS TRIP procedures).[17]

Moreover, plaintiffs' argument appears to be that the record here would be the underlying derogatory information supporting TSC's alleged decision to keep the plaintiffs on the No Fly List. Br. 22. But as noted numerous times above, plaintiffs' challenge in this case is not directed at the substantive decision reached in the DHS TRIP process, and thus the relevant record here would

[17] Furthermore, the Court in Ibrahim stated that "the absence of a record lends support" to the view that a challenged decision is not subject to the appellate court's exclusive jurisdiction under Section 46110, not that the issue is dispositive. Ibrahim, 538 F.3d at 1256 n.8.

not involve that alleged derogatory information.[18]

Furthermore, plaintiffs' argument appears to focus on which federal agency creates or retains the relevant administrative record. Br. 22. Nothing in this Court's cases suggests that Section 46110 turns on that question. While this Court has stated that the existence of a record informs whether the agency action at issue is an "order" under Section 46110, the Court has never held that which agency creates the record or maintains custody of it informs whether the agency action at issue is or is not a "order" under Section 46110. The only thing that matters under the language of Section 46110 is which agency issues the "order," see 49 U.S.C. § 46110(a)(1) ("a person disclosing a substantial interest in an order issued by the Secretary of Transportation * * * or the Under Secretary of Transportation for Security * * * may apply for review of the order * * * "), not which agency maintains custody of the record supporting that order.[19]

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[18] Of course, were a plaintiff to bring a challenge in the proper forum to the substantive decision reached in the DHS TRIP process involving alleged No Fly List status, see supra note 15, there would be an administrative record available for judicial review (albeit in camera, ex parte review, in whole or in part). That is consistent with the government's position in Kadirov v. TSA, D.C. Cir. No. 10-1185 (certified index of record filed Jan. 5, 2011).

[19] We note further that Congress has directed TSA as part of the redress process to establish "a method by which [TSA] will be able to maintain a record of air passengers and other individuals who have been misidentified and have corrected

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS BECAUSE TSA IS A REQUIRED PARTY THAT CANNOT FEASIBLY BE JOINED

As discussed above, TSA is a required party to this action, and TSA could not have feasibly been joined in the district court because exclusive jurisdiction over plaintiffs' claims lies in the courts of appeals under 49 U.S.C. § 46110. The final question under Rule 19, then, is whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

Plaintiffs present no argument for why "in equity and good conscience" this case should proceed even without TSA joined to the action. Nor did they present any such argument below. Without presenting any argument, plaintiffs cannot hope to show that the district court abused its discretion in dismissing their action once the court determined that TSA is a required party and could not feasibly be joined the action.[20] Plaintiffs' sole

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erroneous information." 49 U.S.C. § 44903(j)(2)(G)(ii); see also id. § 44926(b)(2) (DHS must "maintain a record of air carrier passengers and other individuals who have been misidentified and have corrected erroneous information"); id. § 44909(c)(6)(B)(ii) (TSA "shall * * * maintain a record of air passengers and other individuals who have been misidentified and have corrected erroneous information" in order "[t]o prevent repeated delays of misidentified passengers and other individuals"). TSA does exactly that. ER 57, 143 (discussing TSA's records).

[20] Plaintiffs obviously cannot raise such an argument for the first time in their reply brief. Bazuaye v. INS, 79 F .3d 118, 120 (9th Cir.1996) ("Issues raised for the first time in the reply brief are waived").

contention on this score is to reassert (Br. 29-30) that Section 46110 would not have prohibited joinder of TSA in this case. That argument is incorrect for the reasons discussed above.

IV. PLAINTIFFS' CASE CANNOT BE TRANSFERRED TO THIS COURT.

In Gilmore v. Gonzales, this Court held that the district court properly dismissed a complaint that should have been raised directly in the court of appeals in a petition for review under 49 U.S.C. § 46110, Gilmore, 435 F.3d at 1132-33, but nonetheless held that under 28 U.S.C. § 1631, the Court could transfer the case to itself and consider the petition as though it had never been filed in the district court," Gilmore, 435 F.3d at 1134 (alterations and internal quotation marks omitted). Unlike in Gilmore, however, plaintiffs' complaint cannot be transferred to this Court as if it had never been filed in the district court.

As Gilmore notes, a case cannot be transferred unless the court of appeals "would have been able to exercise jurisdiction on the date that it was filed in the district court." Gilmore, 435 F.3d at 1134 (alterations omitted). But this Court would not have been "able to exercise jurisdiction [under Section 46110] on the date [plaintiffs' complaint] was filed in the district court." Ibid. The first and most simple reason is that Section 46110 provides for jurisdiction over challenges to certain TSA orders. But plaintiffs' complaint in this case never named TSA as a defendant. Thus, at the time the complaint was filed, this

Court would not have had jurisdiction under Section 46110 over a suit that neither named TSA as a party nor purported to be brought against TSA, for the straightforward reason that Section 46110 provides no basis for jurisdiction in a suit against only the Attorney General, the Director of the FBI, and the Director of TSC (as the complaint purported to be). In Gilmore, by contrast, the Director of the TSA was in fact a named defendant at the time the complaint was filed.

This Court would not have been able to exercise jurisdiction under 49 U.S.C. § 46110 on the date plaintiffs' complaint was filed (June 30, 2010) for an additional reason. Section 46110 requires a petitioner to file "not later than 60 days after the order [being challenged] is issued." 49 U.S.C. § 46110(a). Whether this Court would have been able to exercise jurisdiction under Section 46110 on the date the complaint was filed in district court requires the Court to determine (a) which TSA order triggers the beginning of the 60-day filing deadline; and (b) whether the plaintiffs filed their complaint within that time.

As discussed above, supra at 35-38, the relevant order at issue in this case is the DHS TRIP procedures set forth in 49 C.F.R. § 1560.205. Those regulations were issued on October 20, 2008. See 73 Fed. Reg. 64018, 64066 (Oct. 20, 2008). If the issuance of those regulations is the date triggering the 60-day

filing deadline, then none of the plaintiffs filed a complaint within 60 days of when the regulations issued.

If the 60-day deadline instead (or additionally) began when those regulations were applied to plaintiffs, i.e., when the plaintiffs filed their applications under the DHS TRIP procedures, then at least five plaintiffs filed their complaints out of time because their complaints came more than 60 days after filing their DHS TRIP applications.[21]

If the relevant event triggering the 60-day deadline is when plaintiffs were denied boarding allegedly because of the No Fly List, then at least nine of the 15 plaintiffs did not timely file their complaint with 60 days of that event because they filed their complaint on June 30, 2010, more than 60 days after that event.[22] Six other plaintiffs arguably filed within 60 days,

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[21] Five plaintiffs filed their original complaint (on June 30, 2010) more than 60 days after they filed their DHS TRIP applications: Ayman Latif (filed application on April 15, 2010, see ER 168); Raymond Earle Knaeble IV (March 26, see ER 175); Steven William Washburn (April 27, see ER 188); Nagib Ali Ghaleb (March 2, see ER 202); and Ibraheim (Abe) Mashal (April 20, see ER 217).

[22] Eight plaintiffs filed their original complaint (on June 30, 2010) more than 60 days after they were denied boarding): Ayman Latif (denied boarding on April 13, see ER 33); Raymond Earle Knaeble IV (March 10-11, see ER 34); Steven William Washburn (February 5-12, see ER 37-38); Nagib Ali Ghaleb (February 6, see ER 41); Saleh A. Omar (March 8, see ER 42); Abdul Hakeim Thabet Ahmed (February 4, see ER 43); Mohamed Sheikh Abdirahman Kariye (March 8, see ER 44); Ibraheim (Abe) Mashal (April 20, see ER 44). A ninth plaintiff, Stephen Durga Persaud, was denied boarding on May 11, 2010. ER 47. If he had joined the original petition filed on June 30, 2010, it would have been

assuming the time to file was triggered by the denial of boarding.[23]

Finally, if the 60 day time to file began to run when plaintiffs received their DHS TRIP determination letters, then all 15 plaintiffs filed untimely complaints - not because they were too late, but because they filed prematurely before receiving any DHS TRIP determination letter. Section 46110 grants jurisdiction over final orders, see, e.g., City & County of San Francisco v. Engen, 819 F.2d 873, 874 (9th Cir. 1987), and if the DHS TRIP determination letters trigger the 60 day filing deadline when received, they could not have been final before the letters were issued. And as the Eleventh Circuit has held, a court of appeals lacks jurisdiction under Section 46110 where the petition is prematurely filed even one day before the order becomes final, and no subsequent timely petition is filed.

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within 60 days of his denial of boarding. But Mr. Persaud was not included in the original complaint. He was added as a plaintiff in the first amendment complaint on August 6, 2010, but by that time the denial of boarding had occurred more than 60 days before.

[23] Two plaintiffs filed their original complaint (on June 30, 2010) within 60 days of being denied boarding: Samir Mohamed Ahmed Mohamed (May 3, see ER 39) and Abdullatif Muthanna (June 3, see ER 40). Three more plaintiffs were added in the first amended complaint, filed August 6, 2010, within 60 days of when they were denied boarding: Faisal Nabin Kashem (June 23, see ER 36); Elias Mustafa Mohamed (June 25, see ER 37); and Amir Meshal (June 9, see ER 46). A sixth plaintiff, Salah Ali Ahmed joined the first amended complaint on August 6, 2010, within 60 days of being denied boarding on July 16, 2010, ER 45.

See Aeromar, C. Por A. v. Dep't of Transp., 767 F.2d 1491, 1493-94 (11th Cir. 1985).

All of the plaintiffs in this case either joined the original complaint filed on June 30, 2010, or the first amended complaint filed on August 6, 2010. But none of the plaintiffs (save for one exception) received a DHS TRIP determination letter until after both dates, see ER 60-121, and thus any complaint challenging those letters would have been filed prematurely (and no subsequent timely complaint or petition was filed). The one exception (plaintiff Nagib Ali Ghaleb) received a DHS TRIP determination letter on July 15, 2010, ER 68, but still filed prematurely when joining the original complaint on June 30, 2010.

Plaintiffs' complaint cannot be transferred, as in Gilmore, for yet another reason. This Court would not have been able to exercise jurisdiction over a petition filed in this Court because Section 46110 requires a petition to be filed "in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a). Here, 11 or 12 of the 15 plaintiffs do not reside in this Circuit, and thus this Court would have lacked jurisdiction to adjudicate their petition.[24] Only three

[24] Eleven plaintiffs allege that they reside outside this Circuit: Ayman Latif (resides in Egypt, ER 33); Raymond Earl Knaeble IV (Kuwait, ER 34); Faisal Nabin Kashem (Connecticut or

plaintiffs allege any facts that might establish residency in this Circuit.[25]

This Court need not resolve any of the difficult factual and legal questions that would need to be addressed in order to determine whether the complaint could be transferred to this Court. The Court in Gilmore transferred a complaint to itself under the "unique circumstances" of that case, in which it was clear that the Court "would have been able to exercise jurisdiction on the date that it was filed in the district court." Gilmore, 435 F.3d at 1134 (alterations omitted). (In Gilmore, the plaintiff was a resident of California and thus resided within the Ninth Circuit, ibid., and he filed his district court complaint within 60 days of the order challenged in his complaint.) Here, it is enough to note the substantial factual and legal doubt as to whether this Court "would have been able to exercise jurisdiction" on the date the complaint was filed. It would not be "in the interests of justice," Gilmore,

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Saudi Arabia, ER 36); Steven William Washburn (Saudi Arabia, ER 37); Abdullatif Muthanna (New York, ER 40); Nagib Ali Ghaleb (Yemen, ER 41); Saleh A. Omar (Detroit, ER 42); Abdul Hakeim Thabet Ahmed (New York, ER 43); Ibraheim (Abe) Mashal (Illinois, ER 44); Salah Ali Ahmed (Georgia, ER 45); Amir Meshal (New Jersey, ER 46). The status of the twelfth plaintiff, Elias Mustafa Mohamed, is unclear; he alleges that he "lived in Seattle" since the age of six, but also that he moved to Saudi Arabia for two years of language study. ER 36-37.

[25] Samir Mohamed Ahmed Mohamed (California, ER 39); Mohamed Sheikh Abdirahman Kariye (Portland, Oregon, ER 44); Stephen Durga Persaud (California, ER 46).

435 F.3d at 1134, for this Court to wade into and resolve the difficult questions concerning the authority to transfer this case to the court of appeals.

Plaintiffs chose their own litigation strategy, and could have taken alternative steps to preserve their rights: they could have filed a complaint that would have been timely even under the 60-day filing deadline in Section 46110; they could have chosen to join plaintiffs only if they reside within the Ninth Circuit or, in the alternative, filed their action in the D.C. Circuit; they could have filed both a complaint as well as a timely petition for review, and then sought a stay of the latter petition while the district court resolved questions as to its jurisdiction. To permit transfer in these circumstances puts the Court in the position of unnecessarily delving into and resolving complicated factual and legal questions to determine whether it can salvage any part of the plaintiffs' complaint due to the jurisdictional deficiencies created by plaintiffs' own litigation choices. That responsibility lies with plaintiffs' counsel, not with the Court, and it is not "in the interests of justice" for the Court to assume that role. 28 U.S.C. § 1631.[26]

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[26] It should be noted that counsel here is or should have been aware of the jurisdictional limitations in Section 46110, and that a challenge to the sufficiency of the DHS TRIP procedures must be made in the court of appeals under that statute. That was the holding of the court in Scherfen (discussed supra at 29-30), a case in which the plaintiffs were represented by the ACLU, the same organization representing

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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plaintiffs here, and in which plaintiffs filed both a district court complaint and a petition for review under Section 46110 in order to preserve their rights. See Scherfen, 2010 WL 456784 at *4-*5 (discussing plaintiffs' parallel petition for review in the court of appeals). The plaintiff in Ibrahim likewise attempted to preserve her jurisdictional options by filing both a district court complaint and a petition for review in the court of appeals. See Ibrahim, 538 F.3d at 1253 n.2.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Appellees is monospaced, has 10.5 or fewer characters per inch and contains no more than 12,729 words.

/s/ Joshua Waldman
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Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Ninth Circuit Rule 25-5(f), that on October 18, 2011, I filed the foregoing Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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STATEMENT OF RELATED CASES

Counsel is aware of no cases pending in this Court that are related within the meaning of Ninth Circuit Rule 28-2.6.