11-35407

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AYMAN LATIF, MOHAMED SHEIKH ABDIRAHMAN KARIYE, RAYMOND EARL KNAEBLE IV, FAISAL NABIN KASHEM, ELIAS MUSTAFA MOHAMED, STEVEN WILLIAM WASHBURN, SAMIR MOHAMED AHMED MOHAMED, ABDULLATIF MUTHANNA, NAGIB ALI GHALEB, SALEH A. OMAR, ABDUL HAKEIM THABET AHMED, IBRAHEIM Y. MASHAL, SALAH ALI AHMED, AMIR MESHAL, and STEPHEN DURGA PERSAUD,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; ROBERT S. MUELLER, III, in his official capacity as Director of the Federal Bureau of Investigation; and TIMOTHY J. HEALY, in his official capacity as Director of the Terrorist Screening Center,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Brief of Plaintiffs-Appellants

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CORPORATE DISCLOSURE STATEMENT

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

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702, which waives the sovereign immunity of the United States with respect to any action for injunctive relief under 28 U.S.C. § 1331. On May 5, 2011, the district court entered an order dismissing the action.

Plaintiffs timely appealed. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err in dismissing this action for lack of subject matter jurisdiction on the ground that the suit challenges an "order" of the Transportation Security Administration ("TSA"), even though the TSA is neither responsible for Plaintiffs' deprivations nor authorized to provide the requested relief?

Did the district court err in holding that the TSA and the Department of Homeland Security ("DHS") are indispensable parties to the litigation and must be joined under Fed. R. Civ. P. 19(b)?

STATEMENT OF THE CASE

On June 30, 2010, Ayman Latif, Mohamed Sheikh Abdirahman Kariye, Raymond Earl Knaeble IV, Steven William Washburn, Samir Mohamed Ahmed Mohamed, Nagib Ali Ghaleb, Abdullatif Muthanna, and Saleh A. Omar filed this action against Eric H. Holder, Jr., in his official capacity as Attorney General of

the United States; Robert S. Mueller, III, in his official capacity as Director of the Federal Bureau of Investigation ("FBI"); and Timothy J. Healy, in his official capacity as Director of the Terrorist Screening Center ("TSC"). On August 6, 2010, Faisal Nabin Kashem, Elias Mustafa Mohamed, Abdul Hakeim Thabet Ahmed, Ibraheim Y. Mashal, Salah Ali Ahmed, Amir Meshal, and Stephen Durga Persaud joined as plaintiffs in an amended complaint. Plaintiffs alleged that Defendants violated their Fifth Amendment right to due process and rights under the Administrative Procedure Act by failing to afford them a meaningful opportunity to contest their inclusion on the "No Fly List" following their denial of boarding on commercial flights to or from the United States or over U.S. airspace.

The Defendants moved for dismissal at the pleading stage or, in the alternative, for summary judgment on Plaintiffs' claims. In their motion to dismiss, they contended that dismissal was warranted for lack of jurisdiction because (1) the action challenged final "TSA orders"; (2) 49 U.S.C. § 46110 vested exclusive review in the court of appeals over challenges to those "TSA orders"; (3) TSA was an indispensable party to the litigation; and (4) TSA could not be joined in the district court under Fed. R. Civ. P. 19(b).

Following a conference with the parties, the court ordered responsive briefing and oral argument on the motion to dismiss and stayed the motion for summary judgment. The district court heard oral argument on January 21, 2011.

On February 4, 2011, with leave of the court, Plaintiffs filed a second amended complaint. The Defendants renewed their motion to dismiss.

In an order dated May 3, 2011, the court held that "TSA is an indispensable party without whose presence this action cannot proceed"; that "any 'order' through [the] DHS [Traveler Redress Inquiry Program] that might cause the names of any or all Plaintiffs to remain on or to be removed from any No Fly List would have to be issued by TSA pursuant to [49 U.S.C.] § 46110(a)"; and that, "[a]ccordingly, this Court does not have jurisdiction to provide the relief Plaintiffs seek . . . ." Excerpt of Record ("ER") 17 (District Op. 15). This appeal followed.

STATEMENT OF FACTS

This case challenges the constitutionality of the government's "No Fly List"—the mechanism by which the government prohibits United States citizens and lawful residents from flying commercially to or from the United States or over U.S. airspace without providing any meaningful opportunity to object. Plaintiffs are fifteen citizens and lawful permanent residents of the United States who attempted to board commercial flights in the United States and overseas only to find that they have been barred from commercial air travel to or from the United States or over U.S. airspace. ER 25–26 (Second Am. Compl. ("SAC") ¶¶ 1–2). Plaintiffs believe they are on the government's No Fly List; indeed, most have

been told that they are on the list by FBI agents or other government officials. ER 26 (SAC ¶ 3).

Ten plaintiffs, including four veterans of the United States Armed Forces, were placed on the list while traveling abroad and were stranded in foreign countries, without explanation or appropriate visas, unable to return home to their families, jobs, and needed medical care in the United States. ER 26, 31, 33–43 (SAC ¶¶ 1, 44, 55, 66, 69, 73, 75–76, 82, 91, 95, 98, 102, 107). Five plaintiffs were prevented from boarding flights in the United States. ER 44–47 (SAC ¶¶ 113, 117, 122, 126, 131, 135). All Plaintiffs remain unable to travel by commercial airlines to or from the United States or over U.S. airspace for familial, educational, social, religious, legal, business and employment reasons. ER 48–49 (SAC ¶ 145). Plaintiffs present no security threat to commercial aviation and know of no reason why they would be placed on the No Fly List. ER 48 (SAC ¶ 143).

Each Plaintiff applied for "redress" through the only available government mechanism, but no government official or agency has offered any explanation for Plaintiffs' apparent placement on the No Fly List or offered any of the Plaintiffs a meaningful opportunity to confront or rebut the basis for their inclusion, or apparent inclusion, on such a list. ER 26 (SAC ¶ 4).

Through this action, Plaintiffs seek the removal of their names from any government watch list that has prevented them from flying. ER 26–27 (SAC ¶ 5). In the alternative, Plaintiffs seek a fair hearing in which they can confront any evidence against them and contest their unlawful designation. *Id*.

A. The Terrorist Screening Center's No Fly List

In September 2003, Attorney General John Ashcroft established the Terrorist Screening Center to consolidate the government's approach to terrorism screening. ER 30 (SAC ¶ 29). The TSC, which is administered by the FBI, develops and maintains the Terrorist Screening Database ("TSDB" or "watch list"), of which the No Fly List is a component. ER 28, 30 (SAC ¶¶ 21, 29). The Terrorist Screening Database is the federal government's master repository for suspected international and domestic terrorist records used for watch list-related screening. ER 30 (SAC ¶ 29).

The TSC decides whether an individual meets the minimum requirements for inclusion in the watch list as a known or suspected terrorist and which screening systems will receive information about the individual. ER 30 (SAC ¶ 32); ER 142 (Joint Statement of Stipulated Facts ("Stip. Facts") ¶ 1).[1]

[1] In support of their motion to dismiss for lack of subject matter jurisdiction, the Defendants submitted, among other things, the Parties' Joint Statement of Stipulated Facts; the Declaration of James G. Kennedy, the Director of the Office of Transportation Security Redress ("Kennedy Decl."), and accompanying exhibits; and the public portions of the Declaration of Christopher M. Piehota, the

Defendants have not stated publicly what standards or criteria are applied to determine whether an individual on the consolidated watch list will be placed on the No Fly List. ER 31 (SAC ¶ 34); ER 144 (Stip. Facts ¶ 18).

The TSC sends records from the TSDB to other government agencies, which then use those records to identify suspected terrorists. ER 30 (SAC ¶ 30). For example, applicable TSC records, including those from the No Fly List, are provided to TSA for use in pre-screening passengers. ER 30–31 (SAC ¶¶ 30, 34); ER 142 (Stip. Facts ¶ 3). Certain TSC records are also provided to U.S. Customs and Border Protection for use in screening travelers entering the United States. ER 30 (SAC ¶ 30). Thus, while the front-line agencies like TSA carry out the screening function, TSC maintains and controls the database of suspected terrorists and determines whether individuals should be added to, or removed from, the watch list. ER 30–32 (SAC ¶¶ 30–31, 38); ER 143 (Stip. Facts ¶ 9).

Although no single government entity is responsible for removing an individual from the No Fly List, ER 31–32 (SAC ¶ 38), the Terrorist Screening Center is the "final arbiter of whether terrorist identifiers are removed from the TSDB," ER 136–37 (Piehota Decl. ¶ 35). The TSC has provided no publicly available information about how it makes these decisions. *Id.*

Deputy Director for Operations of the Terrorist Screening Center ("Piehota Decl."). This Court may consider evidence on a motion to dismiss for lack of subject matter jurisdiction under 49 U.S.C. § 46110, as it did in *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250, 1254–55 & n.6 (9th Cir. 2008).

B. Lack of Adequate Redress

The TSC does not accept redress inquiries from individuals who have been barred from boarding an aircraft on account of apparent inclusion on the No Fly List. ER 31–32 (SAC ¶ 38). Nor does it directly provide final disposition letters to individuals who have submitted redress queries. *Id.* Rather, individuals who seek redress after having been prevented from flying must complete a standard form and submit it to the DHS Traveler Redress Inquiry Program ("TRIP"). ER 32 (SAC ¶ 39).

DHS TRIP transmits traveler complaints to the TSC, which determines whether any action should be taken. *Id.* Once TSC makes a determination regarding a particular individual's status on the watch lists, it notifies DHS TRIP. ER 32 (SAC ¶ 39); ER 57 (Kennedy Decl. ¶ 10). DHS TRIP then responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. ER 57 (Kennedy Decl. ¶ 10). DHS TRIP determination letters also do not say whether the complainant may fly commercial airlines in the future. ER 143 (Stip. Facts ¶ 12).

C. Plaintiffs' Action and Requests for Redress through DHS TRIP

Plaintiffs commenced this action on June 30, 2010, alleging that Defendants violated their Fifth Amendment right to due process and rights under the Administrative Procedure Act by failing to afford them a meaningful opportunity

to contest their inclusion on the No Fly List following their denial of boarding on commercial flights to or from the United States or over U.S. airspace.[2] Although each Plaintiff had filed an application for redress through DHS TRIP, only Plaintiff Ghaleb had received a DHS TRIP determination letter at the time the complaint was filed. *See* ER 248, 274 (Compl. ¶¶ 4, 124). Most Plaintiffs first received DHS TRIP determination letters on November 17, 2010, when the Defendants moved for dismissal or summary judgment, and attached these letters to their motion. *See* ER 58–121 (Kennedy Decl. ¶ 13, Exs. A–B); ER 331 (Trial Court Docket entry No. 44).

The DHS TRIP determination letters sent to Plaintiffs neither confirmed nor denied whether the Plaintiffs were on a government watch list, including the No Fly List; did not provide any basis for Plaintiffs' inclusion on such a list; and did not provide any assurances about future travel. ER 32 (SAC ¶¶ 40–41). For example, the letter to Plaintiff Ghaleb stated:

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[2] The complaint also alleged that Defendants had banished certain plaintiffs from the United States by placing them on the No Fly List while they were overseas in violation of the Fourteenth Amendment and the Immigration and Nationality Act. ER 296–97 (Compl. ¶¶ 226–33); ER 239–41 (First Am. Compl. ¶¶ 387–93).

On these grounds, the Plaintiffs who remained stranded in Egypt, Saudi Arabia and Yemen moved for a preliminary injunction ordering the Defendants to permit them to fly home to the United States subject to suitable screening procedures. ER 145–50 (Pls.' Corrected Mot. for Prelim. Inj.). In response to the motion, Defendants arranged for these Plaintiffs to return to the United States by commercial air under what was understood to be "one-time waivers". ER 48 (SAC ¶ 140).

> Security procedures and legal concerns mandate that we can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information. However, we have made any corrections to records that our inquiries determined were necessary, including, as appropriate, notations that may assist in avoiding instances of misidentification.

ER 68 (Kennedy Decl. Ex. A at 10).

At no point in the available administrative redress process has any Plaintiff been told whether he is on the No Fly List or the basis for his inclusion on the list, let alone been given an opportunity to contest such inclusion. ER 143 (Stip. Facts ¶ 15).

SUMMARY OF ARGUMENT

Plaintiffs brought this action to compel the Defendants, who administer the federal government's No Fly List, either to remove their names from any watch list that has prevented them from flying or to provide a constitutionally adequate process for them to clear their names. Constitutional claims seeking injunctive relief presumptively reside in the district courts unless Congress has expressly provided that those claims are within the exclusive jurisdiction of the courts of appeals. The district court held that Congress so provided in 49 U.S.C. § 46110 ("Section 46110"), which divests the district court of jurisdiction over claims challenging final "orders" of the TSA.

The district court's decision is contrary to this Court's controlling precedent set forth in *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir.

2008), the text of Section 46110, and the cases construing it. According to these authorities, Section 46110 has no bearing on the litigation or resolution of this case for two simple reasons: first, Plaintiffs challenge the decisions of the Terrorist Screening Center—the sole entity responsible for their deprivations and empowered to provide the requested relief—and not of the TSA; and second, TSA has not issued, and Plaintiffs have not challenged, any "order" within the meaning of Section 46110.

First, in *Ibrahim*, in an opinion by Chief Judge Kozinski, this Court squarely held that suits challenging government conduct concerning the placement of a name on the No Fly List are properly filed in the district court. 538 F.3d at 1255–56. That is because, as the undisputed facts establish, the No Fly List is administered not by the TSA, but by the Terrorist Screening Center, which is in turn administered by the FBI. Section 46110 does not divest district courts of jurisdiction over orders of the *TSC*; it applies only to orders issued by the *TSA*. It is the TSC, not the TSA, that determines whether an individual should be added to the list, and whether s/he should be removed from the list.

Like the plaintiff in *Ibrahim*, Plaintiffs' claims challenge their placement on the No Fly List. The Defendants' own evidentiary submissions establish that the Terrorist Screening Center controls both the placement of names on, and the removal of names from, the No Fly List. The district court's conclusion that

Section 46110 applies to this action is thus contrary to both the letter and spirit of *Ibrahim*.

Second, Plaintiffs are not in any sense challenging a TSA "order" to which Section 46110 applies. Although each Plaintiff has received a DHS TRIP determination letter in response to his application for redress, under this Circuit's law, these letters are not "orders" at all: they do not "order" anyone to do anything, determine any legal rights, or take a position regarding Plaintiffs' claims. The letters do not even inform the petitioners of the outcome of their redress complaints; there is no way to determine from the letters whether a petition for redress has been successful or not. Moreover, Plaintiffs' suit is not a challenge to their DHS TRIP determination letters—indeed, this case was filed before most of those letters were issued; it is a challenge to TSC's decision to prevent them from flying and its failure to provide them with a constitutionally adequate redress procedure after having done so. If this Court were to conclude that the letters are "orders," they are orders of the TSC, not TSA; TSA simply functions as a messenger.

In a striking absence of discussion or analysis, the district court concluded that the requested relief—an order removing Plaintiffs from the No Fly List—would have to be issued by TSA through DHS TRIP. ER 17 (District Op. 15). This conclusion is obviously wrong. The undisputed facts establish that the

Terrorist Screening Center compiles the list of names ultimately placed on the No Fly List and is the final arbiter of whether a name is removed from the list. The district court also erred in construing Plaintiffs' broad due process claims against TSC for its decisions and failures in administering the No Fly List as challenges to a TSA "order" simply because TSA plays a ministerial role in the existing "redress" process for travelers denied boarding. Although adjudicating these claims may involve consideration of the DHS TRIP program's inadequacies, it is undisputed that the Terrorist Screening Center is the final decision-maker in this program—not TSA.

Plaintiffs have thus neither "disclos[ed] a substantial interest in" nor challenged any "order" of the TSA or any other agency named in Section 46110. Dismissal for lack of subject matter jurisdiction was wholly unwarranted.

Finally, there is no need to join to the action parties that do not possess the authority to provide the requested remedy. The Defendants retain the exclusive authority over who is added to the No Fly List and who is removed from it, and are thus uniquely capable of effectuating the relief that Plaintiffs seek. The district court can therefore "accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), and DHS and TSA are not indispensable under Fed. R. Civ. P. 19(b). Nevertheless, even if this Court were to determine that the participation of DHS and TSA is necessary to the implementation of a remedy, there is no reason

whatsoever why they cannot be joined in the district court, and Plaintiffs do not object to joinder of either party.

STANDARD OF REVIEW

This Court applies de novo review to a district court's grant of a motion to dismiss for lack of subject matter jurisdiction. *Natural Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist.*, No. 09-57064, 2011 WL 2557246, at *2 (9th Cir. 2011). This Court "review[s] a district court's decision on joinder for abuse of discretion, and . . . the legal conclusions underlying the decision de novo." *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 610 F.3d 1070, 1076 (9th Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION FOR LACK OF JURISDICTION.

A. Under this Circuit's Precedent, District Courts Have Jurisdiction Over a Challenge to the Placement of a Plaintiff's Name on the No Fly List.

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 702, which waives the United States' sovereign immunity with respect to any action for injunctive relief under 28 U.S.C. § 1331 ("Section 1331"). *See, e.g.*, *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992). Section 1331, in turn, expressly confers upon the "*district* courts . . . original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331

(emphasis added). Constitutional claims seeking injunctive relief thus presumptively reside in the district courts unless Congress has expressly provided that those claims are within the exclusive jurisdiction of the courts of appeals. In the court below, Defendants invoked 49 U.S.C. § 46110, which divests the district court of jurisdiction where a party has "disclos[ed] a substantial interest in" or challenged a "final order" of the Transportation Security Administration. This statute has no application to this action, however, according to controlling precedent of this Court set forth in *Ibrahim v. Department of Homeland Security*.

In *Ibrahim*, a plaintiff who had been detained and denied boarding on a commercial flight sued various defendants, seeking, among other relief, "an injunction directing the government to remove her name from the No-Fly List." 538 F.3d at 1254. The United States moved for dismissal of all claims related to the No Fly List, contending (as Defendants argued in the court below) that 49 U.S.C. § 46110(a) grants exclusive jurisdiction to the court of appeals to review the "orders" of TSA, and that "the No-Fly List is an 'order' [of TSA] under the ambit of section 46110." 538 F.3d at 1254. The district court agreed with the United States and dismissed the claims. *Id*.

This Court reversed. Writing for the majority, Chief Judge Kozinski observed that "an agency called the Terrorist Screening Center actually compiles the list of names ultimately placed on the No-Fly List. And the Terrorist Screening

Center isn't part of the Transportation Security Administration or any other agency named in section 46110; it is part of the Federal Bureau of Investigation, as the government concedes." *Id*. at 1255 (internal quotation marks omitted). Indeed, this Court noted that the government had asserted to a sister circuit that it "is not TSA but another agency within the government that makes the determination that an individual . . . should be placed on . . . the No-Fly List." *Id*. at 1254 n.6.[3] The plaintiff's claims relating to her watch list status were therefore remanded for further proceedings.

This Court squarely held in *Ibrahim* that where a Plaintiff challenges an action of the Terrorist Screening Center, Section 46110 does not apply. *See* 538 F.3d at 1256 ("The No-Fly List is maintained by the Terrorist Screening Center, and section 46110 doesn't apply to that agency's actions."). Furthermore, "[b]ecause putting Ibrahim's name on the No-Fly List was an 'order' of an agency

[3] Chief Judge Kozinski also explained that the court's holding was "consistent not merely with the statutory language but with common sense as well." *Ibrahim*, 538 F.3d at 1256. He continued:

> Just how would an appellate court review the agency's decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government's decision to put Ibrahim's name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.

Id. (citation omitted).

not named in section 46110, the district court retains jurisdiction to review that agency's order under the [Administrative Procedure Act]." 538 F.3d at 1255 (emphasis in original). That holding is controlling here.

Like the plaintiff in *Ibrahim*, Plaintiffs contend that their names were improperly placed on the No Fly List and seek an injunction ordering the Terrorist Screening Center to remove their names from that list. ER 26–27, 48 (SAC ¶¶ 5, 143); *see also* ER 51 (SAC 29 ¶ 2) (Prayer for Relief). *Ibrahim* holds that these challenges are to "'order[s]' of an agency *not* named in section 46110," and that the district court therefore has jurisdiction over such claims. 538 F.3d at 1255.

Indeed, even if *Ibrahim* had left room for doubt as to which entity possesses the authority to afford Plaintiffs the relief they seek, Defendants themselves submitted sworn declarations in the court below conceding that the Terrorist Screening Center, not the TSA, is "the final arbiter" of whether an individual is placed on, or removed from, the No Fly List. *See* ER 136–37 (Piehota Decl. ¶ 35).[4] The Deputy Director of the TSC confirmed that the TSC is administered by the FBI, not TSA, and that it is the TSC that has the authority to "accept or reject" nominations to the government's consolidated terrorism watch list, from which the

[4] Indeed, DHS has publicly described itself as "an entity that is primarily a *consumer*" of watch list information. *Flight 253: Learning Lessons from an Averted Tragedy: Hearing before the H. Comm. on Homeland Sec.*, 111th Cong. 6 (2010) (statement of Jane Holl Lute, Deputy Secretary of Homeland Sec.) (emphasis added), *available at* http://homeland.house.gov/SiteDocuments/20100127100900-30495.pdf.

No Fly List is drawn. ER 123, 131–32 (Piehota Decl. ¶¶ 4, 22). Although individuals who have encountered travel difficulties must seek redress through DHS, those complaints are forwarded to the TSC, which is responsible for any changes to the watch list. ER 135–37 (Piehota Decl. ¶¶ 33–35). The Director of the Office of Transportation Security Redress similarly explained that when passengers seek redress from DHS, DHS refers the complaints to the Terrorist Screening Center; thereafter, the "TSC's Redress Unit notifies DHS TRIP as to the outcome of the review, and DHS TRIP then issues a determination letter." ER 57 (Kennedy Decl. ¶ 10). The district court ignored these undisputed facts and their import when it incorrectly concluded that affording Plaintiffs their requested removal from the No Fly List would require an order "issued by TSA." ER 17 (District Op. 15).

The district court also drew a false distinction between claims challenging the "placement" of a name on the No Fly List and those seeking "removal" from the list. *See* ER 17 (District Op. 15) ("[T]he overarching theme throughout Plaintiff's Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have Plaintiffs' names removed from any No Fly List and not the *placement* of their names on such List") (emphasis in original). "Placement" and "removal" are two sides of the same coin, and the Terrorist Screening Center, not the TSA, is responsible for both—a fact that the district court failed to

acknowledge. Similarly, the alternative remedy that Plaintiffs seek—a constitutionally adequate name-clearing hearing before the government entity responsible for their inclusion on the No Fly List—may be afforded only by TSC. As with the Plaintiffs' primary request for an injunction seeking their removal from the list, the *purpose* of this process would be to provide the Plaintiffs with a mechanism to challenge the Terrorist Screening Center's decision to place their names on the No Fly List.

B. DHS TRIP Letters are not TSA "Orders" Within the Meaning of 49 U.S.C. § 46110.

A second, and independent, fatal flaw in the district court's decision arises from the fact that Section 46110 divests the district court of jurisdiction only over claims challenging TSA final "orders." But this statute cannot provide the basis for dismissal of this action for the simple reason that no TSA "orders" are at issue. The Defendants argued, and the district court held, that TSA's TRIP determination letters are orders within the meaning of Section 46110. They are not. The letters neither confirm nor deny the complainants' watch list status, do not tell them whether they can fly, and do not inform them of the outcome of their redress complaints; indeed, they are devoid of any substantive content. *See* ER 59–121 (Kennedy Decl. Exs. A–B). Under the law of this Circuit, TSA's TRIP determination letters are not "orders" in any sense.

An agency decision is an "order" under Section 46110 only if it "imposes an obligation, denies a right, or fixes some legal relationship." *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994) (discussing the predecessor provision, 49 U.S.C. app. § 1486 (1988));[5] *see also City of Dania Beach v. Fed. Aviation Admin.*, 485 F.3d 1181, 1187–88 (D.C. Cir. 2007) (Section 46110 order "determines 'rights or obligations' or has 'legal consequences.'"). DHS TRIP letters do none of those things. They do not "ha[ve] a 'direct and immediate' effect on the day-to-day business of the party asserting wrongdoing" and do not "envision[] 'immediate compliance with [their] terms.'" *Mace*, 34 F.3d at 857 (internal citations omitted); *see also Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (similar). The letters do not say whether an individual was on a watch list prior to receipt of a redress inquiry; they do not set forth the bases for any such inclusion; and, most critically, they do not say how the government has resolved the complaint at issue or specify whether an individual will be permitted to fly in the future. DHS "does not order anybody to do anything at the conclusion of" a DHS TRIP inquiry, so a DHS TRIP letter is a "'final disposition' of that proceeding" only in the "tautological sense" that DHS refuses to do anything more after issuing

[5] 49 U.S.C. § 46110 was formerly 49 U.S.C. app. § 1486 ("Section 1486") and is interpreted consistently with that provision. *See Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1995).

a letter: the letter is not an "order" because it "binds no one." *Int'l Tel. & Tel. Corp., v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443–44 (1975).[6]

Similarly, the letters do not meet the statutory definition of an "order" under the Administrative Procedure Act ("APA") because they provide no "disposition" of a complaint.[7] An "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). The letters that Plaintiffs received from the DHS TRIP program do not meet this definition, since they are neither "affirmative," "negative," "injunctive," nor "declaratory" in form.

Moreover, to constitute an "order," a decision must "provide[] a 'definitive' statement of the agency's position." *Mace*, 34 F.3d at 857 (internal citations omitted). Plaintiffs invoked the DHS TRIP process to restore their right to board commercial flights within the United States or over U.S. airspace, but the DHS

[6] While some of the letters state that an "appeal" is available, *see, e.g.*, ER 60 (Kennedy Decl. Ex. A at 2), that fact does not render them "orders" under the criteria established for what constitutes an order under governing precedent. In any event, those letters that do mention the possibility of an appeal say nothing about what the recipient would be appealing, or even whether they have any need to appeal.

[7] Section 46110 incorporates the APA's definition of an "order" and adds a finality requirement. *See Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616, 619–20 (9th Cir. 1981) (applying APA definition of "order" to predecessor Section 1486); *see also, e.g.*, *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 68 (D.C. Cir. 2006) (looking to APA caselaw in applying Section 46110).

TRIP letters take no position, let alone a "definitive" one, on that question. *See* ER 57 (Kennedy Decl. ¶ 11) ("DHS TRIP determination letters do not provide specific assurances about future travel."); ER 143 (Stip. Facts ¶ 12). Indeed, the Department of Homeland Security's own Office of the Inspector General ("OIG") has conceded as much, observing that TSA's responses to redress-seekers leave travelers "without a clear understanding of how their travel difficulty arose, whether they are likely to face future problems, and what course of action they might take next." Dep't of Homeland Sec. Office of the Inspector Gen., OIG-09-103, Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program 89 (2009). The OIG noted that DHS TRIP letters may not even accurately report that the government has investigated an individual's case and made any appropriate changes because the Office of Transportation Security, which issues the letters, "has no authority over DHS components' or other agencies' redress personnel" who are "central to much of the case review and adjudication process," and is thus "in no position to ensure" the truth or accuracy of these representations. *Id*. at 30.

Finally, DHS TRIP letters are not "orders" because the agency that issues them does not create a record that would permit meaningful appellate review of any claims, let alone of the claims raised here. The "existence of a reviewable administrative record is the determinative element" in deciding whether a decision

is an "order." *Sierra Club v. Skinner*, 885 F.2d 591, 593 (9th Cir. 1989); *see also Ibrahim*, 538 F.3d at 1256 & n.8 (noting that "the absence of a record lends support to the view that Congress didn't intend" for courts of appeals to review pursuant to Section 46110 TSC decisions to place names on the No Fly List). To the extent that any administrative record is created, it is created by the TSC, not TSA; as the government's declarations make clear, TSA transmits traveler complaints to the TSC, which determines whether any action should be taken. Thereafter, "TSC's Redress Unit notifies DHS TRIP as to the outcome of the review, and DHS TRIP then issues a determination letter." ER 57 (Kennedy Decl. ¶ 10). Thus, the issuing agency does not even possess the "derogatory information"—the substantive information supporting inclusion of a name on the No Fly List, ER 130 (Piehota Decl. ¶ 19)—that would be required for meaningful review; that information resides elsewhere. If DHS TRIP letters can be described as "orders" of any agency, they are orders of the TSC; the TRIP process, according to its director, serves merely as a "central processing point." ER 55–56 (Kennedy Decl. ¶ 4).[8] This Court has never applied Section 46110 in circumstances in which TSA's role in the challenged conduct is so tangential.[9]

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[8] *Cf.* Shaina N. Elias, *Challenges to Inclusion on the "No-Fly List" Should Fly in District Court*, 77 Geo. Wash. L. Rev. 1015, 1030 (2009) ("While administrative agency structure can sometimes be a bureaucratic jungle, the assignment of responsibility for the No-Fly List is clear: TSC makes the list, and TSA enforces it. Thus the No-Fly List can only be considered an 'order' of TSA to

In concluding that the DHS TRIP determination letters issued to Plaintiffs constitute "orders" within the meaning of the statute, the district court relied on *Scherfen v. U.S. Department of Homeland Security*, an unpublished opinion in which a district court in Pennsylvania held incorrectly that it lacked jurisdiction over a pilot's claim challenging his placement on a watch list. *See* ER 16 (District Op. 14) (citing *Scherfen v. U.S. Dep't of Homeland Sec.*, No. 3:CV-08-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010)). *Scherfen* is the only decision of which Plaintiffs are aware in which a court held that a putative "final order" was issued by an entity with no authority over the challenged action; in which the

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the extent that criminal laws can be considered an 'order' of the police department or the country's decision to go to war can be considered an 'order' of the country's military troops."). Moreover, any "administrative record" supporting a DHS TRIP determination would be entirely one-sided and would provide no basis for a reviewing court to adjudicate Plaintiffs' constitutional challenges.

[9] Rather, this Court has exercised review over the decisions of agencies named in Section 46110—the TSA and the Federal Aviation Administration ("FAA")—where the agency at issue had actual authority to make the determination underlying the order. *See, e.g.*, *City of Las Vegas v. Fed. Aviation Admin.*, 570 F.3d 1109, 1113 (9th Cir. 2009) (FAA order granting approval to a proposed air traffic regulation); *Andrzejewski v. Fed. Aviation Admin.*, 563 F.3d 796, 798 (9th Cir. 2009) (FAA order revoking a commercial pilot's license for dangerous flying); *MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008) (TSA order firing a federal air marshal for disclosing sensitive security information via text message); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1147 (9th Cir. 2002) (FAA rule "which establishe[d] procedural, operational, and equipment safety requirements for air tour operators in Hawaii"). Flight routes, safety rules, pilot licensing, and hiring and firing decisions are all "orders" over which the FAA or TSA—the agencies named in Section 46110—have authority and responsibility.

administrative process and "final order" afforded no notice whatsoever to the petitioner; and in which the process and "order" left the petitioner precisely where he began. That decision is not controlling here and its flawed reasoning should be rejected.[10]

In short, this case peripherally involves TSA letters that do not "order" anyone to do anything, do not fix any legal rights, do not purport to make factual findings, take no position whatsoever regarding Plaintiffs' claims, bind no one, and are not backed up by any administrative record that a reviewing court could examine. And even if the letters did announce the government's decision with respect to the petitioners' grievances—which they emphatically do not—the announcement would have been made by the Terrorist Screening Center, not by the TSA, which simply relays the decision. This case therefore involves no "order[s] issued by . . . the Under Secretary of Transportation for Security" and does not fall under the jurisdictional provision of 49 U.S.C. § 46110(a).

C. Plaintiffs' Claims Against the Terrorist Screening Center do not Challenge a TSA "Order" Simply Because of TSA's Ministerial Role in DHS TRIP.

This suit is properly brought against the Terrorist Screening Center—the only entity with the authority to cause and to remedy the deprivations that Plaintiffs have suffered. Although adjudicating Plaintiffs' claims will involve

[10] Indeed, the district court in *Scherfen* expressed its own disagreement with this Court's decision in *Ibrahim*. *Scherfen*, 2010 WL 456784, at *12.

consideration of the DHS TRIP program's deficiencies, the undisputed facts establish that this program is squarely within the purview of the Terrorist Screening Center and that Plaintiffs' claims were therefore properly brought in the district court. *See Ibrahim*, 538 F.3d at 1256 ("The No Fly List is maintained by the Terrorist Screening Center, and section 46110 doesn't apply to that agency's actions."). As Defendants' affidavits attest, TSA's role in the DHS TRIP process is purely ministerial: it accepts complaints from the public, relays them to the actual decision-makers, and then transmits *pro forma* letters to the complainants.[11] That TSA plays *some role* in the DHS TRIP process does not transform Plaintiffs' claims against TSC into claims challenging a TSA "order."

The district court thus erred in concluding that "the relief Plaintiffs seek is a matter that Congress has delegated to TSA, which is responsible for administering the DHS TRIP procedures" on the basis of its observation that "the overarching theme throughout Plaintiffs' Second Amended Complaint is the inadequacy of TSA's DHS TRIP procedures to have Plaintiffs' names removed from any No Fly List." ER 17 (District Op. 15). It also incorrectly held that Plaintiffs' claims fall

[11] *See supra* 16–17; *see also* ER 135–37 (Piehota Decl. ¶¶ 33–35) (confirming that DHS forwards redress requests to the Terrorist Screening Center, which determines whether changes to the watch list are warranted); ER 57 (Kennedy Decl. ¶ 10) (recognizing that after the Terrorist Screening Center reviews a redress request, it "notifies DHS TRIP as to the outcome of the review," and that thereafter, DHS TRIP "issues a determination letter").

within the scope of an inapplicable portion of this Court's ruling in *Ibrahim* concerning challenges to *actual* TSA actions. In that ruling, this Court upheld the dismissal under Section 46110 of certain claims concerning a TSA-issued "Security Directive *implementing* the No-Fly List"—a directive that instructed airline personnel to check passengers' identification against the list and to take certain actions (including a limited detention) when they find a passenger's name on it. *Ibrahim*, 538 F.3d at 1256–57 (emphasis added).[12] This Court reached that holding because the plaintiff in *Ibrahim* had separately challenged *both* her watch list status—a claim over which the district court retained jurisdiction—*and* subsequent actions taken by the TSA (*e.g.*, ordering her detention), which arose as a *result* of her watch list status. Here, Plaintiffs challenge *only* their watch list status. Accordingly, the district court's reliance on this portion of *Ibrahim* was incorrect.

Finally, that Congress delegated to TSA the task of establishing a redress process for travelers who have been denied boarding on commercial flights, *see* 49

[12] The *Ibrahim* plaintiff brought claims against the TSA for "instruct[ing] airline personnel to detain and interrogate any person whose name is on the No-Fly List" and for not providing her "an 'opportunity to contest' the placement of her name on the No-Fly List before subjecting her to this treatment." *Ibrahim*, 538 F.3d at 1256.

U.S.C. § 44926, does not alter this conclusion.[13] Although Congress may have contemplated a more robust role for TSA in the DHS TRIP process, the executive branch has structured an inter-agency redress process in which the TSA is entirely powerless to provide redress to travelers. This action presents the question of whether the *existing* scheme satisfies due process. Under that scheme, it is the Terrorist Screening Center that decides who is placed on the No Fly List and who is removed from it. The district court thus erred in concluding that "the relief Plaintiffs seek is a matter that Congress has delegated to TSA," simply because TSA "administer[s] the DHS TRIP procedures." ER 17 (District Op. 15).

Plaintiffs' claims contest the validity of the Terrorist Screening Center's decisions and seek their reversal; they do not challenge any TSA "order" or "policy or procedure" that would fall under the ambit of Section 46110. This action was properly filed in the district court under *Ibrahim*.

[13] This Court firmly rejected a similar argument in *Ibrahim*. The government contended on appeal that "[a]lthough TSC assists TSA in carrying out" its "statutory responsibility for security in air travel," the plaintiff's challenge to her placement on the No Fly List concerned an order that "is ultimately one issued by TSA." Brief for Defendants-Appellees at 26, *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2008) (No. 06-16727), 2007 WL 1511928, at *25–26. Chief Judge Kozinski's opinion for this Court nevertheless held that placement of an individual's name on the No Fly List is a TSC decision. *Ibrahim*, 538 F.3d at 1255. It also easily disposed of the contention that such a decision is reviewable under Section 46110 because it is "inescapably intertwined" with a TSA order. *Id*. at 1255–56.

II. DHS AND TSA ARE NOT INDISPENSABLE PARTIES, BUT IF THIS COURT DETERMINES OTHERWISE, THEY CAN BE JOINED IN THE DISTRICT COURT.

The district court held that "TSA is an indispensable party without whose presence this action cannot proceed," but that TSA cannot be joined because its "orders" are not challengeable in the district court pursuant to 49 U.S.C. § 46110. ER 17 (District Op. 15). For the reasons discussed *supra*, Section 46110 does not apply and the district court erred in dismissing this action for lack of subject matter jurisdiction.

According to the government's own declarations, Plaintiffs have brought suit against the entities that possess the sole authority to place names on, and to remove names from, the No Fly List. The district court can therefore plainly "accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), and there is no need to join TSA or DHS—parties that do *not* possess the authority to provide the requested remedy.

The relief Plaintiffs seek is a constitutionally adequate process for adjudicating alleged violations of their constitutional and statutory rights. While that relief could come in the form of additional procedural protections within the DHS TRIP framework, assuming Defendants agreed to it, it would more logically come in the form of a new redress process operated by the governmental actors with actual authority to provide the relief sought. The mere fact that the executive

branch has chosen to make TSA a "processing point," ER 55–56 (Kennedy Decl. ¶ 4), and bureaucratic messenger for the decisions of the Defendants does not suffice to make TSA an indispensable party—notwithstanding Congress's directive to TSA to create a redress mechanism for travelers who are denied boarding. In the existing redress scheme, the Terrorist Screening Center is empowered to provide the requested relief—not the TSA. The district court therefore incorrectly concluded that "the relief Plaintiffs seek is a matter that Congress has delegated to TSA, which is responsible for administering DHS TRIP procedures," ER 17 (District Op. 15),[14] and abused its discretion in holding that TSA is an indispensable party.

However, even if this Court were to determine that the participation of DHS and TSA is necessary to the implementation of a remedy, there is no reason whatsoever why TSA cannot be joined in the district court, and Plaintiffs do not object to joinder of either party. *See Schnabel v. Lui*, 302 F.3d 1023, 1031 (9th Cir. 2002) (noting that "[i]f joinder of a party will not deprive a court of subject matter jurisdiction, the party shall be joined as necessary if" the conditions set forth in Fed. R. Civ. P. 19(a) are met). The putative barrier to TSA's joinder is 49

[14] This ruling is a legal determination underlying the district court's ruling on joinder and is subject to de novo review. *See Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002).

U.S.C. § 46110. As explained above, that statute has no bearing on the litigation or resolution of this case.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the case remanded for further proceedings.

In the event that this Court holds otherwise, Plaintiffs respectfully request that the action be transferred to this Court pursuant to 28 U.S.C. § 1631. *See, e.g.*, *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1128 (9th Cir. 2001) (pursuant to 28 U.S.C. § 1631, transferring an appeal from a district court decision to the Ninth Circuit for direct review where the Ninth Circuit had jurisdiction to review but district court did not).

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are unaware of any related cases.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,553 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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August 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2011.

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