UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT'S MOTION FOR A LIMITED STAY OF PROCEEDINGS WITH REGARD TO PLAINTIFFS' OFFICIAL CAPACITY CLAIMS

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The defendants sued in their official capacities (the "Government") respectfully submit this memorandum of law in support of the Government's motion to stay proceedings with regard to plaintiffs' official capacity claims, pending the outcome of the reopening and reconsideration of plaintiffs' Department of Homeland Security Travel Redress Inquiry Program ("DHS TRIP") inquiries under revised redress procedures that were recently established. As explained below, the establishment of the revised redress procedures has mooted certain of plaintiffs' official capacity claims, and the remaining official capacity claims may be mooted as a result of the reopened redress process. At a minimum, the outcome of the reopened redress process will materially inform this Court's resolution of the pending motion to dismiss the official capacity claims and facilitate the eventual resolution of those claims. It would be far more efficient to await the outcome of the reopened redress process and focus the litigation on whatever claims may remain, if any, than to address plaintiffs' existing claims relating to a process that no longer exists. A limited stay of proceedings for the period of time necessary to complete the reopened redress process—estimated to be approximately three months—would further the interests of judicial economy and efficiency, while causing no appreciable prejudice to plaintiffs. A stay should therefore be granted.

BACKGROUND

In their amended complaint, plaintiffs assert both official capacity and individual capacity claims. The official capacity claims are asserted against all defendants, and they challenge both plaintiffs' alleged status on the No Fly List and the procedural adequacy of the DHS TRIP process, asserting claims under the First and Fifth Amendments, the Religious Freedom Restoration Act ("RFRA") and the Administrative Procedure Act ("APA"). Compl. ¶¶ 203-04, 214-15, 216-28. It is uncontested that plaintiffs' official capacity claims seek only injunctive and

declaratory relief. *See* ECF 81 at 1 n.1 (noting that plaintiffs have not contested that they cannot recover damages from the Government).

On July 28, 2014, the Government separately moved to dismiss the official capacity and the individual capacity claims in the amended complaint. *See* ECF 34, 38. In its motion to dismiss the official capacity claims, the Government argues that this Court lacks jurisdiction over those claims because they are subject to the exclusive jurisdiction of the courts of appeals pursuant to 49 U.S.C. § 46110. *See* ECF 37 at Pt. I. The Government also contends that two of the plaintiffs—Muhammad Tanvir and Naveed Shinwari—lack standing because they allege in the amended complaint that, after they were denied boarding, they filed DHS TRIP inquiries, received responses indicating that updates to government records had been made, and thereafter were able to board commercial aircraft on one or more occasions. *Id.* at Pt. II. The Court has scheduled oral argument on both motions to dismiss for June 12, 2015. *See* ECF 87.[1]

On April 13, 2015, the Government notified the Court and plaintiffs that it had completed the process of revising the DHS TRIP procedures. *See* ECF 85 ("Notice of Revised Redress Procedures" or "Notice"). The revision process was "directed at improving the redress procedures, including by increasing transparency relating to the No Fly List." *Id.* As explained in the Notice,

> Under the previous redress procedures, individuals who had submitted inquiries to DHS TRIP generally received a letter responding to their inquiry that neither confirmed nor denied their No Fly status. Under the newly revised procedures, a U.S. person who purchases a ticket, is denied boarding at the airport, subsequently applies for redress through DHS TRIP about the denial of boarding, and is on the No Fly List after a redress review, will now receive a letter providing his or her status on the No Fly List and the option to receive and/or

[1] The stay sought by the Government would not affect plaintiffs' individual capacity claims or the pending motion to dismiss those claims.

> submit additional information. If such an individual opts to receive and/or submit further information after receiving this initial response, DHS TRIP will provide a second, more detailed response. This second letter will identify the specific criterion under which the individual has been placed on the No Fly List and will include an unclassified summary of information supporting the individual's No Fly List status, to the extent feasible, consistent with the national security and law enforcement interests at stake. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. In some circumstances, an unclassified summary may not be able to be provided when the national security and law enforcement interests at stake are taken into account.
>
> This second letter will also provide the requester an opportunity to be heard further concerning their status. Written responses from such individuals may be submitted and may include exhibits or other materials the individual deems relevant. Upon DHS TRIP's receipt of an individual's submission in response to the second letter, the matter will be reviewed by the Administrator of the Transportation Security Administration (TSA) or his/her designee in coordination with other relevant agencies, who will review the submission, as well as the unclassified and classified information that is being relied upon to support the No Fly listing, and will issue a final determination. TSA will provide the individual with a final written determination, providing the basis for the decision (to the extent feasible in light of the national security and law enforcement interests at stake) and will notify the individual of the ability to seek further judicial review under 49 U.S.C. § 46110.

Id.[2]

The Government had previously advised plaintiffs, in response to a request that the Government confirm whether or not they are on the No Fly List, that the Government was in the process of revising the redress procedures, and that when the revised procedures were finalized, plaintiffs would have an opportunity to have their redress inquiries reopened and reconsidered under the new procedures. *See* ECF 74 at Exh. L; *see also* ECF 81 at 20. Accordingly, now that the revised redress procedures have been finalized, the Government has offered plaintiffs the

[2] The redress process was revised following the district court's decision in *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014), holding that the former redress process provided insufficient notice and opportunity to be heard to satisfy the Due Process Clause. On May 28, 2015, the Government cross-moved for summary judgment with regard to the procedural adequacy of the revised redress process as applied to those of the *Latif* plaintiffs who are on the No Fly List. *See Latif v. Holder*, No. 3:10-cv-750-BR (D. Or.), ECF 241-54.

opportunity to have their DHS TRIP inquiries reopened and reconsidered under the revised procedures. On May 25, 2015, plaintiffs elected to avail themselves of that opportunity, and the process of reopening their DHS TRIP inquiries is now underway. The Government anticipates that TSA will issue the initial letters addressing each plaintiff's status with regard to the No Fly List within two weeks, or by June 8, 2015. Thereafter, for any plaintiff who is on the No Fly List, we anticipate that it will take approximately 30 days to issue the second letter identifying the specific criterion under which the individual has been placed on the No Fly List and, if feasible, consistent with the national security and law enforcement interests at stake, providing an unclassified summary of information supporting the individual's No Fly List status.[3] Although the length of the remaining process will depend on what, if anything, is submitted by plaintiffs in response to the second letter, the Government estimates that it will take approximately three months to complete the entire process for any plaintiff who is on the No Fly List.

We have been advised that plaintiffs do not consent at this time to a stay of the pending motion to dismiss the official capacity claims. However, plaintiffs' counsel has advised that once they have the initial letter concerning plaintiffs' status with regard to the No Fly List, plaintiffs may want to revisit the question of a stay depending on the response and other considerations.

[3] Plaintiffs' counsel has advised us that all plaintiffs wish to receive the second letter if they are on the No Fly List, and thus there will be no additional period in which plaintiffs consider whether they wish to proceed to the second step. We note that plaintiffs have requested that the 30-day period be shortened on this basis. The Government is unable to commit to a shorter time period, given that the revised process calls for the creation of an unclassified summary of information where feasible, consistent with the national security and law enforcement interests at stake. However, the letter will be provided as soon as it is available.

ARGUMENT

This Court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "[T]he decision whether to issue a stay is 'firmly within a district court's discretion.'" *LaSala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005) (quoting *Am. Shipping Line v. Massan Shipping*, 885 F. Supp. 499, 502 (S.D.N.Y. 1995)). When considering a motion to stay proceedings, the district courts in the Second Circuit examine the following factors:

> (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

Kappel v. Comfort, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996). A court may stay an action "in the interest of judicial economy . . . pending the outcome of proceedings which bear upon the case, even if such proceedings are not necessarily controlling of the action that is to be stayed." *LaSala*, 399 F. Supp. 2d at 427.

Here, a limited stay of proceedings pending the outcome of plaintiffs' reopened DHS TRIP inquiries would serve the interest of judicial economy in several ways.

A. Plaintiffs' Official Capacity Claims Either Are or May Become Moot

"The Case or Controversy Clause of Article III, Section 2 of the United States Constitution limits the subject matter jurisdiction of the federal courts such that the 'parties must continue to have a personal stake in the outcome of the lawsuit.'" *United States v. Wiltshire*, 772 F.3d 976, 978 (2d Cir. 2014) (per curiam) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990)); *United States v. Mercurris*, 192 F.3d 290, 293 (2d Cir. 1999). "'When the issues in dispute between the parties are no longer live, a case becomes moot.'" *Tanasi v. New Alliance*

Bank, -- F.3d. --, 2015 WL 2251472, at *2 (2d Cir. May 14, 2015) (quoting *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005)); *see also ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 485 F.3d 85, 94 (2d Cir. 2007) ("Mootness, in the constitutional sense, occurs when the parties have no 'legally cognizable interest' or practical 'personal stake' in the dispute, and the court is therefore incapable of granting a judgment that will affect the legal rights as between the parties.").

"An action not moot at its inception can become moot . . . if 'an event occurs during the course of the proceedings or on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party.'" *Westchester County v. U.S. Dep't of Housing and Urban Development*, 778 F.3d 412, 416-17 (2d Cir. 2015) (quoting *County of Suffolk v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010)); *United States v. Blackburn*, 461 F.3d 259, 261 (2d Cir. 2006). "To avoid mootness, 'throughout the litigation, the party must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Leybinsky v. U.S. CIS*, 553 F. App'x 108, 109 (2d Cir.), *cert. denied*, 135 S. Ct. 279 (Oct. 6, 2014) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

Here, the Government's revision of the redress procedures previously applied to plaintiffs' DHS TRIP inquiries renders moot plaintiffs' claims challenging the procedural adequacy of that process. In their amended complaint, plaintiffs allege that the DHS TRIP process that each plaintiff underwent provided insufficient notice and opportunity to be heard to satisfy the Due Process Clause. Compl. ¶¶ 216-24 (Fifth Amendment procedural due process claim), 227 (APA claim). That process, however, is no longer being applied, and has been replaced by the revised redress procedures. *See* Notice of Revised Redress Procedures. The revised procedures were specifically designed to improve the redress process by increasing

transparency, and they enhance both the notice provided to DHS TRIP applicants and their opportunity to be heard. *See id.* Plaintiffs therefore "no longer have a personal stake" in the outcome of their claims with regard to the procedural adequacy of the former redress process, and the Court cannot "grant any effectual relief" relating to the process. *Wiltshire*, 772 F.3d at 978; *Westchester County*, 778 F.3d at 416-17; *see, e.g.*, *Massachusetts v. Oakes*, 491 U.S. 576, 582-85 (1989) (case moot due to state's amendment of challenged statute); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992) (claim moot after state suspended program at issue); *Nevada ex rel. Nevada State Bd. of Agric. v. United States*, 699 F.2d 486, 487 (9th Cir. 1983) (dismissing challenge to government moratorium as moot where challenged action rescinded during litigation). Indeed, any decision issued by this Court with regard to the procedural adequacy of the now-discontinued process would be a purely advisory opinion, as that process is not in effect. *Dessaint v. Lignel*, 584 F. App'x 30, 30 (2d Cir. 2014) ("[I]t is well settled that where a case is moot the court may not 'issue an advisory opinion.'") (quoting *ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004)).

Plaintiffs' remaining official capacity claims, moreover, may become moot as a result of the reopened redress process. Aside from their challenge to the adequacy of the former redress process itself, all of plaintiffs' official capacity claims turn on their alleged placement and "continued presence" or "continued inclusion" on the No Fly List, which they claim is causing them "immediate and ongoing harm." Compl. ¶¶ 203-04 (First Amendment claim), 214-15 (RFRA claim), 228 (APA claim). Plaintiffs, however, have elected to have their redress inquiries reopened under the new procedures, and that process is underway. *See supra*. There is a possibility, therefore, that plaintiffs' claims challenging their alleged inclusion on the No Fly List will become moot as a result of the reopened redress process. The claims of any plaintiff

who is determined as a result of this process not to be on the No Fly List—even if they had sufficiently alleged standing at the outset of the case, which is disputed as to plaintiffs Tanvir and Shinwari—will be moot. *See, e.g.*, *Aslin v. Financial Indus. Regulatory Auth.*, 704 F.3d 475, 477-79 (7th Cir. 2013) (plaintiff's removal from list of securities brokers from disciplined firms by quasi-governmental authority mooted claim for injunctive relief).

B. A Stay Will Facilitate the Resolution of the Official Capacity Claims

Even setting aside the question of mootness, staying proceedings on the official capacity claims while plaintiffs undergo the revised redress process is likely to provide information that will materially inform and facilitate the Court's resolution of the motion to dismiss the official capacity claims, and the eventual resolution of those claims. The outcome of plaintiffs' reopened DHS TRIP inquiries will affect the pending motion to dismiss the official capacity claims in at least two ways. First, a stay of proceedings will obviate the need for the Court to resolve the current question of standing. Plaintiffs do not dispute that, if they are not on the No Fly List, they lack standing to seek injunctive or declaratory relief.[4] Given that each plaintiff will learn his status with regard to the No Fly List as a result of the application of the revised procedures, the Court need not resolve the current standing question if a stay is granted.

Second, the revised redress procedures may impact the analysis with regard to the applicability of 49 U.S.C. § 46110, and the Court should await the outcome of the reopened DHS TRIP process before ruling on that issue. One of plaintiffs' principal contentions is that Section 46110 does not apply here because, they claim, it is TSC and not TSA that makes the determination as to whether a claimant will remain on the No Fly List. *See* ECF 73 at 25 ("The

[4] In their opposition to the motion, Plaintiffs Tanvir and Shinwari argue that they have standing to seek injunctive and declaratory relief because, they claim, they have adequately pled their "continued placement" on the No Fly List. *See* ECF 73, at 34-38. They do not contest the proposition that a person who is not on the No Fly List could not establish standing to seek prospective relief.

TSA Has No Authority to Make No Fly List-Related Determinations"). Under the revised DHS TRIP procedures, however, the TSA Administrator makes the final determination. *See* Notice ("Upon DHS TRIP's receipt of an individual's submission in response to the second letter, the matter will be reviewed by the Administrator of the Transportation Security Administration (TSA) or his/her designee in coordination with other relevant agencies, who will review the submission, as well as the unclassified and classified information that is being relied upon to support the No Fly listing, and will issue a final determination."). This and other changes cast doubt on the continuing validity of the Ninth Circuit's decision in *Latif v. Holder*, 686 F.3d 1122, 1128-29 (9th Cir. 2012), on which plaintiffs rely heavily in their opposition, that a court of appeals would lack jurisdiction over a petition to review a challenge to the outcome of a DHS TRIP determination.[5] Deferring a ruling on the motion to dismiss would therefore allow the Court to evaluate the applicability of Section 46110 based upon a more complete and accurate record.

[5] The D.C. Circuit's divided panel decision in *Ege v. U.S. DHS*, No. 13-1110, 2015 WL 1903206 (D.C. Cir. Apr. 28, 2015), was also premised on the proposition that the court could not grant effective relief under Section 46110 because TSA ostensibly lacks "authority to decide whose name goes on the No-Fly List," Slip op. at 2; *but see* Concurring op. at 1-2 (disagreeing with majority and noting that TSA controls access to planes; Congress has directed TSA to establish a procedure for correcting erroneous information on the No-Fly List; and TSA informed the court that it would and could allow petitioner to board a plane if the court ordered it to do so). Under the revised redress procedures, TSA unquestionably has authority to "issue a final determination" with regard to a redress applicant's "No Fly listing." Notice of Revised Redress Procedures. In addition, unlike plaintiffs here, the petitioner in *Ege* challenged his denial into the United States at a port of entry, and the majority specifically relied on that fact in concluding that TSA could not provide effective relief because, if Ege's alleged status in the Terrorist Screening Database (TSDB) remained unchanged, other federal agencies might rely on that status "to prevent Ege from crossing the U.S. border." Slip op. 9.

C. The Stay Factors Weigh Heavily in Favor of a Stay

Under all of these circumstances, and considering the factors identified in the case law, the Court should grant a limited stay of proceedings pending the outcome of plaintiffs' reopened DHS TRIP inquiries.

Three of the factors—the interests of the Court, interests of and burden on the Government and the public interest—all heavily favor a stay. The outcome of plaintiffs' reopened DHS TRIP inquiries will provide material information about the plaintiffs' status with regard to the No Fly List, and will elucidate which claims, if any, remain in the case. Indeed, it is possible that as a result of the DHS TRIP process, there will be no plaintiffs on the No Fly List—either because they are not now on the List, or because the TSA Administrator determines that they no longer belong on the List. The interests of the Court, the Government and the public thus would be furthered by a limited stay, which would conserve resources, eliminate claims that have or will become moot, and ensure that the Court's rulings are based on the most current and complete record available.

Meanwhile, the limited stay proposed by the Government would not cause any appreciable prejudice to plaintiffs. The proposed stay would result in only a modest delay, as the Government anticipates that the reopened redress process is likely to take only three months. Any plaintiff who learns, as a result of the process, that he is not on the No Fly List will have no further official capacity claim to pursue. And to the extent any plaintiff is on the No Fly List following the reopened DHS TRIP process, he will have an opportunity to assert any remaining claims, including with regard to the procedural adequacy of the revised process. The Court can then consider whether it has jurisdiction with regard to any claims that remain.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court stay proceedings with respect to the official capacity claims pending the outcome of plaintiffs' reopened DHS TRIP inquiries.

Dated: New York, New York
June 1, 2015

Respectfully submitted,

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