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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

<p>AYMAN LATIF, et al.,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>ERIC H. HOLDER, JR., et al.,</p> <p><i>Defendants.</i></p>	<p>Case No. 3:10-cv-00750-BR</p>
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFF MOHAMED SHEIKH ABDIRAHMAN KARIYE'S RENEWED MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

## INTRODUCTION

The revised redress process that Defendants applied to Plaintiff Mohamed Sheikh Abdirahman Kariye is constitutionally deficient in fundamental ways. It denies him what this Court unambiguously required—adequate notice of the reasons for his placement on the No Fly List—along with highly relevant evidence in the government’s possession, including his own statements and those of other witnesses, material evidence showing that he should *not* be on the No Fly List, and other evidence that must be available to ensure basic fairness. Defendants’ revised process also entirely fails to provide Imam Kariye with an in-person hearing at which he could cross-examine witnesses and establish his credibility. Because the risk of error in Defendants’ revised redress process remains unacceptably high, Imam Kariye therefore renews his motion for partial summary judgment on his claims for violations of his procedural due process rights and the Administrative Procedure Act.

## STATEMENT OF FACTS<sup>1</sup>

Defendants provided Imam Kariye with a DHS TRIP notification letter on November 26, 2014. J. Stmt. of Agreed Facts Relevant to Mohamed Sheikh Abdirahman Kariye (“J. Stmt.”), ECF No. 175 ¶ 2; ECF Nos. 175-1, 184. The letter informed him that 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. 175 ¶ 3 (citing 49 U.S.C. § 114(h)(3)(A)), and that “it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.” *Id.* ¶ 4.

The notification letter contained “an unclassified summary that includes reasons supporting” Defendants’ placement of Imam Kariye on the No Fly List, *id.* ¶ 5, including [REDACTED]

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<sup>1</sup> Imam Kariye incorporates and does not restate facts described in Plaintiffs’ Combined Motion for Partial Summary Judgment except where necessary to provide context for his specific facts.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is undisputed that the letter did not disclose all of the reasons or information that Defendants relied upon in determining that Imam Kariye should remain on the List. J. Stmt., ECF No. 175 ¶ 6. It is undisputed that the letter stated Defendants were “unable to provide additional disclosures,” *id.* ¶ 7, and that it did not describe the withheld evidence in any manner, nor did it disclose whether Defendants possess exculpatory or material information otherwise “contravening” Imam Kariye’s placement on the No Fly List. *Id.* ¶ 8. It is undisputed that the letter referred to prior statements Imam Kariye and others had allegedly made, but did not provide the full statements. *Id.* ¶ 9. Defendants did not explain how the allegations in the letter satisfied Defendants’ substantive criterion for placing Imam Kariye on the List. *See* Notification Letter, ECF Nos. 175-1, 184 Ex. A.

By letter dated December 5, 2014, counsel for Imam Kariye objected to the DHS TRIP notification letters to all Plaintiffs as constitutionally inadequate, and requested additional information and procedures, which Defendants refused to provide. Exs. to J. Status Rep., ECF Nos. 167-1, 167-2.

Imam Kariye submitted a response to the notification letter on December 16, 2014. J. Stmt., ECF No. 175 ¶ 14; Response Letter, ECF Nos. 175-2, 184 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, it also summarized Imam Kariye’s anticipated testimony explaining why the allegations in the letter were incorrect, lacked credibility, or omitted important contextual information. Response Letter, ECF No. 184, Ex. B at 6-8. It further stated that if called to testify at an evidentiary hearing, Imam Kariye would state that he does not pose a threat to U.S. Government facilities, personnel,

or aviation security, within the borders of the U.S. or abroad; that he has no intention of engaging in or providing support for any violence against the United States or any U.S. personnel anywhere in the world; [REDACTED]

[REDACTED] and that his placement on the No Fly List was erroneous. Response Letter, ECF No. 175-2 at 6-7; *see also* Kariye Decl., ECF No. 91-4 ¶ 11 (“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.”).

The Acting TSA Administrator issued a final determination to Imam Kariye on January 21, 2015. J. Stmt., ECF No. 175 ¶ 15; Determination Letter, ECF Nos. 175-3, 184. The determination stated that the Administrator had considered Imam Kariye’s response and “other information available” to him in concluding that Imam Kariye was “properly placed” on the No Fly List. Determination Letter, ECF No. 175-3 at 4. The Administrator stated that his explanations “do not constitute the entire basis of my decision but I am unable to provide additional information” because, according to the Administrator, doing so would risk harm to national security and law enforcement activities. *See* Determination Letter, ECF No. 175-3. The Administrator provided no additional information on the basis for placing Imam Kariye on the No Fly List, nor did he provide any reasons for rejecting Imam Kariye’s response. *See id.* At no point during the revised redress process was Imam Kariye given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. J. Stmt., ECF No. 175 ¶ 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). Imam Kariye 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 Imam Kariye’s Fifth Amendment Right to Procedural Due Process.**

Imam Kariye 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, Argument Section II.A. In denying Imam Kariye full notice of the allegations and evidence against him, a hearing before a neutral decision-maker, 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.*

**1. The revised redress process does not provide Imam Kariye 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 Imam Kariye fails to meet even these minimal due process requirements, making it virtually impossible for Imam Kariye to meaningfully respond to the allegations against him.

**a. Defendants’ failure to provide full notice of their reasons for placing Imam Kariye 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. Section II.B.1.

Here, it is undisputed that Defendants did not provide Imam Kariye with full notice of the reasons for his inclusion on the No Fly List. J. Stmt., ECF No. 175 ¶¶ 6-7. The notification and

final determination letters acknowledged that Defendants had withheld part of the basis for their decision. *See* ECF Nos. 175-1 at 3, 175-3 at 3. Defendants also failed to provide reasons for rejecting Imam Kariye’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.

Imam Kariye cannot meaningfully respond to allegations Defendants have kept from him—as he attempted to do for the brief allegations included in the letter. For instance, Imam Kariye’s response submission stated that, should he be allowed to testify at an evidentiary hearing, he would explain that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Response Letter, ECF No.

184, Ex. B at 7. 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 Imam Kariye with a complete statement of reasons constitutes a clear violation of his due process rights.

**b. Defendants’ failure to disclose to Imam Kariye the evidence used against him violates due process.**

When liberty or even 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. Section II.B.2.

Here, it is undisputed that the notification letter to Imam Kariye did not disclose *any* of



Defendants' evidence against him. J. Stmt., ECF No. 175 ¶¶ 6-10. The letter made clear that Defendants relied on second- and even third-hand statements of several witnesses— [REDACTED] [REDACTED]—some of which described Imam Kariye's own alleged prior statements. The letter also relies on the [REDACTED]. Notification Letter, ECF No. 184, Ex. A. Defendants refused to provide any of that evidence to Imam Kariye. Not only do these witness statements reflect hearsay within hearsay, but what little Defendants revealed about them calls into question their reliability. For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] *Id.*, Ex. A at 2. [REDACTED] [REDACTED] Without access to these witness statements [REDACTED] [REDACTED] Imam Kariye has no means to discover or rebut misperception, error, or outright lies in the original statements, inquire into whether information was distorted as it was passed from first- to second- and third-hand and eventually to the letter, or probe into the witnesses' potential biases or ulterior motives. Due process requires that Defendants provide the evidence, statements, recordings, and any reports on which they rely in placing Imam Kariye on the List.

**c. Defendants' failure to provide Imam Kariye 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. Section II.B.3.

Here, it is undisputed that Defendants did not provide information in their possession that is exculpatory and "contravened" their basis for including Imam Kariye on the No Fly List, J.

Stmt., ECF No. 175 ¶ 8—nor did they even identify material exculpatory information not reflected in the notification letter. Defendants refused to confirm or deny whether they possessed such information, even though the letter relies almost entirely upon statements made by individuals who were [REDACTED], as well as statements of other people whose identities are wholly unknown. *See id.* ¶¶ 8-9; Notification Letter, ECF No. 184, Ex. A. Defendants’ refusals in these respects violate elemental due process principles and increases the risk of error in their final determination as to Imam Kariye.

**2. Defendants’ impermissibly vague criteria do not give Imam Kariye 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 Imam Kariye fails to provide him with fair notice, for three reasons. First, the criterion lacks a required nexus to aviation security and encompasses a broad array of other potential harms. Defendants applied the third No Fly List criterion to Imam Kariye, *see* J. Comb. Stmt., ECF No. 173 ¶ 5; J. Stmt., ECF No. 175 ¶ 4, but that criterion does not constitute fair notice, both because it includes a long list of diverse conduct within it and because it entails a significant penalty—inability to travel by air—that is unrelated to the “threat” that Defendants think Imam Kariye represents. As the government’s Watchlisting Guidance itself states, this criterion was intended specifically to encompass individuals perceived to represent “threats to [facilities] abroad *that d[o] not involve ... civil aviation.*” Handeyside Decl. dated April 17, 2015, Ex. A at 51.

Second, the criterion Defendants applied to Imam Kariye is unconstitutionally vague on its face. *See* Combined MPSJ, Arg. Section II.C. Terms such as “represents” and “threat” are entirely ambiguous and encompass conduct that Imam Kariye could not have known would lead to placement on the No Fly List—including innocent conduct. The vagueness of the criterion leaves Imam Kariye vulnerable to subjective, arbitrary, and discriminatory interpretation.

The criterion is also unconstitutional as applied to Imam Kariye. The notification letter states that Imam Kariye was placed on the No Fly List in part because of alleged conduct that, if accurately described in the letter, is plainly protected under the First Amendment, including alleged [REDACTED]

[REDACTED]. See Notification Letter, ECF No. 184, Ex. A. Thus, an elevated standard of clarity must apply because the criterion impinges on Imam Kariye’s protected speech, association, and religious practice. See *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). The criterion plainly fails to provide that clarity.

Third, the notification letter fails to explain how the stated reasons satisfy the substantive criterion. The letter merely recites the criterion followed by various allegations—including entirely innocent conduct. See Notification Letter, ECF No. 184, Ex. A. Simply making such allegations does not explain *how*, even if every factual allegation regarding his prior associations and conduct were true (which Imam Kariye disputes), those facts would render Imam Kariye a “threat” worthy of inclusion on the List today, [REDACTED]

**3. Defendants’ failure to provide Imam Kariye 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. Section II.D. Due process requires Defendants to provide Imam Kariye a hearing before a neutral decision-maker 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 Imam Kariye.

**a. Defendants’ failure to provide Imam Kariye a live hearing before a neutral decision-maker violates due process.**

The opportunity to be heard is an indispensable minimum of due process, see *Mathews*,

424 U.S. at 333, and the Supreme Court has repeatedly required hearings for far less weighty interests than those at stake here. *See* Combined MPSJ, Arg. Section II.A. A live hearing would give Imam Kariye a critical opportunity to present his defenses and explain his reasons for needing to be able to fly, *see* Kariye Decl., ECF No. 91-4 ¶ 9, and would enable decision-makers to effectively assess his credibility and that of other witnesses.

Defendants' revised redress process provides *no hearing at all* at which Imam Kariye could contest his inclusion on the No Fly List. J. Stmt., ECF No. 175 ¶ 16. It is clear, moreover, that the TSA Administrator made an adverse credibility finding when he stated that he had "considered" the information provided in Imam Kariye's response but concluded that the "information available" to the Administrator—which included all the information Defendants failed to disclose to Imam Kariye—supported Imam Kariye's placement on the No Fly List. *See* Determination Letter, ECF Nos. 175-3. Given the gravity of the restriction on Imam Kariye's liberty, Defendants' failure to allow him to testify plainly violates the Due Process Clause.

**b. Defendants' refusal to allow Imam Kariye the opportunity to confront and cross-examine adverse witnesses violates due process.**

Defendants' refusal to hold an in-person hearing also necessarily denies Imam Kariye 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. Section II.D.2.

Defendants revised redress process permits the entirely unconstrained use of hearsay. The notification letter relies almost exclusively on conversations—some recorded, some not—in which different individuals—some named, some not—describe statements allegedly made by third parties or by Imam Kariye to third parties and then relayed to the witness. *See* ECF No. 184, Ex. A. Imam Kariye has no opportunity to test the memories, motives, and potential biases of these individuals. *Id.* 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 report of someone else; if the speakers whose conversations are 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 original statements have been accurately conveyed.

Similarly, the final determination that Imam Kariye should remain on the No Fly List plainly turned on disputed questions of fact, [REDACTED]

[REDACTED] *See id.*, Ex. C at 3. In making a final determination, the TSA Administrator appears not only to have assessed Imam Kariye’s credibility—without directly hearing from him—but also to have decided that several other witnesses were credible without their having been cross-examined. Defendants’ pervasive, unconstrained reliance on multiple levels of hearsay simply does not comport with basic notions of fairness or due process.

**c. 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 Imam Kariye does not know what standard must be met and by whom. *See* Combined MPSJ, Arg. Section II.D.3

**4. Defendants can provide additional procedural protections without harming government interests.**

The robust procedural protections courts use to ensure due process in analogous contexts, including in criminal and immigration cases, demonstrate that such protections can be applied here without harming government interests. *See* Combined MPSJ, Arg. Section II.E. Defendants may not use secret evidence without allowing Imam Kariye to confront it.

**III. Defendants’ Revised Redress Process Violates the Administrative Procedure Act.**

Imam Kariye also renews his motion for partial summary judgment under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. *See* Combined MPSJ, Arg. Section III.

**IV. CONCLUSION**

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

Dated: April 17, 2015

Respectfully Submitted,

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