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)

DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS

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INTRODUCTION

As set forth in the Government's opening memorandum, the Court should dismiss Plaintiff's claims for lack of jurisdiction. They also fail as a matter of law. Fundamentally, Plaintiff's amended complaint challenges his status on the No Fly List, and the Court has transferred those claims to the court of appeals, where they are now pending. Plaintiff's responses to the Government's arguments do not rescue his claims. Rather, they reinforce that his inclusion in the Terrorist Screening Dataset ("TSDS") cannot be artificially separated from his No Fly List status and adjudicated in its absence.

Most fundamentally, Plaintiff lacks standing to bring his TSDS-only claims because he has not alleged an injury specifically attributable to mere TSDS placement. Moreover, the Court cannot redress any injury he has suffered based on his No Fly List status because any change to the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP") for the broader TSDS (as opposed to the No Fly List subset) will not benefit Plaintiff. Unless his status on the No Fly List changes, he will remain on the No Fly List no matter how the Court rules on his TSDS claims. Plaintiff attempts to salvage his claims by contending for the first time that he has been injured by airport travel delays—a contention that is nowhere to be found in his amended complaint, and which one would not expect to find, given that he is not actually permitted to fly. This is both an impermissible amendment through argument and also futile. The Court should not credit injuries never actually pleaded and lacking any support in case law, nor should it credit injuries that Plaintiff claims his wife has suffered. And in response to the Government's redressability arguments, Plaintiff suggests several alternative forms of relief (other than removal from the No Fly List), including changes to the process for placement in or removal from the TSDS. But here, too, the changes would not benefit Plaintiff because he is subject to a different

set of procedures because he is on the No Fly List. Moreover, he does not even contest the Government's argument that no harm will befall him from withholding review until his claims become ripe, where there is no relief to be had for him in this Court.

Turning to the merits, Plaintiff's arguments again suffer from the same fatal flaw: they require the Court to engage in a hypothetical thought-experiment that involves twisting the No Fly List claims he *actually* alleges in his amended complaint into the contours of TSDS-only claims that he *must* allege to survive this motion to dismiss. On his procedural due process claim, too, he invents a new form of deprivation of a liberty interest—airport travel delays, as alleged by one who is not permitted to board an aircraft. But he falls short because, with the tide of the case law against him and facing unanimous views of every circuit court to rule on the issue cutting the other way, he relies on out-of-circuit district court cases that have either been explicitly overruled or nullified. His stigma plus claim fares no better. There, he cannot show a stigma by claiming that TSDS status is simply "inherently" stigmatizing, nor can he establish a plus factor where none of the three he alleges has actually resulted in the alteration or extinguishment of a right or status that he previously enjoyed. And in any event, even if he could demonstrate these requirements for procedural due process, his claim also fails because he does not allege that the existing process is inadequate. Finally, Plaintiff dismisses the Government's national security arguments as "platitudes," but they assuredly are weighty. Indeed, the only circuit court to have evaluated the TSDS processes—the Fourth Circuit—has found that the Government's compelling national security interests outweigh a traveler's limited interest in traveling delay-free and that, in any case, Congress balanced these competing interests when mandating the creation of DHS TRIP, and courts should hesitate before second-guessing Congress's judgment as to how much procedure is needed in this context. *Elhady v. Kable*, 993 F.3d 208, 228–29 (4th Cir. 2021).

For these reasons, the reasons set forth in the Government's Motion, Defs.' Mot. to Dismiss, ECF No. 43 ("Defs.' Mot." or the "Motion"), and the reasons set forth further below, the Court should dismiss Plaintiff's amended complaint.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS.

The Court lacks jurisdiction over Plaintiff's remaining claims because Plaintiff does not have standing to pursue those claims, and those claims are not ripe for adjudication. In his opposition, Plaintiff alleges new forms of injury that do not appear in his amended complaint. Plaintiff's responses to the Government's arguments fall flat: he does not address the problem that any conjectural injury is not redressable by action of this Court, and he provides no reason why any hypothetical, future alleged TSDS-only harm must be considered now rather than waiting for those claims to become ripe following disposition of his No Fly List claims by the D.C. Circuit.

A. Plaintiff Does Not Have Standing on His TSDS-Only Claims.

As set forth in the Government's Motion, standing requires that "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Notwithstanding that Plaintiff bears the burden to establish these elements, Plaintiff alleges new forms of injury for the first time in opposition to the Government's motion to dismiss that were never actually pleaded in his amended complaint, and he does not respond in any way to the Government's arguments that he has not shown redressability.

1. Plaintiff Has Not Pleaded an Injury in Fact.

Plaintiff argues that he has pleaded two forms of injury—delays when re-entering the United States on a single occasion and delays in his wife's immigration process—but the former does not appear anywhere in his amended complaint and neither is sufficient to meet his Article III burden for a variety of independent reasons. *First*, Plaintiff does not allege in his amended complaint that he was ever delayed when entering the United States. In his opposition to the Government's Motion, Plaintiff cites two declarations where he claims to have alleged this, but these were attached to his motion for a preliminary injunction, which was filed months after his amended complaint and which the Court denied—not attached to his amended complaint. *See* Decl. of Gadeir I. Abbas ("Abbas Decl.") ¶ 13, ECF No. 22-2; Decl. of Saad Bin Khalid ("Khalid Decl.") ¶ 6, ECF No. 22-4. A plaintiff must plead an injury in fact in the complaint—not in subsequent pleadings. *Cf. Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1230 (11th Cir. 2000) ("If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury."). This is particularly true where the allegations are necessary to meet the plaintiff's burden to establish jurisdiction. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (citation omitted)).

But even if the Court were to credit these allegations of injury, they fail on their merits. The first statement Plaintiff identifies is in fact a statement by his attorney—not by Plaintiff—that states, "Subject to special screening and whatever security procedures the Government decided upon, Mr. Khalid flew from London to New York City and then again from New York City to Cincinnati with the Government's permission." Abbas Decl. ¶ 13. Plaintiff's attorney does not state that Plaintiff was in any way delayed during these travels.

In the second statement attached to his preliminary injunction motion, Plaintiff claims:

> I was only able to return to the United States, without my wife and child, after I filed this action, and my attorneys secured from the Government special clearance for me to return to the United States for work. Though I was able to fly into JFK airport on JetBlue. The clearance covered my connecting flight, so I flew on to Cincinnati by Delta Airlines. I was detained and interrogated for 5-6 hours upon my arrival at JFK.

Khalid Decl. ¶ 6. The declaration itself explains that this alleged delay was caused by his No Fly List status and not by mere TSDS status: the trip on which Plaintiff claims to have been delayed was specially facilitated by the Government for him to be repatriated to the United States. Plaintiff never claims that he was delayed because of mere TSDS status (as opposed to his No Fly List status). And that is in fact because, according to Plaintiff's own pleadings, he was not. As Plaintiff acknowledges, this was a "special clearance," and the Government implemented enhanced security measures given Plaintiff's No Fly List status. *See* Declaration of Michael Turner ¶¶ 21–23, ECF No. 25-1. It would be speculative for the Court to presume, as Plaintiff now asks it to, that this same delay would have occurred if Plaintiff was not on the No Fly List. Under that scenario, the Government would not have assessed there to be a threat that Plaintiff would conduct a violent act of terrorism and would not have determined that he had the capability of doing so. Plaintiff's No Fly List status is not "just an annotation," as Plaintiff wrongly claims. *See* Pl.'s Opp'n to Defs.' Mot. to Dismiss at 3, ECF No. 45 ("Pl.'s Opp'n"). Rather, it results in distinct security measures being employed. *See* Declaration of Steven L. McQueen ("McQueen Decl.") ¶¶ 8–13, ECF No. 43-1 (explaining different security measures that apply to individuals in different TSDS subsets).[1]

[1] Plaintiff appears to at least implicitly argue that all he need show to demonstrate an injury due to TSDS placement is that he has "a willingness to travel." Pl.'s Opp'n at 3. But a willingness to travel is insufficient where he is prevented from traveling because he is on the No Fly List, thereby making it entirely speculative that he will experience future airport travel delays due specifically to his TSDS status. For this reason, all the cases that Plaintiff cites, which did not involve individuals alleged to be on the No Fly List, are inapposite. *See Jibril v. Mayorkas*, 20

In any event, courts across the country—and every circuit court that has considered the issue—have found that delays, including delays of far more than five to six hours, do not suffice to support due process claims. *See infra* Section II (A)(1).

Second, Plaintiff's allegation that his wife's immigration process was delayed by his TSDS status does not demonstrate injury. To begin, these allegations are speculative and not supported by meaningful factual allegations. In any event, any harm would, if anything, be borne by his wife—not by him—and he does not allege that she would have received an immigration benefit absent his TSDS placement. "[A] U.S. citizen has no constitutional right which is violated by the denial of a spouse's visa application." *Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128, 133 (D.D.C. 2019) (Cooper, J.), *aff'd*, No. 19-5263, 2020 WL 2610600 (D.C. Cir. May 15, 2020); *see also Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (holding that a U.S. citizen "has no constitutional right which is violated by the deportation" of their spouse). Delays are generally not legally actionable, *see* Defs.' Mot. at 23, but to the extent anybody could claim injury from the delay, it would be Plaintiff's wife—not him. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[S]tanding is not dispensed in gross." (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)) (internal quotation marks omitted)); *Molina v. Ocwen Loan Servicing*, 545 F. App'x 1, 2 (D.C. Cir. 2013) (Plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other[s]" (quoting *Warth v. Seldin*, 422 U.S. 490, 502(1975)).

F.4th 804 (D.C. Cir. 2021), *on remand to* 1:19-cv-2457, 2023 WL 2240271 (D.D.C. Feb. 27, 2023), *appeal filed* No. 23-5074 (D.C. Cir. Apr. 5, 2023); *El Ali v. Barr*, 473 F. Supp. 3d 479, 519 (D. Md. 2020), *Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1302 (D. Minn. 2018); *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 WL 2170323, at *10 (D. Mass. May 9, 2018). For the same reason, Plaintiff cannot show that he "is likely to be harmed in the future" by delays when flying, Pl.'s Opp'n at 4, because it is entirely speculative whether he will be permitted to fly in the future, let alone to be delayed when flying.

Plaintiff seems to realize this as he acknowledges that "*she* has a statutory right to [immigration process] under Section 1154(b)." Pl.'s Opp'n at 4 (emphasis added). Indeed, the sole case that Plaintiff cites for the argument that an immigration delay due to watchlist status establishes standing is one in which the Plaintiff alleges that *his own* immigration status was delayed. *See Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *5 (N.D. Tex. Mar. 9, 2023) (noting that TSDS status may "perhaps . . . impos[e] adverse immigration consequences *on listees*" (emphasis added)).[2]

Plaintiff never even alleges that his wife's immigration process was delayed specifically because of his TSDS status. His amended complaint alternatively alleges that the delays were due specifically to his No Fly List status, *see* Am. Compl. ¶ 7, ECF No. 17 ("Mr. Khalid has faced additional harm due to his status on the No Fly List as it relates to an I-130 petition he filed for his Pakistani wife."), or due to the combination of his No Fly List and TSDS status, *see id.* ¶ 143 ("[A]s a result of his status on the TSDB *and* No Fly List, Mr. Khalid's I-130 immigration application will be significantly, if not permanently, delayed." (emphasis added)). He never alleges these delays were due specifically to his TSDS status alone, and for good reason: he is not in fact in the TSDS alone but rather also on the No Fly List and cannot meet his burden to show that he would have still been injured by these delays if he were not on the No Fly List. But even apart from the No Fly List issue, Plaintiff does not allege that his wife's petition would have been approved delay-free but for his TSDS status. *See, e.g.*, *Da Costa v. Immigr. Inv. Program Off.*,

[2] Plaintiff also claims that the court in *El Ali* "found immigration-related delays due to watchlist status plausible in defeating motions to dismiss claims challenging that status." Pl.'s Opp'n at 4. That is incorrect. Although the *El Ali* court noted as background that some of the plaintiffs there had alleged delays in relatives' immigrations proceedings, the court never indicated that it considered that at all in analyzing the plaintiffs' standing. *El Ali v. Barr*, 473 F. Supp. 3d at 500–02.

No. CV 22-1576 (JEB), 2022 WL 17173186, at *10 (D.D.C. Nov. 16, 2022), *appeal argued*, No. 22-5313 (D.C. Cir. May 11, 2023) ("Although no bright lines have been drawn in this context, district courts have generally found that immigration delays in excess of five, six, seven years are unreasonable, while those between three to five years are often not unreasonable." (citation omitted) (internal quotation marks omitted)).

In fact, it appears that any delay had ended as of the filing of the amended complaint. In Plaintiff's amended complaint filed June 29, 2022, he stated that on "June 25, 2022[,] . . . the National Visa Center provided him and his wife notice that the Immigrant Visa Case was documentarily qualified for an interview appointment." Am. Compl. ¶ 7. He notes that "[t]o date, no interview has been scheduled," *id.*, but he made that statement just four days after receiving the notice of documentary qualification. That is hardly a delay and certainly no indication of whether a visa will be processed or not. *See* Pl.'s Opp'n at 4 ("Claims for injunctive relief, like this one, are . . . future looking, and thus test whether an individual is likely to be harmed in the future.").

2. Plaintiff Has Not Shown it is Likely that a Favorable Decision Will Redress Any Hypothetical Injury.

"Because redressability is an 'irreducible' component of standing, no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (citation omitted). The Government argued in its Motion that Plaintiff has failed to demonstrate redressability because, were the Court to evaluate the procedural adequacy of the redress process available to watchlisted individuals who are *not* on the No Fly List, and were the Court to order any remedies related to that process, such remedies would avail Plaintiff nothing. Given his current placement on the No Fly List (an issue now before the court of appeals), the procedures available to him are different, and he cannot benefit from any changes to inapplicable procedures, whether ordered by the Court or developed

on remand from this Court to the relevant agencies. *See* Defs.' Mot. at 14.

Plaintiff responds that, "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." Pl.'s Opp'n at 7. But none of these remedies would benefit Plaintiff. He argues that the Court could "order changes to the process for placement or removal of individuals on the watchlist," *id.*, but, again, any procedures the Court might order regarding individuals *not* on the No Fly List would not apply to him. Plaintiff suggests that the Court could "prohibit TSC from disseminating watchlist status to other agencies or private individuals, except TSA and airlines as necessary to enforce the No Fly annotation," *id.*, but such relief, if somehow granted, would not benefit Plaintiff, since his information would still be disseminated for No Fly List purposes. And perhaps most importantly, all these suggested forms of relief are blanket relief that are not available to Plaintiff in this as-applied challenge. *See* Op. & Order at 8, ECF No. 32 ("Order") ("[T]he Court interprets Khalid's complaint as raising only as-applied challenges to his own placement on the watchlist and No Fly List.").

B. Plaintiff's TSDS-Only Claims Are Not Ripe.

Nor are Plaintiff's TSDS-only claims ripe. Ripeness turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (citation omitted). As to fitness, Plaintiff argues that he is not required to exhaust administrative remedies in the form of the DHS TRIP process. This misses the primary point, which is that there is no case or controversy regarding the adequacy of the TSDS redress procedures where Plaintiff has in fact already exhausted his administrative remedies as to the different No Fly List procedures. But it is also wrong. An individual who suspects he or she is in the TSDS should be required to pursue the DHS

TRIP process before bringing a claim in federal court. *See Shearson v. Holder*, 725 F.3d 588, 594 (6th Cir. 2013) ("[W]hen considering the purposes of the exhaustion doctrine, making [plaintiff] submit a Traveler Redress inquiry is reasonable to promote judicial efficiency and allow the agencies involved an opportunity to resolve problems with their procedures."). None of Plaintiff's cases is availing because none relates exclusively to the TSDS-specific process.[3]

As to the hardship to the parties of withholding review, the Government argued in its Motion that there would be no hardship to Plaintiff from withholding judicial review because Plaintiff is suffering no hardship at all related to mere TSDS status so long as he remains on the No Fly List, and his No Fly List claims are pending with the court of appeals. *See* Defs.' Mot. at 15–16. Plaintiff does not respond to this argument, and "the court may treat the unaddressed arguments as conceded." *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (citation omitted).

II. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even if the Court had subject matter jurisdiction, Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) because Plaintiff fails to state a viable claim for relief.

A. Count I (Procedural Due Process) Should Be Dismissed.

1. Plaintiff Has Not Pleaded Deprivation of Any Constitutionally Protected "Movement-Related" Liberty Interest.

Plaintiff first claims that his TSDS status "implicates [his] movement-related liberty interest," Pl.'s Opp'n at 7, but the Court has already dismissed this claim:

> In support of his due process claims, Khalid alleges that his inclusion on the terrorist watchlist infringes his rights to travel and to be free from government-imposed

[3] *See El Ali*, 473 F. Supp. 3d at 506 (plaintiffs included individuals on No Fly List); *Kovac v. Wray*, 363 F. Supp. 3d 721, 747 (N.D. Tex. 2019) (No Fly List); *Crooker v. TSA*, 323 F. Supp. 3d 148, 157 (D. Mass. 2018) (No Fly List; plaintiff had made DHS TRIP inquiry); *Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014) (No Fly List).

> stigma. Am. Compl. ¶¶ 155–56, 159–61, 166. For the most part, those arguments are unavailing. To start, Khalid's placement on the broader terrorist watchlist alone does not subject him to flight restrictions. See Watchlist Overview at 2. Thus, regardless of whether there is a constitutionally protected right or liberty interest in air travel—a question the parties dispute—placement on the watchlist does not implicate it. See Elhady v. Kable, 993 F.3d 208, 220-23 (4th Cir. 2021) (rejecting theory that presence on watchlist infringed any right to travel).

Order at 10. Even if the Court had not already dismissed Plaintiff's claim, it would be unavailing. As already described, Plaintiff's amended complaint never once alleges that he was *delayed* in travel. *See supra* Section I(A)(1). And Plaintiff relies on just three cases for his argument that the TSDS interferes with his right to travel, but each of those was either overturned or nullified as to that holding by a case this Court already relied on in its prior Order—*Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021)—and none of the cases Plaintiff cites is good law today. *See El Ali*, 473 F. Supp. 3d 479; *Elhady v. Piehota*, 303 F. Supp. 3d 453, 463 (E.D. Va. 2017); *Mohamed v. Holder*, 266 F. Supp. 3d 868, 878 (E.D. Va. 2017). Indeed, the Fourth Circuit overturned the district court decision in *Elhady v. Piehota* and nullified the relevant holdings in *El Ali* and *Mohamed* when it held that alleged delays that plaintiffs experienced at airports and at the border due to being in the TSDS do not violate any due process liberty interests in travel. *Elhady*, 993 F.3d at 224.[4]

Nor is the Fourth Circuit alone. In fact, every circuit court across the country to consider the issue has held that there is no liberty interest in delay-free travel. *See Ghedi v. Mayorkas*, 16 F.4th 456, 462, 466–67 (5th Cir. 2021) (holding that "being detained for seven hours by DHS and CBP officials" was an "inconvenience[]" that did "not plausibly allege a deprivation of [the plaintiff's] right to travel"); *Abdi v. Wray*, 942 F.3d 1019, 1032 (10th Cir. 2019) (holding that a

[4] Plaintiff correctly notes that the *Elhady* plaintiff, who was represented by the same counsel as that which represents Plaintiff in this matter, petitioned for rehearing *en banc* in *Elhady*. Plaintiff does not note, however, that the Fourth Circuit denied that petition. *See* Order, *Elhady v.* Kable, 993 F.3d 208 (4th Cir. 2021) (No. 20-1119), ECF No. 84.

"forty-eight-hour delay . . . merely reasonably encumbered" traveler and did not deprive him of a liberty interest in travel); *see also Beydoun v. Sessions*, 871 F.3d 459, 468 (6th Cir. 2017) (holding with respect to a substantive due process claim that "incidental or negligible" delays of up to "an entire day" do not "implicate the right to travel"); *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 141 (2d Cir. 2010) (holding that delaying a traveler for a "little over one day" "was a minor restriction that did not result in a denial of the right to travel").[5]

2. Plaintiff Has Not Pleaded Deprivation of Any Constitutionally Protected Liberty Interest in Freedom from Government-Imposed Stigma.

Plaintiff's claim that he has been deprived of a stigma-plus protected liberty interest fares no better. As to this claim, Plaintiff has not pleaded a stigma by merely alleging the "inherent" stigmatization of the TSDS, and he has not pleaded a plus factor where none of the consequences he alleges were the result of the altering or extinguishment of a right or status he already had.

a. Plaintiff Has Not Pleaded a Stigma.

Plaintiff's argument that he has suffered a stigma amounts to this: "Being accused of being a terrorist is inherently stigmatizing." Pl.'s Opp'n at 10 (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2001)).[6] In its Motion, the Government argued that

[5] Plaintiff argues that the Government has somehow "forfeited" the argument that the TSDS does not deprive him of a liberty interest in delay-free travel. *See* Pl.'s Opp'n at 8. That strains credulity. The Court already dismissed that travel-based claim, Order at 10, and the Government cited that dismissal in its motion, Defs.' Mot. at 6. In any event, the Government was not on notice that Plaintiff would try to resuscitate that argument here where his amended complaint does not allege that the TSDS in any way delayed his travel.

[6] In fact, this case stands for an entirely different proposition that supports the Government's argument here. In *National Council of Resistance of Iran*, two Iranian dissident organizations petitioned for review of an order of the Secretary of State designating them as "foreign terrorist organization" under the Anti–Terrorism and Effective Death Penalty Act ("AEDPA"). Far from holding that being labeled a terrorist or even a terrorist organization was "inherently stigmatizing," as Plaintiff mischaracterizes this case, the court actually held that the

merely stating without elaboration and in a conclusory manner that the Government has disseminated Plaintiff's TSDS status to a variety of different entities does not suffice to plead that he was actually injured by that dissemination. For example, Plaintiff alleges that his TSDS status was disseminated to "gun sellers," Am. Compl. ¶ 24, but not that he tried to purchase a gun and was prevented from doing so because of that dissemination. Or he alleges that it was disseminated to "financial institutions," *id.*, but not that he was prevented from opening a bank account because of that dissemination. Plaintiff does allege that it was disseminated to CBP, which used that information to delay Plaintiff's travel, but that claim is foreclosed because the Court dismissed it and because Plaintiff never alleged any travel delays in his complaint. *See supra* Section I(A)(1). So, the closest Plaintiff comes to actually alleging a stigma is that his status was disseminated to USCIS, which in turn, he speculates, used his status to delay his wife's immigration petition. But there, too, his argument falls flat because he did not personally suffer any such stigma—he alleges that his wife did—and the connection between Plaintiff's TSDS status and his wife's immigration delays is attenuated and falls far short of the *Twombly*/*Iqbal* pleading standard. *See id.* And in any event, Plaintiff's wife's immigration proceedings now appear to be proceeding in due course so there is no relief for the Court to order there. *See id.*

Plaintiff also fails to plead a stigma because he has not alleged facts demonstrating public defamation by merely alleging that his TSDS status is shared with other government agencies. *See Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995) ("As we have held, injury to reputation cannot occur in the absence of public disclosure of the allegedly damaging

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plaintiffs there had stated a stigma plus claim because that label has specific consequences under AEDPA, including preventing the organizations from "receiv[ing] material support or resources from anyone within the jurisdiction of the United States" and "impair[ing] . . . petitioners' property rights," among others. *Nat'l Council of Resistance of Iran*, 251 F.3d at 204. As that court explained, "petitioners here have suffered more than mere stigmatization." *Id.*

statements."); *see also Elhady*, 993 F.3d at 225 ("The federal government's intragovernmental dissemination of TSDB information to other federal agencies and components, to be used for federal law enforcement purposes, is not 'public disclosure' for purposes of a stigma-plus claim." (citation omitted)). Confoundingly, Plaintiff responds, "[t]he 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." Pl.'s Opp'n at 10. Plaintiff does not, however, cite any of that supposed "Circuit precedent," nor does he respond to any of the ample precedent the Government cites across multiple pages of argument on that precise point. *See* Defs.' Mot. at 17–19 (arguing that Plaintiff's claim fails because he has not alleged that TSDS status is publicly available).

b. Plaintiff Has Not Pleaded A "Plus Factor."

The Court has already held that Plaintiff has only alleged two possible plus factors in his amended complaint: his "assertion that his status on the watchlist results in 'indefinitely delaying or denying immigration benefits' and lost employment opportunities." Order at 11 (quoting Am. Compl. ¶¶ 63, 77–79, 108, 144). Nonetheless, Plaintiff conjures up a variety of alleged harms in his opposition that do not appear in his amended complaint, which might be termed "inherent" plus factors. *See* Pl.'s Opp'n at 11 (arguing that "watchlist 'status' is inherently a status"). The Court should not credit any such arguments that do not appear in the amended complaint and which, to the extent they do appear, the Court dismissed or transferred to the court of appeals because they are predicated on his No Fly List status. But to the extent the Court considers those "inherent" plus factors, they fail for the same reasons as the other alleged plus factors—Plaintiff has not shown as to any of them that "a right or status previously recognized by state law was

distinctly altered or extinguished." *Paul v. Davis*, 424 U.S. 693,711 (1976); *see also* Order at 10 (same).

Immigration Benefits: The Government set forth a variety of reasons why the delay of Plaintiff's wife's visa cannot be a plus factor. These include that (1) Plaintiff does not allege that he had a right to any immigration status—such as an already approved petition—that was extinguished or altered; (2) from the face of the complaint, it appears that his wife's immigration claim is progressing as of just four days before the filing; and (3) Plaintiff does not allege there is any connection between his TSDS status and the loss or delay of benefits beyond conclusory allegations. *See* Defs.' Mot. at 22–23. Plaintiff responds to just one of those arguments—the first—and claims that "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." Pl.'s Opp'n at 12. Plaintiff misapprehends the law. A plaintiff making a stigma plus claim must plead that because of Government stigmatization, "a right or status previously recognized by state law was distinctly altered or extinguished." *Paul*, 424 U.S. at 711; *see also* Order at 10 (same). But that right need not be a "constitutional right"—nor has the Government ever claimed it needed to be one—but "[f]or due process purposes . . . it is not enough that one has 'an abstract need or desire' for the [benefit]; to merit due process protection, '[h]e must . . . have a legitimate claim for entitlement to it." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 119 (D.C. Cir. 2010) (last alteration and ellipses in original) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Plaintiff has no entitlement to his wife having delay-free consideration of her visa application, and there is, therefore, no plus factor.

Employment Opportunities: Plaintiff now clarifies, as he must for the reasons explained in the Government's Motion, that the only employment-related plus factor that he is claiming as

to his TSDS status is that he has allegedly been "prohibit[ted] . . . from obtaining any government security clearances required by Mr. Khalid's employers. Thus, Mr. Khalid continues to be prevented from growing his career and obtaining financial security for his family." Am. Compl. ¶ 108.

To prevail on a stigma-or-disability claim, a plaintiff must prove that the government has either "formally debar[red] an individual from certain work" or "implement[ed] broadly preclusive criteria that prevent pursuit of a chosen career." *Abdelfattah v. DHS*, 787 F.3d 524, 538 (D.C. Cir. 2015). Plaintiff does not dispute that he had no right to a security clearance that his TSDS status deprived him of or that he lost a job he previously had because a clearance was revoked. In fact, he does not claim that he has ever applied for a clearance or that any clearance was denied. Rather, he claims that merely being less likely to receive a security clearance in the event he one day chooses to apply for one (and therefore being less likely to receive particular unnamed jobs in the event he one day chooses to apply for those) is sufficient to constitute a plus factor. That is not the law, and the cases Plaintiff relies on do not lead to that conclusion. *See McGinnis v. District of Columbia*, 65 F. Supp. 3d 203, 215 (D.D.C. 2014) (noting that to state a stigma or disability liberty-interest claim, the plaintiff "[a]t a minimum . . . must allege that she has applied for and been rejected from other positions in the field").

In *Kartseva v. Dep't of State*, 37 F.3d 1524, 1527 (D.C. Cir. 1994), the court held that "a government action that potentially constrains future employment opportunities must involve a tangible change in status to be actionable under the due process clause." It is true that the Court found that if a government action "has the *broad* effect of largely precluding [Plaintiff] from pursuing her chosen career as a Russian translator, that, too, would constitute a 'status change' adequate to implicate a liberty interest." *Id.* at 1528. The Court made clear, however, that "if

[Plaintiff] has merely lost one position in her profession but is not foreclosed from reentering the field, she has not carried her burden." *Id.* at 1529. Plaintiff does not allege that he was unable to pursue his chosen career field but rather that he lost "certain employment opportunities" that are not named in his complaint. Pl.'s Opp'n at 12. Indeed, the only conclusory reference to security clearances in his amended complaint does not even specify what his career field is or identify any particular employer that he was not able to work for because of his lack of clearance but merely states that the "TSDB prohibits him from obtaining any government security clearances required by Mr. Khalid's employers. Thus, Mr. Khalid continues to be prevented from growing his career and obtaining financial security for his family." Am. Compl. ¶ 108. That does not suffice to plead a claim under the reasoning of *Kartseva*. *See also Taylor v. Resol. Tr. Corp.*, 56 F.3d 1497, 1506 (D.C. Cir. 1995), (no stigma-or-disability claim where the agency "had taken no action to formally debar [plaintiff] or automatically disqualify him from working on any future [agency] contracts"), *opinion amended on reh'g*, 66 F.3d 1226 (D.C. Cir. 1995).

Plaintiff also relies on *Ranger v. Tenet*, 274 F. Supp. 2d 1, 9 (D.D.C. 2003). While the district court there ruled that CIA's denial of a security clearance to the plaintiff constituted a plus factor, the court's ruling was based on the fact that the plaintiff was fired from his job he already had as a result of the revocation of a clearance he also already had and that it was furthermore plausible that CIA informed his employer that the reasons for the revocation were that he was financially irresponsible, and lacked judgment, honesty, and reliability. *Id.* at 8–9. By contrast, Plaintiff here does not allege that he either had a clearance that was revoked or that he was fired

from a job because of any revocation of that clearance. And to the extent the reasons for his TSDS placement are public, that is because Plaintiff first made them so.[7]

In fact, the case most directly on point is *Navy v. Egan*, 484 U.S. 518, 528 (1988), which held that "[i]t should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official." Plaintiff argues that the Government's reliance on *Egan* is misplaced because "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' factor in the stigma-plus test." Pl.'s Opp'n at 13. But that begs the question. Here, Khalid acknowledges he doesn't have a pre-existing right to a clearance but has somehow lost the right to one. He never identifies the source of that right. That is because it does not exist and therefore cannot serve as the plus factor.

And Plaintiff does not respond to the Government's argument that Plaintiff in fact appears to be advancing successfully in his career even in the absence of a security clearance, having obtained the position of partner and director at Global Services Marketplace. *See* Defs.' Mot. at 25. Nor does he refute the Government's assertion that, to the extent he didn't get other unidentified jobs or opportunities because he was unable to obtain a clearance, those were the actions of third parties and are therefore excluded from the stigma-plus doctrine. *See id.* (citing *Siegert v. Gilley*, 500 U.S. 226, 234 (1991)). The Court should treat Plaintiff's failure to respond to these arguments as conceded. *See Wannall*, 775 F.3d at 428.

[7] The Government previously filed parts of Plaintiff's January 25, 2022 DHS TRIP letter informing him why he was placed on the No Fly List under seal. *See* Sealed Doc., ECF No. 14. However, Plaintiff's Amended Complaint then voluntarily disclosed on the public docket the information from the letter that previously had been redacted in the publicly filed version. *See* Am. Compl. ¶ 113.

"Inherent" Plus Factors: In his opposition, Plaintiff claims that he suffered several consequences that would apply to anyone in the TSDS. These include (1) subjecting him to electronic devices searches at the border, (2) issuing "handling codes" to state and local police that might affect how TSDS individuals are treated during encounters, and (3) subjecting him to secondary screening at airports. *See* Pl.'s Opp'n at 11–13. The Court has already rejected such arguments in its earlier order, *see supra* Section I(A)(1), but they also fail for a variety of independent reasons.

First, Plaintiff does not ever claim that he has personally been subject to electronic device searches or any alteration to the way law enforcement have treated him as a result of his TSDS status, as opposed to generalized statements that the Government generally does these things or that he was subjected to them due to his No Fly List status. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972) (Plaintiff "may not seek redress for injuries done to others"). In fact, it would be impossible for him to have been subject to secondary screening at an airport due to mere TSDS status because he is on the No Fly List and therefore not able to enter the secure area beyond security within an airport.

Second, although this Court need not reach the issue given that Plaintiff does not have standing to raise it, Plaintiff has no legal right to be either free from electronic device searches at border crossings or secondary screenings or to any particular type of treatment from law enforcement that was extinguished by his TSDS placement. In fact, the overwhelming case law demonstrates that neither Plaintiff nor any other U.S. citizen has a right to be free from an electronic device search at the border. *See United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) ("[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are

reasonable simply by virtue of the fact that they occur at the border." (citation omitted)); *United States v. Touset*, 890 F.3d 1227, 1232 (11th Cir. 2018) ("[S]earches at the border of the country '"never" require probable cause or a warrant.'" (quoting *United States v. Ramsey*, 431 U.S. 606, 619 (1977)). And of course, any traveler any given day may be subject to secondary screening—certainly not the basis of a plus factor. *See Elhady*, 993 F.3d at 221 ("These burdens are not dissimilar from what many travelers routinely face, whether in standard or enhanced screenings, particularly at busy airports.").

In short, none of the "inherent" plus factors Plaintiff cites, nor any loss of immigration benefits for his wife or employment opportunities for himself, amounts to an alteration or extinguishment of a right or status that he previously enjoyed.

3. DHS TRIP Provides Constitutionally Adequate Process.

Plaintiff next argues that "every court *that has found a right in the first place* has held" that DHS TRIP is inadequate. Pl.'s Opp'n at 14 (emphasis added). But out of the many courts across the country—including three circuit courts—to address the issue of procedural due process in the TSDS context, Plaintiff identifies just three district courts that have found that the plaintiff has sufficiently pled that the process afforded was inadequate. The first case that Plaintiff identifies—*Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019)—was overturned by the Fourth Circuit on this exact point, among others. *See supra* Section II(A)(1). The other two cases—*Kovac v. Wray*, 363 F. Supp. 3d 721, 758 (N.D. Tex. 2019)[8] and *Salloum v. Kable*, No. 19-CV-13505, 2020 WL 7480549, at *11 (E.D. Mich. Dec. 18, 2020)—pre-date the Fourth Circuit *Elhady* decision and relied, in part, on now overturned caselaw. In short, the Government respectfully submits that they

[8] In any event, the *Kovac* court ultimately went on to uphold the DHS TRIP redress process for individuals in the TSDS. *See Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *10 (N.D. Tex. Mar. 9, 2023), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 23, 2023).

were wrongly decided. But in any event, they are distinguishable in that they each involved plaintiffs who had actually pursued the DHS TRIP process as to their alleged TSDS status and made specific allegations about why the process they actually received was insufficient. In this as-applied claim, *see* Order at 8, Plaintiff never once argues that the process he was specifically afforded because of his TSDS status was inadequate. That is because he received the No Fly List process. His newfound complaints about individuals solely in the TSDS are hypothetical as to him.

Every one of the circuit courts to consider procedural due process challenges to the TSDS found that the respective plaintiff failed to allege the deprivation of a liberty interest, and therefore, did not need to consider whether the process afforded was adequate. This Court should do the same. But if the Court considers the adequacy of the process, it should consider guidance from Fourth Circuit's decision in *Elhady*. There, the Fourth Circuit noted that "[s]everal factors make us doubt the merits of plaintiffs' arguments under [the *Mathews*] framework." *Elhady*, 993 F.3d at 228. The Fourth Circuit first noted that "the government's interest is extraordinarily significant in this case." *Id.* The Plaintiff here dismisses these "platitudes about national security," Pl.'s Opp'n at 15, but these concerns are very real to the men and women at the defendant agencies in this action who serve this country every day, ensuring that it is protected from terrorist attacks. And they are also very real to courts across the country. *See* Defs.' Mot. at 26 (collecting cases). Counterbalanced against that, "the weight of the private interests at stake is comparatively weak" where plaintiffs complained about delays in airports and border crossing, and asserted stigma-plus claims like those of Plaintiff here. *Elhady*, 993 F.3d at 229. Finally, the court noted that it "would not casually second-guess Congress's specific judgment as to how much procedure was needed in this context." *Id.*

Here, the Government explained the actual process involved in TSDS placement in detail in its motion. *See* Defs.' Mot. at 26–27. Plaintiff does not contest the accuracy of the Government's account of the process in any specific way but rather argues that the Court must accept Plaintiff's myopic view of what it entails, while ignoring case law and official Government documents to the contrary. The Court need not be so blinded. *See infra* Section III.

B. Count IV (APA Claims) Should Be Dismissed.

Plaintiff's APA claim likewise should be dismissed. The scope of APA review is narrow and deferential, and a court cannot substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As long as the agency action being challenged has a rational basis, it must be affirmed. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). As to Plaintiff's procedural APA challenge, for the same reasons the DHS TRIP procedures satisfy due process, *see supra* Section II, they also have a rational basis. Plaintiff argues his APA claim is in fact "independent from his constitutional ones," Pl.'s Opp'n at 16, but he does not identify any particular APA procedural requirement in conflict with the redress policies. Rather, he claims that to the extent nominations are solely based on factors protected by the First Amendment and Fifth Amendment, then the TSDS could violate the APA "in the absence of an independent constitutional right." Pl.'s Opp'n at 16. It is not clear what Plaintiff means by this because by definition, this would amount to repackaged constitutional claims that would rise or fall based on the alleged First and Fifth Amendment violations. But it is of no moment anyway because Plaintiff does not actually allege that nominations are based solely on those factors. Nor can he. "'Nominations must not be based solely on the individual's race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment as free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, and

petitioning the government for redress of grievances.'" *Kashem v. Barr*, 941 F.3d 358, 370 (9th Cir. 2019) (no citation in original). Plaintiffs makes no allegation that the Government made any nomination, much less his own, in violation of these procedures.

III. THE COURT MAY PROPERLY TAKE JUDICIAL NOTICE OF THE WATCHLISTING OVERVIEW DOCUMENT.

Plaintiff argues that the Court should not take judicial notice of the Watchlisting Overview document in adjudicating his motion to dismiss because it is outside of his amended complaint. *See* Pl.'s Opp'n at 14 n.7. Plaintiff's argument is unavailing because the Court has already taken judicial notice of the Watchlisting Overview. *See* Order at 2, 3, 4, 9, 10 (citing Watchlisting Overview). The Court was correct to do so. The Watchlisting Overview document, which was released by the U.S. Government following an inter-agency review process, provides an official, authorized description of watchlisting policies and procedures. *See* Declaration of Samuel P. Robinson ¶ 7, ECF No. 19-1. The Court may properly take judicial notice of this public document. *See, e.g.*, *Gustave–Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (at the motion to dismiss stage, courts may consider "matters about which the Court may take judicial notice"); *Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) ("[J]udicial notice may be taken of public records and government documents available from reliable sources."), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017).

In any event, to support his argument that the Court should not consider the Watchlisting Overview, Plaintiff relies on *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), but in fact that case reached the opposite conclusion. There, the Ninth Circuit held that "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Here, both of those are true. Plaintiff's Amended Complaint repeatedly

directly quotes from the Watchlisting Overview. *See* Am. Compl. ¶¶ 35–40, 45. This is so notwithstanding that Plaintiff fails to give any attribution to the sources of those direct quotes in his amended complaint. And even apart from Plaintiff's extensive references to the Watchlisting Overview, it is central to Plaintiff's complaint where it describes the policies and procedures that apply to the U.S. watchlisting process, which forms the entirety of Plaintiff's complaint.

In any event, Plaintiff's complaints about the Government's reliance on certain Government documents are belied by his own reliance on Government documents in at least three separate citations when Plaintiff evidently believes those documents benefit him. *See* Pl.'s Opp'n at 1, 5, 11.

In short, where Plaintiff extensively quotes the Watchlisting Overview in his Amended Complaint, where that document forms the very basis of the complaint, and where Plaintiff himself relies on numerous Government documents in his opposition where he deems it to his benefit, the Court may properly take judicial notice of the one document most centrally at issue in this case—the Watchlisting Overview.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's Motion and dismiss Plaintiff's amended complaint.

Dated: October 20, 2023

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