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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

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INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment. The arguments made in support of Plaintiffs' procedural due process challenge fall into two broad categories: arguments relating to the watchlisting decision-making process, and arguments relating to the procedures available to challenge watchlisting decisions.

The first set of Plaintiffs' arguments challenge the manner in which watchlisting decisions are made — the criteria for inclusion, the burden of proof, and, for the first time, the "predictive judgments" used to determine whether an individual should be placed on the No Fly List. In support of these arguments, Plaintiffs have belatedly introduced purported "expert" testimony in an effort to demonstrate a high "error rate" associated with predictions about future acts of terrorism. In doing so, Plaintiffs misapprehend the task assigned by Congress to the Executive Branch: to identify individuals who pose too great a threat to aviation or national security to board an aircraft. Implementation of this mandate does not require or call for the use of statistical models to forecast the likelihood of future terrorist acts, and the Government commits no "error" if an individual on the No Fly List never successfully commits a terrorist act. Rather, the task imposed by statute is to identify persons who may pose threats and deny them access to civilian aircraft and the means to carry out mass-casualty attacks. To this end, the Government, applying its expertise in intelligence and threat analysis, identifies individuals who satisfy one or more of the criteria for inclusion on the No Fly List. The type of statistical modeling urged by Plaintiffs' "experts" is not appropriate for this task, which calls for deliberate, individualized analysis of the threat posed by a particular person based on available intelligence.

The second set of Plaintiff's arguments relates to the redress procedures available to U.S. persons who have been denied boarding as a result of their placement on the No Fly List. Seeking to impose novel requirements for satisfying due process in this administrative and national security context, Plaintiffs demand procedures comparable to those used in criminal trials, including adversarial hearings and access to witnesses and sensitive documents. This Court, however, has already described the process due for U.S. citizen plaintiffs who are on the No Fly List: namely, notice of an individual's status on the No Fly List and, to the extent consistent with national security, notice of the reasons for the individual's placement. Plaintiffs nonetheless seek to re-litigate their claims, already implicitly rejected by the Court, for new procedural protections, relying on the same inapposite analogies. In so doing, Plaintiffs fail to appropriately balance the interests at play. Moreover, Plaintiffs fail to demonstrate that additional procedures, such as adversarial hearings or access to classified information, should be required under an appropriate balancing of interests, or would make it less likely that the Government would erroneously determine whether an individual satisfies one or more of the threat-based criteria for inclusion on the No Fly List.

Accordingly, Plaintiffs' demand for formal administrative processes that rival or surpass the stringent processes available in more demanding (and primarily judicial) contexts is misplaced. The Government has provided a reasonable redress process that informs the Plaintiffs of their current status on the No Fly List, the reason for their listing, and to the extent possible without endangering national security, an unclassified summary of the underlying evidence. That is more than due process requires.

ARGUMENT

I. The Government's Process For Identifying Terrorist Threats Is Reliable, And Plaintiffs' Arguments About Error Rates Are Misplaced.

Under the pretense of responding to a "new" argument, Plaintiffs have opened a new and elaborate line of attack against what they call the "predictive model" used to determine whether an individual satisfies the criteria for inclusion on the No Fly List. By Plaintiffs' own account, the purpose of these new arguments is to demonstrate "from an objective, scientific standpoint, [that] the predictive judgments Defendants use to place and retain Plaintiffs on the No Fly List result in an extremely high risk of error." Dkt. No. 267 (Pls.' Opp.) at 4.

This entire line of argument stems from a misconception about the purpose of the No Fly List, the basis on which individuals are denied boarding, and what constitutes an error in administering the List. Plaintiffs assume that the Government commits "error" when it retains someone on the No Fly List who "will never commit an act of terrorism." Pls.' Opp. at 2; *see also id.* at 8 (describing difficulty in identifying indicators "that could be used to predict whether the individual will actually commit a terrorist act"), 10 ("acts of terrorist violence are very rare and therefore exceedingly hard to predict"), 11 (discussing the rate of error associated with a tool used "to identify actual terrorists"), 12 (characterizing the No Fly List criteria as "attempting to predict … violent acts of terrorism"). Under their approach, Plaintiffs and their experts contend that any "tool used to predict who will commit acts of terrorism" would be "flooded with false positives," by which they mean someone "falsely identif[ied] … as a future terrorist when he is not." Dkt. No. 268, Sageman Decl. ¶¶ 21, 34.

Plaintiffs are fundamentally mistaken about the purpose of the No Fly List and the policy mandates that gives rise to it. There is a crucial difference between attempting to predict a future terrorist attack (the exercise Plaintiffs challenge) and attempting to identify an individual who

may pose a threat of committing an act of terrorism (the determination at the heart of the No Fly List). Congress directed the Executive Branch to deny boarding to travelers "who may be a threat" to national security. 49 U.S.C. § 114(h)(3). In carrying out that mandate, the Government does not commit "error" or generate a "false positive" each time it places or retains someone on the No Fly List who does not actually go on to commit an act of terrorism. *See* Declaration of John Giacalone, Executive Assistant Director of the National Security Branch of the FBI ("Giacalone Decl.") ¶ 6 ("whether the Government can predict future acts of terrorism without a high rate of error has no bearing on the reliability of the No Fly List, which is designed to identify individuals who may pose a threat of committing a violent act of terrorism rather than predict the chance of future events"). That some individuals assessed to pose a threat will not wind up carrying out a terrorist attack is a natural, if entirely unremarkable, feature of the No Fly List. Indeed, neutralizing threats so as to avoid actual terrorist activity is the primary purpose of the List, and the fact that an individual does not go on to commit a terrorist act may reflect the success of the listing determination and other counterterrorism tools as deterrents.

As a matter of law, the Government would commit an "error" only when it places someone on the No Fly List who does not satisfy the criteria for inclusion. *See Kaley v. United States*, 134 S. Ct. 1090, 1101 (2014) (analyzing a procedural due process claim and explaining that "an asset freeze depriving a defendant of that interest is erroneous only when unsupported by a finding of [the applicable legal standard].") (emphasis in original). The question for the Court is not whether the Government can accurately predict the likelihood that a person on the No Fly List will commit a terrorist act, but whether it can reliably apply the criteria for inclusion on the List and reasonably determine, based on the available information, that an individual poses a present threat to national security. To the extent Plaintiffs' seek to address that question,

their arguments and proposed expert testimony have missed the mark. To the extent Plaintiffs seek to show that denial of boarding should be based on something more than a clearly defined threat to aviation or national security, then their challenge goes to the substance of the criteria underlying placement on the No Fly List and the wisdom of the congressional directive upon which it is based. As the Seventh Circuit explained:

> Judges are good at dealing with false positives, because the victims come to court and narrate their grievances, but bad at dealing with false negatives, which are invisible. Any change that reduces the number of false positives on a terrorist watch list may well increase the number of false negatives. Political rather than judicial actors should determine the terms of trade between false positives and false negatives.

Rahman v. Chertoff, 530 F.3d 622, 627 (7th Cir. 2008). In either case, this new line of argument is neither relevant to the procedural due process inquiry nor persuasive.

As set forth below, the "expert" testimony proffered by Plaintiffs should be excluded because it has no valid connection to the precise issue before the Court. Alternatively, if the Court concludes that the proffered testimony could be relevant to resolving the procedural due process inquiry, the Government has a number of additional objections to the proffered testimony, including objections relating to the qualifications of the putative experts, the reliability of their theories, and the manner in which their testimony was presented.

A. Plaintiffs' Putative Expert Testimony Should Be Excluded As Irrelevant.

As an initial matter, Plaintiffs' proffered expert testimony is not relevant to any issue before the Court. Rule 702 requires that "[e]xpert testimony … be both relevant and reliable," *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014), *cert. denied* 135 S. Ct. 55 (2014) (alteration and omission in original) (quoting *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001)). If "there is no 'fit' between [the expert's] testimony and the issue"

in dispute, then the testimony is not relevant and is potentially misleading and confusing. *United States v. Scholl*, 166 F.3d 964, 971 (9th Cir. 1999) (citation omitted).

"Relevancy depends on the particular law at issue because [e]xpert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry." *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196-97 (9th Cir. 2014) (internal citation omitted). Here, the question before the Court is whether the revised redress procedures constitute a constitutionally adequate process for U.S. persons who have been denied boarding as a result of their placement on the No Fly List. The putative expert testimony has been submitted to help the Court understand why "the predictive judgments Defendants use to place and retain Plaintiffs on the No Fly List result in an extremely high risk of error." Pls.' Opp. at 4. The risk of error, Plaintiffs argue, "must inform the Court's due process analysis," because "accounting for error and minimizing its consequences is at the heart of procedural due process analysis." Pls.' Opp. at 1–2. Accordingly, by Plaintiffs' own logic, the relevance of the testimony turns on whether it would help the Court assess the risk of error in the Government's watchlisting process.

The proffered testimony should be excluded as irrelevant to the procedural due process inquiry for two basic reasons. First, from a legal standpoint, Plaintiffs and their putative experts incorrectly assume that the Government makes a mistake when someone on the No Fly List does not commit an act of terrorism. Second, from a factual standpoint, the putative experts fail to draw a valid connection between the scientific principles discussed in their opinions and the analytical judgments that form the basis for individual No Fly List decisions.

Both declarants conclude that the Government's system for placing individuals on the No Fly List results in a high rate of error, and both offer the same basic rationale: When the frequency of a particular form of violence is low and a large number of people have identifiable

risk factors, there is no reliable way to identify in that large group the few individuals who will actually commit the violent act. Thus, Dr. Austin concludes that "any effort to identify people who will commit [acts of terrorism] … would inevitably produce a large number of false positives," Dkt. No. 269, Austin Decl. ¶ 27, while Dr. Sageman opines that "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," Sageman Decl. ¶ 34.

As discussed, this reasoning stems from a fundamental misunderstanding of what it means to commit an error in making determinations about the No Fly List. The purpose of the No Fly List is not to predict future acts of terrorism but, through a combination of intelligence gathering and analysis, to prevent it. *See* Giacalone Decl. ¶ 6; *see also* 49 U.S.C. § 114(h)(3). An assessment that someone poses a threat of committing an act of terrorism emerges from specific intelligence about that individual and his or her circumstances that point to known or possible terrorist activity. This type of analysis does not require the Government to statistically calculate the chance a person will actually blow up a plane or commit some other terrorist attack. *See* Giacalone Decl. ¶ 7. While the Government cannot predict the likelihood that someone who satisfies the No Fly List criteria will commit an attack, Congress did not require the Government to make that prediction, *see* 49 U.S.C. § 114(h)(2), and such a standard would ill-serve the purpose of that mandate.

For this reason, the putative experts' focus on "predictive accuracy" and "false positives" is legally irrelevant. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (holding that expert testimony must draw on specialized knowledge with regard to the precise question at issue). Unlike a prediction as to future conduct, which turns on the outcome of some

determinable event in the future, the reasonableness of a watchlisting determination can be ascertained when it is made, and any errors in the decision-making process would turn on whether the facts available were fairly and reliably applied by responsible officials to the criteria for inclusion. If there is a risk of erroneous deprivation in the watchlisting process, it stems from the operation of that decision-making process, not from errors in predicting the likelihood of future terrorism. But neither putative expert offers specialized knowledge concerning the Government's ability to make judgments, based on available intelligence, as to whether an individual presents a sufficient risk of terrorism to deny boarding an aircraft. Indeed, the Court could accept the thesis at the heart of these proffered opinions — that a system designed to predict future acts of terrorism will be prone to error — and still find that Plaintiffs have not logically advanced their procedural due process challenge.

A second, related problem concerns the putative experts' failure to tie the social science principles discussed in their opinions to the facts of this case. Although both declarants fault the Government for purportedly failing to incorporate scientific methods into its No Fly List determinations, neither considers whether the threat-based judgments they challenge are in fact susceptible to statistical modeling. This problem goes directly to "fit": Dr. Sageman and Dr. Austin purport to base their opinions on the processes and procedures set forth in the Government's declarations, but the "predictive model" described in their opinions bears little resemblance to the individualized judgments that actually inform No Fly List decisions — judgments that are not actuarial predictions, but rather highly specific, intelligence-driven threat assessments concerning the past and present conduct of particular individuals. *See Daubert*, 509 U.S. at 591.

There is no indication, for example, that Plaintiffs or their putative experts have considered what it would mean to employ principles of conditional probability in the fluid, intelligence-driven environment in which No Fly List determinations are made, or how such principles would interact with the context-specific analysis about particular persons and the judgments by counterterrorism officials that form the basis for No Fly List decisions. While both putative experts opine that incorporating scientific methods into the Government's process would improve reliability, neither makes any serious attempt to explain how.[1] It cannot be, for example, that where the Government has derogatory information about a person that satisfies the No Fly List criteria, the Government must then separately calculate, through statistical models, the likelihood that the person will actually commit an attack, and if the percentage is sufficiently low (Plaintiffs do not specify what level), must allow the individual to fly. When the No Fly List criteria are satisfied, the Government cannot risk hundreds of lives by subordinating intelligence-driven, individualized expert judgments to actuarial models. Giacalone Decl. ¶ 10; *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) ("The Government, when seeking to

[1] In addition, the proposed expert opinions are riddled with factual errors and erroneous assumptions about the watchlisting process, many of which are contradicted by the Government's declarations filed before Plaintiffs' submissions. For example, Dr. Sageman's assumption that known terrorists on the No Fly List either have been or soon will be charged with a crime is wrong. *See* Sageman Decl. ¶ 13. As Michael Steinbach, FBI Assistant Director of Counterterrorism, explained, nominations to the No Fly List are often based on highly sensitive national security information that cannot be compromised even for the purpose of criminal prosecution. Steinbach Decl. ¶ 23. Nor is there any basis for Dr. Sageman's statement that FBI agents "are promoted and rewarded—even with monetary bonuses—based on providing derogatory information on U.S. persons." Sageman Decl. ¶ 45. To the contrary, "[t]here are no incentives that encourage the one-sided reporting of threats, or that discourage the reporting of information inconsistent with reported threats." Giacalone Decl. ¶ 15. Similarly inaccurate is Dr. Austin's apparent assumption that the nominating agency is solely responsible for determining that the applicable criteria are met. *See* Austin Decl. ¶ 26. As the Government has explained (and as discussed further below), nomination is just the beginning of a multi-stage, interagency review process.

prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.").

Perhaps more problematically, Plaintiffs have failed to identify a connection between the additional procedures they seek, such as hearings and access to classified information, and the purported gaps in the Government's decision-making process. The *Mathews* inquiry concerns "the requested procedure's usefulness in correcting erroneous deprivations of [the plaintiffs'] private interest." *Kaley*, 134 S. Ct. at 1101 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). If the problem with the Government's decision-making process is the absence of an actuarial model for making predictions, Plaintiffs fail to show how the additional procedures they request would reduce the risk of erroneous deprivation.

B. The Government's No Fly List Determinations Are Effective And Reliable.

As the foregoing discussion makes clear, Plaintiffs' challenge to the "predictive judgments" underlying the Government's No Fly List determinations has confused the procedural due process inquiry and obscured the precise issue before the Court: whether the Government fairly and reliably applies the threat-based criteria for inclusion on the No Fly List to particular individuals. With respect to that question, the summary judgment record is one-sided. The declaration testimony demonstrates that the Government has the resources, expertise, and safeguards in place to make reliable assessments and keep the risk of error to a minimum.

In particular, through the declaration of Executive Assistant Director Giacalone, a senior FBI official who oversees the Bureau's national security operations, the Government reiterates a basic but critical point: The analytical judgments that inform watchlisting decisions fall within the core proficiencies of the intelligence community. Giacalone Decl. ¶¶ 11–13. Watchlisting is

not an experimental exercise but rather a natural extension of the intelligence-gathering and investigative functions of nominating agencies such as the FBI. *Id.* ¶ 11 ("Analytical judgments about potential threats are the stock-in-trade of the intelligence community.").

Applying its constitutionally vested expertise in this dynamic and challenging arena, the Government draws on a rich body of source information and applies accepted tradecraft to analyze intelligence and investigative information about terrorist activity. "Making a No Fly List determination is a professional discipline that combines substantive expertise and analytical thinking," *id.* ¶ 14, and agents and analysts are guided in their decision-making by deeply engrained analytical standards that structure their discretion and promote scrutiny and professionalism in their work, *id.* ¶¶ 14–15. Agents and analysts also leverage the knowledge of subject-matter experts to support and enrich their assessments. *Id.* ¶ 13. "Such intelligence expertise can fill knowledge gaps and identify certain patterns of behavior or overarching trends that can help agents and analysts gauge the credibility and seriousness of a threat." *Id.*[2]

The Government has a host of procedures and safeguards in place to ensure that

[2] In the watchlisting context, these broader analytical tools are supplemented by the Watchlisting Guidance. The product of many years of interagency coordination and review, the standards, criteria, and operational guidance set out in the Watchlisting Guidance reflect the Government's mechanism to determine who may pose a threat to civil aviation or national security. Certain elements of the Watchlisting Guidance have been set forth in the Government's declarations in support of summary judgment. *See* Grigg Decl. [Dkt. No. 253] ¶ 15. The entire Watchlisting Guidance, however, is subject to privilege, and the Government has not released it, nor has it authenticated the purportedly leaked version to which Plaintiffs cite. And Plaintiffs' arguments that their counsel are somehow empowered to authenticate it by, *inter alia*, downloading a copy from the Internet, counting the number of agency seals on the cover, and describing its contents, are baseless. *See Mobley v. CIA*, 924 F. Supp. 2d 24, 65 (D.D.C. 2013), on appeal No. 13-5286 (D.C. Cir.) ("In order to constitute an official acknowledgement, 'the information requested must,' inter alia, 'already have been made public through an official and documented disclosure' because 'in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures."'(quoting *Fitzgibbon v. CIA* , 911 F.2d 755, 765 (D.C. Cir. 1990)).

watchlisting decisions are based on the most current and accurate information available, and are subject to rigorous, multi-layered review. These measures are discussed at length in the Grigg (Dkt. No. 253) and Giacalone declarations, which describe the continuous review, rigorous cross-checking, and quality control that figures into every stage of the watchlisting process, from nomination to redress. As Executive Assistant Director Giacalone explains, "At each of these stages, the Government is, to one degree or another, utilizing the analytic process that first gave rise to the nomination: analyzing historic and current intelligence, assessing reliability, and bringing expertise to bear to make judgments about the nature and severity of the threat." Giacalone Decl. ¶ 23.

Plaintiffs' arguments about the risk of erroneous deprivation in the watchlisting process gloss over these procedures and safeguards and entirely ignore the Government's constitutionally based expertise in this field. Instead, their arguments focus on a "predictive model" that bears little resemblance to the decision-making process that the Government actually follows (or one that due process should be held to require). There is, however, at least one proposition the parties agree about: It would be extremely difficult, if not impossible, to develop a predictive model that accurately predicts the likelihood of future acts of terrorism. But far from an indictment of the Government's approach, this proposition only underscores the necessity of an individualized watchlisting system aimed at those who pose a threat of terrorism, and built on expert judgment and intelligence analysis. As Mr. Giacalone explains, in the fluid, intelligence-driven environment in which watchlisting decisions are made, statistical models and general data are no "substitute for the informed judgment of a trained and experienced analyst or agent about the threat posed by a particular individual based on a rigorous analysis of the investigative and

intelligence information particular to that individual." *Id.* ¶ 9.[3]

C. Alternatively, Defendants Preserve Their Right To Challenge The Qualifications Of The Proffered Experts And The Reliability Of Their Opinions.

Should the Court nonetheless conclude that the proffered testimony were relevant and deserving of any consideration on the due process issue, the Government has the right to challenge the qualifications of Plaintiffs' putative experts and the reliability of their opinions. However, due to the unusual posture of this case, the Government has not yet had the opportunity to explore these concerns through expert discovery concerning Plaintiffs' putative experts. *See* Dkt. No. 256 at 8–9 (arguing the prejudice to Defendants from the lack of expert discovery prior to Plaintiffs' intended expert filings). Accordingly, if the Court does not exclude the proffered testimony on relevance grounds or does not reject it on the merits, the Government should be granted an opportunity to conduct expert discovery and, if necessary, obtain rebuttal experts. To the extent the Court entertains Plaintiffs' experts and their related arguments at any level, it should not grant Plaintiffs' motion.

[3] Plaintiffs claim that they "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." Pls.' Opp. at 5. But such determinations occur and have been upheld in a variety of contexts: preventative detention during times of war (*Ludecke v. Watkins*, 335 U.S. 160 (1948)) or insurrection (*Moyer v. Peabody*, 212 U.S. 78 (1909)); the detention of potentially dangerous resident aliens pending deportation proceedings (*Carlson v. Landon*, 342 U.S. 524 (1952)); the detention of mentally unstable individuals who present a danger to the public (*Addington v. Texas*, 441 U.S. 418 (1979)); the revocation of passports (*Haig v. Agee*, 453 U.S. 280 (1981)); the revocation of security clearances (*Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)); the revocation of airmen's certificate (*Jifry v. F.A.A.*, 370 F.3d 1174, 1181 (D.C. Cir. 2004)); and the imposition of economic sanctions, *see, e.g.*, Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001) (authorizing the Department of Treasury to block assets of individuals who "pose a significant risk of committing" acts of terrorism). And in any event, Congress has already determined that the public interest in preventing mass-casualty terrorist attacks on an aircraft or otherwise cannot be risked by waiting for a particular terrorist to commit a chargeable criminal offense.

The Government disputes that the social science principles discussed in the Sageman and Austin opinions can be properly extrapolated to the watchlisting context. At the heart of both opinions is the supposition that predictive systems that employ scientific methods to test underlying judgments are more reliable than reliance on analytical expertise and actual investigative information about a person. However, as Executive Assistant Director Giacalone observes, any attempt to apply a statistical model to No Fly List determinations "would be fraught with uncertainty and considerable risk." Giacalone Decl. ¶ 8. For example, efforts to find reliable data on the risk of terrorism are "frustrated by the fact that the people who plan to commit terrorist attacks take every precaution to hide and obscure information about their activities." *Id*. Moreover, a predictive model would have no way of accounting for the possibility that the No Fly List actually serves its purposes — that is, that it deters and prevents terrorist attacks that would have been carried out in its absence. *Id*.

Whatever the merits of this theory, it cannot be accepted at face value. Indeed, both declarants appear to recognize the limitations of an actuarial model in this context. *See, e.g.*, Austin Decl. ¶ 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"); Sageman Decl. ¶ 17 (opining that "behavioral indicators cannot reliably be used to predict whether an individual will carry out an act of terrorism").

The Government also has the right to further challenge the declarants' expert qualifications. For example, Dr. Sageman does not appear to have the appropriate background or experience to address, let alone offer expert opinion about, "cognitive biases and structural errors" within the intelligence community. His conclusions and generalizations appear to be based on his experience as a case officer for the Central Intelligence Agency some 25 years ago,

and his academic expertise appears to be in psychology. *See Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993 (9th Cir. 2001) (personal experience in the form of anecdotal examples with no empirical evidence or studies cannot form the basis for expert opinion); *cf. Gardels v. CIA*, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (declining to accord any weight to declaration by former CIA employee); *Halperin v. Nat'l Sec. Council*, 452 F. Supp. 47, 51 (D.D.C. 1978) (rejecting proposed submission by plaintiff with impressive credentials because nothing in the record justified "the substitution of this Court's judgment or the informed judgment of plaintiff for that of the officials constitutionally responsible for the conduct of United States foreign policy as to the proper classification of [the documents]"), *aff'd* 612 F.2d 586 (D.C. Cir. 1980). For his part, Dr. Austin, who studies recidivism in prison populations, seems to have no relevant experience at all with respect to national security intelligence analysis or counterterrorism matters.

At bottom, Plaintiffs' arguments about predictive judgments are a sideshow designed to distract from the questions at issue in this case. The Government's ability to make or to test predictions about the likelihood that someone will commit an act of terrorism in the future is irrelevant to the deliberate, individualized decision-making process underlying No Fly List determinations. Plaintiffs' predictive judgment arguments should be disregarded entirely, and their proposed expert testimony should be excluded or given no weight in the Court's review of the pending due process claim.

II. The No Fly Criteria Are Appropriately Calibrated, And Plaintiffs' Standard-Of-Proof And Vagueness Arguments Are Baseless.

Plaintiffs' next line of attack purports to target Defendants' redress procedures, when in fact it is a substantive attack on the overall standards the Executive Branch has developed to carry out its No Fly List mandate. These substantive challenges to the standards and criteria for listing individuals are inconsistent with the law and plainly erroneous.

A. The Criteria Are Appropriately Calibrated To Thwart Terrorist Risks.

Plaintiffs' first flawed contention is their argument that the reasonable suspicion standard "is not required by Congress" because "the statute … requires no particular standard of proof for placement on the No Fly List at all." Pls.' Opp. at 14–15. Most fundamentally, this argument is at odds with the terms of the statute itself. Congress directed the Executive Branch to identify "individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety," 49 U.S.C. § 114(h)(2), "to identify individuals on passenger lists who may be a threat to civil aviation or national security," *id.* § 114(h)(3)(A), and to "prevent th[ose] individual[s] from boarding an aircraft, or take other appropriate action," *id.* § 114(h)(3)(B). Like a host of other legislative mandates, Congress left it to the discretion of the Executive to determine the most appropriate means, including the choice of a governing standard, for identifying individuals, known to pose or suspected of posing a threat, or who "may be a threat to civil aviation or national security." *Id.* § 114(h)(3)(A). Such determinations, especially in the national security realm, are due deference. *Humanitarian Law Project*, 561 U.S. at 34–35 (observing that, when "it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate") (internal quotation marks and citation omitted). Even if there were not a clear statutory mandate, the Executive Branch may reasonably

determine how to implement the congressional mandate in order to effectively counter the terrorism threats it was created to thwart. 49 U.S.C. § 114(h); *cf. Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996) ("Given the lesser importance of ... freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.").[4]

The reasonable suspicion standard is not only consistent with these congressional mandates, but also appropriate given the purpose to be achieved. First, the statutory language itself prudently grants the Executive Branch latitude to protect against possible threats by focusing on the category of individuals who are "suspected of posing" a threat of terrorism or "may be a threat." Plaintiffs, however, disregard the statutory language and would rewrite the language to say "will commit acts of terror," or "have committed" such acts or even are "likely" to commit such acts. Second, the reasonable suspicion standard is appropriate given the nature of the harm to be prevented. Individuals who seek to commit acts of terrorism go to great lengths to conceal their intentions, and the information available to law enforcement and intelligence agencies may be of a kind or quantity that cannot, at least at the outset, sustain an arrest (probable cause) or conviction (beyond a reasonable doubt). *See* Giacalone Decl. ¶ 8; *see also Terry v. Ohio*, 392 U.S. 1, 22, 24 (1968) (recognizing the public's interest in "effective crime prevention" and explaining that "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest"). Moreover, the harm to be prevented — the

[4] And even if Congress had not expressly mandated a standard for inclusion on the No Fly List, it could reasonably defer to the expertise of the Executive Branch to develop appropriate standards for inclusion, particularly because the No Fly List was already in existence prior to the enactment of the Aviation and Transportation Security Act (Pub. L. 107-71 November 2001).

intentional targeting of civilians for an attack — is extraordinarily grave. In these circumstances, a preventative system necessarily needs to cover not only "known" terrorists and those who have committed terrorist acts (including both those who have and have not been charged for such conduct), and those who will or are likely to commit terrorist attacks, Sageman Decl. ¶ 34, but also those who are suspected of posing a threat, regardless of whether they have any concrete plans (known or unknown) to engage in the activities the No Fly List is designed to thwart. And where the Government is charged with identifying those whom it suspects may pose a terrorist threat, establishing a standard beyond reasonable suspicion would not only frustrate the purpose of the List but increase the risk of harm that Congress seeks to prevent.

B. Plaintiffs' Demands For An Elevated Burden Of Proof Are Baseless.

Plaintiffs also continue to insist that the Government must demonstrate to itself, and to the Court, that its determinations meet the "clear and convincing" burden of proof. Pls.' Opp. at 16–18. Plaintiffs are wrong on both counts. As discussed above and in Defendants' opening brief, the standards for inclusion on the No Fly List are tied directly to the Congressional standard in § 114(h); Grigg Decl. [Dkt. No. 253] ¶¶ 15–21. Plaintiffs can point to no authority that grants them the power to elevate the standard of "may" be a threat to "clear and convincing" evidence of a threat. *See Steadman v. SEC*, 450 U.S. 91, 95 (1981) (explaining that where Congress has prescribed the governing standard of proof, its choice controls absent countervailing constitutional constraints.); 5 U.S.C. § 706(2)(e) (evidentiary standard for administrative factfinding is substantial evidence).

It is not entirely clear whether Plaintiffs seek to impose their elevated burden of proof on

the administrative process, on the ultimate judicial review process, or both.[5] If Plaintiffs seek to impose a "clear and convincing" standard of proof on the ultimate judicial review of substantive No Fly List determinations, they are plainly mistaken. The proper standard of review that applies to a substantive challenge to a No Fly List determination is determined by the nature of the substantive challenge itself (*e.g.*, a substantive due process claim or an APA claim). For example, as the Court has found, a substantive due process challenge to a restriction on international travel would not require clear and convincing proof even at the judicial review phase, but rather would be subject to rational basis review, or at most to a slightly heightened level of scrutiny. *Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1270–73 (D. Or. 2014). And an APA challenge would be subject, at the most, to the deferential arbitrary and capricious standard (with factual determinations reviewed for substantial evidence). *Al Haramain Islamic Found. Inc. v. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2012) ("*AHIF*").

To the extent Plaintiffs' arguments are about the administrative burden of proof, they are likewise wrong. Plaintiffs are seeking to impose a judicial standard of review, borrowed from other non-analogous contexts, on an administrative determination. There is no basis for doing so. *Cubaexport v. Treasury*, 606 F. Supp. 2d 59, 72-73 (D.D.C. 2009), *aff'd on other grounds*, 638 F.3d 794, 803 (D.C. Cir. 2011) (observing that an agency determination "does not have to meet the same rigorous requirements as proceedings in court. If it did, the administrative decision making process would come to a grinding halt." Thus, the agency must instead "consider[] the relevant factors and articulate[] a rational connection between the facts found and

[5] It is also unclear what Plaintiffs believe, as a factual matter, must be shown by clear and convincing evidence. Is it that the individual is a threat? Or may be a threat? Or is planning a terrorist attack? Or will commit a terrorist attack? *See* Sageman Decl. ¶ 35 (referring to "true terrorists"). Plaintiffs' lack of clarity underscores the rootlessness of their demands.

the choice made.") (citing *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004)).[6]

Moreover, in support of their demand for a "clear and convincing" standard of proof, Plaintiffs point to the standards used in plainly inapposite contexts such as pretrial detention proceedings, deportation proceedings, and parole revocation proceedings. For example, Plaintiffs defend their borrowed standard by emphasizing that the detention cases involve "time-bound" detention determinations. But No Fly List determinations, by their very nature, are not indefinite, but are subject to continuing revision and reassessment as new information comes to light. *See generally* Grigg Decl; Giacalone Decl. ¶¶ 17-23. Plaintiffs' contention that they do not seek all the protections afforded criminal defendants provides little help, because they do not explain why their preferred standard of review should apply here. And Plaintiffs' notion that detention cases are remotely analogous strains credulity. The contention that a person who is otherwise completely at liberty, but cannot fly on aircraft over U.S. airspace, is comparably curtailed in their liberty to an incarcerated person, is plainly wrong. So, too, is the notion that a person being deprived of all the benefits of presence in the United States via deportation is analogous to a person who has full access to U.S. presence and merely cannot board certain flights.

Notably, in urging for their "clear and convincing" standard, Plaintiffs overlook international sanctions cases that present a more analogous context, and in which Courts employ an arbitrary and capricious/substantial evidence standard of review. *See AHIF*, 686 F.3d at 976; *id.* at 979 (observing that "we reiterate that our review—in an area at the intersection of national

[6] Indeed, although Defendants strongly resist the notion that Plaintiffs are somehow entitled to a hearing, *see* Part III.D, *infra*, even if they were granted formal administrative hearings, they would not be entitled to insist on a "clear and convincing" standard. The standard of review for administrative hearings is substantial evidence. 5 U.S.C. § 706(2)(E).

security, foreign policy, and administrative law—is extremely deferential") (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007)).

C. The Criteria Are Not Impermissibly Vague.

Plaintiffs urge the Court to invalidate the No Fly List criteria on vagueness grounds, but have yet to demonstrate why the criteria themselves are impermissibly vague. Instead, they focus their challenge on the relative uncertainty inherent in the application of qualitative standards that call for the assessment of risk. This approach neither states nor remotely supports a vagueness claim.

Plaintiffs have made no effort to distinguish the threat-based standard for inclusion on the No Fly List from any of the numerous provisions that impose criminal consequences for conduct assessed to present risk. *See, e.g.*, 18 U.S.C. § 16 (defining "crime of violence" to include any felony "that, by its nature, involves a substantial risk that physical forces against the person or property of another may be used in the course of committing the offense") (emphasis added); N.Y. Penal Law § 120.20 (2013) ("recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person") (emphasis added); N.C. Gen. Stat. § 14-318.2(a) (2013) (creating criminal liability for exposing a child to "substantial risk of physical injury"). As the Supreme Court recently acknowledged, a statute is not unconstitutionally vague merely because it relies on an assessment of risk. *See Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."). Such provisions do not authorize penalties based on "wholly subjective judgments" such as "whether the defendant's conduct was 'annoying' or 'indecent,'" *United States v. Williams*, 553 U.S. 285, 306 (2008), or patently ambiguous terms such as "unjust or unreasonable rates," *United States v.*

L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

These principles apply with equal force to the criteria for inclusion on the No Fly List. As the Government has already explained, the core concern of the No Fly List is countering the risk of terrorism, and an ordinary person is likely to understand as much from the plain language of the criteria, which either explicitly require the threat of a "violent act of terrorism" (in the case of the fourth criterion), or (in the case of the first three) focus on the particular target of a terrorist attack and incorporate the statutory definitions of domestic and international terrorism, both of which presuppose violent conduct. *See* 18 U.S.C. § 2331(1)(A), (5)(A). The criteria thus provide the "statutory definitions, narrowing context, or settled legal meanings" normally absent in provisions that are vulnerable to vagueness challenges. *See Williams*, 553 U.S. at 306. That reasonable minds may differ as to what constitutes "a threat of engaging in or conducting a violent act of terrorism" does not mean the underlying criteria are 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). "[T]he law is full of instances where a man's fate depends on his estimating rightly … some matter of degree," *Nash v. United States*, 229 U.S. 373, 377 (1913), and a provision is not void for vagueness merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," *Williams*, 553 U.S. at 306.

Nor is there any merit to Plaintiffs' contention that the use of predictive assessments "proves why [the No Fly List criteria] are vague." Pls.' Opp. at 49. There is "nothing inherently unattainable" about an assessment that an individual poses a threat of engaging in certain conduct in the future. *Schall v. Martin*, 467 U.S. 253, 278 (1984). Indeed, the Supreme Court has "specifically rejected the contention, based on … sociological data …, 'that it is impossible

to predict future behavior and that the question is so vague as to be meaningless.'" *Id*. at 278-79 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 & 279 (1976); *see also Humanitarian Law Project*, 561 U.S. at 34 (rejecting a standard that demands hard proof—with "detail," "specific facts," and "specific evidence"— that a person's proposed activities will support terrorist attacks, as a "dangerous requirement").

Finally, whatever the merit of this vagueness challenge, it cannot be brought by a plaintiff "who engages in some conduct that is clearly proscribed." *Id*. at 18 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). Contrary to Plaintiffs' suggestion, this rule was not disturbed by the Supreme Court's decision in *Johnson*, which, as relevant here, dealt only with the requirements for stating a vagueness claim. Although the Court cast doubt on "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, it did not purport to address the independent question of who can assert a vagueness claim, and certainly did not purport to overturn the long-settled rule that a party who engages in "clearly proscribed" conduct cannot challenge a statute in its "hypothetical applications." *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997). Accordingly, and as discussed further in the individual briefs, Plaintiffs' vagueness claims fail because each of their conduct lies at the core of the reasons why they were placed on the No Fly List.

Plaintiffs argue that this rule does not apply where the application of the provision in question implicates First Amendment-protected activity. Pls.' Opp. at 49. But the "rule makes no exception for conduct in the form of speech." *Humanitarian Law Project*, 561 U.S. at 20. "Thus, even to the extent a heightened vagueness standard applies, a plaintiff whose speech is

clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Id.*[7]

III. The No Fly List Redress Process Complies With The Parameters Of The Court's June 2014 Order, And Plaintiffs' Demands For Even More Process Are Meritless.

Plaintiffs' challenge to the propriety of the revised redress procedures fails. The Court has determined in its prior summary judgment order that due process requires notice of an individual's status on the No Fly List and, to the extent consistent with national security, notice of the reasons for the individual's placement on the List. The Court recognized that determinations about what can be provided must be made on a case-by-case basis, and that in some cases, certain information relating to the reasons for the No Fly List determination may not be disclosed without compromising national security. Dkt. No. 136 at 62. The question at hand is whether the revised redress procedures fit within the parameters prescribed by the Court, or whether, as Plaintiffs insist, additional procedures are required to satisfy due process. In answering that question, the Court's analysis should be guided by two key principles.

First, the *Mathews* balancing inquiry focuses on weighing the respective interests, including, as applied here, national security concerns, and is principally concerned with the utility of the substitute procedures. That is, the question is not whether the procedures sought by the plaintiff may in theory be of benefit but whether and to what extent they would reduce the

[7] Plaintiffs have not alleged overbreadth, *see Humanitarian Law Project*, 561 U.S. at 20, and even if they had, it would not be sufficient to claim merely that the application of the No Fly List criteria touch on speech; rather, they would have to demonstrate that the criteria apply to "a substantial amount of protected speech," *Williams*, 553 U.S. at 304, which would not include "speech integral to criminal conduct," *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). Also, it is dubious at best to suggest that statements that advance acts of terrorist violence or an "association" with a known or suspected terrorist can reasonably be regarded as purely expressive where they also reflect conduct indicating that a person is a terrorist threat. The applicable criteria do not target speech or association directly or indirectly, but seek to identify those who may pose a threat of terrorism.

risk of erroneous deprivation. *See, e.g.*, *Kaley*, 134 S. Ct. at 1101-04; *ASSE Int'l v. Kerry*, No. 14-56402, 2015 WL 5904715 (9th Cir. Oct. 9, 2015).

Second, in determining whether the proposed procedures would reduce the risk of erroneous deprivation, a proper understanding of the concept of "error" in the context of administering the No Fly List is critical. Plaintiffs must show that the proposed procedures would reduce the risk of error, and cannot rest on the general proposition that "the adversarial process leads to better, more accurate decision-making." *Kaley*, 134 S. Ct. at 1104 (finding that asset freeze did not warrant adversarial procedures). Plaintiffs' demands are meritless, particularly given the very low likelihood that the Government will erroneously apply the criteria for placement on the No Fly List. *See AHIF*, 686 F.3d at 979 (noting "extremely deferential review" at the "the intersection of national security, foreign policy, and administrative law").

Plaintiffs' other due process arguments fail for related and independent reasons. As set forth below, Plaintiffs' demands for access to national security information from DHS TRIP, for CIPA-like procedures, or a full evidentiary hearing, and insistence that the Government must satisfy a heightened burden of proof are all meritless. Any due process analysis of the revised redress process must also balance the Government's compelling interest in protecting national security. The process is designed to provide as much information as can properly be provided without compromising the very national security interests that the No Fly List is designed to protect, and is in accord with the principles already laid out by the Court in its prior decisions.

A. Plaintiffs Are Not Entitled To Obtain National Security Information.

Plaintiffs' core demand for additional process effectively seeks the disclosure of national security information to the very parties deemed to pose a terrorist threat. As the DHS TRIP correspondence for each plaintiff here reflects, the central impediment to the Government

providing additional disclosures — and the primary reason why additional processes would be unwarranted — is that the information Plaintiffs continue to demand is predominantly protected national security information. *See* TSA Decision and Order, Dkt. No. 175-3 at 3; Dkt. No. 176-3 at 3; Dkt. No. 177-3 at 2; Dkt. No. 178-3 at 3; Dkt. No. 179-3 at 3; and Dkt. No. 180-3 at 3. The Court has previously recognized the Government's compelling interest in protecting this information, Dkt. No. 136 at 42, and the Court's contemplation of unclassified summaries reflects the recognition that such information must be protected from disclosure and the limits of what the Government can reasonably be asked to disclose.[8] Plaintiffs insist, mostly in general terms, that they are entitled to more "notice," "evidence," and "exculpatory information." But this insistence almost entirely fails to recognize both the nature of the information they seek and the compelling reasons why additional information cannot be, and must not be, disclosed to them (even if not publicly disclosed). Dkt. No. 136 at 42, 62; *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 131 S. Ct. 1900, 1904 (2011) (noting that disclosure of sensitive information to a limited number of lawyers led to "unauthorized disclosure of military secrets"). As *Ellsberg* and *General Dynamics* reflect, entrusting national security information to the care of private counsel is an excessively dangerous proposition. The Government, to which deference is due, has both considered and rejected the idea. The Court should do the same.

B. Plaintiffs Are Not Entitled To CIPA-like Procedures.

Plaintiffs' continued efforts to import CIPA procedures into the watchlisting redress process are meritless. Defendants have demonstrated that such procedures do not apply in civil

[8] The Court's express recognition that in some cases, the Government may not be able to provide any information, Dkt. No. 136 at 62, likewise reinforces the validity of the revised process and recognizes the constraints that limit the Government's ability to make disclosures in this context.

cases, and the use of CIPA-like procedures would not be appropriate here, for numerous reasons. The core purpose of CIPA in a criminal setting is to ascertain the relevance of classified information to a prosecution or defense and, if relevant, to provide the Government an opportunity to substitute unclassified summaries or, if necessary to protect national security, dismiss an indictment. Here, of course, it is established that the classified information underlying a No Fly List determination is relevant, and that the Government has already provided a summary thereof to the extent possible. It is also clear that, as a defendant, the Government cannot act unilaterally to prevent this case from proceeding. CIPA-like proceedings, if properly understood, have no application here.

Moreover, under well-established separation of powers principles, decisions about who may access or use classified information and under what circumstances are committed to the Executive Branch and not subject to judicial review. *See Egan*, 484 U.S. at 529-30; *CIA v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the [Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]."); *see also Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at *9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive [Branch] may not be countermanded by either coordinate Branch"); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2004) (emphasizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information"). Thus, while Courts may certainly examine the due process rights of U.S. citizens, any finding that due process requires that the Government grant private parties who sue it access to classified

national security information would raise profound separation of powers concerns. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007) (rejecting argument that the court provide counsel access to state secrets pursuant to a nondisclosure agreement (after arranging for necessary security clearances), and then conduct an in camera trial); *Sterling v. Tenet*, 416 F.3d 338, 344–49 (4th Cir. 2005) (rejecting a plaintiff's request to devise "special procedures" to allow suit involving state secrets to proceed).

Even if the Court disagreed that it could not grant access to national security information, there still would be no due process concern where such information is not provided. The due process question turns not simply on the authority to grant or deny access, but on whether a proper balancing of the interests in this setting should require such access. As the Court has already recognized, the Government has compelling interests not only in maintaining the No Fly List but in protecting sensitive information that underlies each determination. Any required disclosure of national security information here would be self-defeating and fail to properly balance the respective interests at stake.

Plaintiffs' answer to these concerns and settled law is largely to ignore it. They dismiss cases explicating these doctrines on the basis that they are not "due process" cases. *See, e.g.*, Pls.' Opp. at 23 n.10. But the principles that inform the Executive's role in protecting national security information clearly inform consideration of whether due process requires such access. *Egan*, 484 U.S. at 527; *Sims*, 471 U.S. at 180. Plaintiffs' effort to distinguish *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) illustrates the point. The court in *Ellsberg* stated that "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." *Id.* at 61. Plaintiffs retort that

Ellsberg dealt with a state secrets assertion, whereas the privilege has not yet been asserted here. This is a distinction without a difference. The *Ellsberg* principle applies equally to any attempt by private counsel to gain access to classified information in pursuit of litigation.[9]

Plaintiffs' citations to Guantanamo Bay habeas cases, *e.g.*, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *vacated*, 554 U.S. 913 (2008), *decided on other grounds*, 551 F.3d 1068 (D.C. Cir. 2009);[10] *Al-Odah v. United States*, 559 F.3d 539, 544–45 (D. C. Cir. 2009); which are quasi-criminal in nature,[11] are no more persuasive than their citations to criminal cases, for which CIPA procedures are expressly tailored; *see*, *e.g.*, *United States v. Abuhamra*, 389 F.3d 309, 329 (2d Cir. 2004); *United States v. Sedeghaty*, 728 F.3d 885, 906 (9th Cir. 2013).

Nor do terrorism sanctions cases support Plaintiffs' demands for access to protected information. In *AHIF*, the court reviewed classified information *ex parte* and rejected an argument that such information must be disclosed in order to satisfy the demands of due process. 686 F.3d at 980–82; *see also Jifry*, 370 F.3d at 1182. Only in suggesting possible avenues for

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[9] Plaintiffs' other authorities fare no better. Plaintiffs' tortured reading of the Court of Appeals' decision in this case is deeply flawed. Nowhere does that decision require this Court to grant counsel access to classified information or otherwise employ any provision of CIPA. The Court only generically cited CIPA, in *dicta* and without analysis, for the unremarkable proposition that this Court had sound discretion to determine how to handle sensitive information. The question whether or how CIPA-like procedures might bear on further proceedings was not before the Court, and Plaintiffs' notion that the Court is required to employ whichever provisions of CIPA Plaintiffs wish to utilize, Pls.' Opp. at 24, is baseless.

[10] Defendants note that Plaintiffs' citation to *Bismullah*, 501 F.3d 178 (D.C. Cir. 2007), incorrectly states that the D.C. Circuit reinstated the decision after it was vacated by the Supreme Court. Pls.' Opp. at 23. Rather, on rehearing, the D.C. Circuit held that it lacked jurisdiction and dismissed the case. *See Bismullah v. Gates*, 551 F.3d at 1075.

[11] Notably, the Government agreed to the information-sharing regime in the Guantanamo habeas cases, precisely because of the unique context they presented: quasi-criminal proceedings arising from potentially indefinite detention. *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 154 (D.D.C. 2008) (¶ 48(b): "Nothing herein requires the government to disclose classified information."); *see also Bismullah v. Gates*, 501 F.3d 178, 198 (D.C. Cir. 2007) ("Without authorization from the Government, neither Petitioner nor Petitioner's counsel may have access to any classified information involved in this case.").

the Executive Branch to "consider" did it raise the possibility of disclosures to counsel, in conjunction with the possibility of unclassified summaries (which is what the revised DHS TRIP process provides, where possible). But the Court did not require such disclosures, as Plaintiffs wrongly suggest, and such access was not granted by the Government in these cases. *Compare AHIF*, 686 F.3d at 980–82 *with* Pls.' Opp. at 23 (citing *AHIF* for the proposition that the Government is "routinely required to disclose, or at least summarize, classified or otherwise sensitive information").[12]

Plaintiffs' reliance on deportation proceedings, which they wrongly contend are most analogous to the No Fly determinations here, is similarly misplaced. Setting aside the clear weakness of the analogy, Plaintiffs' citation to a generic regulation concerning protective orders is meaningless. No immigration statue, regulation, Board of Immigration Appeals decision, or federal court opinion has authorized disclosure of classified information to an alien (or his counsel) in immigration proceedings.

In sum, the question whether a person on the No Fly List (or his counsel) should be granted access to classified national security information is not only foreclosed by the law, but also by common sense. To grant such access (in administrative or judicial proceedings) would

[12] Elsewhere, Plaintiffs cite *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014), for the unsupported notion that courts "consistently require more process than Defendants provide here." Pls.' Opp. at 17. But in *Ralls*, the court expressly held that "due process does not require disclosure of classified information supporting official action," relying on prior authorities for the settled proposition that classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Id.* at 319 (quoting *NCRI v. Dep't of State*, 251 F.3d 192, 209–10) (D.C. Cir. 2001). Likewise, in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010), the court did not require disclosure of classified information and only "propose[d]" counsel access as one of multiple options, subject to further briefing. *Id.* at 660. The case settled, and private counsel was never given access to classified information.

effectively transform a tool for the protection of national security into one that threatens harm to national security. The proper balancing of due process principles does not require access to national security information in this setting, which obviously would create a perverse incentive for lawsuits as well as a disincentive for agencies to nominate to the No Fly List in the face of risk. *See Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) ("The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives." (internal citation omitted)).

C. Plaintiffs Wrongly Seek To Impose Inapplicable Judicial Procedures On An Administrative Process.

Relatedly, Plaintiffs repeatedly offer the puzzling argument that Defendants cannot withhold privileged or otherwise protected information because Defendants have not formally asserted privilege. Plaintiffs also appear to insist (somewhat inconsistently) that they must be given access to national security information through DHS TRIP in order to satisfy due process, without regard to whether that information is properly protected. Pls.' Opp. at 25. The Government is not required to formally assert its privileges at the administrative stage, and has not found it necessary to do so in this litigation (particularly where the parties have agreed to proceed without discovery at this stage and are presently addressing issues of process, not the reasons for No Fly List determinations). The Due Process Clause does not require the Government to assert or waive privileges to protect information during the administrative redress phase. Thus, while it may become necessary for the Government to protect against the disclosure of information at the point when a No Fly List determination is subject to litigation, including discovery, an assertion of privilege is not required during the administrative process.

Plaintiffs' insistence that the Government has improperly withheld information in the administrative process turns the ordinary procedure on its head. In effect, they are attempting to

litigate privileges in advance of, rather than during, any litigation of the substantive determinations. In point of fact, Plaintiffs concede that these issues are not properly before the Court at this time. Pls.' Opp. at 22 (conceding that privileges should be litigated at the "next, substantive due process stage in these proceedings"). Indeed, Plaintiffs' express concession that the merits of Defendants' invocations of privilege should be reserved until later in the proceedings demonstrates that all their arguments about their purported entitlement to particular kinds of evidence, notice, or procedures, are entirely premature at this stage. For all these reasons, Plaintiffs' demands that privileges be waived during the administrative process, or that this Court should presumptively deem them invalid and require additional administrative disclosures *ex ante*, are without merit.

D. Plaintiffs Are Not Entitled To A Live Or Adversarial Hearing.

Plaintiffs' demands for a live or adversarial hearing are also meritless. When the Court assessed the prior DHS TRIP process, it looked primarily to the international sanctions context and found that those proceedings do not require or involve an adversarial hearing. *See, e.g.*, *AHIF*, 686 F.3d at 1001; *Holy Land Found.*, 333 F.3d at 164; *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002). Indeed, the only additional process the court in that case contemplated for the Government to undertake were ameliorative steps, such as the preparation of unclassified summaries, without disclosing national security information or otherwise threatening national security. *AHIF*, 686 F.3d at 984. Moreover, this Court rejected Plaintiffs' demands for adversarial hearings and made no mention of them in outlining the contours of the process the Court contemplated as sufficient. Dkt. No. 136 at 39, 61–62.[13]

[13] Consistent with this precedent, the Ninth Circuit recently rejected a demand for formal hearings in the administrative context, including a demand for confrontation and cross-

As a factual and policy matter, the Government's declarations establish the numerous risks that would be associated with undertaking hearings in the unique context of No Fly List determinations, all of which informed the Government's decision to incorporate unclassified summaries, without attendant adversarial hearings, into the revised process. Steinbach Decl. ¶¶ 36–37. Of necessity, TSC and the nominating agencies may rely on reporting from a wide variety of sources, including foreign governments, confidential informants, and other sources and methods. As noted above, to require disclosure and cross-examination of those sources in order to administratively adjudicate a No Fly List determination would risk significant harm to vital counterterrorism sources and methods used to detect and prevent terrorist attacks that may be directed at commercial aircraft or other targets. Such a process would defeat the counterterrorism mission of the No Fly List.

Plaintiffs' individual complaints illustrate the risks associated with adversarial hearings. In each instance, the individual Plaintiffs seek to look past the summaries they have already received to probe at witnesses and sources and into the Government's information-gathering processes. To the extent information could be provided to Plaintiffs without harming national security, the Government provided such information to the maximum extent possible. But to permit Plaintiffs to probe further would risk or result in the very harms to national security that

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examination of witnesses. *See ASSE Int'l, Inc.*, 2015 WL 5904715, at 9-12. The State Department sanctioned ASSE, a State Department-designated international exchange program sponsor, for its failure to comply with regulations governing the Exchange Visitor Program on the basis of a paper proceeding. In *ASSE*, which did not involve privileged or classified information or the protection of the national security, the Ninth Circuit held that no such formal proceeding was required, noting that regulatory violations can "be established—and investigated—through paper records." *Id*. The Court noted the agency's "broad discretion" in determining the form of the administrative proceeding, and upheld the informal administrative review. *Id*.

the No Fly List is intended to prevent. No extant or appropriately analogous law entitles Plaintiffs to a hearing.[14]

E. Plaintiffs Are Not Entitled To Additional Notice.

Through their demands for more "notice," Plaintiffs continue to dispute this Court's previous holding that the Government must provide meaningful notice, including the subject matter of the Government's concerns. *Cf. AHIF*, 686 F.3d at 982–83. This demand for more information about "the reasons" for their listing is meritless.[15] This Court, like every other court to consider the issue, has held that certain information that implicates national security can be properly withheld. *See* Dkt. No. 136 at 59–62. Indeed, this Court has specifically noted that there may be cases in which the traveler can get no information at all. *Id*. at 62.

Plaintiffs' complaints about the adequacy of notice appear to be little more than renewed arguments about the validity of the Government's withholdings. By insisting that they need more information (including national security information) in order for due process to be satisfied, Plaintiffs are re-litigating settled law against them and pre-litigating privileges prematurely. *See AHIF*, 686 F.3d at 983; *Ralls*, 758 F.3d at 319; *Jifry*, 370 F.3d at 1182; Dkt.

[14] Plaintiffs counter that such risks can be ameliorated through "appropriate" judicial mechanisms such as the entry of protective orders. But these arguments are misplaced for numerous reasons. As discussed above, they are unnecessary and inappropriate in the administrative process, and they threaten the disclosure of highly sensitive information. Steinbach Decl. ¶¶ 36–37; *Gen. Dynamics*, 131 S. Ct. at 1904.

[15] Plaintiffs also raise, for the first time, an alleged statutory violation, claiming that Congress intended to create a process where Plaintiffs had access to classified or privileged information because Congress instructed the agency to develop a "timely and fair" redress process "to correct any erroneous information" in the screening database. This untimely argument, long since waived, is a plain misreading of the statute, which does not purport to require the Government to disclose national security information. *See* Part VI, *infra* (addressing Plaintiffs' statutory claim.)

136 at 42, 61–62.[16] Moreover, they again are seeking to impose judicial mechanisms on an administrative process. *Cf.* Part III.C, *supra*.[17]

In the end, Plaintiffs' insistence that they need more "notice" fails to grapple with the breadth of the notice already provided, and with the significant constraints on the Government's ability to provide more robust notice. The notice they received was developed to provide them with as much unclassified information as possible, without compromising national security. This is precisely the kind of disclosure contemplated by the Court.

F. Defendants Are Not Required to Provide the Underlying Documents.

Next, Plaintiffs dispute that the disclosures provided are "evidence" and seem to propose that the Government must disclose any underlying documents read by agency analysts and decisionmakers. As previously explained, Defendants have segregated the relevant unclassified,

[16] Plaintiffs' citation of distinguishable cases in inapposite contexts is of little use. It is unsurprising that a detailed statement of reasons may be required when a criminal defendant is facing imprisonment. *See Russell v.* U.S., 369 U.S. 749, 764 (1962) (requiring a certain amount of detail in a criminal indictment). And more details have also been required in run-of-the-mill civil contexts involving forfeiture of property. *See Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997). But due process is a context-specific inquiry, requiring consideration of the interests at play. Being unable to fly is not the same as being imprisoned for life, nor is it the same as property forfeiture. And the Government's interest in preventing terrorist attacks is not akin to the government's interest in taking private property that might have a nexus to a crime. Plaintiffs' citation *AHIF*, addressed in Defendants' opening brief, *see* Defs.' Summ J. Mem. at 20-21, is of no additional help. The *AHIF*, Court found a due process error in the failure to provide "reasons" when the agency provided only one of the three broad reasons relied upon under the Executive Order. Namely, the agency had informed the plaintiff that it was designated for "providing support" to Chechen terrorists but failed to notify them that the agency was concerned about "ownership and control" by specific terrorists. *See AHIF*, 686 F.3d at 987. Here, Plaintiffs have been provided with the criterion under which they are listed, and to the extent possible, additional information designed to permit Plaintiffs a meaningful opportunity to respond to the facts identified and disclosed.

[17] Even a cursory review of the individualized determinations and DHS TRIP correspondence demonstrates that Plaintiffs have received adequate notice. In contending that all the Plaintiffs should receive additional notice, Plaintiffs cite the examples of Messrs. Kariye and Knaeble in particular. As discussed in the individual briefs, an assessment of these two individuals demonstrates the adequacy of notice and how far afield Plaintiffs' demands are.

nonprivileged information from any underlying reports considered by the Government for disclosure in the notice letters. *See* Moore Decl. ¶ 16.[18] Despite Plaintiffs' alleged interest in receiving documents, they have not even attempted to gain access to these documents.[19]

Plaintiffs also repeat their argument that agency decisionmakers cannot rely on "hearsay" information such as, presumably, intelligence reporting and analysis. But they do not meaningfully distinguish the abundant case law showing that agency decisionmakers are routinely permitted to rely on hearsay. *See* Defs.' Summ. J. Mem. at 36.[20] Moreover, the use of hearsay in administrative proceedings is routine and acceptable even outside the context of national security cases. *See, e.g., Lacson v. DHS,* 726 F.3d 170 (D.C. Cir. 2013) (noting that "it is well-settled not only that hearsay can be considered by an administrative agency but that it can constitute substantial evidence."). Most importantly, Plaintiffs have no response to the point that in making No Fly List determinations the Government necessarily may rely on information from

[18] While, in *ASSE*, the Ninth Circuit held that the State Department must disclose the underlying notes of an interview with an exchange visitor, there was no contention that the witness statements were classified or privileged. *See ASSE Int'l*, 2015 WL 5904715 at *12–*15. Moreover, the Ninth Circuit upheld the agency's reliance on hearsay. *Id*. at *10–*12.

[19] Plaintiffs claim that the Freedom of Information Act cannot be the only avenue to receive documents to which they are constitutionally entitled. But for present purposes the salient point is that the Court cannot determine whether there is constitutional error in the process currently available until Plaintiffs have actually sought documents.

[20] For example, Plaintiffs argue incorrectly that the process at issue in the terrorism designation cases like *Holy Land* "was set forth in detail by a statute authorizing the seizure of organizations property." Pls.' Opp. at 33. That is inaccurate in several ways, but most notably, there is no statute setting forth in detail the process to be followed in administrative reconsideration of a terrorist designation under Executive Order 13224. Although the designation of terrorist supporters is authorized by an Executive Order issued pursuant to the International Emergency Economic Powers Act, neither the statute nor the Executive Order address the details of the process to be provided. The Court nonetheless found the consideration of intelligence and press reporting to be both substantively and procedurally acceptable. *See Holy Land*, 333 F.3d at 162. Although the separate designation statute at issue in *NCRI* is slightly more detailed, the statute certainly does not address the issue of admissible evidence or hearsay. *See* 251 F.3d at 196.

confidential human sources, foreign governments, undercover agents, and other sources of information that cannot be presented or considered in any other form.

G. Plaintiffs Wrongly Demand Additional Material And Exculpatory Information.

Plaintiffs also insist they are legally entitled to certain information, including exculpatory information, irrespective of the national security or law enforcement implications of such disclosures. This argument is meritless. In particular, Plaintiffs are wrong as a matter of law in insisting on additional disclosures of "exculpatory information." Contrary to law on the subject, Plaintiffs continue to argue that the same *Brady* obligations that apply in the criminal context apply here. *Brady* simply does not apply in civil or administrative cases where there is no threat of physical confinement. *See Brodie v. HHS*, 951 F. Supp. 2d 108 (D.D.C. 2013) ("Brady does not apply in civil cases except in rare situations."), aff'd 2014 WL 211222 (D.C. Cir. Jan. 10, 2014); *U.S. v. Project on Gov't Oversight*, 839 F. Supp. 2d 330 (D.D.C. 2012) (similar), *aff'd* 766 F.3d 9 (D.C. Cir. 2014); *see also Tandon v. Comm'r*, 2000 WL 331926 (6th Cir. Mar. 23, 2000) (rejecting application of *Brady* to a civil tax case involving allegations of tax fraud); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961 (4th Cir. 1985) (rejecting application of *Brady* to a National Labor Relations Board proceeding); *Mister Disc. Stockbrokers, Inc. v. SEC*, 768 F.2d 875 (7th Cir.1985) (rejecting application of *Brady* to a securities administrative disciplinary proceeding).

The authority on which Plaintiffs rely does not stand for the extraordinary proposition that *Brady* is "bedrock" procedure applicable in every civil case. In *Sperry & Hutchison Co. v FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966), for example, the district court refused to order the agency to turn over exculpatory materials relevant to an ongoing formal administrative adjudication. The court did note in dicta that due process "presumably" requires "similar disclosures [of information helpful to the accused] by the agency where consistent with the

public interest." *Id.* (emphasis added). Notably, the Court found it not to be consistent with the public interest there, where the plaintiff had other means of pursuing the information at issue. Here, it is not "consistent with the public interest" to order disclosure of classified or law enforcement sensitive information in the context of DHS TRIP. Dkt. No. 136 at 42.[21]

IV. Plaintiffs' Objections To The Existence Of A No Fly List Are Substantive, Rather Than Procedural, And Do Not Undercut The Government's Compelling Interests.

In addition to their misplaced demands for more evidence, notice, documentation, and for live hearings, Plaintiffs dispute the governmental interest in protecting the nation from terrorist attacks through the No Fly List. Their argument seems to be that the Defendants could just conduct additional and more intrusive screening in lieu of a No Fly List. Plaintiffs claim that there is a "grossly imperfect fit" between the governmental interest in preventing future attacks and the means of denying potential threats access to weapons of mass destruction in the form of commercial aircraft. Pls.' Opp. at 46. There are numerous problems with this argument.

First, this line of argument clearly does not go to the Government's interest in preventing terrorist attacks through the No Fly List. Even if Plaintiffs' "imperfect fit" theory were correct (and it is not), the interests in preventing terrorist attacks would remain compelling. *See* Dkt. No. 136 at 42 (finding the government's interests "particularly compelling").[22] Beyond that, Plaintiffs' "imperfect fit" argument does not otherwise pertain to their procedural claim. That is,

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[21] Defendants do not contend that the Government may ignore exculpatory information. Generally, the APA requires that the agency consider any relevant factors, including relevant exculpatory information, in reaching agency decisions. *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir. 1987). And considering exculpatory information is essential to the tradecraft of gathering intelligence. *See, e.g.*, Giacalone Decl ¶¶ 13–14; Grigg Decl. ¶¶ 19–21. The notion that the Government would fail entirely to consider such evidence defies common sense.

[22] Plaintiffs' reliance on *AHIF* is puzzling, particularly in light of the fact that the Ninth Circuit found any due process error there harmless and upheld the substantive measures imposed on the plaintiff. The Ninth Circuit plainly did not take into account "additional protocols" short of a total blocking that would be available to accommodate the Government's interests.

whether Defendants chose the correct security measure (the No Fly List) is not relevant to how much process Plaintiffs would get to challenge that designation. At most, this theory could go to a substantive claim about the merits of Plaintiffs' placement on the No Fly List.[23]

Second, if such a claim were properly raised, this Court would lack jurisdiction over any claim about the choice of security measures. Section 46110 assigns exclusive jurisdiction over challenges to orders of TSA to the Court of Appeals. 49 U.S.C. § 46110(a). The Ninth Circuit in this matter found that jurisdiction was in the district court over the inclusion of the Plaintiffs on the No Fly List and the redress process as applied to them, not over a challenge to a statute or the choice of security measures. *See Latif v. Holder*, 686 F.3d 1122, 1128 (9th Cir. 2012). A challenge to the particular security measures authorized by Congress and chosen by TSA to ensure aviation security would involve relevant security regulations that concern TSA's statutory authority to deny boarding, *see* 49 U.S.C. § 114(h); § 44903(j)(2)(C)(ii), and to establish and conduct screening procedures, *see* 49 U.S.C. § 114(e), pursuant to rules established under TSA rulemaking authority in this area, *see generally* 49 U.S.C. §§ 114(*l*), 44903(b); 49 C.F.R. Part 1560. But this Court does not have jurisdiction to consider these claims because such challenges must be brought directly in the Court of Appeals under 49 U.S.C. § 46110. *See Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254–56 (9th Cir. 2008) (holding that § 46110 requires challenges to TSA orders implementing the No Fly List to be filed in the court of appeals); *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (holding that a TSA order

[23] If this distinct substantive issue were properly raised here, its resolution would put at issue sensitive information concerning both individuals and security policies in general and thereby accentuate the risk of disclosure of such information. The Court need not enter that thicket at this stage, because the theory has nothing to do with the pending procedural due process claim.

implementing the agency's airline passenger identification policy is a final order within the meaning of § 46110).[24]

V. If Any Errors Arise From The Revised Process, They Are Harmless As Applied To These Plaintiffs.

Plaintiffs claim that the "procedural posture" of this case prevents the Court from making a harmless error determination. That is true only to the extent that the Court requires more information to determine whether any error it finds was harmless. Defendants maintain that there is sufficient information in the record to determine that any error was harmless, especially given the Plaintiffs' nearly total failure to refute the allegations against them. If the Court disagrees, however, the Plaintiffs would not be entitled to summary judgment. Plaintiffs cannot skip over the harmless error analysis required by the Supreme Court just because the parties have agreed to litigate procedural due process first. Harmless error analysis is required in every case in which a court finds a due process violation. *See, e.g., Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 303 (2007); *ASSE Int'l.*, 2015 WL 5904715, at *15.

Plaintiffs cite D.C. Circuit cases in which the court held that failure to provide unclassified, nonprivileged information warranted a remand to the agency for further proceedings. Pls.' Opp. at 54. If this were a blanket rule, it is contradicted by the Ninth Circuit ruling in *AHIF*, which found harmless error even though the agency had failed to provide similar information. *See AHIF*, 686 F.3d at 990 (placing the burden on the Plaintiff to demonstrate harmless error from the notice violations). But it is not a blanket rule even in the D.C. Circuit, and those cases are plainly distinguishable. In *Ralls*, for example, the Plaintiff received a bare statement that its transaction was deemed a threat to national security, and a court could

[24] *See also Blitz v. Napolitano*, 700 F.3d 733, 735-37 (4th Cir. 2012); *Roberts v. Napolitano*, 463 Fed. App'x 4, 4–5 (D.C. Cir. 2012); *Ruskai v. Pistole*, 775 F.3d 61, 65 (1st Cir. 2014).

reasonably conclude that Plaintiff may have been able to change the outcome with adequate notice. *See Ralls Corp.*, 758 F.3d at 320. And in *PMOI*, the D.C. Circuit likewise concluded that there was sufficient information to be added to the record that the Plaintiff may be able to change the agency's determination. *See People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220 (2010) (D.C. Cir. 2010).[25]

VI. Defendants Are Entitled To Summary Judgment On Plaintiffs' APA Claims.

In the now five years this case has been pending, Plaintiffs have not previously articulated any statutory arguments related to the redress process (old or new), in their Complaint or elsewhere. In reply in support of their motion for summary judgment, Plaintiffs make two brand new arguments that they style as APA arguments. To begin, the Court need not consider new claims raised in a reply brief. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n. 8 (9th Cir. 2009) ("arguments not raised by a party in an opening brief are waived"); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief"). At a bare minimum, Plaintiffs would need to seek leave to amend their Complaint, which does not allege any such statutory violation. In any event, the new claims would be futile. First, Plaintiffs argue that the redress process is "arbitrary and capricious" because there is a high rate of error. More specifically, they argue "no statute prescribes the low standard for inclusion" on the No Fly List and that a "low standard does not justify blind acceptance of high rates of error." Pls.' Opp. at 56. This contention is flawed for the same reasons the Plaintiffs' attack on the standard and the "error rate" is flawed. *See* Parts I, II *supra*. Moreover, the standard applied by Defendants is mandated by Congress, which

[25] Moreover, the D.C. Circuit improperly relieved the petitioner of the burden of showing harmless error when it indicated that it could not "presume" that the error was harmless. *Compare PMOI*, 613 F.3d at 228 n. 6, *with AHIF*, 686 F.3d at 990.

directed the Defendants "to identify individuals on passenger lists who may be a threat to civil aviation or national security" and "prevent the individual[s] from boarding an aircraft." 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(A). If anything, the agencies have adopted a more stringent test than that implied by Congress's grant of authority to identify individuals who "may be a threat." If, as Plaintiffs claim, no standard is mandated by Congress, then the agencies have clearly not acted arbitrarily or failed to consider the relevant statutory factors.

Second, Plaintiffs argue that Defendants have failed to comply with the redress statute, which provides that the agency should "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight … to appeal such determination and correct information contained in the system." Pls.' Opp. at 55-56; 49 U.S.C. § 44903(j)(2)(G)(i); *see also* 49 U.S.C. § 44909(c)(6)(B) ("establish a timely and fair process for individuals identified as a threat … to appeal … the determination and correct any erroneous information"). But, of course, the Government has in fact established such a process, and there is no reason to believe that the mandate to establish a "timely and fair" process is more demanding than the Due Process Clause. Nor is there any basis for finding that the agencies failed to consider relevant statutory factors in devising a "timely and fair" system. Insofar as Plaintiffs are relying on the language that requires travelers to "correct information," that particular phrase provides no obligation to provide the travelers with derogatory information at all. Read in context, it is clear that travelers are meant to be able to correct erroneous information in the TSDB, which does not contain derogatory information, only identifying information.[26] Nothing in that language suggests that

[26] This portion of the statute requires the establishment of a process for individuals identified as a threat in the preceding subparagraph, which specifically mandates comparison of international passenger information against "the consolidated and integrated terrorist watchlist maintained by the Federal Government." Accordingly, it is clear that the watchlisting information is what may

access be granted to classified or privileged derogatory information, and the redress process is more than adequate for travelers to challenge erroneous listings. Accordingly, even if Plaintiff had pled these statutory claims, they would be meritless.

VII. Plaintiffs' Objections to Defendants' Evidentiary Submissions Are Without Merit.

Finally, Plaintiffs' evidentiary objections are baseless. Plaintiffs contend that the Government's summary judgment declarations are not based on personal knowledge and should instead be considered inadmissible hearsay. Plaintiffs also argue that Steinbach's declaration should be rejected as improper expert testimony. Neither argument has any merit.

Contrary to Plaintiffs' assertion, reliance by government officials on information made available to them in their official capacities is consistent with Rule 56's requirement that any declaration in support of a summary judgment motion be "based on personal knowledge." *Self-Realization Fellowship Church v. Ananda Church of Self- Realization*, 206 F.3d 1322, 1330 (9th Cir. 2000) (stating that "[p]ersonal knowledge can be inferred from an affiant's position"); *see also Wolf v. CIA*, 473 F.3d 370, 375 n.5 (D.C. Cir. 2007); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986); *Russell v. Dep't of State*, No. CV 09-6050, 2011 WL 941334, at *4 (C.D. Cal. Mar. 15, 2011) (declaration based on personal knowledge, review of the records in the case, and information furnished in the course of official duties); *Blunt-Bey v. U.S. Dep't of Justice*, 612 F. Supp. 2d 72, 74 (D.D.C.

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be corrected, not all derogatory information considered by the Government. The Government is certainly under an obligation to allow travelers a meaningful avenue to challenge their listing, but this particular statutory language ("any erroneous information") imposes no obligation related to providing or correcting derogatory information.

2009) (recognizing that government declarants can "acquire[]" personal knowledge "through the performance of their official duties and their review of the official files").[27]

Similarly, the declarations are not based on inadmissible hearsay. They would fall under the "public records" exception in Federal Rule of Evidence 803(8)(a) setting out, *inter alia*, the "the office's activities." *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161 (1988) (adopting a "broader interpretation" of "what 'public records and reports' are made not excludable" by Rule 803(8)). "Under this rule, courts have admitted affidavits, letters, and other less formal documents that summarize agency investigations and assert agency conclusions." *Roberts v. Heating Specialist Inc.*, No. 12-cv-01820, 2013 WL 1814894, at *3 (D. Or. April 29, 2013) (collecting cases).

Plaintiffs' argument that Assistant Director Steinbach's declaration is improper expert testimony should likewise be rejected. As described above, courts routinely accept agency declarations that summarize agency conclusions. *See Roberts*, 2013 WL 1814894, at *3. In any event, under Rule 701, testimony qualifies as the opinion of a lay witness when it is "rationally based on the perception of the witness and … helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *United States v. Yazzie*, 976 F.2d 1252, 1255 (9th Cir. 1992) (quoting Fed. R. Evid. 701). As the Advisory Committee notes to Rule 701 explain, a lay witness can opine on a technical subject when the opinion is rationally based on personal knowledge accrued during the course of the witness's employment. Fed. R. Evid. 701

[27] The only case Plaintiffs cite does not support a finding to the contrary. Plaintiffs rely on *United States v. Lopez*, 762 F.3d 852, 865–66 (9th Cir. 2014), in which a court found it was harmless error that the prosecution did not lay a proper foundation for its witnesses' testimony — a foundation that could easily have been made. *Id*.

Advisory Comm. n. (2000) (employee's technical opinion is admissible if based on "particularized knowledge that the witness has by virtue of his or her position in the business").[28]

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Defendants' opening Memorandum, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process claims.

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Respectfully submitted,

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[28] *See also William Enterprises, Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230, 234 (D.C. Cir. 1991) (noting that the rule "does not distinguish between expert and lay witnesses, but rather between expert and lay testimony," and "[t]he fact that the [witness] based his opinion on specialized knowledge and might have been able to offer his opinion as an expert does not mean he was required to do so"); *United States v. Santiago*, 560 F.3d 62, 66 (1st Cir. 2009) ("Rule 701 is meant to admit testimony based on the lay expertise a witness personally acquires through experience, often on the job."); *cf. United States v. Durham*, 464 F.3d 976, 982–83 (9th Cir. 2006) (lay witness can opine on technical subject based on her "personal knowledge"); *United States v. Hairston*, 64 F.3d 491, 493 (9th Cir. 1995) (government employees can opine under Rule 701 based on their "employment experience").

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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
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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation imposed by the Court because it contains fewer than 45 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
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