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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. JEFFERSON B. SESSIONS, III, et al., *Defendants*.	**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

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INTRODUCTION

The facts needed to resolve the question of jurisdiction are not in dispute. The parties agree that the Acting TSA Administrator issued orders determining that each Plaintiff should be maintained on the No Fly List. They agree that the orders were issued under statutory authorities granted by Congress to TSA and that they had an immediate effect on the Plaintiffs' ability to board a commercial aircraft. They further agree that the orders marked the consummation of the agency's decisionmaking process, overriding any contrary recommendations TSA received before issuing the orders. And they agree that the TSA Administrator has final say in maintaining or removing someone from the No Fly List at the end of the redress process. Indeed, the principal point of contention between the parties is not over TSA's authority to make final No Fly List decisions. Instead, Plaintiffs rely on TSC's role in preparing initial recommendations to assist TSA to argue that they are not challenging final TSA orders subject to exclusive jurisdiction in the courts of appeal.

In Plaintiffs' view, TSC's role in administering the No Fly List, coupled with its participation in the DHS TRIP process, make the agency a necessary party to any judicial relief from a No Fly List determination. But neither the fact that TSA receives initial recommendations from TSC nor the fact that TSC makes No Fly List determinations outside the context of the redress process calls into question TSA's authority as the final decisionmaker. Indeed, because TSA's final decisionmaking authority encompasses the authority to overrule TSC, nothing about TSC's recommendations or prior determinations is material to the operative question before the Court: Who made the decisions that give rise to Plaintiff's substantive due process right-to-travel claims? Under the revised DHS TRIP redress process, the answer to that question is straightforward: TSA. Section 46110 vests exclusive jurisdiction in the courts of appeal to review orders issued "in whole

or in part" under TSA's statutory authority, and Plaintiffs' claims challenge TSA orders within the meaning of the statute.

The Ninth Circuit's decision in *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), is not to the contrary. When the Ninth Circuit held that Plaintiffs' challenge could proceed in district court, it was analyzing a fundamentally different administrative scheme, and the differences between the two redress processes bear directly on the court's rationale. At the crux of the Ninth Circuit's analysis was its finding that TSA was merely a "conduit" for a traveler's challenge to his inclusion on the No Fly List, and that a court could not grant relief to a listed traveler by directing TSA to vacate or modify its orders retaining him on the No Fly List. *Latif*, 686 F.3d at 1128. Whatever the merits of that assessment under the previous redress process, it has no plausible extension to the revised process under consideration here, where the final decision, including the authority to override TSC, rests with TSA, as Plaintiffs have now stipulated. Plaintiffs' reliance on the Ninth Circuit's panel decision is an effort to sidestep the crucial starting point of the jurisdictional analysis: the language of the statute itself. Under that statute, it is clear that Congress intended to preclude district court jurisdiction over Plaintiffs' claims. For these reasons, the motion to dismiss should be granted based on the record before the Court.

ARGUMENT

I. PLAINTIFFS' CLAIMS CHALLENGE, "IN WHOLE OR IN PART," FINAL ORDERS OF TSA, AND THEREFORE MAY BE HEARD ONLY IN THE COURTS OF APPEAL.

The uncontested record evidence demonstrates that the orders Plaintiffs challenge must be reviewed in the courts of appeal. Section 46110(a) vests exclusive jurisdiction in the federal courts of appeal to review TSA orders issued "in whole or in part" under TSA's statutory authority governing redress and assessing risks to transportation or national security, including claims "inescapably intertwined" with such orders. *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir.

2006). In deciding whether the TSA orders Plaintiffs challenge are covered by section 46110, the Court's analysis may begin and end with the parties' stipulated facts, and in particular stipulation 22, which answers the jurisdictional question in a single sentence: "The TSA Administrator may determine, after review of the record before the Administrator and any appropriate interagency consultation, that the individual should not be on the No Fly List, notwithstanding the TSC's recommendation that the individual remain on the No Fly List." Stipulations [Dkt. 347] ¶ 22. In other words, the TSA Administrator has the final say as to whether an individual is removed from the No Fly List, even if TSC recommends otherwise. The Administrator's decision "provides a definitive statement of the agency's position," *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006) (citation omitted), and has a "direct and immediate effect" on the individual's ability to board a commercial aircraft, *id.* (citation omitted). A challenge to the Administrator's determination is, by definition, a challenge to a TSA final order that may be heard only in the U.S. courts of appeal.

Plaintiffs would have the Court look past the TSA Administrator and focus instead on TSC's role in compiling and maintaining the No Fly List and preparing a recommendation for TSA. Plaintiffs are correct, of course, that TSC "remains the hub of the government's watchlisting system" and "plays a primary role throughout the government's No Fly List redress process." Pls.' Opp. [Dkt. 351] at 2, 3. But they are wrong to assert that TSC's actions have any meaningful bearing on the jurisdictional inquiry here, which necessarily focuses on the decisions issued by the TSA Administrator and whether they have "sufficient finality to warrant the appeal offered by section 46110." *Gilmore*, 435 F.3d at 1132 (citation omitted); *cf.* Fourth Am. Compl. [Dkt. 83] ¶ 145 (challenging "Defendants' actions ... in including Plaintiffs on a watch list that prevents them from boarding commercial aircraft"). As the parties have stipulated, the TSA Administrator's decision marks the completion of the agency's decisionmaking process; it has immediate effect, and no

further agency action is required for it to take effect. Stipulations ¶ 22. That TSA received a recommendation from TSC before reaching a final decision does not alter TSA's ultimate decisionmaking authority, any more than any initial agency recommendation implicates the authority of a final agency decisionmaker.

Indeed, taken to its logical extension, Plaintiffs' argument would call into question the finality of countless agency decisionmaking processes across the U.S. Government. Numerous other interagency relationships rely on the provision of recommendations from one agency to another. In such circumstances, neither the mere receipt of a recommendation nor the fact that the recommending agency may have made prior, preliminary determinations calls into question the authority, efficacy, or finality of the actual determination. *See*, *e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (challenge to census report to President not justiciable, as actual action was undertaken by the President); *Americans for Safe Access v. DEA*, 706 F.3d 438, 450 (D.C. Cir. 2013) (challenge to Drug Enforcement Administration's Controlled Substance scheduling determination properly brought against DEA, notwithstanding statutes providing for the Secretary of Health and Human Services to undertake a scientific evaluation that is binding on the DEA); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011) (rejecting challenge to Office of Foreign Assets Control's reliance on a recommendation from the Department of State, and noting that "we decline to impose a novel Administrative Procedure Act rule that would deter one executive agency from consulting another about matters of shared concern"). Indeed, there generally will be no standing to challenge the recommendation, since the agency action giving rise to a justiciable dispute is that of the determining agency. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568 (1992); 5 U.S.C. § 704 (judicial review of final agency action). Here, the

operative decision giving rise to Plaintiffs' claims is not any prior determination or recommendation by TSC, but rather the final determination of TSA that maintains Plaintiffs on the No Fly List.

At a minimum, Plaintiffs' claims are "inescapably intertwined" with the merits of TSA orders, and thus subject to jurisdiction in the courts of appeal. Even accepting Plaintiffs' contention that their claims require review of orders issued by both TSA and TSC, section 46110 would still bar a district court from asserting jurisdiction over any action in which a litigant's claims are "inescapably intertwined" with the merits of the TSA order. *See Americopters*, 441 F.3d at 736. As the parties have stipulated, TSC's recommendation to TSA is one piece of a larger record prepared for the TSA Administrator in determining whether an individual should be maintained on the No Fly List. Stipulations ¶ 20. When the TSA Administrator reviews TSC's recommendation, he also reviews a host of other materials, including a memorandum from DHS TRIP indicating whether TSA's Office of Intelligence and Analysis (OIA) concurred with the recommendation and whether TSA's Office of Chief Counsel (OCC) had any legal objection to the recommendation, and advising as to whether the Administrator should remand the case back to TSC with a request for additional information or issue a final order removing or maintaining the person on the No Fly List. Suppl. Moore Decl. [Dkt. 349] ¶ 12. As a result, any challenge to TSC's recommendation necessarily would call into question the final order of the TSA Administrator. Thus, all of Plaintiffs' claims are "inescapably intertwined" with the merits of TSA's No Fly List determinations and must be reviewed in the court of appeals under section 46110.

Plaintiffs contend the doctrine of inescapable intertwinement applies to "claims" rather than "orders," and that, as a result, it does not extend to Plaintiffs' challenges to orders issued by TSC over the course of the watchlisting and redress process. Pls.' Opp. at 18–19 (citing *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008)). But even accepting that distinction as correct, under the revised

redress process, Plaintiffs cannot credibly claim to be challenging orders issued by TSC. Plaintiffs remain on the No Fly List because the Acting TSA Administrator decided, after considering recommendations from both TSC and TSA, that they each satisfied the relevant placement criteria. It is the Acting Administrator's decisions that Plaintiffs attack in this lawsuit, and to the extent their claims implicate prior (and now-superseded) actions taken by TSC leading up to that decision, the doctrine of inescapable intertwinement requires that such claims be reviewed in a court of appeals. Moreover, even if Plaintiffs were correct that they were challenging an "order" of TSC, that claim cannot be reviewed independently of a claim challenging a TSA order, which is the culmination of the revised redress process.

Plaintiffs' construction of Section 46110 also contravenes its text, which confers exclusive jurisdiction in the court of appeals over any order issued "in whole or in part" by TSA pursuant to its statutory authorities. 49 U.S.C. § 46110(a) (emphasis added). That statutory language is "as broad as could be framed." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2636 (2011); *cf. United States* v. *Rood*, 281 F.3d 353, 356 (2d Cir. 2002) (referring to "broad" language of "in whole or in part"); *United States* v. *Turner*, 586 F.2d 395, 398 (5th Cir. 1978) ("amply broad"); *Ohio Ass'n of Community Action Agencies* v. *FERC*, 654 F.2d 811, 818 (D.C. Cir. 1981) ("the phrase[] 'in whole or in part'" confers "broad discretion").

The legislative history confirms what the text makes clear. Prior to 2003, Section 46110 applied to orders issued "under this part," *i.e.,* Title 49, Subtitle VII, Part A; the statute neither contained the phrase "in whole or in part," nor mentioned orders other than those issued under Part A. Courts, however, addressed that gap by construing Section 46110 to mean that "[i]f a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of

appeals." *Suburban O'Hare Comm'n*, 787 F.2d 186, 192–93 (7th Cir. 1986) (emphasis added); *accord Communities Against Runway Expansion*, 355 F.3d at 683–84; *Sutton v. Dep't of Transp.*, 38 F.3d 621, 625 (2d Cir. 1994); *National Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1527–28 (10th Cir. 1993); *Alliance for Legal Action v. FAA*, 69 Fed. Appx. 617, 620–21 (4th Cir. 2003).

Congress responded by amending Section 46110 to expand the enumerated statutory authorities covered by that section. *See* Pub. L. No. 108-176 § 228(2), 117 Stat. 2490, 2532 (Dec. 12, 2003). In so doing, Congress specified that Section 46110 applies to orders issued "in whole or in part" under TSA's statutory authorities, which language must be given independent meaning. *United States v. Llanez-Garcia*, 735 F.3d 483, 498 (6th Cir. 2013). By using the phrase "in whole or in part," Congress meant to endorse and broaden the holding in *Suburban O'Hare* that, "[i]f a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals." 787 F.2d at 192.

II. THE NINTH CIRCUIT'S PANEL HOLDING DOES NOT APPLY TO TSA ORDERS ISSUED UNDER THE REVISED REDRESS PROCESS.

Rather than considering the jurisdictional question anew, Plaintiffs would have the Court analyze the revised redress process using "key factors" considered by the Ninth Circuit in evaluating the previous version of DHS TRIP. *Latif*, 686 F.3d at 1127. Plaintiffs insist that the Ninth Circuit's analysis controls the outcome here, and that, by moving to dismiss Plaintiffs' claims, the Government is merely "rehash[ing] arguments" that the Ninth Circuit has already rejected. Pls.' Opp. at 1. But the Ninth Circuit's panel holding does not apply to TSA orders issued under the revised DHS TRIP process, and the multi-factor framework Plaintiffs have cobbled together from that now-dated decision is neither accurate nor useful here. And even if the *Latif* decision were an

appropriate starting point for this analysis, the factors considered by the Ninth Circuit would cut in favor of, not against, dismissal of Plaintiffs' claims.

A. The Ninth Circuit's Jurisdictional Analysis Should Be Confined To The Facts Of The Previous Redress Process.

Contrary to Plaintiffs' suggestion, it is section 46110(a), and not a Ninth Circuit decision applying that provision to a nonoperational administrative scheme, that governs the Court's analysis here. When the Ninth Circuit held that Plaintiffs' challenge could proceed in district court, it was analyzing a fundamentally different administrative scheme, and the differences between the two redress processes bear directly on the Court's rationale. In straining to extend the Ninth Circuit's analysis to the revised redress process, Plaintiffs fail to account for these differences. For example, while the *Latif* panel found it significant that TSC "actually compile[d] the list of names ultimately placed" on the No Fly List, *Latif*, 686 F.3d at 1127, that fact carries little weight in the context of a redress process that culminates in independent record review and a final, potentially overriding decision by TSA. Similarly, when the *Latif* panel concluded that judicial review of a No Fly List determination arguably required review of both TSA and TSC orders, *id.*, it was not contemplating a redress process whereby TSA makes the final decision.

Plaintiffs' account of the Ninth Circuit's jurisdictional analysis is also incomplete. The one factor the Ninth Circuit considered that may still have force here is the one factor Plaintiffs neglect to mention: the authority to grant relief by removing someone from the No Fly List. *See Latif*, 686 F.3d at 1128–29. The Ninth Circuit ultimately concluded that a court "would not be able to provide relief by simply amending, modifying, or setting aside TSA's orders," because, in the panel's view, TSA was merely a "conduit for a traveler's challenge to inclusion on the List" and it was TSC, not TSA, that "actually reviews the classified intelligence information about travelers and decides whether to remove them from the List." *Id.* Not one of those statements is true in light of TSA's

role under the revised redress process, and it strains logic to suggest that the Ninth Circuit or any other court would reach the same conclusion for the revised process.

B. The Factors Identified By Plaintiffs Do Not Support Jurisdiction In The District Court.

Even if the Court were to follow Plaintiffs' proposed framework, the factors they identify do not support jurisdiction in the district court. Instead, the factors highlighted by Plaintiffs are either inapplicable to the revised redress process or support the conclusion that section 46110 bars jurisdiction of Plaintiffs' claims here. For example, Plaintiffs make much of the fact that TSC continues to "determine initial placement on the No Fly List." Pls.' Opp. at 8. As explained, however, when the Ninth Circuit relied on that fact, it was not considering an administrative scheme under which TSA is fully empowered to scrutinize the recommendation provided by TSC, seek additional information, and, if the TSA Administrator disagreed, override it. *See Latif*, 686 F.3d at 1129 (finding that the court "would not be able to provide relief by simply amending, modifying, or setting aside TSA's orders or by directing TSA to conduct further proceedings"). Under the revised redress process, TSC's initial determination that an individual should be on the No Fly List (along with any subsequent determination that the individual should remain on the No Fly List) is a preliminary determination separate from, and independent of, the TSA Administrator's determination as to whether to maintain or remove an individual once he has sought redress through DHS TRIP. Now that TSA has final say, TSC's role in compiling and maintaining the TSDB and its subset lists should have no bearing on the jurisdictional inquiry.

Next, Plaintiffs argue that, under the revised redress process, "any judicial review of a final determination" "is necessarily of both TSC and TSA orders," because (according to Plaintiffs) the TSA Administrator's decision "implicates multiple TSC orders" and "TSC controls every phase of the redress process." Pls.' Opp. at 9–10. This is simply not correct. TSC's recommendation to

maintain No Fly List status is a step along the way to a final decision by TSA. *See* Stipulations ¶¶ 20–22. The recommendation is not dispositive. Indeed, TSA can override it. The TSA Administrator's decision does follow prior TSC actions, but only in the sense that any final redress decision follows the various agency actions that gave rise to it. *See* Part I, *supra*. The salient question under section 46110 is not which agency first placed an individual on the No Fly List, but which agency decided to ultimately keep him on the List. As the parties have stipulated, it is TSA, not TSC, that has the final say in the redress process, and that fact is decisive here.

Nor is it accurate to suggest that TSC "controls every phase of the redress process." Pls.' Opp. at 10. Again, the record plainly demonstrates that the phase of the redress process at issue for purposes of the jurisdictional inquiry — the final order removing or maintaining an individual on the No Fly List — is controlled by TSA. That TSA may not be considering the full set of information available to TSC only underscores the independent nature of its decision-making process and the importance of confining judicial review to the operative decision — that made by TSA. TSA's decision to maintain someone on the No Fly List is based on the record prepared for the TSA Administrator, including a written recommendation from TSC as to whether the individual should remain on the No Fly List. *See* Stipulations ¶ 18. TSA is given information sufficient to support TSC's recommendation and any material information regarding the individual included on the No Fly List. Groh Decl. [Dkt. 350] ¶ 5. Put differently, the scope of the recommendation to TSA from TSC goes to the adequacy of the basis for decision. It does not call into question the identity of the decisionmaker.

Further, even if TSC's role in the earlier stages of the redress process were relevant to the jurisdictional question — a contention with which the Government disagrees — Plaintiffs have overstated that role, while consistently devaluing the roles played by other agencies. For example,

Plaintiffs assert, without any support, that DHS TRIP "merely serves as a pass-through for information from TSC" for purposes of the second letter of the redress process. Pls.' Opp. at 11. On the contrary, in preparing a second letter to a petitioner, DHS TRIP submits information it receives from TSC for review to two separate TSA offices (OIA and OCC), to be analyzed in light of information available to TSA, whether provided directly from TSC or otherwise available to TSA. *See* Suppl. Moore Decl. ¶ 6. DHS TRIP also notifies the relevant agencies that a second letter is being prepared and may consult with other agencies about the information authorized to be disclosed and whether any changes may be warranted to offer the individual a meaningful opportunity to respond. *Id.* ¶ 7.

Also incorrect is Plaintiffs' suggestion that TSC controls the flow of information between DHS TRIP and individuals seeking redress. As Defendants' submissions demonstrate, determinations about what information is released to individuals seeking redress are controlled not by TSC but by whichever agency "owns" the information in question. Grigg Decl. [Dkt. 253] ¶ 41; Groh Decl. ¶¶ 4, 11. Those determinations, in turn, are subject to interagency consultations with all affected agencies, including TSA, TSC, and any nominating agencies, *id.*, and TSA is empowered to raise any questions relating to content.

Plaintiffs next argue that "[a]ny remedy for Plaintiffs must involve both TSC and TSA." Pls.' Opp. at 13. This is a reformulation of their argument, repeated throughout the opposition brief, that TSC's involvement in early stages of the redress process somehow makes the agency a necessary party to any remedy. However, as explained, TSA now explicitly makes the final determination and has the information and full authority to effectuate the relief Plaintiffs are seeking. *See* Stipulations ¶ 21; *see also Latif*, 686 F.3d at 1128 (finding jurisdiction was proper in the district court because the appellate court could not provide relief by directing TSA to modify its

orders). Further, even if TSC were a necessary party, review of the TSA order would still reside in the courts of appeal because any claims challenging TSC's recommendation would be inextricably intertwined with review of the final TSA order. *See Americopters*, 441 F.3d at 736. Plaintiffs' arguments to the contrary are wrong.

Plaintiffs assert, for example, that TSA would be unable to conduct any proceedings without the recommendation provided by TSC. Pls.' Opp. at 13. Even if this were true, it is counterfactual. If TSC were to withhold the recommendation, it would not cause the DHS TRIP process to cease to exist or call into question TSA's authority. In any event, the notion that TSA's power to decide hinges on TSC's ongoing willingness to participate in the Government's process (which willingness is not in doubt, in any event) is incorrect. Plaintiffs' contention is ultimately irrelevant to the legal question before the Court. That TSC provides a recommendation that is a part of the record before the TSA Administrator does not make TSC a necessary party in a lawsuit challenging a No Fly List determination. Nor does it make TSA a mere conduit for TSC's recommendations, which, as explained, form but one part of a larger record of materials provided to the TSA Administrator.

Similarly, Plaintiffs are wrong to suggest that TSA "plays at most a ministerial role in determining what information will be provided to the petitioner as part of the No Fly List redress process." Pls.' Opp. at 14. TSA is fully empowered to scrutinize the record presented to it, including by making inquiries regarding the scope of the information presented and whether additional information can be disclosed to an individual. Such questions typically would be directed to the agency controlling the relevant information. *See* Groh Decl. ¶ 11. Plaintiffs are also wrong to assert that the relief they seek would require modifying or setting aside TSC determinations. The only operative orders at issue in this case are the final orders issued by the Acting TSA Administrator maintaining the Plaintiffs on the No Fly List. If, as Plaintiffs contend, those TSA

orders lack evidentiary support, each Plaintiff can obtain the relief he seeks by petitioning a court of appeals to invalidate the TSA order applicable. No further action by TSC or any other agency is required to effectuate the relief sought by Plaintiffs.

Finally, Plaintiffs contend that jurisdiction should lie in the district court for the "practical" reason that district courts have the ability to take evidence. Pls' Opp. at 15. This argument is meritless. First, because the orders Plaintiffs challenge fall squarely within the scope of section 46110, the Court has no reason to consider the most practical forum for review. Second, even if practical considerations were relevant, for the reasons outlined in our January 2016 submission, they would cut in favor of exclusive jurisdiction in the courts of appeal. *See* Dkt. No. 319 at 6–7.

Contrary to Plaintiffs' suggestion, a court's primary task in reviewing No Fly List determinations is to determine whether there is a reasonable basis for the agency's determination, not to "take evidence." Courts have found that section 46110 provides a suitable method for cases to be litigated in the appellate courts based on an administrative record, including where necessary classified information. *See*, *e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). In contrast to the 46110 statutory framework providing for appellate review, the law governing review of classified information in district court is not well established. *See* Dkt. 319 at 6–7.[1]

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[1] Plaintiffs rely on *Ibrahim* for the proposition that "the lack of a hearing before an administrative law judge or a public notice-and-comment period for the redress process means that the reviewing court should be one with the ability to take evidence." Pls.' Opp. at 7, Dkt. 351. Plaintiffs' reliance on *Ibrahim* is misplaced. The Ninth Circuit, in considering the prior DHS TRIP process, speculated that "[f]or all we know, there is no administrative record of any sort for us to review." *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1256 (9th Cir. 2008). That speculation was unfounded at the time and has no bearing on the revised DHS TRIP process, which grants final decisionmaking authority to TSA. The stipulated record before this Court plainly demonstrates that there is in fact an administrative record appropriate for review under Section 46110.

III. PLAINTIFFS' ATTEMPTS TO IMPUGN DEFENDANTS' LITIGATION CONDUCT AND FACTUAL SUBMISSIONS ARE BASELESS.

Finally, throughout their filings, Plaintiffs suggest that Defendants refused to participate in the meet-and-confer process, and that Defendants' submission of additional declarations concerning jurisdiction signal an "unclear," *ad hoc*, or suspect redress process, going so far as to suggest that the Court should entertain an adverse inference. Pls.' Opp. at 20. Such arguments are baseless. The factual record provided to the Court is voluminous and almost entirely uncontested. Throughout this litigation, Defendants have provided information when necessary and in response to emerging issues as they have arisen in litigation. Plaintiffs' suggestion that there is something untoward about this lengthy factual development has no grounding in fact and is belied by the record in this case. Likewise for Plaintiffs' suggestion that Defendants, in volunteering additional declaration testimony regarding the topics that Plaintiffs insisted were relevant to jurisdiction, somehow should be deemed to have acted inappropriately. On the contrary, the attestation to pertinent facts in litigation, rather than announcement through a policy document, arguably gives those facts more weight, rather than less, as Plaintiffs appear to suggest. Pls.' Mot. at 5 (observing that the record has developed in court filings, rather than in the Federal Register or other processes). Moreover, any suggestion that Defendants were not forthcoming in the negotiations regarding jurisdictional stipulations is meritless. All parties engaged in multiple rounds of good faith efforts to arrive at acceptable language for stipulations. In point of fact, Plaintiffs rejected many more proposed stipulations — including concerning uncontested, previously attested facts shown in Defendants' prior submissions — than did Defendants. In all events, the record before the Court appropriately addresses the issues presented to the Court at each stage of the litigation and demonstrates that Plaintiffs' claims

are appropriately brought against final orders of TSA. Plaintiffs offer no basis to dispute that unavoidable conclusion.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss Plaintiffs' claims for lack of jurisdiction.

Dated: March 6, 2017

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) and this Court's Order (Dkt. 346) because it does not exceed 20 pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Brigham J. Bowen
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