16-1176

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI,

Plaintiffs-Appellants,

AWAIS SAJJAD,

Plaintiff,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
VOLUME II OF II
(Pages JA-167 to JA-327)

BENJAMIN H. TORRANCE
JENNIFER E. BLAIN
SARAH S. NORMAND
Assistant United States Attorneys
UNITED STATES ATTORNEY'S OFFICE
FOR THE SOUTHERN DISTRICT OF
NEW YORK
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2703

Attorneys for Defendants-Appellees

JENNIFER R. COWAN
EROL GULAY
SANDY TOMASIK
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-7445

SHAYANA D. KADIDAL
BAHER AZMY
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6438

RAMZI KASSEM
NAZ AHMED
CLEAR PROJECT
MAIN STREET LEGAL SERVICES, INC.
CITY UNIVERSITY OF
NEW YORK SCHOOL OF LAW
2 Court Square
Long Island City, New York 11101
(718) 340-4558

Attorneys for Plaintiffs-Appellants

—against—

FNU TANZIN, Special Agent, FBI; SANYA GARCIA, Special Agent, FBI; JOHN LNU, Special Agent, FBI; FRANCISCO ARTUSA, Special Agent, FBI; JOHN C. HARLEY III, Special Agent, FBI; STEVEN LNU, Special Agent, FBI; MICHAEL LNU, Special Agent, FBI; GREGG GROSSOEHMIG, Special Agent, FBI; WEYSAN DUN, Special Agent in Charge, FBI; JAMES C. LANGENBERG, Assistant Special Agent in Charge, FBI; JOHN DOE #1, Special Agent, FBI; JOHN DOE #2, Special Agent, FBI; JOHN DOE #3, Special Agent, FBI; JOHN DOE #4, Special Agent, FBI; JOHN DOE #5, Special Agent, FBI; JOHN DOE #6, Special Agent, FBI,

Defendants-Appellees,

LORETTA E. LYNCH, Attorney General of the United States; JAMES COMEY, Director, Federal Bureau of Investigation; CHRISTOPHER M. PIEHOTA, Director, Terrorist Screening Center; JEH C. JOHNSON, Secretary, Department of Homeland Security; MICHAEL RUTKOWSKI, Special Agent, FBI; WILLIAM GALE, Supervisory Special Agent, FBI; JOHN DOE #7, Special Agent, FBI; JOHN DOE #8, Special Agent, FBI; JOHN DOE #9, Special Agent, FBI; JOHN DOE #10, Special Agent, DHS; JOHN DOE #11, Special Agent, FBI; JOHN DOE #12, Special Agent, FBI; JOHN DOE #13, Special Agent, FBI,

Defendants.

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EXHIBIT A

EXHIBIT B

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' OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

In accordance with Rules 26 and 33 of the Federal Rules of Civil Procedure, Defendants Eric H. Holder, Jr., in his official capacity as Attorney General of the United States; James Comey, in his official capacity as Director of the Federal Bureau of Investigation; and Christopher Piehota, in his official capacity as Director of the Terrorist Screening Center; (Responding Parties),[1] by and through their undersigned counsel, hereby respond to Plaintiff's Set of Interrogatories.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

1. Identify all persons, by name, agency, and title, who played any role in nominating and/or in placing Gulet Mohamed on the No-Fly List.

Objections: Responding Parties object to the term "role," an undefined term, as vague and overbroad. The Responding Parties further object to the terms "all" and "any" as overly

[1] This discovery was propounded only to the Defendants in the case at the time the discovery was served.

broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Responding Parties object to the extent this Interrogatory seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Defendants further object to the Interrogatory to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection. Any further response would require the Responding Parties to confirm or deny publicly the existence of information in a manner that would reveal or tend to reveal national security or law enforcement sensitive information, or Sensitive Security Information, including, but not limited to whether Plaintiff's name is or has been included on the No Fly List. Responding Parties can neither confirm nor deny Plaintiff's purported status with respect to the No Fly List because to do so would be contrary to government policy related to the disclosure of information relating to alleged No Fly placement.

Answer: For the reasons set forth in their objections, the Responding Parties will not respond to this interrogatory.

2. Identify all persons, by name, agency, and title, who played any role in detaining and/or in interrogating Gulet Mohamed from December 20, 2010 to January 21, 2011.

Objections: Responding Parties object to the term "role," an undefined term, as vague and overbroad. The Responding Parties further object to the terms "all" and "any" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Responding Parties also object to the terms "detaining" and "interrogating" as undefined, vague, and overbroad.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties object to the extent this Interrogatory seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Defendants further object to the Interrogatory to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: For the reasons set forth in their objections, the Responding Parties will not respond to this interrogatory.

3. For the years 2003 to the present, identify the names, agency affiliations, job titles, and job descriptions of the personnel who administer(ed) the No-Fly List.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the term "administer(ed)," an undefined term, as vague and overbroad. Responding Parties further object to this interrogatory as unduly burdensome to the extent it seeks information outside the knowledge of Responding Parties.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege,

Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC is a multi-agency center created by the Attorney General pursuant to Homeland Security Presidential Directive 6 (HSPD-6) on September 16, 2003. The TSC administers the Terrorist Screening Database (TSDB), of which the No Fly List is a subset. The TSC, to include the No Fly List, is administered by its director, principal deputy director, and deputy director of operations.

The current director of the TSC, Christopher M. Piehota (FBI), was appointed on April 2013. Robin C. Burke (DHS) served as acting-director from February 2013 until April 2013. The prior director, Timothy J. Healy (FBI), served as acting-director beginning in March 2009, until he was appointed director on May 14, 2009. Director Healy served until February 2013.

The current principal deputy director (PDD), Steven Mabeus (DHS) was appointed in October 2013. The prior PDD, Robin C. Burke, served from November 2010 until July 2013. Anne Vessey (DHS) served as acting-PDD between July 2013 and October 2013. Prior to PDD Burke's service, Donald Torrence (DHS) served as PDD from December 2009 through November 2010, with his predecessor, Rick Kopel (DHS), serving through November 2009.

The current deputy director of operations (DDOps) is G. Clayton Grigg (FBI), who began serving as DDOps in September 2013. Prior to Grigg, Deborah Lubman and Cindy Coppola (both FBI) served intermittently as acting-deputy directors of operations between February 2013 and September 2013. Prior to that time, Scott Cruse (FBI) served as DDOps from September 2011 until February 2013. Christopher M. Piehota served as DDOps from February 2010 until June 2011 with Cindy Coppola serving as acting-DDOps between June and September 2011. Cory Nelson (FBI) served as DDOps until April 2009 and Bryan Lynch (FBI) served as DDOps from May 2009 until September 2009.

4. For each year from 2003 to the present, identify the number of individuals placed in the Terrorist Screening Database (TSDB), the Selectee List, and the No-Fly List and the number of U.S. citizens contained in each respective list.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to this interrogatory as overbroad and vague to the extent that it seeks numbers of individuals on the No Fly and Selectee List and in the TSDB. The TSDB, and therefore its subset lists, are constantly changing and evolving, and it would be unduly burdensome to provide Plaintiff with new numbers every time an individual is added or removed from the TSDB or its subset lists.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: At the outset, the Responding Parties note that an entry for an individual included in the TSDB includes fields for specific types of information (*e.g.*, name, date of birth) , but the entry of information is not required for all fields. The TSC is able to aggregate, and therefore "track," the information that is entered into these fields. The TSDB does not track individuals as U.S. citizens. In 2008, the TSDB began tracking individuals as "U.S. persons" ("USPER"), which, as defined by Executive Order 12,333, includes both U.S. citizens and permanent resident aliens. Beginning in May 18,-2012, the TSDB also began tracking the lawful permanent resident

("LPR") status of individuals, however, it did so only for new individuals added to the TSDB. In other words, for individuals in the TSDB prior to May 18, 2012, the TSDB did not track them by LPR status but rather only as a USPER or non-USPER. Additionally, there are instances in which information about whether an individual is an USPER or non-USPER (since 2008), or as an LPR or non-LPR (since 2012)is not verified but rather is presumed based upon other facts. There are also instances in which the information regarding the USPER or LPR status that was submitted to the government may be fraudulent. For these reasons, the identification of an individual in the TSDB as an USPER, non-USPER, LPR, or non-LPR, may be factually incorrect.

For these reasons, from the totality of this information, the Responding Parties are only able to answer this interrogatory in part based upon the TSDB's tracking of USPERS. It would be unduly burdensome, however, for the Responding parties to provide an answer for the years prior to 2008 because the TSDB did not track this information at that time. Additionally, because the TSDB began to identify the LPR status of individuals who were added to the TSDB after May 18, 2012, the Responding Parties are unable to answer this interrogatory in terms of U.S. citizens. A search to determine the U.S. citizenship status of every USPER who has been in the TSDB since 2009 would be unduly burdensome because it would require a review of the voluminous records for each those individuals labeled as USPERS and it would require a review of underlying source documents to determine if they clearly indicate citizenship. Additionally, because those underlying source documents are maintained by other agencies, such reviews would also require significant coordination with non-party government agencies. Finally, as

noted previously in this answer, the results of any such search would be incomplete because the USPER or LPR status, in some instances, may not be factually correct.

With these caveats, the Responding Parties will provide an answer this interrogatory (to the extent it would be appropriate for disclosure pursuant to Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 525, 120 Stat. 1355, 1381-82 (Oct. 4, 2006), as reenacted) subject to an appropriate protective order entered by the court.

5. Identify by year, between 2003 to the present, the number of nominations to the TSDB submitted by U.S. agencies and the number of nominations that the Terrorist Screening Center (TSC) has rejected.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the term "rejected" as vague and undefined. Responding Parties further object to this interrogatory as unduly burdensome. Responding Parties do not track, in the usual course of business, the number of nominations that are rejected from inclusion in the TSDB. Compiling such information would be difficult or impossible.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List,

and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC did not, in the usual course of business during the time period requested, track the number of nominations and rejected nominations for inclusion in the TSDB. However, after further investigation, the TSC determined a means of calculating this information, and therefore the Responding Parties can provide a partial answer to this interrogatory. The Responding Parties note that the TSDB did not begin to include information allowing the TSC to identify the number of nominations and rejections until 2006. For this reason, a search for any such information before 2006 would be unduly burdensome, if not impossible, because it would require TSC to search its archives for potentially responsive records and, if such records exist, it would require TSC to review and catalog the content of

those records because TSC did not keep information about nominations and rejected nominations in the usual course of business between 2003 and 2006. Additionally, such information is tracked by fiscal year, with only annual totals available between October 1, 2008 and September 30, 2013.

With those caveats, the TSC determined that, since October 1, 2008, and September 30, 2013, the annual number of nominations for inclusion in the TSDB and the corresponding number of nominations that were rejected for inclusion, are as follows:

FY	NOMINATIONS	REJECTED
2009	227,932	508
2010	250,847	1628
2011	274,470	2776
2012	336,712	4356
2013	468,749	4915

6. Identify by year, between 2003 to the present, the number of nominations TSC has rejected because the derogatory information submitted to TSC did not meet TSC's standard for TSDB inclusion.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome. In addition, Responding Parties object to

this interrogatory on the grounds that the phrase "TSC's standard for TSDB inclusion" is vague and ambiguous.

Responding Parties object to the term "rejected" as vague and undefined. Responding Parties further object to this interrogatory as unduly burdensome, especially in light of the previous Interrogatory. Responding Parties do not track, in the usual course of business, the number of nominations that are rejected. Compiling such information would be difficult or impossible.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC does not, in the usual course of business, track or aggregate the basis for the rejection of a nomination for inclusion in the TSDB. Rather, as noted in the response to Plaintiff's Interrogatory 5, the TSC was able to determine through other means the number of nominations for inclusion in the TSDB and the number of those nominations that TSC rejected. When a nomination for inclusion in the TSDB is rejected, however, TSC records require only that such a rejected nomination be identified as having insufficient "minimum criteria." As explained more thoroughly in the testimony of then-Director Timothy J. Healy before Congress from March 2010, the "minimum criteria" necessary for inclusion in the TSDB is sufficient biographic information and sufficient derogatory information. In some cases, the TSC personnel reviewing a nomination may provide additional details about the basis for the rejection of a nomination in a free-form part of the record. The TSC, however, does not require its personnel to provide this information. Because this information is not required, any additional details provided (if they are at all) may, may not, or may only partially address the basis for the rejection. Therefore, because such information is not required, any purported statement about the basis for a rejection cannot be considered to represent the actual basis for the decision. A search for any such information would be unduly burdensome. For these reasons, Responding Parties are not able to provide an answer to this interrogatory.

7. For the years 2003 to the present, of the total number of U.S. citizens who are on the No-Fly List, identify the percentage of those who are naturalized U.S. citizens.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. Responding Parties do not track in the usual course of business whether or not an individual is a naturalized citizen, and therefore, responding to this interrogatory would be unduly burdensome or impossible.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act

of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC does not, in the usual course of business, track persons in the TSDB, and by derivation on the No Fly List, as "U.S. citizens." As noted in the response to Interrogatory 4, the TSDB does track "U.S. person" and lawful permanent residents ("LPR") status. The TSDB began tracking individuals as USPERs in 2008, and starting on May 18, 2012, started identifying newly added individuals as LPRs. While the TSDB does contain a field for recording the naturalization certificate number of an individual, completion of this field is not required so individuals without a listed naturalization certificate number may still in fact be naturalized U.S. citizens. Additionally, the existence of a naturalization certificate number does not mean that a person actually is a naturalized U.S. citizen. So, while the TSC can identify the number of USPERS on the No Fly List with a completed field for a naturalization certificate number, this information does not provide an accurate answer about the actual number of naturalized U.S. citizens on the No Fly List. Further, a search for any such information would be unduly burdensome because it would require a review of the underlying source documents for every person on the No Fly List since 2009 to determine if information in the documents confirms or denies naturalization status. Additionally, such a review would require coordination with other government agencies to confirm the accuracy of that status.

8. For the years 2003 to the present, provide a numerical breakdown of religious affiliations and countries of birth of U.S. citizens who are on the No-Fly List.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. Responding Parties do not track either the religion of the individuals contained in the TSDB or the "country of birth," and therefore, responding to this interrogatory would be unduly burdensome.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act

of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC does not, in the usual course of business, identify the religion of individuals in the TSDB or on the No Fly List. The TSDB, and its subset No Fly List, does not include a field for indicating an individual's religion. A search for any such information would be unduly burdensome because it would require the TSC to access all the underlying source documents for every USPER that has ever been on the No Fly List since 2009 (*see* Response to Interrogatory 4), and would involve coordination with other government agencies, which control those source documents. Additionally, such a search would then require a review of those source documents to determine if they contain any information that may indicate or otherwise reveal the religion of that individual. For these reasons, the Responding Parties are not able to provide an answer to this part of the interrogatory.

Similarly, the TSC does not, in the usual course of business, identify the country of birth of individuals in the TSDB or on the No Fly List. The TSDB does include a field for indicating an individual's "place of birth," but completion of this field is not required, and therefore the accuracy of the information listed cannot be confirmed. Additionally, because this information is captured in a free form text field, there may be multiple countries listed for one individual, which would require a separate review of each record to determine which, if any, listed country was the actual "place of birth". Further, while the TSDB does include a field for "place of

birth," the TSDB does not aggregate that information, in the usual course of business, over time. In other words, the TSDB can identify the "place of birth" for individuals currently on the No Fly List, but the TSDB does not provide a means for determining the "place of birth" for persons on the No Fly List at some point in time in the past. A search for the "place of birth" for all individuals on the No Fly List and the aggregation of the resulting information would be unduly burdensome, however, because it would require sorting thousands of responses. Rather, a targeted search of the "place of birth" field by country would be more manageable.

In light of that explanation, the Responding Parties agree to provide an answer in part to this interrogatory (to the extent it would be appropriate for disclosure pursuant to Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 525, 120 Stat. 1355, 1381-82 (Oct. 4, 2006), as reenacted) by asking Plaintiff to submit a list of countries, for which the Responding Parties will query the TSDB and disclose to Plaintiff (subject to an appropriate protective order entered by the court) the number of individuals from the requested countries that are currently on the No Fly List.

9. For the years 2003 to the present, identify the percentage and number of persons on the TSDB and/or the No-Fly List, who TSC later determined had been erroneously placed on said lists.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties object to the term "erroneously" as vague and undefined. Responding Parties further object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. The Responding Parties do not track, in the usual course of business, the number of individuals who are removed from the TSDB and any subset lists because of an erroneous placement.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: The TSC does not, in the usual course of business, identify persons who were

"erroneously" included in the TSDB or on the No Fly List. Rather, the Responding Parties refer to their answers for Interrogatories 10 (concerning U.S. citizens removed from, or in between, the TSDB, Selectee List, or No Fly List) and 15 (concerning the removal of persons from the TSDB, Selectee List, or No Fly List as a result of a DHS TRIP complaint). For this reason, Responding Parties are not able to respond to the interrogatory.

10. **For the years 2003 to the present, as to each U.S. citizen who has been removed from the TSDB, Selectee List, or the No-Fly List, or whose placement thereon has been changed from one list to another, list specific reasons for said removal or change.**

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. Responding Parties do not track, in the usual course of business, the reasons why individuals are removed from the TSDB and any subset lists or why placement has changed from one list to another.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the

No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: Other than the ultimate determination that a person does or does not meet the criteria for inclusion in the TSDB or on the Selectee or No Fly Lists, the TSC does not track, in the usual course of business, the reasons why a person is removed from the TSDB, No Fly List, or Selectee List, nor does TSC track the reasons why a person may be moved between or off the No Fly List or Selectee List (*see* Answers to Interrogatories 5, 6, and 18). Insofar as the TSC possesses information concerning the removal of a person from the TSDB, No Fly List, or Selectee List, or information concerning the reason for moving a person between the No Fly List and Selectee List, any such information would only be included in the underlying source documents for the individuals themselves, which are not contained in the TSBD or controlled

by the TSC. A search for any such information, if it existed, would be unduly burdensome because it would require the TSC to access all records of every USPER that has ever been in the TSDB, on the Selectee List, or on the No Fly List since 2009 (*see* Answer to Interrogatory 4), and then require a review of the underlying source documents for each of those records for information that may indicate or otherwise reveal a basis for the removal or change in the status of the individual. The search for, review of, and aggregation of information from these tens of thousands of individual records and the underlying source documents for a different decision about that person (*i.e.*, a reason for the change in status; removal) would involve coordination with other government agencies and be unduly burdensome. For these reasons, Responding Parties are not able to provide an answer to this interrogatory.

11. For the years 2003 to the present, identify the number of times U.S. officials permitted persons on the No-Fly List to board flights that crossed U.S. airspace.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. Responding Parties are not involved in the decision to allow any individual to board a plane.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: For the reasons discussed at the March 21, 2014, meet and confer, the Responding Parties, as part of the usual course of business, do not track the number of times U.S. officials permitted persons included on the No Fly List to board flights that crossed U.S. airspace.

The Responding Parties in coordination with other U.S. government agencies, developed policy on how to respond following an encounter with an USPER who was prohibited from boarding a flight originating outside of the continental United States that was

bound for the United States, due to possible inclusion on the No Fly List. The goal of the policy is to proactively and quickly resolve the travel issues of USPERs located abroad who have been prohibited from boarding flights returning to the United States. Since 2009, the TSC has taken part in that process on a number of occasions. The TSC's participation in that process, however, does not mean that an individual originally denied boarding eventually succeeded in traveling to U.S. airspace on a commercial aircraft, even if such a result was the intended goal of that process, because the individual may not have boarded the flight. Additionally, any search for additional information about whether the person eventually succeeded in boarding a flight crossing U.S. airspace, if such information existed, would be unduly burdensome because it would require the TSC to access all records of every individual who has ever been on the No Fly List since 2009 (*see* Answer to Interrogatory 4), and then to compare those records with information controlled by other government agencies to determine or otherwise reveal whether the individual actually ever boarded a flight crossing U.S. airspace while on the No Fly List. Thus, the search for, review of, and aggregation of information from these tens of thousands of individual records would be unduly burdensome. For these reasons, Responding Parties can only provide an answer to part of this interrogatory.

12. For the years 2003 to the present, identify all extra safety or other measures used prior to, during, and after flights crossing U.S. airspace on which U.S. officials permitted persons on the No-Fly List to fly.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem

from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome. In addition, Responding Parties object to this interrogatory on the grounds that the phrase "all extra safety or other measures used prior to, during, and after flights crossing U.S. airspace" is vague and ambiguous.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. The Responding Parties do not take any action with respect to any extra security or other measures.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: Although the Responding Parties have access to certain information regarding security measures, they cannot readily account for or confirm any measures taken before August 2013 without researching and reviewing information controlled by other government agencies. As noted in their answer to Interrogatory 11, however, the Responding Parties, in coordination with other U.S. government agencies, developed policy on how to respond following an encounter with a USPER who was prohibited from boarding a flight originating outside of the continental United States that was bound for the United States, due to possible inclusion on the No Fly List. The goal of the policy is to proactively and quickly resolve the travel issues of USPERs located abroad who have been prohibited from boarding flights returning to the United States. The Responding Parties do not administer "extra safety or other measures" for commercial flights crossing U.S. airspace. For these reasons, the Responding Parties cannot provide an answer to this interrogatory.

13. By year, for the years 2003 to the present, identify the number of Traveler Redress Inquiry Program (TRIP) complaints that TSC has received from DHS or the Transportation Security Administration (TSA).

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties further object to the request as overbroad and unduly burdensome to the extent it seeks information about all persons who have ever filed DHS TRIP complaints referred to TSC. Plaintiff himself has never filed for DHS TRIP and accordingly, such information is neither relevant for Plaintiff's claims nor reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: This information is tracked by fiscal year (October 1 – September 30), with only annual totals available. The following is the total number of TRIP complaints that TSC has received from DHS/TSA by year, for the years 2009 through 2013.

FY	NUMBER of DHS-TRIP Complaints Received by TSC
2009	227
2010	376
2011	545
2012	760
2013	752

14. For the years 2003 to the present, identify the number of reviews, investigations, or assessments that TSC has done of TRIP complaints.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to this interrogatory on the grounds that the phrase "reviews, investigations, or assessments" is vague and ambiguous and on the grounds that the interrogatory is overly broad and unduly burdensome. Responding Parties further object to the request as overbroad and unduly burdensome to the extent it seeks information about all persons for whom TSC has reviewed DHS TRIP complaints, and TSC's actions in response to such complaints. Plaintiff himself has never filed for DHS TRIP and accordingly, such information is neither relevant for Plaintiff's claims nor reasonably calculated to lead to the discovery of admissible

evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: As indicated in the answer to Interrogatory 13, between October 1, 2008 and September 30, 2013, TSC has conducted a total of 2,660 reviews, investigations or assessments of TRIP complaints.

15. For the years 2003 to the present, identify the number of times TSC has removed persons from the TSDB, Selectee List, or the No Fly List as a result of having received filed TRIP complaints.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly

List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome.

Responding Parties object to the request as overbroad and unduly burdensome to the extent it seeks information about all persons for whom TSC has reviewed DHS TRIP complaints, and TSC's actions in response to such complaints. Plaintiff himself has never filed for DHS TRIP and accordingly, such information is neither relevant for Plaintiff's claims nor reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information, (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: This information is tracked by fiscal year, with only annual totals available. Between October 1, 2008 and September 30, 2013, TSC removed a total of 391 persons from the TSDB, Selectee List or No Fly List as a result of having reviewed filed TRIP complaints.

FY	NUMBER of removals as a result of having reviewed filed DHS-TRIP complaints
2009	68
2010	76
2011	74
2012	73
2013	100

16. For the years 2003 to the present, identify the number of times TSC has itself gathered, or has solicited from other government agencies, additional information in response to having received filed TRIP complaints.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome. Responding Parties object to this interrogatory on the grounds that the phrase "TSC has itself gathered, or has solicited from other government agencies, additional information" is vague and ambiguous.

Responding Parties further object to the request as overbroad and unduly burdensome to the extent it seeks information about all persons who have ever filed DHS TRIP complaints that

are reviewed by TSC, and TSC's actions in response to such complaints. Plaintiff himself has never filed for DHS TRIP and accordingly, such information is neither relevant for Plaintiff's claims nor reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: In some instances, the TSC Redress Unit will receive a DHS TRIP complaint that, generally for administrative reasons, does not require any further action or the gathering of or soliciting of additional information from other government agencies. In cases where the traveler filing the DHS TRIP complaint is an exact match to an identity of a person included in the TSDB, the TSC Redress Unit will provide copies of the complaint form and other relevant

information to the nominating agency in order to have that agency assist the TSC in the resolution of the complaint. The TSC Redress Unit will then work with the agency that originally nominated the individual for inclusion in the TSDB to determine whether the complainant's current status in the TSDB is suitable based on the most current, accurate, and thorough information available. The TSC Redress Unit may ask the nominating agency to provide updated information or analysis, as well as for recommendations on addressing the DHS TRIP complaint.

This information is tracked by fiscal year, with only annual totals available. Between October 1, 2008 and September 30, 2013, TSC has itself gathered, or has solicited from other government agencies, additional information in response to having received filed TRIP complaints a total of 2,334 times.

FY	ADDITIONAL INFORMATION REQUESTED from Other GOVT agency
2009	25
2010	354
2011	508
2012	618
2013	629

17. Identify all extra safety measures used prior to, during, and after Gulet Mohamed's January 21, 2011, flight from Kuwait to the United States.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly

List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome. Responding Parties further object to this interrogatory on the grounds that the phrase "safety measure used prior to, during, and after Gulet Mohamed's January 21, 2011 flight" is vague and ambiguous.

Responding Parties object to this interrogatory as unduly burdensome to the extent that it seeks information that is unavailable. The Responding Parties neither make the determination to allow persons on the No Fly list to cross U.S. airspace nor do they implement security measures regarding the transport of such persons.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client

privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: For the same reasons set forth in their answer to Interrogatory 12, the Responding Parties are not able to provide an answer to this interrogatory.

18. By year, for the years 2003 to the present, identify the number of TSDB nominations TSC has rejected because the identity information submitted did not meet TSC's standard for TSDB inclusion.

Objections: Responding Parties object to any interrogatory that seeks the disclosure of information prior to March 1, 2009. Plaintiff alleges that Defendants placed him on the No Fly List sometime after March 1, 2009, while Plaintiff was abroad. As alleged, his claims thus stem from that purported placement, and accordingly, discovery into actions prior to March 1, 2009, would be irrelevant and therefore, unduly burdensome. In addition, Responding Parties object to this interrogatory on the grounds that the phrase "TSC's standard for TSDB inclusion" is vague and ambiguous.

Responding Parties object to the term "rejected" as vague and undefined.

Responding Parties object to the extent that this Interrogatory seeks information not reasonably calculated to lead to the discovery of admissible evidence. The only claims currently before the Court relate to the process by which Plaintiff was allegedly placed on the No Fly List, and this Interrogatory sweeps beyond information and procedures considered with respect to his alleged placement, if any, on the No Fly List.

Responding Parties further object to this request to the extent it seeks information that is classified and/or subject to an assertion of the state secrets privilege or other appropriate statutory protection pertaining to such information. Responding Parties object to this request to the extent it seeks information subject to the law enforcement and investigatory files privilege, Sensitive Security Information (including Sensitive Security Information that is not appropriate for disclosure under Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Public Law No. 109-295, 120 Stat. 1355, as reenacted), national security information, or information otherwise protected by the deliberative process privilege, the attorney-client privilege, the work product doctrine, the Privacy Act (5 U.S.C. § 552a), or any other appropriate statutory protection.

Answer: Subject to and without waiving these objections, the Responding Parties state as follows: For the same reasons set forth in their answer to Interrogatory 6, the Responding Parties are not able to provide an answer to this interrogatory.

As to the objections:

Dated: March 28, 2014

Respectfully submitted,

STUART F. DELERY
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

DANA J. BOENTE
ACTING UNITED STATES ATTORNEY

DIANE KELLEHER
ASSISTANT BRANCH DIRECTOR
FEDERAL PROGRAMS BRANCH

/S/ LILY SARA FAREL
AMY E. POWELL
LILY SARA FAREL
JOSEPH C. FOLIO III
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20001
TELEPHONE: (202) 514-9836
FAX: (202) 616-8460
E-MAIL: amy.powell@usdoj.gov

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

For Interrogatories 1, and 3 through 18, I declare under penalty of perjury that the foregoing are true and correct as they relate to the Terrorist Screening Center.

March 28, 2014

3/28/14

G. Clayton Grigg
Deputy Director
Terrorist Screening Center

EXHIBIT B

LAW ENFORCEMENT SENSITIVE
SENSITIVE SECURITY INFORMATION

TONY WEST
Assistant Attorney General
Civil Division
SANDRA M. SCHRAIBMAN
Assistant Branch Director
Federal Programs Branch
DIANE KELLEHER
diane.kelleher@usdoj.gov
AMY POWELL
Amy.powell@usdoj.gov
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., #7318
Washington, D.C. 20001
Phone: (202) 514-4775
Fax: (202) 616-8470
Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

AYMAN LATIF, *et al.*, Plaintiffs, v. ERIC H. HOLDER, JR., *et al.*, Defendants.	Case 3:10-cv-00750-BR DECLARATION OF CHRISTOPHER M. PIEHOTA

DECLARATION OF CHRISTOPHER M. PIEHOTA

I, Christopher M. Piehota, hereby declare the following:

1. (U) I am the Deputy Director for Operations of the Terrorist Screening Center ("TSC"). I became the Deputy Director for Operations in February 2010. I have been a Special Agent with the Federal Bureau of Investigation ("FBI") since 1995 and have served in a

variety of counterterrorism, counterintelligence, intelligence, and senior management positions.

2. (U) The TSC is a multi-agency center that was created by the Attorney General pursuant to Homeland Security Presidential Directive ("HSPD")-6 on September 16, 2003. The TSC is administered by the FBI and receives support from, *inter alia*, the Department of Homeland Security ("DHS"), the Department of State ("DOS"), the Department of Justice, and the Office of the Director of National Intelligence. TSC is staffed by officials from multiple agencies, including FBI, DHS, DOS, Transportation Security Administration ("TSA") and U.S. Customs and Border Protection ("CBP").

3. (U) I make this declaration in support of the government's motion for summary judgment. The matters stated herein are based on my personal knowledge and my review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, including FBI Special Agents, Federal Air Marshals, other government agency employees or contract employees in the course of their official duties.

OVERVIEW OF U.S. TERROR WATCHLISTS

4. (U) Since the attacks of September 11, 2001, Congress and the President have mandated that federal executive departments and agencies share terrorism information with those in the counterterrorism community that are responsible for protecting the homeland such as CBP officers who conduct inspections at U.S. ports of entry, TSA personnel implementing the No Fly and Selectee lists, and domestic law enforcement officers.

5. (U) Prior to the creation of the TSC in 2003, nine U.S. Government agencies maintained 12 different watch lists intended to accomplish a variety of purposes.[1] Two of these lists, the No Fly and Selectee Lists, were originally maintained by the TSA, which was formerly within the Department of Transportation and is now part of DHS.

6. (U) The Terrorist Screening Database ("TSDB") was created pursuant to HSPD-6; the TSDB is the U.S. Government's consolidated terrorist watchlist and is maintained by the TSC. The TSDB contains no derogatory intelligence information. Instead, the TSDB contains only sensitive but unclassified terrorist identity information consisting of biographic identifying information such as name or date of birth. The TSDB also contains limited biometric information such as photographs, iris scans, and fingerprints.

7. (U) The TSC and the TSDB are supported by a 24 hours a day/7 days a week/365 days a year operations center that is continuously updated with information concerning encounters with known[2] or suspected[3] terrorists.

8. (U) The TSC receives sensitive but unclassified terrorist identity information for inclusion in the TSDB from two sources: (1) the National Counterterrorism Center (NCTC), which provides information about known or suspected international terrorists; and, (2) the FBI, which provides information about known or suspected domestic terrorists. The unclassified terrorist identity information is derived from classified

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[1] (U) *See,* Government Accountability Office, *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322, April 2003.

[2] (U) A known terrorist is an individual who has been convicted of, currently charged with, or under indictment for a crime related to terrorism in a U.S. or foreign court of competent jurisdiction. Watchlisting Guidance, July 2010, Appendix 1, Page 2.

[3] (U) A suspected terrorist is an individual who is reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on an articulable and reasonable suspicion. Watchlisting Guidance, July 2010, Appendix 1, Page 3.

intelligence or derogatory information that supports a finding that the individual is a known or suspected terrorist. If the individual is being nominated for the No Fly or Selectee lists, additional derogatory information must exist demonstrating that the individual meets the requisite criteria.

9. (U) Pursuant to Section 1021 of the Intelligence Reform and Terrorism Prevention Act of 2004, the NCTC serves as the primary organization in the U.S. Government for analyzing and integrating all intelligence possessed or acquired by the U.S. Government pertaining to terrorism and counterterrorism, excepting purely domestic counterterrorism information.[4] The NCTC also ensures that appropriate agencies have access to and receive intelligence needed to accomplish their assigned missions and serves as the central and shared knowledge bank on known and suspected terrorists and international terror groups, as well as their goals, strategies, capabilities, and networks of contacts and support.

10. (U) The TSDB is a sensitive but unclassified system that is updated continuously. The terrorist identity information (i.e., name, date of birth, place of birth, etc.) contained in the TSDB is deemed For Official Use Only ("FOUO") because it is derived from classified national security and unclassified but sensitive law enforcement information.

11. (U) The TSC, through the TSDB, makes terrorist identity information accessible to various screening agencies and entities by the regular export of updated subsets of TSDB

[4] (U) Because of the codification of NCTC in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, Executive Order 13354, which originally created NCTC, was revoked by amendments to Executive Order 12333 in July 2008.

data. For example, the No Fly and Selectee Lists are subsets of TSDB information that are available for passenger and employee screening.

12. (U) DHS defines the No Fly List as "a list of individuals who are prohibited from boarding an aircraft" and the Selectee List as "a list of individuals who must undergo additional security screening before being permitted to board an aircraft."[5]

13. (U) The No Fly and Selectee Lists are treated as Sensitive Security Information (SSI), as is the watchlist status of an individual on either list. *See*, 49 CFR 1520.5(b)(9)(ii).

NO FLY and SELECTEE LISTS CRITERIA

14. (U\\LES) [redacted]

[5] (U) *See*, U.S. Department of Homeland Security, Privacy Office, *Report on Effects on Privacy and Civil Liberties: DHS Privacy Office Report Assessing the Impact of the Automatic Selectee and No Fly Lists on Privacy and Civil Liberties as Required Under Section 4012(b) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458*, April 27, 2005.

[6] (LES) [redacted]

guidance. Consequently, a new Watchlisting Guidance was approved and authorized for release to the watchlisting and screening communities in July 2010.

15. (U) Under the July 2010 Watchlisting Guidance, the following criteria must be met to qualify for placement on the No Fly List: Any person, regardless of citizenship, who represents:

[redacted]

[7] (U) Defined in 18 U.S.C. § 2331(5)(C) as "within the territorial jurisdiction of the United States."

[redacted]

LAW ENFORCEMENT SENSITIVE
SENSITIVE SECURITY INFORMATION

16. (U) Under the July 2010 Watchlisting Guidance, the following criteria must be met to qualify for placement on the Selectee List: Any person, regardless of citizenship, SSI [redacted]

17. (U) As part of the July 2010 Watchlisting Guidance, the watchlisting community also developed five general guidelines regarding the No Fly and Selectee Lists that should be reemphasized in order to effectively implement the No Fly List and Selectee List criteria. They are:

SSI [redacted]

[redacted]

LAW ENFORCEMENT SENSITIVE

SENSITIVE SECURITY INFORMATION

[redacted]

[redacted]

LAW ENFORCEMENT SENSITIVE

SENSITIVE SECURITY INFORMATION

[redacted]

18. (U//LES) [redacted]

HOW NAMES ARE ADDED TO AND REMOVED FROM THE NO FLY AND SELECTEE LISTS

19. (U) Names are added to and removed from the No Fly and Selectee Lists through an ongoing nomination and review process. Files from NCTC containing nominations to the TSDB are uploaded to the TSC. These files contain the nominee's identifying information, as well as, the underlying information in support of the nomination. FBI case agents also submit nominations to the No Fly and Selectee Lists by completing the relevant forms and providing a summary of the underlying information that demonstrates that a person meets the standards for inclusion on either list. TSC refers to all of this underlying information as "derogatory information."

20. (U) TSC personnel then review nominations to determine (a) whether the biographic information associated with a nomination contains sufficient identifying data so that a person being screened can be matched to or distinguished from a watchlisted terrorist on the TSDB; and (b) whether the nomination is supported by the minimum substantive derogatory criteria for inclusion in the TSDB, with limited exceptions, as well as the

additional derogatory requirements for the No Fly and Selectee lists. TSA employees assigned to and stationed at the TSC serve as subject matter experts regarding those individuals nominated to the No Fly and Selectee Lists.

21. (U) Generally, nominations to the TSDB are based on whether there is reasonable suspicion to believe that a person is a known or suspected terrorist. To meet this standard, the nominator, based on the totality of the circumstances, must rely upon "articulable" intelligence or information which, taken together with rational inferences from those facts, [redacted] Mere guesses or "hunches," or the reporting of suspicious activity alone are not enough to constitute a reasonable suspicion and are not sufficient bases to watchlist an individual. Additionally, nominations must not be solely based on race, ethnicity, national origin, religious affiliation, or First Amendment protected activities, such as free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, and petitioning the government for redress of grievances.

22. (U) Upon conclusion of the TSC's review, TSC personnel will either accept or reject the TSDB nomination. If a nomination is accepted, the TSC will create a TSDB record which includes only the "terrorist identifiers" (*i.e.*, name, date of birth, etc.). Because it is a sensitive but unclassified system, the TSDB does not include substantive derogatory

information or classified national security information. This means, as explained in more detail below, that government screening officers, such as CBP officers at ports of entry and state and local law enforcement, can use the identifying information from the TSDB even though they may not possess Secret or Top Secret security clearances.

23. (U) To uphold the directive in HSPD-6 to maintain "thorough, accurate and current" information within the TSDB, several quality control measures are continuously applied by nominating agencies, the TSC, and NCTC. These measures include periodic reviews and audits to guarantee the integrity of the information relied upon for maintenance of TSDB records, and an ongoing responsibility upon the nominating agencies to notify NCTC and TSC of any changes that could affect the validity or reliability of that information. In those cases where modification or deletion of a record relating to international terrorism is required, the nominating agency must immediately notify NCTC, which will process the request and transmit it to the TSC for action. For nominations relating to domestic terrorism, the FBI must follow applicable FBI procedures to request that a FBI-nominated TSDB record be modified or deleted. Additionally, the TSC regularly reviews every record stored in the TSDB to ensure that the nominating standards were met, and to correct or remove any record that does not meet those standards.

24. (U) Most of the derogatory information relied on by nominating agencies consists of operational facts derived from underlying international counterterrorism investigations or intelligence collection methods, which are generally classified to protect intelligence sources and methods. 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 and screening purposes. This allows government officials to access TSDB data for screening purposes without compromising an investigation or intelligence collection methods.

25. (U) Because the contents of the TSDB are derived from classified and sensitive law enforcement and intelligence information, the U.S. Government does not confirm or deny whether an individual is on the watchlist. Disclosure of an individual's watchlist status may reveal, as a general matter that an individual is of counterterrorism investigative interest to the U.S. Government. Revealing U.S. Government interest in a particular individual could also alert any terrorist group associated with the individual that they too may be under investigation.

26. (U) The disclosure of watchlist status could also provide the individual or associated terrorist group with the ability to identify the specific means by which the U.S. Government gathered information about them, thereby endangering classified or law enforcement sensitive sources and methods. By not disclosing the contents of the TSDB, the operational counterterrorism and intelligence collection objectives of the federal government are protected, as well as the personal safety of the officers involved in counterterrorism investigations. The TSDB is an effective tool in the U.S. Government's counterterrorism efforts in part because its contents are not disclosed to the public.

27. (U) Neither confirming nor denying that a person is in the TSDB protects the nature, source and methods of any intelligence gathering that occurred if the individual is or was the subject of a counterterrorism investigation. Publically revealing this type of

information could harm national security, because an individual or associated terrorist group could use a person's disclosed TSDB status to their advantage by allowing them to avoid future detection, destroy evidence, coerce witnesses, change plans from what is known by law enforcement or intelligence agencies, or recruit new members who are unknown to the Government. Releasing an individual's status could enable that person or an associated terrorist group to manipulate or circumvent enhanced airline or border screening procedures, thus increasing their ability to commit an act of terrorism.

28. (U) Furthermore, to confirm that someone is not in the TSDB would imply that silence about another person is actually a confirmation of their status in the TSDB. Confirming that an individual is not in the TSDB or the subject of a national security investigation would substantially harm law enforcement investigative and intelligence gathering interests because such knowledge would serve to encourage the commission of an act of terrorism and lead someone intent on committing an act of terrorism to move without detection. Knowing which members of terrorist group have escaped the attention of law enforcement and intelligence investigations will permit such groups to manipulate the system and provide an incentive for them to prepare for and commit an act of terrorism prior to being detected.

29. (U) Lastly, disclosing the underlying derogatory information used to nominate an individual to the TSDB would compromise ongoing or future intelligence or law enforcement operations and hinder the effectiveness of intelligence gathering methods by limiting the collection techniques used, informing targets of the U.S. government's range of intelligence capabilities, and encouraging the development of countermeasures.

REDRESS PROCESS

30. (U) The DHS Traveler Redress Inquiry Program (DHS TRIP) provides the public with a single point of contact for all traveler screening issues and is available at http://www.dhs.gov/files/programs/gc_1169676919316.shtm. This program acts as a mechanism for travelers who have experienced difficulties while traveling, such as delayed or denied airline boarding, screening problems at ports of entry, or being repeatedly identified for additional screening.

31. (U) Since there are many reasons why a traveler may seek redress, DHS TRIP works with DHS component agencies, such as CBP and Immigration and Customs Enforcement ("ICE") and other government agencies, including the Department of State and the TSC, as appropriate, to make an accurate determination about the traveler's redress matter.

32. (U) The TSC supports DHS TRIP by helping to resolve complaints that appear to be related to data in the TSDB. This interagency redress process is described in the *Memorandum of Understanding on Terrorist Watchlist Redress Procedures*[10], which was executed on September 19, 2007, by the Secretaries of State, Treasury, Defense and Homeland Security, the Attorney General, the Director of the FBI, the Director of NCTC, the Director of the Central Intelligence Agency, the Director of National Intelligence, and the Director of the TSC.

33. (U) Even though approximately 99% of DHS TRIP complaints do not relate to the TSDB, when a traveler's inquiry may appear to concern data in the TSDB, the matter is referred to the TSC Redress Unit, which assigns the matter to a TSC redress analyst for

[10] (U) A copy is attached hereto.

research.[11] Upon receipt of a DHS TRIP complaint, TSC Redress reviews the available information, including the information and documentation provided by the traveler, and determines (1) whether the traveler is an exact match to an identity in the TSDB; and, if an exact match exists, (2) whether the identity should continue to be in the TSDB or whether the status should be changed (for example, No Fly to Selectee).

34. (U) In cases where the traveler is an exact match to an identity in the TSDB, the TSC Redress Unit will provide copies of the complaint form and other relevant information to the nominating agency to assist in the resolution of the complaint. The TSC Redress Unit will then work with the agency that originally nominated the individual to be included in the TSDB to determine whether the complainant's current status in the TSDB is suitable based on the most current, accurate, and thorough information available. The TSC Redress Unit may ask the nominating agency to provide updated information or analysis, as well as for recommendations on addressing the complaint.

35. (U) After reviewing the available information and considering any recommendation from the nominating agency, 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. In such cases, TSC will only prepare a recommendation for the decision-making agency and will implement any determination once made. When changes to a record's status are warranted, the TSC will ensure such corrections are made, since the TSC remains the final arbiter of whether terrorist identifiers are removed

[11](U) The TSC does not accept redress inquiries directly from the public, nor does it respond directly to redress inquiries.

from the TSDB. The TSC will also verify that such modifications or removals carry over to the various screening systems that receive TSDB data (*e.g.*, the Selectee and No Fly Lists).

36. (U) After the TSC Redress Unit completes its review of the matter, DHS TRIP is notified of the recommendation so DHS TRIP may send a determination letter to the traveler. The determination letter provides as much information to the traveler as possible without disclosing the traveler's status in the TSDB or other law enforcement databases, or whether there is other government agency interest in the individual that may be considered law enforcement sensitive. The letter does not reveal the person's status because that could alert an individual, or any terrorist group the individual is associated with, to the fact that he or she is of investigative interest to the FBI or other members of the Intelligence Community.

PROCESS FOR U.S. PERSONS PROHIBITED FROM BOARDING FLIGHTS WHEN LOCATED ABROAD

37. (U) The TSC and the FBI, in coordination with the Department of State, DHS, TSA and CBP, developed policy on how to respond following an encounter with a U.S. person[12] who was prohibited from boarding a flight originating outside the continental United States (OCONUS) that was bound for the United States, due to their possible inclusion on the No Fly List. The goal of the policy is to proactively and quickly resolve the travel issues of U.S. persons located abroad who have been prohibited from boarding flights returning to the United States.

[12] (U) "U.S. person" here refers to a U.S. citizen or Lawful Permanent Resident (LPR).

38. (U//LES) SSI [redacted]

LAW ENFORCEMENT SENSITIVE
SENSITIVE SECURITY INFORMATION

[redacted]

39. (U//LES) [redacted]

40. (U//LES) [redacted]

41. (U//LES) SSI [redacted]

LAW ENFORCEMENT SENSITIVE
SENSITIVE SECURITY INFORMATION

[redacted]

42. (U//LES) [redacted]

Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of November, in Virginia.

CHRISTOPHER M. PIEHOTA
Deputy Director for Operations
Terrorist Screening Center

EXHIBIT C

PUBLIC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND ARJMAND,	)	
Petitioner,	)	
v.	)	No. 12-71748
U.S. DEPARTMENT OF HOMELAND SECURITY et al.	)	
Respondents.	)	

DECLARATION OF CINDY A. COPPOLA
SUBMITTED IN CAMERA, EX PARTE

I, Cindy A. Coppola, hereby declare:

1. (U) I am the Acting Deputy Director for Operations of the Terrorist Screening Center (TSC) and the current Unit Chief for the Nominations and Data Integrity Unit. I became a Unit Chief at TSC in July 2011. I have been a Special Agent with the Federal Bureau of Investigation (FBI) since 1997 and have served in a variety of criminal investigative, counterterrorism, and senior management positions.

2. (U) This declaration is based on my personal knowledge and my review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, FBI Special Agents, Federal Air Marshals, and/or other government agency employees or contract employees in the course of their official duties.

3. (U) Each paragraph in this declaration is marked with letters indicating the level of classification applicable to that paragraph. Paragraphs marked with a "U" are unclassified.

Paragraphs designated "U//LES//SSI" are considered to be "Unclassified//Law Enforcement Sensitive//Sensitive Security Information." [redacted]

4. (U) I make this declaration in support of the government's position in this proceeding, in which petitioner Raymond Arjmand challenges his alleged placement on a list of individuals suspected of ties to terrorism. The purpose of this declaration is to assist the Court in evaluating petitioner's claims by describing the consolidated terrorist watchlist created and maintained by the federal government; explaining how that list is created and used; and clarifying why information from that list, including whether an individual is on the list, cannot be publicly disclosed. [redacted]

5. (U) [redacted] The TSDB is maintained by TSC, a multi-agency federal government center that is administered by the FBI. TSC provides identifying information of persons in the TSDB to various federal agencies, including the Transportation Security Agency (TSA) and the U.S. Customs and Border Protection (CBP). Both agencies use that information in determining the appropriate level of security screening by TSA before boarding a commercial aircraft or for purposes of an inspection by CBP at the border. In 2009, after CBP officers conducted a primary inspection of Mr. Arjmand, he was referred for a secondary inspection for further scrutiny as he travelled from Canada to the United States. Mr. Arjmand filed a travel-related complaint using the administrative procedures for determining whether an individual is mistakenly being subjected to additional scrutiny while traveling. [redacted] For the reasons discussed below, disclosure of an individual's inclusion or non-inclusion in the TSDB would significantly impair the government's ability to investigate and counteract terrorism and protect transportation security. [redacted]

Overview Of The Consolidated U.S. Terrorist Watchlist

6. (U) The TSDB is the federal government's consolidated terrorist watchlist. The TSDB contains names and other identifying information, such as name and date of birth of individuals known or suspected to be or to have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism. The TDSB does not contain the underlying classified intelligence or other sensitive information that is the basis for the individual's inclusion in the database.

7. (U) Several federal agencies use information from the TSDB for a variety of national security and law enforcement purposes. As relevant here, U.S. Customs and Border Protection receives information from the TSDB for inclusion in its TECS computer database and may rely on that information when inspecting individuals at U.S. ports of entry and preclearance locations in foreign countries. TSA also relies on information in the TSDB in implementing aviation security procedures.

8. (U) The TSDB was created and is maintained by TSC, a multi-agency federal government center administered by the FBI. TSC receives identity information about individuals suspected of links to domestic terrorism from the FBI. Identity information about individuals with suspected links to international terrorism is supplied by the National Counterterrorism Center (NCTC), which serves as the central agency for gathering and analyzing all intelligence obtained by the U.S. Government pertaining to international terrorism.

9. (U) Upon receipt of this identity information, TSC reviews these nominations received from the FBI and NCTC, and conducts a review of the underlying derogatory information maintained by those entities to determine whether an individual meets the criteria for inclusion in the TSDB. Inclusion generally requires a determination that there is reasonable suspicion to

believe that the individual is known or suspected to be or have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism. That determination must be made on the basis of objective information.

10. (U) TSC's examination is particularly stringent in the case of a U.S. citizen, lawful permanent resident, or someone within the United States. In such cases, the relevant information must come from a source of known reliability or be corroborated by additional evidence. Similarly, before an agency may nominate a U.S. Person, a term that includes U.S. citizens and aliens who are known lawful permanent residents of the United States, the agency must abide by particularly stringent procedures, including review by the nominating agency's legal counsel or designated reviewer to confirm that an adequate basis exists for nominating the individual for inclusion. [redacted]

11. (U) As of January 27, 2013, there were approximately [redacted] persons listed on the TSDB. Of these, less than [redacted] %, or approximately [redacted], were U.S. Persons, which again includes U.S. citizens and aliens who are known lawful permanent residents of the United States.

12. (U) A subset of persons listed in the TSDB are placed on a No-Fly list when TSC determines that they pose a threat of committing a terrorist act with respect to an aircraft. [redacted] TSA may prohibit persons on the No-Fly list from boarding commercial aircraft. As of January 27, 2013, there were approximately [redacted] individuals on the No-Fly List, of whom approximately [redacted] were U.S. Persons.

13. (U) Another subset of persons in the TSDB is included in the Selectee List, which is used by TSA to determine which passengers should be subject to additional airport security screening. TSC places individuals on the Selectee List if it determines that they are [redacted].

As of January 27, 2013, there were approximately [redacted] persons on the Selectee List, of whom approximately [redacted] were U.S. Persons.

14. (U) Prior to the failed terrorist attack on a Detroit-bound aircraft on December 25, 2009, only persons on the Selectee List were subject to routine additional airport security screening before boarding a commercial aircraft. After this incident, the federal government expanded the number of persons in the TSDB who are subject to additional pre-boarding screening. These persons are included on the "Expanded Selectee List," which, as of January 27, 2013, included approximately [redacted] persons, of whom approximately [redacted] were U.S. persons.

15. (U) TSC and the nominating agencies seek to ensure the continuing accuracy of the information in the TSDB. An intelligence or law enforcement agency that nominated an individual to the TSDB because of suspected ties to international terrorism must promptly notify the NCTC of any information that might require modification or deletion of an individual from the TSDB, and the NCTC must then transmit that information to TSC. The FBI is likewise required to promptly notify TSC if it receives information suggesting the need to modify or delete a record from the TSDB with respect to an individual suspected of links to domestic terrorism.

16. (U) In addition, records in the TSDB are regularly reviewed to verify that there is adequate support for continued inclusion in the database. Those reviews are particularly frequent and thorough for the small fraction of TSDB records concerning U.S. Persons. [redacted]

17. (U) As directed by Congress, DHS has established a formal administrative process by which individuals may raise concerns regarding travel difficulties that they believe may have resulted from inclusion on the consolidated terrorist watchlist. Such individuals may make an

inquiry under the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). If the individual's name matches, or closely matches, that of a person listed in the TSDB, the inquiry is referred to TSC's Redress Unit for further review. In the case of individuals who are, in fact, included in the TSDB, TSC conducts an in-depth review to determine whether the person continues to meet the criteria for inclusion. As part of this review, the Redress Unit contacts the original nominating agency to ensure that its analysis is based on the most recent and complete information available. Where appropriate, TSC removes the individual from the TSDB or downgrades the individual's status.

18. (U) From the creation of the DHS TRIP process in February 2007 through May 4, 2012, 53,426 inquiry forms were filed, of which [redacted] were referred to TSC's Redress Unit. Of these, TSC determined that [redacted] individuals were properly watchlisted. TSC determined that [redacted] individuals were mis-identified (*i.e.,* improperly matched against an identity in the TSDB), and in those cases TSC notified DHS TRIP so it could take steps to prevent future misidentification. TSC removed or downgraded [redacted] individuals as a result of its review. An additional [redacted] individuals had already been removed from the TSDB prior to the filing of the DHS TRIP request. [redacted]

Petitioner's DHS TRIP Requests For Redress

19. (U) Mr. Arjmand filed a DHS TRIP inquiry form in December 2009 and a virtually identical DHS TRIP inquiry form in January 2010. The forms described an encounter on November 11, 2009, at the Montreal Airport, during which Mr. Arjmand and his wife were sent for a secondary inspection by CBP officers during preclearance for a flight to Los Angeles, California. [redacted] Records indicate that, on December 27, 2010, [redacted], he was sent for

a secondary inspection by CBP officers at the Los Angeles International Airport after arriving from Mexico. [redacted]

Harms To National Security Resulting From Disclosing Whether An Individual Is Listed In The TSDB And The Basis For Inclusion In The TSDB

20. (U) [redacted] Persons included in the TSDB are generally the subject of ongoing law enforcement or intelligence gathering investigations. To reveal that an individual is the subject of such an investigation could significantly compromise its effectiveness. Once aware that they are the targets of an investigation, individuals may alter the patterns of their behavior in order to hinder investigative efforts and may also take steps to destroy relevant evidence. Disclosure may also jeopardize the efforts of undercover employees who seek to establish and maintain the trust of the suspected terrorist, and, in some cases, may endanger the safety of undercover employees and other sources. Disclosure may also risk revealing law enforcement techniques and procedures. Individuals who learn that they are being investigated can often deduce the methods the government is using to monitor them, or the sources the government used to uncover their terrorist activity. [redacted]

21. (U) Disclosure of an individual's status on the No-Fly or Selectee Lists could also harm the government's ability to use the watchlist as a means of gathering additional information about individuals suspected of being connected to terrorism. [redacted]

22. (U) If the government were to identify an individual's status only when he is not listed in the TSDB, failing to acknowledge a person's status when he or she is in the TSDB would be tantamount to a confirmation that the individual is, in fact, in the database. It would also be of considerable value to terrorist groups to confirm which individuals are not the subject of ongoing investigations and who are thus more likely to escape scrutiny.

Relevant Privileges

23. (U) Because TSA screens commercial aircraft passengers using information from the TSDB and subset lists, it is my understanding that TSA has, pursuant to its statutory authority, designated an individual's watchlisting status as Sensitive Security Information, which is information the disclosure of which TSA has determined would "[b]e detrimental to the security or transportation." 49 C.F.R. 1520.5(a). It is also my understanding that TSA has designated some of the information in this declaration as SSI. Such information is protected from disclosure by statute and regulation. *See* 49 U.S.C. 114(r)(1)(C), 48 C.F.R. 1520.9(a)(1). [redacted] For similar reasons, the law enforcement privilege protects the underlying record information in this case. [redacted]

Executed this 4th day of February 2013 in Virginia.

_____
Cindy A. Coppola
Acting Deputy Director for Operations
Terrorist Screening Center

F6cgtanf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI, and AWAIS SAJJAD,

Plaintiffs,

v. 13 Civ. 6951 (RA)

LORETTA LYNCH, ATTORNEY GENERAL of the UNITED STATES, et al.,

Defendants.
----------x

New York, N.Y.
June 12, 2015
2:00 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

DEBEVOISE & PLIMPTON
Attorney for Plaintiffs
ROBERT SHWARTZ
-and-
CUNY LAW SCHOOL CLEAR PROJECT
Attorneys for Plaintiffs
DIALA SHAMAS and RAMZI KASSEM
-and-
CENTER FOR CONSTITUTIONAL RIGHTS
Attorney for Plaintiff
SHAYANA KADIDAL and BAHER AZMY

PREET BHARARA
United States Attorney for the
Southern District of New York
ELLEN BLAIN
SARAH NORMAND
Assistant United States Attorneys

(Case called)

THE COURT: Good afternoon. We're here for oral argument on defendants' motion to dismiss. As all of you know, and as many of you in attendance may know, there were initially two motions to dismiss: One for the defendants in their official capacity, as was just noted, and the other for defendants in their personal or individual capacities.

Earlier this month, the defendants moved to stay the official capacity claims. As they've explained, the government revised its redress procedures related to the No Fly List following the decision in *Latif v. Holder* in June of last year which held aspects of the then-existing procedures unconstitutional.

Each of the plaintiffs in the case took advantage of the revised procedures, and according to a letter I received two days ago, were told on June 8, 2015, that at this time the U.S. government knows of no reason you should be unable to fly. As a result, the plaintiffs now consent to a stay of the official capacity claims. We'll need to address how that aspect of the case is going to proceed, but I think we can do that at a later date. Today our sole focus will be the motion to dismiss the personal capacity claims.

First of all, I want to apologize in advance. I have a jury that's deliberating, so I may need to take some breaks during the course of oral argument, and I apologize for that.

I'll do it as quickly as possible. And I'll give you all the time you need today to make your arguments.

I know that plaintiffs would like different attorneys to address the different issues. I'm fine with that.

Would the government prefer that we do issues one issue at a time. So I'll hear the government first because it's your motion on a particular issue, plaintiffs' counsel to respond issue by issue.

Is that your preference?

MS. BLAIN: Yes. I think that makes most sense.

THE COURT: Why don't we do that and why don't we start with the *Bivens* issue.

MS. BLAIN: May I address the Court from the podium.

THE COURT: Absolutely. Please use the podium, and I just ask that you speak into the microphone. And anyone who doesn't have a seat, you are welcome to sit in the jury box if you'd like to do that.

MS. BLAIN: May it please the Court. My name is Ellen Blain, as I said, from the U.S. Attorney's Office arguing on behalf of the individual capacity defendants today, and we will start with the First Amendment *Bivens* claim.

Plaintiffs seek to hold 25 individual federal agents personally liable for money damages for claims based on the First Amendment and RFRA, which I know we'll address later, but both of these claims, however, fail at the threshold. First,

plaintiffs seeks to extend *Bivens* to an entirely new context. Neither the Supreme Court nor the Second Circuit has recognized a *Bivens* remedy sounding in the First Amendment noting repeatedly, in fact, that *Bivens* remedies are "disfavored" and rare.

THE COURT: Tell me how you would define the context. How broad? How narrow? How do you define the context?

MS. BLAIN: The context here is the context of the government's decisions regarding the composition of the No Fly List. That directly implicates national security concerns which the Second Circuit in *Arar* sitting en banc noted was a special factor strongly counseling hesitation before creating a new *Bivens* remedy here. In fact, the circuit said there would be a substantial understatement to say that one must hesitate before extending *Bivens* to the national security context.

Plaintiffs' claims allege that 25 individual federal defendants retaliated against the plaintiffs by putting them on the No Fly List, so the only reason the plaintiffs are on the No Fly List is for a retaliatory reason. In order to defend those claims, the agents would have to show that the plaintiffs were, in fact, on the No Fly List not for a retaliatory reason, but for a legitimate national security law enforcement related reason. That would unquestionably enmesh this Court in a review of the government's counterterrorism policies and procedures, the FBI's policies, and the decisions made

particularly with respect to these plaintiffs in determining whether or not each of these four plaintiffs was, quote, a "known or suspected terrorist" and had additional derogatory information against them which could include the capability of committing terrorist acts against this country with a commercial aircraft. That's what this context is. It's a challenge to the government's and these individual agents' determinations allegedly to include these plaintiffs on the No Fly List, and in that context, that strongly counsels against recognizing an entirely new *Bivens* remedy sounding in the First Amendment.

THE COURT: But aren't plaintiffs defining that harm more broadly?

MS. BLAIN: Your Honor, yes, they attempt to define this harm as retaliation and say it's of no moment, the Court need not recognize at all that what's happened here is the harm is an alleged placement on the No Fly List, but that is just unquestionably inpracticable and incorrect, because the only way for the agents to defend against this retaliation claim is to show that these individuals were placed on the list for a nonretaliatory, nondiscriminatory motive. So that implicitly and explicitly involves a review of the No Fly List procedures.

And it's particularly problematic where it's not just an allegedly retaliatory tool used by these agents against these particular plaintiffs, but it involves review of an

entire no fly redress scheme, an entire regulatory and statutory component that Congress has devoted particular attention to in the wake of the 9/11 attacks in particular.

THE COURT: Can I actually ask you a question about the remedial scheme in light of the new developments in this case. Now we have a new alternative remedial scheme. And I think that we'll all agree that part of the analysis of the *Bivens* remedy is the availability of the alternative remedial scheme. Do I know enough? I have your letter, but do I need additional briefing? Is there anything else that I need to know? Does the complaint need to be amended to learn more about that remedial scheme?

MS. BLAIN: No, your Honor. The Court need only, for this enterprise, engage in what the complaint alleges, and what the complaint alleges is an existing remedial scheme. That existing scheme, as the Court knows, has been revised, and the government has put in a letter explaining those revised procedures. There are additional details about the specifics of those revised procedures filed in other courts, particularly in *Latif* from the District of Oregon. However, that is outside the context of the four corners of the complaint, and the Court need not evaluate the remedial mechanism now. The Court need only evaluate whether Congress created an alternative means to redress the plaintiffs' harm, and Congress did that.

The remedial process is a separate issue. The

remedial process is an interagency involved, sort of, rejiggering of the no-fly redress process, if you will. But the enterprise before the Court is, What did Congress intend, what mechanism did Congress create? And Congress here created several alternative remedial mechanisms.

First, Congress directed TSA to establish a timely process for individuals to appeal the TSA decisions regarding security threats. That's 49 U.S.C. 44903(j). Congress also directed not only TSA, but also DHS, to establish a timely and fair process for a similar reason and to coordinate with TSA. That's 49 U.S.C. 44926. In addition, TSA administers this DHS TRIP process pursuant to numerous codes, and those are 49 CFR 1560.201-.206. Furthermore, Congress also passed another section, 49 U.S.C. 46110, which provides that any judicial challenge to a person's alleged placement on the No Fly List should go to the Court of Appeals.

This all indicates that Congress evaluated what redress processes should be available for people wrongly allegedly included on the No Fly List. And Congress intended that this process encompass all claims related to the national security determinations involved with including people on the No Fly List, involved in determining whether or not someone is a known or suspected terrorist and can commit commercial or terrorist activities with a commercial aircraft. That's the redress process that Congress did. And as the Supreme Court

observed in *Shipley*, the question before the Court is whether Congress has provided what it considers an adequate remedial mechanism, not what plaintiffs consider to be an adequate remedial mechanism, and it's particularly true here where Congress has devoted substantial attention to air traffic safety.

THE COURT: When I look at adequacy, do I look at procedural adequacy? Do I look at substantive adequacy?

MS. BLAIN: Simply the question is whether or not there is a means for redress of the plaintiffs' harm. It could encompass both procedural and substantive, but in terms of substantive, the redress process need not provide the plaintiffs with full remedies for all of their alleged harms. In other words, the redress process under the No Fly List procedures would not provide plaintiffs with damages. And the Supreme Court has held, and the Second Circuit has held, that that is fine; that that's not dispositive in terms of whether the redress process is adequate. It's more procedural, your Honor, but there is a substantive aspect to that, and here, there is both. There are numerous levels of review built into the regulatory scheme and there's also substantive redress, which ultimately happened here, and that is, a determination of whether these plaintiffs properly belong on the No Fly List. That's the harm and that's the harm that was redressed.

THE COURT: Anything else?

MS. BLAIN: Just briefly, your Honor. To recognize a *Bivens* remedy in this case would absolutely involve the Court, as I said, in an evaluation of the government's counterterrorism policies. And that presents a very difficult problem in cases where individuals file lawsuits against individuals because plaintiffs would seek discovery from these individuals. And the government in two cases, in *Ibrahim* and *Mohamed*, assert a state secrets privilege against that particular information.

Here, the individual defendants don't have custody or control over the information that they would need to defend against these claims. That information belongs in the custody and control of the agencies and the privilege, state secrets or otherwise, belongs in control of the agencies. The individual defendants would have almost no means to defend against any alleged retaliatory claim here, and that is particularly a strong, special factor counseling hesitation, as the Second Circuit said, from creating a *Bivens* remedy in this particular context, a challenge to the No Fly List procedures. Thank you.

THE COURT: All right. Thank you.

MR. KADIDAL: Good afternoon, your Honor. Again, I'm Shayana Kadidal with the Center for Constitutional Rights. I can address your questions and hopefully take the government's three arguments in turn: First, that the First Amendment is a novel context for *Bivens* claims; second, that Congress intended

DHS TRIP and perhaps the APA as an alternative remedial scheme; and then, finally, this hypothesized need to protect sensitive information that might come up in the course of defending this litigation and defending the listing determinations as a special factor counseling hesitation.

To begin with, our assertion is that the government is simply wrong that the Supreme Court hasn't recognized a First Amendment *Bivens* claim. In *Hartman* in 2006, the court very clearly states official reprisal for protective speech offends the Constitution when nonretaliatory grounds are insufficient, we've held that retaliation is subject to recovery as the but-for cause of official action. When the vengeful officer's federal, he is subject to an action for damages on the authority of *Bivens*.

THE COURT: How do you square that with the more recent language from *Iqbal* and *Reichle*?

MR. KADIDAL: *Iqbal* says we have not found an implied damages remedy under the free exercise clause. *Hartman* was the free speech component of the First Amendment. *Reichle* says we have never held that *Bivens* extends to First Amendment claims. One could conceivably read that as meaning all First Amendment claims: both free exercise, free association, free speech. I think it might just simply be an error. It cites to *Iqbal* and *Lucas*, but not to *Hartman*.

The worst the government can say about the language in

Hartman is that it's too summary, too quickly reasoned to be relied on, but it appears that the court was 7-0 on that point. The government doesn't claim it's dicta, it doesn't claim it's an argument -- or an assumption *arguendo*, and it's not. I think the court could have dispensed with the case on the *Bivens* issue and not reached what I think was a slightly more complex question of whether or not a retaliatory prosecution claim required the plaintiff to show absence of probable cause. Certainly, the language that the court uses that I just read doesn't, to me, indicate that that's not part of the holding.

You had asked what does a new context mean. It's a very good question. I don't know that there's necessarily any great guidance on it. Usually, the Supreme Court cases have talked about this in terms of invoking a new constitutional clause. I think *Wilkie* and the brief discussion in *Iqbal* tend towards that direction, maybe even *Arar* could be read that way since it's a substantive due process claim; on the other hand, *Arar* seems very tied up with the context of rendition. Cases that turn on kind of category of defendants also spend a lot of time talking about the specifics of the claim.

Here, I think it's not so important because, again, the Supreme Court has recognized a First Amendment claim and a First Amendment retaliation claim. The only thing that's new here is the tool that was used to retaliate. And as we say in our briefs, I think it would be a little bit difficult to

assume that the vast variety of retaliatory tools that the federal government could use automatically means that we're extending it to a new context. But there's certainly enough lack of clarity in the case law that this sort of issue could come out, I suppose, either way.

We think we still have the better of the arguments on the next two factors, whether Congress has intended an alternative remedial scheme and whether there are special factors counseling hesitation. So to turn to those arguments, the government claims that the TRIP 46110 process, and perhaps even the APA, should be viewed as signs that Congress intended to displace some *Bivens* action, even for retrospective claims, as to which its damages are nothing for the plaintiffs, and I think this is clearly a situation like that. We have argued in our briefs that retrospective relief for injuries needs to be adequate and effective, even if it's not complete. And the government has, to the contrary, argued that adequacy is utterly irrelevant.

Our office has litigated a good half-dozen cases like this. And there are certain arguments that reappear time and again that the government makes, and they always rely on two pairs of cases which I'd like to address in a little bit of detail. The first pair is *Bush v. Lucas* and *Schweiker* v. *Chilicky* where plaintiffs received some measure of monetary relief but not full compensatory damages. And the next pair

are *Stanley* and *Chappell*, the two military servicemen cases.

The first pair, in *Bush*, the NASA employee who had made a First Amendment retaliation claim had actually gone through a civil service process, had received backpay and even received reappointment to his job. And the Supreme Court said that he received a meaningful remedy, even though he couldn't receive more remote measures of damage such as emotional harm or punitives or attorneys' fees, which I think in the modern context, we typically understand is not available in *Bivens* anyway.

In *Schweiker*, Congress provided a process that could give the various Social Security disability claimants there who had been wrongfully terminated their back-disability payments. Now they didn't, again, get more remote measures of harm compensated and, certainly, in a sense in that case, there were some very emotional accounts of how difficult it was for these typically economically underprivileged people to be denied their benefits for a significant period of time. But again, I think it fits into this model of a meaningful remedy, an adequate and effective remedy if not a complete money damages remedy as we typically understand that term to mean consequential and punitive damages.

THE COURT: If I agree with you on the official capacity claims, which we're not dealing with today, and I agree hypothetically that you have subject matter jurisdiction,

you have injunctive relief available, right?

MR. KADIDAL: That's right, meaning assuming that the plaintiffs are still on the list.

THE COURT: Right. It assumes a lot, but my question is, does that not provide that remedy.

MR. KADIDAL: Right. Well, look, if it were the case that injunctive relief was enough, I think *Bivens* might have been decided differently. In *Bivens*, the plaintiff was complaining not only of a warrantless domestic national security surveillance, but also of the seizure of his person, and he would have had *habeas* relief.

I'm trying to remember the prison conditions claim. Give me a second. *Carlson v. Green*. Typically prison conditions are also addressable in *habeas*. There I believe *Carlson* might have passed away by the time the claim reached the courts. But, again, when I say that damages are nothing for those plaintiffs in those cases and for our plaintiffs, that typically means that they can't obviate the harm by seeking injunctive relief.

Here we have a situation where, for instance, Muhammad Tanvir filed a TRIP complaint and didn't receive his final notice under the old TRIP scheme until 19 months later, and what he got was a nonresponse really. It didn't tell him whether he was on or off. It didn't tell him anything meaningful that might have allowed him to decide, well, now I

can buy that international plane ticket and not worry about cancellation fees if I can't board.

So, again, the fact that theoretically injunctive relief might have been available through some process doesn't remedy the retrospective harms here, the fact that for years these clients lost out on plane tickets, couldn't travel to visit family, suffered stigmatic harm. Shinwari and I think Algibhah have talked in some detail in the complaint about how they were sort of shunned by the community, lost the ability to associate because of the stigma that hung over their heads from being on the list.

THE COURT: If you were to succeed on RFRA, does that change the analysis on *Bivens*?

MR. KADIDAL: Well, at worst, RFRA would cover one prong of the three that we've mentioned in our first cause of action. There are paragraphs that relate to free speech, to free association, to free exercise. But the question in looking at these alternative remedial schemes is what did Congress intend.

And it's possible, I suppose, that someone could look at the continued existence of RFRA which was passed I think before the modern No Fly List and was intended I think very clearly to overturn the one Supreme Court decision that lowered the First Amendment protection for free exercise claims; it's possible, I suppose, to maybe look at a statute like that and

say, well, it may have also been intended to deal with a situation like this, but it seems quite remote to me. And at worst, it would deal with the free exercise component of our first cause of action rather than the free speech component, which, again, I think is clearly covered by *Hartman* and the free association component, which free association claims have always been viewed as kind of intertwined with free speech.

Does that answer your question?

THE COURT: Yes.

MR. KADIDAL: Okay. Just to return to the thread here, the plaintiffs in *Bush* and *Schweiker* all got something in the way of monetary relief for their retrospective injuries, even if they didn't get full consequential and punitive damages. They got compensatory money which is less than full damages. Again, as we said in our brief, that I think meets the adequate and effective, but not necessarily the complete, standard. And it probably also applies them to the Second Circuit's decision in *M.E.S. v. Snell* where there's a Contracts Dispute Act claim that provided meaningful remedies for broken contracts with the government.

The other pair of cases that are constantly cited by the government in *Bivens* claims, and here as well, involve internal disputes between the military and its own servicemen. Those are *U.S. v. Stanley* and *Chappell v. Wallace*. In those cases, the Supreme Court said the concern with litigating

Bivens claims in federal courts was that it might disrupt the military's unique disciplinary hierarchy. Servicemen might know - and these were all enlisted men - that the actions of their superior officers might ultimately be questioned in court. Those superior officers might be hailed into court in discovery and so forth. So it is *Stanley* that the government cites to in its opening brief when they say it's irrelevant to a special factors analysis whether laws currently on the books afford an adequate federal remedy for its injuries. So that's their authority for the idea that adequate isn't really the standard here.

But what the government allies with an ellipsis is the phrase "*Stanley* or any other particular serviceman." So the quote is actually, "It is irrelevant to a special factors analysis whether the laws currently on the books afford *Stanley* or any other serviceman an adequate federal remedy for his injuries." The Court goes on in the next sentence to say "The special factor that counsels hesitation is the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."

And those servicemen cases have been relied on by many other circuits in deciding that - for instance, military detention cases, the *José Padilla* case, *Lebron* in the Fourth Circuit, *In Re: Iraq and Afghanistan Detainees Litigation* or any number of former Guantanamo detainee damages cases - that

those cases shouldn't be recognized in *Bivens* because they involve military detention, but I think that's sort of a subset of these two military servicemen cases, *Stanley* and Chappell.

Wrapping this up, the most important point I want to make today is that the worst language throughout the case law in the circuits and in the Supreme Court about the adequacy of alternative remedial schemes comes from these military cases or is extrapolated from *Schweiker* and *Bush* where, again, the plaintiffs were seeking compensation for denial of payments owed by government - in one case to an employee and in another case to benefits recipients - and they got restoration of statutory rights in both cases as *Schweiker* put it, and they got some monetary relief for those retrospective harms. So it wasn't a situation where they got nothing rather than damages; it's just that the measure of their damages was limited to consequential damages rather than full compensatory damages.

Here what we have proposed as a remedial scheme is certainly not enough to manifest the clearly discernable will of Congress, as the *Davis* case puts it; that this TRIP 46110 process displace the retrospective relief that we're seeking in *Bivens*. The statute here, 46110, was passed in 1958. It has no relevant modification since 9/11, so it predates in substance the current No Fly List and the existence of the TSA itself. In fact, the TSA isn't mentioned in the text of the statute, although it's always been understood that since

various powers were delegated from FAA to TSA, that TSA orders fall within the ambit of 46110. Again, if this kind of purely prospective relief were enough, both *Bivens* and *Carlson* I think would have been decided differently because the *habeas* statute was there to address some of those claims prospectively.

There might also be different case law in the various cases where the government has claimed that the Immigration and Naturalization Act should displace a *Bivens* remedy because it allows some form of prospective relief. For instance, a case where we won at the district court level, and it's pending appeal in the Second Circuit, *Turkmen v. Ashcroft*, the government made this sort of argument about plaintiff's free exercise claims. And Judge Gleeson recognized a First Amendment free exercise Bivens action and said that there wasn't anything that he saw in the remedial scheme of the INA that should be allowed to displace it.

The same arguments I think apply to the Administrative Procedure Act. I won't delve into detail there. I think the government's cases all involve situations where specific relief was probably enough for the kind of things that those plaintiffs complained about.

That brings us finally to the special factors counseling hesitation. And what the government's argued in its briefs is, one, that the remedial process under DHS TRIP and 46110 is a special factor. I think I have already addressed

the reasons why that shouldn't be the case. There is a certain conflation of special factors and alternative remedial relief in the government's briefing. I think some of that is down to a little bit of obscurity from the Supreme Court. Certainly *Schweiker* sort of blurs the lines between those two. But putting that to one side, I think the problem with their assertions about the need to protect sensitive information is that it's a hypothesized need at this point.

I think it bears repeating that as we pled it, this is essentially a civil rights action, not a national security action. It challenges the actions of low-level agents, not the policy of maintaining a No Fly List. The plaintiffs have said in their pleadings that they don't pose a threat to national security and I think their recent delisting or the recent notice that they are not on the list anymore is consistent with the pleadings in that regard. And it's just a further sign that the litigation of their claim shouldn't be presumed at this early stage to involve information that's so sensitive that federal courts should not recognize any cause of action for retaliation using the tool of the No Fly List.

Now, the defendants place tremendous weight on one sentence in the *Arar* en banc decision stating, "The only relevant threshold that a factor counsels hesitation is remarkably low." But if that were the rule, as the government interprets it, then no *Bivens* claim I think would ever go

forward and the *Arar* decision wouldn't have been as difficult as both the majority and the dissenting opinions in the en banc held that it was.

I think we would contrast that with what we cite is the operative standard, the Supreme Court's most recent general pronouncement in 2007 in *Wilkie v. Robbins* where they instructed that in a special factors analysis, federal courts should weigh reasons for and against the creation of a new cause of action the way common law judges have always done.

And as to that language in *Arar*, certainly the majority and the dissents disagree about whether or not it's dicta in the context of that case. I suppose no majority opinion has ever announced that a sentence in it is dicta. I think in that case, which was a very emotional case for the judges, not in the least for people in our office as well, one can find in each set of opinions something to support arguments all along the spectrum of the special factors analysis. And I think what we really got to do to interpret what the decision means is look at what was really dispositive to the majority in deciding that. And that's all contained very compactly in section 13 of the opinion at the very end where Judge Jacobs says after agreeing with the dissents that there's a long history of judicial review of foreign relations and national security issues in federal courts, he says, Where does that leave us? We recognize our limited competence, authority and

jurisdiction to make rules or set parameters to govern the practice called rendition.

Why was that difficult? I think the two primary reasons that come out of the opinion are, first, on the facts of that case, it involved torture of a dual foreign citizen on foreign soil that was carried out by agreement with various foreign allies, proof of which would have, I think, necessarily involved evidence of diplomatic exchanges between Canada, the United States, perhaps Jordan and Syria, all of those countries essentially conspiring to have *Arar* tortured in Syria based on information provided by the Canadian government. So exceptional diplomatic sensitivity that was obviously present on the pleadings that would obviously have to be sorted through if that case were to be litigated further than it was.

Then the second factor was, as we emphasized in our briefs, the defendants included high-level policymakers who were actually quite deeply involved in the decision to render *Arar* such that suit against them would effectively be holding the government liable, not the individuals, or, as both the majority opinion and I believe Judge Pooler's opinion say, it would be creating a *Bivens* analogue to *Monell* in institutional or enterprise liability in the Section 1983 context. Those are all factors that aren't present at all here.

If we ask, as the *Carlson* court asked, do the defendants enjoy such independent status in our constitutional

scheme that we don't want to hail them into court on judicially implied or judicially created remedies. Here, they don't. They're FBI agents, not policymakers or personifications of another branch of government. The FBI agents were the classic *Bivens* defendants. They were the defendants in *Bivens* itself.

I think when we are forced to dig down to specifics, the government --

THE COURT: Aren't the concerns that the government has different than in *Bivens*, more serious on a long-term scale than on *Bivens*?

MR. KADIDAL: I don't know that we can say that on the pleadings actually. *Bivens* was supposedly engaged in plotting to carry out bombings inside the United States and I believe to kidnap Secretary of State Kissinger. The wiretapping there was warrantless, domestic national security wiretapping of the sort that between the time it happened, I suppose, and the time the case was filed, was subject to at least the district court and maybe Court of Appeals decisions in *Keith* where the Supreme Court announced, maybe to the surprise of most onlookers, that that sort of surveillance was actually subject to the warrant requirement. So I think it's very sensitive intelligence-gathering, stuff that appears to be as sensitive as you can get in terms of domestic terrorism investigations.

Whereas here on the pleadings, our claims are basically that the FBI agents wrongly nominated our clients to

the list in order to be able to twist their arms. In the complaint we discuss, I think at paragraph 49, how in the *Ibrahim* case, basically she ended up getting listed by a wrong box being checked on a form, and yet it took her years to get off of it. So there may have been mechanisms here for FBI agents to list our clients that didn't involve even fabricated intelligence concerns.

The government said here at the podium that the reasons for placing plaintiffs on the list would certainly get into the risk of terrorism with respect to an aircraft. If you look at the government's most recent disclosures about the standard that's applied here, and I think the best exposition of this is in some of the briefs filed two weeks ago in *Latif*, they actually say that the threat of committing an act of terrorism, as defined in this panoply of federal terrorism statutes, is enough to put you on the list. It doesn't have to have anything to do with an aircraft. So it could conceivably be something like providing material support in the form of personnel or services, which those statutes are so broad that it could be associational evidence, I suppose, that's mustered against clients.

So I don't think it's necessarily the case that extraordinarily sensitive intelligence or diplomatic information is necessarily going to be the subject of litigation here. And if it turns out that it is as the

discovery process proceeds, I think if a cabinet-level official is willing to place his or her name and reputation behind an affidavit, the details of the case, then we can litigate the state secrets privilege, which, as counsel noted, has been invoked in at least two other No Fly List cases.

It's not the case, I don't think, that it's impossible for the United States government to come in and try to assert that in this case. In the NSA surveillance litigation, the way that happened -- or just to give you a tangible example, there was some litigation in California against just the phone companies as defendants invoking various federal statutes that allowed for liquidated damages for each instance of surveillance. The United States government moved to intervene in those cases and then asserted the state secrets privilege. I think that sort of process is probably typical where it is required, but again, on the pleadings here, I don't know that it's necessarily required at all.

One final note on the state secrets privilege, the four plaintiffs here have five lawyers with either current top-secret SCI clearances or secret-level clearances, which hopefully would aid in the litigation of this case if some level of classified information were required in sorting through the facts. We remind the Court, as the Wright & Miller Treatise puts it, that in camera doesn't necessarily mean ex parte in camera. The fact that we have clear counsel here I

think can allow for some level of litigation of classified matters, should that come up. Again, I don't know that on the pleadings we can necessarily expect that that will come up; for instance, the fact of a No Fly Listing in the past for these clients is FOUO according to some of the government's briefs filed in *Latif*.

THE COURT: Thank you very much.

Would you like to respond?

MS. BLAIN: Yes, briefly, your Honor. Four things: First, plaintiffs spend a lot of time arguing about the adequacy or perceived inadequacies of the remedies here, but that is entirely irrelevant because even if the Court were to find that the redress process via a DHS TRIP were inadequate, that is not dispositive because the Court still has to ask itself if special factors counsel hesitation here, and that's why the *Arar* en banc decision is so vital. *Arar* found that there may be alternate redress procedures for the plaintiff in that case, but it wasn't going to opine on that because the second prong of the *Bivens* inquiry was dispositive, and that is that there were special factors counseling hesitation there, just like there are special factors counseling hesitation here.

THE COURT: How do you respond to plaintiffs' allegations about that issue?

MS. BLAIN: The fact --

THE COURT: Their arguments that were just made about

those factors.

MS. BLAIN: Number one, the argument that the Second Circuit said that in dicta that the threshold was remarkably low is incorrect. The Second Circuit explicitly held that the threshold for a special factors analysis is "remarkably low." That is not dicta. That is a holding.

Second, plaintiffs seem to ignore that the government asserted the state secrets privilege in other cases about the same information that the plaintiffs have already sought here. So in connection with the personal jurisdiction motion, which I know the Court has put on hold pending resolution of this motion, the plaintiffs ask for information about the FBI's policies and procedures, and those are directly implicated in how the FBI goes about evaluating whether to nominate someone to the No Fly List. That is just unquestionably the information that would be in play here.

And the other cases -- let's take it one at a time. In *Ibrahim*, the government asserted state secrets privilege over classified information about why the professor was placed on the list, but the court found that because it turned out that she was placed on the list for an inaccurate sort of mechanism, that someone checked the wrong box, in effect, the trial could go forward about that issue and didn't need to look at the classified information.

In *Mohamed*, the government has asserted the state

secrets privilege and that assertion remains pending. The court there has recently asked for much additional briefing on it and there are additional documents that the government has submitted in camera and ex parte. So it's simply not the case that any litigation has ever gone forward on the merits about the reasons for someone's placement on the No Fly List. It just hasn't happened, and there are good reasons for that.

Third, the plaintiffs' recent delisting is entirely irrelevant to the question of whether or not the Court should recognize a *Bivens* remedy for this particular harm.

Finally, the Second Circuit has found that for the Court to evaluate whether to recognize a *Bivens* remedy, it needs to evaluate whether or not there is an alternative remedial scheme or "any other special factor." So it does remain a fact that special factors have been applied to both a remedial scheme and the national security and other reasons that counsel hesitation, so just a side note.

Let's look at the *Arar* case and the *Wilkie* case. In *Wilkie*, the Supreme Court also opined there were possible ways for plaintiff in that case to get relief, but the court again found there was no reason to opine on that because special factors, other special factors, specifically counseled hesitation and that was, how does the court evaluate to determine what a deprivation of a property right is. So because there was not any reasonable way to define the

constitutional right at issue, the court found that that was a special factor counseling hesitation against creating a *Bivens* remedy. You don't want to create a *Bivens* remedy against a federal official for violating a vague, unconstitutional right.

In *Arar*, the court, the dissent actually took issue with the majority in finding that the context of that case was extraordinary rendition focusing on the context at this point. And the majority said no, no, the context here is extraordinary rendition. It can't be broader, that's what it is, because any allegation or any litigation about why this person was extradited would involve information, classified information about the government's extradition policies and procedures, which are the same types of policies and procedures that the plaintiffs have already sought here about the government's procedures regarding the No Fly List.

Even if the Court were to find that 46110 didn't apply, even if the official capacity claims were still live, then the plaintiffs would also have an additional remedy here, as the Court I think was glancing towards, and that would be the APA. The APA provides under Section 7026 that the plaintiffs can seek to "set aside any final agency action found to be contrary to constitutional right, privileges or immunity." So there is another way that plaintiffs, even if 46110 didn't apply, for plaintiffs to seek redress for alleged harms for placement on the No Fly List.

But again, your Honor, there's two questions here: One, is there an alternative remedial mechanism, is that adequate? But even if that's not adequate, which I know plaintiffs are obviously arguing, the Court still has to look at whether or not there are special factors counseling hesitation, keeping in mind *Arar*'s pronouncement that that threshold is remarkably low.

THE COURT: Where should I be factoring in a deterrence rationale? There are cases as recent as 2012 where the Supreme Court recognized that *Bivens* has a deterrence rationale. So what's the deterrent effect here of the statutory scheme?

MS. BLAIN: The Court need not recognize a *Bivens* remedy just to establish a deterrence against alleged retaliation for use of the No Fly List. The question really is, what did Congress intend the remedy to be. And Congress actually looked at whether or not to create a civil remedy here in terms of the No Fly List procedures and the redress procedures and determined not to do that. That is a strong enough indication of congressional intent that the Court need not look at the issue of deterrence. That's a special factor counseling hesitation.

THE COURT: All right. Thank you.

MS. BLAIN: Thank you.

THE COURT: Do you want to take over on RFRA?

MS. BLAIN: Sure. RFRA does not provide for claims against individual federal employees in their personal capacity. The text of the statute doesn't support that reading, the legislative history in the statute doesn't support that reading. They all make clear, both the text and the legislative history make clear that this law was directed towards laws of mutual application to restore the compelling interest tests the Supreme Court jettisoned in *Employment Division v. Smith* to laws of mutual applicability.

THE COURT: You talked about text. Doesn't the text track the language in 1983?

MS. BLAIN: Your Honor, it only does that in two places, and the plaintiffs would have the Court read those two words in absolute isolation from the whole purpose and rest of the text of the statute. So, it is true that RFRA does talk about person and it is true that RFRA says under color of law, but let's contrast that with 1983. 1983 says that a person "shall be liable for any action at law." It doesn't mention government. It doesn't mention official. It does talk about under color of law and person, but again, it actually explicitly mentions liability and action at law, which is absolutely absent in RFRA.

Furthermore, person in and of itself, doesn't automatically mean individual capacity claims. As the Supreme Court ruled in *Hafer* and in *Stafford* and multiple, multiple

cases, the Court needs to look at the purpose of the statute as a whole. And getting back to the purpose of the statute as a whole as Congress explicitly stated, it is to restore the compelling interest test as set forth in *Sherbert* and in *Wisconsin* and guaranteeing its application in all cases where free exercise of religion is substantially burdened.

Person in and of itself does not necessarily mean a person in an individual capacity. There is no congressional intent to make that connection. Similarly, under color of law, plaintiffs cite to one case.

THE COURT: Stick to persons for a minute. What about the *Sutton* case from the Ninth Circuit?

MS. BLAIN: The *Sutton* case from the Ninth Circuit --

THE COURT: It found that under RFRA, person should be interpreted as tracking 1983.

MS. BLAIN: That case, I believe, was decided -- it assumed, without deciding, that RFRA does apply, so they could evaluate whether or not the defendants there were entitled to qualified immunity. There's really only been one case where any court has analyzed whether RFRA provides for individual capacity claims in any detail, and that's the *Mack v. O'Leary*, a Seventh Circuit case.

In that case, the circuit spent a grand total of four sentences evaluating whether or not RFRA provides for individual capacity claims, and that court is wrong for four

reasons. First, it was decided -- it's no longer good law because it was reversed on other grounds by the Supreme Court in 1997, so it's questionable whether or not that's relevant even today in the Seventh Circuit; second, in that case, the defendants didn't even contest whether or not RFRA provided for individual capacity claims, so there was no briefing on the issue; third, the Court itself expressed skepticism about whether or not RFRA creates individual capacity claims noting that Congress did not explicitly say so; and finally, that case was decided before the crucial cases *Sossaman* in the Supreme Court in 2011 holding that RLUIPA, RFRA's companion statute, does not provide for money damages against state governments, before *Washington*, the Second Circuit case where the Second Circuit decided that RLUIPA does not provide for individual capacity claims, and before the Sixth Circuit, the D.C. Circuit, the Ninth Circuit, and the Eleventh Circuit and a case in the Southern District found that likewise RFRA does not provide for money damages against the federal court.

Mack v. O'Leary is simply old and incomplete. That is the only circuit case to evaluate whether or not RFRA creates individual capacity claims and its reasoning was brief and flawed.

I will say that the courts interpret RFRA and RLUIPA similarly. And the statutes share a common purpose, a common stated goal. Neither operates a waiver of sovereign immunity.

Neither expressly authorizes suits against individuals. And as the Ninth Circuit and as the Supreme Court recently in *Hobby Lobby* held, when two statutes share a similar purpose, they should be interpreted similarly. And here, because RLUIPA - as the Second Circuit has held - does not recognize individual capacity claims, RFRA should be interpreted the same way.

There's simply no congressional indication whatsoever that they intended to hold individual actors liable for money damages because that would have the anomalous result, unintended by Congress, of making individual federal employees the only class of defendants subject to monetary liability. State governments are not subject to it, federal governments are not subject to it, state individual actors are not subject to it. So only federal employees would be subject to monetary damages under RFRA under plaintiffs' reading, and that's just unsupported.

THE COURT: To stay on your analogy to RLUIPA for a minute, the circuit's holding in *Gonyea* was based on the exercise of Congress' spending power. Isn't that distinguishable?

MS. BLAIN: Your Honor, not when the two statutes have the same common purpose and a common goal, and the common goal here is, again, to restore the compelling interest test as set forth prior to *Employment Division v. Smith*. So, yes, while the Second Circuit did find that RLUIPA does not create money

damages based on the commerce clause, that's a distinction without a difference in the context of why these two statutes were passed and the absence of congressional intent otherwise. Thank you.

MR. SHWARTZ: Good afternoon. I'm eager to address the government's arguments on the availability of money damages claims under RFRA, but if I may take two minutes on just a preliminary matter, and thank you for permitting us to split the arguments as you have.

There are four plaintiffs in this case. Three of them are present in the court. I'd like to introduce them. The fourth, Mr. Muhammad Tanvir, is working. He's a cross-country trucker and is not here, but he is represented here today by his sister and two of his nieces who are also here.

THE COURT: Go ahead. You're free to introduce them.

MR. SHWARTZ: Mr. Tanvir, who is not here, is represented by his sister and two of his nieces. Mr. Tanvir is originally from Pakistan. He's in this country as a permanent legal resident. He is married with child here. His parents, however, continue to live in Pakistan, which, of course, is germane to what they had to endure for the years when they have been on the No Fly List.

Mr. Jameel Algibhah is here.

THE COURT: Good afternoon.

MR. SHWARTZ: He hails from Yemen originally. He's a

U.S. citizen. His wife and three daughters still live in Yemen, which, obviously, has made it hard for him to maintain normal relations and contact with his wife and three daughters. He is actually in the process of applying to medical school, and the recent news that he's no longer on the No Fly List will certainly make it easier if he is accepted to actually attend and get to the medical school.

Mr. Naveed Shinwari is here.

THE COURT: Good afternoon.

MR. SHWARTZ: He is originally from Afghanistan. His wife is in Afghanistan. He also, as did some of the other plaintiffs, lost his job as a result of his original being put on the No Fly List.

And, finally, Mr. Awais Sajjad is here.

THE COURT: Good afternoon.

MR. SHWARTZ: He was here at a prior court appearance, your Honor will recall. He is originally from Pakistan, like the other plaintiffs, is a permanent legal resident of the United States, Mr. Algibhah being a U.S. citizen. He has relatives, including a grandmother in her 90's who raised him who is still in Pakistan. He's hopeful he's now going to be able to visit her. He works in this country. He manages a gas station and a mini-mart.

These are the people who bring this action, your Honor. These are the people who have, until four days ago,

when they received the letter that your Honor's familiar with, which the government has confirmed, delists them or confirms that they are no longer on the No Fly List, who have had to deal with the stigma and the pain and suffering and economic loss of being on the No Fly List for years despite efforts over several years predating this lawsuit to try to get off of the No Fly List.

The nature of those sufferings and losses not only includes the enforced separation from loved ones and family, the lost income, job opportunities, career opportunities, lost or delayed educational opportunities, in addition to the out-of-pocket costs for forfeited airline tickets, disrupted travel plans, etc. And that doesn't speak to the stigma of being treated as if they were threats to aviation security, which thankfully the government has now acknowledged is not the case.

They never should have been on the No Fly List. It's our contention they never should have been on the No Fly List and they should have been taken off of it years ago. The only reason -- and these are the allegations in our complaint -- that they were put on the No Fly List is because various FBI agents punished them and put them on the No Fly List when they refused to become informants in their own mosques, in their own American Muslim communities here.

We have sued those agents, your Honor, in their

individual capacity for their active involvement in the decisions in that scheme to retaliate and put these people on the No Fly List. We're not seeking to punish them for honest mistakes. We understand there's latitude for honest mistakes made in good faith. It's our contention, and we believe the proof will show, and we think the events of last Monday are supportive of this, that there was never any good-faith basis for putting them and treating them on the No Fly List.

Today I'll turn to focus on the issues relating to the personal capacity claims and, specifically, the claim that three of our four plaintiffs -- Mr. Sajjad is not a plaintiff under the RFRA statute -- but the other three plaintiffs assert a claim for money damages against the specific agents who dealt directly with them and contributed to placing them and keeping them on the No Fly List when we contend there was no basis for doing that, other than to retaliate against them; and the consequence is they were punished in the exercise of their First Amendment free exercise rights.

Your Honor, Ms. Blain's arguments I think boil down to four categories: She argues the text doesn't support such claims; that the legislative history and purpose doesn't support such claims; she argues either that there are no RFRA precedents supporting monetary claims against individuals in their individual capacity; and, fourth, she argues that the Court should follow precedents under a different statute, the

Religious Land Use and Institutionalized Person's Act or RLUIPA, if that's a fair acronym by which to call it. All of those arguments, your Honor, are without merit, and I'll address them each in turn.

First of all, with regard to the text of the statute, I would have thought that the text was pretty clear about the right to bring a claim. There is certainly a section entitled "Judicial Relief," which specifically authorizes that a person whose religious exercise has been burdened in violation of this law may assert a claim for violation of this law and, and I quote, "obtain appropriate relief against a government." A government is a defined term in the statute, as I'm sure your Honor already appreciates, and that definition of government specifically includes officials or other person acting under color of law.

I don't believe the government is contesting that FBI agents don't fit squarely within that category. They do. And obtaining appropriate relief, it is true that the statute doesn't define appropriate relief. It is also true that in American juris prudence, the ordinary appropriate relief is money damages. And there are some instances where only injunctive relief is appropriate. There are some instances where Congress has deemed money damages should not be available. When Congress does that, of course - and we have cited numerous examples, I can bring the Court's attention to

them, but they're in the brief - various statutes where Congress created causes of action and expressly carved out the right to seek money damages. There's no such carveout here. It simply says "obtain appropriate relief." It doesn't limit it to injunctive relief at all. In fact, normally one would assume appropriate relief is money damages absent a showing that money damages are inadequate.

Of course, in this case, now that the government has finally acknowledged that these plaintiffs ought not to be on No Fly List and they have, I understand, been removed from the No Fly List, these individuals will have no remedy available for the harm they have suffered, which I just mentioned in very broad terms, unless there is some opportunity for compensatory relief. There is no injunctive relief that's going to give back the years they have lost separated from loved ones, the job opportunities they have missed, the educational opportunities they have missed. Monetary relief is really the only appropriate relief for that retrospective harm that cannot be undone by what we are grateful happened on Monday where the government finally acknowledged these people are not on the No Fly List any longer.

THE COURT: Let me ask you, I assume you accept that the purpose of RFRA was to restore the compelling interest test fit after *Smith*. So how does creating a claim for personal capacity damages fit with that purpose?

MR. SHWARTZ: Well, I think when one looks at *Employment Division v. Smith*, the Supreme Court decision that essentially rolled back the protections that were available, Congress reacted to that decision and by RFRA, attempted to restore or reinvigorate the application of the full protection of First Amendment free exercise rights. There were cases that preceded RFRA, that preceded *Smith* in which courts awarded and recognized compensatory damages for the exercise of First Amendment free exercise rights. We cite some of them in our brief. *Bivens* and its progeny was certainly a mechanism by which individuals could receive compensatory relief. 1983 was used in a variety of ways.

THE COURT: Can you point me to any cases where the Supreme Court or a Court of Appeal actually awarded damages under *Bivens* for a First Amendment claim before RFRA was passed?

MR. SHWARTZ: Actually awarded monetary damages? I don't think I can, but there are a number of cases where the Court recognized the plaintiff's right to seek compensatory damages pre-RFRA: *Jihaad v. O'Brien*, which is a Sixth Circuit case in 1981, I believe it's cited in our brief, but I can add to the record the citation if your Honor wishes.

THE COURT: I'm sure it's in your brief.

MR. SHWARTZ: I believe it is. *Sutton* v. Rasheed, which is a Third Circuit case in 2003; and *Jamal v. INS*, which

is probably the most exhaustive analysis of this issue itself refers to pre-*Smith*, pre-RFRA cases that recognize there was compensatory relief available for intrusions and violations of free exercise rights under the First Amendment. It's hard to believe that Congress, when it was trying to reinvigorate the protections around the First Amendment and the free exercise rights actually, as the government would have you accept, chose to narrow the scope of remedies available for individuals whose free exercise rights had been infringed on.

There's nothing in the legislative history to suggest that Congress, when it adopted RFRA, was trying in any way to narrow the protections; to the contrary, it was trying to reinvigorate and it assured that the protections were there.

THE COURT: Well, the legislative history also makes clear that there was no intent to expand the definition, right? I think one statement in the Senate Judiciary Committee Report stated "To be absolutely clear, the Act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise juris prudence under the compelling interest standard test prior to *Smith*."

MR. SHWARTZ: We think that's helpful, your Honor, because, in fact, there were pre-RFRA cases that recognized the right to seek compensatory damage for infringement on First Amendment rights.

Now, you asked a narrower question about whether I could cite a specific Supreme Court case where there was a judgment awarding such damages. I'm not aware of any case that actually resulted in a judgment awarding compensatory damages. Most of these cases reach resolutions in a variety of ways before getting to final judgment. But courts that have spoken to this issue before RFRA and those after who have looked back at the pre-*Smith*, pre-RFRA period have been clear that there were such a remedy available and found no support in RFRA or its legislative history to suggest the intention on Congress' part to narrow or draw back on those available remedies.

I have moved from the text arguments onto the history and purpose, and I think I've covered the points that needed to be made there. Let me turn to the government's arguments that there are no RFRA precedents, no precedents under this statute, the statute before your Honor, recognizing the right to monetary damages against individual federal officials and other persons acting under color of law when they are sued in their individual capacity. That's just inaccurate. The government may wish to distinguish or try to persuade your Honor why a number of the cases that have been issued, all of whom are in complete agreement that there is such a right to compensatory damages against such persons when sued in their individual capacity, but every court that's issued an opinion on this has found such a right, not in every case because appropriate

relief -- admittedly we're not saying that monetary damages is going to prove to be the appropriate relief in every case, but in this stage in the proceedings where the government is seeking on a motion to dismiss to deny us, as a matter of law, the right to pursue a claim against FBI agents whom we have alleged with specificity engaged in a retaliatory set of acts that resulted in our clients wrongfully being placed on and/or kept on the No Fly List for years, there's no support for the proposition that monetary damages might not be appropriate relief for what those people did in denying my clients their right to free exercise of their religious beliefs.

Mack v. O'Leary from the Seventh Circuit, yes, it was reversed on other grounds, but not on this ground. And while the government may wish that it's still not good law, there is nothing in the Seventh Circuit or other jurisdictions to suggest that the Court has drawn back from Judge Posner's analysis and conclusions in *Mack v. O'Leary*.

The district court in New Jersey in *Jama v. INS*, which, as I said, is probably the most complete and comprehensive analysis of both pre-RFRA and RFRA precedence likewise found that INS agents could be held in their individual capacity responsible for monetary damages for their actions which infringed on the religious exercise rights of the plaintiffs in that case.

THE COURT: Individual capacity suits are essentially

a legal fiction to work around sovereign immunity. Can you explain to me why Congress, instead of simply waiving sovereign immunity as it did with, say, the Federal Torts Claim Act, would create an individual capacity cause of action in RFRA?

MR. SHWARTZ: First of all, I don't know that I agree that individual capacity actions are a fiction to get around sovereign immunity, but obviously an individual who is sued in an individual capacity has no sovereign immunity. And while there are other defenses that such individuals have, and you're going to hear about some of them over the course of the balance of these motions, to be sure, they do not enjoy sovereign immunity when they are sued for their personal misconduct under color of law. That's been true for, I don't know how far back under 1983; *Bivens* certainly has recognized that, and RFRA is no different in that regard, and I would turn to RLUIPA and the relevance of its precedence. But many courts have recognized that the language in 1983, not just the *Sutton* case that your Honor mentioned earlier, but that the language of 1983 was intended by Congress to have application in RFRA by its use of persons acting under color of law.

THE COURT: But 1983 isn't federal. Can you point to any other provision of federal law that authorizes an action for damages against a federal government officer in their individual capacity?

MR. SHWARTZ: Besides *Bivens*, you're talking about

statutory?

THE COURT: Yes.

MR. SHWARTZ: Not as I stand here, your Honor. I can't represent that there are others, but I'll give that some further thought, and if I can bring others to your attention, with the Court's permission, I'll send a letter to counsel and to the Court.

THE COURT: Yes. Thank you.

MR. SHWARTZ: There is no question that the use of the language here, and *Jama* I think makes this point more forcefully as well as any, but numerous courts, both in the Southern District and in other circuits, have recognized that the logic of RFRA does reach claims for monetary damages against individuals for violations of RFRA, and *Jama* is one of those. I'm going to mispronounce this name, *Elmagrabhy v. Ashcroft* from the Eastern District of New York cited in our brief is another instance. That case cites to a decision by then-District Court Judge Chin here in the Southern District, *Solomon v. Chin; LEP v. Gonzalez* - which is a Northern District of California case - recognized claims for monetary damages against individual federal officers sued in their individual capacity; and another case that we did not cite in our brief, your Honor, but we think is equally relevant is *Padilla v. Yoo*, 633 F. Supp 2d 1005 (N.D.Ca. 2009). That case was reversed on other grounds in the Ninth Circuit, your Honor, but not on a

ground in which the district court found in 2009 that RFRA authorized actions for monetary damages against individuals sued in their individual capacity.

I must have misheard Ms. Blain, but I'm not aware of any cases, and there are certainly none cited in the government's brief, that held, under RFRA, that claims for monetary damages are not permitted. There are lots of RFRA cases dealing with other defenses, to be sure, but I'm aware of no decision by any court dealing with RFRA that has held to the contrary of the various precedents that we've cited in our brief, discussed in our brief and that I've mentioned here.

There are, in addition, numerous other federal cases, which, as the government concedes, the court assumed, or the defendants didn't even argue, didn't even argue that they had such a defense. They were sued for monetary damages and they didn't even argue that that's not allowed under the statute. It's true the court in those cases didn't analyze the issue or address the issue. I don't think it's all that easily dismissed when defendants, federal officials who were sued for monetary damages, advance a multifaceted defense but don't even suggest that one of their defenses is that the statute doesn't permit claims for monetary damages. And the government tries to dismiss those in one of its footnotes. I think it's footnote 17 in their brief. And we haven't tried to put together a comprehensive list of every case brought under RFRA

where a defendant mounted a defense but didn't add to it this argument that somehow the statute precludes, as a matter of law, monetary damages against individuals sued in their individual capacity.

Let me then just finish, your Honor, with what I think is the government's favorite statute, RLUIPA. Your Honor stole some of my thunder earlier when you asked the question about whether Congress' reliance on its spending clause authority in enacting RLUIPA in any way is relevant here. I would beg to differ with the government on their response.

First of all, as I'm sure your Honor understands, RFRA, when it was first enacted in 1993, I believe, applied to federal as well as state governments, federal as well as state officers acting under color of law. The Supreme Court in *City of Boerne v. Flores* held that that portion of the original RFRA statute that dealt with state officers and state governments exceeded Congress' authority under Article V of the Fourteenth Amendment. And there was some question for a period of time whether it affected the entire statute or just that portion which related to the state governments and state officers. I think subsequent case law has made clear that RFRA, as it applies to federal government agencies and federal officers, remains wholly unaffected by that decision, but Congress was confronted with the reality that the Supreme Court had spoken and that RFRA, to the extent that it reached state governments

and state officers, exceeded their authority under Article V of the Fourteenth Amendment. And so Congress went back and enacted a new statute, which we now call RLUIPA, which was Religious Land Use and Institutionalized Persons Act, again protecting the exercise of First Amendment rights, but substantially crafting and narrowing the statute.

First of all, it didn't apply to all laws; it just applied to those two substantive areas, land use and essentially prisoners. There are other subsets under institutionalized persons. And also, it further narrowed the purpose that is to be served by that narrower statute. And the Second Circuit in *Washington* specifically recognized that there was no right to seek monetary damages against individuals in their personal capacity under RLUIPA because the logic of the spending clause is the federal government gives a state government money to spend on prisons or some project. The state government is required by RLUIPA to spend that money in a way that does not substantially burden the First Amendment free exercise rights of individuals.

By definition, the federal money that's going to the state doesn't go to state officials in their personal or individual capacity; it goes to the state in furtherance of whatever the state project is. And as *Washington* recognized, there's no logic in seeking to hold individual state officers or other persons acting under state law personally responsible

for the harm they might cause to individuals' First Amendment rights under a statute that was limited by the spending powers of Congress. The Second Circuit recognized that we're not going to allow that to happen. It doesn't have any bearing on the question under RFRA. When we're talking about a statute that was adopted under Congress' Necessary and Proper Clause, the full array of its authority applies to all federal laws and not just statutes and regulations - but as the statute itself recognizes - and the implementation of those laws, and that's what these FBI agents were purporting to do when they placed our clients wrongfully in retaliation on the No Fly List.

So it cannot be that Congress having been told by the Supreme Court that the state portion of RFRA is unconstitutional could simply turn around and create an identical statute that essentially reenacted the very provisions that the Supreme Court just said was unconstitutional. And they did not. There were very clear: It's limited by the spending authority and it's limited to those two substantive areas.

There is language in RLUIPA that is similar to the language in RFRA, and, of course, any court that has interpreted RLUIPA, including the Second Circuit, has done so, as it should, in the context of that statute and that legislative history. And while the language may be the same, as it is for 1983 as well, those RLUIPA precedents, your Honor,

while they're interesting and worth considering, they don't dictate the outcome here and no court has said that the RFRA statutes, the RFRA court decisions applying to federal officers and persons acting under federal law is somehow now trumped by a court's interpretation of a different statute enacted under a different provision of the Constitution for a different and narrower purpose, separate and apart from the legitimate concerns of federalism, which would also restrict how far Congress should go in intruding and dictating consequences for state officers and state employees or state persons acting under state law.

We like the 1983 precedents. They like the RLUIPA precedents. I would be the first to acknowledge that the issue before the Court is neither 1983 or RLUIPA. The question before the Court is whether as a matter of law monetary damages are authorized and permitted under the RFRA statute in claims against federal law officials acting under color of federal law, and there the court is unanimous that it is.

THE COURT: Thank you very much.

I'm going to have you respond briefly on this issue, then I'm going to take a short break to deal with an issue on my civil trial. I'm going to ask you to take a short break, and then I'll bring you back in and we'll talk about qualified immunity, okay?

MS. BLAIN: Thank you, your Honor.

THE COURT: Thank you.

MS. BLAIN: Your Honor asked about the legislative history of the statute. And as your Honor read into the record, Congress said, "To be absolutely clear, the Act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the free exercise test or compelling interest test prior to *Smith*."

At the time RFRA was passed, and still today, the Supreme Court has never recognized a claim sounding in the First Amendment for a free exercise violation. It just hasn't done that. RFRA did not intend, therefore, as it said, to expand that jurisprudence, it meant to continue with that jurisprudence, and that jurisprudence in terms of a First Amendment violation is simply lacking.

Your Honor asked about the case *Sutton* v. *Providence*, I believe the Ninth Circuit case. And that goes to whether or not courts evaluate under color of law that phrase similarly for 1983 and RFRA. And in every case that plaintiffs cite, the courts did look to 1983 to evaluate under color of law for RFRA, RLUIPA, but that was only to determine whether or not the private entities in those cases were acting under color of law sufficient to make those private entities government actors such that they could be held responsible for a substantial burden of religious exercise. It was not an evaluation of

whether or not under color of law creates individual capacity claims. It's simply a different analysis and it's totally irrelevant.

In terms of other circuits recognizing potential RFRA claims, only one circuit, again the Seventh Circuit, has evaluated whether or not RFRA does create individual capacity claims. Every other circuit to have evaluated the issue either assumed that RFRA applied without analyzing it or didn't even evaluate whether or not -- or assume that RFRA applied because the defendants didn't contest it. And whatever defendants did in another case in a different district in a different circuit in a different context is totally irrelevant to the question before this Court today, which is, does RFRA provide an individual capacity claim for money damages.

Mack v. O'Leary is unpersuasive because Judge Posner did not have the benefit of these other decisions from the Supreme Court, the Second Circuit, the Sixth Circuit, the DC Circuit, the Ninth Circuit, and the Eleventh circuit. It just didn't have the benefit of those precedents and didn't have any briefing on the issue, and the defendants didn't raise the point.

Then there are two district court cases, your Honor, that the plaintiffs point to. I'd like to distinguish those just briefly. First the *Jama* case. It's a case from the District of New Jersey from 2004, and that case can be

distinguished on four bases. First, again, that case was issued before *Sossaman* finding that there's no money damages claims against the states under RLUIPA; before *Washington* finding no money damages against individuals under RLUIPA; and before the Sixth, Ninth, Eleventh, DC Circuit and S.D.N.Y. decisions finding there is no money against federal actors or federal entities under RFRA. It just didn't have the benefit, like *Mack*, of those decisions.

Second, it relied on courts, as plaintiffs attempt to do here, that simply didn't evaluate the issue. So those courts provide no support for the notion that a RFRA individual capacity claim exists. It just doesn't provide that support. It's inarticulate and absent.

Third, *Jama* did not analyze Section 1983 whatsoever. So it didn't talk about the difference between a person in 1983 and a person in RFRA where a person follows a list of entities that are all government entities. It didn't evaluate that 1983 provides "shall be liable," it didn't evaluate that 1983 provides an action at law. It simply ignored it.

Finally, it did not evaluate the fact that the goal of restoring a compelling interest test before *Smith* can be accomplished just as well by declaratory and injunctive relief. That's what happened before RFRA, it's what happened after RFRA. RFRA simply restored the compelling interest test to laws of mutual applicability, and declaratory and injunctive

relief are entirely sufficient to give relief for that substantial burden.

In terms of RLUIPA briefly, RLUIPA shares the exact same language as RFRA. It "imposes a substantial burden on the religious exercise of a person" unless it "is in furtherance of a compelling government interest and the least restrictive means of furthering that compelling government interest." It also provides a cause of action, which is exactly the same as RFRA, that a person "may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." Exactly the same as RFRA. It also provides that government is defined as "Any branch, department, agency, instrumentality or official...and any other person acting under color of state law." Again, exactly the same as RFRA.

Both statutes were passed to restore a compelling interest test to laws. Both statutes contain the almost exact same language. As the Supreme Court held in *Northcross* in 1973, "Where two statutes share both the same language and a common" -- my French is terrible, so I'm going mispronounce this -- "a common *raison d'être,* they should be interpreted to have the same meaning."

THE COURT: The transcript will get it right.

MS. BLAIN: I completely mangled that. In there, the Supreme Court was evaluating two statutes: the Emergency School

Aid Act of 1972 and section 204 of the Civil Rights Act of 1974, and both of those statutes were geared towards "encouraging individuals harmed by discrimination to seek relief." And because one authorized money damages and attorneys' fees, the second one should also authorize attorneys' fees, the Supreme Court held, because both the statutes were aimed towards remedying the same harm.

RLUIPA is also important because neither RLUIPA nor RFRA, as we said, operates as a waiver of sovereign immunity, another indication that these statutes are similar. It's also similar to RFRA because neither expressly authorizes suits against individuals for money damages, and as 1983 shows, Congress knows how to do that when it wants to.

Finally, courts do interpret these two statutes similarly. Another one I'm going to mispronounce, in *Oklevueha*, a case in the Ninth Circuit said, "Although *Sossaman* was guided by the Eleventh Amendment, the court's interpretation of appropriate relief is also applicable to actions under RFRA."

Hobby Lobby in 2014, the evaluation of the phrase "exercise of religion," the Court found, should be the same in RFRA and RLUIPA. These two statutes are similar and they are instructive, and they are very different from 1983. So while plaintiffs say that we are a fan of RLUIPA and they are a fan of 1983, we're a fan of both, your Honor. 1983 provides ample

distinction between RFRA and RLUIPA and the cause of action the plaintiffs seek to find here is completely absent in the legislative history and the text of the statute. Thank you.

THE COURT: Thank you.

Why don't we take a break for about 15 minutes. I'm going to ask people to step away from counsel table and from the jury box because I have to bring my civil jury back in. Then we'll resume argument on qualified immunity.

Thank you very much.

(Recess)

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THE COURT: Thank you all for indulging me. I didn't want to keep the jury waiting. I appreciate your patience.

Are we ready to talk about qualified immunity?

MS. BLAIN: Yes, your Honor.

THE COURT: Great.

MS. BLAIN: So, your Honor, to be clear about the sort of procedural process here of qualified immunity, we have argued that the plaintiffs failed to state a claim under both First Amendment and RFRA, assuming those claims exist. We have also argued that, even if those claims exist, that the agents are entitled to qualify immunity because the rights at issue were not clearly established, or at the very least, officers of reasonable competence could disagree.

The qualified immunity analysis is actually sort of a behemoth. From the one hand, you had a failure to state a claim; on the second, you have whether or not the right was clearly established.

THE COURT: How are you defining the right here? Is it a right against First Amendment retaliation, is it a right not to be an informant, is it the right to travel? I know in the briefs you addressed a number. How do you define the right at issue?

MS. BLAIN: Your Honor, plaintiff seek to define the right extremely broadly. As you said, the right to travel or rather the freedom of religion, freedom of expression, freedom

of association.

However, the Supreme Court cautions that the test of clearly established law, if the test of clearly established law were to be applied at that level of generality, it would bear no relationship to the objective legal reasonableness of the qualified immunity doctrine. Plaintiffs would be able to convert, quoting again, the rule of qualified immunity that our case is plainly established into a rule of virtually unqualified liability simply by alleging violation of an extremely abstract right, end quote. Anderson v. Creighton 486 U.S. 635.

THE COURT: Give me the right, your definition, in one sentence or two if you can.

MS. BLAIN: There are three rights, I think, at issue here, your Honor. One is the right to be able to fly. Two is the right not to have one's name nominated for inclusion on a watch list. Three is the right not to be requested to be an informant. Neither or none of those rights were clearly established now, and they certainly weren't clearly established at the time of the agents' alleged actions.

Here, I think it is important to look at exactly what each agent was alleged to have done. We need not go through all 25 of them, your Honor, but I am happy to do so if the court would find that helpful.

I think it is helpful to go through in buckets of

alleged actions with some examples within each bucket. So, for example, plaintiffs failed to allege that 12 agents ever asked the plaintiffs to be an informant or were present when anybody else asked the plaintiffs to be an informant.

So what are the plaintiffs asking the court to infer there? The plaintiffs are asking the court to infer that these agents retaliated against plaintiffs' refusal to be an informant, even where the agents never asked them to be an informant. That is simply implausible. That fails at the first prong of the qualified immunity analysis. There is no claim.

Moreover, there is certainly no clearly established law that would put any reasonable officer on notice that simply conducting interviews of a suspects violates any clearly established constitutional right.

That is 12 agents, your Honor. For example, John Doe 1. John Doe 1 is alleged to have interacted with Mr. Tanvir on one occasion in February of 2007. He is alleged to have met with Mr. Tanvir with Agent Tanson, met with Mr. Tanvir outside of Mr. Tanvir's workplace for 30 minutes, and asked him questions about an old acquaintance who allegedly entered the country illegally. That is it; no request to be an informant, 30-minute interview.

Mr. Tanvir then flew to Pakistan a year and a half later and flew back. Two years after that, he flew to Pakistan

and then flew back. It wasn't until October of 2010 that Mr. Tanvir was denied boarding; three years after first interacting with John Doe 1, and there had been no interactions with John Doe since.

So what is the plausible inference that the plaintiffs would have this court draw? Where is the discriminatory or retaliatory motive? John Doe 1 never asked Mr. Tanvir to be an informant. It makes no sense that John Doe 1 would then retaliate against Mr. Tanvir based on his refusal in the future to other agents with whom he didn't interact.

Second bucket of agents, your Honor, and those are plaintiffs allege that they were denied boarding before ever interacting with 16 agents. So what is the plausible inference that the plaintiffs would have the court draw here? The inference that the plaintiffs wish the court would draw is, the plaintiffs remained on the No Fly List because for the sole reason that the agents refused to recommend to TSC to take the plaintiff's name off the list. In other words, that they remained on the No Fly List not for a legitimate law enforcement reason, but for the sole reason of retaliatory animus.

Let's look at what the plaintiffs also pled with regard to this situation. The plaintiffs also pled that, at that point, when someone has been denied board and is on the list, TSC has made two independent determinations; one, that

the person is a known or suspected terrorist, and two, that there is additional derogatory information that can include -- it includes many criteria, but it can include committing terrorist acts with an aircraft and many other things.

Nevertheless, the plaintiffs would have this court infer that plaintiffs remain on the list despite TSC's independent determination simply because the agents refused to request their removal. This is not plausible, your Honor, where there is obvious alternative explanation to this conduct.

As the Supreme Court has cautioned and outlined, rather, in Iqbal, 2009, where there is a choice between an invidious discrimination that the plaintiffs would have the court infer and an obvious alternative explanation consistent with legitimate law enforcement interest. The inference of discrimination simply is implausible. There is not a plausible inference, particularly with respect to these 16 agents, with whom plaintiffs interacted only after they were denied boarding.

So, for example, let's look at John Doe 9. John Doe 9 allegedly interacted with Mr. Sajjad on one occasion. Mr. Sajjad was denied boarding at JFK, and John Doe 9 asked him questions in another room at JFK on one occasion; asked him questions about his acquaintances, about military training, about certain other things. That is the end of John Doe 9's interaction with Mr. Sajjad, according to the complaint.

Nevertheless, the plaintiffs would have this court infer that John Doe 9 had retaliatory animus and decided to keep, assuming it had the authority to do so, which of course we dispute and plaintiffs themselves concede effectively, that John Doe 9 tried to keep Mr. Sajjad on the list simply because he refused to be an informant. That is simply not plausible, your Honor, when there is an alternative explanation.

Let's look at some of the questions that these agents asked various plaintiffs. John Doe 2 and 3, Agent Tanzin, Agent Garcia, and John LNU, asked Mr. Tanvir about a military camp near his village, about particular people in the American-Muslim community, or about that community rather, about an old acquaintance who entered the country illegally, about his ability to climb ropes, and rappel down construction sites.

John Doe 2 and 5 asked Mr. Algibhah about a particular student with whom he interacted with, particularly students at the library he interacted with, where he worked at the library, particular websites that he went on, and particular regions he entered.

In terms of Mr. Shinwari, plaintiffs allege that Stephen LNU, Agent Harley, Agent Grossoehmig, Michael LNU, and Agent Langenberg asked Mr. Shinwari about online religious sermons, about training camps, and about particular mosques.

Finally, as for Plaintiff Sajjad, Plaintiff Sajjad

alleges John Doe 7, John Doe 8, John Doe 9, John Doe 10, John Doe 11, John Doe 13, and Agent Rutkowski asked him questions about videos on You Tube about bomb making, about a particular Pakistan organization, and about military training.

When there is an obvious alternative explanation for placement on the No Fly List or maintenance on the No Fly List, it is simply not a plausible inference for the court to draw, looking at each individual agent's action, as the court has to do under Bivens, define these agents intentionally discriminated against the plaintiffs for any retaliatory reason. There is simply not a plausible conclusion.

Let's talk about another bucket of agents. There are six agents plaintiffs allege they interacted with, concluded their interactions with, and then plaintiffs could fly thereafter. So what's the plausible inference here that the plaintiffs would have the court draw? It's that somehow these agents, who again interacted with the plaintiffs before they were denied boarding and then plaintiffs flew afterwards, retaliated later because someone else down the line asked them to be informants and then down the line they said no.

THE COURT: I'm sorry. This bucket, in your view, involves agents who only had contact prior to the plaintiffs being put on the No Fly List, but in between that they did fly, so they had contact, they flew, and then they were put on the No Fly List after some intervening factor, this bucket of

agents in your view.

MS. BLAIN: That's right, your Honor. Those agents are Agent Tanzin, John Doe 1, John Does 2 and 3, which interacted with Plaintiff Tanvir allegedly, as well as Stephen LNU, Agent Harley, and Agent Grossoehmig who interacted with Plaintiff Shinwari.

Finally, there is another bucket, your Honor. Two more buckets, generally. The second bucket is there are three agents who only interacted with counsel, with plaintiff's counsel, at counsel's request. So, for example, Agent Gale is alleged to be a supervisor in the Newark office, the Newark FBI office. Plaintiffs alleged that Mr. Sajjad's counsel called Agent Gale to ask about Mr. Sajjad's status. All Agent Gale said was he is not going to get into it, quote, over the phone. That is what the complaint says.

So what is the inference that the plaintiffs would have this court draw about Agent Gale, that somehow Agent Gale, who never allegedly interacted with Mr. Sajjad, who never asked him to be an informant, nevertheless, at some point, at some unknown time, either placed him on the No Fly List or refused to affirmatively recommend his removal in the No Fly List solely because Sajjad told agents he wouldn't be an informant? It's just not plausible.

The same thing with Agents Landenberg and Agent Dun in Omaha with Mr. Shinwari. There, Mr. Shinwari's counsel

specifically asked to meet with Agents Landenberg and Agent Dun, and they did that. That is the only time Agents Landenberg and Agent Dun appear in the complaint. They didn't interview Mr. Shinwari, they didn't ask him to be an informant, there is no allegation there.

The final bucket, your Honor --

THE COURT: The allegation on those people is that they had the power to take them off the list, but they kept them there for these retaliatory purposes?

MS. BLAIN: Right. What the plaintiffs ask them is for this court to draw an inference that the plaintiffs remained on the No Fly List because they refused to serve as informants. So the question before the court is, have plaintiffs pled facts that are not merely consistent with each defendants' liability, but actually plausibly, plausibly stated each defendants' liability? Right, that is Iqbal. Iqbal also says that plaintiffs need to plead factual content that allows the court to draw the reasonable inference that defendant, that each defendant, is liable for the alleged misconduct.

What is the reasonable inference, your Honor? There is a connection that the plaintiffs would have this court draw that is simply not supported by the well-pled factual allegations. In fact, this complaint is detailed. It has numerous allegations, and even with these numerous allegations, these allegations in and of themselves provide an obvious

alternative explanation for the conduct.

As Iqbal provides, that is what the court needs to evaluate and decide, if you have a choice between alleged conclusory retaliation, or in that case discrimination, and an obvious alternative explanation, the obvious alternative explanation is simply plausible and the other one is not. So for qualified immunity, that is why, your Honor, the plaintiffs fail to state a claim under the First Amendment against each of these agents.

Now, each of the 25 interacted with each of these plaintiffs at different times and at different points, different places in the country, and each of those individuals have, therefore, a different defense to these allegations. We can go through all 25, if the court wants, or the court can take my buckets.

THE COURT: I don't think that is necessary today.

MS. BLAIN: Okay.

THE COURT: But I will go through them, of course.

Let's just go back to the initial question that I asked about the right, and what the right at issue is. You defined three rights and you defined them fairly narrowly.

Let's say I were to define the right more broadly, as the right to be free from First Amendment retaliation. Do you agree or do you not agree that a right against First Amendment retaliation was clearly established?

MS. BLAIN: Your Honor, it depends on what that means. I don't mean to be Platonian here, but if there is a general right, I think we would all acknowledge to be free from government retaliation, but that is not the end of the story.

The next question is what does that mean? Because as the Supreme Court has said, if you define that right so broadly it is a violation of any constitutional provision, then qualified immunity is meaningless.

The right at issue has to be clearly established, as the Supreme Court says, we do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. That is beyond debate to every reasonable officer. Because, if any reasonable officer could think that what he was doing doesn't violate a particular right, that officer is still entitled to qualified immunity.

THE COURT: Do you think that a reasonable officer would believe that it was constitutional to ask someone to be an informant, for the person to say, I don't want to be an informant for religion reasons, and as a result of that, put them on a No Fly List that prevents them from traveling?

MS. BLAIN: Your Honor, those are not the allegations here. The allegation here is, first of all, no plaintiff told any agent that they had a religious objection to being an informant. That is nowhere in the complaint.

As a matter of fact, there is no constitutional right not to be an informant, and there is certainly not anything wrong with asking someone to be an informant or even asking a suspect.

THE COURT: I am asking if there is a constitutional right not to be an informant, because I think you're right about that. But if you ask someone if they're willing to be an informant and they say no, and you know their religion, and their allegation is that it is as a result of their religious beliefs that you are punishing them for not agreeing to assist, is that something a reasonable agent would think is okay?

MS. BLAIN: Well, I think, your Honor, two answers. First, that right has not been recognized in any court that we are aware of. So a reasonable officer wouldn't be on notice that that conduct violates a right. That is the question.

Would a reasonable officer know that that scenario the court just laid out would violate a right? One of the ways that the court would evaluate whether or not an officer would know that is if there is preexisting precedent. The government is not aware, the plaintiffs certainly haven't pointed to any precedent that would put an officer on notice that that would be a violation, particularly where, number one, there is no clearly established constitutional right to air travel. Particularly where, as the D.C. district held in Halkin, there is no constitutional right against having one's name submitted

to a watch list. Particularly where TSC here, as the plaintiffs themselves allege, made an independent determination about who to include on the No Fly List.

THE COURT: Just going back to my question, taking the plaintiffs' allegations as true, would a reasonable officer believe that it was constitutional to punish someone for not agreeing to be an informant, when that punishment takes the form of putting them on a No Fly List that prevents them from traveling?

MS. BLAIN: Your Honor, I am simply quarreling with the presumption in that question, and the presumption in that question is that there was a direct connection, number one, between the request to be an informant and the placement on the list. There is another presumption in there that the agents knew that it was a religious burden, and I think neither of those things are present in the complaint. So that is why it is almost impossible to answer that question, because it is not the circumstances presented here.

(Continued on next page)

MS. BLAIN: And, in fact, what is particularly apparent is that in the context of qualified immunity, there is an entire No Fly List scheme here, and no case anywhere in the country has ever held that anything to do with the No Fly List has created a constitutional right in any way. So there's not a clearly defined right from a circuit, and certainly not from the Supreme Court, that any malfeasance, alleged malfeasance in connection with the No Fly List, creates a constitutional violation. No officer, even if they were to have retaliated against these plaintiffs, would know that in this context where there are multiple layers built into this schema to review nominations to the No Fly List, that a nomination in and of itself violates any constitutional right.

THE COURT: Well, take a different scenario. Would a reasonable agent know that you can't put people on the No Fly List just because of their race?

MS. BLAIN: There is an assumption in there, which is "put a person on the No Fly List."

THE COURT: For whatever reason, if you had someone who is racist, who is an agent, who, because of someone's race, recommended that someone be added to the No Fly List.

MS. BLAIN: Your Honor, I'm not sure that that would be clearly recognized because I don't know any Supreme Court or Second Circuit case that would say a submission to a watchlist is per se unconstitutional. I do agree, and I'm not trying to

back away from the idea that retaliation by government officials is a violation of a Constitutional right; the question is, what's the retaliation and in what context. And it's impossible to divorce the context from the contours of the right that the Court needs to evaluate to determine whether or not it was clearly established for every reasonable officer. A reasonable officer may decide or may conclude that that's a violation of a constitutional right, but the question is, would every reasonable officer decide that, and there is no support in the case law for that.

I would also like to point out in terms of the RFRA claim, the idea that defendants could be held personally liable for asking somebody to be an informant because that substantially burdens that person's religion when they were never told that would substantially burden anyone's religion and there's no case law out there to suggest that would substantially burden anyone's religion is an anathema to the idea of liability against individuals in their personal capacity.

So now we touched on failure to state a claim, qualified immunity. Should I keep going on failure to state a claim for RFRA? Can I just take one more point, actually?

THE COURT: Sure. Absolutely.

MS. BLAIN: Staying on failure to state a RFRA claim, so not only is it patently unfair to hold individuals liable

for doing something that they didn't know was bad, but as for the complaint itself, your Honor, plaintiffs do not allege that seven agents, seven agents even asked the plaintiffs to be informants.

Now, there's actually a group of 12 when you add in Mr. Sajjad, but Mr. Sajjad is not asserting a RFRA claim, so five of those agents drop out. So you're left with seven agents who never even asked the plaintiffs to be an informant; therefore, those seven agents couldn't have placed a substantial burden on those plaintiffs' religious exercise. I think that's vital, again, to look at defendant by defendant and not these, sort of, generalized ideas of retaliation or burden. Thank you.

THE COURT: Thank you.

MS. SHAMAS: My name is Diala Shamas from the CLEAR project from the CUNY Law School on behalf of plaintiffs. And I will respond to some of the qualified immunity and failure to state a claim arguments that special agents/defendants raise.

In their arguments, your Honor, defendants are asking the Court to miss the forest for the trees here. They ask you to look at fragments of allegations rather than the full picture; and that full picture that we have painted is a very vivid detailed one of retaliatory acts taken by individual FBI agents in response to plaintiffs' refusal to become informants.

THE COURT: Can I follow up on that point with a point

that government counsel made.

MS. SHAMAS: Sure.

THE COURT: Does the complaint allege that the defendants knew either (1) that each of these plaintiffs were Muslim, and (2) that it put a burden on their religion to become an informant?

MS. SHAMAS: Yes to (1). And to (2), it doesn't need to because the defendants didn't need to tell agents that it puts a burden on their religious beliefs but it certainly did, and it's something that the complaint does allege.

Based on the allegations in the complaint, a very reasonable inference can be drawn that defendants did know, or reasonable agents similarly situated would know, that what they were asking plaintiffs to do, namely going into mosques or engaging with members of the Muslim community on terms that they wouldn't otherwise do so or to act extremist in Mr. Algibhah's case, would burden their religious beliefs.

THE COURT: You may proceed.

MS. SHAMAS: The question before the Court today is whether, with the allegations taken, of course, in the light most favorable to the plaintiffs, we've properly alleged that special agents/defendants' conduct was retaliatory, and they have more than met that burden.

Two of our clients, Mr. Tanvir and Mr. Algibhah, were first aggressively recruited to become informants, and when

they said no, they were placed on the No Fly List, only to have the same or different agents tell them they could take them off if they provided information.

Two of our other clients, Mr. Sajjad and Mr. Shinwari, were approached either immediately or shortly after they found out they were denied boarding for the first time and asked to become informants. The multiple agents involved in all of these offenses doesn't make it any less plausible that these acts were retaliatory.

THE COURT: Are you asking for, sort of, a theory of liability based on vicarious liability? Or should I be looking, as the government suggests, at what each individual agent did?

And I have a quote from Iqbal, for example, which says "Absent vicarious liability, each government official, his or her title notwithstanding, is only liable for his or her own misconduct."

So, should I be looking at people individual or should I be looking at them collectively?

MS. SHAMAS: Your Honor, you should be looking at each of them individually, and it's not under a theory of vicarious liability. Each individual defendant here took specific acts. They all either personally interacted with the plaintiffs or certainly had their files in front of them when they were speaking to plaintiffs' counsel. Each individual agent took

part in the scheme. Whether they came earlier on or later on, according to our plaintiffs' knowledge, doesn't change the fact that they had all the necessary elements for a First Amendment retaliation claim.

For example, perhaps speaking about specifics here might help more, and I'm going to push back against defendants' use of the buckets idea because this is an individual agent-by-agent inquiry that the Court has to take, of course, so I will go about it in that way. But, of course, if there are any questions that come up based on defendants' presentations, please feel free to raise them.

Mr. Jameel Algibhah, to begin, Agent Frank Artusa and John Doe 4 started recruiting him or approached him for the first time in December 2009. They told him they really wanted him to be an informant, they gave him details of what that might entail, to go to specific mosques, online forums and to act extremist. And they also told him, when he said no, that he should think about it some more. They also offered incentives. At that point, they said they knew his wife and daughters were in Yemen and they offered to bring them over.

The very next time plaintiff Mr. Algibhah tries to fly, he's denied boarding. That was a few months later in May. He files his TRIP complaint, and then not having heard back, he starts very aggressively trying to advocate on his own behalf reaching out to his Congress people and then, again, receives a

visit this time by the same Agent Artusa and a new agent, John Doe 5, and they continue what they had started earlier, which was recruiting him to become an informant; this time telling him that they will remove him from the No Fly List if he agrees to do what they do, and they sort of describe what they wanted him to do along the same lines that they had described earlier in December 2009. They follow up with a phone call and tell him that they're still working on trying to remove him from the No Fly List but that it would be very helpful if he decided to become an informant.

So the continuity across agents here, the clear causation between recruitment, refusal, placement, and then maintenance, the most plausible inference here is that they were recruiting him to become an informant and that they retaliated against him when he refused by placing him - and then by keeping him in the case of Agent John Doe 5 - on the No Fly List.

THE COURT: Doesn't each of them need to commit a retaliatory act?

MS. SHAMAS: Yes. In this case, each of them either placed or kept. So the retaliatory act or the adverse action here is that kind of placement or maintenance on the No Fly List. And each of them, based on the allegations and the plausible inferences that can result, obviously did do that. And you may be thinking about Agent John Doe 5 who accompanied

Agent Artusa after Mr. Algibhah was already on the No Fly List and who kept him. And they were following up with Mr. Algibhah and they were talking to him about his No Fly List placement. They were telling him that they would remove him if he were to do X, Y and Z. Then their ability to remove him is something that they have stated and, that based on our allegations, also we have established, but they didn't.

They knew he was not a threat to aviation safety. In fact, they wouldn't have offered to remove him from the No Fly List and tell him it would take him a month to do so if they did believe that he was a threat to aviation safety. The fact that Mr. Algibhah can now fly further proves that he was never a threat to aviation safety. Really, the only reason he was ever on the No Fly List in the first place was because he refused to become an informant when he spoke to Mr. Artusa and John Doe 4. That continuity between Agent Artusa from beginning to end further confirms that these agents were all obviously working together.

And many of the defendants' arguments really turn on this idea or this assumption that FBI agents aren't coordinating; that at the FBI, the left hand doesn't know what the right hand is doing, and that's an implausible assumption. In fact, I really hope for all of our safety that that's not actually how the FBI functions. So it would be implausible to assume that an FBI agent reaching out to a potential source at

some point wouldn't have openness (w)filing on what a prior agent said had spoken to him about had he been recruited to become an informant. Therefore, they all knew about his protected activity.

THE COURT: Is knowing or coordination enough or do they have to do something?

MS. SHAMAS: Well, for example, with regards to Agent Doe 5 in the example that we're working with, he had refused, even though he didn't refuse before him, and then he kept him on the No Fly List, which is what he did. Protected activity doesn't have to be express in the presence of the retaliatory actor. You can simply know about it and that's sufficient, and that shouldn't be controversial.

Perhaps we can talk about Mr. Tanvir.

THE COURT: That's fine. I actually just want to ask one broader question I started with and I asked the government about it, just defining the right, so I want to talk about that. Then you're welcome to make any arguments about Mr. Tanvir or anyone else. But your brief says on page 69, "The right to exercise speech, association and religion free from retaliation is clearly established," but do you have a narrower formula of the right at issue here?

MS. SHAMAS: Well, your Honor, the right at issue here is retaliation based on First Amendment activities and those three ways that we broke it down.

THE COURT: I shouldn't look at it more narrowly in the context of being put on the No Fly List or choosing not to cooperate and assist the government?

MS. SHAMAS: No, your Honor, that would be far too specific and that would essentially throw away the possibility or remedy for any victims of retaliation. What the government is doing is, again, the same 'forest for trees' problem but on the law here. By breaking down the, sort of, modality of retaliation by saying that it has to be clearly established so you don't have to be on the No Fly List, that you have the right to not be on the No Fly List or to be approached to become an informant would be like saying it has to be clearly established that you have the right to not be in solitary confinement in order to state a retaliation claim. That's not the case, your Honor.

You have the right to not be in solitary confinement for retaliatory or improper motives, but there are certainly many legitimate reasons for placing someone in solitary confinement. So the allegations here are precisely -- they turn on the retaliation narrative, so it's important to look at it in its totality.

Also, for it to be clearly established, the contours of the right have to be sufficiently clear that a reasonable official would understand that what he was doing violated that right. We don't actually need a case specifically on point or

on those specific facts. A reasonable FBI agent would have to know that he can't retaliate against someone for refusing to go to a mosque or for refusing to say something or for refusing to act extremist. No two FBI agents would disagree that's a perfectly reasonable assumption, and that's really what is the right that is at issue here. And in three ways, it's an expression of speech which is clearly established. You have the right to speak, as well as not to speak.

It's also clearly established you have the right to not associate, and our clients were declining to associate with members of our community on terms that they don't believe in or or normally associate with them on. And you have the right to freely exercise your religion, which is another thing that three of our four clients were asserting when they refused to be FBI informants and go into their Muslim community and into places of worship and pass information along about those places of worship that are in contradiction with their faith.

Your Honor, if you don't have any questions on the clearly established piece.

THE COURT: No.

MS. SHAMAS: I can maybe go through Mr. Tanvir and the agents involved there. Defendants focused a lot on Agent John Doe 1, who appears at the very beginning of this process in 2007 where he approaches Mr. Tanvir with Tanzin and questions him. That started a process over several years where Agent

Tanzin and different Does recruited Mr. Tanvir very aggressively between February 2007 and July 2009. In January 2009, Mr. Tanvir is approached again by Tanzin and another John Doe, and he is taken down to 26 Federal Plaza and very aggressively asked to become an informant. They tell him that they believe he's special and that he's honest, but they also threaten him with potential deportation. That visit is followed by multiple phone calls where they ask him if he got anything for them, if he's made any decisions. And Mr. Tanvir continues to say no. At the end of the series of these interactions, he finally starts refusing to speak to the agents entirely.

In January of 2010, Tanvir returns from a trip and then in October of 2010, he's not able to fly. Now, the fact - and defendants make a lot of this - the fact that Tanvir was able to fly at some point in the course of very many years doesn't mean that the No Fly List is one of the many modalities or many tools that they use to recruit him which is what they did at some point before October 2010. We have a very long timeline here of aggressive recruitment by some of the same agents. And then the next thing he knows, at the end of that timeline with Mr. Tanzin, he's unable to fly in October, and then he's passed on essentially to Agent Garcia, who continues the same scheme.

THE COURT: Let me ask you something. Do you have any

cases that stand for the proposition that *Bivens* liability can be based on collective action, ideally after *Iqbal* which stressed personal involvement?

MS. SHAMAS: Your Honor, I don't have any cases in mind with that particular proposition. But *Iqbal* was a case focusing on supervisory liability and the importance of obviously having individual personal responsibility. That's not case here. We haven't sued any supervisors, which was the case in *Iqbal*, and the claims are also very different. There aren't many 1983 cases where multiple individuals who acted in different ways were found to be liable. It's certainly not controversial that just because there is collective action and rights can be violated in a number of ways, it doesn't need to be something that is brought separately.

What we need to show here, your Honor, is that defendants knew of the protected activity; and it would be implausible to infer that FBI agents didn't know of the protected activity given the way that what we can assume they're operating or also what we know in terms of what they told our clients.

We also need to show that there is retaliatory action that was taken and that there is a relationship between that action and their knowledge of the protected activity. And the Second Circuit has been very clear in its instruction to courts that causation or retaliatory intent are very difficult to

plead in a motion to dismiss and are more appropriately left for a motion on summary judgment. It's also directed courts that they can make reasonable inferences or inferences of causation based on circumstantial evidence; Chronology has been one way to show that or temporal proximity, for example, or even in a case of *Dougherty v. Town of Hempstead,* which is a Second Circuit case in 2002, the Court found that a chronology of events spanning a period of over five years displayed a general pattern of egregious treatment by, in that case, it was a board, and it was sufficient to plead retaliatory intent for that case to go forward. It was on a motion to dismiss.

Again, your Honor, remember the posture that we're in in this case. At this early stage, all we need to show is based on the facts that we have alleged, the ample facts that we have alleged, with all reasonable inferences in our favor, the most plausible explanation for the way the FBI agents interacted with our clients was that they were retaliating.

The defendants tried to present alternative plausible explanations, but our burden here isn't to disprove all alternative explanations. The facts are very clear, whether you look at the chronology or whether you look at the explicit statements made by defendants, that they were trying to recruit our clients to be informants.

THE COURT: There's nothing wrong with that. There's nothing wrong with trying to get someone to become an

informant, right?

MS. SHAMAS: We're not alleging there's anything wrong with that, but there's something wrong with then retaliating against someone when they say they just don't want to be an informant, and that's what the facts show when you have agents making various threats and waving various kinds of incentives to people to first become an informant; and then when there is refusal and then placement on the No Fly List, it certainly suggests a retaliatory motive.

And remember, your Honor, we have clear allegations that -- none of our plaintiffs ever presented a threat to aviation safety. The government hasn't even made any alternative proposal here. They could have answered our complaint with facts in the alternative, but they didn't. And our clients are now off the No Fly List, further confirming that theory. So it's certainly more than plausible that that's what actually is going on here.

Mr. Sajjad was informed by the agents that they thought he was a great guy and that they really wanted him to work for them and they made him various offers. None of the things that any of these FBI agents said to our clients even suggested that there was any reason to suspect that there was an alternative explanation here.

On one hand, we have very elaborate, detailed allegations about plaintiffs' recruitment and threats and

incentives; and on the other hand, we have nothing suggesting the opposite alternative explanation that the government is attempting to put forward. At this early stage, they shouldn't be entitled to qualified immunity based on such little information and we should be allowed and permitted to go forward so that we can prosecute these claims.

THE COURT: Thank you very much.

MS. SHAMAS: Thank you.

THE COURT: Ms. Blain.

MS. BLAIN: Once more, briefly, your Honor. Just to respond to the idea of who has the burden here, at the pleading stage, the plaintiffs need to plead sufficient factual allegations for the Court to draw a plausible inference of retaliatory motive. That's what this case is about. It's a motive-based retaliatory claim. In order to state a retaliatory claim as *Iqbal* says under the First Amendment, assuming that one exists, you need to prove motive, you need to allege motive. And here, what are the facts that would lead the Court to draw that inference in a plausible way. As to each individual defendant, they are different and they are lacking.

Furthermore, the fact that the plaintiffs are now off the No Fly List should have no bearing on this Court's analysis that whether to, (a) recognize the First Amendment claim under *Bivens*, (b) recognize an individual capacity claim under RFRA,

(c) recognize whether or not the plaintiffs have stated a claim, and (d) recognize whether or not these agents are entitled to qualified immunity, because the qualified immunity analysis, in particular, your Honor, asks the Court to evaluate what right was burdened and whether a reasonable agent -- every reasonable agent in that agent's position would know that they were burdening that right. So I would urge the Court to look at the qualified immunity of each individual defendant.

There are many agents who have been hailed into court because they interviewed the plaintiff once or twice or met with plaintiffs' counsel and were never present during any purported recruiting efforts. Conclusory allegations of this scheme, as counsel just noted, do not state a claim under *Iqbal* and several Second Circuit cases. If you look at the defendants one by one, there is simply no way to conclude that each person engaged in retaliatory conduct, because if you do that, you'd have to credit entirely the conclusory allegations of conspiracy and concerted action.

So why is qualified immunity important here? Because we want law enforcement officers not to be afraid to interview suspects, to interview potential terrorists, to recruit informants for information about potential terrorists and to nominate individuals to watchlists knowing that the TSC, as plaintiffs themselves allege, will conduct an independent determination of whether the watchlist criteria had been met.

The qualified immunity doctrine gives officials breathing room to do their jobs. It should be decided as early as possible in litigation, it should be decided before discovery is commenced, it should be decided now because there are sufficient facts as pled in the complaint to allow the Court to provide these agents with qualified immunity.

Again, qualified immunity gives ample room for officials to make mistakes and protects all but the plainly incompetent or those who knowingly violate the law. That is just not the case here, your Honor. And we would urge the Court not to, for the first time, recognize a First Amendment claim or a RFRA claim in these particular circumstances having to do with such serious national security concerns. Thank you.

THE COURT: Thank you.

I'm going to reserve decision, but I want to thank all the lawyers for their outstanding advocacy, both in the briefs and today. Thank you.

We're adjourned.

(Adjourned)

January 29, 2016

BY ECF

Hon. Ronnie Abrams
United States District Judge
Thurgood Marshall United States Courthouse
Room 2203
40 Foley Square
New York, NY 10007

***Tanvir v. Lynch, et al.*, No. 13 Civ. 6951 (RA)**

Your Honor:

Plaintiffs submit this letter in response to the Court's order, issued December 28, 2015, which dismissed without prejudice Plaintiffs' official capacity claims and directed the clerk to enter final judgment pending a January 29, 2016 deadline for Plaintiffs to "move for attorneys' fees and costs." *See* Order, ECF No. 109.

Plaintiffs hereby advise the Court that they will not seek an award of fees and costs at this stage of the litigation.

Respectfully submitted,

/s/ *Shayana Kadidal*
Baher Azmy
Shayana Kadidal
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel.: (212) 614-6438
Email: kadidal@ccrjustice.org

Ramzi Kassem
Naz Ahmad
CLEAR Project
Main Street Legal Services, Inc.
City University of New York School of Law
2 Court Square
Long Island City, NY 11101
Tel.: (718) 340-4558
Email: ramzi.kassem@law.cuny.edu

Debevoise & Plimpton

919 Third Avenue
New York, NY 10022
Tel.: (212) 909-6000

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI, and AWAIS SAJJAD,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General of the United States, *et al.*,

Defendants.

13 Civ. 6951 (RA)

NOTICE OF APPEAL

NOTICE is hereby given that Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari, Plaintiffs in the above-titled action, hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment of the Honorable Ronnie Abrams, entered on February 17, 2016, dismissing Plaintiffs' individual capacity claims against Defendants (annexed as Exhibit A).

Dated: April 18, 2016

/s/ *Jennifer R. Cowan*

Jennifer R. Cowan
Erol N. Gulay
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel.: (212) 909-7445
Email: jrcowan@debevoise.com

Ramzi Kassem
Naz Ahmad
CLEAR Project
Main Street Legal Services, Inc.
City University of New York School of Law
2 Court Square
Long Island City, NY 11101
Tel.: (718) 340-4558
Email: ramzi.kassem@law.cuny.edu

Baher Azmy
Shayana Kadidal
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel.: (212) 614-6438
Email: bazmy@ccrjustice.org

Counsel for Plaintiffs

cc: Sarah S. Normand
Ellen Blain
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, NY 10007

Counsel for Defendants