UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civ. No. 17-CV-02835 (DWF/DTS)

Abdisalam Wilwal, *et al.*,

Plaintiffs,

v.

Kirstjen Nielsen[1], *et al.*,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

[1] Pursuant to Federal Rule of Procedure 25(d), Secretary of the Department of Homeland Security Kirstjen Nielsen has been automatically substituted as a Defendant.

INTRODUCTION

In this case, Plaintiffs have brought suit against various Government agencies alleging constitutional, Administrative Procedure Act (APA), and tort claims related to their delay at the border, and Defendants have moved to dismiss. Because Plaintiffs have not shown that the combination of factors that led to their delay at the border is likely to occur again, they lack standing to seek prospective relief. Plaintiffs have also failed to show that Defendants acted unreasonably, given the circumstances alleged in the Amended Complaint, and have, therefore, failed to state valid constitutional, APA, or tort claims. Accordingly, the Court should grant Defendants' motion and dismiss Plaintiffs' claims.

ARGUMENT

I. Plaintiffs Lack Standing to Seek Prospective Relief.

The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs have not shown a certainly impending injury for at least three reasons. First, Plaintiffs have not alleged specific plans to cross the border in the future. Second, nearly three years have passed since Mr. Wilwal was allegedly referred for additional scrutiny during his border inspection, and it is unclear whether he would be required to undergo additional scrutiny if he chooses to cross the border in the future. Third, Plaintiffs have not alleged that they are likely to cross the border in the future at a remote location. The

"attenuated chain of inferences necessary to find harm here" is simply insufficient to establish a certainly impending injury. *Id.* at 414 n.5.

Relying heavily on the Sixth Circuit's decision in *Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013), Plaintiffs argue that the Court should presume that Mr. Wilwal was placed and remains on a Government watchlist, ECF 45 at 12-13, and that this presumption is appropriate because the Government does not confirm or deny whether individuals are on watchlists. *Id.* at 13. To the extent *Shearson* supports Plaintiffs' argument, it is inconsistent with the Supreme Court's decision in *Clapper*. 568 U.S. at 412 n.4. Addressing the contention that the Government should reveal whether it was intercepting the plaintiffs' communications, the Supreme Court explained that, "it is [plaintiffs'] burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing by revealing details of its surveillance priorities." *Id.* Plaintiffs have not alleged specific facts that would support a finding that Mr. Wilwal is currently on a watchlist and such a presumption would be improper.

Plaintiffs also argue that Defendants' retention of certain information provides standing to seek expungement, but they are incorrect for two reasons. First, Plaintiffs allege no concrete and particularized injury stemming from the Government's alleged retention of information. Rather, Plaintiffs state only that they "are deeply concerned that [the Government] will use information collected during the detention to expand the duration or scope of border detentions in the future." ECF 45 at 16. Plaintiffs' concern is plainly insufficient to establish that they are facing a "certainly impending" injury. *Clapper*, 568 U.S. at 416 (holding that standing cannot be founded on "fears of

hypothetical future harm that is not certainly impending"). Second, Plaintiffs bring no legal challenge to the Government's retention of information. Absent a claim whereby this Court could find retention unlawful, there is no basis to order expungement.

Finally, Plaintiffs argue that Mr. Wilwal has standing to bring his procedural due process claim. ECF 45 at 16. Contrary to Plaintiffs' argument, simply alleging a procedural due process violation does not confer standing. *See Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 901 (8th Cir. 2008). In addition, "standing is not dispensed in gross" and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), *remanded*, *Laroe Estates, Inc. v. Town of Chester*, 693 Fed. App'x 69 (2d Cir. 2017). Even if Mr. Wilwal were to have standing to bring his procedural due process claim, Plaintiffs have not established standing to bring their other constitutional and APA claims seeking prospective relief. And as explained below, Plaintiffs' procedural due process claims should be dismissed on other grounds for lack of subject matter jurisdiction.

II. Plaintiffs' Challenges to the Sufficiency of the DHS Traveler Redress Inquiry Program (DHS TRIP) Should Be Dismissed for Lack of Subject Matter Jurisdiction.

In Counts Four and Seven, Plaintiffs ask this Court to review the adequacy of Department of Homeland Security Travelers Redress Inquiry Program ("DHS TRIP"). As Defendants explained in their motion, however, the Transportation Security Administration (TSA) administers DHS TRIP and promulgated the regulations governing the program. ECF 38 at 13-14. Accordingly, "[t]o the extent that [Plaintiffs] challenge[]

the adequacy of the redress process, [their] claims amount to a challenge to a TSA order." *Mokdad v. Lynch*, 804 F.3d 807, 811 (6th Cir. 2015), *remanded*, No. 13-cv-12038, 2016 WL 4205909 (E.D. Mich. Aug. 10, 2016), *aff'd*, *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017). Such a challenge cannot proceed in this Court because, "the federal courts of appeals have exclusive jurisdiction to review the orders of certain federal agencies, including the Transportation Security Administration." *Id.* at 809 (citing 49 U.S.C. § 46110(a)). Counts Four and Seven should, therefore, be dismissed for lack of subject matter jurisdiction, *see Bazzi v. Lynch*, No. 16-10123, 2016 WL 4525240, at *5 (E.D. Mich. Aug. 30, 2016), *aff'd sub. nom.*, *Beydoun v. Sessions*, 871 F. 3d 459 (6th Cir. 2017), *rehearing en banc denied* (Nov. 28, 2017) ("This Court concludes that it lacks subject matter jurisdiction over any challenges in Plaintiff's Complaint to the adequacy of the DHS TRIP redress process, under the express terms of 49 U.S.C. § 46110(a)."); *Kadura v. Lynch*, No. CV 14-13128, 2017 WL 914249, at *4-5 (E.D. Mich. Mar. 8, 2017) (same); *Beydoun v. Lynch*, No. 14-CV-13812, 2016 WL 3753561, at *4 (E.D. Mich. July 14, 2016) *aff'd sub nom. Beydoun*, 871 F.3d at 459 (same); *but see* ECF 38 at 15 n.2.

Plaintiffs do not appear to contest that DHS TRIP was created through regulations promulgated by TSA or that TSA administers DHS TRIP. They raise instead equitable arguments that the Court should ignore the plain language of 49 U.S.C. § 46110 because Plaintiffs are not satisfied with the type of review that Congress has provided. *See* ECF 45 at 20 ("direct review of Plaintiffs' claims in the court of appeals would be unfair because the redress process lacks fundamental procedural safeguards."). The Court

should reject these arguments and dismiss Counts Four and Seven for lack of subject matter jurisdiction based on the plain language of 49 U.S.C. § 46110.[2]

Finally, the contrary case law that Plaintiffs have cited, primarily from the Ninth Circuit Court of Appeals, is unpersuasive. ECF 45 at 21-22. As TSA promulgated the regulations creating DHS TRIP and administers the redress process, challenges to the adequacy of the DHS TRIP Redress Process are clearly challenges to TSA orders. Accordingly under 49 U.S.C. § 46110, the courts of appeals have exclusive jurisdiction over such challenges. The Court should, therefore, adopt the analysis set forth in *Mokdad*, *Bazzi, Kadura*, and *Beydoun,* and dismiss Counts Four and Seven for lack of subject matter jurisdiction.[3]

III. Claims One and Three- Plaintiffs Cannot Show a Plausible Unlawful Seizure Claim.

Plaintiffs' claim of unreasonable seizures is precluded as a matter of law. To state a claim for unlawful seizure at the border, Plaintiffs must plausibly show that their detention was not "reasonably related in scope to the circumstances which justified it initially." *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985). Plaintiffs do not plead facts sufficient to support this claim. In their Response, Plaintiffs argue that they were detained for an unreasonable period at the border. But Plaintiffs' argument fails to acknowledge critical circumstances undermining their unlawful seizure claim,

[2] The Court should also dismiss Counts Four and Seven for failure to join TSA as a required party. *See Mokdad*, 804 F.3d at 812.

[3] Count Seven should also be dismissed because Plaintiffs have failed to state a plausible claim that DHS Trip is contrary to a constitutional right, under 5 U.S.C. § 706(2)(B), or is arbitrary and capricious under 5 U.S.C. § 706(2)(B).

including their pre-dawn arrival at a tiny land port of entry in North Dakota, and the consequent need for additional officials to travel approximately 100 miles to conduct questioning. Thus, Plaintiffs' detention was reasonably related to its initial justification, namely to complete a border inspection and ensure border security. Taken as true, the facts as alleged in the Amended Complaint – including the purported match of Mr. Wilwal's name to a "terrorism-related watchlist" – would provide additional support for the conclusion that the detention was reasonably related to its initial justification. ECF 25 at ¶ 37.

Though Plaintiffs fault Defendants for citing the legal standard applicable to border searches, the primary case cited by both parties, *Montoya de Hernandez*, makes plain that the Government may conduct both "searches and seizures at the border, without probable cause or a warrant . . . ." 473 U.S. at 537. And while Plaintiffs attempt to divine a vague two-prong legal standard to govern their claims, with the exception of *Montoya de Hernandez*, none of the cases cited concern border searches or detentions. Further, *Montoya de Hernandez* sets forth no such test. Rather, the Supreme Court narrowly held that the sixteen-hour detention of a traveler, to determine whether she was smuggling drugs in her "alimentary canal," was justified by reasonable suspicion. *Id*. at 541. Further, the Court held that in evaluating whether the "length of time" of the detention is reasonable under the Fourth Amendment, it has "consistently rejected hard-and-fast time limits," and "[i]nstead, 'common sense and ordinary human experience must govern over rigid criteria." *Id*. at 543.

Accordingly, in light of the "broad powers" of the Government to detain persons and items at the border absent suspicion, border detentions lasting several hours are permissible where "common sense" makes plain that such time was required to conduct a border inspection. *See, e.g., Tabbaa v. Chertoff*, 509 F.3d 89, 95, 100 (2d Cir. 2007) (six-hour suspicionless border detention "did not violate the Fourth Amendment"); *Bibicheff v. Holder*, 55 F. Supp. 3d 254, 264 (E.D.N.Y. 2014) (six hours of detention and three "secondary inspections," without any particularized suspicion, upheld as reasonable). Similarly here, common sense demonstrates that the circumstances set forth in the Amended Complaint, such as an arrival at a remote port of entry, lengthened the time necessary for Defendants to conduct a border inspection. In light of the flexible standard set forth by the Supreme Court, the search and detention of Plaintiffs absent individualized suspicion was constitutional.

Indeed, even under Plaintiffs' alternative test, the detentions here would clearly pass muster assuming the allegations in the Amended Complaint. That is, according to Plaintiffs, "[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." ECF 45 at 24. Yet, by its own terms, the Amended Complaint itself articulates a valid justification for continuing to detain Mr. Wilwal, as it avers that Mr. Wilwal was a match to a terrorism-related watchlist, which would reasonably require that "HSI officers" come to the "Portal station from Minot, North Dakota," in order to conduct questioning. ECF 25 ¶ 56. Plaintiffs cannot plausibly contend that Defendants must allow travelers or their companions to enter the United States absent appropriate

questioning, when they are allegedly on a "terrorism-related watchlist." *Id.* at ¶ 37. Thus, assuming *arguendo* the watchlist allegation in the Amended Complaint, even by their own purported standard Plaintiffs' claims fail.

Similarly, Plaintiffs have no basis to contend that Mr. Wilwal was subject to a *de facto* arrest during his detention. Plaintiffs cite *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986) because it supposedly "indicated that a border detention can constitute an arrest" in certain circumstances. ECF 45 at 29.[4] In fact, the Eighth Circuit specifically held that the women detained at the border, also for purposes of detecting "alimentary canal" smuggling, were not "'in custody' for *Miranda* purposes." *Oyekan*, 786 F.3d at 837, 839 n. 12. As the court explained, "the warnings required by *Miranda* need not be given to one detained at the border 'unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense, or the person questioned has been arrested." *Id*. at 839 n. 12. The court further held that "detentions during legitimate border searches do not constitute arrests." *Id*. (citation and internal punctuation omitted). As the district court recognized in *United States v. Smasal*, No. CRIM 15-cr-85 (JRT/BRT), 2015 WL 4622246, at *11 (D. Minn. June 19, 2015), this decision is "binding [ ] precedent" and accordingly bars Plaintiff's claim that he was arrested when he was "detained at the border for questioning . . . ."

[4] The language cited by Plaintiffs, concerning a "show of force," and the use of "physical restraint," in fact did not concern the question of whether an arrest had occurred. *Oyekan*, 786 F.2d at 839. In context, the Eighth Circuit found that because plaintiffs were not arrested, and were not the subject of any "show of force" or "physical restraint," they had not been "coerced" into an x-ray examination. *Id*.

IV. Claim Two- Plaintiff's Excessive Force Claim is Barred by Eighth Circuit Precedent.

Mr. Wilwal's excessive force claim is grounded upon his allegations that (1) Government officials drew their firearms and (2) used handcuffs in effectuating his detention. *See* ECF 45 at 33. These allegations are not enough to support an excessive force claim, as Eighth Circuit authority makes clear, thereby compelling the dismissal of Claim Two.

Drawing and pointing a firearm, "without any indication [the official] intended or attempted to fire the gun, does not rise to the level of a constitutional violation." *Edwards v. Giles*, 51 F.3d 155, 157 (8th Cir. 1995); *Rodriguez v. Vega*, No. 5:14-CV-05161, 2015 WL 4241042, at *2 (W.D. Ark. July 13, 2015) (following *Giles*). *Giles* precludes Mr. Wilwal's claim pertaining to the drawing of firearms, a point which Plaintiffs do not contest.

Further, Plaintiffs appear to concede that they are required to show some type of physical injury to state a claim for excessive force founded on the application of handcuffs. *See* ECF 45 at 32; *Chambers v. Pennycook*, 641 F.3d 898, 907 (8th Cir. 2011) (holding that "a plaintiff must demonstrate something more" than "irritation, minor injury, or discomfort"). Plaintiffs thus claim that Mr. Wilwal's "injur[y]" was that he "passed out on the floor." ECF 32. Yet Plaintiffs do not allege in the Amended Complaint that the application of handcuffs somehow caused Mr. Wilwal to "pass[] out." *Id*.; *see also* Am. Compl. ¶ 52 (alleging that Mr. Wilwal remained "anxious about his family's safety"). Further, in their Response, Plaintiffs omit any mention of "pain" or

"physical injury" as stated in the Amended Complaint. *See* ECF 25 ¶ 96. Just as with their allegations concerning the drawing of firearms, Plaintiff's claims concerning handcuffing cannot support a claim of excessive force.

Plaintiffs urge that these actions, the drawing of firearms and handcuffing, should be considered collectively in evaluating this claim. However, when evaluating similar claims of excessive force the Eighth Circuit has separately analyzed each official action at issue, to determine whether the force used was excessive. *See, e.g., Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (evaluating separately, and finding no violation in the alleged (1) "pulling [of plaintiff] from a car and handcuffing him," (2) "push[ing plaintiff] against a wall twice," and (3) handcuffing plaintiff "too tightly" resulting in alleged "nerve damage"); *see also Sanders v. City of Md. Heights*, No. 4:14CV00238 TCM, 2015 WL 7776903, at *14 (E.D. Mo. Dec. 2, 2015). Moreover, even under Plaintiff's collective framework, it would be incongruous to hold that, where each successive action of an official is permitted by the Fourth Amendment, those acts collectively can somehow establish a viable claim of excessive force.

At bottom, even crediting Plaintiffs' allegations at this stage, it was reasonable for Defendants to draw their firearms and use handcuffs in detaining Mr. Wilwal. *See, e.g.*, *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006) ("[T]he use of handcuffs can be a reasonable precaution during a *Terry* stop to protect [officers'] safety and maintain the status quo."). This detention at the border, "where the Fourth Amendment balance of interests leans heavily to the Government," cannot constitute excessive force. *See Montoya de Hernandez*, 473 U.S. at 544. This claim should therefore be dismissed.

V. Claim Four- Plaintiff Wilwal Fails to State a Procedural Due Process Claim.

The Amended Complaint fails to establish that Mr. Wilwal was "deprived of [a] protected interest" in "life, liberty or property" as required to state a procedural due process claim. *See Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 965–66 (8th Cir. 2015). In their Response, Plaintiffs contend that Mr. Wilwal was deprived of his interest in: (1) freedom from unconstitutional seizure, and (2) international travel. Neither alleged deprivation salvages this claim.

First, Plaintiff concedes that to the extent they challenge the deprivation of "freedom from unconstitutional seizure" without due process, that claim is coextensive with the "unconstitutional seizure" claim in Count One. ECF 45 at 34-35. Accordingly, it should be dismissed for the same reasons set forth above. In addition, this aspect of Plaintiff Wilwal's claim is redundant, and it should be dismissed on that ground as well. *See Ritchie Eng'g Co. v. Delta T. Corp.*, No. CIV. 11-1513 ADM/JJG, 2012 WL 1150844, at *6 (D. Minn. Apr. 6, 2012) ("Where a claim is simply redundant of another, dismissal is warranted.").

Second, Plaintiff alleges that he was deprived of his interest in "international travel," despite the fact that Plaintiff does not allege he was prevented from traveling internationally. In the decisions cited by Plaintiffs, the travelers at issue had their passport confiscated or were barred from flying altogether. *See Hernandez*, 913 F.2d at 237; *Latif*, 28 F. Supp. 3d at 1149. By contrast, Mr. Wilwal does not contend that he has been or could be barred from any travel in the future, let alone any mode of travel; nor does he allege that he has experienced any delays in any travel since March 2015.

Rather, based on a single border-crossing nearly three years ago, Plaintiff's due process claim is based only on a subjective fear of possible delays if he were to travel internationally in the future.

Critically, Plaintiff fails to contest the fact that delays do not constitute a "denial of the right to travel." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007); *Beydoun*, 2016 WL 3753561, at *5 ("[P]laintiff's allegations do not rise to the level of a due process violation, because he alleges that he can still fly after additional screening and has not been deterred from flying."). Further, even if Plaintiff could show that potential delays at the border somehow prevent him from traveling internationally, he would need to also establish that the Government lacked a "rational, or at most an important, reason' for restricting international travel." *Risenhoover v. Wash. Cty. Cmty. Servs.*, 545 F. Supp. 2d 885, 890 (D. Minn. 2008); ECF 38 at 25 n.5. Plaintiff fails to address this obstacle, and for good reason, since the Government has multiple important reasons for exercising its authority to detain people and property for inspection at the border, including the prohibition of contraband, and safeguarding national security. *See Flores-Montano*, 541 U.S. at 152 ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."). Thus, Plaintiff cannot show that he was deprived of his interest in international travel, nor can he establish that the Government acted irrationally in conducting the border inspection. This claim should be dismissed.

VI. Claim Five- Plaintiff Wilwal Fails to Allege Egregious Conduct as Required to State a Substantive Due Process Claim.

To state a substantive due process claim, Mr. Wilwal must allege conscience-shocking Government action, that is, action inspired by "malice or sadism," in violation of a fundamental right. *Karsjens v. Piper*, 845 F.3d 394, 408 (8th Cir. 2017). Plaintiff fails to allege facts showing the violation of any fundamental right, much less Government action that shocks the conscience, ECF No. 38 at 26, and the Response suggests no reason why this claim should withstand dismissal under Rule 12(b)(6).

Plaintiffs' Response relies on the violation of two claimed fundamental rights. First, Plaintiffs reiterate their contention that Mr. Wilwal was deprived of his interest in international travel. ECF 45 at 38. Second, Plaintiffs allege that Mr. Wilwal's alleged placement on a watchlist "interferes with his fundamental right to return to the United States from abroad . . . ." *Id*. But neither of these arguments supports Plaintiff's substantive due process claim.

Plaintiffs' first argument – that Mr. Wilwal was deprived of an interest in international travel – fails at the outset, as there is no fundamental right in international travel, and so this interest cannot support a substantive due process claim. *See Haig v. Agee*, 453 U.S. 280, 306 (1981).

Plaintiffs' second argument – that Mr. Wilwal's alleged watchlist placement interferes with a fundamental "right to return" – fares no better. Plaintiffs fail to cite any Supreme Court or Eighth Circuit authority recognizing a fundamental "right to return" in this context, and Defendants are aware of none. This is unsurprising, as the Supreme

Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Moreover, even if a fundamental "right to return" could exist here, Plaintiffs could not show any violation. Mr. Wilwal does not allege that he was ever barred from returning to the United States, and only claims one instance in which he was temporarily detained pending a border inspection.

Finally, Plaintiffs plead no factual allegations suggesting any "conscience-shocking" Government conduct, as required to state a substantive due process claim. Plaintiff's alleged placement on a terrorism-related watchlist, which resulted in a temporary detention and delay in crossing the border on one occasion nearly three years ago, does not constitute a "brutal and inhumane abuse of official power literally shocking to the conscience[,]" as required to state a claim. *See Karsjens*, 845 F.3d at 408.

VII. Claim Six- Plaintiffs' Vague APA Claim Fails to State a Claim on Which Relief Can be Granted.

Plaintiffs argue unconvincingly that the allegations underlying their first APA claim are "clear." ECF No. 45 at 39. In their Response, Plaintiffs cite to no fewer than eight wide-ranging, non-sequential paragraphs of their Amended Complaint as the claimed "grounds" for their APA claim, none of which are incorporated in the APA claim itself. *Compare* ECF 45 at 39 *with* ECF 25 ¶¶ 103-104. Among other things, Plaintiffs appear to fault (1) the standards used in developing the TSC's "master watchlist," (2) the fact that the watchlist "causes a heightened response at border crossings," and (3) that

officers allegedly detained Mr. Wilwal because his name appeared on the watchlist. ECF 45 at 39. Plaintiffs fail to clarify which of these, or other allegations, constitutes the "final agency action" they seek to challenge under the APA. *See* 5 U.S.C. § 704; *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009) (judicial review under the APA is permitted only where "the claim for relief identifies some particular agency action"). Thus, even with the benefit of Plaintiffs' Response, Defendants are still forced to "guess as to which action is the subject of the APA claim." *Jordan v. Presidio Tr.*, No. 16-CV-02122-KAW, 2017 WL 5479607, at *4 (N.D. Cal. Nov. 15, 2017). Claim Six should be "[d]ismiss[ed] . . . on this ground alone." *See id*.; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests").

Even if this Court were to reach the merits of Claim Six, it should still be dismissed. Though Defendants cannot be sure, at least part of the APA claim appears to challenge the "standards and criteria" used in creating the "master watchlist," by TSC. ECF 45 at 39. As Defendants previously explained, APA review here is inappropriate because there is no "judicially manageable standard . . . for reviewing Defendants' inclusion of persons" on a terrorism-related watchlist. Rather, such a determination is "committed to the discretion of the law enforcement agencies involved in the intelligence evaluation and screening processes . . . ." *Shearson v. Holder*, 865 F. Supp. 2d 850, 866 (N.D. Ohio 2011), *aff'd*, 725 F.3d 588 (6th Cir. 2013). In response, Plaintiffs do not offer a manageable standard or otherwise explain why this conclusion is incorrect. Instead,

Plaintiffs state that "[c]ourts afford agencies no deference in interpreting the Constitution." ECF 45 at 39. This is both a truism and a red herring. Defendants seek no deference in interpreting the Constitution, but explained instead that the sensitive matter of "maintain[ing] watchlists" for the purpose of screening at the nation's borders is committed to agency discretion, and is therefore unreviewable under the APA. Plaintiffs offer no substantive rejoinder and this claim should be accordingly dismissed.

XIII. Claims Eight, Nine, and Ten- Plaintiffs' FTCA Assault And Battery Claims Should Be Dismissed Because the Officers Acted Reasonably Under the Circumstances.

Plaintiffs suggest that the United States relies solely on the constitutionality of the CBP officers' conduct to seek dismissal of the FTCA claims. That is not accurate. The United States contends that the false arrest/false imprisonment claim should be dismissed because the CBP officers acted with proper legal authority when they conducted the border inspection. And while the plenary authority of the CBP officers to conduct a border inspection is also sufficient to defeat the assault and battery claims, that rationale is not the only basis on which to dismiss those causes of action. Rather, Plaintiffs' own allegations highlight that the CBP officers acted reasonably. Since they failed to allege that the officers performed their duties in a manner "intending to cause a harmful or offensive contact," *Wishnatsky v. Huey*, 584 N.W.2d 859, 861 (N.D. Ct. App. 1998) (quoting Restatement (Second) of Torts §§ 18, 19 (1965)), their claims must fail.

Under North Dakota law, a plaintiff has the burden to prove that a law-enforcement officer used more force than necessary under the circumstances. *Wall v. Zeeb*, 153 N.W. 2d 779, 786 (N.D. 1967). Where use of force by an officer is viewed as

a privilege that defeats a claim of assault and battery, that affirmative defense may be raised at the motion to dismiss stage when the face of the complaint demonstrates the reasonableness of the conduct. "An affirmative defense permits 12(b)(6) dismissal if the fact of the complaint includes all necessary facts for the defense to prevail." *Leichling v. Honeywell Int'l., Inc.*, 842 F.3d 848, 850-51 (4th Cir. 2016); *see also C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758 (8th Cir. 2012) (affirming dismissal for failure to state a claim based on affirmative defense of res judicata).

As noted in Defendants' Motion to Dismiss, the Eighth Circuit has held that law-enforcement officer conduct is privileged when performed in a reasonable manner. *Washington v. DEA*, 183 F.3d 868, 874 (8th Cir. 1999) ("*Washington*"). In *Washington*, DEA agents broke down plaintiffs' front door using a battering ram, entered the home with their weapons drawn, and threatened to shoot the 72-year-old husband if he disobeyed their orders. The Washingtons argued that "such conduct was more than enough to constitute assault and battery under Missouri law." *Id.* at 874. The Eighth Circuit disagreed, concluding that the officers' conduct was reasonable because they were entering a location they "reasonably believed to be a location associated with narcotics and occupied by drug dealers who were suspected of several murders." *Id.* It held that, "[t]he officers sought to gain immediate control of the situation, in order to protect themselves and the occupants, by drawing their weapons and using forceful language and conduct. . . . Although the officers did use a significant amount of force, under the circumstances we cannot say that it was unreasonable to do so." *Id.*

Here, Plaintiffs allege that when they returned to the land border crossing at Portal, North Dakota, CBP officers entered their names into the TECS System and discovered Mr. Wilwal's name on a terrorism-related watchlist. ECF 25 at 30, 50. The CBP officers then surrounded the family's van with their handguns drawn; forced them out of the van; handcuffed Mr. Wilwal; placed the family in a border station; and conducted pat-down searches. ECF 25 ¶ 110-12.

Taking such allegations as true, the steps taken by the CBP officers constitute reasonable and prudent law-enforcement conduct when confronting an individual whose name allegedly appears on a terrorism-related watchlist. Similar to the conduct in *Washington*, the CBP officers "sought to gain immediate control of the situation, in order to protect themselves and the occupants, by drawing their weapons and using forceful language and conduct." *Washington*, 183 F.3d at 874. For the same reasons Mr. Wilwal's constitutional claims fail with respect to the officers' decisions to draw their weapons and apply handcuffs, the conduct was reasonable under the circumstances. This is not a case in which the plaintiffs allege they were verbally or physically abused while in custody. *See, e.g.*, *Iqbal v. Ashcroft*, 556 U.S. 662 (2009) (plaintiffs allegedly not only detained as terrorist suspects but subjected to physical and mental abuse by BOP prison guards during their confinement). Plaintiffs therefore have failed to identify any conduct that extends beyond that which was reasonable when confronting an individual purportedly on a terrorist-related watchlist.

Whether Mr. Wilwal's name was, in fact, on a terrorist-related watchlist or whether his name was properly placed on that list, is immaterial to the assault and battery

claim. "When the privilege is conditional, a person is sometimes protected by his reasonable belief in the existence of facts that would give rise to a privilege, even though the facts do not exist . . . [such as] a policeman is not liable for mistakenly arresting one whom he believes to have committed a felony." Restatement (Second) of Torts § 890 cmt. (f). Plaintiffs allege that Mr. Wilwal's name appeared on a terrorist-related watchlist. Crediting such allegations as true at the pleading stage, the CBP officers were privileged to act in response to that notification, even if the notification derived from mistaken information. *Cf.*, *Milligan v. United States*, 670 F.3d 686 (6th Cir. 2012) (officer did not commit intentional tort when arresting a fugitive based on negligently derived warrant). Plaintiffs cannot characterize their actions as an assault and battery in an attempt to argue the merits of Mr. Wilwal's name purportedly appearing on a terrorist-related watchlist. The allegations in Plaintiff's Amended Complaint highlight that the actions taken by the CBP officers were reasonable and, therefore, privileged. Plaintiffs' claims for assault and battery should be dismissed with prejudice.

Dated: January 19, 2018

Respectfully submitted,

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