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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,*	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants.*	**JOINT FILING REGARDING DISPOSITION OF CLAIMS FOR INDIVIDUALS NOT ON THE NO FLY LIST**

In accordance with the Court's Case Management Order dated February 13, 2015 (Dkt. No. 168), the parties have conferred and hereby submit the following Joint Filing concerning the disposition of claims brought by plaintiffs who have received notice that they are not on the No Fly List. The parties have been unable to reach agreement and submit their competing statements below. The parties' proposed orders are appended as Exhibits 1 and 2.

PLAINTIFFS' STATEMENT:

In their Third Amended Complaint, Plaintiffs alleged violation of their Fifth Amendment right to procedural due process (Claim One) and unlawful agency action in violation of the Administrative Procedure Act (Claim Three). They accordingly sought relief in the form of a declaration that "Defendants' policies, practices, and customs violate the Fifth Amendment to the United States Constitution and the Administrative Procedure Act," and an injunction requiring Defendants "to remedy the constitutional and statutory violations." Dkt. No. 83 at 82–83.

This Court's Opinion and Order issued August 28, 2013 concluded that Plaintiffs have constitutionally protected liberty interests in their rights to travel internationally by air and to be free from false governmental stigmatization that were affected by inclusion on the No Fly List. Dkt. No. 110 at 25–27; Dkt. No. 136 at 29-30, 32. This Court's June 24, 2014 ruling granted

partial summary judgment to all Plaintiffs on Claims One (Violation of the Fifth Amendment Right to Procedural Due Process) and Three (Unlawful Agency Action in Violation of the Administrative Procedure Act) of the Third Amended Complaint, Dkt. No. 136 at 57-60. The Court ruled, *inter alia*, that Defendants' existing procedures were "wholly ineffective" to protect Plaintiffs' rights, and that Defendants had an obligation to provide notice of Plaintiffs' listing status and greater process. *Id*. at 60.

After those orders, as well as a Case Management Order on October 3, 2014, Dkt. No. 152 at 3, on October 10, 2014, Defendants filed a status report attaching a letter notifying Plaintiffs Ayman Latif, Elias Mohamed, Nagib Ghaleb, Abdullatif Muthanna, Ibraheim Mashal, Salah Ahmed, and Mashaal Rana that, as of the date of the status report, they were not on the No Fly List. Dkt. Nos. 153, 153-1. Thus, they prevailed and are entitled to judgment.

Defendants previously informed Plaintiffs that they intended to argue that these Plaintiffs are not entitled to judgment in their favor. Plaintiffs made clear their disagreement with that position, and provided their proposed dispositive order to Defendants two days ago—on the afternoon of March 11, 2015. At that time, Plaintiffs suggested to Defendants that if the parties were going to disagree as to whether Plaintiffs had prevailed, they should file short statements and then jointly ask the Court to order briefing on the question if it thought elaboration would be helpful. Plaintiffs received no response to that proposal.

Instead, at 12:42 p.m. Eastern Time today, Defendants provided Plaintiffs for the first time the five-page legal argument below, followed by a proposed dispositive order.

Plaintiffs do not believe Defendants' lengthy legal arguments comply with the Court's order requiring "a concise statement of the bases for any disputed provisions," (Dk. 186 at 10),

and asked Defendants to withdraw them, noting that Plaintiffs are unable to respond in this short time-frame. Defendants refused.

Given this unfortunate procedural history, Plaintiffs respectfully request that the Court permit them to file a 5-page response by Thursday, March 19, 2015, so that Plaintiffs are not prejudiced by Defendants' filing, and the Court has the benefit of briefing from both parties.

While Plaintiffs cannot set forth a complete explanation of why Defendants' position is incorrect, even cursory review reveals deep confusion and manifest error in Defendants' arguments. For example, Defendants nowhere acknowledge that this Court specifically found Plaintiffs "entitled to summary judgment on the bases described herein," in the June 24, 2014 order, Dkt. 136 at 5 n.2. The Court made that statement *before* Defendants informed these Plaintiffs that they were not on the No Fly List. At that time, the Court reserved "for further development" the substance of any judgment, but it left no doubt that Plaintiffs had prevailed, and therefore should be entitled to judgment at the appropriate time.

Defendants also appear to suggest that even if Plaintiffs did prevail, because Defendants have *now* complied with this Court's order, the controversy is moot. Unsurprisingly, they cite no cases that establish such a bizarre rule. Instead, the cases they cite establish two very different propositions—that an *appeal* becomes moot when circumstances *other than compliance* remove the prospect of injury, and that the passage or repeal of *legislation* that eliminates the risk of injury can render a case moot. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) (judgment in favor of plaintiff vacated on appeal by Defendant where plaintiff resigned from position); *NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1067 (9th Cir. 2007) (case rendered moot because *other litigation* provided the relief sought); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011) (holding that repeal of

offending legislation can moot claim on appeal because "voluntary cessation is different from a statutory amendment or repeal"). These cases obviously do not establish what Defendants seek to prove: that *compliance* with an order by the losing party *after* it is entered can moot a case and thereby prevent entry of a binding judgment.

Defendants also conflate standing—which Plaintiffs had an obligation to establish at the outset of the case—and mootness, which Defendants must prove by showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 733 (9th Cir. Cal. 2007) (noting that "careful analysis should distinguish" mootness from standing). Defendants have not even attempted to make the showing needed to establish that the case is moot as to these Plaintiffs, and if their position is that Plaintiffs have not prevailed, then Defendants presumably would also take the position that they are under no legal requirement to provide notice and constitutionally-compliant listing procedures to these Plaintiffs should any of them be placed on the No Fly List in the future.

Thus, even if the Court were to conclude that Defendants' decision to remove these Plaintiffs from the List and notify them about their status was not caused by the Court's order, but rather by Defendants' (apparently fortuitous) decision to reconsider these Plaintiffs' listing status, that would neither render this case moot nor foreclose Plaintiffs' right to a binding judgment entered in accordance with this Court's order of June 24. Otherwise, on Defendants' theory, any defendant could easily escape judgment by claiming that it chose on its own to do exactly what the Court ordered.

While Defendants' argument is patently meritless, if the Court does not summarily reject it, then Plaintiffs respectfully request an adequate opportunity to respond on the timeline set forth above.

DEFENDANTS' STATEMENT:

In light of the fact that a number of plaintiffs have received notice that they are not on the No Fly List, those plaintiffs' claims are moot, and they lack standing to seek further relief from the Court. Each of their three claims — procedural due process, substantive due process, and claims under the APA — is premised on the notion that plaintiffs are (or were) on the No Fly List. Since plaintiffs are not on the list, the basis for these claims, and the court's jurisdiction to hear them, is lacking. And plaintiffs' challenges to past DHS TRIP procedures are likewise moot, because plaintiffs have been provided with the information they sought, *i.e.*, their status on or off of the No Fly List, and because the procedures on which their claims are based are no longer being used. Plaintiffs thus face no ongoing harm, deprivation, or prospective injury. In such circumstances, the correct result is dismissal. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 984 (9th Cir. 2011) (where there is no deprivation of a protected interest, procedural due process claims are moot); *NASD Dispute Resolution, Inc. v. Judicial Council of the State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (stating that the "established practice" when claims become moot during an appeal is to reverse or vacate the order below and remand with instructions to dismiss) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)).

Plaintiffs' contention that the Court should nonetheless reach to enter some kind of new judgment is inconsistent with law. Their stated reason for this position — that they have

"obtain[ed] the relief they sought through this litigation," Joint Status Rpt. [#167] at 8 — undermines, rather than supports their position. *See Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166–67 (9th Cir. 2011) (controversy moot when statutory repeal or amendment provides a plaintiff with everything it hoped to achieve); *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007) ("Because there is no longer any risk that Outdoor Media will be subject to the challenged ordinance, there exists no live issue upon which the court could issue prospective relief."); *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1067 n.8 (9th Cir. 2013) (citing *Log Cabin Republicans* and *Outdoor Media Group* for the proposition that where a plaintiff has obtained "everything it hoped to achieve, the controversy is moot").[1] Whatever may be said for any relief plaintiffs may have obtained under prior proceedings in this case, the question before the Court is what remains to be adjudged now. And there is nothing to adjudge or enjoin. To maintain a case or controversy, plaintiffs must continue to have a viable claim for relief "at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English*, 520 U.S. at 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)) (additional citations omitted) (emphasis added). As plaintiffs tacitly concede, there are no live claims, and there is no ongoing case or controversy.[2]

[1] Defendants also dispute that plaintiffs have entirely obtained the relief they sought in this litigation, as their form of proposed order appears to suggest.

[2] For similar reasons, plaintiffs lack standing to seek declaratory relief. Plaintiffs have the burden of supporting their standing as a factual matter when challenged at any stage of the litigation. Even if standing exists at the outset of a case, "[a]n actual controversy must exist at all stages of federal court proceedings," meaning that "at all stages of the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant [that is] likely to be redressed by a favorable judicial decision.'" *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (internal citations omitted). Having been advised that they are not on the No Fly List, plaintiffs can no longer point to a deprivation of a protected liberty interest, or to any other present injury in fact that could satisfy the Article III standing requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). Moreover, any suggestion that plaintiffs might face similar travel difficulties in the future would be too

This result is not altered because plaintiffs have sought declaratory relief. The purpose of declaratory relief is to "bring[ ] to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1991). Thus, claims for such relief are likewise subject to dismissal on mootness and standing grounds, and should be dismissed here. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (stating that a case or controversy warranting declaratory relief exists only when "the challenged government activity ... is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties"); *Golden v. Zwickler*, 394 U.S. 103, 108–109 (1969) (declaratory relief inappropriate where plaintiff lacks standing).

Plaintiffs' request for an order of judgment is nothing more than a request for an advisory opinion on claims over which the court now lacks jurisdiction. To the extent the request for judgment is made with an eye towards potential fees (plaintiffs seek an order memorializing their position that they have "prevailed," *see* Joint Status Rpt. [#167] at 8), the request is misplaced. Plaintiffs' entitlement to fees — or lack thereof — will rise or fall on its own merit on the basis of proceedings already conducted. And the question of whether plaintiffs have "prevailed" for fee purposes, and, if so, to what extent, is for resolution in the context of fee proceedings on the basis of the existing record, not via the artificial record plaintiffs seek to create now. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (declaring that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim" and that "reasonable caution is needed to be sure that mooted litigation is

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speculative to establish the certainly impending threat of future injury necessary for Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (discussing the certainly impending requirement for standing) (internal quotations omitted).

not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained"). Plaintiffs' appeal for a judgment is therefore circular: It rests on the premise that they have already obtained relief, and this premise is, to them, a basis to enter a new judgment essentially memorializing that purported fact.[3] But that is not the law. The law dictates that their claims are moot, and, that being the case, the claims must now be dismissed. The fact that their contentions rest almost exclusively on the Court's prior orders only proves the point. Whatever may be said of what has been adjudged, there is nothing further to be adjudged now.

Plaintiffs' claims are moot in light of the fact that they are not on the No Fly List and have been notified of that status, and they lack standing to obtain further relief. The Court lacks jurisdiction to further adjudicate any of plaintiffs' former claims and, according to "established practice" in this Circuit, those claims should be dismissed on that basis. *NASD Dispute Resolution*, 488 F.3d at 1068.[4] And plaintiffs' request for an order of judgment purporting to

[3] Moreover, defendants dispute plaintiffs' contention that they were notified of their No Fly status as a result of "prevailing" through the lawsuit. Whereas the notice given to this effect was provided pursuant to a schedule established by the Court, the record does not reflect that this notice would not have been given but for the Court's order requiring it; as the Court is aware, the Government was in the process of revising its redress policies and procedures at that time, in an effort to increase transparency. *See* Joint Status Rpt. [#148] at 8. These matters of contention further demonstrate the error in plaintiffs' position.

[4] Where a claim becomes moot and a party has received a prior adverse decision, that party is deprived of the opportunity to appeal that adverse decision. *NASD Dispute Resolution*, 488 F.3d at 1068. That being the case, the Ninth Circuit typically requires not only dismissal, but vacatur of the adverse decision that can no longer be appealed. *Id.* ("Without vacatur, the lower court's judgment, 'which in the statutory scheme was only preliminary,' would escape meaningful appellate review thanks to the 'happenstance' of mootness.") (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Here, defendants have been deprived of the potential opportunity to appeal any of the Court's orders as they apply to these plaintiffs, and would not have any opportunity to appeal from any new judgment the Court might consider entering now, precisely because the court of appeals would not have jurisdiction to entertain it. Defendants do not seek vacatur of any order here, but these principles underscore the inappropriateness of granting plaintiffs' request for a new judgment in their favor in this case and demonstrate that, at a minimum, plaintiffs' claims must be dismissed.

declare that they have "prevailed" should be rejected. A proposed order of dismissal is annexed hereto as Exhibit 2.

Finally, plaintiffs should not be given additional time to provide further justification for their request for judgment. That justification should be in this joint filing. Plaintiffs were advised of defendants' legal position on the disposition of these claims as early as February 6, *see* Joint Status Rpt. [#167 at 9 n.7] ("Defendants submit that their claims should be dismissed, *inter alia*, on grounds of mootness."), and counsel conferred on these issues prior to the exchange of defendants' statement, including during a meet-and-confer teleconference on March 10, and again during a teleconference on March 12.[5] Defendants accordingly dispute, among other things, plaintiffs' suggestion that they were provided defendants' arguments "for the first time" today. There is no legitimate basis for plaintiffs to seek an extension to brief issues (1) required to be included in this filing; (2) they were on notice would be at issue more than a month ago; and (3) that they have repeatedly discussed with counsel for defendants.[6] Should the Court nonetheless grant plaintiffs' request for additional time, defendants would request the opportunity to file a three-page response thereafter, if needed.

Dated: March 13, 2015

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[5] Counsel repeatedly advised plaintiffs' counsel in these conversations that defendants would be filing a competing statement in light of the parties' clear disagreement.

[6] With regard to plaintiffs' complaint concerning length, defendants made an effort to keep the submission short while also providing the Court with sufficient reasoning and legal authority to inform its decision-making. Given these constraints, defendants believe this short submission satisfies any reasonable definition of "concise."

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen