Steven M. Wilker, OSB No. 911882
Email: steven.wilker@tonkon.com
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204
Tel.: (503) 802-2040; Fax: (503) 972-3740
Cooperating Attorney for the ACLU Foundation of Oregon

Hina Shamsi (Admitted *pro hac vice*)
Email: hshamsi@aclu.org
Hugh Handeyside (Admitted *pro hac vice*)
Email: hhandeyside@aclu.org
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500; Fax: (212) 549-2654

Ahilan T. Arulanantham (Admitted *pro hac vice*)
Email: aarulanantham@aclu-sc.org
Jennifer Pasquarella (Admitted *pro hac vice*)
Email: jpasquarella@aclu-sc.org
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Tel.: (213) 977-9500; Fax: (213) 977-5297

Alan L. Schlosser (Admitted *pro hac vice*)
Email: aschlosser@aclunc.org
Julia Harumi Mass (Admitted *pro hac vice*)
Email: jmass@aclunc.org
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493; Fax: (415) 255-8437

Alexandra F. Smith (Admitted *pro hac vice*)
Email: asmith@aclu-nm.org
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
Tel.: (505) 266-5915; Fax: (505) 266-5916

Mitchell P. Hurley (Admitted *pro hac vice*)
Email: mhurley@akingump.com
Christopher M. Egleson (Admitted *pro hac vice*)
Email: cegleson@akingump.com
Justin H. Bell (Admitted *pro hac vice*)
Email: bellj@akingump.com
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel.: (212) 872-1011; Fax: (212) 872-1002

Attorneys for Plaintiffs Salah Ali Ahmed, Nagib Ali Ghaleb, Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Ayman Latif, Ibraheim Mashal, Amir Mohamed Meshal, Elias Mustafa Mohamed, Abdullatif Muthanna, Steven Washburn, and Mashaal Rana

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

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

Attorneys for Plaintiff Stephen Persaud

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. ERIC H. HOLDER, JR., et al., *Defendants*.	Case No. 3:10-cv-00750-BR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

When this Court ruled in June 2014 that Defendants' original DHS TRIP redress system violated Plaintiffs' Fifth Amendment rights, it did so because it found that the government had deprived these Americans of their protected rights by placing them on the No Fly List, and failed to give them meaningful notice and an opportunity to challenge the flying ban. The Court then gave Defendants an opportunity to fashion a new redress process that meets constitutional standards.

Defendants have failed to do what the Court asked of them. Their revised No Fly List redress process provides Plaintiffs only with bare, incomplete allegations shorn of important context, while denying Plaintiffs the means to rebut those allegations and correct errors. After receiving these incomplete allegations, Plaintiffs asked Defendants for what the prior orders in this case required: notice of *all* the reasons for Defendants' placement of Plaintiffs on the No Fly List. Defendants refused. Plaintiffs also asked for access to highly relevant evidence in the government's possession, including Plaintiffs' *own statements*, statements against them by paid or otherwise potentially biased government informants or witnesses, and evidence showing that Plaintiffs should *not* be on the No Fly List. Defendants refused. As a result, the "notice" Defendants provided Plaintiffs is far more deficient than any previously upheld by a court when the liberty of American citizens is at stake.

Perhaps worse, Defendants refused to provide a hearing of any kind. Under Defendants' approach, the dramatic deprivation of liberty that results from placement on the No Fly List can occur entirely through paper review, without any opportunity for a decision-maker either to assess Plaintiffs' credibility or to allow them to examine witnesses who have spoken against them. Instead, hearsay—and in many cases double and triple hearsay—can form the basis for absolute and indefinite flying ban without allowing Plaintiffs any ability to inquire into the reliability of their accusers. To permit this result, this Court would have to become the first ever to authorize such a significant deprivation of U.S. citizens' liberty without a hearing.

Defendants will defend their largely meaningless new redress process on the ground that providing greater process would endanger national security, but they cannot deny that the government provides far more process to people and even organizations in a variety of contexts, including contexts implicating national security concerns. Indeed, even non-citizens whom the government seeks to deport on national security grounds are entitled to substantially more process than Defendants afforded Plaintiffs here.

As with the DHS TRIP process the Court has already ruled unconstitutional, the risk of error remains unacceptably high under the revised redress process. The fundamental deficiencies in Defendants' new system cannot be rectified without necessary procedural protections, additional information regarding the basis for Plaintiffs' inclusion on the No Fly List, and appropriately narrow, specific criteria for placement on the List.

It has been nearly five years since Plaintiffs on the No Fly List filed this case seeking a fair process by which to clear their names and regain a right that most other Americans take for granted. Thanks to the Court's decisions, seven Plaintiffs are now able to fly. The six Plaintiffs who remain blacklisted still languish in limbo, stymied by a redress process that denies them their right to the basic requirements of due process. These Plaintiffs therefore renew their motions for partial summary judgment on their claims for violation of the right to procedural due process and violation of the Administrative Procedure Act. They respectfully request that the Court either order Defendants to provide them with the process that is now long past due, or provide it directly in this Court.

STATEMENT OF FACTS

I. Procedural Background

On August 28, 2013, this Court held that "Plaintiffs have constitutionally-protected liberty interests both in international air travel and reputation," Op. and Order, ECF No. 110 at 27.

Subsequently, on June 24, 2014, this Court found that "placement on the No-Fly List is a "significant impediment to international travel" with "far-reaching" implications for the ability to

travel by sea and land, and that "international travel is a necessary aspect of liberties sacred to members of a free society." Op. and Order, ECF No. 136 at 28, 29, 30. It held "the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process," as well as the Administrative Procedures Act. Op. and Order, ECF No. 136 at 60, 63. In reaching those conclusions, the Court found that "without proper notice and an opportunity to be heard, an individual could be doomed to indefinite placement on the No-Fly List." *Id.*

On October 3, 2014, the Court directed Defendants to disclose to Plaintiffs and the Court by October 10, 2014 which Plaintiffs, if any, were not on the No Fly List, and to conduct an interim substantive review of the grounds for inclusion of the remaining Plaintiffs on the No Fly List. Case Mgmt. Order, ECF No. 152 at 2-4. The Court further directed Defendants to reconsider those Plaintiffs' DHS TRIP redress inquiries using procedures that are "fully compliant with the Court's June 24, 2014, Opinion and Order." *Id.*

II. The Revised No Fly List Redress Process Applied to Plaintiffs

On October 10, 2014, Defendants informed seven Plaintiffs they were not on the No Fly List as of that date.[1] Defs.' Status Report, ECF Nos. 153, 153-1; Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs. ("J. Comb. Stmt."), ECF No. 173 ¶ 14. Defendants applied a revised redress process to the six other Plaintiffs, and issued DHS TRIP notification letters to those Plaintiffs during the final week of November 2014. J. Comb. Stmt., ECF No. 173 ¶ 16-17. The letters informed Plaintiffs that they are on the No Fly List, stated the applicable substantive criterion for each Plaintiff's inclusion on the List, and provided an unclassified summary of reasons for each Plaintiff's placement on the List. *Id.* ¶ 17.[2]

[1] These Plaintiffs are Ayman Latif, Elias Mohamed, Nagib Ghaleb, Abdullatif Muthanna, Ibraheim Mashal, Salah Ahmed, and Mashaal Rana. This Memorandum is being filed on behalf of the Plaintiffs who remain on the List.

[2] Because the DHS TRIP notification letters raised privacy, stigma, and security-related concerns for Plaintiffs, Plaintiffs designated portions of the letters Confidential pursuant to the Stipulated Protective Order entered in this matter. Stipulated Protective Order, ECF No. 182. Redacted versions of the letters are on the public docket, *see* Redacted DHS TRIP Notification Letters,

It is undisputed that the notification letters did not disclose all of the reasons or information Defendants relied upon in determining that the six Plaintiffs should remain on the No Fly List. *Id.* ¶ 17.[3] It is undisputed that the letters made clear that Defendants had withheld relevant evidence, but did not describe that evidence in any manner. *Id.* ¶ 20. It is undisputed that the letters did not disclose whether the government possesses exculpatory information or information otherwise "contravening" any Plaintiff's placement on the No Fly List. *Id.* ¶ 20. It is undisputed that the letters referred to prior statements allegedly made by Plaintiffs or other individuals, but did not provide those statements, *id.* ¶ 21, or even the identities of the other individuals in most cases. It is undisputed that the letters did not confirm or deny whether any surveillance techniques were used to procure information that formed a basis for including the Plaintiffs on the No Fly List, including techniques that could render the use of such evidence unlawful. *Id.* ¶ 22. From the face of the letters it is clear that none explained how any allegations in them satisfied Defendants' substantive criteria for placement on the List.[4]

By letter dated December 5, 2014, Plaintiffs' counsel objected to the DHS TRIP notification letters as constitutionally inadequate. Ex. A to Joint Status Report, ECF No. 167-1. Plaintiffs asked Defendants to provide the following specific additional information and procedures:

- A complete statement of the reasons on which Defendants relied in placing Plaintiffs on the No Fly List;

ECF Nos. 175-1 (Letter to Kariye), 176-1 (Letter to Kashem), 177-1 (Letter to Knaeble), 178-1 (Letter to Meshal), 179-1 (Letter to Washburn), 180-1 (Letter to Persaud), and the unredacted versions were filed under seal pursuant to the Court's order granting Plaintiffs' Consent Motion to Seal. *See* Unredacted DHS TRIP Notification Letters, ECF Nos. 183 Ex. A (Letter to Persaud), 184 Ex. A (Letter to Kariye), 185 Ex. A (Letter to Kashem), 186 Ex. A (Letter to Knaeble), 187 Ex. A (Letter to Meshal), 188 Ex. A (Letter to Washburn).

[3] Plaintiff-Specific Joint Statements, ECF Nos. 175 ¶¶ 6-7 (Kariye Statement), 176 ¶¶ 6-7 (Kashem Statement), 177 ¶¶ 6-7 (Knaeble Statement), 178 ¶¶ 6-7 (Meshal Statement), 179 ¶¶ 6-7 (Washburn Statement), 180 ¶¶ 6-7 (Persaud Statement).

[4] Redacted DHS TRIP Notification Letters, ECF Nos. 175-1 (Kariye), 176-1 (Kashem), 177-1 (Knaeble), 178-1 (Meshal), 179-1 (Washburn), 180-1 (Persaud); Unredacted DHS TRIP Notification Letters, ECF Nos. 183 Ex. A (Persaud), 184 Ex. A (Kariye), 185 Ex. A (Kashem), 186 Ex. A (Knaeble), 187 Ex. A (Meshal), 188 Ex. A (Washburn).

- A complete statement regarding withheld evidence and the basis for withholding it;
- An explanation of how the allegations in the notification letters satisfied the government's stated criteria for inclusion on the No Fly List;
- Plaintiffs' full prior written or recorded statements, and the substance of any oral statements;
- Notice of surveillance techniques used to obtain the information that formed the basis for Plaintiffs' inclusion on the No Fly List;
- Information on, and the statements of, witnesses on whom Defendants relied to support Plaintiffs' inclusion on the No Fly List;
- Information on promises to witnesses whose statements were a basis for including Plaintiffs on the No Fly List;
- Exculpatory evidence in the government's possession;
- Hearings at which witnesses could provide live testimony and be cross-examined; and
- 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.

Id. Plaintiffs' counsel also objected to Defendants' use of vague, overbroad criteria for placement on the No Fly List. *Id.*

By letter dated December 14, 2014, Defendants refused to provide the information and procedures Plaintiffs had requested. Ex. B to Joint Status Report, ECF No. 167-2.

Plaintiffs each submitted responses to the DHS TRIP notification letters during the week of December 15, 2014.[5] J. Comb. Stmt., ECF No. 173 ¶ 26. The responses repeated Plaintiffs' objections to the adequacy of the disclosures in the notification letters and again requested additional information and procedural protections, including in-person hearings.[6] To the extent possible given the incomplete notice, the responses also summarized each Plaintiff's anticipated testimony explaining why the allegations in the DHS TRIP notification letters were incorrect, lacked credibility, or omitted important contextual information.[7] In addition, the responses

[5] Plaintiff Stephen Persaud's response was submitted on January 8, 2015.
[6] Plaintiffs' Redacted Response Letters, ECF Nos. 175-2 (Kariye Response Letter), 176-2 (Kashem Response Letter), 177-2 (Knaeble Response Letter), 178-2 (Meshal Response Letter), 179-2 (Washburn Response Letter), 180-2 (Persaud Response Letter).
[7] *Id.*, ECF Nos. 175-2 at 6-8 (Kariye), 176-2 at 7-8 (Kashem), 177-2 at 6-7 (Knaeble), 178-2 at 7-8 (Meshal), 179-2 at 7-8 (Washburn), 180-2 at 7 (Persaud); Plaintiffs' Unredacted Response Letters, ECF Nos. 183 Ex. B at 7 (Persaud Response Letter), 184 Ex. B at 6-8 (Kariye Response Letter), 185 Ex. B at 7-8 (Kashem Response Letter), 186 Ex. B at 6-7 (Knaeble Response

stated that if called to testify at an evidentiary hearing, each Plaintiff 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 anywhere in the world, that he does not knowingly have ties to terrorist organizations or individual terrorists, and that he does not advocate violence.[8] The responses stated that each Plaintiff's placement on the No Fly List was erroneous, and that each should promptly be removed from the List.[9]

The Acting TSA Administrator issued final determinations in late January. J. Comb. Stmt., ECF No. 173 ¶ 27. In each final determination, the TSA Administrator stated that he had considered the Plaintiff's response, and "other information available" to him, in concluding that the Plaintiff was "properly placed" on the No Fly List.[10] The Administrator explicitly 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.[11] The TSA administrator provided no additional information about the basis for placing each Plaintiff on the No Fly List, nor did he provide any reasons for rejecting Plaintiffs' responses. Defs.' Status Report, ECF No. 165 at 3. At no point during the revised redress process were Plaintiffs given any opportunity to present

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Letter), 187 Ex. B at 7-8 (Meshal Response Letter), 188 Ex. B at 7-8 (Washburn Response Letter).

[8] *Id*; *see also* Plaintiffs' Declarations in Support of Cross-Motions for Summary Judgment, filed Mar. 22, 2013 ("Pls. Summ. J. Declarations"), ECF Nos. 91-4 (Kariye Declaration), 91-5 (Kashem Declaration), 91-6 (Knaeble Declaration), 91-11 (Meshal Declaration), 91-13 (Persaud Declaration), 91-14 (Washburn Declaration) (each stating, "I do not pose a threat to civil aviation or national security").

[9] Plaintiffs' Unredacted Response Letters, ECF Nos. 183 Ex. B at 7 (Persaud), 184 Ex. B at 8 (Kariye), 185 Ex. B at 7 (Kashem), 186 Ex. B at 6 (Knaeble), 187 Ex. B at 8 (Meshal), 188 Ex. B at 7 (Washburn).

[10] Redacted Final DHS TRIP Determination Letters, ECF Nos. 175-3 at 4 (Kariye Determination Letter), 176-3 at 4 (Kashem Determination Letter), 177-3 at 4 (Knaeble Determination Letter), 178-3 at 4 (Meshal Determination Letter), 179-3 at 4 (Washburn Determination Letter), 180-3 at 4 (Persaud Determination Letter).

[11] *Id.*, ECF Nos. 175-3 at 5 (Kariye), 176-3 at 5 (Kashem), 177-3 at 4 (Knaeble), 178-3 at 5 (Meshal), 179-3 at 5 (Washburn), 180-3 at 5 (Persaud); Unredacted Final DHS TRIP Determination Letters, ECF Nos. 184 Ex. C at 5 (Kariye Determination Letter), 185 Ex. C at 5 (Kashem Determination Letter), 188 Ex. C at 5 (Washburn Determination Letter).

live testimony or cross-examine witnesses at an in-person hearing. J. Comb. Stmt., ECF No. 173 ¶ 28.

III. Substantive Criteria for Placement on the No Fly List

As stated above, the DHS TRIP notification letters to each Plaintiff included what the government identified as the applicable substantive criterion for inclusion on the List. Defendants also filed a status report that set forth the full criteria: "an individual nominated to the No Fly List must meet at least one of the following criteria by posing a threat of:

> (1) committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of air piracy, or threat to an airline, passenger, or civil aviation security); or
> (2) committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland; or
> (3) committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. § 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or
> (4) engaging in or conducting a violent act of terrorism and who is operationally capable of doing so."

Defs.' Status Report, ECF No. 165 at 2; *see also* J. Comb. Stmt., ECF No. 173 ¶ 5. In the notification letters to the Plaintiffs, Defendants applied criteria (2), (3), or (4) above.[12] Neither the notification letters to Plaintiffs nor Defendants' status report elaborated on the meaning of any of the criteria terms. At no point during the revised redress process did Defendants disclose what, if any, evidentiary standard or burden of proof must be met in order to satisfy the criteria.

The government has defined or further explained some of the terms used in its criteria in Watchlisting Guidance (J. Comb. Stmt., ECF No. 173 ¶ 6), that has been published by the media, and is publicly available. Declaration of Hugh Handeyside dated April 17, 2015 ("Handeyside Decl."), Ex. A.

[12] Plaintiffs' Redacted Response Letters, ECF Nos. 175-2 at 2 (Kariye), 176-2 at 2 (Kashem), 177-2 at 2 (Knaeble), 178-2 at 2 (Meshal), 179-2 at 2 (Washburn), 180-2 at 2 (Persaud).

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).

II. Defendants' Revised Redress Process Violates Plaintiffs' Fifth Amendment Right to Procedural Due Process.

Plaintiffs renew their motion for partial summary judgment under the procedural component of the Fifth Amendment's Due Process Clause. Courts assess the adequacy of procedural protections, as this Court previously has, according to the familiar test set forth in *Mathews v. Eldridge*: (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of that interest through the procedures used, and the value of additional safeguards, and (3) the government's interest, including the burdens that additional safeguards would entail. 424 U.S. 319, 335 (1976). As this Court has already found, the hallmarks of due process are notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Op. and Order, ECF 136 at 24 (citing *Mathews*, 424 U.S. at 333).

Although Defendants have created a novel process in what may appear to be a novel context, there are multiple analogous contexts to which this Court should look in applying the *Matthews* test and determining what process Plaintiffs are due. Examination of those contexts reveals that Defendants' revised redress process falls far short of what courts have required for deprivations of comparable significance—as well as lesser ones. Indeed, in denying Plaintiffs full notice of the allegations and evidence in their cases, a hearing before a neutral decision-maker, and the basic incidents of fairness that accompany those protections, Defendants' revised redress system affords less process than *any* system involving a significant liberty or even

property interest.[13]

A. Courts require far greater procedural protections in analogous contexts than Defendants have provided Plaintiffs here.

No court has ever upheld a deprivation of a U.S. citizen's (or lawful resident's) liberty as burdensome as a total ban on air travel based upon procedures as deficient as Defendants'. In fact, the Supreme Court has repeatedly required full-blown adversarial hearings with extensive notice procedures when the interests at stake were far less weighty than those here. Although there is no precise analogue for determining what process is due here, and while Plaintiffs do not argue that the Due Process Clause requires that they receive all the protections afforded in modern criminal trials, a review of the rules courts apply to satisfy elemental principles of fairness in different contexts provides a useful starting point for why Defendants' revised redress process is so plainly inadequate.

As an initial matter, the procedures available for deprivations of *property* are relevant because they establish a procedural floor *below* the one applicable in this case, which involves liberty. In general, courts regard property interests as less weighty than liberty interests. *See Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n.*, 426 U.S. 482, 495 (1976) (suggesting property interest was not comparable to a liberty interest in terms of pre-deprivation process required); *cf. Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (finding process for indefinitely detaining non-citizen convicted of aggravated felony likely unconstitutional because "[t]he Constitution demands greater procedural protection *even for property*") (emphasis added). For this reason, the Constitution must require greater protections here than, for example, in *Al Haramain Islamic Foundation v. United States Dep't of the Treasury*, 686 F.3d 965 (9th Cir. 2012) and *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F.

[13] Plaintiffs do not press at this time their request for notice of surveillance techniques used to obtain information that formed the basis for Plaintiffs' inclusion on the No Fly List, although they maintain their right to seek it at a later stage should it become necessary for this process to be fair. If this Court grants Plaintiffs' request for the additional other information that Plaintiffs seek here, their need for notice of surveillance techniques may be alleviated—thus preserving judicial resources.

Supp. 2d 857 (N.D. Ohio 2009), two national security cases involving deprivations of property.

Even in property deprivation cases, the government must typically provide more process than Defendants do here. For example, when the government seeks to take property subject to civil forfeiture, it must use strict procedural rules that require full and clear notice and a hearing before a judge. *See* 28 U.S.C. 1395 (jurisdiction and venue for civil forfeitures); 18 U.S.C. §§ 981, 983(a)(2)-(3) (general rules for civil forfeiture proceedings); 19 U.S.C. § 1600 *et seq.* (civil forfeiture of property seized by customs officers); 21 U.S.C. § 881 (forfeitures of drugs and controlled substances). *See also Krecioch v. United States*, 221 F.3d 976, 980 (7th Cir. 2000) (emphasizing, in the context of customs forfeitures, that due process requires notice and a meaningful opportunity to present objections and contest forfeitures at hearing before neutral decision-maker).

Similarly, courts require robust notice and an actual hearing in other property contexts, such as those involving termination of government benefits, public employment, housing rights, and utility services. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 270 (1970) (termination of welfare benefits); *Lindsey v. Normet*, 405 U.S. 56, 66, 84 (1972) (housing and eviction context); *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (temporary school suspension); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1978) (cancellation of subsidized utility services); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (recovery of excess Social Security payments); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (termination of public employment).

Above the floor set by property cases, when courts consider comparable *liberty* interests, they also uniformly require far more process than Defendants provide. One useful analogy involves civil commitment for mental illness or pedophilia. While the deprivation of liberty in those cases is greater in some respects because it involves physical confinement, it is lesser in others, because confinement can continue only so long as the individual in question remains ill—and not indefinitely. *See Foucha v. Louisiana*, 504 U.S. 71, 82–83 (1992) (statutory scheme for confinement of mentally ill violated due process because plaintiff could be held indefinitely); *cf.*

Op. and Order, ECF No. 136 at 60 (without due process, individuals "could be doomed to indefinite placement on the No-Fly List"). To civilly commit someone even for a limited duration, the state must employ specific procedural safeguards, including full and detailed notice of the allegations justifying commitment, *In re Gault*, 387 U.S. 1, 33 (1967), and a hearing in which it must prove its case by at least clear and convincing evidence, *Addington v. Texas*, 441 U.S. 418, 431–32 (1979).

Regardless of whether liberty or mere property rights are at stake, the Supreme Court and the Ninth Circuit require the government to disclose the evidence that forms the basis for its case, so that individuals have a meaningful opportunity to refute that evidence. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 494-495 (1980) (involuntary transfer of a prisoner to a mental health facility required disclosure to the prisoner of evidence relied upon for the transfer); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation required "disclosure to the parolee of evidence against him"); *Goldberg*, 397 U.S. at 270 (evidence used to prove government's case must be disclosed to individual in welfare termination proceedings); *Gete v. INS*, 121 F.3d 1285, 1298 (9th Cir. 1997) (evidence against owners of seized vehicles, including detailed officers' reports, must be provided to "afford them a fair opportunity to prepare a proper defense").

Deportation is perhaps the most analogous example to the deprivation of liberty at issue here, and the protections courts require in that context—including in national security cases—make very clear that Defendants' revised redress process violates due process. Like placement on the No Fly List, deportation does not result in incarceration, but can separate family members, preclude participation in important life events, interfere with employment opportunities, and limit access to medical care and educational opportunities. It imposes a "most serious" penalty and "may . . . visit as great a hardship as the deprivation of the right to pursue a vocation or a calling," mandating "[m]eticulous care . . . lest the procedure by which [an individual] is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 147, 154 (1945); *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (interest of non-citizen subject to exclusion order was, "without question, a weighty one," given that she stood to

lose the right to rejoin her immediate family). Courts require the government to provide a rigorous process even though, as the Supreme Court has repeatedly stated, courts have uniquely limited authority to interfere with the decisions of the political branches in the immigration context. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that "over no conceivable subject is the legislative power of Congress more complete.").

Virtually all of the procedural protections that the U.S. citizen Plaintiffs seek here are available to *non-citizens* facing deportation, including in cases in which the alleged ground of deportation involves national security. Non-citizens are afforded a panoply of due process protections, including: the ability to obtain adverse evidence and confront and cross-examine witnesses, *Saidane v. INS*, 129 F.3d 1063, 1066 (9th Cir. 1997), *Bondarenko v. Holder*, 733 F.3d 899, 906 (9th Cir. 2013); the right to a "full and fair" administrative hearing before a neutral fact-finder, *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000), *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003); and a reasoned explanation for the fact-finder's decision, *Su Hwa She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010). *See also Rafeedie v. INS*, 880 F.2d 506, 508–09 (D.C. Cir. 1989); *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992) (holding, in national security context, that due process forbade the use of secret evidence and required a hearing in exclusion proceedings against permanent resident). *See also* Section II.D.2, *infra*.

Finally, the protections available in criminal cases, though not dispositive, are an important touchstone in this Court's due process analysis for two reasons. First, with respect to the treatment of classified information in particular, the Ninth Circuit directed this Court to look to the procedures set forth in the Classified Information Procedures Act. *See Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012). As explained below, Defendants' revised redress process effectively seeks to preclude the Court from utilizing those procedures, both because Defendants provide *none* of the underlying evidence on which they rely—whether classified or unclassified—and because they provide no notice of potentially favorable (i.e., "Brady") evidence in the government's possession. *See* Section II.B.3, *infra*. Second, wholly apart from the Ninth Circuit's guidance, the criminal analogy is relevant and appropriate for the Court to

consider because the bedrock due process guarantees articulated before and during the 1950s and 1960s in the context of federal constitutional review of state court criminal cases establish the fundamental requirements of procedural fairness that courts apply whenever a serious deprivation of liberty is at stake.[14]

These bedrock protections included: notice of specific charges, *see Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge"), to which a specified evidentiary standard can be applied, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (upholding the quashing of an indictment because the statute provided no "ascertainable standard of guilt"); access to relevant evidence, *Dennis v. United States*, 384 U.S. 855, 873 (1966) (requiring trial court to allow defense inspection of grand jury minutes because "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact"); the right to cross-examine adverse witnesses, *In re Oliver*, 333 U.S. 257, 273 (1948) (a person's basic rights "include, as a minimum, a right to examine the witnesses against him"); and notice of certain critical categories of evidence, regardless of whether national security is at stake. *See Jencks v. United States*, 353 U.S. 657, 668-69, 672 (1957) (prior witness statements must be disclosed, even if they involve

[14] 1950s-era constitutional law did not require states to provide the full panoply of due process safeguards available in criminal proceedings today. Federal courts of that era typically struck down only those state criminal procedures that produced "fundamental unfairness," *Cicenia v. Lagay*, 357 U.S. 504, 509 (1958), a bare minimum that is substantively indistinguishable from the "fundamental fairness" that due process requires in this context. As the Supreme Court later recognized, the courts at that time applied to the states a far weaker "subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964); *see also Riser v. Teets*, 253 F.2d 844, 847 (9th Cir. 1958) (recognizing same). As a result, the prior era's courts allowed states to engage in conduct against criminal defendants that would later be repudiated as unconstitutional. *See, e.g.*, *Cicenia*, 357 U.S. at 509-10 (no due process violation where police refused to allow the defendant to confer with his lawyer prior to interrogation); *Stein v. New York*, 346 U.S. 156, 179 (1953) (no due process violation when question of voluntariness of confession was decided by jury, not the judge). However, the basic protections that Plaintiffs seek here were found to be required as a matter of fundamental fairness during this same era. *See* Section II.B.3, *infra*. Thus, although some of the more stringent constitutional protections of the modern criminal system need not apply in No Fly List proceedings, the basic requirements of fairness courts have long articulated surely must.

"state secrets"); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (same, for exculpatory evidence). Defendants' new redress process fails to provide *any* of these basic requirements of due process.

B. Defendants' revised redress process does not provide Plaintiffs adequate notice.

This Court already rejected Defendants' argument that Plaintiffs were not entitled to adequate notice. Op. and Order, ECF No. 136 at 59-60. It then directed Defendants to provide Plaintiffs with notice "reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." *Id.* at 61. To comply with that requirement, Defendants' notice must "set forth the alleged misconduct with particularity," *In re Gault*, 387 U.S. at 33, and "permit adequate preparation for . . . an impending hearing." *Memphis Light*, 436 U.S. at 14 (internal quotations omitted).

Defendants' revised notice process falls far short of these minimal requirements for three reasons. First, the notices provided to Plaintiffs are incomplete on their face because they do not include all of Defendants' *reasons* for placing Plaintiffs on the List. Second, they do not disclose any of the *evidence* in the government's possession on which it relies. Third, the notices do not include material and exculpatory evidence. Together, these deficiencies make it virtually impossible for Plaintiffs to respond meaningfully to the allegations against them.[15]

1. Defendants' failure to provide full notice of their reasons for placing Plaintiffs on the No Fly List violates due process.

There can be no dispute that Defendants' notice is incomplete because it fails to provide Plaintiffs with all of the reasons for their placement on the No Fly List. As discussed below, the notification letters admit this explicitly, and Defendants rejected Plaintiffs' request for complete notice. This defect alone renders the notice unconstitutional because constitutionally-sufficient notice must provide *full* notice of the reasons for the government's adverse action. The need for this requirement has long been obvious: Plaintiffs can only rebut the reasons they are given.

Overwhelming authority, including in the national security context, establishes that

[15] In addition to the examples below, specific examples of the defects in Defendants' process are set forth in the Plaintiff-specific memoranda filed concurrently with this Memorandum.

constitutionally-sufficient notice must be complete and precise. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72, (1951) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him.") (Frankfurter, J., concurring); *Al Haramain*, 686 F.3d at 986 (when government provided notice of only one of three reasons for designating organization as terrorist, it violated due process); *see also Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014) (the "right to know the factual basis for the action" is one of the "essential components of due process."); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (use of secret evidence to support detention pending removal of a non-citizen who was a suspected member of a terrorist organization violated due process because it denied meaningful notice); *Rafeedie v. INS*, 795 F. Supp. at 19 (due process violated when government kept confidential its bases for exclusion proceedings against permanent resident with alleged terrorist ties) *cf. Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) ("*NCRI*") (without due process protections, court could not presume one way or the other whether an organization designated as terrorist based on secret evidence could offer rebutting evidence that would change decision-maker's mind).

The importance of full notice flows directly from the fairness considerations underlying due process. Fundamentally, an individual cannot respond to what has not been alleged. Incomplete notice leaves people unable to "clear up simple misunderstandings or rebut erroneous inferences," *Gete*, 121 F.3d at 1297, provide "potentially easy, ready, and persuasive explanations" to factual errors, *Al Haramain*, 686 F.3d at 982, or tailor responses to the true reasons for the government's action, *Ralls*, 758 F.3d at 320. These deficiencies not only deny the most basic element of due process, they also inevitably increase the risk of error in the government's determinations. *See, e.g.*, *Al Haramain*, 686 F.3d at 986 ("[B]ecause AHIF-Oregon could only *guess* (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high."); *KindHearts*, 647 F. Supp. 2d at 904 ("substantial risk of wrongful deprivation" where, despite disclosure of evidentiary memo and unclassified exhibits,

plaintiff remained "largely uninformed about the basis for the government's actions").

In light of these basic notice principles, Defendants' notice is woefully insufficient. There is no dispute that Defendants did not provide Plaintiffs with full notice of all the reasons for their inclusion on the No Fly List, or even the reasons Defendants rejected Plaintiffs' explanations for why they should be removed. J. Comb. Stmt., ECF No. 173 ¶ 18.[16] Thus, Plaintiffs cannot respond to all of the allegations against them, correct obvious errors as to those allegations, or provide invaluable contextual information regarding the undisclosed reasons. Nor, without more information, can Plaintiffs meaningfully challenge, and the Court meaningfully adjudicate, Defendants' privilege assertions.

Defendants' notice to Plaintiff Raymond Knaeble starkly exemplifies the problems with incomplete notice. It consists of a single ambiguous sentence regarding the government's "concerns" about Mr. Knaeble's travel to one country in a particular year. Knaeble Notification Letter, ECF No. 186, Ex. A. It says nothing about the nature of those "concerns," why Mr. Knaeble's alleged travel prompted them, or how such concerns could possibly satisfy Defendants' stated criterion for placing Mr. Knaeble on the No Fly List. Although other notification letters include more information than Mr. Knaeble's, no Plaintiff received full notice of the reasons for his inclusion on the List.

Defendants' refusal to provide Plaintiffs with complete and precise statements of reasons constitutes a clear violation of their due process rights.

2. Defendants' failure to disclose all of the evidence used against Plaintiffs violates due process.

Defendants' notice is also grossly inadequate because of the evidence it fails to disclose.

[16] Redacted DHS TRIP Notification Letters, ECF Nos. 175-1 at 4 (Kariye), 176-1 at 3 (Kashem), 177-1 at 2 (Knaeble), 178-1 at 3 (Meshal), 179-1 at 3 (Washburn), 180-1 at 3 (Persaud) (each stating that "additional disclosures" have been withheld); Redacted Final DHS TRIP Determination Letters, ECF Nos. ECF Nos. 175-3 at 5 (Kariye), 176-3 at 5 (Kashem), 177-3 at 4 (Knaeble), 178-3 at 5 (Meshal), 179-3 at 5 (Washburn), 180-3 at 5 (Persaud); Unredacted Final DHS TRIP Determination Letters, ECF Nos. 184 Ex. C at 5 (Kariye), 185 Ex. C at 5 (Kashem), 188 Ex. C at 5 (Washburn) (each stating that the explanations "do not constitute the entire basis for my decision but I am unable to provide further information").

This is once again apparent from the face of the notification letters. They refer to various allegedly adverse evidence—recordings of conversations with third parties, statements by the Plaintiffs themselves as memorialized in agents' investigative reports, secret testimony from confidential informants, etc.—but Defendants provided Plaintiffs with *none* of this evidence. That failure cannot be reconciled with due process, which requires full notice of all of the evidence used against an individual when constitutionally-protected interests are at stake.

As described above, 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, so that individuals have a meaningful opportunity to refute it. *See* Section II.A,, *supra*. Courts enforce this requirement in the national security context, even when minimal property interests are at stake. *See Ralls*, 758 F.3d at 318-19 (applying rule to designated foreign terrorist organization's small bank account). They also enforce it for non-citizens alleged to be unlawful enemy combatants held at Guantanamo, a context in which national security issues are central. In these cases, the government is required to provide access to the evidence on which it seeks to rely, including access by cleared counsel to all of the evidence used in the case. *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 …"). There is no legitimate reason why Defendants cannot do the same here.

In addition, as with full notice of allegations, the deportation context provides strong analogous authority that Defendants may not withhold evidence that they use to deprive Plaintiffs of their constitutionally-protected liberty interest. The government must generally produce all of the evidence it intends to use against someone in a deportation case.[17] *See*

[17] When Congress considered an exception to that general rule for national security information, it permitted the use of secret evidence against two groups of individuals facing deportation--those who had no right to remain in the United States but were seeking admission, and those who had lost the right to remain but were seeking an exercise of discretion in their favor. However, Congress did *not* authorize the use of secret evidence against individuals who *did* have a right to remain—presumably because of their heightened liberty interests. *See* 8 U.S.C. § 1229a(b)(4)(B). In striking that balance, Congress acted consistent with constitutional law

Cinapian v. Holder, 567 F.3d 1067, 1074 (9th Cir. 2009) (due process requires reasonable opportunity to confront evidence in removal proceeding) (citing, *inter alia*, 8 U.S.C. 1229a(b)(4)(B)); s*ee also Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069–70 (9th Cir. 1995) ("*AADC*") (holding that use of secret evidence in legalization proceedings violates due process because it creates an "exceptionally high risk of erroneous deprivation"); *Rafeedie*, 880 F.2d at 508–09 (strongly suggesting that use of secret evidence against returning lawful permanent resident in exclusion hearings violated due process); *Rafeedie*, 795 F. Supp. at 19 (holding same on remand); *Kiareldeen*, 71 F. Supp. 2d at 414 (holding that use of secret evidence in bond and removal proceedings violated due process despite provision of unclassified summaries). If non-citizens cannot be deported without first having the opportunity to see the evidence against them, the same must be true of citizens effectively denied the opportunity to leave.

Here, it is undisputed that the DHS TRIP notification letters did not disclose to Plaintiffs *any* of Defendants' evidence against them, let alone information classified as secret. J. Comb. Stmt., ECF No. 173 ¶¶ 17-22. Although the notification letters make clear that Defendants relied on the statements of witnesses, including government officials, informants working for the government (presumably for compensation of some kind), and private third parties (whom Plaintiffs' counsel could interview if they knew who they were), Defendants refused to provide those statements, virtually any information on the witnesses themselves, or any reports prepared by law enforcement and other government personnel on which Defendants relied. *Id.*; Ex. B to Joint Status Report, ECF No. 167-2. Like Defendants' failure to provide complete statements of reasons, the consequences of withholding the evidence used against Plaintiffs are obvious: Plaintiffs lack any means to rebut misperception, error, or outright lies in the statements of

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strongly suggesting that due process does not permit the use of secret evidence in deportation cases involving individuals who had established lawful residence in the United States. *Bridges*, 326 U.S. at 150–54 (reversing deportation order of lawful resident based on hearsay allegations in national security case).

witnesses, including by inquiring into their potential biases.[18] *Cf. Greene v. McElroy*, 360 U.S. 474, 496 (1959) (due process must afford the opportunity to rebut the "testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy"). Instead, the statements of various witnesses whose reliability is either entirely unknown (and unknowable) or at the very least open to question are allowed to stand untested, "without the probing questions . . . which often uncover inconsistencies, lapses of recollection, and bias." *Id*. at 498-99.

Defendants' notification letters demonstrate the unfair consequences of withholding evidence. For instance, the letter to Plaintiff Imam Kariye indicates that Defendants are relying on the second-hand statements of several witnesses to support his inclusion on the No Fly List, including statements (at times recorded) from government agents and other individuals whose statements reflect hearsay within hearsay. Kariye Notification Letter, ECF No. 184, Ex. A. Moreover, what little Defendants revealed about the circumstances of these statements also calls into question the witnesses' reliability. *Id*. Defendants possess the full statements and recordings on which the letter is based but have not produced them.

Therefore, due process requires that Defendants provide to Plaintiffs the evidence, statements, recordings, and reports on which Defendants rely in placing them on the No Fly List.

3. Defendants failure to provide material and exculpatory evidence violates due process.

Due process has long required the government to disclose evidence in its possession that is favorable to an accused, and to produce the prior statements of its witnesses so as to allow the

[18] The *Ibrahim* case—in which a district court adjudicated a non-citizen's challenge to her inclusion on terrorism watchlists—provides a stark example of how long erroneous watchlisting information can stay in government systems. The plaintiff in that case spent years challenging her placement on the No Fly List before the government acknowledged that the original nomination was erroneous. Although the plaintiff was removed from the No Fly List shortly after she had been barred from flying in January 2005, the original basis for the error remained uncorrected in related watchlists and databases, resulting in the revocation of her visa and her inability even to fly to the United States for the trial in her own civil case. *See Ibrahim v. Dep't of Homeland Sec., et al.*, No. C06-0545-WHA (N.D. Cal. Jan. 14, 2014) (ECF No. 682); *see also* Op. and Order, ECF No. 136 at 37, 44-46 (discussing *Ibrahim* case).

accused to explore inconsistencies or omissions. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). As set forth above, *Brady* and its progeny are grounded in principles of fundamental fairness that apply outside the criminal context. *See* Section II.A, *supra*. In accordance with those principles, courts have applied *Brady*'s basic protection in a variety of other civil contexts, including when property or liberty interests are at stake, and in the face of national security concerns. *See, e.g.*, *Pavlik v. United States*, 951 F.2d 220, 224 n.5 (9th Cir. 1991) (assuming, without discussion, "that the principle enunciated in *Brady v. Maryland* applies in the context of a NOAA [National Oceanic and Atmospheric Administration] civil penalty proceedings."); *Enforcement of Statutes, Regulations, & Orders*, 129 FERC ¶ 61248, 62339, 2009 WL 4890651 (Dec. 17, 2009) (Federal Energy Regulatory Commission policy formalizing the "longstanding practice" of disclosing *Brady* materials in civil administrative enforcement actions); *see also United States v. Bostic*, 336 F. Supp. 1312, 1314 (D.S.C. 1971) *aff'd*, 473 F.2d 1388 (4th Cir. 1972) ("The principle of the Jencks case has been applied to administrative hearings, and justice requires no less."); *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (failure to provide potentially exculpatory evidence to individual asserting citizenship defense against deportation violated due process); *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (extending *Brady* to denaturalization and extradition cases in which the government's case is based on proof of alleged criminal activities); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 280 (E.D.N.Y. 2002) *aff'd*, 60 F. App'x 861 (2d Cir. 2003) (holding, in due process challenge to program allowing summary suspension of taxicab licenses, that "[w]hen the procedures in place do not allow for the presentation of potentially exculpatory evidence, there is little doubt that due process rights are in jeopardy.").

Similarly in the national security context, in habeas corpus proceedings brought by non-citizens held at Guantanamo, the government must disclose all evidence that is reasonably available or can be obtained through reasonable diligence and that tends to materially undermine the government's justification for holding the individual. *Dhiab v. Bush*, No. CIV.A 05-1457 (GK), 2008 WL 4905489, at *1 (D.D.C. Nov. 17, 2008). And in *Al Maqaleh v. Hagel*, 738 F.3d

312, 327 (D.C. Cir. 2013), the D.C. Circuit noted that alleged enemy combatants detained by U.S. authorities in Afghanistan are able not only to call witnesses, but also to discover and investigate potentially exculpatory evidence in the government's possession.

Courts' application of *Brady* and *Jencks* in all of these varying contexts demonstrates that when the government restricts or seeks to restrict a person's liberty, access to exculpatory evidence in the government's possession is a fundamental right. The context before this Court demands no less.

Here, it is undisputed that Defendants did not provide information in their possession that is exculpatory or that "contravened" their basis for including Plaintiffs on the No Fly List, J. Comb. Stmt., ECF No. 173 ¶ 20—nor did Defendants even identify material exculpatory information not reflected in the DHS TRIP notification letters. When Plaintiffs requested such information, Defendants refused to confirm or deny whether they possessed it, although in many cases it is obvious that they do—such as where the notification letters refer directly to Plaintiffs' alleged prior statements or the testimony of confidential informants who are almost certainly receiving compensation from the government (whether monetary or through leniency for criminal conduct). Two Plaintiffs also allege that they were placed on the No Fly List in retaliation for their unwillingness to serve as government informants. *See* Third Am. Compl. ¶¶ 112, 121. Yet Defendants have disclosed nothing about the pressure they put on Plaintiffs to serve as informants—which is exculpatory because it could tend to show that the government listed these Plaintiffs not because they threaten aviation security, but as a means of gaining leverage over them.

The disclosure to Plaintiff Amir Meshal shows the unfair consequences of withholding material and exculpatory evidence. The information in his DHS TRIP notification letter all appears to derive from statements he allegedly made when FBI agents coercively interrogated him while unlawfully detaining him for over four months in Kenya, Somalia, and Ethiopia. Meshal Notification Letter, ECF No. 187, Ex. A. Defendants neither mention in the letter nor produce any evidence showing that, as Mr. Meshal has alleged, FBI agents repeatedly

denied his requests for access to counsel and threatened him with torture and death if he refused to cooperate.[19] Referring *only* to certain of Mr. Meshal's alleged statements while denying him access to the complete statements, and disclosing nothing whatsoever about the conditions under which they were made, violates the most elemental due process principles and dramatically increases the risk of error both by the Defendants, and any decision-maker adjudicating the merits of Mr. Meshal's placement on the No Fly List.

The incomplete notice Defendants have provided under their revised redress process does not remedy the constitutional deficiencies in their original process. Defendants' failure to afford Plaintiffs adequate notice violates due process, creates an unacceptably high risk of error, and prevents Plaintiffs from responding meaningfully to the allegations against them.

C. Defendants' impermissibly vague criteria do not give Plaintiffs adequate notice of conduct that could lead to placement on the No Fly List.

Defendants' notices are also deficient for a distinct reason: a reasonable person could not discern how to conform her conduct to avoid being listed based on the criteria set forth in the notices, which are largely untethered from aviation security and rest on Defendants' vague and undefined positing of a "threat" Defendants determine Plaintiffs may "pose," rather than any concrete wrongful action they have taken. Plaintiffs may not be banned from flight and stigmatized as suspected terrorists because the government believes they *might* commit crimes unrelated to aviation security—apparently in some cases on the basis of First Amendment-protected speech or activity—but that is precisely what Defendants' criteria permit and what they have done here.

The Due Process Clause requires that a statute or regulation—whether civil or criminal—

[19] Mr. Meshal filed a civil action in November 2009 against the FBI agents who interrogated and detained him in violation of his constitutional rights. The district court judge in that case called Mr. Meshal's treatment at the hands of the FBI "appalling" and "embarrassing," but held that circuit court precedent nevertheless prevented the case from proceeding. *See* Memorandum Opinion, *Meshal v. Higgenbotham*, No. 1:09-cv-02178-EGS (D.D.C. June 13, 2014). The matter is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit. *See Meshal v. Higgenbotham*, No. 14-5194 (D.C. Cir. 2014). Certain ACLU counsel for Mr. Meshal in this matter also represent him in that case.

give "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, --- U.S. ---, 132 S. Ct. 2307, 2317 (2012). The No Fly List criteria fail to provide fair notice, for several reasons. First, three of the four criteria lack *any* nexus to aviation security—the ostensible purpose of maintaining a No Fly List—and encompass a broad array of other vaguely-defined harms. *See* J. Comb. Stmt., ECF No. 173 ¶ 5. Defendants applied at least one of those three criteria to each of the Plaintiffs.[20] Notice of these criteria is not fair notice because placement on the List under them imposes a significant penalty—inability to travel by air—that is unrelated to the "threat" that Plaintiffs allegedly "pose."

Second, the criteria are unconstitutionally vague, on their face and as applied to Plaintiffs. As the Supreme Court has held, the void-for-vagueness doctrine draws upon the procedural due process requirement that a government measure must provide "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. De George*, 341 U.S. 223, 231-32 (1951) (applying vagueness requirement in deportation context). Vague statutes and regulations are invalidated in order to avoid (1) penalizing people for behavior that they could not have known was illegal; (2) subjective, arbitrary, and discriminatory enforcement of laws by government officers; and (3) "any chilling effect on the exercise of First Amendment freedoms." *United States v. Kilbride*, 584 F.3d 1240, 1256-57 (9th Cir. 2009). A law is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Greater certainty as to the meaning of a measure is especially necessary when it "might induce individuals to forego their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

Neither the criteria that Defendants disclosed to Plaintiffs nor the government's Watchlisting Guidance includes definitions of critically important but ambiguous terms such as

[20] *See* Redacted DHS TRIP Notification Letters, ECF Nos. 175-1 (Kariye), 176-1 (Kashem), 177-1 (Knaeble), 178-1 (Meshal), 179-1 (Washburn), 180-1 (Persaud).

"pose," "threat," and "represent."[21] Such terms easily encompass conduct that Plaintiffs (and anyone else) could not have known would lead to placement on the No Fly List. Indeed, the fact that the criteria refer to, but necessarily fall short of, certain criminal statutes underscores how vague they are: for example, what does it mean for someone to pose a threat of committing those crimes if they have neither attempted nor conspired to actually commit them?[22] The only further explanation in the government's Watchlisting Guidance—expanding on the phrase "operationally capable" in one of the criteria—is deeply problematic in that it appears to penalize individuals for their First Amendment-protected and innocuous links and associations to others the government might suspect of wrongdoing. For example, it incorporates entirely innocent conduct such as travel to countries in which terrorist training grounds may be located. *See* Handeyside Decl., Ex. A at 52-3. Moreover, the lack of any evidentiary standard or burden of proof, *see infra* Section II.D.3, also leaves individuals ignorant of what conduct of an undefined nature is required to warrant placement on the List. The vagueness of the criteria opens the door to subjective, arbitrary, and discriminatory interpretation and renders them unconstitutional on their face.

The criteria are also unconstitutionally vague as applied to Plaintiffs. Most of the DHS TRIP letters include allegations related to Plaintiffs' speech or other expressive activity and associations, making it clear that the vagueness of the criteria led Defendants to apply them to penalize First Amendment-protected conduct. For instance, the notification letter to Plaintiff Faisal Kashem states that he was placed on the No Fly List in part because of certain alleged

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[21] The dictionary definitions of these terms are similarly unhelpful. *See Calop Bus. Sys., Inc. v. City of Los Angeles*, 984 F. Supp. 2d 981, 997 (C.D. Cal. 2013) (courts examining whether language is unconstitutionally vague on its face frequently begin with dictionary definitions). Merriam-Webster defines "threat" as "someone or something that could cause trouble, harm, etc." and "pose" as "to come to attention as." *See* http://www.merriam-webster.com. "Represent," which appears in the Guidance criteria, includes numerous possible meanings. *Id.* These definitions only underscore the indeterminacy and ambiguity of the criteria.

[22] The statutory references in the criteria do not cure these deficiencies, as they merely incorporate broad definitions of terrorism-related offenses but offer no guidance on what it means to "pose" a "threat" of committing such offenses. *See* 18 U.S.C. §§ 2331(1), 2331(5).

statements that, if accurately described in the letter, are plainly protected under the First Amendment as opinions about foreign policy—not actual wrongdoing. Kashem Notification Letter, ECF No. 185, Ex. A. Defendants may not sanction Plaintiffs for engaging in speech that is constitutionally protected, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982), and an elevated standard of clarity must apply for criteria that plainly impinge on protected speech or conduct. *See Scull*, 359 U.S. at 353. Given their defects, the criteria cannot possibly meet that standard.

Third, the notification letters fail to explain how the stated reasons satisfy the substantive criteria. The mere recitation of the applicable substantive criterion for each Plaintiff, followed by allegations of varying specificity, does not explain *how*, even if the allegations were true, such conduct would render Plaintiffs "threats" worthy of inclusion on the List. *See People's Mojahedin Org. of Iran v. United States 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).[23]

These defects in the No Fly List criteria are not only sufficient by themselves to render

[23] As Plaintiffs will argue during the substantive due process portion of their case, the criteria are also overbroad because they rely on *substantive* criteria that go far beyond—and in some cases depart entirely from—criteria for ensuring aviation security. A statute or rule is overbroad if it restricts constitutionally protected conduct and, if a sufficient governmental interest exists to justify the restriction, fails to employ the narrowest means consistent with the furtherance of that interest. *See Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *see also 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"). *See also Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (holding as facially unconstitutional Subversive Activities Control Act provision permitting revocation of passports because it "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and was not "narrowly drawn to prevent the supposed evil"). Plaintiffs will argue that the No Fly List criteria are overbroad for several reasons, including that they mandate an outright flight ban instead of measures (such as heightened screening coupled with the use of air marshals) that would infringe on Plaintiffs' liberty to a far lesser extent; they do not require that the conduct leading to placement on the List be knowing or intentional—and they therefore potentially include a range of innocent or First Amendment-protected conduct—and they place no limitation on the time during which information can support an individual's placement on the No Fly List.

the criteria unconstitutional, but also an independent reason for why they create a substantial risk of error. *Cf. Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 (9th Cir. 2013) (lack of objective criteria in determining whether an individual is an "active gang member" for purpose of enforcing anti-gang order presented "considerable risk of error"). Defendants' failure to utilize criteria that provide fair notice to Plaintiffs necessarily rendered their final determinations deeply flawed.

D. Defendants' failure to provide Plaintiffs with a hearing violates due process.

Wholly apart from the notice deficiencies set forth above, Defendants' revised redress procedure violates procedural due process because it does not afford Plaintiffs a hearing. No court has *ever* upheld the deprivation of a citizen's liberty without a hearing, and courts have routinely found that deprivations even of lesser property interests require hearings. Here, due process requires that Plaintiffs receive a hearing with all of the basic protections that a hearing entails, including the right to testify before a neutral decision-maker, cross-examine witnesses, and receive the benefit of a decision that applies a fixed burden of proof to the evidence presented.

1. Defendants' failure to provide Plaintiffs a live hearing before a neutral decision-maker violates due process.

Defendants' revised redress process falls far short of constitutional requirements because it provides *no hearing at all* at which Plaintiffs can contest their inclusion on the No Fly List. Although the precise procedures required at that hearing may be disputed—and Plaintiffs do not argue that they must include all of the procedural protections guaranteed, for example, in criminal trials—when liberty is at stake, due process demands a hearing in which live testimony can be presented to a neutral decision-maker.

The opportunity to be heard is an indispensable minimum of due process. *See Mathews*, 424 U.S. at 333; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard."). The Supreme Court has held consistently that the government may not deprive a person of a protected liberty

or property interest without a hearing. Indeed, as explained above, the Supreme Court has repeatedly required hearings for far less weighty interests than those at stake here. The government may not terminate welfare benefits, cease public utility services, suspend children from school, or even recover excess Social Security benefits without a hearing. *See* Section II.A, *supra*. The notion that the government can stigmatize U.S. citizens as suspected terrorists and deny them the right to board aircraft—thereby separating them from loved ones, dramatically limiting their prospects for economic prosperity, and blacklisting them—without providing a hearing simply cannot be reconciled with these cases.

The deportation context again provides a useful analogy to illustrate the radical nature of the government's position. As a general matter, the government cannot remove a non-citizen from the United States without a hearing that comports with fundamental fairness principles. The Supreme Court held over one hundred years ago that executive administrative officers could not take a non-citizen alleged to be in the United States illegally "into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903); *see also Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) (citing *Yamataya* in holding that "every individual in removal proceedings is entitled to a full and fair hearing"). It would be anomalous, to say the least, for courts to hold that the Constitution requires hearings for non-citizens who are alleged to be deportable, often by virtue of a criminal conviction, while denying hearings to citizens whose liberty the government has severely restricted even though they are not accused of criminal activity.

The rationale underlying the requirement of hearings in deportation cases applies equally here. Hearings with live testimony are provided in those cases not only because of the liberty interests at stake, but also because the outcome often turns on credibility assessments. *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2002) (reversing adverse credibility assessment based solely on appellate record review, because "[w]eight is given [to] the administrative law judge's determinations of credibility for the obvious reason that he or she sees

the witnesses and hears them testify") (internal citations omitted). Similarly, each Plaintiff in this case made clear he would testify that he presents no threat to aviation security (and would have offered testimony to refute adverse evidence had Defendants disclosed it). *See supra* Stmt. of Facts. Each Plaintiff also would have explained his particular interest in being able to fly—including to see loved ones, pursue employment opportunities, and enjoy the freedoms most other Americans take for granted.[24] Defendants' decision to place and keep each Plaintiff on the No Fly List necessarily included an adverse credibility finding, but no neutral decision-maker ever assessed Plaintiffs' credibility (or any other witness's credibility) in person.

The failure to provide a hearing constitutes an obvious and severe violation of the Due Process Clause in this context.

2. Defendants' refusal to allow Plaintiffs the opportunity to confront and cross-examine adverse witnesses violates due process.

Because Plaintiffs have been denied any hearing, they have also been denied any opportunity to confront and cross-examine adverse witnesses and to call witnesses on their own behalf, even though both those rights have long been recognized as essential to due process. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process."). As the Supreme Court explained even in a case that did *not* involve a liberty interest, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 270. That opportunity is even more important where the witnesses may be motivated by greed, vindictiveness, or prejudice. *See Greene*, 360 U.S. at 496.

Defendants have ignored these basic due process principles. Instead, their revised redress

[24] *See* Pls.' Summ. J. Declarations, ECF Nos. 91-4 (Kariye), 91-5 (Kashem), 91-6 (Knaeble), 91-11 (Meshal), 91-13 (Persaud), 91-14 (Washburn); Pls.' Response Letters, ECF Nos. 175-2 (Kariye), 176-2 (Kashem), 177-2 (Knaeble), 178-2 (Meshal), 179-2 (Washburn), 180-2 (Persaud).

process permits the entirely unconstrained use of hearsay, including by witnesses with actual or potential biases, against Plaintiffs. The absence of any such constraint is profoundly at odds with the principles courts have adopted in analogous contexts. For example, in determining whether the use of hearsay comports with basic due process constraints, courts in the deportation context routinely require both that testimony from individuals lacking personal knowledge be considered only where the original witness is unavailable *and* that a hearsay witness's testimony be found reliable. *See, e.g.*, *Cinapian*, 567 F.3d at 1074–76 (emphasizing "the importance of Petitioners' right to cross-examine witnesses against them and test the strength and establish the scope of an expert witness's factual determinations."); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (holding that "the Fifth Amendment's 'Due Process Clause applies to all "persons" within the United States', … and requires that [they] be given a reasonable opportunity to confront and cross-examine witnesses," and finding due process violation where government's own conduct caused the unavailability of the witness and witness had apparent motive to inculpate defendant); *Saidane v. INS*, 129 F.3d 1063 (9th Cir. 1997) (reversing deportation order because it relied on the hearsay affidavit of a witness who was available); *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983) (same); *see also Kiareldeen*, 71 F. Supp. 2d at 416 ("[D]ue process concerns are not satisfied unless the government provides the detainee with an opportunity to cross-examine the affiant, or at the minimum, submits a sworn statement by a witness who can address the reliability of the evidence.").

Here, the final determinations that Plaintiffs should remain on the No Fly List plainly turned on questions of fact and on the TSA Administrator's assessment of the credibility of adverse witnesses to whom Plaintiffs had no access and could confront and cross-examine. Although Plaintiffs do not contend that hearsay could never be used in a proceeding to determine whether to maintain someone on the No Fly List, Defendants appear to have used it against Plaintiffs without any limitations. None of the final determination letters contain any discussion as to a) whether the TSA Administrator arrived at conclusions based on evidence from individuals with *personal knowledge* of the allegedly adverse information; b) whether

individuals who did have personal knowledge of the allegedly adverse information were *available* to make their own statements; or c) whether the TSA Administrator considered (or even had any way to know) if the person providing the adverse information had any self-interested motivation to provide the information in question.[25]

Plaintiff Amir Meshal's notification letter provides a telling illustration of Defendants' use of hearsay from sources whose bias and reliability is at the very least open to question, but could not be meaningful contested. The letter relies almost entirely on the testimony of the FBI agents who unlawfully detained and coercively "interviewed" Mr. Meshal, yet Defendants do not name the agents in the letter, let alone provide their records of interrogation. Meshal Notification Letter, ECF No. 187, Ex. A. Mr. Meshal had no opportunity to examine the FBI agents regarding their coercive tactics, contest the accuracy and completeness of their accounts of what he said, or explore other factors that would tend to undermine their truthfulness (such as their unlawful detention of him). Indeed, there is no way for Mr. Meshal 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.

Defendants' notification letter to Plaintiff Imam Kariye provides another example of Defendants' reliance on hearsay that cried out for testing thorough cross-examination—to no avail. That letter relies, repeatedly, on both recorded and unrecorded conversations in which different individuals—some of whom are unnamed—describe statements allegedly made by third parties or by Imam Kariye to third parties. Kariye Notification Letter, ECF No. 184, Ex. A. Not only did Defendants deny Imam Kariye the actual full statements, they also denied him the opportunity to examine any of the individuals with personal knowledge of the allegations made in the letter, including the DHS TRIP Director who wrote the letter, whoever first described the recordings (or other conversations) to which the letter refers, the people whose conversations

[25] Redacted Final DHS TRIP Determination Letters, ECF Nos. 175-3 at 5 (Kariye), 176-3 at 5 (Kashem), 177-3 at 4 (Knaeble), 178-3 at 5 (Meshal), 179-3 at 5 (Washburn), 180-3 at 5 (Persaud); Unredacted Final DHS TRIP Determination Letters, ECF Nos. 184 Ex. C at 5 (Kariye), 185 Ex. C at 5 (Kashem), 188 Ex. C at 5 (Washburn).

that person purports to describe, or, in at least some cases, the *other* people who made the statements described by the people whose statements are described in the letter. As a result, there is no way to know if the DHS TRIP Director even listened to the recordings—or if instead she was summarizing the investigative report of someone else; if the speakers whose conversations are being described in the recording are themselves biased or unreliable (*e.g.*, if they have a history of false statements, or were being compensated for their testimony); or if the statements of or described by these individuals have been accurately conveyed. Defendants' reliance on unreliable hearsay from agents on the government's own payroll—without affording Plaintiffs the opportunity to confront and cross-examine adverse witnesses—simply does not comport with basic notions of fairness.

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

Finally with respect to the right to a hearing, Defendants failed to apply any specified burden or standard of proof in their determinations. Analyzing the adequacy of procedural due process protections requires an assessment of the standard the government applied in making its determinations. Op. and Order, ECF No. 136 at 34 (citing *Santosky v. Kramer*, 455 U.S. 745, 761-64 (1982)). Defendants' failure to employ any particular burden of proof or evidentiary standard was itself a due process violation, because Plaintiffs do not know what standard they have to satisfy in order to be removed from the list. *See, e.g.*, *Singh v. INS*, 213 F.3d 1050, 1054 (9th Cir. 2000) ("failure to give notice and an opportunity to respond in the face of ever-shifting evidentiary standards denied [the petitioner] a full and fair hearing").

Defendants should have applied a "clear and convincing" standard of proof, with the burden on the government. In civil proceedings in which the individual interests at stake "are both particularly important and more substantial than mere loss of money," the "clear and convincing evidence" standard is "the normal burden of proof . . ." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (internal citations and quotations omitted). As the Ninth Circuit has recognized, courts apply 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).

In sum, the numerous shortcomings in the notice provided to Plaintiffs guaranteed that they could not meaningfully be heard under the revised redress process, and Defendants' refusal to hold in-person hearings, allow Plaintiffs to confront and cross-examine adverse witnesses, and apply a burden of proof commensurate with the deprivation of Plaintiffs' liberty further deprived them of essential due process protections.

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

Contrary to Defendants' suggestions in their notification and determination letters, this Court can—and should—require procedural protections that protect both the government's interest in keeping sensitive information confidential and Plaintiffs' due process rights. Courts and administrative bodies routinely adjudicate claims that involve sensitive, confidential, or classified information in other contexts, such as those involving national security, as well as in cases involving minors, medical records, personal financial information, trade secrets, ongoing investigations, or witnesses whose safety requires anonymity. In all of these circumstances, courts have adopted procedures that simultaneously protect the sensitive information involved and adjudicate claims consistent with due process. *Cf.* Op. and Order, ECF No. 136 at 34-41, 57-61 (recognizing risk of error from inadequate procedures and the utility of additional procedural safeguards, and setting forth due process requirements).

In this case specifically, the Ninth Circuit has suggested that the Court look to the Classified Information Procedures Act (CIPA) in determining how to deal with sensitive information—a suggestion with which Plaintiffs agree. *Latif v. Holder*, 686 F.3d at 1130 ("We also leave to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information. *See* Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16."). CIPA does not alter the bedrock principle that Defendants must disclose information they use to both the Plaintiffs themselves and their counsel, but it does regulate those disclosures

through, *inter alia*, the use of stringent protective orders. *See id.* § 3; *see also United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (holding that CIPA requires the disclosure of classified information that is helpful to the defense or essential to a fair trial because "[w]ere it otherwise, CIPA would be in tension with the defendant's fundamental constitutional right to present a complete defense").[26] Thus, under CIPA, Defendants could seek to replace certain disclosures about which they have legitimate secrecy concerns with unclassified summaries or factual stipulations provided in lieu of the evidence, so long as the substitute disclosures give each Plaintiff "substantially the same ability to make his defense as would disclosure of the specific classified information." *See* 18 U.S.C. app. 3 §§ 4, 6(c); *United States v. Sedaghaty*, 728 F.3d 885, 906 (9th Cir. 2013) (finding inadequate a substitute CIPA disclosure that excluded exculpatory information and failed to provide "crucial context" for information that it did convey).

Even were the Court inclined to deviate from the Ninth Circuit's suggestion and instead look to the deportation context for guidance, Defendants would still be forbidden from doing what they sought to do here, which is to use secret evidence *against* Plaintiffs without allowing them to confront it. *See* Section II.D.2, *supra*. As noted above, the balance struck by the immigration laws is somewhat more generous to the government than that struck in CIPA, insofar as the immigration laws purport to permit the use of secret evidence against an immigrant when the immigrant seeks a favorable exercise of discretion (such as the privilege of admission to the United States or any form of discretionary relief from deportation). *See* Section II.B.2, *supra* (citing 8 U.S.C. § 1229a(b)(4)(B)), *but see also* (*AADC*, 70 F.3d at 1069–70 (holding that

[26] *See also Sedaghaty*, 728 F.3d at 903 ("CIPA does not expand or restrict established principles of discovery and does not have a substantive impact on the admissibility of probative evidence."); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-1364, (11th Cir. 1994) ("CIPA . . . simply ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information."); *cf. Crawford v. Washington*, 541 U.S. 36, 66-68 (2004) (where an out-of-court, testimonial statement is at issue, a court may not substitute its own judgment about reliability for what the Confrontation Clause requires—the opportunity to cross-examine).

use of secret evidence in legalization proceedings violates due process because it creates an "exceptionally high risk of erroneous deprivation"). But should the Court look to the deportation context to fashion alternative procedures, immigration judges have the regulatory authority to issue protective orders and seal records containing national security information, while still providing for their use by the immigrant. *See* 8 C.F.R. § 1003.46; *see also Khouzam v. Attorney Gen. of U.S.*, 549 F.3d 235, 259 n.16 (3d Cir. 2008) (citing 8 C.F.R. § 1003.46 in explaining that "the Government can move for the issuance of an appropriate protective order"). Although the immigrant has the right to examine materials submitted in such cases, the records are nonetheless sealed.[27] Moreover, the regulations give the judge various tools to ensure the information remains protected, including the use of certain storage protocols, and the power to issue protective orders. 8 C.F.R. § 1003.46(f)(1-3).

The robust procedural protections used to ensure due process in these contexts demonstrate that they can be applied here without harming government interests. There is simply no basis to believe that these mechanisms, trusted and proven to protect national security information in other circumstances, would be inadequate here.

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

Plaintiffs also renew their motion for partial summary judgment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, on two separate grounds. First, for the reasons stated above, Defendants' failure to afford Plaintiffs adequate notice and a meaningful hearing under the revised No Fly List redress procedures violates due process and is "contrary to constitutional right, power, privilege, or immunity," under 5 U.S.C. § 706(2)(B). Because the undisputed facts show that Defendants have denied Plaintiffs due process, Plaintiffs are entitled to relief under § 706(2)(B).

[27] As explained by the Executive Office for Immigration Review when it proposed the rule, "[t]his authority will ensure that sensitive law enforcement or national security information can be protected against general disclosure, while still affording *full use of the information* by the immigration judges, Board of Immigration Appeals, *the respondent*, and the courts." 67 Fed. Reg. 36799 (emphasis added).

Second, Defendants' revised redress procedures are also arbitrary, capricious, or "otherwise not in accordance with the law." *See* 5 U.S.C. § 706(2)(A). An agency rule is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The revised redress procedures violate Plaintiffs' constitutional rights and are therefore "not in accordance with the law." Additionally, the defects in the redress process underscore that Defendants failed to consider important aspects of Congress's instruction to "establish a timely and fair process for individuals identified as a threat . . . to appeal to the [TSA] the determination and correct any erroneous information." *See* 49 U.S.C. § 44903(j)(2)(G)(i). That failure constitutes a violation of § 706(2)(A) of the APA.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant their renewed motion for partial summary judgment.

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Respectfully submitted,

Steven M. Wilker, OSB No. 911882
Email: steven.wilker@tonkon.com
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204
Tel.: (503) 802-2040; Fax: (503) 972-3740
Cooperating Attorney for the ACLU
Foundation of Oregon

s/ *Hina Shamsi*
Hina Shamsi (Admitted *pro hac vice*)
Email: hshamsi@aclu.org
Hugh Handeyside (Admitted *pro hac vice*)
Email: hhandeyside@aclu.org
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500; Fax: (212) 549-2654

Ahilan T. Arulanantham (Admitted *pro hac vice*)
Email: aarulanantham@aclu-sc.org
Jennifer Pasquarella (Admitted *pro hac vice*)
Email: jpasquarella@aclu-sc.org
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Tel.: (213) 977-9500; Fax: (213) 977-5297

Alan L. Schlosser (Admitted *pro hac vice*)
Email: aschlosser@aclunc.org
Julia Harumi Mass (Admitted *pro hac vice*)
Email: jmass@aclunc.org
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493; Fax: (415) 255-8437

Alexandra F. Smith (Admitted *pro hac vice*)
Email: asmith@aclu-nm.org
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
Tel.: (505) 266-5915; Fax: (505) 266-5916
Mitchell P. Hurley (Admitted *pro hac vice*)
Email: mhurley@akingump.com
Christopher M. Egleson (Admitted *pro hac vice*)
Email: cegleson@akingump.com
Justin H. Bell (Admitted *pro hac vice*)
Email: bellj@akingump.com
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel.: (212) 872-1011; Fax: (212) 872-1002

Attorneys for Plaintiffs Salah Ali Ahmed, Nagib Ali Ghaleb, Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Ayman Latif, Ibraheim Mashal, Amir Mohamed Meshal, Elias Mustafa Mohamed, Abdullatif Muthanna, Steven Washburn, and Mashaal Rana

s/ *William Genego*

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

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

Attorneys for Plaintiff Stephen Persaud

CERTIFICATE OF SERVICE

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

s/ Hina Shamsi
Hina Shamsi