11-35407

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHMAN KARIYE, RAYMOND EARL KNAEBLE IV, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, STEVEN WILLIAM WASHBURN, SAMIR MOHAMED AHMED MOHAMED, ABDULLATIF MUTHANNA, NAGIB ALI GHALEB, SALEH A. OMAR, ABDUL HAKEIM THABET AHMED, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, and STEPHEN DURGA PERSAUD,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; ROBERT S. MUELLER, III, in his official capacity as Director of the Federal Bureau of Investigation; and TIMOTHY J. HEALY, in his official capacity as Director of the Terrorist Screening Center,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Reply Brief of Plaintiffs-Appellants

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INTRODUCTORY STATEMENT

This is a simple case. The Plaintiffs are U.S. citizens and lawful permanent residents who have been prevented from flying within or over the United States; the Defendants are the government officials who are responsible for that injury and who possess the sole authority to remedy it. Plaintiffs believe (though Defendants refuse to confirm) that they have been placed on the Terrorist Screening Center's ("TSC") No Fly List, and they seek either an order removing them from that list, or a constitutionally adequate name-clearing hearing in which they can confront and rebut the evidence or innuendo upon which Defendants relied in prohibiting them from flying.

Defendants' brief represents an elaborate and laborious effort to misconstrue Plaintiffs' complaint and thereby shoehorn it into an inapplicable jurisdictional statute intended to safeguard wholly unrelated government interests. As Plaintiffs made clear in their opening brief, that statute—49 U.S.C. § 46110 ("Section 46110")—has no bearing on the claims at issue here, because it applies to "orders" of the Transportation Security Administration ("TSA"), and this suit challenges the actions (and inactions) of other government agencies. *See* Pls.' Br. 15–18, 24–25, 27. Defendants do not dispute—indeed, they have sworn in affidavits—that

TSA is neither responsible for Plaintiffs' injuries nor empowered to redress them. *See* Defs.' Br. 11 ("TSC is responsible for determining whether a record should remain in the ["Terrorist Screening Database"] or have its status modified or removed."); Pls.' Br. 16–17. Accordingly, TSA is not an indispensable party, and Plaintiffs' challenge may proceed in the district court—with or without the joinder of TSA.

Defendants' principal contention is that Plaintiffs' suit is a "wholly procedural challenge"—that is, Plaintiffs "do not attack the alleged underlying decision to put them on the No Fly List" or the "substantive outcome" of their petitions for redress—and that, somehow, that putative distinction means that Plaintiffs' "procedural" suit must be styled as a petition for review of a TSA order. Defs.' Br. 17. But Defendants' characterization of this suit is both irreconcilable with the pleadings and immaterial to their jurisdictional argument. In seeking their removal from the No Fly List and demanding a fair process for adjudicating their status, Plaintiffs obviously challenge their "placement" on the list. And even if Plaintiffs' suit were a "wholly procedural" challenge, as Defendants implausibly assert, it would not follow that the suit must be brought pursuant to the very procedures that Plaintiffs challenge as deficient; rather, such a suit would even more clearly be the kind of "*broad* challenge to the

allegedly unconstitutional actions" of the relevant agencies that this Court has held belongs in the district courts in the first instance. *Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994) (emphasis added).

ARGUMENT

1. The Defendants repeatedly assert that Plaintiffs' suit challenges *only* the adequacy of the procedures that the government has established to provide "redress" to aggrieved travelers, and not the "underlying decision" to prevent them from flying. *See* Defs.' Br. 17, 21–25, 29, 41–43. This is quite wrong.

The Complaint alleges that: each Plaintiff was denied boarding on flights to or from the United States or over U.S. airspace, Excerpt of Record ("ER") 26 (Second Am. Compl. ("SAC") ¶ 2); the Plaintiffs believe—and many have been expressly told—that they are on the government's No Fly List, ER 26 (SAC ¶ 3); the Plaintiffs "do not present a security threat to commercial aviation," ER 48 (SAC ¶ 143); the Plaintiffs have suffered numerous harms as a result of their inability to fly within or over the United States, ER 48–49 (SAC ¶ 145); the Plaintiffs possess constitutionally protected liberty interests that have been burdened by Defendants' actions, ER 49 (SAC ¶¶ 147–150); and the Defendants and other government officials responsible for creating and maintaining the No Fly List have not

provided Plaintiffs "with a fair and effective mechanism" by which they can challenge the "decision to place them on the No Fly List," ER 31 (SAC ¶ 37). The suit seeks an injunction that "requires Defendants to remedy the constitutional and statutory violations identified above, including the removal of Plaintiffs from any watch list or database that prevents them from flying; or requires Defendants to provide Plaintiffs with a legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List." ER 51 (SAC Prayer for Relief).

Put even more simply, Plaintiffs allege that the Defendants have improperly placed them on a list that has prevented them from flying and have offered them no reasonable way to get off of the list. To be sure, the procedural deficiencies of the only available government "redress" process are highly relevant to the disposition of Plaintiffs' suit. But, as the Complaint makes clear, it is the substantive deprivation of Plaintiffs' liberty interests that triggers their right to a fair process in the first instance.[1] By the Defendants' logic, the petitioner in *Mathews v. Eldridge*, 424 U.S. 319 (1976), did not attack the "underlying decision" by government agencies to

[1] Indeed, had Plaintiffs not been denied boarding on commercial flights within or over the United States, Defendants undoubtedly would have moved to dismiss this suit on the ground that Plaintiffs lacked constitutional standing to pursue their claims.

cut off his disability benefits; he simply challenged the adequacy of the termination process. On the contrary, the petitioner in *Eldridge* challenged both, as do the Plaintiffs here. *See Eldridge*, 424 U.S. at 324–25.

Defendants' insistence that Plaintiffs do not challenge the "substantive outcome" of their Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP") applications is even more peculiar. For one thing, it's not at all clear what Defendants mean by this; Plaintiffs have never been notified of *any* "outcomes," substantive or otherwise, of their applications for redress through DHS TRIP, and it is the government's stated policy not to disclose those outcomes. *See* Pls.' Br. 18–19, 21.[2] What's more, this suit was filed before most of the Plaintiffs had received any response at all—even a non-responsive "Glomar" response that neither confirmed nor denied their inclusion on the list —from DHS TRIP, Pls.' Br.

[2] Defendants concede, as they must, that DHS TRIP letters do not reveal the outcome of the redress process because of the government's "Glomar" policy, but they contend, remarkably, that Plaintiffs do not challenge that policy. Defs.' Br. 19. A constitutional challenge to inadequate notice surely encompasses a challenge to *no* notice; the Defendants cannot possibly fashion a remedy that affords Plaintiffs an opportunity to confront the evidence against them while simultaneously refusing to confirm or deny whether the Plaintiffs have anything to complain about. Moreover, Defendants submitted a sworn affidavit purporting to justify the Defendants' Glomar policy, demonstrating their awareness that the Complaint challenges that policy. *See* ER 133–34 (Decl. of Christopher M. Piehota ("Piehota Decl.") ¶¶ 25–29).

8, so *a fortiori* the suit cannot be aimed at challenging nonexistent "outcomes." But it bears noting that Defendants misapprehend the significance of the DHS TRIP process to the claims in Plaintiffs' complaint. This suit is not a challenge to the DHS TRIP process; it is a challenge to the Defendants' deprivation of Plaintiffs' rights without constitutionally adequate process. Because DHS TRIP is the process by which the government purports to offer "redress" to aggrieved travelers, its structural deficiencies will be central to the resolution of Plaintiffs' due process and Administrative Procedure Act ("APA") claims. *See* Pls.' Br. 24–25. But Plaintiffs have addressed their challenge not to the powerless administrators of DHS TRIP—who, by the Defendants' own admissions, *cannot* afford the Plaintiffs relief—but to the actual decision makers who alone can provide either the substantive *or* procedural remedy that Plaintiffs seek. *See* Pls.' Br. 16–17.[3]

2. Defendants describe as "critical" the distinction between challenges to a traveler's "alleged *original* placement on the No Fly List" and challenges to a traveler's "alleged *continued* placement on the No Fly List." Defs.' Br. 31–32 (emphasis in original). The former, they are compelled to concede,

[3] For the same reason, Defendants' argument (presented for the first time on appeal) that Section 46110 governs here because this suit is a challenge to "TSA's regulations" establishing DHS TRIP, Defs.' Br. 36–38, is unavailing.

may be filed in the district court pursuant to this Court's decision in *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008). Defs.' Br. 31–32. The latter, they vehemently insist, must be filed in the court of appeals pursuant to Section 46110. *Id.* at 32. By any reasonable measure, this is a distinction without a difference: a traveler learns of his watch list status only after he has been denied boarding on a commercial flight; his challenge to that status plainly encompasses both his "original" *and* his "continued" placement on the list; and TSC is the "final arbiter" of both of these decisions, ER 131, 136–37 (Piehota Decl. ¶¶ 22, 35). Moreover, by Defendants' reasoning, had Plaintiffs simply included an allegation expressly challenging their "original" placement on the No Fly List, *that* challenge could have been pursued in the district court, even though precisely the same constitutional considerations would have been at issue. In addition to being contrary to the plain language of Section 46110 and this Court's decision in *Ibrahim*, *see* Pls.' Br. 14–17, Defendants' suggested rule is both illogical and unworkable.[4]

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[4] If the Defendants mean to argue that a suit claiming that the Constitution requires *pre*-deprivation notice challenges "placement" and is properly brought in the district court, but a suit seeking only *post*-deprivation notice challenges "redress" and must therefore be brought in the court of appeals, they fare no better. The district court's jurisdiction cannot conceivably turn on the type (or timing) of notice that Plaintiffs understand the Constitution to require when their rights are violated.

Defendants rely heavily on the fact that Congress assigned to the *TSA*—not to the Defendants in this case—the task of establishing "a timely and fair process for individuals identified as a threat . . . to appeal to the Transportation Security Administration the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i); *see also* Defs.' Br. 8–9, 25–27. Because Plaintiffs sought to avail themselves of TSA's redress process—even as they attacked it as ineffectual and unconstitutional—Defendants maintain that this case is unlike *Ibrahim*, in which an established redress process was not at issue. Defs.' Br. 31–32.

But even if Congress indeed delegated to the TSA control over the redress process, it hardly follows that Plaintiffs have sued the wrong defendants. On the contrary, this would show only that the executive branch has *flouted* congressional intent by assigning real control to the Defendants. As Defendants have conceded, DHS TRIP receives traveler complaints but does not adjudicate them; rather, it transmits them to Defendant TSC, which determines whether any action should be taken. ER 32 (SAC ¶ 39); ER 136–37 (Piehota Decl. ¶ 35). Once the *TSC* makes a determination regarding an individual's watch list status, it notifies DHS TRIP of the outcome. ER 57 (Declaration of James G. Kennedy ("Kennedy Decl.") ¶ 10). In apparent contravention of Congress's directive, the executive

branch has assembled a redress process that wholly divests the TSA of any authority to "correct any erroneous information," 49 U.S.C. § 44903(j)(2)(G)(i), and wholly insulates the *actual* decision makers from the complaints of the traveling public. *See* Pls.' Br. 24–25, 27. To adjudicate Plaintiffs' due process and APA claims, the court will evaluate the *existing* redress process, not the process that Congress may have contemplated. Put otherwise, you go to court with the redress process you have, not the one Congress might have wanted or wished you to have.

3. As Plaintiffs argued at length in their opening brief, this suit in no way challenges "orders" of the TSA because the DHS TRIP letters upon which Defendants rely do not order anyone to do anything, do not fix any legal rights, do not purport to make factual findings, take no position regarding Plaintiffs' claims, bind no one, and are not backed up by an administrative record upon which a reviewing court could rely. *See* Pls.' Br. 18–22.[5]

[5] Contrary to Defendants' brief, Plaintiffs do not contend that "an agency action cannot constitute an 'order' under Section 46110 unless the government discloses everything about the agency action." Defs.' Br. 41. Plaintiffs do contend, however, that the agency action must disclose *something*. The petitioner in *Gilmore v. Gonzales*, upon which Defendants rely, may not have been permitted to read the TSA "security directive" at issue, but he was on notice that the directive imposed a requirement that he either present identification or submit to secondary screening in order to board a commercial flight. 435 F.3d 1125, 1136 (9th Cir. 2006) ("Although [petitioner] was not given the text of the identification policy due to the Security Directive's classification as [Sensitive Security Information], he

Indeed, the Defendants themselves cannot seem to settle on a single coherent narrative about precisely which TSA action constituted the "order" within the meaning of Section 46110.[6] Moreover, the Defendants cannot point to a single case—because none exists—in which the putative order under Section 46110 (or its predecessor provision) was issued by an entity that had no authority over the matter in dispute. *See* Pls.' Br. 22 & n.8, 23 n.9. On these grounds alone, the district court erred in dismissing this suit for lack of jurisdiction.

But Defendants' brief has presented a possible additional ground for rejecting their jurisdictional argument. If this Court were to accept Defendants' characterization of this suit as a "wholly procedural" attack on the constitutionality of the administrative process that does not contest the

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was nonetheless accorded adequate notice given that he was informed of the policy and how to comply."). By contrast, at the conclusion of the DHS TRIP process, petitioners do not know what—or even *whether*—to appeal.

[6] Defendants alternatively argue that the DHS TRIP letters sent to Plaintiffs are the relevant "orders," and that the TSA regulations establishing DHS TRIP are the relevant "orders." *See* Defs.' Br. 39–40 (DHS TRIP determination letters); *id*. at 35–38 (TSA regulations establishing DHS TRIP). In doing so, they create even more confusion for redress-seeking travelers. For example, Defendants are unable to say precisely when Section 46110's 60-day clock begins to run; rather, they offer four different scenarios for calculating the time limit. *See* Defs.' Br. 46–49. If Defendants themselves cannot settle upon a single triggering event for Section 46110's timeliness requirement, it follows that aggrieved travelers will be even more uncertain.

"underlying decision" to prevent Plaintiffs from flying, Defs.' Br. 17, then, under this Court's precedents, it would be even *clearer* that Plaintiffs may litigate this case in the district court.

In *Mace v. Skinner*, an aircraft mechanic whose license was revoked by the FAA brought suit, raising numerous constitutional challenges to the FAA's revocation procedures. 34 F.3d 854, 856 (9th Cir. 1994). The district court, applying Section 46110's predecessor provision,[7] dismissed the suit for lack of jurisdiction. *Id.* at 856–57. This Court reversed for at least the following three reasons. First, the appellant's claims were "not based on the merits of his individual situation, but constitute[d] a broad challenge to allegedly unconstitutional FAA practices." *Id.* at 859. Second, "the administrative record for a single revocation would have little relevance to [appellant's] constitutional challenges…" *Id.* Finally, "any examination of the constitutionality of the FAA's revocation power should logically take place in the district courts, as such an examination [was] neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *Id.*

[7] 49 U.S.C. § 46110 was formerly 49 U.S.C. app. § 1486 (1988) and is interpreted consistently with that provision. *See Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1995).

According to Defendants' characterization of Plaintiffs' suit, *all* of those considerations are present here: Plaintiffs' claims constitute a "broad challenge" to DHS TRIP; the "record" created by TSA—to the extent it exists at all—would have "little relevance" to a constitutional challenge aimed at the process itself; and the question of whether the agency's process satisfies due process is hardly within the unique expertise of the agency itself. Thus, even if the DHS TRIP letters were orders—which they are not—Plaintiffs' "broad challenge" to the constitutionality of the DHS TRIP process could be litigated in the district court. This makes sense because such a challenge would require the kind of fact-finding that would be impossible within the existing agency "redress" process.

4. The "central issue" on this appeal is not, as Defendants contend, whether "TSA is a 'required party' under [Federal Rule of Civil Procedure] 19(a)(1)," Defs.' Br. 20. Rather, the "central issue" is whether the district court properly determined that it lacked subject matter jurisdiction over this action. As explained above and in Plaintiffs' opening brief, the district court reached the incorrect conclusion. *See* Pls.' Br. 9–12, 17, 23–27. Since there is no order to which Section 46110 applies, there is no barrier to TSA's joinder in the district court. Thus, although TSA is not a required party to the action, if this Court were to determine that TSA or DHS (or both) will be

necessary to the implementation of a full remedy, there is no reason why they cannot be joined on remand. *See* Pls.' Br. 28–30.

5. Plaintiffs believed that the jurisdictional question in dispute on this appeal had been resolved by *Ibrahim*, but that decision evidently left some confusion about which kinds of challenges to the No Fly List could be litigated in the district courts. It is critical that this Court provide clarity so that Plaintiffs' claims, which have already been in limbo for more than a year, may proceed in the proper forum. In particular, this Court should resolve whether Section 46110 applies to (a) claims that a traveler has been improperly placed on the No Fly List; (b) claims seeking the removal of a traveler's name from the No Fly List (assuming this Court agrees with Defendants that there is any distinction between claims challenging "placement" and claims seeking "removal"); (c) claims that the "redress" process the government has established for travelers who are denied boarding is unconstitutional, arbitrary, and capricious, because individuals placed on the No Fly List are entitled to meaningful notice of the government's allegations against them and a fair process for contesting those allegations; and (d) a suit that encompasses *all* of the claims listed above. As in *Gilmore*, "it is of the utmost importance" that this Court resolve this

dispute "without further delay," as the rights of many travelers "are affected by the policy." 435 F.3d at 1134.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' opening brief, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,712 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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November 7, 2011

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Ninth Circuit Rule 25-5(f), that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2011.

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