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' RENEWED MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Defendants move to dismiss the Amended Complaint, ECF No. 17, for lack of subject matter jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. For the reasons below, the Court should grant Defendants' motion and dismiss Plaintiff's Amended Complaint. A proposed order is attached.

Dated: August 10, 2023

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

/s/ Christopher D. Edelman
Christopher D. Edelman
(D.C. Bar No. 1033486)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Phone: (202) 305-8659
Email: christopher.edelman@usdoj.gov

Counsel for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Following the Court's dismissal of a portion of Plaintiff's watchlist claims and the transfer of all his No Fly List claims to the court of appeals, including his substantive due process and related Administrative Procedures Act ("APA") challenge to his status on the No Fly List, the sole issue that remains for this Court to decide is whether Plaintiff may proceed on his procedural due process and related APA claims arising from his status in the Terrorist Screening Dataset ("TSDS" or what the Court refers to as the "watchlist")—status which is intrinsic to his placement on the No Fly List. The answer is no.

To begin, Plaintiff lacks standing to bring his TSDS claims. He has not alleged any injury specifically attributable to his TSDS placement, as opposed to arising from his No Fly List placement. These deficiencies are readily apparent when considered in the context of Plaintiff's remaining TSDS claims. Plaintiff's TSDS-only due process claim and related APA claim are not justiciable because the available redress procedures differ, depending on one's status in the TSDS. The process that Plaintiff has in fact received—that is, the only one that a court can review at this time—is the one available to individuals on the No Fly List. And Plaintiff is currently challenging that process in the court of appeals. Plaintiff does not have standing to challenge procedures available to *other* people in the TSDS but which are neither available nor applicable to him, given his current status on the No Fly List. By definition, because Plaintiff is on the No Fly List, he is not *only* in the TSDS and he is also not on *any other* subset of the TSDS other than the No Fly List. Thus, he cannot claim injury from the process for seeking removal from a list he is not on.

This Court also lacks jurisdiction because Plaintiff's claims are not ripe. They depend on contingencies (removal from the No Fly List and then proceeding through the TSDS-specific redress process) that are entirely speculative. On the flipside, Plaintiff will not face any hardship

from waiting until his claim ripens for review because he is not currently suffering any hardship related to his status in the TSDS. Unless and until the court of appeals decides Plaintiff's No Fly List claims and Plaintiff proceeds through the redress process as to his speculative TSDS non-No Fly List status, his claims related to that particular redress process, through which he has never proceeded, are not ripe for review.

Plaintiff's claims fare no better on the merits, either. With respect to his procedural due process claim (Count I), Plaintiff has not identified the deprivation of any constitutionally protected liberty interest attributable to any stigmatization allegedly suffered due to his TSDS status because he has not alleged either (1) that his TSDS status was shared with either the public or with any particular third party or (2) that the sharing with any particular party caused him to suffer a stigma. He also has not alleged the loss or extinguishment of a preexisting right or status recognized by state law (i.e., a "plus factor") that courts require to make stigmatization claims. And in any event, the Government provides adequate process through the Department of Homeland Security ("DHS") Traveler Redress Inquiry Program ("TRIP"). Plaintiff's APA claim (Count III) similarly fails as well because Plaintiff does not allege that the Government has violated any APA procedural rule and his APA claim otherwise depends on his due process claim.

Finally, Defendants do not construe the remaining claims to include a direct substantive challenge to Plaintiff's status in the TSDS as a separate question from his status on the No Fly List. Although aspects of the Court's prior Opinion and Order, ECF No. 32, appear to contemplate the possibility of such a claim proceeding in district court, Defendants submit that there is no such claim in the operative pleading. In any event, such a substantive challenge must intrinsically be wrapped up in Plaintiff's No Fly List challenge that now is before the court of appeals. There is neither a doctrinal nor practical way to untether a TSDS-only substantive challenge from his No

Fly List challenge; indeed, the Court could not afford any remedy without disrupting the court of appeals' jurisdiction. Whether pleaded or not, such a claim could not proceed in this Court.

The Court should therefore dismiss Plaintiff's remaining claims in this action for lack of jurisdiction and for failure to state a claim.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A full description of the statutory and regulatory background of this case is set forth in the Government's memorandum in support of its original motion to dismiss. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 10–15, ECF No. 19 ("Defs.' 1st Mem."). This includes declarations filed by officials at (1) the Terrorist Screening Center ("TSC"), which is administered by the Federal Bureau of Investigation ("FBI") and (2) the Transportation Security Administration ("TSA") of DHS, as well as the attachments to those declarations. *See* Declaration of Samuel P. Robinson, ECF No. 19-1 ("Robinson Decl."); Declaration of Stanley Mungaray, ECF No. 19-2 ("Mungaray Decl."). In particular, the Government invites the Court to direct its attention to the watchlisting overview document. *See* Robinson Decl., Ex. A, Overview of the U.S. Government's Watchlisting Process and Procedures as of September 2020 ("Watchlisting Overview"); *see also* Defs.' 1st Mem. at 4 n.1 (explaining that the Court may properly take judicial notice of this public document). Much of the applicable background is also set forth in the Court's order on the Government's first motion to dismiss. *See* Op. and Order on Defs.' Mot. to Dismiss, ECF No. 32 ("Order") at 2–4. Now that Plaintiff's No Fly List claims have been transferred to the court of appeals, however, certain aspects of the way the TSDS and its subsets function, as well as the process by which individuals may challenge their suspected status in the TSDS, merit further explanation. Accordingly, the Government now submits a supplemental declaration from TSC Deputy Director

for Operations Steven L. McQueen to further elaborate upon these points. *See* Declaration of Steven L. McQueen, Ex. A ("McQueen Decl.").

A. The Terrorist Screening Dataset and Its Subsets

As part of its duties, the TSC maintains the TSDS,[1] which is "the federal government's consolidated watchlist of known or suspected terrorists." *Elhady v. Kable*, 993 F.3d 208, 213 (4th Cir. 2021); *see* Order at 2. Inclusion in the TSDS follows a multi-step assessment, based on analysis of available intelligence and investigative information about an individual. Watchlisting Overview 3. This assessment process is further elaborated in the Government's first memorandum. *See* Defs.' 1st Mem. at 5–6. Of importance here, however, is that the TSDS includes several subsets of data. These include (1) the Selectee List, (2) the Expanded Selectee List, and (3) the No Fly List. McQueen Decl. ¶ 2. An individual may be placed on one—but not more than one—of the subset lists. *Id.* ¶ 12. The Selectee and Expanded Selectee Lists consist of those individuals in the TSDS who may be required to undergo additional screening before flying. *Id.* ¶¶ 8–10; *see also Elhady*, 993 F.3d at 214. An individual who has met the reasonable suspicion standard for inclusion in the TSDS and for whom the TSDS record contains a full name and a full date of birth may be included on the Expanded Selectee List. McQueen Decl. ¶ 10. And the No Fly List includes those individuals in the TSDS who are "prohibited from boarding flights on U.S. carriers as well as flights into, out of, over, or within U.S. airspace." *Id.* ¶ 11.

Inclusion on the No Fly List or the Selectee List require additional heightened substantive derogatory criteria to be met. For the Selectee List, the criteria for inclusion cannot be made public for security reasons. *Id.* ¶ 9. Inclusion on the No Fly List requires credible information showing

[1] Until recently, the TSDS was known as the Terrorist Screening Database or the "TSDB." *See* Robinson Decl. ¶ 5; McQueen Decl. ¶ 1 n.1. Thus, references to the TSDB appear in cited caselaw and some exhibits. It is the same thing as the TSDS.

the individual presents a threat of committing an act of terrorism with respect to an aircraft, the homeland, U.S. facilities or interests abroad, or presents a threat of engaging in or conducting a violent act of terrorism and is operationally capable of doing so. *Id.* ¶ 11.

B. Redress Procedures for All Travelers Delayed or Denied Boarding

Congress directed TSA to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii)(I); *see also id.* § 44903(j)(2)(G)(i) (instructing the TSA Administrator to "establish a timely and fair process for individuals identified as a threat under [the passenger screening system] to appeal to the Transportation Security Administration the determination and correct any erroneous information"); *see also id.* § 44926(a) (granting similar authority to the DHS Secretary). Pursuant to these authorities, TSA has promulgated regulations creating a redress process known as DHS TRIP. 49 C.F.R. §§ 1560.201–1560.207. Under these regulations, travelers may initiate this redress process by submitting a redress inquiry form. *See id.* § 1560.205(b); DHS Traveler Redress Inquiry Program (DHS TRIP), U.S. Department of Homeland Security, http://www.dhs.gov/trip (May 8, 2023).

If the traveler's name is a match or near match with a name in the TSDS, "TSA, in coordination with the TSC and other appropriate Federal law enforcement or intelligence agencies, if necessary, will review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." 49 C.F.R. § 1560.205(d). At the end of its review, DHS TRIP responds with a determination letter, the contents of which vary based on the circumstances, but which generally advises the traveler

that any appropriate corrections have been made as a result of DHS TRIP's review. *See generally Elhady*, 993 F.3d at 215 (describing redress process for individuals experiencing travel-related difficulties).

The Government generally does not disclose whether an individual is in the TSDS. Such status is protected by the law enforcement privilege, and the identities of those on the No Fly List, Selectee List, and Expanded Selectee List are further statutorily protected as Sensitive Security Information ("SSI") pursuant to 49 U.S.C. § 114(r). *See, e.g.*, *Blitz v. Napolitano*, 700 F.3d 733, 737 n.5 (4th Cir. 2012) ("The pertinent regulations deem the following to be sensitive security information that may not be publicly released: . . . the identities of individuals on no-fly[.]"); *Scherfen v. DHS*, No. 3:cv-08-1554, 2010 WL 456784, at *8 n.5 (M.D. Pa. Feb. 2, 2010) ("Because the TSDB status of Plaintiffs can neither be confirmed nor denied, this Court cannot discuss . . . the contents of [documents revealing Plaintiffs' status] submitted for *in camera* review[.]"); *see also* 49 C.F.R. § 1520.5(b)(9)(ii) (SSI includes "[i]nformation and sources of information used by a passenger or property screening program or system, including an automated screening system."). However, as described below, No Fly List status is disclosed in certain narrow circumstances—namely, when a U.S. citizen or lawful permanent resident (collectively, "U.S. persons") has been denied boarding on a commercial aircraft because of his or her presence on the No Fly List and thereafter properly seeks redress through DHS TRIP. *See* Watchlisting Overview 9. This enhanced redress process is further described below.

C. Enhanced Redress Procedures for U.S. Persons Who Are Denied Boarding

In 2015, TSA adopted revised DHS TRIP procedures applicable to U.S persons who are denied boarding due to No Fly List status and who file a redress inquiry. *See generally Latif v. Lynch*, No. 3:10-cv-00750 (BR), 2016 WL 1239925, at *5 (D. Or. Mar. 28, 2016) (describing

process, information disclosed, and resulting order issued by TSA Administrator), *aff'd sub nom.*, *Kashem v. Barr*, 941 F.3d 358, 366 (9th Cir. 2019); Watchlisting Overview 7–10; Mungaray Decl. ¶¶ 5–10. "When a U.S. person . . . is denied boarding because of his or her inclusion on the No Fly List, that person receives additional process that is not available to other DHS TRIP petitioners." McQueen Decl. ¶ 24. If a U.S. person who has been denied boarding and properly invokes these procedures is determined to be appropriately placed on the No Fly List, DHS TRIP will inform the individual of such status and of the opportunity to seek additional information. Watchlisting Overview 7–10; Mungaray Decl. ¶ 6. If the individual takes this opportunity, DHS TRIP will provide the individual with the No Fly List criterion or criteria on which his or her placement was based and, to the extent possible consistent with national security and law enforcement interests, a summary of the factual basis for the No Fly List determination. Mungaray Decl. ¶ 6. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. *Id.* After receiving any such information, the individual then has an opportunity to submit to DHS TRIP any information that the individual considers potentially relevant to the individual's No Fly List status. Watchlisting Overview 9; Mungaray Decl. ¶¶ 6–7.

If TSC concludes that the individual should remain on the No Fly List, TSC will provide a recommendation to the TSA Administrator. Watchlisting Overview 9; Mungaray Decl. ¶¶ 7–8. The TSA Administrator reviews the information on the individual's placement, including TSC's recommendation and any information the individual submitted, and will either issue a final order removing the individual from, or maintaining the individual on, the No Fly List, or remand the matter back to TSC with a request for additional information or clarification. Watchlisting Overview 9; Mungaray Decl. ¶ 8. If TSA issues a final order, the order will state (to the extent

possible consistent with national security and law enforcement interests) the basis for the decision and will further notify the individual of the ability to seek judicial review in the courts of appeals pursuant to 49 U.S.C. § 46110. Watchlisting Overview 9; Mungaray Decl. ¶¶ 9–10. "[I]f the TSA Administrator issues a final order maintaining the traveler on the No Fly list, that order necessarily reflects a determination that the traveler satisfies *both* the criteria for inclusion on the No Fly list *and* the criteria for inclusion in the TSDS generally." McQueen Decl. ¶ 24. It is not possible to be on the No Fly List, or any other TSDS subset, and not be in the TSDS itself. *Id.* ¶ 12. If, however, the TSA Administrator issues a final order removing an individual from the No Fly List, that individual will be removed, even if TSC recommended that he or she not be. *See* Watchlisting Overview 9; Mungaray Decl. ¶¶ 8–10; McQueen Decl. ¶ 21.

D. Changes to TSDS Status

TSC regularly reviews and performs audits of the data in the TSDS to ensure that its underlying information is accurate and supports individuals' placement within the system. Watchlisting Overview at 6. TSC also conducts a specific biannual review of all U.S. persons on the No Fly List (including Plaintiff) to determine whether any changes in status are warranted. *Id.* "If TSC determines an individual no longer satisfies the reasonable suspicion standard required for inclusion in the TSDS as a KST [or known or suspected terrorist], TSC would not maintain that individual in the TSDS as a KST, No Fly, Selectee, or Expanded Selectee. . . . However, if TSC determines an individual no longer satisfies the criteria required for inclusion in a subset category, that individual could remain in the TSDS as a KST if he or she continues to satisfy the reasonable suspicion standard." McQueen Decl. ¶ 13.

II. ADMINISTRATIVE AND PROCEDURAL BACKGROUND

The Government has provided much of the administrative and procedural background in its prior filing and incorporates it by reference here. *See* Defs.' 1st Mem. at 10–14; *see also* Order at 4–5. Since the Government made that filing, on March 16, 2023, the Court issued an Order partially granting and partially denying the Government's first motion to dismiss. Order at 13. The Court ruled that "Khalid's claims challenging his placement on the No Fly List are dismissed with prejudice for lack of subject matter jurisdiction because the courts of appeals have exclusive jurisdiction over those claims." *Id.* However, "Khalid's claims regarding his placement on the terrorist watchlist are permitted to continue subject to further briefing as to whether he has adequately pleaded a due process violation based on government-imposed stigma and whether he may proceed under the APA." *Id.* at 13–14. The Court also dismissed Plaintiff's TSDS "due process claims based on any right to travel and any potential Religious Freedom Restoration Act claim," which the Court found to be "legally deficient." *Id.* at 9.

On April 6, 2023, Plaintiff filed a Motion to Amend the Opinion and Order Partially Granting Defendants' Motion to Dismiss or, in the Alternative, Transfer Claims. ECF No. 34. In that motion, Plaintiff asked the Court to either (1) certify that the Order was an interlocutory order that could be immediately appealed or, in the alternative, (2) transfer the claims over which the Court lacked jurisdiction to the D.C. Circuit pursuant to 28 U.S.C. §1631. *Id.* On May 25, 2023, the Court issued an Opinion and Order in which it declined to certify an interlocutory appeal but granted Plaintiff's motion to transfer his No Fly List claims to the D.C. Circuit. ECF No. 39 at 7. All of Plaintiff's claims related to his placement on the No Fly List subset of the TSDS have therefore been severed from this case and are currently pending in the D.C. Circuit. *See Khalid v. TSA*, No. 23-1150 (D.C. Cir. Appeal docketed June 6, 2023). All that remains for this Court is "to

determine whether Khalid may proceed on his due process claim based on the government-imposed stigma from placement on the watchlist and on his APA claim." Order, ECF No. 32 at 9. The Court decided that it "requires subsequent briefing from the parties" on these issues. *Id.* The Government hereby provides that briefing.

LEGAL STANDARDS

On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of establishing the court's subject-matter jurisdiction. *See, e.g.*, *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). If the plaintiff is unable to do so, the Court must dismiss the action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). When resolving a motion made under Rule 12(b)(1), a court may consider material beyond the allegations in the plaintiff's complaint. *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253–54 (D.C. Cir. 2005).

A Rule 12(b)(6) motion tests whether a complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a complaint "does not need detailed factual allegations," it "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted).

ARGUMENT

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

Plaintiff has the burden of establishing that the court's exercise of jurisdiction is both constitutional and authorized by statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must resolve all issues of subject matter jurisdiction before it proceeds to the merits of a plaintiff's claims. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549

U.S. 422, 430–31 (2007); *see also Steel Co.*, 523 U.S. at 94–95. 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.

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

As the Supreme Court has explained, an "essential and unchanging part of the case-or-controversy requirement" is that a plaintiff must establish Article III standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). 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*, 504 U.S. at 560–61). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Plaintiff does not have standing to pursue his TSDS claims in the absence of his No Fly List claims because he has alleged no injury in fact attributable specifically to his TSDS placement. Nor would a ruling in his favor related to the process available for non-No-Fly-List individuals in the TSDS redress his alleged injuries.

1. Plaintiff Has Not Pleaded an Injury in Fact.

Where the relief sought is prospective relief only, it is well established that a plaintiff must demonstrate a risk of future injury that is both "real" and "immediate" and neither "conjectural" nor "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 (1983). Thus, a plaintiff seeking forward-looking relief must demonstrate the existence of a future "threatened injury [that is] 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Importantly, the Supreme Court has repeatedly held that "standing is not dispensed in gross" and that "a plaintiff must demonstrate standing for

each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (*quoting Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

Here, Plaintiff has not alleged any injury from his TSDS status alone or from the process for removing individuals from the TSDS. Because Plaintiff is currently on the No Fly List, it is not possible to assess whether he hypothetically would have been injured by alleged infirmities in the available procedures had he been listed only in the TSDS. This is because the process Plaintiff would have received had he been in the TSDS but not also on the No Fly List, is different. McQueen Decl. ¶ 24. As the McQueen declaration explains, when an individual is placed in the TSDS—and not also in the No Fly List subset—that individual receives a certain set of procedures. *See* McQueen Decl. ¶¶ 14–23. This includes the opportunity to submit an online inquiry and, under appropriate circumstances, have the TSC Redress Office independently review the available information determine whether the individual matches the identity of someone in the TSDS and to determine whether that individual continues to satisfy the criteria for inclusion or whether, alternatively, the individual should be removed or have his or her status modified. *Id.* ¶¶ 19–21. However, when a U.S. person is placed on the No Fly List subset of the TSDS, and subsequently petitions DHS TRIP based upon a denial of boarding, that individual receives process that differs substantively from that afforded to an individual who is in the TSDS but not on the No Fly List. *See* McQueen Decl. ¶ 24, Mungaray Decl. ¶¶ 5–10. For a U.S. person on the No Fly List, this will include official confirmation of No Fly List status and, may include, among other things, where feasible, an unclassified summary of information supporting the individual's placement. Mungaray Decl. ¶ 6. The individual may then submit additional information relevant to the redress

determination, and if the individual does so, the TSA Administrator will conduct an independent review of all the available information and make a final determination. *Id.* ¶ 8.

Because Plaintiff was placed on the No Fly List subset of the TSDS, he received the No Fly List procedures applicable to U.S. persons, and the court of appeals is now evaluating whether those were adequate. But Plaintiff now asks this Court to decide whether the redress process pertaining to TSDS placement alone is adequate. There are multiple problems with this request. Most fundamentally, these procedures, which involve fewer disclosures than the No Fly List counterparts, are not provided to individuals on the No Fly List. It is no surprise, then, that "Plaintiff has never submitted a DHS TRIP petition challenging the sorts of travel-related difficulties that might stem from inclusion in the TSDS as a KST alone, Selectee, or Expanded Selectee (such as enhanced screening at airports or at the border)." McQueen Decl. ¶ 27. Thus, Plaintiff never invoked the non-No Fly List redress procedures and cannot claim any injury from his placement in the TSDS alone or from the process for being removed from the TSDS.

Nor is it enough that Plaintiff may hypothetically one day (1) be removed from the No Fly List, (2) be maintained in a different subset of the TSDS, and (3) suffer injury specifically attributable to just his TSDS placement. Any such injury is entirely speculative and not certainly impending. *See Clapper*, 568 U.S. at 401. Plaintiff is in fact on the No Fly List subset of the TSDS, and should the court of appeals reject his No Fly List claims, he would not have experienced other travel-related difficulties attributable to his TSDS status (such as lengthy screenings, since he cannot obtain a boarding pass in the first instance) and would have no basis to make any separate challenge in district court, precisely because all his alleged travel harms would arise from his No Fly List status. Plaintiff can identify no injury arising from a process he has not pursued and may never be in a position to pursue. Such an alleged injury is hypothetical and speculative—not actual

or imminent. In all events, these future contingencies underscore that at present, Plaintiff's alleged travel-related injuries stem from his current placement on the No Fly List. And unless that status were to change, Plaintiff simply has no standing to challenge procedures afforded to individuals with a different TSDS status.

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

The impediments to reviewing Plaintiff's TSDS-only claims likewise reveal themselves when viewed through the lens of redressability. "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). 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.

As both a jurisdictional and practical matter, there is no way that this Court can meaningfully evaluate any procedural claims related to mere TSDS placement. Plaintiff is not merely in the TSDS and has not pursued TSDS-only redress, nor would he do so unless his status changed in the future. Such hypothetical eventualities cannot form the basis of a present case or controversy in this Court.

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

The Court further lacks subject matter jurisdiction over Plaintiff's remaining claims because they are not ripe for adjudication. Plaintiff bears the burden to show that his claims are

ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). Ripeness incorporates both constitutional and prudential requirements. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). The prudential ripeness test turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 220 F.3d at 1141 (citation omitted).

The issues raised here are not ripe for judicial decision. Again, because Plaintiff has not submitted a DHS TRIP inquiry challenging the sorts of travel-related difficulties that might stem from inclusion in the TSDS as a KST alone, Selectee, or Expanded Selectee (such as enhanced screening at airports or at the border), there is no case or controversy before the Court regarding the adequacy of those redress procedures. Only in the hypothetical future scenario where Plaintiff has been removed from the No Fly List by the court of appeals and has pleaded harms arising from the redress process for non-No-Fly-List individuals in the TSDS would a challenge to them potentially ripen. That is a matter for another day, if ever.[2]

Moreover, plaintiff will not face any hardship from waiting until his claim is ripe for review because Plaintiff is not currently suffering any hardship at all related to his status in the TSDS. Additionally, this Court cannot in fact grant him any relief based on his TSDS status so long as his

[2] To be clear, dismissing the TSDS-only claims would not prohibit Plaintiff from challenging those procedures at an appropriate time. To the contrary, should Plaintiff's TSDS status change, as discussed above, Plaintiff could presumably challenge the available procedures after availing himself of them. If he was unsatisfied with the outcome of that process, he would then have a separate cause of action that he could raise in a new court filing, and that filing would presumably not be time-barred because the cause of action would only accrue once Plaintiff alleged a TSDS-related injury after he was removed from the No Fly List. The hypothetical nature of all these events occurring demonstrates why it is inappropriate for the Court to consider the TSDS-only claims at this time.

No Fly List claims are pending in the court of appeals, and he remains on the No Fly List. Were the court of appeals to rule in Plaintiff's favor on his No Fly List claims, he may then be able to take the necessary procedural steps that are predicate to his claim ripening. So, waiting for his claim to ripen will not delay Plaintiff from obtaining the relief he seeks and will not cause him any hardship.

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

If the Court determines that it has 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.

"A procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections." *Abdelfattah v. DHS*, 787 F.3d 524, 538 (D.C. Cir. 2015) (quoting *Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009)). "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 stigma." Order at 10 (citing Am. Compl. ¶¶ 155–56, 159–61, 166, ECF No. 17). The Court has already noted that, "[f]or the most part, those arguments are unavailing," *id.*, and has determined that "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." *Id.* (citing *Elhady*, 993 F.3d at 220–23). Thus, the sole due process issue before the Court on this renewed motion to dismiss is "whether Khalid's placement [i]n the [TSDS] watchlist plausibly constitutes a due process violation under a 'stigma-plus' theory." *Id.* It does not.

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

Plaintiff alleges an infringement of his "right to be free from false governmental stigmatization as an individual who is 'known or suspected to be' a terrorist." Am. Compl. ¶ 161. Because "injury to reputation by itself [is] not a 'liberty' interest protected under the [Due Process Clause]," *Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (citation omitted), courts have discerned that additional facts beyond reputational injury are required to determine whether alleged reputational harm infringes a liberty interest. *See Paul v. Davis*, 424 U.S. 693, 711 (1976). In its Order, the Court reasoned that in the D.C. Circuit, Plaintiff may plead what the Court referred to as either a traditional "reputation-plus" claim or a "stigma-plus" claim. *See* Order at 10–11. Under any formulation of this test, plaintiffs alleging reputational harm must demonstrate a harm from governmental action plus an alteration or extinguishment of "a right or status previously recognized by state law." *Paul*, 424 U.S. at 711. Plaintiff has not pleaded an injury under either type of claim, nor has he alleged a "plus factor."

a. Plaintiff Has Not Pleaded a "Reputation-Plus" Injury.

This Court held that a "reputation-plus" claim—as opposed to a so called "stigma-plus" claim—"requires 'the conjunction of official defamation,' . . . and the violation of a 'right or status previously recognized by state law.'" Order at 10 (quoting *O'Donnell v. Barry*, 148 F.3d 1126, 1139–40 (D.C. Cir. 1998)) (citations omitted). Plaintiff fails to meet this test because he has not alleged facts demonstrating public defamation. *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 statements."); *Doe v. Cheney*, 885 F.2d 898, 910 (D.C. Cir. 1989) ("NSA's actions do not, however, appear to be stigmatizing because NSA did not make

public accusations that will damage Doe's standing and associations in the community."); *Garcia v. Pompeo*, No. 1:18-CV-01822 (APM), 2020 WL 134865, at *6 n.2 (D.D.C. Jan. 13, 2020) (noting "the critical element of public disclosure"). That is, Plaintiff does not allege that any Defendant disclosed to the public his placement in the TSDS, nor does he claim that the Government otherwise publicly labeled him, as he asserts, "an individual who is 'known or suspected to be' a terrorist, or who is otherwise associated with terrorist activity." Am. Compl. ¶ 161. The Government protects TSDS status as law enforcement sensitive information and SSI, and in only limited circumstances is an individual's TSDS status ever disclosed to the individual, let alone the public. *See* Watchlisting Overview at 9 (explaining that TSDS status generally is not disclosed even to individuals included in the TSDS, except for U.S. persons who have been denied boarding a commercial aircraft because of their presence on the No Fly List and thereafter properly seek redress through DHS TRIP). And as the Fourth Circuit has explained, "[t]he 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." *Elhady*, 993 F.3d at 225 (citation omitted).

Other courts have reached similar conclusions, differentiating between the proper Government use of information and the improper dissemination of potentially stigmatizing information to the public. *See Tarhuni v. Holder*, 8 F. Supp. 3d 1253, 1275 (D. Or. 2014) (Government's disclosure of TSDS status to an airline to deny boarding did "not constitute dissemination of the stigmatizing information in such a way as to reach the community at large"); *Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) (no public disclosure when statements were not disseminated beyond proper chain of command); *Van Atta v. Def. Intel. Agency*, No. 87-1508, 1988 WL 73856, at *2–3 (D.D.C. July 6, 1988) (recognizing the "crucial distinction between

official disclosure and public disclosure" in cases where "[t]he government's decision to share information with a foreign power does not open that information to public scrutiny"). Here, the Government did not disclose any stigmatizing information relating to Plaintiff's inclusion on the No Fly List to the public.

b. Plaintiff Has Not Pleaded a "Stigma-Plus" Injury.

This Court held that a "stigma-plus" claim "differs from [the reputation-plus theory] in that it does not depend on official speech, but on a continuing stigma or disability arising from official action." Order at 10 (quoting *O'Donnell*, 148 F.3d at 1140) (internal quotation marks omitted). "'In other words, where a reputation[-]plus theory requires some form of defamatory or stigmatizing speech by the government, the latter depends only on governmental imposition of a continuing stigma or other disability arising from official action' that foreclosed the plaintiff from other recognized rights." *Id.* at 10–11 (quoting *Garcia*, 2020 WL 134865, at *6). Although a "stigma-plus" claim supposedly may not require disclosure to the public, it nevertheless, as Plaintiff concedes, "requires dissemination to a third party in relation to the change in status" of the plaintiff. Pl.'s Opp'n to Defs.' Mot. to Dismiss, ECF No. 20, at 19; *see Kadura v. Lynch*, No. 14-13128, 2017 WL 914249, at *7 (E.D. Mich. Mar. 8, 2017) (The plaintiffs, who had alleged widespread TSDS distribution of their names to third party entities, "[did] not provide any factual support that they suffered any stigmatization by the disclosure of their names to third parties" and thus had failed to state a stigma-plus claim.). This, of course, makes sense: if nobody knows of a government action, then by definition, the action cannot have a stigmatizing effect.

Plaintiff fails here because he has not alleged either (1) that his TSDS status was shared with any particular third party or (2) that any particular sharing caused him to suffer a stigma. "[P]laintiffs must plead more than the simple act of making derogatory information available; they must prove that information is 'likely to be inspected by prospective employers.'" *Elhady*, 993

F.3d at 226 (quoting *Sciolino v. City of Newport News*, 480 F.3d 642, 649 (4th Cir. 2007) (holding that plaintiffs had failed to meet their burden where "[t]hey d[id] not point to specific instances where private employers looked at this evidence or made employment decisions based upon it"). To be sure, Plaintiff alleges, without elaboration and in a conclusory manner, that "Defendants disseminated the federal terrorist watchlist to government authorities, private corporations and individuals," Am. Compl. ¶ 62, but he does not allege that any specific individual or entity received that information or used it in any way that caused Plaintiff reputational injury. In other words, Plaintiff does not claim that there is any connection between any alleged Government dissemination and the harms he claims to have suffered. *See Abdi v. Wray*, 942 F.3d 1019, 1034 (10th Cir. 2019) (rejecting stigma plus claim where plaintiff failed to allege that, in addition to distributing the list of "known of suspected" terrorists on which his name allegedly appeared, "the government mandates that the private and public entities in receipt of the list refuse to offer service or employment to the listed individuals.").

Although he claims that "[t]he stigma caused by Plaintiff being placed on the watchlist has caused Plain- tiff [sic] injuries in the form of lost jobs and business opportunities, injury to social and familial relationships, and delay to the immigration status of family members," Am. Compl. ¶ 160, he provides little support for these vague assertations and entirely fails to connect these speculative dots. He does not allege that the Government shared his TSDS status with any hypothetical employer who did not hire him or that the Government shared this information with any of his social or familial relations, much less that the Government required anything of anyone it alleged shared the information with, as *Abdi* requires. Indeed, insofar as there is public knowledge of Plaintiff's TSDS status, that is the result of Plaintiff's own disclosure, in his publicly filed complaints, of his inclusion in the TSDS, as well as the unclassified, nonprivileged basis for

his inclusion disclosed to him through the DHS TRIP process, and which the Government had omitted from its prior filings. *See generally* Am. Compl. (repeatedly referencing Plaintiff's TSDS status, as well as publicly disclosing the unclassified, nonprivileged reasons for his status).

The importance of alleging to whom the status was disclosed and how that specific disclosure harmed him is even more critical here, where TSDS information is disseminated only to a select number of authorized screening partners who have a clear reason to know. *See Elhady*, 993 F.3d at 226 ("Here, in contrast, TSDB status is made available only to a select number of private companies that work closely with issues related to national security, like nuclear power and chemical plants."). And indeed, the very act of sharing that information itself does not create a constitutional claim.

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

Even if Plaintiff were able to show that he suffered a stigma under either of the two theories above, he must also allege a "plus factor"—*i.e.*, 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). In its Order, the Court noted that Plaintiff claims to have suffered two "plus factors" relating to his TSDS placement: 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). Plaintiff has not adequately pleaded either.

Immigration Benefits: Plaintiff claims that his status has resulted in the indefinite delay or denial of approval of his I-130 Petition for Alien Relative to permit his Pakistani wife to immigrate to the United States. To the extent Plaintiff attributes his denial or delay of immigration benefits to his No Fly List status, the Court should not consider those claims because they have

been transferred to the court of appeals.[3] *See* Am. Compl. ¶ 7 ("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." (emphasis added)). To the extent he premises his claims on his TSDS status, Plaintiff's assertion that he was in some way denied the receipt of immigration benefits or delayed in receiving such benefits based on his TSDS status alone, but not on his No Fly List status, is too nebulous and speculative to constitute the alternation or extinguishment of a legal right.

First, he does not allege that he had "a right or status previously recognized" that would have entitled him to these benefits, irrespective of his TSDS placement, standing alone. "For 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) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Plaintiff here does not allege he has any immigration status—such as, for example, an already approved I-130 petition—that is somehow being "extinguished or altered." Moreover, "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). And in any event, Plaintiff does not allege that his Petition would have been approved but-for his TSDS status. In other words, there very well may be other reasons for the alleged delay and potential denial of his Petition.

[3] Plaintiff also alleges that "his expedited passport renewal application is currently delayed (and may be permanently delayed), due to, upon information and belief, his status on the No Fly List." Am Compl. ¶ 151. Any such claimed injury has plainly been transferred to the court of appeals.

Second, Plaintiff has not alleged that he has suffered any actual extinguishment of a right in connection with his immigration-based claims. According to Plaintiff, "[t]hough Mr. Khalid filed the [I-130] petition on August 13, 2019, it was not until June 25, 2022 that the National Visa Center provided him and his wife notice that the Immigrant Visa Case was documentarily qualified for an interview appointment. To date, no interview has been scheduled." Am. Compl. ¶ 7. Even accepting all the allegations in the Amended Complaint as true, it in fact appears that his I-130 petition is currently being processed and that he has suffered, at most, a delay in the processing time. But delays in immigration processing times are nothing new or, generally, legally actionable. *See, e.g.*, *Da Costa v. Immigr. Inv. Program Off.*, 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)).

Third, Plaintiff has not alleged that there is any connection between his TSDS status and the loss or delay of these benefits. Plaintiff alleges no basis for concluding there is anything related about the two, other than the speculative and conclusory statement that, "[u]pon information and belief, family-based immigration applications filed by individuals listed on the federal terrorist watchlist are delayed indefinitely due to an 'FBI name check' and not adjudicated." Am. Compl. ¶ 63; *but see Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a motion to dismiss.).

Finally, to the extent Plaintiff claims to premise any "plus factor" on the denial of immigration benefits to his children, *see* Am Compl. ¶¶ 7, 65, 144, he lacks standing to make such a claim. By his own admission, Plaintiff has not in fact applied for any immigration benefits for

either his daughter or his son, who was not in fact even born at the time Plaintiff filed his Amended Complaint. *See id.* ¶ 65 ("Mr. Khalid has a son *on the way*, who will also not be a U.S. citizen until Mr. Khalid files and receives approval for his immigration petition." (emphasis added)); *id.* ¶ 144 ("Upon information and belief, *when* Mr. Khalid applies for immigration benefits for his daughter and son, their applications will be similarly delayed . . . ." (emphasis added)).

Employment Opportunities: It is axiomatic that "loss of some employment opportunities do not . . . amount to an alteration of a legal right." *Mosrie v. Barry*, 718 F.2d 1151, 1162 (D.C. Cir. 1983); *see also Garcia*, 2020 WL 134865, at *7 (same). Here, Plaintiff alleges that the vast bulk of the harms he has suffered in relation to his employment come not from his TSDS placement but rather his No Fly List status. For example, he claims that he was tasked by his employer with completing several lucrative projects that required him to travel to the United States when he was living abroad and also that he was offered a promotion at his company to an office based in Mexico, but he was unable to take advantage of these opportunities because of his placement on the No Fly List. Am Compl. ¶ 99–107. All those claims are now before the court of appeals, and in any event, lack any legal basis given that he never alleges that he was terminated from any job because of his placement or even that he was demoted—merely that he may not have received jobs that interested him at the time.

The only employment-related harm that could even be charitably read in his Amended Complaint to be attributable to his TSDS placement (again, standing alone and apart from his No Fly List 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. But "[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." *Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988). In any event, again, Plaintiff does not allege that he was terminated from any job because of his lack of clearance but merely that he was prevented from advancing in his career. In fact, "Mr. Khalid currently is a partner and technical director for Global Services Marketplace (GSM)." Am. Compl. ¶ 66. The hypothetical loss of supposedly *better* employment cannot form the basis of a due process violation. *See Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) ("[P]ersons whose future employment prospects have been impaired by government defamation 'lack . . . any constitutional protection for the interest in reputation.'" (citation omitted)). In any event, any such lost economic opportunities were the actions of third parties, and injuries caused by third parties that flow because of purportedly stigmatic injuries have been excluded from the stigma-plus doctrine. *Cf. Seigert v. Gilley*, 500 U.S. 226, 234 (1991).

Because Plaintiff has not alleged deprivation of any constitutionally protected liberty interest arising from his TSDS status, standing alone, his procedural due process claim should be dismissed.

2. DHS TRIP Provides Constitutionally Adequate Process.

If the Court nonetheless concludes that Plaintiff has pleaded the deprivation of a protected liberty interest, that is only the first step in the due process inquiry under either a reputation-plus or stigma-plus theory. If the court reaches the second step, which assesses the adequacy of the process available to a person who has pleaded the deprivation of a protected interest, Plaintiff's procedural due process claims should still be dismissed because DHS TRIP provides constitutionally adequate process. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*,

520 U.S. 924, 930 (1997) (citation omitted). Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971)).

In evaluating the adequacy of procedures, the Court should consider: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest," including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 931–32 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

As explained above, Plaintiff has received the process due to him as an individual placed on the No Fly List and, for that reason, does not have standing to bring a procedural due process challenge to his placement in the TSDS alone. *See* Part I.A, *supra*. Assuming *arguendo* that Plaintiff has identified a constitutionally protected interest in freedom from reputational injury attributable to his TSDS placement, the private interest in that right is limited, given the minimal degree of burden it imposes. In contrast, "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Wayte v. United States*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."); *Elhady*, 993 F.3d at 228 ("[T]he Government's interest in combating terrorism is an urgent objective of the highest order.") (citation omitted).

Through the DHS TRIP procedures for non-No-Fly-List individuals in the TSDS, a traveler is afforded a constitutionally sufficient redress process that is adequate to protect travelers' alleged limited liberty interest from the risk of erroneous deprivation. When an individual is placed in the

TSDS, that placement decision undergoes several layers of review: (1) a decision by the nominating agency to nominate an individual for placement in the TSDS, (2) a determination by TSC that placement in the TSDS is appropriate; (3) regular reviews and audits of placement, and (4) redress in which the traveler can draw the Government's attention to any possible errors by explaining the difficulties the traveler has encountered and submitting relevant information, and in which the Government conducts a review of available relevant information. *See generally* Watchlisting Overview.

Providing additional process would not substantially reduce the risk of error but would undermine the Government's efforts to detect terrorists and prevent terrorist attacks. There is substantial authority supporting the Government's interest in withholding watchlist status from the public because it is operationally valuable information to terrorists. *Bassiouni v. CIA*, 392 F.3d 244, 245–46 (7th Cir. 2004); *Tooley v. Bush*, No. 06-306 (CKK), 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006), *aff'd sub nom.*, *Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (upholding government's position that confirming or denying the existence of records indicating plaintiff's presence on watch lists would reveal sensitive security information); *Al-Kidd v. Gonzales*, No. 05-093-EJL-MHW, 2007 WL 4391029, at *8 (D. Idaho Dec. 10, 2007). On balance, therefore, the harm to counterterrorism efforts caused by alerting individuals as to whether they are on a terrorist watchlist far outweighs the benefits of additional process for people who are in the TSDS. *See Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008) ("Any change that reduces the number of false positives on a terrorist watch list may well increase the number of false negatives."); *Proctor v. DHS*, 777 F. App'x 235, 236 (9th Cir. 2019).

In any event, Congress made a specific judgment here as to how much process was needed in this context, and the Court should defer to Congress's judgment. *See Walters v. Nat'l Ass'n of*

Radiation Survivors, 473 U.S. 305, 319–20 (1985) (emphasizing the "deference [courts] customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government" because "legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities"). That is precisely what the Fourth Circuit held when it upheld the DHS TRIP process as to the TSDS. *See Elhady*, 993 F.3d at 229 ("Congress made a policy choice, balancing the burdens imposed on the victims of false positives with the costs imposed on the entire country when a terrorist attack occurs. When such competing interests are at stake, value judgments must be made. Striking the balance in this most sensitive of areas belongs principally with the people's representatives."); *see also Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *10 (N.D. Tex. Mar. 9, 2023) (upholding DHS TRIP redress process for individuals on the TSDS), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 23, 2023). Because Plaintiff has not pleaded deprivation of any constitutionally protected liberty interest in freedom from government-imposed stigma and because individuals in the TSDS—but not on the No Fly List—receive constitutionally adequate process, the Court should dismiss Plaintiff's procedural due process claim.

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

In its Opinion and Order on the prior motion to dismiss, the Court observed that the parties had not discussed whether Plaintiff's "APA claim tracks so closely with his constitutional claim that it is effectively redundant." *See* Order at 13 (citing *Elhady*, 993 F.3d at 218 n.4). Defendants submit that the claim is redundant and therefore fails. Plaintiff includes only a boilerplate allegation that the Government's alleged actions are "arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and contrary to

constitutional rights, power, privilege, or immunity, and should be set aside as unlawful pursuant to 5 U.S.C. § 706" of the APA. Am. Compl. ¶ 173. To the extent this language challenges Plaintiff's No Fly List placement, that claim is wrapped up in his claims before the court of appeals. To the extent this language is construed to challenge the non-No Fly List DHS TRIP procedures, those procedures satisfy due process. *See* Part II.A, *supra*. Because that is so, they are not arbitrary and capricious under the APA, an abuse of discretion, or otherwise not in accordance with law, and Plaintiff's APA challenge therefore falls with his procedural due process claim. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (holding that if the agency action being challenged has a rational basis, it must be affirmed.).

III. Plaintiff Has Not Pleaded a Substantive Due Process or APA Challenge to his TSDS Status Alone, and the Court Lacks Jurisdiction to Review Such a Challenge.

The Government construes Plaintiff's complaint to include only one substantive challenge to his watchlist status, on which his due process and APA claims might plausibly be based: his challenge to his status on the No Fly List. *See, e.g.*, Am. Compl. ¶ 174 ("Plaintiff is neither a known nor appropriately suspected terrorist, thus Defendants' conduct in placing him on the No Fly List [violates the APA]."). That claim is now pending before the court of appeals for good reason: There is no separate placement apart from his current status on the No Fly List. McQueen Decl. ¶ 12. Because that is so, the Government maintains that Section 46110 grants the Courts of Appeals jurisdiction to review orders of the TSA Administrator, and the TSA Administrator's final order maintaining Plaintiff on the No Fly List reflected a determination that he satisfied the criteria for inclusion both on the No Fly List and in the TSDS generally. *See supra* at 8.

In its Opinion and Order, the Court appeared to contemplate the possibility of a substantive due process challenge, and related substantive APA challenge, to Plaintiff's TSDS status, standing

alone, as possibly remaining in the District Court. *See* Order at 13. The Court noted that "Defendants have not briefed what, if any, alternative adequate remedies are available to Khalid to challenge his placement on the watchlist. Nor have the parties debated whether Khalid's existing suit challenging the constitutionality of his placement on the watchlist may constitute an adequate alternative remedy that precludes APA review." *Id.* The Court is correct that the Government did not address the concept of a separate substantive due process or related substantive APA challenge to Plaintiff's placement in the TSDS. But that is because there is no such challenge, nor could there be. Plaintiff has not pleaded one and, in any event, would lack standing to do so.

Start with the question of Section 704 and adequate alternative remedies raised by the Court. As to that question, for an individual on the No Fly List, the availability of appellate review is an adequate remedy foreclosing any APA claim related to No Fly List or TSDS status. *See* Defs.' 1st Mem. at 34–35. Plaintiff thus has an adequate alternative remedy for both his substantive challenge to his TSDS status and his procedural challenge to DHS TRIP. *See* 5 U.S.C. § 702 (forbidding courts "to grant relief" under the provisions of the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"); *id.* § 704 (permitting review of final agency action "for which there is no other adequate remedy in a court").

To the extent the Court is suggesting that Plaintiff has viable TSDS-only claims that stand apart from his No Fly List claims that are before the court of appeals, the Government respectfully disagrees, for the reasons set forth above. Plaintiff has not alleged any separate harms that arise from his TSDS status, and apart from his status on the No Fly List. Part I.A.1, *supra.* Nor does he have standing to challenge the procedures available to other individuals whose status differs from his own. Part I.A, *supra*. The question is not remedial; it is jurisdictional. *If* Plaintiff was only on the TSDS, and *if* Plaintiff sought to challenge such status, procedurally or substantively,

the adequate alternative remedy language of Section 704 would not likely apply. But as it stands, Section 704 does apply.

The Court's transfer of Plaintiff's substantive No Fly List challenge also presents a fundamental redressability problem for any theoretical substantive challenge in the district court. "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*, 141 S. Ct. at 801 (citation omitted). Now that the Court has transferred Plaintiff's No Fly List claims to the court of appeals, the Court is in no position to order substantive relief related to his TSDS status. If Plaintiff were somehow successful on such a claim, he would likely argue that he should be removed from the TSDS. But, putting other issues aside regarding such requested relief, this Court cannot order that relief while the No Fly List claims are pending in the court of appeals because an individual cannot be simultaneously on the No Fly List and removed from the TSDS. As explained above, the No Fly List is a subset of the TSDS. And because this Court cannot overrule the court of appeals, even a favorable decision by this Court as to Plaintiff's TSDS claim would be improper and disrupt the D.C. Circuit's jurisdiction. Moreover, the relief that Plaintiff seeks—removal from the TSDS—would undermine the TSA Administrator's final order, which reflected a determination that Plaintiff satisfied the criteria for inclusion on *both* the No Fly List and also in the TSDS generally, McQueen Decl. ¶ 27, which this Court already found it lacks jurisdiction over,[4] *see* Order at 2 ("[T]he Court lacks jurisdiction to 'affirm, amend,

[4] This Court found that "Section 46110 . . . does not bar challenges in district court to one's inclusion on the broader terrorist watchlist." Order at 9. In cases where other courts have found that to be true and have gone on to rule on watchlist-related claims, however, it has, to counsel's awareness, only been true in cases where the plaintiff *only* alleged placement in the TSDS and did not allege current placement on the No Fly List. *See, e.g.*, *El Ali v. Barr*, 473 F. Supp. 3d 479, 505–06 (D. Md. 2020); *Kovac v. Wray*, 363 F. Supp. 3d 721, 744 (N.D. Tex. 2019); *Elhady v.*

modify, or set aside' the order of the TSA Administrator that placed Khalid on the No Fly List."). Put differently, such a remedy would not redress any alleged hypothetical injury because this Court could not remove Plaintiff from the No Fly List.[5]

CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint.

Piehota, 303 F. Supp. 3d 453, 461 (E.D. Va. 2017). Here, where Plaintiff is on the No Fly List, it is not possible to disentangle his TSDS claims from his No Fly List claims, and should this Court proceed in that fashion, it would be the first ever to do so, to counsel's awareness.

[5] If the Court allowed a substantive TSDS-only challenge to proceed, the Government notes that such judicial review would appropriately assess an administrative record supporting TSDS status and that discovery would not be appropriate. *See Trinity Am. Corp. v. EPA*, 150 F.3d 389, 401 n.4 (4th Cir. 1998) ("Review of agency action is limited to the administrative record before the agency when it makes its decision."). Moreover, as is common in cases implicating sensitive national security information, such review may involve submission of materials for the Court's review *ex parte* and *in camera*. *See, e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1181–82 (D.C. Cir. 2004); *Scherfen*, 2010 WL 456784, at *4, 7–8; *see also, e.g.*, *Bassiouni v. FBI*, 436 F.3d 712, 722 n.7 (7th Cir. 2006).

Dated: August 10, 2023

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

/s/ Christopher D. Edelman
Christopher D. Edelman
(D.C. Bar No. 1033486)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Phone: (202) 305-8659
Email: christopher.edelman@usdoj.gov

Counsel for Defendants