



Homeland Security

August 11, 2020

The Honorable Bennie Thompson
Chairman
Committee on Homeland Security
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Thompson:

The Department of Homeland Security (DHS) is in receipt of your letter dated July 25, 2020, requesting documents, communications, and transcribed interviews related to the suspension of New York residents' ability to apply for Department of Homeland Security (DHS) Trusted Traveler Programs (TTP). Acting Secretary Wolf has asked that I respond on his behalf.

As you are aware, on December 14, 2019, the State of New York, pursuant to its "Green Light Law", officially terminated the longstanding ability of DHS' component agencies U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to access the New York Department of Motor Vehicles (DMV) database through the National Law Enforcement Telecommunications Service (NLETS). This action is antithetical to the purpose for which Congress created DHS: To enhance information-sharing among the States and federal government in order to minimize the risk of recurrence of terrorist attacks like those on the World Trade Center on September 11, 2001. Since New York took the affirmative step to reduce the information it was sharing with DHS, DHS reviewed what, if any, impact that would have on our TTP vetting process.

As the United States Department of Justice (DOJ) informed the United States District Courts for the Southern District of New York and the District of Columbia on July 23, 2020, at the time the decision was made to restrict New Yorkers' eligibility to enroll or re-enroll in TTP, DHS believed that "[t]he data restrictions imposed by New York's Green Light Law—in particular, its restriction of access to certain criminal history information in New York DMV records—were unique and precluded CBP from conducting adequate risk assessments of New York applicants for TTPs." When explaining the rationale for suspending TTP enrollment and re-enrollment for New York residents, whether to the State of New York, Congress, the public, or in court, Department DHS officials were consistent in stating that the decision was made because of New York's unique step in restricting DHS's necessary and proper access to material information concerning TTP applicants' criminal and driving histories.

As DOJ also informed the courts last week, upon further review of information shared with CBP for TTP applicant vetting from other states and territories, DHS learned that while several states, the District of Columbia, and a territory provide access to driver's license information and vehicle registration information via NLETS, they *do not currently provide access to driving history information*, including driving-related criminal histories, and that two territories do not participate in DMV-related NLETS queries. Subsequently, the Acting Secretary determined that it was appropriate to restore New York residents' eligibility to participate in TTPs. New York residents may now submit applications to enroll and re-enroll in TTPs.

The statements made by Acting Secretary Wolf and the former Deputy Executive Assistant Commissioner of CBP's Office of Field Operations, John Wagner, to the Committee were true to the best of their knowledge at the time they were made. DHS, represented by DOJ, also made the same representations in court, which were immediately corrected upon identification of different underlying facts. That said, we hope the Committee accepts this explanation, along with the enclosed attachments, which were filed with the United States District Courts on July 23, 2020, as corrections of the Committee's record.

With respect to the Committee's investigation as well as its accompanying request for documents and transcribed interviews, the Committee does not appear to have a legitimate legislative purpose. Supreme Court precedents, including *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), *Quinn v. United States*, 349 U.S. 155 (1955), and *McGrain v. Daugherty*, 273 U.S. 135 (1927), are clear about this. The Committee's request for transcribed interviews, in particular, lacks a legitimate legislative purpose because the Committee is endeavoring to do what the Supreme Court in *Mazars* and *Quinn* forbade Congress from carrying out: investigating "for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'"¹ Notably, the Supreme Court has recognized that "Congress may not [investigate] to 'try' someone 'before [a] committee for any crime or wrongdoing.'"² Yet that is precisely what you are trying to do, as you yourself have admitted in your letter. For you expressly state early on, in the second paragraph, in framing your five-page letter: "[U]nder 18 U.S.C. § 1001, if [the Acting Secretary's and then-CBP official John Wagner's] statements were made knowingly and willfully [to the Committee], they could constitute *criminal acts*."³

Enforcement of the laws is plainly within the Executive's and the Judiciary's purview; Congress's role is to legislate. The Committee's request to investigate alleged wrongdoing squarely violates constitutional separation of powers principles. The Supreme Court has established that "there is no congressional power to expose for the sake of exposure."⁴ Yet, by ignoring the Supreme Court's clear command in *Mazars* and

¹ *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn*, 349 U.S. at 161).

² *Id.* (quoting *McGrain*, 273 U.S. at 179).

³ Emphasis added.

⁴ *Mazars*, 140 S. Ct. at 2032 (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)).

elsewhere, the Committee is attempting to manufacture for itself a “‘general’ power to . . . compel disclosures” from the subjects of this investigation and perhaps from others.⁵ This undertaking by the Committee imperils the individual liberty that our Constitution’s separation of powers robustly protects.

The Committee’s investigation can best be described as one that, in the Supreme Court’s disapproving words, is being “conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated.”⁶ Such investigations the Supreme Court has deemed to be constitutionally “‘indefensible.’”⁷ Accordingly, under the Constitution as the Supreme Court has construed it in *Mazars* and related precedents, the Committee lacks a valid legislative purpose in conducting this investigation at all, much less in requesting transcribed interviews.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,



BETH SPIVEY

Assistant Secretary of Legislative Affairs

⁵ *Id.* (quoting *McGrain*, 273 U.S. at 173—74).

⁶ *Id.* (quoting *Watkins*, 354 U.S. at 187).

⁷ *Id.* (quoting *Watkins*, 354 U.S. at 187).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JONATHAN DIMAIO, et al.)	
)	
Plaintiffs,)	
v.)	No. 1:20-cv-00445-RJL
)	
CHAD WOLF, et al.)	
)	
Defendants.)	
)	

DEFENDANTS’ NOTICE OF CORRECTION

Defendants respectfully submit this notice to correct several statements in Defendants’ briefs and declaration, and to inform the Court and the Plaintiffs that the Acting Secretary of Homeland Security has determined that it is appropriate to restore New York residents’ eligibility to participate in Trusted Travel Programs (“TTPs”), effective immediately. July 23, 2020 Press Release, <https://www.dhs.gov/news/2020/07/23/new-york-amends-dangerous-green-light-law-cooperate-federal-law-enforcement-dmv>.

As the Court is aware, Defendants have stated that the data restrictions imposed by New York’s Green Light Law—in particular its restriction of access to certain criminal history information in New York DMV records—precluded CBP from conducting adequate risk assessments of New York applicants for TTPs. For example, the February 5 Letter itself asserted that the Green Light Law “prevents [the Department of Homeland Security (“DHS”)] from accessing relevant information that only New York DMV maintains, including some aspects of an individual’s criminal history. As such, the Act compromises CBP’s ability to confirm whether an individual applying for TTP membership meets program eligibility requirements.” Pls.’ Mot. for Partial Summ. J., Ex. A, Dkt. No. 11-2 at 2. Similar statements appeared in other, pre-decisional documents contained in the administrative record filed in the Southern District of

New York litigation and produced to Plaintiffs in this case, *see, e.g.*, Administrative Record at 62, *New York v. Wolf*, No. 1:20-cv-1127 (S.D.N.Y. June 17, 2020), Dkt. No. 65-1 (“The NY Green Light law would prevent CBP from receiving information relating to criminal convictions involving motor vehicles Membership in a CBP Trusted Traveler Program requires application of strict standards for multiple convictions that can no longer be assessed for applicants residing in the State of NY.”), and in the declaration submitted by a CBP official in opposition to Plaintiffs’ Partial Motion for Summary Judgment, *see, e.g.*, Decl. by John P. Wagner, Dkt. No. 14-1 at ¶ 24 (“Such a gap in information precludes CBP from being able to conduct a full assessment of whether the applicant is considered low risk.”). Based on these statements and representations, Defendants made similar assertions in their filings. *See, e.g.*, Defs.’ Opp’n to Pls.’ Mot. for Partial Summ. J, Dkt. No. 14 at 15 (“New York State denied its residents the ability to meet [the low-risk status] condition by shutting off CBP’s access to information that CBP has long deemed necessary to make a proper risk assessment.”); Defs.’ Resp. to Pls.’ Post-Arg. Letter, Dkt. No. 26 at 4–5 (“New York is the *only* State that has terminated CBP’s access to driver license and vehicle data via Nlets altogether, preventing the agency’s vetting of Trusted Traveler Program applications.”).

This Sunday evening, undersigned counsel was advised that those statements and representations are inaccurate in some instances and give the wrong impression in others. Specifically, DHS learned that several States, the District of Columbia, and one Territory provide access to driver’s license information (referred to as “Driver Query”) and vehicle registration information via Nlets, but do not currently provide access to driving history information, including driving-related criminal histories. In addition, DHS determined that two Territories do not participate in Nlets DMV-related queries, such that DMV records are not available to CBP

(or other Nlets users). Nevertheless, CBP has continued to accept, vet, and, where appropriate, approve TTP applications from these States, the District of Columbia, and Territories.

These revelations undermine a central argument in Defendants' filings to date: that CBP is not able to assure itself of an applicant's low-risk status because New York fails to share relevant DMV information with CBP for TTP purposes. Because this argument supplies the rationale for the TTP Decision and supports Defendants' defense of the TTP Decision, Defendants have determined that the proper course of action is to withdraw their general-statement-of-policy, interpretive-rule, good-cause, and harmless-error arguments. *See* Defs.' Opp'n. Parts II.A, II.C & III.

Defendants deeply regret the foregoing inaccurate or misleading statements and apologize to the Court and Plaintiffs for the need to make these corrections at this stage in the litigation. Defendants respectfully request that the Court accept this Notice to correct the record, and permit Defendants to withdraw the aforementioned arguments. As noted above, the Acting Secretary of Homeland Security has decided to withdraw the TTP Decision and restore New York residents' access to the TTPs, effective immediately. Accordingly, Defendants further intend to confer with Plaintiffs, and to notify, expeditiously, the Court of Defendants' views as to the impacts on the pending litigation arising from this information and the restoration of TTP access to New York residents.

Dated: July 23, 2020

Respectfully Submitted,

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July 23, 2020

By ECF

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *New York v. Chad F. Wolf, et al.*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.)
Lewis-McCoy, et al. v. Chad Wolf, et al., No. 20 Civ. 1142 (JMF) (S.D.N.Y.)

Dear Judge Furman:

This Office represents the defendants in the above-referenced actions. We write respectfully to correct several statements in defendants' briefs and declarations, and to withdraw defendants' motion to dismiss, Dkt. Nos. 29-30,¹ and motion for summary judgment, Dkt. Nos. 67-68, along with the materials submitted in support of those motions. We also write to inform the Court and the plaintiffs that the Acting Secretary of Homeland Security has determined that it is appropriate to restore New York residents' eligibility to participate in Trusted Traveler Programs ("TTPs"), effective immediately. *See* Dep't of Homeland Security, *New York Amends Dangerous Green Light Law to Cooperate with Federal Law Enforcement on DMV Records*, available at <https://www.dhs.gov/news/2020/07/23/new-york-amends-dangerous-green-light-law-cooperate-federal-law-enforcement-dmv> (July 23, 2020).

As the Court is aware, defendants have maintained that the TTP Decision at issue in this litigation is constitutionally permissible, and not arbitrary and capricious, because the data restrictions imposed by New York's Green Light Law—in particular, its restriction of access to certain criminal history information in New York DMV records—were unique and precluded CBP from conducting adequate risk assessments of New York applicants for TTPs. For example, the TTP Decision itself asserted that the Green Light Law “prevents DHS from accessing relevant information that only New York DMV maintains, including some aspects of an individual’s criminal history. As such, the Act compromises CBP’s ability to confirm whether an individual applying for TTP membership meets program eligibility requirements.” AR 2. Similar statements appeared in other, pre-decisional documents contained in the administrative record, *see, e.g.*, AR 62 (“The NY Green Light law would prevent CBP from receiving information relating to criminal convictions involving motor vehicles Membership in a CBP Trusted Traveler Program requires application of strict standards for multiple convictions that can no longer be assessed for

¹ Citations refer to the docket of *New York v. Wolf*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.).

applicants residing in the State of NY.”), and in the declarations submitted by Department of Homeland Security (“DHS”) officials in support of defendants’ motion for summary judgment, *see, e.g.*, Decl. of Pete R. Acosta, dated June 19, 2020 (Dkt. No. 68-1) ¶ 24 (“Currently, New York is the only state that has terminated CBP’s access to driver license and vehicle data via Nlets.”). Based on these statements and representations, defendants made similar assertions in their briefs in support of their motions. *See, e.g.*, Motion to Dismiss (Dkt. No. 30) at 14 (“Here, no other state has adopted a policy barring CBP’s access to records to vet TTP applicants.”); Motion for Summary Judgment (Dkt No. 68) at 12 (“In other words, without DMV information, DHS determined that TTP applicants from New York could not satisfy TTP eligibility requirements.”).

Last Friday afternoon, July 17, DHS advised this Office that those statements and representations are inaccurate in some instances and give the wrong impression in others. Specifically, in connection with preparing defendants’ opposition to plaintiffs’ cross-motion for summary judgment, DHS learned and informed this Office that several states, the District of Columbia, and a territory provide access to driver’s license information (referred to as Driver Query) and vehicle registration information via Nlets, but do not currently provide access to driving history information, including driving-related criminal histories. In addition, DHS determined that two territories do not participate in Nlets DMV-related queries, such that DMV records are not available to CBP (or other Nlets users). Nevertheless, CBP has continued to accept, vet, and, where appropriate, approve TTP applications from these states and territories.

These revelations undermine a central argument in defendants’ briefs and declarations to date: that CBP is not able to assure itself of an applicant’s low-risk status because New York fails to share relevant DMV information with CBP for TTP purposes. Because this argument supplies the rationale for the TTP Decision, *see* AR 2-3, and supports defendants’ defense of the TTP Decision, defendants have determined that the proper course of action is to withdraw their motion to dismiss and motion for summary judgment.

Furthermore, although the parties have agreed that New York’s April amendment to its Green Light Law need not be considered in adjudicating this matter, *see* Dkt. No. 72 at 2-4; Dkt. No. 79 at 2 n.2, DHS has also informed this Office of an issue concerning the amendment’s effect on the TTP Decision. The declarations of DHS officials Scott L. Glabe and Robert Perez both state that any cabining of New York DMV information to ensure compliance with the Green Light Law amendment’s criminalization of information sharing for immigration enforcement purposes would be antithetical to DHS’s congressionally-mandated mission and data access policies. *See, e.g.*, Decl. of Scott L. Glabe, dated June 19, 2020 (Dkt. No. 68-2) ¶¶ 4-8, 12-14; Decl. of Robert Perez, dated June 19, 2020 (Dkt. No. 68-3) ¶¶ 15-16. Accordingly, in their brief in support of summary judgment, defendants argued that by purporting to impose restrictions on DHS’s ability to share DMV information obtained to vet TTP applicants, the amendment to the New York Green Light Law failed to cure the problems that necessitated the TTP Decision. *See* Motion for Summary Judgment (Dkt. No. 68) at 7-8, 24-25. Last Friday, however, DHS informed this Office that in 2019, CBP, at the local level, entered into agreements with the California Department of Justice that preclude the use of non-criminal history information accessed through Nlets for immigration enforcement purposes. According to DHS, it does not appear that those agreements were vetted by DHS’s headquarters, as is required under the One DHS Policy. *See* Glabe Decl. ¶ 8. Thus, according to DHS, it remains true that, as asserted in the Glabe and Perez declarations

and defendants' summary judgment brief, information restrictions of the type contemplated by New York's Green Light Law amendment are contrary to the recommendations of the 9-11 Commission as embodied by the One DHS Policy. *See, e.g.*, Glabe Decl. ¶ 14; Perez Decl. ¶ 17. However, considering DHS's agreements with the California Department of Justice, defendants no longer wish to press this argument to support the TTP Decision.

Defendants deeply regret the foregoing inaccurate or misleading statements and apologize to the Court and plaintiffs for the need to make these corrections at this late stage in the litigation. Defendants respectfully request that the Court accept this letter to correct the record, and permit them to withdraw their motions to dismiss and for summary judgment, along with all briefs and declarations submitted in support of those motions. As noted above, the Acting Secretary of Homeland Security has decided to restore New York residents' access to the Trusted Traveler Programs, effective immediately.

We thank the Court for its consideration of this letter.

Respectfully submitted,

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