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
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 Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Mohamed Meshal, and Steven Washburn

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. LORETTA E. LYNCH, et al., *Defendants*.	Case No. 3:10-cv-00750-BR

PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

INTRODUCTION

Defendants' reliance on "predictive judgments" to place Plaintiffs on the No Fly List and deprive them of their constitutionally-protected liberty interests is now central to Defendants' defense of their revised redress process. Defendants have embarked on the perilous endeavor of trying to predict whether people who have never been charged with, let alone convicted of, any violent crime might nevertheless commit a violent act of terrorism at some point. And for the first time, Defendants confirm they are using the "reasonable suspicion" evidentiary standard, which this Court has criticized as fundamentally flawed, to make their predictions. Because Defendants predict that Plaintiffs—all innocent U.S. citizens entitled to the full protections of the Due Process Clause—may engage in violence at some unknown point in the future, it has blacklisted them indefinitely. Defendants offer no evidence whatsoever about the accuracy of their predictive model, any scientific basis or methodology that might justify it, or the extent to which it might result in errors. Instead, Defendants ask this Court to do something no court has ever done: defer to the government's decision to deprive Americans of their constitutionally protected liberties based solely on *predictions* about potential future misconduct and deny these Americans a meaningful process to prove their innocence.

The Due Process Clause bars the outcome Defendants seek. As this Court well knows, accounting for error and minimizing its consequences is at the heart of procedural due process analysis. Evidence from Plaintiffs' two experts—a long-time intelligence community professional and forensic psychiatrist with extensive expertise in terrorism research, and an expert in risk assessment in the criminal justice system—conclusively shows that Defendants' predictive model results in an extremely high risk of error. That is because, despite years of research, no one in or outside the government has devised a model that can predict with any reliability whether a given person will commit an act of terrorism. As Plaintiffs' experts show, there is no indication that Defendants' model for placing Plaintiffs on the No Fly List even tries to use basic scientific methods to make and test Defendants' predictive judgments. By contrast,

Plaintiffs' experts apply these basic scientific principles and find that the rate of error from inclusion on the No Fly List of individuals like Plaintiffs (who have not been charged or convicted of any crime) "will necessarily be very high" and result in a List that includes people who will never commit an act of terrorism.

The high risk of error in Defendants' predictive model must inform the Court's due process analysis here. To be clear, Plaintiffs are not challenging Defendants' predictive model as such; rather, they are asking the Court to account for the error it produces. In their opening brief, Plaintiffs established their entitlement to greater procedural safeguards than Defendants' revised redress process affords. Now, there can be no genuine dispute that Defendants' predictive model results in the erroneous listing of individuals, like Plaintiffs, who are *not* prone to commit acts of terrorism. It is even more imperative that Plaintiffs receive stringent procedural protections so they can demonstrate to a neutral decision-maker their "innocence" of crimes they will never commit. Moreover, even if Defendants' predictive model had a high degree of accuracy—which it does not—Plaintiffs would still be entitled to more protections than Defendants' revised redress process provides, in order to ensure that the evidence Defendants consider in making their predictions is full and fair.

Defendants' refusal to provide Plaintiffs all the reasons for their predictions, the evidence that is the basis for those reasons—including exculpatory evidence—use of a clear and convincing evidentiary standard, and a live hearing violates due process. Courts in the national security and analogous contexts, including contexts in which the government seeks to predict future dangerousness, require the safeguards that Plaintiffs seek. Ignoring or downplaying those contexts, Defendants invoke categorical secrecy and harm arguments to claim they cannot provide truly meaningful safeguards against government error. That is manifestly incorrect. As Plaintiffs have shown and the Ninth Circuit suggested in this case, there are time-tested legislative and judicially devised tools that preserve the government's secrecy interests while providing individuals meaningful notice and a hearing to challenge government deprivations of

their liberties. Each of those tools is available here, and all would provide greater safeguards than Defendants provide against the high risk of error that their predictive model produces.

As a matter of law, therefore, Defendants' revised redress process is unconstitutional and Plaintiffs, not Defendants, are entitled to summary judgment. Plaintiffs respectfully ask the Court to deny Defendants' motion, and order Defendants to provide Plaintiffs the safeguards to which they are entitled in a process for each Plaintiff that is now overseen by the Court.

ARGUMENT

I. Defendants' Revised Redress Process Guarantees a High Risk of Error.

Defendants' arguments for the adequacy of their revised redress process are based—to a new and unprecedented degree—on their "predictive judgments" that Plaintiffs might constitute a future threat to aviation or national security, justifying their placement on the No Fly List. *See* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J., ECF No. 251 ("Defs.' Mem.") at 6 (placement on the No Fly List is a "predictive judgment intended to prevent future acts of terrorism"), 13 (government makes "predictive judgments . . . as to whether certain individuals present too great a risk to be allowed to board commercial aircraft"), 15 ("No Fly List determinations are predictive assessments about potential threats"), 18 ("[I]dentifying individuals who 'may be a threat to civil aviation or national security' is a predictive judgment intended to prevent future acts of terrorism."), 27 ("No Fly List determinations are predictive assessments about potential threats"), 29 ("These assessments are, by nature and necessity, predictive judgments about individuals who may pose threats."). Defendants emphasize that the focus of the No Fly List is on "violent acts of terrorism," *id*. at 48 and 49, and readily admit that their "predictive judgments" are "assessments about conduct that *may or may not occur in the future*." *Id.* at 59 (emphasis added). Defendants further assert that the Court must defer to their predictive judgments. *Id*. at 19 n.7, 30, 45.

In order to assess the adequacy of the revised redress process, therefore, the Court must first examine the basis for and accuracy of Defendants' predictive judgment model. To be clear,

in this proceeding, Plaintiffs do not challenge Defendants' No Fly List predictive model as such, but ask the Court to account for the error it produces. It is axiomatic that the higher the risk of error in Defendants' predictive model, the more the revised redress process must do to minimize the risk of erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) (risk of erroneous deprivation is essentially a measure of the "fairness and reliability" of the existing procedures); *cf.* Op. and Order dated June 25, 2014 ("June 2014 Op."), ECF No. 136 at 34-41 (analyzing risk of error and utility of substitute safeguards).

As set forth below, and as the expert declarations of Dr. Marc Sageman and Dr. James Austin make clear, from an objective, scientific standpoint, the predictive judgments Defendants use to place and retain Plaintiffs on the No Fly List result in an extremely high risk of error.[1] That is because Defendants are (i) by their own admission, lumping together "known" terrorists who have actually been charged or convicted of crimes with Plaintiffs (and individuals like them), who have never even been charged with a violent crime, let alone convicted; (2) attempting to predict exceedingly rare future events based on "derogatory criteria" or other indicators that have never been shown to be predictive, and (3) using predictions without employing even the most rudimentary scientific tools to assess and test their validity and account for error.

Making matters worse, Defendants now confirm that they placed Plaintiffs on the No Fly List using a low "reasonable suspicion" evidentiary standard, which means the risk of erroneous placement is even greater. As this Court previously held, Defendants' use of the reasonable suspicion standard contributed to the high risk of error in Defendants' original redress process. It also exacerbates error in Defendants' revised process.

The extreme risk of error inherent in Defendants' predictive model mandates stringent procedural protections, but Defendants' revised redress process falls far short of providing them.

[1] Dr. Sageman is a former long-time intelligence community professional and a forensic psychiatrist; he specializes in terrorism research. Dr. Austin is an expert in individual risk assessment, particularly in the corrections and criminal justice context. Their curricula vitae are attached as exhibits to their declarations.

As a result, the revised redress process violates Plaintiffs' Fifth Amendment right to procedural due process.

A. Defendants' Predictive Judgments Underlying Their Revised Redress Process Result in an Extremely High Risk of Error.

Defendants admit that their predictive judgments are based on an assessment that Plaintiffs pose a threat of committing a future violent act of terrorism. Defs.' Mem., ECF No. 251 at 48, 49 ("[t]he conduct contemplated by the No Fly List is a violent act of terrorism"). As a threshold matter, Plaintiffs are unaware of any context in which a court has upheld predictions of a future threat of dangerousness without a showing that the individual in question has been charged with or convicted of *a relevant prior* crime. *See* Declaration of James Austin, dated Aug. 7, 2015 ("Austin Decl.") ¶¶ 8-10 ("I am not aware of attempts to develop risk assessment tools on individuals who have not been charged with or convicted of crimes, and I am skeptical that any such tools could be developed."); Declaration of Marc Sageman, dated Aug. 7, 2015 ("Sageman Decl.") ¶¶13, 18, 31; *cf. Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("[p]revious instances of violent behavior are an important indicator of future violent tendencies.") (citing *Heller v. Doe*, 509 U.S. 312, 323 (1993)). Here, there can be no dispute that no Plaintiff has been charged with, let alone convicted of, a violent act of terrorism, and all have submitted sworn declarations to this Court that they pose no threat to aviation or national security.[2]

Ignoring this critical distinction, Defendants further admit that the No Fly List includes people who *have* been charged with or convicted of violent crimes, and are placed on the list together with individuals like Plaintiffs, who have *not*. *See* Declaration of G. Clayton Grigg, dated May 28, 2015 ("Grigg Decl."), ECF No. 253 ¶ 21 (referring to "known *or* suspected" terrorists who may be placed on the No Fly List) (emphasis added). Defendants then ask the Court to defer to their predictive judgments and redress process, citing *Mathews*, 424 U.S. at

[2] Plaintiffs' Declarations in Support of Cross-Motions for Summary Judgment, dated 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).

344, for the proposition that the Court should assess the adequacy of their redress process not with respect to Plaintiffs individually, but "as applied to the generality of cases" of all U.S. persons on the No Fly List. Defs.' Mem., ECF No. 251 at 13-14 n.6. But this language in *Mathews* does not stand for the proposition that Defendants can lump together entirely distinct categories of individuals—those charged or convicted of a relevant crime and those not—in considering what process is due. As this Court has rightly acknowledged from the start of this case, the rights it must adjudicate are those of Plaintiffs. *See, e.g.*, Case Mgmt. Order dated Oct. 3, 2014, ECF No. 152 at 2 (noting need to resolve Plaintiffs' claims "on an individualized basis as soon as practicable").[3]

Defendants also invoke national security in arguing that their predictive judgment model as applied to Plaintiffs is entitled to deference, Defs.' Mem., ECF No. 251 at 29-30, but the fact that an agency decision implicates national security does not amount to a license to ignore science or otherwise act arbitrarily. To the contrary, government agencies are not entitled to deference when they act arbitrarily, without legal or evidentiary support. *Cf.* 5 U.S.C. § 706 (empowering courts to strike down "arbitrary" agency behavior); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (no deference where agency failed to consider relevant factors or base its decision on those factors, and/or made a "clear error of judgment").

The only "evidence" Defendants cite in support of their predictive judgment model is the Steinbach Declaration, but this declaration does not even attempt to show that predictive judgments are accurate or reliable. *See* Defs.' Mem., ECF No. 251 at 18, 41-42. Mr. Steinbach recites only the criteria and process for inclusion in the government's consolidated Terrorist Screening Database ("TSDB") and the No Fly List, describes internal procedures for the correction of "errors in information," and asserts that No Fly List nomination decisions "may be based on classified national security information or otherwise privileged law enforcement information." Declaration of Michael Steinbach, dated May 28, 2015 ("Steinbach Decl."), ECF

[3] In any event, Defendants do not even attempt to show their predictive judgments are scientifically-based or accurate with respect to those accused or convicted of prior crimes.

No. 254 ¶¶ 9-12, 19, 20, 21. Mr. Steinbach's declaration does not describe or identify *any* methodology, let alone a valid one, for making predictive judgments. He offers no factual conclusions or empirical support whatsoever regarding the rate of error in the government's predictive assessments. Indeed, Defendants have failed to support their assertions regarding predictive judgments by reference to any valid principle of science, and they have not attempted to show that the government has utilized scientific methods to make those predictions or test their accuracy. Instead, Defendants' primary defense of their nomination procedures is their reliance on "multiple layers of independent review" by the nominating agency itself, TSC experts, and other government agencies. Defs.' Mem., ECF No. 251 at 27-28. That kind of review is neither "independent" nor a sufficient safeguard against nomination error. Sageman Decl. ¶ 38 ("To my knowledge, nominators' determinations and their training do not include critically important instruction in conditional probability analysis and science-based safeguards against error."); Austin Decl. ¶ 26 ("The government's process for nominating individuals to the No Fly List appears to ensure a low degree of reliability").

There can be no genuine dispute, therefore, that Defendants' predictive judgments are not based on science or any reasoned methodology. In the absence of any scientific, evidentiary support, Defendants' predictive judgments are no more than guesses that Plaintiffs might engage in terrorist violence at some point in the future, and Mr. Steinbach simply offers faith that Defendants' internal checks validate their own guesses. No judicial deference is due to the government's guesses and faith.

1. No reliable indicators predict a future violent terrorist act.

It is perhaps unsurprising that Defendants offer no scientifically sound explanation of or basis for their predictive judgments. Plaintiffs' expert Dr. Sageman explains that "[d]espite decades of research . . . we still do not know what leads people to engage in political violence," and that "[a]ttempts to discern a terrorist 'profile' or to model terrorist behavior have failed to yield lasting insights." Sageman Decl. ¶ 14.

Dr. Sageman attributes that failure in part to the intelligence community's insularity and unwillingness to incorporate scientific methods and expertise from the academic community, which are systemic problems that "undermine the accuracy of the assessments the intelligence community makes." *Id.* ¶¶ 15, 16. Dr. Sageman's research, carried out on behalf of government agencies as well as independently, finds that an individual's decision to engage in terrorist violence is context-specific and unique to that individual, making it very difficult to identify specific indicators that could be used to predict whether the individual will actually commit a terrorist act. *Id.* ¶ 17. He states that to his knowledge, "no one inside or outside the government has yet devised a 'profile' or model that can, with any accuracy and reliability, predict the likelihood that a given individual will commit an act of terrorism." *Id.* ¶ 18.

Dr. Austin, Plaintiffs' second expert, is similarly "not aware of attempts to develop risk assessment tools on individuals who have not been charged with or convicted of crimes," and is "skeptical that any such tools could be developed." Austin Decl. ¶ 9.

The lack of any reliable indicators or behaviors that can be used to predict terrorist violence renders Defendants' predictive judgments, based on "derogatory information," fundamentally flawed.

2. Defendants fail to employ basic scientific methods to test the validity of their predictive judgments.

Even if Defendants had a basis to establish the reliability of their indicators to predict future terrorist violence, their predictive model suffers from a distinct flaw: it does not use basic scientific methods to assess its validity, establish an error rate, and account for error. As Dr. Sageman explains, "numerous disciplines have devised methods that, depending on their rigor, allow for prediction *with an estimated rate of error*." Sageman Decl. ¶ 20 (emphasis in original). The rate of error is important to calculate because it "constitutes a rough indicator of the validity and reliability of the predictive tool" and allows decisionmakers—and this Court—to determine the appropriate consequences of the predictions. *Id.*; *see also* Austin Decl. ¶ 13 ("All risk assessment systems must pass the dual tests of reliability and validity."). Basic scientific

methods that can be used to arrive at and assess predictions include: (a) use of a control group; (b) a means of assessing reliability of predictions across agencies and over time; and (c) conditional probability analysis and the use of an accurate base rate to determine the likelihood that an individual will commit a violent act of terrorism. According to Dr. Sageman, "[a]bsent a scientifically validated process for attempting to make predictive judgments, those judgments amount to little more than the 'guesses' or 'hunches'" that Defendants' declarant Mr. Grigg says are insufficient to meet the criteria for placement on the No Fly List. Sageman Decl. ¶ 20; *see also* Grigg Decl., ECF No. 253 ¶ 15.

(a) Control group. Defendants' description of their predictive No Fly List assessments nowhere indicates their use of a control group, which is a foundational requirement of scientific assessments. According to Dr. Sageman:

> In the No Fly List prediction context, any attempt to assess the validity of indicators or factors that might lead an individual to commit political violence would require a study including both (a) individuals who actually carried out acts of political violence, and (b) individuals (the control group) who are similar to the first set in all respects except that they did not engage in violence. Use of a control group is critically important because it is only by a comparison with this control group, in which the indicator of actual violence is *absent*, that one can make the argument that other indicators specific to the *subject* group are valid. In short, a control group helps to lower the probability of generating a false positive, that is, falsely identifying someone as a future terrorist when he is not.

Sageman Decl. ¶ 21 (emphasis added). To Dr. Sageman's knowledge, "the intelligence community has not used control groups in making predictive judgments about a propensity (or lack thereof) to commit political violence" or in making predictions about individuals placed on the No Fly List. *Id.* Without a control group, Defendants' predictive model inevitably results in error.

(b) Reliability of predictive judgments across agencies and over time. "Reliability" in the context of assessing a risk of future violence also requires consistency in the assessment process by those trained in completing risk assessments. Austin Decl. ¶ 13. Dr. Austin identifies two components of reliability: intra-reliability is the degree of consistency by a given assessor over time, while inter-reliability is the degree of consistency between different assessors using

the same system of assessment. *Id.* Without a high degree of inter- and intra-reliability, those assessing risk will value factors differently and come to varied conclusions, rendering the system and the predictions inconsistent and, ultimately, invalid. *Id.* Mr. Steinbach explains that "[e]ach nominating agency is responsible for ensuring that its watchlist nominations satisfy the applicable criteria for inclusion, and that it has established internal procedures to confirm that the nominations process is properly performed." Steinbach Decl., ECF No. 254 ¶ 12. But as discussed above, there is no indication that Defendants have evaluated the reliability of their nominators' No Fly List assessments. And Dr. Austin finds that the diffuse nature of Defendants' No Fly List nominating procedure "appears to ensure a low degree of reliability in the assessments that lead to placement on the list." Austin Decl. ¶ 26.

(c) Terrorism is too rare to predict without an extremely high error rate. Perhaps the most fundamental defect in Defendants' predictive model derives from the fact that acts of terrorist violence are very rare and therefore exceedingly hard to predict—requiring even more rigorous probability analysis, which Defendants have not attempted. *See* Sageman Decl. ¶¶ 23-26 (discussing basic requirements of conditional probability analysis); Austin Decl. ¶¶ 18, 24 (explaining that the government has failed to take into account the low base rate, thus committing a fundamental error in probability analysis). As a result, Dr. Sageman concludes that "the government's predictive judgments are necessarily unreliable, and the risk of error associated with them is extremely high, because the events they attempt to predict—violent acts of terrorism—are exceedingly rare." Sageman Decl. ¶ 22. Dr. Austin similarly concludes that "[w]ith so few terrorist events, there is simply little variance and, unavoidably, an extremely high rate of false positives—no methodological system can meaningfully predict such behavior." Austin Decl. ¶ 24.

To illustrate the severe flaws in Defendants' predictive assessments, Dr. Sageman applies conditional probability analysis to a hypothetical in which the government has developed a tool to identify potential terrorists based on "derogatory information." Sageman Decl. ¶ 27. Giving

the government the benefit of the doubt, he assumes the particular derogatory information is 100 percent sensitive, meaning it is associated with, and can actually be used to identify, all potential terrorists who will actually carry out violent acts. *Id.* He then assumes for the purposes of the hypothetical that the derogatory information is 99 percent specific, meaning it would only lead to one error—i.e., one false positive—in 100 predictions. *Id.* (noting that such near-perfect accuracy is basically unheard of in the social sciences). The rate of error for such a hypothetical tool to identify actual terrorists depends on the base rate of terrorists in the population. *Id.* ¶ 28. Assuming a total population of one million people in which there are 100 actual terrorists (a base rate of 1/10,000), the predictive tool would identify all 100 of them, because it is 100 percent sensitive. However, because the tool is only 99 percent specific, it would make one error in every one hundred evaluations and *falsely* identify another 10,000 people as actual terrorists, even though they are not. *Id.* Thus, even though the tool is near "perfect" in terms of specificity, the probability that a person is an actual terrorist, given that he has been identified as such by this instrument, is less than 1 percent. *Id.* "What this example illustrates is that *the lower the base rate of actual terrorists, the greater the error*." *Id.* ¶ 29 (emphasis added). Ignoring a low base rate "can lead to an enormous number of false positives for rare events." Sageman Decl. ¶ 30; *see also* Austin Decl. ¶ 18 ("The other major reason for a high level of false positives is a low 'base rate.'").

This hypothetical demonstrates the critical importance of applying basic probability principles to Defendants' No Fly List predictive model. Thus, for example, if an individual makes statements of intent to commit an act of violent terrorism and has the operational ability (as defined by Defendants) to do so, and even if Defendants could show that those behaviors were a reliable indicator that the individual would *in fact* commit a future violent act (which Defendants have not shown), Defendants would still need to account for *other* individuals who also meet those derogatory criteria but would *not* commit such acts (the false positives). However, Dr. Sageman states that he knows of no one within the government who has applied

these principles in terrorism-related assessments, and that "there is no indication that the government has attempted to apply them to the predictive judgments underlying placement on the No Fly List." Sageman Decl. ¶ 31.

The fact that Defendants have neglected to consider these factors or estimate the rate of error in their predictive judgments does not mean that the rate of error cannot be assessed. Dr. Sageman provides an example of how it could be done. He notes that the relevant base rate is the base rate of the event that Defendants are attempting to predict under the No Fly List criteria: acts of violent terrorism. *Id.* ¶ 32; *see also* Grigg Decl., ECF No. 253 ¶ 17 (listing criteria); Defs.' Mem., ECF No. 251 at 47 and 48 (No Fly List focus is on "a violent act of terrorism."). Dr. Sageman and Dr. Austin agree that the base rate of violent terrorist acts is extremely low by any measure. Sageman Decl. ¶ 33; Austin Decl. ¶ 24 ("Even outside the aviation context, terrorist attacks are far rarer than homicides or suicides, which themselves are so rare as to pose significant prediction challenges"). Using data on terrorism-related incidents from a commonly used public database—data that Dr. Sageman emphasizes are unreliable and overinflated in important respects—yields a base rate of 120 terrorists in 10 years in a country of about 330 million people. Sageman Decl. ¶¶ 33, 34. That amounts to 1 terrorist per 27.5 million people per year, or 0.0036 per 100,000 per year—a vanishingly low base rate. *See id.* ¶ 34. With such a low base rate, Dr. Sageman concludes, "a tool used to predict who will commit acts of terrorism would have to be extremely accurate, especially in terms of specificity, for the government agencies not to be flooded with false positives or false alarms in attempting to identify terrorists." *Id.* Defendants provide no basis to believe their predictive judgment model achieves anything near the virtually impossible level of accuracy that would be needed to avoid a large number of false positives.

Applying actuarial and social science principles, both Dr. Sageman and Dr. Austin conclude that Defendants cannot achieve anything close to the specificity necessary to minimize these inevitable false positives. Because there is currently no valid profile to predict who will

engage in a violent act of terrorism, "any purported 'indicators,' alone or in combination, of future terrorist violence will necessarily lack specificity." *Id.* ¶ 36; *see also* Austin Decl. ¶ 25. Ultimately, because of the extremely low base rate of violent terrorist acts, the lack of specificity for indicators of political violence, and the lack of a control group for valid prediction, Dr. Sageman and Dr. Austin conclude that Defendants' predictive judgment model results in "an extremely high risk of error." Sageman Decl. ¶¶ 35, 48; *see also* Austin Decl. ¶ 24, 27 ("I am not aware of any scientifically accepted methods available to accurately predict or identify people who have not committed an act of terrorism, but are likely to commit one, much less an act of aviation terrorism specifically.").[4]

In sum, Defendants' predictive judgment model necessarily entails an extremely high risk of error, and Defendants' provide no evidence that would allow the Court to conclude otherwise.

B. Defendants' "Reasonable Suspicion" Evidentiary Standard Exacerbates the Extremely High Risk of Error.

In their brief, Defendants state—for the first time—that "reasonable suspicion" is the evidentiary standard for placement on the No Fly List. Defs.' Mem., ECF No. 251 at 41.[5] This

[4] As Dr. Sageman points out, "[p]oliticians and policy-makers—and indeed all of us—understandably want to prevent violence and protect the American population." Sageman Decl. ¶ 43. He notes that the "difficulty" with the understandable political goal of near-total elimination of the threat of terrorism is that it is an impossible scientific or law enforcement standard to meet, and "results in a system of incentives that encourages the generation of false positives." *Id*. Those incentives in the intelligence and law enforcement communities also contribute to the elevated risk of error in No Fly List predictive judgments. *Id.* ¶¶ 44-46 ("the imperatives working within the intelligence system encourage reporting derogatory information on U.S. persons but discourage reporting disconfirming information.").

[5] Defendants assert that "the Government has previously explained and this Court has previously acknowledged, [that] the standard for inclusion on the No Fly List is 'reasonable suspicion.'" Defs.' Mem., ECF No. 251 at 41. This is untrue. Until now, Defendants kept secret the evidentiary standard for placement on the No Fly List. Defendants have been clear that "reasonable suspicion" is the evidentiary standard for inclusion *in the TSDB*, but they have repeatedly indicated that "[t]o be included on the No Fly or Selectee Lists, an individual must be on the TSDB *and meet additional criteria*, beyond the 'reasonable suspicion' standard generally required for inclusion in the TSDB." Defs.' Mem. in Supp. Mot. to Dismiss or for Summ. J., dated Nov. 17, 2010, ECF No. 44 at 11 (emphasis added); *see also* Defs.' Mem. in Supp. Mot. to Dismiss, dated Jan. 7, 2011, ECF No. 53, Exh. 1 at 4 (statement of the TSC Director, explaining "The No Fly and Selectee lists are unique among TSDB subsets in that they . . . have their own

low evidentiary standard injects an even greater risk of error into Defendants' predictive judgments placing Plaintiffs on the No Fly List, as well as the administrative and judicial review processes for those placements. On its face and as Defendants interpret it, the standard they employ does not even require that it be more probable than not that an individual meets the criteria for placement on the No Fly List. *See* Steinbach Decl., ECF No. 254 ¶ 9; Grigg Decl., ECF No. 253 ¶ 15. Instead, an individual can be placed on the No Fly List if nominators think he *might* meet the criteria, even if the nominators think he *probably does not*. *See* Sageman Decl. ¶ 37. As Dr. Sageman concludes, such a low threshold "virtually guarantees . . . that numerous false positives will result" from Defendants' predictive No Fly List assessments. *Id.*

Contrary to Defendants' arguments in defense of their reasonable suspicion standard, a standard that allocates so much of the risk of error to individuals facing a significant deprivation of their liberty is a "fundamental flaw" under this Court's prior summary judgment ruling, is not required by Congress, and cannot be reconciled with governing due process doctrine.

This Court has already criticized the "reasonable suspicion" standard as unacceptably low based on the high risk of error it creates. In June 2014, the Court ruled that such a "low evidentiary threshold" for inclusion in the TSDB constituted a "fundamental deficiency" in the original DHS TRIP process, and that the low standard contributed to the substantial likelihood that errors at the administrative review stage would carry over to the judicial review stage. June 2014 Op., ECF No. 136 at 38-39. Ultimately, the Court found that the "reasonable suspicion" evidentiary standard was a prime factor contributing to the "high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests." *Id.* at 39. That the criteria for placement on the

---

substantive minimum derogatory criteria requirements, which are *considerably more stringent* than the reasonable suspicion standard required for inclusion in TSDB itself") (emphasis added); Defs.' Mem. in Supp. Mot. for Partial Summ. J., dated Feb. 13, 2013, ECF No. 85-1 at 6 ("To be included on the No Fly List, an individual must be in the TSDB and meet additional criteria, beyond the 'reasonable suspicion' standard generally required for inclusion in the TSDB."). In any event, this Court has never blessed the reasonable suspicion evidentiary standard for placement on the No Fly List, but has instead criticized it even with respect to placement on the TSDB. *See infra*.

No Fly List differ from the criteria for placement on the TSDB is of no significance because regardless of the substantive criterion used, application of a low evidentiary standard will be a significant driver of error.

Defendants' contention that Congress has mandated that it use a "reasonable suspicion" standard when making predictive judgments simply has no basis. *See* Defs.' Mem., ECF No. 251 at 3, 5, 17, 41, 50 (citing 49 U.S.C. § 114(h)(3) on pp. 17 and 50). By its terms, the statute Defendants cite requires no particular standard of proof for placement on the No Fly List at all. Instead, as Plaintiffs explain in greater detail below, *see infra* Section IV, the statute sets forth requirements TSA must establish for *air carriers*, and imposes no other obligations on the government. *See* 49 U.S.C. § 114(h)(3). In short, neither that statute nor any other reflects Congress's intent that Defendants employ such a low evidentiary threshold for watchlisting. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'") (citing *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004)).

In the only statute Defendants cite that does impose watchlisting-related obligations on the government, 49 U.S.C. § 44903(j)(2)(C), Congress requires the government to, among other things, "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct *information contained in the system*" and to "ensure that Federal Government databases that will be used to establish the identity of a passenger under the system *will not produce a large number of false positives*." (emphases added). *Compare* Sageman Decl. ¶ 37 (existing system gives rise to "numerous false positives"). Thus, the only relevant Congressional authorization here appears to require a burden of proof rigorous enough to correct errors, which is obviously not the case with a reasonable suspicion standard.

Even if Congress had mandated the reasonable suspicion standard for placement on the List—which it has not—that would not resolve the question whether such a low threshold meets due process requirements. As the U.S. Supreme Court explained in *Santosky v. Kramer*, "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" 455 U.S. 745, 755-56 (citing *Woodby v. INS*, 385 U.S. 276, 284 (1966)). Decades of due process jurisprudence demonstrate that when liberty is at stake, the Constitution requires heightened burdens of proof. *See* Pls.' Mem. in Supp. of Mot. for Summ. J., dated April 17, 2015 ("Pls.' Mem."), ECF No. 207 at 31 (citing cases); *see also Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both particularly important and more substantial than mere loss of money.'"). As Plaintiffs discuss below, *see infra* Section II.A, to safeguard against error, due process requires a "clear and convincing evidence" standard for placement on the No Fly List.

II. Defendants' Revised Redress Process Violates Due Process.

Plaintiffs' opening brief explained why Defendants' revised redress process violated the Fifth Amendment guarantee of procedural due process, given decades of case law establishing the minimum procedural safeguards when the government seeks to deprive individuals of their significant liberties. Now, in light of Plaintiffs' evidence that Defendants' revised process is based on predictive judgments that guarantee an extremely high risk of error, there can be no doubt that Plaintiffs are constitutionally entitled to the additional safeguards they seek. *See Mathews*, 424 U.S. at 335, 343-44. Defendants' arguments otherwise fail because courts in the national security and analogous contexts, including cases in which the government seeks to predict future dangerousness, require the safeguards that Plaintiffs seek. *See infra* Section II.A. Defendants' asserted secrecy interests may not categorically bar these safeguards; rather, any legitimate secrecy concerns must be accommodated through tested mechanisms courts routinely employ. *See infra* Section II.B.

A. Defendants' Revised Redress Process Fails to Provide Bedrock Protections.

Defendants suggest that Plaintiffs' due process analysis ignores the extent to which this case involves national security, but they ignore the *national security cases* that Plaintiffs cite, in which courts consistently require more process than Defendants provide here. *See* Pls.' Mem., ECF No. 207 at 12, 15 (citing, *inter alia*, *Al Haramain Islamic Found. v. United States Dep't of the Treasury*, 686 F.3d 965 (9th Cir. 2012); *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014); *Rafeedie v. INS*, 880 F.2d 506, 508–09 (D.C. Cir. 1989); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999); *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992)). This Court must look to these and other analogous contexts in resolving the due process concerns before it now.

Defendants also ignore the fact that courts have repeatedly concluded that rigorous procedural protections are necessary when the government deprives people of liberty on the basis of future dangerousness. Pls.' Mem., ECF No. 207 at 31 (citing *V. Singh v. Holder*, 638 F.3d 1196, 1203 (2011) (collecting cases, and requiring the government to bear the burden of proving dangerousness by clear and convincing evidence in immigration bond hearings triggered by prolonged detention). Notably, that is so even in contexts in which—unlike Plaintiffs—the individuals whose dangerousness is being assessed *have* been charged with serious (usually violent) crime, and even if they have prior convictions for such offenses. *See* Austin Decl. ¶¶ 10-11 (discussing risk assessments in these contexts). For example, in the pretrial detention context, "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." *United States v. Salerno*, 481 U.S. 739, 751 (1987) ("Nor is the [Bail Reform] Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes."). Probable cause (a higher standard than Defendants use here) "is not enough" to support a determination of future dangerousness; rather, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no

conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750. Courts have applied those rules in national security cases arising in the pre-trial detention context as well. *See, e.g.*, *United States v. Hir*, 517 F.3d 1081 (9th Cir. 2008); *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000); *United States v. El-Gabrowny*, 35 F.3d 63 (2d Cir. 1994); *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985). Similarly, before civil commitment on the basis of dangerousness, an individual is entitled to a full adversarial hearing, presided over by a judge, at which the government bears the burden of proving by clear and convincing evidence that the individual "is demonstrably dangerous to the community" as well as mentally ill. *See* Pls.' Mem., ECF No. 207 at 10-11 (citing cases including *Addington v. Texas*, 441 U.S. 418, 431–32 (1979) (civil commitment requires proof by clear and convincing evidence) and *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992)). And in parole revocation hearings, individuals who are already serving their sentences are nonetheless entitled to disclosure of the evidence against them and the right to confront and cross-examine adverse witnesses at a live hearing before a neutral and impartial body. *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972).

All of these protections—disclosure of reasons, evidence, an adversarial hearing, and use of a clear and convincing evidentiary standard—are necessary not only because of the significant deprivation of liberty involved, but also because of the inherent limitations of predictions of future dangerousness, even in situations in which the individuals being assessed have previously been charged with or convicted of crimes. As Dr. Austin explains, risk assessments are typically undertaken in such contexts, where there has already been, at a minimum, an independent judicial determination that a crime has likely been committed. Austin Decl. ¶¶ 10-13. In addition, in contexts where the phenomenon being predicted is rare (such as murder) and therefore has "a low base rate," restrictions are rarely imposed on individuals as a result of the risk assessments, because the risk of error is too great. *Id.* ¶¶ 18, 20, 22.

Here, of course, Plaintiffs have never been charged with, let alone convicted of, any prior violent crime, and the risk of error is greatly magnified by the vanishingly low base rate of actual

terrorism violence. Under these circumstances, the Due Process Clause entitles Plaintiffs to procedures more robust than those used in other contexts, in which courts have found the probable value of additional safeguards is lower in light of the government's greater ability to predict dangerousness. Pls.' Mem., ECF No. 207 at 9-14.

Defendants' attempts to distinguish these analogous contexts fall flat. For instance, they dismiss wholesale the criminal and other cases involving physical detention on the grounds that those cases involve a more severe deprivation of liberty than placement on the No Fly List entails. *See* Defs.' Mem., ECF No. 251 at 31-32. But Plaintiffs have made clear that they do not seek all the protections afforded in criminal trials, but instead seek only the basic protections that arise from the fundamental requirements of procedural fairness. *See* Pls.' Mem., ECF No. 207 at 12-13, 13 n.14 (discussing basic protections deemed essential to fundamental fairness before modern criminal procedure doctrine). Defendants also ignore that in these other contexts, the deprivation of liberty is time-bound in ways that placement on the No Fly List is not. *Compare Hendricks*, 521 U.S. at 364 (time limitation critical to constitutionality of commitment scheme) *and Foucha*, 504 U.S. at 77 (civil commitment must end when individual is no longer dangerous) *with* Defs.' Mem., ECF No. 251 at 20 n.8 (placement on the No Fly List is for "an indeterminate amount of time").

Moreoever, Defendants fail to meaningfully distinguish the deportation context, which is perhaps most analogous to the No Fly List context because of the nature and extent of the liberty interest at stake. Defendants cite in their own support immigration national security cases that do *not* involve deportation and its concomitant deprivation of liberty, but they fail to grapple with immigration cases involving national security in which courts applied rigorous due process protections, including the requirement that an individual have an opportunity to rebut secret evidence. *Compare* Defs.' Mem., ECF No. 251 at 32-33 (ignoring immigration cases implicating national security) *with* Pls.' Mem., ECF No. 207 at 12, 15, 17-18. Ultimately, Defendants cannot dispute that courts have granted to non-citizens facing deportation the basic

protections that Plaintiffs—all citizens—seek here: a full and fair hearing before a neutral decision maker that includes notice of all reasons supporting the deprivation of liberty, access to adverse and exculpatory evidence, the right to testify in one's own defense at a hearing, and the ability to confront and cross-examine witnesses. *See* Pls.' Mem., ECF No. 207 at 11-12.

Finally, Defendants attempt to distinguish the entire body of cases involving deprivations of property on the grounds that the "balance of interests" in those cases does not favor the government to the extent that it does here. *See* Defs.' Mem., ECF No. 251 at 33. But that conclusion ignores that the private interests in those cases are far less weighty than those here. Defendants cannot credibly deny that the organizational property interests at stake in *Al Haramain*, 686 F.3d 965, and *KindHearts*, 710 F. Supp. 2d 637, do not weigh as heavily as the restraint on liberty created by a ban on all air travel, potentially for life, coupled with the widespread dissemination of information labeling someone as a suspected terrorist to law enforcement and others both here and abroad. *See also infra* Section III.

Thus, a rigorous analysis of national security and analogous contexts compels the conclusion that Plaintiffs are due far greater protections than Defendants' revised redress process provides.

B. Defendants' Secrecy Concerns Cannot Categorically Bar Necessary Procedural Safeguards.

Throughout their brief, Defendants invoke the sensitivity of national security and intelligence information as a categorical bar against the additional procedural safeguards Plaintiffs seek. Based on that invocation Defendants ask the Court to defer to their unilateral determination that they cannot provide Plaintiffs with relevant, material, and dispositive reasons for their No Fly List placement, access to evidence, or a hearing. Defendants' extensive reliance on secrecy fails for three central reasons.[6]

[6] Defendants' assertion that their revised redress process comports with the parameters laid out by the Court, *see, e.g.*, Defs.' Mem., ECF No. 251 at 20, 21, is a conclusion, not an argument, that the revised process actually comports with Fifth Amendment requirements. Although the Court stated that it could not "foreclose the possibility" that in some instances disclosures may

First, the Court cannot credit Defendants' categorical assertions of secrecy when Defendants have not invoked—and this Court has not adjudicated—any specific privilege with respect to particular evidence. Instead, Defendants' repeated references to national security information are imprecise and speculative. Defendants assert, without support or reference to specific instances, that "No Fly determinations are *often* based on highly sensitive national security and law enforcement information," disclosure of which "*could* . . . 'tend to reveal whether an individual has been the subject of an FBI counterterrorism investigation.'" Defs.' Mem., ECF No. 251 at 18 (quoting Steinbach Decl., ECF No. 254 ¶ 23) (emphasis added); *see also id.* at 34, 35 (No Fly List determinations "typically" involve sensitive or classified information). But the mere *potential* that the No Fly List redress process will implicate national security information in some cases cannot justify Defendants' failure to provide the safeguards that due process mandates. It is not enough for Defendants to raise the general spectre of a privilege as a basis for denying disclosures. *Cf. Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (stating, by reference to state secrets privilege—which the government has not invoked here—that "[s]imply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the [state secrets] privilege.").[7] To the extent that Defendants seek to

---

be limited or withheld, June 2014 Op. at 62, it made no findings that the summary and deficient process Defendants *now* apply is adequate. Indeed, the language used by the Court in its June 2014 opinion can and should be read to include the CIPA-like procedures the Ninth Circuit and Plaintiffs suggest, *see infra*, and Defendants refuse to provide. Moreover, the Court specifically stated that Defendants' revised redress process determinations "must be reviewable by the relevant court," June 2014 Op. at 62, but because these determinations are based on a deficient process and therefore a deficient administrative record for the reasons stated below, "the fundamental flaw[s] at the administrative review stage (the combination of a one-sided record and a low evidentiary standard) carries over to the judifical-review stage." *Id*. at 39.

[7] A recent case involving the government's actual invocation of the state secrets privilege in a No Fly List challenge is instructive. In *Mohamed v. Holder*, Case No. 1:11-cv-50 (AJT/MSN) 2015 WL 4394958 (E.D. Va. July 16, 2015), the court reviewed the government's purported state secrets information *ex parte* and *in camera*, determined that not all of the information was subject to the privilege, and found *none* of it necessary to litigate the due process claim. *Id.* at 24. *Mohamed* shows why any reliance on Defendants' privilege arguments at this stage would be premature.

invoke any applicable privilege, they must do so by reference to specific information and according to the procedures courts have devised for the adjudication of such privileges—at the next, substantive due process stage in these proceedings.[8]

Second, Defendants' request for judicial deference to their categorical secrecy claims ignores that the government *does* provide the types of information Plaintiffs seek in national security and other contexts. Thus, the question before the Court is whether Defendants must provide greater procedural safeguards because due process requires it—and on that legal question, Defendants are not entitled to deference. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that "essential constitutional promises" of meaningful notice and an opportunity to be heard "may not be eroded" in cases implicating national security concerns) (plurality opinion); *Rafeedie*, 880 F.2d at 523 ("[E]ven a manifest national security interest of the United States cannot support an argument that Rafeedie is not entitled, as a threshold matter, to protection under the Due Process Clause."). Relatedly, Defendants repeatedly insist that classified information "cannot be disclosed," Defs.' Mem., ECF No. 251 at 18, and that federal courts may not "compel" the Executive Branch to give an opposing party access to classified information. But even if information is properly classified (which, again, the government has not asserted as to any particular piece of evidence here), that does not relieve the government of its obligation to comply with the Due Process Clause.

---

[8] For example, invocation of the state secrets privilege requires a formal process and adjudication. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080, 1082 (9th Cir. 2010) (*en banc*). Similarly, a claim that evidence constitutes sensitive security information requires an assertion of privilege as to specific information. *See, e.g., Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2013 WL 1703367 (N.D. Cal. Apr. 19, 2013) (requiring privilege log of materials over which government asserted that and other privileges); *see also* Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006) (providing for disclosure of sensitive security information to private parties in civil litigation, subject to protective orders). Courts also routinely adjudicate law enforcement privilege assertions with respect to specific information. *Ibrahim*, 2013 WL 1703367 (describing factors considered); *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (in case extensively cited by district courts in the Ninth Circuit, setting forth ten factors to be balanced in evaluating assertion of law enforcement privilege).

As Plaintiffs have repeatedly pointed out in this case, the government is routinely required to disclose, or at least summarize, classified or otherwise sensitive information in numerous contexts in which it seeks to deprive liberty in the name of national security, including when designating terrorist organizations. *See supra* Section II.A. *See also Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions), *vacated*, 554 U.S. 913 (2008), *reinstated*, 551 F.3d 1068 (D.C. Cir. 2008) (per curiam); *Al Haramain*, 686 F.3d at 983–84 (requiring provision of either unclassified summaries of classified information or presentation of classified information to appropriately cleared counsel); *KindHearts*, 710 F. Supp. 2d at 657–60 (requiring government to declassify and/or summarize classified information and, if that was insufficient or impossible, requiring plaintiff's counsel to view the information under a protective order).[9] When courts order such disclosure, they also consider whether the government's summaries satisfy due process. *See, e.g.*, *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). None of the cases Defendants cite, Defs.' Mem., ECF No. 251 42-44, for their insistence on deference and refusal to provide additional information or a hearing to Plaintiffs stands for the radical proposition that executive branch classification decisions can surmount constitutionally required due process.[10]

---

[9] *See also Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir. 2009) (per curiam) (court may compel disclosure to counsel of classified information for habeas corpus review); *United States v. Abuhamra*, 389 F.3d 309, 329 (2d Cir. 2004) (requiring substitute disclosures to explain "the gist or substance" of *ex parte* submissions).

[10] *Department of Navy v. Egan*, 484 U.S. 518 (1988), *CIA v. Sims*, 471 U.S. 159, 188–89 (1985), and *In re United States*, 1 F.3d 1251, 1993 WL 262656 (Fed. Cir. 1993) do not address constitutional due process requirements. In *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990), the Ninth Circuit acknowledged that the president has authority to grant or revoke security clearances, but also clearly stated that "federal courts may entertain colorable constitutional challenges to security clearance decisions." Both *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), and *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), were damages cases in which courts dismissed lawsuits after the government invoked the state secrets privilege

Third, Defendants' assessment of the harms that would result from additional disclosures in this litigation suffers from a basic flaw: it presents this Court with a false choice between two extremes. Defs.' Mem., ECF No. 251 at 18-19 (discussing harms). By casting the only alternative as full disclosure, Defendants downplay the range of proven mechanisms available for the Court to provide greater procedural safeguards to Plaintiffs while protecting the government's legitimate interest in keeping truly sensitive information secure. *See* Pls.' Mem., ECF No. 207 at 32-34 (discussing mechanisms).

Contrary to Defendants suggestion, Plaintiffs do not seek full, public release of sensitive national security information. Rather, Plaintiffs propose concrete mechanisms by which the Court can closely manage access to such information while still complying with due process requirements, including mechanisms routinely used in criminal, deportation, habeas corpus, and other No Fly List proceedings. *See id.*[11] Defendants, by contrast, invite this Court to commit reversible error by disregarding the Ninth Circuit's suggestion that it use such mechanisms in this case. *Compare* Defs.' Mem., ECF No. 251 at 42 (arguing that Plaintiffs are not "entitled" to CIPA-like proceedings) *with Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012) ("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."). The Ninth Circuit was undoubtedly aware that, as Defendants insist, CIPA applies in the criminal context. Yet as the Circuit also undoubtedly recognized, the mechanisms laid out in CIPA are useful to this Court as a model, regardless of their typical application. That is because CIPA procedures are designed specifically for circumstances where, as here, the government

---

at the motion to dismiss stage. Finally, in *Holy Land Foundation for Relief & Development v. Ashcroft*, the court did not hold that government classification decisions somehow trumped due process concerns, but instead held that where the property interests of a designated foreign terrorist organization were at stake, the court's *ex parte*, review of classified material was appropriate. *See* 333 F.3d 156, 159 (D.C. Cir. 2003).

[11] In dismissing the notion that protective orders have been used to protect sensitive national security information in the immigration context, *see* Defs.' Mem., ECF No. 251 at 44 n.27, Defendants completely disregard the federal regulation providing for precisely that: 8 C.F.R. § 1003.46. *See* Pls.' Mem., ECF No. 207 at 34; *id.* at 34 n.27.

seeks to deprive an individual of a liberty interest on the basis of sensitive national security information. Indeed, the very existence of CIPA is premised on Congress's recognition that the price for depriving a liberty interest is that the government must submit to certain basic principles of fairness.[12] When a model like this exists, the Court should follow and not disregard it. *Cf. Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (per curiam) (applying CIPA-like procedures in civil Guantanamo habeas proceedings).

Defendants also intimate, without foundation, that protective orders would be insufficient to prevent Plaintiffs and their counsel from divulging sensitive information. *See* Defs.' Mem., ECF No. 251 at 45.[13] But Defendants' unfounded speculation is not entitled to deference regarding the effectiveness and appropriateness of various protective measures available to the Court. *See Mohamed*, 2015 WL 4394958 at 24 (rejecting as insufficient government's reasons why sensitive information could not be managed through an adequate protective order).

Because Defendants disagree that their interest in secrecy can be accommodated through available procedures, they incorrectly equate the consequences of *any* additional disclosures with the potential harms that could result from *full* and *public* disclosure of the information Plaintiffs seek. Indeed, the bulk of the harms predicted by Assistant Director Steinbach in his declaration—upon which Defendants extensively rely—assume that any information disclosed in the litigation will fall into the hands of "adversaries." *See* Steinbach Decl., ECF No. 254 at 12, 14, 17, 19; *see generally id.* at 12-20. But that is simply not the case here. This Court can employ strict protective orders that bar any recipients of information from disclosing it to third parties, subject to heavy sanctions for failure to comply.

---

[12] Indeed, the practice of "graymail" that CIPA was designed to protect against, *see* Defs.' Mem., ECF No. 251 at 44 n.28 (referring to this reason for passage of CIPA), was only possible because of the strong due process rights to notice, confrontation, and cross-examination recognized for deprivations of liberty in the criminal context.

[13] The language Defendants cite for this proposition, in *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983), is the court's explanation of the reasons for excluding counsel from the court's *in camera* inspection of material over which the state secrets privilege was asserted. Here, of course, Defendants have not asserted the state secrets privilege.

The harms that Defendants predict also strain common sense and the factual history of this litigation in other respects. For example, Defendants' suggestion that individuals who have been publicly denied boarding could remain unaware that they are the subject of investigations, *see id.* at 12-13, borders on the absurd. This Court has already recognized that placement on the No Fly List "carries with it the stigma of being a suspected terrorist that is publicly disclosed to airline employees and other travelers near the ticket counter," and that under Defendants' revised redress process, U.S. citizens who have been denied boarding must be notified of their status on the No Fly List. June 2014 Op., ECF No. 136 at 31-32, 61. In some instances, Defendants' agents themselves disclosed Plaintiffs' No Fly List status in an effort to coerce Plaintiffs to become informants within their communities. *See* Pls.' Mem. in Supp. of Cross-Mot. for Summ. J., dated March 22, 2013, ECF No. 91-1 at 27-28 (citing instances in which government agents sought to pressure certain Plaintiffs to serve as informants). Defendants point to no harm arising from their own disclosures, for their own purposes, of Plaintiffs' No Fly List status, or from the disclosures required so far by this Court. Thus, there is no support for the contention that "subject identification" presents any great risk of harm in Plaintiffs' case. Relatedly, Defendants' concern about any "chilling effect" of disclosures on their decision to place and keep individuals on the No Fly List, Defs.' Mem., ECF No. 251 at 19, might have some force if Plaintiffs were seeking pre-deprivation disclosures and a redress process—i.e., *before* Defendants placed them on the No Fly List. That is not what Plaintiffs seek. When, as here, Defendants must inform Plaintiffs and other U.S. persons of the basis for listing not just after the fact, but after the U.S. person voluntarily contacts the government twice and submits information about himself, *id*. at 10, Defendants' secrecy concerns can be accommodated by tested safegards used every day in courts around the country—including in national security cases—any chilling effect, if it exists, must give way to due process requirements. Finally, because the entire world, including any actual "terrorist adversaries," already has access to the government's "March 2013 Watchlisting Guidance," *see* Declaration of Hugh Handeyside, dated April 17, 2015

("Handeyside Decl."), ECF No. 208 at 3, Defendants' interest in maintaining secrecy around No Fly List policies, procedures, and process, Steinbach Decl., ECF. No. 254 at 17, is necessarily limited.[14] It strains credulity to believe that individuals who know they are on the No Fly List will not also assume they are already subject to all manner of investigative methods.[15]

Given the availability of strong protective measures that other courts have utilized in national security cases and those suggested by the Ninth Circuit in this case, the Court must not deny Plaintiffs additional process on the ground that the government's interest in secrecy forecloses it.

C. Defendants' Revised Redress Process Fails to Provide Meaningful Notice.

Defendants' arguments regarding the sufficiency of the notice provided through the revised redress process largely rely on secrecy, which is addressed above. Defendants otherwise fail to confront authority requiring that Defendants provide full notice of the reasons for Plaintiffs' placement on the No Fly List, evidence used against Plaintiffs, and material and

---

[14] Defendants are incorrect that the Watchlisting Guidance "cannot be authenticated" and is therefore inadmissible. *See* Defs.' Mem., ECF No. 251 at 51 n.31. Personal knowledge need not be established in order to authenticate a document; rather, Federal Rule of Evidence 901 requires only "that a reasonable juror could find in favor of authenticity." *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004). Authenticity can be shown through "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Fed. R. Evid. 901(b)(4). Moreover, a "publication purporting to be issued by a public authority" is self-authenticating and "require[s] no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902, 902(5). Not only is the Guidance self-authenticating—it contains the seals of nineteen government agencies—but it also displays numerous signs of authenticity, not least of which is that Defendants' declarants quote from the Guidance at length. *Compare* Steinbach Decl., ECF No. 254 ¶¶ 9, 13 *and* Grigg Decl., ECF No. 253 ¶¶ 17, 25, *with* the Guidance, ECF No. 208-1 at 11-12, 20, 52, 83. The sole case that Defendants cite on this point—*Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975)—addressed only whether leaked information was in the public realm for the purpose of determining whether a publisher and former intelligence community employees could publish it.

[15] In support of their secrecy arguments, Defendants cite to *Al Haramain*, which Plaintiffs address more fully above and below, and *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004). Defs.' Mem., ECF No. 251 at 20-21. With respect to *Jifry*, Defendants disagree with this Court's determination that Plaintiffs' case presents a "substantially greater" deprivation than in *Jifry*, Defs.' Mem., ECF No. 251 at 22, but the parties have extensively briefed the issue, the Court has rejected Defendants' view, and there is no reason to disturb the Court's prior decision.

exculpatory information Plaintiffs need to defend themselves. By withholding from Plaintiffs information and evidence that due process mandates Defendants disclose—and by refusing to employ existing mechanisms for providing such notice despite the government's secrecy concerns—Defendants have failed to meet their burden to provide Plaintiffs with notice that is reasonably calculated to enable them to respond. June 2014 Op., ECF No. 136 at 60. That failure, in turn, further exacerbates the risk of error in Defendants' final determinations.

1. Defendants must provide full notice.

Defendants either ignore or misunderstand binding authority regarding the due process requirements for the adequacy of the notice provided to Plaintiffs. That authority requires that such notice include "the exact *reasons*" for the adverse action. *Gete v. I.N.S.*, 121 F.3d 1285, 1297 (9th Cir. 1997) (emphasis added); *see also* Pls.' Mem., ECF No. 207 at 15 (citing *Gete*). The Ninth Circuit in *Al Haramain* explicitly held that the government violated due process when it provided notice of only one of three reasons for designating an organization as a "specially designated global terrorist." 686 F.3d at 986, 987. Although Defendants ignore the Ninth Circuit's holding, this Court should not.[16]

The harm from withholding all reasons is obvious: it prevents individuals "from responding effectively to the unspecified accusations." *Gete*, 121 F.3d at 1298. Congress also has repeatedly directed the executive to establish a "timely and fair" watchlisting redress process that would enable affected individuals to "correct *any erroneous information*." 49 U.S.C.A. § 44903 (j)(2)(G) (emphasis added); 49 U.S.C.A. § 44909(c)(6)(B) (same). That mandate is not limited to only those reasons or information that the government chooses to disclose to the individual.

[16] This Court explained in its August 2013 order that "[n]otice is insufficient when an individual does not have adequate information and an opportunity to correct *any errors* that may have led to the deprivation." Op. and Order, ECF No. 110 at 28 (emphasis added) (citing *Al Haramain*, 686 F.3d at 982). Although the Court in its June 2014 order contemplated that Defendants could provide unclassified summaries of the reasons for Plaintiffs' placement on the No Fly List, nothing in that order established that Defendants could exclude some reasons in their entirety.

Defendants' revised redress process violates these constitutional and statutory imperatives. Because Defendants must admit they have not provided full notice, they instead attempt to minimize their omissions. They state that "[a]s summaries . . . the notice letters do not include every fact or detail considered by the Government in determining whether the individual poses a threat to civil aviation or national security." Defs.' Mem., ECF No. 251 at 25. But that significantly understates the scope of the withheld information. It is undisputed that the notification and determination letters did not include all of the *reasons* that Defendants relied upon in placing Plaintiffs on the No Fly List. Joint Combined Statement of Agreed Facts Relevant to All Plaintiffs ("J. Comb. Stmt."), ECF No. 173 ¶ 18.[17] Thus, even if Plaintiffs were able to respond meaningfully to all of the "reasons" disclosed in the notification letters—and Plaintiffs cannot do so because Defendants have withheld supporting evidence and exculpatory information, and have refused to hold in-person hearings—Defendants have relied on other, undisclosed reasons for keeping Plaintiffs on the List anyway. In essence, unless Plaintiffs happen to guess the undisclosed reasons and submit information addressing them, Defendants' reliance on those reasons makes it impossible for Plaintiffs ever to clear their names and get off the List. *See 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.").

Similarly, Defendants ' assertion that they have made Plaintiffs "aware of at least the applicable criterion and the nature of the Government's concerns," Defs.' Mem., ECF No. 251 at 34, does not constitute notice of all *reasons*. It should go without saying that the No Fly List criteria are not "reasons," and disclosure of the relevant criterion does not come close to enabling Plaintiffs to respond meaningfully to Defendants' "concerns," just as an indictment that identifies a statute but excludes the circumstances of the alleged offense prevents a criminal defendant from mounting an effective defense. *See Russell v. United States*, 369 U.S. 749, 764

[17] *See also* Redacted Final DHS TRIP Determination Letters, ECF Nos. 175-3 at 4, 5 (Kariye Determination Letter), 176-3 at 4, 5 (Kashem Determination Letter), 177-3 at 4 (Knaeble Determination Letter), 178-3 at 4, 5 (Meshal Determination Letter), 179-3 at 4, 5 (Washburn Determination Letter), 180-3 at 4, 5 (Persaud Determination Letter).

(1962) ("[O]ur cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.").

Defendants' refusal to provide full disclosure results in grave unfairness for Plaintiffs. For example, Defendants assert that their one-sentence reference to Mr. Knaeble's travel to a particular country in a particular year identifies "the general nature" of Defendants' concerns. Defs.' Mem., ECF No. 251 at 34, n.18; Defs.' Cross-Mot. for Partial Summ. J.: Knaeble dated May 28, 2015 ("Defs.' Knaeble Mem."), ECF No. 250 at 11. According to Defendants, the fact that Mr. Knaeble's response included reasons why he does not believe the government should be concerned about his travels meant that he had "ample opportunity to challenge the basis for his listing." Defs.' Knaeble Mem., ECF No. 250 at 11. But even if Mr. Knaeble is correct in *guessing* why the government might be concerned about his travels, the very fact that Mr. Knaeble has to *guess* means Defendants' process is fundamentally inadequate. And Mr. Knaeble cannot guess—or respond to—other, undisclosed reasons Defendants might have.

Plaintiff Mr. Kariye was similarly forced to guess at Defendants' reasons for placing him on the No Fly List. Now, the government has filed a denaturalization case against him, which includes allegations that (with greater detail) overlap with allegations made in his DHS TRIP notification—together with other, new allegations. *See United States v. Kariye*, No. 3:15-cv-1343 (D. Or. filed July 20, 2015). If Defendants have their way in this case, Mr. Kariye will have no means of knowing whether the allegations now publicly made in his denaturalization case also formed or form any basis for his No Fly List placement and retention, and therefore no idea whether and how he should respond to them here. The deep and troubling irony of Mr. Kariye's situation is that it is only because the government has filed a denaturalization case against him that he even knows of these possible additional allegations and details.

Thus, the notice Defendants provided in the DHS TRIP notification letters is not reasonably calculated to permit Plaintiffs to submit evidence relevant to *the reasons* for their placement on the No-Fly List. *See* June 2014 Op., ECF No. 136 at 61. It does not meet

minimum due process requirements.

2. Defendants must disclose evidence.

Defendants again rely heavily on their secrecy arguments to defend against disclosure of the evidence against Plaintiffs. They state that they provided Plaintiffs with unclassified summaries and assert, without citation to any authority, that "[t]he due process clause does not impose additional requirements for the production of original documents or other forms of evidence." Defs.' Mem., ECF No. 251 at 35. That assertion is wholly at odds with longstanding Supreme Court and Ninth Circuit authority requiring 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* Pls.' Mem., ECF No. 207 at 11, 17, 18.[18]

Plaintiffs are not theorizing or conceiving of possible additional disclosures, as Defendants suggest, *see* Defs.' Mem., ECF No. 251 at 35, and it is no comfort that Defendants assert they have provided "at least a general summary of the underlying factual basis." *Id.* at 34. Rather, Plaintiffs are seeking access to the actual bases for Defendants' predictive judgments: the investigative information on which Defendants plainly are relying in making predictions about Plaintiffs' future conduct—predictive judgments that are wrong.

Defendants also argue that the notification letters they sent to Plaintiffs are themselves evidence, but this is obviously incorrect. Just as the No Fly List criteria are not "reasons," summaries are not "evidence" because neither criteria nor summaries afford Plaintiffs a meaningful opportunity to confront and respond to facts on which Defendants rely. The Supreme Court has warned that "the Due Process Clause forbids an agency to use evidence in a

[18] Defendants suggest that Plaintiffs could obtain the information they seek by filing requests under the Freedom of Information Act ("FOIA"). Defs.' Mem., ECF No. 251 at 35 n.20. But this is a suggestion that Plaintiffs engage in a futile exercise. FOIA incorporates privilege rules applicable in federal litigation, so Defendants would presumably deny Plaintiffs information for the same reasons they assert here. *See* 5 U.S.C. 552(b)(5); *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (FOIA incorporates law enforcement privilege). In any event, Plaintiffs are entitled to the information they seek as a matter of *constitutional* right; FOIA cannot be the only mechanism to satisfy what the Constitution requires.

way that forecloses an opportunity to offer a contrary presentation," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974), but that is precisely what Defendants are seeking to do here by characterizing their DHS TRIP notification letters as evidence.[19] Those letters only *refer* in the most general terms to evidence—including Plaintiffs' own alleged statements and those of witnesses, which are almost certainly memorialized in government reports or recordings—without providing it.[20] And like the government's reliance on reasons not disclosed to Plaintiffs, it presumably is relying on evidence not referred to in the notification letters.

Critically for the purposes of this Court's determination whether Plaintiffs should have access to the evidence in their particular cases, Defendants have made no individualized showing that any of the evidence they have refused to disclose is either classified or otherwise privileged. Defendants therefore provide no justification on this record for their refusal to make it available to Plaintiffs—thereby further foreclosing Plaintiffs' ability to rebut or "offer a contrary presentation." *See id.*

Given the extremely high likelihood of error in Defendants' predictive judgments, it is all the more important that Plaintiffs, and the Court, have the opportunity to review any evidence on which those predictions are purportedly based. But the summaries that Defendants provided in the DHS TRIP notification letters do not enable such a review. In fact, the Grigg Declaration leaves room to question whether those who review "evidence" in support of No Fly List nominations are in fact themselves reviewing only summaries of that evidence. *See* Grigg Decl., ECF No. 253, ¶¶ 27, 28, 41. Nominators (and the TSA administrator in the revised redress process) are apparently, therefore, reviewing second-hand information or hearsay-within-hearsay

[19] To allay Defendants' apparent confusion about the meaning of "evidence" in each of Plaintiffs' cases, *see, e.g.*, Defs.' Knaeble Mem., ECF No. 250 at 7, Plaintiffs use the term as the Supreme Court does here: information that forms the basis (and is not just a summary) of the government's determinations such that Plaintiffs have a meaningful opportunity to contest it.

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

from other government employees, third-party witnesses, or other sources.[21] Such a system of "review" does not increase the chance that unreliable or erroneous information will be corrected and reinforces Plaintiffs' need for access to the evidence used against them, consistent with due process.

Finally, Defendants are incorrect that no "due process concern arise[s] from any reliance on hearsay." *See* Defs.' Mem., ECF No. 251 at 36. As Plaintiffs set forth at length in their opening brief, the unconstrained use of hearsay is incompatible with due process.[22] *See* Pls.' Mem., ECF No. 207 at 28-29. The Ninth Circuit, moreover, has repeatedly emphasized that the use of evidence in administrative proceedings must be fundamentally fair. *See* Pls.' Mem., ECF No. 207 at 28-29 (citing cases).

---

[21] That Defendants refer to the unclassified summaries they provided to Plaintiffs as "detailed actual evidence" compounds Plaintiffs' concerns on this point. *See* Defs.' Cross-Mot. for Summ. J.: Kariye ("Defs.' Kariye Mem."), ECF No. 241 at 7; Defs.' Summ. J. Kashem ("Defs.' Kashem Mem."), ECF No. 242 at 7. *See also* Defs.' Knaeble Mem., ECF No. 250 at 7 ("the information given to Mr. Knaeble is evidence – information considered by the agency decisionmaker"); Defs.' Cross-Mot. for Summ. J.: Meshal ("Defs.' Meshal Mem."), ECF No. 247 at 7 (same); Defs.' Cross-Mot. for Summ. J.: Persaud ("Defs.' Persaud Mem."), ECF No. 248 at 7 (same); Defs.' Cross-Mot. for Summ. J.: Washburn ("Defs.' Washburn Mem."), ECF No. 249 at 8 (same).

[22] Defendants cite *Holy Land Foundation* regarding the permissibility of reliance on hearsay, but that case is clearly distinguishable. First, the process at issue in *Holy Land Foundation*, unlike the No Fly List redress process, was set forth in detail by a statute authorizing the seizure of organizations' property. As explained above, the only statutes addressing the No Fly List redress process require that it be "timely and fair," and that it enable listed individuals to "correct any erroneous information." 49 U.S.C.A. § 44903(G); 49 U.S.C.A. § 44909(B). Second, the court's decision in *Holy Land Foundation* was grounded in a "highly deferential" standard of review under the APA, not a constitutional due process analysis, which incorporates fundamental fairness considerations. Third, the court in *Holy Land Foundation* (as well as Defendants) cited *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) ("*NCRI*"), for the proposition that an entity may be designated as a terrorist organization based on hearsay evidence, but the court in *NCRI* specifically noted that the designation statute at issue in that case did not forbid the use of "third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities," which *set it apart* from the "procedure normally employed by the Congress to afford due process in administrative proceedings." 251 F.3d at 196. Far from establishing that the use of hearsay is consistent with due process, these cases show the opposite—the default rule is that an individual must have an opportunity to confront adverse evidence and witnesses.

Defendants' use of evidence against Plaintiffs without granting them any opportunity to meaningfully review and confront that evidence is fundamentally unfair and inconsistent with due process.

3. Defendants must disclose material and exculpatory information.

As with their failure to provide full notice and the evidence used against Plaintiffs, Defendants cannot rely on national security concerns writ large to justify withholding material and exculpatory information from Plaintiffs. It is beyond reasonable dispute that disclosure of such information would reduce the high likelihood of error in Defendants' predictions and increase the fundamental fairness of the revised redress process. Defendants' refusal to make such information available to Plaintiffs starkly shows the shortcomings of that process.

In arguing against disclosure of exculpatory information, Defendants misinterpret and ignore key aspects of the *Brady* doctrine and the fundamental fairness considerations on which it is based. Although it is true that *Brady v. Maryland*, 373 U.S. 83 (1963), is a criminal case, Defendants are incorrect that "[t]he *Brady* doctrine applies only in the criminal context." *See* Defs.' Mem., ECF No. 251 at 37. Plaintiffs have shown—and Defendants ignore—that the Supreme Court has never held that *Brady* is confined to criminal cases, and lower courts apply it in civil contexts. *See* Pls.' Mem., ECF No. 207 at 12-14, 19-20 (collecting cases). Even beyond the cases Plaintiffs cited in their opening brief, lower courts have often concluded that the government must meet *Brady* obligations in civil and administrative contexts, such as when: (1) the public interest requires it, *Sperry & Hutchinson Co. v. F.T.C.*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("[p]resumably, the essentials of due process at the administrative level require similar disclosures [of information helpful to the accused] by the agency where consistent with the public interest"); (2) government action affects individual liberty, *United States v. Edwards*, 777 F. Supp. 2d 985, 991-92 (E.D.N.C. 2011) (applying *Brady* obligation to government in civil commitment context); and (3) the lack of available discovery or compulsory process prevents an individual from otherwise accessing such information. *See id.* ("the normal rules and customs

governing civil procedure in the federal courts are inadequate to protect the fundamental liberty interests at stake" and that due process "requires the application of the *Brady* doctrine"); *United States v. Gupta*, 848 F. Supp. 2d 491, 496-97 (S.D.N.Y. 2012) (imposing *Brady* obligation in civil enforcement context because the information was not available through other sources).[23]

These authorities demonstrate why *Brady*, *Jencks*, and their progeny must apply here. To conclude otherwise would result in fundamental unfairness. For example, surely Plaintiff Mr. Kariye—and the Court—should know whether the informant on whom Defendants extensively rely for their case against him has a history of making false statements or strong reasons to do so here. *See* Kariye Notification Letter, ECF No. 184, Ex. C. In Mr. Kariye and other Plaintiffs' cases, the combination of (1) the severity of the deprivation of liberty that placement on the No Fly List entails; (2) the very high likelihood that Plaintiffs are being deprived of their liberty erroneously; (3) the fact that the government claims a near-unlimited right to gather and use information against Plaintiffs; and (4) the unavailability to Plaintiffs of civil discovery or other information-gathering mechanisms underscores the importance of disclosure of material and exculpatory information. DHS TRIP notification letters make it clear that information derived from the full range of investigative tools at Defendants' disposal—including confidential informants and physical and electronic surveillance—formed the basis for placing Plaintiffs on the List. Plaintiffs' ability to gather and refute evidence in the context of Defendants' revised process, by contrast, is essentially non-existent. This extreme differential reinforces the rationale for imposing a *Brady* obligation, particularly because here, as elsewhere, the government's ultimate objective is not to win its case but to ensure "that justice shall be done." *See Campbell*

[23] Agencies have concluded that *Brady* applies during administrative proceedings. *See* Federal Deposit Insurance Corporation (*First Guar. Bank*, No. FDIC-95-65e, 1997 WL 33774615, at *2 (F.D.I.C. Apr. 7, 1997)) ("[T]he [Administrative Law Judge] correctly concluded that in civil and enforcement matters fundamental fairness requires the production of all exculpatory, factual material."); Commodity Futures Trading Commission (*In re First Guar. Metals Co.*, No. 79-55, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980)) ("Since *Brady* is premised upon due process grounds we hold that its principles are applicable to administrative enforcement actions such as this").

v. United States, 365 U.S. 85, 96 (1961).

Thus, Defendants have failed to show that due process does not mandate the full notice, evidence, and exculpatory information that Plaintiffs seek.

D. Defendants Revised Redress Process Fails to Provide a Necessary Hearing.

Plaintiffs argued in their opening brief that no court has ever upheld the deprivation of a citizen's significant liberties without a hearing. ECF No. 207 at 26. In response, Defendants provide no counter-examples to refute this argument. Instead, Defendants ask this Court to become the first ever to uphold the denial of a live hearing because they contend, without authority or support, that each Plaintiff's ability to present his case to a neutral decision-maker, confront and cross-examine adverse witnesses, and hold the government to the appropriate burden of proof "would add little value to the process or reduce the risk of error." Defs.' Mem., ECF No. 251 at 38. This is manifestly untrue, as this Court previously found. *See* June 2014 Op., ECF No. 136 at 40-41 ("additional procedural safeguards would have significant probative value in ensuring that individuals are not erroneously deprived of their constitutionally-protected liberty interests"). If anything, a hearing is even more essential because Defendants are making credibility assessments—of Plaintiffs and witnesses—based on mere reasonable suspicion to form their error-prone predictive judgments.

In no other context have courts upheld a deprivation of a citizen's significant liberty interest without a hearing. For any comparable deprivation—including in other civil and administrative contexts, such as deportation, *see* Pls.' Mem., ECF No. 207 at 11-12, and civil commitment, *see id.* at 10-11, and for severe deprivations of property interests, *see id.* at 10—a hearing before a neutral decision-maker is a hallmark of due process. In arguing against a live hearing, Defendants cite authorities concerning deprivations that are not remotely comparable to Plaintiffs' significant liberty interests—and none in which a deprivation is based on mere prediction of possible future wrongdoing. *See* Defs.' Mem., ECF No. 251 at 39. That a hearing may not be required for deprivation of certain property interests in the cases Defendants cite—

such as revocation of a product certification, *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 717 (9th Cir. 2011), cancellation of a grazing permit, *Buckingham v. USDA*, 603 F.3d 1073, 1083 (9th Cir. 2010), or hydroelectric licensing decisions, *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984)—has no bearing on due process requirements for Plaintiffs in this case.

Defendants also rely heavily on charitable organization designation cases, but although the *government's* interest at stake in designating an entity a "Specially Designated Global Terrorist" organization is akin to its interest here, the *private* interest at stake is manifestly different. *See* Defs.' Mem., ECF No. 251 at 39; *Al Haramain*, 686 F.3d at 979-80 (9th Cir. 2012) (property, not liberty, interest at stake); *Holy Land Found.*, 333 F.3d at 159 (same); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 750 (7th Cir. 2002) (same). In addition, nothing in these cases suggests that they involved predictive future judgments about individuals' dangerousness—as opposed to the past activities of an organization. Nor do they appear to turn on credibility assessments.

In contrast to these largely inapposite cases, the weight of authority dealing with comparable liberty interests from a range of contexts makes clear that due process requires that Plaintiffs have a live hearing. Defendants have no answer to the fact that in the most analogous context, deportation, a live hearing is required even where national security concerns are involved. *See* Pls.' Mem., ECF No. 207 at 12.

Moreover, Plaintiffs' ability to submit statements through the DHS TRIP process is not an adequate substitute for a hearing at which their credibility, and that of Defendants' evidence and witnesses, can be assessed by a neutral decision-maker. Defendants, in their briefs regarding individual Plaintiffs, have stated outright that "[t]here is no reason to believe that [this Plaintiff's] testimony would alter the Government's reasonable suspicion that he poses a threat" warranting his placement on the No Fly List.[24] The bias revealed in this summary and

[24] Defs.' Kariye Mem., ECF No. 241 at 11; Defs.' Kashem Mem., ECF No. 242 at 12; Defs.' Meshal Mem., ECF No. 247 at 13; Defs.' Persaud Mem., ECF No. 248 at 13; Defs.' Washburn Mem., ECF No. 249 at 13; Defs.' Knaeble Mem., ECF No. 250 at 11.

conclusory pronouncement, particularly when combined with Defendants' low standard for prediction and placement of Plaintiffs on the List in the first place, drives home the need for a hearing before a neutral decisionmaker—such as this Court.

Similarly, Plaintiffs must be able to confront the adverse evidence Defendants are using against them because, as the Supreme Court has explained, the right of confrontation and cross-examination is essential to "the accuracy of the truth-determining process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1158 (9th Cir. 2013) ("[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."). When the government's "truth-determining process" rests on as shaky a foundation as Defendants' does here, with such a high risk of erroneous deprivation, that right is all the more crucial to safeguard against error. As with Plaintiffs' right to a live hearing, their right to an adversarial process is well established because significant liberty interests are at stake and the outcome depends on questions of fact. *See* Pls.' Mem., ECF No. 207 at 12, 18, 28. Defendants' predictive judgments about Plaintiffs undoubtedly rest on some type of factual determination, regarding the underlying evidence at least. Neither Plaintiffs nor the Court can simply trust the strength and credibility of those determinations because the right to confrontation and cross-examination is fundamentally at odds with that sort of trust—and for good reason. *See Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (the right is "even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice…") (citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)).

Defendants note disapprovingly that inquiries put to the government agents responsible for No Fly List nominations—for example, the FBI agents who unlawfully and coercively interrogated Plaintiff Meshal—"would inevitably seek to scrutinize reasons for the No Fly determination and support for them." Defs.' Mem., ECF No. 251 at 40. Defendants express

similar concerns about Mr. Kariye's access to information that formed the basis for his inclusion on the List. That is precisely the point, for Mr. Meshal, Mr. Kariye, and other Plaintiffs.[25] As discussed above, *see supra* section I.A, Plaintiffs' experts have concluded that Defendants' predictive judgments resulting in placements on the No Fly List context necessarily carry a high risk of error. Those predictive judgments must, therefore, be subject to rigorous testing. They are also manifestly vulnerable to the vagaries and inherent evidentiary weaknesses of hearsay. *See* Pls.' Mem., ECF No. 207 at 29-31. Due process requires that Plaintiffs have the ability to probe the extent to which erroneous predictions, judgments, biases, and unreliable hearsay taint Defendants' decision to place and keep them on the No Fly List.

Defendants' argument that "the preference for a live hearing to confront witnesses may be dispensed with in appropriate cases" lacks any meaningful support. Defendants cite *Ching*, 725 F.3d at 1159, *see* Defs.' Mem., ECF No. 251 at 39, but that case strongly undermines their claim. Even though *Ching* did not involve deportation, but instead concerned the denial of a visa petition, the Ninth Circuit held that the process the government afforded was insufficient precisely because it did not include a hearing at which the petitioner could cross-examine witnesses. 725 F.3d at 1159.[26]

Finally, Defendants's arguments against a live hearing based on their asserted need for secrecy, Defs.' Mem., ECF No. 251 at 38-42, largely ignore the examples Plaintiffs provide demonstrating that adversarial procedures can be managed while protecting any legitimate secrecy concerns. CIPA, for example, specifically identifies procedural devices designed to

[25] In addition, Mr. Kariye would be entitled to this information in defending against the denaturalization case Defendants have filed against him, which involves overlapping—and more detailed—allegations. The detailed allegations filed on the public record in the denaturalization case also cast serious doubt on Defendants' claims in all of Plaintiffs' cases that absolutely no more evidence can be disclosed without grave harm to national security.

[26] Defendants' citation to an unpublished district court decision, *Alabed v. Crawford*, No. 1:13-cv-2006, 2015 WL 1889289 at *20 (E.D. Cal. April 24, 2015), *see* Defs.' Mem., ECF No. 251 at 39, provides similarly weak support. *Alabed* involved only the denial of a visa petition, not deportation, and the plaintiff there had access to the adverse witnesses (and actually submitted declarations from them). *Id.* at 51-60. Defendants have denied Plaintiffs even this access.

permit government agents to give testimony and be cross-examined. *See* 18 U.S.C. app. 3 § 8(c); U.S. Dept. of Justice, Offices of the U.S. Attorneys, *Synopsis of Classified Information Procedures Act (CIPA)*, Criminal Resource Manual 2001-2099 ("testimony may be required from an intelligence officer or other agency representative engaged in covert activity" and explaining that CIPA provides methods for maintaining secrecy of, for example, true identity, "that will provide the defendant with the same ability that he would have otherwise had to impeach, or bolster, the credibility of that witness").[27] Defendants also do not explain—beyond asserting that the deprivation of Plaintiffs' liberty is less severe—why the procedures available to Guantanamo detainees (none of whom are U.S. citizens) would not be workable here. *See* Pls.' Mem., ECF No. 207 at 20-21; *Al Maqaleh v. Hagel*, 738 F.3d 312, 327 (D.C. Cir. 2013); *Dhiab v. Bush*, No. 05-1457 (GK), 2008 WL 4905489, at *1 (D.D.C. Nov. 17, 2008). Nor do they provide any reason why protective measures employed in national security-related deportation cases would not be apt. *See* Pls.' Mem., ECF No. 207 at 12, 29.

Given the high risk of erroneous deprivation based on Defendants' predictive judgments and the weight of the precedent dictating the right to a live, adversarial hearing before a neutral decision-maker when liberty interests are at stake, Defendants' refusal to provide a hearing violates due process.

III. Defendants Understate Plaintiffs' Interests at Stake.

Defendants attempt to re-litigate the private interests at stake for Plaintiffs, arguing that those interests are "limited" and "weaker than other liberty interests courts have recognized." Defs.' Mem., ECF No. 251 at 23, 24. Their attempt fails. This Court has already decided that placement on the No Fly List constitutes an ongoing "significant deprivation" of Plaintiffs' liberty interests. June 2014 Op., ECF No. 136 at 30. There is no basis to alter that ruling.

This Court has found, unequivocally, that the interests at stake for Plaintiffs are significant. Nearly two years ago, the Court concluded that "the realistic implications of being

[27] *Available at* http://www.justice.gov/usam/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa (last visited August 7, 2015).

on the No Fly List are potentially far-reaching" and noted that the effects of placement on the No Fly List, such as Defendants' sharing of the List with numerous foreign governments, "severely restrict Plaintiffs' ability to travel internationally." Op. and Order, ECF No. 110 at 25. The Court repeated those findings in its June 2014 order, including that "Plaintiffs' placement on the No-Fly List operates as a complete and indefinite ban on boarding commercial flights," that the effects of placement include "extensive detention and interrogation at the hands of foreign authorities," and that "placement on the No-Fly List carries with it the significant stigma of being labeled a suspected terrorist." June 2014 Op., ECF No. 136 at 32. Importantly, in determining the scope of Plaintiffs' interests, the Court did not focus narrowly on Plaintiffs' inability to board an airplane. Rather, it also rightly considered the inevitable consequences of being barred from flight altogether, including "long-term separation from spouses and children," loss of employment opportunities, and the inability to access medical care, pursue an education, and participate in important religious obligations, among others. *Id.* at 30. In light of the "major burden" and "hardships suffered by Plaintiffs," the Court concluded that their "inclusion on the No-Fly List constitutes a significant deprivation of their liberty interests in international travel." *Id.*

The Court's findings are the law of the case and should not be disturbed. *See Arizona v. California*, 460 U.S. 605 (1983) (under law of the case doctrine, when a court decides on a rule of law, it should ordinarily follow that rule in subsequent stages of the same case); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (law of the case doctrine "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues") (quotes omitted). Defendants do not even attempt to argue that the Court's prior decision was based on a misunderstanding of the factual record, or otherwise in need of reconsideration. [28]

[28] Defendants cite to Rule 54(b) in noting their objection to this Court's rulings, *see* Defs.' Mem., ECF No. 251 at 23 n.11, but they make no attempt to show that the high threshold for reconsideration under that rule has been met here. In any event, there are no new material facts or changes in the law that could support reconsideration. *See Nike, Inc. v. Dixon*, No. CV 01-

Instead, Defendants make legal arguments based on cases decided long before this Court's prior decision. Defendants assert that the Court should not consider the "indirect adverse effects" of placement on the No Fly List, *see* Defs.' Mem., ECF No. 251 at 23 n.11, but there is nothing "indirect" about the harm Plaintiffs continue to suffer. The scope of the private interests at stake in due process analysis goes beyond the most immediate and direct impact of the adverse government action. For example, in *Memphis Light Gas & Water Division v. Craft*—which Defendants cite in attempting to distinguish Plaintiffs' interests, *see* Defs.' Mem., ECF No. 251 at 33—the Supreme Court explicitly considered the broader consequences of a public utility's discontinuation of service in weighing the severity of the deprivation. 436 U.S. 1, 18, 20 (1978). The Court did the same in *Goldberg*, 397 U.S. at 264, *Goss v. Lopez*, 419 U.S. 565, 575 (1975), and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). Defendants further rely on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 789 (1980), but the "indirect adverse effects" that the Supreme Court refused to consider in *O'Bannon* were fundamentally different from the harms at issue here, because the *O'Bannon* plaintiffs were *third parties* to the governmental action. *See* 447 U.S. at 775-76 (residents of nursing home had no right to hearing when government sought to revoke *the home's* license to receive Medicare reimbursements). *O'Bannon* focused on the threshold question of whether the plaintiffs had a protected interest at all; it did not declare that courts may not consider downstream consequences when governmental action harms an individual directly. *Id.* at 788, 784-86. Indeed, the Court in *O'Bannon* cited *Memphis Light* as an example of the kind of direct relationship that gives rise to interests protected by the Due Process clause. *Id.* at 788.

Defendants also cite *Haig v. Agee*, 453 U.S. 280 (1981), in their attempt to re-litigate Plaintiffs' liberty interests, but that case held only that the process the plaintiff received—which included a live post-revocation hearing—was sufficient. *Id.* at 309. *Haig* provides no support to Defendants' position here, where Defendants have provided inadequate notice and no hearing of

---

1459-BR, 2004 WL 1375281 at *1-2 (D. Or. June 16, 2004) (setting forth factors for reconsideration under Rule 54(b)), *aff'd*, 163 Fed. App'x 908 (Fed. Cir. 2006).

any kind. *See* Pls.' Amended Mem. in Supp. Cross-Mot. Partial Summ. J., dated April 1, 2013, ECF No. 98-1 at 10-11 (citing *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Freedom of movement across frontiers . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.")); *see also Vartelas v. Holder*, 132 S. Ct. 1479, 1488 (2012) ("Loss of the ability to travel abroad is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members living abroad."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964); ("[T]he right to travel abroad is an important aspect of the citizen's liberty guaranteed in the Due Process Clause of the Fifth Amendment.") (internal quotations omitted).

Each of the Plaintiffs continues to suffer from the burden and stigma of placement on the No Fly List that the Court previously recognized.[29] Plaintiff Amir Meshal's recent experiences underscore how severe and lasting the consequences of placement on the No Fly List are.

In addition to not being able to fly, Mr. Meshal has not been able to secure or retain employment because of the stigma associated with placement on the No Fly List as a "suspected" terrorist. After a lengthy period of unemployment, Mr. Meshal finally obtained a job with the Minnesota Department of Transportation in November 2014, but was quickly dismissed after other employees complained about working with a person on the No Fly List and a local news channel aired a story describing him as a "suspected terrorist" because of his placement on the List. Declaration of Amir Meshal, dated August 7, 2015 ("Meshal Decl.") ¶ 6.

The harm to Mr. Meshal has not stopped there. As Plaintiffs have previously noted, the government disseminates its watchlists widely to state and local law enforcement agencies. Pls.' Amended Summ. J. Mem., dated April 1, 2013, ECF No. 98-1 at 17 n.30. As a result, Mr. Meshal and his family were recently subjected to a pretextual and abusive traffic stop. On May 27, 2015, two state police officers in Pennsylvania stopped Mr. Meshal on Interstate 80 while he was returning with his wife and seven-month-old baby from a family wedding in New Jersey.

[29] 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).

Meshal Decl. ¶¶ 7-8. One officer made clear that the purpose of the stop was to question Mr. Meshal. *Id.* ¶ 10. During the course of that stop, an officer asked Mr. Meshal, referring to Mr. Meshal's wife and baby, "Was flying not an option for them, either?" *Id.* at 15. Mr. Meshal had said nothing about the No Fly List; the officer already knew of Mr. Meshal's placement on the List. *Id.* ¶¶ 15, 21.

An hour-long unjustified stop, search, and humiliation followed—for Mr. Meshal as well as his wife, who was forced to undergo a patdown by a male police officer in violation of her religious beliefs. *Id.* ¶¶ 14-20. Mr. Meshal was refused access to his phone and could not call his family and lawyers. *Id.* ¶ 15. The Meshals' baby was forced to wait with them by the side of the road in the cold night while the officers ran a drug dog around the Meshals' car and talked to each other. *Id.* ¶¶ 18-22. Unsurprisingly the police officers and the dog found nothing because there was no legitimate basis to stop and search Mr. Meshal and his family. *Id.* ¶ 21. This is a stark example of the harms that Plaintiffs continue to face because of Defendants' placement of them on the No Fly List.

IV. Defendants Fail to Assess Their Security Interests in Light of Readily Available Screening Protocols.

In their brief, Defendants repeatedly emphasize the weight of the governmental interest in protecting aviation and national security, arguing that it justifies their use of predictive judgments to place Plaintiffs on the No Fly List in order to "prohibit[] [individuals identified as potential terrorists] from boarding aircraft." *See, e.g.*, Defs.' Mem., ECF No. 251 at 17. Defendants also underscore that the purpose of their listing is not just to protect airplanes, but more broadly to deny boarding to people whom it has determined pose a threat of terrorist activity generally. *See, e.g.*, Defs.' Mem., ECF No. 251 at 50-51 (because the purpose of the No Fly List "is broader than aviation security," "the No Fly List criteria allow nominators to identify individuals who pose a threat to key national security interests . . . even if they do not pose a threat to civil aviation").

Defendants frame their interests too broadly, however. As this Court has already recognized, Defendants' interest must be understood in the context of additional protocols—short of a complete ban on all air travel—that are available to accommodate its interests in both aviation security and secrecy. *See supra* Section II.B; *see also* June 2014 Op., ECF No. 136 at 58 ("the adequacy of current procedures and potential additional procedures, however, affect the weight given to the governmental interest."). Indeed, the government lost the due process challenge in *Al Haramain*, which also involved weighty counter-terrorism interests, for precisely this reason. *See id*. (citing *Al Haramain*).

Properly framed, the governmental interest in the No Fly List is an interest in preventing individuals from boarding aircraft even *after* they have submitted to heightened screening and other security measures. This feature—the complete ban on air travel—is what distinguishes the No Fly List from other methods of protecting aviation or national security that Plaintiffs do not challenge in this case. Therefore, the due process question here requires the Court to assess the government's interest in using a *complete ban* even though it has at its disposal rigorous screening and other security options, including those Defendants previously used in this case to allow Plaintiffs stranded abroad to fly home.[30] *See* Supp. J. Status Rep., ECF No. 148 at 9-10 (noting procedures Defendants devised to enable Plaintiffs stranded overseas to return to the United States). Defendants' interest in preventing non-aviation violence at a traveler's destination is also greatly mitigated for a reason that Defendants themselves have repeatedly stressed—eliminating an individual's ability to fly does not prevent *all* travel.[31] *See id.* at 23.

[30] *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006) illustrates this flaw in Defendants' argument. Although Defendants cite it in support of their interest in preventing boarding altogether, *Hartwell* addressed and upheld suspicionless airport security screening, after which passengers were allowed to board.

[31] Acknowledging this logical flaw does not undermine this Court's ruling 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 inclusion on the List imposes a "major burden" on Plaintiffs' constitutionally-protected liberty interests. June 2014 Op., ECF No. 136 at 28, 29, 30. It merely shows that there is a significantly imperfect fit between Defendants' proferred goal of preventing Plaintiffs from engaging in violence and their chosen means of accomplishing that task.

Thus, whatever weight this interest is entitled to is significantly diminished by the grossly imperfect fit between Defendants' proferred goal of preventing future violence and their chosen means of accomplishing that task.

In asserting the weight of their interest, Defendants rely on their purported mandate from Congress to create the No Fly List. But whatever Congress mandated (or not) with respect to creation of the No Fly List, it certainly did not mandate the revised redress process that Defendants advocate here. As Plaintiffs note above, the statutes on which Defendants rely to assert their interest say nothing about the process individuals should receive when challenging their inclusion on the No Fly List, except insofar as Congress has required Defendants to correct errors, minimize false positives, and take other measures "to reduce the opportunities for abuse." *See supra* Section II.B (citing 49 U.S.C. § 114(h)(3), which requires *air carriers* to "use information from government agencies to identify individuals on passenger lists who may be a threat," notify appropriate law enforcement, and *either* prevent the passenger from boarding *or* take "other appropriate action"; and 49 U.S.C. § 44903(j)(2)(C) (requiring creation of process that will allow for correction of information; "will not produce a large number of false positives"; and will "reduce the opportunities for abuse").[32]

Nothing in any of these statutes requires Defendants to create a blacklist of people who are barred indefinitely from flying on the basis of a deeply flawed predictive model without receiving the meaningful procedural safeguards that Plaintiffs seek.

[32] The two other provisions that Defendants intermittently cite as support for a purported Congressional "mandate," 49 U.S.C. § 44903(j)(2)(A) and 49 C.F.R. § 1560.105, are similarly inapt. *See* Defs.' Mem., ECF No. 251 at 4-5. The first, Section 44903(j)(2)(A), describes the requirement that all air passengers' identities be checked through a pre-screening computer program, and that flagged individuals be "adequately screened," but says nothing about what process to afford individuals subject to such screening. The second, Section 1560.105, describes the mandate for aircraft operators to comply with the TSA's watch list procedures, and specifies various actions the operators must take in response to particular "boarding pass printing results" provided through the TSA. It, too, is silent as to what procedures should be used for people seeking to get off the List. *See* 49 C.F.R. § 1560.105(b)(1).

V. The No Fly List Criteria Are Unconstitutionally Vague.

Defendants make three basic responses to Plaintiffs' arguments showing the No Fly List criteria are unconstitutionally vague, all of which are meritless. Defendants argue that (1) Plaintiffs may not bring a facial challenge and may only challenge the criteria as applied to their conduct, (2) the criteria are not vague because they do not regulate conduct but instead "require predictive assessments" about future behavior; and (3) even as applied, the criteria provide adequate guidance for those who apply them.[33] *See* Defs.' Mem., ECF No. 251 at 46-51. Defendants' first argument is foreclosed by *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), in which the Supreme Court upheld facial challenges on vagueness grounds without requiring as-applied challenges—results that control here. Their second argument based on "prediction" only reinforces how standardless their criteria are and is not supported by the cases they cite or any cases of which Plaintiffs are aware. Defendants' third argument entirely fails to acknowledge that the No Fly List criteria implicate First Amendment-protected activity and therefore must meet a heightened standard of clarity—but cannot. They are hopelessly vague—on their face and as applied to Plaintiffs—and they open the door to arbitrary and discriminatory placement on the No Fly List.[34]

---

[33] Defendants also argue that "the No Fly List is not a statute" and does not "regulat[e] conduct per se." *See* Defs.' Mem., ECF No. 251 at 47. That argument scarcely merits a response. Vagueness doctrine reaches "any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. State of Pa.*, 382 U.S. 399, 402 (1966). That includes regulations, *see United States v. Backlund*, 689 F.3d 986, 996 (9th Cir. 2012) (reviewing Forest Service regulation for vagueness), and other "enactments," *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (city anti-noise ordinance). The No Fly List criteria serve as the basis for significant deprivations of liberty and are therefore subject to review for unconstitutional vagueness.

[34] All the Plaintiffs in this case are American Muslims. Media accounts have raised concerns that government watchlists disproportionately target American Muslims and Americans of Arab or South Asian origin. *See, e.g.*, Jeremy Scahill & Ryan Devereaux, Barack Obama's Secret Terrorist-Tracking System, By the Numbers, August 5, 2014, available at https://firstlook.org/theintercept/2014/08/05/watch-commander/ ("The second-highest concentration of people designated as 'known or suspected terrorists' by the government is in Dearborn, Mich.—a city of 96,000 that has the largest percentage of Arab-American residents in the country").

Defendants first dispute that Plaintiffs can even bring a facial vagueness challenge here, arguing that "the Court must consider whether the No Fly List criteria are vague as applied to the particular party challenging them, not merely "in [their] hypothetical applications." Defs.' Mem., Defs.' Mem., ECF No. 251 at 46 (citing *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997)). This argument fails for at least three reasons.

First, Defendants cannot claim that an "as applied" analysis is required before a facial vagueness challenge when the Supreme Court in *Johnson* has conclusively rejected "the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 135 S.Ct. at 2561. Similarly, Defendants' argument that, for a facial challenge to succeed, there must be "no set of circumstances" under which the challenged measure could be valid, Defs.' Mem., ECF No. 251 at 47 n.30, is no longer tenable. *Johnson*, 135 S. Ct. at 2561 (the "supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications").

Second, unlike the criteria utilized in the cases Defendants cite, Defs.' Mem., ECF No. 251 at 48-49, the No Fly List criteria do not actually proscribe any particular conduct. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (challenge to 18 U.S.C. § 2339B prohibiting provision of "material support or resources" to certain designated foreign groups); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1145 (9th Cir. 2009) (executive order required finding that person or organization acted on behalf of entity designated as terrorist or provided material support for terrorism); *Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009) (statute rendering inadmissible certain non-citizens who actually engaged in terrorist activity). Rather, each of the No Fly List criteria concerns a *threat* (which is undefined) of conduct that "may or may not occur." J. Comb. Stmt., ECF. No. 173 ¶ 5; Defs.' Mem., ECF No. 251 at 47-8. That is the essence of vagueness.

Defendants assert that Plaintiffs' own conduct "lies at the core" of and explains why they

are on the No Fly List, but nothing about any alleged conduct Defendants have disclosed as a basis for putting Plaintiffs' on the No Fly List was "clearly proscribed," as Defendants assert. To take just one example, Mr. Knaeble's travel to a particular country in a particular year is not conduct that is any way unlawful, let alone clearly so. *See* DHS TRIP Notification Letter, ECF No. 177-1 (Letter to Mr. Knaeble).

Third, even in cases before *Johnson*—including cases Defendants cite—in which courts invoked an "as-applied" standard, courts acknowledged that the standard does not apply where "First Amendment freedoms are implicated." *See U.S. v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 & nn. 6, 7 (1982); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–74 (1997); *United States v. Williams*, 553 U.S. 285, 304 (2008). As Plaintiffs explained in their opening brief, Defendants' DHS TRIP notification letters make clear that the No Fly List criteria implicate substantial First Amendment-protected freedoms. *See* Pls.' Mem., ECF No. 207 at 24-25.

Ultimately, Defendants have not defined what conduct results in placement on the No Fly List. And binding Supreme Court authority on the void-for-vagueness doctrine compels the conclusion that the No Fly List's criteria are unconstitutionally vague on their face.

Defendants' second argument against the vagueness of the No Fly List criteria actually proves why they are vague. Defendants assert that the criteria are not vague because they do not "regulat[e] conduct per se" but instead "require[] predictive assessments." Defs.' Mem., ECF No. 251 at 47. But that makes the vagueness of the criteria worse than the Cincinnati ordinance that the Supreme Court struck down in *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971), which made it a criminal offense for three or more people to assemble and conduct themselves "in a manner annoying to persons passing by." As the Supreme Court explained, "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 614. Here, Defendants acknowledge they are not even "regulating

conduct," but rather blacklisting people based on predictions not tied to any conduct at all.

Defendants acknowledge, as they must, that "a vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable." Defs.' Mem., ECF No. 251 at 48 (citing *Leonardson v. City of E. Lansing*, 896 F.2d 190, 196 (6th Cir. 1990)). Individuals must therefore know what leads to placement on the No Fly List so they may act accordingly. The criteria, however, provide no notice whatsoever of proscribed or required conduct, let alone notice sufficient to meet a heightened standard of review. The criteria neither explain what it means to be a "threat" nor provide even the broadest indication of the types of considerations that lead Defendants to determinate that someone "represents" a threat.[35] Although Defendants state that "an ordinary person is likely to understand what conduct triggers placement on the No Fly List," *id.*, they do not explain why that would be true. An ordinary reasonable person—like each of the Plaintiffs—is left guessing at terms as amorphous as these.

Defendants also err when they assert that the nature of the conduct they seek to proscribe is clear because "the conduct contemplated by the No Fly List is a violent act of terrorism." *Id.* But none of the Plaintiffs has committed any such act. The criteria instead require something *other* than a violent act of terrorism. Aside from the violent acts of terrorism that the criteria *do not* require, they lack any limitation—they are the quintessence of vagueness. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 392 (1926) (Food Control Act unconstitutionally vague because it placed people at risk of penalty but "forbade no specific or definite act"). Defendants' conclusory assertions do not render the criteria clear.

For similar reasons, Defendants' third argument—that the No Fly List's criteria are sufficiently definite to permit Plaintiffs and other members of the public to avoid their prohibitions—fares no better. Defendants have no coherent answer to Plaintiffs' argument that the No Fly List's criteria must satisfy a heightened standard of clarity because they penalize

[35] The inclusion of the phrase "operationally capable" in the final criterion, but not in the first three criteria, suggests that a person need not even be capable of committing an act of terrorism personally in order to meet those criteria.

individuals for First Amendment-protected conduct, speech, beliefs, or association. Time and again, the Supreme Court has emphasized that measures implicating First Amendment freedoms must meet a heightened standard of clarity: "*[P]erhaps the most important factor* affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates*, 455 U.S. at 499 (emphasis added).

Defendants cannot credibly argue that the No Fly List criteria do not implicate First Amendment-protected conduct. Their conclusory statement that "a nomination based solely on First Amendment-protected activity [would] run afoul of longstanding watchlisting policy," Defs.' Mem., ECF No. 251 at 51, misses the point. Even if the policy forbids placement on the No Fly List *solely* for First Amendment-protected activity, it is clear from each of Plaintiffs' cases that such activity can, and often does, constitute *part* of the basis for placing an individual on the List. That First Amendment-protected activity can constitute even a part of the reason for a listing is enough to require the heightened standard, which applies when a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," "operates to inhibit the exercise of (those) freedoms," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), (internal quotations omitted), or has "a potentially inhibiting effect on speech." *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 287, (1961). Given that the (incomplete) notices to Plaintiffs explicitly identify protected speech and activity in various forms—including speech on the internet, religious beliefs, practices, and association—and that the No Fly List criteria potentially implicate the entire universe of First Amendment-protected activity that falls short of committing the terrorist acts they reference, it is clear that more exacting, "rigorous adherence" to the requirements of due process "is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). The No Fly List criteria fail to meet that heightened, more rigorous standard of review.

Finally, the No Fly List criteria implicate another core consideration underlying the vagueness inquiry, which the Supreme Court has held is an even "more important aspect of vagueness doctrine" than actual notice, *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983): the need for precision so that government officials do not exercise their authority in an arbitrary or discriminatory manner. In *Johnson*, the Supreme Court invalidated as unconstitutionally vague the "residual clause" of the Armed Career Criminal Act of 1984 ("ACCA"), which defines "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. at 2555-56 (citing 18 U.S.C. § 924(e)(2)(B)). The Court concluded that the residual clause "leaves grave uncertainty about how to estimate the risk posed by a crime," and that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557, 2558. The No Fly List criteria raise the same concerns that led the Supreme Court to find the statute in *Johnson* unconstitutionally vague. They entail the same double-indeterminacy because they lack (1) any standard or basis for measuring the "threat" that an individual poses and (2) any standard or basis for determining how much of a "threat" one must "pose" or "represent" in order to satisfy the criteria. The fact that, as Defendants emphasize, the criteria are predictive makes them all the more ambiguous and indeterminate: Defendants are essentially guessing "about conduct that may or may not occur in the future," Defs.' Mem., ECF No. 251 at 47—and deciding based on those guesses that Plaintiffs satisfy the criteria. Defendants' predictive assessments are in fact "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *Williams*, 553 U.S. at 306, that "invite[] arbitrary, discriminatory and overzealous enforcement." *Leonardson*, 896 F.2d at 196.

For the foregoing reasons, it is patently clear that the No Fly List criteria are unconstitutionally vague.

VI. Defendants' Constitutional Violations Cannot Be Deemed Harmless.

Defendants' argument that the numerous deficiencies in their revised redress process are "harmless," Defs.' Mem., ECF No. 251 at 51, suffers from two fundamental and related flaws.

As a threshold matter, the procedural posture of this case leaves the Court with no basis for making a harmless error determination. The question before this Court now is the same procedural one that was before it after the Ninth Circuit remanded the case to the Court in 2012: whether Defendants' redress process is constitutionally adequate. *Latif*, 686 F.3d at 1129 ("Plaintiffs raise broad constitutional claims that do not require review of the merits of their individual DHS TRIP grievances"). The parties are not at the substantive due process merits stage, in which the Court would consider whether the outcome of any process Plaintiffs receive is justified. If Plaintiffs prevail on their procedural due process arguments, they will receive the additional process to which they are entitled, and the substantive due process stage can then proceed. If Plaintiffs do not prevail fully or at all on their procedural claims, the Court would still have to conduct its own merits inquiry before deciding if any error in the agency process is harmless.

This case's procedural posture is therefore different from the one in *Al Haramain*, which Defendants cite in support of their harmless error argument. In *Al Haramain*, the Ninth Circuit upheld the district court's finding that the government's procedural due process violation was ultimately harmless, but that conclusion rested on the district court's substantive review under the APA of whether the government's terrorism designation of the plaintiff was supported by substantial evidence—and the Ninth Circuit's further review of that merits decision. 636 F.3d at 990. Here, no such merits review has taken place, and the Plaintiffs and the Court remain ignorant of the nature of the government's undisclosed reasons and evidence. Thus, the holding in *Al Haramain* relevant to this case is that the government's failure to provide complete notice and to use measures to mitigate against non-disclosure of classified evidence violated due process. *See id.* at 988. Any other decision at this stage in the proceedings would elevate a unilateral agency determination about the purported adequacy of its own process above the

Court's duty to make that threshold constitutional determination. That cannot be.

The second, related flaw in Defendants' harmless error argument is that even if the Court were to reach the issue at this stage in the proceedings, the prejudice to Plaintiffs from Defendants' constitutional violations is clear and substantial. Defendants' refusal to provide adequate notice, evidence, and a live hearing deprives the Court of the very record material on which a determination of harmlessness could be made. Other courts have acknowledged as much in evaluating the government's designations of foreign entities as terrorist organizations and have rejected the government's arguments that any failure to provide full notice was harmless, or that disclosure of materials consistently with due process would not alter the outcome. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 228 (D.C. Cir. 2010) ("*PMOI*") (rejecting government's contention that failure to provide required notice was harmless); *NCRI*, 251 F.3d at 209 ("We have no reason to presume that the petitioners . . . could have offered evidence which might have . . . changed the Secretary's mind . . . However, without the due process protections which we have outlined, we cannot presume the contrary either."). In *PMOI*, the D.C. Circuit further noted that its reluctance to accept the government's "no harm, no foul" theory was greater because it was unclear what material the government had in fact relied upon in its designation. 613 F.3d at 229. Additionally, in *Ralls*, the court held that a presidential order blocking the investment of a corporation with Chinese nationals as principals failed to provide required notice, "notwithstanding the [government's] substantial interest in national security and despite our uncertainty that more process would have led to a different presidential decision." 758 F.3d at 320. These cases stand for the unremarkable proposition that when due process violations deprive a court of the information on which a harmlessness determination could rest, no such determination can be made. That is exactly the record before this Court.

Here, there is no basis for this Court to determine that additional notice would *not* alter the outcome of the revised redress process. Likewise, the Court cannot conclude that what little

"evidence" Defendants disclosed supports their listing determinations when the Court does not know the strength of any exculpatory evidence in the government's possession, nor can it conclude that Defendants' adverse credibility findings were harmless when Defendants have refused to permit live testimony at which credibility can be tested by Plaintiffs.

In any event, as the Plaintiff-specific motions and opposition briefs make clear, Defendants' failure to provide constitutionally required process to Plaintiffs plainly harmed them. Defendants not only denied Plaintiffs the ability or opportunity to rebut all the reasons on which Defendants relied in placing Plaintiffs on the No Fly List, but they also placed their own witnesses and evidence beyond Plaintiffs' reach and rejected Plaintiffs' proffered explanations summarily, without taking any testimony from Plaintiffs or other witnesses. Deficiencies as profound as these cannot be labeled harmless.

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

Plaintiffs should also prevail on both grounds of their APA claims. First, if Plaintiffs prevail on their due process claims, it must follow that Defendants' revised redress process is "contrary to constitutional right," and Plaintiffs are entitled to relief under 5 U.S.C. § 706(2)(B).

Second, Defendants' revised redress process is arbitrary and capricious, 5 U.S.C. § 706(2)(A), because it "fail[s] to consider an important aspect of the problem," *see Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—the extraordinarily high risk of error in its predictive judgments. *See supra* Section I. The deference due an agency's judgment under the APA does not extend to its decision to simply ignore an extremely high likelihood that its assessments will be wrong. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action"); *see also Sierra Club v. United States EPA*, 671 F.3d 955, 968 (9th Cir. 2012) (refusal to "rubber stamp" agency action found to be arbitrary and capricious due to reliance on old data).

Defendants' reliance on a purported congressional mandate for ignoring such a high rate of error is misplaced. As discussed above, *supra* Section I.A, no statute prescribes the low standard for inclusion Defendants have chosen to apply—and, in any event, a low standard would not justify blind acceptance of high rates of error in the assessments to which that standard is applied. Further, because Defendants have failed to comply with the mandate Congress has issued, 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," 49 U.S.C. § 44903(j)(2)(G)(i), their redress process is "not in accordance with law" and violates Section 706(2)(A) of the APA.

VIII. Plaintiffs' Objections to Defendants' Flawed and Inadmissible Evidence.

Throughout their brief, Defendants rely extensively on their two declarants, Mr. Grigg and Mr. Steinbach. But neither individual is offering information based entirely on his personal knowledge and both rely on inadmissible hearsay.

Defendants rely on the Grigg Declaration to make assertions about the adequacy of the internal review process applied to each Plaintiff. Grigg Decl., ECF No. 253 at 7-10; 25-29. They also rely on the Grigg Declaration for other propositions, including that they could disclose no further information to Plaintiffs, *id*. at 34, that they have considered any exculpatory evidence, *id*. at 38, and that people are not blacklisted based "solely" on First Amendment activity, *id*. at 51. Plaintiffs object to the Grigg Declaration to the extent that it is not based on Mr. Grigg's personal knowledge, and because it contains hearsay. *Compare* ECF No. 253 at ¶ 4 (asserting declaration is based on personal knowledge *and* "review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, including FBI Special Agents, as well as other government agency employees or contract employees acting in the course of their official duties.") *with* Fed. R. Evid. 602 (witness may only testify to facts of which they have personal knowledge); Fed. R. Evid. 803 (setting forth hearsay exceptions, none of which encompass "information" given to the agent of a party

by other agents of that party). The wording of Mr. Grigg's declaration makes it impossible to know which statements derive from his personal knowledge and which are hearsay, and the Court cannot therefore rely on it. *See United States v. Lopez*, 762 F.3d 852, 863-64 (9th Cir. 2014) (admission of law enforcement officer's testimony was error because "the prosecution laid no foundation" to establish personal knowledge).

Defendants rely on the Steinbach Declaration to describe their predictive judgment model, and for various related propositions, including that the disclosure of some or all of the information Defendants have withheld from Plaintiffs would harm national security. Steinbach Decl., ECF No. 254 at 6-7, 18-19. Plaintiffs object to the Steinbach Declaration because it relies on hearsay rather than personal knowledge. As with the Grigg Declaration, this defect exists throughout the document. *See* Steinbach Decl., ECF No. 254 at ¶ 1 (information in declaration based on personal knowledge *and* "my consideration of information provided to me in my official capacity"). To the extent that Defendants offer Mr. Steinbach as an expert witness on error arising out of their predictive judgment model, Plaintiffs object because his declaration establishes no foundation on which to qualify him as an expert. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) ("The subject of an expert's testimony must be 'scientific . . . knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation."); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 146-149 (1999) (extending *Daubert*'s methodology to "technical" and "other specialized" fields of knowledge). Plaintiffs also object to the Steinbach Declaration insofar as it contains improper opinion testimony with respect to their predictive model. *Cf. United States v. Vera*, 770 F.3d 1232, 1238, 1242 (9th Cir. 2014) (noting danger of "present[ing] testimonial hearsay in the guise of an expert opinion" and reversing portion of conviction where court failed to separate expert from lay witness testimony).

CONCLUSION

For the reasons stated above and in Plaintiffs' renewed motion for partial summary

judgment, this Court should grant Plaintiffs' motion for partial summary judgment and deny Defendants' motion for summary judgment.

Dated: August 7, 2015

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 Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Earl Knaeble, Amir Mohamed Meshal, and Steven Washburn

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 Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment was delivered to all counsel of record via the Court's ECF notification system.

s/ Hina Shamsi
Hina Shamsi