UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAAD BIN KHALID,

Plaintiff,

v.

MERRICK GARLAND, et al

Defendants.

Case No. 1:21-cv-02307-CRC

Hon. Judge Christopher R. Cooper

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Government concedes that Terrorist Screening Center (or whatever it calls itself these days[1]) has placed Khalid on a secret government watchlist. It concedes—as it must at this stage—that because of this list, Khalid will be detained for hours, potentially at gunpoint, every time he enters the country at a land border. The Government concedes that it will search and seize his devices when he does. The Government concedes that because of his watchlist status, his wife (who is entitled to an immigration visa) has had that visa indefinitely delayed, and that if his wife's visa application is ever granted, his children are likely to face similar delays.

But, borrowing mostly from Kafka, and a little from Joseph Heller, the Government suggests there is nothing this Court can do about it. The Government reasons that because the TSA (along with TSC) can remove his No-Fly annotation, this Court must wait until the D.C. Circuit orders that relief before doing anything else. Then, even though the TSA does not have the ability to remove Khalid from the watchlist, Khalid must travel again, suffer inevitable watchlist effects, and file a DHS TRIP complaint. Even though DHS TRIP does not even provide a substantive response about watchlist placement (because the Government refuses to admit or deny that anyone is on the watchlist in the first place), Khalid then has to wait until the Government issues its pro forma response (which could take years), and then try and travel again to see if TSC actually remove him from the watchlist. Then, and only then, the Government contends, does the Court have jurisdiction to hear Khalid's watchlist

[1] *See* https://www.dni.gov/files/NCTC/documents/features_documents/InsideNCTC-2021.pdf *at* 9 (threat screening center); *see also* https://www.justice.gov/d9/2023-03/fbi_narrative_-_fy_2024_presidents_budget_-_final_3-13-2023_omb_cleared.pdf *(referring to the TSC as both the Threat Screening Center and the Terrorist Screening Center in the same document).*

challenge.

Thankfully, this madness is not supported by caselaw. Instead, ordinary principles of standing establish that Khalid is suffering from his watchlist placement right now, and that this Court can provide relief from that placement.

The Government separately claims that all of this harm that befalls Khalid and more, such as the denial of clearances and job opportunities, does not give rise to any liberty interest protected by the Due Process clause. But, as Courts have long established, the Due Process clause gives rise to liberty interests in travel and, under a principle known as stigma-plus, in having one's reputation destroyed in connection with an official government action—such as putting someone on a list that declares them a terrorist, subjecting them to differential treatment by the federal government, state and local governments, and airlines alike. For these reasons, as described in more detail below, the Court should deny the Government's Motion to Dismiss.

ARGUMENT

I. Khalid's watchlist claims are ripe.

The Government's argument (at 2) that Khalid's claims are not ripe is incorrect in several ways, but the most straightforward error the Government makes is claiming that Khalid has not (yet) been harmed by his watchlist placement, other than by the No Fly annotation (i.e., the part of the case that was transferred to the D.C. Circuit).

A. Khalid has been and will continue to be injured by his watchlist status.

Khalid has already been harmed in two important ways.

First, he was subject to significant, hours-long, excess screening at the border when he arrived in the United States in 2022. *See* Dkt. 22-2 ¶ 13 (Abbas Declaration); Dkt. 22-4 ¶ 6

(Khalid Declaration). The Government may claim that this excess screening was based on him being on the No-Fly List, but that ignores that the No-Fly "List" is just an annotation to one's watchlist status that prohibits Khalid from flying on airplanes. And if there was any doubt that the screening was related to watchlist status, *see Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019), *rev'd and remanded*, 993 F.3d 208 (4th Cir. 2021) (watchlist status causes hours-long detention and screening at borders), remember that the justification for the No Fly List is that Khalid is supposedly a threat to aviation safety, but Khalid had already arrived on an airplane (and did so going through significant security prior). The idea that hours-long additional screening was related to his supposed threat to aviation security belies belief.

Meanwhile, given his status as an American, his job as a businessman, *see* Amend. Compl. at ¶ 107 (job requires travel), that his wife is living in Pakistan (and entitled to a visa under 8 U.S.C. § 1154(b) (if "the facts stated in the petition are true and the alien in behalf of whom the petition is made is an immediate relative," the Attorney General "shall... approve" a citizen's visa request.), *see Manwani v. DOJ*, 736 F. Supp. 1367, 1378 (W.D.N.C. 1990) , *see also* Amend. Compl. ¶ 143, and that he has shown a willingness to travel despite being on the No Fly List, *see* Dkt. 22 ¶ 7-10 (Motion for Preliminary Injunction), it is certain that Khalid will in the future interact with the United States border. *See Jibril v. Mayorkis*, 20 F.4th 804, 814-15, 817 (D.C. Cir. 2021) (question of whether a watchlisted individual has standing to challenge the watchlist is whether that person is likely to engage in future travel, which can be based on past travel); *see also Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1302 (D. Minn. 2018)*; Alasaad v. Nielsen,* 2018 WL 2170323, at *10 (D. Mass. May 9, 2018); *El Ali v. Barr*, 473 F. Supp. 3d 479, 519 (D. Md. 2020).

Second, Khalid's wife's immigration process has been delayed by his watchlist status even though she has a statutory right to it under Section 1154(b), limited only to whether the facts stated in the petition are accurate. The Government suggests that the watchlist cause of the delay is speculation insufficient to overcome *Iqbal*. But the Government has already admitted in other litigation that immigration officials use the watchlist in screening applications. *See Elhady*, 391 F. Supp. 3d at 570.[2] And other Courts have found immigration-related delays due to watchlist status plausible in defeating motions to dismiss claims challenging that status. *See El Ali*, 473 F. Supp. 3d at 497. Indeed, a recent District Court in Texas found that the immigration delays caused by the watchlist were one reason the watchlist implicated the major questions doctrine. *Kovac v. Wray*, --- F. Supp. 3d -----, 2023 WL 2430147, at *5 (N.D. Tex. Mar. 9, 2023).

The Government also errs in demanding that Khalid show that he has already been harmed by watchlist placement apart from being on the No Fly List. As the D.C. Circuit explained in *Jibril*, 20 F. 4th at 813, claims for damages are necessarily backwards looking, and thus test whether an individual has been harmed by the watchlist. Claims for injunctive relief, like this one, are instead future looking, and thus test whether an individual is likely to be harmed in the future. While past injury is one way to show a likelihood of future injury, it is not dispositive.

[2] Because the Government's argument here relies on Rule 12(b)(1), the Court may look outside the Complaint (as to 12(b)(1) arguments only). Even if it were otherwise, Khalid would be able to amend as any dismissal for lack of standing would necessarily be without prejudice. *Jibril*, 20 F.4th at 813.

B. There is no exhaustion requirement for watchlist status.

In the course of making its argument, the Government suggests (Mot. to Dismiss at 4-5) Khalid will not have standing until he not only suffers a (non-No-Fly-List) watchlist related injury but also exhausts DHS TRIP over the injury. This is wrong. A federal court cannot require a plaintiff to exhaust administrative remedies before seeking judicial review where neither the relevant statute nor an agency rule imposes such a requirement. *See Darby v. Cisneros*, 509 U.S. 137 (1993). Here, "Congress has not mandated exhaustion of the DHS TRIP process," "and there are no regulations regarding DHS TRIP that mandate exhaustion." *Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014). Other courts have likewise rejected any exhaustion requirement. *Kovac v. Wray*, 363 F. Supp. 3d 721, 747 (N.D. Tex. 2019); *Crooker v. TSA*, 323 F. Supp. 3d 148, 157 (D. Mass. 2018); *El Ali*, 473 F. Supp. 3d at 506. Indeed, once Khalid is removed from the No Fly List, the Government will not even disclose whether he remains on the watchlist, making DHS TRIP essentially a black box. *See Nur v. Unknown CBP Officers*, 2022 WL 16747284, at *7 (E.D. Va. Nov. 7, 2022) (describing policy with some skepticism of the reasoning behind it).[3]

And all this ignores that the DHS TRIP process is exclusively for travel-related harm, *see* §49 U.S.C. 44926, *see also* www.dhs.gov/dhs-trip ("a single point of contact for individuals who have had difficulties during travel screenings at transportation hubs such as airports or U.S. borders "). So it provides no redress related to the abovementioned immigration delays.

[3] Historically, any response from DHS TRIP expressly states that "DHS TRIP can neither confirm nor deny any information about you which may be within federal watchlists or reveal any law enforcement sensitive information." Example of DHS TRIP Response (Ex. A).

C. Section 49 § USC 46110 does not remove jurisdiction to challenge watchlist status

One argument the Government has (correctly) not made, at least not explicitly, is that Section 49 U.S.C. § 46110 prevents this Court from deciding questions of Khalid's watchlist status. For good reason. While the TSA has the ability to remove people's No Fly annotation at the end of the DHS TRIP process, the TSA has no direct role in placing or removing people on the watchlist itself. Instead, the TSC has the sole ability to place individuals on, or remove individuals from the watchlist.

And while removing someone from the watchlist may remove them from the No Fly List under the TSC's current system, that is a result of the TSC's own Kafkaesque process. TSC delegated a scintilla of authority[4] to the TSA to remove individuals from the No Fly List via the DHS TRIP process only (that is, to delete a watchlisted individual's No Fly List annotation if that individual files a DHS TRIP complaint). TSC did so in a transparent effort to benefit from Section 46110. But TSC retains the sole authority to remove someone from the watchlist altogether. Removing Khalid from the watchlist is something entirely within the TSC's authority, and thus something this Court can order TSC to do.

The alternative would be Kafkaesque. Someone wrongfully placed on the watchlist with a No Fly List designation would have to, according to the Government, file a DHS TRIP application and exhaust it to conclusion. *See* Dkt. 10 at ¶ 12) (suggesting exhaustion is mandatory); *see also* Feb. 2, 2022 Minute Order. As this and other cases have shown, that can take

[4] TSA has the ability to remove someone from the No Fly List, but only as a result of a DHS TRIP inquiry that is appealed to the TSA Administrator. TSC, in contrast, has the ability to remove someone from the No Fly List at any time (including at interim steps during the DHS TRIP process, or, more commonly, in order to moot ongoing litigation, *See Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022); *see also Fikre v. F.B.I.*,35 F.4th 762 (9th Cir. 2014*).* And TSC has the sole ability to place someone on (or back on) the No Fly List.

years. Then that individual would have to file an original action against the TSA Administrator in the Circuit Court over just No Fly List status. Upon winning that case (which would likely take years, particularly given disputes over the record, *see Moharam v. TSA*, 22-1184 (D.C. Cir.) (pending motions regarding filing record in camera not fully briefed until a year after docketing), an individual would then have to suffer some other travel-related injury, exhaust that through DHS TRIP, and then—and only then—bring a claim challenging his watchlist status in the District Court, including as to its constitutionality.

But even if this Court were somehow impotent from ordering the removal of Khalid from the watchlist for fear of interfering with the ongoing D.C. Circuit decision, lesser remedies in this case abound. The Court can simply order changes to the process for placement or removal of individuals on the watchlist. Or, since the TSC itself does not use watchlist information to inflict harm on others, the Court can prohibit TSC from disseminating watchlist status to other agencies or private individuals, except TSA and airlines as necessary to enforce the No Fly annotation.

II. The watchlist violates the Procedural Due Process Clause.

A. The watchlist implicates Khalid's movement-related liberty interest.

First and foremost, the watchlist implicates Khalid's movement-related liberty interest "Plaintiffs' movement-related liberty interests involve the right to travel by airplane or reenter the United States without being detained for additional screening." *Elhady v. Piehota*, 303 F. Supp. 3d 453, 463 (E.D. Va. 2017). Whatever the precise standard for determining when a movement-related deprivation is sufficient to require due process, that standard is met by "invasive additional screening and other liberty-constraining activities when they fly or reenter the country at a land border or port," including being "detained for hours," and the result

"has caused them to avoid travel." *Id*. at 464 (noting conflicting decisions about when travel-related deprivations constitute constitutional harm but that the above allegations establish standing regardless of what test is used); *see also Mohamed v. Holder*, 266 F. Supp. 3d 868, 875 (E.D. Va. 2017) ("Plaintiff's decision not to engage in international travel because of the difficulties he reasonably expects to encounter upon return to the United States is sufficient to demonstrate standing") (stringcite omitted). As a result, the watchlist, as alleged, violates the Due Process Clause unless accompanied by sufficient process, *but see* Section C, below (it does not), and the Government has forfeited this argument at the Motion to Dismiss stage for failing to raise it in their opening motion. *Lindsey v. D.C.*, 879 F.Supp.2d 87, 95 (D.D.C. 2012).

Even if the Court were to consider it, the Court should resolve it according to the well-reasoned decisions of the District Court in *El Ali v. Barr*, 473 F. Supp. 3d 479 and *Elhady v. Kable*, 391 F. Supp. 3d 562. Yes, *Elhady* was reversed by the Fourth Circuit on this ground. But the Fourth Circuit's decision, not binding here, is wrong. *See generally Elhady*, 303 F. Supp. 3d 562; *see also Elhady v. Kable*, No. 20-1119, Petition for Rehearing en Banc, Dkt. 76 (4th Cir. May 14, 2021) (explaining error). And even if it were not wrong, that decision was based on summary judgment on a different record. Indeed, the Fourth Circuit's own decision was based on its view of the record that "[m]ost plaintiffs complain of minor delays in airports of an hour or less," including some who had clearly been removed post-filing from the watchlist. *Elhady* 993 F.3d at 221 (recounting how many of the plaintiffs have had few or no post-filing travel-related delays). And, as far as the border, the Court of Appeals based its argument that the delays were generally of one-to-two hours—less than the delays Khalid has already suffered. *Elhady* 993 F.3d at 224. So the Fourth Circuit relied on the factual finding that the watchlist-related delays in that case were "not atypical for travelers, particularly at busy ports

of entry at land borders" – a finding of fact that Khalid should be given the opportunity to disprove here. *Id.*

B. Khalid has a stigma-plus related liberty interest.

Plaintiffs also have a cognizable due process interest under the "stigma-plus" test. That test finds that suffering stigma from governmental action plus a negative impact on legally-recognized right or status constitutes constitutional injury. *Paul v. Davis*, 424 U.S. 693, 711 (1976).

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). But in order to "limit the[] constitutionalization of tort law," *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998), a stigmatizing allegation or label is not enough. Instead, "the plaintiff must show not only that the government has imposed some stigma upon him, but also that it has worked some change in his status under law." *Taylor v. Resol. Tr. Corp.*, 56 F.3d 1497, 1506, *as amended*, 66 F.3d 1226 (D.C. Cir. 1995).

1. Khalid has alleged stigma.

The Government (at 2-3) claims that Khalid has failed to claim "(1) that his TSDS status was shared with any particular third party or (2) that any particular sharing caused him to suffer a stigma." To the extent the Government is just re-arguing that Khalid has no standing to bring his watchlist-related claims, that fails for the reasons explained in Section I , above. To the extent the Government is instead claiming that Khalid has not properly alleged stigma under the stigma-plus test, it is wrong.

Being accused of being a terrorist is inherently stigmatizing. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2001). The Government does not appear to contest that obvious truth. And, as the Complaint alleges, Khalid's watchlist status is disseminated broadly to "state and local authorities, courts, foreign governments, private corporations, private contractors, airlines, gun sellers, financial institutions, the captains of sea-faring vessels, and others." Amend. Compl. ¶ 24. It is disseminated to the CBP, *Id.* at¶ 29, who used that information to subject him to hours-long screening and interrogation at the airport. *See* § I(A), *above*. It was disseminated to USCIS, who used it to delay his wife's immigration petition. *Id.* Its dissemination to foreign governments continues to put Khalid at risk, particularly since the Government's No-Fly List annotation in the United States encourages Khalid to spend more time abroad. Amend. Compl. ¶ 109.

Because Khalid can show actual instances of effects-causing dissemination, this Court need not weigh in on the intra-Circuit split as to whether proof of dissemination is even required. *See McGinnis v. D.C.,* 65 F. Supp. 3d 203, 221-22 (D.D.C. 2014) (explaining split). But to the extent the Court finds the need to reach that issue, it should follow Judge Sullivan's well-reasoned opinion in *McGinnis*, which shows actual dissemination is not required, and only that the risk of future injury based on the likely future dissemination is all that needs to be shown. *Id.* at 222; *see also* Section I(B) *above*.

The Government does not appear to argue that the stigma-plus claim fails because the watchlist is not available to the general public, and for good reason—that argument is foreclosed by Circuit precedent.

2. Khalid has alleged the "plus."

The Government separately suggests (at 17-18) that there is no "plus" factor. That is, the Government suggests that being designated a known or suspected terrorist in the TSDB does not constitute a "change in his status" under *Taylor,* 56 F.3d 1497. This is wrong. Indeed, the very idea of the watchlist is to change the status of those on it, to essentially automate accusations of being a terrorist into a series of concrete, regular consequences. *See* Amend. Compl. at ¶ 53 and ¶ 62; *see* also *Elhady* 993 F.3d 208 at 213-214; *El Ali*, 473 F. Supp at 493; *cf. University Gardens Apts. Joint Venture v. Jack B. Johnson*, 419 F. Supp 2d 733, 739 (D. Md. 2006) (recognizing "loss of a government-issued license" as a "plus"); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp 3d 712, 722 (ED. Va. 2015) (expulsion from public university sufficient as a "plus".)

Being designated a known or suspected terrorist on the watchlist changes one's status in a number of clear and obvious ways, including ways that the Government formally acknowledges. *See* CBP Directive 3340-049A, at § 5.1.4 (placement on watchlist constitutes alternative and sufficient grounds for performing "advanced search" of individual's electronics at the border).[5] The Government also issues particular "handling codes" to state and local police, alongside instructions on how to treat people on the watchlist during law enforcement encounters. Amended Compl. ¶ 47. In sum, watchlist "status" is inherently a status, which is why the Government uses the phrase "TSDS status" 30 times in its brief.

[5] *Available at* https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

Still, the Government—mostly conflating the difference between a change in status and an independent constitutional right—tries to claim that some of the consequences of watchlist status do not rise to an actual change in status.

First, the Government suggests (at 21-22) that USCIS's delay of Khalid's wife's visa does not show a change in status because he has no constitutional rights in his wife's visa application. But if Khalid had to have a constitutional right to something in order for it to constitute a change in status, then there would be no need for the stigma-plus test in the first instance. Instead, Khalid could have just proceeded on that right alone. Likewise, individuals do not have a right as to private employment, but Courts in this Circuit have frequently held that disseminations that have the "broad effect" of disqualifying someone from private employment qualifies, even if there is no formal prohibition on any particular employment. *Campbell v. D.C.*, 894 F.3d 281, 289 (D.C. Cir. 2018); *see also Second*, below.

The Government also argues that because Khalid's wife's visa has only been indefinitely delayed, not denied, that is not a change in status. But that does not work either, for similar reasons.

Second, the Government suggests (at Mot. To Dismiss 24) that the loss in certain employment opportunities is not a change in status, because even though being on the watchlist broadly prevents Khalid from obtaining any necessary security clearances, that is technically a discretionary act of the security granter. But as *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994), explained, even if the result is not formally binding, if it has a broad intended intent of disqualifying Khalid, that is enough to constitute a plus factor. *See also O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998) (describing *Kartseva* specifically as a case about

security clearances); *Ranger v. Tenet*, 274 F. Supp. 2d 1, 9 (D.D.C. 2003) (CIA's denial of security clearance constituted change in status under stigma-plus test).

The Government's citation to *Navy v. Egan*, 484 U.S. 518 (1988), again misses the mark—just because Khalid may not have a due process right in a security clearance directly does not mean that the loss of a right to one cannot constitute the "plus" in the stigma-plus test. *Trifax Corp. v. D.C.*, 314 F.3d 641 (D.C. Cir. 2003), is even further afield. It held that a damning OIG report that was not accompanied by any change in government status does not constitute a plus factor. If all the Government did here was announce to individuals or the world that it thought Khalid was a terrorist, that would be the case here, too. But it did more—it created an entire watchlisting system with specific consequences that it both imposes directly by itself[6] and demands other entities (such as police, airlines, and private security) impose on Khalid as well.

Meanwhile, the Government fails to address or explain how Khalid now being subject to secondary screening at airports, detentions and advanced electronic searches at the border, and an official change in the way state and local police interact with him during encounters, Amend. Compl ¶ 47, does not constitute a change in status under *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497 (DC. Cir. 1995). Nor can it make that argument for the first time on reply. *Lindsey,* 879 F. Supp. 2d at 95.

[6] While the TSC is the entity that puts individuals on the list (and does not otherwise impose any watchlisting consequences, the TSC co-heads an interagency group called the Watchlisting Advisory Council that acts, by unanimous consensus, to make changes to how the watchlist works. CBP (just as an example), as part of this system, thus cannot make changes to watchlisting system processes without the approval of TSC. *Jardaneh v. Barr,* Dkt. 31, Amended Compl. at ¶44-67, 8:18-cv-02415-PX (D. Md. Aug. 29 2018).

C. The watchlisting system does not provide adequate process.

The Government asks the Court to dismiss the Due Process claims because enough process is provided. Mot. to Dismiss at 25-26. As every court that has found a right in the first place has held, this is wrong, *Elhady,* 391 F. Supp. 3d 562, particularly at the Motion to Dismiss stage, *Elhady*, 303 F. Supp. 3d at 465; *see also Kovac v. Wray*, 363 F. Supp. 3d 721, 758 (N.D. Tex. 2019); *Salloum v. Kable*, No. 19-CV-13505, 2020 WL 7480549, at *11 (E.D. Mich. Dec. 18, 2020).

As grounds for dismissal, the Government unsuccessfully tries to perform the balancing test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). But deciding the *Mathews* balancing test at the motion to dismiss stage is rarely appropriate because "the determination of what process is due requires a balancing of factors which in turn requires the type of factual record generally not available upon a motion to dismiss." *Louise B. v. Coluatti*, 606 F.2d 392, 401 (3d Cir. 1979). And, indeed, the Government's claims (at 27), that DHS TRIP provides rigorous process subject to "several layers of review," including "regular reviews and audits" and a "redress" process "in which the Government conducts a review of available relevant information" is expressly based on outside-the-Complaint record information (which Khalid disputes the accuracy of), which is inappropriate for resolution of a Motion to Dismiss. *See Id.*[7]

[7] The Government asks the Court to take "judicial notice" of this information, but the only reason they provide was that it was published by the Government (indeed, the very defendants in this case). By that measure, the Court could take judicial notice of any fact asserted by the Government in this case. *But see United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (rejecting precisely this argument in this context). In any event, the Court may take judicial notice of the fact that the Watchlisting Overview exists but may not take judicial notice for the truth of the matters described therein, unless those matters are undisputed—which here, they are not. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001*); see also County. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2008) (similar). The Inspector General's

The Government critically ***does not*** lay out for the Court what the processes are that would meet the *Mathews* balancing test. That's because there are none. There is no notice, no hearing, no ability to hear the Government's evidence, much less rebut it, no neutral decisionmaker, and because individuals are not even told that the Government has made an adverse decision against them, no chance to appeal. At most, the Government might concede that there is an APA claim. *See* Section III, below. Even then, that claim is massively hampered by the fact the Government will not even acknowledge that there is a decision against someone that should be set aside, much less provide the record to allow that individual to judge or rebut whether it is based on substantial evidence.

Instead, all the Government musters is platitudes about national security. But *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010), made clear that the Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." And such deference is particularly unwarranted here in the absence of any Congressional authorization for the watchlist in the first place. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). "[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role." *HLP*, 561 U.S. at 34. Yet, by creating a watchlist with far-ranging consequences, without even acknowledging to those individuals they are on the watchlist, much less providing them with judicial review, that is exactly what the Government is asking this Court to do.

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report is not the type of document about which there can be no reasonable dispute. Khalid specifically objects to the conversion of the Government's Motion into one for summary judgment and, before the Court does so, asks for an opportunity to respond under Rule 12(d), including by submitting a Rule 56(d) declaration.

The Government also cites (at 27) a number of cases that are in completely different contexts. *Bassiouni v. Central Intelligence Agency*, 392 F.3d 244 (7th Cir. 2004), *Bassiouni v. Federal Bureau of Investigation*, 436 F.3d 712 (7th Cir. 2006), *Tooley v. Bush*, 2006 WL 3783142 (D.D.C. Dec. 21, 2006), and *Al-Kidd v. Gonzales*, 2007 WL 4391029 (D. Idaho Dec. 10, 2007), are about entitlement to documents under FOIA or in discovery. *Rahman v. Chertoff*, 530 F.3d 622, 627–28 (7th Cir. 2008), is about class certification. *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021), as noted above, did not find any rights to balance in the first place. None of these cases stand for the proposition that a Court could rule—particularly at the Motion to Dismiss stage—that Khalid may have a constitutionally protected Due Process right, but that right could be satisfied with essentially zero process at all.

III. Khalid has an APA claim independent from his constitutional ones.

The Government claims (at Mot. to Dismiss at 29-31) that Khalid's APA Claim (Count III) is wholly derivative of his Due Process claims. That is wrong. As one District Court explained in rejecting a similar argument from the Government, Khalid can show "that Defendants' actions were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" even apart from whether the same conduct violates the Constitution. *Kovac*, 363 F. Supp.3d at 758-59; *see also Kovac v. Wray*, 2020 WL 6545913, at *5 (N.D. Tex. 2020) Likewise, to the extent (as Khalid alleges) that "nominations were solely based on such factors as race, ethnicity, national origin, religious affiliation, or First Amendment protected activities" (or, not cooperating sufficiently with the FBI, as protected by both the First and Fifth Amendment), the watchlisting system could also violate the APA even in the absence of an independent constitutional right. *Kovac*, 2020 WL 6545913, at *5.

Meanwhile, whether or not the substantive and procedural rules that make up the watchlist are arbitrary and capricious are just as fact-dependent and inappropriate for Rule 12(b) dismissal as the whether those rules provide constitutionally-inadequate process under *Mathews*.

And more fundamentally, to the extent the Government has (a) turned Khalid's life upside down by placing him on a watchlist because, as Khalid alleges, his mother made a since-recanted allegation that Khalid's father was taking Khalid to a terrorist training camp in Pakistan as part of an understandably-desperate attempt to retain custody of her child, and (b) refuses to remove him from the list despite his mother's recanting as punishment for his refusal to take extraordinary actions to provide information to the FBI (that would surely be unconstitutional if coerced), this would be the epitome of arbitrary and capricious.

IV. Khalid's Substantive Due Process claim relates to his No Fly list status alone.

Khalid's Substantive Due Process claim, as the Government correctly suggests, is based on Khalid's No-Fly list annotation. Because that claim was transferred to the D.C. Circuit, that claim is not currently before the Court.

CONCLUSION

The Court should deny the Motion to Dismiss.

Respectfully Submitted,

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Dated: September 22, 2023