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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

| | |
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| AYMAN LATIF, et al.,<br><br>*Plaintiffs,*<br>v.<br><br>ERIC H. HOLDER, JR., *et al.*,<br><br>*Defendants.* | Case 3:10-cv-00750-BR<br><br>**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 19(B)** |

# DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 19(B)

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In opposing Defendants' motion to dismiss, Plaintiffs ignore specific statutory commands issued by Congress, misapply *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008), and disclaim any challenge to the very redress process they simultaneously contend is unlawful. Plaintiffs, who allege that they have been placed on the No-Fly List without being given any meaningful opportunity to contest such placement, cannot escape the fact that they are challenging the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"), a redress program that is the statutory responsibility of DHS, as administered by the Transportation Security Administration ("TSA"). Plaintiffs' DHS TRIP determination letters are final orders from TSA and can only be challenged in the Courts of Appeals.

## I. TSA HAS A STATUTORY MANDATE TO PROVIDE REDRESS, AND TSA IS THE ONLY AGENCY AUTHORIZED TO EFFECTUATE REDRESS DECISIONS INVOLVING TRAVELERS WHO HAVE BEEN DELAYED OR DENIED AIRLINE BOARDING BECAUSE THEY HAVE ALLEGEDLY BEEN WRONGLY IDENTIFIED AS INDIVIDUALS ON THE NO FLY OR SELECTEE LIST

In 2004, Congress set up a statutory structure that charged TSA with providing redress to travelers in the very situation Plaintiffs claim to be in. *See* 49 U.S.C. § 44903(j)(2)(C)(iii); 49 U.S.C. § 44903(j)(2)(G)(i); 49 U.S.C. § 44909(c)(6). Specifically, TSA is required to "establish a procedure to enable airline passengers, *who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat*, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii) (emphasis added). TSA created the Office of Transportation Security Redress ("OTSR") in response to this Congressional mandate.

A further Act of Congress required the Secretary of Homeland Security to set up a timely and fair redress process for travelers who believe they have been delayed or prohibited from

boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by any office or component of DHS. *See* 49 U.S.C. § 44926. The Secretary designated the by then already-established TSA OTSR to act as the Office of Appeals and Redress required by 49 U.S.C. § 44926. Declaration of James Kennedy ("Kennedy Dec."), Docket # 44-3, ¶ 4. In providing redress and issuing DHS TRIP determination letters to travelers who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under a screening regime, DHS TRIP is acting pursuant to both TSA's and DHS's statutory obligation and authority to provide redress.

The redress offered by TSA (on behalf of DHS) to passengers who have been delayed or prohibited from boarding a flight due to wrongful placement on the No Fly List thus fulfills Congress's mandate that TSA provide a process of review and resolution for such persons. Indeed, in making TSA responsible for providing redress in this context, Congress implicitly recognized that TSA decisions on complaints for delayed or denied boarding would constitute TSA final orders pursuant to 49 U.S.C. § 46110 ("Section 46110") that could only be challenged in federal appellate courts. To the extent Congress wanted to make these kinds of decisions subject to challenge in district court, it has been free to act at any time since 2004, when it charged TSA with administering redress for travelers experiencing the same difficulties flying alleged by Plaintiffs. Congress has not done so.

While Plaintiffs are free to challenge the redress program established by Congress, they cannot ask the Court to create, out of whole cloth, a new redress program, while simultaneously disclaiming any interest in changing the existing allegedly unlawful redress process and

contending that their suit is not "a challenge to TSA's letters." Pls. Opp. to Defs. Mot. To Dismiss, Docket # 50 ("Pls. Opp.") at 2. However creatively Plaintiffs characterize their claims, their allegation that "they have been prohibited from flying without being provided a constitutionally adequate means of redress," Pls.' Opp. at 7, is in fact a challenge to the DHS TRIP redress process available to travelers who believe they have been delayed or prohibited from boarding a commercial aircraft due to being mistaken for, or being a match with, an identity on the Selectee or No-Fly List. This process culminates administratively in the issuance of a final action by TSA. If the allegations Plaintiffs make are not about DHS TRIP, then all they have really alleged is a desire for a different redress process, which is essentially a "generalized grievance" and cannot form the basis of a lawsuit.[1] Consequently, Plaintiffs' claim that they have been deprived of constitutional due process by DHS TRIP is necessarily a claim that DHS TRIP is legally deficient.

Indeed, Plaintiffs' complaint must be evaluated in the context of the comprehensive scheme Congress has created to maintain aviation security. *See* 49 U.S.C. §§ 44901, 44902, 44903, 44904. The TSA Administrator is responsible for security over all modes of transportation, including the day-to-day Federal security screening operations for passenger air transportation, as well as final administrative actions related to redress complaints. *See id;* 49 U.S.C. § 114(d) and (e). This extensive statutory structure provides a further reason to reject Plaintiffs' assertion that private litigants can file suit and request the creation of a brand-new

[1] *See generally Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (standing to bring suit "bar[s] adjudication of generalized grievances more appropriately addressed in the representative branches) (internal quotation marks and citations omitted).

redress procedure, without requiring any changes to the existing process or the involvement of the agency charged with administering that process.

Moreover, all of the Plaintiffs filed applications with DHS TRIP, so their claims necessarily implicate the program. *See* Am. Compl., Docket # 15, ¶¶ 51, 61, 85, 109, 124, 145, 168, 210, 229, 251, 260, 280, 305, 316, 343, 356; Kennedy Dec., Exhibits A and B. Plaintiffs suggest that the Court should devise its own redress process, without regard for the statutorily-mandated process provided by TSA through DHS TRIP. *See* Pls. Opp. at 12 (suggesting that changes to DHS TRIP would not be enough to satisfy legal requirements, likely requiring a "new redress process" to be operated by "governmental actors" but presumably to be specified by the Court as requested in Plaintiffs' Prayer for Relief). A court cannot substitute its judgment for that of Congress in deciding who has the responsibility to provide redress and how they should provide it. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 834-35 (1976) (where Congress created "an exclusive, pre-emptive administrative and judicial scheme for the redress" of injuries, including violations of constitutional rights, Congress' enforcement scheme is presumptively the only means to remedy such injuries).[2]

Nor can the Court substitute its judgment for that the agency statutorily directed to administer the challenged program. If the Court were to find the process unlawful, it should remand to the responsible agency, which is not currently a party to this litigation, for revised

[2] Moreover, even if a court were to actually schedule the kind of name-clearing hearing Plaintiffs are seeking, such relief would be inconsistent with the long-standing principle that courts defer to the executive branch in cases involving national security. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705, 2727 (2010) ("when it comes to collecting evidence and drawing factual inferences in [the national security context], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.").

procedures. Remand is appropriate even where an agency has acted unconstitutionally because a court should not assume the role of a government administrator. *See, e.g., Florida Power & Light v. Lorion,* 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *PMOI v. United States Dep't of State*, 613 F.3d 220, 222- 31 (D.C. Cir. 2010) (finding petitioner's designation as a foreign terrorist organization was not consistent with due process but remanding to agency for "proceedings consistent with this opinion"); *Taylor v. Freeman*, 34 F.3d 266, 269 (4th Cir. 1994) ("intrusive and far-reaching federal judicial intervention . . . is justifiable only where state officials have been afforded the opportunity to correct constitutional infirmities and have abdicated their responsibility to do so."; *United States v. Cortez-Rocha*, 394 F.3d 1115, 1122 (9th Cir. 2005) (federal courts were not created to "manage the day to day affairs and control the policies of the Executive Branch of government.").

Finally, while the Terrorist Screening Center ("TSC") considers whether changes are warranted to an individual's status on the No Fly List, it is TSA that effectuates whether or not individuals may board an airline by determining who may or may not obtain a boarding pass through the administration of passenger prescreening programs. As a result, if an individual is denied boarding due to his placement on the No Fly List, seeks redress, and is removed from the

No Fly List, it is *TSA* that permits the airlines to issue a boarding pass to allow that individual to board a flight.

DHS and TSA are thus necessary parties to any lawsuit that contends that the process provided to travelers in Plaintiffs' alleged position is inadequate and that seeks a different form of redress for those who have experienced difficulties boarding flights to, from or within the United States. Consequently, Plaintiffs' claim that they have been deprived of due process necessarily relies on the argument that DHS TRIP is deficient. DHS and TSA are thus necessary and indispensable parties. But because TSA final orders are at issue, TSA may not be joined in this litigation before this Court, and the case must be dismissed.

## II. IBRAHIM IS NOT DISPOSITIVE OF THE CLAIMS PRESENTED IN THIS CASE

Plaintiffs misapply and over-rely on the Ninth Circuit's decision in *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008). Because redress was specifically not an issue in that case, the Ninth Circuit's holding does not extend to actions taken by TSA as part of its statutory obligation to provide redress. *See Ibrahim v. DHS*, No. 06-545 (N.D. Cal. Aug. 16, 2006), Docket # 101, Order Granting Defendants' Motions to Dismiss at 11 (attached hereto as Exhibit 1) ("But the difference here is that Plaintiff is not actually challenging the Passenger Identity Verification Process. Plaintiff did not raise allegations in her Amended Complaint about the procedures for 'clearing' herself as *not* on the No Fly List. Instead, Plaintiff challenged the fact that she was on the No Fly List."). In addition, in *Ibrahim*, a central part of the Ninth Circuit's conclusion was that "[f]or all we know, there is no administrative record of any sort for us to review." 538 F.3d

at 1256. Here, the declarations submitted by Defendants in support of their dispositive motion conclusively establish that this is not the case with an application for redress; complaints are filed, investigated, and resolved based on relevant records, if any. *See* Kennedy Dec., at ¶¶ 8-13; Declaration of Christopher Piehota ("Piehota Dec."), Docket # 44-1, at ¶¶ 30-36. Indeed, the DHS TRIP determination letters sent to Plaintiffs state that "applicable records" have been reviewed and that the letters constituted final agency action. *See* Kennedy Dec., ¶ 13, Exhibits A and B (attaching letters).[3] The appropriate records would then be filed in the relevant Court of Appeals if the recipient filed a Petition for Review. *See, e.g.*, *Kadirov v. TSA*, No. 10-1185 (D.C. Circuit), Petition for Review and Certified Index of Record (petition for review challenges DHS TRIP Determination Letter) (attached as Exhibit 3).

Plaintiffs chide the government for relying on an "unpublished" decision from the middle District of Pennsylvania, *Scherfen v. DHS*, No. 08-154, 2010 WL 456784, at *11 (M.D. Pa. Feb. 2, 2010), to support the government's effort to distinguish *Ibrahim*. But *Scherfen*, unlike *Ibrahim*, is directly on point because *Scherfen* involved a specific claim that DHS TRIP was legally deficient. *Compare id.* at *1 (Plaintiffs alleged they were "falsely stigmatized as individuals associated with terrorist activity' without being afforded 'a legal mechanism that affords them notice and an opportunity to contest their inclusion on the terrorist watch lists.'")

[3] Plaintiffs also respond that TSA cannot be a necessary party because although TSA sends the letters, it does not generate the record related to redress decisions when an individual is a match to a name on the No Fly List. But Congress was well aware of the various roles played by the different agencies when it mandated traveler redress. Moreover, on a petition for review, the government is required to file the record supporting its decision; to the extent an inadequate record is filed, the appellate court may grant the petition and find that the government's action is not supported. Accordingly, whatever record needs to be filed, will be filed, and Plaintiffs' concerns are unfounded.

(quoting *Scherfen* complaint) *with* Pls.' Opp. at 7 ("Plaintiffs' suit challenges the government's actions in prohibiting them from flying without providing a constitutionally adequate means of redress."). As the *Scherfen* court noted, in distinguishing *Ibrahim*,

> Plaintiffs' reliance upon the majority opinion in *Ibrahim* is misplaced. Significantly, *Ibrahim* did not involve a determination made by DHS following receipt of a Traveler Inquiry Form from the affected person. Thus, *Ibrahim* did not present for consideration the issue of whether a TRIP determination letter constitutes an order falling within § 46110. Instead, *Ibrahim* focused solely on the question of whether placement on the No Fly List fell within § 46110.

*Id.* at *10. The *Scherfen* court explicitly found that DHS TRIP determination letter were "orders" within the meaning of Section 46110. *Id.* at *11. Thus, as the *Scherfen* court correctly noted, because the action being challenged here is the DHS TRIP process, *Ibrahim* is not on point.

## III. PLAINTIFFS' CHALLENGES TO THEIR DHS TRIP DETERMINATIONS, AND TO HOW DHS TRIP WORKS, INVOLVE FINAL ORDERS FROM TSA AND MUST BE FILED IN THE COURT OF APPEALS

There is no authority to support Plaintiffs' argument that the DHS TRIP determination letters they received "do not permit" them to raise due process challenges to redress procedures. Pls. Opp. at 4. Plaintiffs may, indeed should, file related constitutional claims and allegations in any action they might file in the Courts of Appeal. *See Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006); *Green v. TSA*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005). To the contrary, litigants often bring constitutional challenges as part of their challenges to Section 46110 orders. For example, in *Gilmore*, Plaintiff challenged a final order of TSA but also asserted a due process vagueness challenge to the TSA order; the Ninth Circuit held that his challenges to the TSA

order, constitutional and otherwise, were to be brought in the Court of Appeals. *See Gilmore*, 535 F.3d at n. 9. Plaintiffs also argue that the DHS TRIP determination letters do not provide them with a roadmap for a way to "develop[] . . . a record necessary to establish such a due process claim." Pls. Opp. at 4. It is not clear what Plaintiffs are missing; they claim to have developed precisely such a record in this Court. Why any appeal from the determination letters Plaintiffs received from TSA could not make out the same record is not explained.

Next, contrary to Plaintiffs' assertions, the DHS TRIP determination letters they received are final orders under Section 46110. While Plaintiffs contend the term "order" should mean the same in the Section 46110 context as it does in the Administrative Procedure Act ("APA"), this argument is mistaken. Courts "have given a broad construction to the term 'order' in Section 1486(a) [46110's predecessor]." *Gilmore*, 435 F.3d at 1133 (internal citations and quotation marks omitted). The only case that appears to support the use of the APA to analyze Section 46110 orders is quite old and not consistent with the current approach of the Ninth Circuit to this issue. *See Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616,619-621 (9th Cir. 1981). More recent Ninth Circuit law, like *Gilmore*, provides a much more liberal definition of what is an order under Section 46110, emphasizing that the term "order" should be broadly construed and need only consist of a record and findings to be final. *See* 435 F.3d at 1133 ("Finality is usually demonstrated by an administrative record and factual findings.").

Consequently, the DHS TRIP determination letters Plaintiffs received are "orders" of TSA because they constitute an agency's finding based on an administrative record. For purposes of 49 U.S.C. § 46110, "a record may be adequate even if 'little more' than a letter."

*Gilmore*, 435 F.3d at 1133) (quoting *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir.1989)).[4] Moreover, a Section 46110 order "need not result from lengthy administrative proceedings . . ." *Green*, 351 F. Supp. 2d at 1126. The order is "definitive" if it is a statement of the agency's position, has a "direct and immediate" effect on the day-to-day business of the party asserting wrongdoing, and envisions "immediate compliance with its terms . . . ." *Gilmore*, 435 F.3d at 1133 (quoting from *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998)). The DHS TRIP determination letters sent to Plaintiffs mean one of two things: (a) the subject of the letter is included in the No Fly or Selectee List; his or her inclusion has been found upon review to be justified; and any travel delays resulting from the inclusion will continue; or (b) the subject of the

[4] To suggest that nominations to the No Fly List are based on inadequate grounds, Plaintiffs cite their own press — an ABC News Internet report about the filing of their lawsuit. *See* Pls. Opp. at n.8. The article is inadmissible hearsay and thus should not be considered by the Court. But even if it were admissible, Plaintiffs have selectively quoted from the article to take a statement by the TSC Director out of context and obscure the fact that nominations to the No Fly list must be grounded in "reasonable suspicion" of terrorist activity or terrorist associations. The full and complete statement is quoted below:

> TSC accepts nominations when they satisfy two requirements. First, the biographic information associated with a nomination must contain sufficient identifying data so that a person being screened can be matched to or disassociated from a watchlisted terrorist. Second, the facts and circumstances pertaining to the nomination must meet the reasonable suspicion standard of review established by terrorist screening Presidential Directives. Reasonable suspicion requires articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual "is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities." *The reasonable suspicion standard is based on the totality of the circumstances in order to account for the sometimes* ***fragmentary*** *nature of terrorist information.* Due weight must be given to the reasonable inferences that a person can draw from the available facts. Mere guesses or inarticulate "hunches" are not enough to constitute reasonable suspicion. A TSC interagency group composed of members from the intelligence and law enforcement communities issued clarifying guidance to the watchlisting community in February 2009.

Timothy Healy, Testimony, Senate Committee on Homeland Security and Governmental Affairs, "The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-screening," March 10, 2010 (emphasis added) (attached as Exhibit 2).

letter is *not* included in the No Fly or Selectee List. By their express terms, the DHS TRIP determination letters received by Plaintiffs are "final." *See* Kennedy Dec., Exhibits A and B. The fact that the determination letters do not "take a position" regarding Plaintiffs' alleged "right to board commercial flights within the United States or over U.S. airspace" (Pls. Opp. at 10) has no bearing on whether or not the decision is final and is therefore irrelevant for jurisdictional purposes.

As such, the DHS TRIP determination letters Plaintiffs received regarding delayed or denied airline boarding fall within the scope of 49 U.S.C. § 46110. Whatever the outcome of an individual's DHS TRIP application, the letters "'fix[] some legal relationship'" and are thus "orders" for purposes of Section 46110. *See Gilmore*, 435 F.3d at 1132-33. The DHS TRIP determination letters received by Plaintiffs reflect this by stating that they constitute final agency action on the issue. *See* Kennedy Decl., Exs. A and B.

The cases Plaintiffs cite in support of their contention that the determination letters are not "final orders" for purposes of Section 46110 are materially distinguishable. First, one case (*IT&T*) involves an order under the APA, rather than Section 46110. But even putting that distinction aside, all of the cases Plaintiffs cite involve "orders" that are demonstrably non-final and non-substantive.

In *IT&T v. Local 134*, 419 U.S. 428, 443 (1975), the Supreme Court found that a National Labor Relations Board ("NLRB") *preliminary* hearing was not a final order because it resulted in neither a decision nor a recommendation; instead, the hearing was held only to create a statement of "pertinent facts." *Id.* at 440. The ultimate issue to be resolved by the NLRB, whether or not

an employer had engaged in an unfair labor practice, was left to be resolved at another level. *Id.* The same is true for the other cases Plaintiffs cite. In *Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616,619-621 (9th Cir. 1981), a letter from the Federal Aviation Administration was not a final order because it did not render a decision but "commented, briefly and tentatively" on possible ways the Orange County Board of Supervisors could bring itself into compliance with federal law for its alleged failure to accord equal treatment to all air carriers was not a final order.[5] Nor was the FAA "letter of intent" approving an O'Hare Airport expansion plan a final order, because it did not actually obligate any federal funds but was instead a "planning tool" that would permit the City of Chicago to "approach financial partners for private funding for the [airport] development plan." *Village of Bensenville v. FAA*, 457 F.3d 52, 69-70 (7th Cir. 2006).

No such intermediate review and evaluation, or tentative comment, is given in DHS TRIP determination letters that respond to complaints arising from the fact that a traveler has been mistaken for, or is a match with, an identity on the Selectee or No-Fly List. When an individual alleges that he or she has been delayed or denied boarding due to being mistaken for or being a match on the Selectee or No Fly list, his or her complaint is investigated, and an appropriate determination letter is ultimately sent out by TSA. *See* Kennedy Dec., ¶¶ 7-11; Piehota Dec., ¶¶ 30-26. The DHS TRIP determination letters Plaintiffs received from TSA *are* the final administrative decisions; there is nothing preliminary about them.

[5] This case does apply the APA standard to the "order" in question, but it is thirty years old, and its reasoning has not been reflected in more recent cases involving Section 46110. *See, e.g., Gilmore*, 535 F.3d at 1133.

Finally, it is no defense to suggest that TSA agree to be sued in district court. Exclusive jurisdiction lies in the Courts of Appeal by statute, and courts have not hesitated to dismiss a case, where the only way for the absent party to be heard was to subject itself to a court of improper jurisdiction. *See Virginia Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1248 (9th Cir. 1998) (finding Rule 19(b) factors required dismissal where plaintiff sued "an available surrogate" in place of the absent party, thereby forcing the absent party "to submit to United States jurisdiction voluntarily").

## CONCLUSION

Accordingly, since TSA is a necessary and indispensable party that cannot be joined, Plaintiffs' complaint must be dismissed, and judgment entered in Defendants' favor.

Dated: January 7, 2011

Respectfully submitted,

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## INDEX OF EXHIBITS

| Exhibit | Description |
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| **1** | *Ibrahim v. DHS*, No. 06-545 (N.D. Cal. Aug. 16, 2006), Docket # 101, Order Granting Defendants' Motions to Dismiss at 11 |
| **2** | Timothy Healy, Testimony, Senate Committee on Homeland Security and Governmental Affairs, "The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-screening," March 10, 2010 |
| **3** | *Kadirov v. TSA*, No. 10-1185 (D.C. Circuit), Petition for Review and Certified Index of Record |