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

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

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

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

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

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

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

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

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

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

Plaintiffs now move for partial summary judgment. They ask this Court to find that Defendants, the government entities that control the No Fly List, violated Plaintiffs' rights to procedural due process under the Fifth Amendment and the Administrative Procedure Act. The record indisputably shows that inclusion on the No Fly List is a draconian sanction: It severely burdens Plaintiffs' liberty interest in travel, which is one of the basic incidents of modern life; it stigmatizes Plaintiffs, who have never been charged with any crime, as suspected terrorists; and it has resulted in devastating consequences for Plaintiffs' personal and professional lives.

At this time, though, Plaintiffs seek only the most minimal relief. Plaintiffs do not challenge Defendants' ability to put them on a secret watch list, to screen them extensively prior to boarding, or to take other security measures to satisfy whatever aviation security concern Defendants mistakenly believe that Plaintiffs pose. Instead, Plaintiffs ask this Court to find

unconstitutional the government's decision—despite all of these available alternatives—to ban them from flying without providing any after-the-fact notice, statement of reasons, or a hearing.

Defendants' refusal to provide the bare rudiments of due process stems from their embrace of an explicit policy—known as the "Glomar" policy—of refusing to confirm or deny *any* information concerning a person's status on the No Fly List. The Glomar policy and Defendants' inadequate process cannot be reconciled with governing due process doctrine. Courts routinely require notice and some form of hearing for much less severe deprivations of liberty than Plaintiffs have suffered. Thus, the government cannot suspend a student from school for ten days, or recover excess Social Security payments, or terminate state assistance for utility bills without *some* kind of notice and hearing. Defendants' Glomar policy and failure to provide any meaningful process does not even comport with the more robust notice and procedures required in the national security context for alleged enemy alien combatants detained outside the United States, foreign and domestic organizations the government seeks to designate as terrorist, and others who are not entitled to more constitutional protections than Plaintiffs.

Without notice or a meaningful opportunity to rebut Defendants' secret record or present their own evidence at a hearing, Plaintiffs cannot correct Defendants' error in placing them on the No Fly List. The need for additional safeguards to truly redress the acute harm to Plaintiffs' liberties is obvious. Affording Plaintiffs the protections to which they are entitled would not harm any government interests. The government is routinely required to disclose or describe sensitive and, in some cases, classified information in other contexts when it seeks to deprive individuals of their liberties in the name of national security. That sensitive national security information might be involved in this case is no reason to foreclose notice or a hearing entirely.

To find for Plaintiffs, this Court does not have to decide now what process is specifically due; if the Court rules for Plaintiffs, as they urge, the question of a remedy can be addressed at a later stage after additional briefing from the parties, as it has been in other, similar cases. Instead, based on the indisputable record in this case, Plaintiffs simply ask the Court to hold that Defendants' failure to provide Plaintiffs *any* notice or a hearing after banning them from flying violates their constitutional and statutory rights.[1]

STATEMENT OF FACTS

I. The No Fly List

The Terrorist Screening Center ("TSC"), which is administered by the Federal Bureau of Investigation ("FBI"), develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB or the "watch list"). Joint Statement of Stipulated Facts ("Stip. Facts"), ECF No. 84 ¶ 1. The watch list is the federal government's master repository for suspected international and domestic terrorist records used for watch list-related screening. *Id.*[2] TSC sends watch list records to other agencies, including the Transportation Security Administration ("TSA"), which use those records to identify suspected terrorists. Stip. Facts ¶¶ 1, 3. When individuals make airline reservations and check in at airports, TSA or the airline conducts a name-based search to determine whether the person is on TSC's watch list.[3]

TSC makes the ultimate decision whether a nominated individual meets the minimum requirements for inclusion on the watch list. Stip. Facts ¶ 15. TSC determines whether it has

[1] At this time, Plaintiffs also do not cross-move for summary judgment with respect to their claims challenging their placement on the No Fly List under substantive due process and the Administrative Procedure Act. The case management plan contemplates that the parties will confer on how best to present those claims after the Court rules on the procedural claims presented here. Parties' Joint Case Mgmt. Plan at 4, ECF No. 77.
[2] Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. K at 1.
[3] Choudhury Decl. Ex. K at 3.

"reasonable suspicion" that the person is a "known or suspected terrorist." *Id*. ¶ 16. According to TSC, "reasonable suspicion requires articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism and terrorist activities." *Id*. (internal quotation marks omitted).

According to the government's own audits and investigations, TSC's procedures have resulted in gross over-inclusion and error. A 2007 Government Accountability Office ("GAO") report found that the TSC rejects only approximately one percent of nominations to the watch list.[4] Audits in 2008 and 2009 by the Department of Justice's Office of the Inspector General ("DOJ OIG") concluded that "the FBI did not consistently update or remove watch list records when appropriate."[5] The 2009 DOJ OIG audit also determined that, of the watch list records it reviewed, in 72 percent of cases, the FBI failed to timely remove closed-case records; in 67 percent of cases, the FBI failed to appropriately modify outdated records; and in 35 percent of cases, the FBI failed to appropriately remove terrorism classifications, even though many of these should have been removed from the watch list entirely.[6]

TSC selects a subset of individuals from the consolidated watch list for inclusion in the No Fly List. Stip. Facts ¶¶ 1–2; Decl. of Cindy A. Coppola ("Coppola Decl.") ¶ 12. Defendants have not publicly disclosed the standards or criteria TSC applies to determine whether a person will be placed on the No Fly List. Stip. Facts ¶ 17. People placed on the No Fly List are denied boarding on planes flying to or from the United States or over U.S. airspace. Coppola Decl.

[4] Choudhury Decl. Ex. I at 22.
[5] Choudhury Decl. Ex. F at ii; *see also* Choudhury Decl. Ex. J.
[6] Choudhury Decl. Ex. F at iv–vi.

¶ 13.[7] They are also denied passage on ships bound for, or departing from, the United States.[8] In addition, they may be prevented from boarding flights that do not cross U.S. airspace because TSC shares the watch list with 22 foreign governments.[9]

II. The Current Redress Process

An individual who is apparently placed on the No Fly List can seek redress only by completing a standard form and submitting it to the Department of Homeland Security's Traveler Redress Inquiry Program. Stip. Facts ¶ 4. DHS TRIP determines whether a redress request concerns an exact or near match to the watch list, and if so, forwards the complaint to TSC. *Id.* ¶¶ 8–9. TSC determines whether the individual is on the watch list, consults with any relevant agencies, and makes a final decision as to whether the person should remain on the list. *Id.* DHS TRIP responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. Stip. Facts ¶ 11.[10]

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

Each of the Plaintiffs flew for years without incident, but was prevented from boarding a flight over U.S. airspace after January 1, 2009.[11] Plaintiffs first found out that they could not fly

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[7] Choudhury Decl. Ex. K at 3.

[8] Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-64, 72 Fed. Reg. 48,320, 48,322 (Aug. 23, 2007) (passengers on vessels departing the United States are vetted against consolidated terrorism watch list); *id.* at 48,325 (denying passage on ships to "matches" against "the same terrorist watch list used for aircraft passenger vetting").

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

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

[11] Decl. of Salah Ali Ahmed ("Ahmed Decl.") ¶¶ 3, 6; Decl. of Nagib Ali Ghaleb ("Ghaleb Decl.") ¶¶ 5–6; Decl. of Mohamed Sheikh Abdirahman Kariye ("Kariye Decl.") ¶¶ 4, 6; Decl. of Faisal Nabin Kashem ("Kashem Decl.") ¶¶ 3, 6; Decl. of Raymond Earl Knaeble IV ("Knaeble Decl.") ¶¶ 8–9; Third Am Compl. ¶ 42, ECF No. 83; Decl. of Ibraheim Mashal ("Mashal Decl.")

when they were denied boarding in airports; they felt humiliated and deeply stigmatized as suspected terrorists because airline officials, law enforcement officers, their family members and classmates, and members of the public saw or learned that they were denied boarding.[12] None of the Plaintiffs poses a threat to civil aviation, or knows why they were prevented from flying.[13]

Each Plaintiff filed at least one DHS TRIP complaint seeking removal of his or her name from the No Fly List. Stip. Facts ¶ 13. In response, each received a DHS TRIP determination letter that neither confirms nor denies the existence of any terrorist watch list records relating to him or her. Stip. Facts ¶¶ 11, 13.[14] None of the letters explain any reason or basis for the individual's inclusion on the watch list or the No Fly List. Stip. Facts ¶¶ 11–12; *see* Decl. of James G. Kennedy, Jr. ("Kennedy Decl."), Ex. A; Decl. of Mashaal Rana ("M. Rana Decl.") ¶ 17 & Ex. A.

IV. Defendants' Disclosure of Watch List Status

In accordance with their Glomar policy, Defendants will not disclose the names of individuals on the No Fly List or the consolidated terrorism watch list. Coppola Decl. ¶ 14.

¶¶ 5, 7; Decl. of Amir Meshal ("Meshal Decl.") ¶¶ 3, 5; Decl. of Elias Mustafa Mohamed ("Mohamed Decl.") ¶¶ 3, 6; Choudhury Decl. Ex. L ¶¶ 3, 5 (Decl. of Abdullatif Muthanna ("Muthanna Decl.")); Decl. of Stephen Durga Persaud ("Persaud Decl.") ¶ 5; Decl. of Allah R. Rana ("A. Rana Decl.") ¶ 5; Decl. of Mashaal Rana ("M. Rana Decl.") ¶¶ 4, 6; Decl. of Nauman Rana ("N. Rana Decl.") ¶ 3; Decl. of Steven William Washburn ("Washburn Decl.") ¶¶ 6–7.

[12] Ahmed Decl. ¶ 7; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 7; Kashem Decl. ¶ 7; Knaeble Decl. ¶ 10; Third Am Compl. ¶ 42, ECF No. 83; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 7; Choudhury Decl. Ex. L ¶ 6, 22 (Muthanna Decl.); Persaud Decl. ¶ 6; M. Rana Decl. ¶ 6; Washburn Decl. ¶ 8.

[13] Ahmed Decl. ¶¶ 11–12; Ghaleb Decl. ¶¶ 15–16; Kariye Decl. ¶¶ 10–11; Kashem Decl. ¶¶ 14–15; Knaeble Decl. ¶¶ 22–23; Third Am Compl. ¶ 135, ECF No. 83; Mashal Decl. ¶¶ 17–18; Meshal Decl. ¶¶ 9–10; Mohamed Decl. ¶¶ 14–15; Choudhury Decl. Ex. L. ¶¶ 25–26 (Muthanna Decl.); Persaud Decl. ¶¶ 13–14; M. Rana Decl. ¶¶ 18–19; Washburn Decl. ¶¶ 23–24.

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

U.S. and airline officials, however, told each of the Plaintiffs that they are on the No Fly List.[15]

TSC also shares watch list information with thousands of law enforcement officers from federal, state, local, territorial, and tribal agencies, some private sector individuals, and 22 foreign governments.[16] In addition, the government discloses watch list status through CBP's Global Entry program, which identifies "low-risk" travelers permitted to apply for expedited clearance through border inspection when arriving in the United States from abroad.[17] CBP selects participants in the Global Entry program after checking their names against the watch list.[18] According to the government's own description of Global Entry and the No Fly List, people on the No Fly List are categorically ineligible for Global Entry. Accordingly, by approving a traveler for Global Entry, the government discloses that the individual is not on the No Fly List.

ARGUMENT

I) Summary Judgment Standard

Rule 56 permits motions for partial summary judgment such as this one. *See* FED. R. CIV. P. 56(a). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

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[15] Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 6; Kashem Decl. ¶ 6; Knaeble Decl. ¶ 9; Third Am Compl. ¶ 43, ECF No. 83; Mashal Decl. ¶¶ 7–10; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L. ¶¶ 5, 22 (Muthanna Decl.); Persaud Decl. ¶¶ 7–10; A. Rana Decl. ¶ 5; M. Rana Decl. ¶ 6; Washburn Decl. ¶ 8.

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

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

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

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

Plaintiffs seek partial summary judgment under the procedural component of the Fifth Amendment's Due Process Clause. To prevail, Plaintiffs must first show that Defendants' No Fly List burdens a protected liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *De Nieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992). Once Plaintiffs establish that their placement on the No Fly List burdens a protected interest, the Court must determine whether the procedures Defendants afford Plaintiffs satisfy due process under the familiar three-part test set forth in *Mathews v. Eldridge*, which requires the Court to weigh three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

The undisputed facts show that Plaintiffs' placement on the No Fly List severely restricts their liberty interest in travel by banning them from flights to and from the United States, and over U.S. airspace, and from ships sailing to and from the United States. *See infra* pp. 10–15. The undisputed facts also show that inclusion badly harms Plaintiffs' liberty interest in reputation, because Defendants have branded Plaintiffs as suspected terrorists while preventing them from exercising rights they otherwise have to fly. *See infra* pp. 15–18. The Constitution requires Defendants to provide meaningful process when they exact such acute burdens on liberty.[19]

[19] Because Plaintiffs clearly have protected liberty interests in travel and freedom from false government stigmatization, they do not here press their claim that they have a third liberty

Defendants have failed to meet even the most basic requirements of due process. It is undisputed that the DHS TRIP system, the only redress mechanism Defendants provide, is premised on their explicit "Glomar" policy of refusing to confirm or deny *any* information concerning watch list status. As a matter of policy, therefore, Defendants provide no notice. Without notice, a statement of reasons, or knowledge of the evidence against them, Plaintiffs have no opportunity at all to confront or rebut Defendants' allegations even in writing. And there is no dispute that DHS TRIP does not provide Plaintiffs an in-person hearing at which they might present their case or defend themselves. It is hard to imagine a "redress" process that more clearly violates U.S. citizens' most basic due process rights.

The second *Mathews* factor requires the Court to assess the risk of error from the government's procedures, and there can be no dispute that Defendants' No Fly List procedures create an unacceptably high error rate. Because Defendants refuse to provide Plaintiffs notice or an opportunity to confront or rebut the allegations against them, DHS TRIP does not correct against the erroneous or unjustified inclusion of people—like Plaintiffs—in the No Fly List. Yet, numerous government audits and reports document errors in the watch listing process, including failures to remove names from the list. Providing Plaintiffs notice and a statement of the reasons for their inclusion, which they can challenge in a hearing, will correct error.

Finally, application of the third *Mathews* factor shows that providing U.S. citizens notice and a meaningful opportunity to be heard will not harm government interests. Affording Plaintiffs notice of the reasons for their inclusion on the No Fly List and a hearing can easily be accomplished—as it routinely is in other national security contexts—without harming

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interest in being free of attainder for purposes of procedural due process. *See* Third Am. Compl. ¶¶ 142, 144. However, Plaintiffs reserve the right to argue in the second phase of this case that their interest in being free of attainder can serve as a basis for their substantive due process challenges to their individual placement on the No Fly List.

government interests. The undisputed facts show that each Plaintiff already knows that she or he is on the No Fly List and that the government routinely discloses watch list status through other means. Any hearing can employ—as agencies and courts regularly do—a variety of calibrated tools to protect any appropriate assertions of government secrecy.

When weighed against the undisputed facts, the balance of the three *Mathews* factors tips decisively in Plaintiffs' favor. To find for Plaintiffs, this Court does not have to decide now what process is specifically due, however; the question of a remedy can be addressed at a later stage after additional briefing from the parties. *See, e.g.*, *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009) (ordering briefing on remedy *after* finding that Treasury Department violated U.S. charity's procedural due process rights by failing to provide prompt post-deprivation notice and a hearing after provisionally designating charity as a suspected terrorist).

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

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

It is firmly established that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). The Supreme Court first recognized this liberty interest in *Kent v. Dulles*, when considering a challenge to the Secretary of State's refusal to issue a passport to an applicant due to his links to left-wing political groups. Although the Supreme Court struck down the Secretary's action on statutory grounds, it acknowledged that freedom to travel is an "important aspect of the citizen's liberty" and elaborated: "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel

abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Id*. at 126–27.

Subsequent decisions have affirmed that due process protects the liberty interest in travel. The Supreme Court and the Ninth Circuit have unambiguously held that there is a liberty interest in international travel. *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (striking down statute that made it a criminal offense for a member of the Communist Party to apply for a passport because it "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment"); *De Nieva*, 966 F.2d at 485 (holding that it has been "clearly established" since at least 1988 that due process protects the right to international travel). There is no question that due process applies to burdens on the right to interstate travel, including "the right of a citizen of one State to enter and to leave another State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *see also Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (requiring "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).[20]

Government action that burdens the liberty interest in travel thus triggers the need for procedural safeguards against undue deprivations. *See, e.g.*, *De Nieva*, 966 F.2d at 485 (requiring procedural due process where retention of passport burdened liberty interest in travel); *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990) (same where denial of admission to the

[20] While the right to interstate travel is a "virtually unqualified" right, the right to international travel "can be regulated within the bounds of due process." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *Fisher v. Reiser*, 610 F.2d 629, 637–638 & n.1 (9th Cir. 1980) (collecting Supreme Court authority recognizing that interstate travel is a "fundamental" right). Any government restriction on interstate travel must therefore satisfy at least the lesser procedural due process requirements applicable to restrictions on international travel. *See Shapiro*, 394 U.S. at 642–43 & n.1 (Stewart, J., concurring).

United States deprived citizen of liberty interest in travel). This is true even if the challenged action does not foreclose all travel. *See, e.g.*, *De Nieva*, 966 F.2d at 485 (plaintiff "could travel internationally *only with great difficulty*, if at all") (emphasis added); *Hernandez*, 913 F.2d at 234 (burden on ability to "travel to and from Mexico," but not other countries); *Agee v. Baker*, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing that one-way restriction on travel from the United States to foreign countries deprived liberty interest in travel); *cf. Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972) (due process is required for deprivations of protected interests that "cannot be characterized as de minimis.") (internal quotation marks omitted).

There is no question that the No Fly List severely burdens Plaintiffs' liberty interest in travel. In today's world, the ability to fly by commercial air to and from the United States and over U.S. airspace is integral to Americans' ability to travel abroad, which is increasingly "importan[t] . . . particularly in a global economy and an interdependent world." *Eunique v. Powell*, 302 F.3d 971, 978 (9th Cir. 2002) (McKeown, J., concurring). It is undisputed that the No Fly List bans U.S. citizens from such flights without exception. Coppola Decl. ¶ 13.[21] Placement on the No Fly list also bars citizens from sailing on ships to and from the United States, as confirmed by a CBP regulation and the experience of one Plaintiff. *See* Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-64, 72 Fed. Reg. 48,320, 48,325 (Aug. 23, 2007) (denying passage on ships to "matches" against "the same terrorist watch list used for aircraft passenger vetting"); Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. L ¶¶ 19–21 (Decl. of Abdullatif Muthanna ("Muthanna Decl.")) (describing denial of passage on cargo freighter sailing from the United

[21] Choudhury Decl. Ex. K at 3.

States to Europe). Because TSC shares the list with foreign governments, No Fly List placement also threatens to prevent citizens from travelling on flights that do not cross U.S. airspace.[22]

Plaintiffs' experiences demonstrate the depth of the harm inflicted by the No Fly List. Inclusion on the list has prevented Plaintiffs from travelling to be with their families, preserving disability benefits, obtaining medical care, gaining employment, fulfilling religious obligations, and conducting business—with truly devastating effects on their personal and professional lives.[23] *Cf. Kent*, 357 U.S. at 127 (travel "may be necessary for a livelihood" and "as close to the heart of the individual as the choice of what he eats, or wears, or reads").

For two and a half years, Plaintiff Steven Washburn has been separated from his wife, a Spanish citizen who lives in Ireland and was denied a visa for travel to the United States, because he cannot travel from his home in New Mexico to Ireland without boarding a prohibited flight. Decl. of Steven Washburn ("Washburn Decl.") ¶ 20. Similarly, Plaintiff Mohamed Sheikh Abdirahman Kariye cannot travel from Portland, Oregon to Saudi Arabia to accompany his mother on the *hajj* pilgrimage, an Islamic religious obligation, because he cannot make the 6,500-mile journey without flying. Decl. of Abdirahman Kariye ("Kariye Decl.") ¶ 9.[24] No Fly List placement effectively banned Plaintiff Muthanna from traveling from New York to be with his family in Yemen.[25] Any alternative means for Plaintiffs to travel from the United States to

[22] Choudhury Decl. Ex. E at 21 n.24.
[23] *See* Ahmed Decl. ¶ 10; Ghaleb Decl. ¶ 12; Kariye Decl. ¶ 9; Kashem Decl. ¶ 13; Knaeble Decl. ¶¶ 19–21; Third Am Compl. ¶ 47-48, ECF No. 83; Mashal Decl. ¶¶ 11–16; Meshal Decl. ¶¶ 7–8; Mohamed Decl. ¶¶ 12–13; Choudhury Decl. Ex. L ¶¶ 7, 22 (Muthanna Decl.); Persaud Decl. ¶¶ 11–12; M. Rana Decl. ¶¶ 8, 10, 14, 16; Washburn Decl. ¶¶ 20–22.
[24] Nor can Plaintiffs Faisal Kashem and Elias Mohamed travel from the United States to their graduate programs in Saudi Arabia for the same reason. Kashem Decl. ¶ 13; Mohamed Decl. ¶ 13.
[25] Despite a diligent attempt to undertake a 30-day journey from New York to Yemen by car and boat, Plaintiff Muthanna was turned back when CBP denied him passage on a ship sailing from Philadelphia to Belgium. Choudhury Decl. ¶¶ 9–10 & Ex. L ¶¶ 17–21 (Muthanna Decl.).

countries other than Mexico and Canada are uncertain, indirect, infrequent, and prohibitively expensive.[26] They require the consent of foreign countries and place Plaintiffs at risk of interrogation and detention by foreign authorities.[27] There can be no question that such severe restrictions on international travel trigger procedural due process requirements. *See De Nieva*, 966 F.2d at 485. That the No Fly List does not restrict *every* mode of transportation potentially available to Plaintiffs does not alter this conclusion. *See Fuentes*, 407 U.S. at 86; *see, e.g.*, *Hernandez*, 913 F.2d at 234; *cf. Agee v. Baker*, 753 F. Supp. at 386.[28]

Domestically, No Fly List placement prevented Plaintiff Abe Mashal from attending his sister-in-law's graduation from Christian missionary school in Hawaii (he had no practical means of travel other than flying), fulfilling a lucrative contract to provide his professional dog training services to a client in Washington, and attending the wedding of a close friend and fellow Marine Corps veteran in New Mexico. Decl. of Ibraheim Y. Mashal ("Mashal Decl.") ¶¶ 11–13. Yet, Defendants assert the authority to deprive Plaintiff Mashal of his right to "be free to travel

[26] Although Plaintiff Washburn appears to have two such alternatives for traveling from New Mexico to Ireland, neither will likely succeed. Traveling over land and flying from Mexico or Canada will fail because such flights likely cross U.S. airspace and TSC shares the watch list with Mexico and Canada. *See, e.g.*, Washburn Decl. ¶¶ 9, 22 (describing London-Mexico City flight that took off, but flew back to London due to his presence on board); Choudhury Decl. Ex. E at 21 n.24. Travel over land from New Mexico to the United States' east coast and sailing to Ireland will also fail because CBP will likely deny Plaintiff Washburn passage on a ship, just as it did Plaintiff Muthanna. *See* Choudhury Decl. ¶¶ 9–10 & Ex. L ¶¶ 17–22 (Muthanna Decl.).

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

[28] *Green v. Transportation Security Administration* is not to the contrary. 351 F. Supp. 2d 1119 (W.D. Wash. 2005). That case is inapposite because the plaintiffs were not denied boarding and did not allege that they "suffered impediments different than the general traveling public." *Id*. at 1122, 1130.

throughout the length and breadth of our land," *Shapiro*, 394 U.S. at 629, without any notice or hearing.

To be clear, Plaintiffs' claim is firmly grounded in their Fifth Amendment right to procedural due process—not *other* constitutional protections concerning the right to travel. Plaintiffs do not, for example, invoke the fundamental right to interstate travel or substantive due process, and they do not seek as a remedy the invalidation of the entire No Fly List as *per se* unconstitutional. *See, e.g.*, *Shapiro*, 394 U.S. at 629 (invalidating under fundamental right to interstate travel a state residency requirement denying welfare to applicants who had resided in state for less than one year because it inhibited migration of needy persons); *Gilmore v. Gonzales*, 435 F.3d 1125, 1130–32 (9th Cir. 2006) (denying request to invalidate TSA policy requiring identification or extra screening as a condition of boarding planes under fundamental right to interstate travel).[29] Plaintiffs bring an altogether different—and more modest—claim. They simply argue that the No Fly List's restriction on their travel requires fairer procedures. *See, e.g.*, *DeNieva*, 966 F.2d at 485.

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

The Supreme Court has recognized a constitutionally protected liberty interest in "a person's good name, reputation, honor, or integrity" when a plaintiff satisfies the so-called

[29] Nor do they seek to invalidate entirely a government travel restriction that imposes only an incidental burden. *See, e.g.*, *Califano v. Aznavorian*, 439 U.S. 170, 171–72 (1978) (law suspended benefit payments to people while they freely traveled outside of the United States); *Gilmore*, 435 F.3d 1125, 1130–32 (9th Cir. 2006) (TSA policy required presentation of identification or extra screening as a condition of boarding planes); *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (policy requiring individual to submit Social Security number as a condition of renewing driver's license); *Fisher*, 610 F.2d at 629 (state law denying cost-of-living increases to out-of-state workers' compensation beneficiaries); *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d Cir. 2007) (law regulating ferry operators); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991) (law restricting air service to a local airport).

"stigma-plus" test. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1185 (9th Cir. 2008) (describing "stigma-plus" test), *overruled in part on other grounds*, 131 S. Ct. 447 (2010). Under this test, the government must afford procedural due process when a plaintiff suffers stigma from governmental action "plus" an alteration or extinguishment of a right or status recognized by law. *See Paul v. Davis*, 424 U.S. 693, 711 (1976). To satisfy the "stigma" prong, the government's stigmatizing statement must be publicly disclosed and the plaintiff must contest its accuracy. *Ulrich v. City and Cnty. of S.F.*, 308 F.3d 968, 981 (9th Cir. 2002). To satisfy the "plus" prong, a plaintiff must show that the injury to reputation either was inflicted in connection with the deprivation of a legal right, or caused the denial of a legal right. *Id*. at 982. This requires only showing that "once listed, [Plaintiffs] legally could not do something that [they] could otherwise do." *Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing *Constantineau*, 400 U.S. 433); *Humphries*, 554 F.3d at 1187–88 (describing test as whether plaintiffs are "legally disabled by the listing . . . alone from doing anything they otherwise could do") (internal quotation marks omitted).

This case presents a quintessential example of stigma *and* plus. "[T]here can be little doubt that association with a government terrorist watch-list 'might seriously damage [Plaintiffs'] standing and associations in [their] community.'" *Green v. T.S.A.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005) (alteration in original) (quoting *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 n.5 (9th Cir. 1982)); Third Am. Compl. ¶¶ 3, 5 (Plaintiffs were branded as suspected terrorists on the No Fly List, a label they vigorously contest). The Supreme Court has found stigma on the basis of far lesser accusations. *See Constantineau*, 400 U.S. at 435–37 (finding "excessive drink[er]" label to be stigmatizing); *Paul*, 424 U.S. at 697 (same for "active shoplifter").

The Ninth Circuit's decision in *Humphries*, 554 F.3d at 1186–87, 1189, is directly on point. In *Humphries*, the Court of Appeals found that when a California state agency included the plaintiffs' names on a state list of child abusers that was not publicly available but which other state and law enforcement agencies and private entities consulted, plaintiffs suffered stigma. *Id*. Here, Defendants similarly publicized the terrorist label (notwithstanding their refusal to confirm or deny Plaintiffs' watch list status) by providing the No Fly List to TSA, which shared it with airlines conducting security screening, and publicized it further by preventing Plaintiffs from boarding planes in front of security and airline officials, their families and classmates, and members of the public.[30] Under Ninth Circuit law, these undisputed facts establish the public disclosure of stigmatizing government statements.

Plaintiffs have also satisfied the "plus" prong of their stigma-plus claim. This should be obvious: they now "legally [cannot] do something that [they] could otherwise do"—namely, board commercial flights—because of their No Fly List placement. *Miller*, 355 F.3d at 1172, 1179; *Humphries*, 554 F.3d at 1187. It is undisputed that TSA and airline officials prevent ticketed travelers on the No Fly List from boarding their flights by operation of law. *See* 49 U.S.C. § 114(h)(3) (head of TSA must "establish policies and procedures requiring air carriers (A) to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; and (B) if such an individual is identified, . .

[30] Stip. Facts. ¶¶ 1, 3; Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶¶ 5, 8; Kariye Decl. ¶¶ 6–7; Kashem Decl. ¶¶ 6–7; Knaeble Decl. ¶¶ 9–10; Third Am Compl. ¶ 42, ECF No. 83; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶¶ 6–7; Choudhury Decl. Ex. L ¶¶ 5–6, 12–16 (Muthanna Decl.); Persaud Decl. ¶¶ 5–6; Rana Decl. ¶ 6. Because the consolidated watch list, of which the No Fly List is a subset, is further disseminated to law enforcement, private individuals, and foreign governments, Defendants' stigmatizing statements are likely publicized beyond entities and individuals involved in airport security. Choudhury Decl. Ex. D, at 2 & n.3; Choudhury Decl. Ex. E at 21 n.24; *see Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 989 (9th Cir. 2012) (recognizing widespread dissemination of TSDB).

. prevent the individual from boarding an aircraft . . .").[31] Plaintiffs who were prevented from boarding flights back home to the United States suffered a second plus factor: they were involuntary exiled for periods ranging from two to eight months in violation of their rights as U.S. citizens.[32] These acute alterations in Plaintiffs' legal status distinguishes their case from those in which there is no showing of tangible harm connected to the defamation. *See Humphries*, 554 F.3d at 1188 ("stigma-plus applies when a . . . status is altered *or* extinguished") (emphasis in original) (internal quotation marks omitted); *Green*, 351 F. Supp. 2d at 1130 (dismissing stigma-plus claim where plaintiffs did "not allege that they have suffered impediments different than the general traveling public").

* * *

The undisputed facts thus establish that Plaintiffs' inclusion on the No Fly List has deprived them of their liberty interests in travel and freedom from false government stigmatization. Defendants cannot cause such acute deprivations without affording procedural due process. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). As

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

[32] *See* Ghaleb Decl. ¶¶ 6, 9–11; Kashem Decl. ¶¶ 10–11; Knaeble Decl. ¶ 18; Third Am Compl. ¶¶ 42, 133, ECF No. 83, 16–17; Mohamed Decl. ¶ 11; Choudhury Decl. Ex. L ¶ 10 (Muthanna Decl.); M. Rana Decl.
¶ 8; Washburn Decl. ¶¶ 7, 12, 13–14. The Fourteenth Amendment protects this right as "absolute" and "fundamental." U.S. CONST. AMEND. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."); *Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001) (U.S. citizenship confers an "absolute right to enter" the United States); *see also Hernandez*, 913 F.2d at 238 ("[T]he right of a citizen to re-enter the United States after lawfully traveling abroad . . . is fundamental."). These Plaintiffs' experiences of months-long involuntary exile constitute "deprivation[s] of liberty," and thereby serve as a plus factor. *Miller*, 355 F.3d at 1178; *see, e.g.*, *Hernandez*, 913 F.2d at 232, 238 (citizen's 46-day exile from the United States deprived him of liberty interest in travel).

explained below, Defendants fail to satisfy even the most minimal requirements under the Fifth Amendment.

B) The DHS TRIP Process Denies Plaintiffs Notice and an Opportunity to Be Heard

Once it is determined that the No Fly List triggers procedural due process protections, "the question remains what process is due." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). The key inquiry is whether Defendants afford the most basic requirements of due process: notice and an opportunity to contest the relevant determination "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The undisputed facts show that DHS TRIP, the only available redress system for U.S. citizens on the No Fly List, utterly fails to provide either constitutionally adequate notice of the reasons for Plaintiffs' inclusion on the No Fly List, or a meaningful opportunity to be heard on why those reasons are improper or inaccurate.

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

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes*, 407 U.S. at 80 (internal quotation marks omitted). Due process requires notice "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. At a minimum, notice must "set forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967) (internal quotation marks omitted). It must "permit adequate preparation for . . . an impending hearing." *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (internal quotation marks omitted); *Vitek v. Jones*, 445 U.S. 480, 496 (1980) ("notice is essential

to afford the [plaintiff] an opportunity to challenge the contemplated action").[33] Notice is therefore inadequate when it simply communicates an adverse government decision without providing supportive reasons. *See, e.g.*, *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) (holding that denial of child support payments to parents on welfare must be supported by specific reasons); *Hernandez*, 913 F.2d at 240 (upholding injunction requiring statement of reasons for denial of U.S. admission to U.S. citizen); *De Nieva v. Reyes*, Civ. A. No. 88-00017, 1989 WL 158912, at *7 (D. N. Mar. I. Oct. 19, 1989) (holding that failure to provide written notice of reasons for seizure and retention of passport violated notice requirement), *aff'd*, 966 F.2d 480 (9th Cir. 1992).

Defendants' Glomar policy is an explicit and categorical denial of notice. The undisputed facts show that DHS TRIP determination letters, which reflect the Glomar policy, are the only documents Defendants provided Plaintiffs in response to their requests for redress; these letters do not state whether Plaintiffs remain on the No Fly List and do not provide any basis or reason for their inclusion. Stip. Facts ¶ 11. Nor is it disputed that "[a]t *no point* in the available administrative process is a complainant told whether s/he is in the TSDB or a subset of the TSDB," including the No Fly List, "or the basis for her/his inclusion on such a list." *Id.* ¶ 14 (emphasis supplied). Defendants thus not only violate the basic requirement that notice "allege[] misconduct with particularity"; they fail even to allege misconduct *at all*. *In re Gault*, 387 U.S. at 33; *see, e.g.*, *Hernandez*, 913 F.2d at 240; *Barnes*, 980 F.2d at 579. Plaintiffs are unaware of

[33] *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (notice must inform student facing short-term suspension of accusations and their bases).

any decision holding that such deficient notice to U.S. citizens following the deprivation of protected liberties complies with due process.[34]

Plaintiffs do not at this time challenge Defendants' failure to disclose their criteria for placing U.S. citizens on the No Fly List, Coppola Decl. ¶¶ 15–18 (criteria are not disclosed).[35] That is because no matter what the criteria are—and even if they were disclosed to Plaintiffs—it is Defendants' basic failure to provide *any* notice, statement of reasons, or a hearing that violates Plaintiffs' procedural due process rights. In other words, although the secrecy of the criteria compounds the problem because Plaintiffs are in the dark about the legal basis for Defendants' decision to ban them from flying, Stip. Facts. ¶ 17, disclosure of the criteria would not cure the core procedural due process violation.[36]

Defendants' failure to afford Plaintiffs the most "essential" of due process protections—the notice they need to "present [their] side of the story"—violates due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 546 (1985).

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[34] *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004), is not to the contrary. Although the court in that case upheld an agency's refusal to provide reasons for a decision to revoke airmen certificates, the private interests of the non-resident alien plaintiffs in that case are obviously less weighty than those of Plaintiffs, who are U.S. citizens seeking to protect their liberty interests in travel and reputation. *Id*. at 1183.

[35] The vague and self-referential standard for inclusion in the consolidated terrorism watch list—"reasonable suspicion" to believe "that [an] individual is a known or suspected terrorist"—does not constitute disclosure. Stip. Facts ¶¶ 15–16. None of the Plaintiffs are "known terrorists"—none of them have been charged, indicted, or convicted of a terrorism crime in a U.S. or foreign court. *See* Coppola Decl. ¶ 8 & n.3; Ahmed Decl. ¶ 11; Ghaleb Decl. ¶ 15; Kariye Decl. ¶ 10; Kashem Decl. ¶ 14; Knaeble Decl. ¶ 22; Third Am Compl. ¶¶ 1,3, ECF No. 83; Mashal Decl. ¶ 17; Meshal Decl. ¶ 9; Mohamed Decl. ¶ 14; Choudhury Decl. Ex. L ¶ 25 (Muthanna Decl.); Persaud Decl. ¶ 13;
M. Rana Decl. ¶ 18; Washburn Decl. ¶ 23.

[36] Although Plaintiffs do not seek disclosure of the criteria now and do not need the criteria to prevail on this partial motion for summary judgment, at any hearing on the merits, they would need at least some form of disclosure to defend themselves legally and factually.

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

Due process requires the government to provide "*some* kind of hearing . . . at *some* time" when it deprives a person of a protected liberty. *See Memphis Light*, 436 U.S. at 16 (emphasis added) (internal quotation marks omitted). The Ninth Circuit has made this requirement clear: "There have been cases in which the Supreme Court has found that a post-deprivation hearing suffices, but under no circumstances has the Supreme Court permitted a state to deprive a person of a life, liberty, or property interest under the Due Process Clause *without any hearing whatsoever*." *De Nieva*, 966 F.2d at 485 (emphasis supplied) (citation omitted). Essential to the hearing requirement is the provision of at least some opportunity to confront and respond to the government's allegations or evidence. *American-Arab Anti-Discrimination Comm. v. Reno (AAADC)*, 70 F.3d 1045, 1069 (9th Cir. 1995) (due process hearing requirement has "ancient roots" in the rights to confrontation and cross-examination) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). The hearing must permit the plaintiff "to prove or disprove" the facts that are "relevant" to the deprivation. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (discussing *Constantineau*, 400 U.S. 433, and *Goss*, 419 U.S. 565).

It is undisputed that Defendants fail to provide Plaintiffs any type of hearing—written or in-person, pre- or post-deprivation—where they can confront or rebut the allegations or evidence supporting their inclusion in the No Fly List. *See* Defs.' Br. 27. The Defendants' application of secret criteria to include U.S. citizens in the No Fly List shows that factual findings necessarily underlie these decisions. Stip. Facts ¶ 17; Coppola Decl. ¶¶ 15–18, 21. Defendants concede as much, but refuse to disclose any of this evidentiary information. Stip. Facts ¶¶ 11, 14. The DHS TRIP process itself, based on these secret criteria and secret evidence, deprives Plaintiffs of the

opportunity to confront and rebut the facts deemed "relevant" to their inclusion on the No Fly List in any meaningful way. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

Due process particularly requires an in-person hearing for U.S. citizens on the No Fly List because No Fly List placement likely involves determinations concerning character and veracity. *See Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) (assessing intelligence, physical and mental condition, and credibility requires "personal contact" between the affected party and "the person who decides his case"). Even in situations where far lesser interests are at stake, the Supreme Court has held that due process requires in-person hearings. *See, e.g.*, *Memphis Light*, 436 U.S. at 16 (in-person hearing required prior to termination of utility subsidies); *Califano*, 442 U.S. at 696 (same for recovery of excess Social Security payments); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (requiring in-person hearing permitting confrontation and cross-examination of adverse witnesses); *Goss*, 419 U.S. at 581 (mandating hearing for students to present their "side of the story" against evidence before temporary school suspension).

To be clear, Plaintiffs do not request a pre-deprivation hearing; they request only an in-person hearing *after* being prevented from flying so that they can clear their names. While "limited" situations may "justify postponing the opportunity to be heard until after the initial deprivation," clearly established Ninth Circuit law prohibits Defendants from categorically refusing, as they do here, to provide U.S. citizens any hearing in which they can contest the reasons or bases for their inclusion. *Fed. Deposit Ins. Corp.*, 486 U.S. at 240–241; *see De Nieva*, 966 F.2d at 486 (finding "no difficulty concluding that [the plaintiff's] right to a hearing was clearly established" where government deprived plaintiff of liberty interest in travel).

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

The second *Mathews* factor requires the Court to assess the risk of error under Defendants' current procedures and the probable value of additional procedural safeguards. *See Mathews*, 424 U.S. at 335. Because DHS TRIP fails to provide *any* notice or *any* meaningful opportunity to be heard, Defendants fail to protect against the erroneous deprivation of citizens' protected liberties.

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

There can be no dispute that Defendants' Glomar policy creates an unacceptably high risk of error. Defendants deprive Plaintiffs of *any* reason or bases for their inclusion on the list, withhold even the rule they accuse Plaintiffs of violating, and force Plaintiffs to guess why they are suddenly banned from flying. *See Gete*, 121 F.3d at 1297; *Barnes*, 980 F.2d at 579. This absolute lack of notice maximizes error by crippling Plaintiffs' ability "to determine whether the agency based its decision on erroneous facts, to discover whether there is evidence not previously considered that might be submitted," and to clear up any error. *Gete*, 121 F.3d at 1298; *see Kindhearts*, 647 F. Supp. 2d at 904. Defendants' failure to afford Plaintiffs a hearing further compounds this error because they are prevented from presenting exculpatory information and their own good characters to an impartial decisionmaker. *See De Nieva*, 1989 WL 158912, at *7; *Califano*, 442 U.S. at 697 (in-person hearing necessary to assess character, credibility, and good faith).[37]

Defendants' redress policy not only fails to provide safeguards against the erroneous deprivations of U.S. citizens' liberties; it also exacerbates error. Numerous government reports and audits document widespread errors in the consolidated terrorism watch list from which the No Fly List is drawn, including the failure to remove names when information is outdated or does not support inclusion. Not only does the record show that the watch list is over-inclusive, it also includes a 2009 DOJ OIG audit that concluded the FBI "did not update or remove watch list records as required."[38] The DOJ OIG found that, in the cases it reviewed, the FBI failed to

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

[38] Choudhury Decl. Ex. F at iv. The record supports the conclusion that the watch list is over-inclusive. In 2007, the GAO determined that TSC rejects only approximately one percent of

timely remove records in an extraordinary 72 percent of cases where it was necessary, failed to modify watch list records in 67 percent of cases where it was necessary, and failed to remove terrorism case classifications in 35 percent of cases where it was necessary—many of which corresponded to "individuals who . . . should have been removed from the watchlist." [39] This record shows what Plaintiffs already know from personal experience: the error-ridden watch list includes names that should be removed.

Based on this record, the "probable value of additional safeguards" in preventing the severe deprivation of Plaintiffs' liberty interests in travel and reputation is clear. *Mathews*, 424 U.S. at 335. Providing Plaintiffs notice of their inclusion in the No Fly List, the bases and reasons for their inclusion, and a hearing before a neutral decisionmaker are the best ways to guard against error. *See Gete*, 121 F.3d at 1297–98 (recognizing that adequate notice of rule allegedly violated and the reasons for Immigration and Naturalization Service vehicle seizure, as well as a meaningful opportunity to confront and rebut, minimize the risk of error).

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

The third *Mathews* factor requires the Court to consider the government's interests, including any burdens imposed by additional procedures. *See Mathews*, 424 U.S. at 335. Providing Plaintiffs meaningful notice and a hearing will not harm any government interests purportedly advanced by Defendants' Glomar policy. Defendants insist that their refusal to confirm or deny watch list status promotes national security. Coppola Decl. ¶¶ 33–38. But the benefits they assert all flow from a central premise, which the facts in this case confirm is a

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watch list nominations. Choudhury Decl. Ex. I at 22. That same year, the DOJ OIG found that TSC's quality assurance process was "weak." Choudhury Decl. Ex. F at v. A 2008 DOJ OIG audit also determined that FBI field offices bypassed certain quality control mechanisms in the nomination process. Choudhury Decl. Ex. J at 3.

[39] Choudhury Decl. Ex. F at iv–vi.

fiction: that it is even possible to keep a person's No Fly List status a secret *after* that person has been prevented from flying.[40] It is undisputed that Plaintiffs already know, albeit without official confirmation, they are on the No Fly List; each was denied boarding on at least one flight, and U.S. or airline officials subsequently told each Plaintiff that she or he is on the list.[41] Some Plaintiffs were very publicly denied boarding in a manner that made clear that the denial was for national security reasons.[42]

To the extent that Defendants assert concerns about law enforcement investigations, Plaintiffs are already on notice that they are or were the subject of a law enforcement or intelligence-gathering investigation because the FBI questioned each of them—often numerous times—following their denial of boarding.[43] Acknowledgement of Plaintiffs' No Fly List-status in the redress process will not tell Plaintiffs anything they do not already know. This Court should reject the government's assertions to the contrary. *See* Coppola Decl. ¶ 36.

The undisputed facts, moreover, show that the government *itself* routinely undermines its own Glomar policy when it serves its own interests. FBI agents confirmed No Fly List-status when they asked four of the Plaintiffs to serve as confidential informants or spy on Muslim

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

[41] Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶¶ 6, 8; Kariye Decl. ¶ 6; Kashem Decl. ¶¶ 6, 8; Knaeble Decl. ¶ 9; Third Am Compl. ¶¶ 42-43, ECF No. 83; Mashal Decl. ¶¶ 7, 10; Meshal Decl. ¶¶ 5–6; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L ¶ 5 (Muthanna Decl.); Persaud Decl. ¶ 7; A. Rana Decl. ¶¶ 4–5;
M. Rana Decl. ¶ 6; Washburn Decl. ¶¶ 7, 18.

[42] Ahmed Decl. ¶¶ 6–8; Kariye Decl. ¶¶ 6–7; Kashem Decl. ¶¶ 6–7; Knaeble Decl. ¶¶ 9–10; Third Am Compl. ¶¶ 3, 42, ECF No. 83; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶¶ 6–7; Choudhury Decl. Ex. L ¶¶ 5–6 (Muthanna Decl.); Persaud Decl. ¶¶ 5–6; A. Rana Decl. ¶ 4; M. Rana Decl. ¶ 6; Washburn Decl. ¶¶ 7–8.

[43] Ahmed Decl. ¶ 9; Ghaleb Decl. ¶ 7; Kariye Decl. ¶ 6; Kashem Decl. ¶ 8; Knaeble Decl. ¶ 11; Third Am Compl. ¶¶ 43, ECF No. 83; Mashal Decl. ¶¶ 8, 10; Meshal Decl. ¶ 6; Mohamed Decl. ¶ 8; Choudhury Decl. Ex. L ¶ 13 (Muthanna Decl.); Persaud Decl. ¶ 19; A. Rana Decl. ¶ 5; M. Rana Decl. ¶ 7; Washburn Decl. ¶¶ 10, 18.

communities in exchange for assistance with removal from the list.[44] CBP confirms that people are *not* on the watch list every time it approves members for its Global Entry program by conducting a check that "ensure[s] that applicants are not on any watch list" before permitting members to join and obtain expedited clearance at U.S. borders.[45] Providing U.S. citizens on the No Fly List the post-deprivation notice and hearing that due process requires will not harm national security when the government itself routinely disregards its Glomar policy. *See* Coppola Decl. ¶ 37.[46]

Moreover, courts require due process even when serious national security interests are at stake because, as the Supreme Court has made clear, the government's interest in protecting national security is not a "blank check . . . when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (requiring notice to alleged enemy combatant captured in Afghanistan of factual and legal basis for charges and a meaningful opportunity to rebut those charges); *see also Kindhearts*, 647 F. Supp. 2d at 904, 907–08 (requiring "prompt" and "meaningful hearing," and statement of reasons following government block on U.S. charity's assets and provisional designation of it as terrorist organization); *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (requiring pre-deprivation notice to organization concerning its impending

[44] *See* Mashal Decl. ¶ 10; Meshal Decl. ¶ 6; Persaud Decl. ¶ 10; Ghaleb Decl. ¶ 8.
[45] Choudhury Decl. Ex. C at 2. According to the executive director of Admissibility and Passenger Programs for CBP, the "rigorous background check . . . tick[s] off the sorts of things the government probes like . . . watch lists . . . ." *Id*. at 3 (internal quotation marks omitted). See generally, Choudhury Decl. Ex. A (describing Global Entry); Choudhury Decl. Ex. B (same).
[46] Cases upholding Glomar responses to requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records concerning the watch list are not to the contrary. Those cases do not raise the constitutional claim at issue here; they address whether an agency has met its statutory burden to withhold watch list information absent evidence in the record undermining its secrecy assertions. *See, e.g.*, *Tooley v. Bush*, No. 06-cv-306 (CKK), 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006), *aff'd*, *Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005).

designation as foreign terrorist organization); *AAADC*, 70 F.3d at 1070–71 (barring use of secret evidence in immigration proceedings for non-citizens seeking discretionary immigration benefit); *United States v. Abuhamra*, 389 F.3d 309, 329 (2d Cir. 2004) (same for pre-trial detention hearings concerning applications for release on bail).[47]

Finally, providing Plaintiffs notice and a hearing will not harm any asserted interest in keeping secret classified or otherwise sensitive information upon which the Defendants may seek to rely. The government is routinely required to disclose, or at least summarize, classified or otherwise sensitive information in other contexts where it seeks to deprive liberty in the name of national security. *See, e.g.*, *Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir. 2009) (per curiam) (holding that court may compel disclosure to counsel of classified information for habeas corpus review); *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions), *vacated*, 554 U.S. 913 (2008), *reinstated*, 551 F.3d 1068 (D.C. Cir. 2009) (per curiam); *Abuhamra*, 389 F.3d at 329 (requiring substitute disclosures to explain "the gist or substance of" ex parte submissions); *cf.* Classified Information Procedures Act, 18 U.S.C. app. (contemplating provision of summaries of, or substitutes for, classified information in criminal proceedings).[48]

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[47] Nor can Defendants rely on *Jifry v. F.A.A.* for their utter failure to afford due process to the U.S. citizens in this case. *Jifry* concerned non-resident aliens seeking "certificates to fly foreign aircraft outside of the United States" and asserting private interests far less weighty than those at issue here. 370 F.3d at 1183.

[48] Although Defendants may argue that access to classified information falls within the exclusive purview of the Executive, "[i]t is simply not the case that all security-clearance decisions are immune from judicial review." *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993). Courts are empowered, and indeed are constitutionally required, to review executive determinations with regard to security clearances where competing interests are at stake. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (reviewing constitutional challenge by former CIA employee found ineligible for security clearance and terminated); *Dorfmont v.*

Plaintiffs do not argue here that Defendants cannot take appropriate steps to protect certain classified evidence in the hearings they seek. But such hearings may not be foreclosed categorically simply because Defendants may attempt to rely on secret information in particular instances. As far more complex cases in the national security context show, the decisionmaker in any process can utilize calibrated tools, including evidentiary privileges and protective orders, to balance U.S. citizens' due process rights and any legitimate government secrecy interests that may arise. *See, e.g.*, *Al Odah*, 559 F.3d at 547–48; *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (TFH), 2009 WL 50155, at *6, *9 (D.D.C. Jan. 9, 2009).

The undisputed facts thus show that the balance of the three *Mathews* factors tips decisively in Plaintiffs' favor. Defendants' placement of these U.S. citizens on the No Fly List has deprived them of their liberties without affording them the most basic notice and opportunity to be heard that the Constitution requires.

III) Defendants' Failure to Provide Plaintiffs Notice or a Hearing Violates the Administrative Procedure Act

Plaintiffs seek partial summary judgment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and have established a violation on two separate theories. First, for the reasons stated above, Defendants' failure to afford U.S. citizens on the No Fly List meaningful notice and a hearing following the deprivation of protected liberties violates due process and is "contrary to constitutional right, power, privilege, or immunity," under APA Section 706(2)(B). 5 U.S.C. § 706(2)(B). When reviewing Section 706(2)(B) claims, courts consider agency action

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Brown, 913 F.2d 1399, 1404 (9th Cir. 1990) ("[F]ederal courts may entertain colorable constitutional challenges to security clearance decisions."); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (citing cases for the same proposition). *Department of Navy v. Egan* does not stand for the contrary proposition because that decision addressed the "narrow question" of whether the Merit Systems Protection Board had statutory authority to review employee security clearance determinations. 484 U.S. 518, 520 (1988).

de novo. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010). Because the undisputed facts show that Defendants have denied Plaintiffs due process, Plaintiffs are entitled to APA relief.

Plaintiffs establish a second and independent violation under APA Section 706(2)(A) because Defendants' redress procedures are also "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A). To analyze this claim, courts examine whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court's review is "searching and careful." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted). Because Plaintiffs have raised "serious constitutional questions" about Defendants' redress procedures, deference to the agency interpretation is inappropriate. *Williams v. Babbitt*, 115 F.3d 657, 661–63 (9th Cir. 1997). The agency must "articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'" *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010) (quoting *State Farm*, 463 U.S. at 43). The agency fails to meet this standard when it issues regulations that are standardless. *See Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039 (9th Cir. 2007) (regulatory standard "must not be so general that the applicant . . . cannot gauge [his or her] level of compliance").[49] Agency action is also arbitrary and capricious when it produces known error that is "uncorrected

[49] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001) (invalidating environmental regulations)

and unverified." *Wash. Toxics Coal. v. U.S. Dep't of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1185–86 (W.D. Wash. 2006).

Defendants' redress process is arbitrary and capricious for two distinct reasons. First, Defendants' Glomar policy and failure to provide notice and a meaningful process prevents Plaintiffs from ensuring their compliance with Defendants' rules or contesting the allegation that Plaintiffs have violated those rules. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001).

Second, the undisputed facts show that Defendants employ No Fly List redress procedures so deficient in providing notice and process that they fail to correct known, widespread errors in the watch list. *See supra* pp. 24–26. These actions are a direct violation of Congress' directive to afford "fair" and effective redress for those wrongly excluded from air travel. *See* 49 U.S.C. § 44926(a) (requiring a "fair" redress process for travelers denied boarding due to threat identification); 49 U.S.C. § 44903(j)(2)(G)(i) (requiring "fair" appeal process for same to "correct any erroneous information").[50] Defendants cannot articulate even a rational connection between the facts and their adoption of unfair, ineffective, error-maximizing redress procedures. *Buckingham*, 603 F.3d at 1080. Defendants' actions thus satisfy the textbook definition of arbitrariness. *See Wash. Toxics Coal.*, 457 F. Supp. 2d at 1185–86. For all of these reasons, Defendants violate the APA.

[50] Although Congress issued this directive to TSA, the Executive made TSC the final decisionmaker concerning the No Fly List. 49 U.S.C. § 44903(j)(2)(G)(i); 49 U.S.C. § 44926(a); Attach. to Coppola Decl. at 8, ECF No. 85-3. Defendants must therefore adhere to Congress' directive concerning redress.

CONCLUSION

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

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Respectfully submitted,

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

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

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

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

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

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

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

Attorneys for Plaintiffs.