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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,*	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants*.	**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United States Constitution

Regulations

INTRODUCTION

In the aftermath of the September 11 attacks, Congress and the Executive Branch have devoted extensive resources to enhancing aviation security. Multiple federal agencies have worked together to strengthen the security of our Nation, including by creating and utilizing a consolidated terrorist watchlist, the Terrorist Screening Database ("TSDB"), to facilitate the identification by United States ("U.S.") authorities of those individuals suspected of engaging in terrorist activity. Throughout this process, Congress and the Executive Branch have worked to protect the civil rights and liberties of the traveling public while ensuring that air travel is safe and secure. Pursuant to statutory authority and Executive Branch action, individuals who believe they have been wrongfully placed on a terrorist watchlist can file for redress with the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP").

Plaintiffs are thirteen U.S. citizens who allege that they have been denied boarding on flights to, from, and within the U.S. and assume, therefore, that they are on the government's No Fly List, a subset of the TSDB. They claim that their assumed placement on the list violates substantive due process by unreasonably depriving them of their liberty interests in travel, freedom from false stigmatization, and nonattainder. And they claim that the DHS TRIP process established for redress of complaints regarding perceived placement on the No Fly List fails to satisfy procedural due process protections. Plaintiffs seek removal of their names from any watchlist that precludes them from flying to or within the U.S., or the disclosure of the grounds for their inclusion on a government watchlist and an opportunity to rebut any grounds for inclusion.

Plaintiffs have failed to demonstrate a cognizable violation of their rights to procedural due process, because the interests advanced by Plaintiffs do not require any additional process beyond what is already provided.[1]

First, any liberty interest in traveling that Plaintiffs possess has not been significantly diminished. In arguing otherwise, Plaintiffs' case rests largely on their overarching, and erroneous, theory that they have a constitutional right to fly to, from, and within the U.S. However, as the United States Court of Appeals for the Ninth Circuit held in *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006), the "Constitution does not guarantee the right to travel by any particular form of transportation." Plaintiffs within the U.S. have access to other modes of transportation, including by rail, car, and bus. And, as the experiences of several of the Plaintiffs reflect, those persons denied boarding an aircraft outside the U.S. also had access to alternative means of returning to the country.

Even assuming Plaintiffs have alleged a deprivation of a constitutionally-protected liberty interest as a result of the denial of boarding, there is a sufficient process to review and correct any errors in the government's actions and therefore satisfies any due process requirements. The redress process necessarily requires a balance between the interests of travelers in being able to challenge perceived impediments to their ability to travel and the government's compelling need to ensure the security of air travel and the protection of information giving rise to placement on the No Fly List. Plaintiffs' requested relief – which would require either removal of persons

[1] As the parties previously informed the Court, the parties agree that briefing in this case should proceed in two stages. *See* Parties' Joint Case Management Plan, Dkt. No. 77, at 4. At this time, Defendants are moving for summary judgment on Plaintiffs' procedural due process claims. After the Court rules on this motion, and Plaintiffs' anticipated cross-motion, the parties will confer on how to address Plaintiffs' substantive due process claims. *Id.*

from their perceived placement on the No Fly List or hearings and disclosure of the underlying reasons for such inclusion – might require the government to turn over classified and otherwise sensitive information to persons it reasonably suspects are associated with terrorism, a result the Constitution does not compel.

Nor can the policies, practices, and procedures at issue here reasonably be considered arbitrary and capricious. In maintaining and managing the TSDB, and its subset No Fly List specifically, the government is acting pursuant to legislation passed by Congress in the wake of the September 11, 2001 terrorist attacks to protect the security of the U.S. and air passengers. Repeated attempts by terrorists in the intervening years establish unequivocally that commercial aircraft remain a primary target and that terrorists will attempt to exploit any perceived deficiencies in the aviation security system. By asking the Court to make decisions about a redress process that implicates who can and cannot board airplanes to, from, and within the U.S., Plaintiffs seek to involve the Court in second-guessing determinations made by the Executive Branch regarding national security risks posed by particular individuals. As the Supreme Court has made clear, courts should avoid taking on such a role: "when it comes to collecting evidence and drawing factual inferences in [the national security context], 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." *Holder v. Humanitarian Law Project ("HLP")*, __ U.S. __, 130 S. Ct. 2705, 2727 (2010) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Accordingly, summary judgment on Plaintiffs' procedural due process claims should be entered for Defendants because DHS TRIP provides sufficient process.

STATUTORY AND REGULATORY BACKGROUND

At present, several different components of the federal government work together to secure the nation (and its airways) from terrorist threats. The Federal Bureau of Investigation ("FBI") has responsibility for investigating and analyzing intelligence relating to both international and domestic terrorist activities, and the National Counterterrorism Center ("NCTC") serves as the primary organization for analyzing and integrating intelligence relating to international terrorism and counterterrorism. *See* 28 U.S.C. § 533; 28 C.F.R. § 0.85(l); 50 U.S.C. §§ 4040(a) & (d)(1). The Department of Homeland Security ("DHS") is primarily charged with "prevent[ing] terrorist attacks within the United States," and "reduc[ing] the vulnerability of the United States to terrorism." 6 U.S.C. § 111. Within DHS, the Transportation Security Administration ("TSA") is responsible for transportation – including aviation – security. *See* 6 U.S.C. §§ 111(b)(1), 202(1); 49 U.S.C. § 114.

Creation of the Terrorist Screening Center

In 2003, the President ordered the establishment of a governmental organization that would "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." *See* Homeland Security Presidential Directive 6. The Terrorist Screening Center ("TSC"), which was established by Executive Order, maintains a consolidated database of identifying information about persons known or reasonably suspected of being involved in terrorist activity. TSC then shares that information with front-line screening agencies and law enforcement officials so that they can positively identify known or suspected terrorists trying to enter the country, board aircraft, or engage in other activity of concern. TSC then shares that information with front-line

screening agencies and law enforcement officials so that they can positively identify known or suspected terrorists trying to obtain visas, enter the country, board aircraft, or engage in other activity of concern and take appropriate action such as stopping known or suspected terrorists from boarding planes traveling to, from, or within the U.S.[2] The creation of TSC was driven by the 9/11 Commission's conclusion that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the nation's security.[3] Before creation of TSC, multiple terrorist watchlists were maintained separately in different agencies; TSC has consolidated and centralized the watchlists, as the 9/11 Commission recommended. Coppola Decl., ¶¶ 6, 12.[4]

TSC is responsible for maintaining the federal government's consolidated terrorist watchlist, the TSDB, which contains identifying information about individuals known or suspected to be engaged or aiding in terrorist related conduct. *See* Stipulated Facts, ¶ 1; Coppola Decl., ¶ 7. Government agencies nominate individuals to be included in the TSDB if there is sufficient identifying information and certain minimum substantive criteria are met, including a

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[2] In support of these arguments, Defendants cite from the Declaration of Cindy A. Coppola, Acting Deputy Director for Operations of the Terrorist Screening Center ("Coppola Decl.").

[3] *See* 9/11 Commission Report, Executive Summary, available at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The missed opportunities to thwart the 9/11 plot were also symptoms of a broader inability to adapt the way government manages problems to the new challenges of the twenty-first century. Action officers should have been able to draw on all available knowledge about al Qaeda in the government. Management should have ensured that information was shared and duties were clearly assigned across agencies, and across the foreign-domestic divide.")

[4] TSC is an interagency entity that was created through a Memorandum of Understanding entered into by the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence in order to fulfill the requirements of HSPD 6. *See* Coppola Decl., ¶ 3. TSC is administered by the Department of Justice (through the FBI); it is staffed by officials from a variety of agencies, including DHS (TSA, Customs and Border Protection ("CBP"), and Immigration Customs Enforcement ("ICE")), and the Department of State. *Id.*

conclusion that the supporting information shows that the government has a "reasonable suspicion" based on the "totality of information reviewed" that the individual is a known or suspected terrorist. Stipulated Facts, ¶¶ 15-16; Coppola Decl., ¶ 8. The substantive information supporting a TSDB nomination is known as the "derogatory information." Coppola Decl., ¶ 10. Any such information is extremely sensitive and may be classified. *Id.*

The TSDB only includes identifying information; it does not include the underlying derogatory information. *Id.*. Separating the names from the underlying derogatory information allows identifying information to be shared with government and law enforcement officials who may lack appropriate security clearances; this, in turn, means that a broad array of screening and law enforcement officials have access to TSDB data to positively identify known or suspected terrorists trying to enter the country, board aircraft, or engage in other activity that may pose a risk to national security. *See* Coppola Decl., ¶ 7; *see also* Stipulated Facts, ¶ 3. Because intelligence is continually evolving, the composition of the TSDB, including the identifying information about known or suspected terrorists, is regularly updated. *See* Coppola Decl., ¶ 7.

No Fly List

The No Fly List is a subset of the TSDB. *See* Stipulated Facts, ¶ 2; Coppola Decl., ¶ 13. The No Fly List is defined as "a list of individuals who are prohibited from boarding an aircraft." *Id.* To be included on the No Fly List, an individual must be in the TSDB and meet additional criteria, beyond the "reasonable suspicion" standard generally required for inclusion in the TSDB. *Id.*, ¶ 16; Stipulated Facts, ¶¶ 15-17.

The government treats the No Fly criteria (as well as the watchlist status of an individual) as Sensitive Security Information ("SSI"); as a result, neither the No Fly criteria, nor the

implementation guidance, may be publicly released.[5] *See* 49 C.F.R. § 1520.5(b)(9)(i); Coppola Decl., ¶ 14; Stipulated Facts, ¶ 17.[6] There is no bar to including U.S. citizens or lawful permanent residents on the No Fly List. Coppola Decl., ¶¶ 16. If a person is denied boarding and wishes to file a complaint about that denial, he or she may do so with DHS TRIP, as explained below. *See* Stipulated Facts, ¶¶ 4-6; Coppola Decl., ¶ 45.

Redress Procedures for Travelers Denied Boarding

As part of the new procedures adopted following the attacks of September 11, 2001, the government has developed programs to redress the complaints of passengers who allege they have been denied boarding or subjected to additional screening at airports by TSA. As part of the legislation implementing the recommendations of the 9/11 Commission, Congress enacted 49 U.S.C. § 44926, which requires DHS, *inter alia*, to "establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration, United States Customs and Border Protection, or any other office or component of the Department of Homeland Security." *Id.* § 44926(a).

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[5] Congress directed TSA to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1)(c) (formerly § 114(s)). Such information is known as Sensitive Security Information ("SSI"), and TSA is authorized by Congress to determine whether particular material is SSI, and, if so, whether and to what extent it may be disclosed. *See id.*; 49 C.F.R. Pt. 1520.

[6] The SSI regulations are published at 49 C.F.R. part 1520. Some of the information filed in support of this memorandum includes SSI; those portions of the declaration are redacted, and an unredacted copy has been filed *ex parte* and *in camera*, as the parties contemplated in their case management plan. *See* Dkt. No. 77 at 4.

In February 2007, DHS launched the current redress process for such complaints, known as DHS TRIP. DHS TRIP is the central administrative redress process for individuals who have, for example, been denied or delayed airline boarding; denied or delayed entry into or exit from the U.S. at a port of entry; or repeated referrals to additional (secondary) screening. *See* Stipulated Facts, ¶¶ 4-7; Coppola Decl., ¶ 45.

Persons who have been denied boarding, or been subject to additional screening by TSA, may file a complaint with DHS TRIP. *See* Stipulated Facts, ¶¶ 4-7. They are required to complete a traveler inquiry form, either on-line or via e-mail or hard copy. *See* Stipulated Facts, ¶ 6. If the applicable DHS component determines that the complainant is an exact or near match to an identity in the TSDB, the matter is referred to the TSC Redress Unit. *See* Stipulated Facts, ¶ 8; Coppola Decl., ¶ 48.[7] To date, less than 1% of all DHS TRIP complaints relate to persons actually included in the TSDB (or by extension, the No Fly List). *See* Coppola Decl., ¶ 48.

The TSC Redress Unit reviews the available information to determine whether the DHS TRIP complainant is an exact match to a TSDB identity, and if so, whether the individual's status should be modified. *See* Stipulated Facts, ¶ 9; Coppola Decl., ¶¶ 49-50. As part of this process, TSC contacts the agency that originally nominated the individual for placement in the TSDB and "determine[s] whether the complainant's current status in the TSDB is suitable based on the most current, accurate, and thorough information available." *Id.; see also* Stipulated Facts, ¶ 9. The TSC Redress Unit makes a determination as to whether any adjustment in the

[7] This interagency review process is described in the Memorandum of Understanding on Watchlist Redress Procedures, which was executed on September 19, 2007, by the secretaries of State, Treasury, Defense, and Homeland Security, the Attorney General, the FBI Director, the NCTC Director, the Central Intelligence Director, the Director of National Intelligence, and the TSC Director. *See* Coppola Decl., ¶ 47.

individual's status, including modification or removal, is required and informs DHS TRIP accordingly; DHS TRIP subsequently sends a determination letter to the complainant. *See* Stipulated Facts, ¶ 10; Coppola Decl., ¶ 51. Pursuant to the government's current "Glomar" policy, the letter does not confirm or deny whether the individual is in the TSDB, or on the No Fly subset list. *See* Stipulated Facts, ¶ 11; Coppola Decl., ¶¶ 27-39.[8] The DHS TRIP determination letters that respond to complaints regarding delayed or denied boarding by TSA indicate that judicial review of the decisions reflected in the letters is available in the Courts of Appeal pursuant to 49 U.S.C. § 46110. *See* Stipulated Facts, ¶ 11.

PROCEDURAL BACKGROUND

Plaintiffs are thirteen U.S. citizens who allege they have been denied boarding on flights to, from, and within the U.S. *See* Third Amended Complaint ("Third Am. Compl."), ¶ 2.[9] Plaintiffs assert three claims: two for alleged Constitutional violations (including procedural and substantive due process) and the last for alleged violations of the Administrative Procedure Act. *Id.* ¶¶ 138-49. All Plaintiffs have filed complaints with DHS TRIP, and all have received responses from DHS TRIP. *See* Stipulated Facts, ¶ 13.

At the outset of this litigation, several Plaintiffs were located outside the U.S. and wished to return home by traveling on commercial airlines. Plaintiffs subsequently filed a motion for a

[8] "Glomar" refers to a "neither confirm nor deny" response. This response was first judicially recognized in the national security context in *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), which raised the issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes's submarine retrieval ship, the Glomar Explorer.

[9] While the complaint alleges that "Plaintiffs are U.S. citizens and lawful permanent residents of the United States," *see* Third Am. Compl. ¶ 2, it separately contends that each individual Plaintiff is a U.S. citizen. *Id.* ¶¶ 18.

preliminary injunction on behalf of those Plaintiffs ("PI Plaintiffs"), asking the Court to require Defendants to allow them to return to the U.S. by air, consistent with "suitable screening procedures." *See* Pls.' PI Memo., Dkt. No. 21, at 39. As a result of the parties' efforts, the PI Plaintiffs who wished to return to the U.S. did so, and Plaintiffs then withdrew their Motion for a Preliminary Injunction. *See* Dkt. No. 33.

Defendants then moved to dismiss or, in the alternative, for summary judgment. *See* Docket # 44. The Court granted Defendants' motion to dismiss on May 3, 2011. *See* Dkt. No. 69. The Ninth Circuit issued its opinion on July 26, 2012, in which it held that this Court has jurisdiction over Plaintiffs' "substantive challenge to their own apparent inclusion on the No Fly List and [their] procedural challenge to the adequacy of the redress procedures available to challenge their apparent inclusion on the List." *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012).

Pursuant to a Joint Case Management Report filed by the parties, *see* Dkt. No. 77, and following a Rule 16 conference conducted by telephone on December 19, 2012, the Court set a briefing schedule for the parties' first stage dispositive motions. *See* Dkt. No. 80.

ARGUMENT

I. THE REDRESS PROCESS ADEQUATELY PROTECTS THE RIGHT TO TRAVEL WHILE ENSURING THAT THE GOVERNMENT'S NATIONAL SECURITY INTERESTS ARE MET

Plaintiffs' first count contends that they have been deprived of procedural due process because the DHS TRIP process does not afford them a meaningful opportunity to challenge their alleged inclusion on the No Fly List. This challenge fails. First, Plaintiffs do not identify any liberty interest that requires more process than what the redress process provides. While they

base their claim on the flawed assumption that they have a constitutional right to travel by plane to, from, and within the United States, the Ninth Circuit held in *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006), that the "Constitution does not guarantee the right to travel by any particular form of transportation." Indeed, Plaintiffs' own experiences demonstrate that they have access to other modes of transportation. Even assuming Plaintiffs have alleged a deprivation of a constitutionally-protected liberty interest, however, there is a sufficient redress for Plaintiffs, considering the nature and purpose of the terrorist screening programs at issue. Summary judgment should therefore be entered for Defendants on Count I of Plaintiffs' complaint. *See* Third Am. Compl., ¶¶ 138-44.

The fundamental requirement of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). But "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal citation omitted). Due process procedures may 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) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). At bottom, the due process evaluation "is flexible and calls for such procedural protections as the *particular situation demands*." *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1083 (9th Cir. 2010) (emphasis added) (*quoting Mathews*, 424 U.S. at 334.).

Plaintiffs allege that they are entitled to a "legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to

contest their continued inclusion on the No Fly List." Third Am. Compl., ¶ 143.[10] "[A]ssessing the adequacy of a particular form of notice requires balancing the interest of the State against the individual interest sought to be protected." *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (internal quotation marks omitted). In cases involving national security and the possibility of terrorist activities, the government's interest is at its zenith. "[N]o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Wayte v. U.S.*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning."). As explained below, TSDB information – including an individual's TSDB status and the reasons why he or she was placed on the TSDB – is extremely sensitive; disclosure of such information would seriously undermine the government's counter-terrorism efforts. As a result, the "process" that is due in cases involving the TSDB cannot, and should not, require (as Plaintiffs suggest) a judicial hearing with the presentation of evidence and examination of witnesses. *See Mathews*, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.").

In evaluating whether the government has provided due process, the Court should consider three factors: (1) "'the private interest that will be affected by the official action'"; (2)

[10] Plaintiffs do not appear to be asserting a claim that persons on the No Fly List should have received pre-deprivation notice. *See* Third Am. Compl., p. 26 (captioning First Claim for Relief as "failure to provide *post-deprivation* notice and hearing….") (emphasis added). The Supreme Court has held that "due process is not denied when postponement of notice and hearing is necessary" to ensure prompt government action in a variety of circumstances, such as where advance warning might frustrate the purpose of the action by allowing the property interest to be destroyed, transferred or removed from the jurisdiction. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). *See also FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988).

"'the risk of an erroneous deprivation of such interests 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.'" *Gilbert*, 520 U.S. at 931-32; *Mathews*, 424 U.S. at 335. In this matter, all of the factors support the process the government provides.

Currently, the process provided to individuals who contend they have been denied boarding by TSA consists of two parts. First, such individuals are directed to file a complaint with DHS TRIP; second, DHS TRIP reviews those complaints. *See* Stipulated Facts, ¶¶ 4-5; Coppola Decl., ¶¶ 45-46. If the denial of boarding resulted from a match to a name on the No Fly List, the complaint is referred from DHS TRIP to TSC. *See* Stipulated Facts, ¶ 8; Coppola Decl., ¶ 47. TSC then reviews the complaint and the underlying information related to the original nomination; TSC also conducts a *de novo* review of any additional derogatory or other available information and determines whether the individual should remain on the No Fly List. *See* Coppola Decl., ¶¶ 49-51; Stipulated Facts, ¶ 9. Once the determination is made, DHS TRIP sends out a letter to the individual. *See* Stipulated Facts, ¶¶ 9-10; Coppola Decl., ¶¶ 51. The letter does not confirm or deny whether the individual is on the No Fly List, but informs the complainant that his or her records have been reviewed and that he or she may (in some cases, after a certain amount of time) pursue judicial review in the Courts of Appeal. *See* Stipulated Facts, ¶ 11.

In cases where individuals believe they have been denied the ability to board a plane as a result of being included on the No Fly List, the government's procedures thus permit them to

apply for redress, receive a response, avail themselves of an administrative appeal process as well as judicial review. This is more than sufficient, particularly in light of the compelling national security concerns related to the No Fly List and the Ninth Circuit's holding that there is no constitutional right to fly. No further process is required.

A. Plaintiffs Have Not Articulated a "Private Interest" That Requires Beyond What the Current Redress Process Provides.

The private interests advanced by Plaintiffs do not require any additional process beyond what is already provided because any liberty interest Plaintiffs have in traveling has not been significantly diminished. The Constitution does not guarantee U.S. citizens a right to the most convenient means of travel. The Ninth Circuit has already held that there is no constitutional right to travel by plane, *Gilmore*, 435 F.3d at 1136, and the Supreme Court has recognized that restrictions on international travel are permissible unless "wholly irrational." *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978). Indeed, courts have repeatedly held that there is no right to any particular means of travel, even if the most convenient means of travel is restricted. *Gilmore*, 435 F.3d at 1136 (holding that there is no right to air travel); *Miller v. Reed*, 176 F.3d 1202, 1205-06 (9th Cir. 2006) (holding that there is no right to drive); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (holding that there is no right to travel "without any impediments" and burdens on a "single" form of transportation are not unreasonable); *see also Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2nd Cir. 2007) ("travelers do not have a constitutional right to the most convenient form of travel"); *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991) (same).

For example, in *Gilmore*, the Ninth Circuit upheld certain requirements for air travel because the plaintiff "does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him." 435 F.3d at 1137. The court accepted as true for the purposes of that decision Gilmore's allegation that "air travel is a necessity and not replaceable by other forms of transportation." *Id.* at 1136. The Ninth Circuit nonetheless held that there was no infringement on his Constitutional right to domestic travel because other means of travel remained possible. Moreover, the Ninth Circuit issued this ruling even though restrictions on interstate travel, unlike international travel, may be subject to higher scrutiny. *See, e.g., Fisher v. Reiser*, 610 F.2d 629, 638 n.1 (9th Cir. 1979); *see also Califano*, 439 U.S. at 177. If restrictions on a specific means of interstate travel do not trigger or offend the Constitution, this is even more clearly true for international travel.

Individuals placed on the No Fly List remain free to travel by other means. *Gilmore*, 435 F.3d at 1136 (holding that even if air travel is "a necessity and not replaceable . . . it does not follow that Defendants violated [Gilmore's] right to travel, given that other forms of travel remain possible"). While U.S. citizens, in general, have a right to enter the country, there are no allegations in the complaint that this right has been denied, and all of the Plaintiffs who wished to return to the U.S. have done so. Passengers who are denied boarding may choose to drive, take a train, or travel by ship, as other Plaintiffs in this case did. *See* Third Am. Compl., ¶¶ 69-76 (detailing Plaintiff Washburn's return to the U.S.); *id.* ¶¶ 122-28 (detailing Plaintiff Persaud's return to the U.S.); Declaration of Knaeble, Dkt. No. 19-7 at 11-12 (detailing Plaintiff Knaeble's

return to the U.S.).[11] While Plaintiffs may prefer to travel by plane, the government's interest in taking necessary steps to protect commercial aviation is of a much higher magnitude, and the balance is accordingly struck in Defendants' favor.

i. *Terrorism Screening Does Not Constitute a Bill of Attainder*

Plaintiffs also assert that they have a liberty interest in nonattainder – "not being singled out for punishment without trial" (Third Am. Compl., ¶ 142) – as well as a "right to be free from false governmental stigmatization as individuals who are 'known or suspected to be' terrorists, or who are otherwise associated with terrorist activity, when such harm arises in conjunction with the deprivation of their right to travel on the same terms as other travelers" and "their liberty interest under the Fifth Amendment in travel free from unreasonable burdens" (*Id.* ¶ 141). None of these interests was infringed when Plaintiffs were denied boarding.

A bill of attainder is "a *law* that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Admin'r of Gen. Servs*, 433 U.S. 425, 468 (1977) (emphasis added). Here, however, there is no law enacted by Congress that allegedly placed the specific Plaintiffs on the No Fly List. Instead, Congress has enacted laws requiring passengers to be screened for risks to civil aviation; the Executive branch is then responsible for identifying the passengers who pose such risks. *See supra* at 7. These actions do not constitute a bill of attainder. *See Paradissiotis v. Rubin*, 171 F.3d 983, 988-89 (5th Cir. 1999) (declining to apply bill of attainder clause to "regulatory" list of persons subject to Treasury's Libyan sanctions regime). Moreover, while persons who allege

[11] Moreover, each of the Plaintiffs who arrived at a U.S. port of entry was permitted to enter the United States. *See* Knaeble PI Decl., Dkt. No. 19-7, at ¶ 39, Washburn PI Decl., Dkt. No.19-10, at ¶¶ 24-25.

they were wrongfully denied boarding due to a mistaken placement on the No Fly List are not provided with a "trial," they are provided with the opportunity to assert grievances via DHS TRIP, and to obtain judicial review of the DHS TRIP decision. *See supra* at 7-9.

Finally, even if there were a bill of attainder to challenge, placement on the No Fly List does not qualify as "punishment." *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grou*p, 468 U.S. 841, 852 (1984) (setting forth relevant factors). First, precluding air travel is not within the historical meaning of punishment; second, Congress' legislative action to strengthen air security (especially in the wake of the 9/11 attacks) can more than reasonably be said to "further nonpunitive legislative purposes"; and third, the legislative record related to the establishment of TSA and the need for passenger screening does not evidence a Congressional "intent to punish." *Id.* Ultimately, there are no similarities between Plaintiffs and the "historical experience with bills of attainder in England and the United States. . . . includ[ing] sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich v. U.S.*, 351 F.3d 1198, 1218 (D.C. Cir. 2003).

ii. *Plaintiffs Have Not Alleged Any Stigma Resulting In a Diminution of Rights Guaranteed by State Law*

Likewise, Plaintiffs have not been stigmatized "in conjunction with their right to travel on the same terms as other travelers." Third Am. Compl., ¶ 141. Procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711 (1976). This is known as a "stigma-plus" claim. *See Green*, 351 F. Supp. 2d at 1129-30. The Constitution contains no reference, implied or otherwise, to a

right to "travel on the same terms as other travelers." *See supra* at 14-15. As a result, Plaintiffs cannot meet the standards required for a stigma-plus claim. *See Green*, 351 F. Supp. at 1130 (rejecting plaintiffs' claim that delayed boarding due to mistaken association with the No Fly List sufficed for stigma-plus claims). The *Green* court held that plaintiffs could not make out a stigma-plus claim, because they did "not have a right to travel without any impediments"; because "burdens on a single mode of transportation do not implicate the right to interstate travel"; and because plaintiffs "have not alleged any tangible harm to their personal or professional lives that is attributable to their association with the No Fly List, and which would rise to the level of a Constitutional deprivation of a liberty right." 351 F. Supp. 2d at 1130. The same is true here, for three reasons.

First, Plaintiffs have not articulated any other "right or status previously recognized under state law" of which they have been deprived. *See supra* at 14-16. Second, assuming there were a right to travel by airplane, there must be a "connection" between the stigma and the plus, which is not present in this case because Plaintiffs have available alternative means of travel domestically and internationally, or have been able to return to the U.S. on commercial aircraft. *See Velez v. Levy*, 401 F.3d 75, 90 (2d Cir. 2005). Third, Plaintiffs' allegations of harm from delay or the passage of time must be put into the context of their travels, which in some cases involved wholesale relocations or absences from the U.S. ranging from several months to more than a year. *See* Third Am. Compl., ¶¶ 49-50, 60, 69, 80-81, 90. Accordingly, to the extent Plaintiffs allege they suffered harm from being out of the country, those absences were not entirely due to the denial of boarding.

B. There is Little Risk of Erroneous Deprivation Given the Quality Controls Over the TSDB (and the even Smaller Subset of the No Fly List) and the Review of Redress Decisions Involving Alleged Placement on the No Fly List.

The government's current procedures for including individuals on the No Fly List protect against erroneous or unnecessary infringements of liberty. The TSDB is updated daily; it is also reviewed and audited on a regular basis to comply with quality control measures. *See* Coppola Decl., ¶23. Nominations for the No Fly List are reviewed by TSC personnel to ensure that they meet the required criteria. Coppola Decl., ¶¶ 20-21; *see also* Testimony of Timothy J. Healy, Former Director, Terrorist Screening Center, Before the Senate Committee on Homeland Security and Governmental Affairs, Washington, DC, March 10, 2010 (available at http://www.fbi.gov/news/testimony/the-lessons-and-implications-of-the-christmas-day-attack-watchlisting-and-pre-screening) (generally describing the criteria for placement on an aviation watchlist). To the extent an individual is denied boarding, and wishes to complain, he or she can file a complaint with DHS TRIP, which then triggers a subsequent review of the individual's status. *See* Stipulated Facts, ¶¶ 4, 5, 8, 9; Coppola Decl. ¶¶ 47-50. The current review process is effective, as demonstrated by the fact that TSC regularly removes or downgrades individuals who no longer meet the criteria for inclusion in the TSDB or its subset lists. Coppola Decl., ¶ 52. If the individual who alleges No Fly status is unsatisfied with the result, he is given notice that he may file a challenge in the court of appeals. *See* Stipulated Facts, ¶ 11.[12]

[12] In its decision in this case, the Ninth Circuit recognized certain limits on its jurisdiction under 49 U.S.C. § 46110 to consider "broad constitutional claims" challenging Plaintiffs' asserted inclusion on government watchlists that "do not require review of the merits of . . . individual DHS TRIP grievances." *Latif*, 686 F.3d at 1129. It also found that the district court may hear substantive challenges to Plaintiffs' alleged inclusion on the No Fly List, insofar as such claims were brought against TSC or the FBI. *Id.* But the fact that individuals may choose to bring

This process is appropriate and adequate to protect Plaintiffs' alleged liberty interests. Plaintiffs contend that the process is inadequate because it does not provide them with all information about their alleged status on the No Fly List, including any underlying derogatory information, and afford them the right to "confront or rebut" the grounds for their alleged inclusion on the list. *See* Third Am. Compl., ¶ 1. Confrontation and rebuttal are not absolute requirements for all government proceedings, especially in cases where the information at issue may be highly sensitive. *See infra* at 27. It is sufficient that persons who receive DHS TRIP determinations pertaining to allegations of denied or delayed airline boarding are provided with judicial review if they seek it. *See* Stipulated Facts, ¶ 11.[13]

Moreover, for reasons discussed in more detail below, the disclosure of status and any underlying derogatory information, which is typically classified, is not possible. Requiring the government to turn over such information to any individual who files suit alleging that he or she is on the No Fly List could force the government to disclose classified national security information to persons who are known or suspected of being associated with terrorism. *See* Coppola Decl., ¶¶ 27-39. As a result, DHS TRIP appropriately provides a process in which

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claims in the district court does not mean that they are required to do so. As a general matter, individuals may still obtain review in the court of appeals in order to challenge a specific redress decision issued through the DHS TRIP process as a result of a complaint for delayed or denied boarding by TSA. *Ibrahim v. DHS*, 538 F.3d 1250, 1256-57 (9th Cir. 2008). In one such case, the government submitted a record for the court's review. *See generally Arjmand v. DHS*, Dkt. No. 34, No. 12-71748 (9th Cir. filed June 2012).

[13] Because the parties have agreed to brief this case in two stages, Plaintiffs' substantive due process claims are not yet at issue. *See supra* note 1; Parties' Joint Case Management Plan, Dkt. No. 77, at 4. For purposes of the present stage in this matter, Plaintiffs' procedural due process claims, the Court need only consider the availability of review; it need not address Plaintiffs' individual substantive challenges. The parties will address how those claims may proceed after the present procedural due process claims are resolved.

individual complaints may be heard and reviewed, but the sensitivity of watchlisting information is preserved.

Due process does not require the government to put national security at risk by providing the process that Plaintiffs demand. *See HLP*, 130 S. Ct. at 2727 ("national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."). As the Ninth Circuit recognized in *Al Haramain Islamic Found., Inc. v. U.S. Dept. of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012), "the Constitution certainly does not require that the government take actions that would endanger national security."[14] *See also Jifry v. FAA*, 370 F.3d 1174, 1181-84 (D.C. Cir. 2004); *Tabba v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007).[15]

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[14] In *Al Haramain*, the Ninth Circuit considered a challenge to the government's designation of Al-Haramain as an organization that supports Al-Qaeda based on a record that included classified information filed *ex parte* and *in camera*. 686 F.3d at 985. While the court found that the *Mathews* factors supported Al-Haramain's due process challenge, it required only that the government consider steps to mitigate any burden from reviewing classified information *in camera* and *ex parte*, not to actually disclose the classified information in full to the other side. *Id.* at 988-89. Moreover, the *Al-Haramain* decision has limited value in this distinct context. There, the blocking of assets by the Office of Foreign Assets Control "deprived AHIF-Oregon of its ability to use any funds whatsoever, for any purpose." *Id.* at 986. By contrast, as discussed above, alleged restrictions on Plaintiffs' ability to fly by commercial airplane have limited effects on their individual's liberty interests in light of the Ninth Circuit's recognition that there is no constitutional right to travel. *Gilmore*, 435 F.3d at 1136.

[15] *See also Nat'l Council of Resistance of Iran ("NCRI") v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) ("[T]hat strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (rejecting "claim that the use of classified information disclosed only to the court *ex parte* and *in camera*" in designation of a foreign terrorist organization violated due process); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (statute not unconstitutional because it "authorizes the use of classified evidence that may be considered *ex parte* by the district court. . . . The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to

By providing an opportunity for review for the alleged denial or delayed boarding by TSA without requiring the government to reveal sensitive information (which may include classified material) that ought not to be revealed, DHS TRIP balances the public and private interests fairly and provides a suitable substitute for an evidentiary hearing. The government gives an individual who has experienced difficulties during TSA travel screening at airports or been prohibited from boarding a commercial aircraft an opportunity to be heard at a meaningful time and in a meaningful manner by permitting that individual to complain with specificity to the appropriate authorities about the difficulties that he or she has experienced; to have his or her watchlist status reviewed; to have appropriate changes made to applicable records; and if unsatisfied, to seek direct judicial review. *See Mathews*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552).

Moreover, Plaintiffs' assertion that due process requires disclosure of all of the evidence supporting a No Fly nomination be given to the person it concerns (Third Am. Compl., ¶ 143) contravenes precedent holding that the Executive is primarily responsible for protecting classified information, and for assessing the risks – like those discussed here – inherent in its disclosure. *See*, *e.g.*, *Stehney*, 101 F.3d at 931-32 (finding that judicial review of the merits of an Executive Branch decision to grant or deny a security clearance would violate separation of

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assets were to reveal information that might cost lives" (internal citation omitted)); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 600 n.9, 604-05 (3d Cir. 1990) (unfairness remedied by "*in camera* examination by the trial court of the withheld documents and any supporting or explanatory affidavits"); *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 45 (D.D.C. 2005), *aff'd in part*, 477 F.3d 728 (D.C. Cir. 2007) (recognizing in IEEPA context plaintiff's review of the administrative record is "limited only to those portions of the administrative record that are not classified" while the Court "has before it both the classified and unclassified administrative record").

powers principles). Even a protective order requiring information to be disclosed notwithstanding the Executive's classification – let alone a full-blown evidentiary hearing in which such information is disclosed and subject to cross-examination – raises serious separation of powers issues. *See* U.S. Const. art. II, § 2, cl. 1; *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The Executive's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President").[16] "[T]hat strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners." *NCRI*, 251 F.3d at 207. As the D.C. Circuit explained in *NCRI*, disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *See id.* at 208-09. DHS TRIP strikes that balance in a manner that is both appropriate and necessary, and it thus provides a remedy to Plaintiffs that fully meets the requirements of due process.

C. Protecting Watchlisting Status, and the Underlying Information, is Crucial to the Government's Counterterrorism Efforts

Finally, the DHS TRIP process afforded Plaintiffs is adequate because the government has a paramount interest in ensuring that TSDB information can be broadly shared across the government to maximize the nation's security, without fear that such information will be disclosed whenever anyone cannot travel as he or she might choose. *See Gilbert*, 520 U.S. at

[16] Faced with similar issues, courts addressing the protection of classified information have consistently acknowledged the Executive's authority and expertise in such matters. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("The assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts.") (internal citation omitted).

931-32. As the events of recent years have demonstrated, "there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance." *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006). To that end, Congress has required TSA by statute to establish, maintain, and update lists of individuals who may be a threat to civil aviation and national security. 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(A). Courts have recognized the vital role watchlisting plays in securing our nation, along with the government's need to maintain the confidentiality of information regarding that list. *See Tooley v. Bush*, Case No. 06-cv-00306 (CKK), 2006 WL 3783142, at *20 (D.D.C. Decl. 21, 2006), *aff'd, Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) ("[I]f TSA were to confirm in one case that a particular individual was not on a watch list, but was constrained in another case merely to refuse to confirm or deny whether a second individual was on a watch list, the accumulation of these answers over time would tend to reveal [sensitive security information].") (internal citations omitted); *Cf. Bassiouini v. CIA*, 392 F.3d 244, 245-46 (7th Cir. 2004) (explaining that if the "CIA opens its files most of the time and asserts the state-secrets privilege only when the information concerns a subject under investigation or one of its agents, then the very fact of asserting the exemption reveals that the request has identified a classified subject or source").

In considering the government's interests in this area, it is clear that the watchlisting process must be appropriately robust to address the evolving terrorist threat facing our nation. The screening process thus allows the intelligence community to share information in order to help identify, detect, and deter terrorists and to make predictive assessments about which persons are likely to pose a risk of engaging in or preparing for terrorism or terrorist activities. Establishing a watchlisting program that is both forceful and flexible is thus a matter of national

security, and thus DHS TRIP represents the government's efforts to provide both redress and security. The Court should decline Plaintiffs' request to substitute a judicially-created program for one that has been developed by Congressional mandate after careful consideration by the government in the sensitive area of watchlisting. Such matters "are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292.[17] The Supreme Court's recent decision in *HLP*, 130 S. Ct. 2705, underscores the deference due to both the Legislative and Executive Branches in review of factual conclusions and legal matters that implicate national security, even when constitutional concerns are raised. *See* 130 S. Ct. at 2727 ("But when it comes to collecting evidence and drawing factual inferences in [national security and foreign relations], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.") (internal quotation marks and citation omitted); *see also Rahman v. Chertoff*, 530 F.3d 626, 627-28 (7th Cir. 2008) ("modesty is the best posture for the branch that knows the least about protecting the nation's security and that lacks the full kit of tools possessed by the legislative and executive branches").

The declaration submitted in support of this motion explains in detail the reasons why the disclosure of information related to watchlisting, including watchlist status and the reasons for an individual's inclusion, could cause serious harm to the national security. The TSDB is the federal government's consolidated terrorist "watchlist," containing identifying information about persons known or reasonably suspected by the government to have ties to domestic or

[17] *See also United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001) (government interest in "ensuring national security" is "important in [itself] . . .but courts have long recognized that the Judicial Branch should defer to decisions of the Executive Branch that relate to national security.")..

international terrorism. Coppola Decl., ¶ 7. The decision to include an individual in the TSDB as a known or suspected terrorist is based on intelligence-gathering and investigative efforts by the FBI, the National Counterterrorism Center, and other agencies within the law enforcement and intelligence communities. Coppola Decl., ¶¶ 19-25.

The government does not publicly confirm or deny whether particular individuals are now or ever have been listed in the TSDB, because to do so would in effect disclose the fact that the individuals in question are currently or once were the subjects of counterterrorism intelligence-gathering or investigative activity by the federal government. *See* Coppola Decl., ¶ 26. Moreover, if the government were to disclose watchlist status, individuals who know they are in the TSDB could take steps to avoid detection and circumvent surveillance. Coppola Decl., ¶¶ 27-39. Similarly, the disclosure that someone is *not* in the TSDB might lead that person to take advantage of that fact, so that he or she is in a better position to commit a terrorist act against the U.S. before he or she comes to the attention of government authorities. *Id*.[18] For these reasons, courts have regularly upheld the government's ability to withhold this kind of information. *See, e.g.*, *Tooley*, 2006 WL 3783142, at *20; *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005) (rejecting FOIA request for information about the No Fly List; "'[r]equiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned.'"); *Barnard v. DHS*, 531 F. Supp. 2d 131,

[18] Some Plaintiffs allege they were told they were on (or off) the No Fly List by government officials, but, even if true, such allegations do not diminish the risks of official disclosure. *See* Coppola Decl., ¶ 35.

134 (D.D.C. 2008) (same) (upholding withholding of records in response to plaintiff's request to "obtain records related to him that could explain why he has been detained, questioned, and/or searched in airports during and after his international trips beginning in January 2003").

Even if the government were to inform individuals on the No Fly List of their status, however, that information would not satisfy Plaintiffs' demands. In their Third Amended Complaint, Plaintiffs ask the Court to order Defendants to provide them "with notice of the reasons and bases for their placement on the No Fly List and a meaningful opportunity to contest their continued inclusion on the No Fly List." Third Am. Compl. at Prayer for Relief.[19] This kind of process would require the government to disclose the classified intelligence and otherwise sensitive derogatory information underlying a TSDB nomination, such as FBI investigative files. Coppola Decl., ¶¶ 40-44. Release of this material would put FBI sources and methods at risk, as well as eliminate any investigative advantages the FBI has over persons legitimately placed on the No Fly List. *Id.* "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) (*per curiam*). These important government interests circumscribe the process that must be provided.

Requiring disclosures of any and all information associated with No Fly List nominations would harm national security. *See Jifry*, 370 F.3d at 1183-84 (In determining whether plaintiffs

[19] While Plaintiffs are not specific about the kind of process they want, their references to an ability to "confront" or "rebut" (Third Am. Compl.,¶ 1), evokes a hearing involving the submission of evidence and the examination of witnesses. *See* U.S. Const., Amend. VI (Confrontation Clause).

posed threats to civil aviation, "substitute procedural safeguards may be impracticable [in those cases] and, in any event, are unnecessary" because of "the governmental interests at stake and the sensitive security information" involved; as a result, due process did not require that plaintiffs be given the "specific evidence" upon which the determinations are based); *Stehney v. Perry*, 101 F.3d 925, 936 (3d Cir. 1996) (agency may revoke a security clearance without affording the holder of the clearance "[t]he right to confront live witnesses, review information from prior investigations, or to present live testimony" because affording those rights would not "improve[] the fairness of the revocation process."). DHS TRIP strikes an appropriate balance between the weighty government interests at stake in air security and the travel burdens imposed by pre-screening passengers on planes to, from, and within the U.S. Plainly, the government cannot, consistent with national security, give notice to known or suspected terrorists regarding their inclusion in the TSDB, and on the No Fly List subset, and the reasons for their inclusion, all so that these individuals may obtain an evidentiary hearing where such classified intelligence and sensitive law enforcement information can be challenged.

II. THE GOVERNMENT'S REDRESS POLICY IS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW

Judgment should also be entered for Defendants on Plaintiffs' claim that the redress policy is unlawful under the Administrative Procedure Act ("APA"). *See* Third Am. Compl., ¶¶ 147-48. Pursuant to the APA's limited waiver of sovereign immunity, a reviewing court must uphold an agency decision unless it is (1) arbitrary and capricious; (2) an abuse of discretion; or (3) otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The scope of judicial review under this

standard is a narrow and deferential one, and a court cannot substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under arbitrary and capricious review, the court does not undertake its own fact-finding; rather, the court must review the administrative record as prepared by the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). As long as the agency's decision was supported by a rational basis, it must be affirmed. *See, e.g., Buckingham v. Sec'y of U.S. Dept. of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010); *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 899 (9th Cir. 2010).

Plaintiffs make no new allegations in this claim, nor do they cite any authority for the proposition that the APA requires something more than what the Constitution does in this context. Defendants have followed Congress' command that all passengers be screened, and that all persons (including U.S. citizens) who pose a threat to civil aviation on any flight be denied boarding. Moreover, Plaintiffs have availed themselves of the redress process mandated by Congress, and the substance of any resulting determinations regarding Plaintiffs is subject to review in court. Consequently, Defendants have acted reasonably and in accordance with law, and the Complaint does not identify any final agency action that is arbitrary or capricious in violation of the APA. Moreover, the availability of judicial review of particular determinations concerning the Plaintiffs constitutes an alternative remedy, and therefore no action will lie under the APA. *See* 5 U.S.C. § 704; *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998). Judgment should thus be entered for Defendants on the due process component of Count III of Plaintiffs' Complaint.

Moreover, the remedy requested by Plaintiffs – an injunction creating "a legal mechanism that affords them notice of the reasons and bases for their placement on the No Fly

List and a meaningful opportunity to contest their continued inclusion on the No Fly List" (Third Am. Compl., p. 29) – is inappropriate. Asking the Court to assume responsibility for a redress process to determine who should and should not be on the No Fly List turns ordinary administrative law principles on their head, and it is particularly troublesome in this national security context. Plaintiffs want the Court to reassess the security risks at issue in maintenance of the No Fly List and to establish new substantive and procedural rules in a new redress process when the current statutorily-authorized process works as it should. Plaintiffs' request is improper because courts "owe considerable deference to [the Executive] branch's assessment in matters of national security," *Bassiouni*, 436 F.3d at 724, and must be "reluctant to intrude upon the authority of the Executive" in such affairs, *Egan*, 484 U.S. at 530. Plaintiffs' requested relief plainly treads upon sensitive national security Executive functions that are committed to the political branches.

CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment should be granted.

Dated: February 13, 2013.

Respectfully submitted,

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