No. 18-1509

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

RAHINAH IBRAHIM

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
EDWIN S. KNEEDLER
Deputy Solicitors General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
SHARON SWINGLE
JOSHUA WALDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

Appendix A — Court of appeals en banc opinion (Jan. 2, 2019) 1a
Appendix B — Court of appeals panel opinion (Aug. 30, 2016) 84a
Appendix C — District court order setting amount of the fee award (Oct. 9, 2014) 116a
Appendix D — District court order granting in part and denying in part plaintiff's motion for attorney's fees and expenses (Apr. 16, 2014) 126a
Appendix E — District court findings of fact, conclusions of law, and order for relief (Jan. 14, 2014) 169a
Appendix F — Statutory provision 225a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16161 and 14-17272
D.C. No. 3:06-cv-545-WHA

DR. RAHINAH IBRAHIM, AN INDIVIDUAL,
PLAINTIFF-APPELLANT

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; TERRORIST SCREENING CENTER; FEDERAL BUREAU OF INVESTIGATION; CRISTOPHER A. WRAY,[*] IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; KIRSTJEN NIELSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY AS ACTING ATTORNEY GENERAL; CHARLES H. KABLE IV, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TERRORIST SCREENING CENTER, JAY S. TABB, JR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE ASSISTANT DIRECTOR OF THE FBI'S NATIONAL SECURITY BRANCH; NATIONAL COUNTERTERRORISM CENTER; RUSSELL "RUSS" TRAVERS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER; DEPARTMENT OF STATE; MICHAEL R. POMPEO, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

---

[*] Current cabinet members and other federal officials have been substituted for their predecessors pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

Argued and Submitted En Banc Mar. 20, 2018
San Francisco, California
Filed: Jan. 2, 2019

OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Before: SIDNEY R. THOMAS, Chief Judge, and M. MARGARET MCKEOWN, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, MARSHA S. BERZON, CONSUELO M. CALLAHAN, MILAN D. SMITH, JR., N. RANDY SMITH, MORGAN CHRISTEN, JACQUELINE H. NGUYEN, and PAUL J. WATFORD, Circuit Judges.

WARDLAW, Circuit Judge:

This appeal arises out of Dr. Rahinah Ibrahim's 2005 detention at the San Francisco International Airport (SFO) while en route to Malaysia with a stopover in Hawaii for a Stanford University conference. U.S. authorities detained Dr. Ibrahim because her name was on the Transportation Security Administration's (TSA) "No Fly" list (the No Fly list). After almost a decade of vigorous and fiercely contested litigation against our state and federal governments and their officials, including two appeals to our court and a weeklong trial, Dr. Ibrahim won a complete victory. In 2014, the federal government at last conceded that she poses no threat to our safety or national security, has never posed a threat to national security, and should never have been placed on the No Fly list. Through Dr. Ibrahim's persistent

discovery efforts, which were met with stubborn opposition at every turn, she learned that she had been nominated to the No Fly list and the Interagency Border Inspection System (IBIS), which are stored within the national Terrorist Screening Database (TSDB)—the federal government's centralized watchlist of known and suspected terrorists—and which serve as a basis for selection for other counterterrorism sub-lists. From there, a Federal Bureau of Investigation (FBI) special agent so misread a nomination form that he accidentally nominated Dr. Ibrahim to the No Fly list, intending to do the opposite, as the No Fly list is supposed to be comprised of individuals who pose a threat to civil aviation.

But Dr. Ibrahim did not accomplish this litigation victory on her own. Indeed, since she was finally allowed to travel to Malaysia in 2005, the United States government has never allowed her to return to the United States, not even to attend the trial that cleared her name. Throughout this hard-fought litigation, the civil rights law firm McManis Faulkner has represented her interests without pay, but with the understanding that if it prevailed on her behalf, it could recover reasonable attorneys' fees and expenses, in addition to costs, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

The firm filed a motion for an award of attorneys' fees and expenses, supported by documentary evidence and declarations, which the government opposed. The motion was met with the "compliments" of the district court and drastic reductions in the claimed fees, by almost ninety percent. In reducing the claimed legal fees, the district court misapplied *Commissioner, I.N.S.*

v. Jean, 496 U.S. 154 (1990), by taking a piecemeal approach to determining whether the government's position was "substantially justified," and so disallowing fees for particular stages of proceedings rather than examining the record as a whole and making a single finding. The district court further erred by treating alternative claims or theories for the same relief Dr. Ibrahim achieved—which the court, therefore, did not reach—as unsuccessful, and reducing fees for work pursuing those claims, contrary to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). These errors were compounded by the now-withdrawn three-judge panel decision, which misapplied the *Hensley* standard for determining "relatedness," i.e., whether the claims arose from a "common course of conduct," to wrongly conclude that because the claims in the alternative were "mutually exclusive," they were not related. In point of fact, all of the legal theories pursued on behalf of Dr. Ibrahim challenged the same and only government action at the heart of this lawsuit: the government's placement of her name on the No Fly list without any basis for doing so. Finally, our prior precedent, which we now reaffirm, requires that when a district court analyzes whether the government acted in bad faith, it must consider the totality of the circumstances, including both the underlying agency action and the litigation in defense of that action.

We reheard this appeal en banc to clarify the standards applicable to awards of attorneys' fees under the EAJA. We now reverse, vacate the award of attorneys'

fees, and remand with instructions to recalculate fees consistent with this opinion.[1]

I.

A. Dr. Ibrahim

Dr. Ibrahim is a Muslim woman, scholar, wife, and mother of four children. She lived in the United States for thirteen years pursuing undergraduate and post-graduate studies. Here's what happened to Dr. Ibrahim, as the events that ultimately excluded her from this country unraveled:

In early January 2005, Dr. Ibrahim planned to fly from San Francisco to Hawaii and then to Los Angeles and on to Kuala Lumpur. She intended to attend a conference in Hawaii sponsored by Stanford University from January 3 to January 6, at which she would present the results of her doctoral research. She was then working toward a Ph.D. in construction engineering and management at Stanford University under an F-1 student visa. On January 2, 2005, Dr. Ibrahim arrived at SFO with her daughter, Rafeah, then fourteen. At the time, Dr. Ibrahim was still recovering from a hysterectomy performed three months earlier and required wheelchair assistance.

When Dr. Ibrahim arrived at the United Airlines counter, the airline staff discovered her name on the No Fly list and called the police. Dr. Ibrahim was handcuffed and arrested. She was escorted to a police car (while handcuffed) and transported to a holding cell by

---

[1] For ease of reading, attached as Appendix A is a glossary of the numerous acronyms referenced throughout this opinion.

male police officers, where she was searched for weapons and held for approximately two hours. Paramedics were called to administer medication related to her surgery. No one explained to Dr. Ibrahim the reasons for her arrest and detention.

Eventually, she was released and an aviation security inspector with the Department of Homeland Security (DHS) informed Dr. Ibrahim that her name had been removed from the No Fly list. The police were satisfied that there were insufficient grounds for making a criminal complaint against her. Dr. Ibrahim was told that she could fly to Hawaii the next day.

The next day she returned to SFO where an unspecified person told her that she was again—or still—on the No Fly list. She was nonetheless allowed to fly, but was issued an unusual red boarding pass with the letters "SSSS," meaning Secondary Security Screening Selection, printed on it. Dr. Ibrahim flew to Hawaii and presented her doctoral findings at the Stanford conference. From there, she flew to Los Angeles and then on to Kuala Lumpur.

Two months later, on March 10, 2005, Dr. Ibrahim was scheduled to return to Stanford University to complete her work on her Ph.D. and to meet with an individual who was one of her Stanford dissertation advisors and also her friend, Professor Boyd Paulson, who was very ill. But when she arrived at the Kuala Lumpur International Airport, she was not permitted to board the flight to the United States. She was told by one ticketing agent that she would have to wait for clearance from the U.S. Embassy, and by another that a note by her name indicated the police should be called to arrest

her. Dr. Ibrahim has not been permitted to return to the United States to this day.

On March 24, 2005, Dr. Ibrahim submitted a Passenger Identity Verification Form (PIVF) to TSA. Before 2007, individuals who claimed they were denied or delayed boarding a plane in or for, or entry to, the United States, or claimed they were repeatedly subjected to additional screening or inspection, could submit a PIVF to TSA. A PIVF prompted various agencies to review whether an individual was properly placed in the TSDB or in related watchlist databases.[2]

Next, on April 14, 2005, the U.S. Embassy in Kuala Lumpur wrote to inform Dr. Ibrahim that the Department of State had revoked her F-1 student visa on January 31, 2005, which seemed to explain why she had not been allowed to fly in March, but gave her no further information regarding her status. The April 14 letter cited Dr. Ibrahim's possible ineligibility "under Section 212(a)(3)(B) of the Immigration and Nationality Act [(INA)]," codified at 8 U.S.C § 1182(a)(3)(B), to explain the revocation. That section prohibits entry into the U.S. by any person who engaged in terrorist activity, was reasonably believed to be engaged in or likely to be engaged in terrorist activity, or who has incited terrorist activity, among other things. 8 U.S.C. § 1182(a)(3)(B). However, the letter also told her that the revocation did "not necessarily indicate that [she would be] ineligible to receive a U.S. visa in [the] future." Not having heard

---

[2] This avenue of redress was replaced in 2007 by the Travel Redress Inquiry Program (TRIP), *see* 49 U.S.C. § 44926(a), which requires a "timely and fair" process for persons wrongly delayed or prohibited from boarding a commercial aircraft.

back from TSA, Dr. Ibrahim retained McManis Faulkner. And on January 27, 2006, she filed the underlying action to challenge her placement on the No Fly list, as well as the federal and state governments' administration of the list and their treatment of her with respect to it.

In a letter dated March 1, 2006, Dr. Ibrahim received a response to her PIVF. That letter stated that TSA had "conducted a review of any applicable records in consultation with other federal agencies, as appropriate," and continued, "[w]here it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watchlist screening process." The letter did not indicate Dr. Ibrahim's status with respect to the No Fly list or any other federal watchlist.

In 2009, Dr. Ibrahim applied for a visa to attend proceedings in this action. The U.S. Embassy in Kuala Lumpur interviewed her on September 29, 2009. On December 14, 2009, a consular officer of the U.S. Department of State sent a letter to Dr. Ibrahim notifying her of her visa application's denial. The consular officer wrote the word "(Terrorist)" next to the checked box for INA § 212(a)(3)(B) on an accompanying form to explain why Dr. Ibrahim was deemed inadmissible.

In September 2013, Dr. Ibrahim submitted a visa application so that she could attend the trial in her case. She went to a consular officer interview in October 2013. At the interview, the consular officer asked her to provide supplemental information via e-mail, which Dr. Ibrahim duly provided. Trial in this action began on December 2 and ended on December 6. While she did not receive a response to her visa application before trial, at

trial, government counsel stated that the visa had been denied. Dr. Ibrahim's counsel said that they had not been aware of the denial and that Dr. Ibrahim had not been notified.

B. United States Government

While Dr. Ibrahim stood in limbo, unaware of her status on any list and unable to return to the United States, even to attend the trial of her own case, the government was well aware that her placement on the No Fly list was a mistake from the get-go.[3]

Here it is helpful to understand, as much as we can on this record, how the U.S. "government maintains and operates a web of interlocking watchlists, all now centered on the [TSDB]," as described in the district court's post-trial order.[4] The FBI, DHS, the Department of State, and other agencies administer an organization called the Terrorist Screening Center (TSC), which manages the TSDB. Both the TSC and TSDB were created in response to the terrorist attacks on September 11, 2001, in order to centralize information about known and suspected terrorists. That information is then exported as appropriate to various "customer databases," i.e., government watchlists, operated by other agencies and government entities. In this way, "the dots could be connected." While the TSDB does not

---

[3] To this date, we do not know how Dr. Ibrahim was initially flagged for potential placement in the TSDB, managed by the Terrorist Screening Center (TSC), of which the No Fly list is a subset. There has never been a determination, nor can we determine, whether this placement was motivated by "race, religion, or ethnicity."

[4] None of the following information was deemed classified or otherwise privileged before or during trial.

contain classified information, the government stores classified "derogatory" information in a closely allied and separate database called the Terrorist Identities Datamart Environment (TIDE), which is operated by the National Counterterrorism Center (NCTC) branch of the Office of the Director of National Intelligence. These terrorist watchlists, and others, provide information to the United States intelligence community, a coalition of seventeen agencies and organizations within the executive branch, and also provide information to certain foreign governments.

Today, individuals are generally nominated to the TSDB using a "reasonable suspicion standard," meaning "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities." This standard was created by executive branch policy and practice and was not promulgated by Congress or the judicial branch. However, from 2004 to 2007, the executive branch and its agencies employed no uniform standard for TSDB nominations, allowing each agency to use its own nominating procedures for inclusion in the TSDB based on each agency's interpretation of homeland security presidential directives and the memorandum of opinion that established the TSC. These directives provided little instruction. For example, one such directive was Homeland Security Presidential Directive 6 (HSPD-6), which stated, "[t]his directive shall be implemented in a manner consistent with the provisions of the Constitution and applicable laws, including those protecting the rights of all Americans."

As the centralized database, the TSDB is the repository for all watchlist nominations. Various government agents nominate individuals by filling out a physical form, which is later computerized and used by the TSDB to indicate on which watchlist each nominee should be included or excluded. There are several watchlists affected by the TSDB, namely[5]:

- the No Fly list (TSA);
- the Selectee list (TSA);
- Known and Suspected Terrorist File (KSTF, previously known as the Violent Gang and Terrorist Organizations File);
- Consular Lookout and Support System (CLASS, including CLASS-Visa, a Department of State database used for screening of visa applicants, and CLASS-Passport, a database that applies only to United States citizens who might be watchlisted) (Department of State);
- TECS (not an acronym, but the successor to the Treasury Enforcement Communications System) (DHS);
- Interagency Border Inspection System (IBIS) (DHS);
- Tipoff United States-Canada (TUSCAN) (used to export information from the United States to Canada); and

[5] This is information derived solely from the record before us, so we do not represent that this is an exclusive list or that there have not been subsequent changes to the lists.

- Tipoff Australia Counterterrorism Information Control System (TACTICS) (used to export information from the United States to Australia).

These TSDB designations are then exported to the customer/government watchlists, which are each operated by various government entities and used in various ways. For example, TSDB nominations are transmitted to the Department of State for inclusion in CLASS-Visa or CLASS-Passport. In ruling on visa applications, consular officers review the CLASS database for information that may inform the visa application and adjudication process.

In November 2004, shortly after Dr. Ibrahim's husband Mustafa Kamal Mohammed Zaini visited her from Malaysia to help her after her surgery, FBI Special Agent Kevin Michael Kelley (Agent Kelley), located in San Jose, California, unintentionally nominated Dr. Ibrahim, who was then a graduate student at Stanford University, to various federal watchlists using the FBI's National Crime Information Center (NCIC) Violent Gang and Terrorist Organizations (VGTO) File Gang Member Entry Form (VGTOF). VGTO was an office within NCIC. Agent Kelley misunderstood the directions on the form and erroneously nominated Dr. Ibrahim to the TSA's No Fly list and DHS's IBIS. He did not intend to do so.

Agent Kelley testified at trial that he intended to nominate Dr. Ibrahim to the CLASS, the TSA Selectee list, TUSCAN (information exported to Canada), and TACTICS (information exported to Australia) lists. He checked the wrong boxes, filling out the form exactly contrary to the form's instructions. The form expressly indicated that he was to check the boxes for the

databases into which the subject should NOT be placed. Here is a blank copy of the form:

It is recommended that the subject **NOT** be entered into the following selected terrorist screening databases:

- ☐ Consular Lookout and Support System (CLASS)
- ☐ Interagency Border Information System (IBIS)
- ☐ TSA No Fly List
- ☐ TSA Selectee List
- ☐ TUSCAN
- ☐ TACTICS

. . .

The case agent will also nominate any terrorist screening database into which the subject should not be entered. If not databases are selected, then the subject will be added by the TSC to all appropriate databases.

In other words, Agent Kelley was instructed to check the boxes for the watchlists for which Dr. Ibrahim was NOT to be nominated. Here is the form as Agent Kelley completed it:

It is recommended the subject **NOT** be entered into the following selected terrorist screening databases:

- ☒ Consular Lookout and Support System (CLASS)
- ☐ Interagency Border Information System (IBIS)
- ☐ TSA No Fly List
- ☒ TSA Selectee List
- ☒ TUSCAN
- ☒ TACTICS

Agent Kelley, by failing to check the boxes for the No Fly list and IBIS, placed Dr. Ibrahim on those watchlists (and by checking the boxes for CLASS, the TSA Selectee list, TUSCAN, and TACTICS, Agent Kelley did not place her on those lists).

Agent Kelley's squad also was conducting a mosque outreach program. One purpose of the program was to provide a point of contact between law enforcement and mosques and Islamic associations. The outreach program included Muslim and Sikh communities and organizations in the San Francisco Bay Area. In December 2004, Agent Kelley and his colleague interviewed Dr. Ibrahim while she was still attending Stanford University.[6] He asked, among other things, about her plans to attend a conference in Hawaii, her dissertation work, her plans after graduation, her involvement in the Muslim community, her husband, her travel plans, and the organization Jemaah Islamiyah, a Department of State-designated terrorist organization that Dr. Ibrahim had heard of only on the news. She was not a member.[7] The Freedom of Information Act-produced version of

---

[6] Again, we do not know on this record the motivation for singling out Dr. Ibrahim for the interview, but we note that the district court stated "it [was] plausible that Dr. Ibrahim was interviewed in the first place on account of her roots and religion." The interview also came soon on the heels of her Muslim husband's visit. However, the motivation question was the basis for one of the claims the district court found it unnecessary to reach.

[7] Dr. Ibrahim was a member of a non-terrorist organization with a similar-sounding name, Jemaah Islah Malaysia, a Malaysian professional organization composed primarily of individuals who studied in the United States or Europe. The district court declined to find that Agent Kelley confused Jemaah Islah Malaysia with Jemaah Islamiyah.

Agent Kelley's interview notes with Dr. Ibrahim were designated by the FBI as "315," which denotes "International Terrorism Investigations."

On January 2, 2005, when Dr. Ibrahim was detained at SFO on her way to Hawaii, a DHS aviation security inspector told her that her name had been removed from the list.

Meanwhile, on January 3, 2005, in the visa office of the Department of State, one official was sitting on a stack of pending visa revocations that were based on the VGTO watchlist from which Agent Kelley had nominated Dr. Ibrahim to the No Fly list. That official e-mailed another visa official to report that although "[t]hese revocations contain virtually no derogatory information," he was going to revoke them. The official wrote, because "there is no practical way to determine the basis of the investigation . . . we will accept that the opening of an investigation itself is a prima facie indicator of potential ineligibility under [§ 212(a)(3)(B) of the INA, relating to terrorist activities]." One of the revocations in that stack was Dr. Ibrahim's student visa.

Sure enough, on January 31, 2005, the Department of State revoked Dr. Ibrahim's F-1 student visa pursuant to § 212(a)(3)(B). In an e-mail conversation dated February 8, 2005 between the chief of the consular section at the U.S. Embassy in Kuala Lumpur and an official in the coordination division at the Department of State's visa office, designated "VO/L/C," the consular chief asked about a prudential visa revocation cable he had received concerning the events Dr. Ibrahim experienced in January 2005. The Department of State official replied,

> I handle revocations in VO/L/C. The short version is that this person's visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn't constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application. . . . My guess based on past experience is that she's probably issuable. However, there's no way to be sure without putting her through the interagency process.

After Dr. Ibrahim's visa was revoked, the Department of State entered a record into CLASS that notified any consular official adjudicating a future visa application on her behalf that she may be inadmissible under § 212(a)(3)(B). In December 2005, Dr. Ibrahim was removed from the TSA's Selectee list. Around this time, however, she was added to TACTICS (exports to Australia) and TUSCAN (exports to Canada). The government has never explained this placement or the effect of Dr. Ibrahim's placement on TACTICS or TUSCAN.[8]

Two weeks later, on January 27, 2006, Dr. Ibrahim filed the underlying action. On February 10, 2006, an unidentified government agent requested that Dr. Ibrahim be "Remove[d] From *ALL* Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)." Answering the question "Is the individual qualified for placement on the no fly list?" the "No" box was checked. For the question, "If

---

[8] The record does not reflect how Canada and Australia use the information exported into the TUSCAN and TACTICS databases. The government declined to provide this information during discovery, deeming it outside the scope of the Federal Rule of Civil Procedure 30(b)(6) subpoena.

No, is the individual qualified for placement on the selectee list?" the "No" box was checked.

On September 18, 2006, the government removed Dr. Ibrahim from the TSDB because she did not meet the "reasonable suspicion standard" for placement on it, which requires that the government believe "an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities." The record, however, does not indicate whether she was removed from all of the customer watchlists that subscribed to the TSDB.

On March 2, 2007, Dr. Ibrahim was placed back on the TSDB. The record does not explain why she was relisted on the TSDB or which customer watchlists were to be notified. Two months later, however, on May 30, 2007, Dr. Ibrahim was again removed from the TSDB. The record does not show the extent to which Dr. Ibrahim's name was then removed from the other customer watchlists, nor the reason for the removal.

Dr. Ibrahim's 2009 visa application to attend proceedings in this case was initially refused under § 221(g) of the INA, 8 U.S.C. § 1201(g), because it was determined that there was insufficient information to make a final adjudication in the matter. The consular officer requested a Security Advisory Opinion from the Department of State. The consular official was concerned that Dr. Ibrahim was potentially inadmissible under § 212(a)(3)(B) of the INA, which provides nine classes of aliens ineligible for visas or admission into the United States based on terrorist activities. The Security Advisory Opinion from the Department of State, initially

unavailable to Dr. Ibrahim but later produced in discovery, stated:

> Information on this applicant surfaced during the SAO review that would support a 212(a)(3)(B) inadmissibility finding. Posts should refuse the case accordingly. Since the Department reports all visa refusals under INA Section 212(a)(3)(B) to Congress, post should notify [the Coordination Division within the Visa Office] when the visa refusal is affected [sic]. There has been no request for an INA section 212(d)(3)(A) waiver at this time.

Based on the Security Advisory Opinion's finding, the consular officer denied her visa application, and wrote the word "(Terrorist)" on the form to explain the inadmissibility determination to Dr. Ibrahim.

On October 20, 2009, Dr. Ibrahim was again nominated to the TSDB pursuant to a secret exception to the reasonable suspicion standard. The government claims that the nature of the exception and the reasons for the nomination are state secrets. In Dr. Ibrahim's circumstance, the effect of the nomination was that Dr. Ibrahim's information was exported from the TSDB database solely to the Department of State's CLASS database and DHS's TECS database.

From October 2009 to the present, Dr. Ibrahim has been included on the TSDB, CLASS, and TECS watchlists. She has been off the No Fly and Selectee lists. She remains in the TSDB, even though she does not meet the "reasonable suspicion standard," pursuant to a classified and secret exception to that standard.

Government counsel conceded at trial that Dr. Ibrahim was not a threat to the national security of the

United States and that she never has been. She did not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism. Despite this assessment, Dr. Ibrahim has been unable to return to the United States to this day.

II.

On January 27, 2006, Dr. Ibrahim filed suit against DHS, TSA, the TSC, the FBI, the Federal Aviation Administration (FAA), and individuals associated with these entities (collectively, the federal defendants); the City and County of San Francisco, the San Francisco Police Department, SFO, the County of San Mateo, and individuals associated with these entities (collectively, the city defendants); and United Airlines, UAL Corporation, and individuals associated with these entities (collectively, the private defendants). Dr. Ibrahim asserted § 1983 claims and state-law tort claims arising out of her detention at SFO, as well as several constitutional claims based on the inclusion of her name on government terrorist watchlists. On August 16, 2006, the district court dismissed her claims against the federal defendants under 49 U.S.C. § 46110(a), which vests exclusive original jurisdiction in the courts of appeals over suits challenging security orders issued by TSA. The order also dismissed Dr. Ibrahim's claims against a TSA employee and the airline. Dr. Ibrahim appealed.

We affirmed in part, reversed in part, and remanded. We reversed the district court's dismissal of the federal defendants, holding that § 46110(a) does not bar district court jurisdiction over Dr. Ibrahim's challenges to her

placement on the government terrorist watchlists, including the No Fly list, because the lists are managed by the TSC rather than TSA. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254-56 (9th Cir. 2008) (*Ibrahim I*). We affirmed the district court's conclusions that § 46110(a) requires all challenges to TSA policies and procedures implementing the No Fly and other lists to be filed directly in the courts of appeals, that the federal agency and airline actions were not state actions under § 1983, and that the tort claims against the federal officials in their official capacities and against the airline defendants were precluded. *Id.* at 1256-58. We further held that the district court had personal jurisdiction over the claims against the TSA employee, who was sued in his individual capacity.[9] *Id.* at 1258-59. We remanded the issue of standing to the district court to decide in the first instance. *Id.* at 1254-56, 1256 n.9.

After we remanded the case, Dr. Ibrahim filed a Second Amended Complaint (SAC), alleging various *Bivens*, constitutional, § 1983, statutory, state tort, and Administrative Procedure Act (APA) claims against several federal agencies and federal officials in their official capacities (collectively, the Federal Defendants) and state and local government agencies, certain individuals in their individual capacities, and the U.S. Investigation Services, Inc. (collectively, the Non-Federal Defendants). Dr. Ibrahim requested an injunction that would

---

[9] We held that although the TSA employee "lives in Virginia and has no ties to California," the court had specific jurisdiction over Dr. Ibrahim's claims against him because "(1) [he] purposefully directed his action (namely, his order to detain Ibrahim) at California; (2) [Dr.] Ibrahim's claim arises out of that action; and (3) jurisdiction is reasonable." *Ibrahim I*, 538 F.3d at 1258 (citation omitted).

require the federal government to take her name off its terrorist watchlists, including the No Fly list, or, in the alternative, to provide procedures under which she could challenge her inclusion on those lists, in addition to other non-monetary requests and damages. The SAC also sought limited relief relevant to Dr. Ibrahim's visa denial, but stopped short of attempting to force the government to issue her a visa.

Both the Federal Defendants and Non-Federal Defendants filed motions to dismiss with respect to the majority of the claims. In an order dated July 27, 2009, the district court partially granted the Non-Federal Defendants' motions to dismiss. Thereafter, all of the Non-Federal Defendants entered into cash settlements with Dr. Ibrahim.

In the same order, the district court again dismissed Dr. Ibrahim's claims against the Federal Defendants. These claims alleged that the inclusion of Dr. Ibrahim's name on the government's terrorist watchlists violated her First Amendment right to freedom of association and her Fifth Amendment rights to due process and equal protection. She also alleged that the Federal Defendants violated the APA, arguing that the APA waives the sovereign immunity of the United States, thereby allowing her claims under the First and Fifth Amendments and authorizing remedies for those claims.

The district court held that while Dr. Ibrahim could seek damages for her past injury at SFO (and had successfully settled that part of the case), she had voluntarily left the United States and, as a nonimmigrant alien abroad, no longer had standing to assert constitutional and statutory claims to seek prospective relief. The district court held that, although nonimmigrant aliens in

the United States had standing to assert constitutional and statutory claims, a nonimmigrant alien who had voluntarily left the United States and was at large abroad had no standing to assert federal claims for prospective relief in our federal courts. Dr. Ibrahim filed a second appeal.

We affirmed in part, but reversed as to prospective standing by holding that even a nonimmigrant alien who had voluntarily left the United States nonetheless has standing to litigate federal constitutional claims in the district courts of the United States so long as the alien had a "substantial voluntary connection" to the United States. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 996 (9th Cir. 2012) (*Ibrahim II*). We held that Dr. Ibrahim had such a connection because of her time at Stanford University, her continuing collaboration with professors in the United States, her membership in several professional organizations located in the United States, the invitations for her to return, and her network of close friends in the United States. *Id.* at 993-94, 996. The government did not seek review by the Supreme Court.

Following the second remand, the government again filed a motion to dismiss, which the district court denied. Despite the unequivocal pronouncement from our court and the district court that Dr. Ibrahim had adequately pleaded Article III standing, the government argued over the next year that Dr. Ibrahim lacked standing. The government made this argument in its third motion to dismiss, its motion for summary judgment, its statements during trial, and its proposed findings of fact and conclusions of law. The government persisted, even

though it was abundantly clear that "the standing issue had gone the other way on appeal."

From the February 2012 remand through trial, the parties and the district court were embroiled in discovery disputes involving the state secrets privilege, the law enforcement privilege, and assertions of "sensitive security information" (SSI), 49 C.F.R. § 1520.5. The government invoked these as bases for withholding classified and otherwise allegedly sensitive government information from Dr. Ibrahim and her counsel.

On April 19, 2013, after years of litigation, the district court finally issued two orders granting in part and denying in part Dr. Ibrahim's motions to compel discovery. Resolving these disputes required the district court judge to review individually each of the documents Dr. Ibrahim sought. Most of this review was conducted *ex parte* and *in camera* due to the privileged, classified, or secret nature of the documents. The state secrets privilege was upheld as to nearly all of the classified documents in question. The government's assertion of other privileges regarding non-classified documents was overruled as to the majority of the remaining documents. The district court compelled the government to release information specifically related to Dr. Ibrahim's watchlist history, in addition to her current watchlist statuses. It also required the government to produce Federal Rule of Civil Procedure 30(b)(6) witnesses.

At last, Dr. Ibrahim and her attorneys were able to learn what the government had known all along. On May 2, 2013, the government stated that Dr. Ibrahim was inadvertently placed on the No-Fly list but did not explain the details of this mistake, or who was involved.

On May 2, 2013, when the government responded to Dr. Ibrahim's interrogatory requests, Dr. Ibrahim learned, for the first time, her historical and current watchlist statuses.[10] On September 12, 2013, again over the government's vigorous objections, Dr. Ibrahim's attorneys deposed Agent Kelley and learned that her placement on the No Fly and IBIS watchlists was, in fact, a mistake based on Agent Kelley's misreading of the form.[11] In sum, the government failed to reveal that Dr. Ibrahim's placement on the No Fly list was a mistake until two months before trial, and eight years after Dr. Ibrahim filed suit. And at all times, as the government vigorously contested Dr. Ibrahim's discovery requests, and lodged over two hundred objections and instructions not to answer questions in depositions, the government was aware that she was not responsible for terrorism or any threats against the United States.

The government's discovery games stretched up to and through trial. The government announced on at

---

[10] The government designated all of its interrogatory responses "attorneys' eyes only," which, under the protective order, meant that only Dr. Ibrahim's attorneys were allowed to review information produced with this stamp, and Dr. Ibrahim herself was not permitted to review those documents. As a result, it is difficult to discern precisely when Dr. Ibrahim herself was able to learn certain information. However, with respect to information regarding her current and historical watchlist statuses, the district court concluded those were not protected by privilege in its April 2013 order, so it is likely counsel was able to inform Dr. Ibrahim of her watchlist statuses the day the interrogatory responses were filed.

[11] Dr. Ibrahim first learned that Agent Kelley had participated in the 2004 interview and that Kelley was personally responsible for nominating her to the TSDB during the deposition of the Acting Deputy Director of the TSC on May 29, 2013.

least two occasions that if it invoked the state secrets privilege to withhold information, then that evidence could not be relied upon by either side at trial. After making such representations on the record, on September 13, 2013, the district court ordered the government to confirm that neither party could use information withheld on grounds of state secrets privilege. The government affirmed it would not rely on any information withheld on grounds of privilege from Dr. Ibrahim. The government nevertheless reversed course during trial and sought to prevail by having this action dismissed due to its inability to disclose state secrets.

The government also filed a motion for summary judgment. A hearing was held on the government's motion on October 31, 2013. Instead of discussing the merits of the summary judgment motion, the government used the vast majority of the hearing time to discuss whether or not the trial should be open to the public and whether certain information listed on Dr. Ibrahim's demonstratives was subject to various privileges. The district court ultimately declined to hear further argument and decided the motion on the papers.

The government's motion for summary judgment was granted in limited part but mostly denied on November 4, 2013. Dr. Ibrahim's "exchange of information" claim based on the First Amendment was dismissed. Dr. Ibrahim's claims based on procedural and substantive due process, equal protection, and First Amendment rights of expressive association and against retaliation proceeded to trial. The government raised lack of standing, yet again, and was denied, yet again. For the first time, and contrary to what it had repre-

sented before, the government further argued that summary judgment in its favor was appropriate based on the state secrets privilege, pursuant to our court's decision in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc) (noting that even when evidence is excluded via an invocation of state secrets, the case may still need to be dismissed because "it will become apparent during the [*United States v. Reynolds*, 345 U.S. 1 (1953)[12]] analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets").

At the final pretrial conference, the government made what amounted to a motion for reconsideration of its previously denied motion for summary judgment on state secrets grounds. The government argued that the action should be dismissed because the core of the case had been excluded as state secrets. The motion was denied on several grounds. First, the government had failed to raise such an argument until weeks before trial. Second, it was too late and too unsettling for the government to reverse its prior position. Third, even

---

[12] Analyzing claims under the *Reynolds* privilege involves three steps:

> First, we must "ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied." Second, we must make an independent determination whether the information is privileged. . . . Finally, "the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim."

Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1202 (9th Cir. 2007) (citations omitted) (quoting *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007)).

under *Jeppesen*, 614 F.3d at 1080, the district court could not say with certainty that Dr. Ibrahim would be unable to prove her case at trial or that the government would be absolutely deprived of a meritorious and complete defense. The district court planned to allow both sides to present their unclassified evidence through the "normal" trial procedure and then to allow the government to submit an *ex parte* and under seal submission to try to explain how its state secrets might bear on the actual trial issues. Surprisingly, although no classified information was used at trial, the government made numerous privilege assertions and motions to close the courtroom. Due to these assertions, the district judge at least ten times "reluctantly" asked the press and the public to leave the courtroom.

On December 2, 2013, the first day of trial, before opening statements, Dr. Ibrahim's counsel reported that Dr. Ibrahim's daughter—a U.S. citizen born in the United States and a witness disclosed on Dr. Ibrahim's witness list—was not permitted to board her flight from Kuala Lumpur to attend trial, evidently because she too was now on the No Fly list. Consequently, Dr. Ibrahim's daughter missed her flight and was forced to reschedule. The district court concluded this was a mistake, and the government quickly remedied this error.

After a one-week bench trial, in the first No Fly list trial ever conducted, the district court found in Dr. Ibrahim's favor on her procedural due process claim and ordered the government to remove all references to the mistaken designations by Agent Kelley in 2004 on all terrorist watchlist databases and records; to inform Dr. Ibrahim of the specific subsection of the INA that rendered Dr. Ibrahim ineligible for a visa in 2009 and 2013;

to inform Dr. Ibrahim she is no longer on the No Fly list and has not been since 2005; and to inform Dr. Ibrahim that she is eligible to apply for a discretionary visa waiver under 8 U.S.C. § 1182(3)(D)(iv) and 22 C.F.R. § 41.121(b)(1). The district court declined to reach Dr. Ibrahim's substantive due process, equal protection, First Amendment, and APA claims, because "those arguments, even if successful, would not lead to any greater relief than already ordered."

Having won an outstanding victory, Dr. Ibrahim's lawyers petitioned for fees under the EAJA. In the district court's April 15, 2014 fee order, although the district court applauded the lawyers' commitment to this difficult and unprecedented case, it awarded only limited compensation. The court acknowledged that Dr. Ibrahim "did not outright lose" on her substantive due process, equal protection, First Amendment, and APA claims, but treated those claims as "unsuccessful" when it calculated fees under *Hensley*. The district court found that her substantive due process and APA claims were related to the procedural due process claim on which she prevailed, so it allowed fees on these claims. But the court also ruled that her First Amendment and equal protection claims were not related to the successful claim, and denied fees for work performed on those claims. The district court also concluded that Dr. Ibrahim's counsel was not entitled to fees for work performed on Dr. Ibrahim's visa issues, the settlement with the Non-Federal Defendants, litigation of standing prior to *Ibrahim II* (although it permitted fees for time after *Ibrahim II*), litigation of privilege issues, and other miscellaneous work. The district court also found that the government did not act in bad faith, that

Dr. Ibrahim's counsel was not entitled to a rate enhancement beyond the $125 per hour fee[13] stated in 28 U.S.C. § 2412(d)(2)(A)(ii), and that counsel was not entitled to fees as discovery sanctions pursuant to Federal Rules of Civil Procedure 37 and 16. The district court appointed a special master to determine the appropriate award of fees and costs based on the district court's findings.

Thereafter, the parties and the court engaged in a lengthy and contentious fee dispute before the special master. The district court ultimately adopted the special master's findings and reduced Dr. Ibrahim's fees for various witnesses and costs associated with those witnesses, expenses related to obtaining TSA clearance, costs that would be "reasonably charged" to the client, and costs for multiple copies of the same book; and rejected certain expenses for lack of supporting documentation or sufficient itemization. In total, Dr. Ibrahim sought $3,630,057.50 in market-rate attorneys' fees and $293,860.18 in expenses. On October 9, 2014, the district court ultimately awarded Dr. Ibrahim $419,987.36 in fees and $34,768.71 in expenses. Dr. Ibrahim appealed the underlying legal framework the district court utilized to determine the fees she was eligible to recover, various specific reductions to eligible fees, and the striking of her objections to the special master's recommendations.

On appeal, in the now-withdrawn panel opinion, our court adopted a number of the district court's rulings under a different approach. *Ibrahim v. U.S. Dep't of Homeland Sec.*, 835 F.3d 1048 (9th Cir. 2016), *reh'g en*

---

[13] The district court allowed a rate enhancement for James McManis because of his "distinctive knowledge and skills."

banc granted, 878 F.3d 703 (9th Cir. 2017) (*Ibrahim III*). The three-judge panel concluded that "it was not an abuse of discretion to find that [Dr.] Ibrahim's unsuccessful claims were unrelated, because although the work done on those claims could have contributed to her ultimately successful claim, the facts and legal theories underlying [Dr.] Ibrahim's claims make that result unlikely." *Id.* at 1063. The panel rested this conclusion on the novel theory that, because the theories underlying claims the district court declined to reach were "mutually exclusive" to the successful claims, the unreached claims were unrelated. *Id.* at 1062-63. The panel also held that the district court incorrectly considered substantial justification at each stage of litigation; that the government did not act in bad faith; that the district court did not err in determining that Dr. Ibrahim had failed to abide by its page limits in objecting to the special master's report and recommendation; and that the district court did not abuse its discretion in striking Dr. Ibrahim's objections to the special master's report and recommendation. *Id.* at 1052, 1065-66.

We now clarify that when a district court awards complete relief on one claim, rendering it unnecessary to reach alternative claims, the alternative claims cannot be deemed unsuccessful for the purpose of calculating a fee award. We also reject the post hoc "mutual exclusivity" approach to determining whether "unsuccessful" claims are related to successful claims and reaffirm that *Hensley* sets forth the correct standard of "relatedness" for claims under the EAJA. And we reaffirm that in evaluating whether the government's position is substantially justified, we look at whether the government's and the underlying agency's positions were justified as a whole and not at each stage.

III.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's award of fees under the EAJA for abuse of discretion. *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005); *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005); *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 900 (9th Cir. 1995). We review a district court's finding on the question of bad faith for clear error. *Cazares v. Barber*, 959 F.2d 753, 754 (9th Cir. 1992). We review the district court's interpretation of the EAJA de novo. *Edwards v. McMahon*, 834 F.2d 796, 801 (9th Cir. 1987). "[A] district court's fee award will be overturned if it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991).

IV.

The parties now[14] do not dispute that Dr. Ibrahim is entitled to attorneys' fees under the EAJA. What they do dispute is whether the amount of fees the district court awarded resulted from a proper application of the EAJA and common law.

In enacting the EAJA, Congress stated:

> For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees

---

[14] Before the district court, the government opposed Dr. Ibrahim's request for attorneys' fees on substantial justification grounds, and it originally cross-appealed the entire award in this appeal. Before argument, however, the government moved to voluntarily dismiss the cross-appeal and paid to Dr. Ibrahim the now uncontested amounts of attorneys' fees and expenses awarded by the district court.

> preclude resort to the adjudicatory process. . . . When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

S. Rep. No. 96-253, at 5 (1979).

"The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. I.N.S.*, 502 U.S. 129, 138 (1991); *see also Jean*, 496 U.S. at 163 ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."). Congress specifically intended the EAJA to deter unreasonable agency conduct. *Jean*, 496 U.S. at 163 n.11 (quoting the statement of purpose for the EAJA, Pub. L. No. 96-481, §§ 201-08, 94 Stat. 2321, 2325-30 (1980)).

The policy behind the EAJA "is to encourage litigants to vindicate their rights where any level of the adjudicating agency has made some error in law or fact and has thereby forced the litigant to seek relief from a federal court." *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). "[W]e have consistently held that regardless of the government's conduct in the federal court proceedings, unreasonable agency action at any level entitles the litigant to EAJA fees." *Id.*

"The EAJA applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim."

Jean, 496 U.S. at 163-64. The EAJA was designed to remedy this situation by providing for an award of reasonable attorneys' fees to a "prevailing party" in a "civil action" unless the position taken by the United States at issue "was substantially justified" or "special circumstances make an award unjust." *Id.* at 158; 28 U.S.C. § 2412(d)(1)(A).

The EAJA specifically provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Thus, as the Supreme Court held in *Jean*:

> eligibility for a fee award in any civil action requires: (1) that the claimant be "a prevailing party"; (2) that the Government's position was not "substantially justified"; (3) that no "special circumstances make an award unjust"; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.

496 U.S. at 158.

The district court correctly concluded that Dr. Ibrahim was the prevailing party in this case. The third and fourth *Jean* factors are not at issue. The only remaining issue as to Dr. Ibrahim's entitlement to fees is whether the government's position was substantially justified.

A. Substantial Justification

Where, as here, a movant under the EAJA has established that it is a prevailing party, "the burden is on the government to show that its litigation position was substantially justified on the law and the facts." *Cinciarelli v. Reagan*, 729 F.2d 801, 806 (D.C. Cir. 1984). To establish substantial justification, the government need not establish that it was correct or "justified to a high degree"—indeed, since the movant is established as a prevailing party it could never do so—but only that its position is one that "a reasonable person could think it correct, that is, [that the position] has a reasonable basis in law and fact."[15] *Pierce v. Underwood*, 487 U.S. 552, 565, 566 n.2 (1988). That the government lost (on some issues) does not raise a presumption that its position was not substantially justified. *Edwards*, 834 F.2d at 802 (citation omitted). Fees may be denied when the litigation involves questions of first impression, but "whether an issue is one of first impression is but one factor to be considered." *United States v. Marolf*, 277 F.3d 1156, 1162 n.2 (9th Cir. 2002).

When evaluating the government's "position" under the EAJA, we consider both the government's litigation position and the "action or failure to act by the agency

---

[15] The partial dissent is incorrect to view the issue as solely a factual one, as we must consider the law as applied to the facts.

upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B). Thus, the substantial justification test is comprised of two inquiries, one directed toward the government agency's conduct, and the other toward the government's attorneys' conduct during litigation. *See Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001). The test is an inclusive one; we consider whether the government's position "as a whole" has "a reasonable basis in both law and fact." *Id.* at 1258, 1261; *see also Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013).

The district court, invoking our decision in *Corbin v. Apfel*, 149 F.3d 1051 (9th Cir. 1998), concluded that, in exceedingly complex cases, a court may appropriately determine whether the government was substantially justified at each "stage" of the litigation and make a fee award apportioned to those separate determinations. It accordingly disallowed fees for discrete positions taken by the government at different stages of the litigation because, in its view, the government's positions in each instance were substantially justified. This approach was error, as it is contrary to the Supreme Court's instructions in *Jean*.

In *Jean*, the Supreme Court rejected the government's argument that it could assert a "'substantial justification' defense at multiple stages of an action." 496 U.S. at 158-59. Examining the statutory language, the Court noted the complete absence of any textual support for this position. *Id.* at 159. Moreover, "[s]ubsection (d)(1)(A) refers to an award of fees 'in any civil action' without any reference to separate parts of the litigation, such as discovery requests, fees, or appeals." *Id.* The Court also noted that "[t]he reference to 'the

position of the United States' in the singular also suggests that the court need make only one finding about the justification of that position." *Id.* An amendment to the EAJA made clear that the "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." Pub. L. No. 99-80, § 2(c)(2)(B), 99 Stat. 183, 185 (1985) (codified at 28 U.S.C. § 2412(d)(2)(D)). As the Court reiterated, "Congress' emphasis on the underlying Government action supports a single evaluation of past conduct." *Jean*, 496 U.S. at 159 n.7 (citing H.R. Rep. No. 98-992, at 9, 13 (1984) ("[T]he amendment will make clear that the Congressional intent is to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation."), and S. Rep. No. 98-586, at 10 (1984) ("Congress expressly recognized 'that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority.'" (citation omitted))). The *Jean* Court concluded that "[t]he single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' thus operates as a one-time threshold for fee eligibility." *Id.* at 160.

In sum, "[a]ny given civil action can have numerous phases," as evidenced by the case at hand. *Id.* at 161. But the Supreme Court clearly instructed, and almost

all courts have clearly understood,[16] that "the EAJA—like other fee-shifting statutes—favors treating a case

---

[16] All but two circuits agree that "the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." *See Glenn v. Comm'r of Soc. Sec.*, 763 F.3d 494, 498-99 (6th Cir. 2014) (adopting a single inquiry test and noting that district courts cannot simply compare the number of successful claims to the number of unsuccessful claims in a single appeal) ("Rather, the question is whether the government's litigating position . . . is justified to a degree that could satisfy a reasonable person and whether it was supported by law and fact." (internal quotation marks and citations omitted)); *United States v. 515 Granby, LLC*, 736 F.3d 309, 315-17 (4th Cir. 2013) (considering the government's pre- and post-litigation conduct as a whole and noting that "an unreasonable prelitigation position will generally lead to an award of attorney's fees under the EAJA"); *United States v. Hurt*, 676 F.3d 649, 653-54 (8th Cir. 2012) (examining government's conduct as a whole); *Gomez-Beleno v. Holder*, 644 F.3d 139, 145 n.3 (2d Cir. 2011) (considering the government's position as a whole rather than making separate substantial justification findings for different stages of the proceedings); *Wagner v. Shinseki*, 640 F.3d 1255, 1259 (Fed. Cir. 2011) (assessing the government's litigation position in totality); *Saysana v. Gillen*, 614 F.3d 1, 5-7 (1st Cir. 2010) (same); *Hackett v. Barnhart*, 475 F.3d 1166, 1173-74 (10th Cir. 2007) (same); *Sims v. Apfel*, 238 F.3d 597, 602 (5th Cir. 2001) (same); *United States v. Jones*, 125 F.3d 1418, 1428-29 (11th Cir. 1997) (same); *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 131 (3d Cir. 1993) (adopting a single inquiry test, though contrary to our holding in this case, requiring a district court to "evaluate every significant argument made by an agency . . . to determine if the argument is substantially justified" as "necessary to . . . determine whether, *as a whole*, the Government's position was substantially justified").

The D.C. and Seventh Circuits stand alone in declining to adopt a single inquiry test. The D.C. Circuit has rejected a reading of *Jean* that would preclude a claim-by-claim determination on the ground that such a rule would render the EAJA a "virtual nullity" because government conduct is nearly always grouped with or part

as an inclusive whole, rather than as atomized line-items." *Id.* at 161-62.

Our decision in *Corbin* is inapposite because that case hinged on jurisdictional features present when we review agency actions, but not present here. 149 F.3d 1051. In *Corbin*, a case involving judicial review of the agency's denial of disability benefits, we upheld EAJA fee awards that were apportioned to successive stages of the underlying litigation, in which we reversed and remanded for further proceedings before the agency.[17]

---

of some greater, and presumably justified, action. *Air Transport Ass'n of Canada v. F.A.A.*, 156 F.3d 1329, 1332 (D.C. Cir. 1998). In the same vein, the Seventh Circuit has cautioned against taking "judicial language out of context," reasoning that *Jean* "does not address the question whether allocation is permissible under the [EAJA], thus allowing an award of fees for the part of the government's case that was not substantially justified." *Gatimi v. Holder*, 606 F.3d 344, 350 (7th Cir. 2010). We understand these concerns, but we think that Congress clearly contemplated the denial of attorneys' fees even where some of the litigation conduct was unjustified when it used the qualifying term "substantial" rather than "total" or "complete." *See* 28 U.S.C. § 2412(d)(1)(A); *see also United States v. Rubin*, 97 F.3d 373, 375-76 (9th Cir. 1996) (affirming the district court's denial of fees because the government was substantially justified in most, but not all, of its positions). Further, we conclude that this happenstance will predominantly affect cases challenging the government agency's litigation position, and likely have little effect in cases where the government agency's conduct is unjustified, as EAJA "fees generally should be awarded where the government's underlying action was unreasonable even if the government advanced a reasonable litigation position." *Marolf*, 277 F.3d at 1159.

[17] "Remand" is something of a misnomer, albeit one oft used in agency cases, as in fact "the civil action seeking judicial review of the . . . final decision," *Shalala v. Schaefer*, 509 U.S. 292, 299 (1993) (internal citation and quotation marks omitted), is terminated, not remanded.

Id. at 1052. Because Corbin prevailed upon judicial review and was the prevailing party at that stage—whatever the ultimate disposition of his disability claim—he was entitled to EAJA attorneys' fees. *Id.* at 1053. But, the administrative review context is unique because the different stages of the litigation are reviewed by different, unconnected quasi-judicial systems. In administrative review cases, we award fees when we vacate an administrative determination and require the agency to conduct new proceedings. *See, e.g.*, *Rueda-Menicucci v. I.N.S.*, 132 F.3d 493, 495 (9th Cir. 1997) (awarding fees to prevailing petitioners on a petition for review from a Board of Immigration Appeals proceeding without regard to whether they would later succeed on underlying asylum claims, explaining that "the remand terminates judicial proceedings and results in the entry of a final judgment"); *Kelly v. Nicholson*, 463 F.3d 1349, 1355-56 (Fed. Cir. 2006) (reversing and remanding denial of EAJA fees after an erroneous Agent Orange disability determination by the Department of Veterans Affairs); *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) (vacating and remanding denial of EAJA fees after an erroneous analysis of readjustment of benefits by the Department of Labor). This eligibility for fees arises whether the plaintiff challenges administrative action under a statute specifically providing for review, as with the examples above, or under an umbrella statute authorizing challenges to agency action, such as the APA. *See, e.g.*, *Wood v. Burwell*, 837 F.3d 969, 977 (9th Cir. 2016) (granting "prevailing party" status for success on an APA claim alleging procedural deficiencies, notwithstanding plaintiffs' later loss on their "substantive" claims). By contrast, the various stages at issue here

were all part of one litigation in federal court; the case was never returned to an agency for further proceedings. Therefore, *Corbin* does not apply.[18]

The district court thus erred in its piecemeal approach to substantial justification. Most fundamentally, the agency position upon which these going-on-thirteen years of litigation was based was not justified at all, much less substantially. The district court correctly recognized as much, finding: "The original sin—Agent Kelley's mistake and that he did not learn about his error until his deposition eight years later—was not reasonable" under the EAJA. Whether the error is attributable to the failure to train Agent Kelley, the counter-intuitive nature of the form (check the categories that do NOT apply), the lack of cross-checking or other verification procedures, or anti-Muslim animus (Agent Kelley interviewed Dr. Ibrahim on December 23, 2004, as part of an International Terrorism Investigation), the precise cause is irrelevant to, and does not mitigate, the lack of any basis to place Dr. Ibrahim on the list, nor does it justify a reduction in fees.[19] *See Marolf*, 277 F.3d at 1159 (holding that EAJA "fees generally should be awarded where the government's underlying

---

[18] And even if *Corbin* did apply to this case, the district court misapplied *Corbin* because it evaluated whether each *individual* argument at each stage of the litigation was substantially justified, rather than the government's position at each stage as a whole.

[19] We make no findings, nor can we on appeal, as to how this mistaken placement came about, and we ascribe no nefarious motivations to the government as an entity. Again, we cannot know on this record precisely why Dr. Ibrahim's name was listed on the TSDB watchlist to begin with.

action was unreasonable even if the government advanced a reasonable litigation position").

The district court correctly concluded that the government's litigation position—to defend the indefensible, its No Fly list error—was not reasonable. As the district court stated, "[t]he government's defense of such inadequate due process in Dr. Ibrahim's circumstance—when she was concededly not a threat to national security—was not substantially justified."

Those conclusions should have been the end of the district court's EAJA eligibility analysis. After the government engaged in years of scorched earth litigation, it finally conceded during trial in December 2013 that Dr. Ibrahim is "not a threat to our country. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism." But the government knew this in November 2004, when Agent Kelley completed the form; it knew it in January 2005, when the DHS agent told Dr. Ibrahim she was not on the No Fly list; and it was well aware of it two weeks after Dr. Ibrahim filed the underlying action, when a government agent ordered her "Remove[d] from *ALL* watchlisting supported systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)" and further stated that Dr. Ibrahim was not qualified for placement on either the No Fly or TSA Selectee lists. Yet knowing this, the government essentially doubled-down over the course of the litigation with a no-holds-barred defense.

That some of the arguments made along the way by the government attorneys passed the straight face test

until they were reversed on appeal does not persuade us that the government's position was substantially justified.[20] And the court is to consider the government agencies' conduct during the course of this litigation as well. *See* 28 U.S.C. § 2412(d)(2)(D) ("'position of the United States' means, in addition to the position taken

---

[20] We do not find that the government's defense of this litigation was unreasonable at all points of the litigation. Instead, what was not substantially justified was the government's continued defense of issues even after the reasons justifying their defense disappeared. For example, the government was justified in initially raising standing arguments, but was not justified in continuing to raise the same meritless standing arguments on numerous occasions once that issue had been definitively resolved by both our court and the district court. In a similar vein, while the government may have been justified in defending this litigation and refusing to tell Dr. Ibrahim her No Fly list status pursuant to its *Glomar* policy—a policy whereby the government refuses to confirm or deny the existence of documents in response to a Freedom of Information Act request, *see N.Y. Times v. U.S. Dep't of Justice*, 756 F.3d 100, 105 (2d Cir. 2014), *amended by* 758 F.3d 436 (2d Cir. 2014)—any justification it had to defend Dr. Ibrahim's No Fly list status vanished once she was made aware of her watchlist statuses and it had admitted its mistake in 2013.

Further, when considering the government's litigation position, we also consider the government's positions on discovery and other non-merits issues, i.e., the government's conduct as a whole. *See United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)) (considering government's conduct during discovery when performing substantial justification inquiry). Here, as discussed at length below, the government played discovery games, made false representations to the court, misused the court's time, and interfered with the public's right of access to trial. Thus, the government attorneys' actual conduct during this litigation was ethically questionable and not substantially justified.

by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based"). From the suit's inception, the government agencies' actions, including their on-again, off-again placement of Dr. Ibrahim on various government watchlists; refusal to allow her to reenter the United States at all, even to attend her own trial; and delay of her U.S.-born, U.S.-citizen daughter's attendance at trial, were unreasonable and served only to drive up attorneys' fees. Indeed, as a consequence of the government's conduct, Dr. Ibrahim was deposed in London, England, as opposed to the Northern District of California—which also drove up the costs and fees.

In sum, neither the agencies' conduct nor the government's litigation position was substantially justified.[21]

---

[21] The partial dissent argues that "Supreme Court precedent requires that we allow the district court to make [the] determination" as to whether the government's position was substantially justified. Concurring & Dissenting Op. at 78 (citing *Pierce*, 487 U.S. at 560); *see also id.* at 78-81. Not so. The dissent is actually quoting from the portion of the *Pierce* decision where Justice Scalia is deciding which of the three general standards of review should apply to the district court's "substantial justification" determination—de novo, clear error, or abuse of discretion. *Pierce*, 487 U.S. at 558. He decides that the abuse of discretion standard applies because the appropriate degree of deference is inherent in the standard itself. *Id.* at 559-63. Here, we applied the abuse of discretion standard and concluded the district court abused its discretion. Notably, in *Pierce*, the Court also declared that an abuse of discretion standard will "implement our view that a 'request for attorney's fees should not result in a second major litigation.'" *Id.* at 563 (quoting *Hensley*, 461 U.S. at 437). But that is exactly what has happened here. *See infra* Part V. We have already engaged in the "unusual expense" of reviewing over 7,000 pages of record and over 1,000 pages of trial exhibits, *Pierce*, 487 U.S. at 560, and we see no further need to triplicate this work.

The EAJA mandates that attorneys' fees be awarded to Dr. Ibrahim's attorneys, subject only to reasonableness review. *Jean*, 496 U.S. at 161. "It remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433.

B. Reasonableness

In *Hensley*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his claims for relief or achieves "limited success." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (citing *Hensley*, 461 U.S. at 436-37). First, we ask, "did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Hensley*, 461 U.S. at 434. This inquiry rests on whether the "related claims involve a common core of facts *or* are based on related legal theories," *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003) (citing *Hensley*, 461 U.S. at 435), with "the *focus* . . . on whether the claims arose out of a common course of conduct," *id.* at 1169 (emphasis added) (citing *Schwarz*, 73 F.3d at 903 (interpreting *Hensley*)). Second, we ask whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley*, 461 U.S. at 434. If the court concludes the prevailing party achieved "excellent results," it may permit a full fee award—that is, the entirety of those hours reasonably expended on both the prevailing and unsuccessful but related claims. *Id.* at 435; *Schwarz*, 73 F.3d at 905-06.

1. "Unsuccessful Claims"

The district court erroneously determined that Dr. Ibrahim was entitled to reasonable fees and expenses with respect to only her procedural due process claim, which provided her with substantial relief, and her related substantive due process and APA claims. Because Dr. Ibrahim's equal protection, APA, substantive due process, and First Amendment claims "would not lead to any greater relief than [what the district court had] already ordered," the district court declined to reach them. The district court then treated these unreached claims as unsuccessful, even while acknowledging that Dr. Ibrahim "did not outright lose on these claims," and disallowed counsel's reasonable fees and expenses on the "unrelated" First Amendment and equal protection claims. This overall approach was error.

The *Hensley* Court recognized that in complex civil rights litigation, plaintiffs may raise numerous claims, not all of which will be successful: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or *failure to reach* certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Hensley*, 461 U.S. at 435 (emphasis added). And where, as here, "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* The district court's rationale—that because Dr. Ibrahim won substantial relief on one claim, and it was therefore unnecessary to reach her other equally pursued claims that could also lead to the same relief, no fees were available for the unreached claim—turns *Hensley* on its head.

We are aware of no court that has held that a plaintiff who obtains full relief on some claims, thereby rendering it unnecessary to reach the remaining claims, "lost" on the unreached claims. When confronted with this question, our sister circuits that have addressed the issue have uniformly declined to adopt the district court's analysis. The Sixth Circuit "decline[d] the government's invitation to apportion [plaintiff's] attorney fees to the single claim addressed in [its] previous opinion." *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016). The Eighth Circuit also refused to reduce fees where the district court found in plaintiffs' favor on their state claim without reaching the federal claims, because plaintiffs' federal claims "were alternative grounds for the result the district court reached" and "plaintiffs fully achieved [their] goal by prevailing on their state constitutional claim." *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001). And the Seventh Circuit rejected defendants' argument that plaintiff did not succeed on her sexual harassment claim where "the court did not find in [defendant's] favor on the sexual harassment claim; it merely did not reach the merits of the issue." *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 874 (7th Cir. 1995).

We agree with our sister circuits that a district court's "failure to reach" certain grounds does not make those grounds "unsuccessful," and conclude that the district court clearly erred in holding that Dr. Ibrahim's unreached claims were "unsuccessful."

2. Related Claims

The district court and the original panel exacerbated this error in analyzing whether the claims the district court did not reach were related to her successful

claims. The district court correctly concluded that Dr. Ibrahim's substantive due process and APA claims were related to her prevailing procedural due process claim and allowed recovery of some of those fees and expenses. Without much analysis, however, the district court also concluded that her equal protection and First Amendment claims were not related "because they involved different evidence, different theories, and arose from a different alleged course of conduct." The three-judge panel stepped into the breach with its newly devised "mutually exclusive" rationale to determine that the claims were unrelated because, after trial, the district court found that Dr. Ibrahim was placed on the No Fly list due to negligence, and her First Amendment and equal protection claims alleged intentional discrimination. The three-judge panel concluded that the two mens rea requirements were "mutually exclusive."

But both the district court and the now-withdrawn opinion failed to follow clear precedent to the contrary. The Court made clear in *Hensley* that, while hours spent on an unsuccessful claim "that is distinct in all respects from [the plaintiff's] successful claim" should be excluded, "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 440. Construing the *Hensley* Court's statement that claims are "unrelated" if they are "entirely distinct and separate" from the prevailing claims, we have held that "related claims involve a common core of facts *or* are based on related legal theories." *Webb*, 330 F.3d at 1168 (citations omitted). We do not require commonality of *both* facts *and* law to conclude that claims are related. *Id.* Rather "the focus is to be on whether the

unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." *Schwarz*, 73 F.3d at 903. The three-judge panel's introduction of the mutual-exclusivity test is contrary to Supreme Court precedent,[22] our precedent,[23] and the precedent of every other circuit interpreting *Hensley* that has addressed the question.[24] We

---

[22] *See, e.g.*, *Hensley*, 461 U.S. at 438 (concluding that, despite the differences in legal theories and some facts, "[g]iven the interrelated nature of the facts and legal theories in this case, the District Court did not err in refusing to apportion the fee award mechanically on the basis of respondents' success or failure on particular issues").

[23] *See, e.g.*, *Webb*, 330 F.3d at 1169 (holding that the plaintiff's unsuccessful false arrest claim was "unquestionably" related to the successful claims for false imprisonment and malicious prosecution, and allowing his attorney to recover fees for time spent in pursuit of that claim because "all [of plaintiff's] claims arose out of a common core of facts and a common course of conduct: Plaintiff's arrest, detention, and prosecution"); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1142 (9th Cir. 1986) (reasoning that a police department clerk-typist's claims for discriminatory hiring and unconstitutionally obtained information could be related because they both concerned a polygraph interview she underwent during which the department discussed her sexual history); *cf. Schwarz*, 73 F.3d at 902-04 (determining that an employee's claims of employment discrimination against offices in Phoenix, Arizona and Portland, Oregon were distinct because they were predicated on independently discriminatory conduct by different actors, relating to different employment positions, in different states).

[24] *See, e.g.*, *Murphy v. Smith*, 864 F.3d 583, 586 (7th Cir. 2017) ("Where claims are closely related, however, a plaintiff who obtains excellent results should recover a fully compensatory fee even if he did not prevail on every contention in the lawsuit or if a court rejected or did not reach certain grounds supporting the excellent result." (citation omitted)); *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016) (declining to reduce fees where all of the claims pertained to one asylum application and related evidence); *SecurityPoint*

Holdings, Inc. v. Transp. Sec. Admin., 836 F.3d 32, 41 (D.C. Cir. 2016) ("We believe that [the plaintiff's] petition for review presented only one claim for relief—that TSA's denial of the cease-and-desist request was unlawful and must be set aside. Its assertion of several distinct *grounds* does not create multiple claims. But even if we treated the various grounds as separate claims, they are related in the sense meant by *Hensley*." (citation omitted)); *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773 (8th Cir. 2000) (applying *Hensley* to 42 U.S.C. § 2000e-5(k) and finding that the plaintiff's "state claims of assault and battery, outrage, and negligent retention shared a common core of facts with her Title VII claims, all of which arose from [the defendant's] alleged sexual harassment of [the plaintiff]"); *United States v. Jones*, 125 F.3d 1418, 1430 (11th Cir. 1997) ("[U]nder *Hensley*, a plaintiff who has prevailed against the United States on one claim may recover for all the hours reasonably expended on the litigation even though he or she failed to prevail on other claims involving a common core of facts or related legal theories."); *Jane L. v. Bangerter*, 61 F.3d 1505, 1512 (10th Cir. 1995) ("We have refused to permit the reduction of an attorneys fee request if successful and unsuccessful claims are based on a 'common core of facts.' . . . Claims are also related to each other if based on 'related legal theories.'" (citations omitted)); *Keely v. Merit Sys. Prot. Bd.*, 793 F.2d 1273, 1275-76 (Fed. Cir. 1986) (rejecting the government's argument that the court should reduce attorneys' fees and individually evaluate each of the plaintiff's separate arguments where the plaintiff only prevailed on one); *Citizens Council of Del. Cty. v. Brinegar*, 741 F.2d 584, 596 (3d Cir. 1984) (concluding that "it is clear that there was a sufficient interrelationship among the essential claims advanced by the plaintiff in the course of the litigation that the district court was not required to apportion fees based on the success or failure of any particular legal argument advanced by the plaintiffs"); *cf. Paris v. U.S. Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 240 (1st Cir. 1993) (concluding, in the context of analyzing a related provision of the Fair Housing Act, that if the case involves what is essentially a single claim arising from "a common nucleus of operative fact," and the plaintiff advances separate legal theories that "are but different statutory avenues to the same goal," then all of the time should be compensable), *overruled on other*

are aware of no other court that has adopted the mutual-exclusivity test, and we now disavow its use as a standard for relatedness.

All of Dr. Ibrahim's claims arose from a "common course of conduct" and are therefore related under *Hensley*. *See Webb*, 330 F.3d at 1169. The First Amended Complaint at bottom was a challenge to "defendants' administration, management, and implementation of the 'No-Fly List.'" Specifically, Dr. Ibrahim alleged that the manner in which the government created, maintained, updated, and disseminated the No Fly list led to the humiliating treatment she experienced at SFO in January 2005 and afterwards, as she was unable to learn whether she was on or off the list or why she was placed there in the first place. She alleged several alternative theories for this treatment, five of which ultimately went to trial against the federal government. That the government's actions arose from negligence or unconstitutional animus could not have been known until the case was tried, and we still do not know whether,

---

grounds by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).

Only the Second Circuit has interpreted *Hensley* to allow the lodestar reductions in cases where multiple claims involve a common nucleus of fact. *Kassim v. City of Schenectady*, 415 F.3d 246, 256 (2d Cir. 2005) ("[A] district judge's authority to reduce the fee awarded to a prevailing plaintiff below the lodestar by reason of the plaintiff's 'partial or limited success' is not restricted . . . to cases of multiple discrete theories. . . . "). The Fourth and Fifth Circuits have not yet reached this issue. *See Vaughns by Vaughns v. Bd. of Educ. of Prince George's Cty.*, 770 F.2d 1244, 1245 (4th Cir. 1985) (affirming the district court's fee determination based on the standard of review, and not reaching whether its relatedness analysis, which focused on whether the claims arose from a common course of conduct, was accurate).

in addition to Agent Kelley's negligence in placing her on the No Fly list, the government's initial interest in Dr. Ibrahim stemmed from its allegedly heightened interest in foreign students from Muslim countries here on U.S. student visas,[25] or her husband's recent visit, or her regular attendance at a mosque, or her involvement in the Islamic Society of Stanford University, which, if true, would have shown discriminatory intent. And because the district court did not reach the First Amendment and equal protection claims, we will never know whether placement on the TSDB was a result of discrimination on the basis of her race, religion, country of origin, or association with Muslims and Muslim groups.

There is no question that all of these claims arise from the government's common course of conduct toward Dr. Ibrahim. To hold otherwise would ignore the

---

[25] In opening argument at trial, Dr. Ibrahim's attorney Elizabeth Pipkin stated:

> In another Homeland Security presidential directive, the president calls for the end of abuse of student visas and increased the scrutiny of foreign students during the time that Dr. Ibrahim was studying at Stanford. In the months prior to the November 2004 presidential election and continuing up until the inauguration, the government ramped up its efforts to interrogate Muslims in America in a national dragnet called the October Plan, or Operation Front Line.
>
> The government's decision to target foreign students had a strong effect on the Muslim student community at Stanford. That community emailed its members, including Dr. Ibrahim, to advise them that there may be an increased likelihood that law enforcement would contact them and that if they were contacted, they should cooperate.

The district court never made a factual finding regarding whether this allegation was true.

realities of lawyering. As here, the key question in a lawsuit is often not what happened—but why. Before the litigation begins and while it is ongoing, the plaintiff and her lawyers cannot know for sure why someone else did something, but may, as here, have evidence suggesting various possibilities. So, as here, the plaintiff raises alternative claims and theories as to why something was done, some of which may be ultimately inconsistent, with regard to a single set of facts. The plaintiff's claims are then tested by dispositive motions, discovery, and perhaps (as happened here) trial. The fact that one claim or theory is eventually determined to be true does not mean that the claims were unrelated to one another.

It is common to plead that a defendant committed some act "intentionally, knowingly, or recklessly," or simultaneously to bring different claims premised on distinct mental states. This widely accepted litigation strategy is accommodated by the clear standard pronounced by the Supreme Court and previously applied by our court, which focuses on whether the claims are premised on an "entirely distinct and separate" set of facts, not whether they are based on different "mental states." The analysis in the now-withdrawn opinion shows that had it applied the correct standard, it would have recognized that all of Dr. Ibrahim's claims were based on the same set of facts—the placement of Dr. Ibrahim's name on the government's watchlists—regardless of what "mental state" was required to prove each particular claim. *Ibrahim III*, 835 F.3d at 1063 ("[I]f the government negligently placed [Dr.] Ibrahim on its watchlists because it failed to properly fill out a form, then it could not at the same time have intention-

ally placed [Dr.] Ibrahim on the list based on constitutionally protected attributes [Dr.] Ibrahim possesses, and vice versa.").

Allowing hindsight to creep in to fee awards also would put lawyers in an untenable ethical position. Res judicata bars claims that could have been raised in an earlier litigation that arise out of the same "transactional nucleus of facts." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (internal quotation marks and citation omitted). Ethical obligations—or perhaps more likely, the specter of malpractice liability—thus require a lawyer to bring all reasonably related, viable claims in a single action.[26] But

---

[26] Our sister circuits have recognized the difficult task facing lawyers navigating the complexities of civil rights litigation. The D.C. Circuit, for example, has emphasized that

> [a] lawyer who wins full relief for her client on one of several related claims . . . is not apt to be criticized because the court failed to reach some of the grounds, or even ruled against the client on them. . . . After the fact, it is of course easier to identify which arguments were winners and which were losers and state forcefully how an attorney's time could have been better spent. But litigation is not an exact science. In some cases, the lawyer's flagship argument may not carry the day, while the court embraces a secondary argument the lawyer rated less favorably. That is precisely why lawyers raise alternative grounds—a practice which is explicitly sanctioned by our Rules of Civil Procedure.

Goos v. Nat'l Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995); *see also id.* at 1384-86.

The Seventh Circuit similarly has rejected the panel's ex post approach:

> For tactical reasons and out of caution lawyers often try to state their client's claim in a number of different ways, some of which may fall by the wayside as the litigation proceeds.

the three-judge panel's "mutually exclusive" rule raises the possibility that some fraction (perhaps a substantial one) of these reasonably related, ethically compelled claims, which a lawyer must research and litigate, will be excluded from a fee award.

> Dr. Ibrahim's lawyers may have violated their ethical duties and risked malpractice if they had failed to bring all claims that their client could present in good faith. *See* Model Rules of Prof'l Conduct r. 1.3 cmt. (Am. Bar Ass'n 2016) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."). Dr. Ibrahim and her lawyers faced an uphill battle. The government vigorously defended this case, and Dr. Ibrahim did not have access to meaningful discovery until a few months before trial, after years of litigation and two appeals—she was fighting blind

---

> The lawyer has no right to advance a theory that is completely groundless or has no factual basis, but if he presents a congeries of theories each legally and factually plausible, he is not to be penalized just because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he reasonably could have asked for.

Lenard v. Argento, 808 F.2d 1242, 1245-46 (7th Cir. 1987). Other circuits are in accord. *See, e.g.*, *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006) ("[L]itigation is not an 'exact science': Lawyers cannot preordain which claims will carry the day and which will be treated less favorably."); *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir. 1998) ("Litigants should be given the breathing room to raise alternative legal grounds without fear that merely raising an alternative theory will threaten the attorney's subsequent compensation.").

against the Many-Faced Bureaucratic God.[27] And as demonstrated by the complex and longstanding procedural history, it was not even clear that Dr. Ibrahim could advance the case beyond the dismissal stage.

Applying the correct "common course of conduct" test to Dr. Ibrahim's claims for procedural and substantive due process, violations of her First Amendment and equal protection rights and the APA, we conclude that Dr. Ibrahim meets the first prong of *Hensley*. All of Dr. Ibrahim's claims arose from her wrongful placement on the No Fly list, and are therefore related. Fees for each of these claims are thus recoverable. All of these claims derive from the government's interest in Dr. Ibrahim's activities, which led to her placement on the No Fly list, her placement on and off various other watchlists (which the district court deemed "Kafkaesque"), her attempts to learn why she was on the No Fly list, her attempts to get herself removed from the No Fly list, and the government's intransigence in setting the record straight for almost a decade. As the district court found, this treatment had a "palpable impact, leading to the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler." Dr. Ibrahim's "litany of troubles" flow directly from her erroneous placement on the No Fly list, as do all of the claims that went to trial. None of the claims was distinct or separable from another, and each claim sought the same relief Dr. Ibrahim ultimately obtained.

---

[27] *See Game of Thrones: The Red Woman* (Home Box Office, Inc. broadcast Apr. 24, 2016).

3. Level of Success

Dr. Ibrahim also satisfied *Hensley*'s second prong because she "achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Sorenson*, 239 F.3d at 1147 (internal punctuation omitted) (quoting *Hensley*, 461 U.S. at 434). The district court found that Dr. Ibrahim had only "limited" success. We disagree.

The achievement of Dr. Ibrahim and her attorneys in successfully challenging her No Fly list placement and forcing the government to fix its error was not just "excellent," but extraordinary. *Hensley*, 461 U.S. at 435. Although this is not a class action, and thus we assess Dr. Ibrahim's individual success, the pathbreaking nature of her lawsuit underscores her achievement. Dr. Ibrahim was the first person ever to force the government to admit a terrorist watchlisting mistake; to obtain significant discovery regarding how the federal watchlisting system works; to proceed to trial regarding a watchlisting mistake; to force the government to trace and correct all erroneous records in its customer watchlists and databases; to require the government to inform a watchlisted individual of her TSDB status; and to admit that it has secret exceptions to the watchlisting reasonable suspicion standard. Dr. Ibrahim, in her first appeal to our court, established that district courts have jurisdiction over challenges to placement on terrorist watchlists, including the No Fly list. *Ibrahim I*, 538 F.3d at 1254-57. In her second appeal, she established that even aliens who voluntarily depart from the U.S. have standing to bring constitutional claims when they have had a significant voluntary connection with the U.S. *Ibrahim II*, 669 F.3d at 993-94. Moreover,

on her journey, Dr. Ibrahim established important principles of law, benefiting future individuals wrongfully placed on government watchlists. Previously, most such challenges failed at the pleading stage. *See, e.g.*, *Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013); *Rahman v. Chertoff*, No. 05 C 3761, 2010 WL 1335434 (N.D. Ill. Mar. 31, 2010); *Scherfen v. U.S. Dep't of Homeland Sec.*, No. 3:CV-08-1554, 2010 WL 456784 (M.D. Penn. Feb. 2, 2010); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119 (W.D. Wash. 2005).

Dr. Ibrahim's victory affected more than just her case—it affected the way all individuals can contest their placement on these watchlists.[28] The EAJA

> rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.

Escobar Ruiz v. I.N.S., 813 F.2d 283, 288 (9th Cir. 1987) (quoting H.R. Rep. No. 1418, at 10 (1980)). Dr. Ibrahim refined federal watchlisting policy by creating a roadmap for other similarly situated plaintiffs to seek judicial redress for alleged wrongful placement on government watchlists.[29]

---

[28] The government has since changed its policy regarding contesting placement on the No Fly list. It now allows certain categories of individuals to challenge their No Fly list status.

[29] For example, in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014), where U.S. citizens and lawful permanent residents challenged their allegedly wrongful placement on the No Fly list, the

The significance of Dr. Ibrahim's roadmap cannot be overstated. Any person could have the misfortune of being mistakenly placed on a government watchlist,[30] and the consequences are severe.[31] Placement on the

---

district court held at the summary judgment stage that the DHS Traveler Redress Inquiry Program process "falls far short of satisfying the requirements of due process," and that "the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process." *Id.* at 1161. In evaluating the procedural due process factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), the *Latif* court cited to Dr. Ibrahim's case, the only available case involving a due process challenge to watchlisting procedures, to find that the plaintiffs had been deprived of their liberty interests in travel, and that the DHS redress process contains a high risk of erroneous deprivation of constitutionally-protected interests. 28 F. Supp. 3d at 1148, 1152-53. Today, relief from No Fly list errors is widely recognized as available. *See, e.g.*, Murtaza Hussain, *How a Young American Escaped the No Fly List*, Intercept (Jan. 21, 2016, 4:30 AM), https://theintercept.com/2016/01/21/how-a-young-american-escaped-the-No-Fly-list/.

[30] As of 2014, it was reported that there are 680,000 individuals listed in the TSDB and 47,000 individuals listed on the No Fly list, and that these lists are littered with errors. *See Ibrahim II*, 669 F.3d at 990 (noting that there are significant numbers of erroneous placements on the federal watchlists).

[31] Placement on the No Fly list can also affect an individual's visa eligibility, lead to arrest and temporary incarceration, and be considered in the probable cause inquiry of a bail determination. *See United States v. Duque*, No. CR-09-265-D, 2009 WL 3698127, at *5 (W.D. Okla. Nov. 2, 2009) (describing presence on the VGTOF as part of "officers' collective knowledge" reasonably used to determine probable cause for an arrest). What is more, "[the U.S. government] shares the TSDB [watchlisting database] with 22 foreign governments," so there are doubtless international repercussions even if a listed person never tries to enter the United States, fly over U.S. airspace, or use a U.S. carrier. *Ibrahim II*, 669 F.3d at 993.

No Fly list, if left unchanged, prevents an individual from *ever* boarding an airplane that touches the vast expanse of U.S. airspace. Travel by air has become a normal part of our lives, whether for work, vacations, funerals, weddings, or to visit friends and family. In 2017 alone, there were 728 million airline passengers in the United States.[32] It is debilitating to lose the option to fly to one's intended destination. Today, those misplaced on the No Fly list can contest that placement, and, if misplaced, regain their right to flight. *See Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))).

A full award of attorneys' fees here is consistent with the EAJA's goal of creating a level playing field in cases in which there is an imbalance of power and resources. "The EAJA grew out of a concern for the unequal position of the individual vis à vis an insensitive and ever-expanding governmental bureaucracy. The House Report expresses concern about the fact that . . . the government with its greater resources and expertise can in effect coerce compliance with its position." *Escobar Ruiz*, 813 F.2d at 288 (internal quotation marks and citation omitted). Dr. Ibrahim—a professor and person of ordinary means—did not have the resources to pay an attorney to pursue her claims, which ultimately cost more than $3.6 million dollars to litigate. And the small seventeen-lawyer law firm that represented her, McManis Faulkner, had similarly limited resources, but,

---

[32] *See Airline Activity: National Summary (U.S. Flights)*, Bureau Transp. Stats., https://www.transtats.bts.gov/ (last visited July 26, 2018).

when others refused, they agreed to take on her case, uncertain whether they would ever be compensated. On the other side of the table was the government and its virtually unlimited resources. The government had a team of twenty-six lawyers—more lawyers than McManis Faulkner employed—and spent at least 13,400 hours—in other words, 558 days of one person working 24 hours a day—vigorously defending this litigation.

Accordingly, we find that Dr. Ibrahim achieved excellent results and is therefore entitled to reasonable fees consistent with that outcome.

C. Bad Faith

Generally, attorneys' fees are capped under the EAJA at $125 per hour. 28 U.S.C. § 2412(d)(2)(A)(ii). The EAJA provides, however, that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law." 28 U.S.C. § 2412(b). Thus, under the common law a court may assess attorneys' fees against the government if it has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). "[W]e hold the government to the same standard of good faith that we demand of all non-governmental parties." *Id.* The purpose of such an award is to "deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process." *Copeland v. Martinez*, 603 F.2d 981, 984 (D.C. Cir. 1979). "The district court may award attorney fees at market rates for the entire course of litigation, including time spent preparing, defending, and appealing the two awards of attorney fees, if it finds that the fees incurred

during the various phases of litigation are in some way traceable to the [government's] bad faith." *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990). And in evaluating whether the government acted in bad faith, we may examine the government's actions that precipitated the litigation, as well as the litigation itself. *Rawlings v. Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1984); *see also Hall v. Cole*, 412 U.S. 1, 15 (1973) (concluding that "the dilatory action of the union and its officers" in expelling an individual from the union following his resolutions unsuccessfully condemning union management's alleged undemocratic and short sighted policies constituted bad faith (internal quotation marks and citation omitted)); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir. 1982) (concluding that an employer would have acted in bad faith if it pursued a defense of an action based on a lie).

"A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (internal quotation marks and citation omitted). "Mere recklessness does not alone constitute bad faith; rather, an award of attorney's fees is justified when reckless conduct is combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Rodriguez*, 542 F.3d at 709 (internal quotation marks omitted) (quoting *Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001)). It is also shown when litigants disregard the judicial process. *Brown*, 916 F.2d at 496 (concluding that the "cumulative effect" of the Appeals Council's review of a claim for social security benefits, including

the "failure to review a tape of an ALJ's hearing, a statutory duty, and other acts that caused delay and necessitated the filing and hearing of additional motions, *viz.*, the Secretary's delay in producing documents and in transcribing the tape" constituted bad faith); *see also Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014) (allowing fee-shifting for willful disobedience of a court's order); *Beaudry Motor Co. v. Abko Props., Inc.*, 780 F.2d 751, 756 (9th Cir. 1986) (bringing a case barred by the statute of limitations); *Toombs v. Leone*, 777 F.2d 465, 471-72 (9th Cir. 1985) (deliberately failing to comply with local rules regarding exchange of exhibits); *Int'l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425, 428-29 (9th Cir. 1983) (refusing to abide by arbitrator's award).

Though the district court cited some of this relevant case law, including *Rodriguez*, *Chambers*, and *Brown*, it erroneously applied a piecemeal approach to its bad faith determination in conflict with the cases it cited. *See Rodriguez*, 542 F.3d at 712. We have long established that to make a bad faith determination, we must review the totality of the government's conduct. *See Brown*, 916 F.2d at 496; *see also Rawlings*, 725 F.2d at 1196. However, "it is unnecessary to find that every aspect of a case is litigated by a party in bad faith in order to find bad faith by that party." *Rodriguez*, 542 F.3d at 712.

The district court clearly erred by failing to consider the totality of the government's conduct, particularly its comportment after discovering Agent Kelley's error. *See Mendenhall v. Nat'l Transp. Safety Bd.*, 92 F.3d 871

(9th Cir. 1996).[33] In *Mendenhall*, we held that a government agency, there the FAA, acted in bad faith, thereby allowing the prevailing party, Mendenhall, to recover fees at a reasonable market rate. We held that "[t]he moment the FAA acknowledged" that its complaint against her was baseless, "the agency was no longer justified in pursuing its action." *Id.* at 877. "The agency's continuation of an action it knew to be baseless . . . is a prime example of bad faith." *Id.* (internal quotation marks omitted) (quoting *Brown*, 916 F.2d at 495-96).

The only post-litigation agency conduct that the district court considered was whether the government obstructed Dr. Ibrahim or her daughter, Raihan, from appearing at trial. The court unreasonably concluded, at least with respect to Raihan, that there was no evidence that the government did so. That conclusion by the district court is "without support in inferences that may be drawn from the facts in the record" and is thus clearly erroneous. *Crittenden v. Chappell*, 804 F.3d 998, 1012

---

[33] The district court made no findings as to whether the agencies acted in bad faith before litigation, and we do not have a record basis upon which to consider this argument. As the district court speculated, however, the government's initial interest in Dr. Ibrahim may have rested on shaky constitutional grounds because it may have been motivated by racial or religious animus. Dr. Ibrahim alleged that, at the time Agent Kelley first investigated Dr. Ibrahim for potential watchlisting placement, the government had a heightened interest in foreign students like her who were in the United States from Muslim countries on U.S. student visas. Stanford University had specifically contacted these students, warning them of the government's potential interest. However, because the district court did not reach this issue despite having more familiarity with the extensive record, we cannot conclude that the government's initial interest in Dr. Ibrahim was in bad faith.

(9th Cir. 2015). Dr. Ibrahim's daughter, a U.S. citizen with a U.S. passport, was flagged by the National Targeting Center (NTC) as potentially inadmissible to the United States. NTC determined that she had been listed in the TSDB database by other government entities as an individual about whom those agencies possessed "substantive 'derogatory' information" that "may be relevant to an admissibility determination under the Immigration and Nationality Act." But, as a U.S. citizen, Dr. Ibrahim's daughter clearly was *not* subject to the INA.

Although Dr. Ibrahim's daughter carried a U.S. passport and U.S. Customs and Border Protection recognized that she appeared to be a U.S. citizen, NTC requested that Philippine Airlines perform additional screening of her in the following e-mail:

> [Subject line:] POSSIBLE NO BOARD REQUESTPNR WNDYJS
>
> [Body:] NOTICE TO AIR CARRIER The [DHS and U.S. Customs and Border Protection] recommends the airline to contact [the carrier liaison group] when the following passenger shows up to check in. . . .

After Philippine Airlines received this notice, Raihan was not permitted to board her flight, causing her to miss her mother's trial, where she had been listed as a witness. The government did not update the TSDB to reflect that Dr. Ibrahim's daughter was a U.S. citizen until after it had purportedly investigated the situation.

The district court also disregarded the government's response to Agent Kelley's error once the error was discovered. On remand, the district court should take into

account in its analysis of bad faith the government's conduct together with the consequences Dr. Ibrahim suffered as a result. For example, the district court failed to consider the February 2006 order to remove Dr. Ibrahim from all watchlist databases because she had "no nexus to terrorism." Despite this order, the government continued to place Dr. Ibrahim on and off federal watchlists, providing no reasonable explanation for Dr. Ibrahim's never-ending transitions in watchlist status. Further, the only justification for her continued watchlist placement is claimed to be a state secret. This assertion begs the question: Why was Dr. Ibrahim added to *any* watchlist once the government determined she was not a threat? Moreover, was there any justification for her seemingly random addition to and removal from watchlists? The district court should also consider the government's failure to remedy its own error until being ordered to do so and its failure to inform Agent Kelley of his mistake for eight years.[34]

The district court also wrongly rejected as a basis for bad faith the government's numerous requests for dismissal on standing grounds post-*Ibrahim II*, where we determined unequivocally that Dr. Ibrahim had Article III standing even though she voluntarily left the United States. The government knowingly pursued baseless standing arguments in its third motion to dismiss, its

---

[34] Even after Agent Kelley learned of his mistake, Agent Kelley never reviewed his old files to see if he had accidentally nominated others to the No Fly list in the hope it was a one-time mistake. But Agent Kelley's hope was not grounded in reality. If Agent Kelley nominated Dr. Ibrahim because he misread the form, this may well not have been a one-time event—he likely would have made the same mistake other times he used the same form.

motion for summary judgment, statements during trial, and post-trial proposed findings of fact and conclusions of law. The district court found that the government's position was "unreasonable," particularly after it "continue[d] to seek dismissal based on lack of standing in the face of our court of appeal's decision," but it did not account for this unreasonableness in its bad faith determination. *See Ibrahim II*, 669 F.3d at 997. This was contrary to our longstanding precedent that when an attorney knowingly or recklessly raises frivolous arguments, a finding of bad faith is warranted. *Fink*, 239 F.3d at 993-94; *see also Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1052 (9th Cir. 1985). As the district court acknowledged, "the government should have sought review by the United States Supreme Court," rather than to repeatedly assert an argument for dismissal it knew to be baseless.

Although the district court concluded that "the government was wrong to assure all that it would not rely on state-secrets evidence and then reverse course and seek dismissal at summary judgment," it incorrectly found that the error was not knowingly or recklessly made. The government falsely represented to both the district court and to Dr. Ibrahim's counsel—orally in court and in written filings—that it would not rely on evidence withheld on the basis of a privilege to "prevail in this action."[35] And yet, after these representations,

---

[35] The government explicitly stated in a response to a court order asking the government to confirm its position on this very question:

> Defendants affirm that they will not rely on any information they have withheld on grounds of privilege from Plaintiff in response to a discovery request in this case. Defendants are mindful of the Court's December 20, 2012 ruling (Dkt. [No.]

the government raised the *very* argument it had promised to forego. This is precisely the type of "abusive litigation" disavowed in the EAJA, which is focused on "protecting the integrity of the judicial process." *Copeland*, 603 F.2d at 984 (concluding that the government was entitled to bad faith fees where the plaintiff brought a frivolous suit under Title VII of the Civil Rights Act of 1964 because the purpose of a fee award under the bad faith exception includes "protecting the integrity of the judicial process").

The district court also clearly erred in concluding the government's privilege assertions were made in good faith by considering only the merits of the privilege arguments themselves ("some were upheld, some were overruled"). The district court disregarded the government's stubborn refusal to produce discovery even after the district court ordered it produced. But "willful disobedience of a court order" supports a bad faith finding. *Octane Fitness, LLC*, 134 S. Ct. at 1758 (citation omitted); *see also Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978) (noting that a court can "award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order"). Here, the government refused to produce evidence designated "sensitive security information" (SSI), even after Dr. Ibrahim's attorneys obtained the requisite security clearance and the court ordered the government to produce discovery. Contrary

---

399) that the Government may not affirmatively seek to prevail in this action based upon information that has been withheld on grounds of privilege, and have acted in a manner consistent with that ruling in both the assertion of privilege and summary judgment briefing.

to its April 2014 bad faith finding, the district court itself, in a December 20, 2012 order, admonished the government for its "persistent and stubborn refusal to follow the statute" that required the government to produce this information in these circumstances.[36]

The district court's 2012 reprimand had little effect on the government's conduct. After this order, the government continued to drag its feet and refused to produce any privileged information—which Dr. Ibrahim's attorneys were cleared to review—because it wanted to renegotiate an already-in-place protective order. The district court, noting its dissatisfaction with the government's handling of this litigation in 2013, emphasized that the government had "once again miss[ed] a deadline to produce materials in this long-pending action."

The government also refused to comply with the district court's order to produce Dr. Ibrahim's current watchlist status until it was compelled to do so. Dr. Ibrahim should not have been required to pursue a motion to compel to require the government to produce this information, especially when the government's justifications for refusing to produce it were baseless. The government first argued that Dr. Ibrahim did not have standing to assert a right to learn the status of her No Fly list placement—a meritless reassertion of a settled issue. The government alternatively argued that her historical watchlist status was irrelevant to this case—a

---

[36] Dr. Ibrahim also argues that the government acted in bad faith by giving the district court secret evidence and secret case law. While the district court ultimately held that the government was not justified in these *ex parte* communications, it is not clear that such communications were so clearly precluded by precedent that the *ex parte* communications were outside the bounds of acceptable conduct.

plainly frivolous contention given that Dr. Ibrahim's watchlist status is at the heart of this dispute. These actions, too, support a bad faith finding.

On remand, when analyzing the government's litigation conduct through a totality of the circumstances lens, the district court must also consider other relevant conduct, including the government's abuse of the discovery process;[37] interference with the public's right of access to trial by making at least ten motions to close the courtroom, *see Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982);[38] and misuse of a summary judgment hearing to discuss tangential issues unrelated to the merits of the summary judgment motion.

Finally, the district court erred in failing to consider whether the government's position as a whole was in good faith. Though the government may have had a legitimate basis to defend this litigation initially, whether the government's defense of this litigation was *ever* in good faith is a different question from whether it was *always* in good faith. Once the government discovers that its litigation position is baseless, it may not continue

---

[37] For example, the government also made depositions exceedingly difficult by lodging over 200 objections and instructions not to answer to questions.

[38] "[H]istorically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality opinion); *see also id.* at 596 (Brennan, J., concurring in judgment) (emphasizing value of open civil proceedings); *id.* at 599 (Stewart, J., concurring in judgment) (remarking that the First Amendment provides a right of access to civil and criminal trials).

to defend it. *Mendenhall*, 92 F.3d at 877. On remand, the district court must consider whether the government had a good faith basis to defend its No Fly list error as the litigation evolved.

In sum, the district court's ruling that the government did not act in bad faith was in error because it was incomplete. The district court focused primarily upon Agent Kelley's "unknowing" placement of Dr. Ibrahim's name on the No Fly list, which it deemed "the original sin," rather than considering the "totality" of the government's conduct, "including conduct 'prelitigation and during trial.'" *Rodriguez*, 542 F.3d at 712 (emphasis removed) (citations omitted); *see also Rawlings*, 725 F.2d at 1196 (opining that when evaluating bad faith we must consider the "totality of the circumstances"). And this conduct should have included both an analysis of the government agencies' and its legal representatives' conduct. Dr. Ibrahim should not have had to endure over a decade of contentious litigation, two trips to the court of appeals, extensive discovery, over 800 docket entries amounting to many thousands of pages of record, and a weeklong trial the government precluded her (and her U.S.-citizen daughter) from attending, only to come full circle to the government's concession that she never belonged on the No Fly list at all—that she is not and never was a terrorist or threat to airline passenger or civil aviation security. It should not have taken a court order to require the government to "cleans[e] and/or correct[] . . . the mistaken 2004 derogatory designation" of Dr. Ibrahim, which had spread like an insidious virus through numerous government watchlists.

V.

The district court's piecemeal award of attorneys' fees in this case runs afoul of the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. In this request for attorneys' fees alone, three courts, both a three-judge panel of our court and an en banc panel, fifteen judges, and one special master have had to consider the merits of this claim while the attorneys' fees and costs continue to mount. The district court and original panel's substantive determination of issues are precisely the type of "second major litigation" that the *Hensley* Court directed us to avoid.

That is not to say that all of the special master's findings and recommended fee reductions accepted by the district court were incorrect. As the Supreme Court noted in *Hensley*, consideration of the twelve factors laid out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on different grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989),[39] was entirely appropriate. 461 U.S. at 429-30. For example, the special master did not err in considering whether there was duplicative or block billing.

---

[39] The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

However, when revisiting this case, the fee reductions should not be so pervasive that they completely eliminate the reasonable fees to which Dr. Ibrahim's attorneys are entitled.

When the district court recalculates these fees, the calculation should acknowledge that Dr. Ibrahim and her lawyers, facing overwhelming odds, won a groundbreaking victory, and that they are entitled to the fees they've earned and the vast majority of fees they requested. *Cf. Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008) ("The district court's inquiry must be limited to determining whether the fees requested by this particular legal team are justified for the particular work performed and the results achieved in this particular case.").

We therefore **REVERSE**, **VACATE** the award of attorneys' fees, and **REMAND** to allow the district court to make a bad faith determination under the correct legal standard in the first instance, and to re-determine the fee award in accordance with this opinion.[40]

---

[40] We do not reach each of the objections to the special master's recommendations, as the fee award is vacated, and many of the objections may be mooted as a result of our opinion, which will require a substantial redetermination of the fee award, as well as commensurate costs.

APPENDIX A

Glossary of Acronyms

APA	Administrative Procedure Act
CLASS	Consular Lookout and Support System
DHS	Department of Homeland Security
EAJA	Equal Access to Justice Act
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
HSPD-6	Homeland Security Presidential Directive 6
IBIS	Interagency Border Inspection System
INA	Immigration and Nationality Act
KSTF	Known and Suspected Terrorist File
NCIC	National Crime Information Center
NCTC	National Counterterrorism Center
NTC	National Targeting Center
PIVF	Passenger Identity Verification Form
SFO	San Francisco International Airport
SSI	Sensitive Security Information
TACTICS	Tipoff Australia Counterterrorism Information Control System
TIDE	Terrorist Identities Datamart Environment
TRIP	Travel Redress Inquiry Program

TSA	Transportation Security Administration
TSC	Terrorist Screening Center
TSDB	Terrorist Screening Database
TUSCAN	Tipoff United States-Canada
VGTO	Violent Gang and Terrorist Organization
VGTOF	Violent Gang and Terrorist Organization File

CALLAHAN, Circuit Judge, joined by N.R. SMITH and NGUYEN, Circuit Judges, concurring in part and dissenting in part:

I agree with the majority that Dr. Ibrahim is the prevailing party in this case and that the test for substantial justification is an inclusive one: whether the government's position as a whole has a reasonable basis in fact and law. I further agree that Dr. Ibrahim's equal protection and First Amendment claims are sufficiently related to her other claims such that the district court's failure to reach those issues does not justify the district court's curtailment of attorneys' fees. But the majority exceeds our role as an appellate court by determining in the first instance that the government's position was not substantially justified. Supreme Court precedent requires that we allow the district court to make that determination on remand. *See Pierce v. Underwood*, 487 U.S. 552, 560 (1988). I also dissent from the majority's setting aside of the district court's finding that the defendants did not proceed in bad faith. Applying the applicable standard of review, *see Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008), Dr. Ibrahim has not shown that the district court committed clear error. Accordingly, I would affirm the district court's limitation of Dr. Ibrahim's attorneys' fees to the statutory rate of $125 per hour set by Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

I

Although I agree that substantial justification requires a single-finding, the majority errs in proceeding to make this factual determination. In *Pierce*, the Supreme Court held that the language in 28 U.S.C. § 2412(d)(1)(A)—that attorneys' fees shall be awarded

"unless *the court finds* that the position of the United States was substantially justified"—contemplates that "the determination is for the district court to make and suggests some deference to the district court." 487 U.S. at 559. The Court explained why the district court is in a better position than an appellate court to make this determination:

> To begin with, some of the elements that bear upon whether the Government's position "*was* substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Id. at 560 (emphasis in original). The EAJA is materially indistinguishable from the statute at issue in *Pierce*, and our case presents just the type of situation alluded to by the Supreme Court. The district court has man-

aged this litigation for twelve years. It is uniquely positioned to determine based on the totality of the circumstances whether the government's position was substantially justified.

Despite its ultimate factual conclusion that "neither the agencies' conduct nor the government's litigation position was substantially justified" (Maj. Opn. at 46), the majority's own description of the litigation shows why the district court should decide the issue in the first instance. The majority "ascribe[s] no nefarious motivations to the government" (Maj. Opn. at 43 n.19) and declines to find that "the government's defense of this litigation was unreasonable at all points of the litigation." Maj. Opn. at 45 n.20. Later in its opinion, the majority notes that "[t]hough the government may have had a legitimate basis to defend this litigation initially, whether the government's defense of this litigation was *ever* in good faith is a different question from whether it was *always* in good faith." Maj. Opn. at 72. The majority's recognition of the complexities of this litigation illustrates precisely why the issue should be decided in the first instance by the district court.

As the Supreme Court directed in *Pierce*, our iteration of the single-finding requirement compels a remand to the district court to make that finding in the first place. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced."). The government would then have the opportunity to explain its reasons for its positions and offer evidence in support of its positions, and, of course, Dr. Ibrahim

would be entitled to respond to the government's arguments and evidence. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 314 (2013) (noting that "fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis"). The district court would then make its independent determination, which we could then review should either side take exception. We are not a fact-finding court, and our feelings concerning the reasonableness of the government's overall litigation strategy do not justify our expropriation of the district court's responsibility to make such a determination in the first instance.[1]

II

Although the majority correctly notes that a finding of bad faith permits a market-rate recovery of attorneys' fees, in reversing the district court's finding of no bad faith, the majority fails to apply, let alone acknowledge, the proper standard of review. "We review a district court's finding regarding a party's bad faith for clear error." *Rodriguez*, 542 F.3d at 709. "A finding is clearly erroneous if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) (internal quotation marks omitted) (quoting *United States v. Hinkson*,

---

[1] *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court."); *see also S.E.C. v. Rogers*, 790 F.2d 1450, 1458 (9th Cir. 1986) (noting that "as a court of limited review" the Ninth Circuit "must abide by the clearly erroneous rule when reviewing a district court's findings.").

585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The Supreme Court has cautioned that pursuant to Federal Rule of Civil Procedure 52, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Anderson*, 470 U.S. at 573. The Supreme Court has counseled:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74.

The majority turns the standard of review on its head by analyzing and emphasizing the pieces of evidence that it concludes "support a bad faith finding." Maj. Opn. at 71-72; *see generally* Maj. Opn. at 65-75. But to reverse for clear error, we should consider whether the district court's finding was plausible and not simply identify evidence that arguably supports a conclusion contrary to the district court's determination.

None of the arguments proffered by Dr. Ibrahim support a finding of clear error. She first argues that there is bad faith because she was wrongly placed on the watchlist, the government refused to acknowledge this fact, and the government continued to oppose her even after it knew its conduct was wrong. But this argument fails to acknowledge the evolution of the law—

which has been prompted, at least in part, by this litigation. We now know that Dr. Ibrahim was placed on the watchlist by the mistake of a single federal employee. Moreover, at the time Dr. Ibrahim was placed on the government's watchlist, there was no uniform standard. Also, as the three-judge panel observed, "[p]rior to this suit no court had held a foreign national such as Ibrahim possessed any right to challenge their placement—mistaken or not—on the government's terrorism watchlists." *Ibrahim v. U.S. Dep't. of Homeland Sec.*, 835 F.3d 1048, 1058 (9th Cir. 2016) (*Ibrahim III*), *reh'g en banc granted*, 878 F.3d 703 (9th Cir. 2017). Thus, it was not necessarily bad faith for the government to assert that Dr. Ibrahim did not possess such a right. *Id.* Furthermore, it appears that the government removed Dr. Ibrahim from the No-Fly List more than a year prior to Dr. Ibrahim filing this action in 2016. *Id.*

Second, Dr. Ibrahim asserts that the government's raising of its standing defense after *Ibrahim v. Dep't. of Homeland Security*, 669 F.3d 983 (9th Cir. 2012) (*Ibrahim II*), demonstrates bad faith. However, the three-judge panel noted:

> Ibrahim fails to point to any evidence indicating the government reraised standing as a defense at summary judgment and trial with vexatious purpose. What's more, the government correctly points out that there was at minimum a colorable argument that the different procedural phases of the case rendered their subsequent standing motions nonfrivolous.

Ibrahim III, 835 F.3d at 1059. Although we held that Dr. Ibrahim had standing in *Ibrahim II*, 669 F.3d at 992-94, this did not preclude the government from seeking

to preserve the issue[2] or from challenging her underlying constitutional claims. *See Ibrahim II*, 669 F.3d at 997 (noting that we expressed "no opinion on the validity of the underlying constitutional claims").

Third, Dr. Ibrahim's claim that the government's privilege assertions were made in bad faith is not compelling as the government was successful on many of its privilege assertions. *See Ibrahim III*, 835 F.3d at 1059.

Fourth, the three-judge panel noted:

> Nor is there any evidence in the record demonstrating the government prevented Ibrahim from entering the United States to offer testimony in this suit, and with respect to her daughter, Ibrahim fails to explain why there was any error in the district court's determination that the government's initial refusal to allow her into the country was anything but a mistake, and a quickly corrected one at that.

Id. at 1060. The majority, however, asserts that it was unreasonable for the district court to conclude that "there was no evidence that the government" obstructed Dr. Ibrahim's daughter from appearing at trial. Maj. Opn. at 66. But the question is not whether there is evidence that the government interfered with the daughter's travel to the United States, but whether it did so in bad faith. The majority notes that as a citizen the daughter "was *not* subject to the INA," (Maj. Opn. at

---

[2] The majority asserts that the government should have sought review of *Ibrahim II* by the Supreme Court, but as *Ibrahim II* reversed and remanded for further proceedings, the government could have decided not to press the issue at that time.

67), but the No-Fly List and other travel restrictions are applicable to citizens as well as others.

Finally, I agree with the three-judge panel that:

> Ibrahim's argument that the district court erred by making piecemeal bad faith determinations is unpersuasive. Her sole authority on point is our decision in *McQuiston v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983), *superseded by statute as recognized by Melkonyan v. Sullivan*, 501 U.S. 89, 96, 111 S. Ct. 2157, 115 L. Ed. 2d 78 (1991), where we made the unremarkable observation that "[b]ad faith may be found either in the action that led to the lawsuit or in the conduct of the litigation." She fails, however, to point to any case where we have elevated that observation to edict. Rather, we have consistently required fee awards based on bad faith to be "traceable" to the conduct in question. *See, e.g., Rodriguez*, 542 F.3d at 713. It was therefore proper for the district court to consider each claimed instance of bad faith in order to determine whether the associated fees should be subject to a market-rate increase.

Ibrahim III, 835 F.3d at 1060.

Of course, we as an en banc panel are free to disagree with the conclusions drawn by the three-judge panel, but where, as here, the standard of review is clear error, the fact that several appellate judges agreed with the district court is some evidence that the district court's decision was not clear error.

Although the majority remanded the issue of bad faith to the district court for its independent re-assessment of the issue, as an appellate court we should allow the district court's determination of no bad faith to stand unless

appellant shows clear error. *Anderson*, 470 U.S. at 572; *Rodriguez*, 542 F.3d at 709. Because Dr. Ibrahim has not shown clear error, the district court's finding of no bad faith should be affirmed.

III

The majority, having determined that the test for substantial justification under the EAJA is an inclusive one—whether the government's position as a whole has a reasonable basis in fact and law—gets carried away and arrogates to itself the determination in the first instance that the government's position was not reasonable. However, the Supreme Court has clearly directed that such a determination should be made by the district court, *Pierce*, 487 U.S. at 560, where the parties will have an opportunity to present argument and evidence applying our substantial justification test to the particularities of this litigation. *See Fisher*, 570 U.S. at 314. And while the majority, by remanding the bad faith issue to the district court, resisted the temptation to decide itself whether the government has proceeded in bad faith, it should have recognized that there was no need for a remand because Dr. Ibrahim failed to show clear error in the district court's holding that the government did not proceed in bad faith. *See Rodriguez*, 542 F.3d at 709. Accordingly, I agree with the majority's test for substantial justification, but I dissent from its factual determination in the first instance that the government's litigation position was not justified and from its disturbance of the district court's finding that the government did not proceed in bad faith.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 14-16161 and 14-17272
D.C. No. 3:06-cv-545-WHA

DR. RAHINAH IBRAHIM, AN INDIVIDUAL,
PLAINTIFF-APPELLANT

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; JEH JOHNSON,* IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; TERRORIST SCREENING CENTER; CHRISTOPHER M. PIEHOTA, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TERRORIST SCREENING CENTER; FEDERAL BUREAU OF INVESTIGATION; JAMES COMEY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; LORETTA E. LYNCH, ATTORNEY GENERAL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL; ANDREW G. MCCABE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE ASSISTANT DIRECTOR OF THE FBI'S NATIONAL SECURITY BRANCH; NATIONAL COUNTERTERRORISM CENTER; NICHOLAS RASMUSSEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER; DEPARTMENT OF STATE; JOHN KERRY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, UNITED STATES OF AMERICA,
DEFENDANT-APPELLEES

---

* Current cabinet members and other federal officials have been substituted for their predecessors pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

Argued and Submitted: June 14, 2016
San Francisco, California
Filed: Aug. 30, 2016

OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Before: RICHARD R. CLIFTON and SANDRA S. IKUTA, Circuit Judges, and ROYCE C. LAMBERTH,** Senior District Judge.

LAMBERTH, Senior District Judge:

Plaintiff-Appellant Dr. Rahinah Ibrahim appeals the district court's award of attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 and the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). She contends the district court incorrectly found that the government had not acted in bad faith under EAJA section 2412(b) and therefore erred by declining to award market-rate fees. She further argues the district court erred by finding that the government's conduct was substantially justified under EAJA section 2412(d)(1)(A) on discrete issues and at discrete stages of the litigation, rather than making a single determination on the case as a whole. Finally, she challenges the district court's

** The Honorable Royce C. Lamberth, Senior District Judge for the U.S. District Court for the District of Columbia, sitting by designation.

striking of her objections to a special master's report on her claimed expenses. We have jurisdiction under 28 U.S.C. § 1291.

In light of the Supreme Court's decision in *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), we hold the district court erred by making multiple substantial justification determinations and accordingly reverse. We also reverse the district court's various reductions imposed on Ibrahim's eligible fees arising from its incorrect substantial justification analysis.

We however affirm the district court's bad faith findings as well as its relatedness findings under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We also affirm the district court's striking of Ibrahim's objections to the special master's report on expenses.

I.

Fee disputes, the Supreme Court has warned, "should not result in a second major litigation." *Hensley*, 461 U.S. at 437. But, unsurprisingly, they sometimes do, and the instant case is one such example.

In January 2006, Ibrahim commenced this action seeking monetary and equitable relief against various state and federal officials alleging 42 U.S.C. § 1983 claims, state law tort claims, and constitutional claims based on her inclusion in the government's terrorist databases, including the No-Fly List. After two dismissals and subsequent reversals and remands by this Court, *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250

(9th Cir. 2008) ("*Ibrahim I*"), *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012) ("*Ibrahim II*"), the district court held a week-long bench trial.[1]

The district court concluded that Ibrahim had been improperly placed within the government's databases.[2] Specifically, it found the FBI agent who nominated Ibrahim to the government watchlists incorrectly filled out the nomination form. As a result, Ibrahim was placed on the No-Fly List and another terrorist screening watchlist, rather than the lists on which the FBI agent had intended she be placed. *Id.* Accordingly, the court below ruled in favor of Ibrahim on her procedural due process claim, concluding the government's nomination error involved a "conceded, proven, undeniable, and serious error by the government." Although Ibrahim had been removed from the No-Fly List in early 2005, the government was ordered to remove any information contained in its databases associated with the 2004 nomination form, including those databases the FBI agent had intended Ibrahim be placed on, because the nomination form had been incorrectly filled out. It also ordered the government to affirmatively inform Ibrahim she was no longer on the No-Fly List because the government's Travel Redress Inquiry Plan—the only means by which an individual may challenge their suspected placement on the No-Fly List—failed to affirmatively

---

[1] At the time of trial, the only remaining claims were those against the federal defendants arising from their placement of Ibrahim on the government's terrorism watchlists, as well as their revocation and subsequent denial of Ibrahim's entry visas.

[2] The district court's factual findings are not challenged on appeal; unless otherwise noted, factual assertions contained herein reflect those findings.

disclose whether she had indeed been placed on the list incorrectly and whether she had been removed as a result.

The district court also granted unasked-for relief under our now-vacated precedent in *Din v. Kerry*, 718 F.3d 856, 863 (9th Cir. 2013), *vacated*, 135 S. Ct. 2128 (2015) by ordering the government to identify the specific subsection under section 212(a)(3)(B) of the Immigration and Nationality Act that rendered Ibrahim ineligible for a visa in 2009 and 2013. Lastly, on additional independent grounds, the district court granted further relief by finding that the consular officer who denied Ibrahim her visa erred in indicating she could not apply for a discretionary waiver of her ineligibility. The district court ordered the government to permit such a waiver application.

The district court did not reach the remainder of Ibrahim's other claims which included her First Amendment, substantive due process, equal protection, and Administrative Procedure Act claims because, in its view, "even if successful, [they] would not lead to any greater relief than already ordered."

Thereafter, the parties and the court engaged in a lengthy and contentious fee dispute. In total, Ibrahim sought $3,630,057.50 in market-rate attorney's fees and $293,860.18 in expenses. Adopting the recommendations of a special master, the district court ultimately awarded Ibrahim $419,987.36 in fees and $34,768.71 in costs and expenses. Ibrahim challenges both the underlying legal framework the district court utilized to determine the fees she was eligible to recover, as well as the district court's adoption of various reductions applied to those eligible fees by the special master.

II.

We begin with the district court's application of the EAJA.

Congress passed the EAJA "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163. To that end, the EAJA permits a "prevailing party" to recover fees and other expenses from the government unless the government demonstrates that its position was "substantially justified."[3] 28 U.S.C. § 2412(d)(1)(A); *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005)). The EAJA limits attorney's fees to "the prevailing market rates for the kind and quality of the services furnished" but, subject to exception, does not permit an award in excess of $125 per hour. 28 U.S.C. § 2412(d)(2)(A). One such exception to that cap applies where the court finds the government acted in bad faith. *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008).

After determining Ibrahim was a prevailing party, the court below found that the government was substantially justified respecting its pre-*Ibrahim II* standing arguments, its defense against Ibrahim's visa-related claims, and its various privilege assertions. It disallowed fees associated with those issues. It found the government's conduct otherwise was not justified.

---

[3] The EAJA also provides for an exception where "special circumstances" would make a fee award to the prevailing party unjust. 28 U.S.C. § 2412(d)(1)(A).

It further ruled that the government had not acted in bad faith, and with one exception not relevant here, imposed the EAJA's hourly cap to Ibrahim's fees.

Ibrahim contends these findings were erroneous. We address each in turn.

A.

We review a district court's substantial justification determination for abuse of discretion. *Gonzales*, 408 F.3d at 618. We review its interpretation of the EAJA de novo. *Edwards v. McMahon*, 834 F.2d 796, 801 (9th Cir. 1987).

The government's "position" when considered within the EAJA context includes both the government's litigation position as well as the "action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B). Hence, we have often articulated the substantial justification test as encompassing two lines of inquiry: one directed towards the government's original action, and the other towards the government's litigation position defending that action. *See, e.g.*, *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001). But it remains true that the test is an inclusive one; it is the government's position "as a whole" that must have "a reasonable basis in fact and law." *Id.* at 1261.[4]

---

[4] And though we have held generally that "a reasonable litigation position does not establish substantial justification in the face of a clearly unjustified underlying action," we have declined to adopt a per se rule foreclosing that possibility. *United States v. Marolf*, 277 F.3d 1156, 1163-64 and n.5 (9th Cir. 2002). We have likewise left open the possibility that reasonable underlying conduct may not be sufficient grounds to preclude a fee award in the face of otherwise unreasonable litigation tactics. *Id.*

Citing our decisions in *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008), and *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court below concluded "[t]he government must show that its position was substantially justified at each stage of the proceedings in order to avoid an award of EAJA fees." It went on to invoke our decision in *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998), for the proposition that in exceedingly complex cases, a court may appropriately determine whether the government was substantially justified at each "stage" of the litigation and make a fee award apportioned to those separate determinations. It accordingly disallowed fees for discrete positions[5] taken by the government because, in its view, the government's positions in each instance were substantially justified. It was error to do so.

In *Jean*, 496 U.S. at 161-62, the Supreme Court broadly pronounced that the EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." Noting section 2412(d)(2)(D)'s use of the term "position" in the singular coupled with Congress's "emphasis on the underlying Government action," the Court concluded the EAJA substantial justification determination acted as a "onetime threshold for fee eligibility." *Id.* at 159-60 and n.7. Accordingly, the *Jean* Court rejected petitioners' argument that the court was required to make two substantial justification determinations:

---

[5] As noted, these include the government's pre-*Ibrahim II* standing assertions, the government's defense of its revocation of Ibrahim's visa, as well as the government's privilege assertions.

one as to respondents' fees for time and expenses incurred in applying for fees, and another as to fees in the litigation itself. *Id.* at 157.

Jean, then, we think is clear: courts are to make but one substantial justification determination on the case as a whole. That is not to say a court may not consider the government's success at various stages of the litigation when making that inquiry, but those separate points of focus must be made as individual inquiries collectively shedding light on the government's conduct on the whole, rather than as distinct stages considered in isolation. Indeed in *United States v. Rubin*, 97 F.3d 373, 375-76 (9th Cir. 1996), we affirmed a district court's treating the case as a whole in disallowing fees although there was some indication at least part of the government's conduct was not substantially justified. In doing so, we cited favorably to *Jean*'s recognition that the EAJA favors treating the case as an "inclusive whole." *Id.* at 375 (quoting *Jean*, 496 U.S. at 161-62).

We are aware our sister courts have adopted contrary views in this regard. The D.C. Circuit, for instance, has rejected a reading of *Jean* that would preclude a claim-by-claim determination on the ground that such a rule would render the EAJA a "virtual nullity" because government conduct is nearly always grouped with or part of some greater, and presumably justified, action. *Air Trans. Ass'n v. F.A.A.*, 156 F.3d 1329, 1332 (D.C. Cir. 1998). In the same vein, the Seventh Circuit has cautioned against taking "judicial language out of context," reasoning that *Jean* "does not address the question whether allocation is permissible under the [EAJA]" to allow fees for the part of the government's case that

was not substantially justified. *Gatimi v. Holder*, 606 F.3d 344, 350 (7th Cir. 2010).[6]

We do not share the fear, however, that a single-inquiry rule will render the EAJA "a virtual nullity." *Air Trans. Ass'n*, 156 F.3d at 1332. The possibility that an evaluation of the government's conduct can be so "'holistic,'" *id.*, so as to preclude a finding that the government was ever without substantial justification surely exists,[7] but such an application would run afoul of the basic principle that courts interpret and apply statutes "in light of the overall purpose and structure of the whole statutory scheme." *United States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015).

Nor are we concerned that a single-inquiry rule would disallow the recovery of fees even where the government may have been unjustified at certain stages or in discrete positions it took throughout the lifetime of the case. As the Supreme Court has noted, "substantially justified" in this context only requires justification "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). That

---

[6] Some circuits, like the Third Circuit, have required district courts to "evaluate every significant argument made by an agency" in order to permit an appellate court "to review a district court's decision and determine whether, as a *whole*, the Government's position was substantially justified." *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 131 (3d Cir. 1993).

[7] Because, on a general level, almost all government action is carried out through authorized avenues pursuant to some legitimate purpose. Analyzed at that bird's-eye level, it is true that almost all government action is "usually substantially justified." *Air Trans. Ass'n*, 156 F.3d at 1332.

formulation implicitly permits the government some leeway, so long as its conduct on the whole remained justified. Whether those portions of the case on which the government was not substantially justified are sufficient to warrant fee shifting on the case as a whole is a question left to the evaluating court's discretion. But that a situation may arise where a court may deny a prevailing party fees even though the government was not substantially justified as to every position it took does not trouble us. Such a result seems expressly contemplated by the EAJA's use of the qualifying term "substantial" rather than "total" or "complete." 28 U.S.C. § 2412(d)(1)(A).

What's more, "[a]voiding an interpretation that ensures that the fee application will spawn a second litigation of significant dimension is central to Supreme Court jurisprudence on fee-shifting statutes." *Hardisty v. Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010) (internal punctuation omitted) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)). An approach permissive of separate substantial justification inquiries runs afoul of that interpretive paradigm.

Nor do we see any conflict with our decisions in *Corbin*, 149 F.3d at 1053, or its progeny in which we have upheld EAJA fee awards in the social security context where the award was apportioned to each successive stage of the litigation. As we noted in *Corbin*, following the Supreme Court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993),[8] "it became possible for a [social security] claimant to be deemed a 'prevailing party' for

[8] At issue in *Schaefer* was the point at which the EAJA's 30-day clock for a fee application begins to run following a successful social

EAJA purposes prior to the ultimate disposition of his disability claim." *Corbin*, 149 F.3d at 1053. As a result, we shifted focus from "considering only [whether the government was substantially justified as to] the ultimate issue of disability to considering the justification of the government's position at the discrete stage in question." *Id.* We have never applied *Corbin* outside of the social security context, nor do we see any reason to extend it to a case like this one where there was no possibility Ibrahim could be considered a prevailing party prior to the ultimate resolution of her claims.

In sum, courts assessing whether the government's position under the EAJA was substantially justified should engage in a single inquiry focused on the government's conduct in the case as a whole. We therefore hold the district court erred in disallowing fees relating to discrete litigation positions taken by the government.

---

security appeal after the district court makes a sentence-four remand under 42 U.S.C. § 405(g) but fails to enter a final judgment. 509 U.S. at 294-95. The Supreme Court held that under such facts, the time for a fee application does not expire while the district court's order remains appealable, and in light of the absence of a final judgment, such orders remain appealable even through the remanded proceedings, therefore making a post-remand EAJA application timely. *Id.* at 303. The Supreme Court noted, however, that it was error for the district court to fail to enter a final judgment upon the sentence-four remand. *Id.* at 300-01. *Schaefer*'s upshot, therefore, was that sentence-four remands were to be accompanied by final judgments, which in turn, would require EAJA fee applications to be filed before the proceedings on remand were concluded.

B.

We next address Ibrahim's assertion that the district court erred in failing to find the government acted in bad faith and by consequently imposing the EAJA's hourly rate cap on the majority of her recoverable hours.[9]

The EAJA mandates that the "United States . . . be liable for such fees and expenses to the same extent that any other party would be liable under the common law." 28 U.S.C. § 2412(b). The common law permits a court to assess attorney's fees against a losing party that has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). We hold the government to the same standard under the EAJA, *Rodriguez*, 542 F.3d at 709, and a finding that the government acted in bad faith permits a market-rate recovery of attorney's fees, *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990).

"Under the common law, a finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Rodriguez*, 542 F.3d at 709 (internal punctuation omitted) (internal quotation marks omitted) (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997)). "Mere recklessness does not alone constitute bad faith; rather, an award of attorney's fees is justified when reckless conduct is combined with an additional factor

[9] The district court permitted an upward departure for attorney James McManis due to his distinctive knowledge and skills.

such as frivolousness, harassment, or an improper purpose." *Id.* (internal quotation marks omitted) (quoting *Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001)).

Ibrahim raises several arguments in support of her contention that the government acted in bad faith both in the conduct leading to and during this action. She first argues that the "Government's refusal to acknowledge and permanently correct the injustice to Ibrahim, and its apparent lack of concern that others may have suffered harm from similar errors, show bad faith from the inception of this case." Her next contention focuses on the government's raising of its standing defense after our decision in *Ibrahim II*, in which we held Ibrahim had Article III standing to pursue her claims. 669 F.3d at 994. She also claims the government's invocation of the state secrets privilege was made in bad faith and analogizes the government's conduct here with that in *Limone v. United States*, 815 F. Supp. 2d 393 (D. Mass. 2011). Ibrahim further alleges the government barred her and her daughter from entering the United States in an effort to prevent them from offering testimony at trial. And lastly, Ibrahim insists the district court clearly erred by failing to review the record in its entirety, and instead "examin[ed] examples of bad conduct in isolation and conclud[ed] each one individually did not show bad faith, rather than examining the totality of the circumstances."

We review the district court's bad faith findings for clear error. *Rodriguez*, 542 F.3d at 709. "A finding is clearly erroneous if it is '(1) 'illogical', (2) 'implausible', or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) (quoting *United States*

v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, [an] appellate court[] must constantly have in mind that their function is not to decide factual issues *de novo*," even where it is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," we must affirm. *Id.* We find that the district court's account of the evidence is plausible in the light of the record, and therefore affirm.

Respecting Ibrahim's first argument, it appears she is making two distinct claims: first, that the government wrongly placed her on its watchlists and therefore acted in bad faith, and second, that its defense of such placement was bad faith because it knew its conduct was wrongful. Both contentions are unavailing.

The district court found that at the time the government placed Ibrahim on its watchlists, including the No-Fly List, there existed "no uniform standard for [watchlist] nominations." It was not until after this suit was instituted that the government adopted the "reasonable suspicion" standard for placement on its watchlists. And although the government admits that Ibrahim did not meet that standard at the time of her placement, that fact alone is insufficient to reverse the district court here. The district court expressly declined to find that the government's initial interest in Ibrahim was due to

her race, religion or ethnicity.[10] Absent evidence Ibrahim's inclusion on the watchlists was otherwise improper, it was not clearly erroneous for the district court to find the government's underlying placement of Ibrahim on its watchlists did not constitute bad faith.

Nor was the government's defense of its partially mistaken placement bad faith. Prior to this suit no court had held a foreign national such as Ibrahim possessed any right to challenge their placement—mistaken or not—on the government's terrorism watchlists. It accordingly could not have been bad faith to assert, as the government did, that Ibrahim possessed no such right. And more importantly, it is not true that the government defended, as Ibrahim claims, its placing her on the No-Fly List. At the time this action was instituted in early 2006, the government had already removed Ibrahim from the No-Fly List more than a year prior, and, with one exception, the lists on which she did appear at that time were the same lists on which the nominating agent *had intended she be placed*.[11] Therefore, to the extent the government defended Ibrahim's

---

[10] A finding Ibrahim does not challenge on appeal.

[11] The district court found the nominating agent had intended to place Ibrahim within the Consular Lookout and Support System ("CLASS") List, the TSA Selectee List, the TUSCAN List, and the TACTICS List, but instead placed Ibrahim on the No-Fly List and the Interagency Border Information System ("IBIS") database. While the district court found the government removed Ibrahim from the No-Fly List in January 2005, it also found she remained on the Selectee List and CLASS Lists at that time. It found that in December 2005, she was removed from the Selectee List, but added to the TUSCAN List and TACTICS List. Thus, when this action was instituted, she was on the CLASS, TACTICS and TUSCAN Lists, which were, as the district court found, the same lists on which

placement on those lists, no colorable argument can be made such a defense was frivolous or made with improper purpose.[12]

The same can be said with respect to the government's raising of the standing defense after our decision in *Ibrahim II*. Ibrahim fails to point to any evidence indicating the government reraised standing as a defense at summary judgment and trial with vexatious purpose. What's more, the government correctly points out that there was at minimum a colorable argument that the different procedural phases of the case rendered their subsequent standing motions nonfrivolous.

Ibrahim's claim that the government's privilege assertions were made in bad faith is also unconvincing. As the district court noted, the government was successful on many of its privilege assertions, and on that basis it declined to find the government's invocation of privilege was frivolous. Ibrahim likens the government's conduct in this case with that in *Limone v. United States*, where a Massachusetts district court found the government had acted in bad faith by "block[ing] access to the relevant documents," and "hiding behind specious

---

the nominating agent had intended she be placed. The district court made no finding, however, whether Ibrahim was ever removed from the IBIS database.

[12] That the government would later determine Ibrahim did not meet the reasonable suspicion standard, which was adopted subsequent to Ibrahim's nomination to the lists, and remove her from its watchlists is of no relevance. Ibrahim did not possess—nor did the district court find her to possess—a right to challenge the substantive basis for her placement on the government's watchlists. The district court's relief was explicitly limited to the government's post-deprivation procedural shortcomings and expressly disavowed "[a]ny other rule requiring reviewability before concrete adverse action."

procedural arguments," which "culminat[ed] in a frivolous interlocutory appeal." 815 F. Supp. 2d at 398. The conduct in *Limone* included a refusal to disclose relevant information, even *in camera*, until ordered by the court to do so. *Id.* Ibrahim sees similar conduct in this case through the government's refusal to produce basic information without a court order, its objections to questions at depositions, and its objections to discussing publicly available information.

But Ibrahim forgets that the government was ultimately successful on at least some of its privilege assertions, and absent evidence, of which Ibrahim has pointed to none, that the government's assertions on those unsuccessful occasions were frivolous or made with improper purpose, it could not have been clear error to decline to find the government acted in bad faith. Nor was the government's action here analogous to that in *Limone* where it had refused to grant its own lawyers access to the allegedly privileged documents which resulted in counsel's inability to respond to discovery motions and court orders for nearly two years. *See id.* at 398, 408. There is nothing similar in this case.

Nor is there any evidence in the record demonstrating the government prevented Ibrahim from entering the United States to offer testimony in this suit, and with respect to her daughter, Ibrahim fails to explain why there was any error in the district court's determination that the government's initial refusal to allow her into the country was anything but a mistake, and a quickly corrected one at that. The district court's findings here were not clearly erroneous.

Lastly, Ibrahim's argument that the district court erred by making piecemeal bad faith determinations

is unpersuasive. Her sole authority on point is our decision in *McQuiston v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983), *superseded by statute as recognized by Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991), where we made the unremarkable observation that "[b]ad faith may be found either in the action that led to the lawsuit or in the conduct of the litigation." She fails, however, to point to any case where we have elevated that observation to edict. Rather, we have consistently required fee awards based on bad faith to be "traceable" to the conduct in question. *See, e.g.*, *Rodriguez*, 542 F.3d at 713. It was therefore proper for the district court to consider each claimed instance of bad faith in order to determine whether the associated fees should be subject to a market-rate increase.

III.

We turn to the district court's fee reductions imposed in accordance with the Supreme Court's decision in *Hensley*, 461 U.S. 424.

Though a prevailing party may be eligible for fees under the EAJA,[13] "[i]t remains for the district court to determine what fee is 'reasonable.'" *Id.* at 433. And as the Supreme Court noted, and we have often repeated, "the most useful starting point for determining the amount of a reasonable fee is the number of hours rea-

---

[13] Though *Hensley* addressed fees in the context of the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, the Court went on to hold in *Jean* that the assessment of reasonable fees under the EAJA is "essentially the same." 496 U.S. at 160-61. We have since applied *Hensley* to EAJA fee awards. *See, e.g.*, *Atkins v. Apfel*, 154 F.3d 986, 989-90 (9th Cir. 1998).

sonably expended on the litigation multiplied by a reasonable hourly rate." *Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995) (internal punctuation omitted) (quoting *Hensley*, 461 U.S. at 433). In the case of fees sought under the EAJA, the "reasonable hourly rate" is capped by the EAJA itself. 28 U.S.C. § 2412(d)(2)(A). Thus, the equation for determining the reasonable amount of fees awardable in cases such as this is the number of hours reasonably expended multiplied by the applicable EAJA rates. The resulting figure—the lodestar figure—forms the basis for the remainder of the *Hensley* determination.

But where a plaintiff has only achieved limited success, not all hours expended on the litigation are eligible for inclusion in the lodestar, and even those that are eligible may be subject to a discretionary reduction. *Hensley*, 461 U.S. at 436; *Schwarz*, 73 F.3d at 901. Thus, under *Hensley* we have required district courts to follow a two-step process where a plaintiff's success is limited: first, the court must determine whether the claims upon which the plaintiff prevailed are related to the unsuccessful claims. *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003). That inquiry rests on whether the "related claims involve a common core of facts *or* are based on related legal theories." *Id.* Time spent on unsuccessful claims the court deems related are to be included in the lodestar, while "[h]ours expended on unrelated, unsuccessful claims should not be included" to the extent those hours can be "isolated." *Id.* at 1168, 1169. Thus, in addition to time reasonably spent on successful claims, potentially recoverable under *Hensley* are those hours expended on related but unsuccessful claims as well as those hours pertaining to unrelated,

unsuccessful claims that cannot be severed cleanly from the whole.

Second, a court must consider "whether 'the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.'" *Sorenson*, 239 F.3d at 1147 (internal punctuation omitted) (quoting *Hensley*, 461 U.S. at 434).[14] Here, "a district court 'should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *Id.* (quoting *Hensley*, 461 U.S. at 435).

If the court concludes the prevailing party achieved "excellent results," it may permit a full fee award—that is, the entirety of those hours reasonably expended on both the prevailing and unsuccessful but related claims. *Hensley*, 461 U.S. at 435; *Schwarz*, 73 F.3d at 905-06. On the other hand, where a plaintiff has not achieved results warranting a fully recoverable fee, the district court may apply a downward adjustment to the lodestar by "award[ing] only that amount of fees that is reasonable in relation to the results obtained."[15] *Hensley*, 461 U.S. at 440.

---

[14] If the district court finds that a plaintiff was wholly successful, it must still evaluate whether the degree of success obtained justifies an award based on the number of hours reasonably expended, whereas a "limited success" finding necessitates the intermediary step of determining which claims were related or unrelated before weighing the degree of success obtained against the total number of hours reasonably expended.

[15] It is at this step for instance that district courts apply a reduction for the inclusion of hours associated with unrelated, unsuccessful claims that could not be easily segregated. *Webb*, 330 F.3d at 1169.

Ibrahim was successful below on her procedural due process claim. The district court, however, expressly refused to reach her remaining claims—which included her substantive due process, equal protection, First Amendment, and Administrative Procedure Act claims because "those arguments, even if successful, would not lead to any greater relief than already ordered." It accordingly treated those claims as having been unsuccessful.

It awarded full fees and expenses for those hours Ibrahim's counsel incurred litigating her procedural due process claim. Because it found that her unsuccessful substantive due process and Administrative Procedure Act claims were related to her successful claim, it also awarded fees and expenses incurred prosecuting those claims. It declined to make any award for those fees and expenses associated with Ibrahim's First Amendment and equal protection claims because they "were not related to the procedural due process claim (for which [Ibrahim] received relief) because they involve different evidence, different theories, and arose from a different alleged course of conduct."

Ibrahim attacks the district court's *Hensley* reductions on two grounds: first, she contends it was error to conclude her First Amendment and equal protection claims were unrelated to her successful procedural due process claim. Second, she argues the "excellent results" she obtained in this litigation support a fully compensable fee. We reject both assertions.

We review a district court's award of fees under *Hensley* for abuse of discretion, including its ruling that a party achieved only limited success, *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005), as well as its

finding that unsuccessful claims are unrelated to the claims upon which a plaintiff prevailed, *Schwarz*, 73 F.3d at 902. Unrelated claims are those that are both factually *and* legally distinct. *Webb*, 330 F.3d at 1168. In *Schwarz*, we observed "the test [for the factual relatedness of claims] is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief [is] granted." 73 F.3d at 903 (internal quotation marks omitted) (quoting *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986)). Thus, "the focus is to be on whether the unsuccessful and successful claims arose out of the same course of conduct," or as the Supreme Court put it: the same "common core." *Id.* (internal quotation marks omitted); *Hensley*, 461 U.S. at 435. "If they didn't, they are unrelated." *Schwarz*, 73 F.3d at 903.

The test does not require that the facts underlying the claims be identical. The concept of a "common core" or "common course of conduct" is permissive of the incidental factual differences underlying distinct legal theories. Were that not the case, rare would be the occasion where legally distinct claims would qualify as related under *Hensley*. But it remains true that the work done on the unsuccessful claims must have contributed to the ultimate result achieved. *Hensley*, 461 U.S. at 435; *Schwarz*, 73 F.3d at 904.

The court below disallowed fees for Ibrahim's First Amendment and equal protection claims because they were based on different legal theories, evidence, and "alleged" courses of conduct. Ibrahim contends that reasoning was erroneous and in support cites *Webb*, 330 F.3d 1158, where we addressed an EAJA fee award

arising out of a suit for false arrest, malicious prosecution, and false imprisonment. There we found that the "common course of conduct" was the plaintiff's "arrest, detention, and prosecution." *Id.* at 1169. In light of that formulation, we noted that the plaintiff's unsuccessful false arrest claim was "unquestionably" related to his successful false imprisonment and malicious prosecution claims because they each sprang from that same underlying conduct. *Id.* We therefore concluded that work done on the plaintiff's unsuccessful false imprisonment claim "could have contributed to the final result achieved" and accordingly treated such work as being related for *Hensley* purposes. *Id.*

What Ibrahim misses—and what distinguishes this case from *Webb*—is the mutually exclusive nature of the claims presented here. As a predicate to the *Webb* plaintiff's false imprisonment claim, the plaintiff had to be arrested. Work done investigating and developing the factual record on the false arrest claim would therefore necessarily further the plaintiff's successful false imprisonment claim. Likewise, the plaintiff's malicious prosecution claim was inextricably tied to the prosecutor's state of mind in bringing the spurious charges, which in turn was heavily reliant on what the prosecutor knew about the circumstances surrounding plaintiff's arrest. Most work attributable to the plaintiff's false arrest claim, therefore, likely also contributed to the plaintiff's successful claims.

The same cannot be said for Ibrahim's claims. In light of the district court's findings, Ibrahim's First Amendment and equal protections claims were mutually exclusive with her procedural due process claims. That is, if the government negligently placed Ibrahim on

its watchlists because it failed to properly fill out a form, then it could not at the same time have intentionally placed Ibrahim on the list based on constitutionally protected attributes Ibrahim possesses, and vice versa.[16] These mental states are mutually exclusive. Therefore, it was not an abuse of discretion to find that Ibrahim's unsuccessful claims were unrelated, because although the work done on those claims could have contributed to her ultimately successful claim, the facts and legal theories underlying Ibrahim's claims make that result unlikely.

We note our prior decisions in this sphere are somewhat opaque. In *Schwarz*, we detailed our previous decisions' shifting focus on the degree to which the unsuccessful and successful claims arose out of the same common course of conduct and the degree to which the work done on unsuccessful claims contributed to the results achieved. 73 F.3d at 903 (citing *Thorne*, 802 F.2d at 1141; *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 619 (9th Cir. 1993); *Herrington v. Cty. of Sonoma*, 883 F.2d 739, 747 (9th Cir. 1989); *Cabrales v. Cty. of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991); and *O'Neal v. City of Seattle*, 66 F.3d 1064, 1068-69 (9th Cir. 1995)). Ultimately in *Schwarz*, we affirmed the district court's decision to reduce the lodestar for work done on unsuccessful claims both because the sets of claims there were both factually and legally dissimilar and because the efforts spent on the unsuccessful claims did not contribute to the plaintiff's success. *Id.* at 904. Nevertheless in

---

[16] The district court expressly declined to find that the government's initial interest in Ibrahim was due to her nationality or her religious beliefs. Ibrahim does not challenge that conclusion before this Court.

Webb, we characterized our decision in *Schwarz* as "reaffirm[ing] that the focus is on whether the claims arose out of a common course of conduct." 330 F.3d at 1169. Here, Ibrahim's First Amendment and equal protection claims were based on her allegations that the government intentionally put her name on the lists based on constitutionally protected attributes, while her procedural due process claims were based on her allegations that the government failed to provide adequate procedures to remove her name from its lists. Accordingly, the district court did not err in concluding that these claims were based on both different alleged courses of conduct and different legal theories. Further, in light of our decisions on the matter, we likewise believe it cannot be error for a district court to also consider—as the court below did—that efforts on unsuccessful claims did not contribute to the success obtained.

In addition, even if it were the case that Ibrahim's unsuccessful claims arose out of the same factual context as her successful claim, it is not true that the work expended on those claims necessarily contributed to her ultimate success. We therefore decline to find the district court abused its discretion by concluding Ibrahim was ineligible to recover fees for work on those claims.

We also reject Ibrahim's second contention that the "excellent results" she obtained should entitle her to a fully compensatory fee. The district court permitted Ibrahim to recover fully for her Administrative Procedure Act and substantive due process claims because, though unsuccessful, they were related to her procedural due process claim. However, in doing so, it made no explicit mention of "excellent results," though such a recovery by necessity implies an "excellent results"

finding. *See Schwarz*, 73 F.3d at 905-06. And in light of our affirmance of the district court's ruling with respect to Ibrahim's First Amendment and equal protection claims, a ruling that Ibrahim also obtained excellent results on two of her four claims would have no effect on her potentially recoverable fee award.

We find unconvincing, however, the government's contention that the district court's overall fee reduction —including its EAJA reductions—should be affirmed because the district court could have imposed such a reduction under *Hensley*'s second step. The government claims that any errors contained in the district court's EAJA application and relatedness findings is harmless. The government, however, forgets that although the district court enjoys substantial discretion in fixing an appropriate fee under *Hensley*, we have imposed the modest requirement that it "explain how it came up with the amount." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). "The explanation need not be elaborate, but it must be comprehensible . . . [T]he explanation must be concise but *clear*." *Id.* (internal quotation marks omitted) (quoting *Hensley*, 461 U.S. at 437). Where the difference between the fee award requested and the fee award granted is negligible, "a somewhat cursory explanation will suffice," but where the disparity is greater, "a more specific articulation of the court's reasoning is expected." *Id.* Whatever the actual basis for the district court's reductions here, there is certainly no room for argument that it clearly and concisely explained that its reductions to Ibrahim's fee award were justified in light of the success she obtained. Absent such an explanation from the district court, we cannot take a rough justice approach and sua sponte decide that the district court's mistaken fee

reductions would be equivalent to the fee reductions it would have made at *Hensley*'s second step.

IV.

Following its fee entitlement determination, the district court appointed a special master to fix Ibrahim's fee award.[17] The special master went on to recommend a number of discretionary reductions to Ibrahim's fee request due to block-billing, vagueness, and lack of billing judgment. The special master also made reductions for failure to demonstrate that the work claimed was associated with recoverable claims or issues. The district court adopted these reductions. It also struck Ibrahim's objections to the special master's report and recommendation on expenses for failure to follow page limits.

Because the reductions recommended by the special master and adopted by the district court were largely rooted in the district court's EAJA determination, we agree with Ibrahim that those findings should be revisited if the district court once more determines Ibrahim is entitled to fees. Ibrahim's contention that the district court abused its discretion in striking her objections to the special master's report and recommendation on expenses, however, is unavailing.

In its order appointing the special master, the district court also ordered the special master to file a report and recommendation regarding fees and expenses, and imposed a ten-page limit on the parties' objections

---

[17] Though Ibrahim objected to the special master's appointment, she does not press that issue on appeal.

to that report and recommendation. It further required each party to file an appendix of all relevant communication with the special master.

The special master, however, filed two reports and recommendations, one focusing on fees and the other on expenses. In response, Ibrahim filed a ten-page set of objections to each, along with a one-page "statement."

The district court struck Ibrahim's objections to the special master's report and recommendation on expenses for having filed "two ten-page briefs, a 234-page declaration with exhibits, and a one-page 'statement,'" without also moving for a page extension. It found her filings were not good faith attempts to abide by its orders.

On appeal Ibrahim argues it was improper to strike her objections because the special master filed two reports and recommendations, and, therefore, it was reasonable to file a ten-page set of objections to each.[18] She alternatively argues that the district court's imposition of a ten-page limit on objections to reports and recommendations totaling hundreds of pages was also an abuse of discretion.

District courts have the inherent power to strike items from their docket for litigation conduct. *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (citing *Hernandez v. City of El Monte*,

---

[18] Ibrahim also argues that the district court's striking of her expenses resulted only in those objections being "overruled." That assertion is patently contradicted by the record. In its order striking Ibrahim's objections, the district court stated: "No objections to the special master's report regarding expenses are preserved because counsel failed to abide by the rules."

138 F.3d 393, 398 (9th Cir. 1998)). We review the exercise of that power for abuse of discretion and the factual determinations underpinning such exercise for clear error. *Id.* at 404; *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 367 (9th Cir. 1992).

Here, it was not clearly erroneous to conclude Ibrahim failed to abide by the district court's page limits. While it is true that the special master filed two reports and recommendations and the district court's order might have been misinterpreted or misunderstood by plaintiff's counsel, it is also true that the order stated "all objections" should not exceed ten pages. Thus, whether the special master filed a single or several reports and recommendations, the district court's order imposed a ten-page limit on objections. Indeed, the government restricted its objections to ten pages. We therefore cannot find that it was clearly erroneous to conclude Ibrahim failed to abide by the district court's page restrictions.

Nor do we see the striking of Ibrahim's objections in response to that failure as being an abuse of discretion. The order in question also required Ibrahim to resubmit her fee request and imposed requirements on that resubmission in order to facilitate the district court's efforts to fix her award.

Ibrahim obstinately refused to abide by those requirements, and instead, filed multiple motions to reconsider the district court's fee entitlement determinations.[19] In light of Ibrahim's repeated failures to follow

---

[19] Ibrahim offered multiple rationales for her refusal to follow the district court's order that she resubmit her fee request. Initially, she argued that counsel had previously been awarded fees based on

the very same order, we cannot conclude the district court abused its discretion by striking her objections to the special mater's report on expenses.

Finally, we refuse to address Ibrahim's contention that it was an abuse of discretion to limit her objections to ten pages. Where a party believes a district court has issued an improper order, their remedy is to raise that issue on appeal. *United States v. Galin*, 222 F.3d 1123, 1127 (9th Cir. 2000). In the meantime, however, they are to either abide by the order, file an interlocutory appeal, if available, or move for reconsideration. *Id.* Ibrahim did none of those things. Rather, she simply exceeded the district court's page limits while "objecting" to those selfsame limits in a footnote. A party will not be heard to complain of an order on appeal by which it failed to abide. We therefore do not reach the merits of Ibrahim's claim here.

V.

Any fee dispute is tedious, and this one is no exception. Though we are reluctant to require the district court to revisit its findings in this already protracted satellite litigation, we see no other alternative. We pause to note, however, that we offer no view on the appropriateness of the amount already awarded by the district court in this case. It may well be Ibrahim is entitled to substantially more or substantially less than that

---

similar billing records. She also argued she would be unable to categorize projects in the manner directed by the district court because "that is not the way the time was recorded or billed." At oral argument, however, she argued she could not comply with the district court's order because it was predicated on legally erroneous conclusions. We find none of these rationales persuasive because Ibrahim, in the end, failed to comport with the order.

amount. But until an amount is fixed in accordance with applicable law, we are unable to pass upon that question.

The present panel will retain responsibility for any appeals that may possibly emanate from an appealable order or judgment of the district court resulting from this remand. The fee and expense awards of the district court are **AFFIRMED in part**, **REVERSED in part**, and **REMANDED** for proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 06-00545 WHA

RAHINAH IBRAHIM, PLAINTIFF

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Filed: Oct. 9, 2014

ORDER RESOLVING OBJECTIONS, ADOPTING SPECIAL MASTER'S REPORT AND RECOMMENDATION, VACATING HEARING, AND FIXING COMPENSATION

INTRODUCTION

At long last, this protracted satellite litigation over attorney's fees and expenses comes to an end, save and except for the pending appeal regarding attorney's fees and expenses. A prior order held that plaintiff was entitled to some but not all of the grossly excessive fees and expenses sought. The special master then issued a report and recommendation regarding the amount of the award. This order resolves the pending objections and adopts the special master's report and recommendation in its entirety.

STATEMENT

The history of this action has been summarized in prior orders and will not be repeated herein (Dkt. Nos. 682, 739). In pertinent part, in January 2014, plaintiff moved for attorney's fees and expenses. There were at least three defects with plaintiff's motion. *First*, in violation of our district's local rules, plaintiff's counsel failed to meet-and-confer prior to filing the motion. This alone was grounds to deny the motion. *Second*, no detailed spreadsheets or invoices supporting the expenses sought were appended to the motion. This was grounds to deny the expenses sought. *Third*, plaintiff's counsel referred to a confidential settlement conference in violation of our local rules. In sum, even though it was a close call whether to deny counsel an award based on these violations, plaintiff's counsel were nevertheless permitted to proceed, spawning this massive satellite litigation.

Following full briefing, supplemental submissions, and oral argument, an April 2014 order determined counsel's entitlement to fees and expenses. Counsel were entitled to some but not all of the grossly excessive fees and expenses sought. A companion order required counsel to file revised declarations in accordance with the April 2014 order (Dkt. Nos. 715, 718, 739, 740).

This was not done. Plaintiff's counsel first requested an extension, which was granted. Counsel then re-filed their declarations seeking *all fees and expenses previously sought* and added more to their demand. In total, counsel sought $3.88 million in fees under market rates and $327,826 in expenses. A June 2014 order gave counsel one more chance to comply (Dkt. No. 758).

Counsel refused. Counsel stubbornly insisted on "the full amount of her requested attorney's fees" and filed notices of appeal regarding fees, expenses, and costs. Counsel then filed three motions for reconsideration, which upon review, were denied. A special master was appointed, after the parties were given adequate notice and an opportunity to be heard. The special master was ordered to file a written report regarding the *amount* of fees and expenses to be awarded. The special master, of course, could not revisit the *entitlement* rulings.

The special master reviewed the parties' submissions and relevant orders, allowed supplemental submissions, and heard oral argument. In pertinent part, plaintiff's counsel continued to insist on "100% of their fees." Counsel also asked for "additional fees" incurred since May 2014, which were actually fees-on-fees-on-fees. The special master then filed a 117-page report regarding attorney's fees and a sixteen-page report regarding expenses. In short, plaintiff's counsel sought $1.76 million in attorney's fees (or more than $3.88 million under market rates) and $293,860 in expenses. The government argued that no more than $232,550 in attorney's fees and $21,080 in expenses were due. The special master recommended an award of $419,987.36 in attorney's fees and $34,768.71 in expenses (Dkt. Nos. 787, 789). The parties had until October 2 to file objections, not to exceed ten pages.

Both sides filed objections. Plaintiff's counsel, however, filed two ten-page briefs and voluminous exhibits. Both sides filed responses. Notably, the government moved to strike all of plaintiff's objections for failure to comply with the page limits.

Now, the time for filings regarding the special master's report has elapsed. Having read the special master's report and recommendation and the parties' submissions, this order finds as follows.

ANALYSIS

1. IMPROPER OBJECTIONS.

All of counsel for plaintiff's improper objections are **OVERRULED.**

First, plaintiff's counsel object to the appointment of a special master because she "did not preside over or attend the trial." Procedurally, this objection has been waived. The deadline to object to a special master was in April and no objection was timely made. Accordingly, the special master was appointed pursuant to Rule 53 and 54, after notice and an opportunity to be heard. Moreover, substantively, this objection makes no sense. There is no evidence that the special master lacked "familiarity" with the case, especially since she reviewed the parties' voluminous submissions and heard oral argument.

Second, plaintiff's counsel vaguely object to the "procedures" set forth in the April, June, and July orders. That is, the procedures for the special master and the orders to file revised declarations. No authority is provided for this objection, other than the bald argument that the "procedures" ordered resulted in "duplicative work" and forced them to "cut fees." Not so. Plaintiff's counsel never complied with the entitlement order, requiring the special master to sift through hundreds of pages of briefing, spreadsheets, and invoices to determine which fees and expenses were recoverable. This

task was rendered even more difficult because the spreadsheets were "without formulas," even though a native production was ordered. Moreover, plaintiff's counsel never "cut fees," other than to excise $462,470 for a whopping $3.88 million demand.

Third, plaintiff's counsel object to the special master's "errors" in failing to award fees for non-recoverable tasks. For example, counsel argue that "the Special Master erred in denying recovery for work done in support of the Equal Protection and First Amendment claims." Plaintiff did not prevail on these claims. Counsel also argue that the special master erred in failing to award fees for visa issues, post-2012 standing issues, and privilege issues. Counsel are wrong. The special master could not (and did not) revisit the entitlement rulings.

Fourth, plaintiff's counsel ignored the page limits. The July 2014 order stated that the objections were not to exceed ten pages. Plaintiff's counsel filed 255 pages: two ten-page briefs, a 234-page declaration with exhibits, and a one-page "statement." This was not a good faith effort to comply with the page limits. Indeed, no motion for a page extension was filed.

The government moves to strike all of plaintiff's objections for failure to comply with the page limits. That motion is **GRANTED IN PART AND DENIED IN PART.** As a sanction for violating the page limits, docket number 793 (brief regarding expenses) is hereby **STRICKEN.** Counsel for plaintiff will not be allowed to "reincorporate" in her response her "previous" objections regarding expenses. Pages eight through ten of her response (Dkt. No. 799) are hereby **STRICKEN.** No objections to

the special master's report regarding expenses are preserved because counsel failed to abide by the rules. It would be unfair to retain these objections when the government made an effort to fit all objections within ten pages.

In sum, all of plaintiff's improper objections are **OVERRULED**.

2. REMAINING OBJECTIONS BY PLAINTIFF'S COUNSEL.

For the reasons stated herein, all of the remaining objections by plaintiff's counsel are **OVERRULED**.

First, plaintiff's counsel object to the special master's reductions for needless duplication, excessive conferencing, and lack of billing judgment. For example, plaintiff's counsel sought fees for three attorneys conferencing regarding "status and plan." Time billed by the third, more senior, attorney was excised by the special master. This order adopts all of the special master's recommendations and finds that she properly reduced many of the grossly overbroad sums demanded by plaintiff's counsel.

Second, plaintiff's counsel object to the special master's reductions for block-billing and vague entries. The special master did not err in finding these line items improper, excessive, and/or inadequately detailed. Plaintiff's counsel also argue that to the extent the special master could not "infer" information from the surrounding entries, "she could have requested further clarification." This argument is misplaced. It was counsel for plaintiff's burden to submit sufficient proof in January 2014. Plaintiff's counsel failed to do so. They were given a second chance to revise their declarations in April. They again failed to do so. They were given a

third chance in June. They refused. They were then given an opportunity to work with the special master to calculate the proper amount of recoverable fees. They stubbornly insisted on "100% of their fees." To now blame the special master for not requesting "further clarification" is utterly misguided.

Third, plaintiff's counsel object to the special master's recommendation, after reviewing all of the relevant line items, that no fees-on-fees-on-fees be awarded. No authority is provided for this objection. Plaintiff's counsel only baldly assert that "[t]he Special Master declined to award plaintiff fees for work done since May 2014. This was improper. Plaintiff requests that the Court award her these fees." This order finds the special master's recommendation reasonable and finds that those amounts were properly omitted.

In sum, all of counsel for plaintiff's objections are **OVERRULED**.

3. OBJECTIONS BY THE GOVERNMENT.

For the reasons stated herein, all of the government's objections are **OVERRULED**.

First, the government argues that no fees and expenses should be awarded "given Plaintiff's counsel's obstinate refusal to comply with the Court's entitlement order . . . and her untimely and insufficiently documented request for expenses." All will recognize that plaintiff's counsel repeatedly disregarded the rules. In such circumstances, it would be justified to refuse to enter an award. Nevertheless, counsel were permitted to proceed, spawning this second major litigation which included three motions for reconsideration and hours-

upon-hours spent sifting through voluminous submissions. Discretion has been exercised to award some but not all of the massive sum demanded. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Second, the government takes issue with some of the special master's percentages and amounts. For some items, the government argues that only 33 percent of the amount requested should be awarded instead of the fifty percent recommended. For other items, the government argues that no fees should be awarded instead of the sixteen percent recommended. For items associated with Professor Kahn, the government argues that no fees should be awarded on account of plaintiff's "uncooperative behavior" during discovery. The government also argues that certain mileage and subpoena expenses should not be awarded because plaintiff's discovery efforts were only partially successful or those depositions never occurred. Upon review of the special master's report, this order finds that the special master properly considered the recoverable items and those so inextricably intertwined.

Third, the government objects to recovery for any "vague" entries. For example, the government argues that plaintiff made no effort to provide detailed descriptions for some line items beyond "[p]repare for trial." The government also argues that no fees should be awarded for "client communication" without a "showing that the activity for which plaintiff seeks to tax the Government is compensable." Plaintiff's counsel respond that the government was not entitled to privileged information. Upon review of the special master's report, this order finds that the special master properly awarded the recoverable amounts.

Fourth, to determine the amount of fees-on-fees, the government argues that the special master should have multiplied the fees recovered by the percentage of merits fees initially sought ($3.5 million) instead of the $1.6 million sought under the EAJA. This order finds that the special master properly calculated the fees-on-fees amount, even though this order recognizes that plaintiff's counsel continue to demand all fees under market rates.

In sum, all of the government's objections are **OVERRULED.**

4. SPECIAL MASTER'S FEES AND EXPENSES.

A prior order appointed Attorney Gina Moon as the special master. As a service to the Court and to save the parties expense, she agreed to cap her hourly rate at $200 per hour. She has submitted an invoice for $27,481.50 in fees and expenses. The time for filing objections has elapsed. Neither side objected to the entries on her invoice. This order finds that the special master's fees and expenses are reasonable. Pursuant to Rule 53(g), the special master's compensation is hereby **FIXED.**

The parties only dispute the allocation of the special master's fees. This order finds that plaintiff's counsel shall pay 75% of the special master's fees, save for one exception, as a sanction for counsel's failure to meet-and-confer before filing their motion, their obstinate refusal to file revised declarations in accordance with the entitlement order, and their disregard for the page limits. The exception is that plaintiff's counsel shall pay 100% of the special master's fees for work done on the fees-on-fees-on-fees demand.

CONCLUSION

For the reasons stated herein, all objections are hereby **OVERRULED**. The special master's report and recommendation is hereby Adopted in **FULL**. The November 20 hearing is hereby **VACATED** (Dkt. Nos. 787, 789).

Accordingly, plaintiff's counsel are hereby awarded $419,987.36 in attorney's fees and $34,768.71 in expenses. The special master's compensation of $27,481.50 is hereby **FIXED**.

To ensure that the special master is promptly paid for her services, the payment procedure shall be as follows. The government shall promptly send a check to the special master for 100% of her fees. The government shall then subtract all of this amount (minus its portion of the special master's fees) from the amount to be paid to plaintiff's counsel. The remainder is the amount due plaintiff's counsel. All payments shall be made by **OCTOBER 30**, unless there is a timely appeal by either side in which the payments shall be made when all appeals are finally ended with no follow up required. The parties shall file a joint status report by **NOON ON OCTOBER 31, 2014**.

This motion for attorney's fees and expenses involved a Herculean task. The Court extends its highest compliments and thanks Attorney Gina Moon for her excellent service and willingness to serve at a reduced rate.

IT IS SO ORDERED.

Dated: Oct. 9, 2014

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 06-00545 WHA

RAHINAH IBRAHIM, PLAINTIFF

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Filed: Apr. 16, 2014

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND EXPENSES

INTRODUCTION

All of us who practice or serve in this district should be proud that we still have counsel willing and able to undertake pro bono representation of someone like our plaintiff here, especially when it requires standing up to our national government and its large litigation resources. Not so long ago, this spirit flourished within our district. More recently, however, pro bono representation seems to have taken second seat to money bono. But these lawyers from plaintiff—Marwa Elzankaly, Kevin Hammon, Ruby Kazi, James McManis, Jennifer Murakami, Christine Peek, Elizabeth Pipkin, and the firm of McManis Faulkner—deserve recognition for the

work they have contributed to this long-fought case. The Court hereby extends its compliments.

This, however, does not translate to approving the massive award they seek under the Equal Access to Justice Act. The EAJA is restricted in important ways that we must recognize and honor. And, plaintiff's counsel may not collect twice for work already compensated in prior partial settlements, for inefficient or duplicative work, or for work on issues for which the government has shown its position to be substantially justified and unrelated to the claim Dr. Ibrahim obtained relief under.

Regrettably, this will be a long order, given the broad scope of the fee petition, and must lead to the very type of satellite litigation our Supreme Court cautioned against. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The essence of this order is that counsel are entitled to recover for their work and expenses on procedural due process, substantive due process, Administrative Procedure Act claims and post-2012 remand standing issues, and no more. This cut back is not intended as a criticism of counsel and their work herein but simply reflects the limits of the law itself. This order resolves the *entitlement* issue. A companion order sets forth a special-master procedure to determine the *amount*.

STATEMENT

This action arises out of a wrongful listing of plaintiff on the no-fly list. The facts are all laid out in findings of fact and conclusions of law after a bench trial (Dkt. Nos. 682, 701-1).

In January 2006, plaintiff commenced this civil action against multiple state and federal agencies alleging Section 1983 claims, state law tort claims, and several constitutional claims. An August 2006 order dismissed her claims against the federal defendants based on lack of subject-matter jurisdiction and dismissed her claims against a TSA employee, the airline, and the federal agency defendants (Dkt. No. 101). Our court of appeals affirmed in part, reversed in part, and remanded, holding that the district court had original subject-matter jurisdiction over her claim for injunctive relief regarding placement of her name on the no-fly list. The court of appeals agreed that the district court, however, lacked subject-matter jurisdiction over her claim for injunctive relief regarding the government's policies and procedures implementing the no-fly list, that the federal agency and airline actions were not state actions under Section 1983, and that the tort claims against the federal officials in their official capacities and airline defendants were precluded. Our court of appeals further held that specific jurisdiction was available for the claims against the TSA employee, who was sued in his individual capacity. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254-56 n.9 (9th Cir. 2008) ("*Ibrahim I*").

On remand, plaintiff filed the operative second amended complaint. Cash settlements were subsequently entered with the non-federal defendants (Dkt. No. 328). Plaintiff's counsel were paid $195,431.35 for attorney's fees and costs pursuant to the settlement (McManis Decl. ¶ 3).

A motion to dismiss for lack of standing was then made and granted based on the distinction between damages claims for past injury while plaintiff had been

in the United States versus prospective relief sought *after* plaintiff had voluntarily left the United States (Dkt. No. 197). Our court of appeals, while affirming in part, reversed (over a dissent) as to standing for prospective relief by holding that even a nonimmigrant alien who had voluntarily left the United States nonetheless had standing to litigate federal constitutional claims in district court in the United States as long as the alien had a "substantial voluntary connection" to the United States. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993-94 (9th Cir. 2012) ("*Ibrahim II*"). The decision was entered on February 8, 2012. The government did not seek review by the United States Supreme Court.

A July 2012 mandate taxed $437.60 in costs against defendants pursuant to the appeal (Dkt. Nos. 355, 356). On remand, the government then again moved to dismiss and the motion was denied. The parties next became embroiled in discovery disputes involving the state secrets privilege, the law enforcement privilege, and so-called "sensitive security information" ("SSI"), 49 U.S.C. 114(r) and 49 C.F.R. 1520.5. A pair of orders dated April 19, 2013, granted in part and denied in part plaintiff's motion to compel (Dkt. Nos. 462, 464). Subsequent rounds of contentious discovery motions required further resolution. The government's assertions of the state secrets privilege were upheld, while its assertions of other privileges were upheld in part and overruled in part (Dkt. Nos. 539, 548).

A number of expert disclosure and discovery disputes were then raised. Notably, plaintiff's expert report failed to identify what materials were considered in forming the opinions therein and plaintiff refused to

produce interview notes. A pair of orders permitted plaintiff to revise her expert report, allowed the government to take a second one-day deposition of the expert, and ordered the expert to produce interview notes he considered in forming his opinions at least 24 hours prior to his second deposition, once a proper subpoena was served (Dkt. Nos. 580, 585).

After oral argument in October 2013, the government's motion for summary judgment was granted in limited part but mostly denied (Dkt. No. 592). The "exchange of information" claim based on the First Amendment was dismissed. Plaintiff's claims based on procedural and substantive due process, equal protection, and First Amendment rights of expressive association and retaliation proceeded to trial. Lack of standing was raised again by the government and denied.

A final pre-trial conference was held in November 2013. A number of motions *in limine* were heard and resolved, including the government's motion to exclude plaintiff from calling the Attorney General (Eric Holder) and the Director of National Intelligence (James Clapper).

The bench trial began in December 2013. On the first day of trial, before opening statements, plaintiff's counsel reported that plaintiff's daughter—a United States citizen and a witness disclosed on plaintiff's witness list—was not permitted to board her flight from Kuala Lumpur to attend trial. Immediately after trial, an evidentiary hearing regarding plaintiff's daughter's travel difficulties was held. Upon request, limited findings of fact were made.

On January 14, 2014, findings of fact, conclusions of law, and order for relief was entered (Dkt. Nos. 682,

701-1). Judgment was entered in favor of plaintiff to the extent stated in the January 14 order, but against plaintiff on all other claims (Dkt. No. 684). Notably, the order found that Dr. Rahinah Ibrahim was entitled to certain post-deprivation remedies and because the government's administrative remedies fell short of that relief, she was deprived due process of law. In addition, limited relief was granted to provide Dr. Ibrahim the specific subsection of Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B), that rendered her ineligible for a visa in 2009 and 2013, and to inform her she was eligible to at least apply for a discretionary waiver. This limited relief was *not* specifically raised by plaintiff, but instead provided by the Court based on a decision by our court of appeals and statutory interpretation. *Din v. Kerry*, 718 F.3d 856, 863 (9th Cir. 2013). The government was required to provide the relief ordered by April 15, 2014.

The order also stated (Dkt. No. 682 at 35):

OTHER CHALLENGES

> Although plaintiff's counsel raise other constitutional challenges, those arguments, even if successful, would not lead to any greater relief than already ordered. It must be emphasized that the original cause of the adverse action was human error. That error was not motivated by race, religion, or ethnicity. While it is plausible that Dr. Ibrahim was interviewed in the first place on account of her roots and religion, this order does not so find, for it is unnecessary to reach the point, given that the only concrete adverse action to Dr. Ibrahim came as a result of a mistake by Agent Kelley in filling out a form and from later, classified

information that separately led to the unreviewable visa denials.

The order thus did not reach plaintiff's equal protection clause, Administrative Procedure Act, substantive due process, and First Amendment claims. To be clear, she did not outright lose on these claims, she just did not prevail.

On January 28, plaintiff's counsel filed a motion for an award of attorney's fees and expenses, seeking a whopping $3.67 million in fees and $294,000 in expenses (Dkt. No. 694). Four supporting declarations were filed. Specifically, the declaration of Attorney Christine Peek appended, *inter alia*, a 172-page spreadsheet (listing chronologically tasks completed and fees sought) and a one-page "summary of additional expenses" (Peek Decl. Exhs. A, B). Invoices and a spreadsheet specifically itemizing the expenses sought were not submitted. The declaration of Attorney James McManis set forth attorney hourly rates and the experience of each attorney. The declaration of Attorney Allen J. Ruby of Skadden, Arps, Slate, Meagher & Flom LLP, attested to the reputation, rates, and experience of plaintiff's counsel. The declaration of Dr. Rahinah Ibrahim stated that she retained McManis Faulkner in June 2005 and they were the only firm willing to take her case on a pro bono basis (Ibrahim Decl. ¶¶ 2, 3). *None of the declarations contained a statement that counsel met and conferred pursuant to Local Rule 54-5 before filing the motion.* The same day, plaintiff's counsel filed a bill of costs seeking approximately $58,000 (Dkt. No. 693). They then submitted supplements to their bill more than a week later (Dkt. Nos. 704-707). On February 21, the Clerk taxed $53,699.13 against defendants (Dkt. No. 713).

After the government filed its opposition, including a statement that plaintiff's counsel should—at most—be entitled to approximately $286,000 in fees (not $3.67 million), plaintiff's counsel submitted a reply declaration, appending 228-pages of exhibits supporting their requested expenses (Dkt. No. 712). Upon request, a February 26 order struck counsel's reply declaration due to the unfairness of counsel submitting voluminous spreadsheets they could have and should have submitted with their opening motion (Dkt. No. 715).

On February 28, the government filed a motion for review of the Clerk's taxation of costs. That motion will be addressed in a separate order. This order covers fees and *expenses* other than the Clerk's taxation of costs.

On March 6, the Court noted a number of line items of questionable merit in counsel's application and allowed supplemental briefing (Dkt. No. 718). On March 13, counsel submitted a spreadsheet showing $462,470 in "unclaimed fees," meaning fees excluded from their fee application. Counsel also indicated that 385 hours were excluded because several attorneys had minor roles in the case (Pipkin Decl. ¶¶ 2-4, Exh. A). This order follows full briefing and oral argument held on March 25, and review, as requested, of the declarations filed pursuant to the injunction as of April 15 (Dkt. No. 737).

ANALYSIS

1. VIOLATION OF OUR DISTRICT'S RULES.

In connection with the motion, plaintiff's counsel violated our district's rules. Plaintiff's counsel failed to meet-and-confer with the opponent prior to filing this

motion (Freeborne Decl. ¶ 2, Reply 15). This was a violation of our district's Local Rule 54-5(a) and (b)(1) which state:

> Counsel for the respective parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's fees before making a motion for award of attorney's fees.
>
> * * *
>
> Unless otherwise ordered, the motion for attorney fees must be supported by declarations or affidavits containing the following information:
>
> (1) A statement that counsel have met and conferred for the purpose of attempting to resolve any disputes with respect to the motion or a statement that no conference was held, with certification that the applying attorney made a good faith effort to arrange such a conference, setting forth the reason the conference was not held; and. . . .

In counsel's reply brief, counsel offered no acceptable reason for their failure to comply with the local rules before filing the motion. The reply stated:

> Although plaintiff did not confer with defendants directly before filing her motion, plaintiff understood defendants' position on fees due to conversations with Judge Corley before the trial, and it was clear that a motion was necessary to resolve the dispute. Defendants' opposition demonstrates the futility of [a] meet and confer to resolve the instant motion; defendants have suffered no prejudice.

(Reply 15). This was another violation. It was wrong for counsel to refer to "anything that happened or was

said" or "any position taken" during a confidential settlement conference. *See* ADR Local Rule 7-5(a). In any event, so much has occurred since that settlement conference that it was wrong to think the government, having lost part of the trial, would still have the same view.[*]

Failing to comply with the local rules is a permissible ground for the denial of a motion for attorney's fees. *Johannson v. Wachovia Mortgage, FSB*, No. C 11-02822 WHA, 2012 WL 2793204, at *1 (N.D. Cal. July 9, 2012) (Judge William Alsup); *Herson v. City of Richmond*, No. C 09-02516 PJH LB, 2012 WL 1189613, at *5 (N.D. Cal. Mar. 9, 2012) (Magistrate Judge Laurel Beeler), report and recommendation adopted, 2012 WL 1188898, at *1 (N.D. Cal. Apr. 6, 2012) (Judge Phyllis J. Hamilton).

It is a close call whether or not to deny counsel an award for this failure to follow our rules. Our rule requirement is meant to head off the very "satellite litigation" problem that worried the United States Supreme Court in *Hensley*, 461 U.S. at 437. The problem is exacerbated by a fee petition that is grossly overbroad, even to the point of seeking double recovery for items previously settled and on which fees were already recovered. A judge would be justified in denying the petition on these grounds.

---

[*] At oral argument, counsel's only explanation was that these particular defense attorneys did not have the authority to agree to a number. Defense counsel explained that pursuant to regulation, an amount of fees this high must be authorized by the Deputy Attorney General (March 25 Hr'g. Tr. 39:7-15). Plaintiff's counsel cannot unilaterally ignore our local rules requiring a meet-and-confer just because specific defense attorneys lack the authority to authorize payment beyond a threshold sum.

Taking into account the purpose of the Equal Access to Justice Act, however, this order will allow the application to go forward provided that plaintiff's counsel shall pay 75% of the special-master's fees (rather than 50%) in connection with the fees-and-expenses procedure set forth in a companion order. The government shall pay the remainder. This allocation is the starting point and may be adjusted to reflect factors set forth in FRCP 53(g)(3).

2. EQUAL ACCESS TO JUSTICE ACT.

Plaintiff's counsel argue that they are entitled to recover attorney's fees and expenses because (1) the federal defendants' position was not substantially justified and (2) the federal defendants' acted in bad faith. Section 2412 of the Equal Access to Justice Act, 28 U.S.C. 2412, states in relevant part (emphasis added):

> (a)(1) Except as otherwise specifically provided by statute, *a judgment for costs*, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, *may be awarded to the prevailing party in any civil action brought* by or *against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action*. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

* * *

> (b) Unless expressly prohibited by statute, *a court may award reasonable fees and expenses of attorneys*, in addition to the costs which may be awarded pursuant to subsection (a), *to the prevailing party in any civil action brought* by or *against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.*
>
> * * *
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.*

This order will first address the arguments under Section 2412(d)(1)(A) for substantial justification and then address the arguments under Section 2412(a)(1) for common law bad faith. This order will then address counsel's enhancement request, discovery sanctions argument, and expenses sought.

Section 2412(d) sets forth a number of definitions. Party includes, *inter alia*, "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed." 28 U.S.C. 2412(d)(2)(B). Dr. Rahinah Ibrahim qualifies (Ibrahim Decl. ¶ 5). This order notes that the government has *not* contested her standing to move for attorney's fees and has *not* argued that she does not qualify as a "party." Our court of appeals previously found that Dr. Ibrahim had established a "substantial voluntary connection" with the United States to assert claims under the First and Fifth Amendments and the Clerk taxed her appeal costs in 2012. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012); *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-00545-WHA (9th Cir. 2012) (Dkt. No. 356). Moreover, asylum applicants have been found to be entitled to fees. *Nadarajah v. Holder*, 569 F.3d 906, 909, 923, 926 (9th Cir. 2009).

"Fees and other expenses" includes:

> reasonable attorney fees . . . except that . . . attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. 2412(d)(2)(A), meaning attorney's fees shall not exceed $125 per hour, unless a cost-of-living or special-factor increase is justified.

"Position of the United States" means:

> *in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based*; except that fees and expenses may not be awarded to a party

> for any portion of the litigation in which the party has unreasonably protracted the proceedings.

28 U.S.C. 2412(d)(2)(D) (emphasis added), meaning the position of the United States extends, to the extent reviewable, to Agent Kelley's error, the denials of Dr. Ibrahim's visa applications in 2009 and 2013, and the government's Traveler Redress Inquiry Program ("TRIP") response.

In sum, the Supreme Court has stated:

> Thus, eligibility for a fee award in any civil action requires: (1) that the claimant be a "prevailing party"; (2) that the Government's position was not "substantially justified"; (3) that no "special circumstances make an award unjust"; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.

Comm'r, I.N.S. v. Jean, 496 U.S. 154, 158, 162 (1990). "The government bears the burden of demonstrating substantial justification." *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005).

A. "Prevailing Party" and Timeliness.

Our court of appeals has held that "a 'prevailing party' under the EAJA must be one who has gained by judgment or consent decree a 'material alteration of the legal relationship of the parties.'" *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)). Based on the findings of fact, conclusions of law, and order for relief, and judgment entered on January 14,

2014, following a bench trial, this order finds that plaintiff qualifies as a prevailing party under the Equal Access to Justice Act. *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007). She obtained some relief pursuant to the January 2014 order and the government's declarations submitted in April 2014 (Dkt. No. 737).

Plaintiff's counsel filed their fee application on January 28, within thirty days of the final judgment. The EAJA extends the time to file a fee application from fourteen days to thirty days. 29 U.S.C. 2412(d)(1)(A), FRCP 54(d)(2)(B). Counsel's application included a spreadsheet listing chronologically the tasks upon which fees were sought. Their spreadsheet, however, did not group tasks by project and identify the claim(s) or issue(s) for which the tasks pertained. This makes it difficult to examine some of the fees sought in relation to the degree of success obtained. *Hensley*, 461 U.S. at 439.

B. "Substantially Justified" and "Special Circumstances."

The next inquiry is whether the government has satisfied its burden of showing that its position was substantially justified. On the one hand, "the EAJA-like other fee-shifting statutes favors treating a case as an inclusive whole, rather than as atomized line-items." *Comm'r*, 496 U.S. at 161. On the other hand, our court of appeals has stated:

> Substantial justification under the [Equal Access to Justice Act] means that the government's position must have a reasonable basis in law and fact. The government's position must be substantially justified at each stage of the proceedings.

Shafer v. Astrue, 518 F.3d 1067, 1071 (9th Cir. 2008). The government must show that its position was substantially justified at each stage of the proceedings in order to avoid an award of EAJA fees. *Li*, 505 F.3d at 918.

The Supreme Court has stated that substantial justification "is not 'justified to a high degree,' but rather '*justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person*." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (emphasis added). "Put another way, substantially justified means there is a dispute over which 'reasonable minds could differ.'" *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005). That the government lost (on some issues) does not raise a presumption that its position was not substantially justified. *Edwards v. McMahon*, 834 F.2d 796, 802-03 (9th Cir. 1987). Fees may be denied when the litigation involves questions of first impression, but "whether an issue is one of first impression is but one factor to be considered." *United States v. Marolf*, 277 F.3d 1156, 1163 (9th Cir. 2002). Our court of appeals has stated:

> The inquiry into the existence of substantial justification therefore must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court.

Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988).

When determining a proper fee award, the Supreme Court has set forth a two-step framework: (1) did the plaintiff fail to prevail on claims that were unrelated to

the claims on which she succeeded, and (2) did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? *Hensley*, 461 U.S. at 440.

> [Related claims will involve a common core of facts or will be based on related legal theories. . . . Thus, the test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted is premised.

Edema v. Weston Tucson Hotel, 53 F.3d 1484, 1499 (9th Cir. 1995) (quoting *Thorns v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986)). Courts consider "whether the unsuccessful claims were presented separately, whether testimony on the successful and unsuccessful claims overlapped, and whether the evidence concerning one issue was material and relevant to the other issues." *Thorns*, 802 F.2d at 1141. In *Schwarz v. Secy. of Health & Human Serve.*, 73 F.3d 895, 903-04 (9th Cir. 1995), our court of appeals found no abuse of discretion in finding the alternative legal theories not related for "the unsuccessful claims did not involve the same course of conduct as her successful claim and the efforts expended on the unsuccessful claims did not contribute to her prevailing on the successful claim."

Turning to the facts of our case, plaintiff's counsel recite a long list of alleged wrongs by the government. For example, they argue that Dr. Ibrahim was told she was removed from the no-fly list in 2005 but she has never been permitted to return to the United States. Even though our court of appeals held that Dr. Ibrahim

had standing, the government repeatedly argued thereafter that Dr. Ibrahim lacked standing via three motions to dismiss, a motion for summary judgment, opening and closing statements at trial, and post-trial briefing. The government's privilege assertions, in counsel's view, also unnecessarily hampered Dr. Ibrahim's investigative efforts.

The government states a number of responses, including that it was appropriate to renew their standing position post-remand because Dr. Ibrahim's status in the Terrorist Screening Database was only revealed during discovery and Dr. Ibrahim could not rely on mere allegations of standing at summary judgment and trial. The government also argues that plaintiff's counsel failed on numerous discovery motions and the government never withheld information from counsel based on SSI (only plaintiff herself who was never cleared to receive SSI or classified information). Finally, the government argues that fees should be denied because this action involved difficult issues of first impression.

This order finds that plaintiff's counsel are entitled to at least some fees and expenses under the EAJA, but substantially less than requested, meaning not the whopping $3.67 million of fees and $294,000 in expenses sought. Plaintiff did not prevail on all of her claims and the government's arguments at certain stages, even on those it lost, were not so unreasonable that complete fee-shifting is warranted. In actions involving different unrelated claims for relief and theories, counsel's work on unsuccessful unrelated claims should not be entirely recovered. *Hensley*, 461 U.S. at 434-35. District courts have discretion in determining the amount of a fee award. *Id*. at 437. This order also recognizes

the novelty of the issues involved, the importance of protecting classified information when national security and counterterrorism efforts are implicated, and that reasonable minds could have differed over some (but not all) of the government's specific strategies. This order will now walk through the details.

In terms of pre-litigation conduct, the government's position was not substantially justified. The original sin—Agent Kelley's mistake and that he did not learn about his error until his deposition eight years later—was not reasonable. It was this error that led to this train of events whereby Dr. Ibrahim was prevented from boarding her flight, suffered a humiliating arrest and detention, received nothing more than an opaque TRIP response, and reasonably suspected, even if not true, that her troubles returning to the United States were caused by an error propagating through the government's web of interlocking databases. This order finds that the government's conduct, in this aspect, under the EAJA was not reasonable.

In terms of litigation conduct, the government's attempt to defend its no-fly error for years was not reasonable. The government's litigation position, that Dr. Ibrahim who was prevented from boarding her flight, detained and arrested, and unknowing of the cause for her troubles, persistently denied plaintiff the due process to which she was entitled. The government's defense of such inadequate due process in Dr. Ibrahim's circumstance—when she was concededly not a threat to national security—was not substantially justified.

Furthermore, after our court of appeals held that Dr. Ibrahim had standing and the government did not seek

review from the United States Supreme Court, the government's stubborn persistence in arguing that Dr. Ibrahim lacked standing was unreasonable. *Ibrahim II*, 669 F.3d at 997. Although the government's position on standing prior to the appeal was substantially justified, for the government to continue to seek dismissal based on lack of standing in the face of our court of appeal's decision on this very point was unreasonable.

The government's conduct with regards to Dr. Ibrahim's visa applications, however, in the context of the EAJA meets the substantial justification test. Even though her applications were denied without mention of the specific subsection(s) of Section 212(a)(3)(B) rendering her ineligible, as required by *later* law from our court of appeals, and she was never informed that she was eligible to apply for a discretionary waiver, that conduct was not wholly unreasonable at the time. *Din*, 718 F.3d at 863. Indeed, plaintiff's counsel never even raised these issues. The Court itself, after raising the issue, ordered limited relief provided by the law. Even though plaintiff's counsel argue that the government branded Dr. Ibrahim as a "terrorist" for years, the consular officer wrote the word "(Terrorist)" on the visa form beside Section 212(a)(3)(B), entitled "Terrorist activities," to explain why she was deemed inadmissible.

It would be unfair to saddle the government with $3.67 million in fees—or anything close to it—when a number of counsel's fee requests appear to be associated with claims Dr. Ibrahim did not prevail on (*e.g.*, First Amendment), other proceedings (*e.g.*, United States Court of Appeals District of Columbia Circuit), over-

staffing (*e.g.*, fees for four plaintiff's attorneys conferencing with each other), and non-attorney tasks (*e.g.*, file organization or managing data in CaseMap).

When a proceeding is complex, our court of appeals has stated:

> In such circumstances, an award of fees properly apportioned to pursuing the stages of the case in which in the government lacked substantial justification—in this instance, the original appeal of the ALJ's decision, the district court's consideration of the procedural errors and fee request on remand, and this appeal—are appropriate.

Corbin v. Apfel, 149 F.3d 1051, 1053 (9th Cir. 1998). *Hensley* also requires evaluating the extent of success and work completed on various claims when determining a fee award. Here, the spread between the parties' proposals is stark. Plaintiff's counsel seek $3,673,215.00 in attorney's fees and $293,860.18 in expenses. Defendants counter that, at most, $286,586.97 in attorney's fees should be awarded and counsel's request for expenses should be reduced (or denied).

(1) Procedural Due Process.

As stated, this order finds that plaintiff's counsel are entitled to recover reasonable fees and expenses incurred for work completed on Dr. Ibrahim's procedural due process claim. Dr. Ibrahim succeeded in showing that the government's post-deprivation administrative remedies under the TRIP program were inadequate due process. This is the type of action intended to be encouraged by the EAJA.

Unfortunately, counsel's request fails to consistently identify the issues or claims worked upon. For example, counsel seek the following:

> "Prepare for trial," 15.8 hours (Nov. 29, 2013) (Dkt. No. 699-1 at 163),
>
> "Prepare for trial (prepare expert documents for production, deposition video clips)," 11.6 hours (Nov. 30, 2013) (*ibid.*),
>
> "Prepare for trial and attend trial," 18.5 hours (Dec. 2, 2013) (*id.* at 164),
>
> "Appear for/attend trial; prepare for trial," 20.5 hours (Dec. 4, 2013) (*id.* at 165),
>
> "Review trial transcripts and exhibits and prepare proposed findings of fact and conclusions of law," 14.1 hours (Dec. 12, 2013) (*id.* at 166),
>
> "Prepare post-trial briefing," 14.3 hours (Dec. 12, 2013) (*id.* at 167), and
>
> "Prepare response to proposed findings of fact and conclusions of law," 14.7 hours (Dec. 18, 2013) (*id.* at 168).

These entries, as well as many others, lack adequate details regarding the claims worked on and whether billing judgment was applied for inefficiencies and overstaffing. Even though plaintiff's counsel argue that they eliminated unnecessary or duplicative hours and imposed "a general reduction of approximately five percent on all hours calculated," they nevertheless seek fees for four attorneys attending trial, three attorneys attending the summary judgment hearing, and four attorneys attending the final pretrial conference (Dkt. No. 699-1 at 154, 159, 164, 165). Plaintiff's counsel also seek fees for their paralegal attending these hearings.

The Supreme Court has stated:

> A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, *the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates*. The applicant should exercise "billing judgment" with respect to hours worked . . . and *should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims*.

Hensley, 461 U.S. at 437 (emphasis added). Plaintiff's counsel must revise their submissions (for the special master) to account for the rules discussed in this order, including to account for good billing judgment.

On the other hand, counsel may recover reasonable fees and expenses for work done that was inextricably intertwined with the due process issue (subject again to billing judgment reduction). For example, the 7.5 hours sought for the "Deposition of [W]itness Kelley" (Sept. 12, 2013) may have covered a number of successful and unsuccessful topics (Dkt. No. 699-1 at 143). *Hensley*, 461 U.S. at 448. Such work is likely to be inextricably intertwined with the due process issue and, if reasonable, is recoverable. The burden must be on plaintiff's counsel to establish such a nexus.

(2) Other Issues and Claims.

This order finds that plaintiff's counsel are entitled to recover for reasonable fees incurred for work done on the substantive due process and Administrative Procedure Act claims. Plaintiff's counsel, however, cannot

recover for work done on the equal protection clause and First Amendment claims. Those claims were not related to the procedural due process claim (for which she received relief) because they involved different evidence, different theories, and arose from a different alleged course of conduct. Her equal protection and First Amendment claims were based on allegations that she was watchlisted because she was Muslim and that defendants intentionally discriminated against her by placing her in the TSDB in violation of her right to equal protection. Her second expert, Professor Sinner, provided an expert report on these issues and plaintiff's counsel seek fees for working with Professor Sinner (*e.g.*, $2,160.00 for 4.5 hours spent "Meeting with expert Sinner" (Aug. 26, 2013) and $4,950 for "Deposition of expert Sinner" (Aug. 28, 2013) (Dkt. No. 699-1 at 33, 140)). This evidence did not contribute to her prevailing procedural due process claim.

Plaintiff also alleged that her placement in the TSDB infringed on her right to associate with Muslims and her family members and the denial of her visa application in 2009 (and 2013) was in retaliation. She further alleged that her placement in the TSDB in 2009 interfered with her First Amendment right to free speech. She did not prevail on these grounds.

It is important to remember that in *Hensley*, the Supreme Court stated: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." 461 U.S. 441. The January 2014 order did not reach the substantive due process and Administrative Procedure Act claims—but it is not as if Dr.

Ibrahim outright lost on these claims. It is simply that she would not receive additional relief and therefore those issues did not need to be reached. The bottom of it is that her substantive due process allegation that her placement in the TSDB infringed on her liberty interest in travel and property interest in her flight ticket were related to and deeply intertwined with her prevailing procedural due process claim. The government's position on the substantive due process claim was in this way not substantially justified. Similarly, the Administrative Procedure Act claim that her placement in the TSDB, which included an error, was arbitrary and capricious, is related to the same facts and conduct underlying her procedural due process claims.

Nevertheless, to the extent not inextricably intertwined, plaintiff's counsel cannot recover the entirety of the time spent on tasks involving prevailing and non-prevailing claims. For example, plaintiff's counsel seek 16.5 hours for "Prepar[ing] proposed findings of fact and conclusions of law," 14.3 hours for "Prepar[ing] post-trial briefing," 8.9 hours for "Prepar[ing] post-trial briefing," and 8.5 hours for "Prepar[ing] post-trial briefing" (*id.* at 167). If only a portion of this time was spent on the procedural due process, substantive due process, and administrative procedure act issues and other portions were spent on non-prevailing unrelated issues, counsel should separate out the time.

The government proposes a 75% reduction of counsel's recoverable fees. If the parties agree to use this adjustment, this order does not preclude them from doing so. Otherwise, the special master will rule on the parties' disputes regarding specific line items. This order does not mandate the 75% reduction.

(3) Visa Issues.

This order finds that plaintiff's counsel cannot recover fees for work done regarding Dr. Ibrahim's visa issues. For example:

> "Review visa application," 0.8 hours (Sept. 26, 2009) (Dkt. No. 699-1 at 49),
>
> "Letter to counsel for U.S. government (plaintiff's visa)," 0.6 hours (Sept. 29, 2009) (*id.* at 50),
>
> "Review applicable authorities (challenging denial of visa application)," 1.2 hours (Jan. 6, 2010) (*id.* at 65), and
>
> "Confer with EP (visa issues)," 0.3 hours (Jan. 11, 2010) (*id.* at 66).

No fees for the visa issues are recoverable. *First*, the government's position in denying Dr. Ibrahim's visa applications was not unreasonable (and is largely unreviewable). *Second*, Dr. Ibrahim did not prevail on the visa issues *plaintiff's counsel* raised even though the Court on its own awarded limited relief.

Moreover, the Court has reviewed the classified information and finds that, in the main, it mitigates what otherwise might seem to be unjustified conduct as to the visa applications. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). But to be clear, the government's position was not substantially justified as to the no-fly, TRIP, due process, and standing issues.

(4) Settlements, Non-Federal Defendants, and Unsuccessful Discovery Efforts.

Counsel's fee petition seeks fees from the settlement with the non-federal defendants, even though plaintiff's

counsel received $195,431.35 for fees and costs pursuant to those settlements (Dkt. Nos. 696, 718). For example, plaintiff's counsel seek: "Telephone conference call with attorneys Flynn and Keith (offer to compromise)," 0.4 hours (Mar. 3, 2010) and "Prepare stipulation for entry of judgment and proposed judgment," 0.8 hours (Mar. 12, 2010) (Dkt. No. 699-1 at 69-72). *Counsel cannot double dip and recover fees associated with past settlements*. It is hard to accept that counsel have been so brazen.

Counsel respond that the fees requested for the settled-out defendants were for "work that was necessary for plaintiff's case against the federal defendants." Such work was needed because "plaintiff's counsel had to analyze the offer carefully to ensure that it would not negatively impact plaintiff's claims against the federal defendants" (Pipkin Decl. Exh. B). This order disagrees. That work was not inextricably intertwined with the due process issue Dr. Ibrahim prevailed on and is not recoverable. *Velez v. Roche*, 335 F. Supp. 2d 1022, 1041 (N.D. Cal. 2004) (Magistrate Judge Edward Chen), an isolated district-court decision wherein a request to offset a jury award was denied in a Title VII action, does not change this analysis.

It also would not be right to saddle the government with amounts spent by plaintiff's counsel on largely unsuccessful discovery efforts. For example, plaintiff's counsel seek fees for:

> "Prepare for depositions and prepare letter brief to court regarding Holder and Clapper depositions," 10.2 hours (May 20, 2013) (*id.* at 119),

"Prepare brief on Holder and Clapper depositions," 3 hours (May 21, 2013) (*ibid.*), and

"Prepare letter to court (Clapper deposition)," 2.9 hours (June 12, 2013) (*id.* at 123).

A May 2013 order quashed the depositions of Attorney General Eric Holder and the Director of National Intelligence James Clapper (Dkt. No. 481). The government should not have to pay for counsel's unsuccessful discovery efforts.

(5) Standing.

As stated above, plaintiff's counsel cannot recover fees for work done regarding standing prior to *Ibrahim II*. This is because Dr. Ibrahim did not prevail on the standing issue prior to the appeal and the government's position was substantially justified at the time. We cannot allow hindsight bias to infiltrate the reasonableness of the government's position at the time.

But for time after *Ibrahim II* (2012), plaintiff's counsel can recover reasonable fees and expenses incurred for defending against the government's standing arguments. For example, plaintiff's counsel seek fees for 1.4 hours spent "Review[ing] applicable authorities (standing)" (Oct. 7, 2013) (Dkt. No. 699-1 at 148). This line item is recoverable.

(6) Privileges.

Plaintiff's counsel argue that the government improperly asserted a number of privileges, including state secrets, "sensitive security information," and the law enforcement privilege, thereby delaying discovery, preventing plaintiff herself from learning what happened, and withholding from the public access to this

proceeding. In the context of the EAJA, this order finds that it was reasonable for the government to take measures necessary to protect classified information from individuals without proper clearance. *United States v. Reynolds*, 345 U.S. 1, 10 (1953). Plaintiff's counsel and plaintiff herself never obtained clearance to view classified information. *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). Dr. Ibrahim also never obtained clearance to view SSI. This order thus finds that plaintiff's counsel cannot recover fees for work done litigating access to classified and state-secrets privileged information. For example, plaintiff's counsel cannot recover fees for "Prepar[ing] response to defendants' brief on classified documents," 8.9 hours (Mar. 25, 2013) (Dkt. No. 699-1 at 114).

Although the undersigned judge has not upheld every privilege assertion by the government, in the main, the government's behavior was not so unreasonable as to warrant fee shifting for the privilege disputes. The government has a duty to follow its regulations and statutes, including the authority granted to the Transportation Security Administration and the United States Courts of Appeals. *See* Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355, 1382, Section 525(d) (Oct. 4, 2006). Accordingly, plaintiff's counsel cannot recover fees for work done on privilege issues. For example,

> "Review applicable authorities (state secrets privilege and law enforcement privilege)," 5 hours (June 12, 2009) (Dkt. No. 699-1 at 42),
>
> "Prepare protective order (SSI)," 1.4 hours (Dec. 7, 2009) (*id*. at 59),

> "Review applicable authorities (appeal ability of order overruling privilege)," 1.2 hours (Dec. 10, 2009) (*id.* at 60),
>
> "Prepare documents (acknowledgments of duty and background applications); multiple telephone calls and emails with internal team regarding plan on SSI," 2.5 hours (Dec. 23, 2009) (*id.* at 61),
>
> "Letter to attorney Houlihan (right to appeal SSI designations), 0.3 hours (July 26, 2013) (*id.* at 134),
>
> "Prepare to challenge TSA's SSI designations; review applicable authorities (same)," 5.8 hours (Aug. 19, 2013) (*id.* at 139), and
>
> "Prepare response to defendants' brief regarding public access," 5.8 hours (Nov. 17, 2013) (*id.* at 159).

Some privileges were naturally implicated by the types of discovery documents requested in this litigation and it would be unfair to wholesale shift onto defendants the fees incurred because of assertions made by the Executive Branch. To the extent distinguishable, plaintiff's counsel should segregate out the privilege-task portions of the 12 hours by Attorney Jennifer Murakami and 15 hours by Attorney Elizabeth Pipkin spent on "Appear[ing] for/attend[ing] trial and prepar[ing the] SSI brief" (Dec. 6, 2013) (*id.* at 165).

Plaintiff's counsel also request fees for work done in 2014 regarding a "Ninth Circuit petition for review of TSA's final orders re SSI," even though the bench trial in this action concluded in December 2013. Plaintiff's counsel cannot recover fees for at least the following requests:

"Confer with team (challenges to SSI designations)," 0.8 hours (Jan. 6, 2014) (Dkt. No. 699-1 at 170),

"Review documents (TSA order regarding SSI designations)," 1.4 hours (Jan. 6, 2014) (*ibid.*), and

"Prepare Ninth Circuit petition for review of TSA's final orders re SSI," 6.5 hours (Jan. 6, 2014) (*ibid.*).

(7) Miscellaneous.

A prior order noted a number of questionable line items in counsel's request, including the following:

"Prepare opposition to motion to dismiss D.C. Circuit petition," 11.6 hours (Aug. 1, 2006) (Dkt. No. 699-1 at 21),

"Review 60-minutes video re No-Fly List," 0.6 hours (Oct. 10, 2006) (*id.* at 23),

"Review and respond to multiple calls and emails re opinion," 2.8 hours (Aug. 19, 2008) (*id.* at 31),

"Meeting with amicus counsel," 5.2 hours (Apr. 23, 2010) (*id.* at 74),

"Review Asian Law Caucus Amicus; Memorandum to/from amicus counsel," 1.8 hours (Oct. 1, 2010) (*id.* at 92),

"Telephone conference with Judge Corley and opposing counsel (settlement conference)," 0.4 hours (Nov. 6, 2012) (*id.* at 105),

"Manage data in CaseMap," 1.9 hours (Mar. 25, 2013) (*id.* at 114), and

"Prepare documents," 3.6 hours (June 11, 2013) (*id.* at 123).

If the parties are unable to resolve their disputes, they will have to review these line items and others in accordance with this order and the special-master procedure set forth in the companion order.

Moreover, this order will not categorically bar counsel from recovering reasonable attorney's fees incurred before filing this action. The request for $39,000 in fees allegedly incurred in 2005, however, seems excessive. Indeed, counsel apparently only reduced $7,700 in fees from 2005 in their fee request (Pipkin Decl. Exh. A). To the extent the requested fees are not related to the issues Dr. Ibrahim prevailed on (*e.g.*, due process and post-2012 standing), they are not recoverable.

Counsel's fee petition also raises a question about overstaffing, inefficiency, and redundancy. The government argues that a reduction in fees is appropriate when there are repeated intra-office conferences. Plaintiff's counsel should review at least the following line items to see whether a reduction or withdrawal is appropriate:

> Attorney Marwa Elzankaly: "Confer with team (status, plan)," 0.8 hours (Aug. 9, 2005) (Dkt. No. 699-1 at 5),
>
> Attorney James McManis: "Confer with team (status, plan)," 0.8 hours (Aug. 9, 2005) (*ibid.*),
>
> Law Clerk Sheila Bari: "Confer with team (status, plan)," 0.8 hours (Aug. 9, 2005) (*ibid.*),
>
> * * *
>
> Attorney Kevin Hammon: "Confer with consultant (jurisdictional issues)," 2.9 hours (June 21, 2006) (*id.* at 18),

Attorney Marwa Elzankaly: "Confer with consultant (jurisdictional issues)," 2.9 hours (June 21, 2006) (*ibid.*),

* * *

Attorney Kevin Hammon: "Confer with ME (preparation for hearing on motions to dismiss)," 3.3 hours (July 7, 2006) (*id.* at 19),

Attorney Marwa Elzankaly: "Confer with KH (preparation for hearing on motions to dismiss)," 3.3 hours (July 7, 2006) (*ibid.*),

* * *

Attorney Christine Peek: "Confer with team (status and plan)," 1.1 hours (Jan. 27, 2010) (*id.* at 67),

Attorney Marwa Elzankaly: "Meeting with JM, EP and CP (case status and plan)," 1.1 hours (Jan. 27, 2010) (*ibid.*),

Attorney Elizabeth Pipkin: "Confer with attorney JM, ME and CP (status and plan)," 1.1 hours (Jan. 27, 2010) (*ibid.*),

Attorney James McManis: "Confer with ME, EP, CP (status and plan)," 1.1 hours (Jan. 27, 2010) (*ibid.*),

* * *

Attorney Elizabeth Pipkin: "Confer with team (status and plan)," 2.1 hours (Jan. 15, 2014 [sic]) (*id.* at 171),

Attorney Christine Peek: "Confer with team (case status and plan)," 2.1 hours (Jan. 16, 2014) (*ibid.*),

> Attorney Jennifer Murakami: Confer with EP, CP, and RK (status and plan)," 2.1 hours (Jan. 16, 2014) (*ibid.*), and
>
> Attorney Ruby Kazi: "Confer with team (status and plan)," 2.1 hours (Jan. 16, 2014) (*ibid.*).

This action was filed in January 2006 and the bench trial was completed in December 2013.

The parties also dispute whether fees for four counsel to appear at trial is reasonable. The government argues that "a reasonable fee award would compensate two attorneys" (Opp. 20). Plaintiff's counsel argue that two attorneys presented while two attorneys simultaneously prepared witnesses to testify, drafted motions, and assisted. Plaintiff's counsel also note that defendants had at least twice as many attorneys as plaintiff in the courtroom each day. This order will not outright limit recoverable fees based on an arbitrary number of attorneys. For some hearings, perhaps two (or even one) rather than three attorneys would have sufficed. For some trial days, perhaps four attorneys were appropriate based on the tasks involved that day, especially given the size of the defense team. Our court of appeals in at least one decision was unpersuaded by arguments of needless duplication because assistance by non-arguing attorneys and observing proceedings can be important for certain hearings in actions of tremendous importance. *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004). Moving forward, plaintiff's counsel should review their time-sheets and reduce or remove any entries involving non-prevailing claims in accordance with this order, inefficiencies, and overstaffing.

C. Bad Faith.

Contrary to plaintiff's counsel, this order does not find bad faith supporting counsel's requested award of attorney's fees. Section 2412(b) states (emphasis added):

> The United States shall be liable for such fees and expenses to the same extent that any other party would be liable *under the common law* or under the terms of any statute which specifically provides for such an award.

"The common law allows a court to assess attorney's fees against a losing party that has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). The bad-faith exception is a narrow one. Our court of appeals has stated:

> Under the common law, [a] finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. Mere recklessness does not alone constitute bad faith; rather, an award of attorney's fees is justified when reckless conduct is combined with an additional factor such as frivolousness, harassment, or an improper purpose.

Id. at 709 (internal citations and quotation marks omitted). Each of counsel's proffered "bad-faith" allegations fails to qualify. *First*, plaintiff's counsel allege bad faith arising from the government's conduct in relation to Dr. Ibrahim. This order disagrees. Agent Kelley's error was unintentional and made unknowingly. The January 14 order did not find that her placement in the

TSDB or visa denials were made in bad faith. *Second*, this order declines to find the government's requests for dismissal based on lack of standing rising to the level of bad faith. It is probably true that the government should have sought review by the United States Supreme Court, but the government's verbal requests for dismissal and the few paragraphs in its briefs were not made in bad faith. *Third*, the government was wrong to assure all that it would not rely on state-secrets evidence and then reverse course and seek dismissal at summary judgment. This was a mistake by the government but there is no indication that this error was knowingly or recklessly made for harassment or improper purpose. *Fourth*, the government's privilege assertions—some were upheld, some were overruled—were not made in bad faith. Additionally, that plaintiff herself, who was never cleared to receive SSI or classified information, could not view certain documents is not "bad faith." *Fifth*, there is no evidence that the government obstructed plaintiff or her daughter from appearing at trial. *Sixth*, Witness Lubman's two corrections at trial to her deposition testimony do not evidence bad faith.

Plaintiff's reliance on *Brown v. Sullivan*, 916 F.2d 492, 495-96 (9th Cir. 1990), at oral argument is unavailing. The facts in *Brown* were extreme. In the disability benefits proceeding, the Appeals Council made a determination without even examining the transcript for the ALJ hearing—a statutory violation, and the Secretary relied on an unconstitutional review program in violation of the claimant's due process rights. The claimant was also forced to endure repeated delays and additional motion practice because of errors. Here, we are not compelled to find the conduct herein falling within

the narrow bad faith exception, invoked in cases of vexatious, wanton, or oppressive conduct. Agent Kelley's mistake in checking the wrong box and the long history of this action (largely due to plaintiff's appeals) do not warrant the extreme finding of bad faith. Accordingly, this order does not find bad faith supporting an entitlement to fees and expenses by plaintiff's counsel.

D. Rate Enhancement.

By plaintiff's counsel's calculation, under the EAJA rates, counsel are entitled to $2,632,438.35. Counsel, however, ask for $3,630,057.50 because they argue that a rate enhancement beyond the $125 per hour fee stated in Section 2412(d)(2)(A)(ii), is appropriate due to the limited availability of attorneys qualified for these proceedings and the specialized constitutional and civil rights knowledge of plaintiff's counsel, specifically Attorneys James McManis, Christine Peek, and Marwa Elzankaly. Our court of appeals has established the following requirements:

> First, the attorney must possess distinctive knowledge and skills developed through a practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those skills must not be available elsewhere at the statutory rate.

Love v. Reilly, 924 F.2d 1492, 1496 (9th Cir. 1991). The statute states that:

> attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as *the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee*.

28 U.S.C. 2412(d)(2)(A) (emphasis added). This enhancement is used sparingly for "some distinctive knowledge or specialized skill needful for the litigation in question." *Pierce*, 487 U.S. at 572. Here, counsel's dedication to litigating this terrorist-watchlist challenge for more than seven years is admirable. But they are not alone. *See, e.g.*, *Green, et al. v. TSA, et al.*, No. 2:04-cv-00763-TSZ (W.D. Wash. filed Apr. 6, 2004) (Judge Thomas S. Zilly) (complaint dismissed in January 2005); *Scherfen, et al. v. DHS, et al.*, No. 3:08-cv-01554-TIV (M.D. Penn. Aug. 19, 2008) (Judge Thomas I. Vanaskie) (complaint dismissed in February 2010); *Latif, et al. v. Holder, et al.*, No. 3:10-cv-00750-BR (D. Or. filed June 30, 2010) (Judge Anna J. Brown) (pending cross-motion for partial summary judgment); *Mohamed v. Holder, et al.*, No. 1:11-cv-00050-AJT-TRJ (E.D. Va. filed Jan. 18, 2011) (Judge Anthony J. Trenga) (granted motion for leave to file fourth amended complaint); *Tarhuni v. Holder, et al.*, No. 3:13-cv-00001-BR (D. Or. filed Jan. 2, 2013) (Judge Anna J. Brown) (third amended complaint due May 2014); *Mokdad v. Holder, et al.*, No. 2:13-cv-12038-VAR-RSW (E.D. Mich. filed May 8, 2013) (Judge Victoria A. Roberts) (pending appeal of an order granting a motion to dismiss); *Fikre v. FBI, et al.*, No. 3:13-cv-00899-BR (D. Or. filed May 30, 2013) (Judge Anna J. Brown) (pending motion to dismiss); *Tanvir v. Comey, et al.*, No. 1:13-cv-06951-RA (S.D.N.Y. filed Oct. 1, 2013) (Judge Ronnie Abrams) (amended complaint due April 2014).

Nevertheless, this order finds that Attorney James McManis is entitled to a rate enhancement. Attorney McManis possesses distinctive knowledge and skills developed over his 46-years of trial experience. He has litigated constitutional-law issues, is a founding member

of the McManis Faulkner firm, has served as a special master in our district, and is a member of the American College of Trial Lawyers, International Academy of Trial Lawyers, and American Bar Foundation. During the relevant time period, his hourly rate was $700 to $900 per hour (McManis Decl. ¶¶ 4, 7-10, 23). Under McManis Faulkner's fee arrangement with Dr. Ibrahim, the firm advanced all fees and expenses related to the action and never billed Dr. Ibrahim. Attorney McManis' distinctive expertise and skills were needed to take this litigation to our court of appeals twice and to a bench trial. The undersigned judge would be hard pressed to find anyone of his caliber with an hourly rate of $125 per hour. Accordingly, Attorney McManis is entitled to a **RATE ENHANCEMENT, RAISING THE $125 TO $250 PER HOUR**.

Attorneys Peek and Elzankaly, much less experienced, are also esteemed members of our district. A rate enhancement, however, will not be applied to their work in this case because it has not been shown that they possess distinctive skills necessary for this litigation.

3. DISCOVERY.

Plaintiff's counsel argue that they are entitled to fees as discovery sanctions pursuant to FRCP 37 and 16 because of defendants' delays in discovery matters. FRCP 16(f), 37(a)(5), and 37(b) require an award of reasonable attorney's fees and expenses incurred for noncompliance with the rules unless the noncompliance was substantially justified or other circumstances make the award unjust. Here, plaintiff's counsel obliquely reference the discovery motions they "prevailed on" and never identify which fees are allegedly recoverable as a

discovery sanction (Br. 15-16, Reply 6-7). In their motion, counsel merely state that "plaintiff had to bring multiple motions to compel resulting in orders that defendants comply with the most basic discovery requirements" (Br. 16). In their reply, counsel identify the April 2013 order which granted in part and denied in part their motion to compel and the August 2013 order which granted in part and denied in part a number of counsel's motions (notably, their request to depose Agent Kelley was granted but their hundreds of objections to the government's privilege instructions during two FRCP 30(b)(6) depositions were found to be largely unwarranted) (Dkt. Nos. 461, 532). Importantly, the August 2013 order stated:

> In the last two months, plaintiff has filed an excessive number of motions (including discovery motions) requesting reconsideration, compulsion of additional discovery, and other forms of relief. The total comes out to fourteen motions.

(Dkt. No. 532). This order will not sanction the government by making it pay for counsel's abundant discovery motions, some of which were denied. Moreover, these requests for discovery expenses should have been raised when the discovery motions were pending so the circumstances would be fresh in the mind of the judge and counsel. Now, some of these requests are almost a year late. This is further exacerbated by counsel's failure to even identify for the Court which fees could be recoverable and the associated tasks. Plaintiff's counsel dumped on the Court a 172-page fee spreadsheet which includes fees for tasks they never prevailed on. To take one example, plaintiff's counsel seek fees for 3.2 hours spent "Prepar[ing her] request for leave to file

motion for reconsideration" (June 7, 2013), which appears to be for time spent preparing a two-page letter filed on and dated June 7, 2013, seeking leave to file a motion for reconsideration of the rulings on state secrets and classified information (Dkt. No. 485, 699-1 at 122). That motion was denied (Dkt. No. 532).

In sum, fee-shifting as a discovery sanction is not warranted here.

4. EXPENSES.

Even though plaintiff's counsel seek hundreds of thousands of dollars in expenses, they never provided with their motion any invoices or itemized spreadsheets supporting their alleged expenses. They also provided no case law supporting an entitlement to specific expenses in their motion other than to baldly pronounce that "plaintiff has incurred expenses in this case in the amount $293,860.18 (Peek Decl., Exh. B.)" (Br. 17). Exhibit B identifies the following lump-sums with no indication as to whether any expenses were reduced for inefficiency or non-prevailing claims:

Photocopy Expense: $40,265.30

Messenger/Delivery Services: $11,597.69

Court Transcripts: $9,125.49

On-line Research: $98,717.67

Facsimile Expense: $232.00

Outside Copy Service: $5,068.86

Investigative Services: $50.00

Long-distance Telephone Services: $21.48

Travel Expenses: $40,335.68

Expert Fees: $88,446.01

Counsel's utter failure to explain why these expenses are reasonable or recoverable and append itemized spreadsheets is unexplained. Instead, they waited until their reply brief to file 228-pages of exhibits. Upon objection, the late reply declaration and exhibits were stricken due to the unfairness of sandbagging the government with such voluminous tardy documents for which there was no opportunity to respond. This order also notes that counsel's spreadsheets were largely insufficiently detailed.

Although plaintiff's counsel are entitled to reasonable expenses in accordance with the issues identified in this order, they should timely serve detailed documents supporting those requests. If disputed, the parties with the special master will have to figure out the specific amounts recoverable, but this order will set forth some guiding principles.

Our court of appeals has affirmed an award of reasonable expenses, including "telephone calls, postage, air courier and attorney travel expenses." *Int'l Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985) (less than $2,000 in expenses). The undersigned judge, however, is hard pressed to find an EAJA award of the magnitude requested by plaintiff's counsel.

CONCLUSION

As stated above, plaintiff's counsel may recover reasonable fees and expenses incurred for the procedural and substantive due process and Administrative Procedure Act claims, and fees and expenses for work inextricably intertwined with those claims. Plaintiff's counsel

may also recover reasonable fees and expenses incurred from defendant's lack-of-standing arguments made after *Ibrahim II* in 2012. Attorney McManis is entitled to an enhanced rate of $250 per hour. No other fees and expenses (beyond statutory costs) may be recovered. A companion order sets forth the special-master procedure.

IT IS SO ORDERED.

Dated: Apr. 15, 2014.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 06-00545 WHA

RAHINAH IBRAHIM, PLAINTIFF

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Filed: Jan. 14, 2014

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR RELIEF

INTRODUCTION

In this terrorist-watchlist challenge, a nonimmigrant alien seeks relief after having been barred airplane-boarding privileges and after having been denied a visa to return to the United States. This order includes the findings of fact and conclusions of law following a five-day bench trial. Some but not all of the relief sought is granted.

PROCEDURAL HISTORY

Plaintiff Dr. Rahinah Ibrahim is Muslim and a subject of Malaysia. Pursuant to a student visa, she was admitted to the United States to study at Stanford University. On January 2, 2005, plaintiff attempted to fly

from the San Francisco airport to Hawaii but was handcuffed and led away because she was on a federal no-fly list. After being held, she was eventually (the next day) allowed to fly to Hawaii and then back to Los Angeles and then to Malaysia. While she was in Malaysia, her student visa was revoked.

In January 2006, plaintiff commenced this civil action against multiple state and federal agencies alleging Section 1983 claims, state law tort claims, and several constitutional claims based on the inclusion of her name on government terrorist watchlists. The complaint sought damages and equitable relief. An August 2006 order dismissed her claims against the federal defendants based on lack of subject-matter jurisdiction because the no-fly list was an order of the Transportation Security Administration under 49 U.S.C. 46110(a), which granted exclusive subject-matter jurisdiction to the federal courts of appeals for review of orders of the TSA (Dkt. No. 101). The order also dismissed plaintiff's claims against a TSA employee, the airline, and the federal agency defendants.

Our court of appeals affirmed in part, reversed in part, and remanded, holding that the district court had original subject-matter jurisdiction over her claim for injunctive relief regarding placement of her name on the no-fly list. The court of appeals agreed that the district court, however, lacked subject-matter jurisdiction over her claim for injunctive relief regarding the government's policies and procedures implementing the no-fly list, that the federal agency and airline actions were not state actions under Section 1983, and that the tort claims against the federal officials in their official capacities and airline defendants were precluded. Our court of

appeals further held that specific jurisdiction was available for the claims against the TSA employee, who was sued in his individual capacity. Although the government urged the appellate court to find no standing, it expressly asked the district court to rule on that issue first. *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254-56 n.9 (9th Cir. 2008) ("*Ibrahim I*").

On remand, plaintiff filed a second amended complaint. The operative second amended complaint sought, among other things, limited relief relevant to plaintiff's visa situation but stopped short of attempting to force the government to issue her a visa. Cash settlements eventually reduced the question to prospective relief only. A motion to dismiss for lack of standing was made. In granting it, the district court drew a distinction between damages claims for past injury while plaintiff had been in the United States (settled) versus prospective relief sought *after* plaintiff had voluntarily left the United States (not settled). The July 2009 order held that while plaintiff could seek damages for her past injury at the San Francisco airport (and had successfully settled that part of the case), she had voluntarily left the United States and, as a nonimmigrant alien abroad, no longer had standing to assert constitutional and statutory claims to seek prospective relief. Although nonimmigrant aliens in the United States had standing to assert constitutional and statutory claims, the order held that a nonimmigrant alien who had voluntarily left the United States and was at large abroad had no standing to assert federal claims for prospective relief in our federal courts. This holding was based on the ground that the development of federal constitutional law should not be controlled by nonimmigrant aliens overseas (Dkt. No. 197). A second appeal followed.

Our court of appeals, while affirming in part, reversed (over a dissent) as to prospective standing by holding that even a nonimmigrant alien who had voluntarily left the United States nonetheless had standing to litigate federal constitutional claims in district court in the United States as long as the alien had a "substantial voluntary connection" to the United States. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993-94 (9th Cir. 2012) ("*Ibrahim II*"). Plaintiff had such a connection, our court of appeals held, because of her time at Stanford University, her continuing collaboration with professors in the United States, her membership in several professional organizations located in the United States, the invitations for her to return, and her network of close friends in the United States. The government did not seek review by the United States Supreme Court.

On the second remand, the government moved to dismiss again. This was denied. The parties and the judge then became embroiled in discovery disputes involving the state secrets privilege, the law enforcement privilege, and so-called "sensitive security information" ("SSI"), 49 U.S.C. 114(r) and 49 C.F.R. 1520.5. Defendants invoked these as bases for withholding classified and otherwise allegedly sensitive government information from plaintiff and her counsel. A pair of orders dated April 19, 2013, granted in part and denied in part plaintiff's motion to compel production (Dkt. Nos. 462, 464). Resolving these disputes required individual review by the district judge of all of the documents sought by plaintiff. Most of this review was conducted *ex parte* and *in camera* due to the privileged and classified nature of the documents. The state secrets privilege was upheld as to nearly all of the classified documents in question.

The government's assertion of other privileges regarding non-classified documents was overruled as to the majority of the remaining documents. Plaintiff's counsel became cleared to receive SSI, but never tried to become cleared to read classified information. (Plaintiff herself was never cleared to receive either SSI or classified information.) Subsequent rounds of contentious discovery motions resulted in yet further *ex parte* and *in camera* review. Again, the government's assertions of the state secrets privilege were upheld, while its assertions of other privileges were upheld in part and overruled in part (Dkt. Nos. 539, 548).

One recurring procedural issue concerned the effect of an assertion of state secrets. The government announced on at least two occasions that if state secrets were invoked, then that evidence could not be relied upon by either side. The evidence was simply out of the case, the government said (Dkt. Nos. 417, 534). After making such representations on the record, an order dated September 13, 2013, provided the government with another opportunity to clarify its position (Dkt. No. 540). The order stated:

> Plaintiff's pending motion to compel production of documents (Dkt. No. 515) raises questions regarding what evidence the government intends to rely on at summary judgment and at trial. The Court is of the view that the government may not rely in any way upon any information it has refused to turn over to plaintiff in response to a reasonable request. The government shall file a submission stating whether it agrees with or objects to this principle by September 17 at Noon.

The government responded:

> In response, Defendants affirm that they will not rely on any information they have withheld on grounds of privilege from Plaintiff in response to a discovery request in this case. Defendants are mindful of the Court's December 20, 2012 ruling (Dkt. [No.] 399) that the Government may not affirmatively seek to prevail in this action based upon information that has been withheld on grounds of privilege, and have acted in a manner consistent with that ruling in both the assertion of privilege and summary judgment briefing.

(Dkt. No. 541). As will be seen, however, the government reversed course at trial and sought to prevail by having this action dismissed due to its inability to disclose state secrets, citing precedent by our court of appeals.

As trial approached, a number of expert disclosure and discovery disputes were raised in late September and October 2013. (There was also a brief stay in light of the appropriations shutdown for the Department of Justice.) A pair of orders permitted plaintiff to revise an expert report, allowed the government to take a second one-day deposition of the expert, and ordered him to produce interview notes he considered in forming his opinions at least 24 hours prior to his second deposition, once a proper subpoena was served (Dkt. Nos. 580, 585).

A hearing was held on the government's motion for summary judgment on October 31, 2013. The vast majority of the hearing time, however, was consumed over whether or not the trial should be public and whether certain information listed on plaintiff's demonstratives was subject to various privileges. The government argued that plaintiff had not yet sought and received a final determination by the TSA regarding whether certain information was SSI pursuant to Section 525(a) and

(d) of the Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, Section 525(a), (d), 120 Stat. 1355, 1382 (Oct. 4, 2006). The government further argued that plaintiff's counsel could only challenge a final order designating information as SSI in the United States Court of Appeals for the District of Columbia. The same day, plaintiff submitted a request to the TSA. The TSA subsequently identified certain information as SSI. Possibly, an appeal from that order has been taken but the parties have not so indicated

The government's motion for summary judgment was granted in limited part but mostly denied (Dkt. No. 592). The "exchange of information" claim based on the First Amendment was dismissed. Plaintiff's claims based on procedural and substantive due process, equal protection, and First Amendment rights of expressive association and retaliation proceeded to trial. Lack of standing was raised yet again by the government and denied.

For the first time, and contrary to what it had represented before, the government further argued that summary judgment in its favor was appropriate based on state secrets, citing to our court of appeals' decision in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc). That motion was denied to provide an opportunity to see how the evidence would actually develop at trial and the extent to which at least portions of the case could be tried and decided without regard to state secrets.

A final pre-trial conference was held on November 15, 2013, during which the parties' motions *in limine* were heard. Plaintiff sought to exclude evidence submitted *ex parte*, to recuse the undersigned judge based

on his having reviewed relevant classified documents (in order to rule on various discovery requests), and to exclude two of defendants' may-call witnesses. The government sought to exclude plaintiff's experts, to exclude 22 of 42 "may call" witnesses on plaintiff's witness list, and to exclude certain trial exhibits. The final pre-trial order denied the motions *in limine*, but the motion to exclude and prevent plaintiff from calling Attorney General Eric Holder and James Clapper, Director of National Intelligence, was granted (Dkt. No. 616).

At the final pretrial conference, the government also made what amounted to a motion for reconsideration of its motion for summary judgment on state secrets, previously denied. The government argued that the action should be dismissed because the core of the case had been excluded as state secrets. The motion was denied on several grounds. *First*, the government failed to raise such an argument until weeks before trial. *Second*, it was unsettling for the government to completely reverse its prior position that the effect of invoking the state secrets doctrine was to exclude the evidence from the action. *Third*, even under *Jeppesen*, 614 F.3d at 1080, it could not be said with certainty that plaintiff would be unable to prove her case at trial or defendants would be absolutely deprived of a meritorious and complete defense. The Court's plan was to allow both sides to present their unclassified evidence through the "normal" trial procedure and then to allow the government to submit an *ex parte* and under seal submission to try to explain how its state secrets might bear on the actual trial issues.

Five days before trial, the government filed another request seeking to exclude a plaintiff expert because of

his refusal to produce documents pursuant to a subpoena issued by the District of Columbia and served at his second deposition (after two failed attempts to serve him). Plaintiff produced non-privileged documents to the government and defendants cross-examined the expert at trial. That dispute was accordingly resolved.

The bench trial then began on December 2, 2013. On the first day of trial, before opening statements, plaintiff's counsel reported that plaintiff's daughter—a United States citizen born in the United States and a witness disclosed on her witness list—was not permitted to board her flight from Kuala Lumpur to attend trial, evidently because she too was on a no-fly list. Counsel were asked to investigate. Immediately after trial, on December 6, an evidentiary hearing regarding plaintiff's daughter's travel difficulties was held. Plaintiff and the government submitted declarations. One live witness was examined. The snafu was the result of government error, albeit corrected quickly, as will be outlined at the end of the findings of fact. Plaintiff's counsel was given the option to reopen the trial to permit the daughter to appear late and testify, which counsel chose not to do. Instead, counsel asked for inclusion of the evidentiary hearing and associated declarations in the trial record. The government objected to reopening the trial record. The parties were permitted to file proposed contingent findings of fact and conclusions of law based on the evidentiary hearing and associated declarations.

No classified information was used at trial (nor referenced in this order). Nonetheless, at numerous times throughout the trial, there were privilege assertions and motions to close the courtroom. These were based on

a statutory privilege called "sensitive security information" ("SSI") and a common law privilege known as the "law enforcement privilege." Due to these assertions, at least ten times, the Court reluctantly asked the press and the public to leave the courtroom.

After a one-week bench trial, lengthy findings of fact and conclusions of law, and responses, were proposed by both sides. Rather than merely vet each and every finding and conclusion proposed by the parties, this order has navigated its own course through the evidence and arguments, although many of the proposals have found their way into this order. Any proposal that has been expressly agreed to by the opposing side at least in part, however, shall be deemed adopted (to the extent agreed upon), even if not expressly adopted herein. It is unnecessary for this order to cite the record for all of the findings herein. Citations will only be provided as to particulars that may assist the court of appeals. All declarative statements herein are factual findings.

FINDINGS OF FACT

PLAINTIFF

1. Dr. Rahinah Ibrahim is a subject of Malaysia, a scholar, a wife, and a mother of four children. She lawfully entered the United States in 1983 to study architecture at the University of Washington in Seattle, where she graduated in 1987. While living in Seattle, she married her husband, Mustafa Kamal Mohammed Zaini, and had her first daughter, Raihan Binti Mustafa Kamal. Mr. Zaini is a subject of Malaysia, not a citizen of the United States. Her daughter, Ms. Kamal, is a United States citizen, having been born in Seattle.

2. Dr. Ibrahim received her master of architecture in 1990 from the Southern California Institute of Architecture in Santa Monica, California.

3. She returned to Malaysia, worked as an architect, and eventually became a lecturer at the Universiti Putra Malaysia. She was the department's first female lecturer. During this time, she met Stanford Professor Boyd Paulson, who encouraged her to apply to Stanford University.

4. In 2000, Dr. Ibrahim returned to the United States under an F-1 student visa to work towards a Ph.D. in construction engineering and management at Stanford University. While studying at Stanford, she was involved in the Islamic Society of Stanford University and volunteered with the spiritual care services at Stanford Hospital. Dr. Ibrahim also attended prayers at the MCA in Santa Clara, a Muslim place of worship. She eventually received a Ph.D from Stanford University.

5. Government counsel has conceded at trial that Dr. Ibrahim is not a threat to our national security. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism. This the government admits and this order finds.

6. On September 11, 2001, radical Islamic terrorists destroyed the World Trade Center in New York City and part of the Pentagon alongside the Potomac and commandeered United Airlines Flight 93, leading to its crash in Pennsylvania. More than 2,900 victims were killed.

7. In November 2004, FBI Special Agent Kevin Michael Kelley, located in San Jose, nominated Dr. Ibrahim, who was then at Stanford, to various federal watchlists using the NCIC Violent Gang and Terrorist Organizations File Gang Member Entry Form ("VGTOF") (TX 8). VGTO, also known as Violent Gang and Terrorist Organization, was an office within the FBI's National Crime Information Center ("NCIC"). VGTOF was a file within the FBI's NCIC.

Agent Kelley misunderstood the directions on the form and erroneously nominated Dr. Ibrahim to the TSA's no-fly list and the Interagency Border Information System ("IBIS"). He did not intend to do so. This was a mistake, he admitted at trial. He intended to nominate her to the Consular Lookout and Support System ("CLASS"), the TSA selectee list, TUSCAN (information exported to Canada), and TACTICS (information exported to Australia). He checked the wrong boxes, filling out the form exactly the opposite way from the instructions on the form. He made this mistake even though the form stated, "It is recommended the subject NOT be entered into the following selected terrorist screening databases." An excerpt of Agent Kelley's nomination form is provided below:

It is recommended the subject NOT be entered into the following selected terrorist screening databases:

☒ Consular Lookout and Support System (CLASS)

☐ Interagency Border Information System (IBIS)

☐ TSA No Fly List

☒ TSA Selectee List

☒ TUSCAN

☒ TACTICS

Figure 1. VGTOF Form (November 2004).

Based on the way Agent Kelley checked the boxes on the form, plaintiff was placed on the no-fly list and IBIS (but not on CLASS, the selectee list, TUSCAN, or TACTICS). So, the way in which plaintiff got on the no-fly list in the first place was human error by the FBI. Agent Kelley did not learn of this error until his deposition in September 2013.

8. Around the same time, Agent Kelley's squad conducted a mosque outreach program. One purpose of the program was to provide a point of contact for mosques and Islamic associations. The outreach program included Muslims and Sikhs in the South Bay.

9. In December 2004, Agent Kelley and his colleague interviewed Dr. Ibrahim, again while she was attending Stanford University. (This was after he had filled out the form wrong.) He asked, among other things, about her plans to attend a conference in Hawaii, her thesis work, her plans after graduation, her involvement in the Muslim community, her husband, her travel plans, and the organization Jemaah Islamiyah (TX 4, 116).

10. Jemaah Islamiyah is (and was then) on the Department of State's list of designated foreign terrorist organizations (TX 13). The FOIA-produced version of Agent Kelley's interview notes with Dr. Ibrahim were designated by the FBI as "315," which means "International Terrorism Investigations" (TX 4, 116, 516). Jemaah Islah Malaysia, a similar sounding name, is not a terrorist organization but a Malaysian professional organization composed primarily of individuals who studied in the United States or Europe. Other than Jemaah Islah Malaysia coming up at trial when counsel asked about it, the significance of this possible point of confusion has been obscured by counsel. This order does not find that Agent Kelley confused the two organizations.

EVENTS FROM JANUARY 2005 TO MARCH 2005

11. In early January 2005, Dr. Ibrahim planned to fly from San Francisco to Hawaii and then to Los Angeles and thence to Kuala Lumpur. Her plans were to attend a conference in Hawaii (sponsored by Stanford University) from January 3 to January 6 and to present her research findings at the conference.

12. On January 2, 2005, Dr. Ibrahim arrived at the San Francisco airport with her daughter, Rafeah, then fourteen. At the time, Dr. Ibrahim was still recovering from her hysterectomy surgery performed three months earlier and thus requested wheelchair assistance to the airport gate.

13. The trouble started when Dr. Ibrahim arrived at the United Airlines counter. The police were called by airline staff. She was handcuffed and arrested. She was escorted to a police car (while handcuffed) and

transported to a holding cell by male police officers. There, a female police officer asked her if she had any weapons and attempted to remove her hiijab.

14. She was held for approximately two hours. Paramedics were called so that medication related to her hysterectomy surgery could be administered.

15. Eventually, an aviation security inspector with the Department of Homeland Security informed Dr. Ibrahim that she was released and her name had been removed from the no-fly list. The police were satisfied that there were insufficient grounds for making a criminal complaint against her (TX 31). The trial record shows no evidence that would have justified a detention or arrest. She was told that she could fly to Hawaii the next day. She did, voluntarily. She was, however, given an unusual red boarding pass (in addition to her regular boarding pass) with "SSSS," meaning Secondary Security Screening Selection, printed on it.

16. Dr. Ibrahim flew to Hawaii and presented her research findings at the conference. From there, she flew to Los Angeles and then to Kuala Lumpur. That was in January 2005.

17. The next trouble came two months later. In March 2005, Dr. Ibrahim planned to visit the United States to meet with one of her Stanford thesis advisors and her friend, Professor Paulson, who was very ill. She was not permitted to board the flight to the United States. She was told her F-1 student visa had been revoked, which in fact it had been, as will be detailed below. The ticket cost was approximately one month's salary at the time. The record is unclear as to the extent to which she was able to get reimbursed. So, even

though she had been told she was off the no-fly list, she was now being told that she could not come to the United States, regardless of how she traveled. She has never been permitted to return to the United States since.

TERRORIST SCREENING DATABASE AND RELATED WATCHLISTS

18. The government maintains a web of interlocking watchlists, all now centered on the Terrorist Screening Database ("TSDB"). This web and how they interlock are important to the relief sought and awarded herein. The present tense is used but the findings accurately describe the procedures in place at the time in question (except as indicated otherwise).

19. The Terrorist Screening Center ("TSC") is a multi-agency organization administered by the FBI. The TSC is staffed by officials from various agencies, including the FBI, the Department of Homeland Security, and the Department of State. The TSC manages the Terrorist Screening Database. The TSC and TSDB were created after September 11 so that information about known and suspected terrorists could be more centralized and then exported as appropriate to various "customer databases" operated by other agencies and government entities. In this way, "the dots could be connected." Information in the TSDB is *not* classified, although a closely allied and separate database called the Terrorist Identities Datamart Environment ("TIDE") does contain classified information. (The predecessor to TIDE was called TIPOFF.) The National Counterterrorism Center ("NCTC"), a branch of the Office of the Director of National Intelligence, places classified substantive "derogatory" information supporting a nomi-

nation to the TSDB in TIDE. These terrorist watchlists, and others, provide information to the United States intelligence community, a coalition of 17 agencies and organizations within the Executive Branch, including the Office of the Director of National Intelligence and the FBI.

20. FBI agents and other government employees normally nominate individuals to the TSDB using a "reasonable suspicion standard," meaning articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities. Unlike a standard codified by Congress or rendered by judicial decision, this "reasonable suspicion" standard was adopted by internal Executive Branch policy and practice. From 2004 to 2007, there was no uniform standard for TSDB nominations. Each agency promulgated its own nominating procedures for inclusion in the TSDB based on its interpretation of homeland security presidential directives and the memorandum of opinion that established the TSC. One such directive was Homeland Security Presidential Directive 6 ("HSPD-6") which stated, "[t]his directive shall be implemented in a manner consistent with the provisions of the Constitution and applicable laws, including those protecting the rights of all Americans" (TX 538). Agents now interpret this guideline, and others, as meaning that it would not be appropriate to watchlist someone based upon their religion, religious practices, and any other First Amendment activity.

21. For each nominee, the TSDB calls out which particular watchlists the nominee should be on and which he or she should not be on. It is a box-check procedure, then computerized. There are several watchlists affected by the TSDB, namely:

- the no-fly list (TSA),
- the selectee list (TSA),
- Known and Suspected Terrorist File ("KSTF," previously known as the Violent Gang and Terrorist Organizations File),
- Consular Lookout and Support System ("CLASS," including CLASS-Visa and CLASS-Passport) (Department of State),
- TECS (not an acronym, but the successor of the Treasury Enforcement Communications System) (Department of Homeland Security),
- Interagency Border Inspection System ("IBIS") (Department of Homeland Security),
- TUSCAN (used by Canada), and
- TACTICS (used by Australia).

If nominated, designations in the TSDB are then exported to the nominated downstream customer watchlists operated by various government entities. For example, information in the TSDB (if selected) is sent to the Department of State for inclusion in CLASS-Visa or CLASS-Passport.

22. Due to Agent Kelley's mistake, Dr. Ibrahim was nominated to the no-fly and IBIS watchlists. She was placed in the TSDB and her information was exported to the no-fly list and IBIS. Thus, when she arrived at

the ticket counter, the airline (which has and had access to the no-fly list), was obligated to deny her boarding (and then called the police).

23. When persons are placed on the no-fly list or any other watchlist, they receive no formal notice of such placement and may never learn of such placement until, if ever, they attempt to board a plane or do any other act covered by the watchlist.

24. When an agency "encounters" an individual via a visa application, airport boarding, border entry, to take three examples, the agency official searches for the individual's identity on applicable watchlists. If there is a potential name match, the individual's name is forwarded to the TSC. The TSC, in turn, reviews the TSDB record and an appropriate counterterrorism response may be made.

TRAVEL REDRESS INQUIRY PROGRAM (TRIP)

25. Under Section 44926(a) of Title 49 of the United States Code:

> The Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration, United States Customs and Border Protection, or any other office or component of the Department of Homeland Security.

Prior to 2007, individuals who claimed they were denied or delayed boarding or entry to the United States or repeatedly subjected to additional screening or inspection could submit a Passenger Identity Verification Form

(PIVF) to the TSA. This program was succeeded by the DHS's TRIP process in 2007.

26. If DHS determines that the complainant is an exact or near match to an identity in the TSDB, the match is referred to the TSC's redress unit.

27. The TSC's redress unit reviews the information available to determine (1) whether the individual's status is an exact match to an identity in the TSDB; (2) if an exact match, whether the traveler should continue to be in the TSDB; and (3) if the traveler should continue to be in the TSDB, whether the traveler meets additional criteria for placement on the no-fly or selectee lists.

28. The TSC's redress unit does not undertake additional fieldwork in determining whether an individual was properly placed in the TSDB or customer databases. The review is based on existing records and may (or may not) include contacting the nominating agency to obtain any new derogatory information that supports a nomination. The TSC's redress unit then notifies DHS TRIP of any modification or removal of the individual's record.

29. A letter responding to the request for redress is eventually sent to the complainant. Dr. Ibrahim attempted to use this redress method and received a vague and inconclusive response, described below.

DEPARTMENT OF STATE AND VISA PROCEDURE

30. A visa is permission for an alien, also known as a foreign national, to approach the borders of the United States and ask to enter. There are several types of visas, based primarily on the purpose of the alien's travel to the United States.

31. The procedure for obtaining a visa is as follows. *First*, the alien applies for a visa by submitting a visa application to a consular officer. The consular officer then evaluates whether the individual is eligible for a visa and what type of visa he or she may be eligible to receive. *Second*, the applicant makes an appointment for a visa interview with a consular officer at the United States embassy or a consulate abroad. Consular officers are employees of the Department of State who are authorized to adjudicate visa applications overseas. *Third*, an interview is conducted. *Fourth*, after the interview, the consular officer grants or denies the application. Consular officers are required to refuse a visa application if the alien has failed to demonstrate eligibility for the visa under the Immigration and Nationality Act, including under 8 U.S.C. 1182.

32. In ruling on applications, consular officers review the CLASS database, maintained by the Department of State, for information that may inform the visa application and adjudication process. Information is entered into CLASS directly by the Department of State or indirectly from other agencies. For example, entries in the Department of Homeland Security's TECS database can be electronically transferred over to CLASS to inform the visa adjudication process. CLASS also obtains information from the TSDB.

33. If the consular officer determines that further information is needed or if there is insufficient information to make an adjudication, the consular officer may refuse an individual's visa application under 8 U.S.C. 1201(g), request further information from the applicant, and/or request a Security Advisory Opinion ("SAO") from the Department of State. A SAO request initiates

an interagency review of information about the applicant available to the Department of State and other agencies, including classified intelligence in TIDE, to determine whether the alien is inadmissible under 8 U.S.C. 1182(a)(3)(A) or (B) or otherwise ineligible for a visa. If requested, a SAO opinion is rendered and the consular officer reviews the SAO opinion. The consular officer then decides whether to issue the visa or refuse the visa application.

34. Once a visa issues, if pertinent information comes to the attention of the Department of State that was not available to the consular officer at the time of issuance, an additional review of the alien's eligibility and admissibility may be conducted. Section 1201(i) states: "After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. . . ." The visa may be "prudentially" revoked, thereby making the individual ineligible to approach the borders of the United States. Within the Department of State, such a revocation is called "prudential." Such a prudential revocation forces the alien to reapply for a new visa, so that a new evaluation of the applicant's eligibility and admissibility can be made. When an alien's visa is revoked, the alien is informed of his or her right to establish their qualification for a visa through a new visa application.

35. The visa office in the Department of State keeps "revocation files" that explain the basis for an entry in the CLASS database until the applicant reaches age ninety and has no visa application within the past ten years.

PLAINTIFF AND THE WATCHLISTS

36. Dr. Ibrahim obtained an F-1 student visa to attend Stanford University for her Ph.D. for at least the duration of 2000 to 2005.

37. In November 2004, Agent Kelley nominated Dr. Ibrahim to the TSDB as he intended, but, by his human error, his nomination form wrongly caused plaintiff to be placed on the no-fly list (and in the IBIS database).

38. Shortly after the arrest and detention, on or around January 2, 2005, the TSC determinated that Dr. Ibrahim should not have been on the no-fly list and her name was thereafter removed from the no-fly list. She, however, remained in the TSDB and on the selectee and CLASS lists.

39. In an e-mail dated January 3, 2005, between two officials in the coordination division of the visa office, one wrote (TX 16) (emphasis in original):

> As I mentioned to you, I have a stack of pending revocations that are based on VGTO entries. These revocations contain virtually no derogatory information. After a *long* and frustrating game of phone tag with INR, TSC, and Steve Naugle of the FBI's VGTO office, finally we're going to revoke them.
>
> Per my conversation with Steve, there is no practical way to determine what the basis of the investigation is for these applicants. The only way to do it would be to contact the case agent for each case individually to determine what the basis of the investigation is. Since we don't have the time to do that (and, in my experience, case agents don't call you back promptly,

> if at all), we will accept that the opening of an investigation itself is a prima facie indicator of potential ineligibility under 3(B). . . .

40. A pending revocation for Dr. Ibrahim was in the above-referenced stack. (Again, VGTO referred to the FBI's Violent Gang and Terrorist Organization office; INR refers to the Department of State's Bureau of Intelligence and Research; and the term 3(B) referred to Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B).)

41. Dr. Ibrahim's F-1 student visa was revoked on January 31, 2005. The certificate of revocation stated: "subsequent to visa issuance, information has come to light indicating that the alien may be inadmissable to the United States and ineligible to receive a visa under section 212(a)(3)(B) of the Immigration and Nationality Act, such that the alien should reappear before a U.S. Consular Officer to establish his eligibility for a visa before being permitted to apply for entry to the United States" (TX 15). The trial record does not explain what "information" had come to light. After Dr. Ibrahim's visa was revoked, the Department of State entered a record into CLASS that would notify any consular officer adjudicating a future visa application submitted by Dr. Ibrahim that Dr. Ibrahim may be inadmissible under 8 U.S.C. 1182(a)(3)(B).

42. The revocation was pursuant to Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B). The revocation itself was on January 31, 2005, and Dr. Ibrahim learned of the revocation in March 2005.

43. In an e-mail dated February 8, 2005, between the chief of the consular section at the United States Embassy in Kuala Lumpur and an official in the coordination division of the visa office of the Department of State, the chief asked about a prudential visa revocation cable he had received concerning the events Dr. Ibrahim experienced in January 2005. The Department of State employee replied in e-mail stating (TX 17):

> Paul asked me to respond to you on this case, as I handle revocations in VO/L/C. The short version is that this person's visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn't constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application. . . . My guess based on past experience is that she's probably issuable. However, there's no way to be sure without putting her through the interagency process. I'll gin up the revocation.

VO/L/C is the designation of the coordination division within the visa office.

44. After she tried unsuccessfully to return to the United States in March 2005, using what she thought was a valid student visa, a letter arrived for Dr. Ibrahim, dated April 2005, stating: "[t]he revocation of your visa does not necessarily indicate that you are ineligible to receive a U.S. visa in future [sic]. That determination can only be made at such time as you apply for a new visa. Should you choose to do so, instructions can be found on the Embassy web site at http://malaysia.usembassy.gov" (TX 224).

45. To repeat, government counsel have conceded at trial and this order finds that Dr. Ibrahim is not a threat to the national security of the United States. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.

46. In March 2005, Dr. Ibrahim filed a Passenger Identity Verification Form (PIVF) (TX 76).

47. In December 2005, Dr. Ibrahim was removed from the selectee list. Around this time, however, she was added to TACTICS (used by Australia) and TUSCAN (used by Canada). No reason was provided for this at trial.

48. On January 27, 2006, this action was filed.

49. In a form dated February 10, 2006, an unidentified government agent requested that Dr. Ibrahim be "Remove[d] From ALL Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)" (TX 10). For the question "Is the individual qualified for placement on the no fly list," the "No" box was checked. For the question, "If no, is the individual qualified for placement on the selectee list," the "No" box was checked.

50. In 2006, the government determined that Dr. Ibrahim did not meet the reasonable suspicion standard. On September 18, 2006, Dr. Ibrahim was removed from the TSDB. The trial record, however, does not show whether she was removed from all of the customer watchlists subscribing to the TSDB.

51. In a letter dated March 1, 2006, the TSA responded to Dr. Ibrahim's PIVF submission as follows (TX 40):

> The Transportation Security Administration (TSA) has received your Passenger Identity Verification Form (PIVF) and identity documentation. In response to your request, we have conducted a review of any applicable records in consultation with other federal agencies, as appropriate. Where it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watchlist screening process. . . . This letter constitutes TSA's final agency decision, which is reviewable by the United States Court of Appeals under 49 U.S.C. § 46110. If you have any further questions, please call the TSA Contact Center Office of Transportation Security Redress (OTSR) toll-free at (866) 289-9673 or locally at (571) 227-2900, send an [e]-mail to TSA-ContactCenter@dhs.gov, or write to the following address. . . .

The response did not indicate Dr. Ibrahim's status with respect to the TSDB and no-fly and selectee lists.

52. One year later, on March 2, 2007, Dr. Ibrahim was placed back in the TSDB. The trial record does not show why or which customer watchlists were to be notified.

53. Two months later, however, on May 30, 2007, Dr. Ibrahim was again removed from the TSDB. The trial record does not show the extent to which Dr. Ibrahim's name was then removed from the customer watchlists, nor the reason for the removal.

54. Dr. Ibrahim did not apply for a new visa from 2005 to 2009. In 2009, however, she applied for a visa to attend proceedings in this action. On September 29, 2009, Dr. Ibrahim was interviewed at the American Embassy in Kuala Lumpur for her visa application.

55. On October 20, 2009, Dr. Ibrahim was nominated to the TSDB pursuant to a secret exception to the reasonable suspicion standard. The nature of the exception and the reasons for the nomination are claimed to be state secrets. In Dr. Ibrahim's circumstance, the effect of the nomination was that Dr. Ibrahim's information was exported solely to the Department of State's CLASS database and the United States Customs and Border Patrol's TECS database.

56. From October 2009 to present, Dr. Ibrahim has been included in the TSDB, CLASS, and TECS. She has been off the no-fly and selectee lists.

57. Dr. Ibrahim's 2009 visa application was initially refused under Section 221(g) of the Immigration and Nationality Act, 8 U.S.C. 1201(g), because it was determinated that there was insufficient information to make a final adjudication in the matter. The consular officer requested a Security Advisory Opinion ("SAO") from the Department of State. There was a concern by the consular official that Dr. Ibrahim was potentially inadmissible under Section 212(a)(3)(B) of the Immigration and Nationality Act.

58. Section 212(a)(3)(B) provides nine classes of aliens ineligible for visas or admission into the United States based on terrorist activities. Because that provision is lengthy and covers many different categories, and because its length bears on the relief granted

herein, Section 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), is set forth in full here:

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (I) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

59. The SAO stated: "Information on this applicant surfaced during the SAO review that would support a [Section] 212(a)(3)(B) inadmissibility finding. Post should refuse the case accordingly. Since the Department reports all visa refusals under INA section 212(a)(3)(B) to Congress, post should notify CA/VO/L/C when the visa refusal is effected. There has been no request for an INA section 212(d)(3)(A) waiver at this time" (TX 68).

(INA means Immigration and Nationality Act.) Based on the SAO, the visa was denied. Dr. Ibrahim was thus not permitted to attend proceedings in this action or return to the United States.

60. On December 14, 2009, Dr. Ibrahim's visa application was denied. Dr. Ibrahim was given a letter by the consular officer informing her that the Department of State was unable to issue her a visa pursuant to Section 212(a)(3)(B). The consular officer wrote the word "(Terrorist)" on the form beside Section 212(a)(3)(B) to explain why she was deemed inadmissible. An excerpt of the form is provided below (TX 47):

IBRAHIM, Rahinah Binti **2009271 050 4 KLL**
Name *(Last, First, Middle)*

Dear Visa Applicant:

This office regrets to inform you that it is unable to issue a visa to you because you have been found ineligible to receive a visa under the following section(s) of the Immigration and Nationality Act. The information contained in the paragraphs marked with "X" pertain to your visa application. Please disregard the unmarked paragraphs.

☐ Section 221(g) which prohibits the issuance of a visa to anyone whose application does not comply with the provisions of the Immigration and Nationality Act or regulations issued pursuant thereto. The following remarks apply in your case:*

☐ Section 212(a)(1) health-related grounds.

☐ Section 212(a)(4) which prohibits the issuance of a visa to anyone likely to become a public charge.

☒ Section 212(a)(3)B (Terrorist).

- ☐ Other.
- ☐ Further consideration will be given to your visa application after you obtain and present the documents listed above and/or the following:*
- ☐ You are eligible to apply for a waiver of the ground(s) of ineligibility.

Figure 2. Department of State Visa Refusal Letter.

61. A Section 212(d)(3)(A) waiver is one granted by the Attorney General or the consular office for aliens who have certain inadmissibilities but are still permitted to obtain visas. Section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), states:

> Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of

the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

62. Section 40.301 of Title 22 of the Code of Federal Regulations states:

(a) Report or recommendation to Department. Except as provided in paragraph (b) of this section, consular officers may, upon their own initiative, and shall, upon the request of the Secretary of State or upon the request of the alien, submit a report to the Department for possible transmission to the Secretary of Homeland Security pursuant to the provisions of INA 212(d)(3)(A) in the case of an alien who is classifiable as a nonimmigrant but who is known or believed by the consular officer to be ineligible to receive a nonimmigrant visa under the provisions of INA 212(a), other than INA 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), or (3)(E)(ii).

(b) Recommendation to designated DHS officer abroad. A consular officer may, in certain categories defined by the Secretary of State, recommend directly to designated DHS officers that the temporary admission of an alien ineligible to receive a visa be authorized under INA 212(d)(3)(A).

(c) Secretary of Homeland Security may impose conditions. When the Secretary of Homeland Security authorizes the temporary admission of an ineligible alien as a nonimmigrant and the consular officer is so informed, the consular officer may proceed with

> the issuance of a nonimmigrant visa to the alien, subject to the conditions, if any, imposed by the Secretary of Homeland Security.

63. Section 41.121(b) sets forth the visa refusal procedure which includes informing the alien of whether grounds of ineligibility (unless disclosure is barred under Section 212(b)(2) or (3)) and whether there is, in law or regulation, a mechanism (such as waiver) to overcome the refusal. Section 41.121(b)(1) of Title 22 of the Code of Federal Regulations states:

> (1) When a consular officer knows or has reason to believe a visa applicant is ineligible and refuses the issuance of a visa, he or she must inform the alien of the ground(s) of ineligibility (unless disclosure is barred under INA 212(b)(2) or (3)) *and whether there is, in law or regulations, a mechanism (such as a waiver) to overcome the refusal*. The officer shall note the reason for the refusal on the application. Upon refusing the nonimmigrant visa, the consular officer shall retain the original of each document upon which the refusal was based, as well as each document indicating a possible ground of ineligibility, and should return all other supporting documents supplied by the applicant.

(emphasis added).

64. The TSC has determined that Dr. Ibrahim does not currently meet the reasonable suspicion standard for inclusion in the TSDB. She, however, remains in the TSDB pursuant to a classified and secret exception to the reasonable suspicion standard. Again, both the reasonable suspicion standard and the secret exception

are self-imposed processes and procedures within the Executive Branch.

65. In September 2013, Dr. Ibrahim submitted a visa application so that she could attend the trial on this matter. She attended a consular officer interview in October 2013. At the interview, she was asked to provide supplemental information via e-mail. Trial in this action began on December 2 and ended on December 6. As of December 6, Dr. Ibrahim had not received a response to her visa application. At trial, however, government counsel stated verbally that the visa had been denied. Plaintiff's counsel said that they had not been so aware and that Dr. Ibrahim had not been so notified.

DR. IBRAHIM TODAY

66. Dr. Ibrahim has been successful at the Universiti Putra Malaysia. She was selected as Deputy Dean in 2006 and Dean for the Faculty of Design and Architecture in 2011.

67. One grant that Dr. Ibrahim received accounted for 75% of the grant funding received for the entire faculty.

68. Due to her inability to travel to the United States, Dr. Ibrahim has resorted to collaborating with her United States colleagues via e-mail, Skype, and telephone.

69. Dr. Ibrahim desires to visit the United States to attend conferences, collaborate on projects, and visit venture capitalists.

70. Since 2005, Dr. Ibrahim has never been permitted to enter the United States.

THE CITIZEN DAUGHTER

On the first day of trial, before opening statements, plaintiff's counsel reported that plaintiff's daughter, Raihan Binti Mustafa Kamal, a United States citizen and a witness disclosed on plaintiff's witness list, had not been permitted to board her flight from Kuala Lumpur to Manila and thence to the United States to attend trial. Counsel were ordered to investigate. After a post-trial evidentiary hearing on the problem, this order finds as follows.

71. Ms. Kamal had reservations for (i) a Malaysian Airlines flight from Kuala Lumpur to Manila and (ii) a Philippine Airlines flight from Manila to San Francisco for December 2.

72. On December 1, the National Targeting Center ("NTC") within the Department of Homeland Security began vetting passengers for the Philippine Airlines flight. NTC officers determined that Ms. Kamal was matched to a record that was listed in the TSDB in a category which notifies the Department of State and Department of Homeland Security that other government agencies may be in possession of substantive "derogatory" information about the individual that may be relevant to an admissibility determination under the Immigration and Nationality Act. United States citizens, of course, are *not* subject to the admissibility provisions of the Immigration and Nationality Act.

73. Within six minutes, the United States Customs and Border Patrol ("CBP") determined that Ms. Kamal appeared to be a United States citizen. The passenger information submitted by the Philippine Airlines for her flight, however, did not include citizen information.

There was thus a need to verify her identify upon check-in. The NTC requested additional screening of Ms. Kamal in Manila via the regional carrier liaison group ("RCLG") in Hawaii.

74. The subject line to an e-mail dated December 1, from the Hawaii RCLG to the Philippine Airlines stated: "POSSIBLE NO BOARD REQUESTPNR WNDYJS" and stated "NOTICE TO AIR CARRIER The [DHS and CBP] recommends the airline to contact HRCLG when the following passenger shows up to check in counter to verify information regarding passenger . . . Mustafa Kamal, R" (Dugan Decl. Exh. A).

75. Before the scheduled departure time, the RCLG was merely advised that Ms. Kamal did not arrive for her scheduled departure.

76. On December 2, Ms. Kamal's records were updated in the TSDB to reflect that she was a United States citizen. The request for additional screening was rescinded and it was requested that Ms. Kamal be allowed to board without delay.

CONCLUSIONS OF LAW

DUE PROCESS

At long last, the government has conceded that plaintiff poses no threat to air safety or national security and should never have been placed on the no-fly list. She got there by human error within the FBI. This too is conceded. This was no minor human error but an error with palpable impact, leading to the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler. That it was human error may seem hard to accept—the FBI agent filled out the nomination form in a way *exactly* opposite from the instructions on the

form, a bureaucratic analogy to a surgeon amputating the wrong digit—human error, yes, but of considerable consequence. Nonetheless, this order accepts the agent's testimony.

Since her erroneous placement on the no-fly list, plaintiff has endured a litany of troubles in getting back into the United States. Whether true or not, she reasonably suspects that those troubles are traceable to the original wrong that placed her on the no-fly list. Once derogatory information is posted to the TSDB, it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away. As a post-deprivation remedy, therefore, due process requires, and this order requires, that the government remediate its wrong by cleansing and/or correcting all of its lists and records of the mistaken 2004 derogatory designation and by certifying that such cleansing and/or correction has been accurately done as to every single government watchlist and database. This will not implicate classified information in any way but will give plaintiff assurance that, going forward, her troubles in returning to the United States, if they continue, are unaffected by the original wrong.

The basic issue is what due process of law requires in these circumstances. The Supreme Court has stated that "[d]ue process . . . is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). To determine what process is constitutionally due, the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), set forth the following three-factor test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Due process provides heightened protection against government interference when certain fundamental rights and liberty interests are involved. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

With respect to Dr. Ibrahim, the private interests at stake in her 2005 deprivations were the right to travel, *Kent v. Dulles*, 357 U.S. 116, 125 (1958), and the right to be free from incarceration, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004), and from the stigma and humiliation of a public denial of boarding and incarceration, *Paul v. Davis*, 424 U.S. 693, 701, 711 (1976), any one of which would be sufficient and all three of which apply on this record.

With respect to the government's interest, all would surely agree that our government must and should track terrorists who pose a threat to America—not just to its air travel—but to any aspect of our national security. In this connection, however, the government concedes that Dr. Ibrahim herself poses no such threat (nor did she in 2005).

The final *Mathews* factor is the risk of an erroneous deprivation through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. FBI Agent Kelley made a plain, old-fashioned, monumental error in filling out the VGTOF nomination form for Dr. Ibrahim. He checked the boxes *in exactly*

the opposite way from the instructions on the form, thus nominating Dr. Ibrahim to the no-fly list (against his intention). This was the start of all problems in Dr. Ibrahim's case. Surprisingly, Agent Kelley first learned of this mistake eight years later at his deposition.

Significantly, therefore, our case involves a conceded, proven, undeniable, and serious error by the government —not merely a risk of error. Consequently, this order holds that due process entitles Dr. Ibrahim to a correction in the government's records to prevent the 2004 error from further propagating through the various agency databases and from causing further injury to Dr. Ibrahim. By this order, all defendants shall specifically and thoroughly query the databases maintained by them, such as the TSDB, TIDE, CLASS, KSTF, TECS, IBIS, TUSCAN, TACTICS, and the no-fly and selectee lists, and to remove all references to the designations made by the defective 2004 nomination form or, if left in place, to add a correction in the same paragraph that the designations were erroneous and should not be relied upon for any purpose. To be clear, no agency should even rely on Agent Kelley's actual unexpressed intention to nominate to certain lists in 2004, for the form instructions were not properly followed. The designations in the November 2004 form should be disregarded for all purposes. The government is always free to make a new nomination doing it the right way. A deadline will be set for defendants to file declarations under oath attesting to compliance.

It is perhaps true that the error has already been corrected, at least in part, but there is reason to doubt that the error and all of its echoes have been traced and cleansed from all interlocking databases. A correction

in the TSDB and TIDE would *not* have automatically expunged incorrect data previously exported from the TSDB and TIDE to the customer agency databases. For example, the Department of State separately maintains its CLASS database. If the bad information was transferred from the TSDB and TIDE to CLASS in the 2004 period, then that bad information may remain there and may linger on there notwithstanding a correction in the TSDB and TIDE. This order will require defendants to trace through each agency database employing the TSDB and TIDE and make sure the correction or deletion has actually been made.

This order finds that suspicious adverse effects continued to haunt Dr. Ibrahim in 2005 and 2006, even though the government claims to have learned of and corrected the mistake. For example, after her name was removed from the no-fly list, the next day, Dr. Ibrahim was issued a bright red "SSSS" pass. Less than a month after she was removed from the no-fly list, her visa was "prudentially" revoked. In March 2005, she was not permitted to fly to the United States. Her daughter was not allowed to fly to the United States even to attend this trial despite the fact that her daughter is a United States citizen. After so much gnashing of teeth and so much on-the-list-off-the-list machinations, the government is ordered to provide the foregoing relief to remediate its wrong. If the government has already cleansed its records, then no harm will be done in making sure again and so certifying to the Court.

With respect to the government's TRIP program, which does provide a measure of post-deprivation relief, this order holds that it is inadequate, at least on this rec-

ord. After Dr. Ibrahim was denied boarding on January 2, 2005, and denied boarding to return in March 2005, she submitted a Passenger Identity Verification Form (PIVF), a program that eventually morphed into the TRIP program by 2007. Approximately one year later, the TSA responded to her PIVF form with the following vague response (TX 40):

> Where it has been determined that a correction to records is warranted, these records have been modified to address any delay or denial of boarding that you may have experienced as a result of the watchlist screening process.

Noticeably missing from the response to Dr. Ibrahim was whether there had been errors in her files and whether all errors in customer databases had been corrected. This vague response fell short of providing any assurance to Dr. Ibrahim—who the government concedes is not a national security threat and was the victim of concrete, reviewable adverse government action caused by government error—that the mistake had been traced down in all its forms and venues and corrected. *Al Haramain Islamic Found., Inc. v. United States Dep't of Treasury*, 686 F.3d 965, 985-88 (9th Cir. 2012).

This order provides only a post-deprivation remedy, to be sure, but post-deprivation remedies are efficacious, especially where, as here, it would be impractical and harmful to national security to routinely provide a pre-deprivation opportunity to be heard of the broad and universal type urged by plaintiff's counsel. *Haig v. Agee*, 453 U.S. 280, 309-10 (1981). Such advance notice to all nominees would aid terrorists in their plans to bomb and kill Americans. Moreover, at the time of listing, the government would have no way of knowing

which nonimmigrant aliens living abroad would enjoy standing under *Ibrahim II*. Instead, any remedy must await the time when, if ever, concrete, reviewable adverse action is taken against the nominee.

Put differently, until concrete, reviewable adverse action occurs against a nominee, the Executive Branch must be free to maintain its watchlists in secret, just as federal agents must be able to maintain in secret its investigations into organized crime, drug trafficking organizations, prostitution, child-pornography rings, and so forth. To publicize such investigative details would ruin them. Once concrete, reviewable adverse action is taken against a target, then there is and will be time enough to determine what post-deprivation process is due the individual affected. In this connection, since the reasonable suspicion standard is an internal guideline used within the Executive Branch for watchlisting and not imposed by statute (or by specific judicial holding), the Executive Branch is free to modify its own standard as needed by exception, even if the exception is cloaked in state secrets. Any other rule requiring reviewability before concrete adverse action would be manifestly unworkable.[*]

---

[*] In the instant case, the nomination in 2004 to the no-fly list was conceded at trial to have been a mistake. In this sense, this is an easier case to resolve. Harder no-fly cases surely exist. For example, the government uses "derogatory" information to place individuals on the no-fly list. When an individual is refused boarding, does he or she have a right to know the specific information that led to the listing? Certainly in some (but not all) cases, providing the specifics would reveal sources and methods used in our counterterrorism defense program and disclosure would unreasonably jeopardize our national security. Possibly, instead, a general summary

Given the Kafkaesque on-off-on-list treatment imposed on Dr. Ibrahim, the government is further ordered expressly to tell Dr. Ibrahim that she is no longer on the no-fly list and has not been on it since 2005 (always subject, of course, to future developments and evidence that might warrant reinstating her to the list). This relief is appropriate and warranted because of the confusion generated by the government's own mistake and the very real misapprehension on her part that the later visa denials are traceable to her erroneous 2004 placement on the no-fly list, suggesting (reasonably from her viewpoint) that she somehow remains on the no-fly list.

It is true, as the government asserts as part of its ripeness position, that she cannot fly to the United States without a visa, but she is entitled to try to solve one hurdle at a time and perhaps the day will come when all hurdles are cleared and she can fly back to our country. The government's legitimate interest in keeping secret the composition of the no-fly list should yield, on the facts of this case, to a particularized remedy isolated by this order only to someone even the government concludes poses no threat to the United States. Everyone

---

might provide a degree of due process, allowing the nominee an opportunity to refute the charge. Or, agents might interview the nominee in such a way as to address the points of concern without revealing the specifics. Possibly (or possibly not), even that much process would betray our defense systems to our enemies. This order need not and does not reach this tougher, broader issue, for, again, the listing of Dr. Ibrahim was concededly based on human error. Revealing this error could not and has not betrayed any worthwhile methods or sources.

else in this case knows it. As a matter of remedy, she should be told that the no-fly hurdle has been cleared.

* * *

No relief granted herein implicates state secrets. The foregoing relief does nothing more than order the government to delete or to correct in all its agency systems any ongoing effects of its own admitted inexcusable error and reconfirm what she was told in 2005, namely that she is *not* on the no-fly list. The government has no defense, classified or not, against their conceded error in 2004. In complying with this relief, the government will not have to reveal any classified information. It merely has to certify that it has cleansed its record of its own error and reveal to plaintiff her current no-fly list status, a non-classified item that the Department of Homeland Security itself revealed to Dr. Ibrahim in 2005.

In sum, after what our government has done by error to Dr. Ibrahim, this order holds that she is entitled to the post-deprivation remedy described above, that the government's post-deprivation administrative remedies fall far short of such relief, and to deny her such relief would deprive her of due process of law. This order will supply the due process that otherwise has been denied to plaintiff.

THE VISA ISSUES

In December 2009, Dr. Ibrahim was informed that her visa application was denied pursuant to Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B). The consular officer wrote the word "(Terrorist)" on the denial form. It is undisputed, moreover, that the visa refusal form did not have a check

mark next to the box stating, "You are eligible to apply for a waiver on the ground(s) of ineligibility" (TX 47). It is also undisputed that the Immigration and Naturalization Act provides that nonimmigrant visa applicants may apply for a waiver of many of the grounds of visa ineligibility under 8 U.S.C. 1182(a).

The Court has read the relevant classified information, under seal and *ex parte*, that led to the visa denials. That classified information, if accurate, warranted denial of the visa under Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B). (That information was different from the 2004 mistaken nomination by Agent Kelley.) Therefore, under the state secrets privilege, any challenge to the visa denials in 2009 and 2013 must be denied. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080, 1086-89 (9th Cir. 2010) (en banc). In any event, denial of visas may *not* be reviewed by district courts. *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

Nonetheless, this order grants other limited relief as follows. The government must inform Dr. Ibrahim of the specific subsection of Section 212(a)(3)(B) that rendered her ineligible for a visa in 2009 and 2013. This is pursuant to the on-point holding of *Din v. Kerry*, 718 F.3d 856, 863 (9th Cir. 2013). As quoted above in the findings, subpart B has nine subsections and is lengthy. The pertinent subsections should have been identified to plaintiff, according to *Din*. Doing so would have assisted her in understanding the particular provision of law that barred her entry. Merely citing to a lengthy collection of grounds collected together under the heading "Terrorist activities" will not do under *Din*. Under

the law of our circuit, this precise error is reviewable and relief is warranted by the record.

One might wonder why, if Dr. Ibrahim herself is concededly not a threat to our national security, the government would find her inadmissible under the Act. In this connection, please remember that the Act includes nine ineligible categories. Some of them go beyond whether the applicant herself poses a national security threat.

Keeping in mind the government's concession that Dr. Ibrahim herself is not a threat to the United States, this order further holds that the consular officer erred in indicating that Dr. Ibrahim was ineligible to *apply* for a waiver of the ground(s) for ineligibility (TX 47). This is a holding separate and apart from *Din*, so the reason for reviewability will now be spelled out.

The Immigration and Nationality Act confers upon consular officers exclusive authority to review applications for visas, precluding even the Secretary of State from controlling their determinations. *See* 8 U.S.C. 1104(a), 1201(a). The powers afforded to consular officers include, in particular, the granting, denying, and revoking of immigrant and non-immigrant visas. 8 U.S.C. 1201(a), (i). Consular officers exercise this authority subject to the eligibility requirements in the statute and corresponding regulations. 22 C.F.R. 41.121-122.

Section 41.121 of Title 22 of the Code of Federal Regulations governs the process for refusal of individual visas. It states that "[w]hen a consular officer knows or has reason to believe a visa applicant is ineligible and refuses the issuance of a visa, he or she *must* inform the alien . . . whether there is, in law or regulations, a

mechanism (*such as waiver*) to overcome the refusal" (emphasis added). Section 42.81 adds that "[t]he consular officer *shall* inform the applicant of the provision of law or implementing regulation on which the [visa] refusal is based *and of any statutory provision of law or implementing regulation under which administrative relief is available*" (emphasis added). The regulations governing the issuance of nonimmigrant visas do not vest the consular officials with discretion on whether to follow the procedure proscribed by the Code of Federal Regulations. *See Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (if consular official fails to render a decision in accordance with Section 42.81, courts have jurisdiction to compel him to do so).

Here, the consular officer indicated, according to the form letter, that Dr. Ibrahim was ineligible for a visa or admission into the United States under Section 212(a)(3)(B). At trial and in the post-trial briefing, the government has not argued that Dr. Ibrahim was ineligible for a waiver and the trial record did not demonstrate (other than via the letter) that the consular officer ever even made a determination, one way or the other, as to whether Dr. Ibrahim was eligible. As the government has conceded, however, Dr. Ibrahim posed no threat of committing an act of international or domestic terrorism. The consular officer, however, never informed Dr. Ibrahim that she could apply for a waiver to be admitted to the United States temporarily. In this Court's view, Dr. Ibrahim was at least eligible to apply for a discretionary waiver.

The government argues that regardless of whether the consular officer made a mistake in determining Dr. Ibrahim's waiver eligibility, the decision was entirely

discretionary and therefore not subject to judicial review. It is true that a consular officer's discretionary decision to grant or deny a visa petition is not subject to judicial review. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986). On the other hand, when a claim challenges the authority of the consular officer to take or fail to take an action as opposed to a decision actually taken within the consular officer's discretion, limited reviewability exists. *See Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (judicial review is appropriate to consider a challenge to the Secretary's authority to place temporal limits on processing non-preference visa applications).

Limited reviewability of a consular officer's wrongful failure to advise an alien about waiver admissibility is further supported by the enabling statute. Section 1182(d)(3)(A) states that a consular official "may" grant a visa waiver "after approval by the Attorney General of a recommendation by the Secretary of State or by the consular official that the alien be admitted temporarily despite his inadmissibility." 8 U.S.C. 1182(d)(3)(A). Section 1182(d)(3)(B), on the other hand, states that the Secretary of State, after consultation with the Secretary of Homeland Security, or vice-versa, "may determine in such Secretary's *sole unreviewable discretion* that subsections (a)(3)(B) of this section shall not apply . . ." (emphasis added). A general guide to statutory construction states that the mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius*. 73 Am. Jur. 2d, *Statutes*, Section 211, at 405 (1974). Here, the governing statute states that the consular official "may" grant a waiver, whereas, it is in the Secretary's "sole unreviewable discretion" to decide whether

the reasons for denying a visa should even apply. Accordingly, a consular officer's failure to advise an alien of her right to at least apply for a visa waiver (as the regulation mandates) is not solely within the consul's discretion and is reviewable by courts.

During trial, the Court asked Sean Cooper, the Chief of the Coordination Division in the Visa Office of the Bureau of Consular Affairs at the State Department, about the waiver procedure:

> **Court:** Does the applicant . . . get told there's such a procedure and they can apply for a waiver, or is it just done totally in-house as a secret process? How does it work?
>
> **Witness:** Normally, the alien would be informed if the inadmissibility has a waiver relief. So they could then choose to try to say, "Well, I'd like to do that." But it is then forwarded for consideration with an endorsement from the Department of State. So the Consular Officer would say, "I support this," or "I don't support this for these reasons."

Because the consular officer unlawfully failed in his duty to advise Dr. Ibrahim of her right to at least apply for a waiver, the doctrine of consular nonreviewability does not apply. Accordingly, this order holds that Dr. Ibrahim must be given an opportunity to apply for a waiver. This order, of course, does not insist that the government grant a waiver. Once acted on, the agency's decision whether (or not) to grant a waiver would presumably be unreviewable.

OTHER CHALLENGES

Although plaintiff's counsel raise other constitutional challenges, those arguments, even if successful, would not lead to any greater relief than already ordered. It must be emphasized that the original cause of the adverse action was human error. That error was not motivated by race, religion, or ethnicity. While it is plausible that Dr. Ibrahim was interviewed in the first place on account of her roots and religion, this order does not so find, for it is unnecessary to reach the point, given that the only concrete adverse action to Dr. Ibrahim came as a result of a mistake by Agent Kelley in filling out a form and from later, classified information that separately led to the unreviewable visa denials.

If and when *reviewable*, concrete adverse action is taken by our government against Dr. Ibrahim, then we may have an occasion to adjudicate the extent to which she should be informed, at least generally, of the classified and under seal grounds for the action against her so as to give her an opportunity to rebut the derogatory information. The visa denial itself is *not* reviewable. Until reviewable, concrete adverse action occurs, there is no occasion to litigate the extent to which any information about her, derogatory or not, should reside in the government's databases—save and except for the more limited relief provided above.

PUBLIC ACCESS TO OUR COURTS

The next part of this order addresses the frustrating efforts by the government to shield its actions from public view and the extent to which this order should be made public. For the time being, all of the order shall

remain secret (save and except for a brief public summary) until the court of appeals can rule on this Court's view that the entire order be opened to public view.

One of the many gifts left for us by Circuit Judge Betty Fletcher was her dedication to protecting the common law right of the public and the press to examine the work of our courts. In a decision upholding such access, Judge Fletcher wrote of the federal right to inspect and copy public records and documents. *San Jose Mercury News, Inc. v. U.S. Dist. Ct.-Northern Dist.*, 187 F.3d 1096, 1102 (9th Cir. 1999). Judge Fletcher later wrote that "[i]n this circuit, we start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Her decision instructed courts to "consider all relevant factors, including: the public interest in understanding the judicial process."

Thanks to Judge Fletcher, the public has a well-recognized right to access its courts. "[Judicial] records are public documents almost by definition, and the public is entitled to access by default." This presumption is strong because the public has an interest in "understanding the judicial process" as well as "keeping a watchful eye on the workings of public agencies." Public oversight of courts and therefore public access to judicial operation is foundational to the functioning of government. Without such oversight, the government can become an instrument for injustice. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178, 1180 (9th Cir. 2006).

In stubborn resistence to letting the public and press see the details of this case, the government has made

numerous motions to dismiss on various grounds, including an overbroad complete dismissal request based on state secrets. When it could not win an outright dismissal, it tried to close the trial from public view via invocation of a statutory privilege for "sensitive security information" ("SSI"), 49 U.S.C. 114(r) and 49 C.F.R. 1520.5, and the "law enforcement privilege." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). At least ten times the trial was interrupted and the public asked to leave so that such evidence could be presented.

This order recognizes the legitimacy of protecting SSI and law enforcement investigative information. On the other hand, the statute itself recognizes that information more than three years old should ordinarily be deemed too stale to protect—which is the case here. *See* Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, Section 525(d), 120 Stat. 1355, 1382 (Oct. 4, 2006).

Significantly, virtually all of the SSI about the workings of the TSDB and its allied complex of databases, including the no-fly list, is publicly known. For example, after a 2006 GAO report revealed that half of the tens of thousands of potential matches sent to the TSDB between December 2003 to January 2006 were misidentifications, the Department of Justice published a September 2007 audit report which revealed astonishing results (TX 102):

- Of the 105 records reviewed in the audit, 38% contained errors or inconsistencies that were not identified through the TSC's "quality assurance efforts."
- Around 2007, the TSDB increased by average of over 20,000 records per month.

- When the TSC began its review of the no-fly list in July 2006, there were 71,872 records. When the review was completed in January 2007, the government determined that the no-fly list should be reduced to 34,230 records.
- TSC redress complaint data showed that 13% of the 388 redress inquiries closed between January 2005 and February 2007 were for complainants who were misidentified and were not an actual watchlist subject. A remarkable 20% necessitated removing the complainant's identity from the watchlist. The TSC determined that 45% of the watchlist records related to redress complaints were inaccurate, incomplete, not current, or incorrectly included.

An October 2007 GAO report detailed the process by which "encounters" with individuals on a terrorist watchlist are resolved, discussing the "reasonable suspicion" standard, described the nomination process to the TSC's watchlists, and charted the rapid growth of watchlist records. This 84-page report describes a number of watchlists and even indicates vulnerabilities with the system (TX 238).

A March 2010 congressional hearing involved testimony and statements from government officials, including the Director of the TSC, Timothy J. Healy, wherein the TSDB, CLASS, TECS, no-fly and selectee lists were discussed in some detail (TX 250). *See* Sharing and Analyzing Information to Prevent Terrorism, 111th Cong. 116 (2010). A May 2012 GAO report addressed weaknesses in the watchlist nomination process exposed in the wake of the 2009 attempted attack (TX 251).

In short, public release of this entire order will reveal very little, if any, information about the workings of our watchlists not already in the public domain. Public release would reveal no classified information whatsoever.

This order has been drafted so as to address all issues without revealing any classified information. With respect to SSI and law enforcement information, this order holds that the information revealed herein is too stale to warrant protection from public view. *See* Section 525(a)(2), 120 Stat. 1355, 1382. Therefore, this entire order will be made public. This aspect of the order, however, will be **STAYED UNTIL NOON ON APRIL 15, 2014**, in order to give defendants an opportunity to seek a further stay thereof from the court of appeals; meanwhile, the entire order shall be **UNDER SEAL** (and a short summary will meanwhile be released by the judge for public view). Barring an order from higher authorities, this entire order will be made public at **NOON ON APRIL 15, 2014**.

CONCLUSION

The following relief is hereby ordered:

A. The government shall search and trace all of its terrorist watchlists and records, including the TSDB, TIDE, KSTF, CLASS, TECS, IBIS, TUSCAN, TACTICS, and the no-fly and selectee lists, for entries identifying Dr. Ibrahim. The government shall remove all references to the mistaken designations by Agent Kelley in 2004 and/or add a correction in the same paragraph that said designations were erroneous and should not be relied upon for any purpose. Declarations signed under oath by appropriate government officials shall be filed no later than **NOON ON APRIL 15, 2014**. The declarations shall certify that the government has

searched, cleansed, and/or corrected in the same paragraph all entries identifying Dr. Ibrahim and the mistaken 2004 designations. Each declaration shall specifically detail the steps and actions taken with respect to each watchlist.

B. The government must inform Dr. Ibrahim of the specific subsection of Section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(3)(B), that rendered her ineligible for a visa in 2009 and 2013.

C. The government must inform Dr. Ibrahim that she is no longer on the no-fly list and has not been on it since 2005.

D. The government must inform Dr. Ibrahim that she is eligible to at least apply for a discretionary waiver under 8 U.S.C. 1182(d) and 22 C.F.R. 41.121(b)(1).

E. All of the foregoing must be done by **APRIL 15, 2014**.

IT IS SO ORDERED.

Dated: Jan. 14, 2014

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX F

28 U.S.C. 2412 provides in pertinent part:

Costs and fees

* * * * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the

party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of

1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

* * * * *