No. 17-35634

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMED SHEIKH KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD,

Plaintiffs – Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director of the Federal Bureau of Investigation; CHARLES H. KABLE IV, Director of the Terrorist Screening Center,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Oregon
(3:10-cv-00750-BR)

ANSWERING BRIEF FOR APPELLEES
[REDACTED PUBLIC BRIEF]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

Statutes:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes:

Regulations:

Other Authorities:

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. 3 ER 652. The district court issued a final judgment on June 9, 2017. 1 ER 1-6. Plaintiffs filed a timely notice of appeal on August 7, 2017. 2 ER 225-228. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the No Fly List criteria are unconstitutionally vague.

2. Whether the administrative process for seeking redress from the No Fly List satisfies due process.

3. Whether, following revisions to the No Fly List review process, the district court has subject matter jurisdiction over plaintiffs' substantive challenge to their placement on the No Fly List.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The No Fly List

The Transportation Security Administration ("TSA"), a component agency of the Department of Homeland Security ("DHS"), ensures security in airline travel. 49 U.S.C. § 114(d). One of TSA's primary responsibilities is to ensure aircraft security by implementing the No Fly List, which is a list of individuals whom airlines serving or flying within or over the United States may not transport. 2 ER 238, 386-

387, 408; *see* 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(C)(ii). The Terrorist Screening Center ("TSC") is a multi-agency center administered by the FBI and staffed by officials from multiple agencies. 2 ER 385. The TSC maintains the Terrorist Screening Database ("TSDB"), of which the No Fly List is a subset. 2 ER 238, 387-388.

TSC makes the initial determination whether to put a person on the No Fly List. In order to include a person on the No Fly List, there must be reasonable suspicion that

> (a) the individual poses a threat of committing an act of international terrorism as defined in 18 U.S.C. § 2331(1) or domestic terrorism as defined in 18 U.S.C. § 2331(5) with respect to an aircraft;
>
> (b) the individual poses a threat of committing an act of domestic terrorism as defined in 18 U.S.C. § 2331(5) with respect to the homeland;
>
> (c) the individual poses a threat of committing an act of international terrorism as defined in 18 U.S.C. § 2331(1) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations as defined by 10 U.S.C. § 2801(c)(4), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. government; or
>
> (d) the individual poses a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

2 ER 391; *see* 3 ER 591. The Government must rely upon articulable intelligence or information which, based on the totality of the circumstances and taken together with rational inferences from those facts, creates a reasonable suspicion that the

individual meets a criterion. Mere guesses or "hunches," or the reporting of suspicious activity alone, is not sufficient to establish reasonable suspicion. Nominations for the No Fly List may not be based solely on an individual's race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment. 2 ER 390-391.

2. DHS TRIP Redress Process

Congress directed TSA to establish a process for individuals with travel-related difficulties to appeal No Fly List determinations. *See* 49 U.S.C. § 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i); *see also* 49 U.S.C. § 44926(a), (b)(1). TSA administers the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP"), which is a program through which individuals may request that TSA correct any erroneous information if they believe, *inter alia*, that they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft as a result of TSA's watchlist matching program. *See* 49 C.F.R. § 1560.201 - .207; 2 ER 397.

Prior to 2015, a DHS TRIP applicant received a response that neither confirmed nor denied the individual's status on the No Fly List and did not inform the individual of the reasons relied on for any inclusion on the No Fly List. 2 ER 399.

In 2015, the Government adopted revised DHS TRIP procedures. Under the new procedures, a U.S. person who purchases a ticket, is denied boarding at the airport, subsequently applies for redress through DHS TRIP about the denial of boarding, and is on the No Fly List after a redress review, will receive a letter providing his or her status on the No Fly List and the opportunity to receive and/or submit additional information. If such an individual opts to receive and/or submit further information after receiving this initial response, DHS TRIP will provide a second, more detailed response. This second letter will identify the specific criterion under which the individual has been placed on the No Fly List. The second letter will also include an unclassified summary of information supporting the individual's No Fly List status, to the extent feasible consistent with the national security and law enforcement interests at stake. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. The second letter will also provide the requester an opportunity to respond and provide relevant information concerning their status. Written responses from such individuals may be submitted and may include exhibits and other materials the individual deems relevant. 2 ER 414-415.

Upon DHS TRIP's receipt of an individual's submission in response to the second letter, DHS TRIP forwards the response and any enclosed information to the TSC Redress Unit for careful consideration. Upon completion of TSC's

comprehensive review of everything submitted to DHS TRIP and other available information, the TSC Principal Deputy Director provides DHS TRIP with a recommendation to the TSA Administrator as to whether the person should be removed from or remain on the No Fly List, and the reasons for that recommendation. DHS TRIP provides the recommendation to the TSA Administrator, along with the requester's DHS TRIP file, including all information submitted by the requester. The TSA Administrator, or his or her designee, will review these materials, in coordination with other relevant agencies. 2 ER 229-236.

Although TSC provides a recommendation, the TSA Administrator "has full authority to order the individual removed from the No Fly List, in which case the individual will be removed." 2 ER 231. *See* 2 ER 401 ("[T]he TSA Administrator makes the final decision as to whether a U.S. person who has filed a DHS TRIP redress inquiry will be maintained on the No Fly List."). In a particular case, the TSA Administrator will either remand the case back to TSC with a request for additional information or clarification, or will issue a final order that either removes the U.S. person from the No Fly List or maintains him or her on the List. If the TSA Administrator issues a final order maintaining a U.S. person on the No Fly List, the order will state the basis for the decision, to the extent feasible in light of the national security and law enforcement interests at stake, and will notify the individual of the ability to seek further judicial review. 2 ER 410-411, 415.

B. Prior Proceedings

1. District Court Dismissed For Lack of Jurisdiction and this Court's Reversal.

Plaintiffs, who are United States citizens or lawfully permanent residents, brought this action in 2010, challenging their placement on the No Fly List as well as the procedures for seeking removal from the List. 1 ER 212. The district court held that plaintiffs' challenges were within the exclusive jurisdiction of the court of appeals under 49 U.S.C. § 46110. 1 ER 209-224. This Court reversed, holding that "district courts have original jurisdiction over travelers' substantive challenges to inclusion on the [No Fly] List," as well as "original jurisdiction over Plaintiffs' claim that the government failed to afford them an adequate opportunity to contest their apparent inclusion on the [No Fly] List." *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012).

2. Further Proceedings On Remand.

In August 2013, the district court held that, for purposes of their due process claims, plaintiffs have a constitutionally protected liberty interest in traveling internationally by air, and in their reputations. 1 ER 171-208.

In June 2014, the district court held that the prior DHS TRIP redress procedures violated due process.

The court held that under the first factor of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) – "the private interest that will be affected by the official action"–

the No Fly List "significantly" affects plaintiffs' private interest in international travel, 1 ER 134, and affects plaintiffs' interest in their reputation, although "not as strong[ly]" as their interest in international travel, 1 ER 137.

The district court held that the second factor – the risk of an erroneous deprivation of those interests and the value of any additional or different procedures, *Mathews*, 424 U.S. at 335 – "weighs heavily in favor of Plaintiffs," 1 ER 146. Under the prior DHS TRIP procedures, the plaintiffs received no notice of their status on the No Fly List or the reasons for inclusion. 1 ER 141-143. As a result, the district court viewed the administrative record as "one-sided," which leaves travelers "without any additional meaningful opportunity * * * to submit evidence intelligently in order to correct anticipated errors in the record." 1 ER 143-144. The court reasoned that additional procedures, such as "notice of inclusion on the No-Fly List," and "the reasons for inclusion on the No-Fly List as well as an opportunity to present exculpatory evidence," "would have significant probative value." 1 ER 145.

Finally, in addressing the third *Mathews* factor – the Government's interests, including the burdens of additional procedures, 424 U.S. at 335 – the court held that the Government's interest in combating terrorism "weighs heavily in Defendants' favor," and that the court "cannot and will not order Defendants to disclose classified information to Plaintiffs." 1 ER 147.

Weighing these factors, the court concluded that the prior DHS TRIP procedures did not comply with due process. The Government must provide "notice regarding [plaintiffs'] status on the No-Fly List and the reasons for placement on that List," that is "reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." 1 ER 166. The Government must also "include any responsive evidence that Plaintiffs submit in the record to be considered at both the administrative and judicial states of review." 1 ER 166.

The court noted, however, that the Government "may choose to provide Plaintiffs with unclassified summaries of the reasons," 1 ER 166, and may withhold disclosures in part or in full if "any such disclosure would create an undue risk to national security," if the Government does so on a case-by-case basis, considering the nature and extent of the threat to national security posed by disclosure, and the possible avenues to allow plaintiffs to respond more effectively, 1 ER 167.

3. Government Issues Revised DHS TRIP Procedures.

The Government subsequently notified the court and plaintiffs of its newly revised DHS TRIP procedures, including notice to qualified applicants of their status on the No Fly List, unclassified summaries of the reasons for that status, and the opportunity to submit responsive evidence for consideration at the administrative and judicial review stages. 2 ER 413-416; *supra* at 4-5.

The Government informed seven former plaintiffs that they were not currently on the No Fly List, 1 ER 58, after which the court dismissed their claims, 3 ER 729 (Dkt. No. 227). The district court also dismissed the claims of a deceased plaintiff. 1 ER 40-41.

For the remaining five plaintiffs – Kariye, Kashem, Knaeble, Meshal and Persaud – the Government re-evaluated their status under the revised DHS TRIP procedures. 2 ER 411. Pursuant to the revised DHS TRIP procedures, all five plaintiffs were notified of their status on the No Fly List and the specific substantive criteria under which each individual was included. Each plaintiff was provided with an unclassified summary that included reasons for his placement on the No Fly List, as discussed more fully below. The Government informed each plaintiff that it could not provide him with additional disclosures because of national security concerns, privileges and/or other legal limitations. 3 ER 573. Each plaintiff was informed of the opportunity to respond to the statement of reasons and to provide any relevant evidence or information. *See* 2 ER 419-421; 4 ER 746-748; 4 ER 776-777; 4 ER 804-805; 4 ER 840-842. Each plaintiff availed himself of that opportunity and contested the reasons for his inclusion on the No Fly List. 2 ER 423-430; 4 ER 752-759; 4 ER 781-787; 4 ER 809-815; 4 ER 847-853.

For each plaintiff, the TSA Administrator issued final orders, considering the available information, including the individual responses submitted by each

plaintiff. For each, the TSA Administrator noted the plaintiff did not "submit any evidence in support of any of [his] representations" in his response letter, and ultimately concluded that each plaintiff "is properly placed on the No Fly List and no change in status is warranted." 2 ER 448; 2 ER 477; 2 ER 508; 3 ER 537; 4 ER 834.

None of the DHS TRIP letters the Government sent to plaintiffs contained any redactions. At plaintiffs' request, however, the district court agreed to seal those materials and to redact certain portions from the public record. *See* 3 ER 725 (Dkt. No. 174). The district court subsequently unsealed the materials relating to Kariye at plaintiffs' request. 3 ER 735 (Dkt. Nos. 292, 293). In this appeal, that materials unsealed by the district court, as well as redacted materials, are found in the public Excepts of Record. *See* 2 ER 418 through 3 ER 567. Materials remaining under seal, in their unredacted form, are found in the sealed Excerpts of Record. 4 ER 743-865.

a. Kariye.

Kariye's inclusion on the No Fly List was based on his "prior history as a mujahedeen fighter in Afghanistan against the Russians and interactions with and financial support of others who have engaged in supporting or committing acts of terror." 2 ER 419. Recorded conversations between a cooperating witness and two members of the "Portland Seven" – a group of individuals prosecuted for terrorism-

related activities in 2003 – revealed that Kariye "expressed support for violent jihad," "provided financial support" to the criminal defendants who traveled to Afghanistan "to fight against American troops," and "told his followers" that they should "fight * * * against Americans." 2 ER 420. Kariye was also identified as a member of the Board of Directors of the Global Relief Foundation, which has been designated as a Specially Designated Global Terrorist by the Department of Treasury. 2 ER 420; *see Global Relief Foundation v. O'Neill*, 315 F.3d 748 (7th Cir. 2002).

b. Meshal.

Meshal was included on the No Fly List based in part on [redacted] 4 ER 746. [redacted] Meshal [redacted] 4 ER 746, that [redacted] 4 ER 747; *see* [redacted]

c. Kashem.

Kashem's inclusion on the No Fly List was based in part on [redacted] 4 ER 804. Kashem [redacted] 4 ER 804-805. Plaintiff [redacted] 4 ER 804. Plaintiff [redacted] 4 ER 804.

d. Persaud.

Persaud was placed on the No Fly List in part because [redacted] 4 ER 840. [redacted] 4 ER 841. Persaud [redacted] 4 ER 841.

e. Knaeble.

DHS TRIP notified Knaeble that he was included on the No Fly List in part because of concerns about the nature and purpose of his travel to [redacted] in [redacted]. 4 ER 776.

4. District Court Holds Revised DHS TRIP Procedures Satisfy Due Process In Principle.

The district court held that the "revised DHS TRIP procedures satisfy in principle most of the procedural due-process requirements that the Court set out in its June 2014 Opinion." 1 ER 50.

Analyzing the first *Mathews* factor, the court again noted that the No Fly List can "seriously impact" plaintiffs' interest in international air travel. 1 ER 66. However, that interest "is subordinate to national security" and "is subject to reasonable government regulation.'" 1 ER 66 (citation omitted). And the court held that plaintiffs' interest in their reputations was "not as strong" as their interest in international air travel, and "do[es] not weigh heavily" in their favor, because No Fly List status is not generally disclosed or disseminated to the public. 1 ER 68-69.

On the third *Mathews* factor, the Court reiterated that the Government's interest in combating terrorism "is an urgent objective of the highest order," and that "[t]he No-Fly List indisputably serves this interest because commercial aviation remains a frequent target of terrorism and preventing known and suspected terrorists from boarding commercial airliners is a reasonable method of ensuring commercial

aviation security." 1 ER 69 (citation omitted). In addition, the Government has a "compelling interest in withholding national security information from unauthorized persons." 1 ER 70 (citation omitted).

Turning to the second *Mathews* factor, the court rejected plaintiffs' numerous arguments that the No Fly List criteria presented an unacceptable risk of erroneous deprivation, and that additional or different procedures were required.

a. Risk of Erroneous Deprivation.

i. Reasonable Suspicion Standard.

The court held that due process does not require a clear-and-convincing standard for inclusion on the No Fly List. 1 ER 74. Although the reasonable-suspicion standard is "a relevant factor for a court to consider," that standard did not by itself violate due process, 1 ER 74-75. Plaintiffs' reliance on cases involving detention, deportation, and revocation of citizenship were inapt, the court concluded, because those consequences are "not substantially equal or substantially comparable to" the No Fly List. 1 ER 73-74.

ii. Vagueness of No Fly List Criteria.

The court held that the No Fly List criteria are not impermissibly vague. Each criterion (*see supra* at 2) "relate[s] to violent terrorism" and "the violent acts of terrorism that underpin the criteria are well-defined and readily understandable." 1 ER 78-79. The criteria are not vague because they refer to a "threat," because "any

such threat must specifically relate to the well-defined violent acts of terrorism." 1 ER 79. In addition, the vagueness analysis is "less stringent" in the context of civil consequences rather than criminal punishment. 1 ER 77.

iii. Use of Predictive Judgments.

The court found the No Fly List does not present an unacceptable risk of error because it relies on "predictive judgments about uncertain future conduct." 1 ER 79. Those assessments "must be made based on 'articulable intelligence or information which, together with rational inferences from those facts, reasonably warrant the determination'" that the individual meets one of the No Fly List criteria. The determination is not "a mere exercise in profiling or guesswork, but must be based on concrete information." 1 ER 79-80; *see supra* at 2-3.

b. Alternative Procedures.

i. Full Disclosure of All Reasons and Evidence.

The district court held that due process does not require the Government to disclose all of the reasons or evidence supporting a person's No Fly List status, regardless of whether they include national security information.

As for the statement of reasons, the court held that due process requires that the Government provide a statement "that is sufficient to permit such Plaintiff to respond meaningfully," and that "the revised DHS TRIP procedures * * * appear facially adequate" because they provide unclassified summaries of the reasons for a

person's placement on the No Fly List. 1 ER 84. The court reasoned that due process permits the government to choose either to disclose a full statement of classified reasons to cleared counsel, or instead to provide plaintiffs with unclassified summaries for the reasons for their placement on the No Fly List, and that the latter choice complies with due process, so long as that determination is made on a case-by-case basis considering all the relevant factors. 1 ER 82-83.

As for the disclosure of evidence, the court held that due process is satisfied "as long as Defendants provide Plaintiffs with sufficient information to permit them to respond meaningfully to the reasons the Defendants are able to disclose." 1 ER 87. Due process does not require the disclosure of classified information to plaintiffs, given the risk to national security from such disclosures and the practical difficulties of separating unclassified from classified evidence. 1 ER 86-88. Nor does due process require the disclosure of evidence "in any particular form (*i.e.*, original evidence)," 1 ER 87, as opposed to summaries of the evidence, 1 ER 88. That standard applies to all material information, including exculpatory information. 1 ER 90-91.

Any withholding of evidence, however, must still "permit Plaintiffs to respond meaningfully to the reasons he has been placed on the No-Fly List," 1 ER 91, and the "decision to withhold material information must itself be subject to judicial review," in which the Government identifies the information withheld and

the justification for withholding, and explains why additional disclosures cannot be made. 1 ER 89.

The court concluded that the "revised DHS TRIP procedures in principle are not inconsistent with this requirement." 1 ER 88.

ii. Live Hearing.

The court rejected plaintiffs' argument that due process requires a live or adversarial hearing in the DHS TRIP process. 1 ER 92. The court emphasized that such a hearing is "particularly inappropriate in this context" given the use of classified information, as well sources from foreign governments and confidential informants, where subjecting such sources to cross-examination would risk "exposing protected national security information" and "hamper the government's ability to gather intelligence from a variety of counterterrorism sources." 1 ER 92.

iii. Use of CIPA-Like Procedures.

The district court held that due process does not require the Government to disclose classified information to counsel with an appropriate security clearance under an protective order, as is done in criminal proceedings under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 §§ 1-16. 1 ER 95-100. The court reasoned that Circuit precedent permits the use of unclassified summaries in analogous circumstances, although the Government "must implement procedures to minimize the amount of material information withheld." 1 ER 97-99.

However, the district court found that "the record is not sufficient" to definitively resolve the due process claims because it "does not identify the information that Defendants withheld from Plaintiffs or the reasons for withholding that information." 1 ER 50. Accordingly, the court ordered the Government to submit a summary of any material information it withheld from the notice letters, a justification for the withholdings, and an explanation of why additional disclosures could not be made. The court permitted the Government to make such submission *ex parte* and *in camera* to protective sensitive national security information. 1 ER 103-104.

5. District Court Grants Summary Judgment to Government on Procedural Due Process Claims.

Following the Government's *ex parte, in camera* filings, the district court granted summary judgment to the Government on plaintiffs' procedural due process challenges to the revised DHS TRIP procedures. "[A]fter a thorough review of the materials submitted * * * the Court concludes Defendants have provided sufficient justifications for withholding additional information in response to each of Plaintiffs' revised DHS TRIP inquiries." 1 ER 42-43.[1]

[1] Concurrently with the filing of this brief, the Government has moved this Court for leave to file, *ex parte* and *in camera*, the same materials provided to the district court.

6. District Court Dismisses Challenge to Placement on the No Fly List For Lack of Jurisdiction.

Plaintiffs' single remaining claim was that their placement on the No Fly List itself (as opposed to the procedures for seeking redress from the List) violates substantive due process. In April 2017, the district court dismissed this claim for lack of subject matter jurisdiction, holding that it was within the exclusive jurisdiction of the court of appeals under 49 U.S.C. § 46110. 1 ER 18-32.

The district court acknowledged that circuit precedents hold that district courts have original jurisdiction over a plaintiff's substantive challenge to his or her placement on the No Fly List. 1 ER 20-24. But, the district court explained, it was an open question whether those precedents apply "following the completion of the *revised* DHS TRIP procedures." 1 ER 26 (emphasis added).

As the district court elaborated, this Court's prior cases had reasoned a person challenging his placement on the No Fly List is challenging an order by TSC – not TSA – because TSC makes the initial placement decision and also decides whether to subsequently remove an individual from the No Fly List. And because Section 46110 does not give the court of appeals exclusive jurisdiction over TSC orders, the district court had jurisdiction over such a challenge. 1 ER 21-24. Under the new DHS TRIP procedures, however, "the TSA Administrator now is clearly the authority to remove from or to maintain DHS TRIP applicants on the No-Fly List." 1 ER 27. *See supra* at 4-5 (discussing TSA Administrator's role under revised DHS

TRIP procedures). Accordingly, a claim seeking review of an order denying removal from the No Fly List is now a challenge to a TSA order (not TSC), and that *is* within Section 46110's exclusive review provision.

Having resolved all claims in the case, the district court entered final judgment, 1 ER 1-5, and plaintiffs filed a notice of appeal, 2 ER 225-228.

SUMMARY OF ARGUMENT

I. The No Fly List criteria are not vague. Due process requires only relatively clear guidelines that a person of ordinary intelligence can readily understand. The No Fly List criteria are tied to specific and well-defined criminal acts of violent terrorism that are sufficiently clear, and no court has held otherwise. Plaintiffs cannot complain that the criteria are vague as applied to them, as their conduct falls clearly within the prohibited criteria. Nor can they contend the criteria are facially vague, because plaintiffs do not even allege that the criteria violate their own First Amendment rights, let alone that the criteria apply to a substantial amount of constitutionally protected conduct. The criteria are not vague because they refer to a "threat" of violent terrorism. The Supreme Court "do[es] not doubt the constitutionality of laws" that assess whether a person poses a "substantial risk" based on their real-world conduct, *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015), and has rejected a vagueness challenge to just that kind of statute, *Schall v. Martin*, 467 U.S. 253, 278 (1984).

II. The revised DHS TRIP procedures comply with due process. The Government has a compelling interest in combatting terrorism and protecting national security information from unauthorized disclosure. Plaintiffs have a legitimate, but comparatively weaker, private interest in international air travel. The DHS TRIP procedures provide constitutionally adequate notice and a meaningful opportunity to respond consistent with the strong Government interests at stake: plaintiffs were provided notice of their status on the No Fly List, and the specific criterion under which they were included. Their placement on the No Fly List requires reasonable suspicion that plaintiffs meets one of the criteria, meaning there must be articulable, objective evidence, particular to each of the plaintiffs. Plaintiffs received an unclassified summary of the reasons for their inclusion, an opportunity to submit additional information and materials of their choosing, and an administrative review in light of the plaintiffs' response. And, finally, the plaintiffs are entitled to judicial review of the record, and review of the Government's *ex parte, in camera* explanation of why the materials were withheld from plaintiffs during the administrative process, its justification for withholding, and why additional disclosures were not possible.

Due process does not require disclosure of classified materials. Nor does it require a live hearing, which would be particularly inappropriate in this context, in light of the risks of unpredictable cross-examination of witnesses and evidence

implicating closely-held sources and methods. And the reasonable-suspicion standard is clearly appropriate given the relative consequences of the risk of erroneous decisions against the plaintiff (loss of international air travel) versus the risk of an erroneous decision against the Government (threat of violent terrorist acts, with the risk borne broadly by the public). Finally, due process does not forbid the use of predictive judgments about the potential threat of violent terrorism based on objective, articulable intelligence specific to individuals as analyzed by professionals trained in the field. The Supreme Court has repeatedly cautioned against requiring the kind of hard proof plaintiffs insist upon in areas in which informed expert judgments are appropriate.

III. The district court lacked jurisdiction over plaintiffs' substantive challenge to their inclusion on the No Fly List. While this Court held that such claims could be brought in district court, those decisions turned on the fact that TSC decided who was put on the No Fly List, and TSC orders are not subject to this Court's exclusive jurisdiction under 49 U.S.C. § 46110. Under the revised procedures, however, it is TSA (not TSC) that has the final authority to decide who remains on the No Fly List following a DHS TRIP request, including the final decision to remove a person, even if TSC recommends keeping them on the No Fly List. Because the ultimate order is from TSA, and TSA orders are within this Court's

exclusive jurisdiction, the district court correctly concluded it lacked jurisdiction over this claim.

STANDARD OF REVIEW

Whether the No Fly List criteria are vague, whether the DHS TRIP procedures comply with due process, and whether the district court had subject matter jurisdiction over plaintiffs' substantive challenge to their inclusion on the No Fly List are all reviewed *de novo*. *United States v. Tidwell*, 191 F.3d 976, 979 (9th Cir. 1999) (vagueness); *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (due process); *Yagman v. Pompeo*, 868 F.3d 1075, 1078 (9th Cir. 2017) (jurisdiction).

ARGUMENT

I. THE NO FLY LIST CRITERIA ARE NOT UNCONSTITUTIONALLY VAGUE

A law is unconstitutionally vague if it does not provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The challenged provision need not be defined with "mathematical certainty," *id.* at 110, but need only provide "relatively clear guidelines," *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994). For "enactments with civil rather than criminal penalties," courts "express[] greater tolerance" with vagueness because "the consequences of imprecision are qualitatively less severe." *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982); *see Hanlester Network v. Shalala*, 51 F.3d 1390, 1398 (9th Cir. 1995).

The No Fly List criteria refer to individuals posing a threat of committing an act of domestic or international terrorism, as defined by federal statute, with respect to aircraft, the homeland, or U.S government facilities or personnel abroad. 2 ER 391; *see supra* at 2. As the district court correctly held, these criteria are not impermissibly vague. 1 ER 75-79. Each relates to "violent acts of terrorism" that "are well-defined and readily understandable by individuals of common intelligence." 1 ER 79. Despite plaintiffs' passing suggestion to the contrary (*see* Pls. Br. 37), these criminal acts are sufficiently clear to a person of ordinary intelligence. Courts have expressly rejected the argument that such terrorist acts, or the federal statutes that define them, are unconstitutionally vague. *See Muhammad v. Kelly*, 2008 WL 4360996 at *12 (E.D. Va. 2008) (unpublished); *United States v. Abdi*, 498 F. Supp.2d 1048, 1066 (S.D. Ohio 2007).

Even if the No Fly List criteria were unclear in some instances, plaintiffs could not successfully challenge the criteria as vague as applied to them because their own conduct falls clearly within the criteria. A "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," and "[t]hat rule makes no exception for conduct in the form of speech." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010)

("*HLP*"). As described above, *supra* at 10-13, plaintiffs' conduct falls squarely and clearly within the No Fly List criteria, and the materials which the Government has moved to file *ex parte* and *in camera* make this clear as well. Plaintiffs cannot prevail on an as-applied vagueness challenge based on the conduct of others and how the criteria might apply in those hypothetical situations.

Plaintiffs cannot mount a facial vagueness challenge to the No Fly List criteria either. "In a facial challenge to the * * * vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494. Accordingly, a facial vagueness challenge must fail when a statute "is surely valid in the vast majority of its intended applications." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1275 (9th Cir. 2017) (citation omitted). The No Fly List criteria – referring to the threat of various criminal terrorist acts – do not target constitutionally protected conduct and are clearly valid in the majority of intended applications. Although plaintiffs assert that the Government might rely on constitutionally-protected First Amendment activity, Pls. Br. 33-34, even "when a statute interferes with the right of free speech or of association * * * perfect clarity and precise guidance have never been required." *HLP*, 561 U.S. at 18-19 (citations omitted). Moreover, while plaintiffs gesture at First Amendment concerns, Pls. Br. 33-34, they did not bring a First Amendment challenge to the No Fly List criteria, *see* 3 ER 646-673 (Third Amended

Complaint). Plaintiffs therefore have not even attempted to show that the No Fly List as applied to them violates their own First Amendment rights, let alone that it reaches a "substantial amount" of constitutionally protected conduct.

Plaintiffs' vagueness challenge, at its core, is that the criteria depend on whether an individual poses a "threat" of committing certain terrorist acts. Br. 29. In their view, the "degree of risk inherent in the concept of a 'threat'" is too vague to comply with due process, Br. 30. Plaintiffs invoke "extensive evidence," Br. 31, in the form of their purported expert declarations, *see* Br. 31 (citing Br. 36-40), to assert that the concept of a "threat" is inherently vague.

Plaintiffs' argument defies common sense. If successful, the argument would presumably mean that the Government could never bar an individual from flying internationally as a preventive or prophylactic measure, regardless of the evidence, unless and until (*see* Pls. Br. 38) the individual has *already* committed a violent act of terrorism or similar crime.

Plaintiffs' argument is also fatally undermined by *Schall v. Martin*, 467 U.S. 253 (1984), which involved a challenge to a New York statute permitting pretrial detention of juveniles based on a finding of a "serious risk" that the arrested juvenile may commit a crime prior to his next court appearance. *Id.* at 263. Like the plaintiffs here, the juveniles in *Schall* argued that the statute was "fatally vague" because "it is virtually impossible to predict future criminal conduct with any degree of

accuracy." *Id.* at 278. The Supreme Court rejected that argument, holding that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees * * * ." *Schall*, 467 U.S. at 278-79. *See also Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (plurality opinion) (rejecting argument that "it is impossible to predict future behavior and that the question is so vague as to be meaningless" because "[t]he fact that such a determination is difficult * * * does not mean that it cannot be made"); *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir. 1993) (rejecting vagueness challenge to the term "continuing threat to society"); *cf. United States v. Salerno*, 481 U.S. 739, 748-50 (1987) (collecting examples of permissible instances for detention based on finding of future dangerousness).

Contrary to plaintiffs' suggestion, Pls. Br. 30-31, *Johnson v. United States*, 135 S. Ct. 2551 (2015), does not assist their argument. In *Johnson*, the Court addressed the residual clause of the Armed Career Criminal Act ("ACCA"), under which an offender receives a higher sentence for certain firearms offenses if he or she has three or more prior convictions for a "violent felony." *Id.* at 2555. "Violent felony" is defined to include such crimes as burglary, arson, or extortion. And, in the so-called residual clause at issue in *Johnson*, "violent felony" also includes any

crime that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555-56. *Johnson* held that the residual clause is vague, but not simply because the statute referred to a "serious potential risk." Indeed, the Court held the opposite, noting that its reasoning would not touch "dozens of federal and state criminal laws [that] use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk.'" *Id.* at 2561.

Instead, *Johnson* held that the residual clause was vague for two reasons. First, because of the "categorical approach" used under the ACCA, a court is required "to picture the kind of conduct that the crime involves in 'the ordinary case,'" and "not [the] real-world facts" of what the defendant actually did. 135 S. Ct. at 2557. The residual clause thus vaguely and confusingly measures risk against "an idealized ordinary case of the crime" rather than the "riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id.* at 2561. Second, the residual clause's reference to "serious potential risk" is part of the statutory definition of "violent felony," which also includes four expressly enumerated felonies. The residual clause was vague partly because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 2558. By "link[ing the] phrase * * * 'substantial risk' to a confusing list of examples," the statute made "this abstract inquiry * * * significantly less predictable," *id.* at 2561.

The No Fly List criteria do not share either of the two features that rendered the residual clause in *Johnson* vague. First, the No Fly List criteria *are* based on an individual's real-world conduct, and not against an abstract or idealized "ordinary" version of a crime. Second, the No Fly List criteria do not contain a confusing list of statutory crimes, but refer consistently to well-defined and similar acts of violent terrorism. 2 ER 391; *supra* at 2. The No Fly List criteria assess whether a particular individual poses a threat of engaging in certain violent terrorist acts based on his or her real-world conduct. *Johnson* specifically re-affirms "the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Johnson*, 135 S. Ct. at 2561.

Finally, plaintiffs argue that the evidence in this case is not sufficient to show that plaintiffs are a threat. Pls. Br. 29-30. But that argument misses the mark. First, the question of whether the evidence is sufficient to meet the No Fly List criteria is a separate question from whether the criteria are vague. Second, the sufficiency of the evidence is not properly before this Court. As discussed below, *see infra* at 63-70, the district court held that it lacked jurisdiction to decide plaintiffs' substantive challenge to their inclusion on the No Fly List, and the question for this Court is whether that jurisdictional holding is correct. Third, plaintiffs base their insufficient-evidence argument on the unclassified summaries revealed in their DHS TRIP letters. But those letters explicitly "did not disclose all of the reasons or information

that the Government relied upon in determining that [] Plaintiffs should remain on the No Fly List" in light of the national security and law enforcement interests as stake. 3 ER 573.

II. THE DHS TRIP PROCESS SATISFIES DUE PROCESS

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "an opportunity to be heard * * * at a meaningful time and in a meaningful manner," *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). *See Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," without regard to "time, place, and circumstances." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001). Courts "generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). Under *Mathews v. Eldridge*, 424 U.S 319, 335 (1976), courts consider (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail. Under that standard, the revised DHS TRIP procedures satisfy due process.

A. THE GOVERNMENT'S INTERESTS OUTWEIGH PLAINTIFFS' PRIVATE INTERESTS

1. Plaintiffs' Interests Are Subject to Reasonable Regulation

Plaintiffs assert a liberty interest in international air travel. Pls. Br. 35-36. But as the district court noted, 1 ER 67, and the Supreme Court has held, "the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment," and as such it "is subject to reasonable government regulation." *Haig v. Agee*, 453 U.S. 280, 306-07 (1981). *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438-39 (9th Cir. 1996) ("Although the freedom to travel internationally is a liberty interest recognized by the Fifth Amendment, * * * [r]estrictions on international travel are usually granted much greater deference. Given the lesser importance of this freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.").[2]

Plaintiffs also obscure the precise interest at stake – international air travel – with repeated references to their private interest as "liberty." *See, e.g.* Pls. Br. 24,

[2] Plaintiffs do not challenge the district court's conclusion that plaintiffs' liberty interest in their reputation is "not as strong" as their interest in international travel, 1 ER 68-69, and accordingly that interest is not separately analyzed here.

44. Plaintiffs' generic use of the term "liberty" should not obscure the critical difference between "liberty from bodily restraint" that has "always been recognized as the core of the liberty protected by the Due Process Clause," *Young v. Romeo*, 457 U.S. 307, 316 (1982), and the vast array of "liberty interests" that trigger at least some due process protections, but have "lesser importance," *Freedom to Travel Campaign*, 82 F.3d at 1439.

Equally misplaced is plaintiffs' effort, permeating their brief, to equate their interest in international travel with detention, deportation, denaturalization, and civil commitment. *See, e.g.*, Pls. Br. 43, 48-51. As the district court held, 1 ER 73-74, a prohibition on international air travel is "not substantially equal or substantively comparable to the deprivation inherent in deportation," revocation of citizenship, or civil commitment. Because due process is "flexible" and depends on what "the particular situation demands," *Wilkinson*, 544 U.S. at 224, court should not elide the significant differences between restraints on international air travel on the one hand, and detention, deportation, and civil commitment on the other.

Plaintiffs argue that a person's interest in international travel is comparable to a person's interest in deportation or detention because they share common consequences, namely, separation from family and loss of economic opportunities. Pls. Br. 49-50. That reasoning is clearly flawed. For example, a person sentenced to life in prison and a person who loses a professional license share a common

consequence – loss of economic opportunities – but the Government's actions are not comparable, and due process does not require the same protections for each. *Compare In re Winship*, 397 U.S. 358, 363 (1970) (due process requires "presumption of innocence"), *with Barry v. Barchi*, 443 U.S. 55, 65-66 (1979) (due process permits a rebuttable presumption that the defendant was negligent). Likewise, family separation can result from criminal incarceration or a civil termination of parental rights, yet due process does not require identical protections in each scenario. *Compare Winship*, 397 U.S. at 365, *with Santosky v. Kramer*, 455 U.S. 745, 748 (1982). And, like plaintiffs, an enemy combatant detained at Guantanamo Bay loses the ability to fly internationally (*see* 49 U.S.C. § 44903(j)(2)(C)(v)), but the two restraints are not comparable and due process does not require the same procedures for each. The consequences of detention involve not only separation from family and loss of economic opportunities, but also (and most critically) bodily confinement and the loss of physical liberty. Similarly, deportation involves not just separation from family, but also the expulsion of a person from the United States, including the loss of all the constitutional rights, privileges, economic opportunities, and all other daily benefits and advantages that are afforded to someone who resides in this Nation. None of those consequences result from the No Fly List and thus the private interests at stake are not comparable.

Plaintiffs also argue that once a court holds that certain procedures are constitutionally required for a particular interest, then the same or greater procedures must be afforded if a supposedly greater interest is a stake. *See, e.g.*, Pls. Br. 46-48. For example, plaintiffs assert that because courts sometimes require an "actual hearing" before an individual is deprived of a property interest, Pls. Br. 47, this sets a constitutional "floor," Pls. Br. 46, and thus due process must also require an actual hearing when a liberty interest (such as international air travel) is at stake. This mechanical approach fundamentally misunderstands the due process analysis, which does not have "fixed content," *Lujan*, 532 U.S. at 196, or "establish rigid rules," *Wilkinson*, 545 U.S. at 224. A plaintiffs' interest must be examined on its own specific terms, not merely lumped into a category of "property" or "liberty interest" – categories that are too vast and varied to provide meaningful insight into the strength of the precise private interest claimed in a particular case. *Cf. Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one."). Plaintiffs' argument also presumes that the strength of their interests is the beginning and end of the analysis. In fact, a court must also weigh the Government's countervailing interest, as well as the probable value of additional or substitute procedural safeguards, and the burdens any additional procedures would entail. Due process does not examine the private interests in a vacuum.

Finally, plaintiffs argue that their private interests are stronger because a person can remain on the No Fly List "indefinitely," Pls. Br. 48, but their reliance on *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992), is misplaced. *Foucha* concerned involuntary commitment to a mental institution, which is not comparable to the interest in international air travel for the reasons noted above. Moreover, a person will remain on the No Fly List only if he or she continues to meet the reasonable suspicion standard for the No Fly List criteria, and the Government conducts periodic audits for that purpose even in the absence of a DHS TRIP request. 2 ER 393-295. *See* Pls. Br. 83-84 (acknowledging that the Government "has multiple opportunities to remove an individual unilaterally from the No Fly List"). No Fly List status is not "irrevocable" or "so irreversible" as to require heightened process, *Santosky*, 455 U.S. at 759, and real-world facts demonstrate that individuals can be and are removed from the No Fly List. *See Tarhuni v. Lynch*, 129 F. Supp. 3d 1052 (D. Or. 2015), *reversed on other grounds*, *Tarhuni v. Sessions*, 2017 WL 2591275 (9th Cir. 2017) (unpublished); *Fikre v. FBI*, 2016 WL 5539591 (D. Or. 2016), *appeal pending* No. 16-36072; *Ibrahim v. DHS*, 62 F. Supp.3d 909, 921 (N.D. Cal. 2014) (Government "determined that [plaintiff] should not have been on the no-fly list and her name was thereafter removed from the no-fly list").

2. The Government's Interests Are Compelling

The Government's interest in the No Fly List is compelling. Congress has directed TSA to "identify individuals on passenger lists who may be a threat to civil aviation or national security" and to prevent such individuals from boarding aircraft. 49 U.S.C. § 114(h)(3). "[T]he Government's interest in combatting terrorism is an urgent objective of the highest order." *HLP*, 561 U.S. at 28. "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307 (internal quotation marks and citation omitted). *See Al Haramain Islamic Found. v. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) ("[T]he government's interest in national security cannot be understated."). Where the "sensitive and weighty interest of national security" is concerned, the "evaluation of facts by the Executive, like Congress's assessment, is entitled to deference." *HLP*, 561 U.S. at 33-34; *see Al Haramain*, 686 F.3d at 980 ("We owe unique deference to the executive branch's determination that we face an unusual and extraordinary threat to the national security of the United States."). As the district court noted, "[t]he No-Fly List indisputably serves this interest because commercial aviation remains a frequent target of terrorism and preventing known and suspected terrorists from boarding commercial airliners is a reasonable method of ensuring commercial aviation security." 1 ER 69.

The Government likewise has a "compelling interest in withholding national security information from unauthorized persons." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). "[K]eeping sensitive information confidential in order to protect national security is a compelling government interest." *In re National Security Letter*, 863 F.3d 1110, 1123 (9th Cir. 2017); *see also* 2 ER 376-384 (describing national-security harms from disclosure of national security and law enforcement privileged information).

The district court correctly concluded that "the governmental interests in combating terrorism and protecting classified information are particularly compelling," and therefore "the third *Mathews* factor weighs heavily in Defendants' favor." 1 ER 147. Contrary to plaintiffs' assertions, the Government does not claim a "blanket" or "categorical" interest in national security that means no procedural protections are required at all. Pls. Br. 3-4. Rather, the Government contends that given the compelling and urgent Government interest, and the relatively weaker private interest as stake, all the procedural protections established in the revised DHS TRIP procedures – discussed immediately below – "ensure basic fairness to the private party" and are "reasonably designed to protect against erroneous deprivation of the private party's interests." *Al Haramain*, 686 F.3d at 980.

B. DHS TRIP PROVIDES REASONABLE NOTICE AND A MEANINGFUL OPPORTUNITY TO RESPOND

The revised DHS TRIP procedures provide the essence of due process: reasonable notice and a meaningful opportunity to respond. Qualified applicants receive written notice of their status on the No Fly List. Applicants are notified of the specific criterion under which they are placed on the No Fly List. 2 ER 400. An individual can be placed or maintained on the No Fly List only if there is reasonable suspicion that the individual meets one of the criteria, which requires presently-known, articulable evidence, and not a mere guess or hunch. 2 ER 390. *See also United States v. Sokolow*, 490 U.S. 1, 7 (1989) (reasonable suspicion cannot be based on "an inchoate and unparticularized suspicion or hunch"); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (reasonable suspicion requires a "particularized and objective basis" including rational inferences drawn from specialized training).

The applicant also receives an unclassified summary of the reasons for inclusion on the List, with the amount and type of information varying on a case-by-case basis depending on the facts and circumstances and the national security and law enforcement interests at stake. 2 ER 400. If the Government is unable to provide further disclosures, the individual will be notified of that fact. The applicant may seek additional administrative review, and may submit any information, materials or exhibits he or she believes is relevant. At the conclusion of the administrative process, the individual will be notified of the TSA Administrator's final decision. If

the individual remains on the No Fly List, he or she may seek judicial review of that decision. 2 ER 403. Judicial review will include examination of the record, and review of the Government's *ex parte, in camera* explanation of why the materials were withheld from plaintiffs during the administrative process, its justification for withholding, and why additional disclosures were not possible.

There is no dispute that all plaintiffs were notified of their No Fly List status; the specific criterion under which they are placed on the No Fly List; an unclassified summary of the reasons; notice that further disclosures could not be made; an opportunity to present rebuttal evidence of their choosing; and the availability of judicial review. *See* 2 ER 419-421; 4 ER 746-748; 4 ER 776-777; 4 ER 804-805; 4 ER 840-842. There is also no dispute that the Government filed with the district court *ex parte, in camera* materials describing what information was withheld from plaintiffs, the rationale for withholding, and an explanation of why additional disclosures were not possible. 1 ER 42-43.

The revised DHS TRIP procedures are constitutionally adequate. As noted above, the Government has a compelling interest both in combatting terrorism and in withholding national security information from unauthorized persons. The DHS TRIP process provides reasonable notice within the bounds of the Government's compelling interest. The Government notifies a qualified person of his or her status on the No Fly List, the specific criterion under which he or she was placed on the

List, and an unclassified summary of reasons. If information or materials are withheld, the Government must do so on a case-by-case basis, and must subsequently justify the withholdings upon judicial review. The DHS TRIP procedures also provide an opportunity to respond, in which an applicant may submit any additional materials, evidence, or exhibits he or she believes is relevant to the Government's reasons. The final DHS TRIP decision is made only after consideration of the applicant's response. The revised DHS TRIP process thus reduces the risk of error by creating a two-sided record, in which an applicant may provide evidence directly tailored to the Government's disclosed reasons and address any other issue the applicant believes may be relevant.

At the conclusion of the administrative process, if the applicant remains on the No Fly List, he or she may seek judicial review of that placement in a proper court. *See Mathews*, 424 U.S. at 349 ("In assessing what process is due" a court should consider the availability of "subsequent judicial review, before the denial of [a plaintiff's] claim becomes final.").

These procedures are constitutionally adequate in light of the Government's compelling interests in combatting terrorism and protecting national security information and the comparatively weaker private interest in international air travel. To be sure, these procedures are not the same as those available in other contexts, as plaintiffs repeatedly emphasize. But "the Constitution certainly does not * * *

require the government to undertake every possible effort to mitigate the risk of erroneous deprivation and the potential harm to the private party." *Al Haramain*, 686 F.3d at 980. Given the weight of the Government's interests against the private interests, the revised DHS TRIP procedures are sufficient.

C. DUE PROCESS DOES NOT COMPEL PLAINTIFFS' ALTERNATIVE PROCEDURES

Courts must consider "the probable value, if any, of additional or substitute procedural safeguards" in improving the accuracy of the Government's determination, as well as "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S at 335. Plaintiffs suggest four alternative procedures – disclosing classified materials; providing a live hearing; imposing a higher standard of proof; and prohibiting the use of predictive judgments. Due process does not compel the use of these procedures, especially in light of the Government's countervailing compelling interests in combating terrorism and withholding national security information from unauthorized persons.[3]

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[3] Plaintiffs also suggest that the Government could abandon the No Fly List and replace it with heightened security screening and/or air marshals to personally escort plaintiffs and others on the List. Pls. Br. 73. But that suggestion is non-responsive to *Mathews*, which asks whether additional or substitute procedures would have "probable value" in mitigating the "risk of an erroneous decision" in making the No Fly List determination, 424 U.S. at 335, not whether (as in a substantive due process

1. Due Process Does Not Require Disclosure of Classified Information.

Plaintiffs contend that due process requires disclosure of classified information, including all the reasons for including plaintiffs on the No Fly List, the evidence in the Government's possession, and material exculpatory evidence. Pls. Br. 54.

a. The Government May Use Classified Evidence and Disclose Only Unclassified Summaries

This Court in *Al Haramain* rejected the same argument that plaintiffs advance here. In that case, the plaintiff was designated as a "specially designated global terrorist," and as a consequence all of its property and interests in property were blocked. 686 F.3d at 970-74. Notwithstanding the "significant" private deprivation at issue, *id.* at 979, this Court held that "the government *may use classified information, without disclosure,* when making designation determinations," *id.* at 982 (emphasis added). The Court held that if the Government uses classified information "it must undertake some reasonable measure to mitigate the potential unfairness." *Id.* at 982. The Government "could, for example, provide an unclassified summary of the classified information or permit [plaintiff's] lawyer to view the documents after receiving a security clearance and pursuant to a protective

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challenge) the No Fly List is the most narrowly tailored means of advancing the Government's interests.

order." *Ibid.* The Court also made clear that even these mitigating measures are not necessarily required in every case. *Id.* at 983. In some instances "an unclassified summary may not be possible," and "[d]epending on the circumstances, [the Government] might have a legitimate interest in shielding the materials even from someone with the appropriate security clearance." *Id.* at 983. Such a decision, however, must be made on a case-by-case basis. *Id.* at 984.

Other circuits have reached substantially the same conclusion. In *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), the court also considered an entity's designation as a "specially designated global terrorist" and held that notice to the designated party "need not disclose the classified information," and "required the disclosure of *only* the unclassified portions of the administrative record." *Id.* at 164. *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), likewise considered a plaintiff's designation as a "specially designated global terrorist," and the consequential freezing of its assets, *id.* at 750, and held that the designation "is not rendered unconstitutional because [of] the use of classified evidence that may be considered *ex parte* by the district court," *id.* at 754.

Similarly, in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001) ("*NCRI*"), the court considered an entity's designation as a "foreign terrorist organization," the "dire" consequences of which included the blocking of all funds, and a criminal prohibition on providing material

support or resources to that organization. *Id.* at 196. The Court held that an entity is entitled to notice that its designation is impending, but "[t]he notice * * * need not disclose the classified information to be presented *in camera* and *ex parte* to the court." *Id.* at 208. In *Zevallos v. Obama*, 793 F.3d 106 (D.C. Cir. 2015), the court addressed a person's designation as a significant foreign narcotics trafficker, which resulted in the blocking of all the person's assets in the United States and a prohibition on anyone in the United States transacting with the blocked property. *Id.* at 110. Although the Government's "decision may be based in part of classified information," *id.* at 113, due process is satisfied if the Government "promptly provide[s] the unclassified administrative record justifying his designation and allow[s] him to respond to it," *id.* at 117. And in *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004), the court reviewed the Government's revocation of the petitioners' airman certificates on the ground that they posed a security threat. *Id.* at 1177. Although the Government's notice to those pilots "did not include the factual basis for [the] determination, which was based on classified information," *id.* at 1178, the court held that the Government "needed only to disclose the unclassified portions of the record," *id.* at 1184, and petitioners in that case "have received all the process that they are due" because they "had the opportunity to file a written reply and were afforded * * * *ex parte, in camera* judicial review of the record," *id.* at 1183. Finally, in *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d

296 (D.C. Cir. 2014), the court considered an order blocking a foreign purchase of American companies because it posed a threat to national security. *Id.* at 305-06. The court held "that due process does not require disclosure of *classified* information supporting official action," *id.* at 319, because "a substantial interest in national security supports withholding only the *classified* information," *id.* at 320. *See also Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007) (reviewing *ex parte* and *in camera* the classified intelligence supporting government action).

Plaintiffs' efforts to distinguish *Al Haramain* miss the mark. *Al Haramain* did not hold, as plaintiffs contend (Pls. Br. 52), that the Government violated due process by failing to disclose all the reasons for its designation. To the contrary, the Government *did* disclose its reasons. 686 F.3d at 974-75. The constitutional deficiency in *Al Haramain* was that the Government's notice disclosing its reasons was "untimely," *id.* at 986, because the Government initially designated the plaintiff in 2004 but took seven months to provide a partial statement of reasons and four years to provide a full statement of reasons, notwithstanding plaintiffs' repeated and unanswered requests. *Id.* at 973-75. In addition, the Government did not assert that it could withhold the reasons for the designation because they were classified, and expressly disavowed any argument that it could withhold the reasons for designation. *Id.* at 986 n.14. Thus, this Court would have had no occasion to consider whether due process compelled the disclosure of all reasons, even those properly classified.

Plaintiffs also argue that *Al Haramain* permitted withholding only "actually classified" information as opposed to "potentially" classified information. Pls. Br. 53; *see* Pls. Br. 74-75. But the district court did not hold otherwise, or endorse a blanket withholding of materials. The court held that non-disclosure of national security information must be made on a case-by-case basis, 1 ER 167, and reviewed the contents of the Government's *ex parte, in camera* filings to satisfy itself that the Government had adequately described and justified the materials it withheld and explained why further disclosures could not be made. 1 ER 42-43.

Contrary to plaintiffs' suggestion, Pls. Br. 53, *Al Haramain* does not require the disclosure of classified information to cleared counsel under a protective order. *Al Haramain* approved the alternative of "provid[ing] an unclassified summary of the classified information," an option the Court referred to six more times in its opinion. 686 F.3d at 982, 982-83 & n.10. Likewise, *Al Haramain*'s recognition that "the proper measures in any given case will depend on a number of factors," *id.*at 984, undermines plaintiffs' argument (Pls. Br. 76-77), that the only way the Government can comply with due process is to apply the procedures in the Classified Information Procedure Act, which do not apply in civil proceedings. *See, e.g.*, 18 U.S.C. App. 3 § 3 ("criminal case"); *id.* § 5 ("criminal prosecution"); *see also United States v. Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013) ("CIPA 'establishes procedures for handling classified information in criminal cases.'") (quoting *United*

States v. Aref, 533 F.3d 72, 78 (2d Cir. 2008)). Nor did this Court impose that requirement in *Latif*, which "le[ft] to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information." 686 F.3d at 1130.

Finally, plaintiffs assert that *Al Haramain* (and similar designation cases) involve a lesser private interest involving only property, whereas plaintiffs' interest in international air travel entails a greater private interest compelling, in their view, more robust process. Pls. Br. 53. As a general matter, and as discussed above, *supra* at 34, plaintiffs' formalistic categorization of interests as "liberty" or "property" is not instructive in the due process analysis; a more particular examination of the interests at stake is required. *Al Haramain* described the extreme deprivation for the designated entity, where "[a]ll assets are frozen," which "completely shutters all domestic operations of an entity," "[n]o person or organization may conduct any business whatsoever with the entity" on pain of criminal penalties, all of which renders "a domestic organization financially defunct." 686 F.3d at 979-80. *See also NCRI*, 251 F.3d at 196 (describing "dire" consequences for designation as foreign terrorist organization including asset blocking and criminalization for knowingly providing material support or resources to organization). Given this Court's description, plaintiffs' suggestion that *Al Haramain* involved lesser private interests than plaintiffs' interest in international air travel is untenable.

Plaintiffs argue they are entitled to classified information if it constitutes "exculpatory" evidence. Pls. Br. 62-64. The due process requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), applicable in criminal cases, are not automatically applied in the civil context, where the private interests at stake may be much less significant. Where *Brady* has been applied in the civil context, it is because of substantial private interest at stake, such as civil commitment that "deprives an individual of their right to live freely among society," *United States v. Edwards*, 777 F. Supp.2d 985, 990 (E.D.N.C. 2011), or because the civil matter is jointly investigated with a criminal prosecution, *United States v. Gupta*, 848 F. Supp.2d 491, 495-97 (S.D.N.Y. 2012). But in civil contexts where lesser private interests are involved, this Court has made "it emphatically clear that the Government's obligation to provide information in this context is not even remotely close to the Government's obligation under *Brady v. Maryland*." *Din v. Kerry*, 718 F.3d 856, 865 (9th Cir. 2013), *rev'd on other grounds Kerry v. Din*, 135 S. Ct. 2128 (2015). *See NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) (rejecting application of Brady to proceeding before the National Labor Relations Board); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir.1985) (rejecting Brady in context of securities administrative disciplinary proceeding). And plaintiffs cannot point to a single case in the civil context in which a court applied *Brady* to compel the disclosure of *national security* information.

b. Plaintiffs' Cases Are Inapt

Plaintiffs' arguments for greater procedures rely on other cases not comparable to their interests in international air travel. *Rafeedie v. INS*, 880 F.3d 506 (D.C. Cir. 1989) (cited Pls. Br. 49, 61), for example, involved a more significant private interest: the Government sought to "imprison[] and force[] to leave the United States," *id.* at 525, a lawful permanent resident who had lived in the United States for 14 years, *id.* at 508. Moreover, the Government initially sought to withhold *any* explanation of its confidential information, *id.* at 509, only to later abandon the claim by disclosing that very information in the course of the litigation, *Rafeedie v. INS*, 795 F. Supp. 13, 20 (D.D.C. 1992). Finally, the Government had alternative and more robust procedures available, but chose in its discretion not to use them, *id.* at 15, even though for the previous 40 years it had exclusively employed the more robust procedures for lawful permanent residents, *id.* at 19.

Plaintiffs contend that the two district court decisions in *KindHearts for Charitable Humanitarian Development v. Geithner* found a due process violation in comparable circumstances to the present case, Pls. Br. 56, and required disclosure of classified information as a remedy, Pls. Br. 76 n.13, but both assertions are incorrect. In *KindHearts*, the designation notice did not explain the specific underlying charges. 647 F. Supp.2d 857, 868, 901 (N.D. Ohio 2009). Furthermore, the Government did not respond to plaintiffs' repeated requests for more

information, *id.*at 869, 902-03, claiming it had "misplaced" those requests, *id.*at 868 n.4, 903 n.22; and although the Government ultimately provided unclassified materials, its explanation largely did not mention or relate to the plaintiffs, *id.* at 902-03, and came after such a prolonged delay that it eviscerated any meaningful opportunity to respond, *id.* at 905-07. And during the entire process, the Government froze plaintiffs' assets so it could not pay its attorneys to challenge the Government's actions. *Id.* at 904 & n.26. Those unique facts bear no resemblance to this case. Likewise, *KindHearts* did not require disclosure of classified evidence to cleared counsel; it simply "propose[d]" to do so, "subject to giving the parties an opportunity to comment," 710 F. Supp.2d 637, 660 (N.D. Ohio 2010), but the parties settled and plaintiff's counsel never received any classified information.

The private interest in *Kiareldeen v. Reno*, 71 F. Supp.2d 402 (D.N.J. 1999) (cited Pls. Br. 55, 61, 68) – plaintiff's year-long detention, and the Government's attempt to deport him – is not comparable to plaintiffs' interest here. That decision also pre-dated *Al Haramain* and all the related designation cases, *see supra* at 42-44, and misconstrued this Court's prior decision in *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995). *Compare Kiardeldeen*, 71 F. Supp.2d at 412-413, *with Al Haramain*, 982 nn.8-9.

Khouzam v. Attorney General, 549 F.3d 235 (3d Cir. 2008), is likewise inapt. The private interest was much greater: the plaintiff was detained, and the

Government sought to deport him to Egypt, where there was "overwhelming" evidence that he would be tortured. *Id.* at 239-40. In addition, unlike the present case, the Government there provided "no notice * * * and provided no information pertaining to the Government's reasons." *Id.* at 257. Although dicta in a footnote suggested disclosure of national security information under a protective order, *id.* at 259 n.16, it is not even clear that national security information was at issue or was ever ordered to be disclosed in that case.

Further afield is plaintiffs' reliance (Pls. Br. 59, 63, 71, 76 n.13) on cases involving the procedures employed in the detention of enemy combatants at Guantanamo Bay, which is obviously not comparable to plaintiffs' interest in international air travel.

Nor is *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), on point. Pls. Br. 76 n.13. The private interest at stake involved actual physical detention due to the denial of bail, *id.* at 314-17, the Government's *ex parte* submission did *not* involve national security information, *id.* at 324-25, and the court endorsed the use of summaries of the confidential information in lieu of full disclosure, *id.* at 330.[4]

[4] Plaintiffs also rely on cases that do not involve classified information, Pls. Br. 55, 58, 62-66, 68, which obviously shed no light on whether due process compels the disclosure of classified information.

c. Plaintiffs Can Meaningfully Respond

Plaintiffs argue that without additional disclosures of classified information, they cannot meaningfully respond to the reasons upon which the Government relied in supporting their inclusion on the No Fly List. Pls. Br. 56-57. It is true that "the information conveyed by an unclassified summary will be decidedly less helpful to the entity than the classified information itself. But limited utility is very different from no utility." *Al Haramain*, 686 F.3d at 983 n.10.

Plaintiffs' contention that the reasons disclosed were too scant to provide a meaningful opportunity to respond is also belied by the record, which provided sufficient detail, tied to plaintiffs' own actions and statements, to allow for a meaningful response. For example, Kariye was informed that the Government relied on his "prior history as a mujahedeen fighter in Afghanistan," his "financial support of others who have engaged in supporting or committing acts of terror," recorded conversations revealing his "expressed support for violent jihad," and his membership in a specially designated global terrorist organization. 2 ER 419-420. Meshal was notified of [redacted] and that [redacted] 4 ER 746-747. Kashem was told his inclusion was based in part on [redacted]

[redacted] 4 ER 804-805. And Persaud was informed of his [redacted] 4 ER 840-841. All the plaintiffs did, in fact, respond to the specific reasons the Government disclosed, *see* 2 ER 428-429; 4 ER 756-758; 4 ER 785-786; 4 ER 814-815; 4 ER 852, but simply failed to "submit any evidence in support of any of the[ir] representations," 2 ER 448; 2 ER 477; 2 ER 508; 2 ER 537; 4 ER 834.

Knaeble asserts (Pls. Br. 57) that he could not meaningfully respond to his one-sentence explanation "[t]he Government has concerns about the nature and purpose of [his] travel to [redacted] in [redacted]." 4 ER 776. But real-world facts undermine his contention. In *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052 (D. Or. 2015), *reversed on other grounds*, *Tarhuni v. Sessions*, 2017 WL 2591275 (9th Cir. 2017), the plaintiff sought redress from the No Fly List under the revised DHS TRIP procedures and received a nearly-identical one-sentence explanation: "The Government has concerns about the nature and purpose of Jamal Tarhuni's travel to Libya in 2011 and 2012." *Tarhuni*, 129 F. Supp. 3d at 1057. *See Tarhuni v. Sessions*, 9th Cir. No. 15-35887, Dkt. 18-2, Excerpts of Record, Volume 2, pp. 354 (hereinafter *Tarhuni Appellate Record*). The plaintiff submitted a lengthy written

response detailing the humanitarian reasons for his trips to Libya, the places he visited, and the activities he undertook while in Libya. *See Tarhuni*, 129 F. Supp.3d at 1055-56; *Tarhuni Appellate Record* at 271-286. He attached exhibits including correspondence from the Libyan government pertaining to his trip prior to departure, *id.* at 288; a trip itinerary from the non-profit organization under whose auspices the plaintiff traveled, *id.* at 293-94; a letter from the Libyan Ministry of Health discussing his work, *id.* at 329; and several letters from employers, co-workers, and friends attesting to his good character and the nature of his work in Libya, *id.* at 333-343. After consideration of plaintiffs' responsive materials, the Government removed the plaintiff from the No Fly List. *Tarhuni*, 129 F. Supp. 3d at 1057. Knaeble's response provided nothing comparable to Tarhuni's. *See* 4 ER 785-786.

2. Due Process Does Not Require A Live Hearing.

Because "due process is flexible," *Wilkinson*, 545 U.S. at 224, "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985).

Contrary to plaintiffs' claim, Pls. Br. 65-72, due process does not require an oral or in-person hearing in every instance. Rather, it need only afford "[t]he opportunity to present reasons, *either in person or in writing*, why proposed action should not be taken." *Loudermill*, 470 U.S. at 545-46 (emphasis added). *FDIC v.*

Mallen, 486 U.S. 230, 247-48 (1988), rejected the argument that an agency "violates due process because it does not guarantee an opportunity to present oral testimony."

Goldberg v. Kelly, 397 U.S. 254 (1970), relied upon by plaintiffs, Pls. Br. 65-67, expressly declined to answer whether a written hearing alone would have been sufficient. *Id.* at 268 n.15. *Califano v. Yamasaki*, 442 U.S. 682 (1979) (cited Pls. Br. 65), required an oral hearing as a matter of statutory construction, not due process, and noted it "would be inconsistent with [due process] to require a[n oral] hearing * * * when review of * * * written submission is an adequate means of resolving" most cases, even if "a few" would benefit from an oral hearing. *Id.* at 696-97.

The district court correctly concluded that due process does not require a live or adversarial hearing in this context. 1 ER 91-92. *See NCRI*, 251 F.3d at 209 (live hearing not required for designation as foreign terrorist organization and plaintiff may respond "in written form"); *Holy Land*, 333 F.3d at 165 (same, for specially designated global terrorist); *Jifry*, 370 F.3d at 1184 (same, for revocation of airman certificate due to security threat). A live adversarial hearing is "particularly inappropriate in this context," because cross-examination would risk exposing protected national security information, such as the Government's use of foreign sources and confidential informants, and do so "in the unpredictable environment of a live hearing." 1 ER 92. *See General Dynamics Corp. v. United States*, 563 U.S.

478, 487 (2011) ("Every * * * question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed."). Such disclosure could comprise existing protected sources and methods and harm the Government's ability to gather intelligence in the future. *See* 2 ER 376-384.

Nor is a live hearing needed to effectively rebut the Government's case. For example, in *Tarhuni v. Lynch*, discussed *supra* at 53-54, the Government removed the plaintiff from the No Fly List based only on the paper record without a live hearing. In *Fikre v. FBI*, 2016 WL 5539591 (D. Or. 2016), *appeal pending* No. 16-36072, the Government also removed the plaintiff from the No Fly List at the conclusion of the revised DHS TRIP process, again based only on a paper record without an adversarial hearing.

Plaintiffs assert a right to cross-examine witnesses at a live hearing, because otherwise hearsay will supposedly run rampant. Pls. Br. 67-68; *but see id.* 68 ("Plaintiffs do not contend that hearsay could never be used."). But in the analogous context of terrorist designation cases based on classified information, a plaintiff "has no right to confront and cross-examine witnesses," *Holy Land*, 333 F.3d at 164, and due process does not forbid the use of hearsay, *id.* at 162; *see NCRI*, 215 F.3d at 196, 209.

Plaintiffs argue that more robust procedures, including the disclosure of classified evidence, is "viable." Pls. Br. 71. But the question is not what is "viable," but what due process *compels*. "[T]he Constitution certainly does not * * * require the government to undertake every possible effort to mitigate the risk of erroneous deprivation and the potential harm to the private party" but only "reasonable measures to ensure basic fairness" that are "reasonably designed to protect against erroneous deprivation of the private party's interests." *Al Haramain*, 686 F.3d at 980. As discussed above, plaintiffs do not cite a single comparable case requiring the disclosure of classified evidence. All the cases plaintiffs rely upon either (a) do not involve national security information at all; (b) did not order disclosure of national security information; and/or (c) involved a stronger private interest such as detention or deportation. *See supra* at 49-51.

3. The Reasonable Suspicion Standard Complies With Due Process.

Placement on the No Fly List is based on the reasonable suspicion standard. 2 ER 390; *see supra* at 2-3. Plaintiffs contend that due process compels a higher clear-and-convincing standard. Pls. Br. 42-45. But the cases on which they rely involve deportation, denaturalization, civil commitment and the like – all private interests far stronger than plaintiffs' interest in international air travel. *See supra* at 32-33, 49-51. The reasonable suspicion standard is appropriate in light of the lesser private interests at stake.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotation marks and citation omitted). The standard "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755.

In the context of the No Fly List, the risk of error against an individual entails the erroneous deprivation of international air travel, borne by that individual, who is mistakenly prohibited from flying. To be sure, a private party's interest in avoiding that consequence is legitimate. On the other hand, the risk of error against the Government is that an individual who in fact does present a threat of committing a terrorist act is nonetheless allowed to fly, and those potentially violent consequences are borne by the public at large. The Government's interest, and society's interest, in avoiding that erroneous conclusion is compelling and broadly shared. Under these circumstances, "the choice of the standard applied * * * reflect[s] an assessment of the comparative social disutility of each" kind of error, *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring), and due process does not compel the use of a higher clear-and-convincing standard.

4. Due Process Does Not Forbid Predictive Judgments.

Plaintiffs argue (Pls. Br. 36-42) that it is inherently unreliable and arbitrary to base the No Fly List on predictive judgments, drawn from intelligence information, to determine whether a person poses a threat of committing a terrorist act, unless that determination is made "from a scientific standpoint," Pls. Br. 37, using "scientific tools," Pls. Br. 39, and employing a "valid methodology," Pls. Br. 40.

As an initial matter, this argument is not a procedural due process argument. Unlike plaintiffs' other arguments, it does not seek additional or substitute *procedures* such as a live hearing, a higher standard of proof, or the disclosure of more evidence. Rather, the argument contends that the outcomes of No Fly List decisions are always, inherently, and unavoidably *substantively* arbitrary.[5] The argument, if correct, would not result in a greater procedures, but in setting aside the No Fly List entirely. Because it is not a procedural due process argument, it is not properly before this Court in this appeal. Plaintiffs did challenge the substantive outcome of their No Fly List status, but as noted below, *infra* at 63-70, the district court did not reach that question because it held that it lacked subject matter jurisdiction to hear it.

[5] *See* 2 ER 319 ("no methodological system can meaningfully predict" whether a person will engage in an act of terrorism); 2 ER 347-348 (even a prediction method with 99% accuracy would be impermissibly unreliable).

More importantly, plaintiffs' argument fundamentally misunderstands the nature of the No Fly List decision. Congress mandated that TSA "identify individuals on passenger lists who *may be a threat* to civil aviation or national security" and to prevent such individuals from boarding aircraft. 49 U.S.C. § 114(h)(3) (emphasis added). Taking prophylactic measures to ensure national security and public safety before violence occurs is the essence of a government's purpose. Those preventative measures, based on the identification of potential threats, are appropriately made according to assessments, drawn from intelligence sources and methods, specific to the individual, and analyzed by experienced professionals trained in the field. Imposing a "scientific methodology" on that judgment is not appropriate.

Nor does the law require it. "[C]ourts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000). As the Supreme Court explained, "when it comes to collecting evidence and drawing factual inferences" in the area of national security, "conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from

the Government." *HLP*, 561 U.S. at 34-35. To "demand[] hard proof – with 'detail,' 'specific facts,' and 'specific evidence' – that plaintiffs' proposed activities will support terrorist attacks * * * would be a dangerous requirement." *Ibid.* "The Government, when seeking to 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." *Id.* at 35. *See also Schall*, 467 U.S. at 278-79 ("from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct"). Moreover, the Government's assessment of a threat in the national security context is entitled to "unique deference." *Al Haramain*, 686 F.3d at 980; *see HLP*, 561 U.S. at 33-34.

Indeed, even when a decision is susceptible of scientific analysis and Congress directs an agency to use the "best available evidence," the Government still does not need to "support its finding that a significant risk exists with anything approaching scientific certainty." *Industrial Union Dep't v. Am. Petroleum Institute*, 448 U.S. 607, 656 (1980) (Opinion of Stevens, J.) (limits of airborne concentrations of benzene).

In addition, as the Supreme Court cautioned in another context, "[t]here are some propositions for which scant empirical evidence can be marshaled," because "[o]ne cannot demand a multiyear controlled study, in which some * * * are intentionally exposed to [harm], and others are shielded from [it]." *FCC v. Fox*

Television Stations, 556 U.S. 502, 519 (2009). Plaintiffs' argument does not heed this sensible warning. One of their proffered experts opines that to develop a valid methodology for assessing threats of violent terrorism, the Government would need to "employ scientific principles, such as the use of a control group" including "individuals who actually carried out acts of political violence" and "individuals (the control group) who are similar to the first set in all respects except that they did not engage in violence." 2 ER 343. The declaration does not spell out how this would work in practice, but presumably it would have the Government allow possible terrorists to fly through the United States in order to see whether they actually commit violent acts. To be sure, the declaration clarified that the control group would be "individuals who are not terrorists," 2 ER 351, but of course if it were already known with certainty, *ex ante*, who were and were not the terrorists, then a control group study would be unnecessary. The absurdity of this proposal is self-evident. "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

Plaintiffs' other declaration suggests that predictive judgments are unreliable due to human error, but that those reliability errors could be mitigated with "[r]isk assessment procedures that do not rely upon people to conduct the assessments" but instead depend on "computer-generated assessments." 2 ER 315. Whatever else plaintiffs propose in terms of additional procedural safeguards, they have sensibly

declined to argue that due process should compel, or would permit, the Government to remove national security decisions from human hands and turn them over to computerized algorithms.

III. THE DISTRICT COURT LACKS JURISDICTION OVER PLAINTIFFS' SUBSTANTIVE CLAIM FOR REMOVAL FROM THE NO FLY LIST

In addition to challenging the constitutional adequacy of the DHS TRIP process, plaintiffs also brought a substantive challenge to their placement on the No Fly List, arguing that they do not present any security risk and therefore their inclusion on the No Fly List is arbitrary and capricious. 3 ER 572-673. The district court correctly held that it lacked subject matter jurisdiction over that claim directly challenging TSA's orders keeping plaintiffs on the No Fly List. 1 ER 7-37.

Under 49 U.S.C. § 46110, the courts of appeals have exclusive jurisdiction to review certain TSA orders. *Ibrahim v. DHS*, 538 F.3d 1250, 1254 (9th Cir. 2008). As the district court acknowledged, this Court has previously held that Section 46110 does *not* preclude district courts from hearing a plaintiff's challenge to his or her placement on the No Fly List. 1 ER 20-24. However, those cases all preceded the revised DHS TRIP procedures established in 2015, and the new procedures lead to a different jurisdictional outcome. 1 ER 27.

In *Ibrahim v. DHS*, this Court held that while Section 46110 grants the court of appeals exclusive jurisdiction to review TSA orders, a person is placed on the No

Fly List by a different agency – specifically, the TSC. *Id.* at 1254-55. The record before the Court established that, under the procedures in effect at that time, "the Transportation Security Administration lacks authority to decide whose name goes on the No-Fly List." *Id.* at 1254 & n.6. Because a plaintiff's challenge to his or her placement on the No Fly List was a challenge to a *TSC* order, not a *TSA* order, and Section 46110's jurisdictional provision does not apply to TSC orders, it followed that "[t]he district court therefore retains original jurisdiction over [a plaintiff's] claim regarding placement of her name on the No-Fly List." *Id.* at 1256.

This Court reaffirmed *Ibrahim*'s holding in the prior appeal in this case, *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012). In *Latif*, this Court again held that the district court has jurisdiction to hear plaintiffs' substantive challenge to their placement on the No Fly List, *id.* at 1127, emphasizing that "TSC decides both whether travelers are placed on the List and whether they stay on it," *id.* at 1127 n.6. *See also id.* at 1128 ("TSA is merely a conduit for a traveler's challenge to inclusion on the List" and "TSC [makes] a final determination. TSC * * * actually * * * decides whether to remove [a person] from the List."); *id.* at 1129 ("Our lack of jurisdiction under § 46110 * * * arises from the unique relationship between TSA and TSC in processing traveler grievances to determine who should remain on the List.").

As the district court noted, "the intervening revisions to the DHS TRIP procedures" – in particular, the fact that "the TSA Administrator now is clearly the authority to remove from or maintain DHS TRIP applicants on the No-Fly List" – fundamentally alters the critical premise of the holdings in *Ibrahim* and *Latif*. 1 ER 27. Under the revised DHS TRIP procedures, when a person challenges his or her inclusion on the No Fly List, TSC prepares a "recommendation to the TSA Administrator" on that question, and prepares materials supporting its recommendation, all of which are forwarded to TSA. 2 ER 230; *see* 2 ER 241, 400-402. The TSA Administrator reviews TSC's recommendation and forwarded materials, the applicant's own submissions, and other relevant, available information. 2 ER 257. The TSA Administrator then "has full authority to order the individual removed from the No Fly List, in which case the individual will be removed." 2 ER 231. *See* 2 ER 401 ("[T]he TSA Administrator makes the final decision as to whether a U.S. person who has filed a DHS TRIP redress inquiry will be maintained on the No Fly List."). "The TSA Administrator may determine * * * that the individual should not be on the No Fly List, notwithstanding TSC's recommendation that the individual remain on the No Fly List. In such a case, the Administrator may issue an order determining that the individual should not be on the No Fly List." 2 ER 242. In addition, if the TSA Administrator determines he or she requires additional information or clarification, the Administration may remand

the case back to TSC with such a request. 2 ER 410. At the end of the DHS TRIP process, the TSA Administrator will issue a final order that either removes the U.S. person from the No Fly List or maintains him or her on the List. 2 ER 410-411.

Accordingly, it is no longer an "indisputable fact[]" that "the Transportation Security Administration lacks authority to decide whose name goes on the No-Fly List." *Ibrahim*, 538 F.3d at 1254 & n.6. And it is no longer the case that "TSC decides * * * whether travelers * * * stay on [the No Fly List]," *Latif*, 686 F.3d at 1127 n.6, or that "TSA is merely a conduit for a traveler's challenge to inclusion on the List," *id.* at 1128. Nor are plaintiffs correct in contending that "TSA plays at most a ministerial role." Pls. Br. 87. Instead, the opposite is true: Under the revised DHS TRIP procedures – which were established after the decision in *Ibrahim* and *Latif* – TSA is now the agency with "full authority" to decide whether an "individual [will be] removed from the No Fly List," and if the TSA Administrator so decides, that "individual will be removed," 2 ER 231, even if the TSC had recommended the opposite, 2 ER 242. It follows (under the reasoning of *Ibrahim* and *Latif*) that because TSA *is* the agency that determines whether or not a person will be removed from the No Fly List, a substantive challenge to a person's placement on the No Fly List *is* a challenge to a TSA order, and therefore the challenge *does* fall under Section

46110's jurisdictional provision granting exclusive jurisdiction in the court of appeals.[6]

Both *Ibrahim* and *Latif* also noted concerns about whether the absence of an administrative record would hamper direct review in the court of appeals. Pls. Br. 81. But those concerns no longer exist under the revised DHS TRIP procedures. *Latif* expressed doubt on whether plaintiffs' claims "ha[d] been reviewed on the merits in any prior administrative proceeding," *Latif*, 686 F.3d at 1129, but the record in this case makes clear that has already happened. And *Ibrahim* stated that the DHS TRIP procedures were "opaque," and doubted if there was "an administrative record * * * for [the court] to review," *Ibrahim*, 538 F.3d at 1256. By contrast, the revised procedures are spelled out in detail, *see* 2 ER 229-232; 2 ER 233-236; 2 ER 399-404; 2 ER 408-411; 2 ER 413-415; and there is no doubt an administrative record is available for the court to review, namely, the same record filed with the district court, including the initial DHS TRIP letters with unclassified summaries of the reasons for each plaintiffs' inclusion on the No Fly List; plaintiffs' own written responses in rebuttal; the final DHS TRIP orders; and the Government's

[6] Other circuits reaching conclusions similar to those in *Ibrahim* and *Latif* were also decided based on the old DHS TRIP procedures. *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015); *Ege v. DHS*, 784 F.3d 791 (D.C. Cir. 2015).

in camera, *ex parte* filings. Thus, any prior concerns about the existence of an administrative record are no longer present.[7]

Equally misplaced is plaintiffs' argument that the absence of notice-and-comment procedures or a hearing affect the jurisdictional analysis. Pls. Br. 88. *Ibrahim* expressly recognized that "[t]he lack of a notice and comment procedure cannot overcome a direct statutory command." 538 F.3d at 1256 n.8. Under the revised DHS TRIP procedures, that is now the case: TSA makes the final, independent decision to maintain a person on the No Fly List, and thus the "direct statutory command" in Section 46110 for exclusive review of TSA orders "cannot [be] overcome" whether or not there is an agency hearing or notice-and-comment procedures. *Ibrahim*, 538 F.3d at 1256 n.8.

Plaintiffs argue that TSC continues to decide "in the first instance" whether a person will be placed on the No Fly List, Pls. Br. 80, but plaintiffs are not challenging their inclusion on the No Fly List in the first instance. Instead, plaintiffs challenge their continued inclusion on the No Fly List following review under the revised DHS TRIP procedures. *Cf.* 3 ER 671 (seeking only "post-deprivation" process for "their continued inclusion on the No Fly List"). Plaintiffs

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[7] *Latif*'s observation that certain claims for money damages might be brought in district court notwithstanding Section 46110, *Latif*, 686 F.3d at 1128-29, has no bearing here, as plaintiffs do not seek money damages.

have all exhausted their DHS TRIP remedies under the revised process, and it is *that* decision of the TSA Administrator that would be reviewed on the merits by whatever court has subject matter jurisdiction to hear the claim.[8]

Similarly, plaintiffs argue that TSC can unilaterally remove an individual from the No Fly List, Pls. Br. 83-84. But plaintiffs are not challenging orders *removing* them from the No Fly List. They are challenging orders *maintaining* them on the No Fly List, and those orders were made under the "full authority" of the TSA Administrator, 2 ER 231, who makes the "final decision as to whether a U.S. person who has filed a DHS TRIP redress inquiry will be maintained on the No Fly List," 2 ER 401.

Plaintiffs observe that TSA does not make the final decision as to what is contained in an individual's unclassified summary of reasons or what information is authorized to be disclosed to plaintiffs. Pls. Br. 84. But that observation goes to the *procedures* governing DHS TRIP, not the *substantive* decision on whether a person remains on the No Fly List. For that substantive decision, the TSA Administrator has full and final authority.

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[8] Because prudential exhaustion of the DHS TRIP procedures is required before a plaintiff may bring a watchlisting challenge, *see Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013), a plaintiff's challenge to his or her placement on the No Fly List should always be directed at the order at the conclusion of that administrative redress process rather than any initial determination.

If this Court affirmed the district court on the jurisdictional question, plaintiffs would not be precluded from bringing their substantive challenge to their inclusion on the No Fly List – they would simply need to file a petition for review in the court of appeals under Section 46110 bringing such a claim. Ordinarily, such a petition must be filed within 60 days of the order being challenged, *i.e.* the final DHS TRIP determination. 49 U.S.C. § 46110(a). However, a "court may allow the petition to be filed after the 60th day * * * if there are reasonable grounds for not filing by the 60th day." *Ibid.* In this case, given existing circuit precedent at the time plaintiffs filed their complaint, and given that the revised DHS TRIP procedures central to the jurisdictional question were revised during the course of these proceedings, the Government would agree that plaintiffs have "reasonable grounds" for not filing a petition for review within 60 days of the final orders maintaining their inclusion on the No Fly List. Plaintiffs would presumably have 60 days to file such a petition for review, running from the date of this Court's decision or the date of any subsequent order from this Court or the Supreme Court denying further review, whichever is later.

CONCLUSION

For these reasons, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5). The brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 and contains 16,763 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

/s/ Joshua Waldman
Joshua Waldman

CERTIFICATE OF SERVICE

On March 7, 2018, I electronically filed the sealed, unredacted copy of the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and served the same on opposing counsel via email, by mutual agreement of the parties and pursuant to Ninth Circuit Interim Rule 27-13(c).

Pursuant to this Court's March 22, 2018 order, I hereby certify that on March 23, 2018, I electronically filed the foregoing redacted, public copy of the brief previously filed on March 7, 2018. Counsel for Appellants are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Waldman
Joshua Waldman

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court.

/s/ Joshua Waldman
Joshua Waldman