No. 22-

IN THE

Supreme Court of the United States

LASSANA MAGASSA,

Petitioner,

v.

ALEJANDRO MAYORKAS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; DAVID PEKOSKE, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION; TROY A. MILLER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF THE U.S. CUSTOMS AND BORDER PROTECTION; MERRICK GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; CHRISTOPHER WRAY, IN HIS OFFICIAL CAPACITY OF DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; CHARLES KABLE, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TERRORIST SCREENING CENTER; MINH TRUONG, IN HIS INDIVIDUAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question No. 1 presented:

Does agency rulemaking itself, like the STA Redress Process, constitute a final order under 49 U.S.C. § 46110, therefore stripping the district court of jurisdiction over constitutional and Administrative Procedure Act challenges, in contrast to this Court's binding precedent in *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991)?

Question No. 2 presented:

Does a plaintiff adequately plead harm to a liberty interest in reputation, sufficient to establish injury-in-fact and therefore standing, when the plaintiff articulates government action that causes ongoing personal harm and stigma, even when part of the reputational harm derives from revocation of an employee access badge?

Question No. 3 presented:

Does 42 U.S.C. § 1981 apply to actions against federal agents sued in their individual capacities, even after Congress amended the statute in 1991 to broaden its applicability?

PARTIES TO THE PROCEEDINGS

Petitioner Lassana Magassa ("Petitioner" or "Dr. Magassa") was the Plaintiff in the district court and the Appellant before the Ninth Circuit Court of Appeals.

Respondent Alejandro Mayorkas, in his official capacity as Secretary of the Department of Homeland Security, was the Appellee before the Ninth Circuit Court of Appeals. His predecessor, Chad Wolf, in his official capacity as Acting Secretary of the Department of Homeland Security, was the Defendant before the district court.

Respondent David Pekoske, in his official capacity as Administrator of the Transportation Security Administration, was the Defendant before the district court and the Appellee before the Ninth Circuit Court of Appeals.

Respondent Troy A. Miller, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection, is the Respondent in the current proceeding.[1] Mark Morgan, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection, was the Defendant before the district court and the Appellee before the Ninth Circuit Court of Appeals.

Respondent Merrick Garland, in his official capacity as Attorney General of the United States, was the

1. Troy A. Miller became Acting Commissioner of U.S. Customs and Border Protection in November 2022. Acting Commissioner Miller is automatically substituted as a party to the case pursuant to Federal Rule of Civil Procedure 25(d). Fed. R. Civ. P. 25(d).

Appellee before the Ninth Circuit Court of Appeals. His predecessor, William Barr, in his official capacity as Attorney General of the United States, was the Defendant before the district court.

Respondent Christopher Wray, in his official capacity of Director of the Federal Bureau of Investigation, was the Defendant before the district court and the Appellee before the Ninth Circuit Court of Appeals.

Respondent Charles Kable, in his official capacity as Director of the Terrorist Screening Center, was the Defendant before the district court and the Appellee before the Ninth Circuit Court of Appeals.

Respondent Minh Truong, in his individual capacity, was the Defendant before the district court and the Appellee before the Ninth Circuit Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

Magassa v. Mayorkas, No. 21-35700, United States Court of Appeals for the Ninth Circuit. Judgment entered November 9, 2022. Mandate issued March 6, 2023.

Magassa v. Wolf, No. C19-2036RSM, United States District Court for the Western District of Washington. Judgment entered June 23, 2021.

Magassa v. Wolf, No. C19-2036RSM, United States District Court for the Western District of Washington. Judgment entered September 16, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lassana Magassa respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Ninth Circuit's decision is available at *Magassa v. Mayorkas*, 52 F.4th 1156 (9th Cir. 2022). Pet. App. 1a–36a. The District Court for the Western District of Washington's decisions are available at *Magassa v. Wolf*, 545 F. Supp. 3d 898 (W.D. Wash. 2021), and *Magassa v. Wolf*, 487 F. Supp. 3d 994 (W.D. Wash. 2020). Pet. App. 37a–106a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on November 9, 2022, and denied Petitioner's petition for rehearing on February 24, 2023. The Ninth Circuit issued its mandate on March 6, 2023. Petitioner timely files this Petition on May 25, 2023. The jurisdiction of the Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Paragraph 1

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be

made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to Controversies between two or more States;– between a State and Citizens of another State,—between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III § 2.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

49 U.S.C. § 46110. Judicial Review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the

Administrator of the Federal Aviation Administration) 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 its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

49 U.S.C. § 46110(a).

5 U.S.C. § 551. Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

***

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;

5 U.S.C. § 551.

STATEMENT OF THE CASE

I. Introduction

Ninth Circuit precedent, "which follows other circuits, is wrong." Pet. App. 29a (Nelson, J. concurring). So observed Judge Nelson regarding the panel's application of Ninth Circuit precedent requiring a "holding that the Redress Process is an 'order' under 49 U.S.C. § 46110(a)." *Id.* Petitioner Lassana Magassa[1] lost his job and endured unwarranted harassment, scrutiny, and stigma when the Transportation Security Administration ("TSA") revoked his existing necessary access credential, a Security Identification Display Area ("SIDA") badge. First Amended Complaint ("FAC"), Doc. 39, ¶¶ 146, 149, 150. During the Security Threat Assessment and Redress Process for Holders of Airport-Approved and/

1. During the pendency of the underlying matter, Lassana Magassa completed his doctorate degree in Information Science. Therefore, this Petition identifies him as "Dr. Magassa." He continues to utilize his access credential via part-time work for another airline.

or Airport-Issued Personal Identification Media ("STA Redress Process"), the only administrative procedure available to him to challenge the TSA's revocation of his SIDA badge, the Administrative Law Judge ("ALJ") prevented Dr. Magassa from learning the reason for the TSA's determination. Id. ¶¶ 99, 103. The government only presented that information, if at all, during a classified hearing that the TSA prevented Dr. Magassa and his counsel from attending. *Id.* ¶¶ 109, 110, 112, 113, 114. Shortly after the conclusion of the STA Redress Process that affirmed the revocation, the TSA notified Dr. Magassa it changed its mind, that he no longer presented a threat after all, and reinstated his SIDA badge. *Id.* ¶ 144.

Dr. Magassa filed and pursued a lawsuit in late 2019, challenging the TSA's STA Redress Process under the Administrative Procedure Act as well as his procedural and substantive due process rights under the Fifth Amendment. *Id.* ¶¶ 158–273. Dr. Magassa also sued FBI Agent Minh Truong in his individual capacity under 42 U.S.C. § 1981 ("Section 1981"), for interfering with Dr. Magassa's right to contract both with his employer and in his purchase of airline tickets. Original Complaint, Doc. 1, ¶¶ 273–82. The United States District Court for the Western District of Washington dismissed Dr. Magassa's claims for lack of subject matter jurisdiction and failure to state a claim. Pet. App. 37a–106a. The Ninth Circuit affirmed the district court's dismissal, though for different reasons. Pet. App. 28a. The Ninth Circuit agreed with the district court's view that Section 1981 only applies to private and state, not federal, actors. *Id.* The Ninth Circuit further agreed that Dr. Magassa failed to establish a liberty interest sufficient to support his due process claims. *Id.* However, the Ninth Circuit diverged from the

district court by holding the district court did *not* have jurisdiction to hear Dr. Magassa's constitutional and APA challenges to the STA Redress Process, because Ninth Circuit authority mandated the finding that 49 U.S.C. § 46110 ("Section 46110") divested the district court's jurisdiction. *Id.* The Ninth Circuit's interpretations of both Section 1981 and Section 46110 contradict the plain meaning, history, and context of these statutes, and lead to growing confusion among the Circuits on their application. Resolution of these legal issues necessitates this Court's intervention to resolve.

II. Relevant Factual Background

Petitioner Lassana Magassa, an African-American, Muslim U.S. citizen, worked as a cargo customer service agent for Delta Airlines in Seattle, Washington beginning in June 2015. FAC ¶¶ 13, 14, 17. To perform his service/ramp agent role, Dr. Magassa underwent background checks and interviewed with Customs and Border Protection ("CBP") to obtain his employment access card, a SIDA badge. *Id.* ¶¶ 18, 66. This SIDA badge allowed Dr. Magassa to enter secured portions of the airport to do his job. During his background check, Dr. Magassa expressed interest in working for law enforcement, including the FBI. *Id.* ¶ 19. The CBP interviewers offered to send his resume to any law enforcement colleagues, and Dr. Magassa agreed. *Id.* ¶ 20.

After Dr. Magassa began his work for Delta, FBI Special Agent Minh Truong contacted him in late October 2015. *Id.* ¶¶ 22, 28. They met over coffee for what Dr. Magassa believed to be an FBI job interview. *Id.* ¶ 28. Instead, Agent Truong questioned Dr. Magassa about his

Muslim faith and his views on violence, then invited Dr. Magassa to become a paid informant for the FBI. *Id.* ¶ 29. Because doing so would require spying on his Muslim community, Dr. Magassa declined Agent Truong's offer. *Id.* ¶ 30. Dr. Magassa explained to Agent Truong that the duplicity of that role contradicts his core religious beliefs, but he reaffirmed his interest in working as an agent or intern with the FBI and that, as he has always done, he would call 911 or report anything concerning he might see to law enforcement. *Id.* ¶¶ 30–32. He specified he did not want payment for continuing to do that, as he considers this his duty as a U.S. citizen.

On June 26, 2016, Dr. Magassa received a credential via the CBP Global Entry program, allowing expedited clearance for pre-approved, low-risk international travelers. *Id.* ¶ 33. A few months later, in September 2016, Agent Truong tried to contact Dr. Magassa again, but the two did not connect. *Id.* ¶ 34.

Shortly after that failed contact attempt, Dr. Magassa began encountering issues when flying, a rarity for an airline employee with a SIDA badge and Global Entry. On October 3, 2016, Dr. Magassa traveled from Seattle, Washington to Paris, France, then Berlin, Germany. *Id.* ¶ 46. While his outgoing travel occurred without issue, he received an error message when he tried to check in for his return flight out of Paris. *Id.* ¶¶ 48–49. Dr. Magassa waited at the Delta ticket counter for an hour and a half, missing his flight, but no one knew why he could not receive a boarding pass. *Id.* ¶ 50. Delta managed to rebook Dr. Magassa on another flight; when he reached the gate to board that flight, however, a loud siren and alarm sounded when the gate agent scanned his boarding pass. *Id.* ¶ 51.

Security agents approached and again searched Dr. Magassa and his belongings, despite him having already been extensively searched at the security checkpoint prior to reaching the gate. *Id.* ¶ 52. Security confiscated a pair of small crochet scissors, not contraband and within approved TSA guidelines to carry on board, then allowed Dr. Magassa to board without further explanation or restrictions. *Id.* ¶ 53.

On or around October 7, 2016, Dr. Magassa attempted to check in for his next flight via the Global Entry kiosk to return to the United States. *Id.* ¶ 54. He then learned that his Global Entry privileges had been revoked. *Id.* After detaining and interviewing him for three hours in Cincinnati, Ohio, government agents and airport officials told Dr. Magassa they could not identify any reason for the triggered alerts. *Id.* ¶ 55. Dr. Magassa then booked travel from Cincinnati to Minneapolis, Minnesota, to Seattle, and required approval at each stage. *Id.* ¶ 56. When Dr. Magassa attempted to go through security, by that point only fifteen minutes before his newly scheduled departure time, he again set off alarms and sirens. *Id.* ¶ 57. TSA cleared him to travel after a twenty-minute search, by which time he missed his new flight. *Id.* Delta then rebooked him to travel the next morning from Cincinnati to Salt Lake City, Utah, then to Seattle. *Id.* ¶ 58. Again, Dr. Magassa set off alarms and underwent additional screening. *Id.* ¶ 59. His boarding passes for both flights contained SSSS[2] markings. *Id.*

2. This designation stands for Secondary Security Screening Selection, and appears each time someone placed in the Terrorist Screening Dataset travels via airplane.

After Dr. Magassa finally reached Seattle on or about October 10, 2016, his Delta Air Lines Cargo supervisor, the Head of Corporate Security for Delta Air Lines, and a Seattle airport police officer all awaited him at the gate. *Id.* ¶ 62. They informed him that his TSA status had changed and his access credentials were therefore revoked, for reasons unknown to them. *Id.* Due to the TSA's change of his access, Delta had no choice but to prevent Dr. Magassa from returning to work after the TSA revoked his SIDA badge, required by federal law for work in any U.S. airport. *Id.* ¶ 63. The officials told Dr. Magassa they had no further information to provide and no other option but to suspend him and escort him from the airport premises. *Id.* ¶ 64.

In a letter dated October 8, 2016, the Port of Seattle Aviation Security officially notified Dr. Magassa that TSA revoked his SIDA workers' identification badge. *Id.* ¶ 66. Dr. Magassa cleared out his locker at Delta's request, again hearing that no one at Delta knew why his TSA status changed. *Id.* ¶ 67. In an attempt to remain marketable for future jobs, and recognizing his then inevitable termination, Dr. Magassa submitted a letter of resignation to Delta on October 12, 2016, with his constructive discharge effective as of October 26, 2016. *Id.* ¶¶ 68–69.

The STA Redress Process

On November 4, 2016, Dr. Magassa received formal notification of the TSA's Initial Determination of Eligibility and Immediate Suspension, informing him he "may" no longer be eligible to hold airport-approved and/or airport-issued personnel identification media. *Id.* ¶ 88. Based on

the TSA's prior revocations of his credentials, he knew that much already. On November 13, 2016, Dr. Magassa requested the release of any and all documentation the TSA relied upon in making that determination. *Id.* ¶ 89. On December 22, 2016, the TSA produced heavily redacted documents to Dr. Magassa in response, including an October 20, 2016 Security Threat Assessment Board ("STAB") report. *Id.* ¶ 90. Due to heavy and near-complete redactions, none of these materials contained any substantive information enlightening Dr. Magassa as to why TSA revoked his SIDA badge and accompanying airport access needed to perform his job duties. *Id.* ¶¶ 91–93.

Dr. Magassa filed a timely appeal of the Initial Determination of Eligibility and Immediate Suspension on February 10, 2017. *Id.* ¶ 94. Dr. Magassa received a Final Determination of Eligibility on June 19, 2017, confirming his ineligibility for airport-approved and/or airport-issued personnel credentials. *Id.* ¶ 95. Dr. Magassa subsequently filed a timely appeal of the Final Determination. *Id.* A Coast Guard ALJ presided over Dr. Magassa's administrative appeal on July 24, 2017. *Id.* ¶ 96.

After a prehearing conference, the ALJ issued an order on October 5, 2017 proscribing a bifurcated hearing. *Id.* ¶ 98. The ALJ scheduled the classified and unclassified portions to take place after an *in camera* review of the unclassified summary the TSA refused to produce to Dr. Magassa. *Id.* One of Dr. Magassa's attorneys, Charles D. Swift, already possessed Secret security clearance at the time, and therefore respectfully requested access to all documents relevant to Dr. Magassa in this matter. *Id.* ¶¶ 99–100, 102. On January 25, 2018, after his completion

of the *in camera* review, the ALJ denied Attorney Swift's request and concurred with the TSA's determination that it could not provide the unclassified summary to Dr. Magassa or any of his counsel. *Id.* ¶ 103. The ALJ also ordered the TSA to provide Dr. Magassa with a redacted version of the STAB report from June 2017. *Id.* ¶ 104. However, this 2017 STAB report, also replete with near-total redactions, proved as uninformative as the 2016 STAB report. *Id.* ¶ 105.

The ALJ denied Dr. Magassa's request that he and his counsel be permitted to attend the classified portion of the hearing, but allowed him and his counsel to attend the unclassified portion. *Id.* ¶¶ 112, 114, 116, 117. At the unclassified portion of the hearing, the TSA provided Dr. Magassa with no information supporting its actions. *Id.* ¶¶ 120–31, 140. He therefore had no opportunity to challenge or rebut any adverse information. On April 29, 2019, the ALJ held the TSA's determination was supported by substantial evidence. *Id.* ¶ 138. Dr. Magassa remains unaware of any of this "substantial evidence." On May 31, 2019, Dr. Magassa timely requested review of the ALJ decision by the TSA Final Decision Maker. *Id.* ¶ 140. On July 1, 2019, the TSA Final Decision Maker concluded the ALJ applied the appropriate standard of review and properly limited Dr. Magassa's access to the record. *Id.* ¶¶ 142–43.

Only a few weeks later, on July 26, 2019, the TSA withdrew its June 19, 2017 Final Determination of Eligibility, and instead concluded that Dr. Magassa was suddenly once again eligible to maintain airport-issued personnel credentials. *Id.* ¶ 144–45. The TSA provided no reasons for its reversal of its prior determination that Dr. Magassa presented a security threat. *Id.* ¶ 146.

After Dr. Magassa received the TSA's reversal, he obtained similar employment to his previous position at Delta, with another airline. *Id.* ¶ 147. This employment also requires him to hold a valid SIDA badge for airport access. *Id.* Though he ultimately re-obtained a SIDA badge and airport access after a three-year battle, Dr. Magassa suffered reputational damage and lost income, as well as opportunities to progress in his employment as he otherwise would have, had he not been prevented from remaining continuously employed. *Id.* ¶¶ 148–49.

Dr. Magassa continues to suffer stigma and reputational harm among his colleagues, who know of the earlier proceedings against him and the related incidents. *Id.* ¶ 150. For example, before a flight in September 2019, Dr. Magassa received permission from his fellow employees to enter the secure area of the airport to retrieve his possessions, including his cell phone charger. *Id.* ¶ 151. He then clearly exited the secured area and went through TSA general screening, as would any traveler, before proceeding to his gate for travel. *Id.* Despite this, airport security alleged that Dr. Magassa intentionally bypassed general security screening procedures prior to heading to the gate to board his flight. *Id.* TSA personnel stormed the breakroom where Dr. Magassa's coworkers were to ask them if they had seen him during the incident, showing the coworkers a picture of him. *Id.* ¶ 153. TSA personnel also instructed an airline administrator whom Dr. Magassa knew personally to suspend and revoke his airport access credentials. *Id.* ¶ 154. Agents approached Dr. Magassa at his departure gate, publicly accusing him of violating security, and temporarily revoked and confiscated his access badge. *Id.* ¶ 151. Without checking the video footage to confirm the accuracy of the allegations,

airport security and TSA personnel accused Dr. Magassa of not going through general security screening. *Id.* The Port of Seattle police even filed a police report. *Id.* While Dr. Magassa eventually vindicated himself and showed he did nothing wrong, he suffered public embarrassment, harassment, and other damages due to missing his scheduled flight. *Id.* ¶ 152.

III. Lower Court Proceedings

Dr. Magassa sued Agent Truong in his individual capacity, and the heads of the Department of Homeland Security ("DHS"), TSA, CBP, Department of Justice, FBI, and Terrorist Screening Center in their official capacities. Dr. Magassa alleges violations of his contractual rights under Section 1981 by Agent Truong, and violations of the Administrative Procedure Act ("APA") and Fifth Amendment by the official capacity defendants.

The United States District Court for the Western District of Washington dismissed Dr. Magassa's claim against Agent Truong for lack of subject matter jurisdiction, holding that Section 1981 does not apply to conduct by federal actors even if sued in their individual capacities. Pet. App. 72a-75a. The district court also held that while its review was not barred by Section 46110, it lacked jurisdiction over the APA claim due to the lack of a final order. Pet. App. 41a–47a, 55a–59a. Finally, the district court dismissed Dr. Magassa's due process claims for failure to state a claim, finding he did not establish a protected liberty or property interest. Pet. App. 47a–55a.

On appeal, the Ninth Circuit affirmed the district court's dismissal with respect to Agent Truong due to

lack of subject matter jurisdiction. Pet. App. 13a–17a. The Ninth Circuit also agreed with the district court that, although Dr. Magassa had standing to pursue his due process claims, he failed to establish a valid liberty or property interest. Pet. App. 24a–28a. The Ninth Circuit then diverged from the district court, holding the district court did not have jurisdiction to consider Dr. Magassa's challenge to the TSA's determination to revoke his SIDA badge because it believed itself bound by its own precedent, that agency rulemaking falls within the appellate court's exclusive jurisdiction under Section 46110. Pet. App. 17a–24a. The Ninth Circuit denied Dr. Magassa's petition for rehearing,[3] and Dr. Magassa timely files this Petition for writ of certiorari. Pet. App. 107a–108a.

REASONS FOR GRANTING THE PETITION

I. The District Court Possesses Jurisdiction to Hear Challenges to the TSA's STA Redress Process, because the Redress Process Does Not Constitute an Order under 49 U.S.C. § 46110(a).

The Ninth Circuit held the district court lacked jurisdiction to hear Dr. Magassa's APA challenge to the STA Redress Process because it believed itself bound by its own precedent that the STA Redress Process constitutes an "order" under 49 U.S.C. § 46110(a),

3. While unanimously agreeing to deny panel rehearing, two of the three Ninth Circuit judges from Dr. Magassa's original panel voted in favor of *en banc* consideration. Pet. App. 108a. However, no remaining judges on the Ninth Circuit voted in favor of *en banc* consideration, ultimately causing denial of his petition for rehearing. *Id.*

therefore giving the appellate courts original jurisdiction. Pet. App. 19a. Notably, the Ninth Circuit held the STA Redress Process constitutes an order because, "[a]lthough seemingly not an 'order' in the intuitive sense, [the Ninth Circuit has] essentially held that final agency actions under the APA are also orders under § 46110." *Id.* But according to Judge Nelson, who wrote both the main opinion and a concurrence in this matter, although Ninth Circuit precedent "compels [the] holding that the Redress Process is an 'order' under 49 U.S.C. § 46110(a) . . . [that] precedent, which follows other circuits, is wrong." Pet. App. 29a (Nelson, J., concurring).

Under Section 46110(a), "a person disclosing a substantial interest in an order issued by the . . . Administrator of the Transportation Security Administration [TSA] . . . may apply for review of the order by filing a petition for review . . . in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a). Subsection (c) of the same statute clarifies that "the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order [the TSA] to conduct further proceedings." *Id.* § 46110(c). The Ninth Circuit therefore held that, by challenging the STA Redress Process, Dr. Magassa seeks review of an order of the TSA. Pet. App. 19a ("Although seemingly not an 'order' in the intuitive sense, we have essentially held that final agency actions under the APA are also orders under § 46110."). However, as Judge Nelson identified, the Ninth Circuit's interpretation of "order" is not supported by plain meaning or the APA's definition of "order." Pet. App. 29a ("In my view, the plain meaning of "order," which § 46110 does not define, does

not include agency policies or procedures like the Redress Process.") (Nelson, J., concurring).

In his concurrence, Judge Nelson acknowledges that the APA defines an "order" as "the whole or a part of a final disposition . . . of an agency in a matter *other than rule making*." Pet. App. 29a (Nelson, J., concurring) (citing 5 U.S.C. § 551(6)) (emphasis in concurrence). In contrast, the APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4). The APA also defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Under these APA definitions, "the Redress Process—the procedures TSA employs to revoke airport workers' SIDA badges—is not an order but a rule." Pet. App. 30a (Nelson, J., concurring).

This Court's precedent conflicts with the Ninth Circuit's holding. In *McNary v. Haitian Refugee Center, Inc.*, this Court held that federal district courts retain jurisdiction to hear constitutional and statutory challenges to Immigration and Naturalization Service ("INS") procedures. 498 U.S. 479, 483-84 (1991). In *McNary*, this Court considered a provision of the Immigration and Nationality Act ("INA") that stripped federal courts of jurisdiction over "a determination respecting an application for adjustment of status" under the Act's Special Agricultural Workers ("SAW") amnesty program. *Id.* at 491 (citing 8 U.S.C. § 1160(e)(1)). This Court held that provision did not apply to the plaintiffs' constitutional and statutory challenges because "the reference to

'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," and therefore the statute did not refer to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* at 492. This Court further observed that "had Congress intended the limited review provisions of [the INA] to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.* at 494. As Judge Nelson explained in his concurrence, "[i]f Congress wanted 'order' to mean 'final agency action,' it could have said so in § 46110." Pet. App. 32a (Nelson, J., concurring).

This Court also emphasized the importance of a reviewable administrative record prior to jurisdictional stripping. The *McNary* decision specified it was "unlikely that a court of appeals would be in a position to provide meaningful review of the type of claims raised in this litigation." *McNary*, 498 U.S. at 497 ("Not only would a court of appeals reviewing an individual SAW determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it would also lack the factfinding and record-developing capabilities of a federal district court."). This Court cited an amicus brief from the American Bar Association clarifying that statutes providing for "only a single level of judicial review in the court of appeals are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record[.]" *Id.* at 497 (citation omitted).

McNary remains good law. *See Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1069 (2020) (citing *McNary* for

the "well-settled" and "strong presumption" favoring meaningful judicial review of agency action); *Ahmad v. Jacquez*, 860 Fed. App'x. 459, 462 (9th Cir. 2021) (citing *McNary* for the proposition that a jurisdiction-stripping statute does not preclude review of all challenges that might implicate individual designation decisions).

Despite the holding the panel felt mandated to reach, even Ninth Circuit precedent still recognizes *McNary*'s requirement of a developed, reviewable administrative record prior to foreclosing district court review. *See Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994) ("Moreover, and like the claims advanced in *McNary*, the administrative record for a single revocation would have little relevance to Mace's constitutional challenges here."); *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (district court erred in dismissing claims for lack of subject matter jurisdiction under Section 46110 even in the presence of an agency order, because "the order did not provide a definitive statement of the agency's position on Crist's constitutional challenge, and the board did not come close to developing a record permitting informed judicial evaluation of his challenge"); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1256 (9th Cir. 2008) ("Just how would an appellate court review the agency's decision to put a particular name on the list? . . . For all we know, there is no administrative record of any sort for us to review."). As the Ninth Circuit in *Mace* observed, "any examination of the constitutionality of the FAA's revocation power should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *Mace*, 34 F.3d at 859.

The STA Redress Process provides, at best, a minimal administrative record for appellate court review. The administrative record contains no discussion of the constitutionality of the process itself, the basis of Dr. Magassa's claims in federal court. The administrative record in this case is further bifurcated between unclassified and classified portions, with the unclassified portion (the only portion Dr. Magassa and his counsel could attend or review) pertaining solely to Dr. Magassa's eligibility for a SIDA badge. The record contains no evidence addressing whether the Redress Process creates a system violating either Dr. Magassa's right to due process, or the APA. *See Axon Enter. v. FTC*, 143 S.Ct. 890, 911 (2023) ("By permitting administrative agencies to adjudicate what may be core private rights, the administrative review schemes here raise serious constitutional issues.") (Thomas, J., concurring). Therefore, not only does the STA Redress Process not constitute an "order" under either the APA or Section 46110, but no administrative record exists that addresses the claims asserted in Dr. Magassa's lawsuit. The Ninth Circuit wrongly failed to recognize the district court's subject matter jurisdiction over Dr. Magassa's claims.

II. Dr. Magassa Adequately Establishes Harm to His Liberty Interest in His Reputation

Under the "stigma plus" theory, a plaintiff who has suffered reputational harm at the hands of the government may assert a cognizable liberty interest for procedural due process purposes if the plaintiff suffers stigma from governmental action plus alteration or extinguishment of a right or status previously recognized by state law. *See Paul v. Davis*, 424 U.S. 693, 701, 711 (1976); *Roe v. Lynch*,

997 F.3d 80, 85–86 (1st Cir. 2021); *Morris v. Lindau*, 196 F.3d 102, 114 (2d Cir. 1999); *Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006); *Long v. Pekoske*, 38 F.4th 417, 426 (4th Cir. 2022); *Blackburn v. City of Marshall*, 42 F.3d 925, 935–36 (5th Cir. 1995); *Quinn v. Shirey*, 293 F.3d 315, 319–20 (6th Cir. 2002); *Doe v. Purdue Univ.*, 928 F.3d 652, 661 (7th Cir. 2019); *Gunderson v. Haas*, 339 F.3d 639, 644 (8th Cir. 2003); *Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022); *Al-Turki v. Tomsic*, 926 F.3d 610, 617 (10th Cir. 2019); *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty.*, 48 F.4th 1222, 1234–35 (11th Cir. 2022); *Doe v. U.S. Dep't of Just.*, 753 F.2d 1092, 1108–09 (D.C. Cir. 1985). The Ninth Circuit correctly held that Dr. Magassa "sufficiently alleges that the government caused reputational harm when the TSA purportedly accused him of security violations and harassed him at work." Pet. App. 27a–28a. But the Ninth Circuit then held that Dr. Magassa could not meet the "stigma plus" standard articulated in *Fikre* because he could not show that he had a right to a security clearance or a job that requires one. Pet. App. 28a. Citing Supreme Court and Ninth Circuit precedent, the Ninth Circuit concluded that Dr. Magassa's employment credential, the SIDA badge, constituted a "security clearance" that he has no right to possess. Pet. App. 27a–28a. The Ninth Circuit erred.

The Ninth Circuit cites two opinions to support its determination. In *Dep't of the Navy v. Egan*, this Court held that a submarine laborer at the Trident Naval Refit Facility who lost his Navy-provided security clearance to work on nuclear submarines could not bring a lawsuit to challenge the executive decision to revoke his clearance because "no one has a 'right' to a security clearance." 484 U.S. 518, 528 (1988). And the Ninth Circuit cites *Dorfmont*

v. Brown, where it relied on *Egan* to reject a defense contractor's challenge to the loss of her Department of Defense-provided security clearance, because "[i]f there is no protected interest in a security clearance, there is no liberty interest in employment requiring such clearance." 913 F.2d 1399, 1403 (9th Cir. 1990).

The Ninth Circuit ignored the many ways Dr. Magassa's facts differ from the plaintiffs in *Egan* and *Dorfmont*. The Ninth Circuit failed to address whether the employment credential of a SIDA badge constitutes a "security clearance" under *Egan* and *Dorfmont*. *See Egan*, 484 U.S. at 527–28 (discussing the history and authority of the Executive Branch to protect national security via security clearance classifications, noting that "[d]ifferent types and levels of clearance are required, depending upon the position sought"). In contrast to the military-provided security clearances that provided the plaintiffs in *Egan* and *Dorfmont* with access to classified national security information, Dr. Magassa's TSA-provided SIDA badge only grants him access to secure locations in the airport where he performs non-classified work. A SIDA badge provides no types or levels of clearance, and no evidence shows that Dr. Magassa obtained any access to national security information via his SIDA badge.

The Ninth Circuit also ignores the due process inherent in procedures the plaintiffs in *Egan* and *Dorfmont* received regarding the revocation of their security clearances. In *Egan*, this Court identified how the respondent "received notice of the reasons for the proposed denial, an opportunity to inspect all relevant evidence, a right to respond, a written decision, and an opportunity to appeal to the [relevant] Board." *Egan,* 484

U.S. at 533. The plaintiff in *Egan* received a letter from the Navy denying his security clearance based on state criminal records, his failure to disclose earlier convictions for assault and being a felon in possession of a gun, and his own statements about drinking problems that led him to serve part of a sentence in an alcohol rehabilitation program. *Id.* at 521. The plaintiff in *Dorfmont* also received a "Statement of Reasons" for the denial of her security clearance, the opportunity to meaningfully respond, and the ability to request a formal hearing and appeal to the Department of Defense Appeal Board, where that Board could permit her additional meaningful substantive opportunities to respond. *See Dorfmont*, 913 F.2d at 1400 (explaining that the Department of Defense revoked Ms. Dorfmont's security clearance because she sent company data to a federal prisoner who attempted to hijack an airliner to utilize his computer programming skills). In contrast to both Mr. Egan and Ms. Dorfmont, Dr. Magassa received no explanation for the revocation of his existing credentials, and he could not review any evidence supporting that revocation because the TSA and ALJ denied him that access. Dr. Magassa is therefore not "like other workers who need security clearances to stay employed" discussed in *Egan* and *Dorfmont* because those workers receive meaningful opportunities to challenge the adverse information. Pet. App. 27a. To this day, Dr. Magassa lacks any knowledge of the reasons the TSA revoked his SIDA badge for three years only to reinstate it a few weeks after the ALJ supported the TSA's earlier adverse determination.

By holding that *Egan* forecloses due process challenges to the government's revocation of an access badge because, in its opinion, it basically equates to a

security clearance, the Ninth Circuit stands in conflict with the D.C. Circuit. *Ranger v. Tenet*, 274 F. Supp. 2d 1, 7 (D.C. Cir. 2003) (holding "a federal agency's revocation of a security clearance may give rise to a due process claim for injury to a liberty interest in reputation"). Like the Ninth Circuit, the D.C. Circuit requires a plaintiff to show that the government "both altered his status and stigmatized his reputation without due process of law." *Id.* (citation omitted). But unlike the Ninth Circuit, the D.C. Circuit does not terminate its analysis based on an overly broad application of *Egan*'s holding, that no one has a right to a security clearance. *See id.* (recognizing that "no one may hold a property interest in a security clearance"). Rather, the D.C. Circuit properly considers whether the plaintiff received due process in light of the effect of the government's revocation of the security clearance on the person's employment and the stigma associated with the revocation. *See id.* at 8–9 (plaintiff allowed to pursue due process claim based on CIA's revocation of security clearance that resulted in his unemployment where he alleged the CIA released information about the reasons for the revocation to his employer and did not give him the opportunity to refute the CIA's charges).

Under the D.C. Circuit's analysis, Dr. Magassa would be permitted to pursue his due process claim related to the STA Redress Process. Dr. Magassa has a liberty interest in his reputation that the TSA infringed upon by revoking his SIDA badge without due process. Dr. Magassa's loss of his SIDA badge resulted not only in his unemployment, but also in his perception as a security threat among his coworkers and the TSA agents at the Seattle airport. *See Coker v. Barr*, No. 19-cv-02486, 2020 U.S. Dist. LEXIS 255249, at *25 (D. Colo. Sept. 15, 2020) ("[I]t is

hard to imagine a greater stigma than being associated with terrorism in our post-9/11 world."). This stigma continues even after the reinstatement of Dr. Magassa's SIDA badge because he continued to endure harassment in front of his coworkers when TSA agents and airport police wrongly accused him of violating airport security without reviewing video evidence and thereby caused him to miss his flight. Finally, Dr. Magassa did not receive sufficient due process because the TSA refused to inform him or his counsel of the reasons for its revocation during the STA Redress Process. Should the TSA change its mind and revoke Dr. Magassa's SIDA badge again, as it very well may at any time, Dr. Magassa cannot properly respond to any adverse determination by the TSA if it continues to use "national security" as a shield for its arbitrary and discriminatory decision-making. *See Rattigan v. Holder*, 689 F.3d 764, 767 (D.C. Cir. 2012) ("[W]e do not believe that *Egan* insulates from Title VII *all* decisions that might bear upon an employee's eligibility to access classified information."); EEOC, *Policy Guidance on the use of the national security exception contained in sec. 703(g) of Title VII of the Civil Rights Act of 1964* (May 1, 1989), https://www.eeoc.gov/laws/guidance/policy-guidance-use-national-security-exception-contained-sec-703g-title-vii-civil ("Employers cannot, merely by invoking national security, exempt themselves from coverage of the nondiscrimination provisions of the act."). The Ninth Circuit erred by refusing to conduct the proper analysis of Dr. Magassa's stigma-plus due process claim.

III. Multiple Circuits Misapply Section 1981 to Exclude Federal Actors

Section 1981's statement of equal rights guarantees "[a]ll persons within the jurisdiction of the United States

shall have the same right in every State and Territory to make contracts . . . and to the full and equal benefit of all laws and proceedings[.]" 42 U.S.C. § 1981(a). The Civil Rights Act of 1991 amended the statute to "strengthen and improve" the federal civil rights laws by adding subsections (b) and (c). Civil Rights Act of 1991, 105 Stat. 1971, Preamble (Nov. 21, 1991) ("An Act To amend the Civil Rights Act of 1964 to *strengthen and improve* Federal civil rights laws[.]") (emphasis added). That new subsection (c) states "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). The Ninth Circuit, along with the Second, Seventh, Tenth, and Eleventh Circuits, holds that the "under color of State law" requirement of subsection (c) precludes claims against individuals acting under color of federal law. Pet. App. 15a–16a; *see Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995); *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Davis v. U.S. Dep't of Just.*, 204 F.3d 723, 725–26 (7th Cir. 2000) (per curiam); *Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998); *see also Sindram v. Fox*, 374 Fed. App'x. 302, 304 (3d Cir. 2010) (unpublished).[4] These circuits' misinterpretations of Section 1981(c) as foreclosing claims against federal agents like Agent Truong when sued in their individual capacities under Section 1981(a) for actions taken under color of *federal* law violates Congress's express intent to *strengthen* Section 1981's protections,

4. The Third Circuit has yet to issue any published opinions addressing Section 1981's applicability to federal actors. Its sole unpublished opinion cites to other circuits' holdings against applicability to federal actors. *See Sindram v. Fox*, 374 Fed. App's. 302, 304 (3d Cir. 2010) (unpublished).

not weaken them. These interpretations therefore betray the plain meaning of the text.

This Court recently endorsed consideration of the "legal backdrop against which Congress enacted [a statute to] confirm[] the propriety of individual-capacity suits." *Tanzin v. Tanvir*, 141 S.Ct. 486, 490 (2020) (citation omitted) (holding unanimously that plaintiffs may bring actions under the Religious Freedom Restoration Act against federal actors in their individual capacities). Congress originally enacted Section 1981 pursuant to the Thirteenth Amendment and the Civil Rights Act of 1866. *See* Civil Rights Act of 1866, Sec. 1, 14 Stat. 27, 39 Cong. Ch. 31 (Apr. 9, 1866). Congress enacted the 1991 Civil Rights Act to "strengthen and improve" federal civil rights laws, in direct response to this Court's potential overruling of *Runyon v. McCrary*, 427 U.S. 160 (1976). Civil Rights Act of 1991, 105 Stat. 1071, Preamble. Congress intended for the amendments to Section 1981 to prevent any construction of the statute that rendered it inapplicable to private actors. *Xia v. Tillerson*, 865 F.3d 643, 658 (D.C. Cir. 2017). Shortly before the enactment of the Civil Rights Act of 1991, the Supreme Court *sua sponte* ordered re-argument on whether it should overrule *Runyon v. McCrary*, a prior precedent that Section 1981 reached private conduct. *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (per curiam) (restoring case to calendar); *decided* 491 U.S. 164 (1989). With the passage of the Civil Rights Act of 1991, Congress responded to the Supreme Court and broadened Section 1981 to explicitly apply to both private and government individual actors. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 450 (2008) ("Congress passes the Civil Rights Act of 1991, 105 Stat. 1071, with the design to

supersede *Patterson*."); *see also* 137 Cong. Rec. 30,630, 30,678 (Nov. 7, 1991) (Statement of Rep. Hyde) ("[T]his section of the Act codifies the holding of *Runyon v. McCrary*, under which section 1981 prohibits private, as well as governmental, discrimination.") (citation omitted). No evidence supports the view that, by adding subsection (c) to Section 1981 to broaden the reach of the statute, Congress somehow simultaneously intended to "eliminate claims based on the exercise of federal governmental authority." *Xia*, 865 F.3d at 659. To realize Congress's goals of strengthening and improving civil rights laws, Section 1981(c) reaffirms the breadth of Section 1981's applicability and protects individuals from both nongovernmental and governmental discrimination by individual actors. No context supports the erroneous view of the Second, Seventh, Ninth, Tenth, and Eleventh Circuits that Congress intended to narrow and foreclose claims against federal actors.

The Ninth Circuit's construction of Section 1981 betrays the plain meaning of the statute, both alone and in conjunction with related statutes. As the D.C. Circuit recognized in *Xia v. Tillerson*, holding that the addition of Section 1981(c) prohibits discriminatory action by only private and state actors, but not federal actors, "would, anomalously, make section 1981 inapplicable" to the District of Columbia and U.S. territories, "a result in tension with subsection (a)'s coverage of all persons 'in every State and Territory.'" *Xia*, 865 F.3d at 659 (D.C. Cir. 2017) (citing 42 U.S.C. § 1981(a)). Further, limiting Section 1981 to private and state actors solely because of the language added by Section 1981(c) conflicts with jurisprudence surrounding Section 1982, which parallels the language in Section 1981(a). *Compare* 42 U.S.C.

§ 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens[.]") *with* 42 U.S.C. 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . as is enjoyed by white citizens."). Section 1982, also deriving from the Civil Rights Act of 1866, rightly applies to federal actors based on interpretation of similar language. *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) ("Moreover, like the [Thirteenth] Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing or upholding' racial discrimination . . . but, rather, an 'absolute' bar to all such discrimination, private as well as public, federal as well as state.") (citation omitted).

The Ninth Circuit, along with the Second, Seventh, Tenth, and Eleventh Circuits, incorrectly interprets Section 1981 to weaken and reduce the civil rights laws Congress specifically intended it to broaden by erroneously reading it to suddenly foreclose claims against individual actors acting under color of federal law. Dr. Magassa respectfully requests this Court grant this Petition to provide clarity and guidance on the proper scope of Section 1981 in light of its legislative history and context.

CONCLUSION

The Ninth Circuit's decision in this matter reflects a fundamental misunderstanding of Congress' intent with both Section 46110 and Section 1981, as well as misapplication of this Court's holding in *Egan*. Section 46110 applies to orders after case-specific fact-finding reflected in a developed record, not any final agency rulemaking procedures like the STA Redress Process.

And *Egan* does not foreclose all due process claims based on the government's infringement of plaintiffs' liberty interests in their reputations, simply because a plaintiff's employment requires an access badge. Finally, Section 1981 must apply to federal actors sued in their individual capacities in order to achieve Congress' express goal of strengthening and improving civil rights laws with that statute and its amendments. Contrary case law developing in the Ninth Circuit and others requires review by this Court. Petitioner Lassana Magassa therefore respectfully requests this Court grant his Petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-35700

LASSANA MAGASSA,

Plaintiff-Appellant,

v.

ALEJANDRO N. MAYORKAS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; MERRICK B. GARLAND, ATTORNEY GENERAL; DAVID PEKOSKE, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION; CHRISTOPHER WRAY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; CHARLES H. KABLE IV, DIRECTOR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TERRORIST SCREENING CENTER; MARK MORGAN, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF US CUSTOMS AND BORDER PROTECTION; MINH TRUONG, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Western District of Washington.
D.C. No, 2:19-cv-02036-RSM.
Ricardo S. Martinez, Chief District Judge, Presiding.

July 7, 2022, Argued and Submitted, Portland, Oregon
November 9, 2022, Filed

Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Jed S. Rakoff,* District Judge. NELSON, R., Circuit Judge, concurring.

Opinion by Judge R. Nelson;
Concurrence by Judge R. Nelson

SUMMARY**

42 U.S.C. § 1981 / Jurisdiction

The panel affirmed the district court's dismissal of an action brought by Lassana Magassa, a former cargo customer service agent for Delta Airlines, claiming that the Transportation Security Agency ("TSA") revoked his security badge without explanation.

Magassa alleged the revocation resulted from his refusal to be an FBI informant, and sued for violations of

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the Administrative Procedure Act, 42 U.S.C. § 1981, and due process. Magassa sued FBI Special Agent Truong in his individual capacity and the heads of the Department of Homeland Security, TSA, Customs and Border Protection, Department of Justice, FBI, and Terrorist Screening Center in their official capacities.

The panel held that § 1981 prohibited discrimination by state—but not federal—officials, and by nongovernmental actors. The panel also held that the district court did not have jurisdiction to consider Magassa's challenge to the TSA's Redress Process because it fell within this court's exclusive jurisdiction under 49 U.S.C. § 46110, and that Magassa failed to establish a liberty interest to support his due process claims.

Specifically, the panel first considered Magassa's section 1981 claim against Special Agent Truong. First, the panel held that the district court improperly concluded that Magassa's claim was against Truong in his official capacity because Truong acted in his official capacity when he unlawfully flagged Magassa as a security threat. Magassa's § 1981 claim seeks damages from Truong as an individual, not as an arm of the sovereign. The panel concluded that the district court had jurisdiction to consider a § 1981 claim against Truong in his individual capacity. Second, the panel affirmed the dismissal of the claim against Truong in his individual capacity because Magassa failed to state a claim. The plain text of § 1981 does not provide a cause of action for discrimination by federal officials acting under color of state law. The panel also rejected Magassa's argument that Truong's conduct

was "nongovernmental discrimination" under § 1981(c). Accordingly, Magassa failed to state a claim under § 1981.

Next, the panel considered Magassa's challenges to the procedures employed to revoke his badge and prevent him from learning the justification for the revocation, alleging violations of the APA and Due Process Clause. The panel affirmed the district court's dismissal for lack of jurisdiction, although for different reasons. The district court retains jurisdiction over challenges to TSA orders only when 49 U.S.C. § 46110 does not explicitly allow the Court of Appeals to hear them. The panel held that precedent suggested that the Redress Process was an "order" under the aviation-agency statute. Aviation agency decisions that satisfy the "final agency action" standard generally also satisfy the "agency order" standard, with two exceptions. Claims remain in district court if they (1) involve agencies not covered by § 46110 or (2) seek monetary damages. Neither of those exceptions applied because Magassa's APA claim was solely against the TSA and sought non-monetary relief in the form of a revised Redress Process. Challenges do not lie beyond § 46110 just because they are broad constitutional challenges to agency procedures. The panel held that Magassa sought relief in the form of a revised Redress Process--a type of relief authorized under § 46110. The district court thus lacked jurisdiction to review Magassa's APA claim.

The panel addressed Magana's procedural and substantive due process claims. First, the panel held that Magassa had Article III standing. Magassa sufficiently alleged injury where he alleged actions that may lead to

an adverse security assessment and continued subjection to the Redress Process. Magassa also established traceability by plausibly alleging a causal connection between his injuries and the complained of conduct that was traceable to TSA's challenged action. Finally, court-ordered remedies could provide Magassa procedural safeguards not provided during the Redress Process.

The panel held that although Magassa had standing, he failed to state a procedural or substantive due process claim. Evaluating Magassa's procedural due process claim, the panel held that Magassa lacked a requisite valid liberty or property interest. Magassa did not have a liberty interest in working for the airlines: no right exists to a security clearance; and no protected interest exists in a job requiring one. Magassa sufficiently alleged that the government caused reputational harm when the TSA purportedly accused him of security violations and harassed him at work, but this was not enough without a right to a security clearance. Accordingly, Magassa's procedural due process claim failed. Magassa's substantive due process claim also failed where there is no right to a specific job.

Concurring, Judge R. Nelson wrote separately because precedent compelled the holding that the Redress Process was an "order" under 49 U.S.C. § 46110(a), but he believed that the precedent, which followed other circuits, was wrong. In his view, the plain meaning of "order," which § 46110 does not define, does not include agency procedures like the Redress Process. Under the term's plain meaning, jurisdiction over Magassa's challenge

to the Redress Process might have been proper in the district court.

R. NELSON, Circuit Judge:

The Transportation Security Agency revoked the security badge of Lassana Magassa, a Delta Airlines agent, without explanation. Magassa, claiming that the revocation resulted from his refusal to be an FBI informant, sued for violations of the Administrative Procedure Act, 42 U.S.C. § 1981, and due process. We hold that § 1981 prohibits discrimination by state—but not federal—officials, and by nongovernmental actors. We also hold that the district court did not have jurisdiction to consider Magassa's challenge to the TSA's Redress Process because it falls within our exclusive jurisdiction under 49 U.S.C. § 46110, and that Magassa failed to establish a liberty interest to support his due process claims.

I

Lassana Magassa, a U.S. citizen and African-American Muslim, worked as a cargo customer service agent for Delta Airlines in Seattle.[1] Before starting with Delta, he completed background checks and interviewed with Customs and Border Protection (CBP) to obtain a security badge (called a Security Identification Display

1. At the motion to dismiss stage, we accept Magassa's factual allegations as true and draw all reasonable inferences in his favor. *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 573 (9th Cir. 2022).

Area or "SIDA" badge). The badge signified that Magassa presented no threat to national security or transportation. During his background check, Magassa mentioned an interest in law enforcement and two CBP interviewers offered to send his resume to their colleagues.

After Magassa started with Delta, FBI Special Agent Minh Truong contacted him. They met over coffee for what Magassa believed would be a job interview. Instead, Truong invited Magassa to be a paid informant. Magassa declined but reaffirmed his interest in working as an agent or intern with the FBI.

Magassa was later approved for the Global Entry program (a CBP program that allows expedited clearance for pre-approved, low-risk international travelers). A few months after Magassa's Global Entry approval, Truong again tried to contact Magassa. They did not connect.

Magassa's airport troubles started during a trip to Paris and Berlin. First, he received an error message when he tried to check in for his return flight. Delta eventually rebooked him on another flight. But an alarm sounded when Magassa went to board. Security agents searched Magassa and his belongings, confiscated a pair of "small crochet scissors," and allowed him to board. Upon return to the United States, Magassa learned that his Global Entry privileges had been revoked. Over the next several hours, his boarding passes triggered more alarms, he endured additional searches, and he missed two flights. His boarding passes for both flights were marked "SSSS." Magassa believed that he was designated

a security threat and listed in the Terrorist Screening Database (colloquially called the "Terrorist Watch List").

When Magassa reached Seattle, his Delta supervisor, the head of Delta security, and an airport police officer met him at the gate. They said that Magassa's credentials had been revoked because his TSA status had changed and he could not return to work. Magassa was escorted from the airport. A few days later, he received a letter informing him that the Port of Seattle Aviation Security had revoked his security badge.

Anticipating termination, Magassa resigned. He received a formal notification of the TSA's "Initial Determination of Eligibility and Immediate Suspension," which stated that he "may no longer be eligible to hold airport-approved and/or airport-issued personnel identification media." After Magassa requested the documents that TSA relied on in its determination, he received heavily redacted documents that included a report from October 2016 (dated ten days after Magassa's return from Paris and one month after Truong's attempt to reconnect). None of the documents revealed substantive information on the TSA's assessment. The "case summary" and "basis of investigation" sections of the report were completely redacted.

Magassa timely challenged the TSA's initial assessment. The agency's Final Determination of Eligibility affirmed the initial assessment, and Magassa filed an administrative appeal. His counsel (who held a Secret-level clearance) requested access to the classified

information submitted by the TSA. After *in camera* review of the record, the administrative law judge (ALJ) denied the request and concluded that the TSA could not provide an unclassified summary of the information. But the ALJ also ordered the TSA to provide Magassa a redacted version of a report from June 2017. Magassa alleges that the 2017 report is only slightly less redacted than the 2016 report and provides no reason for revoking his airport privileges. Like the 2016 report, the 2017 report's "case summary" section was completely redacted.

The ALJ hearing was bifurcated into an unclassified portion (which Magassa attended) and a classified portion (which he did not). The ALJ found that the TSA's determination was supported by substantial evidence. Magassa requested review of the ALJ decision by the TSA Final Decision Maker. The Final Decision Maker concluded that the ALJ had applied the appropriate standard of review and properly limited Magassa's access to unclassified portions of the record.

About three weeks later, the agency withdrew its eligibility determination and concluded that Magassa was "eligible to maintain airport-issued identification media." It did not explain its earlier finding that Magassa was a security threat.

Magassa now works for a different airline in a similar position to the one he held at Delta. His employment depends on maintaining eligibility for a security badge and airport privileges. He alleges that he continues to experience traveling delays and harassment by TSA personnel and remains on a government watch list.

Magassa sued Special Agent Truong in his individual capacity and the heads of the Department of Homeland Security (DHS), TSA, CBP, Department of Justice, FBI, and Terrorist Screening Center (TSC) in their official capacities. He alleges violations of his contractual rights under § 1981 by Truong and violations of the Administrative Procedure Act (APA) and Fifth Amendment by the other defendants in their individual capacities.

The district court dismissed Magassa's claim against Truong for lack of subject matter jurisdiction, reasoning that § 1981 applies to conduct by private or state—not federal—actors. It held that while its review was not barred by the jurisdictional statute in 49 U.S.C. § 46110, it lacked jurisdiction over the APA claim due to the lack of a final order. And it dismissed the Due Process claims for failure to state a claim, because Magassa had not established a protected liberty or property interest. This appeal followed.

II

We review de novo a district court's decision to dismiss for lack of jurisdiction or failure to state a claim, viewing factual allegations in the complaint as true and construing the pleadings in the light most favorable to the nonmoving party. *Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 805 (9th Cir. 2022) (en banc); *Benavidez v. County of San Diego*, 993 F.3d 1134, 1141, 1144 (9th Cir. 2021).

III

We start with Magassa's claim against Special Agent Truong. Section 1981 of the Civil Rights Act prohibits intentional discrimination and promises "[a]ll persons" the right to "make and enforce contracts." 42 U.S.C. § 1981(a). The right "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). The statute provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c).

The district court concluded that Magassa's § 1981 claim challenged "actions taken in the course of [Truong's] official duties." According to the district court, Magassa essentially alleged that Truong, in his capacity as a federal agent acting under federal authority, interfered with Magassa's employment under color of federal—rather than state—law. It dismissed the claim for lack of subject matter jurisdiction because § 1981 provides no cause of action against federal agents acting under color of federal law.

On appeal, Magassa argues that § 1981 applies to "federal actors" (i.e., federal officials acting under color of federal law). In the alternative, he contends that Truong is a "nongovernmental" actor because he was sued in his individual capacity.

Appendix A

A

"The United States, as sovereign, 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. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941) (internal citations omitted). Without a specific statute waiving immunity, there are three main exceptions to this rule: when the plaintiff alleges (1) constitutional violations in the official's scope of authority; (2) actions by an officer beyond his statutory authority; and (3) claims against officials in their individual capacities. *E.V. v. Robinson*, 906 F.3d 1082, 1091, 1098 (9th Cir. 2018); *see Lewis v. Clarke*, 581 U.S. 155, 137 S. Ct. 1285, 1290-91, 197 L. Ed. 2d 631 (2017).

The first two exceptions do not apply. Magassa alleges a violation of his right to contract, not a constitutional violation. Nor does he allege that Truong acted beyond his statutory authority. Rather, he accepts that Truong may flag individuals who are threats to national security but challenges the *reasons* for Truong's decision to flag him as such a threat.

The third exception, however, does apply. The government argues that Magassa's allegations do not assert a claim against Truong in his individual capacity because they concern actions that he took under his position as a federal employee and under color of federal law. Even under the government's construction, Magassa plausibly asserts a claim against Truong in his individual

capacity. When determining whether an official has been sued in his official or individual capacity, we examine the capacity in which the officer is sued, not the capacity in which the officer inflicts the alleged injury. *Hafer v. Melo*, 502 U.S. 21, 26, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). "Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of . . . law." *Lewis*, 137 S. Ct. at 1291 (quoting *Hafer*, 502 U.S. at 25 (state officials)); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (federal officials). "Officers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign." *Lewis*, 137 S. Ct. at 1291 (citation, brackets, and quotation marks omitted).

The district court improperly concluded that Magassa's claim was against Truong in his official capacity because Truong acted in his official capacity when he unlawfully flagged Magassa as a security threat. *Hafer*, 502 U.S. at 26. Magassa's § 1981 claim seeks damages from Truong as an individual, not as an arm of the sovereign. We thus hold that the district court had jurisdiction to consider a § 1981 claim against Truong in his individual capacity.

B

That said, we affirm the district court's dismissal of the claim against Truong in his individual capacity because Magassa fails to state a claim. *See Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008).

Magassa contends that § 1981's promise that "[a]ll persons" have the right to "make and enforce contracts" requires that the statute provide a cause of action against federal actors acting under color of federal law. 42 U.S.C. § 1981(a). The district court held that subsection (c) of the statute limits plaintiffs to claims against private parties and government officials acting under color of state law.

The plain text of the statute establishes that § 1981 does not provide a cause of action for discrimination by federal officials acting under color of federal law. *Id.* § 1981(c). Contractual rights under § 1981 are "protected against . . . impairment under color of State law." *Id.* We have already held that the "under color of state law" requirement in § 1983 "provides no cause of action against federal agents acting under color of federal law." *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995). Every circuit to decide the issue has extended the same logic to § 1981. *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Davis v. U.S. Dep't of Just.*, 204 F.3d 723, 725-26 (7th Cir. 2000) (per curiam); *Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998).

Magassa argues that § 1981 encompasses officials acting under color of federal law because the statute originally derives from the Civil Rights Act of 1866.[2]

2. Prior to the 1991 amendments (adding subsections (b) and (c)), the Supreme Court examined the origins of similar statutes to determine their scope. *District of Columbia v. Carter*, 409 U.S. 418, 423, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973). Because the federal government is beyond the purview of the Fourteenth

He contends that the statute's purpose is to prohibit discrimination on the basis of race and national origin and that there is no reason to believe that Congress intended to preclude suits against federal actors. He also asserts that foreclosing federal-actor liability creates absurd tension with subsection (a)'s coverage of persons "in every State and Territory." Indeed, the D.C. Circuit has recognized the tension between subsection (a)'s broad promise and the narrower protection in subsection (c). *See Xia v. Tillerson*, 865 F.3d 643, 659, 431 U.S. App. D.C. 296 (D.C. Cir. 2017). But *Xia* explicitly declined to decide "whether the Civil Rights Act of 1991 affected section 1981's coverage of federal government discrimination." *Id.* Ultimately, Magassa's position is belied by the statutory text, which imposes liability for "nongovernmental discrimination" or discrimination "under color of State law." 42 U.S.C.

Amendment, the Ku Klux Klan Act of 1871 (and therefore § 1983, which derived from the 1871 Act) does not address conduct by federal agents acting under color of federal law. *Id.* at 423-25. On the other hand, the Court has held that § 1982—derived from the 1866 Act and grounded in the Thirteenth Amendment—prohibits discrimination by the federal government. *See id.* at 422. It has never addressed whether § 1981 also applies to federal actors, but the statute's origins and basis in the Thirteenth Amendment suggest that it did—prior to 1991.

The Civil Rights Act of 1991 amended § 1981 in two ways. First, it added § 1981(b) to specify that the right to "make and enforce contracts" "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Second, it added § 1981(c), which declared that § 1981 rights "are protected against impairment by nongovernmental discrimination and impairment under color of State law."

§ 1981(c). There is simply no cause of action under § 1981 against federal actors like Truong.

That leaves Magassa's argument that Truong's conduct is "nongovernmental discrimination" under § 1981(c). Magassa alleges that Truong personally retaliated against him by placing him on the Terrorist Watch List after he refused to act as an informant and interfered with Magassa's employment because of discriminatory animus. Magassa explains that he is seeking relief directly from Truong, rather than from the FBI.

According to Magassa, seeking relief directly from Truong means that Truong is a nongovernmental actor under § 1981. In support, he cites *Hafer* for the notion that courts rely on a plaintiff's assertions when determining whether defendant is sued in his official or individual capacity. In *Hafer*, former employees sued Pennsylvania's auditor general under § 1983 for improper termination. 502 U.S. at 23. The footnote cited by Magassa notes that the Third Circuit "looked to the proceedings below to determine whether certain respondents brought their claims . . . against Hafer in her official capacity." *Id.* at 24 n.*.

Hafer's reasoning does not apply. First, *Hafer* discusses whether a defendant is a "person who . . . shall be liable" under § 1983. Section 1981, on the other hand, does not name "persons" subject to liability. Second, *Hafer* undermines Magassa's argument that Truong is a "nongovernmental" actor because it repeatedly recognizes

that Hafer—even if she can be sued as a "person" in her individual capacity—is a "government officer." *Id.* at 25, 27.

In any event, the text of the statute forecloses the possibility that Truong's actions as an FBI Special Agent are "nongovernmental discrimination." *See* 42 U.S.C. § 1981(c). Magassa's claims are grounded in allegations about what Truong did in his role as a federal agent, so they necessarily involve the government. Indeed, Magassa's alleged harms rely on the inference that the government has placed him on a watch list. Those actions cannot be "nongovernmental discrimination" and he therefore fails to state a claim under § 1981.

IV

Magassa also challenges the procedures employed to revoke his SIDA badge and prevent him from learning the justification for the revocation, alleging violations of the APA and Due Process Clause. These claims fail.

A

"Under the APA, agency action is subject to judicial review . . . when it is either: (1) made reviewable by statute; or (2) a 'final' action 'for which there is no other adequate remedy in a court.'" *Cabaccang v. U.S. Citizenship & Immigr. Servs.*, 627 F.3d 1313, 1315 (9th Cir. 2010) (quoting 5 U.S.C. § 704). The district court held that it lacked jurisdiction over Magassa's APA claim because, to the extent his claims survive the jurisdictional bar imposed by 49 U.S.C. § 46110, they are not reviewable under the APA for a lack of a final agency order. *See* 5 U.S.C. § 704;

49 U.S.C. § 46110. We affirm the district court's dismissal for lack of jurisdiction, although for different reasons.

1

A district court generally has jurisdiction to review challenges to agency action under the APA. Congress, however, has limited this jurisdiction by granting exclusive jurisdiction to federal courts of appeals to review the "orders" of certain aviation agencies (including the TSA, DHS, and Federal Aviation Administration (FAA), but not the TSC or FBI). *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012). The Court of Appeals may "affirm, amend, modify, or set aside any part of the order" or remand to the agency for further proceedings. 49 U.S.C. § 46110(c). It lacks jurisdiction to grant other forms of relief.

The district court retains jurisdiction over challenges to TSA orders only when "§ 46110 does not explicitly allow [the Court of Appeals] to hear them." *Latif*, 686 F.3d at 1128 (quoting *Americopters, LLC v. FAA*, 441 F.3d 726, 735 (9th Cir. 2006)). We have held that district courts retain jurisdiction over claims against agencies *not* covered by § 46110 (e.g., the TSC) and claims for damages. *See, e.g., Crist v. Leippe*, 138 F.3d 801, 802-05 (9th Cir. 1998) (due process claim for damages); *Foster v. Skinner*, 70 F.3d 1084, 1086-88 (9th Cir. 1995) (Fifth and Sixth Amendment *Bivens* claims); *Mace v. Skinner*, 34 F.3d 854, 856-60 (9th Cir. 1994) (same). And even in cases seeking damages, the district court's jurisdiction does not extend to damages claims "inescapably intertwined with a review of the procedures and merits surrounding the [agency's]

order." *Latif*, 686 F.3d at 1128 (quoting *Americopters*, 441 F.3d at 736).

Magassa argues that the district court has jurisdiction over his APA claim because the Redress Process is a final agency action under the APA but not an order under § 46110. The government argues that his challenge lies within our exclusive jurisdiction because the Redress Process is a final order that "provides a 'definitive statement' of the agency's position" and "envisions immediate compliance with its terms." *See Crist*, 138 F.3d at 804 (quoting *Mace*, 34 F.3d at 857).

We must first decide whether the Redress Process is an "order" under the aviation-agency statute. Our precedent suggests that it is. Although seemingly not an "order" in the intuitive sense, we have essentially held that final agency actions under the APA are also orders under § 46110. Agency action is "final" under the APA if it "amounts to a definitive statement of the agency's position," "has a direct and immediate effect on the day-to-day operations of the subject party," or "immediate compliance with [its terms] is expected." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (quotation marks and brackets omitted) (quoting *Indus. Customers of NW Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005)). The action must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quotation marks and citation omitted).

Likewise, agency decisions are agency orders under § 46110 if they "impose[] an obligation, den[y] a right, or fix[] some legal relationship." *Crist*, 138 F.3d at 804 (quoting *Mace*, 34 F.3d at 857). Qualifying orders (1) are supported by a "reviewable administrative record," (2) are a "definitive statement of the agency's position," (3) have a "direct and immediate effect on the day-to-day business of the party asserting wrongdoing," and (4) "envision[] immediate compliance with [their] terms." *MacLean v. DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008) (quotation marks omitted) (quoting *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006)). At least three circuits have explicitly endorsed § 46110 jurisdiction to review agency rulemakings. *See, e.g., Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 827 F.3d 51, 56, 423 U.S. App. D.C. 409 (D.C. Cir. 2016); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) (reviewing rule pursuant to 49 U.S.C. § 1486(a) (1980), § 46110(a)'s predecessor statute); *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 312-14 (7th Cir. 1980) (same). Along with the Fourth Circuit, we have endorsed the principle implicitly. *See Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1147 (9th Cir. 2002) (asserting jurisdiction over FAA rule without addressing scope of "order" in § 46110); *North Carolina v. FAA*, 957 F.2d 1125, 1127-28 (4th Cir. 1992) (same for § 1486(a)).

2

Under this framework, aviation agency decisions that satisfy the "final agency action" standard generally also satisfy the "agency order" standard. There are two exceptions: Claims remain in district court if they (1) involve agencies not covered by § 46110 or (2) seek

monetary damages. *See, e.g., Latif*, 686 F.3d at 1129 (district court jurisdiction over claim for relief involving TSA and TSC); *Crist*, 438 F.3d at 804 (district court jurisdiction over damages claims asserting constitutional violations by agency practices and procedures); *Mace*, 34 F.3d at 859 (district court jurisdiction when plaintiff seeks damages, asserts broad challenge to allegedly unconstitutional agency action, and complaint is not based on merits of revocation order).

Neither of these exceptions applies. Magassa's APA claim is solely against the TSA and seeks non-monetary relief in the form of a "revised . . . Redress Process."

Citing *Mace*, the district court held that "a district court maintains jurisdiction to hear broad constitutional challenges to the Government's actions." But we have held that § 46110 covers at least some facial constitutional challenges to TSA procedures. *See, e.g., Gilmore*, 435 F.3d at 1130-31. In *Gilmore*, we held that § 46110 granted jurisdiction to review a constitutional challenge to a TSA "Security Directive" that required airlines to check passenger names against the No-Fly List. *Id.* at 1133. Two years later, we recognized § 46110 jurisdiction over a challenge to TSA "policies and procedures" implementing the No-Fly List. *Ibrahim v. DHS*, 538 F.3d 1250, 1256-57 (9th Cir. 2008). The district court distinguished these cases because they "addressed TSA directives that envisioned immediate compliance with direct effects on the day-to-day business of the parties" (in the form of required airline security protocols) and the TSA identified the directives as final orders subject to § 46110. It contrasted those procedures with the Redress Process, which "merely sets

forth the process for challenging TSA's security threat assessments."

Indeed, the day-to-day impact of the Redress Process differs from that of the security directives in *Ibrahim* and *Gilmore*. But under our precedent, it is a distinction without significance. The Redress Process is codified in the Federal Register and governs the procedures by which claimants like Magassa may challenge their security designation and SIDA badge revocation. 49 C.F.R. § 1515.9. For example, it provides that, after an initial determination, claimants "may serve upon TSA a written request for copies of the materials upon which the Initial Determination was based." *Id.* §§ 1515.9(b); 1515.5(b)(2). The TSA must then provide "releasable materials . . . on which the Initial Determination was based" but need not include classified or protected information. *Id.* § 1515.5(b)(3)(i).

By (1) setting the terms by which an applicant may challenge his security designation and (2) establishing agency disclosure obligations, the Redress Process imposes obligations and denies rights. *See Crist*, 138 F.3d at 804 (quoting *Mace*, 34 F.3d at 857). It is a definitive statement on the TSA's position on when and how it will tell applicants the reasons for its assessment, has a direct and immediate effect on the day-to-day business of applicants challenging their status, and envisions immediate compliance with its terms (once promulgated, applicants are bound by regulation requirements, including several sixty-day deadlines for requests and responses throughout the administrative appeals process). *See id.*; 49 C.F.R.

§ 1515.5(b)(2), (b)(3). To be sure, these requirements most obviously apply to orders that govern parties' substantive rights. But, under our precedent, they also apply to orders (such as the Redress Process regulations) that govern procedural rights and obligations.

Both Magassa and the district court compared Magassa's APA challenge to the challenge in *Mace*. Indeed, *Mace* challenged agency procedures more like the Redress Process. 34 F.3d at 856. It involved the FAA's revocation and notice procedures for aircraft mechanic certificates. *Id.* We held that the district court had jurisdiction to consider Mace's challenge, pointing to three distinctions between cases in which we had exclusive jurisdiction. *Id.* at 858. First, Mace sought to recover damages—a remedy outside the scope of § 46110. *Id.* Second (and "[m]ore importantly"), his claim was "a broad challenge to the allegedly unconstitutional actions of the FAA" and two other agencies covered by § 46110. *Id.* Finally, the challenge was not "based on the merits of any particular revocation order." *Id.*

Like *Mace*, Magassa's claim involves "a broad challenge to . . . allegedly unconstitutional actions." *See id.* And it is not "based on the merits of any particular revocation order." *See id.* But we have already held that challenges do not lie beyond § 46110 just because they are broad constitutional challenges to agency procedures. *Crist*, 138 F.3d at 804 ("[A]lthough a broad constitutional challenge is a necessary predicate to district court jurisdiction, we must still determine whether Crist's claim was reviewable . . . under section 46110."). And we

give "broad construction to the term 'order' in § 46110." *MacLean*, 543 F.3d at 1149 (quoting *Gilmore*, 435 F.3d at 1132). *Mace* therefore establishes an exception for broad constitutional challenges to agency procedures that seek damages. 34 F.3d at 858. In contrast, Magassa seeks relief in the form of a "revised [] Redress Process"—a type of relief authorized under § 46110. The district court thus lacked jurisdiction to review Magassa's APA claim.[3]

B

Finally, we address Magassa's procedural and substantive due process claims. Although he has standing, he does not state a claim.

1

For Article III standing, Magassa must show "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950, 204 L. Ed. 2d 305 (2019) (citation omitted).

Magassa sufficiently alleges injury via the "'invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent.'" *Arizona v. Yellen*, 34 F.4th 841, 848 (9th Cir. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.

3. Because Magassa does not ask us to transfer his claim to this court, we do not consider whether transfer is possible under 28 U.S.C. § 1631. *See Gilmore*, 435 F.3d at 1133-34.

Ed. 2d 351 (1992) (cleaned up)). He asserts that ongoing exposure to the Redress Process makes it likely that his due process rights will again be violated. *See Melendres v. Arpaio*, 695 F.3d 990, 997-98 (9th Cir. 2012). As an airline employee, Magassa is subject to an ongoing security assessment. And he continues to experience security problems even after regaining his badge. One time, fellow employees gave Magassa permission to enter a secure area so he could retrieve luggage before boarding. Yet contract security claimed that Magassa had intentionally bypassed airport security and notified government officials. As a result, TSA officials stormed the breakroom asking employees if they had seen Magassa, detained him, accused him of a security breach, temporarily confiscated his badge, and later told the airline to suspend and revoke his badge. Magassa thus alleges actions that may lead to an adverse security assessment and continued subjection to the Redress Process.

Magassa also establishes traceability because he plausibly alleges a "causal connection" between his injuries "and the conduct complained of" that is "traceable to the challenged action of the [TSA], and not the result of independent action of some third party not before the court." *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022) (quoting *Lujan*, 504 U.S. at 560). Only after an adverse TSA assessment did Magassa lose his badge and job, and he is again subject to such assessments. Had the government provided Magassa with reasons for its revocation, given him access to relevant information, and offered him a meaningful chance to respond, Magassa could have challenged—and may be able to challenge, should the need arise—the adverse designation and the

resulting lost wages and reputational harm. Moreover, Magassa's travel-related injuries are sufficiently linked to the TSA. According to the complaint, it is TSA—not some hypothetical third party, *see Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 834 (9th Cir. 2020)—that allegedly put him on a watch list.

Finally, declaratory or injunctive relief would "amount to a significant increase in the likelihood that [Magassa] would obtain relief that directly redresses" his injury. *Mecinas*, 30 F.4th at 900 (citation omitted). As Magassa pleads, he is exposed to the risk of another adverse assessment without explanation. Court-ordered remedies could thus provide Magassa procedural safeguards not provided during the Redress Process. *See Fikre v. FBI* (*Fikre I*), 904 F.3d 1033, 1040 (9th Cir. 2018).

2

That said, we hold that Magassa fails to state a procedural or substantive due process claim. We address each in turn.

A

When evaluating Magassa's procedural due process claim, we weigh "(1) [his] liberty [or property] interests; (2) the risk of an erroneous . . . deprivation through the current traveler redress procedures, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest in national security, including the administrative burdens that additional procedural requirements would entail." *Kashem v. Barr*,

941 F.3d 358, 364, 377 (9th Cir. 2019); *see Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Because Magassa lacks a valid liberty or property interest, we need not reach the other factors.

Magassa claims two liberty interests: the freedom to work in his chosen profession and a reputational interest tied to his job. Magassa does not have a liberty interest in working for the airlines. Magassa's job requires him to have a security badge to access the airport's sensitive areas. To get his badge, Magassa had to undergo extensive background checks and an interview with a government agent. Thus, he is like other workers who need security clearances to stay employed. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 520, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988) (submarine laborer who could not work on nuclear submarines because the government denied him a clearance); *Dorfmont v. Brown*, 913 F.2d 1399, 1400 (9th Cir. 1990) (defense contractor who lost her clearance and job). Yet the Supreme Court has held that no right exists to a security clearance, *Egan*, 484 U.S. at 528, and we have held that no protected interest exists in a job requiring one, *Dorfmont*, 913 F.2d at 1399.

We also deny Magassa's assertion that he has a liberty interest in his reputation. Under the "stigma plus" test, Magassa must show that the government has made stigmatizing statements and that he has lost something tangible, like his employment. *See Paul v. Davis*, 424 U.S. 693, 710, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). "[D]amage to reputation alone is not actionable." *Fikre v. FBI* (*Fikre II*), 35 F.4th 762, 776 (9th Cir. 2022) (citation omitted). Magassa sufficiently alleges that the government caused

reputational harm when the TSA purportedly accused him of security violations and harassed him at work. But that is not enough. Without a right to a security clearance, *Egan*, 484 U.S. at 528, or a job that requires one, *Dorfmont*, 913 F.2d at 1403, his procedural due process claim fails.

B

Magassa's substantive due process claims also fails. Magassa asserts substantive rights to a job requiring a security clearance and a right to avoid reputational damage stemming from such a job. While we have recognized a substantive right for a generalized right to employment, there is no right to a specific job. *See Armstrong v. Reynolds*, 22 F.4th 1058, 1079-80 (9th Cir. 2022). We affirm the dismissal of Magassa's due process claims.

V

We thus affirm the district court's dismissal of Magassa's § 1981 claim because the statute does not cover discrimination by federal actors. The district court lacked jurisdiction to consider his APA challenge to the Redress Process because Magassa does not seek damages and challenges the conduct of agencies covered under § 46110. Finally, Magassa fails to state a violation of due process because he has no liberty interest in maintaining employment that requires a security clearance.

AFFIRMED.

NELSON, R., Circuit Judge, concurring:

I write separately because our precedent compels our holding that the Redress Process is an "order" under 49 U.S.C. § 46110(a). But our precedent, which follows other circuits, is wrong. In my view, the plain meaning of "order," which § 46110 does not define, does not include agency policies or procedures like the Redress Process. And here that matters, because under the term's plain meaning jurisdiction over Magassa's challenge to the Redress Process might have been proper in the district court.

I

The clearest indication that we read "order" too broadly comes from the Administrative Procedure Act (APA), which predates § 46110 and, unlike that statute, defines the term. *See* 5 U.S.C. § 551(6). Under the APA, "'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter *other than rule making*." *Id.* (emphasis added). By excluding rulemakings, APA orders exclude "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4) (defining "rule"). Black's Law Dictionary captures that dynamic: An "agency order" is "[a] *command or ruling* issued by an executive agency and directed to a person or entity over whom the agency has jurisdiction." *Agency Order*, Black's Law Dictionary (11th

ed. 2019) (emphasis added). Under the APA framework, then, the Redress Process—the procedures TSA employs to revoke airport workers' SIDA badges—is not an order but a rule.

That outcome goes against our holding. As our opinion recounts, rather than ask whether an agency action is an APA order, our test for a § 46110 order is just a test for finality. With a few exceptions, any final agency action will do.

II

Why distinguish § 46110 orders from APA ones? We seem to have followed the lead of the D.C. Circuit, which first adopted a broad definition of "order" in the context of special-review statutes like § 46110 despite the term's plain meaning. *See Inv. Co. Inst. v. Bd. of Governors of the Fed. Res. Sys.*, 551 F.2d 1270, 179 U.S. App. D.C. 311 (D.C. Cir. 1977).

In *Investment Co.*, the D.C. Circuit, drawing on legislative history, held that review by a court of appeals of any "agency action capable of review on the basis of the administrative record" would best serve "the purposes underlying" the special-review statute. *Id.* at 1278. Those purposes included "permit[ting] agency expertise to be brought to bear on particular problems," and avoiding "'unnecessary duplication and conflicting litigation,' as well as the confusion inherent in the prospect of different records and standards of review." *Id.* at 1279 (quoting *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411,

420-22, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965) (reasoning why the court of appeals had exclusive jurisdiction over a claim arising from an order that followed an adjudicatory hearing)). The court held that it was "the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." *Id.* at 1277 (citing *Deutsche Lufthansa AG v. Civ. Aeronautics Bd.*, 479 F.2d 912, 916, 156 U.S. App. D.C. 191 (D.C. Cir. 1973)). If a court of appeals could directly review an agency action without the need for factfinding by a district court, then, that action was an "order."

The D.C. Circuit's purposivist reasoning spread to this court. *See, e.g., S. Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672, 676 (9th Cir. 1989) ("[W]e may review a petitioner's claims regarding final agency action other than formal rulemaking [under § 46110's predecessor statute] so long as an administrative record adequate to permit evaluation of those claims exists.") (citing cases including *City of Rochester v. Bond*, 603 F.2d 927, 195 U.S. App. D.C. 345 (D.C. Cir. 1979)). Neither were other circuits immune. *See, e.g., Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 313 (7th Cir. 1980) (citing *Investment Co.* and holding that "the purposes of special review statutes coherence and economy [sic] are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions") (citation omitted); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313 (8th Cir. 1981) (citing *Sima Prods.* and *Investment Co.*). Indeed, the *Investment Co.* line of cases is the authoritative source of law on this issue.

I find that reasoning unpersuasive, especially considering Congress's directive that § 46110 only divests the district courts of jurisdiction over orders. Congress, not the courts, is best placed to decide how best to serve Congress's purposes. And the language it enacted should be the starting and ending place for determining how it chose to do so. An order, properly understood, should not include agency rules, policies, or procedures.

III

A line of cases starting with *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991), offers a better approach. In *McNary*, the Court considered a special-review provision in the Immigration Reform and Control Act of 1986 that stripped federal courts of jurisdiction over "a determination respecting an application for adjustment of status" under the Reform Act's Special Agricultural Workers (SAW) amnesty program. *Id.* at 491 (citing 8 U.S.C. § 1160(e)(1)). The Court held that "'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," so the judicial review bar precluded only "direct review of individual denials of SAW status." *Id.* at 492. The Court then noted that "had Congress intended the limited review provisions of [the special-review statute] to encompass challenges to [the agency's] procedures and practices, it could easily have used broader statutory language." *Id.* at 494. Just as well here. If Congress wanted "order" to mean "final agency action," it could have said so in § 46110.

This does not mean that challenging an agency policy or procedure can be "an automatic shortcut" to district court jurisdiction where it would not otherwise exist. *See City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 872 (9th Cir. 2009). Instead, the procedural challenge must be a general, collateral challenge to an agency's procedures: A prevailing plaintiff would not receive direct relief, but only the benefit of having their case "reconsidered in light of the newly prescribed [] procedures." *McNary*, 498 U.S. at 495. And a plaintiff's "claims still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific congressional directive." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993).

Aside from its fidelity to the text, *McNary*'s reasoning offers an advantage over the *Investment Co.* cases, including those from this circuit: A categorical rule. As first articulated, before stripping the district court of jurisdiction we required "an administrative record adequate to permit evaluation of [a petitioner's] claims." *S. Cal. Aerial Advertisers' Ass'n*, 881 F.2d at 676. But that itself may require the court of appeals to make difficult factual determinations about when the administrative record supports direct review.

Our opinion in *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), illustrates that challenge. In *Gilmore*, we held that a challenged TSA security directive requiring airline passengers to present identification or be subject to search was a § 46110 order, so the district court lacked jurisdiction. *Id.* at 1133. The plaintiff alleged

that airline security officials told him they could not disclose government regulations that required airlines to enforce the identification policy, and that the security directive was revised often, was transmitted orally, and differed according to airport. *Id.* at 1130. We stated that the administrative record required for § 46110 to apply "may consist of little more than a letter," and may be even more curtailed when evaluating certain agency policies or procedures, such as emergency rules. *Id.* at 1133 n.7. After reviewing *in camera* materials about the security directive submitted by the government under seal, we held that the directive was an "order" under § 46110.

Did we really have all the facts we needed to properly review the plaintiff's claims? Gilmore alleged, for example, that the security directive was revised often and transmitted orally. There is no indication it resulted from rulemaking procedures, like notice-and-comment, that would yield a robust record for review. It is conceivable that the records we reviewed *in camera* did not paint a full picture of the regulations to which Gilmore was subject. Had *McNary* governed that case, the plaintiff may have had the opportunity to advance his claims by developing the record in the district court.

Applying *McNary* in the § 46110 context is not without precedent. In *Mace v. Skinner*, we noted that the plaintiff's claims, like those in *McNary*, were not based on the merits of his individual situation, but constituted a broad challenge to allegedly unconstitutional FAA practices. 34 F.3d 854, 859 (9th Cir. 1994). Granted, the plaintiff in *Mace* sought damages, a remedy not among

those provided by § 46110. Still, we noted that in the context of such challenges, like the claims advanced in *McNary*, the available administrative record from his individual adjudication "would have little relevance." *Id.* And "any examination of the constitutionality of the [particular agency procedure] . . . is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 155, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992)).

Our subsequent § 46110 cases did not continue to apply *McNary*. But they still appear to adopt some of its reasoning. In *Gilmore*, we wrote—contradictorily—that "[a]lthough the Security Directive is an 'order' within the meaning of 49 U.S.C. § 46110(a), the district court maintains jurisdiction to hear broad constitutional challenges to Defendants' actions." 435 F.3d at 1133 n.9. The district court would be divested only from jurisdiction if the broad challenge was "inescapably intertwined with a review of the procedures and merits surrounding the . . . order." *Id.* (citing *Mace*, 34 F.3d at 858). We reiterated that point in *Latif v. Holder*, 686 F.3d 1122, 1128 (9th Cir. 2012), where we noted that the district court's jurisdiction does not extend to damages claims "inescapably intertwined with a review of the procedures and merits surrounding the [agency's] order." *Id.* (quoting *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006)). That's exactly the approach *McNary* would have us take. Rather than strip the district court of jurisdiction over broad constitutional challenges because they are § 46110 "orders," applying *McNary*, we would ask whether those challenges—to

agency policies or procedures, which would lie outside § 46110—were distinct enough from the merits of an individual adjudication that they would not constitute an impermissible collateral attack.

Hewing to the plain meaning of "order," rather than the atextual one we adopted from outside this circuit, would swap a purposivist and needlessly complicated approach to interpreting § 46110 in favor of a simple one that respects the lawmaking role of Congress. It would ensure proper judicial review of claims. Here, it might have provided Magassa a forum in district court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JUNE 23, 2021

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-2036RSM

ORDER GRANTING DEFENDANTS' SECOND MOTION TO DISMISS

LASSANA MAGASSA,

Plaintiff,

v.

CHAD WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

I. INTRODUCTION

This matter comes before the Court on Defendants Chad Wolf, David Pekoske, Mark Morgan, William Barr, Christopher Wray, and Charles Kable, sued in their official capacities (the "Official Capacity Defendants")'s Second Motion to Dismiss. Dkt. #40. Plaintiff Lassana Magassa opposes Defendants' motion. Dkt. #44. The Court finds oral argument unnecessary to resolve the underlying issues. Having reviewed the relevant briefing and the

remainder of the record, the Court GRANTS Official Capacity Defendants' Motion to Dismiss and DISMISSES this case.

II. BACKGROUND

A full summary of this case is not necessary given the Court's previous orders in this matter. *See* Dkt. #36. Plaintiff Magassa, a former Cargo Customer Service Agent with Delta Airlines, Inc. ("Delta"), brings this action in response to the U.S. Transportation Security Administration ("TSA")'s Security Threat Assessment, which led to revocation of Plaintiff's SIDA identification badge and termination from his position with Delta. Plaintiff appealed the TSA's determination through the redress process set forth under 49 C.F.R. § 1515 (the "STA Redress Process"), and on July 26, 2019, the TSA issued a Withdrawal of Final Determination notifying Plaintiff that he was once again "eligible to maintain airport-issued identification media." *Id.* at ¶ 116-145.

On September 16, 2020, the Court granted Defendant Minh Truong's motion to dismiss and dismissed Plaintiff's Section 1981 claim. Dkt. #36. The Court also granted in part and denied in part Official Capacity Defendants' motion to dismiss and ordered Plaintiff to file an amended complaint within thirty days from the date of the order. On October 16, 2020, Plaintiff filed an Amended Complaint against Official Capacity Defendants alleging violations of his due process rights under the Fifth Amendment and violations of the Administrative Procedure Act ("APA"). Dkt. #39 at ¶¶ 164-273. Plaintiff also seeks attorneys' fees

under the Equal Access to Justice Act ("EAJA"). *Id.* at ¶¶ 274-276. Plaintiff claims that as a result of these violations, he suffered lost income and opportunities, was precluded from pursuing his chosen employment, and suffered reputational harm and stigmatization, and experienced extreme travel difficulties for nearly three years. *Id.* at ¶¶ 143-146. Official Capacity Defendants moved to dismiss Plaintiff's Amended Complaint on November 16, 2020. Dkt. #40.

III. DISCUSSION

A. Legal Standards

i. Motion to Dismiss for Lack of Jurisdiction under 12(b)(1)

Federal courts are tribunals of limited jurisdiction and may only hear cases authorized by the Constitution or a statutory grant. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). The burden of establishing subject matter jurisdiction rests upon the party seeking to invoke federal jurisdiction. *Id.* Once it is determined that a federal court lacks subject matter jurisdiction, the court has no choice but to dismiss the suit. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

ii. Motion to Dismiss under 12(b)(6)

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This requirement is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint need not include detailed allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff's claims must be dismissed. *Id.* at 570.

Plaintiff alleges three counts of violations by the Official Capacity Defendants under the Fifth Amendment due process clause and the APA. Count I alleges that the STA Redress Process is constitutionally inadequate and deprives Plaintiff of protected liberty interests such as freedom to pursue his chosen profession and freedom from false stigmatization, in violation of his Fifth Amendment right to procedural due process. *Id.* at ¶¶ 154-218. Count

II alleges that the STA Redress Process unduly burdens these same liberty interests and therefore violates Plaintiff's Fifth Amendment right to substantive due process. *Id.* at ¶¶ 219-239. Finally, Count III claims that the STA Redress Process and TSA's implementation of that process is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. *Id.* at ¶¶ 240-272.

Official Capacity Defendants move to dismiss for lack of subject matter under 49 U.S.C. § 46110 and failure to state a claim. Dkt. #40. For the reasons set forth below, the Court grants dismissal of Plaintiff's claims. The Court finds that amendment of the Complaint would be futile and therefore dismisses Plaintiff's claims with prejudice.

B. Jurisdiction under 49 U.S.C. § 46110

The Court will first address Official Capacity Defendants' argument that jurisdiction over Plaintiff's claims lies in the court of appeals, not the district court, pursuant to 49 U.S.C. § 46110. Section 46110 provides:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration . . .) 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

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> 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 its principal place of business.
>
> . . .
>
> When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

49 U.S.C. § 46110(a), (c) (2005). In determining whether an agency action is an "order" under Section 46110 subject to the exclusive jurisdiction of the court of appeals, the Ninth Circuit considers whether the action "imposes an obligation, denies a right, or fixes some legal relationship . . . . if the order 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,' the order has sufficient finality to warrant the appeal offered by section [46110]." *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (quoting *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994)). Courts also consider the existence of an administrative record and factual findings in determining whether a TSA decision constitutes an "order" for purposes of Section 46110. *See Sierra Club v. Skinner*, 885 F.2d 591, 593 (9th Cir. 1989).

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The Court previously considered and rejected the Government's argument that Section 46110 divests this Court of jurisdiction, concluding that the STA Redress Process is neither a "final order" for purposes of Section 46110 nor "inescapably intertwined" with the review of a final order. Dkt. #36 at 23-25. The Government resurrects the same arguments raised in its first motion to dismiss, arguing that the Court erred in its previous analysis.[1] The Court will reconsider these arguments here.

First, the Government argues that the STA Redress Process constitutes a final order based on case law outside the Ninth Circuit holding that challenges to other TSA redress procedures fall within the purview of Section 46110. Dkt. #40 at 18 (citing *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015); *Jifry v. FAA*, 370 F.3d 1174, 361 U.S. App. D.C. 450 (D.C. Cir. 2004)). For the reasons set forth below, neither case demonstrates legal error in the Court's previous analysis.

In *Jifry*, the D.C. Circuit considered two Saudi Arabian pilots' petition for review challenging TSA's revocation of their FAA airman certificates. *Id.* However, *Jifry* did not squarely address the relevant issue here: the preclusive effect of Section 46110. The Government

1. In addition to citing new case law, the Government points out that the Court's previous decision erroneously relied on the similar yet distinct standards under 49 C.F.R. § 1515 as the STA Redress Process. Instead, revocation of Plaintiff's SIDA badge was pursuant to Security Directive 1542-04-08K, issued to regulated airport operators pursuant to 49 C.F.R. § 1542.303. Dkt. #40 at 12, n.5. The Court's analysis here corrects this error.

therefore appears to rely on *Jifry* simply because a court of appeals entertained the pilots' petition for review. As this Court previously recognized, Section 46110 divests a district court of jurisdiction if a plaintiff's constitutional claims are "inescapably intertwined with a review of the procedures and merits surrounding" a final order. *Mace v. Skinner*, 34 F.3d 854, 858 (9th Cir. 1994); *see also Gilmore*, 435 F.3d at 1133, n.9 (Finding that a plaintiff's due process constitutional challenge is "inescapably intertwined" with review of an order if it "squarely attack[s] the orders issued by the TSA with respect to airport security."). Such is the case with the pilots' claims, which directly challenged TSA's revocation of their airman certificates for lack of substantial evidence in the record. *Jifry*, 370 F.3d at 1178. Here, in contrast, Plaintiff's claims solely challenge the adequacy of TSA's redress procedures. *See* Dkt. #36 at 24 ("Plaintiff's only justiciable claims are prospective and challenge the legality of the STA Redress Process under the Constitution and the APA. . . . [B]ecause TSA ultimately withdrew its Final Determination, no final order exists to be challenged."). Consequently, *Jifry* is inapposite here.

The Government also relies on the Sixth Circuit's holding in *Mokdad*, which concluded that a procedural challenge to the redress process under the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP") amounted to a challenge to a TSA order, and made TSA a "required party to [the plaintiff's] litigation about the adequacy of the redress procedures." *Mokdad*, 804 F.3d at 811-12. However, as other circuits have observed, the *Mokdad* court expressly "decline[d]

to opine . . . whether § 46110 would deprive the district court of subject-matter jurisdiction over Mokdad's claims challenging the adequacy of the redress process, including any broad constitutional claims, if he were to file a new suit naming TSA as a defendant." *Id.* at 812. *See, e.g.*, *Kovac v. Wray*, 363 F. Supp. 3d 721, 743 (N.D. Tex. 2019) (Declining to extend *Mokdad* to case where TSA named as a defendant given that the Sixth Circuit "expressly declined to opine on the [Section 46110] jurisdictional question."); *Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1304 (D. Minn. 2018) (concluding that Section 46110 does not deprive district court of jurisdiction over plaintiff's challenge to TSA redress process, given that "Plaintiffs have named DHS as a defendant, of which TSA is a component. The concerns present in *Mokdad* are therefore not present here."). As in *Kovac* and *Wilwal*, Plaintiff has named TSA as a defendant. Accordingly, consistent with these cases, the Court finds that Section 46110 does not divest this Court of subject matter jurisdiction under *Mokdad*.

Next, the Government argues that the Court erred in finding that Plaintiff's claims are not "inescapably intertwined" with a TSA final order. Dkt. #40 at 18-19. The Government contends that the gravamen of Plaintiff's claims related to the STA Redress Process attack "TSA's interpretation and application of its STA procedures *to him*," including his claims about processing time and inability to view classified evidence. Dkt. #40 at 19 (emphasis in original). As a result, the Government argues, Plaintiff asks the Court to review TSA procedures, which constitute a final order.

The Court finds no error in its previous conclusion that Plaintiff's constitutional challenges to the STA Redress Process are not "inescapably intertwined" with a final order under Section 46110. As the Ninth Circuit has recognized, a district court maintains jurisdiction to hear broad constitutional challenges to the Government's actions. *Mace*, 34 F.3d at 858 (9th Cir. 1994)). It is divested of jurisdiction if such claims are "inescapably intertwined with a review of the procedures and merits surrounding" a final order under Section 46110. *Id.* Due process constitutional challenges are "inescapably intertwined" with review of an order if they "squarely attack the orders issued by the TSA with respect to airport security." *Gilmore*, 435 F.3d at 1133, n.9. Such collateral challenges to the merits of a previous adjudication are distinct from "facial challenge[s] to the constitutionality of certain agency actions," the latter of which are not proscribed by Section 46110. *See Tur v. F.A.A.*, 104 F.3d 290, 292 (9th Cir. 1997) (Distinguishing facial challenge in *Mace* from suit directed at conduct of TSA officials in adjudicating specific claim); *see also Mace*, 34 F.3d at 858 ("Mace's claims differ from those asserted in *Green*, where it was the *conduct* of FAA officials in adjudicating a specific individual claim that was under attack") (emphasis in original) (citing *Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993)). Here, TSA withdrew its Final Determination. Consequently, no final order exists to be challenged.

Furthermore, to the extent Plaintiff's APA claims challenge the individual conduct of TSA officials in adjudicating his specific claim, *see* Dkt. #39 at ¶¶ 241-273, the Court already dismissed Plaintiff's claims for retrospective declaratory relief. *See* Dkt. #36 at 15.

Pursuant to this order, Plaintiff's prayer for relief strictly seeks prospective relief based on Defendants' current policies, practices, and customs. *See* Dkt. #39 at 40. Given that Plaintiff's only justiciable claims challenge the legality of the STA Redress Process under the Constitution and the APA, the Court finds that Section 46110 does not divest this Court of jurisdiction. *See Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 113 S.Ct. 2485, 2495, 125 L. Ed. 2d 38 (1993) (Holding that a statutory provision governing the review of single agency actions does not apply to challenges to "a practice or procedure employed in making [numerous] decisions.").

C. Procedural Due Process Claims

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Due process, however, "'is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* at 334, 96 S. Ct. 893 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

"A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate

procedural protections." *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). A threshold requirement is the plaintiff's showing of a liberty or property interest protected by the Constitution. *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013). Plaintiff alleges that Official Capacity Defendants have deprived him of two liberty interests: (i) the right to pursue his chosen profession; and (ii) the right to be free from false government stigmatization. Official Capacity Defendants argue that neither of these interests are cognizable under procedural due process. For the reasons set forth below, the Court finds that Plaintiff has failed to state cognizable liberty or property interests.

i. Right to Pursue Chosen Profession

Plaintiff claims that the STA Redress Process harmed his liberty interest in pursuing his chosen profession. Dkt. #39 at ¶¶ 176-179. The Supreme Court has recognized "some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). However, a liberty interest in pursuing one's chosen profession has only been recognized "in cases where (1) a plaintiff challenges the rationality of government regulations on entry into a particular profession, or (2) a state seeks permanently to bar an individual from public employment." *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009) (internal citations omitted). Because Plaintiff is not a public employee and the federal government implements the STA Redress Process, the first scenario applies here.

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As the Court previously concluded, Plaintiff's chosen profession—working as a cargo service agent for a commercial airline—is not a cognizable liberty interest given that it requires holding a security clearance. Dkt. #36 at 27; *see also Dorfmont*, 913 F.2d 1399, 1403 (9th Cir. 1990) ("There is no right to maintain a security clearance, and no entitlement to continued employment at a job that requires a security clearance."). Plaintiff argues that *Dorfmont* and the case it relies upon, *Dep't of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), are inapplicable here given that "Plaintiff here never possessed, nor attempted to obtain, a security clearance." Dkt. #44 at 15. Plaintiff attempts to distinguish his SIDA badge, which allows its holder to access secure areas of the airport, from the clearances at issue in *Dorfmont* and *Egan*—clearance to work as an employee of a contractor for the U.S. Department of Defense or at a naval nuclear submarine facility, respectively. He argues that his case is more similar to *Kartseva v. Dep't of State*, 37 F.3d 1524, 308 U.S. App. D.C. 397 (D.C. Cir. 1994), which addressed a lower-level clearance for a Russian translator working at a private company processing Soviet refugees for the U.S. State Department, and *Baillargeon v. Drug Enf't Admin.*, 638 F. Supp. 2d 235, 240 (D.R.I. 2009), which addressed a security clearance from the U.S. Drug Enforcement Agency to work as an asset forfeiture specialist for a private contractor.

As an initial matter, *Kartseva* and *Baillargeon* addressed clearances that granted plaintiffs access to "sensitive but unclassified materials." *Id.* at 236; *Kartseva*, 37 F.3d at 1526. These cases distinguished low-level

clearances from those at issue in *Dorfmont* and *Egan*, which addressed national defense, military, and security, "where the government inarguably has the strongest of compelling interests." *Id.* at 239. Here, Plaintiff's SIDA badge affords him access to secure areas of the airport and is a prerequisite to his employment as a cargo customer service agent for private airlines. Dkt. #39 at ¶¶ 66-67. Any person holding such a badge must have a "passed" status from TSA to maintain these airport privileges required for employment as a cargo customer service agent. *Id.* Notwithstanding Plaintiff's efforts to distinguish his airport privileges granted by the SIDA badge from a "true security clearance," Dkt. #44 at 21, courts afford TSA risk assessments substantial deference precisely because of their implications for national security. *See Ardila Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 466, 422 U.S. App. D.C. 107 (D.C. Cir. 2016) ("Given TSA's broad authority to assess potential risks to aviation and national security . . . we are in no position to second-guess TSA's judgment in denying Petitioner's [flight school] application."). For this reason, the Court finds Plaintiff's SIDA badge distinguishable from the clearances at issue in *Kartseva* and *Baillargeon*, which afforded those plaintiffs "access to sensitive, but unclassified, materials *with no matters of national security at stake*." *Baillargeon*, 638 F. Supp. 2d at 241 (emphasis added).

Moreover, to the extent *Kartseva* and *Baillargeon* contravene the Ninth Circuit's holding in *Dorfmont*, the *Dorfmont* decision is binding on this court. *See Echols v. Morpho Detection, Inc.*, No. C 12-1581 CW, 2013 U.S. Dist. LEXIS 53216, 2013 WL 1501523, at *5 (N.D. Cal. Apr. 11, 2013) ("[T]o the extent that the courts in *Kartseva* and

Baillargeon may have reached a different conclusion than the Ninth Circuit in *Dorfmont* about the colorability of a constitutional due process claim based on the revocation or denial of a security clearance, the *Dorfmont* decision, which is directly addresses this point, is binding on this Court."). For that reason, pursuant to *Dorfmont*, Plaintiff holds no due process right to pursue employment requiring a security clearance.

Accordingly, Plaintiff has failed to allege facts that support a due process claim with respect to pursuit of his chosen profession.

ii. Reputational Interest and Freedom from Stigmatization

Plaintiff also claims that he has suffered reputational damage as a result of Defendants' policies and actions. Dkt. #39 at ¶¶ 180-184. The Supreme Court has recognized a constitutionally protected interest in "a person's good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). As such, it has formulated a standard, known as the "stigma-plus" test, to determine whether reputational harm infringes a liberty interest. *Paul v. Davis*, 424 U.S. 693, 711, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

To prevail on a claim under the stigma-plus doctrine, Plaintiff must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; *plus* (2) the denial of some more tangible interest such as employment, or the alteration of a right or

status recognized by state law." *Green v. Transportation Sec. Admin.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005) (emphasis added) (citing *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002); *Paul*, 424 U.S. at 711). "The plus must be a deprivation of a liberty or property interest by the state . . . that directly affects the [Plaintiff's] rights." *Id.* (quoting *Miller v. Cal.*, 355 F.3d 1172, 1178 (9th Cir. 2004)). Under the "plus" prong, a plaintiff can show he has suffered a change of legal status if he "legally [cannot] do something that [he] could otherwise do." *Miller*, 355 F.3d at 1179.

Again, Plaintiff's claims fall short of satisfying the "plus" factor given his failure to allege deprivation of a liberty or property interest to which he is entitled. As discussed above, Plaintiff's SIDA badge and pursuit of a career that requires a TSA "passed" status do not constitute property or liberty interests protected by the due process clause. *See Dorfmont*, 913 F.2d at 1403-04. The Ninth Circuit has made clear that "a cognizable constitutional wrong must be joined with the defamation claim in order to state a stigma-plus claim." *Miller*, 355 F.3d at 1178 (citing *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992)). As such, Plaintiff must "show loss of a recognizable property or liberty interest in conjunction with injury to their reputation." *Id.* at 1179. Failure to do so is fatal to his claims. *Melek v. State Bar of California*, 24 F.3d 247 (9th Cir. 1994) ("Reputation alone is not a liberty or property interest protected by the due process clause.").

Plaintiff argues that even if the Court concludes that he holds no liberty interest in continued employment as

a cargo service agent, the Government's revocation of his SIDA badge nevertheless gives rise to a due process claim where it "both altered his status and stigmatized his reputation without due process of law." Dkt. #44 at 18 (citing *Ranger v. Tenet*, 274 F. Supp. 2d 1, 4 (D.D.C. 2003)). Again, to the extent Plaintiff relies on out-of-circuit precedent that his discharge from Delta deprived him of a liberty interest, the binding decision in *Dorfmont* forecloses this argument. *Echols*, 2013 U.S. Dist. LEXIS 53216, 2013 WL 1501523, at *5; *see also Dorfmont*, 913 F.2d at 1403 ("If there is no protected interest in a security clearance, there is no liberty interest in employment requiring such clearance."). Absent loss of a recognizable property or liberty interest, Plaintiff cannot state a due process claim under the "stigma-plus" doctrine.

For these reasons, Plaintiff has failed to allege deprivation of a property or liberty interest through the unlawful STA Redress Process. Because this issue is dispositive, the Court need not address the remaining *Mathews* factors. Given that Plaintiff failed to correct these errors after leave to amend, the Court finds that amendment would be futile. Accordingly, Plaintiff's procedural due process claims are dismissed with prejudice.

D. Substantive Due Process Claims

In contrast to procedural due process, substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117

L. Ed. 2d 261, (1992) (internal citation and quotations omitted). Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests," which are held to a more exacting standard of strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Rights are protected under the substantive due process clause if they are "so rooted in the tradition and conscience of our people as to be ranked as fundamental" or if such rights reflect "basic values implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (1997); *Griswold v. Connecticut*, 381 U.S. 479, 500, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Plaintiff alleges violations of his substantive due process rights insofar as the STA Redress Process unduly burdened his liberty interest in practicing his chosen profession without government restraint and his liberty interest to be free of government stigmatization. Dkt. #39 at ¶¶ 224-240. As the Court previously concluded, "Plaintiff does not possess a liberty or property interest in a security clearance or continued employment at a job that requires a security clearance." Dkt. #36 at 32 (citing *Egan*, 484 U.S. at 528 (1988); *see also Dorfmont*, 913 F.2d at 1404 ("There is no right to maintain a security clearance, and no entitlement to continued employment at a job that requires a security clearance.")). He therefore possesses no liberty interest in continued employment that requires holding a SIDA badge that could provide a basis for a substantive due process challenge.

Turning to Plaintiff's alleged liberty interest in reputation, Plaintiff's claims fail for the same reasons set forth in the Court's previous order. First, courts in this circuit have recognized freedom from false government stigmatization as a procedural due process right—not a protected constitutional right for purposes of a substantive due process claim. *See Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1272 (D. Or. 2014) ("The freedom from false government stigmatization or 'stigma plus' is a procedural due-process doctrine and is not a protected constitutional right for purposes of a substantive due-process claim.") (citing *Paul v. Davis*, 424 U.S. 693, 712-14, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Moreover, even if a liberty interest in reputation could provide the basis for a substantive due process claim, Plaintiff has failed to state a claim for false government stigmatization under the "stigma plus" test. *See* § III(C)(ii), *supra*.

For these reasons, Plaintiff has failed to state a claim for substantive due process violations, therefore warranting dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Because further amendment would be futile, the Court dismisses Plaintiff's substantive due process claims with prejudice.

E. Administrative Procedure Act Claims

The APA permits suits against the United States by "[a] person suffering legal wrong because of the agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute." 5 U.S.C. § 702. Under 5 U.S.C. § 706, a reviewing court must hold

unlawful and set aside agency regulations that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The arbitrary and capricious standard of review is typically deferential to the agency and is "not to substitute its judgement for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

Here, Plaintiff brings an APA challenge against Official Capacity Defendants for violating TSA's own policies with respect to Plaintiff's security threat assessment, acting outside TSA's stated regulations, and for exceeding its statutory authority delegated by Congress. Dkt. #39 at ¶¶ 242-273. Because this Court dismissed Plaintiff's claims related to past injuries, *see* Section III(C)(1), *supra*, the Court limits its Rule 12(b)(6) analysis to those claims seeking prospective relief in the form of revisions to TSA's current STA Redress Process.

Defendants move to dismiss on the basis that if the STA Redress Process is not a "final order" under Section 46110, then Plaintiffs cannot satisfy the "finality" requirement under the APA. Dkt. #40 at 24-25. "Under the APA, agency action is subject to judicial review only when it is either: (1) made reviewable by statute; or (2) a 'final' action 'for which there is no other adequate remedy in a court.'" *Cabaccang v. U.S. Citizenship & Immigration Servs.*, 627 F.3d 1313, 1315 (9th Cir. 2010) (quoting 5 U.S.C. § 704)). Because Plaintiff has not identified any statute providing for judicial review of TSA's actions, judicial review of his APA claims is only available if Plaintiff has challenged a final agency action. *Id.*; *see also Or. Natural*

Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006).

Plaintiff argues, without support, that "the finality requirement of Section 46110 is not coextensive with the APA . . . [t]hese two provisions exist for entirely distinct purposes, and their finality requirement advances different aims." Dkt. #44 at 24. However, in considering the issue, the Ninth Circuit has applied the same definition of "final order" such that lack of finality under Section 46110 precludes review under the APA. *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 735 (9th Cir. 2006) , *aff'd sub nom. Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299 (Fed. Cir. 2008) ("The dilemma is this: if the Zeigler Email and Kanae Letter are final orders relating to "aviation duties and powers," § 46110 preempts the district court from considering these claims. But if they are not final, then the Administrative Procedure Act ("APA") bars the district court from hearing the case for lack of jurisdiction.") (citing 5 U.S.C. § 704); *see also Air Cal. v. U.S. Dep't of Transp.*, 654 F.2d 616, 622 (9th Cir. 1981) (holding that where court of appeals lacked jurisdiction under § 46110 for lack of finality, the district court also lacked jurisdiction because the orders were not final and thus not ripe for review). Courts outside the Ninth Circuit have likewise found that lack of finality under Section 46110 precludes reviewability under the APA. *See Ass'n of Citizens to Protect & Pres. the Env't v. United States FAA*, No. 2:07-CV-378-MEF, 2007 U.S. Dist. LEXIS 65248, 2007 WL 2580489, at *1 (M.D. Ala. Sept. 4, 2007), *aff'd sub nom. Ass'n Of Citizens To Protect And Pres. The Env't Of The Oak Grove Cmty. v. F.A.A.*, 287 F. App'x 764 (11th

Cir. 2008) ("Therefore, if the FONSI was a final order, then the United States Court of Appeals for the Eleventh Circuit would have exclusive subject matter jurisdiction over Plaintiff's claims. . . . Even if the FONSI was not a final order, then this Court would still lack subject matter jurisdiction over Plaintiff's claims.").

Furthermore, courts apply nearly identical tests when analyzing finality under Section 46110 compared to the APA. When considering finality under the APA, "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix *some* legal relationship as a consummation of the administrative process.'" *Or. Natural Desert Ass'n*, 465 F.3d at 982 (quoting *Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 (9th Cir. 1990)) (emphasis in original). The test for finality under Section 46110 is nearly identical: "'[O]rder' carries a note of finality, and applies to an[y] agency decision which imposes an obligation, denies a right, or fixes some legal relationship." *Crist*, 138 F.3d at 804 (quoting *Mace*, 34 F.3d at 857) (internal quotations and citations omitted).

For these reasons, like the plaintiffs in *Americopters*, Plaintiff's effort to avoid finality under Section 46110 but maintain reviewability under the APA places him "somewhere between Scylla and Charybdis." *Americopters*, 441 F.3d at 735. Without presenting any supportive authority for his proposition that "finality" under Section 46110 bears a distinct definition from "finality" under the APA, Plaintiff has not offered any explanation for why his claims may survive the

jurisdictional bar on challenges to TSA final orders under 46110 yet remain reviewable as a "final order" under the APA. Consistent with *Americopters* and *Air Cal.*, the Court concludes that Plaintiff cannot have it both ways. To the extent Plaintiff's APA claims survive the Section 46110 jurisdictional bar, this Court lacks jurisdiction for lack of finality. Because this deficiency cannot be cured through further amendment, Plaintiff's APA claims are dismissed with prejudice.

IV. CONCLUSION

For the reasons stated herein, the Court ORDERS that Defendants' Motion to Dismiss, Dkt. #40, is GRANTED. This case is DISMISSED.

DATED this 23rd day of June, 2021.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED SEPTEMBER 16, 2020

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-2036RSM

LASSANA MAGASSA,

Plaintiff,

v.

CHAD WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

September 16, 2020, Decided
September 16, 2020, Filed

ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

This matter comes before the Court on two Motions to Dismiss: one filed by Defendant Minh Truong, sued in his individual capacity, Dkt. #17, and Defendants Chad Wolf,

David Pekoske, Mark Morgan, William Barr, Christopher Wray, and Charles Kable, sued in their official capacities (the "Official Capacity Defendants"), Dkt. #18. Plaintiff Lassana Magassa opposes both motions. Dkts. #22, #26. The Court finds oral argument unnecessary to resolve the underlying issues. Having reviewed the relevant briefing and the remainder of the record, the Court GRANTS Defendant Truong's Motion to Dismiss and GRANTS IN PART and DENIES IN PART Official Capacity Defendants' Motion to Dismiss as set forth below. Case 2:19-cv-02036-RSM Document 36 Filed 09/16/20 Page 1 of 36

II. BACKGROUND

A. TSA Security Threat Assessments and Redress Procedures

Civil aviation security regulations require certain employees of U.S. airport operators to undergo a Security Threat Assessment conducted by the U.S. Transportation Security Administration ("TSA") or a "comparable" security threat assessment conducted by another governmental agency. 49 C.F.R. §§ 1540.201(a), 1540.203(a), (f).[1] TSA determines that an individual is a security threat

1. Neither party cites to TSA's regulations for Security Threat Assessments, 49 C.F.R. §§ 1540.201- 1540.209, or Appeal and Waiver Procedure for Security Threat Assessments, 49 C.F.R. § 1515. Accordingly, the Court takes judicial notice of the relevant provisions as set forth in the Code of Federal Regulations. Fed. R. Evid. 201(c)(1). Official Capacity Defendants summarize these procedures, in part, in Exhibit 2 to their Motion to Dismiss. *See* Dkt. #18-2 at 6-38.

if the individual is known to pose or is suspected of posing a threat to national security, to transportation security, or of terrorism. *Id.* at § 1540.203(c). To prevent and detect entry of unauthorized individuals into secure areas of the airport, airport operators issue badges for access into Security Identification Display Areas ("SIDA"). *Id.* at §§ 1540.5, 1542.203.

Individuals identified as security threats who wish to appeal TSA's determination may do so through a redress process set forth under 49 C.F.R. § 1515 (the "STA Redress Process"). An individual who has been issued an Initial Determination of Threat for reasons other than criminal conviction, immigration status, or mental capacity may appeal the TSA's determination in accordance with 49 C.F.R. § 1515.9. If TSA concludes that the applicant does not pose a security threat, TSA serves a Withdrawal of the Initial Determination on the applicant and the applicant's employer. *Id.* at § 1515.9(d). However, if TSA concludes that the applicant poses a security threat following an appeal, TSA serves a Final Determination of Threat Assessment on the applicant. *Id.* at § 1515.9(c). The applicant may then appeal the TSA's Final Determination to an Administrative Law Judge ("ALJ") by filing a request for review. *Id.* at § 1515.11(b). Pursuant to 49 C.F.R. § 1515.11(e)(3), the ALJ reviews any classified information on an *ex parte, in camera* basis. Finally, either party may request that the TSA Final Decision Maker review the ALJ's decision. *Id.* at § 1515.11(g). The final order of the TSA Final Decision Maker is a final order subject to judicial review under 49 U.S.C. § 46110. 49 C.F.R. § 1515.11(h).

B. Revocation of Plaintiff's Airport Privileges

Plaintiff Magassa is an African American, Muslim U.S. citizen and Seattle resident. Dkt. #1 at ¶ 1. In June 2015, Plaintiff underwent extensive background checks, including an interview by a U.S. Customs and Border Protection ("CBP") agent, in order to be hired for a position at Delta Air Lines, Inc. ("Delta") as a Cargo Customer Service Agent. *Id.* at ¶¶ 18-19. During the interview, Plaintiff discussed his religious beliefs and desire to work for law enforcement, including for the Federal Bureau of Investigation ("FBI"). The CBP agent asked if he may pass along Plaintiff's resume to law enforcement colleagues, and Plaintiff agreed. *Id.* at ¶ 21. Plaintiff subsequently received clearance confirming that he posed no threat to national security or transportation security and was not a terrorism threat. He began working for Delta on June 22, 2015. *Id.* at ¶¶ 22-23.

On or around October 2015, CBP agent Tad Foy contacted Plaintiff for an interview. *Id.* at ¶¶ 25-26. Plaintiff met with Foy at the Seattle-Tacoma International Airport ("SeaTac") and again expressed interest in working for law enforcement and expanding his network. Foy introduced Plaintiff to FBI Special Agent Minh Truong over email, and Truong contacted Plaintiff in late October 2015 for a meeting. *Id.* at ¶ 29. Plaintiff and Truong met for coffee, during which Truong questioned Plaintiff on his Muslim faith and views of violence. *Id.* at ¶ 30. Truong asked Plaintiff to work as an informant for the FBI for compensation. Plaintiff refused on the basis that working as an informant was against his personal

and religious reliefs, and that agreeing to such a role would erroneously imply that Plaintiff surrounded himself with bad people. *Id.* at ¶¶ 31-32. Plaintiff stated that he remained interested in working for the FBI as either an agent or an intern. On June 26, 2016, TSA approved Plaintiff for CBP Global Entry program membership, which allows expedited re-entry into the United States from foreign countries.

In September 2016, Truong attempted to contact Plaintiff again, but "they did not connect." *Id.* at ¶ 35. In November 2016, Truong visited Plaintiff's residence. *Id.* at ¶¶ 38-39. Plaintiff was not home, but Truong spoke with Plaintiff's wife and represented that he and Plaintiff were "good friends." Plaintiff's wife called Plaintiff with Truong present, and Truong stated that he wanted to meet Plaintiff in-person that same day. Plaintiff responded that he was unavailable and would call Truong back later. Plaintiff obtained legal representation shortly thereafter, and Truong stopped attempting to contact him. *Id.* at ¶ 40.

On October 3, 2016, Plaintiff traveled from Seattle to Berlin, Germany, by way of Paris, France, to attend an annual conference of the Association of Internet Researchers. *Id.* at ¶¶ 43-45. Plaintiff had no problems traveling to Berlin or on his return leg from Berlin to Paris on or around October 7, 2016. However, on his return leg from Paris to Seattle, Plaintiff suffered extensive delays, secondary screenings, and markings on his boarding passes consistent with someone placed on a terrorist watch list. *Id.* at ¶¶ 46-58. These delays and searches forced Plaintiff to rebook his return leg several times

due to his scheduled flights leaving while he underwent screenings. When he finally arrived in the United States through Cincinnati, Ohio, Plaintiff received an error message at the Global Entry kiosk. The error message informed Plaintiff that his privileges were revoked, and that he had lost membership in the Global Entry program. Government agents and airport officials at the Cincinnati airport detained and interviewed Plaintiff for three hours but could not identify any reason he was triggering alerts.

When Plaintiff finally reached Seattle on or around October 10, 2016, he was met at the gate by his supervisor at Delta, the Head of Corporate Security at Delta, and a police officer. *Id.* at ¶¶ 58-62. They informed Plaintiff that because his TSA status had changed, Delta had no choice but to prevent him from returning to work and to revoke his workers' identification badge. The airport officials stated they had no further information to provide and escorted Plaintiff from the premises. Shortly thereafter, Plaintiff received a letter dated October 8, 2016 from the Port of Seattle Aviation Security, notifying him that his SIDA identification badge was revoked. Per Delta's request, Plaintiff returned to the airport to clear out his locker and was again informed that nobody knew why his TSA status had changed.

Knowing that his termination from Delta was inevitable and imminent, Plaintiff submitted a letter of resignation on October 12, 2016 in order to remain marketable for future jobs. *Id.* at ¶¶ 64-68. His discharge from Delta was effective as of October 26, 2016. Plaintiff never experienced disciplinary problems during his

time with Delta and had planned to begin a data analyst position upon returning from Berlin. Delta officials have confirmed that they do not know why Plaintiff's status changed but had no choice but to suspend his airport privileges pursuant to TSA's orders. Plaintiff claims that his loss of airport privileges coincided with extreme travel difficulties, including sounding alarms whenever his boarding pass was scanned and missing flights due to extensive screenings. *Id.* at ¶¶ 71-82. These difficulties caused Plaintiff emotional distress and embarrassment and caused him to be late for and miss several professional academic events.

C. Plaintiff's Administrative Proceedings

On November 4, 2016, Plaintiff received formal notification of TSA's Initial Determination of Eligibility and Immediate Suspension indicating that he was no longer eligible to hold airport-approved and/or airport-issued personnel identification media. *Id.* at ¶¶ 84-89. On November 13, 2016, Plaintiff requested the release of any and all documentation that the TSA relied upon in reaching its decision. On December 22, 2016, TSA provided Plaintiff with heavily-redacted documents, including a Security Threat Assessment Board report dated October 20, 2016. Plaintiff claims that due to the heavy redactions, the materials contained no substantive information as to why Plaintiff's badge and airport privileges were revoked.

On February 10, 2017, Plaintiff filed an appeal of the TSA's Initial Determination of Eligibility and Immediate Suspension. *Id.* at ¶¶ 90-98. Plaintiff received a Final

Determination of Eligibility on June 19, 2017, confirming he was not eligible for airport-approved and/or airport-issued personnel identification media. Plaintiff filed a timely appeal of the Final Determination pursuant to 49 C.F.R. § 1515.11(b). The Honorable George J. Jordan, ALJ, presided over Plaintiff's appeal. The ALJ ordered a bifurcated hearing with the classified and unclassified portions to be scheduled after an *in camera* review of TSA's classified information. Plaintiff's counsel sought approval to review the classified information given that one attorney, Mr. Charles D. Swift, has "SECRET" security clearance.

After completing an *in camera* review, the ALJ determined that TSA could not provide Plaintiff with the classified materials or an unclassified summary of the materials. *Id.* at ¶¶ 99- 110. The ALJ subsequently denied Plaintiff's motion requesting permission for Plaintiff to attend the classified portion of the bifurcated hearing and his motion requesting review of the classified and sensitive information. The ALJ denied both motions on the basis that the classified and sensitive information was "inextricably intertwined" with information that could be redacted and was therefore unreviewable in its entirety—even by counsel with "SECRET" security clearance. The ALJ also denied Plaintiff's request to schedule the classified portion of the hearing before the unclassified portion.

On April 24, 2018, Plaintiff and counsel attended the unclassified portion of the hearing. The ALJ informed Plaintiff that the purpose of the hearing was to enable

him "to create as complete of a record for an unclassified decision as possible" and to produce proposed findings of fact and conclusions of law for making a final decision. *Id.* at ¶¶ 112-116. Plaintiff objected to submitting proposed findings of fact and conclusions of law on the basis that he and his counsel had "no idea what the basis for Plaintiff's denial is." The classified portion of the bifurcated hearing took place on April 25, 2018. *Id.* at ¶¶ 130-131. Unlike the unclassified hearing, which provided no discussion of the basis for Plaintiff's determination, the classified hearing included TSA witnesses testifying as to Plaintiff and the basis for his determination.

On April 29, 2019, the ALJ ruled that the TSA's June 19, 2017 Final Determination of Eligibility was "supported by substantial evidence in the record" and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at ¶¶ 135-138. Plaintiff timely appealed the ALJ's decision to the TSA Final Decision Maker on the basis that (1) the unclassified decision was not supported by substantial evidence; and (2) neither Plaintiff nor his counsel was permitted to attend the classified portion of the hearing nor received the Classified Addendum upon which the ALJ's ruling relied.

On July 26, 2019, TSA issued a Withdrawal of Final Determination which notified Plaintiff that he was now "eligible to maintain airport-issued identification media." *Id.* at ¶¶ 141-144. This withdrawal rescinded TSA's June 19, 2017 Final Determination of Eligibility that found Plaintiff ineligible to hold airport-issued identification media because he posed a security threat. The Withdrawal

provided no reasons explaining TSA's previous finding that Plaintiff was a security threat. Shortly after TSA's withdrawal, Plaintiff re-secured a SIDA badge and resumed employment with another airline in a position similar to his job at Delta.

D. Claims against Defendants

On December 16, 2019, Plaintiff filed this action against Defendant Truong in his individual capacity and Defendants Chad Wolf (Acting Secretary of the U.S. Department of Homeland Security ("DHS")); David Pekoske (Administrator of TSA); Mark Morgan (Acting Commissioner of CBP); William Barr (U.S. Attorney General); Christopher Wray (Director of the FBI), and Charles Kable (Director of the Terrorist Screening Center). *Id.* at ¶¶ 2-6. Plaintiff alleges violations of Section 1981 of the Civil Rights Act, 42 U.S.C. § 1981, by Special Agent Truong. *Id.* at ¶¶ 273-282. Plaintiff also alleges that Official Capacity Defendants violated his Fifth Amendment due process rights and the Administrative Procedure Act ("APA"). *Id.* at ¶¶ 154-272. Plaintiff claims that as a result of these violations, he lost income and opportunities, was precluded from pursuing his chosen employment, suffered reputational harm and stigmatization, and experienced extreme travel difficulties for nearly three years. *Id.* at ¶¶ 143, 146-146. Plaintiff also claims that he continues to experience travel difficulties as a result of the previous threat designation and continues to be stigmatized. *Id.* at ¶¶ 147-148.

Appendix C

Defendants have moved for dismissal of Plaintiff's claims against Defendant Truong and the Official Capacity Defendants. Dkts. #17, 18. The Court will address each motion in turn.

III. DISCUSSION

A. Legal Standards

1. Motion to Dismiss for Lack of Jurisdiction under 12(b)(1)

Federal courts are tribunals of limited jurisdiction and may only hear cases authorized by the Constitution or a statutory grant. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). The burden of establishing subject matter jurisdiction rests upon the party seeking to invoke federal jurisdiction. *Id.* Once it is determined that a federal court lacks subject matter jurisdiction, the court has no choice but to dismiss the suit. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

2. Motion to Dismiss under 12(b)(6)

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside Cty. Office of Educ.*, 584 F.3d

821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This requirement is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint need not include detailed allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff's claims must be dismissed. *Id.* at 570.

For the reasons set forth below, the Court grants dismissal of Plaintiff's claims with the exception of his APA challenge to the STA Redress Process. The Court finds that amendment of the Complaint would be futile with respect to those claims dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction, but the Court will permit Plaintiff to amend the Complaint with respect to claims dismissed pursuant to Rule 12(b)(6).

B. Section 1981 Claim against Special Agent Truong

Section 1981 "guarantees 'all persons' the right to 'make and enforce contracts.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008)

(quoting 42 U.S.C. § 1981(a)). "This right includes the right to the 'enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship[.]'" *Id.*, quoting 42 U.S.C. § 1981(b). A § 1981 claim "must initially identify an impaired 'contractual relationship' . . . under which the plaintiff has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006).

Plaintiff claims that Defendant Truong, acting outside the scope of his official duties, interfered with Plaintiff's employment contract with Delta after Plaintiff refused to act as an informant and to meet with him again. Dkt. #1 at ¶¶ 276-278. Specifically, Plaintiff alleges that Truong either directly placed or caused others to place him on a terrorist watchlist in the Terrorist Screening Center Database ("TSDB"), which is a database of terrorist watch lists maintained by a sub-agency of the FBI called the Terrorist Screening Center ("TSC"). *Id.* at ¶¶ 279-280. Plaintiff contends that Defendant Truong's actions were motivated by a discriminatory animus based on Plaintiff's race and/or national origin. *Id.* at ¶ 281. Defendant Truong moves to dismiss Plaintiff's Section 1981 discrimination claim for lack of subject matter jurisdiction and failure to state a claim. Dkt. #17.

The Court agrees that Plaintiff's claim against Defendant Truong fails for lack of subject matter jurisdiction, given that Section 1981 only applies to conduct by private or state actors. 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by *nongovernmental discrimination*

and impairment under color of State law.") (emphasis added). For that reason, to the extent that Plaintiff challenges Defendant Truong's actions under the scope of his authority as a federal agent, Section 1981 does not apply. *See Wolde-Giorgis v. Symington*, 225 F.3d 666 (9th Cir. 2000) ("The plain language of 42 U.S.C. §§ 1981, 1983 does not permit actions against federal employees acting under federal law."); *Finch v. United States Dist. Court W. Dist. of Wash.*, No. C19-6131-RJB-TLF, 2020 U.S. Dist. LEXIS 79960, 2020 WL 2115875, at *2 (W.D. Wash. Apr. 10, 2020), *report and recommendation adopted*, No. C19-6131-RJB-TLF, 2020 U.S. Dist. LEXIS 78243, 2020 WL 2113832 (W.D. Wash. May 4, 2020) ("[B]y their very terms, [§§ 1981 and 1983 claims] apply to individuals acting 'under color of state law' and not under color of federal law.") (citing *Gottschalk v. City and Cty. of S.F.*, 964 F. Supp. 2d 1147, 1162-63 (N.D. Cal. 2013)); *see also Cox v. United States*, No. CV 17-00001 JMS-KSC, 2017 U.S. Dist. LEXIS 83478, 2017 WL 2385341, at *8 (D. Haw. May 31, 2017) ("§ 1981 does not apply to individuals acting under color of federal law.").

Plaintiff insists that Section 1981 applies here, given that he challenges Defendant Truong's private conduct for actions outside the scope of his duties as a federal agent. Dkt. #22 at 13 ("[Truong] has been sued in his *individual* capacity, not his official capacity . . . Section 1981 does apply to defendants acting as private actors, by its plain language.") (emphasis in original). Defendant Truong maintains that Plaintiff's argument contradicts the gravamen of his complaint, which only addresses Defendant Truong's actions taken in the course of his

official duties. Dkt. #17 at 6-7 (citing *Elsharkawi v. United States*, No. 818-CV-01971JLSDFM, 2019 U.S. Dist. LEXIS 138403, 2019 WL 3811518, at *7 (C.D. Cal. Aug. 8, 2019)). In *Elsharkawi*, the court addressed the same argument Plaintiff raises here: that federal officials, sued in their personal capacities for conduct allegedly beyond the lawful authority of their official positions, must be considered "nongovernmental" actors under Section 1981. *Elsharkawi*, 2019 U.S. Dist. LEXIS 138403, 2019 WL 3811518, at *7. The court rejected plaintiff's argument, reasoning that "such a conclusion contradicts the obvious nature of this suit: that Individual-Capacity Defendants allegedly improperly *asserted the power of their federal positions* to Plaintiff's detriment." *Id.* (emphasis in original).

The Court finds the reasoning in *Elsharkawi* persuasive. As in that case, Plaintiff attempts to bring a Section 1981 claim against a federal official by suing the officer in his individual capacity. Plaintiff's Section 1981 claim alleges that Defendant Truong asserted his power as a federal agent to (1) place Plaintiff on the Terrorist Watchlist; (2) encourage Official Capacity Defendants to place Plaintiff on the Watchlist; and/or (3) otherwise interfere with Plaintiff's employment by nature of his position at the FBI. *See* Dkt. #1 at ¶¶ 276-282. These claims plainly address actions taken by Defendant Truong in the course of his employment as a federal agent acting under federal authority, rather than as a private, non-governmental actor. Consequently, because Plaintiff challenges actions committed by Defendant Truong "with the imprimatur of federal authority," Section 1981

provides no cause of action. *Elsharkawi*, 2019 U.S. Dist. LEXIS 138403, 2019 WL 3811518, at *7; *see also Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Gottschalk*, 964 F. Supp. 2d at 1162-63; *Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1161 (10th Cir. 2000).

Accordingly, Plaintiff's Section 1981 claim against Defendant Truong is dismissed for lack of subject matter jurisdiction. Because this issue is dispositive, the Court need not reach Defendant Truong's remaining arguments for dismissal.

C. Claims against Official Capacity Defendants

Plaintiff alleges three counts of violations by the Official Capacity Defendants under the Fifth Amendment due process clause and the APA. Count I alleges that the STA Redress Process is constitutionally inadequate and deprives Plaintiff of protected liberty interests such as freedom to pursue his chosen profession, freedom from false stigmatization, and freedom to travel unimpeded across borders, in violation of his Fifth Amendment right to procedural due process. *Id.* at ¶¶ 154-218. Count II alleges that the STA Redress Process unduly burdens these same liberty interests and therefore violates Plaintiff's Fifth Amendment right to substantive due process. *Id.* at ¶¶ 219-239. Finally, Count III claims that the STA Redress Process and TSA's implementation of that process is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. *Id.* at ¶¶ 240- 272.

Appendix C

Official Capacity Defendants move to dismiss for lack of subject matter jurisdiction on grounds of sovereign immunity, lack of standing, and lack of jurisdiction under 49 U.S.C. § 46110, as well as for failure to state a claim. Dkt. #18 at 11-29. The Court will address each argument in turn.

1. Sovereign Immunity

As an initial matter, Plaintiff seeks monetary damages for the Government's past actions in the form of compensatory damages, nominal damages, and lost wages as a result of his badge revocation. Dkt. #1 at 41, ¶¶ 11-13. Defendants argue that sovereign immunity bars these claims for relief. Dkt. #18 at 25-26. The Court agrees.

As a general rule, the United States may not be sued unless it has waived its sovereign immunity. *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 806 (9th Cir. 2003). Accordingly, unless the United States consents to be sued, the Court lacks subject matter jurisdiction over claims against the federal government. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941); *see also Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) ("A court lacks subject matter jurisdiction over a claim against the United States if it has not consented to be sued on that claim.") (internal citations omitted). The doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities. *Hodge v. Dalton* 107 F.3d 705, 707 (9th Cir.1997) (citing *S. Delta Water Agency v. U.S., Dep't of*

Interior, 767 F.2d 531, 536 (9th Cir. 1985)). The federal government's waiver of sovereign immunity "must be unequivocally expressed in statutory text, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) (internal citations omitted). Any limitations and conditions upon the waiver must be strictly observed, *Hodge*, 107 F.3d at 707, and the Court must construe any ambiguities in the scope of such waiver in favor of immunity. *Lane*, 518 U.S. at 192 (citing *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995)).

With respect to claims under the Fifth Amendment due process clause, the Ninth Circuit has recognized that district courts lack jurisdiction to hear claims for monetary relief against the federal government for alleged due process violations. *See Munns v. Kerry*, 782 F.3d 402, 413 (9th Cir. 2015) ("The only possible waivers of sovereign immunity that the plaintiffs allege involve the Due Process and Takings Clauses of the Fifth Amendment. But these provisions are not general waivers of sovereign immunity and do not establish jurisdiction in the district courts over monetary claims"); *see also E.V. v. Robinson*, 906 F.3d 1082, 1095 (9th Cir. 2018) (Finding that suits against "federal officials in their official capacities seeking damages are ipso facto against the government for purposes of sovereign immunity."). To the extent Plaintiff seeks monetary damages under the APA, these claims are likewise barred. For a district court to exercise jurisdiction over an APA claim, a plaintiff's claim must be for "relief *other than money damages*." 5 U.S.C. § 702 (emphasis added); *Harger v. Dep't of Labor*, 569 F.3d 898, 904 (9th Cir. 2009).

Plaintiff contends that his claims for monetary relief have jurisdiction given that 49 U.S.C. § 46110 does not bar damages claims. *See* Dkt. #26 at 19 (citing *Latif v. Holder*, 686 F.3d 1122, 1128 (9th Cir. 2012); *Americopters, LLC v. F.A.A.*, 441 F.3d 726 (9th Cir. 2006), *aff'd sub nom. Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299 (Fed. Cir. 2008)). The Government argues that the operation of Section 46110 is inapposite, given that Plaintiff has provided no basis for the Court's jurisdiction over these claims for monetary relief. Dkt. #32 at 8. The Court agrees. *Latif* and *Americopters* support the narrow proposition that where jurisdiction exists for constitutional claims for monetary damages, Section 46110 poses no bar to relief. *See Latif*, 686 F.3d at 1128 ("[B]road constitutional claims for damages against the [Federal Aviation Administration ("FAA")] [may] proceed in the district court because, under § 46110, [the courts of appeals] lack jurisdiction to grant damages."); *see also Americopters*, 441 F.3d at 735-37 (same). Nevertheless, neither of these cases supports the proposition that Section 46110 confers a waiver of sovereign immunity for monetary relief against the federal government. The Court likewise finds no waiver in the statutory text of Section 46110. *See Lane*, 518 U.S. at 192 (requiring unequivocal expression of waiver). Consequently, regardless of whether Section 46110 bars Plaintiff's claims for money damages, this Court lacks jurisdiction over these claims in the first instance.

Furthermore, Plaintiff seeks declaratory judgments that the past actions of Official Capacity Defendants violated his procedural and substantive due process rights under the Fifth Amendment and were arbitrary,

capricious, and an abuse of discretion under the APA. Dkt. #1 at 40, ¶¶ 2-5. Because these violations occurred in the past and are not ongoing, this relief is entirely retrospective, not prospective, in nature and therefore barred on sovereign immunity grounds. *See Green v. Mansour*, 474 U.S. 64, 73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) ("[T]he issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited . . . .").

For these reasons, Plaintiff's claims for monetary damages and retrospective declaratory relief, Dkt. #1 at 40-41, ¶¶ 2-5; 11-13, are dismissed.

2. Article III Standing

Having determined that Plaintiff's claims for monetary damages and retrospective declaratory relief lack subject matter jurisdiction, the Court will now address his remaining claims for prospective injunctive and declaratory relief. Pursuant to Article III of the U.S. Constitution, federal courts are courts of limited jurisdiction, hearing only live "cases" and "controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); U.S. Const. art. III, § 2. To satisfy the case-or-controversy requirement, the plaintiff must establish "(1) [A]n 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and

(3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). A challenge based on lack of standing is appropriate under Rule 12(b)(1). *Walsh v. Microsoft Corp.*, 63 F. Supp. 3d 1312, 1317-18 (W.D. Wash. 2014). Furthermore, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc.*, 528 U.S. at 185 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

Plaintiff seeks prospective injunctive relief in the form of a revised STA Redress Process, which would (1) grant applicants access to classified portions of hearings; (2) require TSA to supply a list of reasons for the security threat determination; and (3) allow individuals to conduct discovery and issue subpoenas in all revocation hearings. Dkt. #1 at 40, ¶¶ 7-10. Plaintiff also seeks a prospective declaratory judgment that Official Capacity Defendants' policies, practices, and customs violate the Constitution and deprive individuals of a meaningful opportunity to be heard. *Id.* at ¶ 6.

To have standing to seek injunctive relief, a plaintiff must demonstrate "that he is realistically threatened by a repetition" of the injury that the injunction seeks to redress. *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir. 2012) (quoting *Lyons*, 461 U.S. at 109). "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." *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). Continuing, present adverse effects may be found when a plaintiff demonstrates that there is "a sufficient likelihood that he will again be wronged in a similar way." *Lyons*, 461 U.S. at 111. To make a sufficient showing, a plaintiff must establish either "that the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy" or "the harm is part of a pattern of officially sanctioned . . . behavior, violative of plaintiff's federal rights." *Melendres*, 695 F.3d at 998 (quoting *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001)) (internal quotations omitted).

Regarding standing for declaratory relief, "a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment." *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010). Mere "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Thus, a plaintiff "whose injury lies wholly in the past without a reasonable likelihood of recurring in the future" lacks standing to seek a declaratory judgment. *Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1267-68 (D. Or. 2014) (citing *Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 694 (9th Cir. 2010)). Plaintiff must therefore demonstrate that he is reasonably threatened by repetition of the injury to establish standing to seek a declaratory judgment.

Appendix C

i. Injury-in-Fact

The Government argues that Plaintiff lacks standing to pursue his claims given that he was reissued an airport badge in July 2019 and "has held this credential without further incident ever since." Dkt. #32 at 8. As such, Defendants argue, his claims for past injury are moot, and any future injury is merely speculative since he has failed to offer "any actual or reasoned explanation as to why there is any likelihood of that outcome." *Id.* Plaintiff counters that he has standing to seek prospective relief because revocation of his airport privileges "could occur at any time" and would again violate his due process rights, given that he continues to work at a job that requires a SIDA badge and plans to travel in the future. Dkt. #26 at 17.

The Court finds that Plaintiff has sufficiently alleged injury-in-fact. The Government insists that any alleged harm to Plaintiff has been remedied given the TSA's withdrawal of its earlier threat assessment, and that Plaintiff has failed to offer any "reasoned explanation" as to why TSA would again determine him a security risk and revoke his badge. However, the Government neglects to address the fact that so long as Plaintiff continues in his current employment, he must undergo continuous security threat assessments. *See* 49 C.F.R. § 1540.203(j) ("A security threat assessment conducted under this subpart remains valid for five years from the date that TSA issues a Determination of No Security Threat or a Final Determination of Threat Assessment").

Taking Plaintiff's claims as true at this stage of the litigation, he intends to continue working at his current job and therefore remains subject to TSA security threat assessments in order to maintain his required credentials. Dkt. #1 at ¶ 144. Consequently, he remains exposed to TSA's allegedly unlawful STA Redress Process. Courts have recognized that where a plaintiff remains subject to an unlawful policy, "exposure to that policy is both itself an ongoing harm and evidence there is 'sufficient likelihood' that Plaintiffs' rights will be violated again." *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011), *aff'd sub nom. Melendres*, 695 F.3d at 990 (Finding standing to challenge unlawful vehicle stops even if "[t]he likelihood that any particular named Plaintiff will again be stopped in the same way may not be high."). For that reason, Plaintiff's continued exposure to the STA Redress Procedure means that he is reasonably threatened by repetition of the injury. Accordingly, he has demonstrated sufficient likelihood of harm to establish imminence.

The Government counters that insofar as Plaintiff alleges procedural violations, "'a bare procedural violation, divorced from any concrete harm,' cannot establish an injury in fact." Dkt. #18 at 24 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016)); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). Here, Plaintiff has alleged far more than a procedural right *in vacuo*. On the contrary, he has identified concrete

interests, including freedom to pursue his chosen profession and freedom from false stigmatization, that were allegedly harmed by the STA Redress Process and face future harm through continued exposure to the unlawful procedure. *See* Dkt. #1 at ¶¶ 164-179.

Finally, the Government argues that Plaintiff's "subjective intent to keep working" cannot constitute a future action that threatens injury for purposes of standing. Dkt. #32 at 7. Relying on *Clapper v. Amnesty Int'l USA*, Defendants argue that "the future action in question must be one that threatens *injury*, and thus must be one that the *defendant* may take against the plaintiff, as opposed to a plaintiff's own actions." *Id.* (emphases in original) (citing 568 U.S. 398, 401, 133 S. Ct. 1138, 185 L. Ed. 2d 264). The Government's position is untenable. *Clapper* addressed an instance where a party attempted to "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 401. Here, in contrast, the Court finds no such "manufactured standing"—Plaintiff faces imminent harm simply by continuing to work at his current place of employment. If the Court were to adopt the Government's position, it would follow that plaintiffs lack standing so long as they can avoid harm by drastically altering their daily activities. Defendants provide no support for this rigid view of standing, and our case law offers no support for this proposition. *See, e.g., Melendres*, 695 F.3d at 990 (Motorists subject to illegal vehicle stops, who could avoid such harm by not driving, have standing to seek injunctive relief). For these reasons, the Court finds that Plaintiff has sufficiently alleged injury-in-fact.

ii. Causation and Redressability

Turning to the remaining two standing requirements, causation and redressability, Plaintiff has sufficiently pleaded injuries related to his career and reputation that occurred and are sufficiently likely to reoccur as a result of the STA Redress Process. Injunctive and declaratory relief would therefore redress these harms, as they would provide Plaintiff the reasonable opportunity to challenge any future revocation of his SIDA badge and airport credentials.

However, as to Plaintiff's travel-related injuries, the Government argues that "the STA Procedures he challenges have nothing to do with, and cannot redress, any travel-related issues . . . ." Dkt. #32 at 9. The Court agrees. As Plaintiff has made clear, the procedure challenged here is the STA Redress Process, which addresses an individual's security threat assessment for accessing secure areas of the airport as an employee—not the DHS Traveler Redress Inquiry Program ("DHS TRIP"), which addresses an individual's placement on a government watch list for flying as a passenger on commercial aircraft. *See* Dkt. #26 at 16 ("Defendants are correct that this action challenges the constitutional adequacy of the STA Redress Process rather than DHS TRIP."). Plaintiff claims that his travel difficulties coincided with the revocation of his SIDA badge and airport credentials, Dkt. #1 at ¶ 234, yet he fails to allege that the STA Redress Process *caused* his travel-related injuries or that revising the STA Redress Process would redress his travel-related harms. Instead, the Complaint

indicates that his travel difficulties, starting with his October 2015 return from Germany, were caused by his placement on a watch list in the TSDB database either by or at the behest of Special Agent Truong, which separately caused his airport badge revocation. *Id.* at ¶¶ 57, 78, 277. Plaintiff further alleges that his travel difficulties persisted even after TSA withdrew its security threat determination and restored his SIDA badge and airport privileges. *Id.* at ¶ 81. These claims contradict the notion that revocation of his airport badge directly caused his travel difficulties, or that changes to the STA Redress Process would redress his travel-related harms.

For these reasons, Plaintiff has failed to sufficiently allege causation and redressability between the STA Redress Process and his travel-related injuries. *Friends of the Earth, Inc.*, 528 U.S. at 180-81. Plaintiff's claims related to travel are therefore dismissed for lack of standing.

3. <u>Jurisdiction under 49 U.S.C. § 46110</u>

Next, the Government argues that even if Plaintiff has standing, jurisdiction over his claims lies in the court of appeals, not the district court, pursuant to 49 U.S.C. § 46110. Section 46110 provides:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration . . .) 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 its principal place of business.
>
> . . .
>
> When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

49 U.S.C. § 46110(a), (c) (2005). In determining whether an agency action is an "order" under Section 46110 subject to the exclusive jurisdiction of the court of appeals, the Ninth Circuit considers whether the action "imposes an obligation, denies a right, or fixes some legal relationship . . . . if the order 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,' the order has sufficient finality to warrant the appeal offered by section [46110]." *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (quoting *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994)). Courts also consider the existence of an administrative record and factual findings in determining whether a TSA decision constitutes an

"order" for purposes of Section 46110. *See Sierra Club v. Skinner*, 885 F.2d 591, 593 (9th Cir. 1989).

The Government first argues that the STA Redress Process constitutes a "final order" within the meaning of Section 46110. Dkt. #18 at 28. Specifically, the Government analogizes the STA Redress Process to a "Security Directive" of TSA like those in *Ibrahim* and *Gilmore*, which the Ninth Circuit recognized as final orders. *Id.* (citing *Ibrahim v. DHS*, 538 F.3d 1250, 1257 (9th Cir. 2008); *Gilmore*, 435 F.3d at 1133). The Court finds this comparison ill-fitting. *Ibrahim* and *Gilmore* addressed TSA directives that envisioned immediate compliance with direct effects on the day-to-day business of the parties. *Ibrahim* addressed TSA's directive implementing the "No-Fly List," which "requires airlines to check passengers' identification against the No-Fly List and establishes other 'policies and procedures' to be followed if they find a passenger's name on the list." *Ibrahim*, 538 F.3d at 1257. Similarly, *Gilmore* addressed TSA's directive that airline passengers present identification or be a "selectee," and that airport security personnel carry out that policy. *Gilmore*, 435 F.3d at 1133. In the context of the security threat assessment process, the set of procedures TSA follows for making a security threat assessment is clearly identified as a "Security Directive." *See* Dkt. #18-2 at 6 ("Security Directive 1542-04-08K").[2]

2. The Complaint briefly states that TSA's consultation with TSC and/or watch lists maintained by TSC violates substantive due process. Dkt. #1 at ¶¶ 235-236. However, because Plaintiff only seeks revisions to the STA Redress Process, not TSA's process for making an initial security threat assessment determination,

Similarly, TSA has identified the order of the TSA Final Decision Maker as a final order subject to Section 46110. *See* 49 C.F.R. § 1515.11(h). In contrast to these directives, the STA Redress Process merely sets forth the process for challenging TSA's security threat assessments—including options to appeal to an ALJ and a TSA Final Decision Maker. *See generally* 49 C.F.R. § 1515. As such, it lacks the direct and immediate effect, expectation of immediate compliance, and finality necessary to comprise a final order under Section 46110.

Next, the Government argues that even if the STA Redress Process is not a final order, Plaintiff's claims are "inescapably intertwined" with the review of a final order, thus divesting this Court of jurisdiction. Dkt. #18 at 28. A district court maintains jurisdiction to hear broad constitutional challenges to the Government's actions. *Mace*, 34 F.3d at 858 (9th Cir. 1994)). However, it is divested of jurisdiction if such claims are "inescapably intertwined with a review of the procedures and merits surrounding" a final order under Section 46110. *Id.* The Ninth Circuit has determined that a plaintiff's due process constitutional challenge is "inescapably intertwined" with review of an order if it "squarely attack[s] the orders issued by the TSA with respect to airport security." *Gilmore*, 435 F.3d at 1133, n.9. Courts have contrasted such collateral challenges to the merits of a previous agency adjudication with "facial challenge[s] to the constitutionality of certain agency actions," the latter of which are not proscribed by

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the Court does not interpret his claims as challenging Security Directive 1542-04-08K or subsequent versions of that directive. *See id.* at 40-41, ¶¶ 7-10.

Section 46110. *See Tur v. F.A.A.*, 104 F.3d 290, 292 (9th Cir. 1997) (Distinguishing facial challenge in *Mace* from suit directed at conduct of TSA officials in adjudicating specific claim); *see also Mace*, 34 F.3d at 858 ("Mace's claims differ from those asserted in *Green*, where it was the *conduct* of FAA officials in adjudicating a specific individual claim that was under attack") (emphasis in original) (citing *Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993)).

Here, Plaintiff's only justiciable claims are prospective and challenge the legality of the STA Redress Process under the Constitution and the APA.[3] Moreover, because TSA ultimately withdrew its Final Determination, Dkt. #1 at ¶¶ 141-144, no final order exists to be challenged. Plaintiff's claims are therefore more akin to those in *Mace*, where the plaintiff "broadly challenged the constitutionality of the FAA's revocation procedures." *Mace*, 34 F.3d at 858. The Ninth Circuit in *Mace* reasoned that because plaintiff only challenged the procedures, not the merits, of the FAA's order, "the administrative record . . . would have little relevance to Mace's constitutional challenges here." Consequently, the Ninth Circuit concluded that "any examination of the constitutionality of the FAA's revocation power should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *Id.* at 859. Such is the case here, where Plaintiff challenges the

3. Plaintiff attempted to bring claims seeking retrospective relief as to his withdrawn security threat determination, but these claims are barred on sovereign immunity grounds. *See* Section III(C)(1), *supra*.

procedures employed in seeking review of security threat assessments rather than the particular outcome of the decision. For this reason, Section 46110 does not divest this Court of jurisdiction. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 113 S.Ct. 2485, 2495, 125 L. Ed. 2d 38 (1993) (Holding that a statutory provision governing the review of single agency actions does not apply to challenges to "a practice or procedure employed in making [numerous] decisions.").

Having resolved the Government's jurisdictional challenges, the Court will now turn to its merits challenges.

D. Sufficiency of Plaintiff's Claims

Official Capacity Defendants move to dismiss Plaintiff's due process and APA claims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. #18 at 30-40. The Court will address each claim in turn.

1. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Due process, however,

"'is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* at 334, 96 S.Ct. 893 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

"A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). A threshold requirement is the plaintiff's showing of a liberty or property interest protected by the Constitution. *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013). Plaintiff alleges that Official Capacity Defendants have deprived him of three liberty interests: the right to hold worker identification credentials, the right to pursue his chosen profession, and the right to be free from false government stigmatization.[4] The Official Capacity Defendants contend that none of these interests are cognizable under procedural due process. For the reasons set forth below, the Court finds that Plaintiff has failed to state cognizable liberty or property interests.

i. Right to Airport Badge and Identification Credentials

First, Plaintiff asserts that the unlawful STA Redress Process harms his protected property interest in workers'

4. Plaintiff also pleads a protected liberty interest in his right to freely travel. *See* Dkt. #1 at ¶¶ 74, 143, 168, 224-25. However, the Court has dismissed Plaintiff's claims alleging travel-related harm for lack of standing, as set forth in Section III(C)(2)(ii), *supra*.

identification credentials, including the SIDA badge. Dkt. #1 at ¶¶ 163-164, 175-176. "The Constitution itself creates no property interests; rather, such interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *United States v. Guillen-Cervantes*, 748 F.3d 870, 872-73 (9th Cir. 2014) (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005)). Consequently, a constitutionally cognizable property interest "requires more than an 'abstract need or desire' or a 'unilateral expectation of it'—rather, there must be a 'legitimate claim of entitlement.'" *Id.* (quoting *Town of Castle Rock*, 545 U.S. at 756).

The Government contends that Plaintiff cannot substantiate an "entitlement" to an airport badge, particularly given the "highly sensitive" nature of granting access to secure airport areas. Dkt. #18 at 31. The Court agrees. Plaintiff points to no existing law, rule, or understanding that makes the conferral of airport worker credentials "mandatory." Instead, he merely insists that he "properly alleges his protected property interest in workers' identification credentials, such has SIDA badges." Dkt. #26 at 20. This conclusory assertion is insufficient to demonstrate that he holds a constitutionally cognizable interest in airport worker credentials. To the extent Plaintiff relies on *Parker v. Lester* to argue that denial of a security clearance amounts to a denial of due process, *Parker* addressed security clearances in the context of seamen's employment on merchant vessels. *See* 227 F.2d 708 (9th Cir. 1955). Here, in contrast, Plaintiff asserts a property interest over a TSA credentialing

decision that grants individuals access to secure areas of airports—a decision which courts have traditionally accorded broad deference to TSA. *See, e.g., Olivares v. Transportation Sec. Admin.*, 819 F.3d 454, 462, 422 U.S. App. D.C. 107 (D.C. Cir. 2016) ("Congress has entrusted TSA with broad authority over civil aviation security") (internal quotations omitted).

Moreover, since *Parker*, courts have declined to find a liberty or property interest in a security clearance. *See Department of the Navy v. Egan*, 484 U.S. 518, 528, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988) ("It should be obvious that no one has a 'right' to a security clearance."); *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) *cert. denied*, 499 U.S. 905, 111 S. Ct. 1104, 113 L. Ed. 2d 214 (1991) ("There is no right to maintain a security clearance, and no entitlement to continued employment at a job that requires a security clearance."); *see also Jamil v. Secretary, Department of Defense*, 910 F.2d 1203, 1209 (4th Cir. 1990) (since no one has a "right" to security clearance, revocation thereof "does not infringe upon one's property or liberty interests"). Plaintiff's Response fails to meaningfully address *Dorfmont* and its related cases.

For these reasons, Plaintiff has failed to state a procedural due process claim with respect to his interest in holding an airport badge and related identification credentials.

ii. Right to Pursue Chosen Profession

Next, Plaintiff claims that the STA Redress Process harms his liberty interest in pursuing his chosen

profession. Dkt. #1 at ¶¶ 165-166, 169, 175-177. The Supreme Court has recognized "some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). However, a liberty interest in pursuing one's chosen profession has only been recognized "in cases where (1) a plaintiff challenges the rationality of government regulations on entry into a particular profession, or (2) a state seeks permanently to bar an individual from public employment." *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009) (internal citations omitted). Because Plaintiff is not a public employee and the federal government—not the state—implements the STA Redress Process, the Court will focus its analysis on the first scenario.

As an initial matter, Plaintiff fails to clearly define the field and scope of his chosen profession. On one hand, his complaint claims that his "chosen field of employment" is a position similar to the one he held at Delta—a Cargo Customer Service Agent—which "is contingent on holding a SIDA badge and having airport privileges." *See* Dkt. #1 at ¶¶ 144, 151. Confusingly, however, his complaint also alleges a separate and possibly broader interest in data science and/or information technology. Plaintiff is currently pursuing a PhD at the University of Washington Information School with a dissertation that involves "synthesizing data," *id.* at ¶ 15, and was scheduled to begin a data analyst position with Delta once he returned from Berlin. *Id.* at ¶ 67. Consistent with a career path in data analysis, Plaintiff claims he traveled to Berlin for the annual conference of the Association of Internet Researchers. *Id.* at ¶ 44. Nothing in Plaintiff's complaint indicates that the STA Redress Process, which addresses

the discrete issue of Plaintiff's access to secured areas of the airport, affects his ability to pursue a career in data science and/or information technology. On this basis alone, Plaintiff has failed to allege that the STA Redress Process has injured his liberty interest in pursuing his chosen profession.

Even if the Court narrowly construes Plaintiff's chosen profession as working as a cargo service agent for a commercial airline, which requires holding a SIDA badge and airport privileges, courts have declined to recognize a liberty interest in pursuing employment that requires a security clearance. In *Dorfmont*, the Ninth Circuit reasoned that the plaintiff "ha[d] not been deprived of the right to earn a living[,] she ha[d] only been denied the ability to pursue employment requiring a Defense Department security clearance." *Dorfmont*, 913 F.2d at 1403. Consequently, the court reasoned that without a "protected interest in a security clearance, there is no liberty interest in employment requiring such clearance." *Id.* Plaintiff cites two cases from the D.C. Circuit regarding the due process liberty interest in pursuing one's chosen career, *see* Dkt. #26 at 20-21, yet neither of these cases address professions that require security clearances. *See Abdelfattah v. DHS*, 787 F.3d 524, 415 U.S. App. D.C. 275 (D.C. Cir. 2015) (software engineer); *Campbell v. District of Columbia*, 894 F.3d 281, 289, 436 U.S. App. D.C. 339 (D.C. Cir. 2018) (healthcare executive). To the extent Plaintiff relies on *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), to support a due process challenge predicated on revocation of a security clearance, the Ninth Circuit has held otherwise. *See*

Dorfmont, 913 F.2d at 1404 ("[A]lthough [*Greene*] appears superficially to allow a due process attack on a security clearance decision, it in fact does not. The Court stated explicitly that it was not deciding what procedures were constitutionally compelled, but only that [the petitioner] could not be deprived of certain procedures in the absence of authorization from the President or Congress.").

For these reasons, Plaintiff has failed to allege facts that support a due process claim with respect to pursuit of his chosen profession.

iii. Reputational Interest and Freedom from Stigmatization

Finally, Plaintiff claims that he has suffered reputational damage as a result of Defendants' policies and actions. Dkt. #1 at ¶¶ 148-151, 179, 190, 217. The Supreme Court has recognized a constitutionally protected interest in "a person's good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). As such, it has formulated a standard, known as the "stigma-plus" test, to determine whether reputational harm infringes a liberty interest. *Paul v. Davis*, 424 U.S. 693, 711, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

To prevail on a claim under the stigma-plus doctrine, Plaintiff must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; *plus* (2) the denial of some more tangible interest such as employment, or the alteration of a right or

status recognized by state law." *Green v. Transportation Sec. Admin.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005) (emphasis added) (citing *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002); *Paul*, 424 U.S. at 711). "The plus must be a deprivation of a liberty or property interest by the state . . . that directly affects the [Plaintiff's] rights." *Id.* (quoting *Miller v. Cal.*, 355 F.3d 1172, 1178 (9th Cir. 2004)). Under the "plus" prong, a plaintiff can show he has suffered a change of legal status if he "legally [cannot] do something that [he] could otherwise do." *Miller*, 355 F.3d at 1179.

Plaintiff contends, and Defendants do not dispute, that revocation of airport privileges imputes criminal offenses or associations and carries with it a stigma that an individual is dangerous and/or suspected of having ties to terrorism. Dkt. #1 at ¶¶ 171-173. Plaintiff also claims that he poses no security threat to aviation and therefore sufficiently contests the accuracy of the alleged stigmatization. *Id.* at ¶¶ 173-174. Nevertheless, Plaintiff's claims fall short of satisfying the "plus" factor, given that he has failed to allege deprivation of a liberty or property interest to which he is entitled. As discussed above, Plaintiff's SIDA badge and pursuit of a career that requires airport privileges do not constitute liberty or property interests protected by the due process clause. *See Dorfmont*, 913 F.2d at 1403-04.

Plaintiff also raises arguments related to his perceived placement in the TSDB, *see* Dkt. #26 at 21-22, yet he still fails to identify any specific liberty or property interest that satisfies the "plus" prong of the stigma-plus

test. Regardless of "the broad range of consequences" that *could* occur if the general public knew of one's stigmatizing TSA designation or perceived designation, purely speculative harms are insufficient to satisfy the "plus" requirement. *Abdi v. Wray*, 942 F.3d 1019, 1033 (10th Cir. 2019) (Dismissing stigma-plus due process claim where plaintiff "failed to specifically allege that he has actually been prevented from participating in any of the above activities.").[5] Accordingly, he has failed to state a claim under the stigma-plus doctrine.

For these reasons, Plaintiff has failed to allege deprivation of a property or liberty interest through the unlawful STA Redress Process. Because this issue is dispositive, the Court need not address the remaining *Mathews* factors.

2. Substantive Due Process

The Government also seeks to dismiss Plaintiff's substantive due process claims for failure to state a claim. Dkt. #18 at 38-39. In contrast to procedural due process, substantive due process "protects individual

5. Plaintiff also cites to cases that address reputational interests implicated by individuals' inclusion in the TSDB and the dissemination of that TSDB information to other entities. *See Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019); *Mohamed v. Holder*, No. 1:11-cv-50, 2015 U.S. Dist. LEXIS 92997 (E.D. Va. July 16, 2015). Because this case challenges stigmatization from revoked airport privileges caused by the unlawful STA Redress Process, not from inclusion in the TSDB, these cases are inapposite.

liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261, (1992) (internal citation and quotations omitted). Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests," which are held to a more exacting standard of strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Rights are protected under the substantive due process clause if they are "so rooted in the tradition and conscience of our people as to be ranked as fundamental" or if such rights reflect "basic values implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (1997); *Griswold v. Connecticut*, 381 U.S. 479, 500, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Plaintiff alleges violations of his substantive due process rights insofar as the STA Redress Process unduly burdens (1) his fundamental liberty interest in traveling; (2) his liberty interest in practicing his chosen profession without government restraint; (3) his property interest in his SIDA badge; and (4) his liberty interest to be free of government stigmatization. Dkt. #1 at ¶¶ 224-228. As an initial matter, the Court previously determined that Plaintiff lacks standing to pursue claims for travel-related injuries. *See* Section III(C)(2)(ii), *supra*. For that reason, the Court will focus its analysis on the remaining three alleged interests.

Regarding (2) and (3), the Court has already determined that Plaintiff does not possess a liberty or property interest in a security clearance or continued employment at a job that requires a security clearance. *See Egan*, 484 U.S. at 528 (1988); *see also Dorfmont*, 913 F.2d at 1404 ("There is no right to maintain a security clearance, and no entitlement to continued employment at a job that requires a security clearance."). As such, he possesses no property interest in his SIDA badge or in continued employment that requires holding a SIDA badge that could provide a basis for a substantive due process challenge.

Regarding Plaintiff's alleged liberty interest in reputation, courts in this district have recognized freedom from false government stigmatization as a procedural due process right—not a protected constitutional right for purposes of a substantive due process claim. *Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1272 (D. Or. 2014) (citing *Paul v. Davis*, 424 U.S. 693, 712-14, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Moreover, even if a liberty interest in reputation could provide the basis for a substantive due process claim, this Court has already determined that Plaintiff has failed to state a claim for false government stigmatization under the "stigma plus" test.

For these reasons, Plaintiff has failed to state a claim for substantive due process violations, therefore warranting dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

3. Administrative Procedure Act Claims

Finally, the Government moves to dismiss Plaintiff's claims that the policies and procedures related to the TSA Redress Process violate the APA. Dkt. #18 at 39-40. The APA permits suits against the United States by "[a] person suffering legal wrong because of the agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute." 5 U.S.C. § 702. Under 5 U.S.C. § 706, a reviewing court must hold unlawful and set aside agency regulations that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The arbitrary and capricious standard of review is typically deferential to the agency and is "not to substitute its judgement for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30, 103 S. Ct. 2856, 77 L. Ed. 2d 443, (1983).

Here, Plaintiff brings an APA challenge against Official Capacity Defendants for violating TSA's own policies with respect to Plaintiff's security threat assessment, acting outside TSA's stated regulations, and for exceeding its statutory authority delegated by Congress. Dkt. #1 at ¶¶ 211, 247-248, 256-259. Because this Court dismissed Plaintiff's claims related to past injuries, *see* Section III(C)(1), *supra*, the Court limits its Rule 12(b)(6) analysis to those claims seeking prospective relief.

The Court finds that Plaintiff has plausibly stated a claim that the STA Redress Process is arbitrary and

capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A), (B). The Government argues that dismissal is warranted since (1) due process does not require disclosure of classified information; and (2) the Government's assessment of what information may be provided to applicants is "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). Dkt. #18 at 39-40. Both arguments fail. First, an agency's regulations may violate the APA without violating due process. Circumstances that may give rise to a determination that an agency regulation is arbitrary and capricious include reliance on factors which Congress did not intend for the agency to consider, failure to consider important aspects of the problem, explanations for the rule that run counter to the evidence, or the rule is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See State Farm*, 463 U.S. at 31. Here, Plaintiff sufficiently alleges that the STA Redress Process exceeds TSA's statutory mandate, as it allows TSA to refuse to disclose classified information to the applicant or an applicant's counsel, prevents counsel from attending the classified portion of a bifurcated hearing, and enables TSA to revoke airport credentials without a written explanation. Dkt. #1 at ¶¶ 211, 249-272. The Government's second argument, which addresses the extent to which TSA may withhold classified information from applicants pursuant to its statutory and executive authority, is a merits argument that is more appropriately resolved after development of the factual record.

E. Dismissal of DHS, DOJ and TSC Official Capacity Defendants

Finally, the Government moves to dismiss three Official Capacity Defendants from this case on the basis that none of Plaintiff's claims implicate these individuals: Defendant Wolf (Acting Secretary, DHS), Defendant Barr (U.S. Attorney General), and Defendant Kable (Director of the TSC). Dkt. #18 at 40-41. Plaintiff argues that he has properly alleged claims against all named defendants, given that the TSC is the entity which maintains the TSDB, and the FBI oversees the TSC. Dkt. #26 at 27.

Given the dismissal of claims as to Defendant Truong and Plaintiff's travel-related injuries, no cognizable claims remain against the Attorney General, who oversees the FBI, and the TSC Director, who oversees the TSC. Plaintiff argues that TSA's consultation of the TSDB when making its security threat assessments implicates the FBI and the TSC because of the "interagency" nature of this process. Dkt. #26 at 27-28 (citing Dkt. #1 at ¶¶ 235-236). Yet as Plaintiff has clarified, the basis of this action is the STA Redress Process for challenging revocation of SIDA badges and airport credentials—not DHS TRIP or other processes for challenging placement on government watch lists. *See* Dkt. #26 at 16. Because this redress process is a procedure developed and implemented by TSA, not the FBI or TSC, Plaintiff's constitutional and APA challenges to the STA Redress Process do not suffice as properly pleaded claims against the FBI or TSC. Accordingly, dismissal of Defendants Barr and Kable is appropriate.

The Court declines to dismiss the Acting Secretary of DHS at this time, given Plaintiff's claim that he oversees the TSA—the agency charged with the promulgation and implementation of the STA Redress Process.

F. EAJA Claims

Plaintiff also seeks costs and fees in this action pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Dkt. #1 at ¶ 289. To the extent Defendants seek dismissal of these claims as premature, *see* Dkt. #18 at 41, the Court reserves consideration of Plaintiff's EAJA claims until it has jurisdiction to do so. *See* 28 U.S.C. § 2412(d)(1)(B) (Party seeking EAJA award must submit its application "within thirty days of final judgment in the action.").

IV. CONCLUSION

For the reasons stated herein, the Court resolves Defendants' Motions to Dismiss, Dkts. #17, #18, as follows:

(1) The Court GRANTS Defendant Truong's Motion to Dismiss, Dkt. #17, and DISMISSES Plaintiff's Section 1981 claim with prejudice.

(2) The Court GRANTS IN PART and DENIES IN PART Official Capacity Defendants' Motion to Dismiss, Dkt. #18.

a. Claims against Official Capacity Defendants seeking monetary relief, retrospective relief, and relief from injuries related to travel are DISMISSED with prejudice.

b. Claims for prospective relief against Official Capacity Defendants for procedural due process and substantive due process violations are DISMISSED without prejudice.

c. The Court DENIES Official Capacity Defendants' Motion to Dismiss claims for prospective relief under the Administrative Procedure Act.

d. The Court GRANTS dismissal of Defendants Barr and Kable and DENIES dismissal of Defendant Wolf.

e. The Court DENIES dismissal of Plaintiff's request for costs and fees under EAJA.

(3) The Court FURTHER ORDERS Plaintiff to file an Amended Complaint curing the above-mentioned deficiencies **no later than thirty (30) days from the date of this order.**

DATED this 16th day of September, 2020.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

February 24, 2023, Filed

LASSANA MAGASSA,

Plaintiff-Appellant,

v.

ALEJANDRO N. MAYORKAS, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; *et al.*,

Defendants-Appellees.

No. 21-35700

D.C. No. 2:19-cv-02036-RSM
Western District of Washington, Seattle

ORDER

Before: R. NELSON and LEE, Circuit Judges, and RAKOFF,* District Judge.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Appendix D

The panel unanimously votes to deny the petition for panel rehearing.

Judges R. Nelson and Lee vote to grant the petition for rehearing en banc. Judge Rakoff recommends denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are **DENIED**.