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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 MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF KNAEBLE** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF KNAEBLE

INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Raymond Knaeble. As explained in the opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Knaeble 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. Knaeble is whether he in fact received the benefit of that process. With respect to that question, the Government has provided Mr. Knaeble 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 unduly harming national security. The Government has concluded that Mr. Knaeble poses a continuing threat to civil aviation or national security, and that he satisfies the applicable criteria, in part because of information available to the Government about [redacted] Although Mr. Knaeble may take issue with the Government's substantive determination to place him on the No Fly List, he has no plausible argument that he received anything short of the complete process when he sought redress with DHS TRIP. DHS TRIP, as applied to Mr. Knaeble, fully satisfies the requirements of due process. The Court should grant Defendants' motion for summary judgment.

ARGUMENT

I. Plaintiffs' Arguments About Error Rates Are Misplaced

Echoing arguments made in Plaintiffs' consolidated brief, Mr. Knaeble faults the Government for not incorporating scientific methods in its decision-making process and

contends that the predictive judgments underlying his placement on the No Fly List amount to little more than "guessing" at the possibility that he may one day commit an act of terrorism. Knaeble Op. at 2. As a preliminary matter, this line of argument is best reserved for resolution on the parties' consolidated briefs. As the Government has argued, the watchlisting system is reliable and consistent with due process without the benefit of a scientific model, and Mr. Knaeble has no claim for special treatment. The Court is referred to the Government's consolidated reply brief for further discussion of this issue.

Plaintiff otherwise tries to bootstrap putative expert analysis into substantive arguments about the merits of his listing, arguing that [redacted] for placement on the No Fly List. But these arguments are both irrelevant and wrong. Mr. Knaeble's challenge to the reason for his placement on the No Fly List does not address or support his due process claim. The possibility of alternative interpretations of facts does not mean that the Government acted unreasonably or that the process was unfair. Indeed, it does not suggest anything at all about the process, which is the only question currently before the Court.

The notice letter provided to Mr. Knaeble 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. Knaeble need not "guess" as to the basis for his listing and could respond, for example, by explaining [redacted] It is accordingly clear that he has sufficient information to understand the nature of the Government's

concerns. And, as this Court is aware, a plaintiff in another matter in this district responded to a similar notice letter with explanations and was in fact removed from the No Fly List. *See Tarhuni v. Lynch*, No. 13-cv-001, Dkt. No. 89. Thus, the process utilized by the Government does provide a meaningful opportunity to respond to the Government's concerns, and the Government does give such responses careful consideration.

The examples of "error" Plaintiff cites are not procedural errors and are not actually tied to the problems alleged by Plaintiffs' declarants. For example, Mr. Knaeble notes that [redacted] and Mr. Knaeble has sufficient information to understand the subject matter of the Government's concerns and had an opportunity to respond to them.

This particular factor [redacted] 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. For example, the declarants do not address or show how statistical modeling would impact the Government's assessment of the particular facts and circumstances concerning Mr. Knaeble. 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 [redacted] because the Government specifically considered Mr. Knaeble's submissions, which made these contentions.

See Final Decision and Order Regarding Knaeble, dated Jan. 21, 2015 at 3.[1] Plaintiff's disagreement with the Government's substantive conclusions does not demonstrate procedural error.

II. Plaintiff's Vagueness Argument Is Baseless.

As discussed in Defendants' main brief, Mr. Knaeble cannot demonstrate that the No Fly List criteria are impermissibly vague because risk-based criteria are not inherently vague. *See* Defs' Reply at Part II. The Government has found that there is a reasonable basis to believe that Mr. Knaeble 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. Knaeble's conduct and after considering his response to the reasons the Government provided. *See* Dkt. No. 246, Defs. Knaeble Mem. at 9-10.

Moreover, Mr. Knaeble's argument that the criteria are impermissibly vague because they "implicate all manner of First Amendment protected conduct," *see* Dkt. 279 at 8, cannot sustain his claim. He presents no grounds for concluding that the Government's No Fly List determination was based merely on Mr. Knaeble's "associations" or other protected First Amendment activity, or on the content of protected speech. And in any event, the mere fact that speech-related activities might be considered does not render the criteria impermissible. *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("[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

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

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. Knaeble. *See* Defs. Summ. J. Reply at Part III. Because Mr. Knaeble received the benefit of this process, the Court need not entertain his arguments that he is entitled to additional procedures. Mr. Knaeble was provided sufficient information to understand the nature of the information provided and was given ample opportunity to challenge the basis for his listing. Mr. Knaeble's attempt to obtain additional information about sensitive sources and methods should fail.[2] *Id.*; Dkt. 246. The Government is not required to provide sensitive or classified information, the disclosure of which would endanger national security. Defs. Summ. J. Reply at Part III; Dkt. 246.[3] Moreover, the Government has meaningfully considered his response. Dkt. 177-3.

[2] Mr. Knaeble 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.

[3] 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.

Plaintiff also demands a particular form of evidentiary hearing to rebut the Government'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.' Reply Part III.D.

III. 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. Knaeble, he must then show substantial prejudice as a result of the specific error found. *See* Defs.' Summ. J. Reply at Part 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. Instead, he responded to the Government's summary of information with a six page letter [redacted] shows that he has sufficient basis to understand the nature of the concerns, but does not constitute meaningful evidence to address those concerns. For example, even in the absence of a live hearing, the redress process provided him with the opportunity to submit [redacted] He had a chance to submit this kind of information and instead sent only a short letter via counsel that, in sum, reflects a near total absence of support for Plaintiff's contention that his inclusion on the No Fly List is in error. In

these circumstances, there is no basis to infer that the additional procedures sought by Plaintiff would have reduced the risk of erroneous deprivation, and there is no reason to believe that his testimony would alter the Government's reasonable determination that he poses a threat of committing a terrorist attack.

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

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

CONCLUSION

For all of the reasons discussed above, and in the Government's opening brief, the Court should deny Mr. Knaeble'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