No. 04-620

In the Supreme Court of the United States

TAREK H. JIFRY AND MAAN H. ZARIE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal government lawfully revoked the pilot licenses of non-resident aliens based on the Executive Branch's determination that the aliens pose a threat to the security of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 370 F.3d 1174. The administrative decisions of the National Transportation Safety Board (Pet. App. A17-A21, A27-A30, A31-A32) and its administrative law judge (Pet. App. A22-A26, A33-A38, A42-A47) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 11, 2004. A petition for rehearing was denied on August 9, 2004 (Pet. App. A51). The petition for a writ of certiorari was filed on November 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has charged the Federal Aviation Administration (FAA) with "promot[ing] [the] safe flight of civil aircraft." 49 U.S.C. 44701(a). To that end, Congress has vested the FAA with broad authority to prescribe regulations and standards governing "practices, methods, and procedures" relating to air transportation that the agency "finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5). The FAA must carry out its responsibilities "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. 44701(c).

Those safety responsibilities include issuing and revoking pilot licenses under terms that take into account "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44702(b)(1)(A). The FAA may, "at any time," reexamine a pilot who has been issued a license, 49 U.S.C. 44709(a), and may "suspend[] or revok[e]" the license if it concludes, after a "reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action," 49 U.S.C. 44709(b)(1)(A). While Congress established certain procedures and considerations to govern the issuance of licenses to pilots who are citizens, 49 U.S.C. 44703, Congress conferred sweeping discretion on the FAA over the issuance of licenses to aliens, allowing the FAA to "restrict or prohibit issuing" licenses to aliens altogether, or to "make issuing the certificate to an alien dependent on a reciprocal agreement with the government of a foreign country," 49 U.S.C. 44703(e)(1) and (2). The FAA,

however, must ensure that its system for issuing pilot licenses comports with other governmental programs "related to combating acts of terrorism." 49 U.S.C. 44703(g)(1) (Supp. I 2001).

b. In the wake of terrorists' use of civilian airliners to attack the United States on September 11, 2001, Congress created the Transportation Security Administration (TSA) and transferred much of the responsibility for civil aviation security from the FAA to the TSA, which is now a component of the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified at 6 U.S.C. 203(2)). The TSA is "responsible for security in all modes of transportation," including civil aviation. 49 U.S.C. 114(d) (Supp. I 2001). Congress invested the TSA with broad authority to

> (1) receive, assess, and distribute intelligence information related to transportation security; (2) assess threats to transportation; (3) develop poli cies, strategies, and plans for dealing with threats to transportation security; (4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government; * * * (11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities; [and] (12) require background checks for * * * individuals with access to secure areas of airports.

49 U.S.C. 114(f) (Supp. I 2001). As relevant here, Congress directed the TSA to "establish procedures for notifying the Administrator of the [FAA] * * * of the

identity of individuals known to pose, or suspected of posing, a risk of * * * terrorism." 49 U.S.C. 114(h)(2) (Supp. I 2001).

c. On January 24, 2003, the FAA, in coordination with the TSA, issued a regulation establishing that an individual is not qualified for a pilot license if the TSA concludes that the person "poses a security threat." 14 C.F.R. 61.18(a). The TSA simultaneously issued a regulation establishing procedures for threat assessments of non-resident aliens who hold or apply for FAA certificates. 49 C.F.R. 1540.117; see 68 Fed. Reg. 3762 (Jan. 24, 2003). Under that regulation, if the TSA Assistant Administrator determines that an alien holding an FAA certificate poses a security threat, he will serve an Initial Notification of Threat Assessment upon the individual and the FAA. 49 C.F.R. 1540.117(e)(1). An individual will be found to pose a "security threat" if he "is suspected of posing, or is known to pose (1) A threat to transportation or national security; (2) A threat of air piracy or terrorism; (3) A threat to airline or passenger security; or (4) A threat to civil aviation security." 49 C.F.R. 1540.117(c).

Upon receiving the Initial Notification, the FAA will suspend any pilot license or other airman certificate held by the alien, pending the outcome of the TSA's final threat assessment. 14 C.F.R. 61.18(b)(1). The alien may, within 15 days of receiving the Initial Notification, serve a written request for copies of the materials upon which it was based. 49 C.F.R. 1540.117(e)(1) and (2). Within 30 days, TSA must provide any pertinent materials, but it may not disclose any material that is classified or protected from disclosure under law. 49 C.F.R. 1540.117(e)(3). Given the nature of security-threat determinations regarding aliens, the TSA has

advised that, in most cases, the threat assessments will be based largely or exclusively on non-disclosable classified national security information, unclassified information designated as sensitive security information, or other information protected from disclosure by law. 68 Fed. Reg. at 3764.

Within 15 days of the TSA's response (or, if the individual did not request a response, within 15 days of receiving the Initial Notice), the alien may serve a written reply upon TSA, challenging its initial threat assessment determination and including any information that the alien believes the TSA should consider. 49 C.F.R. 1540.117(e)(4). The entire record is then reviewed de novo by the TSA Deputy Administrator. 49 C.F.R. 1540.117(f)(1). If the TSA Deputy Administrator determines that the alien pilot poses a security threat, he will issue a Final Notification of Threat Assessment, *ibid.*, and the FAA will revoke any pilot license or other airman certificate possessed by that individual, 14 C.F.R. 61.18(c)(2).

As relevant here, the alien could appeal the revocation to the National Transportation Safety Board (NTSB). 49 U.S.C. 44709(d); see also note 2, *infra*. The NTSB, however, may not review the merits of the threat assessment. Its review is limited to examining the revocation process to ensure procedural regularity. See *Administrator* v. *Lloyd*, 1 N.T.S.B. 1826, 1828 (1972). The alien may then obtain review in a federal court of appeals. 49 U.S.C. 44709(f); 49 U.S.C. 46110 (2000 & Supp. I 2001). In those proceedings, the government has been making any classified or otherwise non-

releasable information on which the revocation decision was made available to the courts for *in camera* review.[1]

d. While petitioners' case was pending before the court of appeals, Congress enacted the Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111) (Vision 100 law), which now governs security-based pilot license revocations. That statute directs the FAA to suspend or revoke immediately any airman's certificate if the FAA "is notified by the Under Secretary for Border and Transportation Security of the Department of Homeland Security that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety," and if the Under Secretary requests that the order be given immediate effect. Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111(a)). Congress statutorily established appellate procedures for the certificate-revocation process for citizens. Pub. L. No. 108-176, § 601, 117 Stat. 2561-2562 (to be codified at 49 U.S.C. 46111(b)-(g)).[2] Congress did

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[1] In promulgating their regulations in January 2003, both the FAA and the TSA determined that the regulations—which "codifie[d] the fundamental and inherently obvious principle that a person who TSA determines poses a security threat should not hold an FAA-issued airman certificate," 68 Fed. Reg. at 3759—should be immediately issued to minimize potential security vulnerabilities. The court of appeals upheld the agencies' conclusion that good cause existed for "not offering advance public participation," in light of the agencies' "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001." Pet. App. A8. Petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

[2] The amendment also eliminated NTSB review of revocation decisions. Persons whose licenses have been revoked now may appeal

not impose any such requirements for the revocation of licenses held by aliens, however. See H.R. Conf. Rep. No. 334, 108th Cong., 1st Sess. 152 (2003) (the appeal rights for non-resident aliens are limited to those "procedures that [TSA] has already provided for them").

2. Petitioners are non-resident alien pilots from Saudi Arabia who are employed by Saudi Arabian Airlines and who previously held FAA-issued pilot certificates. Pet. App. A3. They used their certificates to fly foreign aircraft primarily between Saudi Arabia and Europe, as well as points in Asia and Africa. *Ibid.*; C.A. App. A191, A208. Petitioner Jifry had not piloted an aircraft to the United States since 1995, and petitioner Zarie had not piloted an aircraft to the United States since 2000. Pet. App. A3; C.A. App. A191, A208.

On January 24, 2003, the TSA Assistant Administrator for Intelligence issued an Initial Notification of Threat Assessment to each petitioner, stating that, "based upon materials available to [TSA] which I have personally reviewed, I have determined that you pose a security threat." C.A. App. A95; see Pet. App. A4. That same day, the FAA issued Emergency Orders of Suspension of petitioners' pilot licenses. Pet. App. A4.; C.A. App. A97-A102. Petitioners pursued their administrative appeal rights, 49 C.F.R. 1540.117(e), and requested that TSA provide copies of the materials upon which the Initial Notifications of Threat Assessment were based. Pet. App. A4. TSA provided petitioners with the material underlying its security threat assessment that could be released, but the majority of the material upon which TSA relied was withheld

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the FAA order directly to the court of appeals. Pub. L. No. 108-176, § 601(a), 117 Stat. 2562 (to be codified at 49 U.S.C. 46110).

because it is classified. *Ibid.* The TSA Deputy Administrator subsequently issued a final determination that petitioners pose a security threat, and the FAA revoked petitioners' pilot licenses. *Id.* at A5.

Petitioners appealed to the NTSB, which affirmed the revocation. See Pet. App. A17-A21; see also *id.* at A22-A25. The NTSB ruled that it lacked "jurisdiction to review the validity of TSA security threat assessments," *id.* at A18, and it accordingly confined its review to the question whether the FAA's revocation decision followed the appropriate procedure, *id.* at A18-A19; see *id.* at A28-A29.

3. The court of appeals affirmed, denying the alien pilots' petitions for review. Pet. App. A1-A16. The court first rejected petitioners' challenge to the validity of the regulations establishing the threat-assessment and license-revocation procedures, holding that "[i]t is self-evident that the regulations are related to the TSA's and FAA's goals of improving the safety of air travel." *Id.* at A8.

The court also held that substantial evidence supported the threat-assessment and attendant license-revocation decisions. In addition to submitting the materials underlying the threat assessment decision to the court of appeals *in camera*, the government submitted an unsealed affidavit from the TSA Deputy Administrator. See *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (where, on a petition for review, the public administrative record contains an insufficient explanation of agency action, the agency may submit, "either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary"). The court of appeals held that the record reviewed *in camera* and the public affidavit

"provide[] an adequate basis for the TSA's determination that [petitioners] each posed a 'security threat.'" Pet. App. A10 (quoting 49 C.F.R. 117(c)). The court explained that the TSA's judgment was properly based on "classified intelligence reports, combined with reports from the intelligence community that aircraft would continue to be used as weapons of terrorism, and consideration of the ease with which an individual may obtain access to aircraft in the United States once he or she has a pilot license." *Id.* at A10-A11 (internal quotation marks omitted).

Finally, the court of appeals rejected petitioners' due process challenge to the revocations. The court held that, even assuming that non-resident alien pilots enjoyed a property interest protected by the Fifth Amendment, petitioners "received all the process that they are due." Pet. App. A13. The court held, in particular, that the opportunity to file a written reply to the TSA's initial determination, to obtain independent *de novo* review of the administrative record by the Deputy Administrator of the FAA, and to have subsequent judicial review of the record provided sufficient protection for petitioners' interest (if any) in possessing FAA licenses to fly United States-registered aircraft, especially when weighed against the government's significant "security interests in preventing pilots from using civil aircraft as instruments of terror." *Id.* at A14.

ARGUMENT

1. Petitioners seek (Pet. 11-19) this Court's review of the court of appeals' holding that the threat-assessment and license-revocation proceedings comport

with due process. That claim does not merit further review for three reasons.

First, given how recently the regulations and administrative procedures were adopted, as well as Congress's recent enactment of legislation that generally revises the threat-assessment and license-revocation procedures, see Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111), review would be premature. The decision below represents the first court of appeals' decision to address the constitutionality of the regulatory proceedings, either before or after passage of the Vision 100 law in 2003. No other court of appeals has addressed the question. Nor are any other cases involving alien pilots pending in any federal court of appeals.[3]

Second, and relatedly, there is no conflict in the circuits on the question of the regulatory scheme's constitutionality. Petitioners' argument (Pet. 14-17) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045 (1995), is without merit. That case concerned the constitutionality of procedures used to deny legalization to and thus to deport aliens who were physically present in the United States. The case did not involve the constitutionality of regulatory procedures employed solely to deny aliens in foreign countries a limited occupational privilege. The constitutional "distinction between an alien who has

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[3] A case challenging the separate regulations governing the revocation of pilot licenses held by citizens and resident aliens was dismissed as moot by the D.C. Circuit following Congress's enactment of the Vision 100 legislation. See *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184 (2004).

effected an entry into the United States and one who has never entered runs throughout [the] law." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001).[4]

Petitioners' contention (Pet. 18-19) that the D.C. Circuit's opinion in this case conflicts with that circuit's rulings in earlier cases does not merit this Court's review. Any such intra-circuit conflict could be addressed by the D.C. Circuit en banc. Indeed, petitioners sought rehearing en banc in this case, but the court of appeals denied their petition. Pet. App. A52. The court's decision in this case, moreover, fully comports with prior circuit precedent.[5]

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[4] See also *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (rights and privileges accorded resident aliens are denied to those who have not effected an entry); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"; an alien who has not entered "stands on a different footing"); cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

[5] See *National Council of Resistance of Iran* v. *Department of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (in designating foreign terrorist organizations under the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. 1189, the State Department must "afford to the entities under consideration notice [of] the designation," but, "where earlier notification would impinge upon the security and other foreign policy goals of the United States," the agency may provide "this notice after the designation"); see also *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) (the notice of designation as a foreign terrorist organization need not include classified information); *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1242

Third, the decision of the court of appeals is correct. While that court assumed, for purposes of its decision, that petitioners enjoyed the protections of the Due Process Clause (see Pet. App. A13), petitioners do not, in fact, assert any property interest that is protected by the Fifth Amendment. Non-resident aliens have no legally protected interest in obtaining a pilot license from the FAA. Indeed, non-resident aliens have no due process right to be in the United States at all, let alone to obtain a highly regulated conditional privilege or benefit from the government. "The Bill of Rights is a futile authority for the alien" who has never been admitted "to these shores." *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).[6]

(D.C. Cir. 2003) ("[D]ue process require[s] the disclosure [to petitioners] of *only* the unclassified portions of the administrative record * * *. [T]he Executive Branch has control and responsibility over access to classified information and has a 'compelling interest' in withholding national security information from unauthorized persons.") (quoting *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988)).

[6] See also *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950) (rejecting proposition that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 293 (1904) (aliens outside the United States "cannot assert

Accordingly, for non-resident aliens like petitioners, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien [who has not effected an] entry is concerned." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). That is because "any policy toward aliens"—including assessing the threat they may pose to national security and allocating professional licenses to them—"is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades*, 342 U.S. at 588-589). Deference to the judgments and processes implemented by the Political Branches in this context is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Klein-dienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (citation omitted).

Although the legal effect of the FAA's decision precludes petitioners only from operating United States-registered civil aircraft, petitioners object that, as a practical matter, the revocation of their licenses precludes them from piloting airplanes in their home or foreign countries. Pet. 3 n.1, 8, 11. That may be, but it

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the rights in general obtaining in a land to which they do not belong as citizens or otherwise").

does not change the constitutional analysis. If foreign governments choose to attach consequences to the regulatory actions of the United States Government, that is a matter for petitioners to take up with those foreign governments. The Fifth Amendment does not protect the rights of aliens on foreign soil to obtain privileges from foreign governments.

In any event, as the court of appeals correctly held, petitioners received all the process that they were due "under the circumstances of this sensitive matter of classified intelligence in the effort to combat foreign terrorism." Pet. App. A15 (citation omitted). Petitioners were afforded notice, an opportunity to be heard, and independent judicial review of the FAA's revocation decision.[7] Those procedures amply vindicate any constitutional interest that petitioners, as non-resident aliens, may have—an interest that "pales in significance" when compared to the United States' "obvious and unarguable" interest in ensuring the Nation's security. *Id.* at A14 (citations omitted).

2. Petitioners' contention (Pet. 20-25) that the court of appeals' decision "[e]viscerates" the protections afforded by the Administrative Procedure Act, 5 U.S.C. 555, 702, 706, and the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, likewise does not merit this Court's review. Petitioners cite no case holding that either of those statutes afforded greater protection to non-resident alien pilots. In any event, Congress is free,

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[7] Petitioners' argument (Pet. 18-19) that classified information may not be used in proceedings affecting the interests of non-resident aliens is squarely foreclosed by *Mezei*. See 345 U.S. at 214-215 (exclusion and resultant detention of non-resident alien may be undertaken, pursuant to agency regulations, "without a hearing," and the Attorney General need not "disclose the evidence upon which that determination rests").

through the enactment of subsequent and particularized legislation, to restrict the operation of general laws, especially when necessary to respond to emergent threats to national security. Congress's recent passage of the Vision 100 law, which now regulates the revocation of pilots' licenses, effectively ratified the very regulatory processes that petitioners challenge. As the court of appeals explained, that new law "now provides an express statutory authorization for the automatic revocation that was previously predicated on the regulations alone," and the statute "compel[s] the FAA to honor the TSA's notification and [to] take immediate action against the pilots' certificates." Pet. App. A9. In addition, the amended law "makes no provision for NTSB review even for citizens, and the Conference Report states that non-resident aliens 'have the right to the appeal procedures that [TSA] has already provided for them.'" *Ibid.* (quoting H.R. Conf. Rep. No. 334, *supra*, at 152).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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