UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.,*

DEFENDANTS.

Case No. 1:11-CV-00050

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY LAW

REGULATIONS

INTRODUCTION

In his Second Amended Complaint, Plaintiff Gulet Mohamed alleges six counts based on: (I) the Fourteenth Amendment's guarantee of a right to citizenship, (II) the Administrative Procedure Act ("APA"), (III) the Torture Victims Protection Act, (IV) the Fifth Amendment (alleging a substantive due process violation), (V) the Fifth Amendment (alleging a procedural due process violation), and (VI) the Fourth Amendment's protection against unlawful searches and seizures. Plaintiff brings Counts I, II, and V against Defendants Eric H. Holder, Jr., Robert Mueller, and Timothy Healy in their official capacities ("Federal Defendants") and Counts III, IV and VI against certain unidentified government "agents" in their individual capacities.[1] Plaintiff seeks declaratory and injunctive relief against the Federal Defendants and damages from the unidentified government agents.

This Court noted in its April 29, 2011 Order that Plaintiff's complaint was "less than clear concerning the scope of the challenges that he is making, particularly now that he has re-entered the United States." Dkt.# 19 at 3. Accordingly, the Court dismissed that complaint, but allowed Plaintiff leave to file a second amended complaint. Plaintiff's Second Amended Complaint, however, fails to cure the deficiencies in his previous two complaints or to set forth cognizable claims against the Federal Defendants. Accordingly, Counts I, II, and V should be dismissed.

[1] These "unknown" individuals have not been identified or served in this action and therefore are not properly before the Court at this time. *See Omni Capital Inv. v. Rudolph Wolff & Co*., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.") It is the Plaintiff's responsibility to identify and serve anonymous defendants. *See Strauss v. City of Chicago*, 760 F.2d 765, 770 n. 6 (7th Cir. 1985) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642-43 (9th Cir. 1980); *Figueroa v. Rivera*, 147 F.3d 77, 82-83 (1st Cir. 1998). Until such time as Plaintiff satisfies this responsibility, these individuals are properly served, and a determination is made that undersigned counsel is authorized to represent these individuals, undersigned counsel is not appearing on their behalf. As such, this motion to dismiss does not include a response to Counts III, IV, and VI, which relate to the unknown individuals.

With respect to Count I, the Fourteenth Amendment claim, Plaintiff brings the very same "right of reentry" claim that the Court dismissed in its April 29, 2011 Order. The claim should again be dismissed. As explained in the Federal Defendants' previous motion, Plaintiff returned to the United States on January 20, 2011, has never been denied entry, and continues to reside here today. He thus lacks standing to assert an entry claim and any claim he might have had is now moot. Further, Plaintiff has not subsequently been denied entry to the United States and he has not shown a real and immediate threat of future injury to establish standing for the prospective relief he seeks.

With respect to Plaintiff's APA challenge, the Court asked Plaintiff to clarify whether he seeks to challenge the following government conduct: (1) his alleged placement on the No Fly List, (2) the implementation of the No-Fly List, and/or (3) the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). Dkt.# 19 at 4. Plaintiff has failed to answer this question with any specificity. Moreover, Plaintiff has failed to cure the standing, ripeness, and jurisdictional deficiencies that the Federal Defendants identified in their previous motion to dismiss. Instead, Plaintiff now alleges that the Federal Defendants have failed to provide him with proper due process to challenge his alleged inclusion on the No Fly List. But as explained in the Federal Defendants' previous motion, Plaintiff's alleged harm can be redressed through DHS TRIP. Until Plaintiff chooses to avail himself of DHS TRIP, neither his APA claim nor his accompanying due process claim are not ripe for review and further, Plaintiff lacks standing to bring either claim.

Moreover, because DHS TRIP would provide Plaintiff with a full and adequate remedy at law for his alleged harm, APA jurisdiction does not lie under 5 U.S.C. § 704. When and if

Plaintiff utilizes DHS TRIP, Plaintiff may then seek judicial review of both the resulting TSA final order and the sufficiency of the process itself in a Court of Appeals, pursuant to 49 U.S.C. § 46110. Accordingly, Plaintiff's APA claim and accompanying procedural due process claim must also be dismissed for lack of subject-matter jurisdiction.

But even if the Court did have jurisdiction to hear Plaintiff's due process challenge, DHS TRIP provides a constitutionally sufficient mechanism for challenging one's inclusion on the No Fly List. As an initial matter, no liberty interest is at stake: Plaintiff has no constitutional right to travel by airplane or any single mode of transportation. DHS TRIP, moreover, provides sufficient process to satisfy the requirements of procedural due process. The redress process provided by DHS TRIP balances interests of travelers challenging alleged inclusion on the No Fly List with the government's compelling interests in ensuring the security of air travel and the protection of classified and sensitive information that supports placement on the No Fly List. Finally, Plaintiff's Second Amended Complaint makes no allegation that supports the conclusion that Federal Defendants' terrorist watch listing procedures are arbitrary and capricious, nor cites any authority for the proposition that the APA requires something more than what Federal Defendants have done in this context.

In sum, Plaintiff has been afforded ample opportunity to plead a cause of action and has failed to do so. As such, this Court should dismiss Plaintiff's claims with prejudice.

PROCEDURAL BACKGROUND

At the outset of this litigation, Plaintiff was located in Kuwait and wished to return home by traveling on commercial airlines. SAC ¶ 4. On January 18, 2011, Plaintiff's counsel filed a motion for a temporary restraining order, a preliminary and permanent injunction, and other

relief on behalf of Plaintiff, asking the Court to require Federal Defendants to allow him to return to the U.S., subject to "suitable screening procedures." *See* Dkt. # 3. This Court held a hearing the same day, which was continued until January 20, 2011. *See* Dkt. # 6. As a result of the parties' efforts, Plaintiff returned to the United States on January 21, 2011. On March 21, 2011, the Federal Defendants filed a Motion to Dismiss Plaintiff's Complaint. *See* Dkt. # 10. After oral argument, the Court granted Federal Defendants' Motion to Dismiss and granted Plaintiff leave to amend his Complaint. *See* Dkt. # 19. The Court directed Plaintiff to plead with specificity: (1) the facts Plaintiff contends establish standing and jurisdiction; (2) the legal rights that Plaintiff contends were violated and the source of those rights; (3) the specific cause of action; (4) the facts that state a plausible claim to relief; and (5) the relief that Plaintiff seeks. *See* Dkt. #19 at 4-5. On May 20, 2011, Plaintiff filed his Second Amended Complaint. Plaintiff's Second Amended Complaint fails to cure the deficiencies in his previous two complaints or to set forth a cognizable claim against the Federal Defendants. Counts I, II, and V against the Federal Defendants should accordingly be dismissed with prejudice.

ARGUMENT

I. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE HIS ALLEGED DENIAL OF ENTRY.

Plaintiff cannot challenge his alleged denial of entry to the United States because he cannot show a cognizable injury. Simply put, Plaintiff was never denied entry into the United States. And even if Plaintiff could demonstrate some injury, whatever claims for relief he may have had are now moot, as he currently resides in the United States. Nor can Plaintiff maintain his claims for prospective, injunctive relief related to his alleged inability to enter the United States because he fails to allege sufficient facts to demonstrate that he is likely to suffer future

harm. The Court recognized this failure in its April 29, 2011 Order, but provided Plaintiff an opportunity to file an amended complaint that would include the facts Plaintiff contends support his claims and this Court"s jurisdiction. *See* Dkt. #19 at 4-5. Tellingly, Plaintiff offers no new support for his right of "re-entry" claim. His claim, therefore, should be dismissed with prejudice.

A. Plaintiff Has Never Been Denied Entry into the United States.

Article III"s limitation on judicial power requires at a minimum that a party must demonstrate that he has suffered an actual or threatened injury to establish standing. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Yet here, Plaintiff has failed to identify any injury-in-fact, and indeed, cannot identify such an injury because he has never been denied entry into the United States. Denial of boarding on an airplane does not constitute a denial of entry into the United States because lawful entry of U.S. citizens into the United States does not occur until the individual citizen has presented himself or herself at a U.S. port of entry and been permitted to enter by U.S. Customs and Border Protection ("CBP"). *See* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section."). On direct flights from Kuwait to Dulles International Airport, the port of entry is Washington Dulles International Airport. *See* Port of Entry-Washington-Dulles http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/dc/5401.xml (last visited 5/31/11). When Plaintiff presented himself at the Port of Entry at Washington Dulles International Airport on January 21, 2011, following his flight from Kuwait, he was permitted to enter the United States

after he appeared before a CBP official. Therefore, any claim that he was denied entry into the United States is baseless.

B. Even if Plaintiff Had Been Denied Entry, That Claim Would Now Be Moot.

Plaintiff alleges that the government has denied him his right to reside in and enter the United States by allegedly placing him on the No Fly List. *See* SAC ¶¶ 49-53. Setting aside the fact that Plaintiff has never been denied entry, even if Plaintiff could identify some injury, his claim is moot because Plaintiff has now returned to the United States. SAC ¶ 48.

The mootness doctrine is based on the Constitution"s case-or-controversy requirement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180 (2000) (citing U.S. Const. art. III, § 2). Whereas standing is determined at the time the lawsuit is filed, the question of mootness arises during the pendency of the lawsuit: "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id*. at 189 (citing quotations omitted). A case is moot if the issues are no longer live and the court is unable to grant effective relief. *United States v. Hardy*, 545 F.3d 280, 282 (4th Cir. 2008). Thus, even if there is a live controversy when the case is filed, courts should refrain from deciding issues "if events have so transpired that the decision will neither presently affect the parties" rights nor have a more-than-speculative chance of affecting them in the future." *See Clarke v. United States,* 915 F.2d 699, 701 (D.C. Cir. 1990) (internal quotation marks omitted). Here, because Plaintiff entered the United States on January 21, 2011, his Fourteenth Amendment claim is no longer a live controversy. Consequently, his claim must be dismissed as moot.

C. Plaintiff Cannot Demonstrate That He Will Likely Suffer Harm in the Future and Therefore, He Cannot Be Granted Prospective, Injunctive Relief.

Plaintiff also lacks standing to seek injunctive relief regarding future travel because he cannot make the requisite showing of imminent, certain future injury. *See Lyons*, 461 U.S. at 102 (requiring "real and immediate threat of repeated injury") (citation omitted). To obtain prospective relief, Plaintiff must point to "an invasion of a legally protected interest which is . . . "'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Other than Plaintiff's denial of boarding in January 2011, Plaintiff has not alleged any additional denials of boarding or entry to the United States, despite being given the opportunity to amend his complaint. His plans for future travel continue to be, at best, pure speculation and devoid of any facts that would support his fear of denial of entry in the future. SAC ¶ 53 (Plaintiff "plans on again departing the United States"). Plaintiff's allegation that he "plans on again departing" the United States is precisely the type of allegation that the Supreme Court found too speculative in *Lyon*s to confer standing or to entitle a party to prospective injunctive relief. Further, it is well established that, in general, U.S. citizens who arrive at a U.S. port of entry are permitted to enter the United States after they establish to the satisfaction of a CBP officer that they are in fact U.S. citizens. 8 C.F.R. § 235.1(b).[2]

[2] While United States citizens have a right to re-enter the country, they do not have a constitutional right to rearrive at a port of entry via a specific mode of transportation. *See, e.g.*, *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007) (holding that there is no protected right to a particular mode of transportation). In particular, there is no constitutional right to air travel. *Gilmore v. Gonzales*, 435 F.3d 1125, 1136-37 (9th Cir. 2006).

In sum, Plaintiff has no basis for immediate or prospective relief regarding his Fourteenth Amendment entry claims.

II. THIS COURT LACKS JURISDICTION TO HEAR EITHER PLAINTIFF'S APA CLAIM OR HIS DUE PROCESS CLAIM.

With respect to his APA claim, Plaintiff has failed to answer the Court's fundamental question about what agency action he challenges: (1) his alleged placement on the No Fly List, (2) the implementation of the No Fly List, and/or (3) DHS TRIP. Dkt.# 19 at 4. Plaintiff instead asserts generally that he has incurred harm because he cannot board an airplane and because he has been denied a "post-deprivation hearing" that would allow him to challenge his alleged placement on the No Fly List. SAC ¶¶ 65-69. To remedy these harms, Plaintiff seeks removal from, and an opportunity to contest any inclusion on, the No Fly List. In answer to the Court's question, these demands make clear that Plaintiff's true grievance is not about his alleged original placement on a terrorist watchlist, but about his purported ongoing inability to fly based on the implementation of the No Fly List, and the lack of a process through which to contest that inability to fly. As explained in Federal Defendants' previous motion, DHS TRIP provides an adequate remedy to grant Plaintiff both forms of relief he seeks – removal and a process through which to seek removal. That Plaintiff has opted not to avail himself of DHS TRIP renders his APA claim unripe and improper for adjudication. Further, if and when Plaintiff does utilize DHS TRIP, he could then choose to seek judicial review of the resulting Transportation Security Administration ("TSA") final order, or any constitutional claims related to the DHS TRIP process, in the Court of Appeals.

A. DHS TRIP Provides an Adequate Remedy at Law for Plaintiff.

While Plaintiff attempts to invoke the APA as the basis for subject-matter jurisdiction and waiver of sovereign immunity, APA jurisdiction will only lie for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As explained below, to the extent Plaintiff seeks removal from the No Fly List, or a post-deprivation process through which to contest ongoing inclusion, DHS TRIP provides a full and adequate remedy for that claim.

i. *DHS and TSA Provide Redress Through DHS TRIP for Travelers Who Allege They Have Been Denied Boarding.*

In response to the terrorist attacks on the United States on September 11, 2001, Congress enacted the Aviation and Transportation Security Act (Pub. L. No. 107-71, 115 Stat. 597 (2001)), which charged TSA with overseeing the "security screening operations for passenger air transportation." *See* 49 U.S.C. § 114(e)(1). TSA is required by statute to secure commercial air travel against the threat of terrorism by establishing policies and procedures that require air carriers to prevent boarding for certain individuals. 49 U.S.C. § 114(h)(3). Specifically, TSA must work "in consultation with other appropriate Federal agencies and air carriers" and "use information from government agencies" to identify travelers who may pose a threat to national security, so that it can "prevent [those] individuals from boarding an aircraft." *Id.* § 114(h)(3)(A), (B); *see also* Piehota Dec., ¶ 2, 4. TSA is also specifically responsible for prescreening passengers against the No Fly and Selectee Lists. *See* 49 U.S.C. § 44903(j)(2)(C). Pursuant to that authority, TSA implemented the Secure Flight program, codified at 49 C.F.R. Parts 1540, 1544, and 1560, through which it performs the watch list matching functions previously conducted by aircraft operators. TSA has been transitioning to the Secure Flight

program since January 2009. Secure Flight was fully implemented for all U.S. airlines on June 22, 2010 and for all covered airlines on November 23, 2010. Lynch Dec., ¶ 7 n.1

As part of its prescreening functions, TSA is also required to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii)(I). The Assistant Secretary of Homeland Security is further required to "establish a timely and fair process for individuals identified as a threat under one or more of subparagraphs (C), (D), and (E) to appeal to the [TSA] the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i).[3] Pursuant to these authorities, TSA provides redress to passengers who were delayed or denied boarding due to alleged placement on the No Fly or Selectee Lists through DHS TRIP, which was codified at 49 C.F.R. §§ 1560.201-1560.207 as part of Secure Flight.

In February 2007, DHS launched DHS TRIP, which is managed by TSA's Office of Transportation Security Redress, as the central administrative redress process for individuals who have, for example, been denied or delayed airline boarding; denied or delayed entry into or exit from the United States at a port of entry; or been repeatedly referred to additional (secondary) screening. *See* Lynch Dec., ¶ 4; Piehota Dec., ¶ 26. Persons who have been denied boarding, or been subject to additional screening, may file a complaint with DHS TRIP. *See* 49

[3] The process must "include the establishment of a method by which the Assistant Secretary will be able to maintain a record of air passengers and other individuals who have been misidentified and have corrected erroneous information. To prevent repeated delays of misidentified passengers and other individuals, the TSA record shall contain information determined by the Assistant Secretary to authenticate the identity of such a passenger or individual." 49 U.S.C. § 44903(j)(2)(G)(ii).

C.F.R. § 1560.201; Lynch Dec., ¶ 5. They are required to complete a traveler inquiry form, either on-line or via e-mail or hard copy. *See* Lynch Dec., ¶ 6.

Other agencies, including Federal Defendants, are involved in the DHS TRIP process. Specifically, if the traveler is an exact or near match to an identity in the Terrorist Screening Database ("TSDB"), the matter is referred to the Terrorist Screening Center ("TSC") Redress Unit. *See* Lynch Dec., ¶ 9; Piehota[4] Dec., ¶¶ 30-32; *see also* 49 C.F.R. § 1560.205(d).[5] After that referral, the TSC Redress Unit reviews the available information to determine whether the DHS TRIP complainant is an exact match to a TSDB identity, and if so, whether the individual"s status should be modified or whether the person should be removed entirely from the TSDB. *See* Piehota Dec., ¶ 31. As part of this process, TSC contacts the agency that originally nominated the individual for inclusion in the TSDB and "determine[s] whether the complainant"s current status in the TSDB is suitable based on the most thorough, accurate, and current information available." Piehota Dec., ¶ 30.

The TSC Redress Unit will make a determination on whether the record should remain in the TSDB, or have its TSDB status modified or removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. Piehota Dec., ¶ 31. In such cases, TSC will only prepare a recommendation for the decision-making agency and

[4] TSC, which was established by Homeland Security Presidential Directive 6 in 2003, maintains a consolidated database of identifying information about persons known or reasonably suspected of being involved in terrorist activity. TSC then feeds that information to front-line screening agencies and law enforcement officials so that they can positively identify known or suspected terrorists trying to obtain visas, enter the country, board aircraft, or engage in other activity of concern. The TSC is responsible for maintaining the federal government"s consolidated terrorist watch list, the TSDB, which contains identifying information about individuals known or suspected to be engaged or aiding in terrorist related conduct. Piehota Dec., ¶¶ 8; Giuliano Dec., ¶ 6.

[5] This interagency review process is described in the Memorandum of Understanding on Watchlist Redress Procedures, which was executed on September 19, 2007, by the Secretaries of State, Treasury, Defense, and Homeland Security, the Attorney General, the FBI Director, the NCTC Director, the CIA Director, the ODNI, and the TSC Director. *See* Piehota Dec., ¶ 28.

will implement any determination once made. *Id*. When changes to a record‟s status are warranted, the TSC will ensure such corrections are made, and will verify that such modifications or removals carry over to the various screening or law enforcement systems that receive TSDB data (*e.g.*, the Selectee and No Fly Lists). *Id*.

For inquiries that involve complaints about delayed or denied boarding due to TSA security screening, DHS TRIP, in conjunction with TSA‟s Office of Transportation Security Redress, subsequently sends a determination letter to the complainant as required under 49 U.S.C. §§ 44903 and 44926. *See* Piehota Dec., ¶ 32; Lynch Dec., ¶ 10; *see also* 49 C.F.R. § 1560.205(d). This multi-agency collaboration ensures the efficacy of DHS TRIP. *See* Piehota Dec., ¶¶ 26-33. That DHS TRIP involves the efforts of multiple agencies does not undermine the fact that, pursuant to Congress‟ mandate, TSA is in charge of the implementation of DHS TRIP.[6] Moreover, it is TSA that effectuates whether or not individuals may board an airline by determining who may or may not obtain a boarding pass through the administration of TSA‟s passenger prescreening programs. *See generally* 49 U.S.C. §§ 114, 44903; 49 C.F.R §§ 1540.107, 1544.103, 1560.1-1560.207

ii. *DHS TRIP Provides an Adequate Remedy for Plaintiff's Alleged Injuries.*

DHS TRIP provides an adequate remedy for Plaintiff‟s purported injuries. First, to remedy his alleged inability to board a plane, Plaintiff seeks removal from the No Fly List. SAC ¶ 52 ("By placing Mr. Mohamed on the No Fly List….[defendants] prevented [him] from

[6] Inter-agency collaboration is precisely the point of centralizing and sharing the contents of the TSDB and the No Fly and Selectee Lists. Indeed, the lack of this kind of centralized information sharing was specifically cited as a government failing by the 9/11 Commission. *See* 9/11 Comm‟n Report, Exec. Summary, at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The missed opportunities to thwart the 9/11 plot were also symptoms of a broader inability to adapt the way government manages problems to the new challenges of the twenty-first century. Action officers should have been able to draw on all available knowledge about al Qaeda in the government. Management should have ensured that information was shared and duties were clearly assigned across agencies, and across the foreign-domestic divide.").

boarding an aircraft."). Second, to remedy his denied post-deprivation hearing, Plaintiff seeks an opportunity to contest his alleged inclusion on the No Fly List. SAC ¶ 73. DHS TRIP is the Congressionally-mandated process offered to seek removal and redress the complaints of travelers who, like Plaintiff, allege they have been wrongfully denied boarding onto commercial aircraft due to placement on the No Fly List. Accordingly, DHS TRIP provides the remedies that Plaintiff seeks.

In *Latif v. Holder*, a group of plaintiffs recently presented claims similar to Plaintiff's claims here. *See Latif v. Holder,* No. 10-cv-750, 2011 WL 1667471 (D. Or. May 3, 2011) (alleging that Federal Defendants violated their due process rights by failing to provide a post-deprivation notice and hearing or any meaningful opportunity to contest their continued inclusion on the No Fly List). Also, as in this case, the plaintiffs in *Latif* sought removal and "a meaningful opportunity to contest their continued inclusion" on such List." *Id*. The *Latif* court dismissed the case, however, for lack of subject matter jurisdiction and concluded that "the relief Plaintiffs seek is a matter that Congress has delegated to TSA, which is responsible for administering the DHS TRIP procedures." *Id.* at *5. Because Plaintiff can seek redress through DHS TRIP and later seek review of any TSA final order in the Court of Appeals, Plaintiff has an adequate remedy in a court and APA jurisdiction will not lie. 5 U.S.C. § 704.

B. Until Plaintiff Avails Himself of DHS TRIP to Challenge His Alleged Placement on the No Fly List, Plaintiff's APA and Due Process Claims are Not Ripe for Review.

Almost five months have elapsed since Plaintiff was denied boarding and yet he has failed to avail himself of the Congressionally-mandated process that would provide him with the relief he seeks, DHS TRIP. Until Plaintiff does so, his claims are not ripe. *See* 13B Charles A.

Wright & Arthur R. Miller, *Fed. Practice & Proc.* § 3532.6 (3d ed. 2004) ("[R]ipeness may be used to express the exhaustion principle that administrative remedies should be tried before running to the courts.").

Ripeness occurs only when a dispute is definite and concrete. *See Ostergren v. Cuccinelli***,** 615 F.3d 263, 288 (4th Cir. 2010). Ripeness cannot, however, occur when "problems such as the inadequacy of the record . . . or ambiguity in the record . . . will make a case unfit for adjudication on the merits," *Ostergren*, 615 F.3d at 288 (quoting *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 662 (9th Cir.2002)) (internal quotations omitted). Without having allowed this process to run its course, the Court would be without the benefit of the agency"s assessment and if needed, a formal administrative record. Indeed, Plaintiff"s refusal to avail himself of DHS TRIP also deprives him of standing. Plaintiff cannot be allowed to invoke the jurisdiction of this Court by refusing to avail himself of a process that may redress his alleged harm. *See, e.g.*, *Shavitz v. City of High Point*, 270 F. Supp. 2d 702, 710 (M.D.N.C 2003) (where "Plaintiff has failed to use the process provided to him, he cannot show that he has suffered injury because of the insufficiency of the process provided[]").

C. Plaintiff Must Bring Any Challenge to the Congressionally-Mandated DHS TRIP Redress Process and any Challenge to a TSA Final Order in a Court of Appeals.

If and when Plaintiff avails himself of DHS TRIP to contest his alleged inclusion on the No Fly List, and he is dissatisfied with TSA"s determination, he may seek judicial review of his DHS TRIP determination letter (and any other challenge to the process of DHS TRIP) in the Court of Appeals under 49 U.S.C. § 46110. Section 46110 of Title 49 of the U.S. Code provides in relevant part:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security[7] with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or [(r)][8] of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business . . .

49 U.S.C. § 46110(a). This section further states that the courts of appeal have "*exclusive jurisdiction* to affirm, amend, modify or set aside any part of [such an] order." *Id.* § 46110(c) (emphasis added).

DHS TRIP determination letters that resolve complaints about denied or delayed airline boarding caused by alleged placement on the No Fly or Selectee Lists are final orders issued by TSA. *Scherfen v. DHS*, No. 3:cv-08-1554, 2010 WL. 456784, at *11 (M.D. Pa. Feb. 2, 2010) (holding that DHS TRIP letters are final orders under § 46110); *Latif v. Holder,* No. 10-cv-750, 2011 WL 1667471, at *6 (D. Or. May 3, 2011) ("The Court also concludes any „order" through DHS TRIP 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 § 46110(a)"). Likewise, the process provided by TSA through DHS TRIP, as codified at 49 C.F.R. §§ 1560.201-1560.207,

[7] 49 U.S.C. § 46110 refers to TSA's Administrator as "the Under Secretary of Transportation for Security." *See* 49 U.S.C. § 46110(a). When TSA was created, Congress appointed the Under Secretary of Transportation for Security as the head of TSA. 49 U.S.C. § 114(b)(1). In 2002, TSA was transferred from the Department of Transportation to the Department of Homeland Security. *See* 6 U.S.C. §§ 203(2), 551(d). Statutory references to the Under Secretary for Transportation Security are deemed to refer to TSA and its Administrator. *See id.* §§ 552(d), 557; 49 C.F.R. § 1500.3 (stating that the Administrator of TSA is the Under Secretary of Transportation for Security).

[8] Although Section 46110 refers to "subsection (1) or (s) of section 114," subsection (s) of section 114 was later redesignated as subsection (r). *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, § 568(a), 121 Stat. 1844, 2092 (2007).

also constitutes a final order under 49 U.S.C. § 46110.[9] *See, e.g.*, *Sima Products v. McLucas*, 612 F.2d 309, 312-13 (7th Cir. 1980) (holding that a regulation that was subject to notice and comment rulemaking may be considered an order pursuant to 49 U.S.C. § 1486(a), the predecessor to 49 U.S.C. § 46110); *O'Donnell v. Bond*, 510 F. Supp. 925, 928 (D.D.C. 1981) (holding that the definition of a final order under 49 U.S.C. § 1486(a) includes "procedures and regulations adopted . . . through informal notice-and-comment rulemaking[,]" and that challenges thereto must be brought in a federal court of appeals). Judicial review of such final orders from TSA is available only in the Court of Appeals. 49 U.S.C. §46110.

Plaintiff cannot circumvent the requirements of Section 46110 by invoking the APA. There is no waiver of sovereign immunity to proceed under the APA. APA jurisdiction does not lie where plaintiff is seeking relief under the APA that is "expressly or impliedly forbidden by another statute." *Lafayette Fed. Credit Union, et al. v. Nat'l Credit Union Admin., et al.*, 960 F.Supp. 999, 1002 (E.D.VA. 1997) (internal citation omitted). In enacting Section 46110, Congress has expressly mandated that challenges to TSA final orders must proceed in the Court of Appeals. Therefore, APA jurisdiction does not lie in this case. *See Lafayette*, 960 F. Supp. at 1002; *Scherfen,* 2011 WL 1667471 at*10 (holding that DHS TRIP determination letters that resolve complaints about denied or delayed airline boarding caused by alleged placement on the No Fly or Selectee Lists are final orders issued by TSA and noting that to the extent plaintiffs "assail[ed] the sufficiency of the process" provided by DHS TRIP, they could raise that claim

[9] These regulations were issued under 49 U.S.C. §114(l), well as 49 U.S.C. §§ 40113, 44901, 44902, and 44903, which are contained in Part A of Subtitle VII of the Title 49 of the U.S. Code. *See, e.g.*, 49 U.S.C. § 46110 (providing that orders issued by the Administrator of TSA in whole or in part under certain sections of Title 49 (Parts A or B of Subtitle VII, or subsections 114(l) or (r)), are subject to review only in the courts of appeals).

pursuant to Section 46110 in a Court of Appeals); *Latif v. Holder,* No. 10-cv-750, 2011 WL 1667471 (D. Or. May 3, 2011) (same).

To the extent that Plaintiff is challenging TSC"s role in maintaining the No Fly list, Section 46110 also precludes preclude district courts from hearing claims that are "inescapably intertwined" with the review of such orders. *Merritt v. Shuttle*, 245 F.3d 182, 187 (2d Cir. 2001); *see also Gilmore*, 435 F.3d at 1133 n. 9 (accord); *Redfern v. Napolitano*, No. 10-cv-12048, 2011 WL 1750445 (D. Mass May 9, 2011)(finding challenge to use of Advanced Imaging Technology machines must be brought in courts of appeal where challenge to underlying Standard Operating Procedures issued by TSA was challenge to TSA "order" subject to Section 46110). Here, Plaintiff recognizes that TSC"s role in the DHS TRIP process is to provide DHS/TSA with information regarding a particular individual"s status so that TSA can a letter of decision–"order"–regarding a particular individual"s No-Fly List status. SAC ¶ 24. Any claim brought by Plaintiff against TSC is, accordingly, "inextricably intertwined" with his claim challenging the adequacy of DHS TRIP and must therefore be brought in the Court of Appeals.

Plaintiff may attempt to rely upon the Ninth Circuit"s decision in *Ibrahim v. DHS*, where the court found TSC"s placement of a name on a watch list to be separate from and, thus, not inextricably intertwined with an order issued by TSA. 538 F.3d 1250, 1254-1256 (9th Cir. 2008). While the government respectfully disagrees with that decision, DHS TRIP did not exist at the time that the district court action was instituted. As such, the question of whether a DHS TRIP determination letter that addresses alleged placement on the No Fly List or the Secure Flight regulation that codified the DHS TRIP process constituted final orders of TSA was not before the Ninth Circuit. This distinction was noted by the court in *Scherfen,* 2010 WL 456784,

at *10 ("Significantly, *Ibrahim* did not involve a determination made by DHS following receipt of a Traveler Inquiry Form from the affected person. Thus, *Ibrahim* did not present for consideration the issue of whether a DHS TRIP determination letter constitutes an order falling within § 46110."). The Ninth Circuit recognized, moreover, that a challenge such as the one presented here, that complains of the inability to contest the placement of one's name on the No-Fly List, is a challenge that is subject to Section 46110 were such TSA "policies and procedures implementing the No Fly List" in place. 538 F.3d at 1257 (citing *Gilmore*, 435 F.3d at 1133). Indeed, the Ninth Circuit noted that any ""order" of an agency . . . named in Section 46110" must be challenged in the Court of Appeals. *Ibrahim*, 538 F.3d at 1255. Currently, both the result of the DHS TRIP process and the process itself are governed by TSA, an agency named in Section 46110. As such, under *Ibrahim*, Plaintiff must bring any challenge to either the final TSA determination letter that would result from DHS TRIP or TSA's procedures and policies that govern the DHS TRIP process in the Court of Appeals.

Plaintiff has the burden of establishing jurisdiction, *Rhodes v. United States*, 995 F.2d 1063 (4th Cir. 1993), and as explained, has failed to do so here. Indeed, even "if there [were] any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals," the ambiguity should be resolved "in favor of review by the court of appeals." *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986); *Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985). Where, as here, the Court of Appeals has exclusive jurisdiction over Plaintiff's procedural due process claim and that claim can be meaningfully addressed by the Court of Appeals, Plaintiff cannot proceed in district court. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (finding exclusive jurisdiction in the

circuit courts where "petitioners'" statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals).

D. TSA is A Necessary Party to Provide the Relief Plaintiff Seeks and Dismissal is Required by Rule 19.

Further, if and when Plaintiff avails himself of DHS TRIP and if he is dissatisfied with the resulting final order from TSA and brings his claim in the Court of Appeals, he must include the proper defendants. Rule 19 of the Federal Rules of Civil Procedure requires that Plaintiff include DHS and TSA as defendants in this case because without DHS and TSA, "the plaintiff could not obtain complete relief[.]" *Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 552 (4th Cir. 2006), s*ee also Latif*, 2011 WL 1667471 at *15 (holding in a case where plaintiffs challenged their alleged placement on the No Fly List that "TSA is an indispensible party without whose presence this action cannot proceed.") The regulations governing the DHS TRIP process in regards to Secure Flight, as well as the DHS TRIP determination letters regarding complaints addressing denied or delayed airline boarding due to TSA security screening are final orders by TSA subject to Section 46110. By failing to join TSA and DHS, therefore, Plaintiff is unable to obtain the relief he seeks. Nor can Plaintiff's preference for litigation in district court cannot trump the need to join TSA and to proceed according to the Congressionally-mandated process in Section 46110.

III. THE GOVERNMENT'S TERRORIST WATCHLISTING PROCEDURES ARE NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW.

But even if the Court were to determine that it, and not the Court of Appeals, has jurisdiction to hear Plaintiff's APA claims, Plaintiff has failed to plead a cognizable claim under the APA. Pursuant to the APA's limited waiver of sovereign immunity, a reviewing court must

uphold an agency decision unless it is (1) arbitrary and capricious; (2) an abuse of discretion; or (3) otherwise not in accordance with law. *See* 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The scope of judicial review under this standard is a narrow and deferential one, and a court cannot substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiff's Second Amended Complaint makes no allegation that supports the conclusion that Federal Defendants' terrorist watch listing procedures are arbitrary and capricious, nor cites any authority for the proposition that the APA requires something more than what Federal Defendants have done in this context. Further, to the extent that Plaintiff wants the Court to establish new substantive and procedural rules to govern the TSDB, or its subset lists, the No Fly and Selectee Lists, Plaintiff's request is improper because matters of national security "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Courts "owe considerable deference to [the Executive branch's] assessment in matters of national security[,]" *Bassiouni v. FBI*, 436 F.3d 712, 724 (7th Cir. 2006), and must be "reluctant to intrude upon the authority of the Executive" in such affairs. *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *see also Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) (holding "that the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001);

Krikorian v. Dep't of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993).

The Supreme Court's recent decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), underscores the deference due to both the Legislative and Executive Branches in review of factual conclusions and legal matters that implicate national security, even when constitutional concerns are raised. *See id.* at 2727 ("But when it comes to collecting evidence and drawing factual inferences in [national security and foreign relations], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.") (internal quotation marks and citation omitted); *see also Rahman v. Chertoff*, 530 F.3d 622, 627-28 (7th Cir. 2008)("modesty is the best posture for the branch that knows the least about protecting the nation's security and that lacks the full kit of tools possessed by the legislative and executive branches."). Plaintiff's requested relief that the Court order Federal Defendants to remove him from any terrorist watch list he may be on plainly implicates sensitive national security Executive judgments that are entitled to deference.

IV. DHS TRIP SATISFIES PLAINTIFF'S PROCEDURAL DUE PROCESS.

Plaintiff's procedural due process claim also fails on the merits. Plaintiff claims that the Federal Defendants are denying him procedural due process by not providing "a constitutionally sufficient legal mechanism for challenging his [alleged] inclusion on the No Fly List," SAC ¶ 67. But DHS TRIP provides exactly the process Plaintiff is seeking, and as explained above, under Section 46110, challenges to either the final TSA order that is the final product of the DHS TRIP process or the DHS TRIP process itself must be brought in a Court of Appeals. But even if Plaintiff's procedural due process claim was appropriately filed in this Court, Plaintiff's due process challenge fails as a matter of law.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal citation omitted). Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id*. (internal citation omitted). "[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected.'" *Jones v. Flowers*, 547 U.S. 220, 229 (2006). In cases involving national security and the possibility of terrorist activities, the government's interest is at its zenith. "[N]o governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307; *see also Wayte v. United States*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning."). The fundamental requirement of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Plaintiff alleges that he is entitled to "meaningful notice of the grounds for his inclusion on a government watch list, and an opportunity to rebut the government's charges and clear his name." SAC, ¶ 73. Due process procedures may vary "'depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). At bottom, the due process evaluation "is flexible and calls for such procedural protections as the *particular situation demands*." *Mallette v. Arlington Cnty. Emps' Supplemental Retirement Sys. II*, 91 F.3d 630. 640 (4th Cir. 1996) (emphasis added) (internal

citations omitted). In this case, DHS TRIP provides sufficient due process to Plaintiff, particularly in light of the compelling national security concerns related to the No Fly List and the fact that there is no constitutional right to fly. *See Gilmore,* 435 F.3d 1125. Plaintiff's refusal to avail himself of that due process, however, is outside the control of the government.

In evaluating whether the government has provided sufficient due process, the Court should consider three factors: (1) "'the private interest that will be affected by the official action'"; (2) "'the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'"; and (3) "'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *Gilbert*, 520 U.S. at 931-32 quoting *Mathews*, 424 U.S. at 335. Because Plaintiff has no constitutional right to travel by airplane or any single mode of transportation, and because DHS TRIP provides sufficient process to review the government's actions, DHS TRIP satisfies the requirements of procedural due process.

A. Plaintiff Has Not Articulated a "Private Interest" That Requires More Process Than What DHS TRIP Provides.

Plaintiff asserts that he has a liberty interest in "traveling free from unreasonable burdens;" in being "free from false governmental stigmatization as an individual that poses a threat to air travel;" and "nonattainder." SAC ¶ 66. Because none of these interests was infringed when Plaintiff was denied boarding, Plaintiff has failed to plead any private interest.

Plaintiff alleges that Federal Defendants, by allegedly denying him the right to fly, have denied him the right to enter the United States. As explained above, however, Plaintiff was never denied entry into the country. And even if he were to be denied the use of a particular

mode of transport, he has no constitutional right to travel by a preferred mode of transportation. *Gilmore,* 435 F.3d at 1136. Nor is there is a right to international travel; such travel is "subordinate to national security and foreign policy considerations." *See Haig*, 453 U.S. at 306. Indeed, the freedom to travel internationally is simply an aspect of the liberty protected by the due process clause, and the restrictions on international travel are permissible unless "wholly irrational[.]" *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978).[10]

While Plaintiff may claim that actions of the Kuwaitis limited his options for returning to the United States, anyone who travels abroad always takes the risk that they will be detained or otherwise subjected to foreign law, and they cannot hold the United States responsible for the actions of foreign nations. *See Munaf v. Geren*, 553 U.S. 674, 694-95 (2008) (Constitution does not prevent US citizens abroad from being subject to foreign law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign state to be [reexamined] and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted).

Plaintiff has also not been stigmatized.[11] SAC ¶ 66. Procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus

[10] Even in the context of interstate travel, a more heavily protected interest, courts have repeatedly held that there is no right to any particular means of travel, even if the most convenient means of travel is restricted. *See League of United Latin Am. Citizens*, 500 F.3d at 534 (holding that there is no protected right to a particular mode of transportation); *Matthew v. Honish*, 233 Fed. Appx. 563, 564 (7th Cir. 2007); *Gilmore,* 435 F.3d 1125 (holding there is no right to air travel)*; Miller v. Reed,* 176 F.3d 1202 (9th Cir. 1999) (no right to drive); *see also Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d Cir. 2007)("travelers do not have a constitutional right to the most convenient form of travel"); *Cramer v. Skinner,* 931 F.2d 1020, 1031 (5th Cir. 1991)(same); *City of Houston v. FAA,* 679 F.2d 1184 (5th Cir. 1982)(same).

[11] Plaintiff's allegations that his perceived inability to fly sends a "public" message is confounding because such information is not even shared with the individual who is denied boarding. SAC ¶ 68. Indeed, pursuant to the government's current "*Glomar*" policy, government officials do not confirm or deny whether an individual is in the

alteration or extinguishment of "a right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711 (1976). This is known as a "stigma-plus" claim. *See Green v. TSA*, 351 F. Supp. 2d 1119, 1129-30 (W.D. Wash. 2005). The Constitution contains no reference, implied or otherwise, to a right to travel by plane. As a result, Plaintiff cannot meet the standards required for a stigma-plus claim. *See Green*, 351 F. Supp. 2d at 1130 (rejecting plaintiffs' claim that delayed boarding due to mistaken association with the No Fly List sufficed for stigma-plus claims). The *Green* court held that plaintiffs could not make out a stigma-plus claim, because they did "not have a right to travel without any impediments"; because "burdens on a single mode of transportation do not implicate the right to interstate travel"; and because plaintiffs "have not alleged any tangible harm to their personal or professional lives that is attributable to their association with the No-Fly List, and which would rise to the level of a Constitutional deprivation of a liberty right." 351 F. Supp. 2d at 1130. Because the same is true here, Plaintiff has failed to plead any cognizable stigma claim.

Plaintiff also fails to raise a bill of attainder. A bill of attainder is "a *law* that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs*, 433 U.S. 425, 468 (1977) (emphasis added). Here, however, there is no law enacted by Congress that placed Plaintiff on the No Fly List. Instead, Congress has enacted laws requiring passengers to be screened for risks to civil aviation; the Executive branch is then responsible for identifying the passengers who pose such risks. *See* 49 U.S.C. § 44903(j)(2)(C); 49 U.S.C. § 44909(c)(6) (requiring TSA to

---

TSDB, or on the No Fly or Selectee subset lists. Guiliano Dec., ¶¶ 13-17; Piehota Dec., ¶¶ 21-23, 32; Lynch Dec. ¶¶ 8, 10. It is also notable that Plaintiff himself has been actively publicizing his alleged inclusion on the No Fly List. *See* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012107042.html (last visited May 23, 2011).

create a redress process for passengers who have been delayed or denied airline boarding due to TSA security screening). Moreover, while persons who allege they were wrongfully denied boarding due to a mistaken placement on the No Fly List are not provided a "trial," they are provided with the opportunity to challenge their alleged placement via DHS TRIP, and to obtain judicial review of the TSA final order in the Court of Appeals.

B. There is Little Risk of Erroneous Deprivation Given the Quality Controls Over the TSDB (and the even Smaller Subset of the No-Fly List) and the Right to Appeal TSA Final Orders in the Court of Appeals.

Even if Plaintiff could plead a cognizable private interest, the government's current procedures for including individuals on the No Fly List protect against erroneous or unnecessary infringements of liberty. The TSDB is regularly updated daily; it is also reviewed and audited on a regular basis to comply with quality control measures. *See* Piehota Dec., ¶ 19. Nominations to the No Fly List are reviewed by TSC personnel to ensure that they meet the required criteria. *Id*. To the extent an individual is denied boarding, and wishes to complain, he or she can file a complaint with DHS TRIP, which then triggers a subsequent review of the individual's status. *See* Lynch Dec., ¶¶ 5-8; Piehota Dec. ¶¶ 30-33. If the individual is unsatisfied with the TSA Final Order he or she receives, then the individual may file a Petition for Review against TSA in the relevant Court of Appeals. *See* Lynch Dec., ¶¶ 11, 13. *See Scherfen*, 2010 WL 456784, at *7 (noting that the availability of DHS TRIP means that a reviewing court would have access to an administrative record to review)

C. Protecting Terrorist Watchlisting Status, and the Underlying Information, is Crucial to the Government's Countererrorism Efforts

Finally, the DHS TRIP process allows a traveler to resolve a travel-related issue without burdening the government's aviation and national security interests. The government has a

paramount interest in ensuring that the TSDB information used for screening or law enforcement purposes can be broadly shared among government agencies to maximize the country‟s counterterrorism efforts related to aviation and national security, without fear that such information will be disclosed whenever anyone cannot travel as he or she chooses.

Most of the derogatory information relied on by nominating agencies to the TSDB consists of operational facts derived from underlying international counterterrorism investigations or intelligence collection methods, which are generally classified to protect intelligence sources and methods. *See* Piehota Dec., ¶ 20. When separated from the classified means by which they were obtained, the terrorist identity information stored in the TSDB is deemed sensitive but unclassified for terrorist watchlisting, law enforcement, and screening purposes, which allows government officials to access TSDB data for law enforcement or screening purposes without compromising an investigation or intelligence collection methods. *Id*.

Courts have recognized the vital role watchlisting plays in securing our nation. *See Tooley v. Bush*, No. 06-306 (CKK), 2006 WL 3783142, at *20 (D.D.C. 2006), *judgment aff'd, Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) ("[I]f TSA were to confirm in one case that a particular individual was not on a watch list, but was constrained in another case merely to refuse to confirm or deny whether a second individual was on a watch list, the accumulation of these answers over time would tend to reveal [sensitive security information]."); *Bassiouni v. CIA*, 392 F.3d 244, 245-46 (7th Cir. 2004) (explaining that if the "CIA opens its files most of the time and asserts the state-secrets privilege only when the information concerns a subject under

investigation or one of its agents, then the very fact of asserting the exemption reveals that the request has identified a classified subject or source").

In this case, by providing an opportunity for judicial review without requiring the government to reveal information that ought not to be revealed, DHS TRIP balances the public and private interests fairly and provides a suitable substitute for an evidentiary hearing. DHS TRIP gives an individual who has experienced difficulties during TSA travel screening at airports, or was prohibited from boarding an airline by TSA, an opportunity to be heard at a meaningful time and in a meaningful manner by permitting that individual to complain with specificity to the appropriate authorities (1) about the difficulties that he or she has experienced; (2) to have his or her alleged No Fly List status reviewed; (3) to have appropriate changes made to applicable records; and(4) if unsatisfied, to seek direct review in a federal appellate court. *See Mathews*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552).

In sum, the DHS TRIP process offers sufficient due process to a person such as the Plaintiff, who wishes to resolve travel-related problems, without burdening the government‟s compelling aviation and national security interests. Therefore, Plaintiff‟s procedural due process claim should thus be dismissed.

CONCLUSION

For the foregoing reasons, Federal Defendants‟ Motion to Dismiss Plaintiff‟s Second Amended Complaint should be granted.

Dated: June 3, 2011

Respectfully submitted,

TONY WEST
ASSISTANT ATTORNEY GENERAL

CIVIL DIVISION

NEIL H. MACBRIDE
UNITED STATES ATTORNEY

SANDRA M. SCHRAIBMAN
ASSISTANT BRANCH DIRECTOR
FEDERAL PROGRAMS BRANCH

PAUL G. FREEBORNE
LILY SARA FAREL
ATTORNEYS
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20001
TELEPHONE: (202) 353-7633
FAX: (202) 616-8460
E-MAIL: lily.farel@usdoj.gov

/S/

R. JOSEPH SHER
ASSISTANT UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
JUSTIN W. WILLIAMS UNITED STATES ATTORNEYS BUILDING
2100 JAMIESON AVE.,
ALEXANDRIA, VA. 22314
TELEPHONE: (703) 299-3747
FAX: (703) 299-3983
E-MAIL JOE.SHER@USDOJ.GOV

ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

Nadhira Faisal Al-Khalili
Council on American Islamic Relations
453 New Jersey Avenue, SE
Washington, DC 20003
Phone: 202-646-6034
Fax: 202-488-3305
nalkhalili@cair.com

DATED: JUNE 3, 2011 /S/

R. JOSEPH SHER
ASSISTANT UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
JUSTIN W. WILLIAMS UNITED STATES ATTORNEYS' BUILDING
2100 JAMIESON AVE.,
ALEXANDRIA, VA. 22314
TELEPHONE: (703) 299-3747
FAX: (703) 299-3983
E-MAIL JOE.SHER@USDOJ.GOV