PARKER & McCONKIE
JAMES W. McCONKIE (Bar # 2156)
BRADLEY H. PARKER (Bar # 2519)
Attorneys for Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Telephone: (801) 264-1950
Facsimile (801)
E-mail: jwmcconkie@utahlawhelp.com
E-mail: bparker@utahlawhelp.com

COUNCIL ON AMERICAN-ISLAMIC RELATIONS
LENA F. MASRI (DC: 1000019)*
GADEIR I. ABBAS (VA: 81161)*
Attorneys for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787
Facsimile: (202)
E-mail: lmasri@cair.com
E-mail: gabbas@cair.com

**Licensed in VA, not in Utah.*
A motion has been filed to admit Lena Masri and Gadeir I. Abbas to appear in the matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

YUSSUF AWADIR ABDI,	)	
	)	
Plaintiff,	)	**Case No. 2:17-cv-00622**
	)	**Hon. Dee Benson**
v.	)	
	)	**** EXPEDITED HEARING**
ANDREW MCCABE, Acting Director of the Federal Bureau of Investigation, in his official capacity, et al.,	)	**REQUESTED ****
	)	
	)	

Defendants.)

PLAINTIFF'S EX PARTE MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

NOW COMES Plaintiff Yusuf Awadir Abdi, by and through his attorneys, by and through his attorneys, CAIR National Legal Defense Fund, Inc. ("Council on American-Islamic Relations" or "CAIR") and Parker & McConkie, and hereby moves this Honorable Court for an Emergency Ex Parte Temporary Restraining Order and/or Preliminary Injunction pursuant to Fed. R. Civ. P. 65, in the form requested in his Complaint [Dkt. 1], to prevent irreparable injury to his fundamental rights and interests. In support of his Emergency Motion, Plaintiff relies on the pleadings and Brief in Support filed concurrently.

WHEREFORE, for the reasons discussed in the accompanying Brief, Plaintiff respectfully requests this Honorable Court **GRANT** his Ex Parte Motion for an Emergency Temporary Restraining Order and/or Preliminary Injunction in the form attached, and grant costs, attorneys' fees, and any other relief it deems just and equitable.

Dated June 16, 2017

Respectfully submitted,

PARKER & McCONKIE

BY: /s/ James W. McConkie
JAMES W. MCCONKIE
Utah State Bar # 2156
Attorney For Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Phone: (801) 264-1950

PARKER & McCONKIE

BY: /s/ Bradley H. Parker
BRADLEY H. PARKER
Utah State Bar # 2519
Attorney For Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Phone: (801) 264-1950

COUNCIL ON AMERICAN-ISLAMIC RELATIONS

BY: /s/ Lena Masri
LENA F. MASRI (DC: 1000019)*
Attorney for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787

COUNCIL ON AMERICAN-ISLAMIC RELATIONS

BY: /s/ Gadeir Abbas
GADEIR I. ABBAS (VA: 81161)*
Attorney for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787

**Licensed in VA, not in Utah. A motion has been filed to admit Lena Masri and Gadeir I. Abbas to appear in the matter.*

Counsel for Plaintiff

PARKER & McCONKIE
JAMES W. McCONKIE (Bar # 2156)
BRADLEY H. PARKER (Bar # 2519)
Attorneys for Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Telephone: (801) 264-1950
Facsimile (801)
E-mail: jwmcconkie@utahlawhelp.com
E-mail: bparker@utahlawhelp.com

COUNCIL ON AMERICAN-ISLAMIC RELATIONS
LENA F. MASRI (DC: 1000019)*
GADEIR I. ABBAS (VA: 81161)*
Attorneys for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787
Facsimile: (202)
E-mail: lmasri@cair.com
E-mail: gabbas@cair.com

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	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF HIS EX PARTE MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

After spending years on one component of the federal government's terrorist watch list, Defendants have moved Imam Yussuf Awadir Abdi, an American citizen, to a different component of the same list. This component of the terrorist watch list is its most punitive part: the No Fly List. The No Fly List does what its name suggests. It prevents even American citizens who have not been charged, arrested or convicted with a crime, and who are often not even under any type of investigation, from flying through United States airspace.

Unfortunately for the Plaintiff, the federal government did not place him on the No Fly List until after he traveled overseas to Kenya to reunite with his wife and children—all of whom are either citizens or otherwise have valid permission to enter and reside in the United States—leaving this American citizen and his family effectively exiled abroad. In exiling Imam Abdi, the federal government knows that it is making none of us any safer. Indeed, Defendants—when prior similar conduct has been publicly revealed and challenged in court—have always allowed American citizens on the No Fly List to fly home. But for reasons unknown to Imam Abdi, in this instance, the federal government continues to prevent him from flying home to the United States with his wife and children.

This motion seeks to address this emergency matter by compelling the government to allow Imam Abdi to board a plane on which he has a ticket and that leaves for the United States in 7 hours. The United States Constitution and the equities of this situation demand this outcome.

STATEMENT OF RELEVANT FACTS

Through extra-judicial and secret means, the federal government is ensnaring individuals into an invisible web of consequences that are imposed indefinitely and without recourse as a result of the shockingly large federal watch list that now include hundreds of thousands of individuals. [Dkt. 1 at 4]. Significantly, the federal watch list disproportionately targets American Muslims. [Dkt. 1 at 98].

It comes as no surprise, then, that government records show that Dearborn, Michigan—which is 40 percent Arab—is disproportionately represented on the federal watch list. [Dkt. 1 at 102]. In fact, Dearborn is among the top five cities in the country, alongside Chicago, Houston, New York, and San Diego, represented on the federal watch list. *Id.* Due to Dearborn's significant population of Muslims, it has also earned a reputation as the "Muslim Capital of America." [Dkt. 1 at 103].

Plaintiff Yussuf Awadir Abdi (hereinafter "Imam Abdi") is a Muslim religious leader and Imam of Madina Masjid Mosque in Salt Lake City, Utah. [Dkt. 1 at 25]. Imam Abdi, a United States Citizen, was wrongfully designated on the federal terrorist watch list and falsely stigmatized as a "known or suspected terrorist" by Defendants. [Dkt. 1 at 25-53]. He was not provided notice of the factual basis for his placement on the watch list. [Dkt. 1 at 49]. Nor was he given notice of the deprivation of his liberty interests or violation of his constitutional rights. [Dkt. 1 at 50]. Most importantly, he has never been arrested, charged or convicted of a terrorism-related offense. [Dkt. 1 at 4, 72, 138, 158].

Some time in 2014, the federal government placed Imam Abdi on the Selectee List component of the federal terror watch list, having secretly concluded that officials had a

"reasonable suspicion" that Imam Abdi was "associated with terrorism." [Dkt. 1 at 26]. Imam Abdi's status on the Selectee List is evident because, for approximately the last three years, every time he travels by air, he has been unable to check in to his flights online or at the kiosks stationed at the airports. [Dkt. 1 at 27]. Rather, he is directed to check in manually with an airline representative in order to print his boarding pass. [Dkt. 1 at 28]. The airline representative, after pulling up his name on the computer system, would contact the Department of Homeland Security in order to obtain clearance so that he could fly. [Dkt. 1 at 29]. Once clearance from the Department of Homeland Security is obtained, the airline representative would then print his boarding pass, which would be stamped with the "SSSS" designation, indicating that he has been designated as a "known or suspected terrorist." [Dkt. 1 at 30]. Imam Abdi was then subjected to routine secondary inspections, prolonged searches and questioning every time he traveled by air. [Dkt. 1 at 31].

However, on June 14, 2017, Imam Abdi appeared at Jomo Kenyatta International Airport in Nairobi, Kenya to board a commercial flight back to his home in the United States. [Dkt. 1 at 34]. Because his visa petitions that he filed for his wife and two of his children had just been approved, Imam Abdi had traveled to Kenya to bring his wife and five children with him to the United States. His remaining three children are United States Citizens. [Dkt. 1 at 35]. Imam Abdi once again was unable to check in at a kiosk stationed at the airport, and presented himself at the Qatar Airlines counter. [Dkt. 1 at 36-37]. Although his wife and children were able to print their boarding passes, the Qatar Airlines representative told Imam Abdi that the United States would not allow him to board his flight in order to return to his home in the United States. [Dkt. 1 at 38].

Imam Abdi rescheduled his flight to the United States to leave later this evening on this date, June 16, 2017. [Dkt. 1 at 41]. Upon information and belief, Imam Abdi was upgraded from the Selectee List to the No Fly List after he arrived in Kenya. [Dkt. 1 at 42]. As a result, he was extrajudicially exiled from his country of citizenship, the United States. [Dkt. 1 at 43]. Moreover, because he remains on the No Fly List, he remains unable to board a flight and return to his home in the United States. [Dkt. 1 at 53]. In the event that Imam Abdi is not removed from the No Fly List, he will be unable to board his flight rescheduled for tonight back home to the United States. [Dkt. 1 at 44].

As a result of being denied boarding, Imam Abdi was unable to return home in time for the last ten nights of the holy month of Ramadan, the most important and blessed nights of Ramadan, when he is expected to lead prayers throughout each night at his mosque. The last ten nights of Ramadan began on the night of June 15, 2017. [Dkt. 1 at 45]. Ramadan is a holy month of spirituality and devotion observed by Muslims worldwide, whereby Muslims fast from sunrise to sunset. [Dkt. 1 at 46]. Moreover, Imam Abdi is designated to lead a group of Muslims to perform the Hajj, or religious pilgrimage in Saudi Arabia, which is scheduled to begin on August 30, 2017. [Dkt. 1 at 47]. In the event Imam Abdi is not removed from the No Fly List, he will be unable to travel to Saudi Arabia to perform the Hajj, nor will he be able to lead the group that he is scheduled to lead. [Dkt. 1 at 48].

The watch list has two primary components: the selectee watch list and the No Fly list. [Dkt. 1 at 55]. Persons on the selectee watch list are systematically subject to extra screening at airports and land border crossings, and often find "SSSS" on their boarding passes printed by airline employees which is marked to indicate a passenger's watch list status as a "known or

suspected terrorist" to airline employees and screeners. *Id*. On the other hand, persons on the No Fly List, including Plaintiff, are prevented from boarding flights that fly into, out of, or even through United States airspace. *Id.* Defendants have utilized the watch list, not as a tool to enhance aviation and border security, but as a bludgeon to coerce American Muslims into becoming informants or forgoing the exercise of their rights, such as the right to have an attorney present during law enforcement questioning. [Dkt. 1 at 100].

Upon information and belief, Defendants disseminated the records of Plaintiff from their terrorist watch list to other government agencies, including the TSA for use by airlines in pre-screening Plaintiff, and CBP for use in screening Plaintiff when attempting to return to the United States. [Dkt. 1 at 57]. Upon information and belief, Defendants' intention in disseminating watch list records, including that of Plaintiff, as widely as possible, is to constrain his movements, not only within the United States, but abroad as well. [Dkt. 1 at 58-59]. As a result, Plaintiff, as a result of being designated as a "known or suspected terrorist," is presumed to be dangerous and a violent menace, and is treated as such. [Dkt. 1 at 6]. Additionally, Defendants disseminate the federal watch list to both government authorities and private corporations and individuals with the purpose and hope that these entities and/or individuals will also impose consequences on those individuals Defendants have listed, including Plaintiff. [Dkt. 1 at 62]. In fact, many listees' ability to access the financial system was imperiled as a result of Defendants' actions in designating them as "known or suspected terrorists" and disseminated the false stigmatizing label to financial institutions. [Dkt. 1 at 63]. As a result, banks have closed the bank accounts of individuals listed on the federal watch list and financial companies have declined to allow these listed individuals to make wire transfers. [Dkt. 1 at 64].

The federal government, through Defendants, also disseminates its federal watch list to state and local police officers which allows those officers to query the names of persons, if for example, the listed individual is pulled over for routine traffic violations. [Dkt. 1 at 71]. Disseminating the federal watch list to state and local police officers creates a dangerous situation insofar as the federal watch list effectively directs state and local officers to treat thousands of Americans charged or convicted with no crime yet listed as a "known or suspected terrorist" and as extremely dangerous. [Dkt. 1 at 72]. In fact, with the advent and deployment of automatic license plate readers by police departments across the country, local and state authorities have relied heavily upon a driver's watch list status as the basis of a traffic stop. [Dkt. 1 at 73].

We also know that the federal government utilizes guilt-by-association as a basis for watch list inclusion. [Dkt. 1 at 87]. For example, the immediate relative of listed persons can be listed without any derogatory information—other than the bonds of family. [Dkt. 1 at 87]. Nonetheless, such designation suggests that the immediate relative is him or herself engaged in nefarious activities. *Id.*

PRELIMINARY INJUNCTION STANDARD

A party seeking a preliminary injunction must prove that all four of the equitable factors weigh in its favor: "(1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Sierra Club, Inc. v. Bostick*, 539 Fed. Appx. 885, 888-889 (10th Cir. 2013); *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067 (10th Cir. 2009); see

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Irreparable injury occurs "when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Moreover, "an injury is not speculative simply because it is not certain to occur. An 'irreparable harm requirement is met if a [movant] demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)).

In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

ARGUMENT

I. Irreparable injury will be suffered unless an injunction is issued.

In an action that sits outside of the accumulated traditions of the United States and that is flatly against the federal government's own policy, Defendants have and continue to obstruct Plaintiff's ability to return to his home by placing him on the No Fly List. Accordingly, Plaintiff seeks a temporary restraining order and/or preliminary injunction compelling Defendants to

allow him to fly from Kenya back to his country of citizenship, to his home in Utah, without delay.

Plaintiff has already suffered and will continue to suffer the irreparable injury of involuntary exile from his country of citizenship in the absence of preliminary relief. Plaintiff's injury is presumed irreparable because the court is "unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). See also *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (affirming a grant of preliminary relief and holding that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986) (finding violation of Fourth Amendment rights to cause irreparable harm); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (finding alleged violation of Fourth Amendment rights to demonstrate irreparable harm); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (affirming a grant of preliminary relief and finding alleged privacy violation to constitute an irreparable harm). Thus, the ongoing involuntary exile that Defendants have placed Plaintiff in constitutes irreparable injury as a matter of law.

If the Court does not enjoin Defendants' actions in preventing Plaintiff from boarding a flight back to his country of citizenship, he will continue to suffer irreparable harm, including violations of his rights under the Fifth Amendment and the Administrative Procedure Act. As the Eleventh Circuit has held, a showing of a likelihood of a constitutional deprivation amounts to irreparable harm for the purposes of a preliminary injunction. See *Siegel v. LePore*, 234 F.3d

1163, 1176 (11th Cir. 2000). A demonstrated violation of certain constitutional rights satisfies the irreparable harm requirement without any further showing. See, e.g., *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) ("It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." (internal quotation marks and citation omitted)). *GeorgiaCarry.Org v. United States Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1378-1379 (N.D. Ga. 2014).

II. Plaintiff has a substantial likelihood of success on the merits.

A. The United States Constitution's substantive due process clause confers a fundamental right of movement that, while unenumerated, undeniably exists.

The right of movement is deeply ingrained in our legal history and traditions. As the Eastern District of Virginia observed in a similar No Fly List case, "the general right of free movement is a long recognized, fundamental liberty." *Gulet Mohamed v. Eric R. Holder, Jr.*, et al. Case No. 11-cv-00050 (2011). This observation is consistent with what the United States Supreme Court declared almost 60 years ago, "[f]reedom of movement is basic to our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958). The United States Supreme Court reiterated the point a decade after *Kent*, explaining that it "long ago recognized that the nature of our federal union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). This language is unequivocal.

But if the Court sets aside the clarity of these statements and opts to conduct the analysis anew, this Court will arrive at the same outcome. To determine whether Plaintiff's

freedom of movement is protected by the Fifth Amendment's substantive due process guarantees, the United States Supreme Court requires courts to follow its "established method of substantive-due-process analysis" which has "two primary features." *Glucksberg*, 521 U.S. at 721. The first step is to "carefully formulat[e] the interest at stake." *Id.* at 71. The second step is to determine whether the freedom in dispute is among those "fundamental rights and liberties" rooted in our country's history. *Id.* at 720-721. Because the formulation of the interest at stake requires this Court to determine "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified," both steps of the *Glucksberg* analysis are contained within the historical and precedential review that follows. *Michael H. v Gerald D.*, 491 U.S. 110, 127 (1989).

i. History reflects that the right of movement is inherent to the Due Process Clause.

The historical examination *Glucksberg* requires this Court to make is, by necessity, broad. For example, in *Glucksberg*, the United States Supreme Court analyzed the present and past laws of the fifty states, as well as laws of other countries, in order to frame its historical examination. *Id*. at 710. In this case, this Court should consider the history of the right of movement between the states, as well as between this country and others, in framing its examination.

This examination of the country's traditions is also meant to be probing. In *Glucksberg*, the Supreme Court analyzed centuries-old historical treatises, changes in the law between now and the founding of the colonies, and evidence of social attitudes in the colonies. *Id*. at 711-715. In this case, this Court should conduct an in-depth treatment of the history of the right of movement as well as historical documents and treatises—such as the Magna Carta and the Articles of

Confederation as well as foundational treatises—relevant to the right of movement. This Court should also note the evolution of our law, particularly the transition away from feudalism that paved the way for the New World's colonization.

An examination of the country's traditions conducted in accordance with *Glucksberg* would reveal that the right of movement is firmly embedded within the American tradition. To begin with, the desire for more freedom of movement is what led many of our forebears to embark on the treacherous journey from Europe to the New World. Many English colonists were motivated by "[t]he unhappiness and frustration caused by the various restrictions on freedom of movement in England." Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787* at 166 (1956). While in England, these same colonists could only move from town to town with permission from various authorities. *Id*. at 164. Religious discrimination in England also motivated some colonists and amplified the deleterious effect of movement restrictions. *Id*. at 175.

In fact, it was the willingness of English authorities to protect the right of movement that is in no small part responsible for the emergence of English authority in North America, rather than Spanish or French. As a general matter, this enlightened attitude toward the right of movement prevailed between the English colonies of the New World as well. Men were free to move "across boundaries wherever their work called them." *Id.* 181. When the colonies gained independence, their representatives codified the right of movement within the Articles of Confederation. *Id.* at 185. "[T]he free inhabitants of each of these States…shall [have] free ingress and regress to and from any other State." Articles of Confederation, Article IV. And while the right of movement was not enumerated in the United States Constitution,

this is because the Founders saw that the right "was already embodied elsewhere" in the text. *Id*. The existence of the right of movement in the United States Constitution, with a presence that saturates the entire document but especially the Bill of Rights' penumbras, is beyond dispute and is established below.

ii. The text of the United States Constitution and an analysis of the Bill of Rights' penumbras reflects that the right of movement is inherent to the Due Process Clause.

The number of enumerated rights that presume a freedom of movement is an indication that, although the right of movement is unenumerated, the United State Constitution confers it. To begin with, it is beyond dispute that the text of the United States Constitution has been interpreted as protecting freedoms not specifically enumerated. In *Griswold v. Connecticut*, for example, the United States Supreme Court recognized an unenumerated fundamental right: the right to privacy. *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965). The Court's process of arriving at this recognition began with an examination of the country's legal traditions and concluded that certain fundamental rights can be inferred from existing traditions and the Constitution's text. *Id*. at 482-484 ("[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras").

The manner that *Griswold* uncovered the constitutional right to privacy is germane to the present matter. The United States Supreme Court identified the right of privacy within the "penumbras" of the Bill of Rights by charting recognized fundamental rights which tacitly include or require the right of privacy to be constitutionally guaranteed. *Id*. For example, the Court analyzed a number of First Amendment cases dealing with "the freedom to associate and privacy in one's associations." *Id*. at 483. That right did not appear explicitly in the First

Amendment, but still existed as a "peripheral First Amendment right." *Id.* at 483.

The Court mentioned other explicit constitutional guarantees which arguably include a privacy component: the Third Amendment, prohibiting quartering of soldiers, the Fourth Amendment, prohibiting searches and seizures, the Fifth Amendment prohibiting self-incrimination, and the Ninth Amendment reserving unenumerated rights to the People. *Id.* at 484. These amendments, along with the freedom to associate found in the First Amendment, create "zones of privacy." *Id.* These "zones of privacy" point to the existence of a more fundamental and basic right of privacy, a right which itself gives "life and substance" to the United States Constitution's explicit guarantees. *Id.*

Like the right of privacy in *Griswold*, the right of movement at issue in this case is basic and far-reaching in nature—the right of movement is simply necessary to the practicing of democracy and the functioning of a healthy society. Just as the United States Supreme Court in *Griswold* recognized "zones of privacy" in threading together various constitutional guarantees, this Court should recognize zones of movement emanating from various constitutional guarantees. It is clear from this nation's legal traditions that such a right exists, and the "penumbras" of the Bill of Rights suggest and imply that right as well.

Article IV of the United States Constitution entitles citizens of one state to the privileges and immunities of all the states. U.S. CONST. art. IV. Article IV clearly recognizes a zone of movement because it guarantees equal treatment for citizens moving from one state to another state, a guarantee that would be unnecessary if the Founders did not consider such movement essential to the healthy functioning of the United States.

Article I of the United States Constitution gives Congress the ability to regulate interstate

commerce, and commerce with foreign states. U.S. CONST. art. I. This authorization anticipates a zone of movement as well: the movement of goods and people between states and between the United States and other countries. The First Amendment, which guarantees the right to assemble, implies a zone of movement: citizens must move between states, and from other countries to this country, in order to freely assemble. The First Amendment also guarantees the right to free exercise of religion. This guarantee implies a separate zone of movement: for many citizens, movement is a necessary component of free exercise of religion. Aside from congregating regularly with members of their faith at a site of worship, many religions encourage pilgrimage in foreign countries. For example, Catholics travel to the Vatican, Jews to Israel, and Muslims to Mecca.

The Fourth Amendment protects against unreasonable searches and seizures. This protection also recognizes a zone of movement: citizens who have not been lawfully stopped or arrested must be released from custody, and are free to move as they please. U.S. CONST. amend. IV. Similarly, citizens are not required to consent to searches, and may move themselves or their possessions, unless a warrant issues.

More broadly, the Ninth Amendment reserves unenumerated rights to the People. U.S. CONST. art. IX. Put differently, the fact that the right of movement is not enumerated does not foreclose on the existence of that right. Rather, the historical record makes clear the right of movement is so fundamental and basic that it was not necessary to dedicate explicit text to the right. Indeed, our constitutional scheme—from the Commerce Clause to the Bill of Rights, from federalism to the Citizenship Clause—presupposes the existence of a right of movement.

Simply put, these various and explicit constitutional guarantees point to an underlying

right: the right of movement. The zones of movement found within these guarantees extend from that underlying right. The zones of movement, when considered in tandem with our nation's constitutional scheme and history, provide clear evidence of the Founders' intent to enshrine the right of movement as a part of the Constitution.

iii. The international law that our United States Constitution incorporates by reference reflects that the right of movement is inherent to the Due Process Clause.

It is not only the history of the United States and the text of its Constitution that reveal a right of movement. The international law which our constitutional scheme incorporates does so as well. As the United States Supreme Court explained in *The Paquete Habana*, "[customary] [i]nternational law is part of our law" and "must be ascertained…as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

In determining what freedoms are protected by customary international law, the Second Circuit, for example, relied on the contents of the Universal Declaration on Human Rights (the "Universal Declaration"), explaining that adoption of the Universal Declaration was made "without dissent by the General Assembly." *Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980). The Second Circuit noted that United Nations declarations are particularly useful articulations of international law "because they specify with great precision the obligations of member nations under the Charter." *Id.* Likewise, the Second Circuit has also found that even agreements that are not self-executing, such as the International Covenant on Civil and Political Rights (the "ICCPR"), "are appropriately considered evidence of the current state of customary international law." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009).

Assessing these two international agreements—the Universal Declaration and the ICCPR—it is telling that both include an explicit right of movement. The Universal Declaration conceives of the right without equivocation: all people have "the right to freedom of movement…[as well as] the right to leave any country, including his own, and to return to his country." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 13 (Dec. 10, 1948). The ICCPR's articulation of the right of movement is essentially the same. Everyone has the "right to liberty of movement…[and] shall be free to leave any country, including his own…[and] shall not be arbitrarily deprived of the right to enter his own country." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, art. 12.1–12.4. The fact that the right of movement is enumerated in two of the cornerstone agreements of customary international law adds further confirmation to the revered status of this right within our own legal traditions, which reflect and incorporate international law.

iv. The No Fly List interferes with Plaintiff's right of movement.

Defendants' inclusion of Plaintiff on the No Fly List violates his right to movement because it "significantly interferes with the exercise of a fundamental right." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). In *Zablocki*, Wisconsin passed a statute that burdened the right to marry. *Id.* at 375. The statute conditioned access to the right to marry on an individual's ability to comply with legal obligations to support offspring not in his custody. *Id.* The Court noted that the statute's burden varied among different groups of individuals with unsatisfied support obligations. Bearing the heaviest burden, the destitute were "absolutely prevented" from exercising their fundamental right to marry. *Id.* at 387. The court also found

that individuals, whose financial outlook preserved some discretion in the matter, may still be "sufficiently burdened" by the statute to "forgo their right to marry." *Id.* Finally, the court found that even those who would pay the support obligations and receive a marriage license still suffer a "serious intrusion into [a] freedom… [the Court has] held…to be fundamental." *Id.* The court found that in all cases—irrespective of whether the statute actually prevented someone from exercising the right to marry—the law "interfered with the exercise of a fundamental right." *Id.* at 388.

The federal government's watch list replicates the same impermissible dynamics declared unconstitutional in *Zablocki*. Though still technically possible, Plaintiff is unable to travel overseas or even across our country. The No Fly List prevents Plaintiff from attending professional gatherings, going on vacation, performing their religious pilgrimage, among numerous other constraints. Indeed, the federal government's No Fly List completely prevents an entire class of citizens who are too elderly, feeble, or destitute to travel by means other than air travel from exercising their right of movement. There are many grandmothers and grandfathers who, though they may not be able to traverse North America by land, could do so by plane. In reality, and in spite of the government's arguments to the contrary, it is an inescapable fact that air travel is a facilitator of movement. Without air travel, a citizen's right of movement is constrained—the No Fly List reduces the ability of citizens the right.

Even if this Court considers the effect of the federal government's actions to be the lesser intrusion of forcing Plaintiff to take a circuitous returning route over land and sea, it would still constitute, under *Zablocki*, an impermissible "serious intrusion" into Plaintiff's right of movement. *Id.* at 387. This is because the condition Defendants place on Plaintiff's

fundamental right— that he may, for instance, return to the United States from abroad or travel to a state but not on an airplane—is more of an obstacle than the condition *Zablocki* found unconstitutional. Defendants' actions impose on Plaintiff the same impermissible obstacle in *Zablocki*—a monetary outlay that was previously unrelated to the exercise of the right—in addition to a substantial increase in the amount of time and physical endurance Plaintiff would need to exercise his right of movement. Defendants' inclusion of Plaintiff on the No Fly List creates a substantial obstacle to Plaintiff exercising his right of movement.

B. Because the No Fly List interferes with the exercise of a fundamental right, strict scrutiny applies.

Strict scrutiny is "essential" where government action interferes with "basic civil rights." *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942). When an asserted right is deemed "fundamental," that interest is "entitled… to the protection of strict scrutiny judicial review of the challenged legislation." *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999). The Due Process Clause provides "heightened protection against government interference with certain fundamental rights," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), and interference with a Due Process fundamental right "warrants the application of strict scrutiny." *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014).

The United States Supreme Court has only ever applied strict scrutiny in cases dealing with fundamental rights. See, e.g., *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. at 541 (fundamental right under Equal Protection Clause), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (fundamental right of household decisions under Due Process Clause), *Zablocki v. Redhail*, 434 U.S. 374 (1978) (fundamental right of marriage under Due Process Clause). See

also, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

As *Mohamed* explained, after a discussion that situated the right of movement within the substantive due process protections announced in *Kent*, the No Fly List implicates the fundamental right of movement. ("The general right of free movement is a long recognized, fundamental liberty" and "[a]t some point, governmental actions taken to prevent or impede a citizen from reaching the border infringe upon the citizen's right to reenter the United States."). *Gulet Mohamed v. Eric R. Holder, Jr.*, et al. Case No. 11-cv-00050 (2011), Dkt. 189, Page ID # 194; Dkt. 70, Page ID #1099-1100. Strict scrutiny must apply because it is necessary to provide the "heightened protection" described by the United States Supreme Court in *Washington v. Glucksberg*. 521 U.S. at 720.

Thus, the No Fly List is illegal unless it is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

v. The No Fly List fails strict scrutiny because it is not narrowly tailored.

A regulation which burdens fundamental rights must be narrowly tailored to further compelling governmental interests. This requirement ensures such regulations are "specifically designed and narrowly framed to accomplish" the purpose underlying the regulation. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (internal quotation marks and citation omitted). The narrow tailoring analysis essentially asks whether the regulation at issue applies to all and to only relevant conduct as "evidenced by factors of relatedness between the regulation and the stated governmental interest." *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). A regulation is not narrowly tailored if the regulation is underinclusive. An

underinclusive regulation leaves "significant influences bearing on the interest unregulated." *Id.* Similarly, a regulation is not narrowly tailored if the regulation is overinclusive. An overinclusive regulation "sweep[s] too broadly." *Id.*

The government relies on two interests to justify its use of the No Fly List. The governing statute, 49 U.S.C. 114(h), invokes these interests disjunctively by authorizing the TSA to prevent, take action against, or notify law enforcement of "individuals on passenger lists who may be a threat to civil aviation *or* national security" from boarding airplanes. 49 U.S.C. 114(h)(3)(A) (emphasis added). Where the government invokes two interests in justifying a law that interferes with fundamental rights, the United States Supreme Court has analyzed the interests separately. *First Nat. Bank v. Bellotti*, 435 U.S. 765, 788-795 (1978). In order to be narrowly tailored, the watch list must neither leave unregulated "significant influences bearing on" aviation security and national security nor "sweep too broadly" by affecting conduct that does not bear on those interests. *Id.* at 788-795.

a. <u>The No Fly List is underinclusive.</u>

Government action can be underinclusive by not regulating significant influences bearing on the interests at issue in at least a few ways. First, it is possible that the government action produces results adverse to governmental interests. Such action would be clearly underinclusive. It would magnify harmful influences bearing on compelling governmental interests rather than limit those influences. Second, government action may incompletely regulate harmful conduct bearing on the interest. Laws of this nature would be underinclusive if the unregulated conduct is significant with regard to the law's underlying purpose. Third, the regulation at issue inadequately addresses the conduct relevant to the stated governmental

interest. Government action such as this would be underinclusive because the regulated conduct would continue unabated notwithstanding the government's interference with a fundamental right. The No Fly List is underinclusive for each of these three reasons.

First, the No Fly List produces results adverse to national security and is underinclusive as a result. The watch list requires the government to disclose its investigative interest in suspected terrorists who attempt to fly or travel across the border. In *Mohamed*, the Government freely admits that disclosure of investigative interest actively harms national security. *Gulet Mohamed v. Eric R. Holder, Jr*., et al. Case No. 11-cv-00050 (2011)), United States District Court, Eastern District of Virginia, Case No. 11-cv-00050 (2011), Dkt. 17 at Ex 5 – Steinbach Decl., ¶ 13. The Government offers multiple reasons as to why this disclosure is harmful: the disclosure could enable evasion by the subject, endanger law enforcement agents and encourage a subject to accelerate plans for an attack. *Id.* at ¶ 13-14. Unless a particular individual who is considered a suspected terrorist poses a discrete threat to aviation security, the No Fly List actually works against national security by enabling harmful conduct unassociated with air travel. Similarly, an individual who attempts and succeeds on boarding an airplane would know that they are not on a watch list. If that individual was actively planning a terrorist operation, that piece of knowledge would be an invaluable assurance. Put differently, the existence of the watch list provides would-be terrorists the opportunity to determine to some extent whether the federal government has an investigative interest in them or others, and allow them to strategize accordingly.

This adverse effect is an independent reason to conclude the law is not narrowly tailored. In *First Nat. Bank v. Bellotti*, the Supreme Court rejected a law that infringed on a

fundamental right because the law adversely affected the compelling interests it was meant to serve. *First Nat. Bank v. Bellotti*, 435 U.S. 765, 788-795 (1978). The law at issue purported to limit corporate contributions in voter referendums to preserve individual voter participation, but such corporate contributions could also enhance voter participation. *Id.* Here, the Government purports to improve national security by preventing suspected terrorists from boarding, but also admits that doing so could harm national security in several ways. Like the *Bellotti* case, by the federal government's own logic, the watch list does not serve the interests at which it is aimed; in fact, the No Fly List harms those interests and makes us all less safe.

Next, the No Fly incompletely regulates harmful conduct bearing on national security. The No Fly List only pertains to movement by plane or across the border. This singular focus neglects other forms of movement, such as ship, train, bus, or motor vehicle, which equally implicate national security—if the legislative and executive branch rationales for the No Fly List are to be believed. This incongruity renders the list prima facie underinclusive, especially when one considers the ability of a terrorist to use the watch list to discover whether the Government suspects them of terrorist activities.

The watch list is also underinclusive, because its predictive-preventive model of listing is "no more effective than a list of randomly selected individuals." [Dkt. 1 at 82-95]. Of all the perpetrators of terrorist acts inside the United States in the last decade, only "one of these perpetrators was designated on the federal terror watch list…prior to their criminal conduct," though that person—Omar Mateen—"was removed from [the List] prior to perpetrating his terrorist attack." [Dkt. 1 at 119]. Simply put, Defendants' watch listing system is incapable of watch listing actual terrorists.

Finally, the watch list inadequately addresses what relevant conduct it does regulate in furtherance of national security. The watch list is inadequate because it is easily evaded. The federal government has effectively conceded this point, when it produced evidence in another watch list case describing how an individual on the watch list who discovers they are on the watch list could employ "countermeasures" to avoid detection, "[alter] his appearance," or "[obtain] a new identification" to avoid the watch list. *Gulet Mohamed v. Eric R. Holder, Jr.*, et al. Case No. 11-cv-00050 (2011)), United States District Court, Eastern District of Virginia, United States District Court, Eastern District of Virginia, Case No. 11-cv-00050 (2011), Dkt. 17 at Ex 5 – Steinbach Decl, ¶ 13. The federal government also points out that an individual who discovers they are *not* on the list by attempting and succeeding to board an airplane would gain a similar advantage over law enforcement. *Id.* at ¶ 16. In other words, the government concedes that the watch list is inadequate and easily evaded with regard to individuals who are on the watch list, and inadequate and easily evaded with regard to individuals who are not on the watch list.

The ease with which the watch list can be evaded, as evidenced by the government's own declarations, undermines national security. As the United States Supreme Court explained in *Brown v. Entertainment Merchants Ass'n*, a law that infringes on a fundamental right but is easily undermined by evasion cannot stand. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 803 (2011). In that case, the Court struck down a law that imposed restrictions on the sale of violent video games to minors because it was easily evaded. *Id.* The Court reasoned that other forms of violent media undermined the government's interest in restricting the sale of violent video games. *Id.* Furthermore, the Court reasoned that allowing a parent to

purchase violent video games for children undermined the law. *Id.* Finally, the Court pointed out how easy it would be to evade even the need for the parental purchase: the law did not provide for verification of the parent-child relationship. *Id.*

Like the easily evaded law at issue in *Brown*, multiple layers of evasion undermine the operation of the watch list. An individual on the watch list can travel by another means, which the watch list would not prevent or screen against. If the individual wanted to fly, the individual could alter his or her appearance or obtain another identification, benefitting from the government's disclosure of investigative interest. Finally, the individual could use the existence of the watch list as a way of discerning whether the Government suspected the individual of terrorist sympathies. These methods of evasion render the watch list seriously underinclusive.

b. <u>The No Fly List is overinclusive.</u>

The No Fly List is overinclusive because of what the watch list actually prevents, who the watch list includes, and who the watch list fails to exclude: the watch list captures mostly legal conduct, classifies individuals on the basis of predictive judgments that perform similarly to a system based on randomized inclusion, and includes Plaintiff who the federal government cannot articulate any reason to believe he poses a threat to United States aviation.

The No Fly List prevents mostly legal conduct by individuals on the watch list and is overinclusive as a result. Individuals on the No Fly List cannot fly for any purpose, including to engage in lawful, constitutionally-protected activities such as attending political and religious gatherings as well as traveling to take part in professional activities, weddings, funerals and vacations, among other lawful activities. These lawful, constitutionally-protected

activities do not implicate either U.S. national security in general or aviation safety in particular, but individuals on the watch list are nonetheless prevented from participating in such activities or screened in a manner not related in any way to the information the government possesses.

This result is particularly absurd when one considers the ability of an individual on the watch list to travel by ship, train or bus. The Government believes on the one hand that individuals on the watch list are suspected terrorists who are too dangerous to fly or so dangerous that they warrant extra screening, even where the individual only seeks to attend a harmless social gathering such as a wedding, and on the other hand that the same individual is not too dangerous to attend the same gathering when traveling by train.

The watch list is also overinclusive because of who it includes: the watch list includes individuals not just on the basis of previous conduct, but also on the basis of expected future conduct. See *Gulet Mohamed v. Eric R. Holder, Jr., et al.* (United States District Court, Eastern District of Virginia, Case No. 11-cv-00050 (2011)), Dkt. 189, Page ID #188 (noting that placement on watch list reserved for individuals that "pose[] a threat of committing" certain acts rather than simply individuals who are in the process of committing those acts). Though the burden of narrow tailoring belongs to the government, there is no evidence that the agencies can muster to demonstrate that Defendants have the ability to predict who will commit acts of terrorism with even a modest amount of accuracy. There is also no evidence that individuals "associated" with suspect persons or suspect organizations are themselves more likely to commit an act of terrorism. In other words, the inclusion of individuals on the basis of a prediction and association renders the list overinclusive, because many individuals—in fact, probably almost all—on the watch list have actually done nothing wrong.

And this problem of overinclusiveness is attributable not to the particular way in which the government administers the watch list; it is inherent to the watch listing system the Defendants have built and now grow, as well as the problem—that there are future terrorists lurking among us, or stated differently, that there are some innocent Americans with an elevated propensity to commit terrorism—at which the watch list is aimed. Indeed, a quantitative analysis of the watch list reveals that, based on its processes and performance over the last decade, the watch listing system is unable to watch list the persons who, if listed, would further the watch list's stated objectives. Publicly available information reveals that only one of the one million persons the Defendants have placed on their watch list were placed there prior to commencing his terrorist act in the United States. This fact allows for a quantitative analysis that concludes that Defendants' No Fly List would perform similarly if the federal government simply listed a random selection of individuals.

III. The threatened injury to Plaintiff Abdi outweighs whatever damage the proposed injunction may cause Defendants.

Because Plaintiff was listed by Defendants in a manner not narrowly tailored to a compelling interest, Defendants' actions as described above in including Plaintiff on the No Fly List, which unreasonably burdens or prevents him, from boarding commercial flights to return to the United States, are arbitrary and capricious, lack even a rational relationship to any legitimate government interest, and have unduly deprived Plaintiff of his constitutionally protected rights, including his liberty interests in travel, freedom from false stigmatization, and nonattainder. Moreover, by placing Plaintiff on the No Fly List, Defendants have placed an undue burden on his fundamental right of movement and treated him like a second-class citizen.

Defendants cannot show a likelihood of harm if this Court was to grant the injunctive relief Plaintiff is seeking: allow him to return to the United States, his country of citizenship, to his home in Utah. By placing Plaintiff on the No Fly List, Defendants caused him an actual, imminent and irreparable injury that cannot be undone through monetary remedies.

Accordingly, the threatened injury to Plaintiff far outweighs whatever damage the proposed injunction may cause Defendants.

IV. If issued, the injunction would not be adverse to the public interest.

The final factor the Court must consider is whether issuance of the injunction is in the public interest. *Siegel v. LePore*, 234 F.3d at 1176. There is no doubt that it is in the public's best interests to prohibit the government from implementing a policy whereby fundamental rights are deprived. Therefore, this factor favors issuance of an injunction.

WHEREFORE, for the reasons discussed in the accompanying Brief, Plaintiff respectfully requests this Honorable Court **GRANT** his Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction in the form attached, and grant costs, attorneys' fees, and any other relief it deems just and equitable.

Dated June 16, 2017

Respectfully submitted,

PARKER & McCONKIE

BY: /s/ James W. McConkie
JAMES W. MCCONKIE
Utah State Bar # 2156
Attorney For Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123

Phone: (801) 264-1950

PARKER & McCONKIE

BY: /s/ Bradley H. Parker
BRADLEY H. PARKER
Utah State Bar # 2519
Attorney For Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Phone: (801) 264-1950

COUNCIL ON AMERICAN-ISLAMIC RELATIONS

BY: /s/ Lena Masri
LENA F. MASRI (DC: 1000019)*
Attorney for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787

COUNCIL ON AMERICAN-ISLAMIC RELATIONS

BY: /s/ Gadeir Abbas
GADEIR I. ABBAS (VA: 81161)*
Attorney for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787

**Licensed in VA, not in Utah.*
A motion has been filed to admit
Lena Masri and Gadeir I. Abbas
to appear in the matter.

Counsel for Plaintiff

INDEX TO ATTACHMENTS

Attachment 1 Proposed Order

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PARKER & McCONKIE
JAMES W. McCONKIE (Bar # 2156)
BRADLEY H. PARKER (Bar # 2519)
Attorneys for Plaintiff
5664 South Green Street
Salt Lake City, Utah 84123
Telephone: (801) 264-1950
Facsimile (801)
E-mail: jwmcconkie@utahlawhelp.com
E-mail: bparker@utahlawhelp.com

COUNCIL ON AMERICAN-ISLAMIC RELATIONS
LENA F. MASRI (DC: 1000019)*
GADEIR I. ABBAS (VA: 81161)*
Attorneys for Plaintiff
National Litigation Director
453 New Jersey Ave, SE
Washington, DC 20003
Phone: (202) 488-8787
Facsimile: (202)
E-mail: lmasri@cair.com
E-mail: gabbas@cair.com

**Licensed in VA, not in Utah.*
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

YUSSUF AWADIR ABDI,	)	
	)	
Plaintiff,	)	**Case No. 2:17-cv-00622**
	)	**Hon. Dee Benson**
v.	)	
	)	
ANDREW MCCABE, Acting Director of the Federal Bureau of Investigation, in his official capacity, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Having considered Plaintiff Yussuf Awadir Abdi's *Ex Parte* Motion for an Emergency Temporary Restraining Order and/or Preliminary Injunction and all documents filed in connection with the Motion, and good causing having been shown, IT IS HEREBY ORDERED, that Defendants shall allow Plaintiff to board his flight departing from Kenya to the United States, and his connecting flight(s) within the United States back to his home in Utah.

IT IS SO ORDERED.

Dated:

_____
United States District Judge