No. 17-35634

In the United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

On Appeal from the United States District Court for the District of Oregon
Portland Division
Case No. 3:10-cv-00750-BR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants certify that they are not corporate entities.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. 1331. After issuing several orders on the merits, the district court entered final judgment disposing of all claims on June 9, 2017. Excerpts of Record ("ER") 1-6. Plaintiffs filed a timely notice of appeal on August 7, 2017. ER 225-28; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. 1291.[1]

ISSUES PRESENTED

1. Whether the government's criteria for placing Americans on the No Fly List are unconstitutionally vague because the criteria do not give notice of conduct that will result in the deprivation of constitutionally protected liberty interests in the right to travel and the right to be free from government-imposed stigma, and because the criteria encompass First Amendment-protected activity.

2. Whether the process for people seeking removal from the No Fly List violates the Fifth Amendment's procedural due process requirement and the Administrative Procedure Act, because the process guarantees a high risk of error and does not require (a) meaningful notice of the reasons for placement on the No Fly List; (b) disclosure of material evidence or exculpatory information; or (c) a hearing before a neutral decision maker.

3. Whether the district court erred in determining it lacked subject matter jurisdiction to hear Plaintiffs' substantive claims on the grounds that those claims challenge "final orders" of the Transportation Security

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[1] For ease, Plaintiffs-Appellants are referred to in this brief as "Plaintiffs." Similarly, unless discussing a specific defendant or government agency, Defendants-Appellees are referred to as "Defendants" or "the government."

Administration ("TSA"), when (a) key decisions regarding continued placement on the No Fly List necessarily involve both TSA and the Terrorist Screening Center; (b) any remedy must involve both agencies; and (c) the administrative record would not permit meaningful review in this Court.

STATEMENT OF THE CASE

I. INTRODUCTION

For over seven years, the government has blacklisted Plaintiffs—all U.S. citizens—on the No Fly List, which bars them from flying to, from, or over U.S. airspace and stigmatizes them as suspected terrorists. As a result, Plaintiffs have been separated from their loved ones, lost important job opportunities, and been subjected to frightening arrest and detention at the hands of foreign governments.

Through this litigation, Plaintiffs sought a fair process by which to clear their names and regain rights most Americans take for granted. They still have not received it. None of the Plaintiffs has been charged with any criminal wrongdoing that would justify their blacklisting. Nor have they received even the rudiments of due process: notice of conduct that can lead to blacklisting, a statement of what they allegedly did to trigger that draconian sanction, and a hearing at which they could rebut the government's allegations.

The district court nonetheless concluded that the government's blacklisting redress process satisfied constitutional requirements. That decision was unprecedented and unjustified. The record in this case established that the

government is blacklisting people who have never even been charged with wrongdoing based on a prediction that they might someday commit violent acts of terrorism. Expert evidence in the record establishes that such predictions guarantee a high risk of error.

Basic due process doctrine requires rigorous procedural safeguards when the government undertakes such an error-prone and perilous endeavor. Yet the district court concluded that the government's process was constitutionally adequate even though it did not provide Plaintiffs with meaningful notice and a hearing. No authority supports that conclusion. Indeed, the Supreme Court has *never* held that the Due Process Clause permits the government to deprive citizens of liberty without a hearing; Plaintiffs are unaware even of any lower court decision authorizing such restrictions without rigorous notice and hearing procedures that are absent here.[2]

The district court largely rested its erroneous conclusion on the ground that "undue risk to national security" justified the government's deficient process. But this Court has never permitted blanket assertions of national security risk, untethered from specific privilege invocations and judicial findings, to justify a process so deficient. Indeed, in this very case, this Court instructed that district

[2] *Korematsu v. United States*, 323 U.S. 214 (1944), is arguably an exception, although the Court there never addressed the Due Process Clause.

court proceedings could involve discovery of "sensitive intelligence information," and suggested that they be managed through use of the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16. *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012). More fundamentally, the Supreme Court has made clear that the "essential constitutional promises" of meaningful notice and an opportunity to be heard "may not be eroded" in cases implicating national security. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion). Nevertheless, the district court deferred to the government's categorical national security and secrecy arguments, and denied the Constitution's promise.

The district court then compounded its errors by dismissing Plaintiffs' substantive claims for lack of subject matter jurisdiction, notwithstanding this Court's prior jurisdictional holdings instructing that the district court retains jurisdiction.

Plaintiffs respectfully ask this Court to reverse the district court's judgment. The Court should hold that the No Fly List criteria are unconstitutionally vague and that the existing blacklisting redress process violates procedural due process. It should remand to the district court and require the application of criteria and procedures that comply with the Due Process Clause. In addition, this Court should hold that the district court retains subject matter jurisdiction over Plaintiffs' substantive claims. It should then direct the district court that, in the event

Plaintiffs remain on the No Fly List after the government applies constitutionally adequate criteria and procedures, the court should resolve Plaintiffs' substantive challenge by determining whether their blacklisting comports with substantive due process requirements and the Administrative Procedure Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs

Plaintiffs are U.S. citizens who flew domestically and internationally for years without incident until the government barred them from flying in 2009 and 2010.[3]

Mohamed Sheikh Abdirahman Kariye is a respected imam and spiritual leader at the Islamic Center of Portland, in Portland, Oregon. He has provided counseling for Portland community members for approximately twenty years, including for youth, women who are victims of domestic violence, married couples, and the bereaved. ER 429.

On March 8, 2010, Mr. Kariye was denied boarding on a flight to Amsterdam to visit his daughter, who was then in high school in the United Arab

[3] Plaintiffs refer to "citizens" here, although the claims and rulings in this case also apply to lawful permanent residents. *Latif*, 686 F.3d at 1126, 1130. Other non-citizens may also have rights against blacklisting. *Cf. Ibrahim v. DHS*, 669 F.3d 983 (9th Cir. 2012) (holding that non-citizen on student visa had "significant voluntary connection" sufficient to assert Fifth Amendment challenge to No Fly List placement).

Emirates. ER 622 ¶¶ 2-6. Five government agents surrounded him in front of other travelers and airline personnel, publicly humiliating and stigmatizing him as a potential terrorist. ER 623 ¶¶ 6-7.

The government has asserted that it is blacklisting Mr. Kariye based on his alleged statements, associations, and purported religious views. ER 418-21. But the government investigated Mr. Kariye for years and has never charged him with any terrorism-related crime.[4]

As a result of the government's blacklisting, Mr. Kariye has been unable to visit his daughter abroad or accompany his mother on the *hajj* pilgrimage in Mecca, a religious obligation for Muslims. ER 623 ¶ 9.

Faisal Kashem grew up in New York and Connecticut. He graduated from the University of Connecticut with a degree in accounting and worked for Accenture until February 2009. He then enrolled in a program of Arabic and Islamic Studies at a public university in Saudi Arabia. ER 548, Sealed Excerpt of Record ("SER") 814. He planned to return home for his summer vacation in June 2010, but was barred from boarding a flight back. ER 627-28 ¶¶ 2-6. When FBI officials sought to interrogate him, Mr. Kashem agreed. ER 628 ¶ 8.

[4] After the district court ruled in favor of Mr. Kariye and other plaintiffs in their first summary judgment motion, the government brought a separate suit attempting to denaturalize him based on fraud allegations that it had not disclosed to him at any point in this case. That suit is pending. *See United States v. Kariye*, No. 3:15-cv-1343-BR (D. Or. filed July 20, 2015).

After Plaintiffs sought a preliminary injunction in August 2010 on behalf of those Plaintiffs unable to fly home, the government told Mr. Kashem he could fly back on a "one-time waiver," subject to heightened security measures, but did not guarantee that he would be able to fly again. ER 628 ¶ 10. Fearing an inability to return to his studies, Mr. Kashem did not accept the offer.

The government has asserted that Mr. Kashem's alleged political views and online statements are the basis for his continued blacklisting. ER 539-41, SER 801-805. Mr. Kashem has stated that, if allowed to testify and present evidence in response to meaningful notice, he would show that those allegations were incorrect or omitted important context. ER 548-49, SER 814-15. But Mr. Kashem has never had that opportunity and instead has been effectively exiled from his country for over seven years. ER 628 ¶¶ 10-12.

Raymond Knaeble is a military veteran who grew up in California and Texas. He was honorably discharged from the U.S. Army in 2003. He moved to Kuwait in 2006 to take a job with a multinational manufacturer of energy and industrial products. ER 632 ¶¶ 2-4. In March 2010, his employer offered him a position in Qatar that was contingent on his passing a medical examination scheduled for later that month in Texas. ER 632-33 ¶¶ 5-6. Before the examination, Mr. Knaeble flew from Kuwait to Bogota to marry his Colombian fiancée. But

when he attempted to fly to the United States, he was denied boarding. ER 633 ¶¶ 7-9. Two FBI agents then interrogated him numerous times. ER 633 ¶ 11.

Desperate to get home, Mr. Knaeble attempted to return via a flight to Mexico. ER 633 ¶ 13. After he landed, Mexican government agents interrogated him for over three hours, detained him for twelve more, and returned him to Bogota. ER 633-34 ¶¶ 13-14. With no other option, Mr. Knaeble embarked on a twelve-day journey from Santa Marta, Colombia, to Mexicali, California. ER 634 ¶ 16. During the trip, Honduran, El Salvadoran, and Guatemalan authorities interrogated, detained, or searched him. ER 634 ¶ 17. He eventually made it home, but had lost his job offer. He has been unable to fly for almost eight years. ER 634-35 ¶¶ 18-21.

In a one-sentence disclosure, the government asserted that Mr. Knaeble's alleged travel to a specific country in a specific year is the basis for his continued blacklisting. ER 511, SER 776. If given the opportunity, Mr. Knaeble would testify that the allegation was inaccurate and reflected wholly innocent conduct. ER 518-19, SER 785-86.

Amir Meshal was born and raised in New Jersey and currently lives in Minnesota. ER 638 ¶¶ 1-2. He planned to travel to visit friends in California on June 9, 2009, but was denied boarding as approximately thirty officials descended

upon him at the check-in counter, humiliating and stigmatizing him. ER 638 ¶¶ 4-5.

The government's publicly stated reasons for blacklisting Mr. Meshal are based on alleged statements he purportedly made in 2007 to FBI agents who unlawfully detained him for months in East Africa. ER 304-05 ¶¶ 2-4. The FBI agents subjected Mr. Meshal to months of grueling interrogation under threat of torture, disappearance, and death, and repeatedly denied his requests for a lawyer. ER 304 ¶ 3. The government eventually allowed him to fly home, and has never charged him with a crime.

The blacklisting has devastated Mr. Meshal and his family. Mr. Meshal has been unable to fly for eight and a half years, and unable to visit his mother and other family abroad. ER 639 ¶¶ 7-8. The resulting stigma has also prevented him from retaining employment. ER 305 ¶ 7. Because the No Fly List is shared with foreign governments and state and local police, *see, e.g.*, ER 392 ¶ 20; ER 195, Mr. Meshal has been repeatedly subjected to unjustified stops, ER 305 ¶ 8. For example, on May 27, 2015, he, his wife, and their seven-month-old baby were stopped while driving from New Jersey to Minnesota after his brother's wedding. ER 305 ¶ 8. Two Pennsylvania state officers made clear that they were aware of his blacklisted status, with one asking, in reference to Mr. Meshal's wife and baby,"[w]as flying not an option for them, either?" ER 308 ¶ 17. Mr. Meshal and

his family were subjected to an hour-long unjustified stop and humiliating search in the cold. ER 307-09 ¶¶ 14-20.

Stephen Persaud works as a registered nurse in Los Angeles, California. ER 643 ¶¶ 2-4. In 2007, he moved to the U.S. Virgin Islands to attend nursing school and be with extended family. ER 643 ¶ 3. He met and married his wife there, and in May 2010, the couple planned to move to California for the birth of their second child, and so that Mr. Persaud could attend a graduate program in nursing. ER 643 ¶¶ 2-4. Mr. Persaud was denied boarding on May 11, 2010, during which five government officials surrounded him, his wife, and his son at the airport. ER 644 ¶ 5. They interrogated Mr. Persaud separately. He ultimately remained behind while his son and wife flew to their home in California. ER 644 ¶ 9. He then spent nine days traveling by ship and train to rejoin them. ER 644 ¶ 9.

The government's asserted basis for continuing to blacklist Mr. Persaud includes his alleged prior statements and those another individual allegedly made—apparently under coercion. ER 451-52, SER 840-41. If given the opportunity, Mr. Persaud would testify that those allegations are incorrect, misleading, or lack essential context demonstrating his innocence of any wrongdoing. ER 460, SER 852. Mr. Persaud has been unable to fly for seven and a half years. ER 644 ¶¶ 5, 11.

Each Plaintiff has averred that, if called to testify, he would state that he does not present a threat to aviation or national security, has no intention of engaging in or supporting violence, and is willing to undergo any suitable security screening that would allow him to fly again. *See* ER 428 (Kariye); ER 547, SER 814 (Kashem); ER 517, SER 785 (Knaeble); ER 488, SER 757 (Meshal); ER 460, SER 852 (Persaud); *see also* ER 640 (Meshal); ER 645 (Persaud); ER 635 (Knaeble); ER 629 (Kashem); ER 624 (Kariye).

B. The No Fly List and Substantive Criteria for Placement on the List.

The Terrorist Screening Center ("TSC") is the hub of the government's watchlisting system. It is a component of the FBI and maintains the Terrorist Screening Database ("TSDB"), of which the No Fly List is a subset. ER 571 ¶¶ 1-3. After an agency "nominates" individuals for placement on the No Fly List, TSC evaluates the information and determines whether they should be placed on the No Fly List, thereby prohibiting them from boarding aircraft flying to, from, or over the United States. ER 386-87, 391-92 ¶¶ 6, 16, 20.

Under the TSC's blacklisting criteria, "any individual, regardless of citizenship, may be placed on the No Fly List if the TSC determines that he or she represents:

a. A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a

threat of air piracy, or threat to an airline, passenger, or civil aviation security); or

b. A threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331 (5)) with respect to the homeland; or

c. A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331 (1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. § 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or

d. A threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so."

ER 571-72 ¶ 5. To bar someone from all air travel, TSC must find only "reasonable suspicion" that an individual meets these criteria—*i.e.*, reasonable suspicion that they constitute a "threat." Neither the criteria nor any other publicly available guidance defines "threat," let alone "reasonable suspicion" of a "threat."

If TSC decides to approve a No Fly List "nomination," it creates a record for other agencies with access to the TSDB, such as TSA or U.S. Customs and Border Protection. ER 392 ¶ 20. But that record does not include the basis for placing the individual on the No Fly List. ER 392. Individuals may remain on the No Fly List indefinitely. ER 132.

C. Plaintiffs' Placement on the No Fly List and Initial Proceedings in the District Court.

Plaintiffs filed this action in June 2010 after having been denied boarding on flights to or within the United States. They brought claims under the Due Process

Clause and the Administrative Procedure Act ("APA"), challenging both the adequacy of the No Fly List redress process—which includes the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP")—and their continued placement on the No Fly List.

At the time of filing, several Plaintiffs were stranded overseas because they were on the No Fly List. They moved for a preliminary injunction directing the government to permit them to fly home, based on their constitutional right to return to the United States. ECF No. 21.[5] Plaintiffs withdrew their motion after the government agreed to let them fly home on a one-time basis under restrictive conditions. *See* ER 608-10.[6]

Defendants then moved to dismiss this action on the grounds that TSA was a necessary party that could not be joined under 49 U.S.C. 46110. ECF No. 44. The district court granted the motion. ER 209-24. Plaintiffs appealed, and this Court reversed, holding that Section 46110 did not divest the district court of jurisdiction over Plaintiffs' claims. *Latif*, 686 F.3d 1122.

After remand, the parties filed cross-motions for partial summary judgment on Plaintiffs' claims challenging the blacklisting redress process. On August 28,

[5] Plaintiffs' ECF cites are to documents that were filed before the district court but, in accordance with Circuit Rule 30-1.5, not included in the Excerpts of Record.
[6] The conditions included a requirement that they book on a U.S.-based carrier, provide advance notice of their flight plans to the government, and submit to heightened security screening, among other restraints. *See* ER 609.

2013, the district court granted Plaintiffs' cross-motion in part, holding that "Plaintiffs have constitutionally-protected liberty interests both in international air travel and reputation." ER 197. The court granted Plaintiffs' cross-motion in full on June 24, 2014. ER 106-70. It found that "the DHS TRIP process falls far short of satisfying the requirements of due process," violating Plaintiffs' rights to procedural due process and the APA. ER 163, 168-69.

The district court then directed Defendants to provide Plaintiffs with "notice regarding their status on the No-Fly List and the reasons for placement on that List," and it required that such notice be "reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." ER 166; *see also* ER 595-600. The district court also held that government disclosures to Plaintiffs "may be limited or withheld altogether" if they would "create an undue risk to national security." ER 167.

D. The Revised Blacklisting Redress Process and the Role of TSC.

In response to the June 24, 2014 order, the government revised its redress process and filed a notice in the district court describing the new procedures on April 13, 2015. ER 413-17. The revised process, however, is not codified: it "has not been subject to a rule-making process and is not published in the Federal Register or the Code of Federal Regulations," and details about the process are publicly available only in court filings. ER 239 ¶¶ 11-12. Nothing precludes the

government from changing the process at any time with no notice to those challenging their blacklisting, or the public generally.

TSC plays a primary role throughout the revised process. When a U.S. person has been denied boarding, the only recourse is to submit a redress petition to DHS TRIP, which then determines only whether the individual matches an identity in the TSDB. If so, DHS TRIP forwards the petition to TSC, which reviews the traveler's record, determines whether the individual is on the No Fly List, and decides whether to continue blacklisting. ER 399-400 ¶ 37; ER 238 ¶ 5; ER 408 ¶ 7. If blacklisting continues, DHS TRIP sends the individual a letter "stating that he or she is on the No Fly List and providing the option to receive or submit additional information." ER 399-400 ¶ 37; ER 238 ¶¶ 6-7.

If the individual requests more information, DHS TRIP merely informs TSC of the individual's request. TSC then provides DHS TRIP with the criterion under which the traveler is placed on the No Fly List, and, "if applicable, the unclassified summary of information supporting the inclusion provided by the nominating agency and approved for disclosure to the person." ER 401-02 ¶¶ 40, 42. The individual may then submit additional information to DHS TRIP for the government's consideration. ER 401-02 ¶¶ 40, 42.

Similarly, if the individual submits information contesting the blacklisting, DHS TRIP simply forwards it to TSC. ER 402 ¶ 43. Under the original redress

process, TSC made a final determination regarding the individual's continued blacklisting. Under the revised procedures, TSC provides DHS TRIP with a recommendation to the TSA Administrator regarding whether the person should remain on the No Fly List, stating "the reasons for that recommendation." ER 402 ¶ 43; ER 241 ¶ 17. TSC is not required to forward all the information it relies on to the TSA Administrator. ER 241 ¶ 18. Rather, TSC determines what information should be included in the record sent to the TSA. TSC also tells the TSA Administrator of the "determination regarding whether and to what extent DHS TRIP is authorized to disclose such information when providing a final redress response." ER 410 ¶ 14.

The TSA Administrator then reviews the record he has been "presented," ECF No. 348 at 9, and issues a final order. Upon learning that the TSA Administrator agrees with TSC's decision, TSC implements it. ER 403 ¶ 45. Only TSC can remove the individual from the blacklist and communicate that removal to other agencies. *See* ER 403 ¶ 45.

The government has refused to further clarify TSC's role in deciding which criterion to apply to a blacklisted individual, the extent to which TSC determines what information is included in the recommendation to the TSA Administrator, and whether the TSA Administrator can access all information that TSC considered in making its recommendation. *See* ER 240-41. Plaintiffs sought

discovery on these and other facts, but the court denied that request.

E. The Blacklisting Redress Procedures Applied to Plaintiffs.

The government applied the revised process to Plaintiffs in modified form. The government issued DHS TRIP notification letters to Plaintiffs.[7] The letters informed Plaintiffs that they are on the No Fly List, listed the criterion on which the government relied, and provided a summary of some—but not all—of its reasons for each blacklisting. ER 573 ¶ 16-17.[8] The notification letters:

- Did not disclose all of the reasons or information the government relied upon in determining that Plaintiffs should remain blacklisted. ER 573 ¶¶ 17-19. For example, the only "reason" it provided Mr. Knaeble was one sentence stating that he traveled to a particular country in a particular year. ER 510, SER 776.

- Summarized only unclassified, unprivileged information. ER 257 ¶ 14.

- Withheld all relevant evidence. ER 573 ¶¶ 17-19. The letter to Mr. Kashem, for instance, made clear that the government relied on statements of FBI agents, reports prepared by those agents describing Mr. Kashem's alleged prior statements, and other materials, *see* ER 539-40, SER 804-05, but the government refused to provide that evidence.

- Did not disclose whether the government possesses exculpatory information, or information otherwise "contravening" any Plaintiff's continued blacklisting. ER 573 ¶ 20. For example, the letter to Mr. Meshal referred only to certain of his alleged statements but withheld the

[7] In October 2014, after the district court ordered Defendants to notify Plaintiffs of their status on the No Fly List, Defendants informed seven Plaintiffs that they were not on the No Fly List at that time. They are not parties to this appeal.

[8] *See* ER 419-21 (Kariye); ER 540-41, SER 804-05 (Kashem); ER 511-12, SER 776-77 (Knaeble); ER 480-82, SER 746-48 (Meshal); ER 451-53, SER 840-42 (Persaud).

complete statements, which would have reflected the highly coercive conditions under which FBI agents interrogated him while he was imprisoned for months in East Africa. ER 488-89, SER 757-58.

- Referred to prior statements allegedly made by Plaintiffs or other individuals, but did not provide those statements. ER 573-74 ¶ 21. For example, the letter to Mr. Kariye summarized, and relied extensively on, others' statements, but the government provided none of those statements. ER 418-20.

- Did not explain how any allegations in the letters satisfied the substantive criteria for placement on the No Fly List.

Plaintiffs objected to the notification letters as constitutionally inadequate and demanded additional information and procedures, including in-person hearings, which the government refused to provide. *See generally* ER 578-89.

Plaintiffs then submitted responses to the DHS TRIP notification letters.[9] ER 574 ¶ 26. The responses repeated Plaintiffs' objections to the inadequate disclosures. To the extent possible, Plaintiffs also summarized their anticipated testimony explaining why the allegations in the notification letters were incorrect, lacked credibility, or omitted important context. For instance, Mr. Knaeble's response letter corrected a false statement in the government's letter, and then explained the perfectly lawful purpose of his travel, which was the only basis the government provided for his blacklisting. Similarly, Mr. Kariye's response refuted

[9] *See* ER 422-44 (Kariye); ER 542-62, SER 806-26 (Kashem); ER 513-33, SER 778-800 (Knaeble); ER 483-504, SER 749-72 (Meshal); ER 454-73, SER 843-65 (Persaud).

the government's claim that he advocated violence. It also explained that his status as an imam in Portland required that he associate with all his congregants, including those whom the government subsequently charged with terrorism-related offenses—about which he had no contemporary knowledge. ER 422-44.

In addition, the responses proffered testimony from each Plaintiff that he poses no threat of terrorism and should promptly be removed from the List. *See* Plaintiffs' Redacted Response Letters, ER 428-30 (Kariye); ER 548-49, SER 814-15 (Kashem); ER 518-19, SER 785-86 (Knaeble); ER 489-90, SER 757-58 (Meshal); ER 450, SER 852 (Persaud).

TSC then provided the Acting TSA Administrator with a "classified memorandum, which summarized information supporting a recommendation to maintain each Plaintiff on the No Fly List." ECF No. 327 at 2. Plaintiffs had no access to that memorandum or even an unclassified summary of it. ER 284-85.

The TSA Administrator issued final determinations continuing the blacklisting of each Plaintiff.[10] ER 574 ¶ 27. In each, the TSA Administrator stated that his determination letters "do not constitute the entire basis for my decision but I am unable to provide further information" because, according to the letters, doing so would risk harm to national security and law enforcement activities. The TSA

[10] *See* ER 445-49 (Kariye); ER 563-67, SER 829-35 (Kashem); ER 534-58 (Knaeble); ER 505-09 (Meshal); ER 474-78 (Persaud).

Administrator provided no additional information about the basis for keeping each Plaintiff on the No Fly List, nor did he provide any reasons for rejecting Plaintiffs' responses. ER 592. At no point during the revised process were Plaintiffs given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. ER 574 ¶ 28.

The government refused to disclose aspects of the procedures it applied to Plaintiffs. *See* ER 242. The government's declarant did state that TSC and/or the FBI determined what information would be withheld from Plaintiffs, and that "additional material exculpatory information, to the extent any such information exists, was properly withheld" from Plaintiffs. ER 264-67 ¶¶ 27-30.

F. Plaintiffs' Challenge to the Blacklisting Redress Process.

Plaintiffs then renewed their challenge to the adequacy of the redress process before the district court. In April and May 2015 the parties filed cross-motions for partial summary judgment on Plaintiffs' procedural due process and APA claims. ECF No. 207; ECF No. 251. The district court granted the government's motion and denied Plaintiffs' motion, holding that the revised procedures "satisfy in principle most of the procedural due-process requirements that the Court set out in its June 2014 Opinion." ER 50. It nonetheless held that it could not determine whether the procedures were adequate as applied to Plaintiffs because the record did not indicate what information the government had withheld or the reasons for

those withholdings. ER 13. The court permitted the government to file *ex parte* and *in camera* a summary of "material information" withheld and explanations for the government's decisions not to make additional disclosures. ER 103.

In response, the government filed a classified declaration and exhibits *ex parte* detailing the information withheld from Plaintiffs and "explain[ing] the bases for the various withholdings." ECF No. 327 at 1-2; ER 250. The government also filed a public declaration memorializing the *ex parte* filing, describing the withheld information only in general terms, and asserting that disclosing more information would endanger national security or "impede law enforcement activities." ER 264-65. Plaintiffs objected to the court's consideration of materials *ex parte*. *See* ECF No. 329 at 10. In an *ex parte* order, the district court directed the government to submit additional information, again *ex parte* if necessary. ER 739. Plaintiffs again objected to the consideration of materials *ex parte* and requested that the government and/or the court provide information about the nature of the materials and the basis for the submission of the materials *ex parte*. ECF No. 333 at 2-3. The court rejected that request. ER 248-49.

In a brief order on October 6, 2016, the district court stated its conclusion that "Defendants have provided sufficient justifications for withholding additional information" from Plaintiffs, and granted the government's motions for summary judgment as to each Plaintiff. ER 42.

The government then moved to dismiss, for lack of jurisdiction, Plaintiffs' substantive claims challenging their continued blacklisting, arguing that the listing decision constituted a TSA order reviewable only in the courts of appeal under 49 U.S.C. 46110. ECF No. 348. Plaintiffs opposed the motion to dismiss and, alternatively, moved for leave to conduct limited jurisdictional discovery. ECF Nos. 351, 352. The court granted the government's motion to dismiss and denied the motion for jurisdictional discovery. ER 7-37. It then entered final judgment. ER 1-6.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment and dismissal for lack of subject matter jurisdiction. *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005).

SUMMARY OF ARGUMENT

The district court erred in three critical respects.

1. The court erred in concluding that the No Fly List criteria are not unconstitutionally vague. The criteria require only that an individual "represent" a "threat" of committing a violent act of terrorism; they do not proscribe any actual conduct whatsoever, leaving reasonable individuals to guess the reasons for government blacklisting. Because the criteria do not describe how someone could "represent" a "threat," federal officials have virtually unbounded discretion to

blacklist Americans for reasons no one outside the government will ever know. The district court offered no valid basis for concluding that the criteria meet the constitutional vagueness standard, let alone the heightened standard of clarity that applies when, as here, the criteria implicate First Amendment-protected activity. *See infra* Section I.

2. The court erred in holding that the blacklisting redress process comports with the Due Process Clause. There can be no dispute that Plaintiffs have suffered a substantial deprivation of liberty by being blacklisted, with devastating consequences for their personal and professional lives. *Infra* Section II.A. Such grievous harms can be imposed only after application of rigorous procedures to safeguard against error, but the government's redress process falls well short of what the Fifth Amendment requires, for three basic reasons.

First, it guarantees an extraordinarily high error rate—i.e., application of the listing criteria results in blacklisting of people who will never engage in terrorism. Plaintiffs submitted detailed expert testimony, which the government did not refute, that the government has no valid methodology for its predictive assessments. That high error risk is further heightened because the district court failed to require a clear and convincing evidence standard for No Fly List determinations. A heightened standard is required when, as here, the individual interests at stake are "particularly important and more substantial than mere loss of

money." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011). *Infra* Section II.B.

Second, the redress process lacks fundamental procedural safeguards that are universally available when liberty interests are at stake—except, according to the district court, in this blacklisting context. The government did not disclose all the *reasons* on which it relied for the blacklistings, and did not disclose *any evidence* in support of those reasons. It even withheld Plaintiffs' own purported statements. It also withheld exculpatory evidence, such as statements of witnesses with clear potential bias—including federal officials engaged in unlawful conduct, and informants. And although a central issue is each Plaintiff's credibility, the government never held a live hearing before a neutral decisionmaker—a protection available even for cases involving small amounts of property. The district court's failure to require the disclosure of all reasons and material evidence contravened *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965 (9th Cir. 2012). And its failure to require a hearing is truly unprecedented—due process always requires hearings when liberty is at stake. *Infra* Section II.C.

Third, the district court erred in justifying the government's extraordinarily deficient process on the basis of "undue risk to national security." The government's interests here are far weaker than the district court recognized. Although this case implicates both aviation security and the government's interest

in maintaining secrecy over certain information, the district court ignored long-tested tools already available to address those concerns while respecting due process. The government can satisfy its aviation security interests by permitting Plaintiffs to fly subject to heightened security measures, which it *already did* at the outset of this case when faced with a motion for preliminary injunction by Plaintiffs who were stranded abroad. The government's interest in secrecy is also manageable. Courts in national security contexts routinely use time-tested mechanisms that preserve government interests while providing individuals a meaningful opportunity to challenge liberty deprivations. Indeed, this Court found a due process violation where the government failed to pursue such mechanisms in *Al Haramain*, 686 F.3d at 984, and it already advised *in this case* that the court should consider using the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16. *Latif*, 686 F.3d at 1130. The district court largely ignored those alternatives. *Infra* Section II.D.

For these reasons, application of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), shows that the government's blacklisting system violates the Fifth Amendment. *See id*. (balancing (1) the private interest affected by the official action; (2) the risk of erroneous deprivation under existing procedures and the value of additional safeguards; and (3) the government's interest, including the burdens that additional safeguards would entail).

3. The district court also disregarded this Court's instructions by holding that it lacked subject matter jurisdiction over Plaintiffs' substantive claims challenging their continued blacklisting. Each Plaintiff contends that, regardless of the quality of the procedures employed, he should not be on the No Fly List because he does not present any danger. Yet the court held that because the revised blacklisting redress process now culminates in determinations by the TSA Administrator, those determinations fall within the scope of 49 U.S.C. 46110, which channels judicial review of certain TSA decisions directly to the courts of appeals.

This Court rejected that jurisdictional argument in this case in 2012, and the government's changes to the process since then do not materially alter the basis for this Court's prior conclusion. *Latif*, 686 F.3d at 1129. Just as in 2012, review of the decision to keep each Plaintiff on the No Fly List still requires review of orders by both TSA and TSC, which makes key determinations regarding initial and continued blacklisting. Just as in 2012, effective judicial review requires that the Court be able to direct both TSA and TSC to undertake action if a challenge is successful. But Section 46110 grants this Court no authority over TSC. Moreover, this Court has concluded on several occasions that district courts must have jurisdiction so that they may provide procedural protections that the blacklisting

process lacked—and still lacks today. The district court erred in dismissing Plaintiffs' substantive claims.

* * *

Plaintiffs seek what the Supreme Court and this Court have long recognized as fundamental, necessary constitutional protections against oppressive government conduct: clear criteria defining conduct that leads to placement on the No Fly List, meaningful notice of the bases for Plaintiffs' blacklisting, and a meaningful opportunity to clear their names at a hearing before a neutral decisionmaker. The Constitution does not permit the government to cast aside these elementary requirements in the name of categorical executive branch assertions of national security and secrecy.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE NO FLY LIST CRITERIA MEET CONSTITUTIONAL VAGUENESS STANDARDS.

The No Fly List blacklisting process is fundamentally flawed because the criteria for placement are impermissibly vague. Without any explanation of what conduct makes someone "represent" a "threat," the criteria provide no notice of how to avoid blacklisting. Moreover, because threat assessments under the criteria are inherently unreliable and error-prone, it is unclear how individuals deemed to be "threats" can successfully clear their names. Worse, the criteria penalize First

Amendment-protected conduct; they therefore require a heightened standard of clarity, which the government cannot meet.

A statute or regulation—whether civil or criminal—must give "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "Clarity in regulation," the Supreme Court has held, "is essential to the protections provided by the Due Process Clause of the Fifth Amendment," which "requires the invalidation of laws that are impermissibly vague." *Id.* Vague measures are invalidated to prevent (1) penalizing people for behavior that they could not have known was proscribed; (2) subjective, arbitrary, and discriminatory enforcement of laws; and (3) "any chilling effect on the exercise of First Amendment freedoms." *United States v. Kilbride*, 584 F.3d 1240, 1256-57 (9th Cir. 2009). A law is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Constitution requires greater certainty as to the meaning of a measure that "might induce individuals to forego their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

The No Fly List criteria fail these due process requirements. They provide no notice of what conduct they proscribe, let alone notice sufficient to meet the

heightened standard required of measures implicating the First Amendment. *See id.* The criteria neither define what a "threat" is, nor provide any indication of what behavior might lead the government to determine that someone "represents" a threat. An ordinary, reasonable person—like each Plaintiff—is left to guess at terms as undefined and amorphous as these. *See Connally*, 269 U.S. at 391.

The district court held that the No Fly List criteria are not impermissibly vague, in part because "the violent acts of terrorism that underpin the criteria are well-defined and readily understandable." ER 78-79. But the criteria do not actually require probable cause or even reasonable suspicion that a person has committed or attempted to commit an act of terrorism. And none of the Plaintiffs has done so. The criteria therefore require something *other* than a violent act of terrorism. But no one can know what those other things are. This is the quintessence of vagueness. *See Connally*, 269 U.S. at 392 (Food Control Act unconstitutionally vague because it placed people at risk of penalty but "forbade no specific or definite act").

The TSA Administrator's notification and determination letters to Plaintiffs reflect this profound indeterminacy. The letters recite TSC's applicable criterion for each Plaintiff, followed by allegations of varying specificity, but never explain *how*, even if true, the alleged conduct would render each Plaintiff a "threat" to justify blacklisting. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*,

613 F.3d 220, 230 (D.C. Cir. 2010) (requiring the Secretary of State to explain how information relied upon for designation as a terrorist organization related to specific portion of governing statute). The alleged conduct disclosed in the notification letters—*e.g.*, associating with mosque congregants, traveling abroad, posting comments online—is not unlawful, let alone clearly so. Mr. Knaeble's letter, for instance, discloses only that the government blacklisted him because of his travel to a particular country in a particular year, without any explanation of why or how such lawful travel presents any threat.

Compounding the vagueness of the criteria is the unspecified nature and degree of risk inherent in the concept of a "threat." Critically, both the Supreme Court and this Court have invalidated as unconstitutionally vague measures that required a similarly inchoate assessment of risk. *See Johnson v. United States*, 135 S. Ct. 2551 (2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert granted*, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1498). *Johnson* invalidated the "residual clause" of the Armed Career Criminal Act of 1984, which defined "violent felony" to include any felony that "involves conduct that presents a serious *potential risk of physical injury* to another." 135 S. Ct. at 2555-56 (citing 18 U.S.C. 924(e)(2)(B)) (emphasis added). The Court concluded that the residual clause "leaves grave uncertainty about how to estimate the risk posed by a crime," and that "[b]y combining indeterminacy about how to measure the risk posed by a

crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557, 2558.

The No Fly List criteria entail the same kind of double-indeterminacy that causes such "grave uncertainty." *See Johnson*, 135 S. Ct. at 2557-58. They lack any standard either for (1) measuring the "threat" that an individual poses or (2) determining how much of a "threat" one must pose in order to satisfy the criteria. And the criteria contain no hint of "real-world facts" or elements by which to determine whether a person represents a threat. *See Dimaya*, 803 F.3d at 1120.

Further support for Plaintiffs' vagueness claim comes from the extensive evidence, described in Section II.B.1 *infra*, establishing that the government has identified no indicators that can be used to actually predict whether someone will threaten aviation security, engage in terrorist activity, or violate the other prohibitions referenced in the No Fly List criteria. As set forth below, the "derogatory information" upon which the government relies to blacklist its citizens has never been shown to actually predict terrorist violence. As a result, the government has no defined or accepted bases on which to classify someone as a "threat" for purposes of the List. It can only guess "about conduct that may or may not occur in the future." *See* ECF No. 251 at 47. It then decides based on those guesses whether Plaintiffs and others should be blacklisted. Because there are no

predictive indicators of "threat," Plaintiffs have no way to demonstrate that they will *not* engage in terrorism or political violence, or otherwise violate the laws referenced in the No Fly List criteria.

Because the No Fly List criteria are imprecise, they are highly prone to inconsistent and discriminatory implementation, which is another core concern of vagueness doctrine. The Supreme Court has described the need for precision as an "important aspect of vagueness doctrine," to ensure that officials do not exercise their authority in an arbitrary or discriminatory manner. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Because the blacklisting criteria lack precision, No Fly List determinations arise from "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *see United States v. Williams*, 553 U.S. 285, 306 (2008), that "invite[] arbitrary, discriminatory and overzealous enforcement," as has occurred here against these Muslim American Plaintiffs. *See Leonardson v. City of E. Lansing*, 896 F.2d 190, 196 (6th Cir. 1990).

The district court nonetheless rejected Plaintiffs' vagueness challenge because, it held, courts had found "similar provisions" not unconstitutionally vague. ER 78-79. The court was wrong. The measures in the court's cited cases actually proscribed specific conduct. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (prohibition on providing "material support or resources" to certain designated foreign groups upheld because terms were specifically defined

by the statute); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1145 (9th Cir. 2009) (executive order required finding that person or organization acted on behalf of entity designated as terrorist or provided material support for terrorism); *Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009) (statute rendering inadmissible certain non-citizens who actually engaged in terrorist activity). The No Fly List criteria, by contrast, proscribe nothing.

The district court also ignored Plaintiffs' argument that the No Fly List criteria must satisfy a heightened standard of clarity because they penalize individuals for First Amendment-protected conduct, speech, beliefs, or association. Time and again, the Supreme Court has emphasized the heightened-clarity requirement: "*[P]erhaps the most important factor* affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (emphasis added); *see also United States v. Williams*, 553 U.S. 285, 304 (2008); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-74 (1997). The heightened standard applies whenever a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," "operates to inhibit the exercise of (those) freedoms," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted), or has "a potentially inhibiting effect

on speech." *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961).

The government's notification letters to Plaintiffs explicitly identify protected speech and activity—including speech on the internet, religious beliefs, practices, and association—as bases for their continued blacklisting. ER 418-21 (Kariye); ER 539-41, SER 801-05 (Kashem); ER 570-72, SER 773-77 (Knaeble); ER 479-82, SER 743-48 (Meshal); ER 450-53, SER 836-42 (Persaud). For instance, the notification letter to Mr. Kashem states that he was on the No Fly List in part because of certain alleged statements that, if accurately described in the letter, are plainly protected under the First Amendment as opinions about foreign policy—not actual wrongdoing. *See* ER 539-41, SER 801-05. Because the No Fly List criteria potentially implicate the entire universe of First Amendment-protected activity that falls *short* of committing the terrorist acts they reference, more exacting, "rigorous adherence" to the requirements of due process "is necessary to ensure that ambiguity does not chill protected speech." *FCC*, 567 U.S. at 252. The No Fly List criteria do not meet that standard.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE REVISED BLACKLISTING REDRESS PROCESS SATISFIES THE FIFTH AMENDMENT'S PROCEDURAL DUE PROCESS GUARANTEE.

A. Placement on the No Fly List Constitutes a Significant Deprivation of Plaintiffs' Liberty.

Blacklisting on the No Fly List unquestionably constitutes a significant and ongoing deprivation of Plaintiffs' liberty interests. *See* ER 197 ("Plaintiffs have constitutionally-protected liberty interests both in international air travel and reputation."); ER 139. The district court correctly found that "the realistic implications of being on the No Fly List are potentially far-reaching," and that the effects of that placement, including the government's sharing of the List with foreign governments, "severely restrict Plaintiffs' ability to travel internationally." ER 195.

The "complete and indefinite ban on boarding commercial flights," ER 132, has had devastating consequences for Plaintiffs. Mr. Meshal has been unable to visit his mother for over seven years. ER 639 ¶ 8. He has also been unable to secure or retain employment because of the stigma resulting from the blacklisting. ER 305 ¶ 7. Mr. Kashem has been separated from his family for over seven years. ER 628 ¶¶ 9-12. Mr. Knaeble lost his job because he could not travel for a required medical examination. ER 634 ¶ 19. He was also detained, interrogated, and searched on multiple occasions by foreign authorities while attempting to return to

the United States. ER 634 ¶ 17. As the district court found, placement on the No Fly List can cause "extensive detention and interrogation at the hands of foreign authorities," and it "carries with it the significant stigma of being a suspected terrorist"—a crippling label in these or any times. ER 134, 137-38.

In short, the government's blacklisting system can lead to "long-term separation from spouses and children," loss of employment opportunities, and the inability to access medical care, pursue an education, and participate in important religious obligations, among others. ER 135. Plaintiffs have suffered exactly these consequences, for over *seven years*. *See* ER 135.

B. The Government's Blacklisting Redress Process Guarantees a High Risk of Error.

Given the significance of Plaintiffs' interests, due process mandates rigorous protections to guard against erroneous deprivation of liberty. But the government's blacklisting redress system lacks even the most basic protections. Its first defect is perhaps the most fundamental: it blacklists many people who have no intention of harming anyone. Unrefuted evidence establishes that the government's blacklisting determinations are inherently unreliable, and its evidentiary threshold for blacklisting Plaintiffs is far too low.

1. The government's No Fly List determinations are unreliable and inherently error-prone.

Before the district court, the government acknowledged that No Fly List

determinations are "predictive judgments" (*see* ECF No. 251 at 6, 13, 15, 18, 27, 29) that Plaintiffs *might* constitute a threat to aviation or national security—*i.e.*, that Plaintiffs *might* commit "violent acts of terrorism" in the future. *Id*. at 48, 49. And it argued that courts should defer to its predictive judgments. *Id*. at 19 n.7, 30, 45.

In response, Plaintiffs submitted expert declarations from Dr. Marc Sageman, a long-time intelligence community professional and forensic psychiatrist specializing in terrorism research, and Dr. James Austin, an expert in individual risk assessment in the corrections and criminal justice context. *See* ER 312-33, 335-64.[11] Drs. Sageman and Austin stated that, from a scientific standpoint, the government's so-called predictive judgments guarantee an extremely high risk of error, for several reasons.

First, the government's determinations are based on "derogatory criteria" or other indicators that have never been shown to predict terrorism (itself a vague term) or other politically motivated violence. As Dr. Sageman explains, "[d]espite decades of research . . . we still do not know what leads people to engage in political violence," and "[a]ttempts to discern a terrorist 'profile' or to model terrorist behavior have failed to yield lasting insights." ER 340 ¶ 14. Rather, research by Dr. Sageman and others has found that an individual's decision to

[11] The experts' CVs are at ER 357 (Sageman) and ER 321 (Austin).

engage in political violence is context-specific and unique to that individual, making it very difficult to identify specific indicators that predict whether the individual will commit a terrorist act. ER 341-42 ¶ 17. To Dr. Sageman's knowledge, "no one inside or outside the government has yet devised a 'profile' or model that can, with any accuracy and reliability, predict the likelihood that a given individual will commit an act of terrorism." ER 342 ¶ 18.

Dr. Austin is similarly "not aware of attempts to develop risk assessment tools on individuals who have not been charged with or convicted of crimes," and is "skeptical that any such tools could be developed." ER 314 ¶ 9. Without valid, reliable indicators that can assess the likelihood that an individual will commit an act of political violence, the government's "predictive judgments" are guaranteed to result in widespread error.

Second, in blacklisting people using the No Fly List, the government lumps together "known" terrorists, who have actually been charged or convicted of terrorism-related crimes, with Plaintiffs and others who have never even been charged with any violent activity, let alone convicted of a terrorism-related offense. *See* ER 393 ¶ 21 (referring to "known *or* suspected" terrorists who may be placed on the No Fly List (emphasis added)). *Korematsu* aside, nowhere else in our legal system has any court upheld the deprivation of a citizen's liberty based on *predictions* of future dangerousness *without* a showing that the individual in

question has been at least charged with *a relevant prior* crime. *See* ER 314 ¶¶ 8-10; ER 339-40, 342, 348 ¶¶ 13, 18, 31; *cf. Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("Previous instances of violent behavior are an important indicator of future violent tendencies." (citing *Heller v. Doe*, 509 U.S. 312, 323 (1993))). Yet the government's system places Plaintiffs, who have never been charged with terrorism-related crimes, on the same footing with "known" terrorists.

Third, in making No Fly List determinations, the government purports to assess the likelihood of exceedingly rare events without employing even the most rudimentary scientific tools to test the validity of their determinations, establish an error rate, and account for that error. Dr. Sageman notes that "numerous disciplines have devised methods that . . . allow for prediction *with an estimated rate of error*," which is important to calculate because it "constitutes a rough indicator of the validity and reliability of the predictive tool" and allows decision makers to evaluate the appropriate consequences of the predictions. ER 342-43 ¶ 20; *see also* ER 315 ¶ 13 ("All risk assessment systems must pass the dual tests of reliability and validity."). Dr. Sageman and Dr. Austin described the basic scientific methods for evaluating the validity of No Fly List assessments. It is undisputed that the government has not used these methods. *See* ER 291, 292-94 ¶ 6, 8-10.

Ultimately, because acts of political violence are so rare and cannot be predicted based on validly discernible indicators, Plaintiffs' experts concluded that

the government' predictive judgment model results in "an extremely high risk of error." ER 350, 355 ¶¶ 35, 48; *see also* ER 318-20 ¶ 24, 27.

The district court dismissed this detailed testimony, claiming that the experts "miss the mark." ER 79-80. Without directly addressing any of the experts' testimony regarding the lack of a valid methodology for, and the inherently error-prone nature of, No Fly List assessments, the court concluded that "No-Fly List determinations are not and cannot be a mere exercise in profiling or guesswork, but must be based on concrete information that, together with rational inferences, create a reasonable suspicion that an individual meets at least one of the No-Fly List substantive derogatory criteria." ER 79-80.

But the "substantive derogatory criteria" to which the district court referred all require a finding of reasonable suspicion that the person constitutes a "threat"—*i.e.*, that the blacklisted person is likely to commit a violent act of terrorism. *See* ER 571-72 ¶ 5; *Threat*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/threat (last visited Dec. 14, 2017) (defining "threat" as "[a] person or thing likely to cause damage or danger"). Under either the government' original formulation ("predictive judgments") or the one the district court adopted without elaboration ("present threat"), a valid threat assessment necessarily requires that the government accurately predict an individual's likelihood of committing a future act of political violence. But the government admitted it could not make

such predictions, *see* ECF No. 304 at 7, and Plaintiffs' unrefuted expert testimony overwhelmingly confirms that fact.

The government also made several arguments other than those the district court adopted, but they too are misguided. The government cited "multiple layers of independent review" of No Fly List determinations, ECF No. 251 at 27-28, but internal executive branch review is useless if no one can make accurate predictive judgments. Moreover, internal, unchecked review is neither "independent" nor a sufficient safeguard against blacklisting errors. *See* ER 352 ¶ 38; ER 319 ¶ 26.

The government also invoked national security in arguing that its predictive judgments as applied to Plaintiffs are entitled to deference. ECF No. 251 at 29-30. But the fact that an agency decision implicates national security does not give it license to ignore the scientific method or otherwise act arbitrarily. *Cf.* 5 U.S.C. 706 (empowering courts to strike down "arbitrary" agency behavior); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (no deference where agency failed to consider relevant factors or base its decision on those factors, and/or made a "clear error of judgment"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Finally, the government tried to move the goalposts. It first stated that its "predictive judgments" are "assessments about conduct that *may or may not occur in the future*," ECF No. 251 at 59 (emphasis added)—but then asserted that it does

not commit "error" when it "places or retains someone on the No Fly List who does not actually go on to commit an act of terrorism." ECF No. 304 at 4. It claimed instead that so long as someone meets the government's No Fly List criteria, blacklisting by definition is not erroneous. *See id.* This tautology cannot save the government's blacklisting scheme. Any threat assessment scheme must accurately assess threat; if it fails to do so it creates a high risk of error.

2. The "reasonable suspicion" evidentiary standard further increases the risk of error.

As explained above (*see* Section II.A.), the government's evidentiary standard for placing people on the No Fly List is "reasonable suspicion" that an individual meets the substantive criteria. ECF No. 251 at 41. This low evidentiary standard injects additional risk of error into the government's determinations, as well as the administrative and judicial processes for reviewing those determinations. The standard does not even require that it be more probable than not that an individual meets the criteria for No Fly List blacklisting. *See* ER 369-70 ¶ 9; ER 390-91 ¶ 15. Instead, an individual can be placed and retained on the No Fly List if the government thinks he or she *might* meet the criteria, even if it thinks he or she *probably does not*. *See* ER 351 ¶ 37. As Dr. Sageman concluded, such a low threshold "virtually guarantees . . . that numerous false positives will result." ER 351 ¶ 37.

Due process requires that the government bear the burden of proof by "clear

and convincing" evidence to justify blacklisting Plaintiffs. Decades of jurisprudence establish that in civil proceedings in which the individual interests at stake "are both particularly important and more substantial than mere loss of money," a "heightened standard of proof is warranted." *V. Singh*, 638 F.3d at 1204 (internal citations and quotations omitted). Courts apply the "clear and convincing" standard in a variety of contexts involving significant deprivations of liberty. *See id.* (collecting cases involving competency, deportation, denaturalization, and civil commitment).

A heightened standard is particularly important when liberty is at stake and the risk of error is high. *See Santosky v. Kramer*, 455 U.S. 745, 757 (1982) ("Standards of proof, like other procedural due process rules, are shaped by the risk of error inherent in the truth-finding process."). In *Santosky*, the Court found the "preponderance of the evidence" standard inadequate where "numerous factors combine to magnify the risk of erroneous factfinding," including that the proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values" of the decision maker, who "possesses unusual discretion to underweigh probative facts," leaving the proceedings "vulnerable" to "cultural or class bias." *Id.* at 762-64. The Court also noted that a "striking asymmetry" between the government and the petitioners in litigation resources and options further magnified the risk of error. *Id.* at 764.

Each of these factors is present here. As explained above, the blacklisting scheme amounts to a "significant deprivation" of liberty. ER 135. The substantive criteria for placement on the No Fly List are beyond imprecise—they are unconstitutionally vague (*see supra* Section I). The revised process gives the government extraordinary discretion to "underweigh" facts, and places Plaintiffs at a severe disadvantage in challenging their blacklisting. *See Santosky*, 455 U.S. at 763-64. In such circumstances, due process requires "clear and convincing evidence."

The district court concluded that "procedural due process does not require Defendants to apply the clear and convincing standard to the No-Fly List determinations," on the grounds that the deprivation of liberty that placement on the No Fly List entails is "not on a comparable footing" with revocation of citizenship, deportation, or other contexts in which courts have required the clear and convincing standard. ER 73-75. In so concluding, however, the district court abandoned both its own findings regarding the severe consequences of placement on the No Fly List and this Court's holding in *V. Singh*, requiring a heightened standard of proof where the individual interests at stake are "particularly important and more substantial than mere loss of money." 638 F.3d at 1204.

The district court also suggested that the review process could compensate for the weak evidentiary standard because "the low standard of proof applicable to

placements on the No-Fly List is a relevant factor for a court to consider" when determining whether the procedures applied to Plaintiffs were "meaningful." ER 74. But *Santosky* rejected exactly that kind of procedural analysis, cautioning that "[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." 455 U.S. at 757.

C. The Blacklisting Redress Process Lacks Critical Procedural Safeguards.

The government's revised redress process falls far short of what the Due Process Clause requires for deprivations of comparable or even lesser significance. To illustrate this, Plaintiffs below set forth the law governing due process in comparable contexts. That comparison shows that courts consistently require full-blown adversarial hearings with extensive notice even when lesser interests were at stake, particularly when the deprivation of liberty rested on a prediction of future dangerousness. Importantly, courts also require such procedures in national security cases. *Infra* Section II.C.1.

The notice the government provided Plaintiffs fell far short of constitutional requirements. It did not include all the reasons for their blacklisting, any of the evidence on which the government relied, or any exculpatory evidence. Those deficiencies violated basic constitutional norms and rendered the redress process a sham. *Infra* Section II.C.2.

Similarly, the government's failure to provide Plaintiffs a hearing violated the most basic due process norms when liberty is at stake. Due process does not permit the government to recoup excess welfare benefits or shut off public utilities without a hearing. It certainly does not permit the significant deprivations of liberty at issue here without that basic safeguard. To hold otherwise would contravene a virtually unbroken line of authority and set a dangerous precedent. It would also deny Plaintiffs an opportunity to show how deeply flawed the government's evidence against them is, by depriving them of the right to confront the evidence and witnesses against them. *Infra* Section II.C.3.

1. In comparable contexts, significant deprivations of liberty based on predictions of future dangerousness require rigorous procedural protections.

When courts consider liberty interests comparable to those of Plaintiffs here, they require far greater process than the government provided and the district court upheld. Indeed, neither the Supreme Court nor any other lower court case of which Plaintiffs are aware has ever upheld the deprivation of a citizen's liberty based upon procedures as deficient as these. Courts consistently require full-blown adversarial hearings with extensive notice procedures when far lesser interests were at stake.

The procedures available for deprivations of *property* set a helpful floor because courts generally regard property interests as less weighty than liberty

interests. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n.*, 426 U.S. 482, 495 (1976) (suggesting property interest was not comparable to a liberty interest in terms of pre-deprivation process required); *cf. Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (finding process for indefinitely detaining non-citizen convicted of aggravated felony likely unconstitutional because "[t]he Constitution demands greater procedural protection *even for property*" (emphasis added)).

Even in property cases, the government must typically provide more process than it does here. For example, civil forfeiture requires full and clear notice and a hearing before a judge. *See, e.g.*, 18 U.S.C. 981, 983(a)(2)-(3) (general rules for civil forfeiture proceedings); 19 U.S.C. 1600 *et seq.* (civil forfeiture of property seized by customs officers). Similarly, courts require robust notice and an actual hearing in other property contexts. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 270 (1970) (termination of welfare benefits); *Lindsey v. Normet*, 405 U.S. 56, 66, 84 (1972) (evictions); *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (temporary school suspension); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1978) (cancellation of subsidized utility services); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (recovery of excess Social Security payments); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (termination of public employment).

When courts consider comparable *liberty* interests, they uniformly require far more process than Plaintiffs received. One useful analogy involves civil

commitment for mental illness or pedophilia. While the deprivation of liberty in those cases is arguably greater because placement on the No Fly List does not generally involve physical confinement, it is also a lesser deprivation because confinement may continue only so long as the individual in question remains ill—but not indefinitely, unlike in the No Fly List context. *See Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992) (statutory scheme for confinement of mentally ill violated due process because plaintiff could be held indefinitely); *cf.* ER 165 (without due process, individuals "could be doomed to indefinite placement on the No-Fly List"). To civilly commit someone for even a limited duration, the state must provide full and detailed notice of the allegations justifying commitment, *In re Gault,* 387 U.S. 1, 33 (1967), and a hearing in which it must prove its case by clear and convincing evidence, *Addington v. Texas*, 441 U.S. 418, 431-32 (1979).

Deportation also involves a deprivation of liberty with consequences comparable to those here. Whereas deported individuals are expelled from the United States, people on the No Fly List are effectively banned from all international air travel. ER 195. Blacklisting, like deportation, may cause separation from families, inability to participate in important life events, loss of employment, and limited access to medical care and educational opportunities.

Non-citizens facing deportation receive virtually all of the procedural protections that Plaintiffs—all citizens—seek, including the ability to obtain

adverse evidence and confront and cross-examine witnesses, *see Saidane v. INS*, 129 F. 3d 1063, 1066 (9th Cir. 1997); *Bondarenko v. Holder*, 733 F.3d 899, 906-07 (9th Cir. 2013); the right to a "full and fair" administrative hearing before a neutral fact-finder, *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003); and a reasoned explanation for the fact-finder's decision, *Su Hwa She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010).

Notably, these safeguards apply in deportation cases implicating national security. *See Rafeedie v. INS*, 880 F.2d 506, 508-09 (D.C. Cir. 1989); *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992) (holding that due process forbade the use of secret evidence and required a hearing in exclusion proceedings against permanent resident).

The district court concluded that the analogy to deportation was "unpersuasive," because "noncitizens who are deported from the United States are functionally stripped of all rights guaranteed by the Constitution unlike those who are placed on the No-Fly List." ER 73. But the relevant harm from deportation arises not primarily from the loss of constitutional rights, which occurs by virtue of departure from the country, but instead from the separation of families and loss of economic and educational opportunities. *See, e.g.*, *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("hardship of deportation" results from "family, social, and economic

ties" that residents have established over time). Plaintiffs experienced those same harms.

Courts have also repeatedly held that rigorous procedural protections are necessary when the government deprives people of liberty based on assessments of future dangerousness. *V. Singh*, 638 F.3d at 1203 (collecting cases, and requiring the government to bear the burden of proving dangerousness in immigration bond hearings by clear and convincing evidence). That is so even in contexts in which—unlike Plaintiffs—those being assessed have been charged with a serious (usually violent) crime, and even if they have prior convictions for such offenses. *See* ER 314 ¶¶ 10-11.

In the pretrial detention context, the Supreme Court emphasized that "the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination." *United States v. Salerno*, 481 U.S. 739, 751 (1987); *id.* at 750 ("Nor is the [Bail Reform] Act by any means a scattershot attempt to incapacitate those who are *merely suspected* of these serious crimes." (emphasis added)). Even probable cause—a higher standard than the government uses here—"is not enough" to support a determination of future dangerousness; rather, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker

by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750.

Courts apply those rules in national security cases arising in the pre-trial detention context as well. *See, e.g.*, *United States v. Hir*, 517 F.3d 1081, 1091 (9th Cir. 2008) (reviewing pre-trial detention for clear and convincing evidence of future dangerousness); *United States v. El-Hage*, 213 F.3d 74, 82 (2d Cir. 2000) (due process requires pretrial detention hearing for defendant accused of terrorism to present and cross-examine witnesses).

Similarly, before being civilly committed on the basis of dangerousness, an individual is entitled to a full adversarial hearing, before a judge, at which the government bears the burden of proving by clear and convincing evidence that the individual "is demonstrably dangerous to the community," as well as mentally ill. *Foucha*, 504 U.S. at 81; *see also Addington*, 441 U.S. at 431-32. And in parole revocation hearings, individuals who are already serving their sentences are nonetheless entitled to disclosure of the evidence against them and the right to confront witnesses at a live hearing before a neutral and impartial body. *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972).

All of these protections—disclosure of reasons and evidence, an adversarial hearing, and use of a clear and convincing evidentiary standard—are necessary not only because of the significant deprivation of liberty involved, but also because of

the inherent limitations of predictions of future dangerousness, even in situations in which the individuals being assessed have previously been charged with or convicted of crimes. *See* ER 314-15 ¶¶ 10-13. Here, Plaintiffs have never been charged with, or convicted of, any prior violent crime, and the risk of error in assessing the "threat" they pose is extremely high. The Due Process Clause therefore entitles Plaintiffs to more robust procedures than they received.

The district court nonetheless rejected the use of the basic procedural protections Plaintiffs urged. In doing so it relied heavily on this Court's decision in *Al Haramain*, 686 F.3d 965. *See* ER 83-84. However, the district court misapplied the central national security holdings of that case in several respects.

First, the government provided far *less* notice to Plaintiffs than the Court required in *Al Haramain*. In *Al Haramain*, the Court held that "due process requires . . . a timely statement of reasons," and held that the government's failure to provide notice of two of three reasons for freezing an organization's assets on national security grounds violated due process. *Al Haramain*, 686 F.3d at 986, 987. Here, the government admitted that it has not provided all its reasons for blacklisting to *any* Plaintiff. ECF No. 251 at 12.

Second, the district court upheld the government decision to provide lesser process if deemed necessary to avoid "undue risk to national security"—a standard that appears nowhere in *Al Haramain*. On that basis the government limited

disclosure of some of its reasons for blacklisting Plaintiffs, withheld *all* actual evidence against them, including their own purported statements and exculpatory evidence, and declined to hold live hearings. In *Al Haramain*, this Court countenanced no such unfairness. It permitted the government to withhold only information that was *actually classified*, not just potentially so. And even then, it required "mitigation measures" such as declassification of relevant information, unclassified summaries, or the use of cleared counsel and protective orders, rather than blanket withholdings based on generalized national security claims. 686 F.3d at 984. *Compare* ER 57 (citing *Al Haramain*, 686 F.3d at 984) *with* ER 82-84.

Third, in treating *Al Haramain* as the most protective available rule, the court conflated the property interests at stake in *Al Haramain* with the personal liberty interests here. Organizational property interests such as those in *Al Haramain* and *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009), are important, but do not weigh as heavily as the restraint on liberty imposed by a ban on all air travel, potentially for life, coupled with labeling a person as a suspected terrorist and disseminating that label widely to law enforcement and other government agencies at home and abroad. *See supra* Section II.C.1 (citing cases that have consistently treated liberty interests as more significant than property).

Finally, due process requires more robust procedures here than in *Al Haramain* because blacklisting involves predictive assessments of individuals' dangerousness—as opposed to the past activities of an organization. *See Al Haramain*, 686 F.3d at 978-79; *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 750 (7th Cir. 2002); *KindHearts*, 647 F. Supp. 2d 857. Whereas those cases turned primarily on an analysis of the organizations' financial transactions, here the central question involves credibility, which creates a greater risk of error and, therefore, a need for more process.

As the law from these contexts shows, the district court erred in failing to require procedural protections commensurate with both the significant deprivation of liberty caused by this blacklisting scheme and the increased risk of error inherent in predictions of future dangerousness.

2. The blacklisting redress process did not provide Plaintiffs with meaningful notice.

The government failed in multiple respects to provide adequate notice of the basis for Plaintiffs' blacklisting because the notices: (a) did not include all of reasons on which the government relied to maintain Plaintiffs on the No Fly List; (b) did not disclose *any* of the evidence in the government's possession to support those reasons; and (c) did not disclose material, exculpatory evidence. Together,

these deficiencies made it virtually impossible for Plaintiffs to respond meaningfully to the allegations against them.

a. Due process requires notice of all of the government's reasons for maintaining Plaintiffs on the No Fly List.

Overwhelming authority, including in the national security context, establishes that constitutionally sufficient notice must be complete and precise. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him.") (Frankfurter, J., concurring); *Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997) (notice must include "the exact reasons" for the adverse action); *Al Haramain*, 686 F.3d at 986 (government violated due process in providing notice of only one of three reasons for designating organization as terrorist); *see also Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014) (the "right to know the factual basis for the action" is one of the "essential components of due process"); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (use of secret evidence to support detention pending removal of a non-citizen who was a suspected member of a terrorist organization violated due process because it denied meaningful notice); *Rafeedie*, 795 F. Supp. at 19 (due process violated when government kept confidential its bases for exclusion proceedings against permanent resident with alleged terrorist ties); *cf. Nat'l Council of Resistance of*

Iran v. Dep't of State, 251 F.3d 192, 209 (D.C. Cir. 2001) (without due process protections, court could not presume that an organization designated as terrorist based on secret evidence could not refute the charges).

The importance of full notice flows directly from the fairness considerations underlying due process. Fundamentally, people cannot respond to an accusation they do not know. Incomplete notice leaves people unable to "clear up simple misunderstandings or rebut erroneous inferences," *Gete*, 121 F.3d at 1297, provide "potentially easy, ready, and persuasive explanations" to factual errors, *Al Haramain*, 686 F.3d at 982, or tailor responses to the true reasons for the government's action, *Ralls*, 758 F.3d at 320. These deficiencies inevitably increase the risk of government error. *See, e.g.*, *Al Haramain*, 686 F.3d at 986 ("[B]ecause AHIF-Oregon could only *guess* (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high."); *KindHearts*, 647 F. Supp. 2d at 904 ("substantial risk of wrongful deprivation" where, despite disclosure of evidentiary memo and unclassified exhibits, plaintiff remained "largely uninformed about the basis for the government's actions").

It is undisputed that the government did not provide notice of all its reasons for maintaining Plaintiffs on the No Fly List. ER 573 ¶ 18. It is hard to overstate the seriousness of this defect. Even if Plaintiffs definitively refuted every "reason" disclosed in the notification letters, the government would still have kept them on

its blacklist based on other, undisclosed reasons. The refusal to provide all reasons for blacklisting each Plaintiff made the redress process a sham; it was impossible for Plaintiffs to clear their names.

The government's notification letters to Plaintiffs demonstrate this unfairness. The one-sentence disclosure to Mr. Knaeble stated just that he traveled to a particular country in a particular year. This cannot constitute meaningful notice. *See* SER 776-77. Mr. Kariye's situation is also illustrative. The government has filed a separate denaturalization case against him that includes different allegations from those it disclosed here. *See United States v. Kariye*, No. 3:15-cv-1343 (D. Or. filed July 20, 2015). Mr. Kariye is refuting those allegations in the separate case, but did not do so here because the government never mentioned them. Mr. Kariye has no way to know whether the allegations now made—publicly—in his denaturalization case were also used to justify his blacklisting.

The district court acknowledged the importance of notice of "the reasons for placement" on the No Fly List, *see* ER 164, 166, but held that the government could limit or withhold them to avoid "undue risk to national security"—a determination the court left the government to make on a "case-by-case basis," subject to review "by the relevant court." ER 167 (citing *Al Haramain*, 686 F.3d at 984); *see also* ER 82-84. Even assuming Plaintiffs' notice rights are governed by the rules for property from *Al Haramain*, *but see supra* Section II.C.1, the district

court erred. As noted above, *Al Haramain* reaffirmed this Court's holding that "due process requires . . . a timely statement of reasons," and held that the government's failure to provide notice of two of three reasons for freezing an organization's assets violated due process. *Al Haramain*, 686 F.3d at 986, 987 (citing *Gete*, 121 F.3d at 1287-91). And the district court's cursory and newly-created "undue risk" standard appears nowhere in any other relevant national security case.

Decades of due process doctrine clearly establish that the government must provide full notice of the reasons on which it is relying to justify blacklisting Plaintiffs. If the reasons are legitimately and properly classified, the government may rely on CIPA-type mitigation measures, as suggested in *Latif* and *Al Haramain*. But it may not withhold entirely reasons on which it relied, and render the redress process a sham.

b. Due process requires the government to disclose evidence on which it relied.

Governing precedent also requires the government to disclose the *evidence* in support of its reasons for blacklisting Plaintiffs. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 494-95 (1980) (involuntary transfer of prisoner to mental health facility required disclosure of evidence relied upon for transfer); *Morrissey*, 408 U.S. at 489 (parole revocation required "disclosure to the parolee of evidence against him"); *Goldberg*, 397 U.S. at 270 (same for welfare termination proceedings);

Gete, 121 F.3d at 1298 (evidence against owners of seized vehicles, including detailed officers' reports, must be provided to "afford them a fair opportunity to prepare a proper defense").

Courts enforce this requirement in the national security context, even when relatively minimal property interests are at stake. *See Ralls*, 758 F.3d at 318-19 (applying rule to designated foreign terrorist organization's small bank account). They also enforce it for non-citizens alleged to be unlawful enemy combatants held at Guantanamo. *See Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) ("we presume counsel . . . has a 'need to know' all Government Information concerning his [or her] client . . ."). The reason for this requirement is self-evident: individuals must have an opportunity to confront and rebut evidence against them.

The government did not disclose *any* evidence against Plaintiffs. ER 573-74 ¶¶ 17-22. Its notification letters referred to various allegedly adverse evidence—*e.g.*, recordings of conversations with third parties, statements by witnesses or *Plaintiffs' own statements*, and secret testimony from confidential informants—but the government provided *none* of it. That omission was particularly glaring because there could be no legitimate justification for it; the notification letters themselves only summarized *unclassified*, *unprivileged* information. *See* ER 284-85.

Unsurprisingly, the government's withholding of evidence severely undermined Plaintiffs' ability to contest its allegations. For instance, the letter to Mr. Kariye indicated that the government relied on the second-hand statements of several witnesses, including recorded statements from government agents and others containing hearsay within hearsay. *See* ER 419-21. What little the government revealed about these statements undermines the witnesses' reliability. *See* ER 419-20. But without the statements, Mr. Kariye could probe no further. *Cf. Greene v. McElroy*, 360 U.S. 474, 496 (1959) (due process must afford the opportunity to rebut the "testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy").

Mr. Meshal's notification letter referred only to some of Mr. Meshal's alleged statements while he was being unlawfully detained and coercively interrogated by the FBI in East Africa. *See* ER 480-81, SER 746-47. The government withheld critical context that undermines the value of the statements—including FBI agents' threats to his life, his forced disappearance, and his multiple requests for access to counsel—and that crippled Mr. Meshal's ability to refute other possibly biased evidence against him, including from the FBI agents who denied him his constitutional rights.

The district court upheld this deficiency, holding that the government's disclosures "need not take the form of original evidence," and that the government "may withhold information when disclosure would create an undue risk to national security subject to Defendants' obligation to implement appropriate procedures to minimize the amount of material information withheld." ER 89. As explained above, adoption of this new "undue risk" standard was itself error. As with notice of reasons, due process requires disclosure of evidence, including in contexts implicating national security. *See Rafeedie*, 880 F.2d at 508-09 (strongly suggesting that use of secret evidence against returning lawful permanent resident in exclusion hearings violated due process); *Rafeedie*, 795 F. Supp. at 19 (holding same on remand); *Kiareldeen*, 71 F. Supp. 2d at 414 (holding that use of secret evidence in bond and removal proceedings violated due process despite provision of unclassified summaries). That rule obviously applies to the summaries here, given that they addressed *unclassified* evidence, including Plaintiffs' own purported statements.

Again, Plaintiffs do not seek full public disclosure of all information relevant to their blacklisting. Rather, consistent with due process, they seek material evidence on which the government relied. To the extent that such evidence is classified or otherwise privileged, the district court should have

adopted minimization procedures used in other national security contexts. It did not.

c. Due process requires the government to disclose material and exculpatory information.

Due process requires that the government disclose evidence in its possession that is favorable to an accused, including the prior statements of its witnesses so as to allow the accused the opportunity to explore inconsistencies or omissions. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). Although *Brady* is a criminal case, the Supreme Court has never confined *Brady* to criminal contexts, and lower courts apply it in civil contexts. *See* ECF No. 207 at 12-14, 19-20 (collecting cases). Courts have concluded that the government must meet its *Brady* obligations when its action affects individual liberty, *United States v. Edwards*, 777 F. Supp. 2d 985, 991-92 (E.D.N.C. 2011) (applying *Brady* in civil commitment context); *United States v. Gupta*, 848 F. Supp. 2d 491, 496-97 (S.D.N.Y. 2012) (imposing *Brady* obligation in civil enforcement context because the information was not available through other sources). Courts apply it even where lesser interests were at stake. *Sperry & Hutchinson Co. v. F.T.C.*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("Presumably, the essentials of due process at the administrative level require similar disclosures [of information helpful to the accused] by the agency where consistent with the public interest.").

Similarly, in a quintessential national security context—habeas proceedings for non-citizens held at Guantanamo—the government must disclose all evidence that is reasonably available or can be obtained through reasonable diligence and that tends to materially undermine the government's justification for detention. *Dhiab v. Bush*, Civil Action No. 05-1457 (GK), 2008 WL 4905489, at *1 (D.D.C. Nov. 17, 2008); *see also Al Maqaleh v. Hagel*, 738 F.3d 312, 327 (D.C. Cir. 2013) (alleged enemy combatants detained by U.S. military in Afghanistan can call witnesses and discover potentially exculpatory evidence in government's possession).

Access to exculpatory evidence would obviously reduce the high likelihood of error arising from the government's blacklist. As this Court explained in the criminal context:

> [W]e expect prosecutors . . . to turn over to the defense in discovery *all* material information casting a shadow on a government witness's credibility. . . . Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison.

United States v. Bernal-Obeso, 989 F.2d 331, 334 (9th Cir. 1993). Surely Plaintiffs also should know whether the confidential informants or other witnesses on whom the government relied have histories of making false statements or strong reasons to do so here.

The district court held that the government must provide exculpatory information to Plaintiffs but only "as long as disclosure of the information would not create an undue risk to national security." ER 90-91. Again, that ruling was erroneous. It permitted the government to withhold information based on a unilateral and categorical assertion of "undue risk to national security," without any invocation of privilege, any public explanation for the withholding, or any meaningful adversarial process. The fundamental requirements of fairness may not be so easily cast aside.

In sum, the district court erred in failing to adhere to longstanding authority requiring a complete statement of reasons and evidence on which the government relied to keep Plaintiffs blacklisted, along with disclosure of material and exculpatory information.

3. The blacklisting redress process provides no hearing.

The revised process also violates the Due Process Clause because it does not afford Plaintiffs a hearing. In holding that the revised process need not include live hearings, the district court broke new ground: Plaintiffs are aware of no other context in which a court has held that the Due Process Claus permits the government to deprive a citizen of liberty without a hearing. The government cannot shut off public utilities or recover excess Social Security benefits without a hearing; yet the decision below permits Plaintiffs' blacklisting for years without

that basic protection. *See Memphis Light*, 436 U.S. at 18, 20 (hearing required before public utility can discontinue service); *Califano*, 442 U.S. at 696 (same for recovery of excess Social Security payments).

a. Due process requires a live hearing before a neutral decision maker.

The opportunity to be heard is an indispensable minimum of due process. *See Mathews*, 424 U.S. at 333; *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard."). The Supreme Court has held consistently that the government may not deprive a person of a protected liberty or property interest—including terminating welfare benefits or public utility services, suspending children from school, or even recovering excess Social Security benefits—without a hearing that occurs "at a meaningful time and in a meaningful manner." *See Goldberg*, 397 U.S. at 267 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also* Section II.C.1., *supra*. Similarly, in the deportation context, the government cannot remove a non-citizen from the United States without a hearing that comports with fundamental fairness principles. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903); *see also Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (*en banc*) (citing *Yamataya* in holding that "every individual in removal proceedings is entitled to a full and fair hearing"). The notion that, without providing a hearing, the government can stigmatize U.S. citizens as suspected

terrorists and deny them the right to board aircraft—thereby separating them from loved ones, limiting their prospects for economic prosperity, and blacklisting them—simply cannot be reconciled with these cases.

Hearings with live testimony are crucial where liberty interests are at stake, especially when outcomes turn on credibility assessments. *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2002) (reversing adverse credibility assessment based solely on appellate record review, because "[w]eight is given [to] the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify" (citations omitted)). This Court has held, for instance, that the Board of Immigration Appeals violates a petitioner's due process rights when it makes "an independent adverse credibility finding" without affording the petitioner an opportunity to establish her credibility. *Abovian v. INS*, 219 F.3d 972, 980 (9th Cir. 2000).

At no point in the last seven years has any Plaintiff had an opportunity to "present[] his own arguments and evidence orally," even though the Supreme Court found that safeguard particularly important where individuals challenge government action "as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *See Goldberg*, 397 U.S. at 268. The government's final blacklisting determinations plainly turned on questions of fact and assessments of Plaintiffs' (and others') credibility. Each

Plaintiff would have testified that he presents no threat to aviation security and would have offered testimony to refute adverse evidence had Defendants disclosed it. *See* ER 425 (Kariye); ER 544, SER 811 (Kashem); ER 516, SER 784 (Knaeble); ER 485, SER 754 (Meshal); ER 456, SER 849 (Persaud). The government's decision therefore necessarily included an adverse credibility finding, but no neutral decision maker ever assessed Plaintiffs' (or any other witness's) credibility in person.

b. Due process requires an opportunity to confront and cross-examine adverse witnesses.

The right to a hearing includes the concomitant right to confront and cross-examine adverse witnesses and to call witnesses on one's own behalf. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process."). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269. That opportunity is even more important where the witnesses may be motivated by greed, vindictiveness, or prejudice. *See Greene*, 360 U.S. at 496.

The unconstrained use of hearsay can also run afoul of due process. In the deportation context, this Court has permitted hearsay only where the original

witness is unavailable *and* the hearsay witness's testimony is reliable. *See, e.g.*, *Cinapian v. Holder*, 567 F.3d 1067, 1074-76 (9th Cir. 2009) (emphasizing "the importance of Petitioners' right to cross-examine witnesses against them and test the strength and establish the scope of an expert witness's factual determinations"); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (holding that the Due Process Clause "requires that [persons] be given a reasonable opportunity to confront and cross-examine witnesses," and finding due process violation where government's own conduct caused the unavailability of the witness and witness had apparent motive to inculpate defendant); *Saidane*, 129 F.3d 1063 (reversing deportation order because it relied on the hearsay affidavit of a witness who was available); *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983) (same). That holds true in deportation cases involving national security. *See Kiareldeen*, 71 F. Supp. 2d at 416 ("[D]ue process concerns are not satisfied unless the government provides the detainee with an opportunity to cross-examine the affiant, or at the minimum, submits a sworn statement by a witness who can address the reliability of the evidence.").

Because Plaintiffs have been denied any hearing, they have also been denied any opportunity to confront and cross-examine adverse witnesses and to call witnesses on their own behalf. And although Plaintiffs do not contend that hearsay could never be used in a proceeding to determine whether to maintain someone on

the No Fly List, the government appears to have relied upon it here without limitation. None of the final determination letters contain any discussion as to whether: a) the TSA Administrator arrived at conclusions based on evidence from individuals with personal knowledge of the allegedly adverse information; b) individuals who did have personal knowledge of the allegedly adverse information were available to make their own statements; or c) the TSA Administrator considered if the person providing the adverse information had any self-interested motivation against Plaintiffs.

Plaintiffs' determination letters are rife with prejudicial hearsay. For instance, Mr. Meshal's notification letter relied almost entirely on the testimony of FBI agents who coercively "interviewed" him during his unlawful detention, *see* ER 479-80, SER 746-47, yet he had no opportunity to examine the FBI agents, contest the accuracy and completeness of their accounts, or explore other factors that would tend to undermine their truthfulness. Mr. Meshal was not even allowed to see a copy of his own purported statement. Similarly, Mr. Kariye's notification letter relied repeatedly on both recorded and unrecorded conversations in which different individuals—some of whom are unnamed—describe statements allegedly made by third parties or by Mr. Kariye to third parties. ER 420. The government denied Mr. Kariye his purported actual full statements and also the opportunity to examine any of the individuals with personal knowledge of the allegations made in

the letter, including the DHS TRIP Director who wrote the letter and whoever within the government first described the conversations to which the letter refers. As a result, Mr. Kariye had no way to know if the speakers whose conversations described in the recording are themselves biased or unreliable, or if the statements described by these individuals have been accurately conveyed. The government's use of unreliable hearsay from agents and perhaps informants on the government's own payroll—without affording Plaintiffs the opportunity to confront and cross-examine adverse witnesses—is simply unfair.

In concluding that "due process does not require a live or adversarial hearing in this context," ER 92, the district court failed to cite any other context where a court has upheld a significant deprivation of a citizen's liberty without a live hearing. Instead, the district court cited to *Al Haramain*. But again, its use of that case was error. The right to a hearing was not at issue in *Al Haramain*; the word "hearing" never appears in the opinion. And, as the district court acknowledged, "[p]lacement of individuals on the No-Fly List . . . arguably presents a stronger need for a live, adversarial hearing because the evidence is more likely to be testimonial and intelligence-based" than the evidence involved in *Al Haramain* or similar cases. ER 94.

Yet, the court concluded that live hearings were not "a viable procedure in this context in light of the sensitive nature of much of the evidence" and the

potential that such hearings could affect intelligence-gathering efforts. ER 94-95. The court never explained why that rationale was justified when courts regularly hold hearings in sensitive national security cases involving deportation, detention at Guantanamo, pretrial bond hearings, and various other contexts where courts use the Classified Information Procedures Act and similar procedures. *See* 18 U.S.C. app. 3 § 8(c); U.S. Dep't of Justice, Offices of the U.S. Attorneys, *Synopsis of Classified Information Procedures Act (CIPA)*, Criminal Resource Manual 2001-2099 ("testimony may be required from an intelligence officer or other agency representative engaged in covert activity" and explaining that CIPA provides methods for maintaining secrecy of, for example, true identity, "that will provide the defendant with the same ability that he would have otherwise had to impeach, or bolster, the credibility of that witness").[12] Nor did the district court explain why the procedures employed in national security-related deportation cases, or those available to Guantanamo detainees (none of whom are U.S. citizens), would not be "viable" here. *See Al Maqaleh*, 738 F.3d at 327; *Dhiab*, 2008 WL 4905489, at *1.

Ultimately, the government's asserted need for secrecy cannot overcome the due process prohibition against deprivations of liberty without an opportunity to be

[12] *Available at* http://www.justice.gov/usam/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa (last visited Dec. 14, 2017).

heard. This Court should not countenance such an affront to our constitutional order.

D. The Government Can Provide Additional Procedural Protections Without Harming Its Interests.

The third prong of the *Mathews* test requires courts to consider the government's interest and any burden that additional safeguards would entail. 424 U.S. at 335. The government identified two interests to the district court: its interests in protecting aviation security and preventing terrorism, and in maintaining secret national security information. The weight of the government's interests, however, must be assessed in light of available protocols that accommodate both aviation security and secrecy while affording Plaintiffs the protections that the Due Process Clause guarantees.

1. The government's security interests must be assessed in light of readily available flight screening protocols.

The district court framed the government's interest broadly as "ensuring the safety of commercial aviation" and "combatting terrorism." ER 70. That characterization was too broad. The government's interest must instead be understood in the context of additional protocols—short of a complete ban on all air travel—that are available to accommodate those interests. The district court acknowledged as much in its order finding that the original process violated due process. *See* ER 163 ("[T]he adequacy of current procedures and potential

additional procedures, however, affect the weight given to the governmental interest."). Similarly, this Court's ruling against the government in *Al Haramain* was predicated in part on the availability of procedures that would not jeopardize national security, despite the weighty counter-terrorism interests involved in that case. *See Al Haramain*, 686 F.3d at 983-84.

Here, the governmental interest in the No Fly List is an interest in preventing individuals from boarding aircraft even *after* they have submitted to heightened screening and other security measures. This feature—the complete and continuing ban on air travel—is what distinguishes the No Fly List from other methods of protecting aviation or national security that Plaintiffs do not challenge in this case. Therefore, the due process question here requires the Court to assess the government's interest in a *complete flying ban* even though it has at its disposal rigorous screening and other security options.

Most important, the Court must consider the procedures the government already utilized to enable Plaintiffs stranded overseas to return to the United States. *See* ER 609-10. Those procedures include: providing the government with advance notice of travel plans; booking on U.S.-based carriers; arriving at departure airports earlier than usual for thorough security screening; undergoing additional screening prior to boarding; and, if necessary, the (presumably undisclosed) use of federal air marshals on flights. *See* ER 609-10.

In other words, the government's security interest is not an unbounded one and can be tailored and accommodated short of draconian blacklisting—factors to which the district court did not give adequate weight.

2. The government's secrecy concerns can be adequately mitigated using procedural safeguards.

The government argued that providing additional procedural safeguards would risk disclosure of sensitive national security and intelligence information. The district court erred in deferring to those broad and categorically invoked concerns.

The Constitution does not permit the government to deprive Plaintiffs of meaningful notice and hearings because of the possibility, or even the likelihood, that its blacklisting determinations rely in part on classified or other privileged information. That "No Fly determinations are *often* based on highly sensitive national security and law enforcement information," disclosure of which "*could* . . . 'tend to reveal whether an individual has been the subject of an FBI counterterrorism investigation,'" cannot justify *always* denying Plaintiffs' process. ECF No. 251 at 18 (emphasis added); *see also id.* at 34, 35 (No Fly List determinations "typically" involve sensitive or classified information). If the mere *potential* that notice and a hearing would implicate national security information were enough to justify the government's failure to provide process, then no notice or hearings would be available in the various national security contexts cited

above. *See supra* II.C.1. *Cf. Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the [state secrets] privilege.").

Instead, due process demands that if the government seeks to invoke a privilege, it must refer to specific information and follow the time-tested procedures courts use for adjudicating privilege claims. That process preserves the rightful place of courts in our constitutional framework. *See Hamdi*, 542 U.S. at 536 ("[T]he United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake."); *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) ("No matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake.").

As noted above, this Court rejected an even more limited government argument in *Al Haramain*. Even where the government had asserted that the information at issue was actually classified, this Court required "mitigation" procedures to safeguard due process. *Al Haramain*, 686 F.3d at 984. *Cf. Hamdi*, 542 U.S. at 533 (holding that "essential constitutional promises" of meaningful notice and an opportunity to be heard "may not be eroded" in cases implicating national security concerns) (plurality opinion).

Courts and administrative bodies routinely adjudicate claims that involve sensitive, confidential, or classified information in multiple contexts, including those involving national security, without resorting to the blanket denial of meaningful notice and hearing that the district court adopted here.[13] In all of these circumstances, courts have adopted procedures that simultaneously protect sensitive information and adjudicate claims consistent with due process.

This Court already made clear its expectation that the district court would look to CIPA in determining how to deal with sensitive information. *Latif*, 686 F.3d at 1130 ("We also leave to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information. *See* Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16."); *Latif*, 686 F.3d at 1129

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[13] Courts require the government to disclose, or at least summarize, classified or otherwise sensitive information in various contexts in which it seeks to deprive liberty or property in the name of national security. *See Bismullah*, 501 F.3d at 187 (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions); *Al Haramain*, 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); *see also 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); *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).

("Ordering TSA to tell Plaintiffs why they were included on the List . . . would be futile. Such relief must come from TSC—the sole entity with both the classified intelligence information Plaintiffs want and the authority to remove them from the List."). CIPA does not alter the principle that the government must disclose reasons and information it relies upon to plaintiffs and their counsel, but it does regulate those disclosures through, *inter alia*, the use of stringent protective orders. *See* 18 U.S.C. app. 3 § 3; *see also United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (holding that CIPA requires the disclosure of classified information that is helpful to the defense or essential to a fair trial because "[w]ere it otherwise, CIPA would be in tension with the defendant's fundamental constitutional right to present a complete defense"). Thus, under CIPA, the government may seek to replace certain disclosures about which they have legitimate secrecy concerns with unclassified summaries or factual stipulations provided in lieu of the evidence, so long as the substitute disclosures give each Appellant "substantially the same ability to make his defense as would disclosure of the specific classified information." *See* 18 U.S.C. app. 3 §§ 4, 6(c); *United States v. Sedaghaty*, 728 F.3d 885, 906 (9th Cir. 2013) (finding inadequate a substitute CIPA disclosure that excluded exculpatory information and failed to provide "crucial context" for information that it did convey).

Immigration judges also have the regulatory authority to issue protective orders and seal records containing national security information, while still providing for their use by the immigrant. *See* 8 C.F.R. 1003.46; *see also Khouzam v. Attorney Gen. of U.S.*, 549 F.3d 235, 259 n.16 (3d Cir. 2008) (explaining that "the Government can move for the issuance of an appropriate protective order"). Although the immigrant has the right to examine materials submitted in such cases, the records are nonetheless sealed.[14] Moreover, the regulations give the judge various tools to ensure the information remains protected, including the use of certain storage protocols, and the power to issue protective orders. 8 C.F.R. 1003.46(f)(1)-(3).

The robust procedural protections used to ensure due process in these contexts demonstrate that they can be applied here without harming government interests. Yet the district court chose not to employ *any* of these tested mechanisms. It acknowledged this Court's suggestion that it look to CIPA, as well as the Court's directive in *Al Haramain* regarding mitigation measures, ER 96-98, but instead permitted the government to "withhold information from any Plaintiff

[14] As explained by the Executive Office for Immigration Review when it proposed the rule, "[t]his authority will ensure that sensitive law enforcement or national security information can be protected against general disclosure, while still affording *full use of the information* by the immigration judges, Board of Immigration Appeals, *the respondent,* and the courts." 67 Fed. Reg. 36,799 (May 28, 2002) (emphasis added).

because the disclosure would create an undue risk to national security," and required only that it "minimize the amount of material information withheld." ER 98-99. The court therefore permitted the government to make the "undue risk" determination unilaterally, and without invocation or adjudication of any privilege. It did not require even the provision of unclassified summaries. *See* 18 U.S.C. app. 3 §§ 4, 6(c); *Sedaghaty*, 728 F.3d 906.

The district court's deviation from governing law in various analogous national security contexts was error.

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' SUBSTANTIVE CLAIMS FOR LACK OF JURISDICTION.

In 2012, this Court held that the district court had jurisdiction to hear Plaintiffs' procedural challenge to the original blacklisting process and their substantive challenge to their placement on the list. The government subsequently made changes to the redress process. It then argued, again, that the district court lacked jurisdiction over Plaintiffs' substantive challenge under 49 U.S.C. 46110.[15] The district court agreed, but its decision was incorrect.

[15] In relevant part, 49 U.S.C. 46110(a) provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business."

This Court has repeatedly concluded that Section 46110 does not apply in cases involving substantive and procedural due process challenges to blacklisting. In so ruling, the Court has considered whether material aspects of the redress process fall under the control of TSA or TSC, such that a review of the blacklisting determination—and any remedy for an improper determination—would necessarily involve both TSA and TSC. *See Latif*, 686 F.3d at 1127, 1129; *Ibrahim v. DHS*, 538 F.3d 1250, 1256 (9th Cir. 2008); *cf. Arjmand v. DHS*, 745 F.3d 1300, 1302 (9th Cir. 2014) (considering whether "meaningful relief" could be granted without jurisdiction over TSC). When claims challenge determinations outside TSA's control, this Court has held that "§ 46110 does not explicitly allow us to hear them." *Latif*, 686 F.3d at 1128.

These factors still dictate that jurisdiction over Plaintiffs' substantive claims properly lies in the district court. TSC, not TSA, orders individuals to be blacklisted in the first instance. *See Latif*, 686 F.3d at 1127 (citation omitted). Review of any final blacklisting determination still requires review of both TSC and TSA decisions. *See id.* at 1128. And any remedy for Plaintiffs' substantive claims must involve both TSC and TSA. *See id.* at 1129. Thus, despite the government's tweaks to the redress process, TSC continues to control the key determinations regarding initial and continued blacklisting. Because Section 46110 does not apply to TSC, it does not strip the district court's jurisdiction.

The district court's ruling also ignores another factor this Court relied upon for its prior jurisdictional holding: this Court cannot review a listing decision with such a deficient administrative record. Because the government held no hearings and declined to disclose the reasons and evidence on which it relied, its revised process produced a "one-sided and potentially insufficient administrative record," just as in *Latif*. *See* ER 143-44. As this Court explained in *Ibrahim*, when the administrative process lacks adequate procedural protections, a court reviewing the outcome of that process must be able to take its own evidence—as the district court, but not this Court, is best able to do. 538 F.3d at 1256; *see also Latif*, 686 F.3d at 1129 (remanding to district court "for such further proceedings as may be required to make an adequate record" to support consideration of Plaintiffs' claims). Here, the revised process remains opaque, and still lacks key procedural protections—additional reasons why Plaintiffs' substantive claims should proceed in the district court.

A. TSC Maintains the No Fly List.

This Court found one factor to be dispositive when it previously considered whether it had jurisdiction over Plaintiffs' substantive claims: that TSC "'actually compiles the list of names ultimately placed' on the List." *Latif*, 686 F.3d at 1127 (citation omitted); *see also Ibrahim*, 538 F.3d at 1256 ("The No-Fly List is maintained by the Terrorist Screening Center, and section 46110 doesn't apply to

that agency's actions."). This is still true. When individuals initially challenge their blacklisting, they do so not in response to any action by the TSA Administrator, but in response to TSC's listing decision. And even if they are removed through the redress process, TSC controls whether they are blacklisted again in the future.

The district court concluded this factor is no longer relevant because, under the revised process, the TSA Administrator's order "is the proximate reason why Plaintiffs remain on the No-Fly List and reversal of the TSA orders as to the remaining Plaintiffs would completely satisfy their requests for relief." ER 28. However, TSA is still just an intermediary for virtually all listing decisions. The clear weight of material decision-making authority remains with TSC.

B. TSC and TSA's "Unique Relationship" Precludes Exclusive Jurisdiction in the Courts of Appeals.

In previously concluding that the district court had jurisdiction over Plaintiffs' claims, this Court emphasized the "unique relationship between TSA and TSC," such that any judicial review required review of both agencies' orders. *Latif*, 686 F.3d at 1129. Although the government has modified the redress process so that the final order bears the TSA Administrator's signature, the "unique relationship" remains. Two aspects of the revised process make this clear: the TSA Administrator's orders against each Plaintiff followed from and necessarily implicated multiple TSC orders; and, TSC controlled nearly every part of the

process leading up to the TSA Administrator's order. *See* ER 399, 401-403 ¶¶ 37, 40-44.

First, the "final order" issued by the TSA Administrator necessarily implicates several TSC orders and decisions. Judicial review would necessarily be of both agencies' decisions. Importantly, before the TSA Administrator became involved in any capacity, (1) TSC ordered the Plaintiffs' initial blacklisting, *see* ER 391, 392-93 ¶¶ 17, 20; (2) TSC determined that Plaintiffs should remain on the No Fly List during periodic review of TSDB and No Fly List records, *see* ER 396 ¶ 28; and (3) TSC decided to continue their blacklisting, *cf.* ER 396, 399-400 ¶ 28-29, 37. TSA's ultimate order is thus dependent upon TSC determining at two or more previous points that the individual should remain blacklisted. TSC, moreover, has multiple opportunities to remove an individual unilaterally from the No Fly List. ER 396, 399-400 ¶ 28-29, 37. Focusing on the TSA Administrator's decision as the end point in this process ignores the series of pivotal TSC decisions that lead up to it.

Second, the modifications the government made to the redress process do little to alter TSC's near-total control, or the fact that the TSA Administrator's role is limited to reviewing recommendations and analysis compiled by TSC. Upon receipt of an individual's redress petition, DHS TRIP forwards it to the TSC, a TSC official reviews the available information, and may obtain additional

information from other agencies. ER 398 ¶¶ 33-34. TSC then determines whether the individual has been properly placed on the No Fly List and, apparently, may unilaterally remove the individual from the No Fly List if it determines that continued placement would be inappropriate. If the individual requests more information after being notified of her status on the No Fly List, it is TSC that coordinates the preparation of an unclassified summary of reasons and is responsible for providing to DHS TRIP the specific criterion under which the individual was blacklisted. ER 402 ¶ 42; ER 375 ¶ 21. If, after receiving any unclassified summary, the individual again seeks review, it is once again TSC that conducts a "comprehensive review." ER 410 ¶ 14; ER 400 ¶ 39. A TSC official then makes the recommendation to the TSA Administrator. ER 410 ¶ 14.

In addition to controlling the process leading up to the TSA Administrator's decision, TSC exercises significant control over relevant information. TSC coordinates the compilation of any unclassified summary of reasons and makes the final "determination regarding whether and to what extent DHS TRIP is authorized to disclose" information underlying the decision to maintain the individual on the No Fly List. *See* ER 410 ¶ 14; ER 402 ¶ 42. TSC is not required to forward all information to the TSA Administrator. ER 241 ¶ 18. TSC need only provide information it considers "material" and "sufficient" to support its recommendation. *See* ER 230 ¶ 5.

Thus, the district court erred in holding that the TSA Administrator is "clearly the authority to remove from or to maintain DHS TRIP applicants on the No-Fly List." ER 27. The district court found that TSC's role in creating the record and recommendation did not undermine the TSA Administrator's role as the "ultimate decision-maker," ER 29, and it hinged that conclusion on the fact that "the TSA Administrator may request additional information from TSC and/or the nominating agency." ER 29. But the district court overlooked a critical issue: although the government stated that TSA could *request* more information from TSC, it refused to stipulate that the TSA Administrator could actually *access* all of the information upon which TSC relied in making its recommendation. ER 241 ¶ 18-19. With no indication that the TSA Administrator can (or ever does) seek, obtain, and consider all the information TSC has in making an independent determination, TSA is functionally "a conduit" for TSC's determinations. *See Latif*, 686 F.3d at 1128.

Finally, because the final "order" is *not* solely an order of TSA, the district court additionally erred when it concluded that jurisdiction over Plaintiffs' constitutional claims lies with this Court because the claims are "inextricably intertwined" with a TSA order. *See* ER 31. This Court has "consistently held that § 46110 is not an absolute bar to district court review of TSA's orders." *Latif*, 686 F.3d at 1129. And No Fly List determinations clearly encompass material TSC

decisions and orders, and thus do not fall within the ambit of Section 46110. *See, e.g.*, *Ibrahim*, 538 F.3d at 1255-56 ("The government advances no good reason why the word 'order' should be interpreted to mean 'order or any action inescapably intertwined with it."); *see also Mokdad v. Lynch*, 804 F.3d 807, 814 (6th Cir. 2015) ("[T]he government in effect urges that we find that a *direct challenge to one agency's order* is inescapably intertwined with *another agency's order* . . . . This would be an unprecedented departure from the doctrine of inescapably intertwinement as applied in other circuits.") (emphasis in original).

C. Any Remedy for Plaintiffs Must Involve Both TSC and TSA.

The district court's ruling presents another fundamental problem: this Court would not be able to provide the relief Plaintiffs seek on direct review because Section 46110 does not authorize this Court to amend, modify, or set aside TSC orders. *See* 49 U.S.C. 46110(a) (setting forth appeals courts' authority on direct review).

First, on a practical level, because TSC controls the blacklisting determinations and the TSDB, any order directing TSA to remove Plaintiffs from the No Fly List would necessarily require TSC action. *See* ER 403 ¶ 45.[16]

[16] Relatedly, if this Court were to directly review Plaintiffs' cases and order their removal from the No Fly List, it would have no power to enjoin the TSC from blacklisting them again for the same reasons in the future. *Cf. Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1061-62 (D. Or. 2015), *rev'd on other grounds by Tarhuni*

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Second, as part of their substantive claims, Plaintiffs would seek to challenge the withholding of information during the redress process, but this Court would lack jurisdiction to grant relief because TSC, not TSA, determines what information is released to petitioners and included in the administrative record. TSA plays at most a ministerial role in transmitting information to the petitioner as part of the redress process. *See* ER 410 ¶ 14. The district court observed that "[t]he TSA Administrator now has the authority to seek additional information," ER 34, but that conclusion ignores the TSC's pivotal role in controlling the information that forms the basis for the TSA Administrator's decision. At most, it appears that this Court could only direct the TSA Administrator to request additional information; it could not require that Plaintiffs be told "why they were included on the List."[17] *See Latif*, 686 F.3d at 1129.

(continued from prior page)
v. Sessions, 692 Fed. App'x 477 (9th Cir. 2017) (acknowledging plaintiff's concern that "there is nothing to stop Defendants from placing him back on the No-Fly List after termination of this litigation," but concluding that defendants' public representations—including by the TSC's Deputy Director of Operations—sufficed to mitigate that concern).

[17] Plaintiffs believe the record clearly establishes that jurisdiction lies with the district court. But if the district court had any doubt (which it clearly did), it should have granted Plaintiffs' request for limited jurisdictional discovery that would answer any remaining questions about the TSC's and the TSA Administrator's decision-making and information-sharing authorities, as well as their actions in applying the process to individual Plaintiffs. ER 34. The Court refused to do so.

Thus, "[i]f Plaintiffs are entitled to judicial relief, any remedy must involve both TSA and TSC." *Id*.

D. The Administrative Process Remains Inadequate to Permit Direct Circuit Court Review.

"[C]ommon sense" also weighs in favor of district court review of an "agency's decision to put a particular name on the list." *Ibrahim*, 538 F.3d at 1256. Despite the government's tweaks to the blacklisting redress process, it still does not generate a meaningful administrative record for direct appellate review, for two reasons.

First, as this Court previously found, the absence of *multiple* procedural safeguards, including a hearing before an administrative law judge and a notice-and-comment procedure, make direct review in this Court inappropriate. *Ibrahim*, 538 F.3d at 1256. The Court echoed those concerns in this case. *See Latif*, 686 F.3d at 1129 ("Plaintiffs demand to know *why* they are apparently included on the List and an *opportunity* to advocate for their removal." (emphasis added)). As explained above, Plaintiffs still do not know all the reasons the government is relying on to blacklist them, they still have had no hearing, and the listing process still has not been subject to notice and comment.

Second, an administrative record based on the current process would be fatally incomplete. As described above, the record does not contain all the information TSC considered in making its recommendation—it contains only

information TSC deemed "material," ER 230 ¶ 5, along with information the blacklisted individual submitted, ER 410 ¶ 15. The administrative record is thus limited by TSC's materiality determination, which, under the government's scheme, is not subject to review by any court.

Fact-finding—in the district court—is necessary to assess the propriety of TSC materiality assessments on which the TSA Administrator's orders are based. *Cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) ("[S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record.'").

Nevertheless, the district court erroneously stated that "a civil plaintiff could not likely obtain through discovery the type of sensitive, national-security information that Defendants are entitled to withhold during the administrative process under the revised DHS TRIP procedures." ER 31. Again, the district court—prematurely and without explanation—simply accepted the government's categorical secrecy assertions without any invocation of privilege, and despite the availability of alternative procedures set out in *Latif* and elsewhere. *See supra* Section II.C.3.b.

In sum, applying the record facts to each of the considerations this Court has analyzed in making Section 46110 jurisdictional determinations establishes that the district court has jurisdiction to adjudicate Plaintiffs' substantive claims.

CONCLUSION

For the foregoing reason, Plaintiffs respectfully ask this Court to reverse the district court's judgment and hold that (1) the No Fly List criteria are unconstitutionally vague; (2) the blacklisting redress process violates procedural due process; and (3) the district court retains subject matter jurisdiction over Plaintiffs' substantive claims.

Dated: December 15, 2017

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Pursuant to Circuit Rule 25-5(e), I attest that all other signatories on whose behalf this filing is submitted concur in the filing's content.

Dated: December 15, 2017

s/ Hina Shamsi
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STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any related cases pending before this court.

Dated: December 15, 2017

s/ Hina Shamsi
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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35634

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Signature of Attorney or Unrepresented Litigant [s/ Hina Shamsi] Date [12/15/2017]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: December 15, 2017

s/ Hina Shamsi
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