

Justine Fischer, OSB No. 812241
 Email: jfattyor@aol.com
 710 SW Madison St., Suite 400
 Portland, OR 97205
 Tel: (503) 222-4326; Fax: (503) 222-6567

William Genego (Admitted *pro hac vice*)
 E-mail: bill@genegolaw.com
 Law Office of William Genego
 2115 Main Street
 Santa Monica, CA 90405
 Tel: (310) 399-3259; Fax: (310) 392-9029

Attorneys for Plaintiff Stephen Persaud

**UNITED STATES DISTRICT COURT
 DISTRICT OF OREGON**

AYMAN LATIF, et al., <p style="text-align: center;"><i>Plaintiffs,</i></p>	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., <p style="text-align: center;"><i>Defendants.</i></p>	<p style="text-align: center;">MEMORANDUM IN SUPPORT OF PLAINTIFF STEPHEN PERSAUD’S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT</p>

INTRODUCTION

Plaintiff Stephen Persaud renews his motion for partial summary judgment on his claims for violations of his procedural due process rights and the Administrative Procedure Act. The revised redress process Defendants applied to Mr. Persaud in keeping him on the No Fly List is constitutionally deficient in that it: (1) does not provide Mr. Persaud with adequate notice of the reasons for his placement on the No Fly List, and denies him access to relevant evidence in the government's possession, including Mr. Persaud's own statements and statements of other witnesses; and material evidence showing that Mr. Persaud should *not* be on the No Fly List; (2) relies on impermissibly vague criteria that fails to provide notice of what conduct may result in placement on the No Fly List; and (3) does not provide Mr. Persaud with an in-person hearing before a neutral decisionmaker at which he could cross-examine witnesses and establish his credibility. These deficiencies create an unacceptably high risk of an erroneous deprivation of liberty. Given the significant deprivation of Mr. Persaud's liberty, each must be remedied for him to be afforded due process.

STATEMENT OF FACTS¹

On November 24, 2014, Defendants provided Mr. Persaud with a DHS TRIP notification letter. J. Stmt. of Agreed Facts Relevant to Stephen Persaud ("J. Stmt."), ECF No. 180 ¶ 2; ECF Nos. 180-1, 183, Ex. A. The letter informed Mr. Persaud he is on the No Fly List because he had been "identified as an individual who 'may be a threat to civil aviation *or* national security,'" (J. Stmt., ECF No. 180 ¶ 3 (citing 49 U.S.C. § 114(h)(3)(A)) (emphasis added)), and specifically that "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." *Id.* ¶ 4.

The notification letter contained "an unclassified summary that includes reasons supporting" Defendants' placement of Mr. Persaud on the No Fly List, J. Stmt., ECF No. 180

¹ Mr. Persaud incorporates and does not restate facts described in Plaintiffs' Combined Renewed Motion for Partial Summary Judgment except to the extent necessary to provide context to his specific facts.

¶ 5 The letter did not disclose all of the reasons or information Defendants relied upon in determining Mr. Persaud should remain on the List. J. Stmt., ECF No. 180 ¶ 6. The letter stated Defendants were “unable to provide additional disclosures,” *id.* ¶ 7, and did not describe the withheld evidence in any manner, nor did it disclose whether Defendants possess exculpatory information or material that would otherwise “contravene” Mr. Persaud’s placement on the List. *Id.* ¶ 8. The letter referred to prior statements Mr. Persaud had allegedly made, but it did not provide the full statements. *Id.* ¶ 9. The letter did not explain how the allegations in it satisfied Defendants’ substantive criterion for placing Mr. Persaud on the List. See ECF No. 180-1.

By letter dated December 5, 2014, Mr. Persaud’s counsel objected to the DHS TRIP notification letters to all Plaintiffs as constitutionally inadequate, and requested additional information and procedures, which Defendants refused to provide. ECF Nos. 167-1, 167-2.

Mr. Persaud submitted a response to the DHS TRIP notification letter on January 5, 2015. J. Stmt., ECF No. 180 ¶ 14; ECF Nos. 180-2, 183, Ex. B. The response repeated the objections to the adequacy of the disclosures and again requested additional information and procedural protections. *Id.* To the extent possible given the incomplete notice, the response also summarized Mr. Persaud’s anticipated testimony which would establish that the allegations in the letter were incorrect. ECF Nos. 180-2, Ex. B at 6; 183, Ex. B at 6. It further stated that if called to testify at an evidentiary hearing, Mr. Persaud would aver that he does not pose a threat of committing an act of terrorism, that he has no intention of engaging in, or providing support for, violent unlawful activity, that he does not knowingly have ties to terrorist organizations or individual terrorists, and that he does not advocate violence. ECF No. 180-2 at 6. The response stated that Mr. Persaud’s placement on the No Fly List was erroneous and that he should promptly be removed from the List. *Id.* at 7; *see also* Persaud Decl., ECF No. 91-13 ¶ 14 (“I do not pose a threat to civil aviation or national security. I would be willing to undergo any suitable screening procedures in order to be permitted to board planes.”).

On January 28, 2015, the Acting TSA Administrator issued a final determination to Mr. Persaud. J. Stmt., ECF No. 180 ¶ 15; ECF No. 180-3. The Administrator stated he had considered Mr. Persaud's response, and "other information available" to him, in concluding that Mr. Persaud was "properly placed" on the No Fly List. *Id.* The Administrator stated that his explanations of his decision "do not constitute the entire basis for my decision but I am unable to provide further information" because, according to the Administrator, doing so would risk harm to national security and law enforcement activities. See ECF Nos. 180-3. The Administrator provided no additional information on the basis for placing Mr. Persaud on the No Fly List, nor did he provide any reasons for rejecting Mr. Persaud's response. *Id.* At no point during the revised redress process was Mr. Persaud given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. J. Stmt., ECF No. 180 ¶ 16.

ARGUMENT

I. Summary Judgment Standard.

Rule 56 permits motions for partial summary judgment such as this one. *See* Fed. R. Civ. P. 56(a). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Mr. Persaud hereby incorporates all of the arguments for summary judgment in Plaintiffs' Combined Renewed Cross-Motion for Partial Summary Judgment ("Combined MPSJ"), filed concurrently herewith, and moves for judgment on the bases described therein.

II. Defendants' Revised Redress Process Violates Mr. Persaud's Fifth Amendment Right to Procedural Due Process.

Mr. Persaud renews his motion for partial summary judgment under the procedural component of the Fifth Amendment's Due Process Clause. The hallmarks of due process are notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Defendants’ revised redress process falls far short of what courts have required in contexts involving deprivations of comparable significance. *See* Combined MPSJ, Arg. Sec. III.B.1. In denying Mr. Persaud full notice of the allegations and evidence against him, a hearing before a neutral decisionmaker, and an opportunity to cross-examine individuals with personal knowledge of the adverse evidence, the revised redress system affords less process than *any* system involving a significant liberty or even property interest. *See id.*

A. The revised redress process does not provide Mr. Persaud adequate notice.

Adequate notice must “set forth the alleged misconduct with particularity,” *In re Gault*, 387 U.S. 1, 33 (1967), and “permit adequate preparation for . . . an impending hearing.” *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 14 (1978). Defendants’ notice to Mr. Persaud fails to meet even these minimal due process requirements, making it virtually impossible for Mr. Persaud to meaningfully respond to the allegations against him.

1. Defendants’ failure to provide adequate notice of their reasons for placing Mr. Persaud on the No Fly List violates due process.

Overwhelming authority, including in the national security context, establishes that constitutionally-sufficient notice must be complete and precise. *See* Combined MPSJ, Arg. Sec. III.B.2.a.

Here, it is undisputed that Defendants did not provide Mr. Persaud with full notice of the reasons for his inclusion on the No Fly List. J. Stmt., ECF No. 180 ¶¶ 6-7. Both the notification letter and the final determination letter acknowledged that Defendants had withheld part of the basis for their decision. ECF Nos. 180-1 at 2, 180-3 at 3. Defendants also failed to provide reasons for rejecting Mr. Persaud’s explanations for why he should be removed from the List, including his clear and unequivocal denials of any intent to harm the United States.

Mr. Persaud cannot meaningfully respond to allegations that Defendants have withheld from him, correct errors as to those allegations, or provide invaluable contextual information regarding the undisclosed reasons — as he attempted to do in response to the

patently incorrect, misleading, or de-contextualized information he was able to ascertain from Defendants' incomplete notification letter. For instance, Mr. Persaud's response stated that, should he be allowed to testify at an evidentiary hearing, he would explain [Redacted]. [Redacted]. ECF No. 183, Ex. B at 6. Even though this response was necessarily constrained by the inadequacy of Defendants' notice, it is more than he can provide in response to the other allegations against him—of which he is wholly unaware. Nor can he meaningfully challenge, and the Court adjudicate, assertions of privilege, as Defendants failed to specify grounds for withholding reasons for placing him on the List.

Defendants' refusal to provide Mr. Persaud with a complete statement of reasons violates his due process rights.

2. Defendants' failure to disclose to Mr. Persaud the evidence used against him violates due process.

When liberty or even mere property interests are at stake, the Supreme Court and the Ninth Circuit require the government to disclose the evidence that forms the basis for its allegations, including in matters involving national security. *See* Combined MPSJ, Arg. Sec. III.B.2.b.

It is undisputed that the notification letter to Mr. Persaud did not disclose *any* of Defendants' evidence against him. J. Stmt., ECF No. 180 ¶¶ 6-10. Although the letter made clear that Defendants relied on statements of FBI agents, reports prepared by those agents describing Mr. Persaud's alleged prior statements, and reports of statements of another individual, ECF No. 183, Ex. A, Defendants refused to provide that evidence to Mr. Persaud. Nor, obviously, did Defendants provide evidence related to the undisclosed reasons for placing Mr. Persaud on the No Fly List. Mr. Persaud therefore has no means to probe the adequacy and reliability of the evidence against him, let alone meaningfully respond to it. Nor can he discover or rebut misperception, error, or outright lies in the statements of witnesses, or inquire into their potential biases or motives. Due process requires that Defendants provide

the evidence, statements, recordings, and reports on which they rely in placing Mr. Persaud on the List.

3. Defendants' failure to disclose to Mr. Persaud with material and exculpatory evidence violates due process.

Due process has long required the government to disclose (1) evidence in its possession that undermines the government's case and is favorable to an accused, and (2) prior witness statements, so that the accused can explore inconsistencies or omissions in those statements. See Combined MPSJ, Arg. Sec. III.B.2.c.

It is undisputed that Defendants did not provide information in their possession that "contravened" their basis for including Mr. Persaud on the No Fly List, J. Stmt., ECF No. 180 ¶ 8 – nor did they even identify material exculpatory information not reflected in the notification letter to Mr. Persaud. Defendants refused to confirm or deny whether they possessed such information, even though the letter refers directly to a number of Mr. Persaud's alleged prior statements. See *id.*, ¶ 9; ECF No. 183, Ex. A. Defendants' refusal to provide such material statements and information that they plainly possess, and to confirm whether or not they have additional information that would undermine Mr. Persaud's placement on the List, violates elemental due process principles and increases the risk of error in their final determination as to Mr. Persaud.

B. Defendants' impermissibly vague criteria do not give Mr. Persaud fair notice of conduct that could lead to placement on the No Fly List.

The Due Process Clause requires that a statute or regulation give "fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, – U.S. –, 132 S. Ct. 2307, 2317 (2012). The No Fly List criterion Defendants applied to Mr. Persaud fails to provide him with fair notice. First, the criterion lacks any nexus to aviation security—which is Defendants' ostensible purpose for maintaining a No Fly List—and encompass a broad array of other potential harms. As noted above, Defendants applied the final, catchall criterion to Mr. Persaud, determining that he is "an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so." See J.

Comb. Stmt., ECF No. 173 ¶ 5; J. Stmt., ECF No. 180 ¶¶ 4-5. Notice of that criterion is not fair notice because it entails a significant penalty—inability to travel by air—that is unrelated to the “threat” that Defendants think Mr. Persaud “represents.”

Second, the criterion Defendants applied to Mr. Persaud is unconstitutionally vague on its face. See Combined MPSJ, Arg. Sec. III.B.4. Terms such as “represents” and “threat” are entirely ambiguous and encompass conduct that Mr. Persaud (or anyone else) could not have known would lead to placement on the No Fly List. Similarly, the vague, multi-pronged explanation in the government’s Watchlisting Guidance of the phrase “operationally capable” not only appears to encompass First Amendment-protected associations to others, but also innocent conduct, such as travel abroad. *Id.* The vagueness of the criterion leaves Mr. Persaud vulnerable to subjective, arbitrary, and discriminatory interpretation and renders it unconstitutional on its face.

The criterion is also unconstitutional as applied to Mr. Persaud because the notification letter to Mr. Persaud fails to explain how the stated reasons satisfy the criterion. Rather, the letter merely recites the criterion followed by various allegations, Redacted [REDACTED]. See ECF No. 182, Ex. A. Simply making such allegations does not explain how, even if the allegations were true and could justify placement on the No Fly List (which Mr. Persaud does not concede), such conduct would render him a “threat” worthy of inclusion on the List.²

These defects in the No Fly List criterion applied to Mr. Persaud increase the already substantial risk of error in Defendants’ determination and render the criterion unconstitutional.

² To the extent Defendants’ allegations against Mr. Persaud are based on or implicate his travel to and stay in Somalia for religious purposes, they implicate and infringe upon his First Amendment-protected beliefs and activities, and he preserves his right to raise these claims at a later stage. See ECF No. 183, Exh. A at 1.

C. Defendants’ failure to provide Mr. Persaud with a meaningful hearing violates due process.

No court has *ever* upheld the deprivation of a citizen’s liberty without a hearing. *See* Combined MPSJ, Arg. Sec. III.B.3. Due process requires Defendants to provide Mr. Persaud a hearing before a neutral decisionmaker at which he can cross-examine witnesses and receive a decision that applies a fixed burden of proof to the evidence presented. *See id.* Defendants failed to provide any of these basic protections to Mr. Persaud.

1. Defendants’ failure to provide Mr. Persaud a live hearing before a neutral decisionmaker violates due process.

The opportunity to be heard is an indispensable minimum of due process, *see Mathews*, 424 U.S. at 333. The Supreme Court has repeatedly required hearings for far less weighty interests than those at stake here. *See* Combined MPSJ, Arg. Sec. III.B.1. A live hearing not only would give Mr. Persaud a critical opportunity to present his defenses, but it would enable decisionmakers to effectively assess his credibility and that of other witnesses.

Defendants’ revised redress process provides *no hearing at all* at which Mr. Persaud could contest his inclusion on the No Fly List. J. Stmt., ECF No. 180 ¶ 16. It is clear, moreover, that the TSA Administrator made an adverse credibility finding when he stated that he had “considered” Mr. Persaud’s response but concluded that the “information available” to the Administrator—which included all the information Defendants failed to disclose to Mr. Persaud—supported Mr. Persaud’s placement on the No Fly List. *See* ECF Nos. 180-3. Given the gravity of the restriction on Mr. Persaud’s liberty, Defendants’ failure to allow him to testify violates the Due Process Clause.

2. Defendants’ refusal to allow Mr. Persaud the opportunity to confront and cross-examine adverse witnesses violates due process.

Defendants’ refusal to hold an in-person hearing also necessarily denies Mr. Persaud any opportunity to confront and cross-examine adverse witnesses and to call his own witnesses—rights long recognized as essential to due process. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); Combined MPSJ, Arg. Sec. III.B.3.b.

Defendants' revised redress process instead permits the entirely unconstrained use of hearsay. Their notification to Mr. Persaud letter placed critical reliance on an unnamed individual's hearsay statements, testimony of FBI agents and on Mr. Persaud's own alleged statements – none of which he had access to. See ECF No. 183, Ex. A. Mr. Persaud had no ability to contest the reliability of the statements, and there is no way for Mr. Persaud or a neutral decision-maker to know even if the information in the letter was derived from the agents' written reports or their oral statements, or if it accords with their personal recollections.

Similarly, the final determination that Mr. Persaud should remain on the No Fly List plainly turned on disputed questions of fact ECF No. 180-3 at 2. In making a final determination against Mr. Persaud, the TSA Administrator not only assessed Mr. Persaud's credibility—without directly hearing from him—but also that of adverse witnesses, to whom Mr. Persaud had no access or ability to confront and cross-examine. The determination letter lacked any mention of whether the TSA Administrator based his conclusions on evidence from government officers with personal knowledge who were available to make their own statements of the allegedly adverse information, or whether those officers had any self-interested motivation to provide that information, for example to pressure Mr. Persaud into providing information. Defendants' pervasive, unconstrained use of hearsay does not comport with basic notions of fairness or due process.

3. Defendants' failure to apply an appropriate burden of proof violated due process.

Defendants' failure to employ the “clear and convincing evidence” standard of proof (or *any* standard), is a further due process violation because Mr. Persaud does not know what standard must be met, and who has the burden of meeting it. *See* Combined MPSJ, Arg. Sec. III.B.3.c.

D. Defendants can provide additional procedural protections without harming government interests.

The robust procedural protections courts use to ensure due process in analogous contexts, such as the Classified Information Procedures Act in criminal cases or relevant regulations in deportation matters, demonstrate that such protections can be applied here without harming government interests. See Combined MPSJ, Arg. Sec III.B.5. Defendants may not use secret evidence against Mr. Persaud without allowing him to confront it

III. Defendants' Revised Redress Process Violates the Administrative Procedure Act.

Mr. Persaud also renews his motion for partial summary judgment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. See Combined MPSJ, Arg. Sec. III.C.

CONCLUSION

For the reasons stated above, Mr. Persaud respectfully requests that the Court grant this renewed motion for partial summary judgment.

Dated: April 17, 2015

Justine Fischer, OSB No. 812241
Email: jfattyor@aol.com
710 SW Madison St., Suite 400
Portland, OR 97205
Tel: (503) 222-4326; Fax: (503) 222-6567

Respectfully submitted,

/s/ William Genego
William Genego (Admitted *pro hac vice*)
E-mail: bill@genegolaw.com
Law Office of William Genego
2115 Main Street
Santa Monica, CA 90405
Tel: (310) 399-3259; Fax: (310) 392-9029

Attorneys for Plaintiff Stephen Persaud

CERTIFICATE OF SERVICE

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

/s/ William Genego