Appeal No. 03-40783; 04-1131; 04-1796 (Consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Arshad Chowdhury,

Petitioner,

vs.

Transportation Security Administration, Department of Homeland Security and the United States of America,

Respondents.

On Appeal From the United States District Court for the Northern District of California
Hon. Charles R. Breyer (Case No. CV-02-2665)

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

STATEMENT OF CASE 2

STATEMENT OF THE ISSUES 4

I. STATEMENT OF FACTS 5

A. Chowdhury's Civil Rights Lawsuit 5

B. SSI and Discovery 8

1. TSA's First Final Order 9

2. The District Court's Motion to Compel Hearing 11

3. The Deposition of Keolani Stacey 11

4. Chowdhury's Motion for a Protective Order 12

5. TSA's Second and Third Final Orders 13

6. The District Court Denies Chowdhury's Motion for Protective Order 13

7. Status of Discovery in the District Court and the Second Circuit Appeal 14

C. The Nature of SSI 15

II. SUMMARY OF THE ARGUMENT 20

III. ARGUMENT 22

A. Congress Did Not Grant TSA Authority to Control the Disclosure of Information in Civil Litigation 22

1. The Plain Language of Section 114(s) Demonstrates that the Statute Authorizes Limitations Only on the Public Disclosure of Transportation Security Related Information 24

2. The Legislative History of Section 114(s) Further Reflects Congressional Intent to Limit Section 114(s) to Control Public Disclosure of Transportation Security-Related Information 30

TABLE OF CONTENTS
(continued)

Page

3. The Non-Delegation Doctrine Further Demonstrates That Congress Did Not Grant TSA Authority To Limit Disclosure Of Information In The Context Of Civil Litigation 31

B. TSA's Attempt to Regulate Disclosure of Information in the Context of Civil Litigation is Not Entitled to Deference Because it is Not Reasonable or Consistent With Section 114(s) 33

C. TSA's Designatin of Non-Disclosable SSI in This Matter is Arbitrary and Capricious and Not Supported by Substantial Evidence 37

1. TSA's Failure to Consider All of the Relevant Disclosure Provisions in this Matter was Arbitrary and Capricious........ 38

2. TSA's Designation of SSI is Not Supported by Substantial Evidence 41

D. TSA's Final Orders Deprived Chowdhury of the Most Basic Requirements of Due Process........ 44

1. Chowdhury has Property Interests Stemming from his Cause of Action Against Northwest Airlines........ 45

2. TSA Violated the Minimal Standards of Procedural Due Process Required by the Constitution 51

a. Chowdhury's Interest in the Contested Information is Substantial 52

b. The Risk of Erroneous Deprivation is High. 53

i. TSA Provided Chowdhury No Notice or Opportunity to be Heard. 53

ii. TSA Employs an Excessively Broad and Standardless Definition of SSI 55

iii. TSA Relied on Undisclosed Evidence. 56

TABLE OF CONTENTS
(continued)

Page

c. Additional Process Will Reduce the Risk of Erroneous Deprivation and Give Meaning to the Statutes and Regulations Governing TSA's Designation of SSI 56

d. TSA's Interests in Avoiing Due Process Are Minimal 59

CONCLUSION AND RELIEF SOUGHT. 62

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) ... 23

Aid Association for Lutherans v. U.S. Postal Service,
321 F.3d 1166 (D.C. Cir. 2003) ... 23
American-Arab Anti-Discrimination Committee v. Reno,
70 F.3d 1045 (9th Cir. 1995) ... 56

Baldrige v. Shapiro,
455 U.S. 345 (1982) ... 26, 28

Barrett v. United States,
689 F.2d 324 (2d Cir. 1982) ... 46

Billington v. Underwood,
613 F.2d 91 (5th Cir. 1980) ... 54

Black v. United States,
62 F.3d 1115 (8th Cir. 1995) ... 15, 29

Boddie v. Connecticut,
401 U.S. 371 (1971) ... 46

Chevron v. Natural Resources Defense Council,
467 U.S. 837 (1984) ... 22

Christian,
252 F.3d at 873 ... 50

Ciambriello v. County of Nassau,
292 F.3d 307 (2d Cir. 2002) ... 55

Cleveland Board of Education v. LaFleur,
414 U.S. 632 (1974) ... 59

Connecticut v. Doehr,

TABLE OF AUTHORITIES
(continued)

Page

501 U.S. 1 (1991)........ 55

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938)........ 38

Cooper v. Salazar,
196 F.3d 809 (7th Cir. 1999)........ 46

Cox v. Miller,
296 F.3d 89 (2d Cir. 2002)........ 28

Federal Open Market Committee of the Federal Reserve System v. Merrill,
443 U.S. 340 (1972)........ 32

Fuentes v. Shevin,
407 U.S. 67 (1972)........ 57

Goldberg v. Kelly,
397 U.S. 254 (1970)........ 52

Gray Panthers,
652 F.2d at 168-69........ 57

Grijalva v. Shalala,
152 F.3d 1115 (9th Cir. 1998), vacated on other grounds........ 57

Hamby v. Neel,
368 F.3d 549 (6th Cir. 2004)........ 59

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987)........ 33

INS v. Chadha,
462 U.S. 919 (1983)........ 23

International Alliance of Theatrical & Stage Employees v. NLRB,

TABLE OF AUTHORITIES
(continued)

Page

334 F.3d 27 (D.C. Cir. 2003)... 34

Kapps v. Wing,
283 F. Supp. 2d 866 (E.D.N.Y. 2003).. 58

Kraemer v. Heckler,
737 F.2d 214 (2d Cir. 1984)... 54

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982)... 44, 45, 53, 54

Lynn v. Regents of the University of Calif.,
656 F.2d 1337 (9th Cir. 1981)... 47

Mathews v. Eldridge,
424 U.S. 319 (1976)... 52, 53

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)... 49, 50

Memorial Hospital for McHenry County v. Shadur,
664 F.2d 1058 (7th Cir. 1981)... 28

Memphis Light, Gas & Water Division v. Craft,
436 U.S. 1 (1978)... 54

Mistretta v. United States,
488 U.S. 361 (1989)... 22

Molerio v. FBI,
749 F.2d 815 (D.C. Cir. 1984)... 29

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950)... 46

NLRB v. United Food & Commercial Workers,

Page

484 U.S. 112 (1987) 33

National Council of Resistance of Iran v. Department of State,
251 F.3d 192 (D.C. Cir. 2001) 54, 60

Penobscot Air Services, Ltd. v. FAA,
164 F.3d 713 (1st Cir. 1999) 37, 38

Perry v. Sindermann,
408 U.S. 593 (1972) 45, 47

Pierce County, Washington v. Guillen,
537 U.S. 129 (2003) 26

Propert v. District of Columbia,
948 F.2d 1327 (D.C. Cir. 1991) 60

Public Citizen, Inc. v. FAA,
988 F.2d 186 (D.C. Cir. 1993) 24

Railway Labor Executives' Association v. National Mediation Board,
29 F.3d 655 (D.C. Cir. 1994) 25

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 49

Stanley v. Illinois,
405 U.S. 645 (1972) 59
Torbet v. United Airlines, Inc.,
298 F.3d 1087 (9th Cir. 2002) 19

Touby v. United States,
500 U.S. 160 (1991) 22

United States v. Nixon,
418 U.S. 683 (1974) 28

TABLE OF AUTHORITIES
(continued)

Page

United States v. Rahmani,
209 F. Supp. 2d 1045 (C.D. Cal. 2002) 60

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1981) 38

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 54

Whitman v. American Trucking Associations, Inc.,
531 U.S. 457 (2001) 31

Wilson Air Center, LLC v. FAA,
372 F.3d 807 (2004) 38

WESTLAW CASES

Ahmed v. American Airlines, Inc.,
2003 WL 1973168 (W.D. Tex. Apr. 15, 2003) 19

Gordon v. F.B.I.,
2004 WL 1368858 (N.D.Cal., Jun. 15, 2004) 55

Kalantar v. Lufthansa German Airlines,
2003 WL 21806187 (D.D.C. Apr. 10, 2003) 19

Rodriguez v. Provident Life and Accident Insurance Co.,
2002 WL 291961 (C.D. Cal. Mar. 2, 2001) 50

United States v. Moussaoui,
2002 WL 1311736 (E.D. Va. Jun. 11, 2002) 42

FEDERAL STATUTES

5 U.S.C. §706(2) 39

TABLE OF AUTHORITIES
(continued)

Page

5 U.S.C.A. 552(d) 29

5 U.S.C.A. 552b(l) 29

5 U.S.C.A. 557(d)(2) 29

62 Fed. Reg. 13736, 13736 (March 21, 1997) 32

12 U.S.C.A. 1828(t)(2) 28

13 U.S.C. 9(a) 28

14 U.S.C.A. 645(c)(1),; 10 U.S.C.A. 1102(b), ... 28

15 U.S.C.A. 1087-2(r)(12) 29

15 U.S.C.A. 78m(h)(7) 28

15 U.S.C.A. 78o-5(b)(2)(3)(6) 28

15 U.S.C.A. 78q(h)(5),; 15 U.S.C.A. 79z-5c(f)(3) 29

15 U.S.C.A. 80a-30(c) 29

15 U.S.C.A. 80b-10a(a)(3) 29

67 Fed. Reg. 8340, 8342 (Feb 22, 2002) 32

28 U.S.C. §1291 5

28 U.S.C. §1292(b) 5

28 U.S.C. §2072 33

49 C.F.R. §1520.11 .... 36, 40

TABLE OF AUTHORITIES
(continued)

Page

49 C.F.R. § 1520.13 38

49 C.F.R. §1520.15(d)(1) 37, 42, 61

49 C.F.R. §1520.5(a) 18

49 C.F.R. §§1520.7, 1520.11 .... 35, 37

49 U.S.C. §114(s) .... passim

49 U.S.C. §46110(c) 3, 39

APA, 5 U.S.C. § 555(e) 61

Fed. R. Civ. P. 26(c) 33

U.S. Const. amend. V 46

U.S. Const. Art. I §1 24

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JURISDICTIONAL STATEMENT

In this consolidated action, Petitioner Arshad Chowdhury ("Chowdhury") seeks review of three Transportation Security Administration ("TSA") final orders. TSA asserts jurisdiction to issue the three final orders at issue here pursuant to 49 U.S.C. §114(s). The jurisdiction of this Court is invoked under 49 U.S.C. §46110(c), which provides that the Courts of Appeal have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order [issued under section 114(s)]." Although the litigation giving rise to this petition for review is in the United States District Court for the Northern District of California, Petitioner timely filed petitions for review of each TSA final order in the Second Circuit pursuant to 49 U.S.C. §46110(a), which provides that a person disclosing substantial interest in an order issued by TSA under section 114(s) may apply for review of the order in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals in the United States for the circuit in which the person resides or has its principal place of business. Petitioner Arshad Chowdhury resides and works in New York City and, as described more fully, infra, has a substantial interest in the three final orders at issue. Chowdhury filed petitions for review of each of these final orders within 60 days after the order was issued, as required under 49 U.S.C. §46110(a). The first final order is dated August 27, 2003. A Petition for Review of the first final order was filed on

October 23, 2003. The second final order is dated January 7, 2004. A Petition for Review of the second final order was filed on March 2, 2004. The third final order is dated February 24, 2004. A Petition for Review of the third final order was filed on April 7, 2004.

STATEMENT OF CASE

This petition for review arises from Petitioner Arshad Chowdhury's federal civil rights lawsuit filed in the United States District Court for the Northern District of California. Chowdhury filed suit on June 4, 2002, alleging that Northwest Airlines Corporation and Northwest Airlines, Inc. (collectively "Northwest") discriminated against him based on his race/ethnicity by refusing to permit him to board a Northwest Airlines flight on October 23, 2001, even after the FBI determined that he posed no security threat. Chowdhury further alleges that Northwest violated his rights by causing his name to appear on widely distributed lists of suspected or known terrorists. See Amended Complaint at A-825 to A-829[1].

During the course of discovery, which is ongoing, Northwest has withheld numerous documents and interrogatory responses, and refused to answer numerous deposition questions, claiming that the information sought included "sensitive security information" or "SSI." In response to Chowdhury's motion to compel this

[1] References to "A" refers to the accompanying Joint Appendix.

information, TSA, without notice to Chowdhury, issued a "final order" designating specific information SSI and asserting that such information could not be disclosed in the litigation. See 8/23/03 Final Order (A-41). Northwest subsequently submitted additional documents to TSA and TSA issued two additional "final orders" without notice or hearing designating further information SSI. See 1/7/04 Final Order (A-251) & 2/24/04 Final Order (A-401). As set out more fully in Chowdhury's jurisdictional statement, Chowdhury timely filed petitions for review of each final order with this Court.

On October 21, 2003, Chowdhury filed a motion in the district court seeking an "attorneys' eyes only" protective order permitting Chowdhury's attorneys access to the information TSA designated SSI. See Memo. of P.& A. in Supp. of Pl.'s Mot. for Protective Order ("Protective Order Mot.") (A-892). In response to Chowdhury's motion for protective order, TSA filed a "statement of interest," asserting that section 114(s) creates an absolute privilege that precludes the district court from even considering whether a protective order would provide adequate protection to the information at issue. See Third Statement of Interest of the United States (A-1107).

The district court denied Chowdhury's motion for protective order, holding that section 114(s) permits TSA to bar Chowdhury's attorneys from viewing SSI. See Memo. & Order (A-1161). The district court certified its decision for

immediate appeal and Chowdhury has sought appeal of the district court's denial of Chowdhury's motion for protective order in the Court of Appeals for the Ninth Circuit under 28 U.S.C. §1291 and 28 U.S.C. §1292(b). See Order Granting Mot. for Interlocutory Appeal ("Certification Order") (A-1174). TSA has moved to intervene, arguing that jurisdiction over all disputes related to TSA's final orders lies exclusively within the Second Circuit. See General Dockets for 2d. Cir. Docket Nos. 04-1796, 03-40783, 04-1131 (A-1, A-8, A-15). To date, the Ninth Circuit has not decided Chowdhury's petition for appeal under section 1292(b) or the government's motion to dismiss Chowdhury's appeal under section 1291.

Chowdhury now seeks review of TSA's three final orders.

STATEMENT OF THE ISSUES

1) Whether TSA exceeded its authority by determining that sensitive security information may not be disclosed under any circumstances in the Chowdhury litigation.

2) Whether the final orders issued by TSA in the Chowdhury litigation are arbitrary and capricious or not supported by substantial evidence.

3) Whether TSA violated Chowdhury's right to constitutional due process when issuing the final orders in the Chowdhury litigation.

I. STATEMENT OF FACTS

A. Chowdhury's Civil Rights Lawsuit

In October 2001, Arshad Chowdhury, a native United States citizen of Bangladeshi ancestry, was studying for a Master's Degree in Business Administration at Carnegie Mellon University in Pittsburgh, Pennsylvania.[2] On October 19, 2001, during a university vacation, Chowdhury flew from Pittsburgh International Airport to San Francisco International Airport ("SFO") to visit friends in the San Francisco Bay Area. On October 23, 2001, Chowdhury returned to SFO expecting to return home on his scheduled flight.

Prior to boarding, Chowdhury was called to the gate counter, where a Northwest supervisor informed him that another employee had found a "phonetic similarity" between Chowdhury's name and a name on an FBI watch list of suspected terrorists. The supervisor told Chowdhury that he would not be able to board until he had been cleared by law enforcement.

Chowdhury was then publicly detained and questioned by FBI and local law enforcement officials. These officials determined that Chowdhury was not the person on the watch list and that he posed no security threat. As Chowdhury proceeded down the jetway to board his flight, another Northwest employee approached him and informed him that, although it did not "make sense,"

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[2] Chowdhury has since graduated from Carnegie Mellon and resides in New York City.

Chowdhury could not board the flight. See Amended Complaint (A-817) & Sept. 30, 2003 Dep. Arshad Chowdhury ("Chowdhury Dep.") at 148:7-14 (SPA-47)[3], 151:10-23 (A-940). At the same time that Northwest refused to permit Chowdhury to board, it permitted a white passenger, who had also been subjected to additional security scrutiny (in the form of having his baggage searched at the gate), to board the plane. Unlike Chowdhury, the white passenger permitted on the plane does not appear to have been cleared personally by the FBI. See Chowdhury Dep., 147:16-148:11 (SPA-47 to SPA-48).

When Chowdhury politely asked the Northwest gate agents why he could not board even though he had been cleared by the FBI, they responded in a rude and threatening manner, refusing to provide a reason in writing and stating that if Chowdhury continued to question his treatment, they would leave him stranded at the airport. See Chowdhury Dep., 156 (SPA-50). In the presence of the Northwest gate agents, Chowdhury asked each law enforcement official whether he was a potential threat. Each officer responded that he was not. See Chowdhury Dep., 155-156 (SPA-49 to SPA-50). When Chowdhury asked one of the law enforcement officers if Northwest could refuse to board him even though he presented no security risk, the officer responded, "[I]t's a private company. They can do whatever they want." Chowdhury Dep., 166 (SPA-51). Northwest

[3] References to SPA refer to the Special Joint Appendix accompanying this brief.

eventually gave Chowdhury a ticket for a US Airways flight that left fifteen minutes later at another gate. Chowdhury rushed to make that flight, and returned home without further incident.

Approximately one month later, when Chowdhury attempted to fly on US Airways, he was told that a security block had been placed on his name and that he would have to be cleared by the FBI before he could fly. A US Airways employee informed Chowdhury that this block appeared to have been placed by Northwest Airlines and that the erroneous information that Chowdhury was a security risk may have been disseminated to airports throughout the nation. Chowdhury was extremely alarmed by this news, and to date has received no explanation of how this might have happened, what impact it might have had, and whether steps have been taken to prevent his erroneous identification as a security risk in the future. Chowdhury Dep., 215-216 (SPA-52 to SPA-53); Amended Complaint ¶¶ 32-33 (A-824).

Chowdhury filed suit on June 4, 2002, in the United States District Court for the Northern District of California, alleging, inter alia, that Northwest discriminated against him based on his race when refusing to permit him to fly on Northwest Airlines on October 23, 2001. See Amended Complaint at ¶¶ 23-30, 37-39 (A-822 to A-823, A-824 to A-825). Chowdhury further alleges that Northwest violated his constitutional right to privacy by causing his name to be

listed with or among suspected or known terrorists and distributed throughout the United States. See Amended Complaint, ¶¶ 27-30, 32-33 (A-823, A-824); Chowdhury Dep., 237:8-239:11 (A-948 to A-950).

B. SSI and Discovery

TSA has been limiting Chowdhury's access to relevant evidence since discovery began in this case nearly two years ago.[4] TSA's involvement in this case began at the initial disclosure stage and involved ad hoc review and SSI designation of documents provided by Northwest. Northwest withheld a five-page document from its initial disclosures on January 10, 2003, asserting that it might contain SSI. See 3/17/03 Letter from D. MacDougall to C. Martin (A-110). Northwest served supplemental disclosures on March 17, 2003, at which time it withheld additional documents, asserting they might contain SSI. See id. Chowdhury served discovery requests on Defendants on February 28, 2003. Northwest made SSI objections to sixteen of Chowdhury's 21 Interrogatories and to 19 of Chowdhury's 24 document requests. See Lopez Decl., Exs. E (A-1015) & F (A-1042).

On May 19, 2003, four months after Northwest began submitting documents to TSA, TSA informed Northwest that it had completed its review of these documents, and determined that portions of the documents withheld by Northwest

[4] There is no dispute that all of the information withheld as SSI is relevant to Chowdhury's claims. Northwest submitted documents to the TSA only after determining they were responsive to Chowdhury's discovery requests.

because they may have contained SSI in fact did not contain SSI. See 5/19/03 Letter from C. Martin to D. MacDougall (A-170). Northwest subsequently produced many of the documents previously withheld as SSI. See 5/21/03 Letter from D. MacDougall to C. Martin (A-221).

Northwest served supplemental disclosures and again withheld documents subject to approval by TSA on April 2, 2003. See 4/2/03 Letter from D. MacDougall to Counsel (A-1082). Those documents were produced in redacted form on June 18, 2003. See 6/18/03 Letter from C. Martin to D. MacDougall (A-224). After conducting a "secondary review" at the request of Chowdhury's counsel, TSA released additional information previously withheld as SSI in July 2003. See 7/11/03 Letter from C. Martin to D. MacDougall (A-243).

As discussed, infra, much of the information that TSA designated SSI is highly relevant to Chowdhury's discrimination claims against Northwest. Accordingly, Chowdhury, on August 8, 2003, moved to compel information withheld by Northwest pursuant to TSA's SSI designations. See N.D. Civ. Docket, A-799.

1. TSA's First Final Order

On August 28, 2003, days prior to the district court's hearing on Chowdhury's motion to compel, the government filed a "Statement of Interest" to which was attached a document entitled Final Order—Chowdhury v. Northwest

Airlines Inc. signed by Brian R. Reed, TSA's Director of Aviation Operations Litigation Support and Special Actions Staff ("First Final Order") (see First Final Order (A-41)) and a Declaration of Stephen J. McHale, the Deputy Under Secretary for TSA, signed approximately one year earlier, on October 25, 2002. See Decl. of Stephen J. McHale (A-26). In its Statement of Interest, the government asserted that the final order designated certain information SSI and prohibited the disclosure of that SSI to Chowdhury in litigation, regardless of its relevance to his claims. See Statement of Interest (A-852).

Issuance of the final order was not preceded by any administrative proceeding or even notice to Chowdhury. The order does not reflect any individualized consideration of whether the disclosure of the redacted information to Chowdhury in the context of this case would be detrimental to transportation safety. Similarly, the final order does not indicate that TSA considered whether conditional disclosure of SSI to Chowdhury under section 1520.15(e) would be appropriate. The final order does not indicate which of section 1520.5's sixteen definitions apply to the purported SSI. Nor does it specify whether particular information was deemed SSI because its disclosure would constitute an unwarranted invasion of privacy; would reveal trade secrets or privileged or confidential information; or would be detrimental to the security of transportation, or some combination of the three.

2. The District Court's Motion to Compel Hearing

On September 5, 2003, the district court heard argument on Chowdhury's motion to compel SSI and other information. The court ordered the government to produce in camera documents containing redacted SSI. See 9/5/03 Minute Entry (A-1091). The government filed the unredacted documents listed in its first final order under seal on September 29, 2003, along with a Second Statement of Interest in opposition to Chowdhury's motion to compel SSI. See United States' Notice of Filing Under Seal (A-764). Although severely prejudiced by his inability to review the redacted material, Chowdhury attempted to offer guidance to the district court regarding how this material may support Chowdhury's claims. See N.D. Civ. Docket, Mot. for Dis. Regarding In Camera Review filed by Arshad Chowdhury at A-801.

3. The Deposition of Keolani Stacey

Also at the September 5 hearing, the district court advised the parties to conduct the previously scheduled deposition of Keolani Stacey, the Northwest Airlines Customer Service Supervisor involved in barring Chowdhury from flying on October 23, 2001. The court advised that once Chowdhury had taken the deposition of Stacey, it would address procedures regarding SSI in depositions. See Transcript of September 5, 2003 Hearing ("Transcript"), at A-1070 to A-1071.

The subsequent SSI "test" deposition of Stacey in September demonstrated that TSA's refusal to provide access to SSI has severely prejudiced, and will continue to prejudice, Chowdhury's ability to litigate his civil rights claims. At her deposition, Stacey and her counsel decided what information constituted SSI and could not be revealed to Chowdhury's counsel. As described more fully, <u>infra</u>, Northwest instructed Stacey regarding SSI approximately 70 times during her deposition and Stacey refused to answer Chowdhury's questions in numerous areas critical to his claims.[5]

4. Chowdhury's Motion for Protective Order

As it became clear that future discovery requests and depositions would elicit additional SSI objections that would prejudice Chowdhury's ability to litigate his case, and while the district court continued to review TSA's SSI designations <u>in camera</u>, Chowdhury moved for a protective order under which his counsel would be granted attorneys' eyes only access to information designated SSI by TSA. <u>See</u> N.D. Civ. Docket at A-804. The government opposed Chowdhury's motion, arguing that the district court had no authority to order the disclosure of information properly designated SSI, or to review whether TSA's designations

[5] Although the government was notified of the date and time of Stacey's deposition, no representative of the government attended. <u>See</u> 9/12/03 Letter form J. Cisneros to C. Martin (A-360). Nor has there been any request that the deposition be sealed or that the information not be further disseminated.

were proper, and that the Courts of Appeal have exclusive jurisdiction over all issues related to TSA's SSI designations. See Third Statement of Interest of the United States (A-1107).

5. TSA's Second and Third Final Orders

While Chowdhury's motion for protective order was pending, TSA issued two additional final orders. TSA's second final order, dated January 7, 2004, designated SSI information in documents totaling 101 pages that Northwest had submitted four months earlier. See 9/12/03 Letter from J. Cisneros to C. Martin (A-362) & Attachments to 1/7/04 Final Order at A-257 to A-359. TSA's third final order, dated, February 24, 2004, addressed additional documents submitted by Northwest totaling approximately 200 pages. See 2/7/04 Letter from J. Cisneros to C. Martin (A-613). The second and third final orders are deficient in the same ways as the first final order, as detailed above and discussed more fully infra.

6. The District Court Denies Chowdhury's Motion for Protective Order

On April 2, 2004, the district court denied Chowdhury's motion for protective order, holding that section 114(s) permits TSA to bar Chowdhury's attorneys from viewing SSI. The district court certified its decision for interlocutory appeal, noting that "[t]here is unquestionably a substantial basis for

difference of opinion on the Court's resolution of the privilege issue. The issue is one of first impression and is not easily resolved. The Court grappled with the issue and, while it concluded that the legal authorities compelled denial of plaintiff's motion, reasonable jurists could quite easily disagree." Certification Order at A-1175 to A-1176. As discussed more fully in Chowdhury's Statement of the Case, Chowdhury has sought appeal of the district court's denial of Chowdhury's motion for protective order in the Court of Appeals for the Ninth Circuit, and TSA has opposed that appeal. The district court was clear that it was not ruling on the legality of TSA's final orders in this case, the issue that is before this Court in this consolidated review.

7. Status of Discovery in the District Court and the Second Circuit Appeal

Discovery has been brought to a standstill while the parties and the government attempt to resolve the SSI issue, and there have been no recent discovery requests, depositions, or further attempts by Chowdhury to secure Northwest's compliance with the district court's discovery orders. Accordingly, there have been no recent submissions by Northwest to TSA or subsequent final orders issued by TSA.

It is expected that the current consolidated appeal before this Court will resolve handling of the particular SSI listed in the three final orders at issue.

However, discovery is ongoing in this case and neither party nor the government disputes that it is likely that additional information produced in discovery will fit TSA's definition of SSI. Indeed, as Keolani Stacey's "test" deposition indicates, much of the deposition testimony in this case will implicate SSI. It is thus highly likely that, under the current approach to SSI, Chowdhury will need to return to this Court numerous times if he believes TSA's SSI designations are erroneous or otherwise improper.

C. The Nature of SSI

The information that TSA has opposed Chowdhury's proposed attorneys' eyes only protective order and withheld relevant information because TSA has unilaterally designated it "sensitive security information," or SSI. Because the consideration of SSI is at the center of this case, it is useful to understand what SSI is—and is not.

SSI is not "National Security Information," which is governed by Executive Order 12958 and applies in the context of national security and defense, intelligence, or foreign relations. See CRS Report for Congress (A-1200). Nor is SSI "states secrets," a judicially created designation reserved for information that would impair the nation's defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt relations with foreign governments. Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995). TSA has not and could not

argue that the SSI at issue here constitutes "states secrets" or "national security information." See Protective Order Mot. at A-909 to A-915. & Third Statement of Interest at A-1113.

Rather, SSI is a designation for unclassified and widely disseminated transportation-related information.[6] Although SSI is information "obtained or developed in the conduct of security activities," SSI itself need not constitute security information at all. SSI may be a "trade secret," "privileged" information, "confidential" information (including confidential business information), "private" information, or *any other information* that TSA determines is SSI. See §114(s); 49 C.F.R. §1520.5(a); 1520.5(b)(14); 1520.5(b)(16). Thus, while information may be designated SSI because TSA has determined that its public release would be "detrimental to transportation safety," information may also be designated SSI even where TSA does not believe its release would have any impact whatsoever on transportation safety.[7] For example, in this case, information redacted as SSI in

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[6] Testimony October 01, 2002, Investigation of Sept. 11, Before the House Select Committee on Intelligence, 2002 WL31253363 (Statement of Claudio Manno, Assistant Under Secretary for Intelligence, Transportation Security Administration), quoted in Protective Order Mot. at A-912 (SSI "consists of a declassified version of originally classified information."); 49 U.S.C. 114(s).

[7] There have been repeated contentions that the TSA on occasion designates information SSI: to avoid criticism; because public release would embarrass the agency; or where disclosure would actually increase safety. See, e.g., Sara Kehaulani Goo, TSA Faulted for restricting Information; Consumer, Aviation Groups Criticize Labeling Pilot, Program Data 'Sensitive', Wash. Post, Oct. 10, 2003, at A11; Bryon Okada, Public Will Not Be Told Details of D/FW Breach, Fort Worth Star-Telegram, Jan. 24, 2004, at 1 (as quoted in Mitchel A. Sollenberger, Sensitive Security Information (SSI) and Transportation Safety: Background and Controversies, CSR Report for Congress, February 5, 2004, at 3.); Tom Alex, Secrecy in Airport Security Contract Criticized, Des Moines Register,

some instances is simply the business addresses and telephone numbers of airline employees. See, e.g., NW 000472 (A-292). Nor does information need to be created by TSA, or even be in current use, to be designated SSI. As this case demonstrates, SSI may be the notes scribbled by an airline's customer service agent on a passenger's travel records, or security directives and name lists that have been obsolete for years.

In addition to not necessarily being security-related, SSI need not be secret. TSA routinely discloses SSI to tens, perhaps hundreds, of thousands of airline employees. TSA widely distributes information about name lists, boarding procedures, and other SSI to airlines and their staff, including Northwest ground security staff and customer service agents. See, e.g., Deposition of Keolani Stacey ("Stacey Dep."), at 13:1-13:5 (A-965); 15:13-17:17 (A-967 to A-969); 27:20-28:6 (A-974 to A-975). See also Testimony October 01, 2002, Investigation of Sept. 11, Before the House Select Committee on Intelligence, 2002 WL31253363 (Statement of Claudio Manno, Assistant Under Secretary for Intelligence, Transportation Security Administration), quoted in Protective Order Mot. at A-912 (SSI is distributed to innumerable "individual airline check-in agents, in either a manual or automated form, depending on the specific airline"). Even if only ten

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Sept. 27, 2003, at 1A; Tom Alex, Dispute Settled on Airport Pact, Des Moines Register, Nov. 13, 2003, at 6B (as described in Mitchel A. Sollenberger, Sensitive Security Information (SSI) and Transportation Safety: Background and Controversies, CSR Report for Congress, February 5, 2004, at 5-6.).

percent of airline employees across the industry have access to SSI, this means that at least tens of thousands of airline employees likely have access to SSI at any given time.[8] The record in this case indicates that airline employees do not have to sign a confidentiality agreement before being given access to SSI. See Stacey Dep., 24:5-25:6 (A-972 to A-975).

Indeed, TSA routinely discloses SSI to attorneys *defending* airlines in civil rights lawsuits, including the *outside counsel* brought in to represent Northwest in this civil rights lawsuit, but not to the attorneys representing plaintiffs in these

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[8] According to their own websites, 15 domestic airlines alone have 459,717 employees: http://www.alaskaair.com/www2/company/Almanac/images/almanac0903.pdf (11,273 Alaskan Airlines employees); http://www.amrcorp.com/corpinfo.htm (101,706 American employees); http://www.alohaairlines.com/aq/Quickreference.shtml (3,459 Aloha employees); http://www.americawest.com/aboutawa/companyprofile/aa_factsheet.htm (14,000 America West employees); http://www.continental.com/company/career/default.asp?SID=57658A1BDF9B45ADA29F (47,000 Continental employees); http://www.delta.com/prog_serv/ad_ops/ad_emp_media/index.jsp (75,000 Delta employees); http://www.frontierairlines.com/about/profile.asp (3,500 Frontier employees); http://www.hawaiianair.com/about/corporate/factsheet.asp (3,276 Hawaiian employees); http://www.jetblue.com/onlineannualreport/our-people.html (4,011 Jet Blue employees); http://media.corporate-ir.net/media_files/NYS/MEH/reports/MEH_2002_AR.pdf (3,385 Midwest employees); http://www.nwa.com/corpinfo/profi/facts/ (43,000 Northwest employees); http://www.southwest.com/about_swa/press/factsheet.html#Employees (35,000 Southwest employees); http://www.spiritair.com/fact.cfm (2700 Spirit employees); http://www.united.com/page/framedpage/0,1449,1382,00.html (84,000 United employees); http://www.usairways.com/about/corporate/profile/factsheets/index.htm (28,407 US Air employees).

same suits. See, e.g., 3/17/03 Letter from D. MacDougall to C. Martin (A-110).[9] Thus, in many civil rights suits, like the one at bar, the exact SSI that TSA deems unsuitable for disclosure to plaintiffs' attorneys pursuant to an attorneys' eyes only protective order is available to outside defense counsel and their support staff.[10] There is no indication that defense counsel or their support staffs are required to sign any confidentiality agreement or undergo any background check to gain access to SSI. As the TSA official involved in the present case explained in a similar case, the FAA "had permitted disclosure of security directives in similar cases to a party's attorney because, unlike in this case, the attorney '[did] not appear to be emotionally or otherwise involved in the issue. And she felt that in those cases there wouldn't be a threat to the information being disseminated.'" Kalantar v. Lufthansa German Airlines, 2003 WL 21806187 at *7 n.3 (alteration in original).

TSA's capricious approach to SSI has brought this litigation to a standstill and threatens to do so in countless other cases.

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[9] See also Kalantar v. Lufthansa German Airlines, No. CV 00644 HH, 2003 WL 21806187 (D.D.C. Apr. 10, 2003) (indicating defense counsel, but not plaintiff's counsel, permitted access to SSI); Ahmed v. American Airlines, Inc., No. Civ. A-02-CV-363 JN, 2003 WL 1973168 (W.D. Tex. Apr. 15, 2003) (same); Torbet v. United Airlines, Inc., 298 F.3d 1087 (9th Cir. 2002) (same).

[10] While the government noted in its Third Statement of Interest at n.5 that support staff of defense counsel are not permitted access to SSI because they do not have a "need to know," the record is silent regarding any attempts by the TSA to ensure that defense counsel's support staff are in fact precluded from accessing SSI. Nor is there any indication that defense counsel in this case have been reviewing, copying, filing, and mailing all SSI documents themselves, or taking any other measures to prevent such disclosure.

II. SUMMARY OF ARGUMENT

TSA's position that it alone has the authority to determine whether SSI may be disclosed in civil litigation finds no support in law or fact. Only Congress may divest the federal judiciary of its fundamental authority to determine what information will be produced in civil litigation, and Congress has not done so here. Indeed, Congress rarely grants the power TSA seeks here—an absolute privilege prohibiting the judiciary from even considering whether the privileged information may be safely disclosed—and Congress has never granted such power to protect information like SSI. Nor has Congress ever granted by implication the authority to create an absolute privilege to an agency, as TSA claims here.

TSA's assertion that it wholly controls the contents and circumstances of the disclosure of SSI in all civil litigation intrudes upon the traditional province of the judiciary and is clearly contrary to its authorizing statute, 49 U.S.C. §114(s), and the Constitution. TSA's statutory authority to limit the disclosure of security related information arising in the context of transportation security is confined to *public* disclosure, akin to that under the Freedom of Information Act. Nowhere did Congress imply, much less state, that TSA could prohibit the disclosure of information sought in civil litigation under the Federal Rules of Civil Procedure.

Thus, TSA issued the final orders at issue in derogation of the limits on its authority. The orders themselves are arbitrary, capricious and not supported by substantial evidence. Moreover, TSA failed to provide Chowdhury due process as it reviewed the information referred by Northwest and issued its final orders. TSA never provided Chowdhury notice or an opportunity to be heard in defense of his interest in the information. TSA decisions are based on undisclosed information and over-generalizations, and contain scant and unconvincing support for TSA's conclusions. Accordingly, Chowdhury is even now substantially disadvantaged in his ability to present a case for why the information is not SSI.

Not only has TSA breached the bounds of its authority by its actions to date, but its proposal for going forward in this litigation is unworkable. TSA proposes to review all information in the Chowdhury litigation for SSI on a rolling basis during the discovery process, and any dispute regarding SSI designations would require a petition for review in this Court. The delays, costs, and expense of judicial resources associated with this approach would be enormous. In contrast, Chowdhury's proposal to access SSI only under a strict "attorneys' eyes only" protective order that includes all measures the district court deems necessary to protect the SSI will permit a fair, safe, and efficient completion of discovery in the case.

In sum, TSA final orders issued in the Chowdhury litigation should be overturned as exceeding TSA's authority, arbitrary and capricious, unsupported by substantial evidence, and violating Chowdhury's right to due process, and the United States District Court for the Northern District of California should be permitted to oversee the fair and efficient resolution of the Chowdhury litigation with TSA's advice and assistance to aid it.

III. ARGUMENT

CONGRESS DID NOT GRANT TSA AUTHORITY TO CONTROL THE DISCLOSURE OF INFORMATION IN CIVIL LITIGATION.

TSA's authority to regulate the disclosure of transportation security related information is limited to the boundaries established by Congress. As a general matter, Congress retains exclusive power to legislate and cannot delegate its legislative power to another branch of government. U.S. Const. Art. I §1; Mistretta v. United States, 488 U.S. 361, 372 (1989); Touby v. United States, 500 U.S. 160, 165 (1991). Congress can, however, obtain the assistance of its coordinate branches, including executive agencies, by delegating its decision-making authority.

Judicial review of the extent of authority delegated to an agency is guided by the familiar two-step Chevron inquiry. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). First, the court must determine whether Congress has unambiguously expressed its intent to delegate authority on the question at

issue. Id. at 842-843. Second, if the congressional intent is ambiguous, courts must determine whether the agency's interpretation of the statute is reasonable and consistent with the purpose of the statute. Id.

Where an agency exceeds the bounds of the delegated authority, its decision making is entitled no deference. INS v. Chadha, 462 U.S. 919, 953 n.16, 955 n.19 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("[a] precondition to deference under Chevron is a congressional delegation of administrative authority"); Aid Ass'n for Lutherans v. U.S. Postal Service, 321 F.3d 1166, 1175 (D.C. Cir. 2003) (finding that regulations failed under Chevron because they "exceeded the Postal Service's delegated authority under the statute").

Congress' intent when enacting section 114(s) is clear: TSA shall have authority to limit the disclosure of transportation security information to the public but does not have authority to prohibit the disclosure of such information in civil litigation. As a result, TSA's determination that it has absolute authority to control the discovery of SSI in civil litigation is entitled no deference.

1. The Plain Language of Section 114(s) Demonstrates that the Statute Authorizes Limitations Only on the Public Disclosure of Transportation Security Related Information.

TSA's authority to regulate the disclosure of transportation security related information flows from 49 U.S.C. §114(s), which states:

> (1) In general.--Notwithstanding section 552 of title 5 ["FOIA"], the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would--
> (A) be an unwarranted invasion of personal privacy;
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
> (C) be detrimental to the security of transportation.

49 U.S.C. §114(s).

The plain language of the statute evinces a congressional intent to grant TSA authority to regulate the *public* disclosure of transportation security related information. On its face, the statute gives TSA authority to limit disclosure of information "notwithstanding FOIA." 49 U.S.C. §114(s). In other words, an individual's right to information under FOIA, and perhaps other related public disclosure statutes, does not mandate the public disclosure of information properly protected under section 114(s).[11]

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[11] Chowdhury's reading of the plain language of the statute is consistent with the D.C. Circuit's interpretation of essentially identical language. In Public Citizen, Inc. v. FAA, 988 F.2d 186 (D.C. Cir. 1993), the D.C. Circuit held that

Congress neither stated nor suggested in section 114(s) that a party's right to SSI in the context of civil litigation must yield to any TSA-created limitation on disclosure. Importantly, a government agency may not wield authority simply because Congress has not "expressly negate[d] the existence of a claimed administrative power (i.e. when the statute is not written in 'thou shall not' terms"). Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994). The absence of any reference to civil litigation reveals Congress' intent to exclude civil litigation from the disclosure limitations addressed in section 114(s) and certainly demonstrates that Congress did not intend to permit TSA to create an absolute privilege barring all discovery of any document covered by section 114(s). Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and likely with the Constitution as well. Railway Labor, 29 F.3d at 671.

In contrast to section 114(s), when Congress has created discovery privileges, it has done so explicitly by stating that the limitations apply in civil

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section 1357(d)(2) of the Federal Aviation Act, the predecessor to section 114(s), can be read to limit requests for *public* disclosure under statutes other than FOIA. 988 F.2d at 194-96. Under the D.C. Circuit's holding, a member of the public may not circumvent the statute's public disclosure limitations by finding an alternative basis for compelling public disclosure that does not implicate FOIA. The Public Citizen court's reasoning and conclusion are based on the understanding that the statute relates only to public disclosure.

litigation or apply to *all* requests for information. In Pierce County, Washington v. Guillen, 537 U.S. 129, 135-136 (2003), for example, the statute at issue stated that information relating to highway safety "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages. . . ."

Similarly, in Baldrige v. Shapiro, the Supreme Court held that statutes that explicitly provide for the nondisclosure of certain census data and allow the Census Bureau no discretion over whether or not to disclose express an "explicit congressional intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals." Baldrige v. Shapiro, 455 U.S. 345, 354, 361 (1982).[12] The Court concluded, therefore, that the statute prohibited disclosure even in civil litigation. Baldrige, 455 U.S. at 361.

Congress has used similarly explicit language in other statutes intended to limit the disclosure of information in civil litigation. See, e.g., 14 U.S.C.A. 645(c)(1), (h)(2); 10 U.S.C.A. 1102(b), (d)(2) (stating that medical quality assurance records "are not subject to discovery.") and 12 U.S.C.A. 1828(t)(2)

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[12] Unlike section 114(s), the statute at issue in Baldrige explicitly limited disclosure to specified individuals, providing that the Department of Commerce could not "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof use the information in question" and that the information could not be used "for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. 9(a); Baldrige, 455 U.S. at 354-55.

(same); 15 U.S.C.A. 78m(h)(7) (regarding information contained in required disclosures from large traders); 15 U.S.C.A. 78o-5(b)(2)(F), (d)(3)(F), (f)(6) (regarding information contained in required disclosures by securities brokers and dealers). Further, it is common for Congress to expressly forbid compelled disclosure "notwithstanding any other provision of law." See 15 U.S.C.A. 80a-30(c) (regarding information contained in required disclosures of investment companies their subsidiaries); 15 U.S.C.A. 80b-10a(a)(3) (regarding information contained in required disclosure of information regarding the investment advisory activities of bank holding companies and banks); 15 U.S.C.A. 78q(h)(5), (j) (regarding information contained in required disclosure of risk assessments by registered brokers, dealers, and municipal securities dealers); 15 U.S.C.A. 79z-5c(f)(3) (regarding information contained in required disclosures by exempt telecommunications companies); 15 U.S.C.A. 1087-2(r)(12) (regarding information contained in required disclosures by the Student Loan Marketing Association).

In contrast to the explicit limitations on civil discovery or all requests for information contained in the statutes cited above, section 114(s) is framed only in terms of public disclosure of information under FOIA.[13] Further, statutory

[13] The language in section 114(s) specifically reserving Congress' right to obtain transportation security information does not suggest that the statute was intended to limit civil discovery. Congress routinely includes such language in statutes related

limitations on the discovery of information in civil litigation are not lightly created and are narrowly construed. Baldrige, 455 U.S. at 360 (holding that a statute granting a discovery privilege is to be strictly construed so as to avoid a construction that would suppress otherwise competent evidence); United States v. Nixon, 418 U.S. 683, 710 (1974) (noting that evidentiary privileges are "are not lightly created"); Cox v. Miller, 296 F.3d 89, 107 (2d Cir. 2002) ("Because claims of privilege derogate from the public's right to every person's evidence, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.") (internal citations and quotation marks omitted).

Absolute privileges, which prohibit without qualification disclosure of genuinely privileged information, are particularly rare because they effectively exclude relevant evidence and subvert the judicial fact finding function. Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (citing Nixon, 418 U.S. at 710). Even under the state secrets privilege, which applies to information that would impair the nation's defense capabilities, disclose intelligence gathering method or capabilities, or disrupt diplomatic relations with

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to the disclosure of information, even where the statute is *explicitly* related only to the public disclosure of information, including FOIA. See, e.g., 5 U.S.C.A. 552(d); 5 U.S.C.A. 552b(l); 5 U.S.C.A. 557(d)(2).

foreign governments, Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995), courts consider the litigant's need for the information when determining whether to allow disclosure. See, e.g., Molerio v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984) ("To some degree at least the validity of the government's [state secrets] assertion must be judicially assessed" and "'[H]ow far the court should probe' in conducting this inquiry depends upon 'the showing of necessity' for the information on the part of the party requesting it.").

Nevertheless, TSA contends that section 114(s) eliminates the authority of all others, including any Court of Appeals, to order disclosure of SSI, even in the context of civil litigation. See Statement of Interest of the United States at A-859 to A-862. TSA further asserts that the district court cannot review the submissions to determine whether TSA properly designated information SSI or to determine whether SSI can be safely disclosed to Chowdhury's counsel under an attorneys' eyes only protective order. See id.

In essence, TSA attempts to interpret section 114(s) as creating an absolute privilege greater than the "state secrets" privilege. The information addressed in section 114(s) would not even meet the requirements for protection as state secrets because it is generally unclassified, broadly disseminated information that may not constitute security information at all. See 49 U.S.C. §114(s) (addressing private,

trade secret and other confidential commercial information, and transportation security information).

The plain language of section 114(s) reflects no intent by Congress to create a statutory privilege prohibiting the disclosure of SSI in civil litigation, much less a delegation to TSA to intrude upon an area at the core of judicial authority by creating an absolute privilege that divests the district courts of their traditional authority to control the disclosure of sensitive information. TSA's determination that it may unilaterally prohibit the disclosure of transportation security information in the civil litigation context exceeds its authority and is entitled no deference.

2. The Legislative History of Section 114(s) Further Reflects Congressional Intent to Limit Section 114(s) to Control Public Disclosure of Transportation Security-Related Information.

The legislative history of section 114(s) further reflects an intent to create limitations on "public" disclosure of potentially harmful information related to transportation security. Commentary by TSA and DOT regarding security related information recognized that the term "disclosure" referred to public disclosure under FOIA. See, e.g., 67 Fed. Reg. 8340, 8342 (Feb 22, 2002) (discussing protection of transportation security information from "public disclosure"); 62 Fed.Reg. 13736, 13736 (March 21, 1997) (noting that terrorist threats led the

"FAA to reevaluate the release of security information to public, particularly in response to requests under the FOIA").

3. The Non-Delegation Doctrine Further Demonstrates That Congress Did Not Grant TSA Authority To Limit Disclosure Of Information In The Context Of Civil Litigation.

Under the non-delegation doctrine, when Congress delegates its authority, it must provide an "intelligible principle" for the exercise of the delegated authority. See, e.g., Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 473-4 (2001). The greater the scope of the power congressionally conferred, the more specific Congress must be in guiding the agency in its exercise of discretion. See, e.g., Am. Trucking, 531 U.S. at 475. Congress has given TSA *no* direction under which to exercise authority to regulate the disclosure of information in the civil litigation context. The exercise of that authority, however, will affect civil litigants throughout the country in almost any matter involving transportation.

In addition, Congress has given TSA no principle by which to navigate the extensive regulation and precedent that already applies to civil discovery. Congress long ago delegated to the Supreme Court the authority to govern civil discovery. 28 U.S.C. §2072. The Supreme Court has established extensive procedures for the discovery of information in civil litigation and created specific protections for the disclosure of private, proprietary, and otherwise potentially detrimental information. See Fed. R. Civ. P. 26(c). In fact, these procedures

explicitly address the precise forms of information identified in section 114(s). For example, section 114(s) addresses limitations on disclosure of trade secrets and confidential commercial information related to transportation security. Courts have effectively regulated *all* forms of trade secrets in civil litigation for years. See Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 362 n.24 (1972) (citing such cases). There is no basis upon which to conclude that Congress would have the Supreme Court establish the procedures to protect such information arising in all contexts except when it relates to transportation security.

Congress made no attempt to explicate the interaction between limitations on civil discovery created by TSA and existing procedures in civil discovery.[14] This further suggests that Congress never intended to grant TSA any authority to create limitations on the disclosure of information in civil litigation.

Congress' intent when enacting section 114(s) is unmistakable: to grant TSA authority to establish limits on the public disclosure of SSI but not to prohibit the disclosure of SSI in the civil litigation context. Accordingly, the TSA exceeds its authority when it attempts to divest the district courts of their authority to determine whether and how sensitive information may be produced in civil discovery.

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[14] The complexity of providing appropriate protections of SSI in the context of civil litigation is highlighted by discovery in this case, described at pp. 9-10, supra and pp. 51-52 infra.

B. TSA's Attempt To Regulate Disclosure of Information in the Context of Civil Litigation is Not Entitled to Deference Because it is Not Reasonable or Consistent With Section 114(s).

Even if the court were to conclude that section 114(s) is ambiguous as to whether TSA's authority is limited to regulating public disclosure of transportation security related information, TSA's regulations are entitled no deference because they are not reasonable and consistent with the statute's purpose. Chevron, 467 U.S. at 843-44 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). When considering whether an agency interpretation is reasonable and consistent with the statute's purposes, courts consider the language, structure, and purpose of statute. See, e.g., NLRB v. United Food & Commercial Workers, 484 U.S. 112, 125 (1987); INS v. Cardoza-Fonseca, 480 U.S. 421, 445-46 & n.29 (1987).

Indisputably, the purpose of section 114(s) is to preclude the harmful disclosure of sensitive information born in the context of transportation security. 49 U.S.C. §114(s). The statute reflects Congress' recognition that the disclosure of such information could, in certain circumstances, harm privacy, commercial, and security interests. Congress directed TSA, therefore, to establish procedures for, and limitations on, potentially harmful disclosures. The resulting TSA regulations do not rationally further that purpose.

In general, TSA's regulations require that "covered persons" take reasonable steps to safeguard SSI from unauthorized disclosure and that SSI may be disclosed only to persons with a "need to know." 49 C.F.R. §§1520.7, 1520.11. The definitions of "covered persons" and "need to know" in the regulations, however, are not rationally related to Congress' purpose of preventing harmful disclosure. The definitions explicitly permit disclosure of SSI to counsel in civil litigation, but only if that counsel represents a covered person. 49 CFR §1520.11. Such disclosure is unfettered with no requirement of a non-disclosure agreement, protective order or background check.

It is of no moment to TSA whether that counsel is in-house counsel routinely required to advise an airline regarding its security obligations or outside counsel brought in solely for the purpose of defending a civil rights lawsuit. On the other hand, TSA precludes all disclosure to attorneys representing any other parties in the same proceedings where SSI is indisputably relevant. See 3/17/03 Letter from D. MacDougall to C. Martin (A-110). Such distinctions find no support in the statute and are sufficient to find the regulations unreasonable and inconsistent with the purpose of section 114(s). International Alliance of Theatrical & Stage Employees v. NLRB, 334 F.3d 27 (D.C. Cir. 2003) (finding NLRB regulations invalid under Chevron step two analysis because application of regulations led to an "absurd result" that "nothing in the legislative history indicate[d] that Congress

intended"); Aid Ass'n for Lutherans, 321 F.3d at 1176 (holding that the "absurd result" of Postal Service regulations that "nothing in the legislative history indicates that Congress intended" sufficient to invalidate the regulations under Chevron step two).

The TSA regulations also permit TSA to provide SSI to persons in the context of an administrative enforcement proceeding when TSA determines that access to the SSI is necessary for the person to prepare a response to allegations contained in a legal enforcement action. 49 CFR §1520.15(d)(1). Thus, a litigant who needs SSI to defend himself in an administrative enforcement proceeding may obtain it, but another prosecuting a discrimination claim in court may not. See 9/2/03 Declaration of Stephen J. McHale (A-33) ("no *civil* litigant who does not otherwise have an operational need to know SSI has been granted access to this sensitive information") (emphasis added). While there are legal distinctions between a defendant in an enforcement action and a plaintiff in a civil rights claim, there is no rational basis for TSA's blanket regulatory determination that the disclosure of SSI to one is more detrimental than disclosure to the other. In fact, a broad determination of this nature would seem to favor permitting disclosure to citizens simply seeking vindication of their civil rights over disclosure to individuals against whom TSA or other authorities have brought administrative enforcement proceedings.

The regulations also permit wide-ranging disclosure to airline employees, federal employees, and all others who might need SSI to provide technical or legal advice to those engaged in transportation security. 49 C.F.R. §§1520.7, 1520.11. The regulations do not require SSI recipients to sign non-disclosure agreements and the record contains no evidence that any of the individuals with access to the SSI at issue in this matter have signed non-disclosure agreements. See Stacey Dep., 24:5-25:6 (A-972 to A-973). However, despite the broad, unprotected dissemination of SSI, the TSA regulations do not permit disclosure of the same information to attorneys in civil litigation, even pursuant to an appropriate protective order.

A number of factors suggest that disclosure to attorneys in litigation would create little potential harm, particularly where the disclosure will occur under the auspices of the court. In the civil litigation context, every document will be identified specifically as SSI, which stands in stark contrast to fact that the innumerable individuals with unfettered access to SSI may have no idea that particular documents or information are SSI.[15] It is not reasonable to conclude

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[15] The regulations state that all SSI should be appropriately marked, 49 C.F.R. § 1520.13, but a number of the documents with SSI redactions that were provided to Chowdhury were not marked. See e.g., name lists (A-51, A-104, A-308); handwritten notes on computer printout of Plaintiff's reservation (A-64); NWA's security shift log (A-65); NWA similar match log (A-66); NWA cabin response training (A-67); security directives (A-257, A-489); emails (A-262, A-263, A-264, A-266, A-270, A-277, A-284, A-292, A-296, A-299, A-301, A-438, A-440, A-442,

that this extensive disclosure of SSI can occur unchecked without causing harm, but that a court, with its extensive experience regulating the discovery of sensitive information, could never determine whether disclosure under an appropriate protective order would sufficiently safeguard the information.

Congress evinced no intent to have an unrestricted flow of undesignated SSI to innumerable untrained individuals not subject to non-disclosure agreements while civil litigants face blanket exclusion. TSA's interpretation of the statute to preclude disclosure of SSI under strict protective mechanisms in civil litigation does nothing to further the congressional goal of preventing harmful disclosures and as such is unreasonable and inconsistent with Congress' purpose.

C. TSA's Designation of Non-Disclosable SSI in This Matter is Arbitrary and Capricious and Not Supported by Substantial Evidence.

When reviewing a final order of TSA under section 114(s), the Court must apply the standards of review articulated in 49 U.S.C. §46110(c) to TSA's factual findings. 49 U.S.C. §46110(c); Penobscot Air Servs., Ltd. v. FAA, 164 F.3d 713, 717 (1st Cir. 1999). The Act is silent regarding the appropriate standard for reviewing the Administration's nonfactual findings; accordingly, courts look to the Administrative Procedure Act to supply the appropriate standard of review. Id. at

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A-448, A-454, A-459, A-470, A-474, A-476, A-504, A-506, A-511, A-520, A-561, A-564, A-567, A-578, A-581); NWA's 2nd Am. Resp. to Pl.'s 1st set of Interrogs. (A-409); GOCOMM communications (A-484, A-485); emergency amendment (A-487).

717. TSA's factual findings, therefore, must be reviewed to determine whether they are supported by substantial evidence and the agency's other findings and conclusions are reviewed to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); Penobscot, 164 F.3d at 719.

Generally, an agency's action is "arbitrary and capricious" when the agency "'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Wilson Air Center, LLC v. FAA, 372 F.3d 807, 812-813 (2004). A conclusion is supported by "substantial evidence" only if a reasonable person might accept the relevant evidence as proof of a conclusion. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1981) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

1. TSA's Failure to Consider All of the Relevant Disclosure Provisions in This Matter Was Arbitrary and Capricious.

TSA's regulations permit conditional disclosure of SSI where TSA determines that "disclosure of such records or information, subject to such limitations and restrictions as TSA may prescribe, would not be detrimental to transportation security." 49 C.F.R. §1520.11(e). The record contains no evidence

that TSA conducted any individual assessment of whether conditional disclosure would be appropriate in the Chowdhury litigation. In fact, there is no evidence in the record to support a finding that the disclosure of the documents under the terms proposed—production under an "attorneys eyes only" protective order—would cause any detriment to transportation safety. In fact, TSA's final order not specify whether particular information was deemed SSI because its disclosure would constitute an unwarranted invasion of privacy; would reveal trade secrets or privileged or confidential information; or would be detrimental to the security of transportation, or some combination of the three.

Indeed, the evidence in the record does show that the very documents sought had already been widely disseminated, with no specific protections, to thousands of airline employees and opposing counsel in the case. See Stacey Dep., 13:1-13:5 (A-965), 15:13-17:17 (A-967 to A-969), 27:20-28:6 (A-974 to A-975); 3/17/03 Letter fro D. MacDougall to C. Martin (A-110). TSA, nonetheless, absolutely precluded disclosure of SSI under any terms to Chowdhury's counsel—a decision that is inconsistent even with other TSA decisions and treatment of SSI in administrative enforcement proceedings.

TSA has indicated its willingness to permit the disclosure of SSI sought by civil and criminal litigants in other cases. In Mariana v. United Air Lines, et al., 01 Civ. 11628 (AKH) (S.D.N.Y.), a civil suit brought by the families of 9/11 victims,

TSA provided a report to the district court regarding the measures it deemed necessary to protect SSI during discovery. TSA agreed to provide, in addition to SSI-redacted documents, a "generic summary of SSI, and/or a declaration that supports certain material facts that relate to the particular SSI at issue." Report of the Transportation Security Administration Regarding Necessary Security Measures for SSI-Related Discovery at A-1186. TSA agreed further that if "actual SSI must be disclosed, TSA would either seek to obtain appellate review of that order or establish a clearance procedure for a strictly limited group of attorneys and litigation support personnel." Id.

Similarly, while TSA refuses to provide SSI to the attorneys of a plaintiff in a civil rights lawsuit, it has provided SSI to the attorneys of suspected terrorist Zacharias Moussaoui. See United States v. Moussaoui, No. CRIM. 01-455-A, 2002 WL 1311736 (E.D. Va. Jun. 11, 2002). While a criminal defendant's interests are entitled to the greatest protection, TSA's decision to provide SSI to the attorneys of a suspected terrorist undermines its assertion that SSI is too sensitive to be disclosed even in civil litigation.

In addition, despite reading its regulations as requiring the absolute blanket preclusion of SSI disclosure in the Chowdhury litigation, TSA allows the release of SSI in administrative enforcement proceedings where the SSI is necessary for persons to prepare responses to allegations made against them. 49 C.F.R.

§1520.15(d). TSA further recognizes that the possible danger of harmful disclosure in such a context can be avoided by requiring individuals in administrative enforcement proceedings and their counsel to satisfy a security background check. Here, however, TSA did not even consider the possibility of a security background check or the proposed entry of a protective order as a means to ensure the safe disclosure of information to Chowdhury's attorneys.

2. TSA's Designation Of SSI Is Not Supported By Substantial Evidence.

The final orders of TSA withholding information contain scant details regarding the basis of the withholding or the evidence relied upon in reaching the decision. See 8/27/03 Final Order (A-41); 1/7/04 Final Order (A-251); 2/24/04 Final Order (A-401). In the majority of instances, TSA's final order simply states that the redacted information is "related to a security measure." Accordingly, there is no basis on which to evaluate TSA's decisions. In addition, a complete analysis of TSA's decisions to redact particular information will require judicial review of the unredacted documents. Nonetheless, it is clear that TSA's decisions to redact several categories of documents are not justified by substantial evidence.

First, TSA has redacted numerous names from watch lists, security directives, and emergency amendments. See, e.g., NWA similar match log (A-66); name lists (A-51, A-54, A-58, A-104, A-267, A-271, A-275, A-278, A-285, A-308); security directives (A-293, A-302, A-305); emails (A-262, A-263, A-264, A-

270, A-277, A-284, A-299, A-301, A-482); emergency amendments (A-487, A-509). There is no basis for names that have been publicly released or have been removed from watch lists or security directives to be designated as SSI. See Gordon v. F.B.I., No. C 03-01779 CRB, 2004 WL 1368858 (N.D.Cal., Jun. 15, 2004) (noting that government had failed to establish why names of persons on historical "no transport" lists constituted SSI).

Second, numerous old documents apparently no longer operative have been redacted. See, e.g., letter (A-45); name lists J(A-51, A-54, A-58, A-104, A-267, A-271, A-275, A-278, A-285, A-308); security directives (A-61, A-257, A-293, A-302, A-305, A-436, A-489, A-491, A-535, A-555); handwritten notes on computer printout of Plaintiff's reservation (A-64); NWA security shift log (A-65); NWA similar match log (A-66); emails at (A-262 to A-266, A-270, A-277, A-284, A-292, A-296, A-299, A-301, A-438 to A-482, A-497, A-504, A-506, A-511, A-520, A-561 to A-599); GOCOMM communications (A-484, A-485); emergency amendments (A-487, A-509, A-513, A-517, A-541, A-558); document entitled Current FAA "Security Directives" (A-522); NWA's 2nd Am. Resp. to Pl.'s 1st Set of Interrogs. (A-409). TSA itself has concluded that security directives that contain obsolete countermeasures are not properly designated SSI. Decl. of Brian R. Reed at ¶¶ 5-6 (A-39).

Third, numerous redacted documents appear to contain information that has been publicized or is simply common sense. See, e.g., name lists (A-51, A-54, A-58, A-104, A-267, A-271, A-275, A-278, A-285, A-308); NWA similar match log (A-66); NWA cabin response training (A-67); emails (A-262 to A-266, A-270, A-277, A-284, A-299, A-301, A-482); security directives (A-491, A-302, A-305, A-436); NWA's 2nd Am. Resp. to Pl.'s 1st Set of Interrogs. (A-409); emergency amendments (A-487, A-509). As noted by the court in Gordon, such information is not SSI. Gordon, 2004 WL 1368858 ("it does not follow that all information that appears in a security directive falls within the exemption for security directives when it appears elsewhere.").

Fourth, TSA has redacted the numbers of security directives and emergency amendments. See, e.g., name lists (A-54, A-58, A-104, A-267, A-271, A-275, A-278, A-285, A-308); security directives (A-61, A-275, A-293, A-302, A-305, A-436, A-489, A-491, A-535, A-555); emails (A-262 to A-266, A-284, A-292, A-299, A-301, A-438 to A-459, A-476, A-482, A-497, A-504, A-506, A-520, A-561, A-567 to A-599); GOCOMM communications (A-484, A-485); emergency amendments (A-487, A-509, A-513, A-517, A-541, A-558); document entitled Current FAA "Security Directives" (A-522). TSA provides no basis for concluding that the document numbers are SSI.

The TSA final orders should be modified to eliminate the SSI designations for all of the information redacted without a substantial evidentiary basis.

D. TSA's Final Orders Deprived Chowdhury of the Most Basic Requirements of Due Process.

TSA's final orders violated the Due Process Clause of the Fifth Amendment by depriving Chowdhury of relevant information that may be critical to his claims of race discrimination and violation of privacy against Northwest. Absent TSA's deprivation, Chowdhury would be entitled to this information pursuant to the rules of discovery of the Federal Rules of Civil Procedure.

The Due Process Clause of the Fifth Amendment forbids the deprivation of "life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. Questions of procedural due process follow the Supreme Court's "familiar two-part inquiry: whether [Chowdhury] was deprived of a protected interest, and, if so, what process was his due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

TSA trampled on Chowdhury's due process rights by depriving him of his strong legal interests in the purported SSI without providing the most basic requirements of due process – notice and an opportunity to be heard – and without any individualized determination or adequate statement of the basis for its action. Thus, even if the Court rejects Chowdhury's arguments that TSA exceeded its statutory and regulatory authority and erred in its SSI determinations, the Court

must, at a minimum, remand to TSA with instructions to provide Chowdhury adequate due process.

1. Chowdhury Has Property Interests Stemming From His Cause of Action Against Northwest Airlines.

Under well-established Supreme Court precedent, Chowdhury has protected property interests in his cause of action against Northwest. TSA's final orders barring Chowdhury's access to relevant and potentially critical information, which he is entitled to under the Federal Rules of Civil Procedure, prejudice Chowdhury's ability to litigate his cause of action. Thus, TSA's final orders constitute a deprivation of Chowdhury's property interest.

Property interests within the meaning of the Due Process Clause "are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by existing rules or understandings. A person's interest in a benefit is a 'property interest' for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Perry v. Sindermann, 408 U.S. 593, 601 (1972) (internal citation omitted).

There is no question that Chowdhury has substantial property interests in his cause of action against Northwest. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982) (holding that it is "affirmatively settled" that "a cause of action

is a species of property protected by [due process].”). The Supreme Court and other courts routinely find a threat to property interests where the government’s action has the effect of impairing or prejudicing a person’s ability to prosecute a civil claim. See Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (striking down filing fee requirement that was “the equivalent of” denying plaintiffs the right to bring a civil action); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311 (1950) (finding due process violation where effect of the absence of due process was to deprive plaintiffs of their ability to pursue civil claims); Cooper v. Salazar, 196 F.3d 809, 814-16 (7th Cir. 1999) (finding high likelihood of a violation of due process where inadequate administrative procedures impaired plaintiffs’ civil rights claims).

This Court, too, has found a deprivation of property interests for purposes of due process where the government withheld information relevant to a plaintiff’s civil claim. See Barrett v. United States, 689 F.2d 324, 332 (2d Cir. 1982). Although the Barrett plaintiff ultimately prevailed on her underlying cause of action, this Court held that the government’s deprivation of information reduced the incremental value of her claim, and therefore deprived her of a property interest. Id. As in Barrett, the government here has withheld information, without due process of law, the withholding of which will impair Chowdhury’s ability to

prove his claims, and may reduce – if not negate – the value of his cause of action against Northwest.

Part and parcel of Chowdhury's constitutionally protected property interests in his claim against Northwest is the normal operation of the Federal Rules of Civil Procedure governing discovery – including Rules 26, 30, 34 and 37 and the laws of privilege. These provisions are exactly the kind of rules that form the basis of a property interest under the Due Process Clause. See Perry, 408 U.S. at 601 (property interests are based on "rules and mutually explicit understandings."). Although such interests usually are secured by the trial court in the normal process of civil discovery, TSA's final orders have supplanted the standard process of civil discovery by purporting to remove the district court's jurisdiction to compel production of the purported SSI pursuant to an appropriate protective order. See Statement of Interest of the United States in Opposition to Motion to Compel Sensitive Security Information (August 28, 2003) at 8-11.

Lynn v. Regents of the Univ. of Calif., 656 F.2d 1337, 1345-46 (9th Cir. 1981), another civil rights case, is instructive. In Lynn, the Ninth Circuit held that the lower court violated due process by denying a plaintiff access to information that the court intended to consider and rely upon in rendering a judgment in that case. Chowdhury possesses exactly the same property interest as the plaintiff in Lynn. As in Lynn, the effect of TSA's final orders will be to deprive Chowdhury

of the ability to review evidence that he might otherwise use (or that might be used against him) in the prosecution of his claims against Northwest.

The tight link between TSA's action and Chowdhury's interest in his underlying cause of action is obvious from the very text of TSA's final orders. Those Orders were issued "[i]n connection with the lawsuit, *Chowdhury v. Northwest Airlines*, Case No. C 02-2665 (N.D. Cal.)." See 8/27/03 Final Order (A-41); 1/7/04 Final Order (A-251); 2/24/04 Final Order (A-401). TSA has asserted that the orders prevent Chowdhury and his counsel from obtaining discovery in the underlying litigation.

Chowdhury has a legal entitlement to this discovery pursuant to the discovery provisions of the Federal Rules of Civil Procedure. Northwest Airlines concedes that these documents are relevant to Chowdhury's claims, and Chowdhury believes they may in fact be critical. The purported SSI includes information such as: portions of a letter from Northwest's in-house counsel to a government agency investigating Chowdhury's claim of discrimination that purports to explain how Northwest's treatment of Chowdhury was consistent with Northwest procedure (see 3/14/02 Letter from Northwest to U.S. Dept. of Transportation (A-45)); the Northwest Airlines Security Shift Activity Log for the date of Chowdhury's travel (A-65); the Northwest Airlines Similar Match Log, and a computer print-out of Chowdhury's reservation with handwritten notations (A-

66); Northwest's Inflight Services Training and Development Manual (A-67); and a wide range of documents related to outdated security directives and instructions on how to respond to situations like the one presented by Chowdhury's "phonetic" name match. (A-257, A-104, A-271 to A-359).

From their descriptions alone, it is clear that these documents may contain information relevant to Chowdhury's discrimination claims. The relevance of some of this information, such as contemporaneous accounts of Northwest's actions and Northwest's subsequent justifications for its actions, is patently obvious. Moreover, it is highly likely that the documents contain information about Northwest's policies and practices regarding placing security blocks on passengers' names, which is relevant to Chowdhury's privacy claim.

Certain information is uniquely important to Chowdhury's discrimination claims, because it will be important, if not essential, in refuting Northwest's primary defense. Defendants typically offer a "legitimate, non-discriminatory reason" as their defense against a charge of intentional race discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff then bears the burden of demonstrating that this purported legitimate, non-discriminatory reason is false and merely a pretext for discrimination. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Much of the information that TSA designated SSI bears directly on this question of pretext, including evidence

comparing Northwest's treatment of Chowdhury to its treatment of other passengers, and evidence of whether its treatment of Chowdhury was in accordance with Northwest's own policies, procedures, and training instructions. See McDonnell Douglas, 411 U.S. at 804; Christian, 252 F.3d at 873; Rodriguez v. Provident Life and Accident Ins. Co., 2002 WL 291961 (C.D. Cal. Mar. 2, 2001) (pretext can be demonstrated where defendant did not enforce one of its supposed policies and provided no training or standards for employees).

Chowdhury's attempt to elicit deposition testimony provides a concrete example of the serious prejudice TSA's SSI designations are causing to his ability to litigate his claims. In the deposition of Keolani Stacey, a Northwest Airlines employee involved in barring Chowdhury from flying, counsel for Northwest instructed Stacey regarding SSI approximately 70 times.[16] Given the obvious

[16] Northwest repeatedly instructed Stacey that her answers could not contain SSI, see Stacey Dep., 112:15-117 (A-994 to A-999), including that her answers could not "include policies and procedures that come down from the government and [are] then implemented by Northwest Airlines; " id., 112:19-25 (A-994); or "reveal information that is disseminated to you by the Federal Government." Id., 114:6-11 (A-996); 116:4-117:2 (A-998 to A-999). Northwest gave the SSI instruction to questions regarding, for example, Northwest's policy on holding a plane while a passenger undergoes additional scrutiny (id., 73:25-74:4 (A-981 to A-982)); how procedures regarding watch lists relate to boarding procedures (id., 122:12-16 (A-1000)); the procedures being followed on 10/23/01 (id., 123:24-124:15 (A-1001 to A-1002)); and Stacey's understanding of the definition of SSI (id.,61:1-62:1 (A-979 to A-980)).

Stacey was specifically instructed not to answer questions related to determining whether a passenger is on a watch list; proper procedures for handling persons on watch lists; and whether watch lists have changed since October 2001. Id., 157-159 (A-1008 to A-1010). Northwest even instructed Stacey not to answer whether the watch list upon which the phonetic match to Chowdhury's name appeared was in fact invalid, as the pilot of Chowdhury's flight indicated. Id., 162:15-163:14 (A-1011 to A-1012).

relevance of this testimony to Chowdhury's claims, and the frequency with which Northwest has deployed the SSI moniker to shut down Chowdhury's attempts to elicit testimony, there can be no doubt that withholding SSI from Chowdhury's counsel has had a substantial and severe impact on Chowdhury's ability to litigate his claims.

To find otherwise would effectively render airlines, and possibly other transportation industries, immune from many claims of discrimination. If the government may foreclose discovery regarding an airline's purported legitimate, non-discriminatory reason for its actions simply by issuing a unilateral administrative order, without affording even basic due process to the plaintiffs who are denied this discovery, many potential plaintiffs' protected interests in claims of discrimination will be effectively extinguished. It is hard to imagine how any victim of discrimination could effectively challenge an airline's defensive assertion of security concerns without access to information of the type sought here.

For all of these reasons, Chowdhury clearly has cognizable property interests stemming from his claims in the underlying litigation against Northwest.

2. TSA Violated the Minimal Standards of Procedural Due Process Required by the Constitution.

Despite Chowdhury's significant legal interest in the contested information, TSA ran roughshod over the Fifth Amendment's basic requirements of due process. TSA issued its final orders denying Chowdhury's access to this

information without *any* notice or *any* hearing whatsoever. TSA provided no individualized determination of the propriety of disclosing the purported SSI to Chowdhury and/or his counsel, in violation of due process and its own regulatory authority, and provided no adequate basis for Chowdhury or a reviewing court to evaluate its conclusions. TSA, therefore, did not meet even the minimal standard of process required by the Fifth Amendment.

The precise form of the process required depends on the familiar balancing test established in Mathews v. Eldridge, 424 U.S. 319 (1976). The relevant factors to consider are: (1) the private interest; (2) the risk of erroneous deprivation and the value of additional safeguards; and (3) the government's interest. 424 U.S. at 335. Each of these factors weighs in favor of requiring basic procedural safeguards here.

a. Chowdhury's Interest in the Contested Information is Substantial.

Chowdhury has a substantial interest in the contested SSI at issue here. As explained above, the alleged SSI contains information that Northwest Airlines concedes is relevant to Chowdhury's claims, and that Chowdhury believes is critical to his claims.[17] Thus, the significance of Chowdhury's interest in this

[17] At this stage of the constitutional analysis, the question is not whether Chowdhury is entitled to receive the benefit of his property interest (i.e., whether Chowdhury would actually be provided with the purported SSI if afforded due process), but rather whether Chowdhury has a cognizable interest in receiving the benefit. For example, in Goldberg v. Kelly, 397 U.S. 254, 262 (1970), the Supreme Court held that individuals challenging the termination of welfare

information weighs strongly in favor of finding that TSA must provide the due process Chowdhury requests.

b. The Risk of Erroneous Deprivation is High.

The risk of arbitrary and erroneous deprivation is extraordinarily high for three reasons. First, TSA afforded no notice and no opportunity for Chowdhury to provide information relevant to whether release of even properly designated SSI in this context would in fact be detrimental to transportation safety. Second, TSA has defined SSI extremely broadly and without any consistent or principled basis. Third, TSA relied on undisclosed evidence to make its determinations. The minimal procedures required by the Due Process Clause are required to address this unacceptably high risk of erroneous and arbitrary government action.

i. TSA Provided Chowdhury No Notice or Opportunity to Be Heard.

The Due Process Clause requires, at a minimum, that TSA provide notice and some opportunity to be heard before permanently depriving Chowdhury the right to obtain civil discovery of the information it has designated SSI. See Logan, 455 U.S. at 433 ("It has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest.") (internal citation omitted); Mathews, 424 U.S. at 348 ("The essence of due process is the

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benefits could not be denied benefits without due process, even if the individuals were eventually deemed ineligible for benefits.

requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.") (internal citation omitted).

TSA afforded Chowdhury no notice, no hearing, and no opportunity to present any opposing viewpoint. The agency simply issued its orders *sua sponte*, with nothing more than a brief statement of its findings. There was, in short, no process at all. See Logan, 455 U.S. at 1156-57 ("To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement."); Kraemer v. Heckler, 737 F.2d 214, 222 (2d Cir. 1984) (finding prima facie due process violation where agency did not notify affected parties prior to deprivation of property and did not give them opportunity "to submit evidence or arguments"); Billington v. Underwood, 613 F.2d 91, 95 (5th Cir. 1980) ("The very notion of a hearing, however informal, connotes that the decision maker will listen to the arguments of both sides before basing a decision on the evidence and legal rules adduced at the hearing.").[18]

Without any notice or hearing whatsoever, the risk of erroneous deprivation is extremely high and additional procedural safeguards are constitutionally

[18] The availability of subsequent judicial review does not cure the underlying due process violation. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19-22 (1978); National Council, 251 F.3d at 209. This is especially true given that the Court's review of TSA's final orders is limited, and given that TSA's violation of due process limited the scope of the record on which it based its orders. Indeed, even where an appellate court has *de novo* review, the Supreme Court has held that subsequent appellate review does not cure a due process violation. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972).

required. See Connecticut v. Doehr, 501 U.S. 1, 14-15 (1991); Ciambriello v. County of Nassau, 292 F.3d 307, 320 (2d Cir. 2002). On this basis alone, the Court must remand and order TSA to comply with basic requirements of due process.

ii. TSA Employs an Excessively Broad and Standardless Definition of SSI.

TSA's overbroad designations of SSI greatly increase the risk of erroneous deprivation. TSA has defined SSI so broadly that it may routinely contain information that cannot be construed as detrimental to transportation safety. See Statement of Facts, supra. Indeed, the judiciary has recently commented on TSA's apparently arbitrary manner of designating information SSI in the absence of facts to support such designation. See Gordon v. FBI, No. C 03-01779 CRB (N.D. Cal. June 15, 2004) (directing TSA and FBI to produce under FOIA records previously designated as SSI, and noting that the government applied the provisions exempting SSI from FOIA "broadly and without providing a detailed explanation of why the withheld material is exempt" and that "in many instances the government . . . has made frivolous claims of exemption"). Particularly in light of this concern regarding loose and overbroad designations of SSI, the Fifth Amendment requires that TSA follow at least the minimum standards of due process.

iii. TSA Relied on Undisclosed Evidence.

TSA's reliance on undisclosed evidence similarly increases the risk of erroneous outcomes. See American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995). Even if TSA may withhold access to the purported SSI as the agency considers whether the information should be released, it is incontrovertible that withholding the information increases the risk of error by depriving Chowdhury of the opportunity to comment and by encouraging one-sided analysis of the undisclosed facts. Thus, SSI determinations demand a particularly careful due process analysis in order to compensate for the risk of error inherent in relying on undisclosed evidence.

c. Additional Process Will Reduce the Risk of Erroneous Deprivation and Give Meaning to the Statutes and Regulations Governing TSA's Designation of SSI

The Mathews factors weigh in favor of requiring TSA to provide, at a minimum: (1) pre-deprivation notice; (2) an opportunity for Chowdhury to present a case against withholding the purported SSI; (3) an individualized determination, pursuant to relevant statutory and regulatory authority, of whether TSA should disclose the contested information to Chowdhury and/or his counsel; and (4) an adequate statement of the basis for TSA's decision, including all releasable facts and legal authority upon which its decision rests. TSA provided none of these basic safeguards here.

These procedural safeguards would reduce the risk of erroneous deprivation by: ensuring that TSA considers all the relevant factors that it is required to consider; ensuring that TSA has all the relevant facts necessary to evaluate whether disclosure to Chowdhury and his counsel poses a risk to transportation safety; forcing TSA to explain the specific basis for its conclusions; and building a more complete record for judicial review.

It is beyond cavil that notice and an opportunity to be heard are indispensable components of adequate due process. See Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("[T]he process of fair decisionmaking that [notice and opportunity to be heard] guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.").

In addition to basic notice and meaningful hearing requirements, there is substantial value in an adequate statement of the basis for agency action, and due process accordingly requires this. See Grijalva v. Shalala, 152 F.3d 1115, 1122 (9th Cir. 1998), vacated on other grounds, 119 S. Ct. 1573 (1999) (noting that "procedural protections . . . are meaningless" if interested persons are not notified of the reasons for agency action); Gray Panthers, 652 F.2d at 168-69 ("Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing

serves no purpose and resembles more a scene from Kafka than a constitutional process."); Kapps v. Wing, 283 F. Supp.2d 866, 878 (E.D.N.Y. 2003) (due process requires state agency to provide factual basis for its determinations of eligibility for benefits).[19]

TSA's final orders are inadequate in several respects. The final orders do not reflect any individualized consideration of whether disclosure of the redacted information to Chowdhury in the context of this case would be detrimental to transportation safety. Similarly, the final orders do not indicate that TSA considered whether conditional disclosure of SSI to Chowdhury under section 1520.15(e) would be appropriate. The final orders do not indicate in which of section 1520.5's sixteen definitions of SSI the redactions fall. Nor do they specify whether particular information was deemed SSI because its disclosure would constitute an unwarranted invasion of privacy; would reveal trade secrets or privileged or confidential information; would be detrimental to the security of transportation; or some combination of the three. This information should have been provided in TSA's final orders.

An individualized consideration of whether, despite the SSI designation, release of the contested information to Chowdhury was nonetheless appropriate, is necessary, under both the Due Process Clause and TSA's own regulations, to avoid

[19] This statement is also required by the APA, 5 U.S.C. § 555(e) (requiring a "brief statement of the grounds for denial.").

erroneous deprivation. Under 49 C.F.R. §1520.15(e), TSA may authorize a "conditional disclosure" of SSI to specific persons if it determines that such limited disclosure would not be detrimental to transportation security. TSA's final orders simply designated the contested documents SSI, and made no findings whatsoever regarding the impact on transportation security of disclosure in this specific instance. Nonetheless, TSA interprets the final orders to specifically prohibit disclosure to Chowdhury. TSA's failure to include individualized findings ignores its own regulations and violates procedural due process. See Hamby v. Neel, 368 F.3d 549, 562 (6th Cir. 2004) (agency violated due process right to a "meaningful hearing" by refusing to consider individualized facts demonstrating that petitioners should not have been denied benefits); cf. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974) (finding due process violation where there was "no individualized determination" prior to government deprivation); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (same).

d. TSA's Interests in Avoiding Due Process Are Minimal.

Finally, TSA's interest in shirking the minimum requirements of procedural due process is not sufficiently weighty to permit the kind of arbitrary, error-prone procedure that produced the final orders in this case. As shown above, see Statement of Facts supra, SSI does not trigger the same national security concerns as state secrets or National Security Information. SSI is unclassified information,

broadly defined and widely disseminated to tens of thousands -- if not hundreds of thousands -- of airline employees and others.

In any case, TSA's failure to afford even minimal due process is not excused by blanket assertions of national security. Some due process is required no matter how strong or important the government's interest in designating the contested information SSI. "[H]owever weighty the governmental interest may be in a given case, the amount of process can never be reduced to zero – that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest." Propert v. District of Columbia, 948 F.2d 1327, 1332 (D.C. Cir. 1991). See also National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) (ordering extensive procedural safeguards even though National Security Information was involved); United States v. Rahmani, 209 F. Supp.2d 1045, 1057 (C.D. Cal. 2002) (finding a hearing required despite government's alleged security interest, and noting that "national security should not serve as an excuse for obliterating the Constitution").

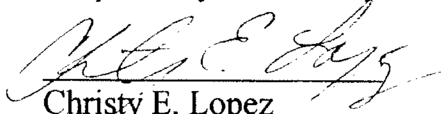
Finally, cost and efficiency considerations weigh in favor of more process, not less. Requiring adequate process minimizes the risk of error and dissatisfaction with the agency's decisions, thus reducing the need for time consuming and resource intensive litigation and judicial review. As the procedural history of this

case demonstrates, TSA's erroneous and overbroad designations of SSI have generated litigation in not one, but two federal Courts of Appeals.

CONCLUSION AND RELIEF SOUGHT

For the above stated reasons, Chowdhury respectfully requests that the Court: 1) hold that the TSA does not have the authority to issue a final order prohibiting the disclosure of SSI sought under the Federal Rules of Civil Procedure, and 2) remove all erroneous SSI designations from documents listed in the subject final orders, or remand the matter to the TSA for a hearing that complies with the relevant statutes and regulations and meets the constitutional requirements for due process.

Respectfully Submitted,



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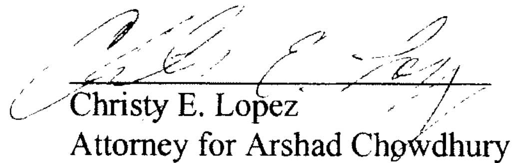
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,926 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.



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