

SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN IBRAHIM v. DHS ET AL., 3:06-CV-00545-WHA (N.D. CAL.)  
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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 RAHINAH IBRAHIM,

17 Plaintiff,

18 v.

19 DEPARTMENT OF HOMELAND  
20 SECURITY, *et al.*,

21 Defendants.  
22

No. 3:06-cv-0545 (WHA)

**EXHIBIT B:**  
**DEFENDANTS' RESPONSE TO**  
**PLAINTIFF'S POST-TRIAL**  
**PROPOSED FINDINGS OF FACT AND**  
**CONCLUSIONS OF LAW**

**[REDACTED]**

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DEFENDANTS' RESPONSE TO PLAINTIFF'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
*Ibrahim v. DHS, et al.*, 3:06-cv-00545 (WHA)

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1 Pursuant to the Court's December 6, 2013 Order (Dkt. 652), Defendants respectfully  
2 submit the following response to Plaintiff's proposed findings of fact and conclusions of law.  
3 For any finding or conclusion where Defendants respond that further response would require  
4 reference to classified information which has been excluded by the Court's April 19, 2013 Order  
5 Regarding Classified Information, Defendants will further respond, as appropriate, in the  
6 accompanying *ex parte, in camera* submission.

### 7 FINDINGS OF FACT

8 1. Dr. Ibrahim first traveled to the United States in 1983. [Dep. of R. Ibrahim at  
9 11:25-13:18.] While studying in the United States, Dr. Ibrahim met her husband, Mustafa Kamal  
10 Mohammed Zaini, and married him in 1986, in Seattle, Washington. [Dep. of R. Ibrahim at  
11 10:6-9, 13:12-14:2, 66:19-67:2.] **Defs.' Response:** Agree.

12 2. In 1987, Dr. Ibrahim graduated from the University of Washington and had her  
13 first child, Raihan Mustafa Kamal, in Seattle. [Dep. of R. Ibrahim at 14:3-5, 15:3-11.] **Defs.'**  
14 **Response:** Agree.

15 3. In 1990, Dr. Ibrahim obtained a Master's Degree in architecture, and then  
16 returned to Malaysia with her family. [Dep. of R. Ibrahim at 14:21-15:2, 15:12-17.] **Defs.'**  
17 **Response:** Agree.

18 4. Dr. Ibrahim became one of the founding members of the architecture department  
19 at the Universiti Putra, Malaysia ("UPM"), and the department's first female lecturer. [Dep. of  
20 R. Ibrahim at 16:2-15.] **Defs.' Response:** Agree.

21 5. She is currently Dean of the Faculty of Design and Architecture, and also a  
22 Professor of Architecture, at UPM. [Dep. of R. Ibrahim at 11:16-18.] **Defs.' Response:** Agree.

23 6. Starting in 2000, Dr. Ibrahim obtained an engineering degree and a Ph.D. in  
24 Construction Engineering and Management from Stanford. [Dep. of R. Ibrahim at 27:2-14; Exh.  
25 28, pp. 1-2.] **Defs.' Response:** Agree.

26 7. While at Stanford, Dr. Ibrahim was involved with the Islamic Society of Stanford  
27 University (ISSU), and volunteered with Spiritual Care Services at Stanford Hospital. [Dep. of  
28 R. Ibrahim at 22:1-5, 22:13-24:18, 25:12-14.] **Defs.' Response:** Agree.

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1 8. Dr. Ibrahim also went with her family to pray at the MCA in Santa Clara, a  
2 Muslim place of worship. [Dep. of R. Ibrahim at 72:1-3, 72:5-21.] **Defs.’ Response:** Agree.

3 **Government Watchlisting Grows in the Wake of September 11, 2001**<sup>1</sup>

4 9. In 2003, the executive branch issued Homeland Security Presidential Directive-6  
5 and its implementing MOU. [Kahn at RT 389:17-390:2; Exhs. 538, 541.] **Defs.’ Response:**  
6 Agree.

7 10. The Terrorist Screening Center (TSC) was charged with administering the TSDB,  
8 a sensitive, but unclassified consolidated terrorist screening database. [Lubman at RT 559:17-  
9 560:9; Exh. 101, p. TSC000400-401.] **Defs.’ Response:** Agree but note that biographic  
10 information from the classified TIDE database that is included in the TSDB is deemed  
11 “Unclassified For Official Use Only” so that it can be included in the TSDB. The information  
12 remains classified for all other purposes. [Lubman at 568:16-21; 570:17-19.]

13 11. A Department of State (DOS) terrorist watchlist known as TIPOFF grew to  
14 become the source of the records contained within the TIDE database currently operated by the  
15 National Counterterrorism Center (NCTC). [Exh. 666, pp. P003648, P003644-3650; Exh. 101,  
16 p. TSC000426.] **Defs.’ Response:** Agree.

17 12. TIDE records are the source of the records contained in the consolidated Terrorist  
18 Screening Database (TSDB). [Exh. 508, p. TSC000010; Kahn at RT 390:11-391:7.] **Defs.’**  
19 **Response:** Agree.

20 13. Department of Homeland Security (DHS) officials have expressed concern about  
21 the quality of the data found in TIDE. [Exh. 638, pp. P001117-1118 & n.156.] **Defs.’**  
22 **Response:** Disagree because this mischaracterizes the statements of DHS employees cited in TX  
23 638. The statements cited by Plaintiff (*e.g.*, “Not everything in TIDE is KST [about a known or  
24 suspected terrorist]” and “intelligence officials had routinely put information on ‘associates’ of  
25 known or suspected terrorists into TIDE”) do not express concern about the quality of data found  
26 in TIDE.

27 \_\_\_\_\_  
28 <sup>1</sup> The headers to the sections of Plaintiff’s briefs are not proffered facts, and therefore do not  
require a response; nevertheless, Defendants object to the characterizations contained therein.

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1           14.     The TSDB exports information on watchlisted individuals to a variety of  
2 downstream “customers” or “clients,” including but not limited to, the following: **Defs.’**

3 **Response:** Agree that some TSDB information is currently exported to certain government  
4 agencies and databases.

5           a.     the No-Fly and Selectee Lists used by Transportation Security Administration  
6 (TSA); [Exh. 6, p. TSC001665; Exhs. 9, 57, 61, 62, 64 & 209-215.] **Defs.’ Response:** Agree  
7 that subsets of TSDB information make up the No Fly and Selectee lists. [TX 250 at  
8 TSC001043, 1047]

9           b.     the Known and Suspected Terrorist File (KSTF) (previously known as the Violent  
10 Gang and Terrorist Organizations File (VGTOF) [Dep. of D. Lubman (FBI) at 82:2-4, 82:6-  
11 8], used by the Federal Bureau of Investigation (FBI); [Exh. 6, p. TSC001665; Exhs. 9, 57,  
12 61, 64 & 209-215.] **Defs.’ Response:** Agree that some TSDB information is exported to the  
13 KSTF database.

14           c.     the Consular Lookout and Support System (CLASS) database used by the DOS;  
15 [Exh. 6, p. TSC001665; Exhs. 9, 57, 61, 64, 77, 78 & 209-215.] **Defs.’ Response:** Agree that  
16 some TSDB information is exported to the State Department for upload to its Consular  
17 Lookout and Support System (“CLASS”).

18           d.     the TECS database used by the DHS; [Exh. 6, p. TSC001665; Exhs. 9, 57, 61, 64,  
19 77, 78 & 209-215, Dep. of D. Lubman (FBI) at 177:18-20.] **Defs.’ Response:** Agree that  
20 some TSDB information is exported to TECS.

21           e.     The TUSCAN database used by Canada; and [Dep. of D. Lubman (FBI) at  
22 172:15-17; Exh. 6, p. TSC001665; Exhs. 9, 57, 61, 64 & 209-215.] **Defs.’ Response:** Agree  
23 that some TSDB information is exported to TUSCAN.

24           f.     The TACTICS database used by Australia. [Dep. of D. Lubman (FBI) at 172:15-  
25 17; Exh. 6, p. TSC001665; Exhs. 9, 57, 61, 64 & 209-215.] **Defs.’ Response:** Agree that  
26 some TSDB information is exported to TACTICS.

27           15.     In 2004, and in the present day, it is standard that individuals in TSDB are  
28 exported to CLASS visa or CLASS passport databases. [Dep. of D. Lubman (FBI) at 176:24-25,

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1 177:15-20, 179:7-10, 220:25-221:1, 221:4-5.] **Defs.’ Response:** Agree, but clarify that (1) only  
2 individuals with requisite identifiers in TSDB are sent to State for inclusion in CLASS Visa or  
3 CLASS Passport [Ex. 1034 p. 8]; and (2) the information is sent to State for State to upload to  
4 CLASS. [Cooper at 635:15-19]

5 16. Defendants do not maintain information regarding the religion of individuals  
6 placed in the TSDB. [Lubman at RT 320:1-321:6.] **Defs.’ Response:** Agree that the TSDB does  
7 not contain a field to indicate an individual’s religion. [Lubman at 339:19-22; TX 1033]



8 17. After September 11, 2001, some female Muslim students at Stanford asked  
9 security officers to escort them home from class to their dormitories, or took off their hijab  
10 because they were afraid to be seen with it on. [Dep. of R. Ibrahim at 209:2-15.] **Defs.’**  
11 **Response:** Agree that Plaintiff testified that, after September 11, 2001, some of her female  
12 friends asked Stanford security officers to bring them home from their classes, and that she  
13 testified that she had friends who took off their hijab. Because nothing in the cited materials  
14 suggests that Plaintiff changed her behavior, the fact has no relevance.

15 18. Some male Muslim students at Stanford shaved their beards to better fit in. [Dep.  
16 of R. Ibrahim at 209:2-15.] **Defs.’ Response:** Agree that Plaintiff testified that after 9/11 some  
17 male Muslim students shaved their beards to better fit in. Because nothing in the cited materials  
18 suggests that Plaintiff changed her behavior, the fact has no relevance.

19 The Effect of the Government’s Policies on Dr. Ibrahim – **REDACTED**

20 19. Dr. Ibrahim has no affiliation with any terrorist organizations, has never  
21 supported terrorist activities, and is not a known or reasonably suspected terrorist. [Dep. of R.  
22 Ibrahim at 52:20-25, 201:23-202:3; Lubman at RT 304:1-22, 312:6-313:18.] **Defs.’ Response:**  
23 Any response would require Defendants to rely upon classified information that has been  
24 excluded by the Court’s April 19, 2013 Order on the state secrets privilege.

25 20. The FBI admits that Dr. Ibrahim ,

26   
27   
28 [Dep. of D. Lubman (FBI) at 52:10-53:9, 53:17-54:8.] **Defs.’ Response:** Agree.

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1           21.     Kelley's JTTF squad conducted a mosque outreach program that included the  
2 MCA in Santa Clara, California. [Kelley at RT 363:9-364:11; Exhs. 84-90 & 657-665.] **Defs.'**

3 **Response:** Agree.

4           22.     One purpose of the mosque outreach program was to provide a point of contact  
5 for the mosques as a potential source of intelligence. [Kelley at RT 364:16-24.] **Defs.'**

6 **Response:** Agree with the clarification that the program was intended to provide a point of  
7 contact for mosques and Islamic associations should they need the assistance of the FBI. [Kelley  
8 at 379:11-380:2]

9           23.     In the 2004 timeframe, the only other religious group members for which the FBI  
10 conducted outreach were Sikhs in the South Bay. [Kelley at RT 381:15-20.] **Defs.' Response:**  
11 Agree to the extent that Agent Kelley testified that he did not remember whether his group at the  
12 FBI did outreach to religious groups other than Muslims and Sikhs in 2004.

13           24.     In the 2001-2004 timeframe, there are numerous examples of surveillance and  
14 investigations targeted at Muslim individuals and communities. [Sinnar at RT 525:18-527:1,  
15 529:25-530:24; Exhs. 84-90, 657-665; Exh. 536.] **Defs.' Response:** Agree that Prof. Sinnar  
16 testified that it is her opinion that there are numerous examples of surveillance and investigations  
17 of Muslim individuals and communities, but aver that (1) Prof. Sinnar's testimony is not  
18 evidence and is based primarily on hearsay statements of unnamed "Muslims in various parts of  
19 the country" and that (2) the cited documents do not support this finding. Exhibits 84-90 and  
20 657-665 are documents dated in 2005-2008, outside the period relevant to this proposed finding.  
21 Also, these are documents related to the mosque outreach initiative that is designed to provide an  
22 FBI point of contact for the mosques. And many of the documents referenced in TX 526 report  
23 interviews with individuals whose religion is not even identified in the documents. [Kelley at  
24 379:11-380:2]

25           25.     In late October, 2004, Dr. Ibrahim's husband came to visit her while she  
26 recovered from surgery. [Dep. of R. Ibrahim at 71:6-11.] **Defs.' Response:** Agree as to the  
27 events, but disagree that the cited testimony establishes the date that Plaintiff's husband visited  
28 her.

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1           26.     On or about November 17, 2004, FBI Special Agent Kevin Kelley nominated Dr.  
2 Ibrahim to the [REDACTED], using the FBI's  
3 FD-930 form. [Kelley at RT 364:25-365:20; Exh. 8, p. NCTC000070.] **Defs.' Response:**  
4 Agree.

5           27.     The FD-930 form also nominated Dr. Ibrahim to the TSA's No-Fly List and [REDACTED]  
6 [REDACTED] [Dep. of D. Lubman (FBI) at 173:14-18; Kelley at RT  
7 375:20-23; Exh. 8, p. NCTC000071], a watchlisting system that resided in [REDACTED].  
8 [Exh. 101, p. TSC000427; Exh. 228.] **Defs.' Response:** Agree, with the clarification that  
9 Plaintiff's characterization of the No-Fly List as "TSA's," is not completely accurate; TSC  
10 maintains the No-Fly List. TSC 1034 at 8.

11           28.     Kelley claims the nomination to the No-Fly List resulted from a misreading of the  
12 FD-930 form. [Kelley at RT 366:24-367:4, 367:16-368:22.] **Defs.' Response:** Agree but aver  
13 that Agent Kelley's nomination of Plaintiff [REDACTED] was not in error and did not result from  
14 misreading a form. Agent Kelley intended to nominate Plaintiff to [REDACTED]  
15 [REDACTED] databases. [Kelley at 367:17-21.]

16           29.     Kelley did not learn of his mistake until the day before his deposition on  
17 September 12, 2013. [Kelley at RT 375:20-376:1, 377:8-13.] **Defs.' Response:** Agree but aver  
18 that despite the mistake, Plaintiff was removed from the No Fly List [REDACTED]  
19 [REDACTED]. [Interrogatory Response at  
20 298:1-8; Kelley at 367:17-21.]

21           30.     Kelley intended to nominate Dr. Ibrahim [REDACTED], believing the  
22 reasonable suspicion standard applied to such nominations. [Kelley at RT 367:16-25, 369:3-6.]  
23 **Defs.' Response:** Agree that Agent Kelley intended to nominate Plaintiff [REDACTED]  
24 [REDACTED], and that in 2004 he believed that he could [REDACTED] if  
25 that person met the reasonable suspicion standard.

26           31.     The reasonable suspicion standard for the TSDB is low – one level above a  
27 hunch. [Kahn at RT 392:12-393:16.] The low standard can facilitate the use of criteria such as  
28 race, religion or national origin in watchlisting decisions. [Sinnar at RT 523:8-525:17.] **Defs.' Response:**

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1 **Response:** Disagree with Prof. Kahn's characterization of the "reasonable suspicion" standard  
2 which is not based upon any actual experience or knowledge of how the "reasonable suspicion"  
3 standard is employed. The reasonable suspicion standard does not—and indeed cannot—  
4 facilitate the use of the cited criteria for considerations that would violate the Constitution.  
5 HSPD-6, the foundational document for the watchlisting process, specifically directs that the  
6 government's terrorist watchlist process shall be done in a manner that is consistent with the  
7 Constitution. And the Memorandum of Understanding (MOU) establishing the TSC specifically  
8 directs that its operations must likewise be conducted consistent with the demands of the  
9 Constitution, as does the MOU establishing the redress procedure for the TSDB. [TX 538; 541;  
10 537; *see also* Lubman at 339:19-22, 564:17-565:8, 611:19-23; Kelley at 380:16-22]. Moreover,  
11 Prof. Sinnar's speculative testimony about how the standard "can facilitate the use of" these  
12 criteria should be given no weight in light of her subsequent testimony that she is not aware of  
13 any instance in which race, ethnicity, national origin, or nationality factored into a watchlisting  
14 decision. [Sinnar at 535:6-11].

15 32. Supervisory Special Agent Debra Lubman could not confirm that associating with  
16 other people already listed in the TSDB would never meet the reasonable suspicion standard.  
17 [Lubman at RT 309:10-311:18.] **Defs.' Response:** Agree that SSA Lubman testified that "if the  
18 only information you had was that someone quote was associated, probably [it would] not be  
19 enough to . . . meet the Reasonable Suspicion standard. But again, the question would be: What  
20 is it associated with? You would want to know what those facts are that lead to the conclusion of  
21 association." [Lubman 311:12-18]

22 33. Kelley's assignment to a South Bay Joint Terrorism Task Force (JTTF), which  
23 included representatives of Immigration and Customs Enforcement (ICE), was his first  
24 assignment out of the academy at Quantico. [Kelley at RT 354:17-355:5, 362:10-21; *see also*  
25 Exh. 512, pp. P001649, P001651.] **Defs.' Response:** Agree but note that Exh. 512 does not  
26 mention Agent Kelley.

27 34. Prior to his deposition on September 12, 2013, Kelley had never heard the term  
28 "Consolidated Terrorist Screening Database." [Kelley at RT 362:1-4.] **Defs.' Response:** Agree.



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1 35. Prior to nominating Dr. Ibrahim to the No Fly List and other associated terrorist  
2 databases, Kelley learned about watchlisting from one-page fold-out pamphlet. [Kelley at RT  
3 355:21-357:25, 359:21-23.] **Defs.' Response:** Disagree; Agent Kelley testified that he learned  
4 watchlisting procedures from electronic communications and other documents, in addition to the  
5 referenced pamphlet. [Kelley at 355:21-356:3; 357:21-25.]

6 36. At trial, Kelley also claimed to have read "EC's" on watchlisting, although he  
7 corrected only spelling and an agency when given the opportunity to correct his deposition  
8 testimony. [Kelley at RT 355:6-357:25, 359:21-23.] **Defs.' Response:** Agree that Agent Kelley  
9 testified to having read electronic communications, or "ECs" on watchlisting, and aver that  
10 Agent Kelley also testified about having learned watchlisting procedures from other documents,  
11 in addition to the pamphlets and ECs. Defendants disagree with the implication that Agent  
12 Kelley's deposition testimony needed to be corrected. [Kelley at 357:21-25, 359:24-360:2]

13 37. Other than the pamphlet and an approximately half-hour online course in 2006,  
14 Kelley had no formal watchlisting training. [Kelley at RT 358:20-359:20, 359:24-361:25.]  
15 **Defs.' Response:** Disagree because Agent Kelley testified that he also learned about watchlisting  
16 procedures from electronic communications and other documents. Also, Agent Kelley testified  
17 that he does not believe that his nomination of Plaintiff to the No Fly List was a result of  
18 improper training. [Kelley at 357:21-24, 359:24-360:2, 378:9-10]

19 38. Certain FBI training materials contained stereotypical reflections and statements  
20 about Islam and Muslims, and some materials were removed. [Sinnar at RT 527:2-22; Exh. 93,  
21 pp. P003570, P003579; Exh. 95; Exhs. 96-99 & 676 (limited purpose).] **Defs.' Response:** Agree  
22 that certain materials designed for FBI trainings contained characterizations of Islam that did not  
23 reflect the views of the FBI and are not consistent with the overall instruction provided to FBI  
24 personnel, and were discontinued. [TX 95] Nothing in the record establishes the relevance of  
25 any of these training materials to this case or to any individual who interacted with Plaintiff.

26 39. On the November 17, 2004 FD-930 form, Kelley designated Dr. Ibrahim as  
27 "handling code 3." [Kelley at RT 365:25-366:23; Exh. 8, p. NCTC000071.] **Defs.' Response:**  
28 Agree.

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1           40.     The majority of individuals in the TSDB are assigned the lowest handling codes –  
2 codes 3 and 4 – and the government admits that it targets individuals that may not pose a direct  
3 threat. [Exh. 101, pp. TSC000404-406 & n.10, TSC000449-450; Exh. 102, p. TSC000126; see  
4 also Exh. 506, pp. P001838-1840.] **Defs.’ Response:** Agree that, as of the dates of the cited  
5 exhibits, the majority of individuals in the TSDB were assigned handling codes 3 or 4. Disagree  
6 with the second part of the sentence because the referenced record cites do not support this  
7 finding. While Ex. 101 describes the “benefits of watchlisting individuals who pose a *lower*  
8 threat,” none of the cited exhibits contain admissions about targeting individuals who may not  
9 pose *any* direct threat.

10           41.     Defendants state that the advantages of Handling Code 3 include allowing law  
11 enforcement officers to ask the individual probing but non-alerting questions, and searching the  
12 individual’s passport [redacted] [Exh. 8, p. NCTC000071.] **Defs.’ Response:** Agree.

13           42.     Kelley typed in the letters “CD” on the FD-930 form where it says “Entry Criteria  
14 Code.” [Kelley at RT 365:21-24, Exh. 8, p. NCTC000070.] **Defs.’ Response:** Agree.

15           43.     The letter “C” signifies: “Corroborated identification as a group member by an  
16 informant or individual of unknown reliability.” [Exh. 58, p. P004123.] **Defs.’ Response:**  
17 Agree that the cited exhibit provides this description for entry field code “C.”

18           44.     The letter “D” signifies: “Frequents a documented group’s area, associates with  
19 known group members, and/or affects group dress, hand signals, tattoos, or symbols.” [Exh. 58,  
20 p. P004123.] **Defs.’ Response:** Agree that the cited exhibit provides this description for entry  
21 field code “D.”

22           45.     Kelley never had a nomination rejected and never heard of anyone else having  
23 one rejected. [Kelley at RT 362:5-9.] **Defs.’ Response:** Agree that Agent Kelley testified that  
24 until his deposition on September 12, 2013 he had never had a watchlist nomination rejected and  
25 that in answer to the question “you had also never heard of anyone else having a watchlist  
26 nomination rejected?” he answered “no.”

27           46.     Even records that have gone through review by the TSC have been found to  
28 contain errors, and auditors have identified numerous errors and inconsistencies in TSDB records

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1 since the TSC was created in 2003. [Exh. 101, pp. TSC000409-410, TSC000469-475; Exh. 102,  
 2 pp. TSC000096-97, TSC000100, TSC000105-107, TSC000109-112, TSC000157-158,  
 3 TSC000170-171 & n.64; Exh. 508, pp. TSC000003, TSC0000010, TSC0000012-13.] **Defs.'**  
 4 **Response:** Agree that as of the dates of the cited reports (June 2005, September 2007, and March  
 5 2008) auditors had identified errors in records in the TSDB (and its predecessor database), but  
 6 aver that the quality assurance processes have improved since those reports were issued. [TX 101  
 7 at TSC000516-517; TX 102 at TSC000188; TX 508 at TSC000028]

8 **The Effect of the Government's Policies on Dr. Ibrahim – Interviewed by FBI**

9 47. Kelley and Special Agent Amy Richardson interviewed Dr. Ibrahim at her home  
 10 on December 23, 2004. [Kelley at RT 369:7-11; Exhs. 4, 71 & 116.] Before being assigned to  
 11 the JTTF, Richardson had no counterterrorism experience. [Kelley at RT 369:12-370:7.] **Defs.'**

12 **Response:** Agree.

13 48. At that time, Dr. Ibrahim's student visa was valid until January 11, 2007. [Dep.  
 14 of R. Ibrahim at 213:1-214:3, 214:19-215:4.] **Defs.' Response:** Disagree that Plaintiff's visa  
 15 was valid until January 11, 2007. Department of State ("State") records indicate that Plaintiff's  
 16 F1 visa was intended to expire on September 18, 2005. [Cooper at 636:9-13; TX 207]

17 49. Kelley claimed not to know why "INS" had asked him to speak to Dr. Ibrahim,  
 18 but volunteered that possibly it was because she was from Malaysia, and Malaysia is blacklisted  
 19 by the government. [Dep. of R. Ibrahim at 45:2-3, 45:6, 45:10, 45:12-13, 45:22-24, 46:1, 51:16-  
 20 17, 51:19, 51:21-23, 51:25, 80:1-2, 80:4, 80:6-7, 80:9.] **Defs.' Response:** Disagree because  
 21 Agent Kelley testified that he did not tell Plaintiff that Malaysia was blacklisted. Any further  
 22 response regarding why Agent Kelley visited Plaintiff would require Defendants to rely upon  
 23 classified information that has been excluded by the Court's April 19, 2013 Order on the state  
 24 secrets privilege. [Kelley at 378:21-379:1, 379:5-10]

25 50. Agent Kelley asked Dr. Ibrahim about Jemaah Islamiyah, a terrorist organization  
 26 that she only knew about from publicly available news sources. [Dep. of R. Ibrahim at 52:10-11,  
 27 52:13, 52:15-16, 52:18; RT at 549:1-550:7 & Exh. 13, p. 1.] **Defs.' Response:** Agree that  
 28 Plaintiff testified that Agent Kelley asked her about Jemaah Islamiyah, a terrorist organization,

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1 and that she told him that she only knew about the organization from reading newspapers. Any  
 2 further response regarding what Agent Kelley asked Plaintiff and why would require Defendants  
 3 to rely upon classified information that has been excluded by the Court's April 19, 2013 Order  
 4 on the state secrets privilege. [TX 4.]

5 51. Agent Kelley also asked about Dr. Ibrahim's upcoming travel plans to a  
 6 conference in Hawaii, her upcoming travel plans to Malaysia, her thesis work, her plans after  
 7 graduation, her future travel plans, her husband, her husband's travel, and her involvement with  
 8 the Muslim community in the Bay Area. [Dep. of R. Ibrahim at 49:8-10, 49:12, 49:20-22, 50:1-  
 9 11, 50:16-23, 50:25, 51:2-3, 51:5, 54:14-15, 54:17, 55:1-4, 55:6, 56:8-9, 56:11, 56:13-14, 58:11-  
 10 12, 58:14, 58:23-59:1, 59:3, 59:16-17, 59:19, 60:22-25, 61:2, 61:18-21, 61:23, 62:17-18, 62:20,  
 11 69:11-12, 69:14-16, 69:18-20, 69:22-23, 70:18-21, 70:23, 71:21-22, 71:24, 72:1-3, 72:5, 74:22-  
 12 23, 74:25, 77:5-7, 77:9; Kelley at RT 372:6-375:7, Exhs. 4, 71, & 116.] **Defs.' Response:**

13 Agree, but note that any explanation of why the specific questions were asked would require  
 14 Defendants to rely upon classified information that has been excluded by the Court's April 19,  
 15 2013 Order on the state secrets privilege.

16 52. Kelley reported the interview inaccurately in many respects. [Dep. of R. Ibrahim  
 17 at 81:15-86:12.] **Defs.' Response:** Disagree with Plaintiff's characterization of "many respects."  
 18 Agree that Plaintiff disputes some minor aspects of Agent Kelley's summary of the interview  
 19 (e.g., where Plaintiff was married), none of which are material to the facts of this case.

20 53. A FOIA version of Kelley's summary of the interview, stamped "unclassified,"  
 21 identifies three file numbers: (1) 315B-SF-137113-302-1; (2) 315B-SF-137006-19; and (3)  
 22 315B-SF-137113-8. [Kelley at RT 370:8-371:11; Exh. 4, p. P000774.] **Defs.' Response:** Agree.

23 54. File number "315" refers to international terrorism investigations. [Exh. 516, p.  
 24 4; Kelley at RT 371:19-372:4; Lubman at RT 339:8-10.] **Defs.' Response:** Agree.

25 55. Defendants' publicly stated policy is that all main international terrorist subjects  
 26 for both full and preliminary investigations in the 315 classification are nominated for entry into  
 27 the TSDB and its supported systems. [Exh. 506, p. P001863; Exh. 508, p. TSC000007; Lubman  
 28 at RT 338:1-13; Kahn at RT 395:9-397:22.] **Defs.' Response:** Agree, with the clarification that

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1 the classification numbers referenced in the documents and the testimony have changed.

2 Lubman at RT 338:1-13.

3 56. At one time, Dr. Ibrahim was the subject of a full international counterterrorism  
 4 investigation. [Exh. 10, p. NCTC000074; Exhs. 4, 116, 513 & 516.] Pursuant to defendants'  
 5 publicly stated policies, [REDACTED]. [Exh. 506,  
 6 p. P001863; Exhs. 8, 9, 57, 61, 64 & 209-215.] **Defs.' Response:** Defendants agree that Plaintiff  
 7 was [REDACTED]. [Interrogatory Response at 298:1-13.] Any  
 8 further response would require Defendants to rely upon classified information that has been  
 9 excluded by the Court's April 19, 2013 Order on the state secrets privilege.

10 57. The TSDB and its associated databases have been used as an investigative tool by  
 11 the FBI and other government agencies. [Kahn at RT 411:8-25; Exh. 8, p. NCTC000071; Exh.  
 12 4; Exh. 71; Exh. 101, p. TSC000405-406; Exh. 238, pp. P006562, P006606, P006608.] **Defs.'**  
 13 **Response:** Disagree because the primary purpose of the TSDB and its derivative subsets is  
 14 screening, not investigation, but agree that encounters with a person who is listed in the TSDB  
 15 can assist government investigative efforts, to the extent there are any, in tracking that person's  
 16 movements or activities, and provide the opportunity to collect additional information about that  
 17 person (and others). Defendants otherwise disagree with this proposed finding because the term  
 18 "investigative tool" is vague and nothing in TX 4, 8, or 71 states that the TSDB or a derivative  
 19 subset has been used as an "investigative tool" by the FBI or any other agency. [TX 238 at  
 20 P006562; TX 541]

21 The Effect of the Government's Policies on Dr. Ibrahim – January 2-3, 2005

22 58. On January 2, 2005, Dr. Ibrahim arrived at San Francisco Airport with her then-  
 23 fourteen-year-old daughter, Rafeah. [Dep. of R. Ibrahim at 86:20-23, 91:3-7, 93:2-9.] **Defs.'**  
 24 **Response:** Agree.

25 59. She was still recovering from surgery and had requested wheelchair assistance.  
 26 [Dep. of R. Ibrahim at 90:21-24, 93:10-15, 94:14-16, 102:8-10, 102:12, 102:19-103:9.] **Defs.'**  
 27 **Response:** Agree.

28 60. When Dr. Ibrahim attempted to check in at the United Airlines counter for her

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1 flight to Kona, Hawaii, Dr. Ibrahim was told she was going to be arrested. [Dep. of R. Ibrahim  
2 at 105:4-5, 105:7, 106:22-23, 106:25-107:2, 107:4-6, 107:8-10.] **Defs.' Response:** Agree that  
3 Plaintiff testified that she was told that she would be arrested, but with the clarification that the  
4 cited testimony states that an "officer" told Plaintiff that she was going to be arrested, and the  
5 testimony preceding that statement establishes that the "officer" was a police officer. [Ibrahim  
6 Dep. at 105:1-3]

7 61. Everyone at the United counter, including the United employees, about 50 people  
8 in line, and Rafeah, saw Dr. Ibrahim get arrested and led away in handcuffs. [Dep. of R. Ibrahim  
9 at 107:17-24, 109:18-110:6.] **Defs.' Response:** Agree that the cited testimony, together with the  
10 testimony referenced in the previous proposed Finding of Fact, states that several employees  
11 standing behind the United counter, Plaintiff's daughter, and individuals in line at the ticket  
12 counter saw Plaintiff taken into custody by the San Francisco Police Department.

13 62. As a Muslim, Dr. Ibrahim wears hijab to reflect her modesty, which she believes  
14 is required by her religion. [Dep. of R. Ibrahim at 27:15-21.] **Defs.' Response:** Agree.

15 63. She was transported in handcuffs to a holding cell, where she was imprisoned for  
16 approximately two hours, searched in a culturally insensitive manner, denied her medication  
17 until the paramedics were called, and denied the ability to use the restroom in private. [Dep. of  
18 R. Ibrahim at 109:3-5, 109:7, 111:5-15, 113:20-21, 113:23, 113:25-114:12, 114:14, 114:16-17,  
19 114:19, 114:21-115:9, 115:14-15, 115:17, 115:19-21, 115:23, 116:13-14, 116:16-19, 116:21-  
20 117:14, 118:16-25, 122:8-9, 122:11-13, 122:15, 122:25-123:1, 123:3-7, 123:9-12, 123:14-21,  
21 123:23, 123:25-124:2, 124:22-24, 127:20-128:1.] **Defs.' Response:** Agree that the San  
22 Francisco Police Department "transported" Plaintiff to their substation. Disagree the following  
23 characterizations of the evidence: (1) that Plaintiff was searched in a "culturally insensitive  
24 manner," which is not established by the cited testimony; (2) that Plaintiff was "imprisoned,"  
25 which is a vague and inaccurate term; and (3) that Plaintiff was "denied the ability to use the  
26 restroom in private," which is not specifically established by the cited testimony. Otherwise  
27 agree.

28 64. Although Dr. Ibrahim asked to speak to Agent Kelley, whom she believed could

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1 clear her name, and was told the FBI was coming to talk to her, no one from the FBI ever came.  
2 [Dep. of R. Ibrahim at 119:19-20, 119:22, 119:24-25, 120:2, 120:8-9, 120:11-15, 120:17-20,  
3 120:22, 216:24-217:8, 217:15-21.] **Defs.' Response:** Disagree as to Plaintiff's characterizations  
4 of the testimony. The testimony establishes that, on the date of the encounter with the San  
5 Francisco police officers: (1) Plaintiff told the police officers that two FBI agents had visited her  
6 ten days earlier; (2) Plaintiff further told the police officers that the FBI agents "knew very well  
7 that [she was] returning to Malaysia;" (3) the police officers told Plaintiff that the FBI was  
8 sending an agent to interview her; (4) Plaintiff believed the FBI agents could explain the  
9 situation to the police officers; and (5) Plaintiff was not interviewed by the FBI.

10 65. After missing her flight, she was released without explanation. [Dep. of R.  
11 Ibrahim at 110:7-9, 127:5-7, 128:25-129:6, 129:11-13, 129:15-16, 135:6-8; Exh. 31.] **Defs.'**  
12 **Response:** Agree that Plaintiff missed her flight on January 2, 2005, but disagree with the  
13 second clause, because TX 31 (which Plaintiff received) explains why she was released from the  
14 San Francisco Police Department's custody.

15 66. No one ever charged her with a crime, or provided any justification for the arrest,  
16 other than to say they had no choice but to arrest her while they waited for Washington D.C. to  
17 clear her. [Dep. of R. Ibrahim at 105:19-20, 105:22-106:4, 106:22-23, 106:25-107:2, 107:4-6,  
18 107:8-10, 128:25-129:6, 129:11-13, 129:15-21, 129:23, 130:7-8, 130:10-14, 135:9-14, 137:14-  
19 16; Kelley at RT 375:17-19; Exh. 31; see also Exhs. 62 & 229.] **Defs.' Response:** Agree that  
20 Plaintiff was not charged with a crime and that Plaintiff testified that the San Francisco police  
21 officers did not tell her why they had taken her into custody. Defendants also agree that Plaintiff  
22 testified that one police officer stated that they were waiting for Washington, D.C., to clear her,  
23 but note that Plaintiff offered no further evidence for this statement other than her own  
24 testimony.

25 67. Lee Korman, an Aviation Security Inspector with the DHS, met Dr. Ibrahim in the  
26 holding cell. [Dep. of R. Ibrahim at 128:5-16.] He told her that her name had been removed  
27 from the No-Fly List. [Dep. of R. Ibrahim at 130:15-17, 130:19, 217:22-218:3, 218:15-20.]  
28 **Defs.' Response:** Agree, but disagree with the characterization that Plaintiff was placed in a

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1 “holding cell.”

2 68. Although Dr. Ibrahim was allowed to fly the next day, and Mr. Korman again said  
3 the new No-Fly List did not have her name on it, certain red flags suggested that her name had  
4 not been totally cleared. [Dep. of R. Ibrahim at 141:1-13, 141:15, 142:5-12, 142:14, 212:6-10,  
5 219:9-16; see also Exh. 74.] **Defs.’ Response:** Agree that Plaintiff flew from San Francisco to  
6 Hawaii on January 3, 2005, and that Plaintiff testified as to what Mr. Korman told her. But  
7 disagree that “certain red flags suggested that her name had not been totally cleared,” which is  
8 vague and not supported by the testimony and the document cited. Document 74 and other  
9 testimony demonstrate that, though Plaintiff was removed from the No-Fly List on January 2,  
10 2005, [REDACTED]. [TX 74; Interrogatory Response at 298:1-8]

11 69. When she traveled the next day – on January 3, 2005 – Dr. Ibrahim was issued a  
12 bright red colored boarding pass. [Dep. of R. Ibrahim at 141:13, 141:15, 149:1-17.] Dr. Ibrahim  
13 saw David Nevins of United making more phone calls before he issued her a boarding pass.  
14 [Dep. of R. Ibrahim at 140:19-23, 141:1-13, 141:15, 212:13-18.] **Defs.’ Response:** Agree to the  
15 first sentence, but disagree to the remainder. For the second sentence, 140:19-23 quotes a  
16 section of TX 30, which was not introduced into evidence. The remaining testimony establishes  
17 that Mr. Nevins was on the phone before he issued Plaintiff a boarding pass.

18 The Effect of the Government’s Policies on Dr. Ibrahim – Visa Revoked in 2005

19 70. Believing her visa was still valid, Dr. Ibrahim spent 3,000 ringgit of her own  
20 money on a plane ticket back to the United States. [Dep. of R. Ibrahim at 176:15-23.] At the  
21 time, this was almost her entire month’s salary. [Dep. of R. Ibrahim at 176:24-177:3.] **Defs.’**  
22 **Response:** For the first sentence, the cited testimony only establishes that Plaintiff paid 3,000  
23 ringgit for the plane ticket back to the United States. It does not establish that Plaintiff  
24 “believ[ed] her visa was still valid.” Agree to the second sentence.

25 71. In March 2005, when she attempted to board her flight at the airport in Kuala  
26 Lumpur, she was denied boarding, told her visa had been revoked, and told there was a note by  
27 her name saying to arrest her. [Dep. of R. Ibrahim at 159:7-9, 160:25-161:4, 162:3-5, 162:7-14,  
28 162:16-17, 162:19-22, 164:8-9, 164:11-16 (limited purpose as to note saying to arrest her),



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1 165:14-15, 165:17-19, 165:21-23, 167:5-6, 167:10-13.] **Defs.' Response:** Agree, but clarify that  
2 (1) Plaintiff was denied boarding on March 10, 2005 because she lacked a valid visa; (2) as to  
3 the final clause, that Plaintiff was not, in fact, arrested at the Kuala Lumpur airport and did not  
4 know if, nor has she established that, the United States made, or was the source of, the notation  
5 referenced by the ticketing agent. [Ibrahim at 240:18-25.]

6 72. Defendants' records show that Dr. Ibrahim's visa had been revoked as of January  
7 31, 2005. [Exh. 15.] Dr. Ibrahim did not learn that her visa had been revoked until she  
8 physically arrived at the airport in Kuala Lumpur, and was denied boarding. [Dep. of R. Ibrahim  
9 at 167:10-13.] **Defs.' Response:** Agree to the first sentence. For the second sentence,  
10 Defendants agree only to the extent that the cited testimony establishes that, when at the airport  
11 on March 10, 2005, Plaintiff was informed that her visa was revoked; Defendants otherwise  
12 disagree that the testimony establishes the proposed fact.

13 73. It was not until after this incident that the government drafted a letter regarding  
14 her visa revocation. [Exh. 38, Exh. A; Exh. 224.] **Defs.' Response:** Agree that the cited  
15 document (in two different formats) is the April 14, 2005 letter that State sent to Plaintiff  
16 indicating that her visa had been revoked, but disagree that the document states when it was  
17 "drafted."

18 74. Dr. Ibrahim's visa was revoked based on the opening of a full international  
19 counterterrorism investigation. [Exh. 16, p. DOS UNCLASS PRIV 000004; Exhs. 4, 10 & 116.]  
20 Exhibit 8, **REDACTED**, was a source document considered by the DOS. [RT at  
21 469:19-470:19; Exh. 14, p. DOS UNCLASS PRIV 000001.] **Defs.' Response:** For the first  
22 sentence, any response would require Defendants to rely upon classified information that has  
23 been excluded by the Court's April 19, 2013 Order on the state secrets privilege. For the second  
24 sentence, agree that Exhibit 8 was, among other documents, considered by State in deciding to  
25 prudentially revoke Plaintiff's visa. Any further response would require Defendants to rely upon  
26 classified information that has been excluded by the Court's Order on the state secrets privilege.

27 75. In an attempt to clear her name, Dr. Ibrahim submitted a Passenger Identity  
28 Verification Form (PIVF) to the TSA in March 2005. [Dep. of R. Ibrahim at 170:2-172:6; Exhs.

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39 & 76.] She did not receive a response until April 2006, several months after she filed this lawsuit. [Dep. of R. Ibrahim at 172:11-173:2; Exh. 40.] **Defs.' Response:** For the first sentence, agree that Plaintiff "submitted a [PIVF] to the TSA in March 2005," but disagree that the cited testimony specifically indicates her intent in submitting the form. Disagree with the second sentence. Exhibit 40 is dated March 1, 2006 (not April 2006), and Plaintiff testified that she received the letter in March 2006. Defendants further disagree with the suggestion that Plaintiff's PIVF was not acted upon until she filed her lawsuit in January 2006. The evidence demonstrates that after Plaintiff submitted her PIVF, DHS forwarded the PIVF to TSC, and TSC conducted a review of her status. In December 2005, after that review was completed, [REDACTED] [REDACTED]. [Lubman at 342:22-25; 349:17-22; 350:20-352:6; 352:11-13; TX 228; Interrogatory Response, 298:1-13; TX 209 at TSC0001820-1823 ( [REDACTED] in December 2005)]

76. The response stated, "[w]here it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may experience as a result of the watch list screening process." [Dep. of R. Ibrahim at 173:9-21; Exh. 40.] **Defs.' Response:** Disagree. The document states: "[w]here it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may *have experienced* as a result of the watch list screening process" (text omitted in the proposed finding italicized here).

77. The response did not clarify Dr. Ibrahim's status. [Exh. 40.] **Defs.' Response:** The phrase "clarify Dr. Ibrahim's status" is vague and is not a "fact" supported by the document. Defendants agree that the letter did not indicate Plaintiff's status with respect to the TSDB and No Fly and Selectee lists.

78. Dr. Ibrahim later received a DHS TRIP Redress Control Number, which also failed to clarify her status. [Dep. of R. Ibrahim at 205:2-7, 206:5-6, 206:9-15, 206:18, 206:20-207:2; Exh. 48.] **Defs.' Response:** Defendants agree that in November 2009, the DHS sent Plaintiff a letter indicating her Redress Control Number. But the phrase "clarify her status" is not a "fact" supported by the document. Defendants agree that the cited letter did not indicate

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1 Plaintiff's status with respect to the TSDB and No Fly and Selectee lists.

2 79. Neither DHS TRIP nor its predecessor, the PIVF, permit discovery of information  
3 necessary to rebut allegations of association with terrorism. [Exhs. 517 & 519.] **Defs.**'

4 **Response:** This fact is not supported by the cited documents. The cited exhibits are court filings  
5 from the D.C. Circuit case. The Court ordered that, for these two documents, it could take  
6 "judicial notice of the fact of the filing and not the truth of any content." Trial Tr. 551:3-23.  
7 Plaintiff thus cannot rely on the truth of the documents' contents to establish the proposed fact.

8 80. Individuals do not receive formal notice from the government that they are in the  
9 TSDB, and lack the ability to complain directly to the FBI or TSC. [Dep. of D. Lubman (FBI) at  
10 83:4-6, 83:9-10, 98:1-6, 101:7-9, 101:16-17; Kahn at RT 402:21-405:4, 415:7-25; Lubman at RT  
11 609:18-611:18; Exhs. 40 & 48.] **Defs. Response:** Agree, but aver that an individual who  
12 believes that he is wrongfully included in the TSDB may challenge his purported inclusion  
13 through the DHS TRIP process (and its PIVF predecessor), and that as part of this process, if  
14 DHS TRIP determines in consultation with appropriate government agencies that the individual  
15 is an exact or near match to an identity in the TSDB, the matter is referred to the TSC Redress  
16 Unit for review. Defendants also note that Professor Kahn's testimony ("there is nobody to  
17 whom that individual can appeal") is unsupported by the record and by his own later testimony  
18 that individuals can avail themselves of the DHS TRIP process, and that as part of this process,  
19 TSC gathers and reviews information, and formulates the appropriate response. [Lubman at  
20 348:14-19, 561:23 – 562:1; Kahn at 402:21-25, 404:22-405:1; TX 251 TSC000928-929]

21 81. If an individual requesting redress is determined to be in the TSDB, the TSC's  
22 redress unit reviews existing records in TIDE and other databases to determine whether the  
23 standard is met. [Dep. of D. Lubman (FBI) at 85:5-86:3, 87:14-87:24, 88:7-12.] **Defs.**'

24 **Response:** Agree and aver that TSC's review also includes contacting the agency that originally  
25 nominated the individual for placement in the TSDB and analyzing any derogatory information  
26 that supports the nomination, as well as any other information available from any sources,  
27 including information provided to DHS TRIP by the individual. [Lubman at 562:3-5; TX 537 at  
28 NCTC00008-9; TX 250; TX 39; TX 76]

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1           82.     The TSC redress unit only looks at existing records, and does not conduct  
 2 additional fieldwork to determine whether the facts in existing records are of good quality or still  
 3 accurate. [Dep. of D. Lubman (FBI) at 88:14-22, 89:25-90:2, 229:2-6.] **Defs.’ Response:** Agree  
 4 that the TSC does not undertake additional fieldwork in determining whether an individual’s  
 5 identity is properly placed in the TSDB or supported systems, but aver that TSC’s review  
 6 includes contacting the nominating agency to obtain any new derogatory information that  
 7 supports the nomination, as well as any other information from any sources. [Lubman at 562:3-5;  
 8 TX 537 at NCTC00008-9; TX 250]

9 The Effect of the Government’s Policies on Dr. Ibrahim – Increased Scrutiny in 2009

10           83.     In 2009, Dr. Ibrahim applied for a visa to come to the United States to give her  
 11 deposition and to participate in her own trial. [Dep. of R. Ibrahim at 177:6-16; Exh. 27; Exh. 46;  
 12 Exh. 47 at P001036-1075.] **Defs.’ Response:** Agree that the cited evidence establishes that  
 13 Plaintiff stated on her 2009 visa application that she applied for a visa in order to “giv[e]  
 14 testimony in legal case in USA” and that she wished to “attend some legal proceeding that my  
 15 attorney advised me to attend.” Defendants otherwise disagree.

16           84.     The DOS consular post in Kuala Lumpur initially rejected the application and  
 17 requested a Security Advisory Opinion (“SAO”), based on a hit in the CLASS database.  
 18 [Cooper at RT 423:15-424:2, 424:6-427:17; Exh. 68.] **Defs.’ Response:** Disagree that “consular  
 19 post in Kuala Lumpur initially rejected the application.” More accurately, on September 29,  
 20 2009, Mr. Steven So, the consular officer that interviewed Plaintiff, refused Plaintiff’s visa  
 21 application under Section 221(g) of the Immigration and Nationality Act (“INA”) (8 U.S.C. §  
 22 1201(g)), which requires the refusal of a visa application when the applicant fails to demonstrate  
 23 entitlement to a visa based on available information at the time of the interview. Agree that the  
 24 Kuala Lumpur Consular Section requested an SAO. It is unclear if the clause “based on a hit in  
 25 the CLASS database” relates to both the 221(g) refusal and the SAO request, or only the latter.  
 26 In any event, a request for an SAO was transmitted from the Consular Section because of Mr.  
 27 So’s concern that Plaintiff was potentially inadmissible under 8 U.S.C. § 1182(a)(3)(B) based on  
 28 information reflected in CLASS with a “P(3)(B)” hit that was entered by State at the time of her

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1 visa revocation. [Cooper at 423:15-19; 424:18-23; 426:8-21; 426:22-427:14; 429:15-21; 670:5-  
2 671:4; 675:4-20; 677:10-25; 678:9-21; 679:10-20; 681:8-20; TX 261; TX 68 at DOS000083-84]

3 85. The systems automatically run a search of the CLASS database as part of the visa  
4 application process. [Cooper at RT 428:18-21.] The hit in CLASS is shared with DHS because  
5 TECS and CLASS share certain information automatically. [Cooper at RT 431:20-432:23]

6 **Defs.' Response:** For the first sentence, agree that the CLASS database is automatically  
7 searched during the visa application process for every visa applicant. For the second sentence, it  
8 is unclear which "hit" is meant here, but the cited testimony establishes that the "P(3)(B)" hit  
9 contained in Plaintiff's electronic file in CLASS would have been shared with the Department of  
10 Homeland Security's TECS system.

11 86. The DOS Visa Office keeps a paper "subject file" that explains the basis for the  
12 hit, which is maintained until the applicant reaches age 90 and has had no visa application within  
13 the past 10 years. [Cooper at RT 429:15-431:16.] Some information in the file is from the FBI,  
14 but none of the information concerning the hit on Dr. Ibrahim relates to events after 2005.

15 [Cooper at RT 430:23-431:19.] **Defs.' Response:** For the first sentence, agree with the  
16 clarification that Mr. Cooper's testimony establishes that the Visa Office keeps what are referred  
17 to as "revocation files." For the second sentence, agree with the clarification that the testimony  
18 establishes that State's revocation files contain information that is contemporaneous with the  
19 revocation decision, which, in this case, was made in January 2005. Additional information that  
20 is examined during a subsequent visa application is not added into the revocation file because it  
21 is included in a separate file. [Cooper at 702:22-703:1; 708:23-709:3; 708:19-710:15]

22 87. The FBI performs name checks for SAO reviews, which involves determining if  
23 there is information in the FBI's holdings that would be relevant to whether a visa should be  
24 granted or denied. [Lubman at RT 329:22-331:6, 617:15-619:2.] **Defs.' Response:** Agree.

25 88. The DOS received no new "derogatory information" on Dr. Ibrahim in 2009.  
26 [Cooper at RT 433:12-14.] In 2009, the DOS reviewed additional details that were not available  
27 to them in 2005, but which concerned the same category of potential inadmissibility under the  
28 Immigration and Nationality Act. [Cooper at RT 684:24-686:18.] **Defs.' Response:** For the

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1 first sentence, disagree. The testimony cited does not account for Mr. Cooper's complete  
2 testimony on this issue. At trial, Mr. Cooper testified that, in 2009, State reviewed information  
3 that was in addition to what was contained in the 2005 revocation file. That information was  
4 new to State and provided an additional level of detail that was not available in the 2005  
5 timeframe. For the second sentence, agree to the extent that Mr. Cooper testified that during the  
6 SAO review process, State reviewed information in addition to that contained in the 2005 visa  
7 revocation file but that regarded the same general category of potential inadmissibility. [Cooper  
8 at 684:24-685:2; 686:9-18]. Any further response regarding what information was reviewed in  
9 adjudicating Plaintiff's 2009 visa application would require Defendants to rely upon classified  
10 information that has been excluded by the Court's April 19, 2013 Order on the state secrets  
11 privilege.

12 89. Dr. Ibrahim was not provided any specific information about the information  
13 supporting the revocation, and did not have the opportunity to specifically address allegations of  
14 which she had no notice. [Cooper at RT 449:4-16.] **Defs.' Response:** Disagree with the  
15 characterization of Mr. Cooper's testimony. The testimony establishes that Plaintiff was not  
16 provided the specific underlying derogatory information supporting the revocation of her visa  
17 and was not made aware of any specific allegations about her. She was provided with notice  
18 regarding the category of her potential inadmissibility. Mr. Cooper further testified, in the cited  
19 testimony and elsewhere, that Plaintiff had the opportunity to establish her eligibility for a visa in  
20 the context of a new visa application. [Cooper at 631:2-8; 648:20-649:3; TX 224]

21 90. In accordance with the DOS's instructions, following the SAO review, the  
22 consular post in Kuala Lumpur denied the visa under section 213(a)(3)(B) of the Immigration  
23 and Nationality Act. [Cooper at RT 459:16-24, 692:14-694:19; Exh. 22, p. DOS UNCLASS  
24 PRIV 000058; Exh. 47; Exh. 68, p. DOS UNCLASS PRIV 000085; Exh. 261.] **Defs.'**  
25 **Response:** Agree with the clarification that a consular officer at the consular post in Kuala  
26 Lumpur, not the post itself, denied Plaintiff's visa application in 2009.

27 91. When Dr. Ibrahim asked what that section meant, a DOS representative wrote the  
28 word "terrorist" on the denial letter, in front of her. [Dep. of R. Ibrahim at 195:10-196:9,

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1 199:19-201:3, 201:5-10; Exh. 47, p. P001033.] **Defs.’ Response:** Agree with the clarification  
2 that Plaintiff testified that she asked the consular officer to “explain what is under that section  
3 that you marked.” [Ibrahim at 201:5-10] Defendants further note that the title of Section  
4 213(a)(3)(B) of the INA is “Terrorist Activities.” [Cooper at 649:7-10; 688:8-10]

5 92. The box stating “You are eligible to apply for a waiver of the ground(s) of  
6 ineligibility” has not been checked on the first page of Exhibit 47. [Cooper at RT 698:15-  
7 701:14; Exh. 47, p. P001033.] **Defs.’ Response:** Agree, with the clarification that not checking  
8 the box did not foreclose Plaintiff’s ability under INA Section 212(d)(3)(A) to request a waiver.

9 93. The government denied Dr. Ibrahim’s visa to travel to the United States to  
10 provide deposition testimony in this case. [Exh. 47.] **Defs.’ Response:** Disagree because of the  
11 inaccuracies in the proposed finding. The document establishes that the State, not “the  
12 government,” denied Plaintiff’s visa application in 2009 after finding that she was ineligible  
13 under INA Section 212(a)(3)(B). Ex. 47 at P001033. TX 47 further establishes that Plaintiff  
14 indicated on her visa application that she intended to travel to the United States in order to  
15 “giv[e] testimony in legal case in USA” for “1 week in Oct/Nov 2009; 2-3 weeks in April 2010,”  
16 not necessarily for “deposition testimony” in this case. *Id.* at P001037.

17 94. Because Dr. Ibrahim could not travel to the United States, she was forced to  
18 decline an invitation to a conference, and had to explain to her superiors at UPM the reason she  
19 could not go. [Ibrahim at RT 208:7-210:3.] **Defs.’ Response:** Disagree that the cited testimony  
20 establishes the proffered facts, and as to Plaintiff’s characterizations of the testimony. Plaintiff  
21 “could not travel to the United States” to attend the conference—or for any purpose—in  
22 December 2012 because she did not have a valid visa at that time, and had not applied for a visa  
23 since September 2009. Plaintiff testified that she told *one* superior at UPM, the Vice Chancellor,  
24 “about her travel problems”—not necessarily about her lack of a visa — and he determined that  
25 she should not attend the conference, which does not establish that “she was forced to decline an  
26 invitation to a conference” or that she “had to explain” anything regarding her lack of a visa to  
27 any superior or superiors at UPM.

28 95. Dr. Ibrahim was embarrassed by having to disclose to her colleagues that she

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1 could not travel to the United State – a fact not known to her staff until that point – and had to  
2 send a junior officer to attend the conference in her place. [Ibrahim at RT 210:4-211:25.] **Defs.’**

3 **Response:** Agree that Plaintiff testified that she sent a junior officer to attend the conference.  
4 Disagree that the cited testimony establishes the remaining proffered facts, and as to Plaintiff’s  
5 characterizations of the testimony. Plaintiff testified that she was embarrassed to inform the  
6 Vice Chancellor that she could not participate in the conference, not that she had to “disclose to  
7 her colleagues that she could not travel to” the United States. It is unclear what Plaintiff means  
8 by “until that point,” but Defendants agree that Plaintiff stated that her staff did not know that  
9 Plaintiff had travel restrictions.

10 96. Dr. Ibrahim has a continuing need to travel to the United States to work on her  
11 projects. [Dep. of R. Ibrahim at 221:10-222:18, 222:23-223:6, 223:17-224:11, 224:14-226:21.]

12 **Defs.’ Response:** Plaintiff has been “incredibly successful” in her career without traveling to the  
13 United States. To the extent she has needed to coordinate with her U.S. colleagues, she has done  
14 so via email and telephone conversations. Additionally, she has never applied for a visa to work  
15 in the United States; she has only applied for a visa to testify in this case. [Ibrahim at 223:8-12  
16 241:21-242:6; 242:21-243:12; Cooper at 654:5-25; 655:1-7; TX 27]

17 97. Dr. Ibrahim requires travel to the United States in order to commercialize her  
18 inventions and interact with venture capitalists. [Dep. of R. Ibrahim at 227:15-228:1.] **Defs.’**

19 **Response:** Disagree that the cited testimony establishes the proffered fact. Plaintiff testified  
20 that, in pitches to venture capitalists, the inventor of a product “usually” needs to be present  
21 during the presentation, and that one of Plaintiff’s products is “very good.” The cited testimony  
22 therefore falls far short of establishing that Plaintiff “requires” travel to the United States.

23 98. Dr. Ibrahim considers the United States her second home. [Dep. of R. Ibrahim at  
24 207:16-23, 208:2-5.] **Defs.’ Response:** Agree that Plaintiff testified to this fact, but aver that it  
25 has little to no legal significance.

26 Dr. Ibrahim’s **REDACTED**

27 99. As of January 2, 2005, Dr. Ibrahim was **REDACTED** on  
28 the No-Fly List. [Lubman at RT 297:16-300:11; Exh. 8, p. NCTC000071.] **Defs.’ Response:**



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1 Agree.

2 100. Defendants claim that later that day, she was [REDACTED].

3 [Lubman at RT 297:16-300:11.] **Defs.' Response:** Agree that on January 2, 2005, Plaintiff's  
4 identity was removed from the No-Fly list, [REDACTED].

5 101. At least as of January 27, 2005, Dr. Ibrahim was also listed in the CLASS  
6 database. [Exh. 60, p. DOS UNCLASS PRIV 000005.] **Defs.' Response:** Agree.

7 102. Dr. Ibrahim likely was included in [REDACTED] in late 2004/early 2005, since the  
8 effect of Kelley's nomination was to nominate Dr. Ibrahim to the databases not marked for  
9 exclusion on the FD-930 form. [Dep. of D. Lubman (FBI) at 177:18-20; Kelley at RT 367:3-7,  
10 375:20-23; Exh. 8, p. NCTC000071.] **Defs.' Response:** Agree.

11 103. Defendants assert that Dr. Ibrahim [REDACTED] in  
12 December 2005. [Lubman at RT 297:16-300:11.] Around this same time, however, she was

13 [REDACTED]  
14 [REDACTED]. [Exh. 61, pp. TSC002222-2223; see also Exhs. 64, Exh.  
15 209-215; Exh. 6, p. TSC001665.] **Defs.' Response:** Agree but aver that Plaintiff's identity [REDACTED]  
16 [REDACTED]. [TX 9 at TSC001749; Lubman at  
17 316:14 – 317:13]

18 104. In 2006, someone submitted a request to [REDACTED]  
19 [REDACTED] [Exh. 10, p. NCTC000074.] The [REDACTED] request form noted the "Entry  
20 Criteria Code" as "H," which is different than the "CD" code that Kelley assigned. [Exhs. 8 &  
21 10; RJN, 2:27-3:4.] **Defs.' Response:** Agree.

22 105. Defendants claim the removal request was effective as of September 18, 2006.  
23 [Lubman at RT 297:16-300:11.] **Defs.' Response:** Agree that Plaintiff's identity [REDACTED]  
24 [REDACTED] on September 18, 2006.

25 106. In 2006, defendants determined plaintiff did not meet the reasonable suspicion  
26 standard. [Lubman at RT 304:7-10; Exh. 10, p. NCTC000074.] The reasonable suspicion  
27 standard did not exist in 2004, so plaintiff could not have met that standard then. [Lubman at RT  
28 304:11-22.] **Defs.' Response:** Agree that in 2006 Defendants determined that Plaintiff [REDACTED]

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1 [REDACTED] and that the reasonable suspicion standard set forth  
2 on page 17 of TX2 did not exist in 2004 or 2006. Defendants further note that Plaintiff [REDACTED]

3 [REDACTED]  
4 [REDACTED]. [Lubman at 308:4-11; TX 538 304:10-306:25; 304:10-306:25]

5 107. There was no uniform standard for TSDB nominations in 2004 and 2007.  
6 [Lubman at RT 304:23-308:24.] **Defs.' Response:** Agree that prior to 2009 each nominating  
7 agency set its own nominating procedures for inclusion in the TSDB based on its interpretation  
8 of HSPD-6, HSPD-11, and the MOU that established the TSC. [Lubman at 308:4-11]

9 108. Dr. Ibrahim was [REDACTED] [REDACTED]  
10 [REDACTED] [Lubman at RT 297:16-300:11; Exh. 77.] **Defs.' Response:** Agree that Plaintiff's  
11 identity was [REDACTED].

12 109. [REDACTED] [REDACTED]  
13 [REDACTED] [Lubman at RT 303:9-25.] Instead, she is [REDACTED]

14 [REDACTED].  
15 [Lubman at RT 303:9-25, 316:14-317:13.] **Defs.' Response:** Agree with the first sentence.  
16 With respect to the second sentence, Defendants agree that Plaintiff's identity is [REDACTED]

17 [REDACTED]  
18 [REDACTED] is law enforcement sensitive information and, as applied to Plaintiff, information that  
19 has been excluded by the state secrets privilege. Any further response would require Defendants  
20 to rely upon classified information that has been excluded by the Court's April 19, 2013 Order  
21 on the state secrets privilege.

22 110. From October 20, 2009 to the present, Dr. Ibrahim has been included [REDACTED]  
23 [REDACTED], CLASS, and [REDACTED] [Lubman at RT 297:16-300:11, 300:16-301:4, 322:9-325:22; Exh.  
24 9, p. TSC0001749; Exh. 57, p. TSC001776.] **Defs.' Response:** Agree.

25 111. Placement in the CLASS database may result in visa revocation or visa denial.  
26 [Exh. 6, p. TSC001665; Lubman at RT 327:7-20.] **Defs.' Response:** Disagree. Ms. Lubman  
27 testified on behalf of FBI/TSC, and acknowledged that she lacked experience or expertise in  
28 State's visa adjudication and revocation processes. As Mr. Cooper from State testified, CLASS

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1 is a database of the State Department. Records in CLASS regarding prior visa refusals,  
2 revocations, or the possible existence of information that might support an ineligibility finding  
3 under INA Section 212(a) may be relevant to a future visa adjudication, but are not controlling.  
4 [Cooper at 634:14-24; 679:3-9; 680:7-14, 15-20; 688:11-13]

5 112. Individuals do not receive notice from DOS that they have been placed in  
6 CLASS. [Cooper at RT 464:4-6.] Outside of the visa application process, individuals have no  
7 opportunity to contest their placement in CLASS. [Cooper at RT 464:7-20.] **Defs.’ Response:**  
8 For the first sentence, agree. For the second sentence, agree with the clarification that CLASS is  
9 a State Department database that includes historical visa adjudications and provides information  
10 to adjudicating consular officers regarding prior visa refusals, revocations, or the possible  
11 existence of information that might support an eligibility finding under INA Section 212(a) that  
12 may be relevant to the visa adjudication.

13 113. An individual who was denied a visa because of watchlisting would not be told  
14 that he or she was denied because of watchlisting. [Lubman at RT 607:22-608:15.] **Defs.’**  
15 **Response:** Disagree. SSA Lubman testified on behalf of FBI/TSC, and she acknowledged that  
16 she lacked experience or expertise in State’s visa adjudication and revocation processes. As Mr.  
17 Cooper from State testified, visa applicants are not “denied a visa because of watchlisting,” but  
18 are denied a visa if they fail to meet the criteria for eligibility under the INA. The fact that a  
19 person is in the TSDB does not indicate any form of visa ineligibility; rather, it acts as a “flag” to  
20 indicate that other agencies may have information that would impact a person’s eligibility on  
21 security-related grounds. When State conducts an SAO review in connection with a visa  
22 application, the individual’s status in the TSDB plays no role in determining eligibility for a visa.  
23 Finally, though Plaintiff was not informed of her status on a watchlist when her visa application  
24 was denied, she was informed that the denial was based on an inadmissibility finding under INA  
25 Section 212(a)(3)(B). [Lubman at 620:23-621:7; Cooper at 629:14-19; 629:22-630:4; 673:12-23;  
26 TX. 238 at P006552; Exh. 47, p. P001033; 8 U.S.C. § 1201(g); 22 C.F.R. § 40.6; 22 C.F.R. §  
27 41.121]

28 114. Defendants’ Redress MOU provides that “whenever appropriate, DOS consults

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1 with TSC, NCTC, and other agencies regarding data that appears incomplete or inaccurate or  
2 otherwise conflicts with information obtained in the visa application process.” [Lubman at RT  
3 600:10-603:2, Exh. 537, p. NCTC000012.] **Defs.’ Response:** Agree, but to provide context, the  
4 entire section states as follows:

5 If a visa application is refused, applicants are advised that they may reapply for a visa. A  
6 subsequent application is considered as a new case. DOS agrees to continue to review the  
7 underlying data and facts in such subsequent applications. Whenever appropriate, DOS  
8 consults with TSC, NCTC, and other agencies regarding data that appears incomplete or  
9 inaccurate, or otherwise conflicts with information obtained in the visa application  
10 process.

11 115. Even if plaintiff had a visa, she would still be screened through the TECS system  
12 by Customs and Border Patrol (CBP) before entry. [Lubman at RT 620:3-14.] **Defs.’ Response:**  
13 Disagree as vague and not supported by the cited testimony. Defendants aver that the proper  
14 name for the agency responsible for processing individuals at U.S. ports of entry is U.S. Customs  
15 and Border Protection. Agree that if Plaintiff had a visa, it would only permit her to apply for  
16 admission to the United States at a port of entry. The decision to allow Plaintiff to enter the  
17 United States would be made by CBP. Both SSA Lubman and Mr. Cooper testified that CBP  
18 would follow its own policies and procedures to process Plaintiff at the border and determine her  
19 admissibility. [Cooper at 625:16-23; 690:7-20] Defendants aver that TECS provides information  
20 to CBP officers who process applicants for admission to the United States, and that information  
21 about Plaintiff contained in TECS would be available to a CBP officer processing Plaintiff if she  
22 applied for admission to the United States at a port of entry.

23 116. Defendants claim that the purpose of [REDACTED]  
24 [REDACTED]  
25 [REDACTED]. [Lubman at RT 312:5-313:18.] **Defs.’ Response:**  
26 Agree.

27 117. [REDACTED] **Defs.’ Response:** The  
28 post-trial testimony regarding Plaintiff’s daughter is not part of the trial record, and the Court

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1 specifically instructed the parties to submit proposed findings on this issue “separate from the  
2 main proposed findings and responses.” See Dkt. 661 at 2:13-20. This proposed finding is  
3 therefore improper. Notwithstanding that objection, Defendants disagree that the cited testimony  
4 establishes the proffered fact. [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 118. Being [REDACTED] affects travel because the final rule for the  
11 government’s Secure Flight program allows the government to [REDACTED]  
12 [REDACTED] [Kahn at RT 398:15-399:6; Exh. 522.] Defs.’ Response:  
13 Disagree because the proposed finding is vague and overbroad, in that it does not explain how or  
14 when travel might be affected. Agree that the Secure Flight program allows TSA to screen  
15 against the TSDB. Also disagree to the extent this finding implies that Plaintiff’s travel has  
16 been, is, or will be affected [REDACTED]. The only effect of [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] (RFA Response at 312:21-313:12, TX9).

20 119. [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 Defs.’ Response: As noted above, see Plaintiff’s Proposed Finding of Fact  
24 (“PPFF”) ¶ 117, this proposed finding is unsupported by testimony in the trial record, and is not  
25 appropriate for this filing. See Dkt. 661. Notwithstanding this objection, Defendants agree to  
26 both sentences.

27 120. [REDACTED]  
28 [REDACTED]

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1 [REDACTED]

Defs.'

2 **Response:** As noted above, *see* PPF 117, the cited testimony is not part of the trial record,  
3 and is not appropriate for this filing. *See* Dkt. 661. Notwithstanding this objection, Defendants  
4 agree.

5 121. [REDACTED]

6 [REDACTED]  
7 [REDACTED] **Defs.' Response:** As noted  
8 above, *see* PPF 117, this proposed finding is unsupported by testimony in the trial record, and  
9 is not appropriate for this filing. *See* Dkt. 661. Notwithstanding this objection, Defendants agree.

10 122. A "no-board" recommendation occurs when CBP recommends to a carrier not to  
11 carry an individual to the United States, because that person would likely be inadmissible and the  
12 carrier would bear the cost of removal. [Dugan at RT 809:18-24.] **Defs.' Response:** As noted  
13 above, *see* PPF 117, this proposed finding is unsupported by testimony in the trial record, and  
14 is not appropriate for this filing. *See* Dkt. 661. Notwithstanding this objection, Defendants  
15 agree.

16 123. The no-board recommendation caused Ms. Mustafa Kamal not to board her flight  
17 in Kuala Lumpur, because she was told she would be denied boarding in Manila. [Declaration of  
18 Raihan Mustafa Kamal (Docket No. 651, ¶¶ 11-19.) **Defs.' Response:** As noted above, *see*  
19 PPF 117, this declaration is not part of the trial record, and is not appropriate for this filing.  
20 *See* Dkt. 661. The Court specifically noted that the parties "can't go into filings made with the  
21 Court or affidavits" that were not introduced at trial. Trial Tr. at 780:7-11. The cited declaration  
22 was not introduced at trial. Defendants disagree further because the cited declaration does not  
23 establish that a "no-board" recommendation was made, or that the United States took any action  
24 that prevented "caused Ms. Mustafa Kamal from boarding her flight in Kuala Lumpur."

25 124. [REDACTED]

26 [REDACTED]  
27 **Defs.' Response:** As noted above, *see* PPF 117, this proposed finding is unsupported by  
28 testimony in the trial record, and is not appropriate for this filing. *See* Dkt. 661.

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1 [REDACTED]

2 [REDACTED]

3 [REDACTED] [REDACTED]

4 [REDACTED]

5 [REDACTED] [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 125. [REDACTED]

9 [REDACTED] **Defs.' Response:** As noted

10 above, *see* PPF ¶ 117, this proposed finding is unsupported by testimony in the trial record, and  
11 is not appropriate for this filing. *See* Dkt. 661. Notwithstanding that objection, Defendants  
12 disagree that the cited portion of the post-trial hearing record establishes the proffered fact.  
13 Plaintiff cites to her counsel's argument at the hearing for this finding, which is not evidence. To  
14 the extent that Plaintiff attempts to rely on ¶ 7 of Ms. Dugan's declaration, which Plaintiff's  
15 counsel quotes during the hearing, that full text of that paragraph states:

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 126. A U.S. citizen who is in the TSDB may be exported to the TECS database.  
23 [Lubman at RT 301:10-302:2.] **Defendants' Response:** Agree.

24 127. Dr. Ibrahim applied for a visa to testify in this case at trial. [Cooper at RT  
25 689:13-15.] **Defendants' Response:** Agree.

26 128. At trial, Ms. Lubman testified that her sworn deposition testimony on two  
27 different topics was inaccurate: (1) action taken in response to plaintiff's PIVF [Lubman at RT  
28 342:10-344:13, 345:17-346:10, 350:6-352:19; Exh. 228]; and (2) the current criteria for the No-

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1 Fly List. [RT 597:21-598:18; Lubman at RT 613:14-617:2.] **Defendants' Response:** Agree that  
 2 SSA Lubman clarified her testimony on the issues identified.

### CONCLUSIONS OF LAW

4 Defendants are unable to fully respond to conclusions of law ¶¶ 3 (a-g), 4 (a, h, and o), 7-  
 5 16, 18-21, 23-24, 26-27, 30-33, and 36-37, because to do so would require information that has  
 6 been excluded under the state secrets privilege. Defendants further respond, as appropriate, in  
 7 the accompanying *ex parte, in camera* filing.

#### Fifth Amendment Right to Procedural Due Process

9 1. “A procedural due process claim has two distinct elements: (1) a deprivation of a  
 10 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural  
 11 protections.” *Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001) (internal quotation  
 12 marks omitted). Even in the face of national security concerns, due process requires “notice of  
 13 the factual basis for [the aggrieved party’s] classification, and a fair opportunity to rebut the  
 14 Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S.  
 15 507, 533 (2004) (plurality), *superseded by statute on other grounds as noted in Gherebi v.*  
 16 *Obama*, 609 F. Supp. 2d 43, 50 (D.D.C. 2009). **Defs.’ Response:** Deny; procedural due process  
 17 also involves “the risk of an erroneous deprivation of such interest through the procedures used,  
 18 *and the probable value, if any, of additional or substitute procedural safeguards,*” as well as “the  
 19 Government’s interest, including the function involved and the fiscal and administrative burdens  
 20 *that the additional or substitute procedural requirement would entail.*” *Mathews v. Eldridge*, 424  
 21 U.S. 319, 335 (1976) (emphasis added). Also deny that notice and opportunity to rebut classified  
 22 information underlying nomination is required by procedural due process. *See NCRI v. Clinton*,  
 23 251 F.3d 208-9 (D.C. Cir. 2001) (government need not disclose classified information to plaintiff  
 24 because this information “is within the privilege and prerogative of the executive”); *Hunt v. CIA*,  
 25 981 F.2d 1116, 1119 (9th Cir. 1992) (“To confirm or deny the existence of [CIA] records on [a  
 26 particular individual] could . . . reveal intelligence sources or targets”); *Clapper v. Amnesty Int’l*  
 27 *USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (government’s disclosure in certain circumstances would  
 28 still have the effect of revealing to an individual “whether his name was on the list of



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1 surveillance targets”).

2 2. The due process balancing test under *Mathews v. Eldridge*, 424 U.S. 319, 335  
 3 (1976) weighs: (1) the private interest that will be affected by the official act, (2) the risk of an  
 4 erroneous deprivation of such interest through the procedures used and the probable value of  
 5 additional procedural safeguards; and (3) the Government’s interest, including the function  
 6 involved and the fiscal and administrative burdens that the additional procedural requirement  
 7 would entail. **Defs.’ Response:** Defendants agree with the statement of law.

8 3. The [REDACTED] without an  
 9 adequate means for redress violates her recognized liberty and property interests. (Facts 1-128.)  
 10 **Defs.’ Response:** Deny that Plaintiff has been deprived of any liberty or property interest that  
 11 would implicate the requirements of procedural due process, *see* Defendants’ Proposed Findings  
 12 of Fact (“DPFF”) ¶ 110-37, or that Plaintiff did not receive constitutionally adequate redress, *see*  
 13 DPFF ¶¶ 34-47.

14 a. The right to international travel is a constitutionally protected liberty interest  
 15 under the Due Process Clause of the Fifth Amendment. *Aptheker v. Secretary of State*, 378  
 16 U.S. 500, 505, 514 (1964). Dr. Ibrahim has a continuing right to travel internationally under  
 17 the Due Process Clause of the Fifth Amendment, due to her significant voluntary connection  
 18 with the United States. *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 994-97 (9th Cir.  
 19 2012) (“*Ibrahim IP*”). [REDACTED]

20 [REDACTED], violated Dr. Ibrahim’s  
 21 liberty interest in the right to international travel. (Facts 19-128.) **Defs.’ Response:** Plaintiff  
 22 has not been denied her purported right to international travel [REDACTED]  
 23 [REDACTED], DPFF ¶  
 24 116, and she has flown internationally on multiple occasions, DPFF ¶¶ 121-24. Plaintiff  
 25 cannot travel to the United States to seek permission to enter the United States to work  
 26 because she lacks a visa, DPFF ¶ 127, and, furthermore, as an unadmitted alien, she has no  
 27 right or liberty interest of entry. *Kleindienst*, 408 U.S. at 762

28 b. “[T]he paradigmatic liberty interest under the due process clause is freedom from

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1 incarceration.” *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *see also Hamdi*, 542  
 2 U.S. at 529. [REDACTED] violated Dr. Ibrahim’s  
 3 liberty interest in freedom from incarceration. (Facts 58-68.) **Defs.’ Response:** Deny that  
 4 the fact of Plaintiff’s [REDACTED] or her placement on the No-Fly List on January 2,  
 5 2005 resulted in her incarceration. None of the facts she relies upon suggest that she was  
 6 ever incarcerated because of Defendants’ actions or her [REDACTED]. The  
 7 handling code Plaintiff was subject to in 2005 clearly instructed that she was *not* to be  
 8 arrested unless there was a violation of law. DPF 114, 129.

9 c. Laws that deprive individuals of liberty or property interests based simply on their  
 10 associations, memberships, and beliefs violate the First Amendment. *See, e.g., Cole v.*  
 11 *Richardson*, 405 U.S. 676, 680 (1972); *In re Stolar*, 401 U.S. 23, 30-31 (1971); *Cummings v.*  
 12 *Hampton*, 485 F.2d 1153, 1154-56 (9th Cir. 1973). [REDACTED]  
 13 [REDACTED] violated Dr. Ibrahim’s liberty interest in free association with other  
 14 Muslims and with her family members. (Facts 21-25, 38, 43-44, 51, 62.) **Defs.’ Response:**  
 15 Deny that Plaintiff’s First Amendment freedoms have been infringed. She has failed to set  
 16 forth any facts that would carry her burden of demonstrating that she has been denied the  
 17 ability to associate with her family members or others in her religion because of the [REDACTED]  
 18 [REDACTED]. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058,  
 19 1069 (9th Cir. 2008) (en banc). The cited cases involve circumstances where public  
 20 employment or professional licensing was conditioned upon association, membership, or  
 21 political beliefs, *see Richardson*, 405 U.S. at 680 (holding that public employment cannot be  
 22 conditioned on political beliefs); *In re Stolar*, 401 U.S. at 30 (holding that admission into Bar  
 23 cannot be conditioned upon political beliefs and associations); *Cummings*, 485 F.3d at 1154  
 24 (holding that physician licensing cannot be conditioned upon political beliefs), but none of  
 25 those circumstances is present here.

26 d. The right to pursue a profession is a protected liberty interest. *See Sagana v.*  
 27 *Tenorio*, 384 F.3d 731, 742-43 (9th Cir. 2004); *Lester v. Parker*, 235 F.2d 787, 788-90 (9th  
 28 Cir. 1956) (per curiam); *Greene v. McElroy*, 360 U.S. 474, 492 (1959). [REDACTED]

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1 [REDACTED] violated Dr. Ibrahim's liberty interest in freedom to  
 2 pursue the occupation of her choice. (Facts 94-98.) **Defs.' Response:** Deny. The right to  
 3 pursue a profession is only implicated where there is a "complete prohibition of the right to  
 4 engaged in a calling," *Conn v. Gabbert*, 526 U.S. 286, 292 (1999), and Plaintiff has been  
 5 "incredibly successful" in her profession. DPF 130-135. Moreover, Plaintiff cannot  
 6 travel to the United States to seek permission to enter the United States to work because she  
 7 lacks a visa, DPF 127, and, furthermore, as an unadmitted alien, she has no right or liberty  
 8 interest of entry. *Kleindienst*, 408 U.S. at 762.

9 e. Possession of money is a recognized property interest. *See Vance v. Barrett*, 345  
 10 F.3d 1083, 1088, n.6 (9th Cir. 2003) (citing *Mahers v. Halford*, 76 F.3d 951, 954 (8th Cir.  
 11 1996); cf. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972)). [REDACTED]

12 [REDACTED] violated Dr. Ibrahim's property interest in the possession of money in  
 13 March 2005, when she was denied boarding on a flight to the United States that she had paid  
 14 for. (Facts 70-73.) **Defs.' Response:** Deny. Plaintiff can prevail on her denial of due process  
 15 only if she has been deprived of a property interest established by applicable law. *Bd. of*  
 16 *Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). As a Malaysian citizen and  
 17 resident, Plaintiff requires a visa to seek permission to enter the United States, and she lacks  
 18 a visa. DPF 125. She has also failed to provide any evidence that she did not receive a  
 19 refund or reimbursement for the March 2005 plane ticket she purportedly purchased.

20 f. Under the "stigma-plus" test, a liberty interest is violated by: (1) "the public  
 21 disclosure of a stigmatizing statement by the government, the accuracy of which is contested,  
 22 plus"; (2) "the denial of 'some more tangible interest [] such as employment,' or the  
 23 alteration of a right or status recognized by state law." *Ulrich v. City & County of San*  
 24 *Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (quoting *Paul v. Davis*, 424 U.S. 693, 701, 711  
 25 (1976)). [REDACTED] is stigmatizing, and  
 26 defendants' dissemination of the false, stigmatizing assertion that Dr. Ibrahim is a known or  
 27 reasonably suspected terrorist directly caused the denial or alteration of her protected liberty  
 28 interests in international travel and freedom from incarceration. (Facts 19-128.) **Defs.'**

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1 **Response:** Agree with the statement of law, but otherwise deny. Plaintiff fails to present  
 2 any facts to establish that **REDACTED** has been publicly disclosed by any of the  
 3 Defendants. DPF ¶ 120. She also fails to show a denial of any tangible interest or the  
 4 alteration of a right. DPF ¶ 134.

5 g. The right to equal protection is fundamental. Defendants' conduct in targeting  
 6 Dr. Ibrahim for investigation and watchlisting violated this fundamental right. (Facts 17-18,  
 7 21-25, 38, 43-44, 51, 62.) **Defs.' Response:** Deny. Plaintiff fails to come forward with proof  
 8 of "discriminatory intent or purpose" to show that the alleged investigation and placement of  
 9 her identity in the TSDB violates equal protection. *Vill. of Arlington Heights v. Metro.*  
 10 *Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). She also fails to present evidence sufficient  
 11 to carry her burden of demonstrating discrimination. *See* PPF ¶ 17-18, 24-25, 62 (failing to  
 12 show evidence of discrimination by Defendants). Regarding Plaintiff's characterization of  
 13 the FBI's Mosque Outreach Program as a "source of intelligence," PPF ¶ 22, the purpose of  
 14 the program was to provide a point of contact for mosques and Islamic associations should  
 15 they need the assistance of the FBI. *See* Kelley at 379:11-380:2. And, lastly, the  
 16 hodgepodge of alleged training materials that Plaintiff attributes to Defendants, PPF ¶ 38,  
 17 fails to support her conclusion, as those materials are no longer used and do not represent the  
 18 views of the FBI. TX 95.

19 4. Defendants' current procedures pose an unacceptably high risk of an erroneous  
 20 deprivation of a protected liberty or property interest for the following reasons:

21 a. Defendants' failure to provide Dr. Ibrahim pre- or post-deprivation notice of the  
 22 factual basis for its decision **REDACTED** increases  
 23 the risk of an erroneous deprivation of her protected liberty and property rights to an  
 24 unacceptable degree. (Facts 13, 19-20, 31, 46, 50, 52, 53-57, 64-66, 74-85, 89, 106-128.)

25 **Defs.' Response:** Agree that Defendants did not give Plaintiff notice of her **REDACTED**  
 26 **REDACTED** before or after she was **REDACTED**. But deny the remainder because, as  
 27 noted in response to Plaintiff's Proposed Conclusions of Law ¶ 3, she has not been deprived  
 28 of any protected liberty or property interest that would trigger procedural due process

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1 protections. Even if she had established a deprivation, Defendants cannot provide Plaintiff  
 2 with the derogatory information (or “factual basis”) underlying [REDACTED],  
 3 either before or after it occurs, because that information is classified. Revealing classified  
 4 information would cause harm to national security, DPF ¶ 33, and therefore, the proposed  
 5 additional safeguard of providing Plaintiff with the basis for [REDACTED]  
 6 conflicts with the most compelling government interest: the security of the nation. *See Haig*  
 7 *v. Agee*, 453 U.S. 280, 307 (1981). Thus, even if this proposed additional safeguard would  
 8 reduce the risk of erroneous deprivation, its value is significantly outweighed by its national  
 9 security cost to the government.

10 b. Defendants did not provide adequate training to Special Agent Kelley before he  
 11 nominated Dr. Ibrahim to [REDACTED] the No Fly List, [REDACTED]. (Facts 28-30, 33-37.) **Defs.’**  
 12 **Response:** Deny that Special Agent Kelley did not receive appropriate training. He  
 13 reviewed electronic communications and other materials. Kelley at 357:10-359:16.  
 14 Defendants further deny that Special Agent Kelley’s training led to Plaintiff’s mistaken  
 15 nomination to the No-Fly List in 2004. Kelley at 378:9-10.

16 c. Defendants’ training materials contained factual inaccuracies and improper  
 17 stereotyping of Muslims. (Fact 38.) **Defs.’ Response:** The evidence cited does not support  
 18 Plaintiff’s conclusion because the training materials that Plaintiff relies upon are no longer  
 19 used by the FBI and do not represent the views of the Bureau, TX 95.

20 d. Defendants’ policy is to watchlist everyone subjected to a full or preliminary  
 21 international terrorism investigation. (Facts 54-55.) **Defs.’ Response:** Agree, with the  
 22 clarification that the classification numbers referenced in the documents and the testimony  
 23 have changed. Lubman at RT 338:1-13.

24 e. The “reasonable suspicion” standard is extremely low and susceptible to abuse.  
 25 *Humphries*, 554 F.3d at 1194-95 (inclusion in a child abuse database based on a  
 26 determination that a report is “not unfounded” is a “very low threshold” and the “reverse of  
 27 the presumption of innocence”). (Facts 19-20, 30-32, 106, 109.) **Defs.’ Response:** Deny the  
 28 allegations made with regard to the “reasonable suspicion” standard. The Executive has

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1 determined “reasonable suspicion” to be the appropriate standard for the predictive nature of  
 2 the TSDB, and the one compelled to best combat terrorism. That determination is entitled to  
 3 deference. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 979  
 4 (9th Cir. 2012). Plaintiff’s contention that the reasonable suspicion standard is “susceptible  
 5 to abuse,” is based upon the testimony of Professor Sinnar, who lacks access to the  
 6 government’s current watchlisting guidance and, thus, has no knowledge of how the  
 7 reasonable suspicion standard is currently interpreted and applied. Sinnar at 531:3-532:4;  
 8 535:6-14.

9 f. Defendants failed to apply the “reasonable suspicion” standard prior to 2009.  
 10 (Facts 106-107.) **Defs.’ Response:** Agree that the “reasonable suspicion” standard was not  
 11 codified by the National Security Staff until 2009, but deny that the “reasonable suspicion”  
 12 standard was not followed or applied prior to 2009. Prior to 2009, each nominating agency  
 13 set forth its own nominating procedures for inclusion in the TSDB based on its interpretation  
 14 of the language in HSPD-6, HSPD-11, and the Memorandum of Understanding that  
 15 established the TSC. DPF ¶ 20.

16 g. Defendants apply secret exceptions to the “reasonable suspicion” standard to  
 17 individuals for whom the evidence is insufficient to meet even the very low reasonable  
 18 suspicion standard. (Fact 109.) **Defs.’ Response:** Deny. The **REDACTED**

19 **REDACTED**  
 20 **REDACTED**, see DPF ¶ 22, and **REDACTED**  
 21 **REDACTED**. As applied to Plaintiff, information that would reveal the basis **REDACTED**  
 22 **REDACTED** is excluded from the case pursuant to the state secrets privilege.

23 h. Defendants have failed to adopt adequate procedures for testing the accuracy of  
 24 facts gathered during investigations, whether those facts are gathered during interviews, from  
 25 informants, or through data mining. (Facts 13, 19-20, 32, 46, 55, 82, 85, 88, 89, 99-128.)  
 26 **Defs.’ Response:** Deny. Ultimately, Plaintiff’s allegation is based upon her assertion that  
 27 the basis for **REDACTED** is in error or is improper. To the  
 28 extent Plaintiff relies upon audits of the Government’s watchlisting process, recent audit

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1 reports (not cited by Plaintiff) show that the database accuracy is quite high. For example,  
2 the General Accounting Office's 2012 Report explains that, while the TSDB does contain  
3 some errors, as any database does, Defendants have taken affirmative steps to create new  
4 safeguards. TX 251 at TSC000894-895.

5 i. Defendants' current procedures create an undue risk that incorrect information  
6 will be perpetuated throughout the screening process. (Facts 13, 19-20, 32, 46, 55, 82, 85, 88,  
7 89, 99-128.) **Defs.' Response:** Deny on the same basis explained in paragraph 5(h) above.

8 j. The FD-930 form used to **REDACTED** is so confusing that  
9 it risks error. (Fact 28.) **Defs.' Response:** Agree to the extent that Special Agent Kelley  
10 mistakenly nominated Plaintiff to the No-Fly List, **REDACTED** using a  
11 particular FD-930 form, but disagree to the extent that the proposed conclusion suggests that  
12 the form is currently in use. *See* TX 10.

13 k. Defendants' DHS TRIP program is the only means available for members of the  
14 public to request that defendants review an erroneous TSDB listing, short of filing a civil  
15 lawsuit. (Facts 78-82.) **Defs.' Response:** Agree that DHS TRIP is the congressionally-  
16 mandated process for seeking redress for passengers who have been delayed or prohibited  
17 from boarding a commercial aircraft because they were wrongly identified as a threat. *See*  
18 DPUF ¶¶ 35-47. Otherwise deny that the DHS TRIP process is inadequate.

19 l. The DHS TRIP program does not provide watchlisted individuals with notice of  
20 the factual basis for their watchlisting, or a fair opportunity to rebut the government's factual  
21 assertions before a neutral decisionmaker. (Facts 78-82.) **Defs.' Response:** Agree that  
22 individuals are not notified of their placement in the TSDB. Doing so could compromise a  
23 counterterrorism intelligence effort or investigation by revealing sources and methods, and  
24 alerting the individual that they may be the subject of an investigation, which could  
25 compromise the investigation. DPUF ¶ 32. Individuals are also not given an opportunity to  
26 present evidence rebutting the inclusion of their identity in the TSDB because to do so would  
27 require the government to release classified information which would compromise  
28 investigations, compromise terrorist combative efforts, and could compromise lives and

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1 undercover sources. DPF ¶ 33. Individuals, however, are provided the DHS TRIP process,  
 2 which appropriately balances the interests of the applicant and national security. DPF ¶¶  
 3 34-47. Deny that the redress process does not provide a “fair” opportunity to obtain redress.

4 m. A redress process that does not provide for any discovery, such as defendants’  
 5 PIVF and DHS TRIP procedures, risks error because a redacted one-sided record that does  
 6 not include the factual basis for the watchlisting does not afford a meaningful opportunity for  
 7 the complainant to challenge his or her placement on the TSDB. (Facts 78-82.) **Defs.’**  
 8 **Response:** Deny because Plaintiff’s evidence fails to consider the redress process in its  
 9 entirety, which includes the opportunity for judicial review of the government’s watchlisting  
 10 decisions, pursuant to a petition for review under 49 U.S.C. § 46110. *See Arjmand v. DHS*,  
 11 ECF No. 34, No. 12-71748 (9th Cir. filed June 2012) (seeking review of letter issued  
 12 pursuant to DHS TRIP; administrative record filed June 2012); *Ege v. DHS*, No. 13-1110  
 13 (D.C. Cir. filed Apr. 4, 2013) (seeking review of letter issued pursuant to DHS TRIP;  
 14 administrative record filed on December 2013).

15 n. Defendants’ redress procedures allow the public to submit redress requests to the  
 16 TSA and not to TSC, but the TSA has no power to provide the relief requested. *See Latif v.*  
 17 *Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012). (Facts 78-82.) **Defs.’ Response:** Agree to the  
 18 extent that the redress procedures allow the public to submit redress requests to DHS TRIP  
 19 (administered by TSA). When DHS TRIP determines that an individual identity is found to  
 20 be an exact match to an identity in the TSDB, the TSC Redress Unit conducts a “de novo”  
 21 review of the TSDB record to determine whether or not the derogatory information, as well  
 22 as information from other sources and information submitted by the applicant, supports the  
 23 individual’s status in the TSDB. Deny to the extent Plaintiff implies that the redress  
 24 procedures cannot provide the relief requested.

25 o. Defendants routinely watchlist individuals whose nexus to terrorism is speculative  
 26 or nonexistent, and these individuals make up the vast majority of TSDB entries. (Facts 31,  
 27 32, 40, 45, 46.) **Defs.’ Response:** Deny that Defendants watchlist individuals whose “nexus  
 28 to terrorism is speculative or non-existent.” Defendants include individuals in the TSDB



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1 who satisfy the “reasonable suspicion” standard or one of the exceptions. DPFF ¶¶ 19, 21.  
2 Those nominations are carefully examined to ensure that they satisfy the applicable criteria.  
3 DPFF ¶¶ 23-29, 34-47. The most recent General Accounting Office Report found, moreover,  
4 *see* TX 251 at TSC000929, that “less than 1 percent” of those individuals who sought redress  
5 based upon the belief that their identities were improperly included in the TSDB were, in  
6 fact, included in that database (or its subset lists, such as the No Fly List).

7 p. Defendants have avoided collecting certain demographic information about  
8 watchlisted individuals – namely religion – that could either establish or refute their liability  
9 for equal protection violations. The failure to collect such statistics facilitates a lack of  
10 accountability for discrimination based on religion, which also tends to increase the risk of  
11 error. (Facts 16, 31.) **Defs.’ Response:** Deny. The TSDB does not contain a field for an  
12 individual’s religion. DPFF ¶ 30. There is, accordingly not a way to collect this information,  
13 and there is no support for Plaintiff’s allegation that Defendants “avoid” collecting the  
14 information.

15 5. The government’s interest in watchlisting persons whose nexus to terrorism is  
16 speculative or non-existent is not sufficient to justify the infringement of protected property  
17 interests caused by placement in the TSDB and its associated databases. (Facts 1-128.) **Defs.’**  
18 **Response:** Deny in so far as the conclusion of law states as its premise that the government  
19 watchlists individuals whose nexus to terrorism is “speculative or non-existent.” Moreover,  
20 Plaintiff has the burden of demonstrating that “*the probable value, if any, of additional or*  
21 *substitute procedural safeguards,*” as well as “the Government’s interest, including the function  
22 involved and the fiscal and administrative burdens *that the additional or substitute procedural*  
23 *requirement would entail.*” *Mathews*, 424 U.S. at 335 (emphasis added). She has failed to carry  
24 her burden under the test set forth in *Mathews*. “[N]o governmental interest is more compelling  
25 than the security of the Nation.” *Haig*, 453 U.S. at 307.

26 6. The government has not met its burden of showing that a compelling or even a  
27 legitimate government interest justifies refusal to provide Dr. Ibrahim additional procedural  
28 protections. (Facts 1-128.) **Defs.’ Response:** Deny for the same reasons set forth in ¶ 5 above.

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1 Further deny based upon the facts set forth in DPF 32-33.

2 7. The government could provide additional procedural protections to Dr. Ibrahim  
3 without compromising national security. *See, e.g., Hamdi*, 542 U.S. at 536-538; *Kindhearts for*  
4 *Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904-08 (N.D. Ohio 2009).

5 **Defs.' Response:** Deny for the reasons set forth in ¶¶ 5 and 6 above.

6 8. Defendants' conduct [REDACTED]  
7 and publication of [REDACTED] to local law enforcement officers, thereby causing  
8 her arrest on January 2, 2005, violated her protected liberty interest in freedom from  
9 unreasonable searches and seizures, without adequate procedural protections, as well as her  
10 protected liberty interest in avoiding stigma in connection with such a deprivation. (Facts 60-61,  
11 63, 65-66, 67.) **Defs.' Response:** Deny for the reasons set forth in ¶¶ 3-6 above.

12 9. Defendants' conduct [REDACTED]  
13 and publication of [REDACTED] to commercial airlines and various law enforcement  
14 agencies, thereby preventing her from boarding her scheduled flight on January 2, 2005 and her  
15 flight in Kuala Lumpur in March 2005, violated her protected liberty interest in the right to  
16 travel, without adequate procedural protections, as well as her protected liberty interest in  
17 avoiding stigma in connection with such deprivation. (Facts 60-61, 63, 65-66, 67-73.) **Defs.'**  
18 **Response:** Deny for the reasons set forth in ¶¶ 3-6 above. Defendants further deny because,  
19 according to Plaintiff, she was denied boarding in March 2005 because her visa had been  
20 revoked, *see* PPF ¶ 71, not because she was on a watchlist.

21 10. Defendants' conduct [REDACTED]  
22 and revoking her visa without notice, based on nothing more than the opening of an  
23 investigation, and resulting in the loss of nearly an entire month's salary, violated her protected  
24 property interest in possession of money, without adequate procedural protections. (Facts 70-  
25 74.) **Defs.' Response:** Deny for the reasons set forth in ¶¶ 3-6 above.

26 11. Dr. Ibrahim is entitled to a name-clearing hearing regarding the [REDACTED]  
27 [REDACTED]. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d  
28 1250, 1256 (9th Cir. 2008). **Defs.' Response:** Deny for the reasons set forth in ¶¶ 3-6 above.

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1           12. Defendants' conduct in [REDACTED]  
 2 and publication of [REDACTED]  
 3 [REDACTED] continues to  
 4 interfere with plaintiff's right to travel, plaintiff's right to pursue her chosen occupation, and  
 5 subjects plaintiff to an undue risk that she will be falsely arrested if she attempts to enter the  
 6 United States even if she could obtain a visa, without adequate procedural protections. (Facts 83-  
 7 127.) **Defs.' Response:** Deny for the reasons set forth in 3-6 above.

8           13. Defendants' conduct in [REDACTED]  
 9 violated and continues to violate plaintiff's First Amendment right to associate with her spouse,  
 10 without adequate procedural protections. (Facts 25, 51.) **Defs.' Response:** Deny for the reasons  
 11 set forth in ¶¶ 3 and 4 above.

12           14. Defendants' conduct in [REDACTED]  
 13 violated and continues to violate plaintiff's First Amendment right to exercise her religion and  
 14 associate with other Muslims, without adequate procedural protections. (Facts 21-25, 38, 43-44,  
 15 51, 62.) **Defs.' Response:** Deny for the reasons set forth in ¶¶ 3-6 above.

16           15. Defendants' conduct in [REDACTED]  
 17 violated and continues to violate plaintiff's right to equal protection, without adequate procedural  
 18 protections. (Facts 21-25, 38, 43-44, 51, 62.)  
 19 **Defs.' Response:** Deny for the reasons set forth in ¶¶ 3-6 above.

20           16. Defendants' decision to deny plaintiff a visa without adequate explanation, when  
 21 she admittedly is not a threat, and without opportunity for waiver violates plaintiff's right of due  
 22 process. *Din v. Kerry*, 718 F.3d 856 (2013). **Defs.' Response:** Deny. The plaintiff in *Din* was a  
 23 U.S. citizen challenging the effect of the refusal of her husband's immigrant visa application on  
 24 her own constitutionally-protected liberty interests in marriage; that case is inapposite to this one,  
 25 which does not involve a direct challenge to the actual visa decision. Furthermore, there is no  
 26 requirement that Plaintiff be provided with an additional explanation of the reasons that underlie  
 27 the denial of her visa in 2009. Even if review of the visa decision were directly at issue here, the  
 28 notice that she was refused under INA § 212(a)(3)(B) was a facially legitimate and bona fide

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1 explanation. Next, Defendants do not concede that Plaintiff is “admittedly not a threat,” and note  
 2 that her use of “threat” is overly broad and vague. Further, ineligibilities under the INA may  
 3 apply without regard to an applicant’s perceived level of threat (however Plaintiff chooses to  
 4 define that term). Finally, Defendants do not concede that Plaintiff was “without waiver.” The  
 5 fact that the box was not checked on the letter did not alter Plaintiff’s right to seek a waiver, and  
 6 even if Plaintiff had exercised that right to request a waiver, (1) the choice to recommend such a  
 7 waiver to DHS is entirely within the discretion of the consular officer and the State Department,  
 8 (2) there is no requirement that State provide notice of eligibility for a waiver in nonimmigrant  
 9 visa cases, and (3) the issue of waiver of the 2009 ineligibility determination is now moot in light  
 10 of her new visa application.

#### 11 Fifth Amendment Right to Substantive Due Process

12 17. Substantive due process protects individuals against “the exercise of power  
 13 without any reasonable justification in the service of a legitimate governmental objective.”  
 14 *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). The first step in the analysis is to  
 15 identify a fundamental life, liberty, or property interest that has been infringed by government  
 16 action. *See Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997). The next step is to analyze  
 17 whether the government’s action is so egregious and lacking in justification as to be “arbitrary in  
 18 the constitutional sense.” *Lewis*, 523 U.S. at 845-46. Under the “shocks the conscience” test,  
 19 when officials with the luxury to make unhurried judgments and “extended opportunities to do  
 20 better” nevertheless exhibit “protracted failure even to care, indifference is truly shocking.” *Id.*  
 21 at 847, 853. **Defs.’ Response:** Agree. But Plaintiff fails to identify a fundamental right to  
 22 trigger substantive due process. Defendants further aver that the “threshold” requirement of any  
 23 substantive due process claim is the showing of the deprivation of a protected interest, *Shanks v.*  
 24 *Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). To satisfy the demanding “shocks the conscience”  
 25 test set forth in *Lewis*, moreover, Plaintiff must point to “conduct intended to injure in some way  
 26 [that is] unjustifiable by any government interest,” *Lewis*, 523 U.S. at 849, and she does not  
 27 make that showing.

28 18. Defendants’ conduct in **REDACTED**

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1 **REDACTED** violated her Ibrahim's protected liberty interests in the unenumerated rights to travel  
 2 and to work in her chosen field without unreasonable restrictions, and her protected property  
 3 interest in money spent on international travel. (Facts 19-128.) **Defs.' Response:** Deny. As  
 4 explained in ¶ 3, neither Plaintiff's ability to travel nor her ability to work has been infringed as a  
 5 result of the **REDACTED**. Nor has she been denied any  
 6 property interest as a result of that placement. None of these alleged infringements would violate  
 7 a fundamental right recognized under substantive due process.

8 19. Defendants' conduct in **REDACTED**,  
 9 and publication of **REDACTED** to commercial airlines and various law enforcement  
 10 agencies, thereby preventing her from boarding her scheduled flight on January 2, 2005, violated  
 11 her protected liberty interest in the right to travel, and was arbitrary and capricious. (Facts 70-  
 12 73.) **Defs.' Response:** Deny. As an initial matter, Plaintiff lacks Article III standing to pursue  
 13 prospective, declaratory and injunctive relief based upon her denial of boarding on January 2,  
 14 2005. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (prospective declaratory and  
 15 injunctive relief must be based upon actual imminent harm, not past harm). Plaintiff's identity  
 16 was removed from the No Fly List on January 2, 2005, **REDACTED**  
 17 **REDACTED** DPFF ¶ 116. She cannot proceed  
 18 based upon the previous inclusion of her identity on that list. *See Friends of the Earth, Inc. v.*  
 19 *Laidlaw Env'tl Servs.*, 528 U.S. 167, 191 (2000) (standing requires that injury exist at the  
 20 commencement of lawsuit). Plaintiff, moreover, has flown on multiple occasions since 2005 to a  
 21 variety of international locations. DPFF ¶ 121. But even if she could overcome these hurdles,  
 22 Plaintiff's purported inability to engage in international travel is not a fundamental right that  
 23 would implicate substantive due process. Finally, the question of whether or not **REDACTED**  
 24 **REDACTED** is "arbitrary and capricious," or otherwise violative of substantive due  
 25 process, goes directly to **REDACTED**—information that has been excluded by this  
 26 Court under the state secrets privilege.

27 20. Defendants' conduct in **REDACTED**,  
 28 and revoking her visa without notice, based on nothing more than the opening of an

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1 investigation, and resulting in the loss of nearly an entire month's salary, violated her protected  
 2 property interest in possession of money, and was arbitrary and capricious. (Facts 70-74.) **Defs.'**  
 3 **Response:** Deny. Plaintiff, a non-resident alien, is not entitled to a visa. *Landon v. Plasencia*,  
 4 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the  
 5 United States requests a privilege and has no constitutional rights regarding his application, for  
 6 the power to admit or exclude aliens is a sovereign prerogative."). The protections of substantive  
 7 due process accordingly do not apply to Plaintiff's claims regarding the revocation or the denial  
 8 of her visa. Finally, as explained above in response to PPF ¶ 3(e), she has presented no  
 9 evidence that the cost of her plane ticket was not refunded.

10 21. Defendants' conduct in **REDACTED**,  
 11 and **REDACTED**  
 12 **REDACTED** continues to  
 13 interfere with plaintiff's right to travel as well as her right to pursue her chosen occupation, and  
 14 is arbitrary and capricious. (Facts 79-127.) **Defs.' Response:** Deny; Defendants have not  
 15 published **REDACTED**, DPF ¶ 120, and have attempted to protect that information.  
 16 Plaintiff's speculation regarding harm that may result from the disclosure of such status to  
 17 federal employees fails to confer Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S.  
 18 555, 561 (1992) (Plaintiff "must 'set forth' by affidavit or other evidence 'specific facts'"   
 19 establishing each element of standing); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)  
 20 (plaintiff must show 'injury in fact' that is concrete and particularized; the threat must be actual  
 21 and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action  
 22 of the defendant; and it must be likely that a favorable judicial decision will prevent or redress  
 23 the injury."). Plaintiff's travel and profession have not been affected by **REDACTED**  
 24 **REDACTED**, DPF ¶¶ 121-137, and do not constitute fundamental rights that would implicate  
 25 substantive due process. Finally, whether Plaintiff's **REDACTED** is "arbitrary and  
 26 capricious" goes directly to the **REDACTED**—information that has been excluded by  
 27 this Court under the state secrets privilege.

28 The Administrative Procedure Act

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1           22.     The Administrative Procedure Act authorizes district courts to issue injunctive  
2 relief to correct agency action that is: (A) arbitrary, capricious, an abuse of discretion, or  
3 otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or  
4 immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory  
5 right; (D) without observance of procedure required by law; . . . or (F) unwarranted by the  
6 facts[.]” 5 U.S.C. § 706. **Defs.’ Response:** Agree that the statement captures the provisions of  
7 Section 706, but note for ¶¶ 22-24 that Plaintiff’s APA claim “depends on the viability of her  
8 First and Fifth Amendment Claims.” *Ibrahim II*, 669 F.3d at 994 n.21; Nov. 1 Order at 13:13-16.

9           23.     Defendants’ conduct in **REDACTED**  
10 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in  
11 violation of the APA, 5 U.S.C. § 706(2)(A). (Facts 1-128.) **Defs.’ Response:** Deny. Whether  
12 Plaintiff’s **REDACTED** is “arbitrary and capricious” goes directly to the **REDACTED**  
13 **REDACTED**—information that has been excluded by this Court under the state secrets privilege.

14           24.     Defendants’ conduct in **REDACTED**  
15 was contrary to constitutional right, power, privilege, or immunity, in violation of the APA, 5  
16 U.S.C. § 706(2)(B). (Facts 1-128.) **Defs.’ Response:** Deny. Whether Plaintiff’s **REDACTED**  
17 **REDACTED** is “arbitrary and capricious” goes directly to **REDACTED**—information  
18 that has been excluded by this Court under the state secrets privilege.

19 First Amendment

20           25.     “The right to freedom of association is a right enjoyed by religious and secular  
21 groups alike.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694,  
22 706 (2012). “Infringements on that right may be justified by regulations adopted to serve  
23 compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through  
24 means significantly less restrictive of associational freedoms.” *Roberts v. U.S. Jaycees*, 468 U.S.  
25 609, 623 (1984). **Defs.’ Response:** Agree that the statement properly quotes the two decisions.

26           26.     Defendants’ conduct in **REDACTED**  
27 **REDACTED** infringed on her right to associate with other Muslims and with her family members.  
28 (Facts 21-25, 38, 43-44, 51, 62.) **Defs.’ Response:** Deny that Plaintiff’s **REDACTED**

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1 **REDACTED** has affected her ability to associate with those in her faith or family members.

2 Plaintiff has failed to make the threshold showing that her **REDACTED** has impeded  
3 her ability to associate with others in her faith or with family members. *Alberici v. County of Los*  
4 *Angeles*, No. 12-10511, 2013 WL 5573045 at 16 n. 8 (C.D. Cal. Oct. 9, 2013); *see also Plevin v.*  
5 *City & Cnty. of San Francisco*, No. 11-2359, 2012 WL 6025765, at \*5 (N.D. Cal. Dec. 4, 2012).

6 27. The government lacks a reasonable belief that Dr. Ibrahim is associated with  
7 terrorism and therefore cannot meet its burden to show that its actions were supported by a  
8 compelling or even a legitimate government interest. (Facts 19-20, 109.) **Defs.' Response:**  
9 Deny; the question of whether or not Plaintiff's **REDACTED** is supported by adequate  
10 evidence, however, goes directly to the **REDACTED**—information that has been  
11 excluded by this Court under the state secrets privilege.

12 28. The government has not met its burden to show that less restrictive measures  
13 would not address its alleged interests. (Facts 1-128.) **Defs.' Response:** Deny. Providing  
14 notice and an opportunity to rebut the derogatory information would result in harm to national  
15 security. *See DPF ¶¶ 32-33.*

16 29. To establish a First Amendment retaliation claim, the plaintiff must show (1) the  
17 defendant acted to deter or chill the plaintiff's speech, *Mendocino Env'tl. Ctr. v. Mendocino*  
18 *County*, 192 F.3d 1283, 1300 (9th Cir. 1999); and (2) the defendant's desire to chill speech was  
19 the "but for" cause of the unlawful conduct. *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th  
20 Cir. 2013). **Defs.' Response:** Deny to the extent that the statement of law fails to acknowledge  
21 that, to make out a *prima facie* case of First Amendment retaliation, Plaintiff has the burden of  
22 showing that the exercise of constitutionally protected rights was "substantial" or "motivating"  
23 factor in the decision. *See Mt. Healthy City Sch. Dist. of Educ. v. Doyle*, 429 U.S. 274, 287  
24 (1977); *see also CarePartners v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008). Otherwise agree.

25 30. In denying Dr. Ibrahim's 2009 visa application and not granting her most recent  
26 visa application, defendants intended to interfere with plaintiff's clearly established right to  
27 petition the court for redress of grievances, and they would not have watchlisted her but for this  
28 desire. (Facts 83, 88, 89-92, 110, 127.) **Defs.' Response:** Deny because none of the proposed



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1 factual findings supports the conclusion that Defendants denied Plaintiff's 2009 visa application  
 2 or placed Plaintiff on a watchlist in order to interfere with her right to "petition the court for  
 3 redress of grievances." The basis for denying her visa and her [REDACTED] in 2009  
 4 are addressed in the classified submission. Regarding Plaintiff's most recent visa application,  
 5 the only evidence that she cites is that she applied for a visa, which does not support her  
 6 conclusion. Furthermore, all grounds that a consular officer may use to refuse a visa are set forth  
 7 in the INA. 8 U.S.C. 1182(a), (f); 8 U.S.C. 1184(b); 8 U.S.C. 1201(g).

8 31. Defendants' conduct in [REDACTED]  
 9 interfered with plaintiff's right to associate with her family members. (Facts 25, 51.) Defs.'  
 10 Response: Deny. Plaintiff has failed to set forth any facts that would permit her to show that  
 11 her [REDACTED] has impeded her ability to associate with her family members.

12 32. Defendants' conduct in [REDACTED]  
 13 interfered with plaintiff's right to associate with others of the Muslim faith. (Facts 21-25, 38, 43-  
 14 44, 51, 62.) Defs.' Response: Deny. Plaintiff has failed to set forth any facts that would permit  
 15 her to show that her [REDACTED] has impeded her ability to associate with others in  
 16 her faith.

17 33. Defendants' 2009 conduct in [REDACTED]  
 18 [REDACTED] interfered with plaintiff's right to exercise her First Amendment right to free speech  
 19 and to petition for redress of grievances. (Facts 83, 88, 89-92, 110, 127.) Defs.' Response:  
 20 Deny. Plaintiff has failed to set forth any facts that would permit her to show that her [REDACTED]  
 21 [REDACTED] has impeded the exercise of any First Amendment freedoms.

#### 22 Equal Protection

23 34. A plaintiff alleging a violation of equal protection must show that the defendant  
 24 acted in a discriminatory manner and that the discrimination was intentional. *See Washington v.*  
 25 *Davis*, 426 U.S. 229, 238-47 (1976). Intent may be proved through direct or indirect evidence.  
 26 *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).  
 27 Defs.' Response: Defendants agree with the statement of law, but aver that Plaintiff has failed to  
 28 make either showing.

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1           35.     Dr. Ibrahim is a Muslim, ethnically Malay, and a citizen of Malaysia. All of these  
2 classifications receive strict scrutiny. **Defs.' Response:** Agree that religion, race, and national  
3 origin may be subject to heightened scrutiny in an analysis of an equal protection claim, but deny  
4 that Plaintiff has been the subject of any suspect classification that would implicate equal  
5 protection.

6           36.     Discriminatory acts towards third parties may be relevant to show discriminatory  
7 intent towards the plaintiff. *Metoyer v. Chassman*, 504 F.3d 919, 937 (9th Cir. 2007).  
8 Defendants' disproportionate targeting of Muslims for counterterrorism investigations, combined  
9 with their policy of automatically watchlisting all persons subjected to a full or preliminary  
10 investigation, is circumstantial evidence of intent to discriminate against plaintiff. *Cf. Church of*  
11 *the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text,  
12 the effect of a law in its real operation is strong evidence of its object."). Here, the government  
13 has consciously chosen to focus its law enforcement efforts on Muslims because of, not in spite  
14 of, their religious beliefs. The effect of the government's watchlisting scheme on Muslims is so  
15 harsh, intent to discriminate is not only a permissible inference, it is also a necessary one. *See*  
16 *Flores*, 617 F.2d at 1389. The other available direct and circumstantial evidence also shows that  
17 defendants intentionally discriminated against Dr. Ibrahim in **REDACTED**  
18 **REDACTED**. (Facts 21-25, 31, 38, 43-44, 49-51, 62.) **Defs.' Response:** Deny that  
19 Plaintiff has provided sufficient direct or circumstantial evidence of discrimination. Here, unlike  
20 in *Metoyer*, there is no evidence (direct or circumstantial) that would suggest that Defendants  
21 have undertaken any discriminatory actions against Plaintiff or Muslims generally. 504 F.3d at  
22 937. Similarly, no evidence exists that only one religion is impacted by the government action,  
23 as was the case in *City of Hialeah*. 508 U.S. at 535. Nor is there any evidence of a "disparate  
24 racial effect," 617 F.2d at 1389, as in *Flores*.

25           37.     Defendants' conduct in **REDACTED**  
26 violated her right to equal protection. **Defs.' Response:** Deny; the basis for Plaintiff's  
27 **REDACTED**, however, has been excluded by this Court under the state secrets  
28 privilege.

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38. Defendants must set aside their decisions [REDACTED]

[REDACTED]  
[REDACTED] y. Defendants shall remove Dr. Ibrahim's identity [REDACTED]. Defs.' Response: Deny that Plaintiff is entitled to the relief; judgment should instead be entered in favor of Defendants.

39. Defendants shall communicate the removal of Dr. Ibrahim's name [REDACTED]

[REDACTED] Defs.' Response: Deny that Plaintiff is entitled to the relief.

40. It would not harm national security for Dr. Ibrahim to be informed of her [REDACTED]

[REDACTED]. Plaintiff's counsel may inform Dr. Ibrahim of her [REDACTED]

[REDACTED]. Defs.' Response: Deny for the reasons set forth in ¶¶ 1, 4(a), and 4(l) above.

41. Dr. Ibrahim is entitled to a public trial in this matter. Defs.' Response: Deny; the right of public access is a common law right that can be overcome when the need to protect Sensitive Security Information and law enforcement sensitive information trumps the common law right. Defendants endeavored to permit as public a trial as possible under the circumstances.

DATED: December 20, 2013

Respectfully submitted,

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/s/ Paul G. Freeborne  
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SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN IBRAHIM v. DHS ET AL., 3:06-CV-00545-WHA (N.D. CAL.)

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