UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD TANVIR; JAMEEL ALGIBHAH; NAVEED SHINWARI; AWAIS SAJJAD, Plaintiffs, v. ERIC H. HOLDER, ATTORNEY GENERAL OF THE UNITED STATES *et al.*, Defendants.	13 Civ. 6951 (RA)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE OFFICIAL CAPACITY DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

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Plaintiffs fail to meet their burden to establish that this Court has subject matter jurisdiction over their claims against the defendants sued in their official capacities (collectively, the "government").[1] Plaintiffs cannot circumvent the jurisdictional limitations of 49 U.S.C. § 46110, and Tanvir and Shinwari do not even attempt to satisfy the stringent requirements for demonstrating standing to seek prospective relief.

I. This Court Lacks Jurisdiction Under 49 U.S.C. § 46110

Despite Plaintiffs' protestations, their amended complaint challenges TSA orders that are subject to exclusive court of appeals review under 49 U.S.C. § 46110. Plaintiffs' claim that Section 46110 is a "narrow jurisdictional provision[]," Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Pl. Br.") at 31, with a "narrow scope," Pl. Br. at 24, is fundamentally incorrect. Under well-settled law in the Second Circuit and other circuits, the term "order" in Section 46110 is "given a 'liberal construction,'" *Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 96 (2d Cir. 2013) (quoting *New York v. FAA*, 712 F.2d 806, 808 (2d Cir. 1983)), and "read expansively," *Aviators for Safe & Fairer Regulation v. FAA*, 221 F.3d 222, 225 (1st Cir. 2000). *See also* OC Br. at 16-17 (citing additional cases). The Court should decline Plaintiffs' invitation to commit error by rejecting a "broad statutory construction of § 46110." Pl. Br. at 29.

Although Plaintiffs assert that "no court of appeals has ever found that it has original subject matter jurisdiction under § 46110 or otherwise over constitutional challenges to the No Fly List," Pl. Br. at 25, they neglect to point out that two courts of appeals are currently

[1] This memorandum addresses Plaintiffs' claims for injunctive and declaratory relief, as plaintiffs do not contest that they cannot obtain damages from the government. *See* Memorandum of Law in Support of the Official Capacity Defendants' Motion to Dismiss the First Amended Complaint for Lack of Subject Matter Jurisdiction ("OC Br.") at Pt. III.

considering this question.[2] Moreover, numerous district courts have held that they lack jurisdiction to hear claims similar to those asserted by Plaintiffs here.[3] Thus, it is hardly well settled that constitutional claims challenging a person's inclusion on the No Fly List, or the adequacy of the redress process available to a person who has been denied boarding, are outside the scope of Section 46110. Indeed, some district courts have explicitly rejected the Ninth Circuit's narrow construction of Section 46110 in *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), and *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008), on which Plaintiffs heavily rely. *See Mokdad*, 2013 WL 8840322, at *3-4; *Scherfen*, 2010 WL 456784, at *13. This Court should do the same here.

A. Plaintiffs Challenge TSA Orders Implementing the No Fly List and Establishing and Administering the Redress Process

1. TSA Implements the No Fly List by Issuing Orders Denying Boarding

Contrary to Plaintiffs' conclusory assertion that "TSA does not issue 'orders' preventing watchlisted persons from boarding individual flights," Pl. Br. at 27, TSA orders are in fact what cause individuals on the No Fly List to be denied boarding. By statute, TSA is the sole agency responsible for ordering airlines not to board individuals whose names are on the No Fly List. *See* 49 U.S.C. § 44903(j)(2)(C)(ii); 49 U.S.C. § 114(h)(1), (3). TSA accomplishes this by

[2] In *Mokdad v. Holder*, the plaintiff claims that he was unlawfully placed on the No Fly List and challenges "the process used by the 'TSC' to place people on the No-Fly List," alleging "violations of his Fifth Amendment right to due process and infringement upon his right to travel." No. 13-12038, 2013 WL 8840322, at *3 (E.D. Mich. Dec. 5, 2013). The district court dismissed the complaint as barred by Section 46110, *see id.* at *5, and the plaintiff's appeal is now pending before the Sixth Circuit, *see* 6th Cir. No. 14-1094 (argument held on October 8, 2014). In another case pending in the D.C. Circuit, *Ege v. DHS*, the petitioner brought a petition for review of the agency's disposition of his Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP") inquiry. *See* D.C. Cir. No. 13-1110. The petitioner in *Ege* raises constitutional claims challenging both the substance of the agency's order and the adequacy of the process that TSA provides for an individual to challenge his inclusion on the No Fly List. After directing supplemental briefing on the jurisdictional question, the D.C. Circuit heard oral argument on September 19, 2014.

[3] *See Mokdad*, 2013 WL 8840322, at *3-5; *Scherfen v. U.S. DHS*, No. 3:CV-08-1554, 2010 WL 456784, at **10-13 (M.D. Pa. Feb. 2, 2010); *Jaffer v. DHS*, No. 6:12-cv-1669-Orl-31GJK, 2013 WL 1830735, at *3 (M.D. Fla. May 1, 2013); *Tooley v. Bush*, No. 06-306(CKK), 2006 WL 3783142, at *26 (D.D.C. Dec. 21, 2006), *aff'd on other grounds*, 586 F.3d 1006 (D.C. Cir. 2009); *Green v. TSA*, 351 F. Supp. 2d 1119, 1124-26 (W.D. Wash. 2005).

performing the watchlist matching function and then providing the airline with the results; if an individual is on the No Fly List, upon receipt of the results of the watchlist matching, the airline "must not allow that individual to board an aircraft or enter a sterile area" of the airport. 49 C.F.R. § 1560.105(b)(1).

Simply put, without such a TSA directive to the air carriers, Plaintiffs could not have been denied boarding based on their alleged status on the No Fly List. Such a directive by TSA, moreover, easily satisfies the "liberal" definition of an "order" under Section 46110: it "imposes an obligation" on the airline not to board the passenger, "denies a right" that the passenger otherwise would have to board the aircraft by virtue of having purchased a ticket, and "fixes [a] legal relationship" between the passenger and the air carrier, by prohibiting the airline from boarding the passenger notwithstanding his or her purchase of a ticket. *Paskar*, 714 F.3d at 96 (internal quotation marks omitted).[4]

Thus, while the Terrorist Screening Center ("TSC") initially determines who is placed or maintained on the No Fly List, TSA gives "operational effect" to the No Fly List by issuing orders requiring air carriers to deny boarding to individuals on the list. *Mokdad*, 2013 WL 8840322, at *5; *see also Scherfen*, 2010 WL 456784, at *11 (finding that Section 46110 applied to TSA Security Directives, the precursors to TSA's Secure Flight regulations regarding denial of boarding to individuals on the No Fly List); *Green*, 351 F. Supp. 2d at 1124-25 (same). Although an individual would not be placed on the No Fly List without the action of TSC, he or she likewise would not be denied boarding without an actual order of TSA. As Plaintiffs

[4] An "order" need not be denominated as such, or take any particular form, so long as it imposes an obligation, denies a right or fixes some legal relationship. *Compare San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) (FAA letter deemed an "order"), *with Paskar*, 714 F.3d at 96 (FAA letter that "urged" the City of New York to implement an expert panel's recommendations, but did not "command" the City to do anything, was not an "order"); *see also Ruskai v. Pistole*, No. 12-1392, __ F.3d __, 2014 WL 7272770, at *4 (1st Cir. Dec. 23, 2014) ("order" may be "the result of informal agency action").

acknowledged in their original complaint, TSA is "responsible for implementing the No Fly List at airports" by "determining whether an individual should be denied boarding." Complaint, Dkt. No. 1, ¶ 12. Plaintiffs challenge their denial of boarding based on their alleged inclusion on the No Fly List; because they could have been denied boarding only pursuant to a TSA order, their complaint constitutes a challenge to a TSA order subject to Section 46110.[5]

2. TSA Established and Administers the Redress Process Plaintiffs Challenge Here

Plaintiffs' claims regarding the procedural adequacy of the redress process, *see* Amended Complaint ("AC") ¶¶ 57-62, 222, 227; Pl. Br. at 31-32, likewise challenge TSA orders that are subject to Section 46110. TSA issued regulations establishing DHS TRIP, by which air travelers can file redress inquiries when they believe they have been delayed or denied boarding because they are on the No Fly list. *See* 49 C.F.R. §§ 1560.201-.207. It is well settled, and Plaintiffs do not dispute, that "regulations promulgated through informal notice-and-comment rule-making"—as the DHS TRIP regulations were—constitute an "order" subject to Section 46110. *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) (citation and internal quotation marks omitted); *see also* OC Br. at 20-21 (citing additional cases). While Plaintiffs insist they are not challenging TSA's regulations or the process applied to them, they concede that they "attack the *adequacy* of the redress process itself," Pl. Br. at 31 & n.14—a process that is set forth in TSA's regulations. *See* 73 Fed. Reg. 64,018, 64,023 (Oct. 28, 2008) ("[t]his final rule explains the redress procedures for individuals who believe they have been improperly or unfairly delayed or prohibited from boarding a flight" and "the process the Federal government will use to review [any] information submitted and to provide a timely written

[5] It is immaterial that inclusion on a watchlist may in some cases affect individuals in ways other than denial of boarding, *see* Pl. Br. at 30 n.11, as plaintiffs do not allege that they experienced any such effects.

response"). Thus, despite Plaintiffs' attempt to disavow any challenge to TSA's regulations (which are undeniably final orders), their attack on the adequacy of the redress process is precisely such a challenge.

Moreover, Plaintiffs availed themselves of the redress process established by TSA regulations by filing DHS TRIP inquiries. Each Plaintiff's DHS TRIP determination letter represents the conclusion of TSA's "thorough review" of each Plaintiff's redress inquiry and "any applicable records," "in consultation with other federal agencies, as appropriate." And each letter provides TSA's "determination," either that it is appropriate to "update" government records (Tanvir and Shinwari), or that "no changes or corrections are warranted at this time" (Algibhah and Sajjad). Declaration of Deborah Moore dated July 28, 2014 ("Moore Decl."), Exhs. A-D, cited in AC ¶¶ 114, 128, 168, 189. Each DHS TRIP letter sent to Plaintiffs thus constitutes an order within the scope of Section 46110 because it "fixes [the] legal relationship" between TSA and the DHS TRIP applicant—that is, it marks the conclusion of the agency's review of the applicant's watchlist status and its determination of whether any changes are warranted in response to the DHS TRIP inquiry. *Paskar*, 714 F.3d at 96; *see Scherfen*, 2010 WL 456784, at *11 (DHS TRIP determinations "reflect the fact that a final determination has been made that fixes some legal relationship," and accordingly "are orders of an agency identified in section 46110(a)" (internal quotation marks omitted)); *accord Jaffer*, 2013 WL 1830735, at *3.[6]

Plaintiffs' contention that "TSC alone adjudicates TRIP complaints," Pl. Br. at 32, is belied by the statutory and regulatory scheme governing the redress process. Congress directed TSA—not TSC—to "establish a procedure to enable airline passengers, who are delayed or

[6] Plaintiffs' DHS TRIP letters explicitly provided that final determinations are "reviewable by the United States Court of Appeals." Moore Decl., Exhs. A-D. While this language in the letters is not dispositive of the jurisdictional question, it is evidence that the TSA itself views each determination letter as an agency order subject to Section 46110.

prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii)(I); *id.* § 44903(j)(2)(G)(i) (TSA to "establish a timely and fair process" for individuals to appeal threat determination "and correct any erroneous information"). Under the regulations TSA promulgated pursuant to these statutory authorities, "*TSA*, in coordination with the TSC and other appropriate . . . agencies, if necessary, will review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." 49 C.F.R. § 1560.205(d) (emphasis added). Thus, while TSA coordinates and consults with TSC and other agencies as appropriate, it is TSA that is responsible for establishing and administering the redress process that Plaintiffs challenge here. Again, Plaintiffs conceded as much in their original complaint. Complaint, Dkt. No. 1, ¶ 12 ("The TSA is responsible for implementing the results of the DHS TRIP process and for taking corrective action if a traveler has been misidentified.").

Plaintiffs are also mistaken when they argue that a DHS TRIP determination letter is "non-substantive." Pl. Br. at 34 (citing *Mohamed v. Holder*, No. 1:11-cv-00050(AJT/TRJ), 2011 WL 3820711, at *8 n.6 (E.D. Va. Aug. 26, 2011)). Although the letters issued to Plaintiffs do not advise them of their watchlist status, they represent the culmination of the agency's review of that status, and constitute a substantive determination as to whether or not a change in status is warranted. *See* 49 C.F.R. § 1560.205(d) (through DHS TRIP process, TSA will "correct any erroneous information"). The letters thus qualify as "orders" within the scope of Section 46110. *Paskar*, 714 F.3d at 96.

B. That TSA Coordinates With TSC Does Not Render Section 46110 Inapplicable

Plaintiffs are simply incorrect in contending that Section 46110 does not apply because TSA is not the *only* agency involved in the operation of the No Fly List and the redress process. Pl. Br. at 25 (alleging that "Plaintiffs were placed and kept on the No Fly List by the FBI[7] and TSC"). The plain language of Section 46110, the governing statutory scheme, and well-settled case law broadly construing Section 46110 make abundantly clear that Congress intended to bring TSA's orders denying boarding and establishing and administering the redress process within the scope of Section 46110, even if TSA coordinates and consults with other agencies in issuing those orders. *See Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012) (where Congress "channels judicial review . . . to a particular court," courts must determine whether it is "fairly discernible in the statutory scheme" that Congress intended "to preclude district court jurisdiction" over those claims (citation and internal quotation marks omitted)). Plaintiffs focus only on TSC's role in the operation of the No Fly List and the redress process, but they cannot avoid the application of Section 46110 simply by invoking TSC's involvement. Congress gave TSC a role, but nevertheless specifically empowered TSA to issue the challenged orders denying boarding and establishing and administering the redress process.

[7] Plaintiffs' statement in their brief that "the FBI" places or maintains individuals on the No Fly List is inconsistent with their acknowledgement in the amended complaint that the FBI and other law enforcement agencies nominate individuals for placement on the list, but TSC decides whether those individuals are placed on the list. *See* AC ¶¶ 19-20. Although administered by the FBI, TSC is a "multi-agency center that was created by the Attorney General." Declaration of Rushmi Bhaskaran ("Bhaskaran Decl."), Exh. B, ¶ 2. TSC receives support from multiple agencies, including the Departments of Homeland Security, State, and Justice and the Office of the Director of National Intelligence, and is staffed by officials from multiple agencies, including FBI, DHS, State, TSA and U.S. Customs and Border Protection. *Id.*; OC Br. at 6.

1. Section 46110 Applies to Orders Issued "In Part" Pursuant to the Enumerated Authorities, Which in Turn Envision That TSA Will Coordinate With TSC and Other Agencies

Plaintiffs ignore that Section 46110 by its plain terms applies to orders issued "in whole *or in part*" by TSA pursuant to certain enumerated statutes.[8] Congress added the "in whole or in part" language to Section 46110 in 2003. *See* Pub. L. No. 108-176, § 228(2), 117 Stat. 2490, 2532 (2003). In doing so, Congress resolved a tension in the case law in favor of a broad construction of Section 46110. In *Suburban O'Hare Commission v. Dole*, 787 F.2d 186 (7th Cir. 1986), the Seventh Circuit had held that "[i]f a decision of an administrative agency is based, *in substantial part*, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals." *Id*. at 192-93 (emphasis added). Several circuit courts adopted a similarly broad construction of Section 46110. *See Communities Against Runway Expansion*, 355 F.3d 678, 683-84 (D.C. Cir. 2004); *Sutton v. U.S. Dep't of Transp.*, 38 F.3d 621, 625 (2d Cir. 1994); *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1527-28 (10th Cir. 1993). In 2002 and 2003, however, some courts began to question whether *Suburban O'Hare* and cases following it had been wrongly decided. *See, e.g.*, *Committee to Stop Airport Expansion v. FAA*, 320 F.3d 285, 289 (2d Cir. 2003); *City of Alameda v. FAA*, 285 F.3d 1143, 1144-45 (9th Cir. 2002). In amending Section 46110(a) in 2003, Congress endorsed *Suburban O'Hare*'s broad construction of Section 46110 and expanded it to include orders issued "in whole or in part" by TSA pursuant to the enumerated statutory authorities.

[8] Those statutes are 49 U.S.C. Parts A & B (§§ 40101 – 47534), 49 U.S.C. § 114(*l*), and 49 U.S.C. § 114(s), which has subsequently been recodified as subsection (r).

Those statutory authorities further demonstrate that Congress intended to channel the types of claims at issue in this case to the courts of appeals under Section 46110. Congress intended that TSA would coordinate and consult with other federal agencies, including TSC, and rely on their information and records in carrying out its responsibilities to deny boarding to individuals deemed to pose a security threat, and to establish and administer the redress process. *See* 49 U.S.C. § 44903(j)(2)(E)(iii) (design and review of "guidelines, policies, and operating procedures for the collection, removal, and updating of data maintained, or to be maintained, in the no fly and automatic selectee lists" to be done "in consultation with the Terrorist Screening Center"); *id.* § 44903(j)(2)(C)(ii) (TSA directed to "utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government"); *see also id.* § 114(h)(1), (3).

Thus, even if TSC, rather than TSA, initially "determines" who is placed on, or removed from, the No Fly List, Plaintiffs' claims challenging that determination are not outside the scope of Section 46110. Pl. Br. 25-28. The Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, provides an apt analogy. There, Congress provided for exclusive court of appeals jurisdiction over final determinations of the Drug Enforcement Agency ("DEA"). 21 U.S.C. § 877; *see Wagner v. FEC*, 717 F.3d 1007, 1012 n.5 (D.C. Cir. 2013) (comparing exclusive jurisdiction provision in Section 877 to Section 46110). DEA places drugs in various categories, known as "schedules," with varying restrictions on access to those drugs. *See* 21 U.S.C. § 812. When DEA receives a petition to reschedule a drug, *see* 21 U.S.C. § 811(a), the agency must "request from the Secretary [of Health and Human Services] a scientific and medical evaluation" of the drug, and that evaluation "shall be binding on the DEA," *id.* § 811(b). Although HHS's evaluation of the drug is "binding," any challenge to DEA's ultimate denial of a petition to

reschedule the drug, including an attack on HHS's underlying scientific and medical evaluation, may be brought only in a court of appeals under the exclusive jurisdiction provision of 21 U.S.C. § 877, and not as a district court action against HHS. *See Americans for Safe Access v. DEA*, 706 F.3d 438, 450 (D.C. Cir. 2013). Similarly here, whether or not TSC's antecedent decision to place or maintain a person on the No Fly List is binding on TSA, the person's challenge to his denial of boarding because of an alleged placement on the No Fly List, or to the redress process relating to such denials, can only be brought in a court of appeals under Section 46110.

Plaintiffs' extensive reliance on *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), is therefore unavailing. *Latif* held that a procedural challenge to the adequacy of the DHS TRIP process was outside the scope of Section 46110 because it "requires judicial review of orders issued by *both* TSA, which is named in § 46110, and by TSC, which is not." 686 F.3d at 1128 (emphasis added). But even if a procedural challenge is only *partially* a challenge to a TSA order, it falls within the scope of Section 46110 so long as the TSA order was issued "in part" pursuant to an enumerated statute, as the orders in this case plainly were. *See* OC Br. at 18-19, 20 & n.8. *Latif* was therefore wrongly decided.[9]

2. Under Well-Established and Binding Case Law, Section 46110 Encompasses Claims "Inescapably Intertwined" With TSA Orders

For more than two decades, the Second Circuit and other circuit courts have construed Section 46110 as encompassing not only claims directly challenging TSA orders, but also claims that are "inescapably intertwined" with such orders. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) ("*Merritt II*") ("statutes such as Section 46110(c) that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from

[9] The Ninth Circuit's subsequent decision in *Arjmand v. U.S. DHS*, 745 F.3d 1300 (9th Cir. 2014), and the Third Circuit's unpublished disposition in *Mohamed v. Holder*, No. 11-1924 (4th Cir. May 28, 2013), which was issued without the benefit of full briefing, are similarly incorrect, as they relied substantially on the flawed analysis in *Latif*.

hearing claims that are 'inescapably intertwined' with review of such orders") (quoting *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 271 (2d Cir. 1999) ("*Merritt I*")); *see also Ligon v. LaHood*, 614 F.3d 150, 155-56 (5th Cir. 2010) (collecting cases); *Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997); *Green v. Brantley*, 981 F.2d 514, 521 (11th Cir. 1993). Quoting the Ninth Circuit's decision in *Ibrahim v. DHS*, 538 F.3d 1250, 1255 (9th Cir. 2008), Plaintiffs argue that "'Defendants advance no good reason why the word 'order' should be interpreted to mean 'order or any action inescapably intertwined with it.'" Pl. Br. at 29. But defendants *have* advanced a good reason: this interpretation is required under Second Circuit law. *See Merritt II*, 245 F.3d at 187; *Merritt I*, 187 F.3d at 271.[10]

As then-Judge Sotomayor explained in *Merritt I*, the "inescapably intertwined" principle has its origins in *City of Tacoma v. Taxpayers of Tacoma*, in which the Supreme Court held that where Congress provides for an "exclusive mode for judicial review" by the courts of appeals, it extends to "all issues inhering in the controversy." 357 U.S. 320, 336 (1958); *see also Fla. Power & Light v. Lorion*, 470 U.S. 729, 743 (1985) (statute vesting exclusive jurisdiction in court of appeals extends to "issues preliminary or ancillary to the core issue"); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*") ("where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals"); *accord In re FCC*, 217 F.3d 125, 139 (2d Cir. 2000) (citing *TRAC*); *Air Line Pilots Ass'n v. Civil Aeronautics Bd.*, 750 F.2d 81 (D.C. Cir. 1984) (applying *TRAC* to Section 46110); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421-22 (11th Cir. 1993) (same). Notably, Congress has amended Section 46110 several times, but has never disavowed

[10] The Court therefore should not follow the contrary holding in *Ibrahim*. As the dissenting judge in *Ibrahim* observed, "[a]t the very minimum," claims challenging a person's alleged placement on the No Fly List "are 'inescapably intertwined' with an order of the [TSA] and are thus still subject to § 46110(a)." 538 F.3d at 1259.

these decisions. *See Watson v. United States*, 552 U.S. 74, 82-83 (2007) (congressional acquiescence accorded significant weight). Instead, Congress has most recently amended Section 46110 to *expand* the statute's scope consistent with the "inescapably intertwined" principle, to include orders issued "in whole or in part" by TSA pursuant to the statutory authorities in Section 46110(a). *See supra* Point I.B.1.

Furthermore, the key purpose of the "inescapably intertwined" principle—to allow courts to identify and dismiss claims that are "actually thinly disguised attempts at an end-run around the jurisdictional limitation imposed by § 46110," *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (internal quotation marks omitted)—is directly implicated here. After initially naming TSA as a defendant and alleging facts regarding TSA's role in implementing the No Fly List and the redress process, Dkt. No. 1, ¶ 12, Plaintiffs' amended complaint attempts to downplay TSA's role in what can only be an effort to "circumvent[] the exclusive jurisdiction of the court of appeals." *Green*, 981 F.2d at 520-21 ("inescapably intertwined" principle avoids "circumventing the exclusive jurisdiction of the court of appeals" and prevents "an impermissible collateral challenge to the agency order" in district court); *see also Mokdad*, 2013 WL 8840322, at *5 (purpose of principle "is to prevent plaintiffs from avoiding special review statutes through creative pleading").

The "inescapably intertwined" principle also promotes judicial efficiency and avoids unnecessary bifurcation of litigation. *See Fla. Power & Light*, 470 U.S. at 742 (refusing to accept "seemingly irrational bifurcated system" of review, which would result in some agency orders "receiving two layers of judicial review and some receiving only one," "[a]bsent a far clearer expression of congressional intent" (internal quotation marks omitted)); *see also City of Rochester v. Bond*, 603 F.2d 927, 936-38 (D.C. Cir. 1979) (applying similar considerations to

Section 46110); *accord Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 313 (7th Cir. 1980); *San Diego Air Sports Ctr.*, 887 F.2d at 968; *Suburban O'Hare*, 787 F.2d at 192-93. The Ninth Circuit's decision in *Ibrahim* illustrates this point. Having rejected the application of Section 46110 to claims that were "inescapably intertwined" with TSA orders, the *Ibrahim* court held that the district court retains jurisdiction over a challenge to the placement of a name on the No Fly List, but that the court of appeals has exclusive jurisdiction over a challenge to TSA's policies and procedures if TSA finds a passenger's name on the No Fly List. 538 F.3d at 1256-57. The court then transferred Ibrahim's Section 46110 petition to the D.C. Circuit, where it has remained in abeyance for over eight years. *See* D.C. Cir. No. 06-1218. Applying binding precedent recognizing that "inescapably intertwined" claims are also subject to Section 46110 avoids such an inefficient and irrational result.[11]

C. A Court of Appeals Could Grant Relief to Individuals Who Claim They Were Unlawfully Placed on the No Fly List and That the Redress Process Available to Them Was Constitutionally Inadequate

Plaintiffs' effort to bring this action outside the scope of Section 46110 by characterizing their lawsuit as a "broad constitutional claim" challenging "government policy," Pl. Br. at 25, also fails. Even if the Court were to accept Plaintiffs' characterization of their claims,[12] the Second Circuit has not recognized any exception to Section 46110 for broad constitutional challenges. *See Merritt I*, 187 F.3d at 271 (declining to reach issue). Nor is there any basis in

[11] *Ibrahim*'s bifurcated review also creates potentially significant Article III standing problems, as a claim based on TSC's alleged placement of an individual on the No Fly List, without any subsequent denial of boarding by TSA, would not constitute a concrete injury sufficient to create standing. *See Halkin v. Helms*, 690 F.2d 977, 997-98 & n.76 (D.C. Cir. 1982) ("watchlisting by itself" does not establish injury in fact); *cf. also* Point II *infra* (Tanvir and Shinwari lack standing to seek prospective injunctive relief because they allege that, after earlier denials of boarding, they have since been permitted to fly).

[12] The Court need not accept Plaintiffs' characterization, as the substance of Plaintiffs' suit challenges the alleged application of the No Fly List, and the DHS TRIP procedures, *to them*. *See* OC Br. at 28; *Merritt I*, 187 F.3d at 271-72.

the statute for such an exception. Section 46110 provides that the courts of appeals have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the [TSA Administrator] . . . to conduct further proceedings." 49 U.S.C. § 46110(c). There is no carve-out for broad constitutional or policy-based claims. If a court of appeals found an agency order unconstitutional in whole or in part, under the plain terms of Section 46110, the court could "modify . . . or set aside any part" of the order on that ground.[13] *Id.* Indeed, numerous courts have held that Section 46110 applies to broad constitutional challenges. *See, e.g.*, *Ruskai*, 2014 WL 7272770, at **3, 6-14 (exercising jurisdiction over Fourth Amendment challenge to TSA "security protocol" requiring a pat-down); *Corbett v. TSA*, 767 F.3d 1171, 1176 (11th Cir. 2014) (exercising jurisdiction over Fourth Amendment challenge to airport screening procedures, and recognizing that "Congress granted the courts of appeals exclusive jurisdiction to decide a petition like [this one]"); *Elec. Privacy Info. Ctr. v. U.S. DHS*, 653 F.3d 1, 2-3, 10-11 (D.C. Cir. 2011) ("*EPIC*") (exercising jurisdiction over facial Fourth Amendment challenge to TSA's decision to use "advanced imaging technology instead of magnetometers")[14]; *see also Blitz v. Napolitano*, 700 F.3d 733, 739-40 (4th Cir. 2012); *Gaunce v. deVincentis*, 708 F.2d 1290, 1291

[13] That Plaintiffs did not—or, in their view, could not—raise their claim that the redress process is inadequate in their DHS TRIP proceedings before filing a lawsuit, Pl. Br. at 31-32, does not mean that Section 46110 does not apply to the claim. *Merritt II* does not support Plaintiffs' argument in this regard. The plaintiff pilot there contended that FAA air traffic controllers were negligent in making and communicating weather forecasts; the court of appeals held that the plaintiff's tort claims relating to the controllers' conduct were not inescapably intertwined with an FAA final order suspending the plaintiff's pilot certificate because whether the controllers were negligent was not material to the suspension proceeding. Here, Plaintiffs' constitutional challenge to the adequacy of the redress process is necessarily a direct challenge to the TSA final orders establishing that process. And, unlike in *Merritt II*, to the extent Plaintiffs here challenge the results of their redress proceedings, their claims about the adequacy of the proceedings are certainly inescapably intertwined with that challenge.

[14] Plaintiffs' reliance on *Adams v. FAA*, 550 F.3d 1174 (D.C. Cir. 2008), Pl. Br. at 25, is misplaced. There, the petitioners sought to challenge the constitutionality of a statute enacted after the FAA issued the orders in question, and the D.C. Circuit made the unremarkable observations that it did "not have jurisdiction to consider constitutional questions *unrelated to* the FAA's order," and that the petitioners' "facial challenges *to the Act* must be brought in the district court in the first instance." 550 F.3d at 1176 (emphasis added). Where, however, a person brings a constitutional challenge to a TSA order, the D.C. Circuit has exercised its exclusive jurisdiction pursuant to Section 46110. *See EPIC*, 653 F.3d at 10-11.

(7th Cir. 1983).[15] In short, Plaintiffs "cannot escape the jurisdictional limitations of § 46110 by claiming" that they assert "a broad constitutional challenge." *Corbett v. United States*, 458 F. App'x 866, 871 (11th Cir. 2012); *Durso v. Napolitano*, 795 F. Supp. 2d 63, 71 (D.D.C. 2011) (dismissing facial Fourth Amendment challenge to airport screening procedures and rejecting argument that "broad constitutional challenges are categorically exempt" from Section 46110).

Plaintiffs are also mistaken that their claims cannot be decided on the basis of the administrative record before the agency. Pl. Br. at 30-31. By statute, any review of TSA's orders is to be based on an administrative record filed by the agency with the court of appeals, rather than fact-finding or discovery overseen by a district court. The Ninth Circuit's suggestion that a court of appeals could not conduct record review of a "decision to put a particular name on the list," *see Ibrahim*, 538 F.3d at 1256, quoted in Pl. Br. at 31, is simply incorrect. Review of TSA's order, after the culmination of the DHS TRIP process, would encompass review of the underlying determination as to whether an individual was properly on the No Fly List. And the administrative record before the court of appeals on review of TSA's order would include the underlying evidence on which that determination was made (submitted *ex parte* and *in camera*, if necessary to protect national security information). In other words, when a court of appeals reviews TSA's final DHS TRIP determination, it is in substance and effect reviewing the underlying No Fly List determination and the evidence on which it was based.

[15] In arguing that Section 46110 does not apply to constitutional claims, Plaintiffs rely principally on *Latif* and subsequent cases citing *Latif*. Pl. Br. at 25. *Latif*'s exception for "broad constitutional claims" originated in *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994), which in turn relied on *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). But *Mace* wrongly engrafted *McNary*'s reasoning onto Section 46110, for two reasons. First, *McNary*'s holding turned on the "critical words" in that particular jurisdictional provision, and numerous courts have rejected its application to entirely different statutory language. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 126 (D.C. Cir. 2010); *Aguilar v. U.S. ICE*, 510 F.3d 1, 15 (1st Cir. 2007); *Corbett*, 458 F. App'x at 871. Second, *McNary* involved a jurisdiction-stripping statute, whereas Section 46110 simply channels review to a particular court. *See Elgin*, 123 S. Ct. at 2132. Because the statute in *McNary* "would amount to the practical equivalent of a total denial of judicial review," whereas "§ 46110 does not deprive the Plaintiffs of meaningful judicial review," but rather is a "jurisdiction-channeling provision[]," the holding of *McNary* does not apply to Section 46110. *Blitz*, 700 F.3d at 742 (internal quotation marks omitted).

Here, Plaintiffs filed DHS TRIP inquiries, triggering an administrative process that culminated in the DHS TRIP determinations issued to plaintiffs and yielded administrative records that a court of appeals could easily review. *See, e.g.*, *Ege v. DHS*, No. 13-1110 (D.C. Cir.), Dkt. Entries dated Dec. 16, 2013 (*ex parte* administrative record filed in connection with petition for review under Section 46110 challenging alleged inclusion on No Fly List). Similarly, to the extent Plaintiffs challenge the redress process itself, TSA could compile an administrative record in connection with the TSA regulations establishing that process. *See, e.g.*, *EPIC v. DHS*, D.C. Cir. No. 10-1157, Dkt. Entries dated Oct. 4 & 29, 2010 (reflecting filing of index to administrative record pertaining to TSA rule).

That Section 46110 does not contemplate discovery or trial-like proceedings does not mean that a court of appeals could not review the factual basis for the agency's determinations and fashion relief where appropriate. If a court of appeals were to conclude that an individual was unlawfully on the No Fly List, it could "amend, modify, or set aside any part" of a TSA order denying that individual boarding, and could direct TSA to correct the records pertaining to that individual. 49 U.S.C. § 46110(c). The court could also order TSA to "conduct further proceedings," if necessary. *Id.*; *see also Roberts v. Napolitano*, 463 F. App'x 4, 5 (D.C. Cir. 2010) (noting that if, upon review of constitutional challenge to TSA order, "the administrative record is inadequately developed for appellate review, section 46110 expressly permits [the court of appeals] to remand for further proceedings").

Nor would the fact that TSC is not a party to a proceeding under Section 46110 preclude relief. The Ninth Circuit thus erred in rejecting the application of Section 46110 on the ground that "any remedy must involve both TSA and TSC." *Latif*, 686 F.3d at 1129. Congress directed TSA, not TSC, to establish the redress process. *See* 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I),

44903(j)(2)(G)(i). If a court of appeals were to hold that a person had been unlawfully placed on the No Fly List, the court could direct TSA, through appropriate orders, to ensure that the person is not denied boarding on account of any unlawful status. In fact, TSA is statutorily authorized to maintain records of passengers who have been misidentified and who have corrected erroneous information, *see id.* § 49903(j)(2)(G)(ii), which would permit TSA to comply with any such court orders. Similarly, if Plaintiffs prevailed on the merits of their procedural claims, a remedial order could be directed at TSA. TSA's authority to "establish a procedure" to "correct information contained in the system," *id.* § 44903(j)(2)(C)(iii)(I), and to "establish a timely and fair process" to "correct any erroneous information," *id.* § 44903(j)(2)(G)(i), along with its general rulemaking authority, 49 U.S.C. §§ 114(*l*), 44903(b), would permit TSA to craft any additional procedures if ordered to do so by the court of appeals.[16] And the government would abide by such an order by the court of appeals, even if doing so required coordination between TSA and other agencies, including TSC.

II. Tanvir and Shinwari Lack Standing to Seek Prospective Relief

Plaintiffs Tanvir and Shinwari fail to acknowledge, let alone show that they satisfy, the stringent standard for establishing standing to seek prospective injunctive relief. Under the Supreme Court's decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), among other cases, to establish standing to seek prospective relief, the "threatened injury must be *certainly impending* to constitute injury in fact." *Id.* at 1147 (internal quotation marks omitted); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a

[16] Indeed, *Latif*'s contrary view contemplates that a court would order one executive agency (TSC) to establish new and different procedures for correcting information relating to the No Fly List, even though Congress expressly delegated authority to establish that process to a different executive agency (TSA), raising potential separation-of-powers concerns.

'substantial risk' that the harm will occur."). "Allegations of *possible* future injury are not sufficient." *Amnesty Int'l*, 133 S. Ct. at 1147 (internal quotation marks omitted). Plaintiffs Tanvir and Shinwari do not come close to meeting this burden. In fact, the allegations in the amended complaint strongly suggest that they are *not* likely to suffer any future injury: Tanvir and Shinwari allege that after filing DHS TRIP inquiries and being advised that the government had "'made updates'" to its records, they were permitted to fly. *See* AC ¶¶ 114-15, 168-69.

Tanvir and Shinwari contend that the fact that they have since been permitted to fly is "not inconsistent with their remaining on the No Fly List" because they might have been granted a "one-time waiver" to fly. Pl. Br. at 36. But to establish standing to seek prospective relief, Plaintiffs must do more than plead allegations that are "not inconsistent" with a future injury. They must establish that their alleged future injury—an inability to fly because they are on the No Fly List—is "certainly impending," *Amnesty Int'l*, 133 S. Ct. at 1147, or at least substantially likely to occur, *Susan B. Anthony List*, 134 S. Ct. at 2341. Tanvir and Shinwari's purported subjective belief that they may have been granted a one-time waiver, without their knowledge or any further interaction with the agents, is not even plausible in light of the other allegations in the amended complaint,[17] much less certain or substantially likely. *See Amnesty Int'l*, 133 S. Ct. at 1147 (even an "objectively reasonable likelihood" of future injury is insufficient because it is "inconsistent with our requirement that threatened injury must be certainly impending to constitute injury in fact" (citations and internal quotation marks omitted)).

Moreover, as the government explained in its opening memorandum—and Plaintiffs fail to address—to show a certainly impending future injury, "a plaintiff cannot rely solely on past

[17] *See* AC ¶¶ 102-04 (alleging that two FBI agents advised Tanvir that they would try to obtain a one-time waiver to allow him to fly, but the following day one of the agents told Tanvir that he would not be permitted to fly until he agreed to come to FBI headquarters and submit to a polygraph test, which he never did); AC ¶¶ 164-65 (alleging that FBI agents told Shinwari that he could potentially get a one-time waiver to travel in an emergency, but then the agent never responded to Shinwari's email asking whether he could obtain a waiver to fly to Afghanistan). Furthermore, Shinwari alleges that he has been able to fly not once, but twice. AC ¶ 169.

injuries." *Marcavage v. City of N.Y.*, 689 F.3d 98, 103 (2d Cir. 2012). Here, contrary to this binding precedent, Tanvir and Shinwari rely entirely on their past denials of boarding to argue that they *may* still be on the No Fly List. AC ¶¶ 115, 169. But especially having since been permitted to fly, *see id.*, Tanvir and Shinwari cannot show "a sufficient likelihood that [they] will be wronged in a similar way." *Marcavage*, 689 F.3d at 103 (citation and internal quotation marks omitted).

Finally, Plaintiffs wrongly contend that they have standing because their DHS TRIP determination letters "did not confirm or clarify plaintiffs Tanvir's or Shinwari's watchlist status." Pl. Br. at 37. The Supreme Court has rejected this very argument, noting that "it is [*plaintiff's*] burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing by revealing the details" of a government counter-terrorism program. *Amnesty Int'l*, 133 S. Ct. at 1149 n.4 (finding "puzzling" argument that government could help resolve standing inquiry by disclosing to court, perhaps *in camera*, whether it was subjecting plaintiffs to complained-of surveillance, and noting that "this type of hypothetical disclosure would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program").

Plaintiffs erroneously accuse the government of a "lack of candor in its TRIP letters" because the letters they received did not state whether or not they were ever on the No Fly List, or whether any changes had been made to their watchlist status. Pl. Br. at 37. Plaintiffs' DHS TRIP determination letters were issued pursuant to the government's longstanding policy, founded on legitimate security concerns, not to confirm or deny the No Fly status of specific individuals. *See* Bhaskaran Decl., Exh. I ("The [DHS TRIP] letter does not reveal the person's

[watchlist] 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."). The government is currently evaluating this policy in connection with its ongoing review and revision of the existing redress procedures regarding the No Fly List. *See* Bhaskaran Decl., Exh. L at n.2. As the government has advised Plaintiffs, once the revised redress procedures have been finalized, the government will notify Plaintiffs and the Court, and Plaintiffs will have an opportunity to have their DHS TRIP inquiries reopened and reconsidered under the revised procedures. *Id*.[18] Whatever the outcome of that process, however, Tanvir and Shinwari's claims in this action should be dismissed now for lack of standing.

CONCLUSION

The claims against defendants in their official capacities should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: New York, New York
January 22, 2015

Respectfully submitted,

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[18] The government no longer uses the DHS TRIP procedures that were applied to the redress inquiries filed by Plaintiffs in this case. Accordingly, if the Court retains jurisdiction, the government will move at an appropriate time to dismiss Plaintiffs' claims for injunctive relief relating to the redress process as moot.