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Divided Sixth Circuit Addresses "No Fly" List

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The ***Sixth Circuit*** issued an opinion this morning taking a stance on an issue of first impression involving subject matter jurisdiction. On appeal from the Eastern District of *Michigan*, Mokdad v. Lynch, et al. involved a challenge by Saeb Mokdad, a naturalized United States citizen, to his placement on the No Fly List, a list compiled by the Terrorist Screening Center. After allegedly applying for redress under the Department of Homeland Security Traveler Redress Inquiry Program, Mr. Mokdad received a redress letter, neither confirming nor denying his placement on the No Fly List, but determining that "no changes or corrections are warranted [to your record] at this time." The letter also stated, per the redress procedure of the Transportation Security Agency (TSA) and § 46110, any "final determination[s]" are reviewable by the United States Court of Appeals. Section 46110 makes it clear that the federal courts of appeals have exclusive jurisdiction to review the orders of certain federal agencies, including the TSA. Mr. Mokdad proceeded to file suit against the Terrorist Screening Center, the Attorney General, and the Director of the FBI in district court (rather than an appellate court) for a violation of his Fifth Amendment rights and a violation of the Administrative Procedure Act.

Central to Mr. Mokdad's claim was that his challenge was to his placement on the No Fly List, a determination made by the Terrorist Screening Center, rather than to the TSA redress letter. Mr. Mokdad claimed that the Terrorist Screening Center is not on the list of agencies included in § 46110; therefore, any determination made by that agency did not require special review by the United States Court of Appeals. The government sought to have the case dismissed due to lack of subject-matter jurisdiction because, while the Terrorist Screening Center was not included in §46110, the doctrine of "inescapable intertwinement" caused the order by the Terrorist Screening Center to be covered due to its relationship with the TSA orders. The doctrine of inescapable intertwinement has been interpreted to hold that special review statutes such as §46110 apply to "challenges to orders by a covered agency [and] to *claims* inescapably intertwined with an order by a covered agency."

The Sixth Circuit disagreed with the district court's dismissal, finding that accepting the district court's reading "would run the risk of inadvertently expanding the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly." Rather, citing law from the Supreme Court and the Second, Ninth, and D.C. Circuits, the Sixth Circuit found that the doctrine of inescapable intertwinement applied only to *claims* made by an agency not included in the statute and could not be extended to *orders* made by an agency not included in the statute as was the case with the Terrorist Screening Center's order to place Mr.

Mokdad on the No Fly List. Therefore, the Sixth Circuit did not have exclusive jurisdiction over a challenge to a placement on the No Fly List and the district court does have subject-matter jurisdiction over the issue. Judge Batchelder issued a brief separate opinion, concurring in part, but dissenting from the majority's analysis of the "inescapable intertwinement" issue.

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