No. 22-1158

IN THE

Supreme Court of the United States

LASSANA MAGASSA,

Petitioner,

v.

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, *et al.*,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Lassana Magassa lost his job for three years when the Transportation Security Administration ("TSA") revoked his airport access credential, a Security Identification Display Area ("SIDA") badge, without providing any reasons or notice. When he appealed the TSA's decision via the Security Threat Assessment ("STA") Redress Process, the TSA denied Dr. Magassa's due process rights by withholding the actual reasons the TSA decided to revoke his SIDA badge, calling them "classified."[1] Although the STA Redress Process resulted in a determination that the TSA's decision was supported by substantial evidence, the TSA inexplicably withdrew its revocation shortly after Dr. Magassa appealed for review by the TSA Final Decision Maker. Dr. Magassa did not change his behavior during this period, and he never learned why the TSA revoked his SIDA badge in the first place. Due to this unexplained contradiction, Dr. Magassa continues to experience stigma and harassment at his current airport position, still regarded by some as a security threat. Dr. Magassa cannot clear his name without knowing and being able to refute the TSA's reasons—but they remain hidden behind a "classified" label. He need not pursue his challenges to the STA Redress Process in an appellate court under 49 U.S.C. § 46110, because the STA Redress Process cannot reasonably qualify as an "order." And as he remains subject to the same STA Redress Process via his employment, Dr. Magassa possesses standing to pursue his claims. Accordingly, Petitioner

1. The TSA also made clear that it could, and did, withhold unclassified "sensitive" information as well. Pet. App. 67a.

respectfully requests this Court grant his Petition for a writ of certiorari.[2]

ARGUMENT

I. Dr. Magassa Possesses Article III Standing to Pursue His Claims

As both the district court and Ninth Circuit recognized, Dr. Magassa possesses and has always possessed Article III standing to bring his due process claims. Pet. App. 24a (Ninth Circuit opinion holding "Magassa sufficiently alleges injury via the 'invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent'"); Pet. App. 82a (district court opinion holding "Plaintiff has sufficiently alleged injury-in-fact"). As a current airline employee, Dr. Magassa remains subject to the unlawful STA Redress Process. Pet. App. 83a ("Plaintiff's continued exposure to the STA Redress Procedure means that he is reasonably threatened by repetition of the injury"). And Dr. Magassa still has no idea why the TSA revoked his SIDA badge previously, raising the risk that the TSA will again change its mind and subject Dr. Magassa to the STA Redress Process, which will again fail to provide him any meaningful opportunity to challenge the reasons for that decision. Respondents' arguments that Dr. Magassa lacks Article III standing fail under the law.

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2. As Respondents merely reiterate their prior arguments regarding Dr. Magassa's claims of reputational damage under the stigma-plus theory and his 42 U.S.C. § 1981 claim against Agent Truong with no new arguments or authority requiring rebuttal, Dr. Magassa refrains from also reiterating his arguments on those points and relies on his Petition.

Respondents argue Dr. Magassa suffered no actual injury because he regained his SIDA badge and airport employment at the time he filed his Complaint. Resp. 24. Respondents ignore the intervening three years during which Dr. Magassa could not work in his chosen profession at the airport, due to the TSA's revocation of his SIDA badge, and his claim for related damages. Respondents ignore Dr. Magassa's experience during the STA Redress Process, where he received no opportunity to learn of or respond to the TSA's charges against him for three years, only for the TSA to inexplicably reverse course when he appealed the administrative court's final decision. And Respondents ignore Dr. Magassa's allegations that TSA and airport security continued to harass him after his return to airport work, due to the TSA's prior determination that he posed a threat. *See* Pet. App. 25a (holding by Ninth Circuit that Dr. Magassa had Article III standing because he "is subject to an ongoing security assessment" and "continues to experience security problems even after regaining his badge"). Contrary to Respondents' claims, Dr. Magassa suffered an actual injury sufficient to satisfy Article III standing at the time he filed his Complaint.

Respondents next assert Dr. Magassa does not face a sufficiently impending or imminent injury to support standing. Respondents argue that the relevant question for Dr. Magassa's standing is "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." Resp. 25. Respondents consider Dr. Magassa's experience with the STA Redress Process "far too 'conjectural' or 'hypothetical' a sequence of

events" to again cause Dr. Magassa injury in the future. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 500 (1992)). Yet due to the bifurcated procedures allowed by the STA Redress Process and its deference to the TSA on what, and whether, to share information with individuals, Dr. Magassa remains unaware of why he lost his SIDA badge, and without assurance that he will not suffer again under the STA Redress Process that still applies to him. Dr. Magassa has not changed his behavior, nor could he: he does not know what "classified" behavior triggered the TSA's determination that he could not possess a SIDA badge. Dr. Magassa may again lose his SIDA badge for whatever purportedly "classified" reasons the TSA refuses to provide, but which it also ultimately determined do not render him a threat—for now, anyway. Contrary to Respondents' argument, the Ninth Circuit's determination that Dr. Magassa possesses standing to challenge the STA Redress Process as a current airline employee subject to an ongoing security assessment process does not "permit virtually any airline employee to bring suit . . . even if that employee had no realistic prospect of being injured." Resp. 25–26. Respondents fail to identify any objective reason Dr. Magassa's risk of future injury is "no[t] realistic." Dr. Magassa possesses standing, as recognized by both lower courts, and Respondents' arguments lack merit.

II. The STA Redress Process Is Not an Order under Any Reasonable Definition

Respondents argue that even if the STA Redress Process constitutes a "rule" under the APA, Section 46110 still applies to the STA Redress Process because older definitions of "order" in use at the time of Section 46110's enactment include the term "rule." Resp. 12.

The STA Redress Process, which meets the definition of a "rule" under the APA, establishes the procedure for redressing agency determinations, yet is neither a factual determination itself nor an order under any reasonable definition of the word. Respondents' own case citations illustrate this distinction.

The STA Redress Process details the procedure for the sole administrative remedy available to SIDA badge recipients to challenge the TSA's revocation of their SIDA badges. *See* D. Ct. Doc. 18-2, at 22 ("Following is the procedure for Transportation Security Administration (TSA) security threat assessments that are conducted on individuals who hold an airport-approved and/or airport-issued personnel identification media."). The STA Redress Process sets out what an applicant for a SIDA badge "may" do, not "must" do, to appeal. *Id.* at 27 ("An applicant who does not meet the eligibility requirements . . . may appeal an Initial Determination of Threat Assessment with TSA."); *id.* at 32 ("No later than 30 days from the date of service of the [Final Determination of Threat Assessment] after an appeal, the applicant may request a review."). The STA Redress Process sets each party's filing requirements and deadlines for briefs, responses, and replies. And the STA Redress Process also clarifies that the TSA "will not disclose to the applicant, or the applicant's counsel, classified information." *Id.* at 34.

Notably, the STA Redress Process does not set out rules or regulations that Dr. Magassa must follow to obtain a specific result, such as a favorable security threat assessment or SIDA badge. Instead, it merely explains the procedure for challenging the TSA's security threat assessment, and therefore meets the APA's definition of a "rule." 5 U.S.C. § 551(4) (defining "rule" as an agency

statement "describing the organization, procedure, or practice requirements of an agency"). The APA's definition of "rule" distinguishes between agency statements describing procedural requirements and those "designed to implement, interpret, or prescribe law or policy." *Id.* While the latter definition may sometimes encompass a broader definition of an "order," the STA Redress Process does not. The STA Redress Process itself contains an acknowledgment that Section 46110 only applies to final orders reflecting a factual determination by the TSA Final Decision Maker as to whether the applicant poses a security threat, and does not apply to the entire STA Redress Process itself. D. Ct. Doc. 18-2, p. 38 ("Judicial Review of a Final Order of Threat Assessment. A person may seek judicial review of a final order of the TSA Final Decision Maker as provided in 49 U.S.C. 46110.").

Respondents first cite dictionary definitions of "order" from the early 1930's as support that even if the STA Redress Process constitutes a "rule," it is a rule that also meets the definition of "order." Resp. 12. Even if appropriate to consider, the cited definitions contradict Respondents' arguments. In 1933, both *Black's Law Dictionary* and the *Oxford English Dictionary* included the following words in their definitions of "order" alongside "rule": "mandate, precept; a command or direction authoritatively given," "direction, mandate." *Id.* The STA Redress Process does not "mandate," "command," or "direct" any results; it merely sets out the procedural steps involved in appealing an adverse TSA decision. Dr. Magassa does not challenge the deadlines and sequential procedural steps established by the STA Redress Process. Instead, Dr. Magassa challenges the denial of due process inherent in the STA Redress Process via its nondisclosure provision. There are no substantive orders at issue in this case.

Respondents cite this Court's *Columbia Broadcasting System, Inc. v. United States* ("*CBS*") decision to illustrate that a rule may also comprise an order covered by a jurisdiction-stripping statute similar to Section 46110. 316 U.S. 407 (1942). The *CBS* case addressed Federal Communications Commission ("FCC") regulations requiring the FCC to refuse to grant licenses to broadcasting stations that enter into certain defined types of contracts with any broadcasting network organization. *Id.* at 408. This Court recognized that these FCC regulations "prescribe rules which govern the contractual relationships between the stations and the networks" to the extent that "failure to comply with them penalizes licensees, and [the broadcasting network], with whom they contract." *Id.* at 417. Because those regulations "alter the status of appellant's contracts and thus determine their validity" and also "impose a penalty and sanction for noncompliance," this Court determined the FCC regulations also qualified as orders subject to appellate review under a jurisdiction-stripping statute. *Id.* at 418–19 ("When, as here, [the regulations] are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act.").

This Court distinguished the FCC's regulations in *CBS* from any "so-called order" previously ruled not judicially reviewable under the Urgent Deficiencies Act. *Id.* at 420. In *United States v. Los Angeles & S. L. R. Co.*, this Court found the order at issue did not constitute a proper order under the Act, because:

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing status or condition; which does not determine any right or obligation.

273 U.S. 299, 309–10 (1927). The STA Redress Process constitutes the same type of "so-called order," and therefore falls outside the automatic appellate review required under Section 46110.

Subsequent appellate court decisions interpreting Section 46110 follow this Court's *CBS* and *Los Angeles* reasoning, and apply Section 46110 only to orders that mandate actions by or deny a right to those alleging injury. *See Nat'l Fed. of the Blind v. United States Dep't of Transp.*, 827 F.3d 51, 53, 55 (D.C. Cir. 2016) (Section 46110 applies to rule requiring air carriers to purchase ticket kiosks accessible to blind persons); *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993) (Section 46110 applies to FAA order revoking a certificate of authority); *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (Section 46110 applies to TSA Security Directive that requires airline passengers to present identification and airline operators to enforce the identification policy); *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 628 (7th Cir. 2007) (Section 46110 applies to the FAA's approval of Chicago's O'Hare International Airport layout plan); *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010) (Section 46110 applies to FAA's decision not to renew

plaintiff's areas of authority, because the notifications "clearly deny a right and fix a legal relationship between Ligon and the FAA"); *Blitz v. Napolitano*, 700 F.3d 733, 735–36 (4th Cir. 2012) (Section 46110 applies to Checkpoint Screening Standard Operating Procedures that "set forth mandatory procedures that . . . passengers must follow" to enter the airport); *Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 224 (1st Cir. 2000) (Section 46110 applies to an FAA "notice of enforcement policy" setting forth its interpretation of flight time limitations and rest requirements for crewmembers). The STA Redress Process Dr. Magassa challenges here does not mandate action by him, nor does it deny or alter a right or status originally possessed by Dr. Magassa. It also does not mandate that the TSA cannot notify Dr. Magassa of the basis for its charges against him. The same reasoning applied by most circuit courts, even those cited by Respondents, would therefore not categorize the STA Redress Process as an order.

Most circuits that hold administrative procedures *do* constitute an order, and therefore warrant application of Section 46110, cite the existence and availability of substantive administrative records to aid appellate review. *Nat'l Fed. of the Blind*, 827 F.3d at 55 (holding "a statutory review provision creating a right of direct judicial review in the court of appeals of an administrative 'order' authorizes such review of any agency action that is otherwise susceptible of review on the basis of the administrative record alone"); *Gilmore*, 435 F.3d at 1133 ("The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section 46110") (internal citation omitted); *Ligon*, 614 F.3d at 154 (holding that for an order to be reviewable under Section 46110, "the order must be

final, and there must be an adequate record for judicial review"); *Blitz*, 700 F.3d at 739 (holding the Checkpoint Screening SOP "capable of review on the basis of an administrative record" because the defendants produced an "extensive" administrative record in a similar case and would submit it to the appropriate court of appeals). And that makes sense, because the administrative records in those cases contained meaningful debate on the issues those plaintiffs challenged.

But the STA Redress Process did not lead to the creation of an administrative record sufficient to aid appellate review here. The record, split into two parts—the unclassified portion of the record relating solely to Dr. Magassa's eligibility for a SIDA badge, and the classified portion (withheld from Dr. Magassa and his counsel) presumably containing a one-sided presentation of the reasons the TSA's revoked his SIDA badge—by definition cannot contain any meaningful debate on the constitutionality[3] of the STA Redress Process and its deference to the TSA, the basis of Dr. Magassa's claims here. Section 46110 does not require Dr. Magassa to file his claims in this lawsuit in the appellate courts, because the STA Redress Process cannot reasonably constitute an order and the administrative record here lacks critical information required for appellate review.

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3. The Administrative Law Judge ("ALJ") in this case recognized the STA's limitations and that ALJs may not decide Constitutional arguments, citing to 49 C.F.R. § 1503.607(b)(v) (prohibiting ALJ's from deciding "issues involving the validity of a TSA regulation, order, or other requirement under the U.S. Constitution, the Administrative Procedures Act, or other law" in hearings regarding civil penalties). No record exists to review, therefore, on the constitutionality of the STA Redress Process and Dr. Magassa's due process claims. *See, e.g.,* Pet. App. 35a–36a.

CONCLUSION

Dr. Magassa suffered the loss of employment in his chosen career and damage to his reputation when the TSA revoked his SIDA badge, then further suffered from the denial of his constitutionally guaranteed due process rights under the STA Redress Process. As both the district court and the Ninth Circuit recognized, Dr. Magassa possesses standing to challenge the STA Redress process. And Section 46110 does not apply to agency procedures like the STA Redress Process, because of both the lack of a factual determination or any other "command" or "mandate," and the lack of a relevant and developed administrative record that could make appellate review meaningful. The district court erred in granting dismissal, and the Circuit court erred in finding the STA Process constituted a substantive final decision subject to 49 U.S.C. § 46110. Petitioner Lassana Magassa therefore respectfully requests this Court grant his Petition for a writ of certiorari on all claims addressed in his Petition.

Respectfully Submitted,

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