

# Exhibit B

(Redacted Version)

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January 5, 2015

VIA FED EX

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

*Re:* Stephen Persaud, Redress Control Number 2102070

Dear Ms. Moore:

I am writing as counsel for Stephen Persaud to respond to your November 24, 2014 letter to him, care of his former counsel, in which you provided “an unclassified summary that includes reasons” for his placement on the No Fly List. DHS TRIP Letter, attached as Exhibit 1. Because I just recently became Mr. Persaud’s counsel, I was not able to respond by the December 15, 2015 date requested by your letter.<sup>1</sup>

I am submitting this response in light of the Court’s order in *Latif v. Holder*, Case No. 10-Civ-750-BR (D. Or.) directing that the Government conduct an administrative review “as soon as practicable,” of Mr. Persaud’s (and the other plaintiffs’), inclusion on the No Fly List. Dkt. 152 at 2.

In doing so, however, I note that your letter lacks information that is critical to Mr. Persaud’s ability to respond meaningfully to the allegations in it, and that the Government’s revised No Fly List administrative redress system remains inadequate. The Court in *Latif* recognized that “Plaintiffs’ inclusion on the No Fly List constitutes a significant deprivation of their liberty interests” and imposes a

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<sup>1</sup> Included with this letter is a DHS Form 590 authorizing release of information regarding Mr. Persaud to me.

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“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 Mr. Persaud 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 Mr. Persaud’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 Mr. Persaud’s due process rights.

On December 5, 2014, Mr. Persaud requested through counsel that the Defendants in *Latif* provide essential procedural protections, additional information, and a constitutionally compliant substantive standard for the revised redress process. Letter, attached as Exhibit 2. On December 17, the Government responded to that letter but did not provide the requested additional information or procedural protections.

Thus, Mr. Persaud 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, Mr. Persaud’s ability to rebut the allegations is critically impaired, and any response from him is necessarily incomplete. This response is thus submitted subject to the objections and requests for further information set forth below, as well as those set forth in Exhibit 2. Mr. Persaud also reserves 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 Exhibit 2, 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 *Latif* Court’s order for two primary reasons.

First, it utilizes a substantive standard that is overbroad and vague. The DHS TRIP letter to Mr. Persaud states:

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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 are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Ex. 1 at 1. The letter contains no further explanation of the standard or its terms.

This standard is overbroad, in that it does not require any nexus to aviation security and lacks a meaningful temporal limitation, and is also unconstitutionally vague on its face. *See* Ex. 2 at 6-7.

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. 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 Mr. Persaud 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 Mr. Persaud on the No Fly List unconstitutional. Mr. Persaud cannot meaningfully respond to allegations purporting to justify placement on the No Fly List when the standard for that placement is ambiguous, overbroad, and open-ended.

The second major defect in the revised redress system is that it lacks necessary procedural protections, necessary to secure Mr. Persaud’s core due process rights. 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. 136 at 39. That risk remains high under the revised system that the Government has applied to Mr. Persaud for a number of reasons.

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, Mr. Persaud would credibly testify that he presents no threat to aviation security and respond to any specific allegations made against him. However, without a hearing, Mr. Persaud 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.

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Second, the disclosure to Mr. Persaud 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.<sup>2</sup> Ex. 1 at 1, 2. An incomplete statement makes it impossible for Mr. Persaud 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, Mr. Persaud cannot meaningfully respond to the allegations in the letter. Nor can he take steps, such as the retention of counsel with a security clearance, to deal with information withheld as classified where 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 what, if any, evidentiary standard the Government used to place Mr. Persaud on the No Fly List, or to review that placement. As explained in Exhibit 2, the Constitution requires that the Government use 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.

As with the substantive standard, these procedural defects preclude Mr. Persaud from responding to the DHS TRIP letter meaningfully and drive home that the Government’s revised redress system remains constitutionally deficient.

## II. Mr. Persaud Cannot Respond Meaningfully Without Further Information.

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

1. Mr. Persaud’s prior statements. The Government is relying on Mr. Persaud’s alleged statements, each of which was purportedly made years ago, in order to justify his inclusion on the No Fly List. *See* Ex. 1 at p. 2. Mr. Persaud must be provided with all of his written or recorded statements, made to any persons at

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<sup>2</sup> The letter also fails to notify Mr. Persaud 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 are an individual who represents a threat...””) (emphasis added). Mr. Persaud therefore cannot assess the institutional competence of the deciding entity or identify specific policies, regulations, and statutes that may govern such a determination.

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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.

2. Witness information and statements. The DHS TRIP letter indicates that the Government is relying on the statements of a witness or witnesses to support Mr. Persaud's inclusion on the No Fly List. Ex. 1 at 1-2. The Government must therefore provide the names and contact information for any such witnesses, including government agents whose statements the letters describe as fact; all reports relating to Mr. Persaud prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating Mr. Persaud); 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; all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath, and the conditions and circumstances under which the statement was made or obtained. *See* Ex. 2 at 5-6.

3. 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 Mr. Persaud's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *See id.* at 6.

4. 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 Mr. Persaud's inclusion on the No Fly List; show that Mr. Persaud does not meet the appropriate criteria for inclusion on the List; or otherwise establish that Mr. Persaud does not merit inclusion on the List. *See id.*

5. Notice of surveillance techniques. To the extent that any information obtained or derived from surveillance activities forms any basis for Mr. Persaud's inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Mr. Persaud 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, which does not fall

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under any of the preceding categories, such information must also be provided to Mr. Persaud.

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

### **III. The Allegations Against Mr. Persaud Do Not Justify His Continued Inclusion On The No Fly List.**

For the foregoing reasons, the revised system the Government is using to review Mr. Persaud's inclusion on the No Fly List is constitutionally inadequate. Mr. Persaud cannot respond to the allegations in the DHS TRIP letter effectively, and he will not receive the process he is due, unless the Government remedies the deficiencies set forth above.

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, I submit this disclosure of Mr. Persaud's expected testimony on his behalf. I 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 Mr. Persaud.

If called to testify at an evidentiary hearing regarding his placement on the No Fly List, it is expected that Mr. Persaud's testimony would include the following:

1. He does not pose, and has never posed, a threat of engaging in an unlawful violent act of terrorism.
2. He does not advocate violence.
3. He has no intention of engaging in, or providing support for, violent unlawful activity anywhere in the world.

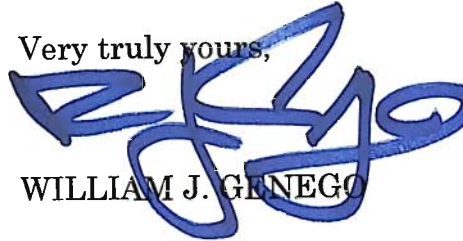
- [REDACTED]
5. He does not knowingly have ties to terrorist organizations or individual terrorists.

Mr. Persaud 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 other witnesses at the appropriate time.

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

Very truly yours,

A handwritten signature in blue ink, appearing to read 'WJG', is written over the typed name 'WILLIAM J. GENEGO'.

WILLIAM J. GENEGO

WJG/

Attachments:

DHS Form 590

Exhibit 1 (November 24, 2014 DHS letter)

Exhibit 2 (December 5, 2014 letter of Plaintiffs' counsel)



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.		
<b>SECTION I. Personal Information</b>		
Name Stephen Persaud		
Address c/o William Genego, Attorney; Law Office of William Genego		
City Santa Monica	State CA	Zip Code 90405
Country United States	Telephone Number(s) +1 (310) 399-3259	
Date of Birth 11/02/1980	Place of Birth (city, state, country) New York, New York	
<b>SECTION II. Representative Information</b>		
Name William Genego, Attorney - Law Office of William Genego		
Address 2115 Main Street		
City Santa Monica	State CA	Zip Code 90405
Country United States	Telephone Number(s) +1 (310) 399-3259	

Pursuant to the Privacy Act of 1974 (5 U.S.C. §552a(b)), I authorize DHS and/or its DHS Component elements to release any and all information relating to my redress request to my representative .

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 Stephen Persaud

Date 12/27/14

**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.

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



**Homeland  
Security**

November 24, 2014

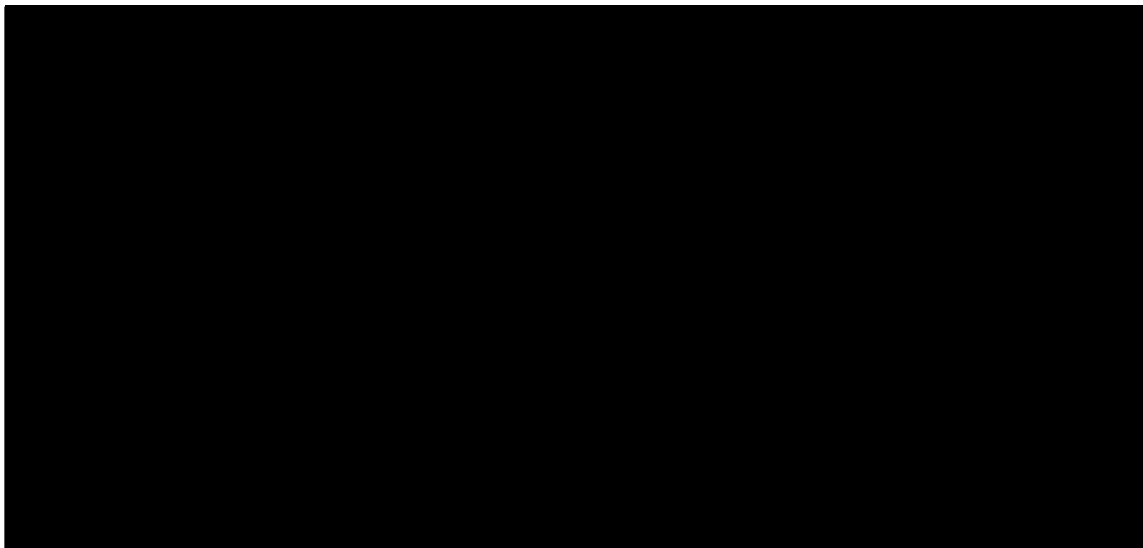
Mr. Stephen Durga Persaud  
c/o Nusrat Jahan Choudhury  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004

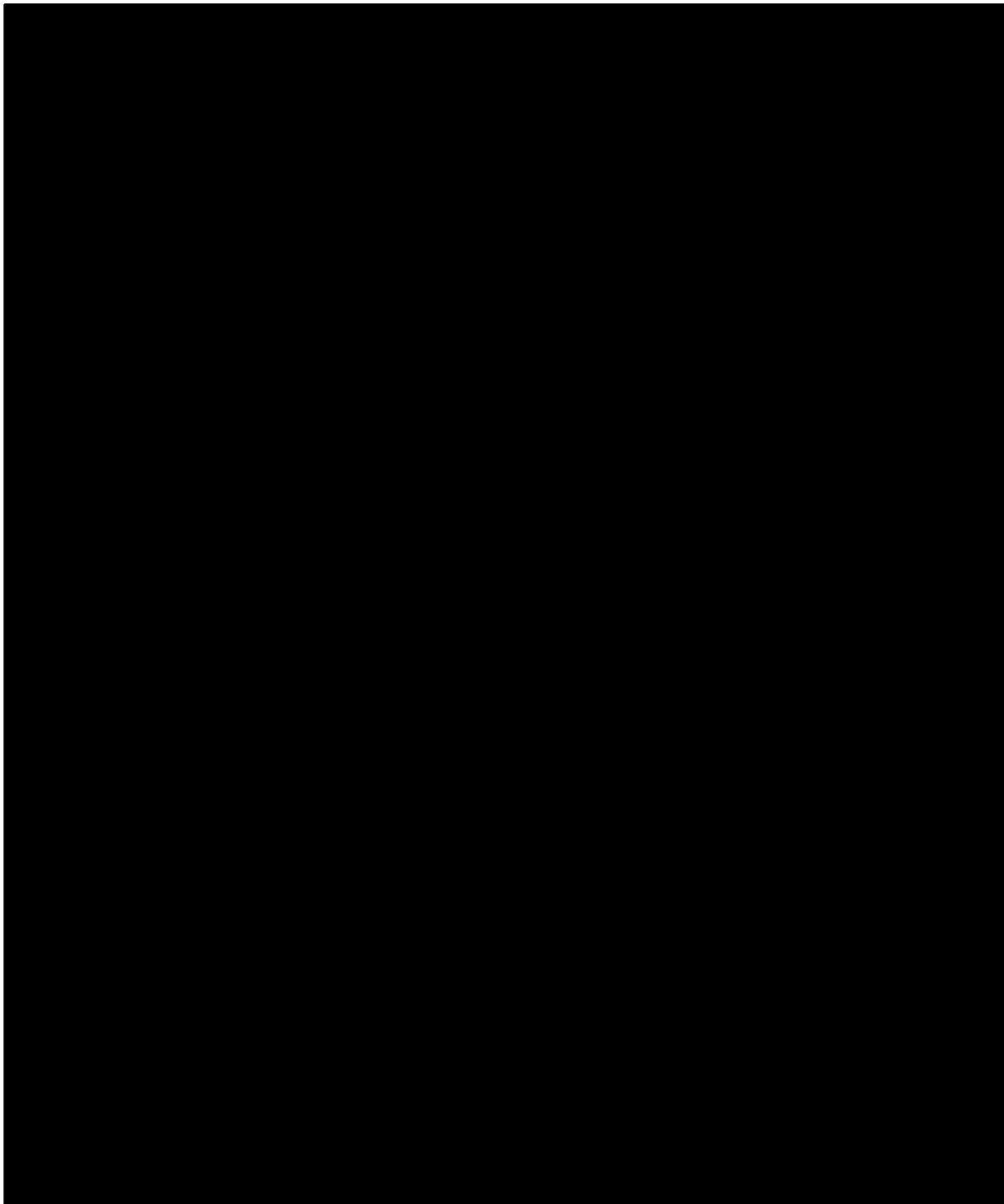
Redress Control Number: 2102070

Dear Mr. Persaud:

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 are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

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





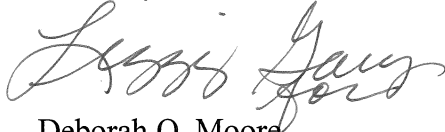
We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

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 15, 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](mailto:TRIP@dhs.gov).

Sincerely,

A handwritten signature in cursive script, appearing to read "Deborah O. Moore".

Deborah O. Moore  
Director, DHS TRIP

NATIONAL SECURITY  
PROJECT



December 5, 2014

VIA EMAIL

Amy Powell  
Brigham J. Bowen  
Adam D. Kirschner  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20001

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

*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.<sup>1</sup> 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.

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<sup>1</sup> 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*).

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.

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.

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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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