No. 22-1158

In the Supreme Court of the United States

LASSANA MAGASSA, PETITIONER

v.

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Congress has provided that, with exceptions not relevant here, "an order issued by the * * * Administrator of the Transportation Security Administration [(TSA)] with respect to security duties and powers designated to be carried out by the Administrator" are subject to judicial review by way of a petition for review in an appropriate court of appeals. 49 U.S.C. 46110(a). In 2016, TSA issued a decision that caused the revocation of security credentials that permitted petitioner to work in secure areas of an airport. In 2019, while petitioner's administrative appeal was pending, TSA withdrew that decision and petitioner regained his security credentials. Petitioner then filed suit in federal district court, alleging that the administrative appeal process violates procedural and substantive due process, and that an FBI agent interfered with his contractual rights in violation of 42 U.S.C. 1981. The questions presented are:

1. Whether 49 U.S.C. 46110 required petitioner to bring his challenge to the administrative appeal process in the court of appeals rather than the district court.

2. Whether petitioner alleged a cognizable constitutional liberty interest arising from the alleged harm to his reputation caused by TSA's 2016 decision.

3. Whether 42 U.S.C. 1981 creates a cause of action against federal officials acting under color of federal law.

4. Whether petitioner had Article III standing at the time he filed suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 52 F.4th 1156. The order of the district court (Pet. App. 37a-59a) is reported at 545 F. Supp. 3d 898. A prior order of the district court (Pet. App. 60a-106a) is reported at 487 F. Supp. 3d 994.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2022. A petition for rehearing was denied on February 24, 2023 (Pet. App. 107a-108a). The petition for a writ of certiorari was filed on May 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has tasked the Transportation Security Administration (TSA) with establishing security

measures at airports. See 49 U.S.C. 114(e), (f). As relevant here, Congress has directed TSA to "require background checks for * * * individuals with access to secure areas of airports," 49 U.S.C. 114(f)(12), and to require that "an employment investigation" be conducted for "individuals who exercise security functions associated with baggage or cargo, as the Administrator determines is necessary to ensure air transportation security," 49 U.S.C. 44936(a)(1)(B)(iv); see 49 U.S.C. 44903(h) and (j)(2)(D). Consistent with those statutory mandates, TSA requires airport operators to establish a secure "air operations area," which includes aircraft movement areas and loading ramps. 49 C.F.R. 1540.5; see 49 U.S.C. 44903(j)(2)(H); 49 C.F.R. 1542.203. Airport operators must "prevent and detect the unauthorized entry, presence, and movement of individuals and ground vehicles into or within" the air operations area, 49 C.F.R. 1542.203(b), including by using a "personnel identification system," 49 C.F.R. 1542.203(b)(5).

In doing so, airport operators must comply with TSA Security Directives, which TSA issues when it "determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation." 49 C.F.R. 1542.303(a). Security Directive 1542-04-08K and subsequent Security Directives set forth requirements related to individuals with airport-issued or -approved identification media—meaning "any credential, card, badge, or other media issued for [identification] purposes and use at an airport," D. Ct. Doc. 18-2, at 7 (Mar. 13, 2020). See *id.* at 6-20 (redacted copy of Security Directive 1542-04-08K); C.A. Supp. E.R. 36-37 & n.1. An individual must possess such identification media (which this brief will call an "airport badge" for ease of reference) to be permitted

to work in secure areas of an airport, such as the air operations area. See C.A. Supp. E.R. 37. One of the requirements to obtain an airport badge is to successfully complete a "security threat assessment." See D. Ct. Doc. 18-2, at 7, 16-18; see also C.A. E.R. 40-56. A "TSA determination that indicates the applicant did not meet all eligibility requirements" of the security threat assessment requires the airport operator to deny issuing or to revoke the individual's airport badge. D. Ct. Doc. 18-2, at 8.

b. TSA has established a multilayer process, known as the "Redress Process," for administrative review when TSA's security threat assessment causes an individual's airport badge to be denied or revoked. C.A. Supp. E.R. 40-56 (describing the Redress Process); see 49 U.S.C. 44903(j)(2)(G). If TSA determines that an applicant is ineligible to hold an airport badge, TSA issues an Initial Determination of Threat Assessment. C.A. Supp. E.R. 43-44. The applicant may "appeal by submitting a written reply to TSA, a written request for materials from TSA, or by requesting an extension of time." *Id.* at 45. If the applicant submits a written request for materials, "TSA serves the applicant with copies of the releasable materials upon which the Initial Determination was based," but "TSA will not include any classified information or other protected information" in that disclosure. *Id.* at 46. If the applicant appeals by submitting a written reply, TSA will review the appeal "[w]ithin 60 days." *Id.* at 47. If TSA concludes on administrative appeal that the applicant is eligible to hold an airport badge, TSA issues a "Withdrawal of Initial Determination." *Id.* at 48. Alternatively, if TSA concludes that the applicant "does not meet the eligibility requirements" to hold an airport

badge, it issues a "Final Determination of Threat Assessment." *Id.* at 47-48.

An applicant who receives a Final Determination "on the grounds that he or she poses a security threat" may within 30 days request further review before an Administrative Law Judge (ALJ) "who possesses the appropriate security clearance." C.A. Supp. E.R. 49-50. The applicant also may request "an in-person hearing." *Id.* at 51. If the ALJ grants an in-person hearing, TSA will provide an unclassified summary of the evidence if applicable and upon request, but "TSA will not disclose to the applicant, or the applicant's counsel, classified information." *Id.* at 52. TSA also "reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure by law or regulation." *Id.* at 53. The ALJ may review materials withheld from the individual, including any classified information, ex parte and in camera. *Ibid.*

An ALJ is authorized to, among other things, receive and review the evidence; "hold conferences and hearings"; "[a]dminister oaths and affirmations"; "[e]xamine witnesses"; "[d]ispose of procedural motions and requests"; and "issue a decision." C.A. Supp. E.R. 51-52. "The hearing is a limited discovery proceeding," in which "[t]he applicant may present the case by oral testimony, documentary, or demonstrative evidence, submit rebuttal evidence, and conduct cross-examination, as permitted by the ALJ." *Id.* at 52-53. "Oral testimony is limited to the evidence or information that was presented to TSA during the appeal," and the standard of proof is substantial evidence in the record. *Id.* at 53. The ALJ "issues an unclassified written decision to the applicant no later than 30 days from the close of the rec-

ord," and also may issue a separate or supplemental classified decision to TSA. *Id.* at 54.

Following the issuance of the ALJ's decision, either party may request review by the TSA Final Decision Maker. C.A. Supp. E.R. 55. "The decision of the TSA Final Decision Maker is a final agency order." *Ibid.* "If the TSA Final Decision Maker determines that the applicant does not pose a security threat, TSA will issue a Withdrawal of the Final Determination to the applicant." *Id.* at 56. "If the TSA Final Decision Maker determines that the applicant poses a security threat, TSA will issue a Final Order of Threat Assessment to the applicant," who may then seek judicial review in a court of appeals under 49 U.S.C. 46110. C.A. Supp. E.R. 55; see *id.* at 56.

2. a. According to the operative complaint, petitioner is a U.S. citizen who began working as a Cargo Customer Service Agent for Delta Airlines in Seattle, Washington, in June 2015. C.A. E.R. 27. Petitioner's position required that he hold an airport badge, and petitioner alleges that he received an airport badge around the same time that he began working. *Ibid.* Petitioner alleges that after expressing an interest in working in law enforcement, he was referred to respondent Minh Truong, an FBI Special Agent, for what petitioner believed was a job interview. *Id.* at 27-28. Petitioner alleges that Truong questioned petitioner about his Muslim faith and asked him to become an informant for the FBI, but that petitioner refused. *Id.* at 28. Petitioner alleges that Truong attempted to contact him twice more over the next year, but that they did not meet again. *Id.* at 28-29.

Petitioner further alleges that in October 2016, he encountered various security-related travel delays

when returning from a trip to Europe. C.A. E.R. 30-32. Petitioner alleges that after he returned to Seattle, his supervisor and other officials informed him "that his TSA status changed and his credentials were therefore revoked," which prevented him "from returning to work." *Id.* at 32; see *id.* at 32-33. Petitioner alleges that he resigned shortly thereafter. *Id.* at 33. Petitioner alleges that he also began to experience travel difficulties, often because of enhanced security screenings. *Id.* at 33-35.

On November 4, 2016, petitioner "received formal notification of TSA's Initial Determination of Eligibility and Immediate Suspension." C.A. E.R. 35. Petitioner alleges that, in response to his request, TSA provided copies of the releasable materials upon which the Initial Determination was based, but that those materials were "heavily redacted" and did not contain "substantive information." *Id.* at 35-36. Petitioner appealed the Initial Determination, and on June 19, 2017, TSA issued a Final Determination "stating that he [was] not eligible for airport-approved and/or airport-issued personnel identification media." *Id.* at 36. Petitioner appealed the Final Determination and requested ALJ review. *Ibid.*

b. On administrative appeal, the ALJ bifurcated the hearing into classified and unclassified portions. Pet. App. 8a, 67a. The ALJ denied petitioner's request to permit his counsel, who had a security clearance, to participate in the classified portion of the proceedings. *Id.* 8a-9a, 67a. TSA provided classified and sensitive materials to the ALJ to be reviewed ex parte and in camera. *Ibid.* The ALJ denied petitioner's request for an unclassified summary of that information, finding that "the classified and sensitive information was 'inextricably intertwined' with information that could be redacted

and was therefore unreviewable in its entirety." *Id.* at 67a. The ALJ directed TSA to provide a redacted version of a June 2017 report, but petitioner alleges that the report was heavily redacted. *Id.* at 9a.

On April 29, 2019, the ALJ issued a written decision finding that TSA's June 19, 2017 Final Determination was supported by substantial evidence in the record and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Pet. App. 68a; see *id.* at 9a. Petitioner requested review of the ALJ's determination by the TSA Final Decision Maker. *Ibid.*

On July 26, 2019, while that review was still pending, TSA issued a Withdrawal of the Final Determination and notified petitioner "that he was now 'eligible to maintain airport-issued identification media.'" Pet. App. 68a (citation omitted). Shortly after that withdrawal, petitioner "re-secured a[n airport] badge and resumed employment with another airline in a position similar to his job at Delta." *Id.* at 69a.

c. In December 2019, petitioner filed this suit alleging that the government had violated procedural and substantive due process during his administrative appeal because TSA had failed to disclose the basis for its adverse security threat assessment. See C.A. E.R. 47-55. Petitioner also brought a facial challenge alleging that TSA's Redress Process violates the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, as well as procedural and substantive due process, because it does not require TSA to disclose all of the bases (including classified and other sensitive information) supporting an adverse security threat assessment to the subject or his counsel. C.A. E.R. 47-60. And petitioner further alleged that Truong interfered with petitioner's contractual rights by causing the revocation of his security cre-

dentials, in purported violation of 42 U.S.C. 1981. See C.A. E.R. 24 n.3, 138-139. Petitioner sought, among other relief, money damages, a declaration that the government had violated petitioner's rights, and an order requiring TSA to develop and implement "a revised * * * Redress Process" that permits "discovery," "subpoenas," and greater disclosure to persons challenging an adverse security threat assessment. *Id.* at 61; see *id.* at 140-141.

3. The district court dismissed all of petitioner's claims in two orders. Pet. App. 37a-59a, 60a-106a.

a. The district court dismissed petitioner's claim against Truong, concluding that Section 1981 does not authorize relief against federal officials acting under color of federal law. Pet. App. 71a-75a. The court also dismissed petitioner's claims against the government for monetary damages and retrospective declaratory relief, finding that he had not identified a waiver of sovereign immunity that would permit such relief. *Id.* at 76a-79a. But the court determined that it had jurisdiction to hear the rest of petitioner's claims notwithstanding 49 U.S.C. 46110, which vests exclusive jurisdiction in the D.C. Circuit or appropriate court of appeals to review certain "order[s] issued by the * * * Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator." 49 U.S.C. 46110(a). The court reasoned that the Redress Process "lacks the direct and immediate effect, expectation of immediate compliance, and finality necessary to comprise a final order under Section 46110." Pet. App. 89a; see *id.* at 86a-91a. The court also determined that petitioner had Article III standing to challenge the Redress Process. *Id.* at 79a-86a.

On the merits, the district court held that petitioner had failed to state a due-process claim because he had not demonstrated a cognizable property or liberty interest in holding an airport badge or a cognizable harm to his liberty interest in pursuing his chosen work. Pet. App. 91a-97a, 99a-101a. For the same reasons, the court held that petitioner had not adequately pleaded a so-called "stigma plus" claim, which the court viewed as requiring a plaintiff to show both a "stigmatizing" action by the government and "the denial of some more tangible interest." *Id.* at 97a (citation omitted); see *id.* at 97a-99a. But the court denied the government's motion to dismiss petitioner's claims under the APA that TSA's Redress Process is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 102a-103a.

b. Following the filing of an amended complaint and further motions practice, the district court dismissed petitioner's APA claims on the ground that because the court had previously concluded that the Redress Process was not sufficiently "final" to constitute an "order" within the meaning of Section 46110, it was not "final agency action" as required for APA review either. Pet. App. 56a; see *id.* at 55a-59a.

4. The court of appeals affirmed. Pet. App. 1a-36a.

a. The court of appeals affirmed the dismissal of petitioner's claim against Truong and his due-process claims, largely on the grounds given by the district court. Pet. App. 11a-17a, 26a-28a. The court also agreed with the district court that petitioner had Article III standing to challenge the Redress Process because "[a]s an airline employee, [petitioner] is subject to an ongoing security assessment" and thus adequately alleged that "ongoing exposure to the Redress Process

makes it likely that his due process rights will again be violated." *Id.* at 25a; see *id.* at 24a-26a.

The court of appeals held, however, that the district court lacked jurisdiction to consider petitioner's APA claims because 49 U.S.C. 46110 required him to bring those claims in the court of appeals. Pet. App. 18a-24a. The court of appeals observed that under circuit precedent, the term "order" in Section 46110 encompasses not just "orders that govern parties' substantive rights," but also "orders (such as the Redress Process regulations) that govern procedural rights and obligations." *Id.* at 23a.

b. Judge Nelson concurred. Pet. App. 29a-36a. He agreed that under circuit precedent, the Redress Process is an "order" within the meaning of Section 46110 and petitioner was thus obligated to bring his claims directly in the court of appeals. *Id.* at 29a-30a. But relying on the definition of "order" in the APA, Judge Nelson expressed the view that "order" in Section 46110, "properly understood, should not include agency rules, policies, or procedures," such as the Redress Process. *Id.* at 32a; see *id.* at 29a-32a. He also viewed this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), as standing for the proposition that "broad constitutional challenges" to agency procedures that are "distinct enough from the merits of an individual adjudication that they would not constitute an impermissible collateral attack" cannot qualify as challenges to agency "orders." Pet. App. 35a-36a; see *id.* at 32a-36a.

ARGUMENT

Petitioner renews his contention (Pet. 15-20) that 49 U.S.C. 46110 did not require him to bring his APA and constitutional claims to the court of appeals in the first

instance. He further contends (Pet. 20-25) that he adequately alleged a reputational liberty interest implicated by the loss of authorization to access secure airport areas. And he contends (Pet. 25-29) that 42 U.S.C. 1981 creates a cause of action against federal officials acting under color of federal law. The court of appeals correctly rejected each of those contentions, and its decision does not create any conflict with decisions of this Court or other courts of appeals warranting further review. Moreover, this case would be a poor vehicle in which to address the issues petitioner raises because he lacked Article III standing when he filed suit. Further review is unwarranted.

1. a. The court of appeals correctly held that Section 46110 required petitioner to bring his challenges to the Redress Process in the court of appeals. As relevant here, Section 46110 provides that a challenge to "an order issued by the * * * Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator" may be heard in the D.C. Circuit or "the court of appeals of the United States for the circuit in which the person resides." 49 U.S.C. 46110(a). The chosen court of appeals then "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," as well as to require the agency "to conduct further proceedings." 49 U.S.C. 46110(c). Petitioner does not dispute that where Section 46110 applies, review may not be had in district court.

Instead, petitioner contends (Pet. 15-20) that Section 46110 does not apply to his APA and constitutional challenges to the Redress Process on the ground that the Redress Process is the equivalent of a generally applicable rule or regulation, and such rules or regulations

are not "order[s]" within the meaning of Section 46110(a). That contention lacks merit. Accepting for present purposes petitioner's characterization of the Redress Process as a rule or regulation, the term "order" in Section 46110 comfortably encompasses such rules or regulations.

When the operative language in Section 46110(a) was first enacted in 1938, see Civil Aeronautics Act of 1938, Ch. 601, § 1006(a), 52 Stat. 1024, the term "order" generally included any type of command, including "a rule or regulation," *Black's Law Dictionary* 1298 (3d ed. 1933) ("[a] mandate, precept; a command or direction authoritatively given; a rule or regulation"); see 7 *Oxford English Dictionary* 183 (1933) ("[t]he action or an act of ordering; regulation, direction, mandate"); *Webster's New International Dictionary* 1716 (2d ed. 1934) ("[a] rule or regulation made by competent authority").

This Court recognized as much in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), which held that regulations adopted by the FCC "in the avowed exercise of its rule-making power" were "'order[s]' within the meaning of" the Communications Act of 1934, 47 U.S.C. 402(a) (1940), for purposes of judicial review. 316 U.S. at 416-417 (citation omitted). And that ordinary meaning of "order" as including a "rule" or "regulation" has persisted over time. See *Black's Law Dictionary* 1322 (11th ed. 2019) (defining "administrative order" to include "[a]n agency regulation that interprets or applies a statutory provision").

The relevant statutory language and context confirm that "order" carries that meaning in Section 46110, and does not (as petitioner contends) exclude generally applicable procedures and regulations. For example, Section 46110 applies to an "order issued by * * * the Ad-

ministrator * * * in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114." 49 U.S.C. 46110(a). Not only is Subsection (*l*) of Section 114 entitled "Regulations," 49 U.S.C. 114(*l*), but regulations, including ones addressing procedure, are the exclusive subject of that subsection, see, *e.g.*, 49 U.S.C. 114(*l*)(2) (describing emergency procedures). Similarly, Subsection (s)—which has since been redesignated as Subsection (r), see Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. V, § 568(a), 121 Stat. 2092; *Lacson* v. *Department of Homeland Security*, 726 F.3d 170, 173 n.2 (D.C. Cir. 2013)—addresses regulations. See 49 U.S.C. 114(r)(1) (requiring the Administrator to "prescribe regulations" addressing confidentiality). Accordingly, the reference in Section 46110 to an "order issued * * * in whole or in part under * * * subsection (*l*) or (s)" *necessarily* is a reference that includes generally applicable procedures and regulations. Petitioner's contrary position would improperly render that statutory text a nullity.

Section 46110 also provides that the administrative record should be filed "as provided in section 2112 of title 28." 49 U.S.C. 46110(b). Section 2112 generally governs the filing of the record "in *all* proceedings instituted in the courts of appeals." 28 U.S.C. 2112(a) (emphasis added). For that reason, Section 2112 applies to challenges to a variety of agency actions, including regulations and other generally applicable rules. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 142 S. Ct. 661, 664 (2022) (per curiam) (challenge to OSHA emergency temporary standard); *National Association of Manufacturers* v. *Department of Defense*, 138 S. Ct. 617, 626 (2018) (challenge to EPA regulation). Congress's express incorporation of Sec-

tion 2112 thus confirms the understanding that Section 46110's reference to "order" includes a wide variety of agency commands, including generally applicable procedures and regulations.

Echoing the concurring judge below (Pet. App. 29a-30a), petitioner relies (Pet. 16-17) on the APA's definition of "order," which expressly excludes "rule making," 5 U.S.C. 551(6). But Congress did not define "order" for purposes of Section 46110, and "unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning," *Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013) (brackets and citation omitted)—not the meaning given to those terms in a different statute for different purposes. Applying the APA's definition here would be particularly inapt given that the APA was enacted several years *after* the operative language in Section 46110.

Even if the APA were relevant, it would cut the other way. That Congress apparently felt the need to expressly exclude "rule making" from the definition of "order" in the APA confirms that rules (including those governing procedures) otherwise *would* be included under the ordinary meaning of "order." Moreover, although the APA excludes rulemaking from the term "order" for purposes of certain procedural requirements, cf. 5 U.S.C. 553, the APA's *judicial-review* provision—which is most analogous to Section 46110—applies equally to orders and rules alike, see 5 U.S.C. 702 (providing a right of action to review "agency action"); 5 U.S.C. 551(13) (defining "agency action" to include both an "agency rule" and an "order," among other actions).

Finally, petitioner suggests (Pet. 18-19) that review of his claims in the district court is necessary to develop

the record, but the APA itself limits judicial review of a regulation to "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

b. Petitioner's reliance (Pet. 17-19) on *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), is misplaced. There, the Court held that a provision of the immigration laws providing for exclusive judicial review in a court of appeals "of *a determination* respecting *an application*" for status as a special agricultural worker did not preclude a district court from entertaining a constitutional and statutory challenge to the agency's procedures in making special-agricultural-worker determinations as a general matter. *Id.* at 492 (citation omitted). In so holding, the Court relied on several features of the statutory text and context that the Court concluded made the provision inapplicable to such collateral constitutional claims.

First, *McNary* observed that the statute's "reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." 498 U.S. at 492. Second, "the record created during the [relevant] administrative review process consist[ed] solely of [materials] all relating to a single" applicant, with no means to supplement the record. *Id.* at 493. Third, "the 'abuse-of-discretion' standard of judicial review" was incompatible with review of purely legal constitutional claims, "which are reviewed *de novo* by the courts." *Ibid.* Fourth, the statute applied only "in the context of a deportation proceeding," *id.* at 492, and so if applicants did not "voluntarily surrender themselves for deportation," a court would "have no complete or meaningful basis

upon which to review application determinations" under the statute, *id.* at 496.

Section 46110 contains none of those features. It is not limited to orders issued in individualized proceedings, but instead applies to *any* relevant "order" issued "in whole or in part" under "this part, part B"—which together comprise Sections 40101 to 47534 of Title 49—and, of course, subsections (*l*) and (r) of Section 114. 49 U.S.C. 46110(a). Section 46110 does not limit the administrative record available to the reviewing court, see 28 U.S.C. 2112(b) and (c), and it even authorizes the court to "order the * * * Administrator * * * to conduct further proceedings," which necessarily would supplement the administrative record, 49 U.S.C. 46110(c). Although Section 46110 specifies that the agency's findings of fact, "if supported by substantial evidence, are conclusive," *ibid.*, it does not specify an abuse-of-discretion standard of review for purely legal or mixed questions. Finally, Section 46110 does not limit review to particular types of proceedings (as with the deportation proceedings in *McNary*), but instead broadly applies to any challenge by "a person disclosing a substantial interest in [the] order." 49 U.S.C. 46110(a). It thus would not deprive such a person from obtaining meaningful judicial review. Indeed, that is also why petitioner's reliance (Pet. 18-19) on the presumption of judicial review is misplaced; Section 46110 does not eliminate or even curtail judicial review, but simply channels it to the court of appeals.

c. At all events, the first question presented does not merit this Court's review. Petitioner does not identify any appellate decision adopting his interpretation of Section 46110. Indeed, courts of appeals have rejected arguments identical or similar to those that peti-

tioner raises here. See, *e.g.*, *National Federation of the Blind* v. *United States Department of Transportation*, 827 F.3d 51, 55 (D.C. Cir. 2016); *Blitz* v. *Napolitano*, 700 F.3d 733, 740 (4th Cir. 2012); *Ligon* v. *LaHood*, 614 F.3d 150, 154 (5th Cir. 2010), cert. denied, 564 U.S. 1038 (2011); *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 629 (7th Cir. 2007), cert. denied, 553 U.S. 1032 (2008); *Aviators for Safe & Fairer Regulation, Inc.* v. *FAA*, 221 F.3d 222, 225 (1st Cir. 2000).

Moreover, against that settled background, the issue lacks sufficient practical importance to warrant this Court's review. Whether judicial review of a TSA order, including a constitutional challenge to the Redress Process, occurs in district court or the court of appeals in the first instance affects neither the existence of review nor the remedies available in such review. See *St. John's*, 502 F.3d at 629. Moreover, a court may transfer any petition for review improperly filed in the district court to the court of appeals if a transfer would be "in the interest of justice." 28 U.S.C. 1631. Accordingly, Section 46110's jurisdictional rule is unlikely to work any meaningful harm on unwary litigants who, through accident or ignorance, seek review in the wrong court. Petitioner's failure even to request such a transfer, see Pet. App. 24a n.3, does not bolster the case for further review of this case.

2. a. The court of appeals correctly held that petitioner failed to adequately plead a cognizable due-process harm to a reputational liberty interest. Pet. App. 26a-28a. This Court has held that an "interest in reputation * * * is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul* v. *Davis*, 424 U.S. 693, 712 (1976); see *Siegert* v. *Gilley*, 500 U.S. 226, 234 (1991). The Court

has accordingly rejected claims based on "injury to that interest" that have not "worked any change" to a plaintiff's legal rights or "status as theretofore recognized under the State's laws." *Paul*, 424 U.S. at 712. And that remains true even when the plaintiff alleges "serious impairment of his future employment opportunities as well as other harm." *Siegert*, 500 U.S. at 234. As petitioner himself recognizes (Pet. 20), a so-called "stigma plus" claim like the one he presses requires a plaintiff to establish an "alteration or extinguishment of a right or status previously recognized by state law."

As the court of appeals explained (Pet. App. 27a), petitioner did not adequately plead any harm to a cognizable legal right or status because petitioner has no legal right to a favorable security threat assessment or to a job requiring one. In *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), for example, this Court held that a laborer did not have a right to a security clearance that would permit him to access sensitive military areas, even though the denial of the clearance caused the plaintiff to lose his job at a facility where he had worked for more than two years. *Id.* at 527-529. As the Court explained, "[i]t should be obvious that no one has a 'right' to a security clearance" because "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Id.* at 528.

Petitioner attempts to distinguish the Court's holding in *Egan* on the ground that "[t]he plaintiff in *Egan* received a letter" supplying the reasons for the denial of a security clearance—namely, the plaintiff's "state criminal records," his "failure to disclose earlier convictions," and "his own statements about drinking problems"—whereas petitioner allegedly "received no explanation for the revocation of his existing creden-

tials" in 2016. Pet. 23; see Pet. 22-25. But those features have no bearing on *Egan*'s holding that the plaintiff lacked a cognizable liberty interest in the security clearance in the first place. Besides, under the Redress Process, petitioner would have been entitled to the same sort of unclassified and non-sensitive reasons provided to the plaintiff in *Egan*. See C.A. Supp. E.R. 45-46. Petitioner's complaint here thus rests on the denial of access to *classified* or other sensitive information—and he has not demonstrated any legal entitlement to access or review such information. See *Al Haramain Islamic Foundation, Inc.* v. *United States Department of Treasury*, 686 F.3d 965, 981 (9th Cir. 2012) (explaining that "all federal courts" "have rejected" the argument that due process requires access to classified materials, and collecting cases).

b. The court of appeals' decision does not implicate any conflict with decisions of other courts of appeals warranting this Court's review. Courts addressing the issue generally have concluded that individuals lack a cognizable constitutional liberty interest in a security clearance or a job requiring one. See, *e.g.*, *Stehney* v. *Perry*, 101 F.3d 925, 936 (3d Cir. 1996) ("[E]very court of appeals which has addressed the issue has ruled that a person has no constitutionally protected liberty or property interest in a security clearance or a job requiring a security clearance."); *Dorfmont* v. *Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) ("If there is no protected interest in a security clearance, there is no liberty interest in employment requiring such clearance."); see also, *e.g.*, *Mowery* v. *National Geospatial-Intelligence Agency*, 42 F.4th 428, 441 n.13 (4th Cir. 2022), cert. denied, 143 S. Ct. 783 (2023); *Williams* v. *United States*, 780 Fed. Appx. 657, 664 (10th Cir. 2019).

Citing the district-court decision in *Ranger* v. *Tenet*, 274 F. Supp. 2d 1 (D.D.C. 2003), petitioner asserts (Pet. 24) that the court of appeals here "stands in conflict with the D.C. Circuit." The D.C. Circuit has generally held that a plaintiff may establish a liberty interest in reputation in two ways: first, through "the conjunction of official defamation and adverse employment action"; and second, through the combination of an adverse employment action and "'a stigma or other disability that foreclosed [the plaintiff's] freedom to take advantage of other employment opportunities.'" *O'Donnell* v. *Barry*, 148 F.3d 1126, 1140 (1998) (citation omitted). The D.C. Circuit has applied that framework in cases involving the loss of a security clearance. See *Kartseva* v. *Department of State*, 37 F.3d 1524, 1528-1529 (1994).

But it is far from clear that the D.C. Circuit would find a cognizable liberty interest in this case under either of those paths. Petitioner does not allege any "official defamation," *O'Donnell*, 148 F.3d at 1140, foreclosing the first path. As for the second, the D.C. Circuit has explained that it requires the governmental action either to have had "the *broad* effect of largely precluding [the plaintiff] from pursuing [his] chosen career" or to "formally or automatically exclude[] [him] from work on some category of future [agency] contracts or from other government employment opportunities." *Kartseva*, 37 F.3d at 1528. That standard is "high" because it requires "showing that the government 'has seriously affected, if not destroyed, [the plaintiff's] ability to find employment in his field.'" *Taylor* v. *Resolution Trust Corp.*, 56 F.3d 1497, 1506 (D.C. Cir. 1995) (brackets and citation omitted). And the D.C. Circuit has emphasized that "[d]ischarge from a particular job is not the same as exclusion from one's

chosen profession." *Crooks* v. *Mabus*, 845 F.3d 412, 421 (2016).

Petitioner has not alleged that the adverse security threat assessment destroyed or had the effect of precluding his career as a cargo handler. As a threshold matter, petitioner reacquired an airport badge during the administrative appeals process and regained employment as a cargo handler. See Pet. App. 69a. But beyond that, in the absence of authorization to access sensitive airport areas, petitioner would remain free to work in any number of jobs that involve handling, sorting, or transporting cargo in contexts that do not require successful completion of a security threat assessment. Cf. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961) (revocation of short-order cook's permission to work on military base did not implicate liberty interest because she "remained entirely free to obtain employment as a short-order cook or to get any other job" at another facility); *Crooks*, 845 F.3d at 421 (explaining that Navy decertification precluding plaintiff from working as ROTC instructor likely would not implicate protected liberty interest because plaintiff could "find employment as a teacher at a new institution," but deciding the case on other grounds). Petitioner thus cannot show that the D.C. Circuit would reach a different result in this case, and such a fact-bound contention would in any event not warrant this Court's review.

3. a. The court of appeals correctly held (Pet. App. 13a-17a) that 42 U.S.C. 1981 does not create a cause of action against federal officials acting under color of federal law. Section 1981(a) states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

enforce contracts." 42 U.S.C. 1981(a). Subsection (c) states that "[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). Federal officials neither are "nongovernmental" nor act "under color of *State* law." *Ibid.* (emphasis added). It follows that Section 1981 does not create a cause of action against federal officials acting under color of federal law.

Petitioner's contrary position principally relies on his view that "Congress intended" the 1991 addition of Subsection (c) "to broaden the reach of the statute" to reach private actors, and so Congress could not have simultaneously "intended to narrow and foreclose claims against federal actors." Pet. 27-28. But as the court of appeals observed (Pet. App. 15a), petitioner's arguments based on congressional intent are "belied by the statutory text" of Subsection (c). See *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022) ("As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text.").

Petitioner's reliance (Pet. 28-29) on nearby Section 1982 is misplaced. That section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. 1982. Petitioner argues (Pet. 28-29) that because this Court has stated that Section 1982 applies to federal action, see *District of Columbia* v. *Carter*, 409 U.S. 418, 422 (1973), the "in every State and Territory" language that Section 1981(a) shares with Section 1982 implies that Section 1981 applies to federal action as well. But

nearby Section 1983 contains similar language ("any State or Territory"), yet indisputably does not apply to federal action. 42 U.S.C. 1983. Besides, unlike Section 1982, Section 1981 contains Subsection (c), which clarifies and limits the scope of that section in a way that plainly excludes federal action. Section 1982 contains no similar counterpart. Nor does Section 1981(a)'s reference to the creation of a "right in every State and Territory" necessarily mean that Congress created a federal *remedy* enforceable against federal officials acting under color of federal law. Cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) (explaining the difference between creation of a right and remedy).

b. As petitioner acknowledges (Pet. 26), every court of appeals to have addressed the question has held that Section 1981 does not provide a remedy against federal officials acting under color of federal law. See, *e.g.*, *Dotson* v. *Griesa*, 398 F.3d 156, 162 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006); *Davis* v. *United States Department of Justice*, 204 F.3d 723, 725-726 (7th Cir. 2000) (per curiam); *Davis-Warren Auctioneers, J.V.* v. *Federal Deposit Insurance Corp.*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Lee* v. *Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998), cert. denied, 525 U.S. 1138 (1999). That is reason enough to deny further review.

Petitioner's reliance (Pet. 27-28) on the D.C. Circuit's decision in *Xia* v. *Tillerson*, 865 F.3d 643 (2017), is misplaced. The court there had "no occasion" to—and thus did not—address the issue, and its discussion of the supposed "anomal[y]" in reading Section 1981 according to its plain text was in a passage recounting the plaintiffs' arguments in that case, not the court's own view of the matter. *Id.* at 659.

4. At all events, this case would be a poor vehicle in which to address any of the questions presented because petitioner lacked Article III standing at the time he filed suit. Article III limits the federal "judicial Power" to the adjudication of "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. An "essential and unchanging part of the case-or-controversy requirement" is Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And because "Article III jurisdiction is always an antecedent question," *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), the Court would have to address petitioner's standing before it could reach the merits of petitioner's due-process and Section 1981 claims, and the presence of the Article III question could complicate the Court's review of the Section 46110 jurisdictional question as well.

Article III standing requires a plaintiff to demonstrate an actual or imminent injury that is personal, concrete, and particularized; that is fairly traceable to the defendant's conduct; and that likely will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-561. Especially relevant here is the requirement that the injury be "*certainly* impending" or "actual or imminent," *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 409 (2013) (citations omitted), rather than "'conjectural' or 'hypothetical,'" *Defenders of Wildlife*, 504 U.S. at 560 (citation omitted). At the time petitioner filed suit in 2019, he already had reacquired an airport badge and had regained employment as a cargo handler with access to secured areas of the airport. Accordingly, he was suffering no "actual" injury at the time he filed suit. *Ibid.* (citation omitted).

Nor was petitioner facing any "*certainly* impending" or "imminent" injury. *Amnesty International*, 568 U.S. at 409 (citations omitted). As this Court has emphasized, "past wrongs do not in themselves amount to [a] real and immediate threat of injury" to support standing to seek prospective relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103, 111 (1983). Indeed, petitioner does not claim that he has lost his airport badge or employment in the nearly four years since he filed suit. For petitioner to again suffer his alleged injury from the Redress Process, he would have to be subject to another adverse security threat assessment, that assessment would have to be based on classified or other sensitive information, the agency would have to affirm any Initial Determination in a Final Determination, petitioner would have to administratively appeal that decision via the Redress Process, and petitioner would again need to be dissatisfied with any redacted summary or bifurcated hearing. That is far too "'conjectural' or 'hypothetical'" a sequence of events to support Article III standing. *Defenders of Wildlife*, 504 U.S. at 560 (citation omitted).

The court of appeals concluded that petitioner had standing because "[a]s an airline employee, [petitioner] is subject to an ongoing security assessment." Pet. App. 25a. But the relevant question is not whether petitioner still must undergo security threat assessments generally, but instead whether he would be subject to an adverse security threat assessment based on classified information and whether he would suffer the same alleged deficiencies in the administrative appeals process that he says injured him here. The court's contrary view would, if accepted, permit virtually any airline employee to bring suit to challenge TSA's redress proce-

dures even if that employee had no realistic prospect of being injured by an adverse security threat assessment or by the procedures employed in an administrative appeal. That is the sort of "boundless theory of standing" that this Court has consistently rejected. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 99 (2013).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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