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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 AMIR MESHAL'S RENEWED MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

## INTRODUCTION

The revised redress process that Defendants applied to Plaintiff Amir Meshal is constitutionally deficient in fundamental ways. It denies Mr. Meshal 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 Mr. Meshal with an in-person hearing at which he could cross-examine witnesses and establish his credibility—a critical due process protection given the significant deprivation of liberty that resulted when Defendants placed Mr. Meshal on the No Fly List. The risk of error in the revised redress process remains unacceptably high. Mr. Meshal 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 Mr. Meshal with a DHS TRIP notification letter on November 24, 2014. J. Stmt. of Agreed Facts Relevant to Amir Meshal (“J. Stmt.”), ECF No. 178 ¶ 2; ECF Nos. 178-1, 187 Ex. A. The letter informed Mr. Meshal 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. 178 ¶ 3 (emphasis added). The letter further stated that “it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.” *Id.* ¶ 4.

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

[REDACTED]. It is undisputed that the letter did not disclose all of the reasons or information that

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<sup>1</sup> Mr. Meshal 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.

Defendants relied upon in determining that Mr. Meshal should remain on the List. *Id.* ¶ 6. The letter stated that Defendants were “unable to provide additional disclosures,” *id.* ¶ 7, but it did not describe the withheld evidence in any manner, nor did it disclose whether Defendants possess exculpatory or material information otherwise “contravening” Mr. Meshal’s placement on the No Fly List. *Id.* ¶ 8. It is undisputed that the letter referred to specific prior statements Mr. Meshal had allegedly made, but it did not provide the full statements. *Id.* ¶ 9. Defendants did not explain how the allegations in the letter satisfied Defendants’ substantive criterion for placing Mr. Meshal on the List. *See* Notification Letter, ECF Nos. 178-1, 187 Ex. A.

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

Mr. Meshal submitted a response to the DHS TRIP notification letter on December 15, 2014. J. Stmt., ECF No. 178 ¶ 14; Response Letter, ECF Nos. 178-2, 187 Ex. B. The response repeated the objections to the adequacy of the disclosures and again requested additional information and procedural protections. *Id.* To the extent possible given the incomplete notice, the response also summarized Mr. Meshal’s anticipated testimony explaining why the allegations in the letter were incorrect, lacked credibility, or omitted important contextual information, most critically because the alleged statements Defendants attributed to him were the result of FBI agents’ coercive interrogation—including threats of torture, disappearance, and death—of Mr. Meshal while they unlawfully detained him in East Africa. Response Letter, ECF No. 187, Ex. B at 6-7. The response further stated that if called to testify at an evidentiary hearing, Mr. Meshal would aver that he does not pose a threat of committing an act of terrorism, that he has no intention of engaging in, or providing support for, violent unlawful activity, that he does not knowingly have ties to terrorists, that he does not advocate violence, and that his placement on the No Fly List was erroneous. *Id.*, ECF No. 178-2 at 6-7; *see also* Meshal Decl., ECF No. 91-11 ¶ 10 (“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 Mr. Meshal on January 21, 2015. J. Stmt., ECF No. 178 ¶ 15; DHS TRIP Determination Letter, ECF No. 178-3. The determination stated that the Administrator had considered Mr. Meshal’s response and “other information available” to him in concluding that Mr. Meshal was “properly placed” on the No Fly List. Determination Letter, ECF No. 178-3 at 4. The Administrator stated that his determinations “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. *Id.* at 5. The Administrator provided no additional information on the basis for placing Mr. Meshal on the No Fly List, nor did he provide any reasons for rejecting Mr. Meshal’s response. *See id.* At no point during the revised redress process was Mr. Meshal given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. J. Stmt., ECF No. 178 ¶ 16.

## **ARGUMENT**

### **I. Summary Judgment Standard**

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

### **II. Defendants’ Revised Redress Process Violates Mr. Meshal’s Fifth Amendment Right to Procedural Due Process.**

Mr. Meshal 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 Mr. Meshal full notice of the allegations and evidence against him, a hearing before a neutral decisionmaker, and an opportunity to cross-examine individuals with personal knowledge of the adverse evidence, the revised redress system affords less process than *any* system involving a significant liberty or even property interest. *See id.*

**1. The revised redress process does not provide Mr. Meshal adequate notice.**

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

**a. Defendants’ failure to provide full notice of their reasons for placing Mr. Meshal 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 Mr. Meshal with full notice of the reasons for his inclusion on the No Fly List. J. Stmt., ECF No. 178 ¶¶ 6-7. Both the notification letter and the final determination letter acknowledged that Defendants had withheld part of the basis for their decision. *See* ECF Nos. 178-1 at 2, 178-3 at 3. Defendants also failed to provide reasons for rejecting Mr. Meshal’s explanations for why he should be removed from the List, including his clear and unequivocal denials of any intent to harm the United States.

Mr. Meshal cannot meaningfully respond to allegations that Defendants have kept from him—as he attempted to do in response to the incorrect, misleading, or de-contextualized information in Defendants’ incomplete notification letter. For instance, Mr. Meshal’s response

submission stated that, should he be allowed to testify at an evidentiary hearing, he would explain that [REDACTED]

[REDACTED] Even though this response was necessarily constrained by the inadequacy of Defendants' notice, it is more than he can provide in response to the other allegations against him—of which he is wholly unaware. Nor can he meaningfully challenge, and the Court adjudicate, assertions of privilege, as Defendants failed to specify grounds for withholding reasons for placing him on the List.

Defendants' refusal to provide Mr. Meshal with a complete statement of reasons constitutes a clear violation of his due process rights.

**b. Defendants' failure to disclose to Mr. Meshal the evidence used against him violates due process.**

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

Here, it is undisputed that the notification letter to Mr. Meshal did not disclose *any* of Defendants' evidence against him. J. Stmt., ECF No. 178 ¶¶ 6-10. Although the letter made clear that Defendants relied on statements of FBI agents and reports prepared by those agents describing Mr. Meshal's alleged prior statements, ECF No. 187, Ex. A, Defendants refused to provide that evidence to Mr. Meshal. Nor, obviously, did Defendants provide evidence related to the undisclosed reasons for placing him on the No Fly List. Mr. Meshal therefore has no means to probe the adequacy and accuracy of the evidence against him, let alone meaningfully respond to it. Nor can he discover or rebut misperception, error, or outright lies in the statements of



witnesses, or inquire into their potential biases (including what may be the FBI agents' motivation to conceal their unlawful treatment of Mr. Meshal). Due process requires that Defendants provide the evidence, statements, recordings, and reports on which they rely in placing Mr. Meshal on the List.

**c. Defendants' failure to provide Mr. Meshal 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.

It is undisputed that Defendants did not provide information in their possession that is exculpatory and "contravened" their basis for including Mr. Meshal on the No Fly List, J. Stmt., ECF No. 178 ¶ 8—nor did they even identify material exculpatory information not reflected in the notification letter to Mr. Meshal. Defendants refused to confirm or deny whether they possessed such information, even though the letter purports to summarize Mr. Meshal's alleged prior statements. *See id.* ¶¶ 8-9; Notification Letter, ECF No. 187, Ex. A. The failure to provide material or exculpatory information is particularly prejudicial in Mr. Meshal's case, given that, as explained in his response submission, the allegations in his notification letter all appear to derive from statements he allegedly made when FBI agents coercively interrogated him and repeatedly denied his requests for access to counsel while he was unlawfully detained in Kenya, Somalia, and Ethiopia. Response Letter, ECF No. 187, Ex. B at 6-7. 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 in Defendants' final determination.

**2. Defendants’ impermissibly vague criteria do not give Mr. Meshal fair notice of conduct that could lead to placement on the No Fly List.**

The Due Process Clause requires that a statute or regulation give “fair notice of conduct that is forbidden or required.” *F.C.C. v. Fox Television Stations, Inc.*, --- U.S. ---, 132 S. Ct. 2307, 2317 (2012). The No Fly List criterion Defendants applied to Mr. Meshal fails to provide him with fair notice. First, it lacks any clear nexus to aviation security—which is Defendants’ ostensible purpose for maintaining a No Fly List—and encompasses a broad array of other potential harms. As noted above, Defendants applied the final, catchall criterion to Mr. Meshal, *see* J. Comb. Stmt., ECF No. 173 ¶ 5; J. Stmt., ECF No. 178 ¶ 4, but that criterion does not constitute fair notice because it entails a significant penalty—inability to travel by air—that is unrelated to the “threat” that Defendants think Mr. Meshal “represents.”

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

The criterion is also unconstitutionally vague as applied to Mr. Meshal, in that the notification letter fails to explain how the stated reasons satisfy the criterion. Rather, the letter merely recites the criterion followed by various allegations, including [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See* Notification Letter, ECF No. 187, Ex. A. Simply making such allegations does not explain *how*, even if the allegations were true (which Mr. Meshal does not concede), such conduct would render him a “threat” worthy of inclusion on the

List.<sup>2</sup>

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

**3. Defendants' failure to provide Mr. Meshal 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 Mr. Meshal a hearing before a neutral decisionmaker at which he can cross-examine witnesses and receive a decision that applies a fixed burden of proof to the evidence presented. *See id.* Defendants failed to provide any of these basic protections to Mr. Meshal.

**a. Defendants' failure to provide Mr. Meshal a live hearing before a neutral decisionmaker violates due process.**

The opportunity to be heard is an indispensable minimum of due process, *see Mathews*, 424 U.S. at 333, and the Supreme Court has repeatedly required hearings for far less weighty interests than those at stake here. *See* Combined MPSJ, Arg. Section II.D.1. A live hearing would give Mr. Meshal a critical opportunity to present his defenses and explain his reasons for needing to be able to fly, *see* Meshal Decl., ECF No. 91-11 ¶¶ 7-8, and would enable decisionmakers to effectively assess his credibility and that of other witnesses.

Defendants' revised redress process provides *no hearing at all* at which Mr. Meshal could contest his inclusion on the No Fly List. J. Stmt., ECF No. 178 ¶ 16. It is clear, moreover, that the TSA Administrator made an adverse credibility finding when he stated that he had "considered" Mr. Meshal's response but concluded that the "information available"—which included the information Defendants failed to disclose to Mr. Meshal—supported Mr. Meshal's placement on the No Fly List. *See* Determination Letter, ECF No. 178-3 at 4. Given the gravity

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<sup>2</sup> From the face of the letter, it is not clear if Defendants' allegations against Mr. Meshal are based on or implicate his travel to and stay in Somalia to further his religious studies. If so, Defendants' allegations would implicate or infringe upon his First Amendment-protected beliefs and activities, and he preserves his right to raise these claims at a later stage.

of the restriction on Mr. Meshal's liberty, Defendants' failure to allow him to testify violates the Due Process Clause.

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

Defendants' refusal to hold an in-person hearing also necessarily denies Mr. Meshal 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. Their notification letter to Mr. Meshal relies almost entirely on the testimony of the FBI agents who unlawfully detained and coercively "interviewed" him, yet Defendants do not name the agents in the letter, let alone provide their records of interrogation. *See* Notification Letter, ECF No. 187, Ex. A. Mr. Meshal had no ability to test the memory and potential biases of these unnamed government witnesses regarding his own alleged statements—none of which he had access to. 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.

Similarly, the final determination that Mr. Meshal should remain on the No Fly List plainly turned on disputed questions of fact, [REDACTED] [REDACTED] *See* Notification Letter, Response Letter, ECF No. 187, Ex. A, B. In making a final determination against Mr. Meshal, the TSA Administrator assessed not only Mr. Meshal's credibility—without directly hearing from him—but also that of adverse witnesses from the FBI to whom Mr. Meshal had no access or ability to confront and cross-examine. The determination letter did not mention whether the TSA Administrator based his conclusions on evidence from government officers with personal knowledge who were available to make their own statements, or whether those officers had any self-interested motivation to provide that information. Such pervasive, unconstrained use of

hearsay simply does not comport with basic fairness.

**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 Mr. Meshal does not know what standard must be met, and who has the burden of meeting it. *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 against Mr. Meshal without allowing him to confront it.

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

Mr. Meshal 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.

**CONCLUSION**

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

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Respectfully Submitted,

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