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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

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

INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Amir Meshal. As explained in the Government's opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Meshal is, "in the generality of cases," reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court concludes that it is, the only question remaining with respect to Mr. Meshal is whether he in fact received the benefit of that process. With respect to that question, the Government has provided Mr. Meshal with his status on the No Fly List, the reason for which he was listed, and an unclassified summary of information supporting his No Fly List status, to the extent feasible without harming national security. The Government has concluded that Mr. Meshal poses a continuing threat to civil aviation or national security, and that he satisfied the applicable criteria, in part because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Although Mr. Meshal may take issue with the Government's substantive determination,

he has no plausible argument that he received anything short of the complete redress process.

The redress procedures provided him sufficient notice regarding the reasons for his placement on the No Fly List, and he had a meaningful opportunity to be heard and to rebut those reasons.

DHS TRIP, as applied to Mr. Meshal, fully satisfies the requirements of due process. The Court should grant Defendants' motion for summary judgment.

Indeed, it does not suggest anything about the process, which is the only question currently before the Court.

The notice letter provided to Mr. Meshal provided him notice of the subject matter of the agency's concerns. *See Al Haramain Islamic Found. Inc. v. Dep't of Treasury*, 686 F.3d 965, 982-83 (9th Cir. 2012) ("AHIF") (describing the utility of describing the "subject matter" of the agency's concerns). Accordingly, Mr. Meshal need not "guess" as to the basis for his listing and could respond, for example, by explaining [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is accordingly clear that he has sufficient information to understand the nature of the Government's concerns and had an opportunity to respond.

The examples of "error" Plaintiff cites are not procedural errors and are not tied to the problems alleged by the Plaintiffs' declarants. For example, Mr. Meshal argues that "even if the allegations in the notification letter to [him] were true ... such conduct still is not reliably associated with violent acts of terrorism." Meshal Opp. at 3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This factor also does not illustrate the so-called "error rate" described by Plaintiffs' putative experts, who have not opined on any of the specific listing determinations. Moreover, there is no reason to believe that Plaintiffs' alleged "errors" show any "cognitive bias." The record shows that Defendants are in fact aware of Mr. Meshal's [REDACTED]

[REDACTED] because the Government specifically

considered the Mr. Meshal's submissions. *See* Dkt. No. 178-3, at 3.² Plaintiff's disagreement with the substantive conclusions of the Government does not demonstrate procedural error.

II. Plaintiff's Vagueness Argument Is Baseless.

As discussed in Defendants' main brief, Mr. Meshal cannot demonstrate that the No Fly List criteria are impermissibly vague because risk-based criteria are not inherently vague. *See* Defs.' Summ. J. Reply at Part II. The Government has found that there is a reasonable basis to believe that Mr. Meshal is a known or suspected terrorist who represents a threat to civil aviation or national security. The Government made that determination applying a clear and specific No Fly List criterion to Mr. Meshal's conduct and after considering his response to the reasons the Government provided. *See* Dkt. No. 243, Defs.' Meshal Mem. at 9-10. Indeed, his conduct as described in the notice letter fits within the plainest possible interpretation of the criterion applied to him — [REDACTED]

[REDACTED]

[REDACTED]

Moreover, because Mr. Meshal engaged in conduct that is "clearly proscribed" by the No Fly List criteria, he cannot sustain a vagueness challenge to the criteria based on its hypothetical applications. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010).

And it cannot reasonably be maintained that the Government's No Fly List determinations are based merely on Mr. Meshal's "associations" or other protected First Amendment activity. [REDACTED]

[REDACTED] And in any event, the mere fact that speech related activities might

² Plaintiff improperly relies on the absence of criminal charges as evidence that there is no "factual basis" for the Government's conclusions. The exercise of prosecutorial discretion, however, depends on numerous factors.

be considered does not render the criteria impermissible. *See Humanitarian Law Project*, 561 U.S. at 28-39. In any event, he is not being listed based on the content of protected speech. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (“[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech.”); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer “may decide to arrest the suspect because his speech ... suggests a potential threat”); *cf. Wayte v. United States*, 470 U.S. 598, 612-613 (1985) (recognizing that letter of protest written to Secret Service can be relevant “evidence of the nonregistrant’s intent not to comply,” an element of the crime).

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

As described in Defendants’ main brief, the revised DHS TRIP process comports with the requirements of due process as set forth in the Court’s order of June 24, 2014, and the procedures were properly applied to Mr. Meshal. *See* Defs.’ Summ. J. Reply at Part III. Because Mr. Meshal received the benefit of this process, the Court need not entertain his arguments that he is entitled to additional procedures. Mr. Meshal has a sufficient notice and ample opportunity to challenge the basis for his listing. Mr. Meshal’s attempt to obtain additional information about sensitive sources and methods should fail.³ *Id.*; Dkt. No. 243.

For example, Mr. Meshal’s baseless claims that [REDACTED]

[REDACTED] indicate that he (1) understands the nature of the allegations against him; and (2) is

³ Mr. Meshal also states that he is willing to undergo additional airport security screening. This appears to be related to Plaintiffs’ substantive argument that the Government imposed an incorrect security measure on the Plaintiffs because more intrusive screening would account for the Government’s interests. As described in Defendants’ main brief, the appropriateness of TSA’s security screening measures is irrelevant to the due process consideration and beyond the jurisdiction of the Court. *See* Defs.’ Summ. J. Reply at Part IV.

able to respond. [REDACTED]

[REDACTED]

[REDACTED]

In any event, the Government should not be required to provide sensitive or classified information, the disclosure of which would endanger national security. Defs.' Summ. J. Reply at Part III.A; Dkt. 243.⁴ Moreover, the Government meaningfully considered his response. Dkt. No. 178-3.

Plaintiff also demands a particular form of evidentiary hearing to rebut the agency's prediction of future threats to national security, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by law, would add little value to the process, and reasonably would be expected to harm national security. *See* Defs.' Summ. J. Mem. Part V.C.; Defs.' Summ. J. Reply Part III.D.⁵

IV. The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any error at all in the process provided to Mr. Meshal, he must then show substantial prejudice as a result of the specific error found. *See* Defs.' Summ. J. Reply at V; *see AHIF*, 686 F.3d at 998–90 (conducting a harmless error analysis and finding that the failure to consider additional summaries or clear counsel was harmless in that case).

Plaintiff failed to submit any meaningful evidence in the administrative proceeding that could have influenced the outcome. Notably, the sworn declaration that Mr. Meshal submitted in

⁴ Even if the Court agreed that the Government was required to disclose investigative information, this is also a good example of how Plaintiffs' demands for disclosure or a privilege assertion during the administrative process are meritless. *See* Defs.' Summ. J. Reply at Part III.C. Defendants are not required to surrender their privileges during the administrative process. Defendants, of course, object to the disclosure of privileged information in the context of a No Fly List determination, but the Court would need to consider that issue only when and how it became necessary in the context of a substantive review of the decision.

⁵ Mr. Meshal has submitted a declaration which (does not deny the central allegations against him but) avers that he has been personally burdened by being on the No Fly List; at most, he has alleged that they these hardships are consequences of Mr. Meshal's terrorist activity. Such supposed hardships would have occurred even if he were not on a No Fly List. In any event, the process due to U.S. citizens on the No Fly List does not turn on Mr. Meshal's personal circumstances.

support of his motion for summary judgment stands in stark contrast to the response letter his attorneys submitted to DHS TRIP. In the response letter, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Without any meaningful

submission, Plaintiff has not established that additional procedures would have altered the Government's reasonable suspicion that he poses a threat of committing a violent act of terrorism.

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

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

CONCLUSION

For all of the foregoing reasons, the Court should deny Mr. Meshal's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.

Dated: October 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
Brigham J. Bowen

CERTIFICATE OF COMPLIANCE

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

s/ Brigham J. Bowen
Brigham J. Bowen