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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,* v. LORETTA E. LYNCH, et al., *Defendants.*	Case 3:10-cv-00750-BR **DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Steven Washburn. As explained in the opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Washburn is, "in the generality of cases," reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court concludes that it is, the only question remaining with respect to Mr. Washburn is whether he in fact received the benefit of that process. Based on the record before the Court, the answer to that question is straightforward: The Government determined that Mr. Washburn satisfied the criteria for inclusion on the No Fly List, [redacted] The Government provided Mr. Washburn with his status, the reasons for which he was listed, and, after carefully considering what information could be disclosed, an unclassified summary of information supporting his status, to the extent feasible without unduly harming national security. The Government then carefully considered his response and explanations and determined that his placement on the No Fly List is appropriate. This is precisely what was called for under the revised redress procedures, and the Constitution requires no more.

Although Mr. Washburn may takes issue with the Government's substantive determination to place him on the No Fly List, he has no plausible argument that he received

anything short of the complete process when he sought redress with DHS TRIP. The Court should grant Defendants' motion for summary judgment.

ARGUMENT

I. Plaintiffs' Arguments About Error Rates Are Misplaced.

Echoing arguments made in Plaintiffs' consolidated brief, Mr. Washburn faults the Government for not incorporating scientific methods in its decision-making process and contends that the predictive judgments underlying his placement on the No Fly List amount to little more than "guessing" at the possibility that he may one day commit an act of terrorism. Washburn Opp. at 2. This line of argument is best addressed in the parties' consolidated briefs. As the Government has argued in its consolidated reply brief, the watchlisting system is reliable and consistent with due process without the benefit of a scientific model. Mr. Washburn's claim presents no particular reasons for separate consideration. Accordingly, the Court is referred to the Government's consolidated reply brief for further discussion of this issue. *See* Defs.' Summ. J. Reply at Parts I and II.

In challenging the Government's decision-making process, Plaintiff tries to bootstrap substantive arguments about the merits of his listing. For example, Mr. Washburn observes that [redacted] Washburn Opp. at 3. But this observation goes to the substance of the listing and does nothing to illustrate a procedural deficiency in the redress process or to otherwise advance his procedural due process claim. The mere possibility of alternative interpretations of facts does not mean that the Government's determination is unreasonable, and it certainly does not mean that the process was unfair. If anything, it confirms that the process was properly applied: [redacted]

[redacted]. Setting aside the lean nature of these responses, it is nonetheless clear that he understands the nature of the Government's concerns and was given a meaningful opportunity to respond.

Accordingly, Mr. Washburn's examples do not illustrate a procedural deficiency in the redress decision. Nor do the examples illustrate the so-called "error rate" described by Plaintiffs' putative experts, who have not opined on any of the specific listing decisions. Moreover, there is no reason to believe that Plaintiffs' alleged "errors" show any "cognitive bias" or that Defendants were unaware of the facts put forward by Plaintiff here. Indeed, the record shows that Defendants are in fact aware of such counterarguments, because the Government specifically considered the submissions of Mr. Washburn in which these contentions were made. *See* Final Decision and Order Regarding Washburn, dated Jan. 21, 2015 at 3.[1] Plaintiff's disagreement with the substantive conclusions of the Government does not demonstrate substantive or procedural error.

II. Plaintiff's Vagueness Argument Is Baseless.

As discussed in Defendants' consolidated reply brief, Mr. Washburn cannot demonstrate that the No Fly List criteria are impermissibly vague. *See* Defs.' Summ. J. Reply at Part II.C. His conduct as described in the notice letter fits within the plainest possible interpretation of the criterion applied to him — [redacted] Because Mr. Washburn engaged in conduct that is "clearly proscribed" by the No Fly List criteria, he cannot sustain a vagueness challenge to the criteria based on its hypothetical applications. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

[1] Plaintiff improperly relies on the absence of criminal charges as evidence that there is no "factual basis" for the Government's conclusions. The exercise of prosecutorial discretion, however, depends on numerous factors.

Setting aside questions concerning the substantive justifications for Mr. Washburn's placement on the No Fly List—questions that are not before the Court at this stage—there can be little doubt that the subject matter of the derogatory information offered in support of Mr. Washburn's listing fits squarely within the conduct contemplated by the No Fly List criteria. In particular, a reasonable person in Mr. Washburn's position would know that [redacted] That common sense terms like "threat" are susceptible to different interpretations does not render the term or the criteria to which it is tied impermissibly vague. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000) (rejecting vagueness challenge where statute contained "common words" understandable by people of ordinary intelligence).

That Mr. Washburn's statements were considered in the No Fly List determination does not change the fundamental analysis concerning vagueness. *Humanitarian Law Project*, 561 U.S. at 19–20 (reversing Ninth Circuit for improperly blending overbreadth and vagueness inquiries). It cannot reasonably be maintained that TSA's conclusions are based merely on protected expression. The summary [redacted] And, in any event, the law is clear that statements can be evidence of proscribed actions. *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (stating that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech … or to conduct necessarily associated with speech"); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer "may decide to arrest the suspect because his speech suggests a potential threat"); *cf. Wayte v. United States*, 470 U.S. 598, 612-

613 (1985) (recognizing that letter of protest written to Secret Service can be relevant "evidence of the nonregistrant's intent not to comply," an element of the crime). Even if the Court scrutinized the determination more closely because of the statements at issue, there can be no doubt both that the applicable criteria are clear and were appropriately applied in this case.

III. The Revised DHS TRIP Process Provides Meaningful Notice And An Opportunity To Be Heard.

As described in Defendants' consolidated reply brief, the revised DHS TRIP process comports with the requirements of due process as contemplated by the Court's prior opinion, and the procedures were properly applied to Mr. Washburn. *See* Defs.' Summ. J. Reply at Part III. Mr. Washburn appears to understand the nature of the information provided and was given ample opportunity to challenge the basis for his listing. Additional procedures are not required, and as described in the Government's previous submission, *see* Dkt. No. 245, his attempt to obtain additional information about sensitive sources and methods should fail.[2] The Government is not required to provide sensitive or classified information, the disclosure of which would endanger national security. Defs.' Summ. J. Reply at Part III; Dkt. No. 245.[3] Moreover, the Government has meaningfully considered his response. Dkt. No. 188-3.

In particular, Mr. Washburn demands access to a particular form of evidentiary hearing to

[2] Mr. Washburn also states that he is willing to undergo additional screening. This appears to be related to Plaintiffs' substantive argument that the Government imposed an incorrect security measure on the Plaintiffs because more intrusive screening would account for the Government's interests. As described in Defendants' main brief, the appropriateness of TSA's security screening measures is irrelevant to the due process consideration and beyond the jurisdiction of the Court. *See* Defs.' Summ. J. Reply at Part IV.

[3] Even if the Court agreed that the Government were required to disclose investigative information, this is also a good example of how Plaintiffs' demands for disclosure or a privilege assertion during the administrative process are meritless. *See* Defs.' Summ. J. Reply at Part III.C. Defendants are not required to surrender their privileges during the administrative process. Defendants, of course, object to the disclosure of privileged information in the context of a No Fly List determination, but the Court would need to consider that issue only when and how it became necessary in the context of a substantive review of the decision.

rebut the agency's determination, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by law, would add little value to the process, and reasonably could be expected to harm national security. *See* Defs.' Summ. J. Mem. Part V.C.; Defs.' Summ. J. Reply Part III.D.

IV. The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any error at all in the process provided to Mr. Washburn, he must then show substantial prejudice as a result of the specific error found. *See* Defs.' Summ. J. Reply at Part V. The notice provided to Mr. Washburn was particularly robust in describing the unclassified, non-privileged information about [redacted]. Mr. Washburn's response is noteworthy for failing to refute any of the actual facts alleged by the Government. [redacted]. His response to the information provided ([redacted]) shows that he understands the nature of the concerns; it does not establish that he would have any persuasive evidence to rebut the Government's concerns — at least none he could not already have submitted. For example, even in the absence of a live hearing, he [redacted] Given Mr. Washburn's failure to deny the central allegations against him, Mr. Washburn cannot establish substantial prejudice from his inability to obtain more notice or a hearing. *See Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 998–90 (9th Cir. 2012) (conducting a harmless error analysis and finding that the failure to consider additional summaries or clear counsel was harmless in that case).

V. Plaintiff's Claims Under The Administrative Procedure Act Should Be Rejected.

Judgment should also be entered for Defendants on Plaintiff's Administrative Procedure Act claims for the same reasons set forth in Defendants' consolidated brief.

CONCLUSION

For all of the reasons discussed above and in the Government's opening brief and consolidated reply brief, the Court should deny Mr. Washburn's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.

Dated: October 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
Brigham J. Bowen

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than seven pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Brigham J. Bowen
Brigham J. Bowen