

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

OSAMA ABU IRSHAID, *et al.*,

Plaintiffs,

v.

MERRICK GARLAND, United States  
Attorney General, *et al.*,

Defendants.

No. 1:24-cv-1405 (MSN/WBP)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS**

Pursuant to Local Rule 7(F)(1), Defendants respectfully submit this reply memorandum of law in support of their motion to dismiss the amended complaint (Dkt. 19) (“Am. Compl.”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. 20).

**INTRODUCTION**

In this challenge to the Terrorist Screening Dataset (“TSDS”), an essential component of the federal government’s counterterrorism apparatus that has been operating for two decades, Plaintiffs all but admit that they are not asking the Court to apply the law so much as to “begin to change” it. Dkt. 25 (“Pl. Br.”) at 1. Indeed, as Plaintiffs grudgingly concede, the Fourth Circuit’s decision in *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021), forecloses many of their claims—though they hasten to add that they believe *Elhady* was “wrongly decided.” Pl. Br. 22. It should come as no surprise, therefore, that Plaintiffs’ arguments in opposition to Defendants’ motion to dismiss rely heavily on an artificially narrow and, ultimately, unsustainable reading of *Elhady*, as well as a handful of district court decisions

that pre-date it. Because controlling law is clear that Plaintiffs' claims cannot proceed, the Court should grant Defendants' motion and dismiss this action.

## **ARGUMENT**

As explained in Defendants' opening brief, Plaintiffs' claims fail on a number of fronts. First, the Court lacks jurisdiction over those claims challenging TSA orders, which must be brought in the courts of appeals. Second, the Court should prudentially require exhaustion of the DHS TRIP process. Third, Plaintiffs fail to state any viable claim. And fourth, Plaintiffs do not plausibly trace their claimed injuries—alleged inclusion in the TSDS—to most named Defendants, requiring those Defendants' dismissal. Plaintiffs' counterarguments, as explained below, do not compel a different result.

### **I. This Court Lacks Jurisdiction Over Challenges to DHS TRIP and TSA's Screening Procedures.**

Defendants showed, and Plaintiffs do not dispute, that “any challenge to an ‘order’ issued ‘in whole or in part’ by TSA may be brought only in the federal courts of appeals.” Def. Br. 12 (quoting 49 U.S.C. § 46110(a), (c)). Defendants further explained that the DHS TRIP process and TSA's choice of screening measures fit comfortably within the Fourth Circuit's definition of an “order” articulated in *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012). *See* Def. Br. 12-14; *see also Abdellatif v. DHS*, 109 F.4th 562, 569 (D.C. Cir. 2024) (taking 46110 jurisdiction over aspects of a petition for review “concerning TSA's prescreening programs, such as Quiet Skies and Silent Partner”). This Court therefore lacks jurisdiction over Plaintiffs' challenges to those orders.

Plaintiffs' response appears to conflate this argument with Defendants' separate, non-jurisdictional argument that the Court should prudentially require them to exhaust the DHS TRIP process before entertaining their claims in this case. *See* Pl. Br. 5-9.<sup>1</sup> Plaintiffs also seem to misunderstand the scope of Defendants' argument regarding section 46110, asserting that their claims

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<sup>1</sup> This issue is addressed below in Section II.

“go[] well beyond the mere decision not to unlist them” and also encompass the alleged decision to include them in the TSDS in the first place. *Id.* at 7. But Defendants never argued that section 46110 applies to *all* of Plaintiffs’ claims—indeed, Defendants did (and do) not contend that the Court lacks jurisdiction over Plaintiffs’ claims regarding their alleged inclusion in the TSDS. Defendants argue only that the specific aspects of Plaintiffs’ claims challenging (1) the adequacy of the DHS TRIP process and (2) TSA’s choice of screening measures must be brought in the courts of appeals. *See* Def. Br. 12. Plaintiffs do not address section 46110 at all with respect to screening measures and so have conceded that argument. *See Borromeo v. Mayorkas*, 2023 WL 2249966, at \*5 (E.D. Va. Feb. 27, 2023) (“A party’s failure to respond to an argument made in a motion to dismiss constitutes a concession of that argument.”). As for DHS TRIP, Plaintiffs argue that 49 U.S.C. § 44926(a) tasks the Secretary of Homeland Security with establishing a redress process. Pl. Br. 8. But Plaintiffs ignore that authority has been statutorily delegated to the TSA Administrator, as Defendants explained in their opening brief. Def. Br. 13 (citing 49 U.S.C. § 44903(j)(2)(C)(iii)(I), (G)(i)). As the Sixth and the Ninth Circuits have held, therefore, challenges to TSA’s redress processes fall within section 46110 and may be heard only in the courts of appeals. *See Magassa v. Mayorkas*, 52 F.4th 1156, 1159 (9th Cir. 2022); *Mokdad v. Lynch*, 804 F.3d 807, 811 (6th Cir. 2015).

Plaintiffs fail to address *Magassa* and *Mokdad* at all. Instead, they argue that the Ninth Circuit is the only court to hold that section 46110 requires an “as-applied challenge involving the No Fly List” be brought in the courts of appeals. Pl. Br. 8-9 (citing *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019)). Vagueness of this description aside, Plaintiffs are again missing the point. *Kashem* held that section 46110 vests the courts of appeals with exclusive jurisdiction over a challenge to the TSA Administrator’s final order regarding No Fly List placement at the end of the DHS TRIP process. 941 F.3d at 390-91. As Plaintiffs admit, there is no such order in this case. Op. Br. 9. Their attempt to

distinguish *Kashem* is thus a *non sequitur*.<sup>2</sup> More broadly, the argument that section 46110 does not apply as long as a plaintiff comes straight to district court rather than completing the DHS TRIP process would nullify Congress’s channeling of such challenges into the courts of appeals. Centuries-old principles of statutory interpretation require the Court to eschew such a reading. *See The Emily*, 22 U.S. 381, 389 (1824) (explaining that interpretation should be avoided that would “render[] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner”).

In short, Defendants showed that the DHS TRIP process and TSA’s choice of screening measures are TSA “orders” that may be challenged only in the courts of appeals. Plaintiffs fail to address screening measures at all. They also misunderstand TSA’s statutory responsibility for developing the DHS TRIP process and conflate a challenge to the adequacy of that process with a challenge to an order issued as a result of that process.

## **II. The Court Should Prudentially Require Plaintiffs to Exhaust DHS TRIP.**

Defendants next argued that the Court should exercise its discretion to require the Plaintiffs who do not claim to have fully exhausted the DHS TRIP process to do so before entertaining their claims (*i.e.*, Dr. Abu Irshaid and Messrs. Zeidan, Hageali, and Ayyad). Def. Br. 14-15. These Plaintiffs do not contend that they have completed the DHS TRIP process. Rather, they argue that exhausting DHS TRIP is not mandatory—a claim Defendants never made. Pl. Br. 5-7.<sup>3</sup> And Plaintiffs fail to dispute Defendants’ point that requiring completion of DHS TRIP in this case would “serve[] the

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<sup>2</sup> Should the Court prudentially require Mr. Zeidan to complete the DHS TRIP process, however, section 46110 would require that any challenge to the Administrator’s final order be filed in the appropriate court of appeals, *Kashem*, 941 F.3d at 390-91; *see Busic v. TSA*, 62 F.4th 547, 549-50 (D.C. Cir. 2023) (exercising jurisdiction pursuant to 46110 over challenge to No Fly List determination). As *Busic* makes clear, Plaintiffs are also mistaken that the Ninth Circuit is “[t]he only Court of Appeals to find that Section 46110” applies to such orders. Pl. Br. 8.

<sup>3</sup> Plaintiffs purport to quote from Defendants’ motion to dismiss in stating “no statute requires exhaustion of administrative remedies in this case.” Pl. Br. 5-6. Not only does this sentence not appear on the page Plaintiffs cite, it does not appear anywhere in Defendants’ brief.

twin purposes of protecting administrative agency authority and promoting judicial efficiency.” Def. Br. 14 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute in other part*, 42 U.S.C. § 1997e(a)). Accordingly, the Court should prudentially require exhaustion in this case.<sup>4</sup>

### **III. Dr. Abu Irshaid Fails to State a Fourth or Fifth Amendment Claim (Counts I & II).**

Dr. Abu Irshaid asserts Fourth and Fifth Amendment claims in connection with federal agents’ alleged searches and seizures of his cell phones on two occasions when he returned from international travel. *See* Am. Compl. ¶¶ 519-39.<sup>5</sup> Both claims fail as a matter of law.

#### **A. The border-search exception to the Fourth Amendment authorized the search and seizure of Dr. Abu Irshaid’s phones (Count I).**

As Defendants explained, the alleged searches and seizures of Dr. Abu Irshaid’s phones, which occurred at Washington Dulles International Airport when he returned from trips abroad, fall within the border-search exception to the Fourth Amendment. Def. Br. 15-16. Under this exception, “government agents may conduct ‘routine’ searches and seizures of persons and property without a warrant or any individualized suspicion.” *Id.* at 16 (quoting *United States v. Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018) (citations omitted)).

Dr. Abu Irshaid does not contend that he in fact knows what kind of search the agents performed on his phone; nonetheless, he continues to insist that he has plausibly alleged it was a non-routine forensic search and thus outside the border-search exception. Pl. Br. 10-12. As Defendants

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<sup>4</sup> Plaintiffs argue that their APA claims—which they incorrectly label as “Counts I, II, and IV”—are not subject to discretionary exhaustion. Pl. Br. 6 (citing *Darby v. Cisneros*, 509 U.S. 137 (1993)). If those claims stood alone, Plaintiffs would be correct. But where, as here, the APA claims are coextensive with Plaintiffs’ constitutional claims, prudential considerations favor exhaustion, or at the very least staying consideration of the APA claims while Plaintiffs exhaust their constitutional claims. *See, e.g., Wilt v. Gilmore*, 62 F. App’x 484, 488-89 (4th Cir. 2003) (holding that consideration of APA claim while administrative proceedings were ongoing “would be imprudent,” notwithstanding *Darby*).

<sup>5</sup> The amended complaint also challenges the government’s retention of one of Dr. Abu Irshaid’s phones. Am. Compl. ¶ 527; *see* Pl. Br. 13. As he admits, however, that phone has been returned, Pl. Br. 9, thus mooting that aspect of his Fourth Amendment claim, *see G. M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977) (“The books and records were returned, . . . that claim, thus, is moot.”).

showed, this assertion relies entirely on impermissible speculation. *See* Def. Br. 16-17. Indeed, his argument boils down to a rhetorical question—“why take the phone for months if not to search it invasively?”—and an assertion that Defendants “offer[] no plausible alternative explanation.” *Id.* at 11. But the Fourth Circuit has been clear that “[b]eing aware of no alternative explanation and guessing” as to the nature of a defendant’s conduct in this way does not meet the plausibility standard. *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 618 (4th Cir. 2020) (affirming dismissal).<sup>6</sup>

Even if Dr. Abu Irshaid could plausibly allege a forensic search, Defendants showed that the allegation that it was done because of his claimed inclusion in the TSDS suffices to establish reasonable suspicion. Def. Br. 17-18; *see United States v. Nkongho*, 107 F.4th 373, 382 (4th Cir. 2024) (holding that forensic search falls within border-search exception where officials have individualized suspicion). The robust process for including an individual in the TSDS is at least as reliable as the anonymous phone tip the Supreme Court approved in *Navarette v. California*, 572 U.S. 393 (2014), and Dr. Abu Irshaid does not—because he cannot—dispute that suspected terrorism bears the necessary nexus to “protecting national security” to justify a forensic search. *Nkongho*, 107 F.4th at 382.<sup>7</sup> The lone, non-binding district court decision on which he relies to oppose Defendants’ argument, *El Ali v. Barr*, 473 F. Supp. 3d 479 (D. Md. 2020), failed to address *Navarette* at all and also pre-dated *Elhady*, a binding Fourth Circuit decision that repeatedly acknowledged that inclusion in the TSDS requires a

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<sup>6</sup> Dr. Abu Irshaid also appears to argue that the mere act of allegedly requiring him to provide the password to his phone somehow makes the resulting search non-routine. Pl. Br. 12-13. None of the cases he cites for this argument stand for such a rule, however. The portion of Defendants’ opening brief to which he refers addressed only the plausibility of his speculative allegation that a forensic search occurred: Because such a search can overcome a password, the request that he provide a password cuts against inferring that a forensic search occurred. Def. Br. 16-17. Significantly, even Dr. Abu Irshaid himself elsewhere seems to agree that requiring him to provide his password may have “facilitate[d] or avoid[ed] a forensic search.” Pl. Br. 13-14 (emphasis added).

<sup>7</sup> Dr. Abu Irshaid tellingly omits this recognized justification for a forensic search, arguing (incorrectly) that only suspicion of an imminent or ongoing crime is sufficient. Pl. Br. 10.

“reasonable suspicion” of involvement in terrorist activity. 993 F.3d at 214. Dr. Abu Irshaid accordingly fails to state a Fourth Amendment claim.

**B. Dr. Abu Irshaid fails to allege that he has been criminally tried or disclosed incriminating information, precluding a Fifth Amendment claim (Count II).**

Dr. Abu Irshaid’s claim that having to provide his phones and passwords violated the Fifth Amendment is likewise meritless because the Fifth Amendment privilege against self-incrimination “is a fundamental *trial* right of criminal defendants,’ meaning that ‘a constitutional violation occurs only *at trial*.” Def. Br. 18-19 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). There is no dispute that Dr. Abu Irshaid has not been criminally tried, so there has been no Fifth Amendment violation as a matter of law. Nor has he alleged that any information he provided was incriminating, which independently defeats his claim. *See id.* at 19 n.15.

In response, Plaintiff asserts that the Supreme Court’s decision in *United States v. Hubbell*, 530 U.S. 27 (2000), holds that “required provisions of passwords violate[] the Fifth Amendment.” Pl. Br. 13. But *Hubbell* did not involve the required provision of a password *at all*. Rather, the issue was whether the defendant’s criminal indictment must be dismissed where the charges were prepared based on incriminating documents the defendant had been judicially compelled to produce under a grant of immunity. *See* 530 U.S. at 29-30.<sup>8</sup> Nothing about this case resembles *Hubbell*: Dr. Abu Irshaid has not been judicially compelled to produce incriminating documents, he has not been granted immunity in connection with that production, and he has not been subsequently indicted. If anything, *Hubbell* confirms what Defendants already showed—that a violation of the Fifth Amendment occurs only when the government tries to use compelled, incriminating testimony against the defendant *during*

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<sup>8</sup> As best Defendants can tell, Dr. Abu Irshaid’s statement about a password in *Hubbell* may refer to an analogy comparing the criminal defendant’s “assembly of . . . documents” to “telling an inquisitor the combination to a wall safe.” 530 U.S. at 43. Apart from being dicta, this part of the opinion discussed only whether the defendant’s disclosure was testimonial; it did not consider the analytically prior question of whether the Fifth Amendment was even implicated—a question not seriously at issue since, again, the case arose in the context of ongoing criminal proceedings.

*criminal proceedings*. See *id.* at 38 (“It is the Fifth Amendment’s protection against *the prosecutor’s use* of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case.” (emphasis added)). Dr. Abu Irshaid’s extended discussion of whether the provision of his passwords was compelled is thus a red herring. Pl. Br. 14-15. As the Fourth Circuit has held, “[e]ven with regard to statements made under circumstances that would otherwise be viewed as coercive, the Self-Incrimination Clause is violated *only* if those statements are used in a criminal trial.” *United States v. Riley*, 920 F.3d 200, 205 (4th Cir. 2019).<sup>9</sup> Because there has been no criminal trial, there has been no Fifth Amendment violation.

Most of the legal authority Dr. Abu Irshaid cites is fully consistent with this limitation of the right against self-incrimination to criminal proceedings. To start, two of the decisions are no longer good law. One order, *Matter of a White Google Pixel 3*, 2019 WL 2082709 (D. Idaho May 8, 2019), was vacated, with the district court holding the opposite of what Dr. Abu Irshaid argues. See *Matter of White Google Pixel 3*, 398 F. Supp. 3d 785, 794 (D. Idaho 2019) (“[T]he requested warrant would not violate the Fifth Amendment because it does not require the suspect to provide any testimonial evidence.”). The Ninth Circuit disapproved of another decision, *Matter of Residence in Oakland, Cal.*, 354 F. Supp. 3d 1010 (N.D. Cal. 2019), and likewise held that use of biometrics is not testimonial and therefore does not implicate the Fifth Amendment. *United States v. Payne*, 99 F.4th 495, 510-13 (9th Cir. 2024). Three other cases—*United States v. Braxton*, 112 F.3d 777 (4th Cir. 1997) (motion to suppress), *In re Application for a Search Warrant*, 236 F. Supp. 3d 1066 (N.D. Ill. 2017) (search warrant), and *United States v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich. 2010) (post-indictment grand jury subpoena)—arose in

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<sup>9</sup> Dr. Abu Irshaid cites no authority for the curious assertion that this rule of law applies only to claims seeking damages—even though most of the cases Defendants cited did not involve damages claims. See Pl. Br. 15. His related point that he is alleging harms other than the use of unlawfully coerced testimony in criminal proceedings only underscores that he misunderstands what the Fifth Amendment protection against self-incrimination does. See *id.*

the context of criminal proceedings. And *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Pentlidge v. Murphy*, 541 F. Supp. 2d 421 (D. Mass. 2008), involved attempts by states to override the Fifth Amendment by punishing its invocation or compelling its waiver, respectively. The single case Dr. Abu Irshaid cites that denied a motion to dismiss in a context similar to this case is *El Ali*, which, like its analysis of the Fourth Amendment, seems not to have considered the dispositive issue—whether the Fifth Amendment even applies outside of criminal proceedings. *See* 473 F. Supp. 3d at 521-23. This is far too thin a reed in light of the Supreme Court’s and Fourth Circuit’s unambiguous pronouncements that the right against self-incrimination can be violated only in criminal proceedings.

Independently, Defendants explained that this claim fails as a matter of law because Dr. Abu Irshaid does not allege that any information he provided was incriminating. *See* Def. Br. 19 n.15. He fails to respond to this point at all and therefore concedes it. *Borromeo*, 2023 WL 2249966, at \*5.

#### **IV. Plaintiffs Fail to State a Due Process Claim (Counts III & IV).**

As Defendants explained, Plaintiffs fail to state procedural and substantive due process claims. *See* Def. Br. 19-25. Plaintiffs largely concede this point regarding their procedural due process claims, but argue that some of those claims, as well as Mr. Zeidan’s substantive due process claim, may proceed. Plaintiffs are mistaken.

##### **A. All Plaintiffs fail to state a procedural due process claim (Count III).**

Defendants showed that Plaintiffs’ procedural due process claims fail under *Elbady* because (1) their allegations of enhanced screening, delays, and so on do not implicate a protected liberty interest in travel, and (2) they fail to allege the necessary dissemination of their claimed TSDS status or interference with a legal right as required to state a stigma-plus claim. Def. Br. 20-23. Plaintiffs also fail to allege constitutionally inadequate procedures. *Id.* at 23-24.

1. Plaintiffs concede that *Elbady* forecloses the procedural due process claims by Dr. Abu Irshaid, and Messrs. Hageali, and Ayyad, as well as aspects of the claims brought by Messrs. Doe and Zarour.

Pl. Br. 22.<sup>10</sup> Accordingly, the Court should grant Defendants’ motion as to those claims. Plaintiffs disagree, however, that *Elbady* controls the procedural due process claim of Mr. Zeidan or certain other aspects of Mr. Doe’s and Mr. Zarour’s claims. Pl. Br. 22. This argument is meritless.

Mr. Zeidan contends that his placement on the No Fly List, and the resulting inability to fly into, out of, within, or over the United States, violates his “freedom of movement.” Pl. Br. 22-23. But as Defendants explained—and Mr. Zeidan conspicuously fails to address—*Elbady* concluded that not being able to fly on an airplane does *not* support a procedural due process claim because “individuals do not have a protected liberty interest to travel via a particular mode of transportation.” Def. Br. 21 (quoting *Elbady*, 993 F.3d at 222). Nor does Mr. Zeidan dispute Defendants’ point that, as in *Elbady*, there is no allegation that he cannot “travel domestically without interference by train or automobile” or “travel internationally by boat.” *Elbady*, 993 F.3d at 222. Mr. Zeidan’s travel-related procedural due process claim therefore fails as a matter of law. And as further explained below and in Defendants’ opening brief, Zeidan’s procedural due process claim fails for the independent reason that he has not exhausted the available redress process. *See infra* at 12; Def. Br. 24.

Mr. Doe and Mr. Zarour, meanwhile, argue that they state viable stigma-plus claims because their alleged TSDS inclusion has altered their legal rights—specifically, Mr. Doe alleges that his TSA Pre-Check status was revoked, and Mr. Zarour claims that he was denied a job by an unspecified law enforcement agency. Pl. Br. 23-24. There are two fatal flaws in this argument.

*First*, even if these were cognizable changes in legal status, as required to state a stigma-plus claim—they are not, as discussed below—Mr. Doe and Mr. Zarour still have not plausibly alleged the *separate* element that the information have been publicly disseminated. Indeed, the amended

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<sup>10</sup> Plaintiffs fail to respond at all to Defendants’ showing that Mr. Doe may not unilaterally proceed using a pseudonym without obtaining leave of the Court. Def. Br. 7 n.4. Defendants defer to the Court as to how best to enforce this requirement.

complaint's allegation on this score is substantively identical to what the Fourth Circuit rejected in *Elbady*. Compare Am. Compl. ¶ 554, with 993 F.3d at 225; see also Def. Br. 22 (collecting cases).

*Second*, Pre-Check status and a single denied job application do not satisfy the altered-legal-status requirement. Expedited screening status is a discretionary benefit conferred by TSA, see *Roberts v. Napolitano*, 792 F. Supp. 2d 67, 72-73 (D.D.C. 2011), and is therefore not a protectible “legal status,” *Al-Turki v. Tomsic*, 926 F.3d 610, 619 (10th Cir. 2019).<sup>11</sup> Government action allegedly impinging on employment, meanwhile, implicates due process only when it results in “a complete prohibition of the right to engage in a calling.” *Conn v. Gabbert*, 526 U.S. 286, 292 (1999); see *Brown v. City of Mich. City, Ind.*, 462 F.3d 720, 731 (7th Cir. 2006) (recognizing due process claim arises when alleged stigma makes “it virtually impossible for the employee to find new employment in his chosen field” (citation omitted)). Mr. Zarour’s allegation of one denied application does not come close to satisfying this threshold requirement. And even if it could, he alleges only that the federal government has made his claimed TSDS status available to law enforcement agencies—presumably including the one that allegedly denied him a job. See Am. Compl. ¶ 554. But the Fourth Circuit has held that this is not enough, since it does not amount to “‘a mandate’ that constitutes the alteration of a legal right or status for purposes of a stigma-plus claim.” *Elbady*, 993 F.3d at 227 (citation omitted). Mr. Doe’s and Mr. Zarour’s non-travel-related procedural due process claims thus fail as well.

2. Finally, Defendants explained that Plaintiffs fail to allege constitutionally inadequate procedures. Def. Br. 23-24. To start, Dr. Abu Irshaid and Messrs. Zeidan, Hageali, and Ayyad may not bring a due process claim when they have not exhausted the process available to them, *i.e.*, DHS

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<sup>11</sup> None of the cases Plaintiffs cite for their counterargument involved Pre Check status. See *Salloum v. Kable*, 2020 WL 7480549 (E.D. Mich. Dec. 18, 2020); *Elbady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019), *rev’d*, 993 F.3d 208; *Kovac v. Wray*, 363 F. Supp. 3d 721 (N.D. Tex. 2019); *Elbady v. Piehota*, 303 F. Supp. 3d 453 (E.D. Va. 2017). Although one plaintiff in *Kovac* alleged that his Global Entry status was revoked, the court did not consider that fact in its analysis of the plaintiffs’ stigma-plus claims, which the court dismissed. 363 F. Supp. 3d at 736, 752-56.

TRIP, *id.*—a point that Plaintiffs ignore and therefore concede, *Borromeo*, 2023 WL 2249966, at \*5.

Further, Defendants showed that this procedure satisfies the requirements of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* Def. Br. 24 (citing *Elbady*, 993 F.3d at 228-29). Plaintiffs respond in two ways, neither successful. First, they argue that the *Mathews* analysis may not be performed at the motion to dismiss stage, Pl. Br. 24—a position flatly refuted by a raft of case law, *e.g.*, *Doe v. Va. Polytechnic Inst. & State Univ.*, 77 F.4th 231, 236-40 (4th Cir. 2023); *Kendall v. Balcerzak*, 650 F.3d 515, 528-30 (4th Cir. 2011); *Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1153-55 (4th Cir. 1988).<sup>12</sup> Second, Plaintiffs contend that Defendants’ explanation of the DHS TRIP process is based on “a full record in a different case,” *Latif v. Lynch*, 2016 WL 1239925 (D. Or. Mar. 28, 2016). Pl. Br. 24. This is simply wrong—Defendants explained the DHS TRIP process by reference to applicable statutes and regulations, as well as the Fourth Circuit’s summary in *Elbady* and the Ninth Circuit’s summary in *Kashem*. Def. Br. 5-6. Defendants did not reference the lower-court *Latif* decision at all.

**B. Mr. Zeidan fails to state a substantive due process claim (Count IV).**

In addition to failing to state a procedural due process claim, Mr. Zeidan does not state a substantive due process claim either. As Defendants explained, the alleged interference with his ability to fly does not implicate his fundamental right of travel because “there is no ‘fundamental right to travel *by airplane*.’” *Id.* at 25 (quoting *Busic*, 62 F.4th at 550).

Plaintiff responds with an exegesis about the historical lineage of the fundamental right to travel. Pl. Br. 16-20. This is a straw man. No one disagrees that there is a fundamental right to travel—the point Defendants made, and which Mr. Zeidan fails to rebut, is that not being allowed to travel *by airplane* does not impinge on that fundamental right. *See Busic*, 62 F.4th at 550; *Gilmore v. Gonzales*, 435

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<sup>12</sup> *Doe* is particularly instructive, as the Fourth Circuit performed the *Mathews* analysis in the first instance *on appeal* in affirming dismissal of the case. Plaintiffs’ suggestion that *Mathews* requires a full discovery record is thus patently false.

F.3d 1125, 1137 (9th Cir. 2006). As the Fourth Circuit put it in *Elbady*, in rejecting a similar argument in the less-demanding context of a liberty interest, “[a]lthough our law may guarantee the citizen’s right to travel, it is less attentive to how he gets there.” 993 F.3d at 222; *see Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (“[T]ravelers do not have a constitutional right to the most convenient form of travel[.]” (citation omitted)). Because Mr. Zeidan has no fundamental right to airline travel, his alleged placement on the No Fly List does not implicate substantive due process.<sup>13</sup>

#### **V. Plaintiffs Fail to State an APA Claim (Counts V & VI).**

The Court should also dismiss Plaintiffs’ two APA claims. Defendants showed that the first claim (Count V) merely recapitulates Plaintiffs’ procedural due process claims and therefore fails for the same reason—and to the extent that Plaintiffs challenge the TSDS as arbitrary and capricious, the processes involved are plainly rational and thus satisfy the APA. Def. Br. 26. Plaintiffs do not respond to this argument and therefore concede it. *Borromeo*, 2023 WL 2249966, at \*5.

As for the second APA claim (Count VI), Defendants explained that Plaintiffs are badly mistaken that the TSDS is not authorized by statute, as every court to consider such a claim has concluded—including Plaintiffs’ preferred district court decision, *El Ali*. Def. Br. 26-28.<sup>14</sup>

In response, Plaintiffs raise challenges—for the first time—under the major questions and non-delegation doctrines. Pl. Br. 25-29. As other courts have held, neither challenge can succeed.

**a.** The major questions doctrine is a principle of statutory interpretation that “requires clear

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<sup>13</sup> Mr. Zeidan’s argument that the No Fly List fails strict scrutiny, *see* Pl. Br. 20-22, would be relevant only if he had a fundamental right at stake and is therefore of no moment, *see Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014) (“Strict scrutiny applies only when laws ‘significantly interfere’ with a fundamental right.” (citation omitted)). Notably, in this respect, his argument rests almost entirely on out-of-circuit and pre-*Elbady* in-circuit district court cases. And even one of those cases held that the No Fly List satisfies strict scrutiny. *See Mohamed v. Holder*, 266 F. Supp. 3d 868, 880-83 (E.D. Va. 2017).

<sup>14</sup> Plaintiffs’ reference to *FBI v. Fikre*, 601 U.S. 234 (2024), is misplaced. *See* Pl. Br. 25. *Fikre* did not consider whether the TSDS is authorized by statute; it noted only that the standards for including or removing individuals from the No Fly List do not appear to be set forth in a statute or regulation. 601 U.S. at 237.

congressional authorization for agency action in ‘extraordinary cases’ when the ‘history and breadth’ and ‘economic and political significance’ of the action at issue gives [courts] ‘reason to hesitate before concluding that Congress meant to confer such authority’ to act on the agency.” *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023) (additional internal quotation marks omitted) (quoting *West Virginia v. EPA*, 597 U.S. 697, 721 (2022)).<sup>15</sup> The doctrine thus often comes into play when the Executive exercises existing statutory authority at odds with how it has done so in the past. *See, e.g., Biden v. Nebraska*, 600 U.S. 447, 500-06 (2023); *West Virginia*, 597 U.S. at 706, 710-15, 725. This is, obviously, not such a case. On the contrary, creation of the TSDS—and many of the agencies involved in its administration—followed closely on the heels of authorizing legislation that was enacted in the aftermath of the 9/11 terrorist attacks. *See, e.g., Durso v. Napolitano*, 795 F. Supp. 2d 63, 65 (D.D.C. 2011) (“Following the September 11, 2001, attacks, Congress created TSA ‘to prevent terrorist attacks and reduce the vulnerability of the United States to terrorism within the nation’s transportation networks.” (citation omitted)). The TSDS has since withstood twenty years’ worth of legal attacks—including, most recently, a case rejecting a challenge under the major questions doctrine. *Kovac v. Wray*, 109 F.4th 331, 335-40 (5th Cir. 2024).<sup>16</sup> Plaintiffs’ argument should meet the same fate.

**b.** Plaintiffs’ non-delegation argument fares no better. Although, as a general matter, “Congress may not constitutionally delegate its legislative power to another branch of Government,” *Touby v. United States*, 500 U.S. 160, 165 (1991), this prohibition does not apply as long as Congress “lay[s]

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<sup>15</sup> As this explanation makes clear, the major questions doctrine is a means of *challenging* federal action. It makes no sense, therefore, for Plaintiffs to assert that it was somehow incumbent on *Defendants* to raise the doctrine. *See* Pl. Br. 25-26. Defendants have not forfeited the opportunity to address a putative legal basis for Plaintiffs’ claim that, for whatever reason, they chose not to raise until their opposition to a motion to dismiss their second complaint in this action.

<sup>16</sup> Plaintiffs conspicuously omit *Kovac*, which Defendants cited in their opening brief, from the list supporting the assertion that Defendants’ case law “all involved the nondelegation doctrine, not the major questions doctrine,” Pl. Br. 28—a mischaracterization made all the more striking by the fact that Plaintiffs’ counsel is also counsel of record in *Kovac*.

down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform,” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citation omitted). This, in turn, requires only that Congress “clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Id.* at 372-73 (citation omitted). Given this deferential baseline, it is no surprise that the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001) (citation omitted).

The statutory scheme underlying the government’s TSDS-related programs easily meets these requirements. Congress has passed legislation delegating clear and broad authority to Executive agencies to protect civil aviation and national security, to screen passengers at airports, and to collect and use data. *See* 49 U.S.C. § 114(d); *id.* § 44904(a); *id.* § 114(h)(1)-(3). In addition, Congress has expressly (i) authorized the investigation of terrorist-related matters and the collection and analysis of related intelligence, *see, e.g.*, 28 U.S.C. §§ 533–34; 6 U.S.C. § 121(d)(1), (d)(12); 50 U.S.C. § 3056(d)(1), (6); (ii) authorized the creation of an information-sharing apparatus to disseminate information within the federal government and to appropriate state and local officials, *see, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002); (iii) authorized various types of screening against the watchlist maintained by the TSC, *e.g.*, 6 U.S.C. §§ 1140, 1181(e)(2), 1162(e)(2); 46 U.S.C. § 70105(a), (d); 49 U.S.C. § 44917(c)(2); and (iv) required TSA to use the TSC’s watchlist, including the No Fly and Selectee Lists, to screen passengers and take appropriate action, 49 U.S.C. § 114(h)(1)-(3). This explicit statutory authorization reflects a clearly delineated general policy that is no broader in scope nor less intelligible in principle than any number of congressional directives that have withstood non-delegation challenges.<sup>17</sup> Unsurprisingly, therefore, the TSDS has unanimously survived

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<sup>17</sup> *See, e.g., Whitman*, 531 U.S. at 473, 476 (upholding air quality standards at a level “requisite to protect public health”); *Touby*, 500 U.S. at 163 (upholding restriction on controlled substance if “necessary to

a number of non-delegation challenges of its own. *See Elbady*, 303 F. Supp. 3d at 467-68; *Kadura v. Lynch*, 2017 WL 914249, at \*9-10 (E.D. Mich. Mar. 8, 2017); *Abdi v. Wray*, 2018 WL 1940411, at \*4 (D. Utah Apr. 23, 2018), *aff'd*, 942 F.3d 1019 (10th Cir. 2019); *Kovac*, 363 F. Supp. 3d at 762–63.

The statutory authority detailed above quite clearly authorizes TSA to “develop policies, strategies, and plans for dealing with threats to transportation security,” 49 U.S.C. § 114(f)(3); to work with and use information from other government agencies, *id.* § 114(h)(3); to prevent individuals from boarding an aircraft or to “take other appropriate action with respect to that individual,” *id.* § 114(h)(3)(B); to “perform[] . . . the passenger prescreening function of comparing passenger information to the automatic selectee and no fly lists . . . ,” *id.* § 44903(j)(2)(C)(ii); and to “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system,” *id.* § 44903(j)(2)(C)(iii)(I); *see also id.* §§ 44903(j)(2)(G)(i), 44926(a). The notion that there is any lack of clear congressional direction in the watchlisting and redress process is plainly meritless.

## **VI. Most Defendants Should Be Dismissed.**

Finally, Plaintiffs fail to plausibly trace any cognizable injury to 23 Defendants, for whom the only allegations are participation in the Watchlisting Advisory Council (“WLAC”) and/or speculation as to who may have purportedly nominated Plaintiffs to the TSDS. Def. Br. 29-30 (noting that for 23 Defendants, the only time they appear in the Complaint is where they are listed as a party). Plaintiffs respond that alleged participation in the WLAC alone is sufficient to state a claim against these

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avoid an imminent hazard to the public safety”); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639 (1980) (upholding regulatory safety standards that “most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health”).

Defendants. Pl. Br. 29.<sup>18</sup> This argument hinges on the allegation that the WLAC reviews and unanimously approves watchlisting guidance with respect to inclusion in and dissemination of the TSDS. *See id.* But as explained, even taking those allegations at face value, Plaintiffs’ true injury is still the alleged decision to include them in the TSDS, and that decision is made by particular federal entities other than these 23 Defendants. Def. Br. 29-30. Accordingly, Plaintiffs’ alleged injuries are traceable only to those entities that made the decision (allegedly) to include them in the TSDS.<sup>19</sup>

### CONCLUSION

Plaintiffs’ broadside attack against the TSDS, while sweeping, lacks a stable legal foundation. Indeed, the claims Plaintiffs assert here have been fully litigated—and rejected—in many courts around the country, including the Fourth Circuit. Notwithstanding Plaintiffs’ forceful insistence that enhanced screening at airports has “ruin[ed] their lives,” Pl. Br. 6, controlling case law holds that such inconveniences as Plaintiffs allege do not amount to a cognizable claim. The Court should therefore grant Defendants’ motion and dismiss this action.

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<sup>18</sup> Plaintiffs do not contest that their speculation as to nominations is insufficient to state a claim. Nor do they dispute that the Court may properly take judicial notice of the documents Defendants cited to explain the TSDS and DHS TRIP process. *See* Def. Br. 2 n.2.

<sup>19</sup> As in their amended complaint, Plaintiffs devote much of their opposition to cataloguing all of the TSDS’s perceived legal deficiencies—many of which have nothing to do with the facts Plaintiffs allege. Pl. Br. 1-5. For instance, no Plaintiff alleges that he has had a visa application refused, been deemed inadmissible, had an immigration application denied, or been denied a security clearance. *See id.* at 4. Such criticism in this case is therefore merely “hypothetical” and “abstract” and cannot support any claim by Plaintiffs. *Stephens v. HSBC Mortg. Servs., Inc.*, 565 F. App’x 238, 240 (4th Cir. 2014) (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)). Similarly, although Plaintiffs point again to alleged effects of their TSDS inclusion on third parties, Pl. Br. 4-5, they do not dispute (and therefore concede) that they have no standing to assert such injuries, *see* Def. Br. 8 n.6. Nor, finally, do Plaintiffs respond to Defendants’ explanation that the amended complaint does not come close to the demanding threshold for stating any facial challenge to the TSDS. *See* Def. Br. 28-29.

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Respectfully submitted,

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