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

P.O. Box 566
Albuquerque, NM 87103
Tel.: (505) 243-9046; Fax: (505) 266-5916

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

Attorneys for Plaintiffs

TABLE OF AUTHORITIES

Cases

INTRODUCTION

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

Defendants' motion for partial summary judgment on Plaintiffs' procedural due process claims boils down to two remarkable contentions. First, Defendants argue that when the government bans U.S. citizens from air travel, one of the basic incidents of modern life, the Constitution has nothing to say about the adequacy and fairness of the procedures the government provides to challenge the ban. Second, Defendants insist that their deprivation procedures are adequate even though Defendants have an explicit policy of refusing to confirm or deny any information concerning a person's status on the No Fly List, and do not provide citizens with any statement of reasons or a hearing to defend themselves. Defendants' arguments fail as a matter of law and fact.

Relying on inapplicable cases invoking the fundamental right to interstate travel—and not controlling cases adjudicating procedural due process rights when the government restricts travel—Defendants erroneously assert that Plaintiffs liberty interest in travel has not been burdened. They also misapply Ninth Circuit law and claim that Plaintiffs cannot show a government deprivation of their liberty interest in reputation because no associated right has

been curtailed—despite the very real government restriction on Plaintiffs' right to fly. Viewed in light of the correct law, Plaintiffs' facts confirm that inclusion on the No Fly List imposes a draconian sanction that triggers due process protections because: it severely burdens Plaintiffs' liberty interest in travel; it stigmatizes Plaintiffs, who have never been charged with any crime, as suspected terrorists and prevents them from flying; and it has resulted in devastating consequences for Plaintiffs' personal and professional lives.

Both Defendants' "Glomar" policy of refusing to confirm or deny any information about No Fly List status and their inadequate procedures are directly contrary to governing due process doctrine. Courts routinely require notice and some form of hearing for much less severe deprivations of liberty than the record shows Plaintiffs have suffered. Thus, the government cannot suspend a student from school for ten days, recover excess Social Security payments, or terminate state assistance for utility bills without some kind of notice and hearing. Courts also require more notice and process in the national security context, including for alleged enemy alien combatants detained outside the United States, foreign and domestic organizations the government seeks to designate as terrorist, and others who are not entitled to more constitutional protections than Plaintiffs.

The facts in the record show that Defendants' refusal to provide Plaintiffs any kind of notice or a hearing to rebut Defendants' evidence and present their own, leaves Plaintiffs unable to correct their wrongful placement on the No Fly List. Nevertheless, Defendants insist that additional notice or process is unwarranted because their secret internal procedures guard against the erroneous deprivation of rights. According to Defendants, only people who meet secret No Fly List criteria are included in the list, and DHS TRIP corrects any inadvertent errors. But the record paints a very different picture. The government's own audits have found substantial

inaccuracy in the watch lists from which the No Fly List is drawn, including failures to timely remove individuals who have been wrongly listed. Based on the facts in the record, the need for greater procedural safeguards to prevent acute harm to Plaintiffs' liberties is obvious.

Defendants' final claim is that providing Plaintiffs any reason for their No Fly List inclusion will unleash a parade of national security horribles. Contrary to Defendants' contentions, however, the record shows that mere confirmation or denial of Plaintiffs' inclusion on the No Fly List will not disclose anything that is not already known or routinely disclosed by the government itself. Nor will providing Plaintiffs the rudiments of process—the government's evidence against them, and a hearing—compromise any government interests in protecting classified or sensitive information. Defendants routinely disclose or describe such information when courts require them to provide notice and a hearing in the national security context. More fundamentally, the possibility that sensitive national security information might be involved in particular instances is no reason to foreclose notice or a hearing categorically.

This Court should deny Defendants summary judgment on Plaintiffs' procedural due process claims.

STATEMENT OF FACTS

I. The No Fly List

The Terrorist Screening Center ("TSC"), which is administered by the Federal Bureau of Investigation ("FBI"), develops and maintains the federal government's consolidated Terrorist Screening Database ("TSDB" or the "watch list"). Joint Statement of Stipulated Facts ("Stip. Facts") ¶ 1, ECF No. 84. The watch list is the federal government's master repository for suspected international and domestic terrorist records used for watch list–related screening. Id.

cases, the FBI failed to appropriately remove terrorism classifications, even though many of these should have been removed from the watch list entirely.[5]

TSC selects a subset of individuals from the consolidated watch list for inclusion in the No Fly List. Stip. Facts ¶¶ 1–2; Decl. of Cindy A. Coppola ("Coppola Decl.") ¶ 12. Defendants have not publicly disclosed the standards or criteria TSC applies to determine whether a person will be placed on the No Fly List. Stip. Facts ¶ 17. People placed on the No Fly List are denied boarding on planes flying to or from the United States or over U.S. airspace. Coppola Decl. ¶ 13.[6] They are also denied passage on ships bound for, or departing from, the United States.[7] In addition, they may be prevented from boarding flights that do not cross U.S. airspace because TSC shares the watch list with 22 foreign governments.[8]

TRIP responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. Stip. Facts[9] ¶ 11.

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

Each of the Plaintiffs flew for years without incident, but was prevented from boarding a flight over U.S. airspace after January 1, 2009.[10] Plaintiffs first found out that they could not fly when they were denied boarding in airports; they felt humiliated and deeply stigmatized as suspected terrorists because airline officials, law enforcement officers, their family members and classmates, and members of the public saw or learned that they were denied boarding.[11] Nothing of the Plaintiffs poses a threat to civil aviation, or knows why they were prevented from flying.[12]

Each Plaintiff filed at least one DHS TRIP complaint seeking removal of his or her name from the No Fly List. Stip. Facts ¶ 13. In response, each received a DHS TRIP determination letter that neither confirms nor denies the existence of any terrorist watch list records relating to

---

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

[10] Decl. of Salah Ali Ahmed ("Ahmed Decl.") ¶¶ 3, 6; Decl. of Nagib Ali Ghaleb ("Ghaleb Decl.") ¶¶ 5–6; Decl. of Mohamed Sheikh Abdirahman Kariye ("Kariye Decl.") ¶¶ 4, 6; Decl. of Faisal Nabin Kashem ("Kashem Decl.") ¶¶ 3, 6; Decl. of Raymond Earl Knaeble IV ("Knaeble Decl.") ¶¶ 8–9; Third Am. Compl. ¶¶ 42, ECF No. 83; Decl. of Ibrahim Y. Mashal ("Mashal Decl.") ¶¶ 5, 7; Decl. of Amir Meshal ("Meshal Decl.") ¶¶ 3, 5; Decl. of Elias Mustafa Mohamed ("Mohamed Decl.") ¶¶ 3, 6; Choudhury Decl. Ex. L ¶¶ 3, 5; Decl. of Abdullatif Muthanna ("Muthanna Decl.") ¶ 7); Decl. of Stephen Durga Persaud ("Persaud Decl.") ¶ 5; Decl. of Allah R. Rana ("A. Rana Decl.") ¶ 5; Decl. of Mashaal Rana ("M. Rana Decl.") ¶¶ 4, 6; Decl. of Nauman Rana ("N. Rana Decl.") ¶ 3; Decl. of Steven William Washburn ("Washburn Decl.") ¶¶ 6–7.

[11] Ahmed Decl. ¶ 7; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 7; Kashem Decl. ¶ 7; Knaeble Decl. ¶ 10; Third Am. Compl. ¶ 42; Mashal Decl. ¶ 7; Meshal Decl. ¶ 5; Mohamed Decl. ¶ 7; Choudhury Decl. Ex. L ¶ 6, 22 (Muthanna Decl.); Persaud Decl. ¶ 6; M. Rana Decl. ¶ 6; Washburn Decl. ¶ 8.

[12] Ahmed Decl. ¶¶ 11–12; Ghaleb Decl. ¶¶ 15–16; Kariye Decl. ¶¶ 10, 11; Kashem Decl. ¶¶ 14–15; Knaeble Decl. ¶¶ 22–23; Third Am. Comp. ¶ 35; Mashal Decl. ¶¶ 17–18; Meshal Decl. ¶¶ 9–10; Mohamed Decl. ¶¶ 14–15; Choudhury Decl. Ex. L ¶¶ 25–26 (Muthanna Decl.); Persaud Decl. ¶¶ 13–14; M. Rana Decl. ¶¶ 18–19; Washburn Decl. ¶¶ 23–24.

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[18]"

Defendants cannot meet their burden because as a matter of law, Plaintiffs have a liberty interest in both travel and their reputations, infra 13, 16–18, and the facts in the record clearly demonstrate a severe deprivation of both, infra 13–18.[19] Contrary to Defendants' arguments that the post-deprivation process they provide is adequate, governing Supreme Court and Ninth

to each are also distinct. In the first, plaintiffs invoke the fundamental right to interstate travel or substantive due process and seek to invalidate entirely a government restriction on travel on the grounds that it is per se unconstitutional. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (invalidating state residency requirement denying welfare to applicants who had resided in state for less than one year because it inhibited migration of needy persons in violation of the fundamental right to interstate travel), overruled in part on other grounds by Edelman v. Jordan, 415 U.S. 651, 670–71 (1974); Gilmore v. Gonzales, 435 F.3d 1125, 1130–32 (9th Cir. 2006) (plaintiff unsuccessfully sought invalidation of TSA policy requiring identification or extra screening as a condition of boarding planes on the grounds that it violated liberty interest in travel). In the second, plaintiffs invoke Fifth Amendment procedural due process, arguing not that a government restriction on travel is unconstitutional per se, but that the burden the restriction imposes on the right to travel requires fair process. See, e.g., De Nieva v. Reyes, 966 F.2d 480, 485 (9th Cir. 1992) (plaintiff was entitled to post-deprivation hearing under Fifth Amendment when government agency seized her passport, burdening her liberty interest in travel). Plaintiffs raise the second claim. But Defendants mistakenly ask this Court to apply standards from the first to deny Plaintiffs' claim. Application of the correct law to the undisputed facts, however, establishes that Defendants' placement of Plaintiffs on the No Fly List severely burdens their liberty interest in travel and that Plaintiffs are entitled to the procedural due process protections they request.

It is firmly established that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." Kent v. Dulles, 357 U.S. 116, 125 (1958); id. at 126–27 ("Freedom

F.2d 480 (9th Cir. 1992). Similarly, in Hernandez v. Cremer, the plaintiff did not argue that the government could never deny admission at the border to a person claiming U.S. citizenship. He challenged the fairness of the procedures afforded to those who sought to contest the denial after the fact; again, the court found procedural due process violations. 913 F.3d at 237, 240; see also Agee v. Baker, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing that one-way restriction on travel from U.S. to foreign countries deprived liberty interest in travel); cf. Fuentes v. Shevin, 407 U.S. 67, 90 & 92 n.21 (1972) ("The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. . . . But some form of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be characterized as de minimis'" (internal citation omitted) (emphasis supplied)).

The single procedural due process case that Defendants cite in their "right to fly" argument, Green v. T.S.A., is easily distinguished because it involved a de minimis burden. 351 F. Supp. 2d 1119 (W.D. Wash. 2005). There, plaintiffs complained of airport securtt Wyl-14(o)-4(o-14 T(r)

foreign countries and place Plaintiffs at risk of interrogation and detention by foreign authorities.[27] There can be no question that such severe restrictions on international travel trigger procedural due process requirements.

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

Defendants argue that Plaintiffs fail to establish an actionable burden on their liberty interest in reputation because they have not shown an associated violation of a constitutional or state law right. Defs.' Br. 18. That argument misstates the law. Under clearly established Ninth Circuit precedent, Plaintiffs need to demonstrate only a stigmatic harm coupled with the denial of a legal right or status to assert a "stigma plus" claim. Defendants do not dispute that No Fly List placement imposes the deeply stigmatizing label of "suspected terrorist" — a label Plaintiffs vigorously contest. And because Plaintiffs' facts show that Defendants have, as a result, denied Plaintiffs the ability to legally board planes, Defendants' deprivation of Plaintiffs' liberty interests in reputation is clear.

The Supreme Court has recognized a constitutionally protected liberty interest in reputation when a plaintiff satisfies the so-called "stigma plus" test. *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *Humphries v. County of L.A.*, 554 F.3d 1170, 1185 (9th Cir. 2009) (describing "stigma-plus" test), overruled in part on other grounds, 131 S. Ct. 447 (2010). The government must afford procedural due process when a plaintiff suffers stigma from government action

---

United States' east coast and sailing to Ireland will also fail because CBP will likely deny Plaintiff Washburn passage on a ship, just as it did Plaintiff Muthanna. See Choudhury Decl. ¶¶ 9–10 & Ex. L ¶¶ 17–22 (Muthanna Decl.).

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

"plus" an alteration or extinguishment of a right or status recognized by law. *See Paul*, 424 U.S. at 711. To satisfy the "plus" prong, a plaintiff must show that the injury to reputation was inflicted in connection with the alteration or extinguishment of a legal right or status. *Humphries*, 554 F.3d at 1188.

Defendants wrongly claim that in order to satisfy the plus prong, Plaintiffs must demonstrate they have been deprived of a constitutional right "to travel on the same terms as other travelers." Def's Br. 17. That argument is squarely contrary to controlling Ninth Circuit law, which requires Plaintiffs only to show that "once listed, [Plaintiffs] legally could not do something that [they] could otherwise do." *Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)); *Humphries*, 554 F.3d at 1187–88 (describing test as whether plaintiffs are "legally disabled by the listing . . . alone from doing anything they otherwise could do" (internal quotation marks omitted)). Plaintiffs' facts show that because of No Fly List placement, they cannot, by law, board commercial flights—something they would otherwise be able to do.[28] There is no dispute that TSA and airline officials prevent ticketed travelers, including Plaintiffs, listed on the No Fly List from boarding their flights by operation of law. *See* 49 U.S.C. § 114(h)(3) (requiring head of TSA to "establish policies and procedures requiring air carriers (A) to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; and (B) if such an individual is identified, . . . prevent the individual from boarding an

* * *

Because application of the correct law to Plaintiffs' facts establishes that No Fly List inclusion has burdened Plaintiffs' liberty interests in travel and reputation, Defendants have failed to show that, as a matter of law, they are not required to provide Plaintiffs procedural due process. *See Mathews*, 424 U.S. at 335. To the contrary, Defendants are required to afford Plaintiffs fair procedures. As explained below, however, Defendants fail to satisfy even the most minimal requirements.

B) DHS TRIP Fails to Provide Plaintiffs Constitutionally Adequate Notice and a Hearing

Once it is determined that the No Fly List triggers procedural due process protections, "the question remains what process is due." *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). The key inquiry is whether Defendants afford the most basic requirements of due process: "notice and an opportunity to contest the relevant determination at a meaningful time and in a meaningful manner."

Defendants offer ress(pr)3(oe)-6(e)4(s)-1(s)-1(i)-2(s)-1(c)-6(2(he)4(t)21(i)-2(t)-u4(t)-2(i)-2(7(a)4(l)-l(t)-1
(([(s)-T(r)](s)-6(D)2(6)4r(f)i8(g)1h(e4t oin)-f(f) 6(a)(o)-1tiz(h)-4(a)6(n) to))-2 D64n6a6af6fu Alany tfaD6gf6u An6an6
r 0oS (4)-1(o)-1tiz(h)-4(a)6(n)8222)n

e4t tonDe4lu A6(a)o fo8-y(g)11d 6sgngo8-6(a)t3th(D)2(6)s T66n o5(s T)82226an6
18.0 T()-h(o)-12(t1)-7(y)2 m
ggt tTTret3(n0(t)-2(m)]TJ 0.002 Tc -0.002 TT* [)4h(D)2(6)4

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

designating terrorist organizations. A.H.I.F., 686 F.3d at 983–84 (requiring provision of either unclassified summaries of classified information or presentation of classified information to appropriately cleared counsel); Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 657–60 (N.D. Ohio 2010) (requiring government to declassify and/or summarize classified information and, if that was insufficient or impossible, requiring plaintiff's counsel to view the information under a protective order).[37] While Defendants contend that access to classified information falls within the exclusive purview of the Executive, that argument is premature and unnecessary to the Court's resolution of the issues before it. This Court need not decide at this stage whether Plaintiffs will be entitled to access classified information at some later point.[38]

As a matter of law and based on the stipulated facts, Defendants thus fail to show that DHS TRIP affords Plaintiffs the most "essential" of due process protections—the notice they

[37] See, e.g., Al Odah v. United States, 559 F.3d 539, 544–45 (D.C. Cir. 2009) (per curiam) (court may compel disclosure to counsel of classified information for habeas corpus review); Bismullah v. Gates, 501 F.3d 178, 187 (D.C. 2007) (granting counsel access to classified information supporting enemy combatant determination, subject to limited exceptions), vacated, 554 U.S. 913, reinstated, 551 F.3d 1068 (D.C. Cir. 2008) (per curiam); United States v. Abuhamra, 389 F.3d 309, 329 (2d Cir. 2004) (requiring substitute disclosures to explain "the gist or substance" of ex parte submissions); Classified Information Procedures Act, 18 U.S.C. app. (contemplating provision of summaries of, or substitutes for, classified information in criminal proceedings).

[38] Moreover, "[i]t is simply not the case that all security clearance decisions are immune from judicial rev4(e)-6(e)4 0 0 8.04 72 342.72 Tm [(3)1(7)]TTf 0 Tc 0 [(3 0 Tw 3.11 0 Td [(ns)-1(t)- [(ns)-1(t)-1

Deposit Ins. Corp., 486 U.S. at 240–241; see De Nieva, 966 F.2d at 486 ("right to a hearing was clearly established" where government burdened liberty interest in travel).

Defendants insist that DHS TRIP provides a "suitable substitute" for a hearing because

unacceptably high risk of erroneous deprivation. Plaintiffs have introduced facts, moreover, that show the widespread error in the watch list from which the No Fly List is drawn. The second *Mathews* factor thus tips decidedly in Plaintiffs' favor.

Government procedures that fail to afford adequate notice create a high risk of error because they force people to "guess[] what evidence" they should submit in their defense, driving them to "respond[] to every possible argument against denial at the risk of missing the critical one altogether." *Barnes*, 980 F.2d at 579; *Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009) (lack of "adequate and timely notice creates a substantial risk of wrongful deprivation" because it leads to "[a]n inability to rebut"). Without notice of the "exact reasons" for the government's decision or "the particular statutory provisions and regulations they are accused of having violated," affected persons cannot "clear up simple misunderstandings or rebut erroneous inferences." *Gete v. I.N.S.*, 121 F.3d 1285, 1297 (9th Cir. 1997); *see also* A.H.I.F., 686 F.3d at 982 ("Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations."). The government compounds the risk of error when it fails to provide any hearing permitting confrontation and rebuttal of the bases for the deprivation. *See De Nieva*, 1989 WL 158912, at *7 (lack of "an adjudicative hearing of any type" concerning passport seizure "maximized the risk of mistaken deprivation"), *aff'd*, 966 F.2d 480 (9th Cir. 1992); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S 123, 171–72 (1951) (Frankfurter, J. concurring) (adversarial process reduces the risk of error because "[s]ecrecy is not congenial to truth-seeking"). In contrast, explaining the specific reasons for the decision increases the likelihood of error correction. *Barnes*, 980 F.2d at 579.

list records as requested."[42]

party's interests." See A.H.I., 686 F.3d at 980.[44] Applying this clear law to the facts Plaintiffs have introduced shows that providing Plaintiffs notice and a hearing requires will not harm any asserted national security interests.

Indeed, court decisions require far more robust process, specifically in the national security context, for alleged enemy alien combatants detained outside the United States and designated terrorist organizations seeking to recover their property. See Hamdi, 542 U.S. at 536–37 (requiring notice to alleged enemy combatant of factual and legal basis for charges and a meaningful opportunity to rebut those charges); N.S.C.R.I., 251 F.3d at 209 (requiring notice to organization concerning impending designation as foreign terrorist organization); Kindhearts, 647 F. Supp. 2d at 904, 907–08 (requiring "prompt" and "meaningful hearing" for charity with blocked assets and provisional designation as a

this argument is based on a demonstrably false premise: that it is even possible to keep a person's No Fly List status a secret after that person has been prevented from flying.[46] The facts show that Plaintiffs already know they are on the No Fly List; each was denied boarding on at least one flight, and U.S. or airline officials subsequently told each of them that he or she is on the list.[47] Contrary to Defendants' assertions, Plaintiffs are also already on notice that they are (or were) the subject of investigations: the FBI questioned each of them following their denial of boarding.[48] Acknowledgement of No Fly List-status in the redress procncncncr6(ncrc6(s)-5(x(Span <(Hd

hearing will not harm national security when the government routinely disregards its own Glomar policy. See Coppola ¶ 37.[51]

This Court should reject Defendants' sweeping and categorical claim that providing Plaintiffs process will necessarily disclose the government's secrets. Defs.' Br. 27. Defendants position puts the cart before the horse—they seek to foreclose hearings entirely because of the possibility that sensitive information may be involved in particular instances. But the government is routinely required to disclose, or at least summarize, classified or otherwise sensitive information in numerous national security contexts. See, e.g., Al Odah, 559 F.3d at 544–45; Bismullah, 501 F.3d at 187; Abuhamra, 389 F.3d at 329; Classified Information Procedures Act, 18 U.S.C. app. Decisionmakers can use calibrated tools—tools courts do all the time—to balance affected parties' rights and any legitimate government secrecy interests. See, e.g., A.H.I.F., 686 F.3d at 983–84 (classified summaries and access to cleared counsel by definition "do not implicate national security" and impose only a "small burden" on the government);

Thus, viewing the factual record in light of the established law, the balance of the three Mathews factors tips decisively in Plaintiffs' favor. Plaintiffs' facts and Defendants' own stipulations concerning DHS TRIP and their Glomar policy establish that Defendants' inclusion of these U.S. citizens on the No Fly List has deprived them of their protected liberties without affording them the most basic notice and opportunity to be heard that due process requires.

II) Defendants' Failure to Provide Plaintiffs Notice and a Hearing Violates the Administrative Procedure Act

Defendants argue that the availability of appellate review of individual No Fly determinations precludes a claim under the Administrative Procedure Act ("APA"), and address only one of Plaintiffs' APA claims – that Defendants' redress procedures are "arbitrary [and] capricious". 5 U.S.C. § 706(2)(A). Defendants also argue that the Court should simply defer to the Defendants' secret redress procedures, that those procedures are reasonable, and that the administrative record concerning these secret procedures is all the Court may consider. Defs.' Br. 29. But, Defendants are wrong on each of these points.

As an initial matter, Defendants ignore that the Ninth Circuit has already held that

secret redress process that fails to afford meaningful notice and a hearing before being deprived of protected liberties. *See supra* 19–32. Contrary to Defendants' contentions, this Court should not defer to Defendants' interpretation of the adequacy of their redress procedures. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010) (recognizing that courts consider agency action de novo when reviewing Section 706(2)(B) claims). Because Defendants' redress procedures violate Plaintiffs' due process rights, they also violate APA Section 706 (2)(B).

Defendants principally contend that their No Fly List procedures are not arbitrary and capricious under APA Section 706(2)(A) because they are reasonable. 5 U.S.C. § 706(2)(A); Defs.' Br. 29. But Defendants fail to demonstrate that their redress procedures, as stipulated, bear the required "rational connection" between Congress's directives and the "facts found and the [agency] choice made" for two distinct reasons. *Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

First, Defendants' stipulate that DHS TRIP categorically does not offer any person on the No Fly List an explanation for the reasons or bases for their inclusion, and that the No Fly List criteria are kept secret from the public. Such secrecy makes it impossible, as a matter of law, for Plaintiffs (or the public) to ensure their compliance with Defendants' rules, and Defendants therefore fail to show that their redress procedures are not arbitrary and capricious. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bur. of Land. Mgmt.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001); *see Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039 (9th Cir. 2007) (regulatory standard "must not be so general" as to prevent compliance").

Second, Defendants fail to demonstrate that their redress procedures carry out Congress' directive to implement a "fair" and effective redress process for U.S. citizens wrongly excluded from air travel. 49 U.S.C. § 44926(a); 49 U.S.C. § 44903(j)(2)(G)(i). Defendants' stipulated

facts establish that in response to Congress' order, Defendants implemented a secret, one-sided process that denies notice or a meaningful opportunity to be heard. See supra 19–32. Plaintiffs have introduced facts, which this Court must consider, controverting Defendants' claim that their redress procedures are fair and effective. See supra 26–29; Webster v. Doe, 486 U.S. 592, 604 (1988) (plaintiff raising constitutional claims under APA may expand record through discovery). The record establishes that Defendants' redress procedures are arbitrary and capricious because they entirely fail to comport with Congress's plain statutory directive. See Wash. Toxics Coal. v. U.S. Dept. of Interior, Fish & Wildlife Serv., 457 F. Supp. 2d 1158, 1185–86 (W.D. Wash. 2006) (EPA screening model arbitrary and capricious because it produced known errors that were "uncorrected and unverified"). Contrary to Defendants' characterizations, this Court's review of the record in assessing Plaintiffs' Section 706(2)(A) claim is not deferential, but "searching and careful." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989); see also U.S. W., Inc. v. F.C.C., 182 F.3d 1224, 1231 (10th Cir. dt beca17 4(er)(C)-3(i)-2(r)3(fu)(. F)1Td ( )Tj (2

888 SW 5th Avenue
Portland, OR 97204
Tel.: (503) 802-2040; Fax: (503) 972-3740
Cooperating Attorney for the ACLU Foundation of Oregon

_s/ Hina Shamsi
Hina Shamsi (Admitted pro hac vice)
Email: hshamsi@aclu.org
Nusrat Jahan Choudhury (Admitted pro hac vice)
Email: nchoudhury@aclu.org