Steven M. Wilker, OSB No. 911882
Email: steven.wilker@tonkon.com
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204
Tel.: (503) 802-2040; Fax: (503) 972-3740
Cooperating Attorney for the ACLU Foundation of Oregon

Hina Shamsi (Admitted *pro hac vice*)
Email: hshamsi@aclu.org
Nusrat Jahan Choudhury (Admitted *pro hac vice*)
Email: nchoudhury@aclu.org
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 519-2500; Fax: (212) 549-2654

Kevin Díaz, OSB No. 970480
Email: kdiaz@aclu-or.org
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel.: (503) 227-6928; Fax: (503) 227-6948

Ahilan T. Arulanantham (Admitted *pro hac vice*)
Email: aarulanantham@aclu-sc.org
Jennifer Pasquarella (Admitted *pro hac vice*)
Email: jpasquarella@aclu-sc.org
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Tel.: (213) 977-9500; Fax: (213) 977-5297

Alan L. Schlosser (Admitted *pro hac vice*)
Email: aschlosser@aclunc.org
Julia Harumi Mass (Admitted *pro hac vice*)
Email: jmass@aclunc.org
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493; Fax: (415) 255-8437

Laura Schauer Ives (Admitted *pro hac vice*)
Email: lives@aclu-nm.org
ACLU Foundation of New Mexico

P.O. Box 566
Albuquerque, NM 87103
Tel.: (505) 243-0046; Fax: (505) 266-5916

Mitchell P. Hurley (Admitted *pro hac vice*)
Email: mhurley@akingump.com
Christopher M. Egleson (Admitted *pro hac vice*)
Email: cegleson@akingump.com
Justin H. Bell (Admitted *pro hac vice*)
Email: bellj@akingump.com
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel.: (212) 872-1011; Fax: (212) 872-1002

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Ayman Latif, et al., Plaintiffs, v. Eric H. Holder, Jr., et al., Defendants.	No. 10-cv-750 (BR)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDATS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs are thirteen U.S. citizens who flew commercial airlines for years without incident until they were branded as suspected terrorists based on secret evidence, publicly denied boarding on flights, and told by U.S. officials that they were banned from flying—perhaps forever. Each of them sought "redress" through the only available government process—the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP")—but none has been told why he or she is on the No Fly List or given an opportunity to refute the basis for his or her inclusion. Plaintiffs, who pose no threat to aviation safety or national security, are left in limbo.

Defendants' motion for partial summary judgment on Plaintiffs' procedural due process claims boils down to two remarkable contentions. First, Defendants argue that when the government bans U.S. citizens from air travel, one of the basic incidents of modern life, the Constitution has nothing to say about the adequacy and fairness of the procedures the government provides to challenge the ban. Second, Defendants insist that their post-deprivation procedures are adequate even though Defendants have an explicit policy of refusing to confirm or deny *any* information concerning a person's status on the No Fly List, and do not provide citizens with any statement of reasons or a hearing to defend themselves. Defendants' arguments fail as a matter of law and fact.

Relying on inapplicable cases invoking the fundamental right to interstate travel—and not controlling cases adjudicating procedural due process rights when the government restricts travel—Defendants erroneously assert that Plaintiffs liberty interest in travel has not been burdened. They also misapply Ninth Circuit law and claim that Plaintiffs cannot show a government deprivation of their liberty interest in reputation because no associated right has

been curtailed—despite the very real government restriction on Plaintiffs' right to fly. Viewed in light of the correct law, Plaintiffs' facts confirm that inclusion on the No Fly List imposes a draconian sanction that triggers due process protections because: it severely burdens Plaintiffs' liberty interest in travel; it stigmatizes Plaintiffs, who have never been charged with any crime, as suspected terrorists and prevents them from flying; and it has resulted in devastating consequences for Plaintiffs' personal and professional lives.

Both Defendants' "Glomar" policy of refusing to confirm or deny any information about No Fly List status and their inadequate procedures are directly contrary to governing due process doctrine. Courts routinely require notice and some form of hearing for much less severe deprivations of liberty than the record shows Plaintiffs have suffered. Thus, the government cannot suspend a student from school for ten days, recover excess Social Security payments, or terminate state assistance for utility bills without *some* kind of notice and hearing. Courts also require more notice and process in the national security context, including for alleged enemy alien combatants detained outside the United States, foreign and domestic organizations the government seeks to designate as terrorist, and others who are not entitled to more constitutional protections than Plaintiffs.

The facts in the record show that Defendants' refusal to provide Plaintiffs any kind of notice or a hearing to rebut Defendants' evidence and present their own, leaves Plaintiffs unable to correct their wrongful placement on the No Fly List. Nevertheless, Defendants insist that additional notice or process is unwarranted because their secret internal procedures guard against the erroneous deprivation of rights. According to Defendants, only people who meet secret No Fly List criteria are included in the list, and DHS TRIP corrects any inadvertent errors. But the record paints a very different picture. The government's own audits have found substantial

inaccuracy in the watch lists from which the No Fly List is drawn, including failures to timely remove individuals who have been wrongly listed. Based on the facts in the record, the need for greater procedural safeguards to prevent acute harm to Plaintiffs' liberties is obvious.

Defendants' final claim is that providing Plaintiffs any reason for their No Fly List inclusion will unleash a parade of national security horribles. Contrary to Defendants' contentions, however, the record shows that mere confirmation or denial of Plaintiffs' inclusion on the No Fly List will not disclose anything that is not already known or routinely disclosed by the government itself. Nor will providing Plaintiffs the rudiments of process—the government's evidence against them, and a hearing—compromise any government interests in protecting classified or sensitive information. Defendants routinely disclose or describe such information when courts require them to provide notice and a hearing in the national security context. More fundamentally, the possibility that sensitive national security information might be involved in particular instances is no reason to foreclose notice or a hearing categorically.

This Court should deny Defendants summary judgment on Plaintiffs' procedural due process claims.

STATEMENT OF FACTS

I. The No Fly List

The Terrorist Screening Center ("TSC"), which is administered by the Federal Bureau of Investigation ("FBI"), develops and maintains the federal government's consolidated Terrorist Screening Database ("TSDB" or the "watch list"). Joint Statement of Stipulated Facts ("Stip. Facts") ¶ 1, ECF No. 84. The watch list is the federal government's master repository for suspected international and domestic terrorist records used for watch list-related screening. *Id*.

¶ 1.[1] TSC sends watch list records to other agencies, including the Transportation Security Administration ("TSA"), which use those records to identify suspected terrorists. Stip. Facts ¶¶ 1, 3. When individuals make airline reservations and check in at airports, TSA or the airline conducts a name-based search to determine whether the person is on TSC's watch list.[2]

TSC makes the ultimate decision whether a nominated individual meets the minimum requirements for inclusion on the watch list. Stip. Facts ¶ 15. TSC determines whether it has "reasonable suspicion" that the person is a "known or suspected terrorist." *Id.* ¶ 16. According to TSC, "reasonable suspicion requires articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism and terrorist activities." *Id.* (internal quotation marks omitted).

According to the government's own audits and investigations, TSC's procedures have resulted in gross over-inclusion and error. A 2007 Government Accountability Office ("GAO") report found that the TSC rejects only approximately one percent of nominations to the watch list.[3] Audits in 2008 and 2009 by the Department of Justice's Office of the Inspector General ("DOJ OIG") concluded that "the FBI did not consistently update or remove watchlist records when appropriate."[4] The 2009 DOJ OIG audit also determined that, of the watch list records it reviewed, in 72 percent of cases, the FBI failed to timely remove closed-case records; in 67 percent of cases, the FBI failed to appropriately modify outdated records; and in 35 percent of

[1] Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. K at 1.
[2] Choudhury Decl. Ex. K at 3.
[3] Choudhury Decl. Ex. I at 22.
[4] Choudhury Decl. Ex. F at ii; *see also* Choudhury Decl. Ex. J.

cases, the FBI failed to appropriately remove terrorism classifications, even though many of these should have been removed from the watch list entirely.[5]

TSC selects a subset of individuals from the consolidated watch list for inclusion in the No Fly List. Stip. Facts ¶¶ 1–2; Decl. of Cindy A. Coppola ("Coppola Decl.") ¶ 12. Defendants have not publicly disclosed the standards or criteria TSC applies to determine whether a person will be placed on the No Fly List. Stip. Facts ¶ 17. People placed on the No Fly List are denied boarding on planes flying to or from the United States or over U.S. airspace. Coppola Decl. ¶ 13.[6] They are also denied passage on ships bound for, or departing from, the United States.[7] In addition, they may be prevented from boarding flights that do not cross U.S. airspace because TSC shares the watch list with 22 foreign governments.[8]

II. The Current Redress Process

An individual who is apparently placed on the No Fly List can seek redress only by completing a standard form and submitting it to the Department of Homeland Security's Traveler Redress Inquiry Program. Stip. Facts ¶ 4. DHS TRIP determines whether a redress request concerns an exact or near match to the watch list, and if so, forwards the complaint to TSC. *Id.* ¶¶ 8–9. TSC determines whether the individual is on the watch list, consults with any relevant agencies, and makes a final decision as to whether the person should remain on the list. *Id.* DHS

[5] Choudhury Decl. Ex. F at iv–vi.
[6] Choudhury Decl. Ex. K at 3.
[7] Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-64, 72 Fed. Reg. 48,320, 48,322 (Aug. 23, 2007) (passengers on vessels departing the United States are vetted against consolidated terrorism watch list); *id.* at 48,325 (denying passage on ships to "matches" against "the same terrorist watch list used for aircraft passenger vetting").
[8] Choudhury Decl. Ex. E at 21 n.24 (reporting that TSC shares the watch list with 22 foreign governments).

TRIP responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. Stip. Facts ¶ 11.[9]

III. Denial of Boarding and Plaintiffs' Efforts to Seek Redress

Each of the Plaintiffs flew for years without incident, but was prevented from boarding a flight over U.S. airspace after January 1, 2009.[10] Plaintiffs first found out that they could not fly when they were denied boarding in airports; they felt humiliated and deeply stigmatized as suspected terrorists because airline officials, law enforcement officers, their family members and classmates, and members of the public saw or learned that they were denied boarding.[11] None of the Plaintiffs poses a threat to civil aviation, or knows why they were prevented from flying.[12]

Each Plaintiff filed at least one DHS TRIP complaint seeking removal of his or her name from the No Fly List. Stip. Facts ¶ 13. In response, each received a DHS TRIP determination letter that neither confirms nor denies the existence of any terrorist watch list records relating to

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[9] Sometimes, the letter indicates that the redress seeker can pursue an administrative appeal with TSA or can seek judicial review in the U.S. Courts of Appeals pursuant to 49 U.S.C. § 46110. Stip. Facts ¶ 11.

[10] Decl. of Salah Ali Ahmed ("Ahmed Decl.") ¶¶ 3, 6; Decl. of Nagib Ali Ghaleb ("Ghaleb Decl.") ¶¶ 5–6; Decl. of Mohamed Sheikh Abdirahman Kariye ("Kariye Decl.") ¶¶ 4, 6; Decl. of Faisal Nabin Kashem ("Kashem Decl.") ¶¶ 3, 6; Decl. of Raymond Earl Knaeble IV ("Knaeble Decl.") ¶¶ 8–9; Third Am. Compl. ¶¶ 42, ECF No. 83; Decl. of Ibraheim Y. Mashal ("Mashal Decl.") ¶¶ 5, 7; Decl. of Amir Meshal ("Meshal Decl.") ¶¶ 3, 5; Decl. of Elias Mustafa Mohamed ("Mohamed Decl.") ¶¶ 3, 6; Choudhury Decl. Ex. L ¶¶ 3, 5 (Decl. of Abdullatif Muthanna ("Muthanna Decl.")); Decl. of Stephen Durga Persaud ("Persaud Decl.") ¶ 5; Decl. of Allah R. Rana ("A. Rana Decl.") ¶ 5; Decl. of Mashaal Rana ("M. Rana Decl.") ¶¶ 4, 6; Decl. of Nauman Rana ("N. Rana Decl.") ¶ 3; Decl. of Steven William Washburn ("Washburn Decl.") ¶¶ 6–7.

[11] Ahmed Decl. ¶ 7; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 7; Kashem Decl. ¶ 7; Knaeble Decl. ¶ 10; Third Am. Compl. ¶ 42; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 7; Choudhury Decl. Ex. L ¶¶ 6, 22 (Muthanna Decl.); Persaud Decl. ¶ 6; M. Rana Decl. ¶ 6; Washburn Decl. ¶ 8.

[12] Ahmed Decl. ¶¶ 11–12; Ghaleb Decl. ¶¶ 15–16; Kariye Decl. ¶¶ 10–11; Kashem Decl. ¶¶ 14–15; Knaeble Decl. ¶¶ 22–23; Third Am. Comp. ¶ 135; Mashal Decl. ¶¶ 17–18; Meshal Decl. ¶¶ 9–10; Mohamed Decl. ¶¶ 14–15; Choudhury Decl. Ex. L ¶¶ 25–26 (Muthanna Decl.); Persaud Decl. ¶¶ 13–14; M. Rana Decl. ¶¶ 18–19; Washburn Decl. ¶¶ 23–24.

him or her. Stip. Facts ¶¶ 11, 13.[13] None of the letters explain any reason or basis for the individual's inclusion on the watch list or the No Fly List. Stip. Facts ¶¶ 11–12; *see* Decl. of James G. Kennedy, Jr. ("Kennedy Decl.") Ex. A; Decl. of Mashaal Rana ("M. Rana Decl.") Ex. ¶ 17 & Ex. A.

IV. Defendants' Disclosure of Watch List Status

In accordance with their Glomar policy, Defendants will not disclose the names of individuals on the No Fly List or the consolidated terrorism watch list. Coppola Decl. ¶ 14. U.S. and airline officials, however, told each of the Plaintiffs that they are on the No Fly List.[14]

TSC also shares watch list information with thousands of law enforcement officers from federal, state, local, territorial, and tribal agencies, some private sector individuals, and 22 foreign governments.[15] In addition, the government discloses watch list status through CBP's Global Entry program, which identifies "low-risk" travelers permitted to apply for expedited clearance through border inspection when arriving in the United States from abroad.[16] CBP selects participants in the Global Entry program after checking their names against the watch list.[17] According to the government's own description of Global Entry and the No Fly List, people on the No Fly List are categorically ineligible for Global Entry. Accordingly, by

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[13] Declaration of James G. Kennedy, Jr. ("Kennedy Decl.") ¶ 13 & Ex. A; Declaration of Mashaal Rana ("M. Rana Decl.") ¶ 17 & Ex. A.

[14] Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 6; Kashem Decl. ¶ 6; Knaeble Decl. ¶ 9; Third Am. Compl. ¶ 43; Mashal Decl. ¶¶ 7–10; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L ¶¶ 5, 22 (Muthanna Decl.); Persaud Decl. ¶¶ 7–10; A. Rana Decl. ¶ 5; M. Rana Decl. ¶ 6; Washburn Decl. ¶ 8.

[15] Choudhury Decl. Ex. D at 2 & n.3; Choudhury Decl. Ex. E at 21 n.24.

[16] Members may use automated kiosks to present identification, answer questions, receive a receipt and proceed to baggage claim and the exit. Choudhury Decl. Ex. A at 1; Choudhury Decl. Ex. B at 1; Choudhury Decl. Ex. C at 2.

[17] Choudhury Decl. Ex. C at 3 (According to the executive director of Admissibility and Passenger Programs for CBP, the "rigorous background check . . . tick[s] off the sorts of things the government probes like . . . watch lists . . . .") (internal quotation marks omitted).

approving a traveler for Global Entry, the government discloses that the individual is not on the No Fly List.

ARGUMENT

Summary judgment is only appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Lawler v. Montblanc North America, LLC*, 704 F.3d 1235 (9th Cir. 2013). The Court may not grant summary judgment if a "reasonable juror, drawing all inferences in favor of the nonmoving party could return a verdict in the nonmoving party's favor." *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

I) Defendants' Failure to Provide Plaintiffs Notice or a Hearing Violates the Fifth Amendment Guarantee of Procedural Due Process

Defendants seek partial summary judgment under the procedural component of the Fifth Amendment's Due Process Clause. The Court must first determine whether the record demonstrates the deprivation of a protected liberty interest. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). The Court must then decide whether Defendants' post-deprivation procedures satisfy due process according to the familiar three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which requires the Court to weigh: (1) "the private interest that will be affected by the official action," (2) "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."[18]

Defendants cannot meet their burden because as a matter of law, Plaintiffs have a liberty interest in both travel and their reputations, *infra* 9–13, 16–18, and the facts in the record clearly demonstrate a severe deprivation of both, *infra* 13–18.[19] Contrary to Defendants' arguments that the post-deprivation process they provide is adequate, governing Supreme Court and Ninth Circuit law and the stipulated facts before this Court make clear that Defendants' failure to provide Plaintiffs any notice, statement of reasons, or hearing that would permit them to confront or rebut the basis for their inclusion in the No Fly List violates the Fifth Amendment's procedural due process guarantee.

A) Defendants' Placement of Plaintiffs on the No Fly List Severely Burdens Their Constitutionally Protected Liberty Interests

1) *No Fly List placement deprives Plaintiffs of their liberty interest in travel.*

Defendants fundamentally misapprehend Plaintiffs' claim when they characterize it as asserting "a constitutional right to fly," or "a right to the most convenient means of travel." Defs.' Mem. of Law in Support of Partial Summ. J. ("Defs.' Br.") 2, 14. Plaintiffs bring a very different claim, asserting their Fifth Amendment procedural due process rights. The distinction between the two is critical. That is because, there are at least two types of right to travel claims, each of which invokes a different right and seeks a different remedy; the standards courts apply

[18] Plaintiffs do not contest that this motion concerns only the constitutionality of Defendants' post-deprivation procedures.

[19] Because Plaintiffs clearly have protected liberty interests in travel and freedom from false government stigmatization, they do not here press their claim that they have a third liberty interest in being free of attainder for purposes of procedural due process. *See* Third Am. Compl. ¶¶ 142, 144. However, Plaintiffs reserve the right to argue in the second phase of this case that their interest in being free of attainder can serve as a basis for their substantive due process challenges to their individual placement on the No Fly List

to each are also distinct. In the first, plaintiffs invoke the fundamental right to interstate travel or substantive due process and seek to invalidate entirely a government restriction on travel on the grounds that it is *per se* unconstitutional. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (invalidating state residency requirement denying welfare to applicants who had resided in state for less than one year because it inhibited migration of needy persons in violation of the fundamental right to interstate travel), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 670–71 (1974); *Gilmore v. Gonzales*, 435 F.3d 1125, 1130–32 (9th Cir. 2006) (plaintiff unsuccessfully sought invalidation of TSA policy requiring identification or extra screening as a condition of boarding planes on the grounds that it violated liberty interest in travel). In the second, plaintiffs invoke Fifth Amendment procedural due process, arguing not that a government restriction on travel is unconstitutional *per se*¸ but that the *burden* the restriction imposes on the right to travel requires fairer process. *See, e.g.*, *De Nieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992) (plaintiff was entitled to post-deprivation hearing under Fifth Amendment when government agency seized her passport, burdening her liberty interest in travel). Plaintiffs raise the second claim. But Defendants mistakenly ask this Court to apply standards from the first to deny Plaintiffs' claim. Application of the correct law to the undisputed facts, however, establishes that Defendants' placement of Plaintiffs on the No Fly List severely burdens their liberty interest in travel and that Plaintiffs are entitled to the procedural due process protections they request.

It is firmly established that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *id.* at 126–27 ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel

within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."). The Supreme Court and the Ninth Circuit have unambiguously held that there is a liberty interest in international travel. *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (striking down statute making it a criminal offense for Communist Party member to apply for passport because it "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment"); *De Nieva*, 966 F.2d at 485 (holding that it has been "clearly established" since at least 1988 that due process protects against burdens on international travel). There is no question that the same rule applies to burdens on interstate travel. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (right to interstate travel is "virtually unqualified"); *Fisher v. Reiser*, 610 F.2d 629, 637–638 & n.1 (9th Cir. 1980) (collecting Supreme Court authority recognizing that interstate travel is a "fundamental" right).[20]

Government action that burdens the liberty interest in travel thus triggers the need for procedural safeguards against undue deprivations. *See, e.g.*, *De Nieva*, 966 F.2d at 485 (procedural due process required after government retention of passport); *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990) (same where government denied U.S. citizen admission to the United States). This is true even where the challenged action does not foreclose all travel. *See, e.g.*, *id*. at 234 (burden on ability to "travel to and from Mexico," but not other countries).

The case on which Defendants rely most heavily, *Gilmore*, does not hold otherwise. There, the plaintiff sought to completely invalidate a TSA policy requiring travelers to present identification or submit to enhanced search before boarding flights. 435 F.3d at 1130–32. The Ninth Circuit rejected the request because there is no "fundamental right to travel by airplane."

[20] Because the right to interstate travel is a "fundamental" right, government action burdening interstate travel must satisfy at least the lesser procedural due process requirements applicable to restrictions on international travel. *See Shapiro*, 394 U.S. 642–43 & n.1 (Stewart, J., concurring).

Id. at 1137. But the Ninth Circuit did not address—because the plaintiff did not raise—the fairness of the government's *procedures*, except insofar as it stated that the plaintiff had notice of the policy he challenged. *Id*. Defendants miss this critical distinction and their argument against affording Plaintiffs greater procedure relies almost exclusively on cases invoking the fundamental right to interstate travel. *See* Defs.' Br. 14.[21]

Plaintiffs need not show that the No Fly List wholly prevents them from traveling in order to secure procedural due process protections; indeed, the seminal procedural due process case involves interests in welfare benefits even though there is no fundamental right to receive welfare. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (requiring in-person hearing where welfare benefit recipient could "confront or cross-examine adverse witnesses" prior to termination of benefits). Severe burdens on the liberty interest in travel trigger procedural due process safeguards, *regardless* of whether they deprive *any* fundamental right. For example, in *De Nieva v. Reyes*, the plaintiff did not assert that the government could *never* seize and retain her passport. She simply asked for notice of the government's reasons and a hearing at which to contest the burden on her liberty interest in travel; the court granted the request. *De Nieva v. Reyes*, Civ. A. No. 88-00017, 1989 WL 158912, at *7 (D. N. Mar. I. Oct. 19, 1989), *aff'd* 966

[21] All the other right to travel cases upon which Defendants rely concern efforts to invalidate government policies concerning travel; none address the fairness of the government's procedures when restricting individuals' ability to travel. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (request to invalidate requirement to provide Social Security number for driver's license renewal); *Fisher v. Reiser*, 610 F.2d 629, 639–40 (9th Cir. 1980) (challenge to state law denying cost-of-living increases to workers' compensation beneficiaries who left the state); *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 53 (2d Cir. 2007)(challenge to law regulating ferry service); *Cramer v. Skinner*, 931 F.2d 1020, 1030–31 (5th Cir. 1991) (request to invalidate restriction on interstate air service from airport).

Defendants also appear to ask the Court to adopt the "wholly irrational" standard of review applied by the Supreme Court in *Califano v. Aznavorian*. Defs.' Br. 20. That case is inapposite both because it did not involve procedural due process and because the restriction on travel was far less—limitation of Social Security benefits to people while they traveled abroad—than the deprivation at issue here.

F.2d 480 (9th Cir. 1992). Similarly, in *Hernandez v. Cremer*, the plaintiff did not argue that the government could *never* deny admission at the border to a person claiming U.S. citizenship. He challenged the fairness of the *procedures* afforded to those who sought to contest the denial after the fact; again, the court found procedural due process violations. 913 F.3d at 237, 240; *see also Agee v. Baker*, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing that one-way restriction on travel from U.S. to foreign countries deprived liberty interest in travel); *cf. Fuentes v. Shevin*, 407 U.S. 67, 90 & 92 n.21 (1972) ("The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. . . . But *some form* of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be characterized as de minimis." (internal citation omitted) (emphasis supplied)).

The single procedural due process case that Defendants cite for their "right to fly" argument, *Green v. T.S.A.*, is easily distinguished because it involved a de minimis burden. 351 F. Supp. 2d 1119 (W.D. Wash. 2005). There, plaintiffs complained of airport security screening lasting one hour or less—an incidental burden on travel—but were not denied boarding and did not allege that they "suffered impediments different than the general traveling public." *Id*. at 1122, 1130. Neither *Green* nor any other case upon which Defendants rely considered the fairness of the government's procedures when imparting as draconian a restriction on travel as the No Fly List.[22]

Finally, Defendants' assertion that the No Fly List does not burden Plaintiffs' liberty interest in travel is squarely contradicted by the record. In today's world, the ability to fly by

[22] *See, e.g., Califano v. Aznavorian*, 439 U.S. 170, 171–72 (1978) (law suspended benefit payments while people freely traveled outside of the United States); *Town of Southold*, 477 F.3d 38 (law regulated ferry operators, but did not prohibit travel for anyone); *Miller*, 176 F.3d at 1206 (policy required submission of Social Security number as condition of renewing driver's license).

commercial air to and from the United States and over U.S. airspace is integral to Americans' ability to travel. It is undisputed that the No Fly List bars U.S. citizens from such flights without exception. Coppola Decl. ¶ 13; Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. K at 3. The No Fly List also bans citizens, including one of the Plaintiffs, from sailing on ships departing from, or arriving in, the United States. *See* Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-64, 72 Fed. Reg. 48,320, 48,325 (Aug. 23, 2007) (denying passage on ships to matches against the watch list); Choudhury Decl. Ex. L ¶¶ 19–21 (Decl. of Abdullatif Muthanna Decl. ("Muthanna Decl.")) (describing denial of passage on cargo freighter). Because TSC shares the list with foreign governments, No Fly List placement also threatens to prevent citizens from travelling on flights that do not cross U.S. airspace.[23] These restrictions indisputably and severely burden Plaintiffs' interstate and international travel.[24] *Cf. Kent*, 357 U.S. at 127 (travel "may be necessary for a livelihood" and "as close to the heart of the individual as the choice of what he eats, or wears, or reads").

Even if it were relevant in this procedural due process context, the facts in the record show the error of Defendants' claim that alternative modes of travel lessen the severity of their deprivation of Plaintiffs' liberties. Choudhury Decl. Ex. L ¶¶ 16–17 (Muthanna Decl.); Decl. of Raymond Earl Knaeble ("Knaeble Decl.") ¶¶ 13–14, 16–17, 21; Decl. of Steven Washburn ("Washburn Decl.") ¶¶ 9, 14, 20, 22. No Fly List placement prevented Plaintiff Abe Mashal

[23] Choudhury Decl. Ex. E at 21 n.24 (reporting that TSC shares the watch list with 22 foreign governments).

[24] Inclusion in the list has prevented Plaintiffs from travelling internationally and domestically to be with their families, protect their disability benefits, obtain medical care, gain employment, and conduct business. *See* Ahmed Decl. ¶ 10; Ghaleb Decl. ¶ 12; Kariye Decl. ¶ 9; Kashem Decl. ¶ 13; Knaeble Decl. ¶¶ 19–21; Third Am. Compl. ¶¶ 41–42, 47–48; Mashal Decl. ¶¶ 11–16; Meshal Decl. ¶¶ 7–8; Mohamed Decl. ¶¶ 12–13; Choudhury Decl. Ex. L ¶¶ 7, 22 (Muthanna Decl.); Persaud Decl. ¶¶ 11–12; M. Rana Decl. ¶¶ 8, 10, 14; Washburn Decl. ¶¶ 20–22.

from attending his sister-in-law's graduation from Christian missionary school in Hawaii (he had no practical means of traveling from his home in Illinois, other than by flying), and fulfilling a lucrative contract to provide his professional dog training services to a client in Washington. Decl. of Ibraheim Y. Mashal ("Mashal Decl.") ¶¶ 11–13; *see Shapiro*, 394 U.S. at 629 (affirming citizens' right to be free to travel throughout the length and breadth of our land"). Even fewer alternatives are available to U.S. citizens seeking to travel abroad, which is increasingly "importan[t] . . . particularly in a global economy and increasingly interdependent world." *Eunique v. Powell*, 302 F.3d 971, 978 (9th Cir. 2002). For two and a half years, Plaintiff Steven Washburn has been separated from his wife, a Spanish citizen who lives in Ireland and was denied a visa for travel to the United States, because he cannot travel from New Mexico to Ireland without flying. Washburn Decl. ¶¶ 17, 20. Plaintiff Mohamed Sheikh Abdirahman Kariye cannot travel from Portland, Oregon to Saudi Arabia to accompany his mother on the *hajj* pilgrimage, an Islamic religious obligation, because he cannot make the 6,500-mile journey without flying. Decl. of Abdirahman Kariye ("Kariye Decl.") ¶ 9. No Fly List placement effectively banned Plaintiff Muthanna from traveling from New York to be with his family in Yemen by prohibiting him from flying *and* sailing across the Atlantic.[25] Any alternative means for Plaintiffs to travel from the United States to countries other than Mexico and Canada are uncertain, indirect, infrequent, and prohibitively expensive.[26] They require the consent of

[25] Despite a diligent attempt to undertake a thirty-day journey from New York to Yemen by car and boat, Plaintiff Muthanna was turned back when CBP denied him passage on a ship sailing from Philadelphia to Belgium. Choudhury Decl. ¶¶ 9–10 & Ex. L ¶¶ 17–21(Muthanna Decl.).

[26] Although Plaintiff Washburn appears to have two such alternatives for traveling from New Mexico to Ireland, neither will likely succeed. Traveling over land and flying from Mexico or Canada will fail because such flights likely cross U.S. airspace and because TSC shares the watch list with Mexico and Canada. *See, e.g.*, Washburn Decl. ¶¶ 9, 22 (describing de-boarding from a London-Mexico City flight); Choudhury Decl. Ex. E at 21 n.24 (reporting that TSC shares the watch list with 22 foreign governments). Travel over land from New Mexico to the

foreign countries and place Plaintiffs at risk of interrogation and detention by foreign authorities.[27] There can be no question that such severe restrictions on international travel trigger procedural due process requirements.

2) *No Fly List placement deprives Plaintiffs of their liberty interest in freedom from false governmental stigmatization.*

Defendants argue that Plaintiffs fail to establish an actionable burden on their liberty interest in reputation because they have not shown an associated violation of a constitutional or state law right. Defs.' Br. 18. That argument misstates the law. Under clearly-established Ninth Circuit precedent, Plaintiffs need to demonstrate only a stigmatic harm coupled with the denial of a legal right or status to assert a "stigma-plus" claim. Defendants do not dispute that No Fly List placement imposes the deeply stigmatizing label of "suspected terrorist"—a label Plaintiffs vigorously contest. And because Plaintiffs' facts show that Defendants have, as a result, denied Plaintiffs the ability to legally board planes, Defendants' deprivation of Plaintiffs' liberty interest in reputation is clear.

The Supreme Court has recognized a constitutionally protected liberty interest in reputation when a plaintiff satisfies the so-called "stigma-plus" test. *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *Humphries v. Cnty of L.A.*, 554 F.3d 1170, 1185 (9th Cir. 2009) (describing "stigma-plus" test), *overruled in part on other grounds*, 131 S. Ct. 447 (2010). The government must afford procedural due process when a plaintiff suffers stigma from government action

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United States' east coast and sailing to Ireland will also fail because CBP will likely deny Plaintiff Washburn passage on a ship, just as it did Plaintiff Muthanna. *See* Choudhury Decl. ¶¶ 9–10 & Ex. L ¶¶ 17–22 (Muthanna Decl.).

[27] Plaintiffs' fears are far from speculative. Plaintiff Knaeble discovered his No Fly List placement when he was prevented from flying from Bogotá, Colombia to Miami. Knaeble Decl. ¶ 10. Desperate to return to the United States, he attempted to fly to Mexico and cross the U.S.-Mexico border over land, but Mexican federal agents detained him for fifteen hours, questioned him for more than three hours, prevented him from traveling to the U.S.-Mexico border, and returned him to Bogotá by plane. *Id*. ¶¶ 21–23.

"plus" an alteration or extinguishment of a right or status recognized by law. *See Paul*, 424 U.S. at 711. To satisfy the "plus" prong, a plaintiff must show that the injury to reputation was inflicted in connection with the alteration or extinguishment of a legal right or status. *Humphries*, 554 F.3d at 1188.

Defendants wrongly claim that in order to satisfy the plus prong, Plaintiffs must demonstrate they have been deprived of a constitutional right "to travel on the same terms as other travelers." Defs.' Br. 17. That argument is squarely contrary to controlling Ninth Circuit law, which requires Plaintiffs only to show that "once listed, [Plaintiffs] legally could not do something that [they] could otherwise do." *Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)); *Humphries*, 554 F.3d at 1187–88 (describing test as whether plaintiffs are "legally disabled by the listing . . . alone from doing anything they otherwise could do") (internal quotation marks omitted). Plaintiffs' facts show that because of No Fly List placement, they cannot, by law, board commercial flights—something they would otherwise be able to do.[28] There is no dispute that TSA and airline officials prevent ticketed travelers, including Plaintiffs, listed on the No Fly List from boarding their flights by operation of law. *See* 49 U.S.C. § 114(h)(3) (requiring head of TSA to "establish policies and procedures requiring air carriers (A) to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; and (B) if such an individual is identified, . . . prevent the individual from boarding an

[28] Ahmed Decl. ¶ 6 ; Ghaleb Decl. ¶¶ 6, 9; Kariye Decl. ¶ 6; Kashem Decl. ¶ 6; Knaeble Decl. ¶¶ 9, 14; Third Am. Coml. ¶¶ 1, 42; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 6; Choudhury Decl. Ex. L ¶¶ 5, 14, 19 (Muthanna Decl.); Persaud Decl. ¶ 5; M. Rana Decl. ¶¶ 6, 13; Washburn Decl. ¶ 7.

aircraft . . . .").[29] This concrete alteration in Plaintiffs' legal status constitutes a plus factor, regardless of whether they have been deprived of a fundamental right to interstate travel or even the lesser constitutionally protected liberty interest in international travel.[30]

Green v. Transportation Security Administration, upon which Defendants rely, is therefore readily distinguishable. The stigma-plus claim in that case failed because the plaintiffs had not alleged *any* tangible alteration in status: they did not miss flights or suffer any "impediments different than the general traveling public." 351 F. Supp. 2d at 1122, 1130. Plaintiffs, who are banned from flying, are in a much different position.

Defendants' final argument that certain Plaintiffs were able to fly back to the United States after Defendants' issued them one-time waivers does not help Defendants. It is undisputed that each of these Plaintiffs had already been denied boarding *before* the government granted them waivers; that alteration in legal status is sufficient. *See Humphries*, 554 F.3d at 1188 (finding "plus" based even on employment disabilities that could *hypothetically* arise from listing on a database of sex offenders).[31]

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[29] The alteration of Plaintiffs' rights bears a striking resemblance to that present in the seminal case establishing the stigma-plus doctrine. Just as the defamatory posting in *Constantineau* prohibited liquor sales to the plaintiff, 400 U.S. at 434–35, No Fly List placement, "by *operation of law*," prohibits TSA and airlines from permitting Plaintiffs to fly. *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (emphasis in original).

[30] For the same reason, Defendants' assertion that Plaintiffs have not shown a connection between Defendants' stigmatizing statement and an alteration in Plaintiffs' status fails. *See* Defs.' Br. 18. The record shows that the same government action caused *both* stigma and plus: No Fly List placement branded Plaintiffs as "suspected terrorists" *and* altered their status so that they can no longer fly. *See Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005) (stigma and plus must "to a reasonable observer, appear connected"). Contrary to Defendants' contention, Defs.' Br. 18, the availability of alternative modes of transportation does not break this connection because, as discussed above, Ninth Circuit law is clear that an alteration in a single legal right or status—here, the right to fly—is enough. *Miller*, 355 F.3d at 1179; *Humphries*, 554 F.3d at 1187.

[31] The Plaintiffs who were prevented from boarding planes while located abroad suffered a second plus factor: they were involuntary exiled from the United States for periods ranging from two to eight months in violation of their rights as U.S. citizens to return to the United States after

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Because application of the correct law to Plaintiffs' facts establishes that No Fly List inclusion has burdened Plaintiffs' liberty interests in travel and reputation, Defendants have failed to show that, as a matter of law, they are not required to provide Plaintiffs procedural due process. *See Mathews*, 424 U.S. at 335. To the contrary, Defendants are required to afford Plaintiffs fair procedures. As explained below, however, Defendants fail to satisfy even the most minimal requirements.

B) DHS TRIP Fails to Provide Plaintiffs Constitutionally Adequate Notice and a Hearing

Once it is determined that the No Fly List triggers procedural due process protections, "the question remains what process is due." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). The key inquiry is whether Defendants afford the most basic requirements of due process: "notice and an opportunity to contest the relevant determination at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The facts in the record show that Defendants' redress process is constitutionally inadequate.

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traveling abroad. Ghaleb Decl. ¶¶ 6, 9–11; Kashem Decl. ¶¶ 10–11; Knaeble Decl. ¶ 18; Third Am. Compl. ¶¶ 42, 133; Mohamed Decl. ¶ 11; Choudhury Decl. Ex. L ¶ 10 (Muthanna Decl.); M. Rana Decl. ¶ 8; Washburn Decl. ¶¶ 7, 12–14. The Fourteenth Amendment protects this right as "absolute" and "fundamental." U.S. Const. Amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."); *Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001) (U.S. citizenship confers an "absolute right to enter" the United States); *see also Hernandez*, 913 F.2d at 238 ([T]he right of a citizen to re-enter the United States after lawfully traveling abroad . . is fundamental."). These Plaintiffs' experiences of months-long involuntary exile constitute "deprivation[s] of liberty" that serve as a plus factor. *Miller*, 355 F.3d at 1178; *see, e.g.*, *Hernandez*, 913 F.2d at 232, 238 (citizen's 46-day exile from the United States deprived liberty interest in travel).

Defendants' attempt to discount this plus factor by arguing that these Plaintiffs' absences from the United States "were not entirely due to the denial of boarding." Defs.' Br. 18. They miss the point. By impairing each of these Plaintiffs' ability to exercise their right to return to the United States, even for finite periods of time, No Fly List placement directly altered their rights. *See Hernandez*, 913 F.2d at 232, 238.

1) *Defendants fail to provide Plaintiffs even the most basic notice.*

Defendants make the remarkable claim that DHS TRIP provides adequate notice even though they stipulate that DHS TRIP determination letters do not set forth any reason or basis for any Plaintiffs' inclusion on the No Fly List, and that "[a]t *no point* . . . is a complainant" *ever* informed of "the basis for her/his inclusion." Stip. Facts ¶¶ 11, 14 (emphasis supplied). Defendants further make the sweeping claim that providing any notice would purportedly compromise the secrecy of classified information and raise separation of powers concerns. Defs.' Br. 20, 22–23. But the Ninth Circuit rejected arguments almost identical to those Defendants make here when it held that due process requires the government to provide a statement of reasons, and reasonable notice of the record supporting those reasons, to a U.S. charity that the government suspected of terrorism and sought to designate as a terrorist organization. *Al Haramain Islamic Found. (A.H.I.F.) v. Dep't of Treasury*, 686 F.3d 965, 983, 986 (9th Cir. 2012); *Nat'l Council of Resistance of Iran (N.C.R.I.) v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) (requiring pre-deprivation notice concerning impending designation as foreign terrorist organization); *Holy Land Found. For Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (government notified organization that pending terrorist designation was based on "additional evidence linking [it] and Hamas"). Ninth Circuit law thus requires the government to provide such notice—including to those it suspects of terrorism—because "the opportunity to guess at the factual and legal bases for a government action does not substitute for actual notice of the government's intentions." *A.H.I.F.*, 686 F.3d at 986–87.

The Ninth Circuit's decision was based on longstanding due process precedent. "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they

must first be notified." *Fuentes*, 407 U.S. at 80 (internal quotation marks omitted). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). And the notice must "set forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967) (internal citations omitted); *see also A.H.I.F.*, 686 F.3d at 986.[32]

As a matter of law, DHS TRIP fails to satisfy these basic requirements. Not only does it fail to "allege misconduct with particularity," according to Defendants' stipulations, it *categorically* refuses to allege misconduct *at all*.[33] *In re Gault*, 387 U.S. 14; *see, e.g.*, *Hernandez*, 913 F.2d at 240; *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992).[34]

Defendants' extreme position that deviation from their Glomar policy could result in disclosure of classified information "to persons who are known or suspected of being associated with terrorism," Defs.' Br. 20, both overstates the concern in this case and was rejected by the Ninth Circuit in a similar context. *None* of the Plaintiffs are "known terrorists"—not one of

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[32] *See also Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) (requiring provision of reasons for denial of child support payments to parents on welfare); *Hernandez*, 913 F.2d at 240 (upholding injunction requiring statement of reasons for denial of U.S. admission to U.S. citizen); *De Nieva v. Reyes*, Civ. A. No. 88-00017, 1989 WL 158912, at *7 (D.N. Mar. I. Oct. 19, 1989) (holding notice requires written explanation of reasons for seizure and retention of passport).

[33] Contrary to Defendants' contention, the fact that some DHS TRIP determination letters provide notice of the availability of appeal to the court of appeals has no bearing on this conclusion. Precisely because the letters failure to provide notice of the government's reasons or evidence, recipients do not know what to appeal, whether to appeal, or how best to advocate for themselves on appeal.

[34] Defendants' secrecy concerning the No Fly List criteria compounds this deficiency by leaving Plaintiffs in the dark as to even the applicable law that Defendants accuse them of violating. Stip. Facts. ¶ 17 (criteria are not disclosed); Coppola Decl. ¶¶ 15–18 (same). Plaintiffs do not, at this time, challenge Defendants' failure to disclose the criteria, because no matter what the criteria are—and even if they were disclosed to Plaintiffs—it is Defendants' basic failure to provide *any* notice, statement of reasons, or hearing that violates Plaintiffs' procedural due process rights. At any hearing on the merits, however, Plaintiffs would need at least some form of disclosure to defend themselves legally and factually.

them has been charged, let alone convicted, of a terrorism crime.[35] Defendants have stigmatized Plaintiffs, based on secret evidence, as individuals for whom Defendants assert there is "reasonable suspicion" to believe that they are "suspected terrorist[s]." Stip. Facts ¶ 16. But again, the Ninth Circuit has squarely rejected the claim that due process does not require the government to provide notice of its reasons when making such accusations. *See A.H.I.F.*, 686 F.3d at 988 (requiring statement of reasons for investigation and designation of entity as terrorist organization).Nor do Defendants establish that as a matter of law, the government may rely on the "sensitivity of watchlisting information" to foreclose U.S. citizens of *any* notice of its reasons even *after* depriving them of protected liberties. Defs.' Br. 19–21 (citing *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004)). In *Jifry*, however, the D.C. Circuit did not conclude that the plaintiffs even had Fifth Amendment rights, and its determination that due process did not require a statement of reasons was explicitly premised on the lesser weight afforded to the interests of non-resident aliens seeking to fly planes outside the United States. *Id*. The interests of the U.S. citizens here are far more significant.[36]

Despite Defendants' assertions to the contrary, the government is routinely required to disclose, or at least summarize, classified or otherwise sensitive information in numerous contexts where it seeks to deprive liberty in the name of national security, including when

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[35] *See* Coppola Decl. ¶ 8 & n.3; Ahmed Decl. ¶ 11; Ghaleb Decl. ¶ 15; Kariye Decl. ¶ 10; Kashem Decl. ¶ 14; Knaeble Decl. ¶ 22; Third Am. Compl. ¶¶ 3, 135; Mashal Decl. ¶ 17; Meshal Decl. ¶ 9; Mohamed Decl. ¶ 14; Choudhury Decl. Ex. L ¶ 25 (Muthanna Decl.); Persaud Decl. ¶ 13;
M. Rana Decl. ¶ 18; Washburn Decl. ¶ 23.

[36] The other cases Defendants rely upon are easily distinguished because they concern pre-deprivation notice without addressing the post-deprivation notice at issue here. *See, e.g., Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002); *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). *Patterson v. FBI*, 893 F.2d 595, 600 n.9, 604–905 (3d Cir. 1990), a Freedom of Information Act ("FOIA") case, is simply inapposite.

designating terrorist organizations. *A.H.I.F.*, 686 F.3d at 983–84 (requiring provision of either unclassified summaries of classified information or presentation of classified information to appropriately cleared counsel); *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 657–60 (N.D. Ohio 2010) (requiring government to declassify and/or summarize classified information and, if that was insufficient or impossible, requiring plaintiff's counsel to view the information under a protective order).[37] While Defendants contend that access to classified information falls within the exclusive purview of the Executive, that argument is premature and unnecessary to the Court's resolution of the issues before it. This Court need not decide at this stage whether Plaintiffs will be entitled to access classified information at some later point.[38]

As a matter of law and based on the stipulated facts, Defendants thus fail to show that DHS TRIP affords Plaintiffs the most "essential" of due process protections—the notice they

[37] *See, e.g.*, *Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir. 2009) (per curiam) (court may compel disclosure to counsel of classified information for habeas corpus review); *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. 2007) (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions), *vacated*, 554 U.S. 913, *reinstated*, 551 F.3d 1068 (D.C. Cir. 2008) (per curiam); *United States v. Abuhamra*, 389 F.3d 309, 329 (2d Cir. 2004) (requiring substitute disclosures to explain "the gist or substance" of *ex parte* submissions); Classified Information Procedures Act, 18 U.S.C. app. (contemplating provision of summaries of, or substitutes for, classified information in criminal proceedings).

[38] Moreover, "[i]t is simply not the case that all security-clearance decisions are immune from judicial review." *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993). Courts are empowered, and indeed are constitutionally required, to review executive determinations with regard to security clearances where constitutional rights are at stake. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (reviewing constitutional challenge by former CIA employee found ineligible for security clearance and terminated); *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) ("federal courts may entertain colorable constitutional challenges to security clearance decisions"); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (recognizing that "not all claims arising from security clearance revocations violate separation of powers"). *Department of Navy v. Egan*, 484 U.S. 518 (1988), does not stand for the contrary proposition because that decision addressed the "narrow question" of whether the Merit Systems Protection Board had statutory authority to review employee security clearance determinations. *Id*. at 520.

need to "present [their] side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 542, 546 (1985).

2) *Defendants fail to provide Plaintiffs any opportunity to be heard.*

Defendants argue that DHS TRIP is a sufficient substitute for a hearing. Defs.' Br. 22. But, Defendants stipulate that they fail to afford Plaintiffs *any* hearing at which to confront or rebut the allegations against them—even *after* the deprivation of their liberties. According to the stipulated record, therefore DHS TRIP is an entirely secret, one-sided process. Defendants fail to establish as a matter of law that a process entirely lacking in any opportunity for Plaintiffs to confront or rebut the reasons the government deprived them.

Due process requires the government to provide "some kind of hearing . . . at some time" when it deprives a person of a protected liberty. *See Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978). "There have been cases in which the Supreme Court has found that a post-deprivation hearing suffices, but *under no circumstances* has the Supreme Court permitted a state to deprive a person of a life, liberty, or property interest under the Due Process Clause *without any hearing whatsoever*." *De Nieva*, 966 F.2d at 485 (emphasis supplied) (internal citation omitted). Essential to the hearing requirement is the provision of at least some opportunity to confront and respond to the government's allegations and evidence. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (due process hearing requirement has "ancient roots" in rights to confrontation and cross-examination) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). The hearing must permit the plaintiff "to prove or disprove" the facts that are "relevant" to the deprivation. *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7 (2003).

DHS TRIP fails to provide Plaintiffs any type of hearing—written or in-person, pre- or post-deprivation—where they can confront or rebut the allegations or evidence supporting their inclusion in the No Fly List. *See* Defs.' Br. 27. Defendants' application of secret criteria for No Fly List inclusion shows that factual findings necessarily underlie these decisions. *See* Stip. Facts ¶ 17; Coppola Decl. ¶¶ 15–18, 21. Defendants concede as much, but refuse to disclose any of this information. Stip. Facts ¶¶ 11, 14. Their secrecy deprives Plaintiffs of the chance to confront and rebut the facts "relevant" to their No Fly List placement. *Conn. Dep't of Public Safety*, 538 U.S. at 7.

Defendants cannot square their insistence on a secret and one-sided process with governing due process doctrine. Even in situations where far lesser interests are at stake, the Supreme Court has held that due process requires in-person hearings permitting confrontation and rebuttal. *See, e.g.*, *Memphis Light*, 436 U.S. at 16 (in-person hearing required prior to termination of utility subsidies); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (same for recovery of excess Social Security payments); *Goldberg v. Kelly*, 397 U.S. at 26 (same prior to termination of welfare benefits); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (same prior to temporary school suspension). Due process particularly requires an in-person hearing for U.S. citizens on the No Fly List because No Fly List placement likely involves determinations concerning character and veracity. *See Califano*, 442 U.S. at 697 (assessing intelligence, physical and mental condition, and credibility requires "personal contact" between the affected party and "the person who decides his case"). While "limited" situations may justify providing a post-deprivation, rather than pre-deprivation hearing, clearly established Ninth Circuit law prohibits Defendants from categorically refusing to provide Plaintiffs any hearing at all. *Fed.*

Deposit Ins. Corp., 486 U.S. at 240–241; *see De Nieva*, 966 F.2d at 486 ("right to a hearing was clearly established" where government burdened liberty interest in travel).

Defendants insist that DHS TRIP provides a "suitable substitute" for a hearing because "confrontation and rebuttal are not absolute requirements . . . especially in cases where the information at issue is highly sensitive." Defs.' Br. 20, 22. But they cannot reconcile this position with court decisions requiring more robust process in contexts where the government deprives liberties in the name of national security. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (plurality opinion) (requiring meaningful opportunity for alleged enemy combatant to rebut factual and legal basis for charges) (plurality opinion); *Kindhearts*, 647 F. Supp. 2d at 904, 907–08 (requiring "prompt" and "meaningful hearing" following government block on charity's assets and provisional designation as terrorist organization).[39]

3) *DHS TRIP creates an extraordinarily high risk of erroneous deprivation.*

The second *Mathews* factor requires the Court to assess the risk of error under Defendants' current procedures and the probable value of additional procedural safeguards. *See Mathews*, 424 U.S. at 335. Defendants make the conclusory assertion that their procedures guard against error because they ensure that listed persons meet the required criteria and because DHS TRIP is "effective." Defs.' Br. 19. But, Defendants ignore governing law, including in the national security context, finding that a secret, one-sided process like DHS TRIP results in an

[39] Defendants rely upon cases from the terrorist designation context that either support Plaintiffs' position or address only the timing of a hearing—not whether a hearing is afforded *at all*. *See* Defs.' Br. 21 & 14; *Holy Land Found. for Relief*, 333 F.3d at 163–64 (government provided organization opportunity to respond to allegation that evidence linked it to Hamas); *Global Relief Found., Inc.*, 315 F.3d at 748 (holding that due process did not require pre-deprivation hearing, but not addressing post-deprivation hearing); *Islamic American Relief Agency*, 394 F. Supp. 2d at 50, *aff'd in part*, 477 F.3d 728 (D.C. Cir. 2007) (same); *N.C.R.I.*, 251 F.3d at 209 (requiring "*at least* in written form" a process permitting entities considered for imminent designation as terrorist organizations to confront or rebut "the administrative record").

unacceptably high risk of erroneous deprivation. Plaintiffs have introduced facts, moreover, that show the widespread error in the watch list from which the No Fly List is drawn. The second *Mathews* factor thus tips decidedly in Plaintiffs favor.

Government procedures that fail to afford adequate notice create a high risk of error because they force people to "guess[] what evidence" they should submit in their defense, driving them to "respond[] to every possible argument against denial at the risk of missing the critical one altogether." *Barnes*, 980 F.2d at 579; *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009) (lack of "adequate and timely notice creates a substantial risk of wrongful deprivation" because it leads to "[a]n inability to rebut"). Without notice of the "exact reasons" for the government's decision or "the particular statutory provisions and regulations they are accused of having violated," affected persons cannot "clear up simple misunderstandings or rebut erroneous inferences." *Gete v. I.N.S.*, 121 F.3d 1285, 1297 (9th Cir. 1997); *see also A.H.I.F.*, 686 F.3d at 982 ("Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations."). The government compounds the risk of error when it fails to provide any hearing permitting confrontation and rebuttal of the bases for the deprivation. *See De Nieva*, 1989 WL 158912, at *7 (lack of "an adjudicative hearing of any type" concerning passport seizure "maximized the risk of mistaken deprivation"), *aff'd*, 966 F.2d 480 (9th Cir. 1992); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S 123, 171–72 (1951) (Frankfurter, J. concurring) (adversarial process reduces the risk of error because "[s]ecrecy is not congenial to truth-seeking"). In contrast, explaining the specific reasons for the decision increases the likelihood of error correction. *Barnes*, 980 F.2d at 579.

Defendants' contention that their No Fly List procedures guard against error provide no assurance. They contend that DHS TRIP is "effective" because the system already identifies errors. Defs.' Br. 19. But that fact reveals nothing about the extent to which *other* errors go undetected. Defendants deprive Plaintiffs of *any* statement of reason for their inclusion on the list, withhold even the rule they accuse Plaintiffs of violating, and force Plaintiffs to guess why they are suddenly banned from flying. *See Gete*, 121 F.3d at 1297; *Barnes*, 980 F.2d at 579. This absolute lack of notice maximizes error by crippling Plaintiffs' ability "to determine whether the agency based its decision on erroneous facts, to discover whether there is evidence not previously considered that might be submitted," and to clear up any error. *Gete*, 121 F.3d at 1298; *see A.H.I.F.*, 686 F.3d at 982; see *Kindhearts*, 647 F. Supp. 2d at 904. Defendants' failure to afford Plaintiffs any hearing compounds this error because they are prevented from presenting exculpatory information and their own good characters to an impartial decisionmaker. *See De Nieva*, 1989 WL 158912, at *7; *Califano*, 442 U.S. at 697 (in-person hearing necessary to assess character, credibility, and good faith).[40]

Defendants' fall-back position is to assert that their front-end inclusion procedures guard against error. Defs.' Br. 19. But that assertion is disputed by government reports and audits documenting the errors plaguing the consolidated terrorism watch list from which the No Fly List is drawn.[41] A 2009 DOJ OIG audit concluded that the FBI "did not update or remove watch

[40] Nor do Defendants provide an appeal process that will correct errors. Even if Plaintiffs could make an informed decision whether to appeal, notwithstanding the complete lack of notice, they cannot make an informed decision on the *basis* for appeal because the letters undisputedly fail to provide any reason or basis for their No Fly List inclusion. Stip. Facts ¶¶ 11, 14.

[41] *See* Choudhury Decl. Ex. F at ii, iv; Choudhury Decl. Ex. J. The record also supports the conclusion that the watch list is over-inclusive. In 2007, the GAO determined that TSC rejects only approximately one percent of watch list nominations. Choudhury Decl. Ex. I at 22. That same year, the DOJ OIG found that TSC's quality assurance process was "weak." Choudhury

list records as required."[42] The DOJ OIG found that, in the cases it reviewed, the FBI failed to timely remove records in an extraordinary 72 percent of cases where it was necessary, failed to modify watch list records in 67 percent of cases where it was necessary, and failed to remove terrorism case classifications in 35 percent of cases where it was necessary—many of which corresponded to "individuals who . . . should have been removed from the watchlist."[43]

Based on this record, and contrary to Defendants' position, the value of additional safeguards in preventing the severe deprivation of Plaintiffs' liberty interests in travel and reputation is clear.

4) *Providing Plaintiffs notice and a hearing to contest their No Fly List placement will not harm any government interests.*

Application of the *third Mathews* factor requires considering the government interests, including any burdens imposed by additional procedures. *See Mathews*, 424 U.S. at 335. Defendants sweepingly assert a number of national security harms will result from providing Plaintiffs *any* notice or a hearing. They urge this Court to defer entirely to the executive's determination that DHS TRIP affords U.S. citizens all the process that is due. Defs.' Br. 25. But, the Supreme Court has made clear that the government's interest in protecting national security is not a "blank check . . . when it comes to the rights of the Nation's citizens," and courts have a critical role to play in safeguarding individual rights. *Hamdi*, 542 U.S. at 536. Even where government policies implicate national security, "The Constitution does require that the government take reasonable measures to ensure basic fairness . . . and that the government follow procedures reasonably designed to protect against the erroneous deprivation of the private

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Decl. Ex. F at v. A 2008 DOJ OIG audit also determined that FBI field offices bypassed certain quality control mechanisms in the nomination process. Choudhury Decl. Ex. J at 3.

[42] Choudhury Decl. Ex. F at ii, iv; *see also* Choudhury Decl. Ex. J.

[43] Choudhury Decl. Ex. F at iv–vi.

party's interests." *See A.H.I.F.*, 686 F.3d at 980.[44] Applying this clear law to the facts Plaintiffs have introduced shows that providing Plaintiffs notice and a hearing requires will not harm any asserted national security interests.

Indeed, court decisions require far more robust process, specifically in the national security context, for alleged enemy alien combatants detained outside the United States and designated terrorist organizations seeking to recover their property. *See Hamdi*, 542 U.S. at 536–37 (requiring notice to alleged enemy combatant of factual and legal basis for charges and a meaningful opportunity to rebut those charges); *N.C.R.I.*, 251 F.3d at 209 (requiring notice to organization concerning impending designation as foreign terrorist organization); *Kindhearts*, 647 F. Supp. 2d at 904, 907–08 (requiring "prompt" and "meaningful hearing" for charity with blocked assets and provisional designation as terrorist organization).[45]

Defendants principally contend that providing Plaintiffs *any* notice or *any* hearing will compromise the "confidentiality" of watch list information. Defs.' Br. 24. According to Defendants, mere confirmation or denial of watch list status will tip off unsuspecting persons that they are on the watch list and are (or were) the subject of investigation. Defs Br. 26. But

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[44] Defendants invoke *Holder v. Humanitarian Law Project* in seeking judicial deference. But there, the Supreme Court made clear that courts "do not defer to the Government's reading of the [Constitution], even when [national security] interests are at stake." 130 S. Ct. 2705, 2727 (2010). Plaintiffs request for fair procedures asks this Court to make a determination well within its competency. *See A.H.I.F.*, 686 F.3d 965 (resolving procedural due process claim in terrorist designation context); *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) (same in denial of child support payments); *De Nieva*, 966 F.2d at 485 (same due to deprivation of liberty interest in travel).

[45] *See also American-Arab Anti-Discrimination Comm. v. Reno)*, 70 F.3d 1045, 1070–71 (9th Cir. 1995) (barring use of secret evidence in immigration proceedings for non-citizens seeking immigration benefit); *United States v. Abuhamra*, 389 F.3d 309, 329 (2d Cir. 2004) (same for pre-trial detention hearings concerning release on bail).[46] While the government might be able to keep secret watch list status for persons merely subjected to heightened screening, it is impossible to keep secret the status of a person on the No Fly List after that person is denied boarding on a flight.

this argument is based on a demonstrably false premise: that it is even possible to keep a person's No Fly List status a secret *after* that person has been prevented from flying.[46] The facts show that Plaintiffs already know they are on the No Fly List; each was denied boarding on at least one flight, and U.S. or airline officials subsequently told each of them that she or he is on the list.[47] Contrary to Defendants' assertions, Plaintiffs are also already on notice that they are (or were) the subject of investigations: the FBI questioned each of them following their denial of boarding.[48] Acknowledgement of No Fly List-status in the redress process will not tell Plaintiffs anything they do not already know, and Defendants consequently overstate any potential harm.

Plaintiffs have introduced evidence, moreover, showing that the government *itself* routinely undermines its own Glomar policy when it serves its own interests. FBI agents confirmed No Fly List-status when they asked four of the Plaintiffs to serve as confidential informants or to spy on their communities in exchange for assistance with removal from the list.[49] And CBP confirms that people are *not* on the watch list every time it approves members for its Global Entry program by conducting a check that "ensures that the applicants are not on any watch list."[50] Providing U.S. citizens on the No Fly List post-deprivation notice and a

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[46] While the government might be able to keep secret watch list status for persons merely subjected to heightened screening, it is impossible to keep secret the status of a person on the No Fly List after that person is denied boarding on a flight.

[47] Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶¶ 6, 8; Kariye Decl. ¶ 6; Kashem Decl. ¶¶ 6, 8; Knaeble Decl. ¶ 9; Third Am. Compl. ¶ 43; Mashal Decl. ¶¶ 7, 10; Meshal Decl. ¶¶ 5–6; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L ¶ 5 (Muthanna Decl.); Persaud Decl. ¶ 7; A. Rana Decl. ¶¶ 4–5; M. Rana Decl. ¶ 6; Washburn Decl. ¶¶ 7, 18.

[48] Ahmed Decl. ¶ 9; Ghaleb Decl. ¶ 7; Kariye Decl. ¶ 6; Kashem Decl. ¶ 8; Knaeble Decl. ¶ 11; Third Am. Compl. ¶¶ 43, 129; Mashal Decl. ¶¶ 8, 10; Meshal Decl. ¶ 6; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L ¶ 13 (Muthanna Decl.); Persaud Decl. ¶ 19; A. Rana Decl. ¶ 5; M. Rana Decl. ¶ 7; Washburn Decl. ¶¶ 10, 18.

[49] *See* Mashal Decl. ¶ 10; Meshal Decl. ¶ 6; Persaud Decl. ¶ 10; Ghaleb Decl. ¶ 8.

[50] Choudhury Decl. Ex. C at 3 (According to the executive director of Admissibility and Passenger Programs for CBP, the "rigorous background check . . . tick[s] off the sorts of things

hearing will not harm national security when the government routinely disregards its own Glomar policy. *See* Coppola ¶ 37.[51]

This Court should reject Defendants' sweeping and categorical claim that providing Plaintiffs process will necessarily disclose the government's secrets. Defs.' Br. 27. Defendants' position puts the cart before the horse—they seek to foreclose hearings entirely because of the *possibility* that sensitive information may be involved in particular instances. But the government is routinely required to disclose, or at least summarize, classified or otherwise sensitive information in numerous national security contexts. *See, e.g.*, *Al Odah*, 559 F.3d at 544–45; *Bismullah*, 501 F.3d at 187; *Abuhamra*, 389 F.3d at 329; Classified Information Procedures Act, 18 U.S.C. app. Decisionmakers can use calibrated tools—as courts do all the time—to balance affected parties' rights and any legitimate government secrecy interests. *See, e.g.*, *A.H.I.F.*, 686 F.3d at 983–84 (unclassified summaries and access to cleared counsel by definition "do not implicate national security" and impose only a "small burden" on the government); *Al Odah*, 559 F.3d at 547–48; *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (TFH), 2009 WL 50155 at *6, *9 (D.D.C. Jan. 9, 2009); *Kindhearts*, 647 F. Supp. 2d at 868.[52]

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the government probes like . . . watch lists . . . .") (internal quotation marks omitted); *see generally*, Choudhury Decl. Ex. A (describing Global Entry); Choudhury Decl. Ex. B (same).

[51] Defendants' reliance on cases upholding Glomar responses to requests for watchlisting information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is entirely misplaced. Defs.' Br. 26. The interests at issue in a constitutional challenge and the statutory FOIA cases are obviously different. Whether an agency has met its burden for withholding information under specific FOIA provisions is irrelevant to the question of what due process requires when the government deprives U.S. citizens of their liberties. *See Tooley v. Bush*, Case No. 06-cv-00306 (CKK), 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006), *aff'd Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005); *Barnard v. D.H.S.*, 531 F. Supp. 2d 131 (D.D.C. 2008).

[52] Finally, neither *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004), nor *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996), support Defendants position. Neither case involved the deprivation of a protected liberty or property interest. *Jifry*, 370 F. 3d at 1183–84; *Stehney*, 101 F.3d at 936. While the private interests of the non-citizen plaintiffs in *Jifry* were outweighed by the

Thus, viewing the factual record in light of the established law, the balance of the three *Mathews* factors tips decisively in Plaintiffs' favor. Plaintiffs' facts and Defendants' own stipulations concerning DHS TRIP and their Glomar policy establish that Defendants' inclusion of these U.S. citizens on the No Fly List has deprived them of their protected liberties without affording them the most basic notice and opportunity to be heard that due process requires.

II) Defendants' Failure to Provide Plaintiffs Notice and a Hearing Violates the Administrative Procedure Act

Defendants argue that the availability of appellate review of individual No Fly determinations precludes a claim under the Administrative Procedure Act ("APA"), and address only one of Plaintiffs' APA claims—that Defendants' redress procedures are "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A). Defendants also argue that the Court should simply defer to the Defendants' secret redress procedures, that those procedures are reasonable, and that the administrative record concerning these secret procedures is all the Court may consider. Defs.' Br. 29. But, Defendants are wrong on each of these points.

As an initial matter, Defendants ignore that the Ninth Circuit has already held that Plaintiffs are entitled to bring a procedural claim against Defendants under the APA; the availability of appellate review of individual DHS TRIP determinations is no substitute. *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012).

Defendants do not establish, as a matter of law, that their redress procedures do not violate APA Section 706(2)(B), which bars agency action that is "contrary to constitutional right, power, privilege, or immunity" in violation of the APA. 5 U.S.C. § 706(2)(B). According to Defendants' own stipulations and the applicable law, Defendants offer an entirely one-sided and

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government's national security interests, here the balance tips decidedly in favor Plaintiffs. 370 F.3d 1174. *Stehney* is inapposite because the plaintiff in that case sought procedures that "would have not improved the fairness of the revocation process." 101 F.3d at 936.

secret redress process that fails to afford meaningful notice and a hearing to those deprived of protected liberties. *See supra* 19–32. Contrary to Defendants' contentions, this Court should not defer to Defendants' interpretation of the adequacy of their redress procedures. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010) (recognizing that courts consider agency action de novo when reviewing Section 706(2)(B) claims). Because Defendants' redress procedures violate Plaintiffs' due process rights, they also violate APA Section 706 (2)(B).

Defendants principally contend that their No Fly List procedures are not arbitrary and capricious under APA Section 706(2)(A) because they are reasonable. 5 U.S.C. § 706(2)(A); Defs.' Br. 29. But Defendants fail to demonstrate that their redress procedures, as stipulated, bear the required "rational connection" between Congress's directives and the "facts found and the [agency] choice made" for two distinct reasons. *Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

First, Defendants' stipulate that DHS TRIP categorically does not offer any person on the No Fly List an explanation for the reasons or bases for their inclusion, and that the No Fly List criteria are kept secret from the public. Such secrecy makes it impossible, as a matter of law, for Plaintiffs (or the public) to ensure their compliance with Defendants' rules; and Defendants therefore fail to show that their redress procedures are not arbitrary and capricious. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bur. of Land. Mgmt.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001); *see Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039 (9th Cir. 2007) (regulatory standard "must not be so general" as to prevent compliance").

Second, Defendants fail to demonstrate that their redress procedures carry out Congress' directive to implement a "fair" and effective redress process for U.S. citizens wrongly excluded from air travel. 49 U.S.C. § 44926(a); 49 U.S.C. § 44903(j)(2)(G)(i). Defendants' stipulated

facts establish that in response to Congress' order, Defendants implemented a secret, one-sided process that denies notice or a meaningful opportunity to be heard. *See supra* 19–32. Plaintiffs have introduced facts, which this Court must consider, controverting Defendants' claim that their redress procedures are fair or effective. *See supra* 26–29; *Webster v. Doe*, 486 U.S. 592, 604 (1988) (plaintiff raising constitutional claims under APA may expand record through discovery). The record establishes that Defendants' redress procedures are arbitrary and capricious because they entirely fail to comport with Congress's plain statutory directives. *See Wash. Toxics Coal. v. U.S. Dept. of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1185–86 (W.D. Wash. 2006) (EPA screening model arbitrary and capricious because it produced known errors that were "uncorrected and unverified"). Contrary to Defendants' characterizations, this Court's review of the record in assessing Plaintiffs' Section 706(2)(A) claim is not deferential, but "searching and careful." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *see also U.S. W., Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999) (where there are "serious constitutional questions" about agency conduct, "deference to [the] agency interpretation is inappropriate"); *Williams v. Babbitt*, 115 F.3d 657, 661–62 (9th Cir. 1997).

Based on the foregoing, the Court should deny the government's motion for summary judgment as to Plaintiffs' APA claims.

CONCLUSION

For the reasons stated above, this Court should deny Defendants' motion for partial summary judgment.

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Respectfully submitted,

Steven M. Wilker, OSB No. 911882
Email: steven.wilker@tonkon.com
Tonkon Torp LLP
1600 Pioneer Tower

888 SW 5th Avenue
Portland, OR 97204
Tel.: (503) 802-2040; Fax: (503) 972-3740
Cooperating Attorney for the ACLU Foundation of Oregon

s/ Hina Shamsi
Hina Shamsi (Admitted *pro hac vice*)
Email: hshamsi@aclu.org
Nusrat Jahan Choudhury (Admitted *pro hac vice*)
Email: nchoudhury@aclu.org
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 519-2500; Fax: (212) 549-2654

Kevin Díaz, OSB No. 970480
Email: kdiaz@aclu-or.org
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel.: (503) 227-6928; Fax: (503) 227-6948

Ahilan T. Arulanantham (Admitted *pro hac vice*)
Email: aarulanantham@aclu-sc.org
Jennifer Pasquarella (Admitted *pro hac vice*)
Email: jpasquarella@aclu-sc.org
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
Tel.: (213) 977-9500; Fax: (213) 977-5297

Alan L. Schlosser (Admitted *pro hac vice*)
Email: aschlosser@aclunc.org
Julia Harumi Mass (Admitted *pro hac vice*)
Email: jmass@aclunc.org
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493; Fax: (415) 255-8437

Laura Schauer Ives (Admitted *pro hac vice*)

Email: lives@aclu-nm.org
ACLU Foundation of New Mexico
P.O. Box 566
Albuquerque, NM 87103
Tel.: (505) 243-0046; Fax: (505) 266-5916

Mitchell P. Hurley (Admitted *pro hac vice*)
Email: mhurley@akingump.com
Christopher M. Egleson (Admitted *pro hac vice*)
Email: cegleson@akingump.com
Justin H. Bell (Admitted *pro hac vice*)
Email: bellj@akingump.com
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel.: (212) 872-1011; Fax: (212) 872-1002

Attorneys for Plaintiffs.