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)

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

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Defendants Eric H. Holder, Jr., United States Attorney General; James Comey, Director of the Federal Bureau of Investigation ("FBI"); Christopher M. Piehota, Director of the Terrorist Screening Center ("TSC"), Jeh C. Johnson, Secretary of the Department of Homeland Security ("DHS") (collectively, the "Agency Defendants"); and twenty-five individual agent defendants (the "Individual Defendants" or "Agents"), to the extent they are sued in their official capacities, respectfully submit this memorandum of law in support of their motion to dismiss the official capacity claims in the First Amended Complaint ("Amended Complaint" or "AC") for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[1]

Preliminary Statement

Plaintiffs are four men who allege that they are or were on the government's "No Fly List." As the Amended Complaint alleges, the No Fly List identifies persons for whom there is "reasonable suspicion" that they are "known or suspected terrorists," and about whom there is additional "derogatory information" demonstrating, for example, that such persons "pose a threat of committing a terrorist act with respect to an aircraft." Two of the plaintiffs, Muhammad Tanvir and Jameel Algibhah, allege that they were interviewed by FBI agents on various occasions. During some of those interviews, they allege, FBI agents asked them to serve as informants in their Muslim communities. At some point months later, these plaintiffs attempted to board commercial aircraft, and were denied boarding at the airport. They believe that they were denied boarding because they were on the No Fly List. Tanvir and Algibhah speculate that the reason they were allegedly placed on the No Fly List is that they refused to serve as informants for the FBI. The other two plaintiffs, Naveed Shinwari and Awais Sajjad, allege that they were denied boarding at the airport, and then later were interviewed by FBI agents and

[1] The Individual Defendants are separately filing a motion to dismiss the individual capacity claims in the Amended Complaint.

purportedly asked to serve as informants. Although plaintiffs Shinwari and Sajjad did not have contact with the FBI until *after* they were denied boarding, they too attribute their alleged placement on the No Fly List (or their remaining on the list) to their alleged refusal to serve as informants for the FBI.

Meanwhile, plaintiffs acknowledge in the Amended Complaint that the Terrorist Screening Center "maintains and controls" the No Fly List; that by contrast the FBI only nominates individuals to the No Fly List; that TSC "makes the final decision on whether an individual should be placed on the No Fly List"; and that the Transportation Security Administration ("TSA") implements the list by ensuring that commercial airlines do not issue boarding passes to individuals who are on the list. The Amended Complaint also acknowledges that there is an administrative process by which travelers can seek redress for denials of boarding, called the DHS Traveler Redress Inquiry Program ("DHS TRIP"), which is administered by TSA. Indeed, each of the plaintiffs alleges that he filed a TRIP inquiry after he was denied boarding. In response to their TRIP inquiries, plaintiffs Tanvir and Shinwari were advised that updates had been made to government records, and they thereafter were permitted to fly. In response to the TRIP inquiries filed by plaintiffs Algibhah and Sajjad, TSA determined that "no changes or corrections [to government records] are warranted at this time," and advised that the agency's final determination was reviewable by a U.S. Court of Appeals under 49 U.S.C. § 46110. Rather than seeking review in that forum, however, all four plaintiffs filed the instant lawsuit.

This Court lacks subject matter jurisdiction over the official capacity claims in the Amended Complaint, and those claims accordingly should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiffs' claims arise from final orders issued "in whole or in part" by TSA, and

therefore are subject to the "exclusive jurisdiction" of the courts of appeals pursuant to 49 U.S.C. § 46110(c). TSA implements the No Fly List, and accordingly would have issued final orders to deny plaintiffs boarding on commercial flights. And DHS TRIP, which is administered by TSA, also issued final determinations with regard to three of the plaintiffs' redress inquiries (DHS TRIP issued a determination letter to the fourth plaintiff, Sajjad, and his administrative appeal remains pending). Although the Amended Complaint attempts to minimize TSA's role, plaintiffs cannot avoid the jurisdictional limitation imposed by Section 46110(c) through artful pleading. Because plaintiffs' claims directly challenge or are inescapably intertwined with review of final TSA orders, they may only be brought in an appropriate court of appeals, and this Court lacks jurisdiction to hear them.

Furthermore, plaintiffs Tanvir and Shinwari lack standing under Article III of the Constitution to seek prospective declaratory or injunctive relief, because the Amended Complaint alleges that they are now able to fly. According to the Amended Complaint, since their initial denial of boarding at the airport, both individuals have been permitted to board commercial flights: Tanvir alleges that on June 27, 2013, he was permitted to board a flight to Pakistan, and Shinwari alleges that he was permitted to fly roundtrip from Connecticut to Nebraska in March 2014. And both plaintiffs received responses from DHS TRIP indicating that updates had been made to government records. Although Tanvir and Shinwari speculate that their names *might* remain on the No Fly List because they have not received confirmation otherwise, plaintiffs cannot rely on conjecture to establish standing; they must allege a "clearly imminent" future injury. Given the response to their DHS TRIP inquiries and the fact that they were subsequently permitted to fly, they cannot make this showing, and therefore fail to establish standing to seek prospective relief.

Finally, to the extent plaintiffs seek to recover monetary damages from the Agency Defendants, or from the Agents in their official capacities, their claims are barred by sovereign immunity. It is well settled that money damages are not available against the United States, or its agencies or officials, for claims arising under the Constitution, the Religious Freedom Restoration Act or the Administrative Procedure Act, the only bases for relief asserted in the Amended Complaint.

BACKGROUND[2]

A. Statutory and Regulatory Framework

Several components of the federal government work together to secure the United States and its aviation system from terrorist threats. The Federal Bureau of Investigation investigates and analyzes intelligence relating to both domestic and international terrorist activities, *see* 28 U.S.C. § 533; 28 C.F.R. § 0.85(l), and the National Counterterrorism Center analyzes and integrates intelligence relating to international terrorism and counterterrorism, *see* 50 U.S.C. § 3056. The Department of Homeland Security is primarily charged with "prevent[ing] terrorist attacks within the United States" and "reduc[ing] the vulnerability of the United States to terrorism." 6 U.S.C. § 111(b)(1)(A), (B); *see also* 6 U.S.C. § 202(1).

Within DHS, TSA is responsible for ensuring security in all modes of transportation, with a particular focus on preventing terrorist attacks against the aviation industry. *See* 49 U.S.C. § 114(d). TSA is responsible for "day-to-day Federal security screening operations for passenger air transportation," *id*. § 114(e), and for developing "policies, strategies, and plans for dealing with threats to transportation security," *id*. § 114(e)(1), (f)(3). TSA may "issue . . . such

[2] Although Defendants neither confirm nor deny whether any plaintiff is or was on the No Fly List, for purposes of this motion only, Defendants accept as true the well-pleaded factual allegations in the Amended Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

regulations as are necessary to carry out [its] functions," *id*. § 114(*l*)(1), and may "prescribe regulations to protect passengers and property on an aircraft," 49 U.S.C. § 44903(b).

1. The No Fly List

One of TSA's primary responsibilities is to ensure aircraft security by implementing the No Fly List. Congress directed TSA to establish procedures for notifying appropriate officials "of the identity of individuals" who are "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline passenger safety." 49 U.S.C. § 114(h)(2). TSA is required to "perform[] . . . the passenger prescreening function of comparing passenger information to the automatic selectee and no fly lists and utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government in performing that function." 49 U.S.C. § 44903(j)(2)(C)(ii). This mandate requires TSA, "in consultation with other appropriate Federal agencies and air carriers," "to use information from government agencies" to identify travelers who may pose a threat to civil aviation or national security, and to "prevent [such] individual[s] from boarding an aircraft." 49 U.S.C. § 114(h)(3)(A), (B); *see also id.* § 114(h)(1) (directing TSA to "enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security").

TSA carries out these responsibilities through the "Secure Flight" program established by regulation. *See* 49 C.F.R. Parts 1540, 1544, 1560. Under Secure Flight, aircraft operators request the full name, gender, date of birth and other information from passengers, and submit them to TSA. 49 C.F.R. § 1560.101(a)(1), (b). TSA uses that data to detect individuals "on Federal government watch lists who seek to travel by air." *Id*. § 1560.1(b). An aircraft operator

may not issue a boarding pass to an individual "until TSA informs the covered aircraft operator of the results of watch list matching for that passenger," and, if TSA so directs, the aircraft operator "must not issue a boarding pass . . . and must not allow that individual to board an aircraft . . . ." *Id*. § 1560.105(b)(1).

As plaintiffs acknowledge in the Amended Complaint, the government's watchlists, including the No Fly List, are maintained by the Terrorist Screening Center. AC ¶¶ 20, 40-41. TSC, established by Executive Order in 2003, is a multi-agency organization administered by the FBI created to "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." Homeland Security Presidential Directive 6 (Sept. 16, 2003).[3] TSC maintains the Terrorist Screening Database ("TSDB"), a consolidated database of identifying information of persons about whom there is reasonable suspicion that they are known or suspected terrorists. AC ¶ 40. The No Fly List is a subset of the TSDB, composed of individuals who satisfy additional heightened criteria for inclusion. *See* AC ¶ 42 (alleging that "[t]o be properly placed on the No Fly List, an individual must not only be a 'known or suspected terrorist,' but there must be some additional 'derogatory information' demonstrating that the person 'poses a threat of committing a terrorist act with respect to an aircraft'" (alteration omitted)); 49 U.S.C. § 114(h)(3)(A) (providing for use of "information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security").

The FBI, in addition to other agencies and departments, nominates individuals known or suspected of being international terrorists for inclusion in the TSDB and, if the heightened

[3] The creation of TSC addressed concerns raised by the National Commission on Terrorist Attacks Against the United States ("9/11 Commission") that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the nation's security. *See, e.g.*, The 9/11 Commission Report at 82-84, 385, 392-93, 416-19 (2004), available at www.9-11commission.gov/report/911Report.pdf.

criteria are satisfied, on the No Fly List. AC ¶ 41. TSC then determines whether those nominations will be accepted. *See* AC ¶ 20 ("The TSC is responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI[,] and for maintaining the list. The TSC is responsible for making the final determination whether to add or removal an individual from the No Fly List."), ¶ 41 ("The TSC makes the final decision on whether an individual should be placed on the No Fly List.").

2. The Redress Process for Travelers Denied Boarding

Congress directed TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to the Transportation Security Administration the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i). TSA is required to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." *Id*. § 44903(j)(2)(C)(iii)(I). Congress also mandated that "[t]he Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration," 49 U.S.C. § 44926(a), and "shall establish" procedures "to implement, coordinate, and execute the process" for redress, *id*. § 44926(b)(1). TSA is also required to maintain records for individuals whose information has been corrected through the redress process, to prevent repeated ongoing delays as a result of erroneous information. *See* 49 U.S.C. §§ 44903(j)(2)(G)(ii), 44926(b)(2).

Pursuant to these authorities, TSA administers DHS TRIP, through which travelers may request the correction of any erroneous information if they believe, *inter alia*, that they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft as a result of TSA's watchlist matching program. 49 C.F.R. §§ 1560.201, 205. TSA has promulgated regulations governing the DHS TRIP process. 73 Fed. Reg. 64,018, 64,066 (Oct. 28, 2008); 49 C.F.R. §§ 1560.201-.207.[4]

Under these regulations, travelers may initiate the redress process by submitting a DHS TRIP inquiry form. *Id*. § 1560.205(b). If TSA requires further information from a traveler in order to resolve the matter, TSA will so notify him. *Id*. § 1560.205(c). "TSA, in coordination with the [Terrorist Screening Center] and other appropriate Federal law enforcement or intelligence 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." *Id*. § 1560.205(d). If a traveler seeking redress could be a match to a name on the No Fly List, TSA refers the inquiry to TSC, which reviews the available information (including that provided by the traveler) and determines whether his name is a positive match to the No Fly List and, if so, whether his No Fly List status should change based on currently available information. *See* AC ¶ 58.

At the conclusion of its review, DHS TRIP responds to a traveler's inquiry with a determination letter. AC ¶ 59. In cases involving an allegation that a traveler was denied

[4] The Amended Complaint alleges that "DHS is responsible for the TRIP procedures and the administrative appeals from such determinations," AC ¶ 57, but TSA, which is a component of DHS, administers DHS TRIP. *See* 49 U.S.C. § 44903(j)(2)(G)(i) (specifically directing the Administrator of TSA to establish a redress process); 49 C.F.R. §§ 1560.201-.207; *see also* Declaration of Deborah Moore, dated July 28, 2014 ("TSA Decl."), ¶ 1. As plaintiff Tanvir alleged in the original complaint, "TSA is responsible for implementing the results of the DHS TRIP process and for taking corrective action if a traveler has been misidentified." Complaint ¶ 12 (citing 49 U.S.C. § 44903(j)(2)(G)(i)).

boarding because he or she is allegedly on the No Fly List, the determination letter advises the traveler whether or not government records have been updated as a result of his inquiry and DHS TRIP's review. *Compare* TSA Decl., Exhs. A, C (determination letters issued to plaintiffs Tanvir and Shinwari, respectively, advising that government had made updates to its records) *with id*. Exhs. B, D (determination letters issued to plaintiffs Algibhah and Sajjad, respectively, advising of determination that "no changes or corrections are warranted at this time").[5] In such cases, the determination letter also states that the traveler may seek judicial review of the government's redress determination in a U.S. Court of Appeals pursuant to 49 U.S.C. § 46110. *Id*., Exhs. A-D. The letter may also provide that the traveler can submit an administrative appeal. *Id*., Exhs. B, D.

B. Plaintiffs' Factual Allegations

Plaintiffs are four Muslim individuals who allege that they were, on one or more occasions, denied boarding on commercial flights because they are or were on the No Fly List. Each of the plaintiffs filed a DHS TRIP inquiry. In response, two plaintiffs received a response indicating that government records had been updated, and they were thereafter able to fly. The other two plaintiffs were advised of TSA's determination that no changes or corrections to government records were warranted at that time. None of the plaintiffs sought review of their DHS TRIP determinations in a court of appeals under 49 U.S.C. § 46110, despite the fact that their DHS TRIP response letters so advised. Instead, they filed this lawsuit.

[5] Although not attached to the Amended Complaint, these letters are referred to and relied upon in the Amended Complaint, *see* AC ¶¶ 114, 128, 168, 189, and are therefore incorporated by reference. *See New York Life Ins. Co. v. United* States, 724 F.3d 256, 258 n.1 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1938 (2014).

1. Plaintiff Muhammad Tanvir

According to the Amended Complaint, plaintiff Tanvir is a Muslim lawful permanent resident of the United States whose most recent residence in the United States was in Queens, New York. AC ¶ 14. He allegedly was questioned by FBI agents on various occasions in February 2007, January 2009, and November 2011. AC ¶¶ 69-70, 73-83, 99-104. According to the Amended Complaint, he was asked about, among other things, terrorist training camps near the village where he was raised, whether he had any Taliban training, and his rope-climbing skills (including an occasion while he was working as a construction worker when he rappelled from the high floors of a building while other workers cheered him on). AC ¶ 75. During some of these interviews, Tanvir alleges, he was asked to serve as an informant in his Muslim community, which he declined to do. AC ¶¶ 76, 79, 83.

Tanvir was able to fly commercially after his February 2007 and January 2009 encounters with FBI agents. AC ¶ 71 (alleging that Tanvir flew to Pakistan in July 2008 and returned to New York in December 2008), AC ¶¶ 88-89 (alleging that Tanvir travelled to Pakistan by air in July 2009 and returned in January 2010). In October 2010, Tanvir allegedly attempted to board a plane from Atlanta to New York, and was denied boarding. AC ¶ 91. Tanvir filed a DHS TRIP inquiry on September 27, 2011. AC ¶ 97. He ultimately received a final TRIP determination letter, dated March 28, 2013, which stated that his experience was "most likely caused by a misidentification against a government record or by random selection," and that updates had been made to government records in order to "assist in avoiding future incident[s] of misidentification." AC ¶ 114 & TSA Decl., Exh. A. The TRIP determination letter stated that it was a final agency decision reviewable by a court of appeals under 49 U.S.C.

§ 46110. TSA Decl., Exh. A. On June 27, 2013, Tanvir boarded a flight and flew to Pakistan. AC ¶ 115.

2. Plaintiff Jameel Algibhah

The Amended Complaint alleges that plaintiff Algibhah is a Muslim U.S. citizen who resides in Bronx, New York. AC ¶¶ 15, 118. His wife and three daughters reside in Yemen. AC ¶ 118.

FBI agents allegedly questioned Algibhah in December 2009 and on two occasions in June 2012. AC ¶¶ 119-123, 131-134. He was allegedly asked questions about his friends, acquaintances, and individuals with whom he worked and attended college, as well as about his activities and whether he knew people from a certain region in Yemen. AC ¶¶ 120, 132. According to Algibhah, during these encounters, FBI agents asked him to serve as an informant for the FBI, which he declined to do. AC ¶¶ 121, 133-134.

The Amended Complaint alleges that on May 4, 2010, Algibhah attempted to fly to Yemen from New York's John F. Kennedy International Airport ("JFK"), but he was denied boarding. AC ¶ 125. Algibhah filed a DHS TRIP inquiry shortly thereafter. AC ¶ 126. He received a response in October 28, 2010, in which the agency determined "that no changes or corrections [to government records] are warranted at this time." AC ¶ 128 & TSA Decl., Exh. B. The response also advised that, if Algibhah did not file a timely administrative appeal, the agency's determination would become final, and final determinations are reviewable by a court of appeals pursuant to 49 U.S.C. § 46110. TSA Decl., Exh. B.

3. Plaintiff Naveed Shinwari

According to the Amended Complaint, plaintiff Shinwari is a Muslim lawful permanent resident of the United States who previously resided in Omaha, Nebraska, and now resides in

West Haven, Connecticut. AC ¶¶ 16, 145-146. On February 26, 2012, Shinwari was traveling with his mother from Kabul, Afghanistan, to Dubai, United Arab Emirates, en route to Omaha. AC ¶ 146. They allegedly were prevented from boarding their connecting flight from Dubai to the United States, and Shinwari was told that he would have to visit the U.S. Embassy before he would be allowed to fly. AC ¶ 146. Shinwari filed a DHS TRIP inquiry on the same day. AC ¶ 167.

Shinwari alleges that he thereafter met with FBI agents at the U.S. Consulate in Dubai, after which Shinwari and his mother were able to fly to Dulles International Airport ("Dulles"). AC ¶¶ 148-151. Shinwari allegedly was questioned by FBI agents upon his arrival at Dulles, and again one week later in Omaha. AC ¶¶ 153-156. Shinwari alleges that certain agents who questioned him in Omaha asked him to serve as an informant for the FBI. AC ¶ 156. He further alleges that FBI agents questioned him on two other occasions in March 2012, when he was again asked to serve as an informant. AC ¶¶ 161-164.

On June 4, 2013, Shinwari received a response to his TRIP inquiry stating that "no changes or corrections [to government records] are warranted at this time." AC ¶ 167. Shinwari thereafter filed a second TRIP inquiry on December 9, 2013. AC ¶ 168. He received a response, dated December 24, 2013, stating that his "experience was most likely caused by a misidentification against a government record or by random selection," and that updates to government records had been made in order to "assist in avoiding future incident[s] of misidentification." AC ¶ 168 & TSA Decl., Exh. C. The TRIP determination letter also stated that it was a final agency decision subject to review by a court of appeals pursuant to 49 U.S.C. § 46110. TSA Decl., Exh. C. Shinwari alleges that he boarded a flight from Hartford,

Connecticut to Omaha, Nebraska on March 19, 2014, and a return flight on March 31, 2014. AC ¶ 169.

4. Plaintiff Awais Sajjad

The Amended Complaint alleges that plaintiff Sajjad is a Muslim lawful permanent resident of the United States who resides in Brooklyn, New York, and Jersey City, New Jersey. AC ¶¶ 17, 172. On September 14, 2012, Sajjad allegedly attempted to board a flight from JFK to Pakistan to visit his family. He allegedly was denied boarding and was questioned at the airport, including about his background, family, friends, and whether he had ever had any military training or sought to enlist for terrorism training. AC ¶¶ 173-176.

Sajjad further alleges that approximately one month later, on October 24, 2012, FBI agents questioned Sajjad at his sister's home and, with his consent, at FBI headquarters. AC ¶¶ 179-187. Sajjad allegedly was asked about, among other things, his last trip to Pakistan in 2011, whether he had watched bomb-making videos on YouTube, and whether he had ever signed up for or taken military training in Pakistan or ever used guns. AC ¶¶ 179, 183-184. Sajjad consented to take a polygraph test, and after the test was administered, he was advised that he had failed. AC ¶¶ 182-185. According to Sajjad, FBI agents also asked him to serve as an informant. AC ¶¶ 180-181. Sajjad further asserts that FBI agents subsequently questioned his sister and father. AC ¶ 188. On April 4, 2014, Sajjad agreed to accompany FBI agents to a diner near his home, where he answered additional questions. AC ¶¶ 192-194.

Sajjad filed a TRIP inquiry on September 14, 2012, when he was first denied boarding. AC ¶ 178. On December 5, 2012, Sajjad received a response to his TRIP inquiry, which stated that the agency had determined "no changes or corrections [to government records] are warranted at this time," and that the agency's final determination was reviewable under 49

U.S.C. § 46110. AC ¶ 189; TSA Decl., Exh. D. Sajjad filed an administrative appeal of this determination, which remains pending. AC ¶ 190; TSA Decl. ¶ 6.

5. Plaintiffs' Requests for Relief

Each of the plaintiffs alleges that he poses no risk to aviation security, but was placed on the No Fly List solely in retaliation for refusing to serve as an informant and to coerce him into becoming an informant. AC ¶¶ 14-17, 108, 135, 166, 195. Plaintiffs assert four causes of action, for (1) alleged retaliation in violation of their First Amendment rights, AC ¶¶ 197-204, (2) alleged violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a), AC ¶¶ 205-215, (3) alleged violation of the Fifth Amendment's procedural due process protections, AC ¶¶ 216-224, and (4) allegedly unlawful agency action in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, AC ¶¶ 225-228. Plaintiffs purport to seek declaratory, injunctive and monetary relief under the APA, 5 U.S.C. §§ 702, 706; RFRA, 42 U.S.C. § 2000bb-1(a); and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). AC ¶ 11. Among other things, plaintiffs seek to compel defendants to remove plaintiffs' names from the No Fly List, AC at 57 ¶ 2; make changes to the redress process, *id*. ¶ 4; and promulgate regulations prohibiting the alleged abuse of the No Fly List for purposes other than the promotion of aviation security, *id*. ¶ 5.

ARGUMENT

A claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citation and internal quotation marks

omitted), *aff'd*, 561 U.S. 247 (2010); *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) ("[W]hen the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it."). Although a court, in ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), may consider evidence outside of the pleadings, *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998), here such evidence is unnecessary because the allegations and documents incorporated by reference in the Amended Complaint demonstrate that the Court lacks jurisdiction over the claims asserted against the Agency Defendants and the Agents in their official capacities.

I. PLAINTIFFS' CLAIMS CHALLENGING THEIR ALLEGED INCLUSION ON THE NO FLY LIST AND THE REDRESS PROCESS ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE COURTS OF APPEALS UNDER 49 U.S.C. § 46110

This Court lacks jurisdiction over plaintiffs' claims regarding their alleged inclusion on the No Fly List and their challenge to the DHS TRIP process. Pursuant to 49 U.S.C. § 46110, plaintiffs' claims may only be brought in an appropriate court of appeals.

Section 46110(a) provides, in relevant part:

> [A] person disclosing a substantial interest in an order issued by . . . the Under Secretary of Transportation for Security [TSA Administrator[6]] with respect to security duties and powers designated to be carried out by the Under Secretary . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has [his] principal place of business. The petition must be filed not later than 60 days after the order is issued.

[6] The Administrator of TSA is also referred to as the "Assistant Secretary of Homeland Security for TSA." *See, e.g.*, 49 U.S.C. § 44925(b)(1). When TSA was within the Department of Transportation (before its functions were transferred to DHS, 6 U.S.C. § 203(2)), the Administrator was known as the "Under Secretary of Transportation for Security." *See also* 49 C.F.R. § 1500.3 (Administrator of TSA "means the Under Secretary of Transportation for Security").

49 U.S.C. § 46110(a).[7] The statute further 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 . . . Under Secretary [TSA Administrator] . . . to conduct further proceedings." *Id*. § 46110(c).

"[S]tatutes such as Section 46110(c) that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) ("*Merritt II*") (quoting *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 271 (2d Cir. 1999) ("*Merritt I*")). "A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Merritt II*, 245 F.3d at 187.

Plaintiffs are "person[s] disclosing a substantial interest in []order[s] issued" "in whole or in part" by TSA under the specified statutory authorities, 49 U.S.C. § 46110(a), and their claims directly challenge these orders or are inescapably intertwined with review of these orders. Plaintiffs' claims are thus within the courts of appeals' exclusive jurisdiction under 49 U.S.C. § 46110(c).

A. Plaintiffs' Alleged Denial of Boarding on Commercial Flights Implicates TSA Final Orders Issued Pursuant to the Statutory Authorities Enumerated in Section 46110

The term "order" in Section 46110 is given a "liberal construction." *New York v. FAA*, 712 F.2d 806, 808 (2d Cir. 1983); *accord City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007); *Aviators for Safe & Fairer Regulation, Inc., v. FAA*, 221 F.3d 222, 225 (1st

[7] The statute's reference to orders issued "under this part, part B," means the United States Code, Title 49, Subtitle VII, Part A (49 U.S.C. §§ 40101-46507) and Part B (49 U.S.C. §§ 47101-47534). The statute's reference to "subsection (l) or (s) of section 114" means 49 U.S.C. § 114(l) and (r). The statute refers to 49 U.S.C. § 114(s), which was subsequently renamed as section 114(r) without a corresponding change to 49 U.S.C. § 46110. *See Lacson v. U.S. DHS*, 726 F.3d 170, 173 n.2 (D.C. Cir. 2013).

Cir. 2000) (term should be "read expansively"); *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993). A final "order" reviewable under Section 46110 "is one that 'imposes an obligation, denies a right, or fixes some legal relationship.'" *Paskar v. U.S. Dep't of Transp*., 714 F.3d 90, 96 (2d Cir. 2013) (quoting *New York v. FAA*, 712 F.2d at 808). In other words, "the agency action must mark 'the consummation of the agency's decisionmaking process,' and the action 'must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *see also Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) ("To be . . . an order under 49 U.S.C. § 46110, an agency disposition must mark the consummation of the agency's decisionmaking process, and it must determine rights or obligations or give rise to legal consequences." (internal quotation marks omitted)); *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006) ("order" includes any agency decision that "provides a definitive statement of the agency's position, has a direct and immediate effect on the day-to-day business of the party asserting wrongdoing, and envisions immediate compliance with its terms").

Here, each plaintiff alleges that he was prevented from boarding one or more commercial flights because he was on the No Fly List. AC ¶¶ 91, 99, 109, 113 (Tanvir), ¶ 125 (Algibhah), ¶ 158 (Shinwari), ¶¶ 173, 176-77 (Sajjad). As plaintiffs acknowledge, *see id.* ¶¶ 40, 50-52; *see also* Complaint ¶ 12, TSA is responsible for implementing the No Fly List, by pre-screening airline passengers and directing airlines not to board persons whose names are on the No Fly List. Accordingly, if, as plaintiffs allege, they were denied boarding because they were on the No Fly List, then TSA would have issued a "boarding pass printing result," 49 C.F.R. § 1560.105(b)(1), to the airlines directing them to deny each plaintiff boarding on the flight in question. Such a TSA directive would both "mark the consummation of the agency's

decisionmaking process," and be an order "by which rights or obligations have been determined," and "from which legal consequences will flow," namely, that each plaintiff could not board the flight in question. *Peskar*, 714 F.3d at 96. Accordingly, each alleged directive to deny boarding is a final "order" under Section 46110. *See* S*cherfen v. U.S. DHS*, No. 3:CV-08-1554, 2010 WL 456784, at *11 (M.D. Pa. Feb. 2, 2010) (holding that TSA Security Directives, the precursors to the Secure Flight regulations regarding denial of boarding to individuals on the No Fly List, were final orders within the meaning of Section 46110); *Green v. TSA*, 351 F. Supp. 2d 1119, 1124-25 (W.D. Wash. 2005) ("These Security Directives provide a definitive statement of the TSA position and have [the] direct and immediate effect . . . [of] barring travel on commercial aircraft," and they are therefore "'orders' for the purposes of § 46110(a).").

An order denying boarding to a passenger on the No Fly List, moreover, is issued by TSA under the authorities expressly enumerated in Section 46110(a). A TSA order denying boarding is issued pursuant to 49 U.S.C. § 44903(j)(2)(C)(ii), which directs TSA to "perform[] the passenger prescreening function of comparing passenger[s] . . . to the . . . no fly list[]." Like Section 46110, Section 44903 is contained within Part A of Subtitle VII, Title 49, and is thus within the scope of Section 46110(c)'s exclusive review provision. *See* 49 U.S.C. § 46110(a) (referring to orders issued "in whole or in part under *this part*, part B, or subsection (l) or (s) of section 114" (emphasis added)). In addition, plaintiffs seek removal of their names from the No Fly List, *see* AC at 57 ¶ 2, which implicates TSA's authority to "correct any erroneous information," 49 U.S.C. § 44903(j)(2)(G)(i), and "correct information contained in the system," *id*. § 44903(j)(2)(C)(iii)(I)). These statutory provisions are also contained within Part A of Subtitle VII, Title 49.

Similarly, when TSA issues an order denying boarding because a person is on the No Fly List, it is also acting pursuant to its statutory authority to "cross-check . . . individuals identified on Federal agency databases who may pose a risk to transportation or national security," in order to "identify individuals on passenger lists who may be a threat to civil aviation or national security" and "prevent the individual from boarding an aircraft." 49 U.S.C. § 114(h)(1), (3). TSA has issued regulations (establishing the Secure Flight program) to carry out that responsibility. *See* 49 C.F.R. §§ 1560.1(b), 1560.101(a)(1), (b), 1560.105(b)(1). Those regulations, in turn, are promulgated under TSA's rulemaking authorities, 49 U.S.C. §§ 114(l), 44903(b), which are also among the statutory authorities enumerated in Section 46110(a).

Because plaintiffs challenge orders issued by TSA pursuant to the statutory authorities specified in Section 46110(a), the courts of appeals have "exclusive jurisdiction" to review their claims, and this Court lacks subject matter jurisdiction to hear them. 49 U.S.C. § 46110(c) ("the court [of appeals] has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order . . . .").

B. Plaintiffs' Procedural Claims Also Challenge TSA Final Orders Under Section 46110

Plaintiffs' claims alleging insufficient process, AC ¶¶ 216-224, or violation of the APA based on the alleged failure to provide adequate process, AC ¶¶ 225-228, also implicate TSA final orders. These claims are a challenge to the existing scheme for passengers to seek redress following denied boarding, which, for each plaintiff here, culminated in a TRIP determination letter. AC ¶ 114 & TSA Decl., Exh. A (Tanvir), AC ¶ 128 & TSA Decl., Exh. B (Algibhah), AC ¶ 168 & TSA Decl., Exh. C (Shinwari), AC ¶¶ 189-190 & TSA Decl., Exh. D (Sajjad). Both the TSA regulations establishing the DHS TRIP redress process and the determination letters issued

to plaintiffs at the conclusion of that process are TSA final orders that can only be reviewed in the courts of appeals under Section 46110.

TSA established DHS TRIP by promulgating regulations through notice-and-comment rulemaking. 49 C.F.R. §§ 1560.201-.207; 73 Fed. Reg. 64,018 (Oct. 28, 2008) (final rule); 72 Fed. Reg. 48,356 (Aug. 23, 2007) (notice of proposed rulemaking). This rulemaking occurred pursuant to statutory authorities enumerated in Section 46110: TSA's authority to establish a redress process, 49 U.S.C. §§ 44903(j), 44926, as well as TSA's general authority to promulgate regulations, 49 U.S.C. §§ 114(*l*), 44903(b).[8] *See* 49 U.S.C. § 46110(a) (specifying "subsection (*l*) . . . of section 114" and authorities contained in "this part"—Part A, Subtitle VII, Title 49—of the U.S. Code, which include sections 44903 and 44926). TSA's final rule establishing DHS TRIP "mark[s] the consummation of the agency's decisionmaking process," and is a determination "from which legal consequences will flow," as it defines the exclusive process through which individuals may request correction of information related to the No Fly List. *Paskar*, 714 F.3d at 96; *see also Safe Extensions*, 509 F.3d at 598. And courts have held that "'regulations promulgated through informal notice-and-comment rule-making'" constitute an "order" within the meaning of Section 46110. *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) (quoting *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 313 (7th Cir. 1980)); *see also Nelson v. DHS*, No. 06-cv-50, 2007 WL 1655344, at *2 (W.D. Va. June 7, 2007) (holding that the TSA regulation at 49 C.F.R. § 1572 "is an order under § 46110(a)" as it

[8] Specifically, DHS TRIP was established pursuant to Congress's direction that TSA must "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to the Transportation Security Administration the determination and correct any erroneous information," 49 U.S.C. § 44903(j)(2)(G)(i), and "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight . . . to appeal such determination and correct information contained in the system," *id.* § 44903(j)(2)(C)(iii)(I). *See also* 49 U.S.C. § 44926(a), (b)(1) ("establish a timely and fair process" for those who believe they were wrongly identified as a threat and "implement, coordinate, and execute the process").

was "issued pursuant to 49 U.S.C. § 114(*l*)"); *Wilks v. FAA*, No. C06-940-P, 2007 WL 1687765, at *3 (W.D. Wash. June 8, 2007) ("[T]he regulations may be regarded as an 'order' within the meaning of Section 46110(a)."); *cf. Utility Workers Union of Am. AFL-CIO by Joy v. Nuclear Regulatory Comm'n*, 664 F. Supp. 136, 138 (S.D.N.Y. 1987) ("Whether an order is the result of agency adjudication or agency rulemaking is of no consequence for purposes of determining whether or by what court judicial review is appropriate."). Accordingly, plaintiffs' challenge to the procedural adequacy of DHS TRIP, a program established by TSA regulations, is a challenge to a TSA final order that can only be heard in the courts of appeals under Section 46110.

In addition, plaintiffs' challenge to the results of the redress inquiries they filed with DHS TRIP (*i.e.*, their challenge to the DHS TRIP procedures as applied to them) is also a challenge to TSA final orders. At the conclusion of the DHS TRIP process, TSA "provide[s] the individual with a timely written response." 49 C.F.R. § 1560.205(d). That determination letter is itself a final "order" under Section 46110 because it "mark[s] the consummation of the agency's decisionmaking process" and "fixes [the] legal relationship," *Peskar*, 714 F.3d at 96, between TSA and the DHS TRIP applicant. *See Scherfen*, 2010 WL 456784, at *11 (DHS TRIP determination letters "reflect the fact that a final determination has been made that fixes some legal relationship" (internal quotation marks omitted)); *see also Safe Extensions*, 509 F.3d at 598; *San Diego Air Sports Center, Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) (FAA letter deemed an "order"). As explained in the determination letter, "[t]his letter constitutes our agency decision, which is reviewable by the United States Court of Appeals under 49 U.S.C. § 46110." TSA Decl., Exhs. A (Tanvir), C (Shinwari); *see also id*. Exhs. B, D (letters to Algibhah and Sajjad, noting: "This determination will become final 30 calendar days after you receive this letter unless you file a timely administrative appeal. Final determinations are

reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110.")[9]; *Scherfen*, 2010 WL 456784, at * 11 (TRIP determination letters "represent a definitive resolution of the matter" and are therefore "final agency action."). Plaintiffs' DHS TRIP determination letters "plainly deal with 'security duties and powers designated to be carried out by [TSA]'" in whole or in part. *Scherfen*, 2010 WL 456784, at *11 (quoting 49 U.S.C. § 46110(a)). For this reason, plaintiffs' DHS TRIP determination letters "are orders of an agency identified in section 46110(a)." *Id*.; *see also Mokdad v. Holder*, No. 2:13-cv-12038, 2013 WL 8840322 (E.D. Mich. Dec. 5, 2013) (district court lacked jurisdiction under Section 46110 to review constitutional challenge brought by passenger who alleged that he was denied boarding on commercial flights, filed DHS TRIP inquiry, and received DHS TRIP determination letter), *appeal filed*, No. 14-1094 (6th Cir.); *Jaffer v. DHS*, No. 6:12-cv-1669, 2013 WL 1830735, at *3 (M.D. Fla. May 1, 2013) (finding DHS TRIP determination letter to be a final order reviewable under 49 U.S.C. § 46110).

C. Plaintiffs' Challenge to Their Alleged Placement on the No Fly List Is Inescapably Intertwined With Review of TSA Final Orders

In their Amended Complaint, plaintiffs attempt to minimize TSA's critical role in implementing the No Fly List and the DHS TRIP process, in an apparent effort to avoid the application of Section 46110. *Compare* Complaint ¶ 12 *with* AC ¶¶ 40, 50-52.[10] This effort is unavailing, however, because "[d]istrict courts are precluded from hearing matters that are

[9] Only Sajjad filed an administrative appeal, which remains pending. AC ¶ 190; TSA Decl. ¶ 6.

[10] In the original complaint, plaintiff Tanvir named the TSA Administrator as a defendant and included more detail about TSA's role in implementing the No Fly List and the DHS TRIP process. *See* Complaint, Docket No. 1, ¶ 12 (alleging, with respect to then-defendant TSA Administrator John S. Pistole: "The TSA is a screening agency responsible for implementing the No Fly List at airports. The TSA receives the List from the TSC without the underlying, classified intelligence, and it in turn implements the List at the airport, determining whether an individual should be denied boarding. The TSA is responsible for implementing the results of the DHS TRIP process and for taking corrective action if a traveler has been misidentified.").

inescapably intertwined with orders that fall under the purview of § 46110." *Mokdad*, 2013 WL 8840322, at *4 (citing *Merritt II*, 245 F.3d at 187); *see also* 49 U.S.C. § 46110(a) (referring to TSA orders issued "in whole or in part" pursuant to certain statutory authorities). Indeed, the purpose of the "inescapably intertwined" doctrine is "to prevent plaintiffs from avoiding special review statutes through creative pleading." *Mokdad*, 2013 WL 8840322, at *5 (citing *United Transp. Union v. Norfolk & W. Ry. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987)).

That plaintiffs also challenge conduct of TSC, for allegedly placing or maintaining them on the No Fly List, *see* AC ¶¶ 40-41, or individual FBI or DHS agents, for allegedly nominating them to the list or failing to affirmatively seek their removal from the list, *see* AC ¶ 41, does not remove this case from the scope of Section 46110. However plaintiffs frame their Amended Complaint, at bottom, they allegedly were "injured by [a TSA] order," *Merritt II*, 245 F.3d at 187, because they were denied boarding on commercial flights and challenge the DHS TRIP process and determinations they received.

If it were not for the actions of TSA in pre-screening plaintiffs before boarding, plaintiffs would not have been denied boarding at all. As plaintiffs acknowledge, *see* AC ¶¶ 40, 52; Complaint ¶ 12, TSA performs prescreening of passengers to "detect[] . . . individuals identified on [the No Fly List] who seek to travel by air," 49 C.F.R. § 1560.1(b), and orders aircraft operators "not [to] issue a boarding pass" and "not [to] allow that individual to board an aircraft" if the passenger is on the No Fly List, *id*. § 1560.105(b)(1). If a court held that TSC had unlawfully placed a person's name on the No Fly List, a grant of relief would necessarily require the court to "amend, modify, or set aside" TSA's order denying the person boarding. 49 U.S.C. § 46110(c); *see Mokdad*, 2013 WL 8840322, at *4 (recognizing that § 46110 applies to both direct and indirect challenges to an "order" encompassed by the provision). Similarly, if a court

held that a person was unlawfully denied boarding due to his status on the No Fly List, then that conclusion would also mean that TSC's placement of the person on the No Fly List was unlawful. The overlapping effect of this kind of judicial determination demonstrates that a challenge to TSC's placement of a person on the No Fly List is inescapably intertwined with TSA's denial of boarding due to the No Fly List, and vice versa.

Plaintiffs' request for an order directing "Defendants to remove Plaintiffs' names from the No Fly List," AC at 57 ¶ 2, further illustrates why plaintiffs' claims are inescapably bound up with TSA orders. TSA has the statutory responsibility to "establish a procedure" to "correct information contained in the system," 49 U.S.C. § 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). If a court granted plaintiffs the relief they seek, that relief would necessarily implicate TSA's statutory authority to correct information, and thus would be inescapably intertwined with a TSA order. As the district court recently concluded in *Mokdad v. Holder*, in which the plaintiff similarly challenged his alleged status on the No Fly List, because the No Fly List "is a direct result of the statutory mandates imposed upon the TSA by Congress," and is "given operational effect" through TSA orders denying passengers boarding, "any claim related to the No-Fly List requires review of TSA policies and regulations." 2013 WL 8840322, at *5; *see also Scherfen*, 2010 WL 456784, at *11 ("operational effect to the No Fly and Selectee Lists is provided by . . . TSA"). Any such claim is "inescapably intertwined with a TSA order," and subject to exclusive court of appeals jurisdiction under Section 46110(c). *Mokdad*, 2013 WL 8840322, at *5; *see also Scherfen*, 2010 WL 456784, at *11 ("Even if the TRIP determination letters do not constitute orders falling within the purview of § 46110, jurisdiction in this matter is foreclosed

because placement on the No Fly or Selectee Lists is inescapably intertwined with orders of the TSA[.]").

The jurisdictional analysis does not change because TSC makes the decision to place an individual on the No Fly List, or because the individual may have been nominated by another agency (such as the FBI) for placement on the list. Congress was fully aware that TSA would consult with other federal agencies and rely on their information and records in carrying out its responsibility to deny boarding to certain individuals. When Congress directed TSA to cross-check passenger lists against federal databases and to prevent individuals believed to pose a security threat from boarding an aircraft, 49 U.S.C. § 114(h)(1), (3), it also directed TSA to "enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check" the No Fly List, and to do so "in consultation with other appropriate Federal agencies," *id*. Similarly, when Congress directed TSA to "assume the performance of the passenger prescreening function of comparing passenger information to the automatic selectee and no fly lists," 49 U.S.C. § 44903(j)(2)(C)(ii), it told TSA to "utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government," *id*. *See also id*. § 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" should be done "in consultation with the Terrorist Screening Center"). Although TSA, at Congress's direction, coordinates and consults with other agencies in executing its responsibilities, an order denying a passenger boarding because he is on the No Fly List or a determination letter responding to a passenger's DHS TRIP inquiry is nonetheless issued by TSA under statutory authorities that are expressly enumerated in

Section 46110. Accordingly, review of those orders lies exclusively in the courts of appeals. *See Mokdad*, 2013 WL 8840322, at **3-5.

Thus, the *Mokdad* and *Scherfen* courts correctly declined to rely on decisions of the Ninth Circuit holding that a district court may, in certain circumstances, retain jurisdiction over a challenge to the No Fly List. *Id.* at *4 (disagreeing with *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008), and *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012)); *Scherfen*, 2010 WL 456784, at **11-12 (rejecting holding in *Ibrahim*).[12] As the *Mokdad* court observed, the *Latif* and *Ibrahim* courts applied a "narrow reading" of Section 46110, finding the statute inapplicable largely because TSC, rather than TSA, compiles the No Fly List. 2013 WL 8840322, at *4; *see Ibrahim*, 538 F.3d at 1255; *Latif*, 686 F.3d at 1128-29. But the Ninth Circuit failed to recognize in those cases that Section 46110 applies to orders issued "in whole *or in part*" by TSA pursuant to the enumerated statutory authorities, and thus does not require that TSA be the only agency involved. 49 U.S.C. § 46110(a) (emphasis added). As the dissenting judge in *Ibrahim* recognized, "[a]t the very minimum," claims against TSC challenging a person's alleged placement on the No Fly List "are 'inescapably intertwined' with an order of the Transportation Security Administration and are thus still subject to § 46110(a)." 538 F.3d at 1259 (dissenting op.); *see id.* at 1259-61 (finding claim within scope of Section 46110 based on statutory language and cases broadly construing "order" and finding no district court jurisdiction over claims "inescapably intertwined" with TSA orders).

[12] The Fourth Circuit, in an unpublished order issued without the benefit of full briefing by the parties, found that a plaintiff's action seeking removal from the No Fly List and challenging the adequacy of redress procedures was properly before the district court. *Mohamed v. Holder*, No. 11-1924, Dkt. No. 86 (4th Cir. May 28, 2013). The Court's conclusion rested on the Ninth Circuit's decision in *Latif*, and hence was erroneous for the same reasons that *Latif* itself is flawed.

Further, contrary to the *Latif* court's conclusion, *see* 686 F.3d at 1129, it would not be futile for a court of appeals to consider a constitutional challenge to the DHS TRIP procedures, or their application to plaintiffs, simply because TSC makes the determination whether to place a person on the No Fly List. As explained above, while TSC decides who is included on the No Fly List, the No Fly List is implemented by TSA, which pre-screens passengers and orders air carriers to deny boarding to particular passengers. If a court of appeals were to determine that a particular 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 records pertaining to that individual. 49 U.S.C. § 46110(c). Similarly, if a court of appeals were to conclude that the redress procedures, as set forth in TSA regulations or as applied through individual TRIP determinations, are insufficient, it could order TSA to craft additional necessary procedures. *Id*. (court of appeals may "order the . . . Under Secretary [TSA Administrator] . . . to conduct further proceedings").[13] Plaintiffs thus could challenge both the substantive and the procedural aspects of their alleged inclusion on the No Fly List before a court of appeals pursuant to Section 46110. *See Ege v. U.S. DHS*, No. 13-1110 (D.C. Cir.) (petition filed Apr. 4, 2013) (petition for review of TSA final order responding to DHS TRIP inquiry, raising substantive and procedural due process and APA claims).

The *Latif* court, moreover, characterized the plaintiffs' procedural claims in that case as "broad constitutional claims that d[id] not require review of the merits of their individual DHS TRIP grievances." 686 F.3d at 1129. Unlike the Ninth Circuit, the Second Circuit has not

[13] On remand from the Ninth Circuit, the district court in *Latif* concluded that the DHS TRIP redress process violated the plaintiffs' rights under the Due Process Clause and the APA, and directed the government to develop substitute procedures. *See Latif* v. *Holder*, No. 10-750 (D. Or. June 24, 2014), *available at* 2014 WL 2871346. The government is evaluating the *Latif* decision and is scheduled to file a status report with the district court on August 4, 2014. The district court's decision in *Latif*, however, does not affect the question whether this Court has subject matter jurisdiction over plaintiffs' claims.

recognized an exception to Section 46110 for broad constitutional challenges. *See Merritt I*, 187 F.3d at 271 (declining to "decide whether a broad-based, facial constitutional attack on an FAA policy or procedure—in contrast to a complaint about the agency's particular actions in a specific case—might constitute appropriate subject matter for a stand-alone federal suit"). In any event, although plaintiffs seek broad relief, this case is not a "broad-based, facial constitutional attack," but fundamentally challenges "the agency's particular actions in a specific case," namely, TSA's orders denying boarding to these four plaintiffs, allegedly because they were on the No Fly List, and TSA's orders issued in response to plaintiffs' DHS TRIP inquiries.

In addition, because plaintiffs sought redress through the DHS TRIP process, an administrative record has been created that the courts of appeals may review. *See Scherfen*, 2010 WL 456784, at *10 ("One of the reasons that the majority in *Ibrahim*[, 538 F.3d at 1256,] found that the placement of a person on the No Fly List fell outside the scope of § 46110 was the absence of any administrative record to review. Where, however, the TRIP process has been invoked, there is indeed a record for review by the appellate court."); *see also, e.g.*, *Ege*, No. 13-1110 (administrative record filed under seal and *ex parte* Dec. 16, 2013). This Court accordingly should dismiss the Amended Complaint for lack of subject matter jurisdiction pursuant to 49 U.S.C. § 46110.

II. PLAINTIFFS TANVIR AND SHINWARI LACK STANDING UNDER ARTICLE III OF THE CONSTITUTION TO SEEK PROSPECTIVE INJUNCTIVE RELIEF

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (citations and internal quotation marks omitted).

The party invoking federal jurisdiction bears the burden of establishing standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and must establish standing for each claim and form of relief sought, *Carver v. City of N.Y.*, 621 F.3d 221, 225 (2d Cir. 2010). To survive a Rule 12(b)(1) motion to dismiss, a plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue." *Amidax Trading Grp. v. S.W.I.F.T SCRL.*, 671 F.3d 140, 145 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 1586 (2013).

To establish Article III standing, plaintiffs must demonstrate: (1) an "injury-in-fact," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (citations and internal quotation marks omitted) (these three elements constitute "the irreducible constitutional minimum of standing"). These requirements ensure that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). Because the law of Article III standing is founded on separation-of-powers principles, moreover, the standing inquiry must be "especially rigorous" where the merits of the dispute require the court to "decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," or where the court is asked "to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Amnesty Int'l*, 133 S. Ct. at 1147; *see also Hedges v. Obama*, 724 F.3d 170, 204 (2d Cir. 2013).

To meet the "injury-in-fact" requirement, plaintiffs must identify an injury that is "'concrete, particularized, and actual or imminent," *Amnesty Int'l*, 133 S. Ct. at 1147, as opposed to "conjectural or hypothetical," *Lujan*, 504 U.S. at 560-61. With regard to claims for prospective relief, moreover, the Supreme Court has "repeatedly reiterated that 'threatened injury

must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Amnesty Int'l*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (alteration and emphasis by the Court); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006); *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 'substantial risk' that the harm will occur."). To establish "certainly impending future injury," "a plaintiff cannot rely solely on past injuries; rather, the plaintiff must establish how he or she will be injured prospectively . . . ." *Marcavage v. City of N.Y.*, 689 F.3d 98, 103 (2d Cir. 2012); *see also O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). In other words, "[t]o obtain prospective relief, such as a declaratory judgment or an injunction, a plaintiff must show, *inter alia*, 'a sufficient likelihood that he or she will again be wronged in a similar way.'" *Marcavage*, 689 F.3d at 103 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (alterations omitted)).

Plaintiffs Tanvir and Shinwari fail to establish that they have standing to seek prospective injunctive relief. Although both Tanvir and Shinwari allege that they were at one time denied boarding because their names were on the No Fly List, AC ¶¶ 109, 158, they both have since been able to fly, AC ¶¶ 115, 169. Shinwari flew round trip from Connecticut to Nebraska in March 2012, and Tanvir flew to Pakistan in June 2013. *Id*. These allegations alone cast substantial doubt on any claim that they remain on the No Fly List, or that they will "again be wronged in a similar way." *Marcavage*, 689 F.3d at 103.

Indeed, according to the Amended Complaint, Tanvir and Shinwari both filed DHS TRIP inquiries challenging their alleged inclusion on the No Fly List, and they both received responses indicating that updates to government records had been made. AC ¶¶ 114, 168. These allegations, taken together with the allegations that they have since been able to fly, render entirely speculative any claim that Tanvir or Shinwari faces a "certainly impending" or even "substantial" risk of future injury based on inclusion on the No Fly List. *Amnesty Int'l*, 133 S. Ct. at 1147, 1150 n.5, cited in *Susan B. Anthony List*, 134 S. Ct. at 2341; *see Scherfen*, 2010 WL 456784, at **7-9 (plaintiff lacked standing to pursue injunctive relief because he did not continue to suffer the effects of the alleged discriminatory inclusion in the TSDB watchlist after completing the DHS TRIP review process).

Tanvir and Shinwari may subjectively "believe[]" their names remain on the No Fly List, purportedly because they have not received "confirmation" that their names have been removed. AC ¶¶ 115, 169. But their mere belief, based on a lack of confirmation otherwise, is nothing more than speculation. Speculation is insufficient to confer Article III standing. *See Amnesty Int'l*, 133 S. Ct. at 1147-50 (rejecting each of plaintiffs' theories of injury as speculative, and concluding that plaintiffs lacked Article III standing where alleged future injury was based on "speculative chain of possibilities").

Accordingly, to the extent they seek prospective injunctive or declaratory relief, Tanvir and Shinwari's claims should be dismissed for lack of subject matter jurisdiction. *Amidax Trading Grp.*, 671 F.3d at 148-49 (district court properly dismissed complaint under Rule 12(b)(1) where plaintiff's "alleged injury [wa]s merely hypothetical and conjectural," and did not "rise to the level of being plausible").

III. PLAINTIFFS' CLAIMS FOR MONETARY RELIEF FROM DEFENDANTS SUED IN THEIR OFFICIAL CAPACITIES ARE BARRED BY SOVEREIGN IMMUNITY

Under the doctrine of sovereign immunity, the United States "is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation marks and alteration omitted). Only Congress may waive the United States' sovereign immunity, through unequivocal statutory language. *See Adeleke v. United States*, 355 F.3d 144, 150, 153 (2d Cir. 2004); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (requiring that waivers of sovereign immunity be "unequivocally expressed in statutory text"). Waivers of sovereign immunity must be strictly construed against the claimant. *See Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998). Official capacity claims against federal employees are considered claims against the United States and require an applicable waiver of sovereign immunity. *Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 510 (2d Cir. 1994).

Plaintiffs bear the burden to demonstrate that sovereign immunity has been waived. *Makarova*, 201 F.3d at 113. Plaintiffs cannot sustain their burden here. Plaintiffs purport to seek monetary relief under the APA, RFRA and *Bivens*, AC ¶ 11, but none of these authorities provides a waiver of the United States' sovereign immunity from damages claims.

The APA provides "a limited waiver of the federal government's sovereign immunity for claims of 'legal wrong [sustained] because of agency action . . . seeking relief other than money damages.'" *County of Suffolk v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010) (quoting 5 U.S.C. § 702) (alteration in original). However, "the APA does not waive sovereign immunity for money damages claims." *Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994); *County of Suffolk*,

605 F.3d at 143 (United States has not waived its sovereign immunity in APA with respect to claims for money damages).

RFRA provides, in relevant part, that an individual may "obtain appropriate relief against a government" when his or her "religious exercise has been burdened in violation of [RFRA]." 42 U.S.C. § 2000bb–1(c). But "[a]s courts in this Circuit have recognized, this language does not demonstrate the clear intent necessary to effect a congressional abrogation of the government's sovereign immunity from suits for damages." *Johnson v. Killian*, No. 07 Civ. 6641(NRB), 2013 WL 103166, at *3 (S.D.N.Y. Jan. 9, 2013) (finding that plaintiff was entitled to only declaratory or injunctive relief under RFRA) (citing *Gilmore-Bey v. Coughlin*, 929 F. Supp. 146, 149-51 (S.D.N.Y. 1996) (RFRA does not permit suits for monetary damages against state officials); *Commack Self–Service Kosher Meats Inc. v. State of N.Y.*, 954 F. Supp. 65, 67–70 (E.D.N.Y. 1997) (RFRA does not waive state's sovereign immunity from damages)); *see also Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012) ("RFRA does not waive the federal government's sovereign immunity from damages"); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (same); *cf. Sossamon v. Texas*, 131 S. Ct. 1651, 1659 (2011) (holding that RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*., which contains identical language regarding remedies, does not waive state's sovereign immunity from monetary damages because the language does not provide "the unequivocal expression of state consent" to waive immunity).

Under *Bivens*, 403 U.S. at 397, a plaintiff may bring a claim against a federal officer in his personal capacity for violations of certain constitutional rights. *Bivens* suits against officers of the United States acting in their official capacities, however, are considered suits against the United States, and are barred by the doctrine of sovereign immunity. *Robinson*, 21 F.3d at 510;

see also FDIC v. Meyer, 510 U.S. 471, 478 (1994) ("the United States simply has not rendered itself liable . . . for constitutional tort claims"); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999) (noting that "Congress has not waived the government's sovereign immunity, for example under the Federal Tort Claims Act . . . , from lawsuits based on constitutional claims" (internal citation omitted)); *Castro v. United States*, 34 F.3d 106, 110 (2d Cir. 1994) (affirming district court's ruling that United States has not waived its sovereign immunity with respect to constitutional tort claims).

Because plaintiffs fail to identify any waiver of the United States' sovereign immunity that would permit them to recover money damages against the Agency Defendants (who are only sued in their official capacities) or the Agents (to the extent they are sued in their official capacities), the Court lacks subject matter jurisdiction over their claims for monetary relief. *See Robinson*, 21 F.3d at 510; *see also Meyer*, 510 U.S. at 474-75 (if the government has not waived its sovereign immunity, federal subject matter jurisdiction does not exist).

CONCLUSION

For the foregoing reasons, the Court should dismiss the official capacity claims in the Amended Complaint.

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July 28, 2014

Respectfully submitted,

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