UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ABDISALAM WILWAL, *et al.*, Plaintiffs, v. KIRSTJEN NIELSEN,[1] *et al.*, Defendants,	Case No. 0:17-cv-02835

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[1] Ms. Nielsen was sworn in as the Secretary of Homeland Security on December 6, 2017. Under Federal Rule of Civil Procedure 25(d), she is automatically substituted as a Defendant in this action.

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INTRODUCTION

This lawsuit challenges the abusive and unlawful border detention of an American family. On March 30, 2015, Plaintiffs Abdisalam Wilwal, Sagal Abdigani, and their four children—then ranging in age from five to fourteen—were returning to Minnesota from a trip to Saskatchewan. When they sought to reenter the United States at Portal, North Dakota, U.S. Customs and Border Protection ("CBP") officers subjected them to a harrowing display of force and nearly eleven-hour detention, terrifying and humiliating the entire family. The officers treated the family this way not because the officers had reason to believe any of them had committed a crime, but because Mr. Wilwal's name appeared on a terrorism-related watchlist. The government, however, has refused to tell Mr. Wilwal why his name was on the watchlist, and it has not given him a meaningful opportunity to correct whatever error caused that placement.

The detention violated the family's Fourth Amendment rights, and the officers' conduct constituted false arrest, assault, and battery. Plaintiffs request declaratory relief and an injunction barring the government from subjecting them to similarly unlawful treatment in the future. They also seek compensatory damages under the Federal Tort Claims Act ("FTCA") and expungement of information the government obtained unlawfully during the detention. Because the government deprived Mr. Wilwal of an adequate process by which to challenge his placement on the watchlist, it also violated his Fifth Amendment due process rights and the Administrative Procedure Act ("APA"). Mr. Wilwal seeks notice of the reasons for his placement on the watchlist and a meaningful opportunity to clear his name.

Defendants move to dismiss Plaintiffs' claims on three grounds, each of which fails. First, Defendants argue that Plaintiffs lack standing to seek prospective relief. Defendants ignore, however, that Plaintiffs have plausibly alleged that their detention was triggered by Mr. Wilwal's watchlist status. Those allegations are more than sufficient to confer standing, because the family likely will encounter similar problems when they attempt to enter the country in the future. Defendants also ignore that the government's retention of information collected during the detention constitutes an ongoing injury, and further demonstrates that Plaintiffs have standing to seek equitable relief of expungement.

Second, Defendants argue that 49 U.S.C. § 46110 gives the courts of appeals exclusive jurisdiction over Mr. Wilwal's claims challenging the adequacy of the redress process for watchlisted individuals. That statute, however, applies only to certain final orders of the Transportation Security Administration ("TSA"). The Terrorist Screening Center ("TSC"), an entity administered by the Federal Bureau of Investigation ("FBI"), is the primary driver of the redress process Mr. Wilwal challenges. Mr. Wilwal's claims therefore fall outside the scope of Section 46110, and this Court has jurisdiction to adjudicate those claims.

Finally, Defendants argue that Plaintiffs have failed to state claims upon which relief can be granted. They ask the Court to disregard Plaintiffs' detailed allegations describing the *de facto* arrest and abusive treatment of Mr. Wilwal, and the unreasonable seizure of the rest of the family without any basis to believe that anyone was engaged in wrongdoing. In short, Plaintiffs more than plausibly allege violations of their constitutional rights, the APA, and the FTCA.

The Court should deny Defendants' motion.

FACTUAL BACKGROUND

I. Border Detention of the Wilwal-Abdigani Family

On March 27, 2015, the Wilwal-Abdigani family drove from their home in Eagan, Minnesota, to visit relatives in Regina, Saskatchewan. Am. Compl. ¶ 26, ECF No. 25. They entered Canada at the Portal, North Dakota border crossing, where Canadian border officers told Mr. Wilwal that their records included a notation from U.S. authorities that might cause additional questioning when he reentered the United States. *Id.* ¶ 27. The family left Regina early on March 30, 2015 and arrived back at the Portal border crossing at approximately 6:00 a.m. Mr. Wilwal drove alongside a booth and handed a CBP officer the family's valid U.S. passports and birth certificates. *Id.* ¶¶ 28-29. Using Plaintiffs' names and information, the officer searched the TECS System, a database that CBP uses for border screening. *Id.* ¶ 30.

Within minutes, several CBP officers emerged from the border station with their handguns drawn and pointed at the family's van. They surrounded the van, yelling at Mr. Wilwal not to use weapons and yelling at each other that there were children in the van. *Id.* ¶ 31. The family was terrified, and the children began screaming and crying. The officers ordered Mr. Wilwal out of the van at gunpoint. He left the van with his hands in the air, and one of the officers handcuffed his hands behind his back. *Id.* ¶¶ 31-32. While walking Mr. Wilwal into the station, one of the officers accused him of being involved with terrorism, and when Mr. Wilwal asked why he made that accusation, the officer said, "We have information." *Id.* ¶¶ 33-34.

A. Detention and Questioning of Abdisalam Wilwal

The officers took Mr. Wilwal to a room inside the station. They asked him nothing and refused to answer his questions about his family's well-being and why he was being detained. They left him on a chair, alone and still handcuffed. *Id.* ¶¶ 35-36.

At about 10:30 a.m., after more than four hours of detention without food or water, and with his hands still restrained behind his back, Mr. Wilwal began to feel light-headed. He tried to stand up but passed out on the floor. *Id.* ¶ 52. When he regained consciousness, he saw that paramedics had arrived. They took his blood pressure, and the CBP officers changed the position of the handcuffs so that Mr. Wilwal's arms were restrained in front of his body. The officers gave him a small glass of water but no food. The paramedics departed, and the officers again left Mr. Wilwal alone and handcuffed in the room. *Id.* ¶¶ 53-55.

At about 3:00 p.m., CBP officers told Mr. Wilwal that two Homeland Security Investigations ("HSI") officers had arrived at the station. Plaintiffs allege that the CBP officers had continued to detain the family at the HSI officers' request, and that the HSI officers had traveled to the station from Minot, North Dakota. *Id.* ¶ 56; *see also* ICE Report of Investigation, Am. Compl. Ex. A, ECF No. 25-1 ("ICE Report") (describing the HSI agents' response to the "encounter" with Plaintiffs). When the HSI officers began questioning Mr. Wilwal shortly before 4:00 p.m., Mr. Wilwal, who speaks English as a second language, asked for an interpreter and a lawyer. The HSI officers rejected both requests. One of the officers told Mr. Wilwal that if he wanted to leave, he would have to answer their questions. Am. Compl. ¶ 57.

The HSI officers questioned Mr. Wilwal for about 45 minutes. They asked about his name, address, employment; how long he had lived in the United States; the purpose of the family's trip to Canada; and other travel. They also asked him if he is Muslim, whether he is Sunni or Shia, and whether he attends a mosque. Mr. Wilwal answered the questions truthfully. *Id.* ¶¶ 57-61.

At about 4:40 p.m., the HSI officers told the CBP officers that they could remove Mr. Wilwal's handcuffs, and that he was free to leave. He had been detained for over ten and a half hours. *Id.* ¶ 62.

B. Detention of Sagal Abdigani and the Children

The CBP officers detained Ms. Abdigani and the children, M.O., N.W., A.W., and A.M, for the duration of Mr. Wilwal's detention. After the officers took Mr. Wilwal into the border station, one of the remaining officers directed Ms. Abdigani to drive the van to the border station. Frightened and confused, she did so, and parked the van. The three younger children, N.W., A.W., and A.M., were screaming and crying. *Id.* ¶¶ 65-66. The officer took the van keys from Ms. Abdigani, told her to leave her mobile phone in the van, and ordered her and the children to enter the station. *Id.* ¶ 67. Aside from asking Ms. Abdigani and the children whether they could speak or write Arabic, the CBP officers never questioned them, nor did they provide a reason for detaining them. *Id.* ¶¶ 69-70.

About an hour into the detention, Ms. Abdigani asked a CBP officer if she could retrieve her mobile phone from the van and contact her sister in Canada or friends in Minnesota. The officer denied the request. *Id.* ¶ 71. Ms. Abdigani asked if she could drive the children to Eagan and return for her husband, or if her sister's husband could pick up

the children, but the officer denied those requests as well, saying, "You're all detainees, including the children," and that no one in the family could leave the station. *Id.* ¶ 72.

At about 11:00 a.m., five hours into the detention, Ms. Abdigani realized that M.O. had his mobile phone with him, as the officers had never directed him to leave it in the van. *Id.* ¶ 74. She used the phone to call 911. She told the dispatcher that she and her family were being held against their will at the border station and were afraid for their safety. *Id.* ¶ 75. One of the CBP officers then grabbed the phone from Ms. Abdigani and convinced the dispatcher not to send assistance. *Id.*

Shortly after Ms. Abdigani's call to 911, a female CBP officer conducted a pat-down search of her. *Id.* ¶ 76. Two male CBP officers also took 14-year-old M.O. into a separate room and patted him down. One of the officers ordered M.O. to take off his clothes for a strip search, which M.O. refused to do. *Id.* ¶ 77. M.O. was humiliated and frightened by the officers' demand that he remove his clothes. *Id.* ¶ 79.

The CBP officers detained Ms. Abdigani and the children until about 4:40 p.m., when they released Mr. Wilwal. The family immediately left the station and drove to Eagan. *Id.* ¶ 84.

On March 31, 2015, Mr. Wilwal and Ms. Abdigani went to the FBI and DHS offices to report the incident at the border. *Id.* ¶¶ 85-86. Mr. Wilwal later received a voicemail from a DHS employee stating that it likely occurred because Mr. Wilwal's name appeared on a terrorism watchlist. *Id.* ¶ 86.

II. The Federal Government's Watchlisting System and Redress Process

The federal government maintains a watchlisting system to identify and track purported "known or suspected" terrorists. The hub of that system is TSC, which controls the consolidated master watchlist. *Id.* ¶ 38. The master watchlist includes names and limited identifying information but does not include the reasons for individuals' placement on the watchlist. *Id.* As of June 2016, the master watchlist included approximately one million people. *Id.* ¶ 44.

TSC makes the watchlist available to agencies such as CBP and TSA that perform screening functions, and it also shares the watchlist with numerous foreign governments, including the Canadian government. *Id.* ¶ 39. TSC controls individuals' placement on, or removal from, the watchlist. *Id.* CBP accesses the watchlist through its TECS System, searches of which automatically search the watchlist. If an individual's name and identifying information match that of a person on the watchlist, CBP typically refers that individual for additional inspection and searches. *Id.* ¶¶ 39-40.

According to TSC, a person may be placed on the watchlist if she is "reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities based on an articulable and reasonable suspicion." *Id.* ¶ 41. The government's Watchlisting Guidance indicates that "concrete facts are not necessary" to satisfy the "reasonable suspicion" standard, and uncorroborated information of questionable or even doubtful reliability can serve as the basis for watchlisting a person. *Id.* ¶ 42. The government has placed or retained people on

the watchlist as a result of human error, and the of the Department of Justice's Inspector General has criticized TSC for weak quality assurance. *Id.* ¶ 43.

An individual who seeks to challenge placement on the watchlist may submit a redress petition to the DHS Traveler Redress Inquiry Program (DHS TRIP). *Id.* ¶ 46. DHS TRIP forwards the petition to TSC, which determines whether the individual should be retained on or removed from the master watchlist. *Id.* Once TSC makes a final determination regarding the individual's watchlisting status, it advises DHS TRIP of that result. *Id.* ¶¶ 46-47. Because the government's policy is to refuse to disclose a person's watchlisting status, DHS TRIP responds to the individual with a letter that neither confirms nor denies whether the person is in fact watchlisted. *Id.* ¶¶ 47-48. The letter does not (a) provide notice of the basis for placement on a terrorism watchlist, (b) state if or how the government has resolved the redress petition, or (c) specify whether the person will experience similar problems related to placement on the watchlist in the future. *Id.* ¶ 47. The redress process does not include an opportunity to appear before a neutral decision maker to challenge placement on the watchlist. *Id.*

Mr. Wilwal has never engaged in conduct that would meet the government's criteria for placement on the watchlist, and he does not know why his name appeared on it. *Id.* ¶ 49. Mr. Wilwal and Ms. Abdigani submitted DHS TRIP petitions regarding the events of March 30, 2015, but neither received a final response from DHS TRIP. *Id.* ¶ 87. No agency has provided Mr. Wilwal with any notice of the reasons for his placement on the watchlist or offered him any meaningful opportunity to contest it and clear his name.

ARGUMENT

I. Plaintiffs Have Standing to Seek Prospective Equitable Relief.

Defendants move to dismiss Plaintiffs' first through seventh claims for lack of standing under Federal Rule of Civil Procedure 12(b)(1), arguing that "[a] single, allegedly delayed border crossing over two years ago does not provide Plaintiffs with standing to seek future injunctive and declaratory relief." Defs.' Mem. in Supp. of Mot. to Dismiss, ECF No. 38 at 8. Plaintiffs' allegations, however, far exceed "delay" at the border, and they plainly confer standing.

A. The Legal Standard to Show Standing at this Stage Is Lenient.

At the pleadings stage, plaintiffs' allegations must be taken as true, and all reasonable inferences must be drawn in their favor in determining whether "the asserted jurisdictional basis is patently meritless." *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005). To establish standing, plaintiffs must demonstrate that they have suffered an injury in fact, and that their injuries were caused by the defendants' conduct and are likely to be redressed by a favorable ruling. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For injunctive relief, the "injury in fact" element requires a showing that the plaintiff "faces a threat of ongoing or future harm." *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000). A threatened injury must be "certainly impending," or there must be "a substantial risk that the harm will occur." *In re SuperValu, Inc.*, 870 F.3d 763, 769 (8th Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotations omitted)).

A plaintiff's burden to show standing varies with "the successive stages of the litigation," *Lujan*, 504 U.S. at 561, and is therefore relaxed at the pleading stage, when "general factual allegations of injury . . . may suffice." *Id.* Here, Plaintiffs have not yet had the opportunity to take discovery. They need only allege specific and plausible facts sufficient to plead the threat of ongoing or future injuries. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Plaintiffs' allegations easily meet that standard.

B. Plaintiffs Have Standing Because They Face the Threat of Unlawful Detention at the Border in the Future.

Defendants' standing arguments boil down to their assertion that "Plaintiffs cannot establish that there is a 'real and immediate threat' that they will undergo additional screening and inspection if they now choose to cross the border." ECF No. 38 at 10 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983)). Plaintiffs' allegations, however, demonstrate that they were subjected to abusive and unlawful treatment during the border crossing because of Mr. Wilwal's placement on the watchlist—which is ongoing. Plaintiffs therefore face a substantial risk of similar treatment in the future.

As an initial matter, the nature and severity of Plaintiffs' past detention is relevant to the standing inquiry. Past injury is "evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Plaintiffs' lengthy unlawful detention at the border demonstrates why they reasonably fear that they will be subjected to similar treatment at border crossings or airports in the future. *See* Am. Compl. ¶¶ 6, 89.

Plaintiffs also plainly allege more than past injury. They allege that the detention was caused by Mr. Wilwal's placement on the watchlist, of which there are numerous indications. *See* Am. Compl. ¶ 48. Canadian border officers told him that a notation in his record from U.S. authorities would result in additional scrutiny when he reentered the United States. *Id.* ¶ 27. That prediction was borne out when CBP officers forcefully detained Mr. Wilwal after searching the TECS system for his identifying information, and an officer told him that CBP had "information" indicating he was involved with terrorism. *Id.* ¶¶ 30-31, 34. A DHS employee told Mr. Wilwal that the incident occurred because his name appeared on a watchlist. *Id.* ¶ 86. Defendants' own documents include terms that arise in the watchlisting context and refer to Mr. Wilwal's status on the list: the partially redacted ICE "Report of Investigation" that Plaintiffs obtained through a Privacy Act request states that the detention of Mr. Wilwal was "due to a confirmed subject record hit," and that the HSI officers questioned him using a "National Security Encounter Sample Questionnaire"—clear indications of watchlisting. *See* ICE Report at 1, 3.

Multiple courts have held in similar circumstances that placement on a watchlist confers standing to seek prospective relief.[2] *See Shearson v. Holder*, 725 F.3d 588, 593 (6th Cir. 2013) (plaintiff who was likely watchlisted had standing to seek prospective

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[2] A risk of harm sufficient to support standing to seek prospective relief may rest on an established government policy or practice. *See Lyons*, 461 U.S. at 106 (identifying official police policy as an indicator of future police conduct); *Park*, 205 F.3d at 1038-39 (official policy or "patterns of past practice" are relevant to likelihood of future harm). Here, it is the government's policy or practice to subject watchlisted individuals and their associates to additional scrutiny and detention. *See* Am. Compl. ¶¶ 39, 40, 88.

relief for constitutional and statutory claims); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (apparent placement on watchlist causing inability to enter the United States was sufficient to confer standing for injunctive relief); *Mohamed v. Holder*, 995 F. Supp. 2d 520, 535 (E.D. Va. 2014) (erroneous placement on watchlist was a legally cognizable injury sufficient to confer standing); *Kadura v. Lynch*, Civil Case No. 14-13128, 2017 WL 914249, at *4 (E.D. Mich. 2017) (plaintiffs had standing based on allegations of inclusion on watchlist). *Shearson* is particularly instructive. In that case, CBP officers stopped the plaintiff and her daughter as they were entering the United States from Canada, removed her from her car, handcuffed her, and detained her for several hours. 725 F.3d at 590. The plaintiff obtained documents through the Freedom of Information Act showing that officers had detained her because she was a "positive match" to a name in a watchlist-related file maintained by the FBI. *Id.* The Sixth Circuit affirmed the district court's finding that the plaintiff had standing to seek prospective relief, holding that her "past detention, in conjunction with the presumption that she remains on terrorist watchlists, make it likely she is 'realistically threatened' with future injury." *Id.* at 593. Here, as in *Shearson*, Plaintiffs' past injuries at the border, coupled with the numerous indications of Mr. Wilwal's placement on the watchlist, are more than sufficient to show a substantial risk of similar treatment in the future.[3] Indeed, the ICE Report regarding the family concludes: "Investigation continues." ICE Report at 4.

[3] That risk is no less substantial for Ms. Abdigani and the children when traveling with Mr. Wilwal. Plaintiffs allege that the CBP officers detained Ms. Abdigani and the children solely because of their association with Mr. Wilwal, *see* Am. Compl. ¶ 82, repeatedly refused to permit Ms. Abdigani or the children to leave the station, *id.* ¶¶ 71-

Defendants scarcely acknowledge the clear indications of Mr. Wilwal's watchlisting, stating only that "there is no factual allegation in the Amended Complaint that Mr. Wilwal remains on any such watchlist." ECF No. 38 at 12. But this is an issue the government itself created because it refuses to confirm whether Mr. Wilwal—or anyone—is watchlisted. The Sixth Circuit rejected the same argument in *Shearson*, stating that "the government does not release information on whether a person continues to be listed in the terrorist database or on terrorist watchlists, and it is impossible for Shearson to prove that her name remains on that list." 725 F.3d at 593; *see also Ibrahim*, 669 F.3d. at 992-93. Plaintiffs' Amended Complaint details credible indications of Mr. Wilwal's status on the watchlist, and Defendants cannot foreclose standing by refusing to confirm that status.

Nor must Plaintiffs allege "specific plans" or identify "dates for future travel" to demonstrate standing, as Defendants argue. *See* ECF No. 38 at 12. The cases Defendants cite for that argument did not involve individuals who, like Plaintiffs, refrained from traveling out of reasonable fear that their constitutional rights would be violated. *See* Am. Compl. ¶ 89. To the contrary, when plaintiffs allege fear or concern as the Wilwal-Abdigani family does, courts do not require that they subject themselves again to the very conduct they fear in order to show standing. *See, e.g.*, *Hernandez v. Cremer*, 913 F.2d 230, 234 (5th Cir. 1990) (U.S. citizen who spent 46 days in Mexico after U.S. officials refused to admit him to the United States had standing based on his testimony that he

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72, and equated Ms. Abdigani and the children with Mr. Wilwal. *See id.* ¶ 72 ("You're all the same. You're all detainees, including the children.").

"would like to return to Mexico, but did not 'want to run the risk of something like this happening again'"); *Mohamed v. Holder*, --- F. Supp. 3d ---, Civil Action No. 1:11cv0050 (AJT/MSN), 2017 WL 3086644, at *4 (E.D. Va. July 20, 2017) ("Plaintiff's decision not to engage in international travel because of the difficulties he reasonably expects to encounter upon return to the United States is sufficient to demonstrate standing."); *Cherri v. Mueller*, 951 F. Supp. 2d 918, 929 (E.D. Mich. 2013) (plaintiffs with no plans to travel abroad had standing where they "claim[ed] that their lawful movements to and from the United States are hindered" because of their "reasonable fear" that they would be questioned about their religious beliefs). Here, Plaintiffs have alleged that they want to travel outside the United States again, including to visit family in Canada, but they are afraid that they will again be subjected to lengthy and abusive border detention when they return. Am. Compl. ¶ 89. They need allege nothing more.

C. Ongoing Injuries to Plaintiffs Independently Confer Standing.

Plaintiffs are experiencing ongoing injuries that constitute separate bases for prospective relief. *See Park*, 205 F.3d at 1037 (identifying ongoing harm as basis for injunctive relief). Defendants fail to address these ongoing injuries in their motion.

First, Plaintiffs continue to be injured by Defendants' retention of information collected during the course of their unlawful seizure. Courts have recognized that the retention of information confers standing to seek expungement in similar circumstances. For instance, in *Tabbaa v. Chertoff*, Americans returning from an Islamic religious conference in Toronto were detained at the U.S. border for hours, questioned,

photographed, and fingerprinted. Among other relief, the plaintiffs sought expungement of information collected during the detention. The district court noted that at the very least the government had retained information in the TECS system as a result of the detention, and it held that "the government's continued possession of information that Plaintiffs allege was obtained from them through unlawful means constitutes a sufficient harm for purposes of establishing standing to pursue expungement of the information." No. 05-CV-582S, 2005 WL 3531828, at *9 (W.D.N.Y. Dec. 22, 2005). On appeal, the Second Circuit agreed, stating that "Defendants properly do not contest that plaintiffs possess Article III standing based on their demand for expungement." *Tabbaa v. Chertoff*, 509 F.3d 89, 96 n.2 (2d Cir. 2007); *see also Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004) (request for a declaration deeming allegedly unlawful detention an arrest, and expungement of associated record, was sufficient to confer standing).

Plaintiffs' allegations are plainly sufficient to support standing based on their demand for expungement. Plaintiffs allege that Defendants continue to maintain records in CBP, HSI, and other government databases, including the TECS system, regarding their border detention. Am. Compl. ¶ 90. Indeed, the ICE Report attached to the Complaint reflects that Defendants have maintained information regarding Plaintiffs' detention, including records describing the contents of M.O.'s mobile phone. ICE Report at 1. The ICE Report states that the HSI officers' interrogation of Mr. Wilwal "was digitally recorded and will be maintained as government generated evidence," and that Mr. Wilwal's responses to the officers' questions "were documented and will be

maintained in the case file." *Id.* at 3. Plaintiffs are deeply concerned that CBP and HSI will use the information collected during the detention to expand the duration or scope of border detentions in the future. Am. Compl. ¶ 91. Thus, Defendants' retention of information continues to harm Plaintiffs and constitutes an independent basis for standing—a basis that Defendants do not challenge.

Second, Mr. Wilwal faces ongoing injury from the denial of an adequate process through which to contest his placement on the watchlist. For procedural due process claims, "[t]he allegations that the procedure is inadequate . . . sufficiently establish[] an injury in fact for Article III standing." *Hughes v. City of Cedar Rapids, Ia.*, 840 F.3d 987, 994 (8th Cir. 2016). Plaintiffs' Amended Complaint details the inadequacy of the government's redress process, including its failure to provide Mr. Wilwal with any notice of the reasons for his placement on the watchlist or a meaningful opportunity to contest his continued placement on the list. Am. Compl. ¶¶ 1, 3, 7, 47, 49. These procedural deficiencies continue to harm Mr. Wilwal, giving him standing to seek prospective relief for violation of procedural due process (Claim Four) and the APA (Claim Seven). Again, Defendants do not address this separate, independent basis for standing.

II. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Procedural Due Process and APA Claims.

Defendants next move to dismiss Claims Four and Seven for lack of subject matter jurisdiction. ECF No. 38 at 13. They argue that, to the extent these claims challenge the adequacy of the redress procedures for watchlisted individuals, 49 U.S.C. § 46110 gives courts of appeals exclusive jurisdiction over such claims. ECF No. 38 at 13. Defendants

are correct that Plaintiffs challenge the adequacy of the redress process: it is woefully insufficient. Section 46110, however, does not strip this Court of jurisdiction. That statute applies only to certain orders of the TSA, not the TSC—the entity that controls the material aspects of the process that Plaintiffs challenge. Because TSC orders are not subject to Section 46110, jurisdiction over Plaintiffs' procedural claims properly lies in this Court.

A. TSC Controls the Redress Process.

TSC makes all material decisions regarding initial and continued placement on the watchlist, whereas TSA and DHS TRIP play at most an intermediary role in the process. TSC maintains the watchlist and exercises control over individuals' placement on or removal from it. Am. Compl. ¶ 39. If a watchlisted individual submits a redress petition, DHS TRIP forwards the petition to TSC, which determines whether and what action should be taken. *Id.* ¶ 46. TSC is the final arbiter of whether the individual is retained on the watchlist. *Id.* Once TSC makes that decision, it informs DHS TRIP. *Id.* ¶ 47. DHS TRIP then sends a letter to the petitioner that reveals nothing about the person's status on the watchlist, the outcome of the redress application, or whether the person is likely to experience watchlist-related problems in the future. *Id.* TSC therefore controls the substantive aspects of the redress process as well as its outcome.

Other courts have addressed the jurisdictional arguments Defendants' make here and have uniformly recognized both the central role that TSC plays in the redress process and TSA's mere ministerial involvement. The Ninth Circuit stated that "TSA is merely a conduit for a traveler's challenge to inclusion on the List" and that it "simply passes

grievances along to TSC and informs travelers when TSC has made a final determination." *Latif v. Holder*, 686 F.3d 1122, 1128 (9th Cir. 2012); *see also Ege v. Dep't of Homeland Sec.*, 784 F.3d 791, 795 (D.C. Cir. 2015) (quoting *Latif*); *Arjmand v. Dep't of Homeland Sec.*, 745 F.3d 1300, 1302 (9th Cir. 2014) ("TSC then completes an independent review of the traveler's record, and notifies TSA of the result."); *Mokdad v. Lynch*, 804 F.3d 807, 810 (6th Cir. 2015) (describing TSC control). TSC's authority over watchlisting determinations extends to authority over underlying information. As the Ninth Circuit emphasized in *Latif*, "TSC—not TSA—actually reviews the classified intelligence information about travelers and decides whether to remove them from the List. And it is TSC—not TSA—that established the policies governing that stage of the redress process." 686 F.3d at 1128.[4]

B. Section 46110 Does Not Deprive the Court of Jurisdiction.

TSC's central, determinative role in the redress process means that claims challenging that process fall outside the scope of Section 46110, and that jurisdiction over such claims properly lies in the district courts. That is so for several reasons.

First, the roles TSA and TSC play in the redress process mean that judicial review of that process entails review of both agencies' procedures and determinations, which Section 46110 does not permit. As the Eighth Circuit has explained, review under Section

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[4] To the extent that Defendants seek to rely on a recent district court decision finding a lack of subject matter jurisdiction under Section 46110, that decision is inapposite. *See Latif v. Sessions*, Case No. 3:10-cv-007500-BR, 2017 WL 1434648 (D. Or. Apr. 21, 2017). The court in that case evaluated a revised redress process that applies only to the No Fly List and that culminates in a determination by the TSA Administrator. The redress process at issue here, however, is the same process that was before the Ninth Circuit in *Latif v. Holder*, 686 F.3d at 1128.

46110 is "quite narrow" and "is limited to TSA's final orders."[5] *Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012). By its own terms, the statute cannot extend to review of other agencies' orders.[6] Thus, the Ninth Circuit cited the "unique relationship between TSA and TSC in processing traveler grievances to determine who should remain on the List" as one reason why it lacked jurisdiction under Section 46110 over claims challenging the adequacy of the redress process. *Latif*, 686 F.3d at 1129; *see also Ege*, 784 F.3d at 795 (declining to exercise jurisdiction under Section 46110 because it would require review of "injury that results from the independent action" of TSC, a "third party not before the court").

Second, any remedy for Plaintiffs' procedural challenge would necessarily involve both TSC and TSA, but courts of appeals lack jurisdiction under Section 46110 to direct TSC to take any action, let alone provide a remedy. Section 46110 grants courts of appeals jurisdiction only to "affirm, amend, modify, or set aside" any part of a TSA order. 49 U.S.C. § 46110(c). That jurisdiction does not extend to any other relief or

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[5] Defendants suggest without elaboration that review under Section 46110 extends to claims "inescapably intertwined" with TSA orders. ECF No. 38 at 13. But courts have rejected attempts to apply that principle in this context. *See Mokdad*, 804 F.3d at 814 ("[T]he government in effect urges that we find that a *direct challenge to one agency's order* is inescapably intertwined with *another agency's order* . . . . This would be an unprecedented departure from the doctrine of inescapable intertwinement as applied in other circuits."); *see also Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1255-56 (9th Cir. 2008) (same).

[6] Defendants state, again without elaboration, that courts of appeals have jurisdiction under Section 46110 to review "orders issued 'in whole or in part' by TSA." ECF No. 38 at 13. That incorrectly implies that an order at least partly issued by TSA must be reviewed in a court of appeals. In reality, the text of the statute refers to the statutory authority under which the order was issued, not the issuing agency. *See* 49 U.S.C. § 46110(a).

agency. *Robinson*, 689 F.3d at 892. Courts of appeals therefore cannot provide the remedy that Plaintiffs seek for their procedural due process and APA claims, as the Ninth Circuit explained in *Latif*:

> Ordering TSA to tell Plaintiffs why they were included on the List and to consider their responses in deciding whether they should remain on it, would be futile. Such relief must come from TSC—the sole entity with both the classified intelligence information Plaintiffs want and the authority to remove them from the List. Thus, because we would not be able to provide relief by simply amending, modifying, or setting aside *TSA's orders* or by directing *TSA* to conduct further proceedings, we lack jurisdiction under § 46110 to address Plaintiffs' procedural challenge.

686 F.3d at 1129; *see also Ege*, 784 F.3d at 795-96 (quoting *Latif* and citing inability to provide requested relief in declining jurisdiction over procedural challenge); *Mohamed v. Holder*, No. 11-1924, 2013 U.S. App. LEXIS 26340, at *5-6 (4th Cir. 2013) (same). Here, Mr. Wilwal seeks notice of the reasons for his placement on the watchlist and a meaningful opportunity to contest his continued retention on it. Am. Compl. at 27. That relief must come from TSC, but the court of appeals could not provide it under Section 46110.

Third, direct review of Plaintiffs' claims in the court of appeals would be unfair because the redress process lacks fundamental procedural safeguards. The redress process was not subject to notice-and-comment procedure, and the government's failure to provide meaningful notice and a hearing during the administrative phase results in a one-sided administrative record. It therefore "makes sense" that a court reviewing the adequacy of the process be "a court with the ability to take evidence." *See Ibrahim*, 538 F.3d at 1256; *see also Latif*, 686 F.3d at 1129 ("Plaintiffs demand to know *why* they are

apparently included on the List and an *opportunity* to advocate for their removal." (emphasis added)). Thus, the very inadequacy of the redress process that Plaintiffs are challenging makes direct review in the court of appeals inadequate.

The "congressional mandate" for "managing DHS TRIP" that Defendants cite does not compel a different result. *See* ECF No. 38 at 13-14. The statutes and regulations Defendants cite relate only to the establishment of a redress process for airline passengers who are delayed or prohibited from boarding flights. *See id.* They do not address lengthy or unlawful border detention as a result of placement on a watchlist. In any event, nothing about those provisions shows congressional intent to preclude district court jurisdiction over the claims Plaintiffs make. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012) (congressional intent to confine review to statutory scheme must be "fairly discernible" from the "text, structure, and purpose" of the relevant statute). For that reason, the Fourth and D.C. Circuits rejected the congressional intent argument Defendants make here. *See Ege*, 784 F.3d at 793 n.3 (court of appeals lacked jurisdiction under Section 46110 notwithstanding statutory directive to DHS to establish redress process); *Mohamed*, 2013 U.S. App. LEXIS 26340, at *5 ("[W]e do not fairly discern . . . a congressional intent to remove such claims from review in the district court.").

Defendants rely heavily on the Sixth Circuit's decision in *Mokdad*, but that case is an outlier and did not involve a ruling on subject matter jurisdiction over the plaintiff's procedural claims. As set forth above, three of the four federal courts of appeals that have ruled on this jurisdictional question have rejected Defendants' argument and held that Section 46110 does not bar district court jurisdiction over claims challenging the

adequacy of the watchlisting redress process. *Ege*, 784 F.3d at 795; *Mohamed*, 2013 U.S. App. LEXIS 26340, at *3; *Latif*, 686 F.3d at 1130. The court in *Mokdad*, moreover, held only that a procedural challenge to the No Fly List redress process challenged a final order of the TSA within the meaning of Section 46110, and that TSA was a required party. 804 F.3d at 811. Because TSA was not a defendant, the court dismissed the plaintiff's procedural claims without prejudice but "decline[d] to opine . . . whether § 46110 would deprive the district court of subject-matter jurisdiction . . . if [the plaintiff] were to file a new suit naming TSA as a defendant." *Id.* at 812. Thus, the *Mokdad* court did not hold that district courts lack jurisdiction to adjudicate challenges to the adequacy of the redress process.

C. TSA Is Not a Required Party.

Defendants imply that TSA is a required party, but they offer no explanation or argument as to why. *See* ECF No. 38 at 14 (citing Fed. R. Civ. P. 19). A party is required to be joined if feasible when, "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a). TSA is not a required party here because, as explained above, TSC—not TSA—controls the material aspects of the process Plaintiffs challenge, including determinations regarding access to underlying information and whether to keep a person on the watchlist. And as the Ninth Circuit explained in *Latif*, TSC established the policies governing that stage of the redress process. 686 F.3d at 1128. TSA's messenger role does not make it a required party.

Additionally, DHS, of which TSA is a component, is already a Defendant in this case. DHS has authority over its components' policies and procedures, and Defendants

fail to explain why DHS could not implement any relief that implicates TSA in this case. *See, e.g.*, *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1034-35 (D. Minn. 2016) (counties were not required parties in action challenging program administered by Minnesota Department of Human Services, given DHS's oversight authority and ultimate responsibility for administering state's Medicaid plan). Because the Court can order complete relief among the existing parties, TSA need not be joined as a defendant.

III. Plaintiffs Plausibly Allege Violations of Their Constitutional Rights and the APA.

Defendants also move to dismiss each of Plaintiffs' claims under Rule 12(b)(6), but their motion fails. Defendants ask the Court not only to ignore Plaintiffs' detailed factual allegations, but also to rule that, in essence, CBP and ICE officers' conduct during border detentions is reasonable by virtue of the fact that it happens at the border. That argument cannot be squared with common sense or decades of border-related case law. The border is not a Constitution-free zone. Plaintiffs' allegations—taken as true here—plainly establish violations of their constitutional rights and the APA.

A. Legal Standard

To avoid dismissal under Rule 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In deciding a Rule 12(b)(6) motion, the Court must construe the complaint liberally, accept a plaintiff's factual allegations as true, and make reasonable inferences in the light most favorable to the plaintiff. *Id.* at 554-56. In addition, "the complaint should be read as a whole, not parsed piece by piece to determine whether each

allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

B. Plaintiffs Plausibly Allege Violations of Their Fourth Amendment Right to Be Free from Unlawful Seizure.

Defendants move to dismiss Claims One and Three, arguing that Plaintiffs' detention was permissible because CBP and HSI officers have broad authority to detain and search travelers at the border. ECF No. 38 at 17. The cases Defendants rely on focus on *searches* conducted at the border, and whether such searches are "non-routine," requiring heightened suspicion. *See id.* at 16-18. Plaintiffs, however, claim that they were unreasonably and unlawfully *seized* during the detention. The Court must therefore consider whether Plaintiffs' detention was unreasonably long or effected using unreasonable methods. Applying the correct legal standard compels the conclusion that Plaintiffs' detention constituted an unlawful seizure.[7]

1. A border detention becomes an unlawful seizure or *de facto* arrest if continued for an unreasonable duration or carried out using unreasonable methods.

A border detention that might initially be lawful becomes an unlawful seizure or *de facto* arrest if officials have no valid justification for continuing to detain an individual. *See, e.g.*, *United States v. Guzman-Padilla*, 573 F.3d 865, 882 (9th Cir. 2009) ("[T]he government's success in demonstrating an entitlement to conduct a border search does not end our inquiry, since there remains the possibility that the . . . seizure amounted

[7] At the very least, Plaintiffs' allegations raise the kind of factual issues that are inappropriate for resolution on a Rule 12(b)(6) motion to dismiss. *See Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 821 (8th Cir. 2008).

to an 'arrest' requiring probable cause, or that the manner of the detention or seizure was otherwise unreasonable."); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person.").

The Supreme Court acknowledged as much in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), when it reviewed "whether the detention of respondent was reasonably related in scope to the circumstances which justified it initially." *Id.* at 542. In that case, customs officers detained overnight a non-citizen seeking entry into the United States on suspicion that she was smuggling drugs inside her body. Although the Court did not specifically address the point at which a border detention becomes constitutionally unreasonable, two aspects of the Court's ruling provide guidance here. First, the Court required a "particularized and objective basis" for believing that the traveler was engaged in specific illegal activity at the time in order to prolong a border detention. *Id.* at 541-42 (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Second, in so ruling, the Court looked to prior cases addressing when and how an investigative detention under *Terry v. Ohio*, 392 U.S. 1 (1968), becomes an unreasonable seizure or a *de facto* arrest—indicating that the framework it employed in those cases should apply to border detentions as well. *See Montoya de Hernandez*, 473 U.S. at 542-44 (citing *United States v. Sharpe*, 470 U.S. 675 (1985), and *United States v. Place*, 462 U.S. 696 (1983)).

Unsurprisingly, under the line of authority that the Supreme Court invoked in *Montoya de Hernandez*, the duration of a detention is a primary consideration in assessing its reasonableness: the longer the detention, the more likely it is unreasonable.

For instance, *Place* involved a 90-minute detention of a traveler's luggage at an airport on suspicion that it contained narcotics. 462 U.S. at 697-99. The Court held that "[t]he length of the detention . . . alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *Id.* at 709. Similarly, in *Sharpe*, the Court upheld a 20-minute investigative detention of the defendant only after examining "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." 470 U.S. at 686. Notably, the Supreme Court applied the same principles to roving border patrol stops in the vicinity of the border. *See Brignoni-Ponce*, 422 U.S. at 881-82 (reasonable suspicion of unlawful presence in the country could justify a brief stop, but "any further detention or search must be based on consent or probable cause").

The Court also found relevant the methods used to effect a detention. In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court held that the seizure of the defendant amounted to an arrest without probable cause because the police transported him to a police station, placed him in an interrogation room, and questioned him at length. *Id.* at 212. Similarly, in *Florida v. Royer*, 460 U.S. 491 (1983), agents stopped the defendant as he was transiting an airport, seized his luggage, took him to a small room for questioning, retained his airline ticket and license, and did not indicate that he was free to depart. *Id.* at 501-02. Five justices agreed that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," that "the investigative methods employed should be the least intrusive means reasonably available to verify or

dispel the officer's suspicion in a short period of time," and that the detention amounted to an arrest without probable cause. *Id.* at 500.

Eighth Circuit detention decisions reflect the same factors. *See United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005) ("[A]n investigative detention may turn into an arrest if it 'lasts for an unreasonably long time or if officers use unreasonable force.'" (quoting *United States v. Navarrete-Barron*, 192 F.3d 786, 790 (8th Cir. 1999))). The Eighth Circuit has also considered "the degree of fear and humiliation that the police conduct engenders," whether police transported the suspect to another location or isolated him from others, and whether a suspect was handcuffed. *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (citing cases).

Thus, while a border detention differs from a typical *Terry* stop in that it need not be justified by reasonable suspicion at the outset, these cases establish that a border detention becomes an unreasonable seizure or wrongful arrest if (1) it lasts longer than necessary to effectuate the purpose of the stop, or (2) border officials use unreasonable means to carry out the detention.

Here, Defendants cite no authority suggesting that CBP or HSI officers can hold an entire family of U.S. citizens captive at the border for nearly eleven hours without any basis to suspect that any of them were engaged in criminal wrongdoing. No such authority exists. Rather, applying the principles set forth in the cases above makes clear that the officers violated Plaintiffs' Fourth Amendment rights.

2. Ms. Abdigani and the children were unreasonably seized.

Defendants' detention of Ms. Abdigani and the children was an unlawful seizure. Plaintiffs' allegations make clear that Ms. Abdigani and the children were not free to leave the border station, and that their detention constituted a seizure. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (seizure occurs "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

Defendants used unreasonable methods to seize Ms. Abdigani and the children and detained them for an unreasonable duration. The officers subjected them to a harrowing show of force on arrival at the border post, approaching the family's car with guns pointed at them. The detention, moreover, lasted far longer than was "necessary to effectuate the purpose of the stop," *see Royer*, 460 U.S. at 500, which was "to regulate the collection of duties and to prevent the introduction of contraband into this country." ECF No. 38 at 17 (quoting *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004)). The CBP officers had no basis to suspect Ms. Abdigani and the children were carrying illegal items or otherwise violating the law, Am. Compl. ¶¶ 80-81, so the 10.5-hour detention was grossly disproportionate to the purpose of the stop. And despite the lack of any colorable basis for suspecting Ms. Abdigani and the children of wrongdoing, the circumstances and duration of the detention caused them to experience deep humiliation and fear. *Id.* ¶¶ 66-69, 72-75, 79, 83. *See Bloomfield*, 40 F.3d at 917.

3. Mr. Wilwal was subjected to a *de facto* arrest absent probable cause.

Defendants' seizure of Mr. Wilwal was unlawful for the same reasons: they used unreasonable force to seize him, and they detained him far longer than necessary. In addition, courts identify other factors that can show arrest, which are present in Mr. Wilwal's case. For instance, in *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986), the Eighth Circuit indicated that a border detention can constitute an arrest where officials make a "show of force," use physical restraint, or "otherwise exceed the bounds of means necessary to continue the detention." *Id.* at 839. Handcuffs, in particular, are "a hallmark of a formal arrest." *United States v. May*, 440 F. Supp. 2d 1016, 1029 (D. Minn. 2006) (citing *New York v. Quarles*, 467 U.S. 649, 655 (1984)). Their use for longer than a brief period at the border can be a conclusive factor in determining whether an individual has been arrested. *See, e.g.*, *United States v. Juvenile (RRA–A)*, 229 F.3d 737, 743 (9th Cir. 2000) (arrest of defendant who was handcuffed for four hours in customs inspection area began when she was first handcuffed to a bench).

The CBP officers' treatment of Mr. Wilwal exhibited each of these factors. Their show of force was overwhelming: they forced him out of the van at gunpoint and handcuffed him immediately. Am. Compl. ¶¶ 31-32. They then separated him from his family, moved him to the secondary inspection building, and kept him isolated—*handcuffed for the entire time*—for almost eleven hours. He was so fearful and anxious (and deprived of sustenance) that he passed out, requiring medical attention. *Id.* ¶¶ 52-53. The officers also refused to answer any questions about his family's well-being and why

they were detaining him. *Id.* ¶ 35; *see also Place*, 462 U.S. at 710 (officers' refusal to provide relevant information exacerbated unreasonableness of seizure). Mr. Wilwal was under arrest.

It is equally clear that the officers lacked probable cause to arrest Mr. Wilwal. "[E]very seizure having the essential attributes of a formal arrest[ ] is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 692, 700 (1981). At no point during the detention did the officers have *any* basis—let alone probable cause—to believe that Mr. Wilwal was engaged in criminal wrongdoing. Nor did the officers indicate any colorable basis for such harsh treatment. The CBP officers asked Mr. Wilwal only if he is Pakistani, and the HSI officers—nearly ten hours later—asked him general questions but never suggested any basis for believing that he had committed, or was in the process of committing, any crime. Am. Compl. ¶¶ 33, 36, 57-63. The ICE Report bears that out: it indicates that the border detention occurred because Mr. Wilwal's name prompted a "subject record hit"—not because of any indication of criminal conduct—and it concedes that the HSI officers "did not discover any derogatory information relating to" Mr. Wilwal. *See* ICE Report at 3.

To be clear: Mr. Wilwal's placement on the master watchlist constituted neither reasonable suspicion nor probable cause to believe that he had been or was engaged in any wrongdoing when he crossed the border in March 2015. That is true not only because of the loose criteria for placement on the watchlist and the TSC's weak quality assurance, *see* Am. Compl. ¶ 43, but also because the "low evidentiary threshold" for placement on the watchlist creates a "high risk" that people will be placed on the watchlist in error. *See*

Latif v. Holder, 28 F. Supp. 3d 1134, 1152-53 (D. Or. 2014). Similarly, the CBP officers had no information about why Mr. Wilwal's name appeared on a terrorism-related watchlist. Am. Compl. ¶ 49. They therefore could not have had a "particularized and objective basis" for suspecting that he was then engaged in any criminal wrongdoing. *See Montoya de Hernandez*, 473 U.S. at 541-42.

B. Plaintiffs Plausibly Allege Violations of Mr. Wilwal's Fourth Amendment Right to Be Free from Excessive Force.

Defendants next move to dismiss Claim Two, arguing that Mr. Wilwal cannot state a claim for excessive force in violation of the Fourth Amendment. ECF No. 38 at 20. But Defendants fail to consider the circumstances surrounding the CBP officers' use of force against Mr. Wilwal in their totality, nor do Defendants identify any authority indicating that the officers' use of force was reasonable as a matter of law. Defendants' motion therefore fails.

In evaluating excessive force claims, courts assess "whether the amount of force used was objectively reasonable under the particular circumstances." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). They consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 496. This inquiry is by nature fact-intensive, requiring "careful attention to the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989). As a result, excessive force claims are rarely dismissed at the pleadings stage.

Taken together, Plaintiffs' allegations establish that the CBP officers' use of force was unreasonable under the circumstances. The officers swarmed the family's van with their guns pointed at the family, despite the absence of any evidence of a crime, let alone a severe or violent one. *See Brown*, 574 F.3d at 496. Mr. Wilwal made no attempt to flee or resist the officers, but rather left the van—alarmed and afraid—with his hands in the air, saying that the family had nothing illegal in the van. Mr. Wilwal's total compliance with the officers' demands cannot reasonably be described as a "tense, uncertain, and rapidly evolving" situation, *see Graham*, 490 U.S. at 397, but one of the officers nonetheless handcuffed Mr. Wilwal's hands behind his back and led him into the station. *See Thompson v. Anoka-Hennepin E. Metro Narcotics*, 673 F. Supp. 2d 805, 816 (D. Minn. 2009) (reasonable juror could conclude officers used excessive force when they forcefully entered home, used threats of deadly force, and handcuffed the plaintiffs at gunpoint). The officers then left Mr. Wilwal handcuffed *for over ten hours*—a wholly unnecessary and excessive use of force for which Defendants offer no colorable justification.

Contrary to Defendants' assertions, *see* ECF No. 38 at 20, Plaintiffs plainly allege that the officers' excessive use of force injured Mr. Wilwal. After four hours spent with his hands cuffed behind his back, and having been denied any food and water, Mr. Wilwal passed out on the floor, requiring medical attention. Am. Compl. ¶¶ 52-54. Courts have upheld excessive force claims on similar facts. *See, e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777-78 (3rd Cir. 2004) (force was excessive where handcuffs caused plaintiff to faint and fall to the ground, and where officer was not "in the midst of a dangerous

situation involving a serious crime or armed criminals"); *Randolph v. Potter*, Civil Action No. PWG-16-2739, 2017 WL 3158775, at *2 (D. Md. July 21, 2017) (in pretrial detention context, plaintiff's allegation that he was "placed in restraints, shackles, and handcuffs for nearly seven hours and then he passed out" was sufficient to state a claim for excessive force).

Defendants' argument that the use of handcuffs and pointing of firearms do not support claims for excessive force is both factually and legally untenable. ECF No. 38 at 21. By their own admission, Defendants consider those uses of force "standing alone," *see id.*, and thereby fail to assess them in their totality. In any event, Defendants point to no authority—nor could they—suggesting that the use of handcuffs or the pointing of firearms is *per se* reasonable. *Cf. Marvin v. City of Taylor*, 509 F.3d 234, 247-48 (6th Cir. 2007) ("[A]n excessive force claim can be premised on handcuffing, *i.e.*, the right not to be handcuffed in an objectively unreasonable manner was clearly established."); *Flah v. City of Maple Grove*, Case No. 14-CV-0264 (PJS/FLN), 2015 WL 7303546, at *4 (D. Minn. Nov. 19, 2015) (citing cases holding that "pointing a gun at a suspect—in and of itself—can violate the Fourth Amendment under some circumstances").

Thus, the kinds of force the CBP officers used against Mr. Wilwal can be unreasonable, and, considered here in their totality, give rise to a cognizable excessive force claim.

C. Plaintiffs Plausibly Allege a Violation of Mr. Wilwal's Fifth Amendment Right to Procedural Due Process.

Defendants move to dismiss Claim Four for violation of Mr. Wilwal's procedural due process rights on the grounds that Plaintiffs have not alleged the deprivation of a protected interest. ECF No. 38 at 22-23. Defendants again attempt to minimize the harm to Plaintiffs as "[i]nconvenience, inspections, or delays" at the border. *Id.* at 24. But Plaintiffs' allegations go far beyond that—allegations that establish deprivations of Mr. Wilwal's liberty interests in freedom from unconstitutional seizure and in international travel.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To set forth a procedural due process violation, a plaintiff must first establish that a protected liberty or property interest is at stake, and second, that the government deprived her of that interest without due process of law. *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 817 (8th Cir. 2011).

Defendants appear to acknowledge that if Mr. Wilwal has stated a claim for unconstitutional seizure, he also has shown the deprivation of a protected liberty interest. *See* ECF No. 38 at 22-23. Thus, for the reasons set forth above (*see* Section III.B), Mr. Wilwal has established that his prolonged detention and *de facto* arrest constituted a substantial deprivation of his personal liberty without due process of law. *See Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972) (due process is required for deprivations of protected

interests that "cannot be characterized as de minimis" (internal quotation marks omitted)).

Mr. Wilwal also has alleged violations of his constitutionally protected liberty interest in international travel. The freedom to travel internationally is a cognizable liberty interest under the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 127 (1958) ("Freedom to travel is, indeed, an important aspect of the citizen's liberty."); *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992) (finding it "clearly established" that due process protects the right to international travel); *Latif*, 28 F. Supp. 3d at 1149 (individuals on the No Fly List have a protected liberty interest in international travel). Government action that burdens this liberty interest triggers the need for procedural safeguards. *See, e.g.*, *DeNieva*, 966 F.2d at 485 (requiring procedural due process where retention of passport burdened liberty interest in travel); *Hernandez*, 913 F.2d at 237 (same where denial of admission to the United States deprived citizen of liberty interest in travel); *Latif*, 28 F. Supp. 3d at 1149 (procedural safeguards required following placement on the No Fly List). This is true even if the challenged action does not foreclose all travel. *See, e.g.*, *DeNieva*, 966 F.2d at 485 (plaintiff "could travel internationally *only with great difficulty*, if at all" (emphasis added)); *Hernandez*, 913 F.2d at 234 (burden on ability to "travel to and from Mexico" but not other countries); *Latif*, 28 F. Supp. 3d at 1149 (placement on No Fly List did not preclude all travel but "significantly affected" ability to travel internationally); *Agee v. Baker*, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing that one-way restriction on travel from the United States to foreign countries deprived liberty interest in travel).

Here, Defendants subjected Mr. Wilwal to an abusive and prolonged detention on his return home because of his placement on the watchlist, and infringed on his protected liberty interest in international travel. As in *Latif*, Mr. Wilwal's placement on the watchlist need not foreclose all international travel in order to trigger his rights to procedural safeguards under the Due Process Clause. 28 F. Supp. 3d. at 1149; *see also Mohamed*, 995 F. Supp. 2d at 538-39 (allegations of placement on No Fly List sufficient to state procedural due process claim). Rather, it is sufficient that his watchlist status interferes with and burdens his liberty interest by exposing him to a substantial risk of repeated detention at the border (*see supra* Section I.B), making him fearful and reluctant to travel abroad. *See* Am. Compl. ¶ 89.

D. Plaintiffs Plausibly Allege a Violation of Mr. Wilwal's Fifth Amendment Right to Substantive Due Process.

Defendants argue that Plaintiffs have not stated a claim for violation of Mr. Wilwal's substantive due process rights, and that Claim Five must therefore be dismissed. ECF No. 38 at 25. The substantive due process inquiry, however, is both flexible and fact-intensive, and Plaintiffs allege the kind of arbitrary and egregious government conduct that suffices to state a substantive due process claim.

The Supreme Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Substantive due process thus "provides heightened protection against government interference with certain fundamental rights and liberty interests."

Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). That protection is lost when government officials act with deliberate indifference to constitutional rights. *Lewis*, 523 U.S. at 849-51.[8] "Rules of due process are not, however, subject to mechanical application," and an "[a]sserted denial is to be tested by an appraisal of the totality of facts in a given case." *Id.* at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Plaintiffs have plausibly alleged conduct that meets this standard. Plaintiffs' substantive due process claim challenges the arbitrary, wrongful, and indefinite placement of Mr. Wilwal on the watchlist, which resulted in an abusive and egregious border detention when he sought to return home. Mr. Wilwal alleges that he is neither a known nor an appropriately suspected terrorist under the government's loose watchlisting criteria, that he has never engaged in conduct that would meet those criteria, and that he does not know why he was placed on the watchlist. Am. Compl. ¶ 49. Defendants placed him on the watchlist anyway, while at the same time refusing to acknowledge that placement, let alone justify it. Placing an innocent person on a blacklist—with all its negative consequences—is the kind of "deliberate indifference" to rights that violates substantive due process. *See Lewis*, 523 U.S. at 849; *see also Mohamed*, 995 F. Supp. 2d at 538 (U.S. citizen on No Fly List stated plausible substantive due process claim); *Moran v. Clarke*, 296 F.3d 638, 645 (8th Cir. 2002) (plaintiff had plausible substantive due process claim where he offered evidence he was "investigated, prosecuted, suspended without pay, demoted and stigmatized by falsely-created evidence").

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[8] Although the Court in *Lewis* reaffirmed the stringent "shocks the conscience" standard, it also clarified that the "deliberate indifference" test should govern claims alleging abuse of executive power in non-emergency situations. *See* 523 U.S. at 851.

To the extent that such deliberate indifference requires interference with a fundamental right or liberty interest, Plaintiffs have adequately alleged that as well. As set forth above (*see* Section III.C), Defendants' placement of Mr. Wilwal on the watchlist infringes on his liberty interest in international travel. It also interferes with his fundamental right to return to the United States from abroad—a right that is inherent in U.S. citizenship. *See Nguyen v. INS*, 533 U.S. 53, 67 (2001); *Balzac v. Porto Rico*, 258 U.S. 298, 308-09 (1922); *Newton v. INS*, 736 F.2d 336, 342 (6th Cir. 1984) ("It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel."); *see also Mohamed*, 995 F. Supp. 2d at 536-37 (concluding in No Fly List case that "[a]t some point, governmental actions taken to prevent or impede a citizen from reaching the border infringe upon the citizen's right to reenter the United States"). Although officials may stop and inspect U.S. citizens seeking to reenter the United States, they may not apprehend them at gunpoint and hold them, handcuffed and in isolation, for nearly eleven hours while denying them access to food, water, family, or counsel, all without any suspicion of wrongdoing, and solely on the basis of placement on a secret blacklist for which no meaningful redress is available. That is the sort of "arbitrary action" and "exercise of power without any reasonable justification" that the Due Process Clause does not tolerate. *See Lewis*, 523 U.S. at 845-46.

E. Plaintiffs Plausibly Allege Violations of the APA.

Defendants move to dismiss Plaintiffs' claims under the APA (Claims Six and Seven), arguing that those claims are beyond the scope of judicial review under the APA.

ECF No. 38 at 27-29. But Defendants cannot insulate unconstitutional conduct from APA review, and dismissal of either claim would be inappropriate at this stage.

First, contrary to Defendants' argument, the allegations underlying Claim Six are clear: Plaintiffs allege that Defendants' existing policies permitted the CBP and HSI officers to carry out the unreasonable seizures that Plaintiffs challenge. Plaintiffs allege that the standards and criteria TSC uses in compiling the master watchlist increase the likelihood of erroneous placement on the list, Am. Compl. ¶¶ 41-43; that TSC shares the master watchlist with CBP, which searches the watchlist via its TECS system, *id.* ¶ 39; that placement on the watchlist causes a heightened response at border crossings and ports of entry, *id.* ¶ 40; that officers handcuffed and arrested Mr. Wilwal because his name appeared on the watchlist, *id.* ¶ 37; and that the officers detained Ms. Abdigani and her children solely because of their association with Mr. Wilwal, *id.* ¶ 82. Those allegations support the reasonable inference that Defendants' policies permitted, or failed to prevent, both the *de facto* arrest of Mr. Wilwal and the unreasonable seizure of Ms. Abdigani and the children. *See id.* ¶ 88. Those policies are therefore arbitrary, capricious, or "otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A). That Plaintiffs are not aware of the precise contours of those policies is unsurprising given government secrecy, but is not a reason to deny Plaintiffs relief under the APA.

Nor are such policies beyond the reach of the courts. Courts afford agencies no deference in interpreting the Constitution. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[D]eference to an agency interpretation is inappropriate not only

when it is conclusively unconstitutional, but also when it raises serious constitutional questions." (citing *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991))).

Similarly, Claim Seven states a plausible APA claim arising out of Defendants' failure to provide Mr. Wilwal with meaningful watchlisting redress procedures. For the reasons stated above (*see* Section III.C), Defendants' failure to afford Mr. Wilwal adequate notice and a meaningful hearing is "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B). Defendants' redress procedures are also arbitrary, capricious, or "otherwise not in accordance with law," *see* 5 U.S.C. § 706(2)(A), because, in devising the procedures, Defendants "entirely failed to consider an important aspect of the problem." *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The defects in the redress process underscore that Defendants failed to consider important aspects of Congress's instruction to "establish a timely and fair process for individuals identified as a threat . . . to appeal to the [TSA] the determination and correct any erroneous information." *See* 49 U.S.C. § 44903(j)(2)(G)(i). That failure constitutes a violation of Section 706(2)(A) of the APA.

IV. Plaintiffs Plausibly Allege Liability Under the Federal Tort Claims Act.

Defendants' motion to dismiss Plaintiffs' tort claims also fails.

First, in plausibly alleging unconstitutional seizures, Plaintiffs *a fortiori* also plausibly allege false arrest and imprisonment. To state a claim for false arrest under North Dakota law, "plaintiffs must demonstrate that they were subject to total restraint against their will by means of physical barriers or by threats of force which intimidated them into compliance with orders." *Copper v. City of Fargo*, 905 F. Supp. 680, 700

(D.N.D. 1994). Plaintiffs may not recover if the arrest is supported by proper legal authority. *Id.*

Defendants do not deny that Plaintiffs were subject to "total restraint against their will"; instead, they recycle their arguments regarding Plaintiffs' Fourth Amendment claims, asserting that the CBP and HSI officers acted within their "plenary authority" to conduct searches at the border. ECF No. 38 at 30-31. For the reasons set forth above (*see* Section III.B), the Constitution limits that authority, and the CBP and HSI officers exceeded those limits here. The officers lacked the legal authority to seize Plaintiffs in an unreasonable manner and for an unreasonable duration without any cause to believe that Plaintiffs were engaged in any criminal wrongdoing. The officers' conduct plainly constituted false arrest.

The same considerations govern Mr. Wilwal's battery claim. Under North Dakota law, a person commits battery when "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." *Wishnatsky v. Huey*, 584 N.W.2d 859, 861 (N.D. Ct. App. 1998). Because Mr. Wilwal has plausibly alleged excessive force in violation of his Fourth Amendment rights, he has also plausibly alleged battery. Taken together, Plaintiffs' allegations—in particular that the CBP officers kept Mr. Wilwal in handcuffs for over ten hours—show contact that was both harmful and offensive.

Finally, Plaintiffs' allegations establish assault. A person commits assault if "he willfully causes bodily restraint or harm to another human being or places another human

being in immediate apprehension of bodily restraint or harm." *Binstock v. Fort Yates Pub. Sch. Dist. No. 4*, 463 N.W.2d 837, 840 (N.D. 1990). The act must be unjustifiable to constitute assault. *Id.*

Here, there can be no question that the CBP officers' alleged conduct placed Plaintiffs in immediate apprehension of bodily harm. The officers surrounded the family's van with their guns pointed at the family while yelling at them not to use weapons, then forced Mr. Wilwal out of the van and handcuffed him at gunpoint. Am. Compl. ¶¶ 31-32. The officers' conduct terrified the family, *see id.*, as it would have any reasonable person. Plaintiffs further allege that the officers had no valid justification for such aggressive, fear-inducing tactics. *Id.* ¶ 29. On the facts as alleged, Plaintiffs have stated a cognizable claim for assault.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss.

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Respectfully submitted,

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