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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

[Filed July 22, 2024]

No. 23-10284

ADIS KOVAC; BASHAR ALJAME; ABRAHAM SBYTI;
SUHAIB ALLABABIDI; FADUMO WARSAME,

Plaintiffs-Appellants,

v.

CHRISTOPHER WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY; CHARLES H. KABLE, DIRECTOR OF THE TERRORIST SCREENING CENTER, IN HIS OFFICIAL CAPACITY; DEBORAH MOORE, DIRECTOR, TRANSPORTATION SECURITY REDRESS (OTSR), IN HER OFFICIAL CAPACITY; NICHOLAS RASMUSSEN, DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER, IN HIS OFFICIAL CAPACITY; DAVID P. PEKOSKE, ADMINISTRATOR TRANSPORTATION SECURITY ADMINISTRATION (TSA), IN HIS OFFICIAL CAPACITY; KEVIN K. MCALEENAN, ACTING COMMISSIONER UNITED STATES CUSTOMS ND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

As revised July 25, 2024

OPINION

Leslie H. Southwick, Circuit Judge:

The Plaintiffs are a group of American citizens who complain they are subject to enhanced screening measures at airport security because they have been placed on a "terrorist watchlist." They sued the heads of various federal agencies connected to the watchlist, asserting numerous constitutional and statutory claims. The sole issue on appeal is whether the relevant agencies have statutory authority to create, maintain, and administer the watchlist. At summary judgment, the district court determined the agencies have statutory authority. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs are five Muslims who are United States citizens, four of whom reside in Dallas, Texas, and the fifth resides in New Jersey. They allege they have been put on what is officially called the Terrorist Screening Dataset ("Watchlist"). The Watchlist contains two sub-lists: (1) the No-Fly List, which automatically excludes individuals from flying; and (2) the Selectee List, which contains individuals who are subject to "additional security screening" before they may be permitted to board. Four of the Plaintiffs allege they are on the Selectee List because they have been subject to enhanced screening on multiple occasions, including prolonged interrogations, border searches, and having "SSSS" printed on their boarding passes.[1] Plaintiff Adis Kovac alleges he is on the No-Fly List because he has been prevented from boarding a commercial flight

[1] The "SSSS" designation indicates that enhanced screening is required. This designation may appear on passengers' boarding passes because they are on the Selectee List, "random selection," or for "reasons unrelated to any status." *Ghedi v. Mayorkas*, 16 F.4th 456, 460 (5th Cir. 2021).

and possibly the Selectee List because he is frequently subject to enhanced screening.

Each Plaintiff utilized the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP"). This program allows individuals who believe they have been improperly subjected to enhanced screening or prohibited from flying to obtain additional review of their status and to correct any errors or to alter their status based on new information. *See* 49 C.F.R. §§ 1560.201, .205. Because of security concerns, the Government's policy is to neither confirm nor deny a person's Selectee List status; those on the No-Fly List will be apprised of their status and may obtain judicial review. 49 U.S.C. § 46110. As a result, the Selectee List Plaintiffs received no-confirm-no-deny letters from DHS. DHS confirmed, however, that Plaintiff Kovac was on the No-Fly List.[2]

In January 2017, the Plaintiffs sued the heads of various federal agencies that maintain or use the Watchlist, in their official capacities (collectively, "Government").[3] The Plaintiffs allege violations of their Fifth Amendment procedural and substantive due process and equal protection rights, unlawful agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), and violations of the nondelegation doctrine. On the Government's motion to dismiss, the district court dismissed all claims against CBP for failure to prosecute, the substantive

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[2] When the Plaintiffs filed their complaint, DHS had yet to respond to Kovac's TRIP request. This confirmation came in April 2018.

[3] The agencies include: the Federal Bureau of Investigation ("FBI"), the Terrorist Screening Center ("TSC"), the Transportation Security Administration ("TSA"), DHS, the National Counterterrorism Center ("NCTC"), and the Customs and Border Protection ("CBP").

and procedural due process claims in part, the equal protection claims, and the nondelegation claims against all Defendants. *See Kovac v. Wray*, 363 F. Supp. 3d 721, 747–48, 762–63 (N.D. Tex. 2019) ("*Kovac I*"). In July 2019, Plaintiff Kovac was notified that he was removed from the No-Fly List, and the district court dismissed his related claims as moot. *Kovac v. Wray*, 449 F. Supp. 3d 649, 654–56 (N.D. Tex. 2020) ("*Kovac II*"). In November 2020, the district court dismissed the Plaintiffs' remaining constitutional claims, leaving only the APA claims. *Kovac v. Wray*, No. 3:18-CV-110, 2020 WL 6545913, at *5 (N.D. Tex. Nov. 6, 2020) ("*Kovac III*"). None of those decisions are before us.

At summary judgment on the APA claims, the Plaintiffs argued both that the major questions doctrine applies in this case and that the Government exceeded its authority because Congress never clearly authorized the Watchlist. The Government's actions against the Plaintiffs, therefore, violated 5 U.S.C. § 706(2)(C). They also asserted their alleged placement on the Selectee List was arbitrary and capricious. § 706(2)(A). Finally, they maintained the TRIP process is arbitrary and capricious because it does not provide a meaningful opportunity to correct erroneous information and distinguishes between the No-Fly and Selectee Lists. *Id.*

The district court agreed that the major questions doctrine applied because of the Watchlist's "vast political significance." *Kovac v. Wray*, 660 F. Supp. 3d 555, 563–65 (N.D. Tex. 2023) ("*Kovac IV*"). Nevertheless, the court concluded that Congress "clearly authorized" the Watchlist by analyzing numerous factors, only some of which pertained to the relevant statutes. *Id.* at 565–69. The court further determined that, even if

the Plaintiffs had been placed on the Watchlist,[4] the TRIP procedures were not arbitrary and capricious. *Id.* at 569–72. The Plaintiffs timely appealed.

DISCUSSION

We review the grant of summary judgment *de novo*, "applying the same standard as the district court." *Lamb v. Ashford Place Apartments LLC*, 914 F.3d 940, 943 (5th Cir. 2019) (citation omitted). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Issues of statutory interpretation are also reviewed *de novo*." *United States v. Arrieta*, 862 F.3d 512, 514 (5th Cir. 2017) (italics added). "This [c]ourt may affirm on grounds other than those relied upon by the district court" when supported by the record. *Lauren C. ex rel. Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 374 (5th Cir. 2018) (citation omitted).

The sole issue on appeal is whether the Government has statutory authority to create, maintain, and use the Watchlist to screen passengers boarding commercial aircraft. If we answer in the negative, then we must "hold unlawful and set aside" the Government's actions regarding the Watchlist as they relate to the Plaintiffs. 5 U.S.C. § 706(2)(C); *see also Loper Bright Enters. v. Raimondo*, —— U.S. ——, 144 S. Ct. 2244, 2261, --- L.Ed.2d —— (2024) ("In addition to prescribing procedures for agency action, the APA

[4] The district court emphasized that "[n]othing in this opinion should be construed as confirming or denying the [Plaintiffs'] status on or off the [W]atchlist." *Id.* at 569 n.85. Similarly, our opinion neither confirms nor denies the Plaintiffs' status.

delineates the basic contours of judicial review of such action." (citing 5 U.S.C. § 706)).

I. Statutory interpretation and the major questions doctrine

The district court started its analysis with the major questions doctrine and concluded that the doctrine applies because "the [W]atchlist has vast political significance." *Kovac IV*, 660 F. Supp. 3d at 565. As support, the district court explained the Watchlist "consists of over a million people," the Government may add "an unlimited number of people" to it, "liberty intrusions ... flow from the [W]atchlist," and the Watchlist can be distributed between federal and state agencies in numerous ways. *Id.* After applying its understanding of the elements of the doctrine, the district court determined that the Government acted properly. *Id.* at 565–69.

We need not analyze whether the major questions doctrine applies to creating, maintaining, and using the Watchlist if the relevant statutes provide "clear congressional authorization." *West Virginia v. EPA*, 597 U.S. 697, 724, 142 S.Ct. 2587, —— L.Ed.2d —— (2022) (citation omitted). Consequently, "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004).

II. Statutory text, structure, and history

Before exploring the dense statutory landscape of this case, we identify what we are looking for. The Plaintiffs' principal statutory discussion pertains to TSA's authority under 49 U.S.C. §§ 114 and 44903. They describe these statutes as "so vague as to barely warrant discussion." The Plaintiffs' primary contention

is that TSA's statutory obligation to protect airline passengers is not specific enough to authorize use of the Watchlist. Where the statute is more specific, they argue it is still not enough because it does not mention the word "watchlist." *See* 49 U.S.C. § 114(h). Even if TSA is authorized to use the Watchlist, the Plaintiffs maintain "TSA does not create, administer, or maintain the [W]atchlist," and the entity that does, TSC, lacks statutory authority to do so. As to the other agencies, the Plaintiffs argue that statutes authorizing their general law-enforcement duties do not confer sufficient authority to create, maintain, and use the Watchlist. *See* 28 U.S.C. § 533; 6 U.S.C. §§ 111, 202; 19 U.S.C. § 482 *et seq*.

Of course, statutes cannot be viewed in isolation, and statutory interpretation requires considering the context and structure of the overall statutory scheme. *West Virginia*, 597 U.S. at 721, 142 S.Ct. 2587. Our analysis, therefore, goes beyond the isolated statutes the Plaintiffs identify. As we go, we will highlight where the Plaintiffs' arguments falter.

a. Aviation and Transportation Security Act

Immediately following the September 11, 2001, terrorist attacks, Congress created TSA and included in its duties the oversight of passenger screening operations at domestic airports. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114). Congress instructed TSA to "enter into memoranda of understanding with Federal agencies ... to share or otherwise cross-check as necessary data on individuals identified on Federal agency *databases* who may pose a risk to transportation or national security." § 101(h)(1) (codified at 49 U.S.C. § 114(h)(1)) (emphasis added). Congress mandated TSA use information from government databases "to

identify individuals on passenger lists" that may pose a threat and, if necessary, "prevent the individual from boarding an aircraft." § 101(h)(3) (codified at 49 U.S.C. § 114(h)(3)). Congress also required TSA to adopt "enhanced security measures" to "aid in the screening of passengers ... who are identified on any State or Federal security-related *data base*" and to coordinate amongst airport security forces. § 109(a)(5) (codified at 49 U.S.C. § 114 note (Enhanced Security Measures)) (emphasis added). TSA assesses security threats "jointly" with the FBI. 49 U.S.C. § 44904(a).

Thus, the statutory authority for TSA to collect, share, and screen identifying information about airline passengers, and to use that information to prevent certain passengers from boarding or to conduct enhanced screening, is clear. They are not vague as the Plaintiffs argue. The Plaintiffs protest, however, that Section 114 does not use the word "watchlist." That word will come, but it is worth noting the term "terrorist watchlist" is only the common term for the Watchlist. Its official name is the Terrorist Screening *Dataset*, and it was previously named the Terrorist Screening *Database.* Those words appear in Section 114(h) and its accompanying note, and similar variations of those words are common in the overall scheme. We now return to that discussion.

b. Homeland Security Act

In 2002, Congress recognized the need for "Federal, State, and local entities [to] share homeland security information to the maximum extent practicable." Homeland Security Act of 2002, Pub. L. No. 107-296, § 891(c), 116 Stat. 2135 (codified at 6 U.S.C. § 481(c)).

Accordingly, Congress created DHS[5] and provided the President statutory authority to prescribe procedures by which "all appropriate agencies ... shall ... share "homeland security information" with appropriate Federal and State agencies and personnel.[6] § 892(b)(1) (codified at 6 U.S.C. § 482(b)(1)). These procedures applied to existing information-sharing systems and new ones that may be created. § 892(b)(2), (4) (codified at 6 U.S.C. § 482(b)(2), (4)). Congress also authorized DHS to access "broad categories of material, ... electronic *databases*, or both," and to harmonize "relevant information *databases*" across federal agencies. §§ 201(d)(15)(A), 202(b)(1) (codified at 6 U.S.C. §§ 121(d)(12)(A), 122(b)(1)) (emphasis added). This is where the Plaintiffs' argument that DHS lacks clear statutory authority related to the Watchlist begins to fall apart.

c. HSPD-6 and the IRTPA

Pursuant to the authority under the Acts discussed above, President Bush in 2003 signed Homeland Security Presidential Directive 6 ("HSPD-6"), which, along with an inter-agency memorandum of understanding, instructed the Attorney General to create the TSC under the administration of the FBI. HSPD-6 sought "to consolidate the Government's approach to terrorism screening" through the Terrorist Threat

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[5] In doing so, Congress transferred TSA from the Department of Transportation to DHS. § 403(2) (codified at 6 U.S.C. § 203(2)).

[6] "[H]omeland security information" is defined as "any information possessed by a Federal, State, or local agency that — (A) relates to the threat of terrorist activity; (B) relates to the ability to prevent, interdict, or disrupt terrorist activity; (C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or (D) would improve the response to a terrorist act." 6 U.S.C. § 482(f)(1).

Integration Center ("TTIC"). President Bush later incorporated TTIC into the NCTC through an executive order. Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004). The executive order directed the NCTC to create, integrate, disseminate, and ensure intra-and inter-governmental access to data and reports concerning terrorism information. *Id.*

In the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, sec. 1021, § 119, 118 Stat. 3638 (codified as amended at 50 U.S.C. § 3056), Congress codified the NCTC and its duties and authority. Today, as then, one of the NCTC's duties is to "develop a strategy for combining terrorist travel intelligence" and law enforcement efforts to "intercept ... and constrain terrorist mobility." Sec. 1021, § 119(f)(1)(F) (codified as amended at 50 U.S.C. § 3056(f)(1)(F)). To support the NCTC's efforts, the IRTPA authorized DHS to establish a program regarding terrorist travel, "including the *analysis, coordination, and dissemination* of terrorist travel intelligence and operational information" with relevant agencies, such as TSA and CBP. IRTPA § 7215 (codified at 6 U.S.C. § 123) (emphasis added); *see also* § 7201 (counterterrorist travel intelligence strategy). Congress further sought to enhance the Government's information-sharing structure by creating an "information sharing environment." § 1016 (codified at 6 U.S.C. § 485). This tool "facilitates the means for *sharing* terrorism information" with relevant governmental entities, "connects *existing systems*," "ensures direct and continuous online electronic access to information," and "builds upon *existing systems* capabilities" used by the Government. § 1016(b)(2) (codified at 6 U.S.C. § 485(b)(2)) (emphasis added).

The IRTPA also made significant changes to airport passenger screenings. Congress charged DHS and TSA

to implement "advanced passenger prescreening" and specifically required the agencies "to assume the performance of ... comparing passenger information to the automatic *selectee and no fly lists* and utilize all appropriate records in the consolidated and integrated *terrorist watchlist* maintained by the Federal Government in performing that function." § 4012(a)(1) (codified as amended at 49 U.S.C. § 44903(j)(2)(C)) (emphasis added). While TSA has such authority for domestic travel, CBP, as DHS's designee, has essentially the same authority for international arrivals. § 4012(a)(2)(B) (codified as amended at 49 U.S.C. § 44909(c)(6)); *see also* 72 Fed. Reg. 48,320 (Aug. 23, 2007) (final rule required under 49 U.S.C. § 44909(c)(6)). The IRTPA further required DHS to consult with TSC to establish procedures "for the collection, removal, and updating of data maintained, or to be maintained, in the *no fly* and *automatic selectee lists*." § 4012(a)(1) (codified as amended at 49 U.S.C. § 44903(j)(2)(E)(iii)) (emphasis added). Congress also instructed DHS to implement appeal procedures for those identified as a threat. *Id.* (codified as amended at 49 U.S.C. § 44903(j)(2)(G)).

Through the combined effects of HSPD-6 and the IRTPA, the Government's Watchlist authority begins to take shape. Along with statutorily directed inter-agency memoranda of understanding, HSPD-6 and the IRTPA created and codified, respectively, the TSC, TTIC, and NCTC and their roles and powers in creating, administering, and maintaining the Watchlist, building off existing systems with the goal of disseminating the information with appropriate agencies for more effective use. In doing so, Congress certainly imagined, indeed required, that an agency like TSC would do this work. Contrary to the Plaintiffs' arguments, the agencies' authority is not solely derived from their general law enforcement statutes. We also see

repeated invocation of the Plaintiffs' magic words — "watchlist" or "terrorist watchlist" — and specific directions to screen airline passengers against the "selectee and no fly lists." 49 U.S.C. §§ 44903(j)(2)(C), (E)(iii), 44909(c)(6). Although the Plaintiffs take issue with these words not appearing in *some* provisions that make up the statutory scheme, the provisions that *do* use the term cannot be ignored. *See Sturgeon v. Frost*, 577 U.S. 424, 438–39, 136 S.Ct. 1061, 194 L.Ed.2d 108 (2016). And there is still more to come.

d. 9/11 Commission Act

To further promote homeland security information sharing Congress enacted the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 501, 121 Stat. 266 (codified in scattered provisions of 6 U.S.C.). DHS was required to develop a homeland security advisory system and "integrate" and "standardize" terrorism and homeland security information for greater dissemination and access. Sec. 501, §§ 203, 204 (codified as amended at 6 U.S.C. §§ 124, 124a). DHS was further instructed to establish "a comprehensive information technology network architecture ... that connects the various *databases* and related *information technology assets*" to "promote *internal information sharing.*" Sec. 501, § 205 (codified as amended at 6 U.S.C. § 124b) (emphasis added). TSA was obligated to develop and distribute a "Transportation Security Information Sharing Plan" to enhance interagency coordination. 9/11 Commission Act § 1203(a) (codified at 49 U.S.C. § 114(t)).

To provide a means for passengers to contend "they were wrongly identified as a threat under the regimes utilized" by TSA, CBP, or other DHS entities, Congress codified more robust appeal and redress procedures than what was included in the IRTPA. § 1606(a)

(codified at 49 U.S.C. § 44926). It established the Office of Appeals and Redress and regulated the records, information, and handling of private information, such as requiring encryption and other security protections. *Id.* The Office of Appeals and Redress is required to furnish necessary information to TSA, CBP, and other DHS entities to "improv[e] their administration of the *advanced passenger prescreening system* and reduce the number of false positives." *Id.* (codified at 49 U.S.C. § 44926(b)(3)(B)) (emphasis added).[7]

The import of this Act is that based on the collective lessons learned from the September 11 terrorist attacks, Congress determined *more* terrorism-related information sharing between appropriate agencies was necessary. Further, working from experience, Congress recognized that many people may be mistakenly swept under the broad authority it was conferring, so it provided more robust redress procedures for those affected. This seriously, if not fatally, undermines the Plaintiffs' argument that Congress never intended for relevant federal agencies to exercise such powers. It clearly did. Congress's more recent enactments confirm as much.

e. Further enactments

The statutory scheme just described remains largely unchanged since its enactment. When Congress has modified parts of it, it has done so by reaffirming the Government's authority to maintain and use the Watchlist. For example, in the FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1937, 132 Stat. 3186 (codified at 49 U.S.C. § 44919(j)), Congress codified TSA's PreCheck Program, which required participants

[7] What resulted was DHS's TRIP, which we previously mentioned the Plaintiffs used.

to submit to "recurrent checks against the *terrorist watchlist*." (emphasis added). In the same Act, Congress took significant steps towards applying the aviation passenger vetting scheme to railroad passengers, including "vetting passengers using *terrorist watch lists* maintained by the Federal Government" or the TSA. § 1974(c)(1) (codified at 6 U.S.C. § 1164 note (Passenger Rail Vetting)) (emphasis added). Congress also amended the statute regulating grants to Amtrak so the corporation can "connect to the National *Terrorism Screening Center watchlist*" for enhanced security. § 1973(b)(1) (amending 6 U.S.C. § 1164(a)(3)(D)) (emphasis added); *see also* § 1973(a)(3) (amending 6 U.S.C. § 1163(b)(7)). In its brief, the Government notes other instances in which Congress directed agencies to maintain, disseminate, or use the Watchlist for security purposes, albeit not directly related to aviation passengers. 6 U.S.C. §§ 621(10), 622(d)(2), 488a(i)(2)(A), 1140, 1181(e)(2), 1162(e)(2); 49 U.S.C. §§ 44903(j)(2)(D), 44917(c)(2); 46 U.S.C. § 70105(a), (d).

"[G]uided to a degree by common sense," it is implausible to conclude that Congress would *expand* use of the Watchlist program if it truly believed it were unauthorized. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). That Congress's words became more specific over time does not undermine the agencies' prior authority, but rather confirms Congress intended to build on what already exists. *Id.* at 137–39, 120 S.Ct. 1291.

* * *

The foregoing demonstrates the Government's Watchlist authority rests on far more than vague authorizing statutes. Instead, the statutory scheme is highly complex and exists today after years of

congressional enactments, presidential actions, and congressional ratifications and enhancements.

The Government suggests that another way to understand this array of statutory authorities is to view them as a stacked Venn diagram, wherein broader statutory authority encircle narrower ones. At its broadest level, Congress has authorized agencies like the FBI, DHS, and NCTC to collect, investigate, and analyze terrorist-related intelligence. *See* 28 U.S.C. §§ 533, 534(a), 538; 6 U.S.C. § 121(d)(1), (12); 50 U.S.C. § 3056(d)(1). At the next, more specific level, Congress instructs these agencies, with direction from the President, to share and coordinate such intelligence with other federal agencies and state and local officials. *See* 6 U.S.C. §§ 122, 123(c)(4), 124, 124a(a), (c)(1), 124b, 126(a), 482(a)(1)(A), (b)(1), 485(b); 49 U.S.C. § 114(t). At the next, more specific level, Congress directs various agencies, including TSA and CBP, to screen persons against the shared and consolidated intelligence (*i.e.*, the Watchlist) in various situations. *See* 6 U.S.C. §§ 622(d)(2), 1162(e)(2), 1181(e)(2); 49 U.S.C. §§ 44903(j)(2), 44909(c)(6)(A), 44917(c)(2), 44919(j). Finally, at the most specific level that directly applies to this case, Congress requires TSA and CBP to coordinate with the TSC and commercial airlines to screen commercial airline passengers against the No Fly and Selectee Lists. 49 U.S.C. §§ 114(h), 44903(j)(2), 44909(c)(6).

Certainly, the Government has broad and detailed statutory authority to screen airline passengers. The Plaintiffs' arguments to the contrary therefore fail. We next consider the Plaintiffs' remaining arguments.

III. Ratification

To overcome the Government's clear statutory authority, the Plaintiffs argue Congress cannot authorize — or more properly perhaps, ratify — a previously unauthorized agency action. That is both factually and legally mistaken. It is factually mistaken because the Government's clear statutory authority existed at least six years before any alleged injury to the Plaintiffs, the earliest of which occurred in 2013. "Agency actions must be assessed according to the statutes and regulations in effect at the time of the relevant activity." *Texas v. EPA*, 829 F.3d 405, 430 (5th Cir. 2016). It is legally mistaken because, even if the initial creation of individual agencies' lists prior to 2001 or 2004 were not authorized, Congress's ratification of their creation, maintenance, and use would "give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02, 57 S.Ct. 478, 81 L.Ed. 659 (1937). This is a long-settled principle.[8]

IV. Other Watchlist uses

The Plaintiffs' final contention is that the relevant statutes do not authorize the entirety of the Watchlist program and its uses. Specifically, the Plaintiffs argue Congress never authorized the Government to maintain or administer the Watchlist for use in immigration proceedings, traffic stops, permitting, licensing, and firearm purchases. As a result, being on the Watchlist "ensnar[es] [the Plaintiffs] in an invisible web of

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[8] *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947); *Charlotte Harbor & N. Ry. Co. v. Welles*, 260 U.S. 8, 11–12, 43 S.Ct. 3, 67 L.Ed. 100 (1922); *Mattingly v. District of Columbia*, 97 U.S. 687, 690, 24 L.Ed. 1098 (1878).

consequences imposed indefinitely and without recourse." This, they say, makes the entirety of the Watchlist program beyond the scope of congressional authorization.

The fundamental reason the Plaintiffs' argument fails is they lack standing to raise it. The Plaintiffs bear the burden of demonstrating they satisfy the familiar Article III standing requirements of (1) an injury in fact that is (2) fairly traceable to the defendant's challenged conduct and (3) will likely be redressable by a favorable opinion. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The alleged injury in fact must be both "concrete," meaning "it must actually exist," and "particularized," meaning "it must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (quotation marks and citation omitted). Future injury may be sufficient for Article III standing, but the "threatened injury must be *certainly impending*"; "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (emphasis in original) (quotation marks and citations omitted). Furthermore, "standing is not dispensed in gross"; "the right to complain of *one* administrative deficiency [does not] automatically confer[ ] the right to complain of *all* administrative deficiencies" from which the plaintiff has not been injured. *Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (emphasis in original).

Here, the Plaintiffs failed to show that they have suffered any adverse consequence unrelated to airport security resulting from their alleged placement on the

Watchlist. The Plaintiffs are United States citizens, and their alleged injury is being subject to enhanced airport screenings because of their purported placement on the Watchlist. Any immigration consequences of their alleged placement, therefore, do not personally or concretely injure the Plaintiffs. *See Spokeo*, 578 U.S. at 339–40, 136 S.Ct. 1540. Although it is possible the Plaintiffs could be injured if their alleged placement on the Watchlist adversely affects them during a traffic stop, firearm purchase, or license application, they have not demonstrated that such injuries have occurred or are "*certainly impending.*" *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original). Instead, the only personal injury they allege is having to undergo TSA's enhanced screenings at airport security and, in Plaintiff Kovac's case, being prevented from boarding a flight.

To avoid this conclusion, the Plaintiffs argue that "once an agency's power is called into question by a plaintiff who has suffered [an] Article III injury, courts consider the full range of the agency's asserted power, *even if the plaintiff has not been harmed by every aspect of the agency's congressionally unauthorized actions.*" As support for this broad proposition, the Plaintiffs cite two Supreme Court cases involving major questions. *See Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 141 S.Ct. 2485, 210 L.Ed.2d 856 (2021); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014). Neither case, however, supports the Plaintiffs' proposition.

In *Alabama Association of Realtors*, the Supreme Court held the Center for Disease Control and Prevention's ("CDC") eviction moratorium exceeded its statutory authority. 594 U.S. at 759–60, 141 S.Ct. 2485. Although the Plaintiffs here concede that the moratorium applied to the plaintiffs in that case, they argue

it supports their proposition because the Court discussed the penalties the CDC could impose on violators even though none of the plaintiffs suffered such a penalty. *Id.* at 764–65, 141 S.Ct. 2485. There, the Court was discussing what the CDC itself said would be the penalties for moratorium violators in the order under review. *Id.* at 765, 141 S.Ct. 2485 (citing 86 Fed. Reg. 43,244, 43,252 (Aug. 6, 2021)). Because the plaintiffs themselves would be subject to such penalties if they violated the order, the "application of the regulations by the Government [would] affect *them*" in a personal and concrete way. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493–94, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (emphasis in original). Here, there is no indication that the Plaintiffs themselves have been or are likely to be subject to the Government's maintenance and use of the Watchlist apart from airport security.

In *Utility Air Regulatory Group*, the Supreme Court held that the Environmental Protection Agency ("EPA") exceeded its statutory authority by treating greenhouse gases as a "pollutant" under a statutory regime regulating the permit needs of certain emission sources. 573 U.S. at 325–26, 134 S.Ct. 2427. At one point, the Court discussed the "numerous small sources not previously regulated" under the Clean Air Act, such as "large office and residential buildings, hotels, large retail establishments, and similar facilities," that the EPA predicted could be regulated if it chose to regulate greenhouse gases. *Id.* at 310, 134 S.Ct. 2427 (quoting 73 Fed. Reg. 44,354, 44,498–99 (July 30, 2008)). The Plaintiffs here use this discussion to support their proposition because the Court "did not pause to ask whether the challenged regulations'

effect" on the previously unregulated entities "would injure petitioner Utility Air Regulatory Group."[9]

The Plaintiffs' reliance on this case, however, is misplaced. To start, the quoted discussion is the Court's review of the EPA's prior concerns over *possible* regulation of greenhouse gases articulated in an advanced notice of proposed rulemaking. *Id.* at 310, 134 S.Ct. 2427. The discussion says nothing about the actual effects of the final rules the petitioners challenged. *See id.* at 311–13, 134 S.Ct. 2427 (describing the final rules). More importantly, the Utility Air Regulatory Group members were subject to the challenged final rules because they were electric utilities. *See* 75 Fed. Reg. 31,514, 31,514 (June 3, 2010); Brief for Petitioner Utility Air Regulatory Group at x, *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (No. 12-1146), 2013 WL 6512952, at *x. Although the Supreme Court did not address standing extensively, it concluded the petitioners had standing because the rules essentially imposed a new permitting regime for greenhouse gases discharged above an administratively created emissions threshold. *See Utility Air Regul. Grp.*, 573 U.S. at 325, 134 S.Ct. 2427. This, the Court said, was an impermissible "rewriting of the statutory thresholds" that "went well beyond the bounds of [the EPA's] statutory authority." *Id.* at 325–26, 134 S.Ct. 2427 (quotation marks and citation omitted).

Here, the Plaintiffs do not argue or suggest that they have been or are likely to be imminently injured by use of the Watchlist in situations unrelated to airport

[9] The Plaintiffs overlook the fact that there were numerous petitioners in that case, including several states. *Id.* at 313, 134 S.Ct. 2427. Only one of the petitioners had to demonstrate standing to satisfy Article III. *See Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

security. Accordingly, they lack standing to challenge the Government's use of the Watchlist in such circumstances. *See Summers*, 555 U.S. at 493–94, 129 S.Ct. 1142. The cases they cite do not support the sweeping proposition that they can challenge *all* uses of the Watchlist because they are injured by only *one* of them. *Lewis*, 518 U.S. at 358 n.6, 116 S.Ct. 2174. Indeed, "[i]t would be quite strange to think that a party experiences an Article III injury by *not* being affected by an unlawful action ... or not being *more* affected by such action." *Department of Educ. v. Brown*, 600 U.S. 551, 564, 143 S.Ct. 2343, 216 L.Ed.2d 1116 (2023) (emphasis in original).

Our conclusion that the Plaintiffs have no standing as to the Watchlist uses unrelated to airport security should not be read as also implying a lack of statutory authority. We simply have no constitutional authority to review an issue for which no actual controversy is presented.

* * *

The Government's creation, maintenance, and use of the Watchlist in screening passengers in commercial air travel does not exceed its statutory authority in violation of 5 U.S.C. § 706(2)(C). Because the Government's statutory authority in this case is clearly authorized by Congress, we do not reach the issue of whether creating, maintaining, and using the Watchlist is a major question.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10284

ADIS KOVAC; BASHAR ALJAME; ABRAHAM SBYTI;
SUHAIB ALLABABIDI; FADUMO WARSAME,

Plaintiffs-Appellants,

versus

CHRISTOPHER WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY; CHARLES H. KABLE, DIRECTOR OF THE TERRORIST SCREENING CENTER, IN HIS OFFICIAL CAPACITY; DEBORAH MOORE, DIRECTOR, TRANSPORTATION SECURITY REDRESS (OTSR), IN HER OFFICIAL CAPACITY; NICHOLAS RASMUSSEN, DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER, IN HIS OFFICIAL CAPACITY; DAVID P. PEKOSKE, ADMINISTRATOR TRANSPORTATION SECURITY ADMINISTRATION (TSA), IN HIS OFFICIAL CAPACITY; KEVIN K. MCALEENAN, ACTING COMMISSIONER UNITED STATES CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-110

Before Barksdale, Southwick, and Graves, *Circuit Judges.*

Leslie H. Southwick, *Circuit Judge*:

The Plaintiffs are a group of American citizens who complain they are subject to enhanced screening measures at airport security because they have been placed on a "terrorist watchlist." They sued the heads of various federal agencies connected to the watchlist, asserting numerous constitutional and statutory claims. The sole issue on appeal is whether the relevant agencies have statutory authority to create, maintain, and administer the watch-list. At summary judgment, the district court determined the agencies have statutory authority. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs are five Muslims who are United States citizens, four of whom reside in Dallas, Texas, and the fifth resides in New Jersey. They allege they have been put on what is officially called the Terrorist Screening Dataset ("Watchlist"). The Watchlist contains two sub-lists: (1) the No-Fly List, which automatically excludes individuals from flying; and (2) the Selectee List, which contains individuals who are subject to "additional security screening" before they may be permitted to board. Four of the Plaintiffs allege they are on the Selectee List because they have been subject to enhanced screening on multiple occasions, including prolonged interrogations, border searches, and having "SSSS" printed on their boarding passes.[1] Plaintiff Adis Kovac alleges he is on

[1] The "SSSS" designation indicates that enhanced screening is required. This designation may appear on passengers' boarding passes because they are on the Selectee List, "random selec-

the No-Fly List because he has been prevented from boarding a commercial flight and possibly the Selectee List because he is frequently subject to enhanced screening.

Each Plaintiff utilized the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP"). This program allows individuals who believe they have been improperly subjected to enhanced screening or prohibited from flying to obtain additional review of their status and to correct any errors or to alter their status based on new information. *See* 49 C.F.R. §§ 1560.201, .205. Because of security concerns, the Government's policy is to neither confirm nor deny a person's Selectee List status; those on the No-Fly List will be apprised of their status and may obtain judicial review. 49 U.S.C. § 46110. As a result, the Selectee List Plaintiffs received no-confirm-no-deny letters from DHS. DHS confirmed, however, that Plaintiff Kovac was on the No-Fly List.[2]

In January 2017, the Plaintiffs sued the heads of various federal agencies that maintain or use the Watchlist, in their official capacities (collectively, "Government").[3] The Plaintiffs allege violations of their Fifth Amendment procedural and substantive due process and equal protection rights, unlawful

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tion," or for "reasons unrelated to any status." *Ghedi v. Mayorkas*, 16 F.4th 456, 460 (5th Cir. 2021).

[2] When the Plaintiffs filed their complaint, DHS had yet to respond to Kovac's TRIP request. This confirmation came in April 2018.

[3] The agencies include: the Federal Bureau of Investigation ("FBI"), the Terrorist Screening Center ("TSC"), the Transportation Security Administration ("TSA"), DHS, the National Counterterrorism Center ("NCTC"), and the Customs and Border Protection ("CBP").

agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), and violations of the nondelegation doctrine. On the Government's motion to dismiss, the district court dismissed all claims against CBP for failure to prosecute, the substantive and procedural due process claims in part, the equal protection claims, and the nondelegation claims against all Defendants. *See Kovac v. Wray*, 363 F. Supp. 3d 721, 747–48, 762–63 (N.D. Tex. 2019) ("*Kovac I*"). In July 2019, Plaintiff Kovac was notified that he was removed from the No-Fly List, and the district court dismissed his related claims as moot. *Kovac v. Wray*, 449 F. Supp. 3d 649, 654–56 (N.D. Tex. 2020) ("*Kovac II*"). In November 2020, the district court dismissed the Plaintiffs' remaining constitutional claims, leaving only the APA claims. *Kovac v. Wray*, No. 3:18-CV-110, 2020 WL 6545913, at *5 (N.D. Tex. Nov. 6, 2020) ("*Kovac III*"). None of those decisions are before us.

At summary judgment on the APA claims, the Plaintiffs argued both that the major questions doctrine applies in this case and that the Government exceeded its authority because Congress never clearly authorized the Watchlist. The Government's actions against the Plaintiffs, therefore, violated U.S.C. § 706(2)(C). They also asserted their alleged placement on the Selectee List was arbitrary and capricious. § 706(2)(A). Finally, they maintained the TRIP process is arbitrary and capricious because it does not provide a meaningful opportunity to correct erroneous information and distinguishes between the No-Fly and Selectee Lists. *Id.*

The district court agreed that the major questions doctrine applied because of the Watchlist's "vast political significance." *Kovac v. Wray*, 660 F. Supp. 3d 555, 563–65 (N.D. Tex. 2023) ("*Kovac IV*"). Neverthe-

less, the court concluded that Congress "clearly authorized" the Watchlist by analyzing numerous factors, only some of which pertained to the relevant statutes. *Id.* at 565–69. The court further determined that, even if the Plaintiffs had been placed on the Watchlist,[4] the TRIP procedures were not arbitrary and capricious. *Id.* at 569–72. The Plaintiffs timely appealed.

DISCUSSION

We review the grant of summary judgment *de novo*, "applying the same standard as the district court." *Lamb v. Ashford Place Apartments LLC*, 914 F.3d 940, 943 (5th Cir. 2019) (citation omitted). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Issues of statutory interpretation are also reviewed *de novo*." *United States v. Arrieta*, 862 F.3d 512, 514 (5th Cir. 2017) (italics added). "This [c]ourt may affirm on grounds other than those relied upon by the district court" when supported by the record. *Lauren C. ex rel. Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 374 (5th Cir. 2018) (citation omitted).

The sole issue on appeal is whether the Government has statutory authority to create, maintain, and use the Watchlist to screen passengers boarding commercial aircraft. If we answer in the negative, then we must "hold unlawful and set aside" the Government's actions regarding the Watchlist as they relate to the

[4] The district court emphasized that "[n]othing in this opinion should be construed as confirming or denying the [Plaintiffs'] status on or off the [W]atchlist." Id. at 569 n.85. Similarly, our opinion neither confirms nor denies the Plaintiffs' status.

Plaintiffs. 5 U.S.C. § 706(2)(C); *see also Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) ("In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action." (citing 5 U.S.C. § 706)).

I. Statutory interpretation and the major questions doctrine

The district court started its analysis with the major questions doctrine and concluded that the doctrine applies because "the [W]atchlist has vast political significance." *Kovac IV*, 660 F. Supp. 3d at 565. As support, the district court explained the Watchlist "consists of over a million people," the Government may add "an unlimited number of people" to it, "liberty intrusions . . . flow from the [W]atchlist," and the Watchlist can be distributed between federal and state agencies in numerous ways. *Id.* After applying its understanding of the elements of the doctrine, the district court determined that the Government acted properly. *Id.* at 565–69.

We conclude that the district court should have started with the relevant statutory texts, not with the doctrine about major questions. "[S]tatutory interpretation must begin with, and ultimately heed, what a statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (quotation marks and citation omitted). The analysis ends with the statutory text "if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Only when there is ambiguity should other analytical steps be taken. *See, e.g.*, *Vitol, Inc. v. United States*, 30 F.4th 248, 253 (5th Cir. 2022). Consequently, before proceeding to the major questions doctrine, courts must first examine the statutory text to discern if it is ambiguous as to the Government's asserted authority. *See*

West Virginia v. EPA, 597 U.S. 697, 722–23 (2022). We now examine the statutory text.

II. Statutory text, structure, and history

Before exploring the dense statutory landscape of this case, we identify what we are looking for. The Plaintiffs' principal statutory discussion pertains to TSA's authority under 49 U.S.C. §§ 114 and 44903. They describe these statutes as "so vague as to barely warrant discussion." The Plaintiffs' primary contention is that TSA's statutory obligation to protect airline passengers is not specific enough to authorize use of the Watchlist. Where the statute is more specific, they argue it is still not enough because it does not mention the word "watchlist." *See* 49 U.S.C. § 114(h). Even if TSA is authorized to use the Watchlist, the Plaintiffs maintain "TSA does not create, administer, or maintain the [W]atchlist," and the entity that does, TSC, lacks statutory authority to do so. As to the other agencies, the Plaintiffs argue that statutes authorizing their general law-enforcement duties do not confer sufficient authority to create, maintain, and use the Watchlist. *See* 28 U.S.C. § 533; 6 U.S.C. §§ 111, 202; 19 U.S.C. § 482 *et seq*.

Of course, statutes cannot be viewed in isolation, and statutory interpretation requires considering the context and structure of the overall statutory scheme. *West Virginia*, 597 U.S. at 721. Our analysis, therefore, goes beyond the isolated statutes the Plaintiffs identify. As we go, we will highlight where the Plaintiffs' arguments falter.

a. *Aviation and Transportation Security Act*

Immediately following the September 11, 2001, terrorist attacks, Congress created TSA and included in its duties the oversight of passenger screening

operations at domestic airports. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114). Congress instructed TSA to "enter into memoranda of understanding with Federal agencies . . . to share or otherwise cross-check as necessary data on individuals identified on Federal agency *databases* who may pose a risk to transportation or national security." § 101(h)(1) (codified at 49 U.S.C. § 114(h)(1)) (emphasis added). Congress mandated TSA use information from government databases "to identify individuals on passenger lists" that may pose a threat and, if necessary, "prevent the individual from boarding an aircraft." § 101(h)(3) (codified at 49 U.S.C. § 114(h)(3)). Congress also required TSA to adopt "enhanced security measures" to "aid in the screening of passengers . . . who are identified on any State or Federal security-related *data base*" and to coordinate amongst airport security forces. § 109(a)(5) (codified at 49 U.S.C. § 114 note (Enhanced Security Measures)) (emphasis added). TSA assesses security threats "jointly" with the FBI. 49 U.S.C. § 44904(a).

Thus, the statutory authority for TSA to collect, share, and screen identifying information about airline passengers, and to use that information to prevent certain passengers from boarding or to conduct enhanced screening, is clear. They are not vague as the Plaintiffs argue. The Plaintiffs protest, however, that Section 114 does not use the word "watchlist." That word will come, but it is worth noting the term "terrorist watchlist" is only the common term for the Watchlist. Its official name is the Terrorist Screening *Dataset*, and it was previously named the Terrorist Screening *Database*. Those words appear in Section 114(h) and its accompanying note, and similar

variations of those words are common in the overall scheme. We now return to that discussion.

b. *Homeland Security Act*

In 2002, Congress recognized the need for "Federal, State, and local entities [to] share homeland security information to the maximum extent practicable." Homeland Security Act of 2002, Pub. L. No. 107-296, § 891(c), 116 Stat. 2135 (codified at 6 U.S.C. § 481(c)). Accordingly, Congress created DHS[5] and provided the President statutory authority to prescribe procedures by which "all appropriate agencies . . . shall . . . share "homeland security information" with appropriate Federal and State agencies and personnel.[6] § 892(b)(1) (codified at 6 U.S.C. § 482(b)(1)). These procedures applied to existing information-sharing systems and new ones that may be created. § 892(b)(2), (4) (codified at 6 U.S.C. § 482(b)(2), (4)). Congress
also authorized DHS to access "broad categories of material, . . . electronic *databases*, or both," and to harmonize "relevant information *databases*" across federal agencies. §§ 201(d)(15)(A), 202(b)(1) (codified at 6 U.S.C. §§ 121(d)(12)(A), 122(b)(1)) (emphasis added). This is where the Plaintiffs' argument that DHS lacks clear statutory authority related to the Watchlist begins to fall apart.

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[5] In doing so, Congress transferred TSA from the Department of Transportation to DHS. § 403(2) (codified at 6 U.S.C. § 203(2)).

[6] "[H]omeland security information" is defined as "any information possessed by a Federal, State, or local agency that — (A) relates to the threat of terrorist activity; (B) relates to the ability to prevent, interdict, or disrupt terrorist activity; (C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or (D) would improve the response to a terrorist act." 6 U.S.C. § 482(f)(1).

c. *HSPD-6 and the IRTPA*

Pursuant to the authority under the Acts discussed above, President Bush in 2003 signed Homeland Security Presidential Directive 6 ("HSPD6"), which, along with an inter-agency memorandum of understanding, instructed the Attorney General to create the TSC under the administration of the FBI. HSPD-6 sought "to consolidate the Government's approach to terrorism screening" through the Terrorist Threat Integration Center ("TTIC"). President Bush later incorporated TTIC into the NCTC through an executive order. Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004). The executive order directed the NCTC to create, integrate, disseminate, and ensure intra- and inter-governmental access to data and reports concerning terrorism information. *Id.*

In the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, sec. 1021, § 119, 118 Stat. 3638 (codified as amended at 50 U.S.C. § 3056), Congress codified the NCTC and its duties and authority. Today, as then, one of the NCTC's duties is to "develop a strategy for combining terrorist travel intelligence" and law enforcement efforts to "intercept . . . and constrain terrorist mobility." Sec. 1021, § 119(f)(1)(F) (codified as amended at 50 U.S.C. § 3056(f)(1)(F)). To support the NCTC's efforts, the IRTPA authorized DHS to establish a program regarding terrorist travel, "including the *analysis, coordination, and dissemination* of terrorist travel intelligence and operational information" with relevant agencies, such as TSA and CBP. IRTPA § 7215 (codified at 6 U.S.C. § 123) (emphasis added); *see also* § 7201 (counterterrorist travel intelligence strategy). Congress further sought to enhance the

Government's information-sharing structure by creating an "information sharing environment." § 1016 (codified at 6 U.S.C. § 485). This tool "facilitates the means for *sharing* terrorism information" with relevant governmental entities, "connects *existing systems*," "ensures direct and continuous online electronic access to information," and "builds upon *existing systems* capabilities" used by the Government. § 1016(b)(2) (codified at 6 U.S.C. § 485(b)(2)) (emphasis added).

The IRTPA also made significant changes to airport passenger screenings. Congress charged DHS and TSA to implement "advanced passenger prescreening" and specifically required the agencies "to assume the performance of . . . comparing passenger information to the automatic *selectee and no fly lists* and utilize all appropriate records in the consolidated and integrated *terrorist watchlist* maintained by the Federal Government in performing that function." § 4012(a)(1) (codified as amended at 49 U.S.C. § 44903(j)(2)(C)) (emphasis added). While TSA has such authority for domestic travel, CBP, as DHS's designee, has essentially the same authority for international arrivals. § 4012(a)(2)(B) (codified as amended at 49 U.S.C. § 44909(c)(6)); *see also* 72 Fed. Reg. 48,320 (Aug. 23, 2007) (final rule required under 49 U.S.C. § 44909(c)(6)). The IRTPA further required DHS to consult with TSC to establish procedures "for the collection, removal, and updating of data maintained, or to be maintained, in the *no fly* and *automatic selectee lists*." § 4012(a)(1) (codified as amended at 49 U.S.C. § 44903(j)(2)(E)(iii)) (emphasis added). Congress also instructed DHS to implement appeal procedures for those identified as a threat. *Id.* (codified as amended at 49 U.S.C. § 44903(j)(2)(G)).

Through the combined effects of HSPD-6 and the IRTPA, the Government's Watchlist authority begins to take shape. Along with statutorily directed interagency memoranda of understanding, HSPD-6 and the IRTPA created and codified, respectively, the TSC, TTIC, and NCTC and their roles and powers in creating, administering, and maintaining the Watchlist, building off existing systems with the goal of disseminating the information with appropriate agencies for more effective use. In doing so, Congress certainly imagined, indeed required, that an agency like TSC would do this work. Contrary to the Plaintiffs' arguments, the agencies' authority is not solely derived from their general law enforcement statutes. We also see repeated invocation of the Plaintiffs' magic words — "watchlist" or "terrorist watchlist" — and specific directions to screen airline passengers against the "selectee and no fly lists." 49 U.S.C. §§ 44903(j)(2)(C), (E)(iii), 44909(c)(6). Although the Plaintiffs take issue with these words not appearing in *some* provisions that make up the statutory scheme, the provisions that *do* use the term cannot be ignored. *See Sturgeon v. Frost*, 577 U.S. 424, 438–39 (2016). And there is still more to come.

d. *9/11 Commission Act*

To further promote homeland security information sharing Congress enacted the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 501, 121 Stat. 266 (codified in scattered provisions of 6 U.S.C.). DHS was required to develop a homeland security advisory system and "integrate" and "standardize" terrorism and homeland security information for greater dissemination and access. Sec. 501, §§ 203, 204 (codified as amended at 6 U.S.C. §§ 124, 124a). DHS was further instructed to

establish "a comprehensive information technology network architecture . . . that connects the various *databases* and related *information technology assets*" to "promote *internal information sharing*." Sec. 501, § 205 (codified as amended at 6 U.S.C. § 124b) (emphasis added). TSA was obligated to develop and distribute a "Transportation Security Information Sharing Plan" to enhance interagency coordination. 9/11 Commission Act § 1203(a) (codified at 49 U.S.C. § 114(t)).

To provide a means for passengers to contend "they were wrongly identified as a threat under the regimes utilized" by TSA, CBP, or other DHS entities, Congress codified more robust appeal and redress procedures than what was included in the IRTPA. § 1606(a) (codified at 49 U.S.C. § 44926).

It established the Office of Appeals and Redress and regulated the records, information, and handling of private information, such as requiring encryption and other security protections. *Id.* The Office of Appeals and Redress is required to furnish necessary information to TSA, CBP, and other DHS entities to "improv[e] their administration of the *advanced passenger prescreening system* and reduce the number of false positives." *Id.* (codified at 49 U.S.C. § 44926(b)(3)(B)) (emphasis added).[7]

The import of this Act is that based on the collective lessons learned from the September 11 terrorist attacks, Congress determined *more* terrorism-related information sharing between appropriate agencies was necessary. Further, working from experience, Congress recognized that many people may be

[7] What resulted was DHS's TRIP, which we previously mentioned the Plaintiffs used.

mistakenly swept under the broad authority it was conferring, so it provided more robust redress procedures for those affected. This seriously, if not fatally, undermines the Plaintiffs' argument that Congress never intended for relevant federal agencies to exercise such powers. It clearly did. Congress's more recent enactments confirm as much.

e. *Further enactments*

The statutory scheme just described remains largely unchanged since its enactment. When Congress has modified parts of it, it has done so by reaffirming the Government's authority to maintain and use the Watchlist. For example, in the FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1937, 132 Stat. 3186 (codified at 49 U.S.C. § 44919(j)), Congress codified TSA's PreCheck Program, which required participants to submit to "recurrent checks against the *terrorist watchlist*." (emphasis added). In the same Act, Congress took significant steps towards applying the aviation passenger vetting scheme to railroad passengers, including "vetting passengers using *terrorist watch lists* maintained by the Federal Government" or the TSA. § 1974(c)(1) (codified at 6 U.S.C. § 1164 note (Passenger Rail Vetting)) (emphasis added). Congress also amended the statute regulating grants to Amtrak so the corporation can "connect to the National *Terrorism Screening Center watchlist*" for enhanced security. § 1973(b)(1) (amending 6 U.S.C. § 1164(a)(3)(D)) (emphasis added); *see also* § 1973(a)(3) (amending 6 U.S.C. § 1163(b)(7)). In its brief, the Government notes other instances in which Congress directed agencies to maintain, disseminate, or use the Watchlist for security purposes, albeit not directly related to aviation passengers. 6 U.S.C. §§ 621(10), 622(d)(2), 488a(i)(2)(A), 1140, 1181(e)(2), 1162(e)(2);

49 U.S.C. §§ 44903(j)(2)(D), 44917(c)(2); 46 U.S.C. § 70105(a), (d).

"[G]uided to a degree by common sense," it is implausible to conclude that Congress would *expand* use of the Watchlist program if it truly believed it were unauthorized. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). That Congress's words became more specific over time does not undermine the agencies' prior authority, but rather confirms Congress intended to build on what already exists. *Id.* at 137–39.

* * *

The foregoing demonstrates the Government's Watchlist authority rests on far more than vague authorizing statutes. Instead, the statutory scheme is highly complex and exists today after years of congressional enactments, presidential actions, and congressional ratifications and enhancements.

The Government suggests that another way to understand this array of statutory authorities is to view them as a stacked Venn diagram, wherein broader statutory authority encircle narrower ones. At its broadest level, Congress has authorized agencies like the FBI, DHS, and NCTC to collect, investigate, and analyze terrorist-related intelligence. *See* 28 U.S.C. §§ 533, 534(a), 538; 6 U.S.C. § 121(d)(1), (12); 50 U.S.C. § 3056(d)(1). At the next, more specific level, Congress instructs these agencies, with direction from the President, to share and coordinate such intelligence with other federal agencies and state and local officials. *See* 6 U.S.C. §§ 122, 123(c)(4), 124, 124a(a), (c)(1), 124b, 126(a), 482(a)(1)(A), (b)(1), 485(b); 49 U.S.C. § 114(t).

At the next, more specific level, Congress directs various agencies, including TSA and CBP, to screen persons against the shared and consolidated intelligence (*i.e.*, the Watchlist) in various situations. *See* 6 U.S.C. §§ 622(d)(2), 1162(e)(2), 1181(e)(2); 49 U.S.C. §§ 44903(j)(2), 44909(c)(6)(A), 44917(c)(2), 44919(j). Finally, at the most specific level that directly applies to this case, Congress requires TSA and CBP to coordinate with the TSC and commercial airlines to screen commercial airline passengers against the No Fly and Selectee Lists. 49 U.S.C. §§ 114(h), 44903(j)(2), 44909(c)(6).

Certainly, the Government has broad and detailed statutory authority to screen airline passengers. The Plaintiffs' arguments to the contrary therefore fail. We next consider the Plaintiffs' remaining arguments.

III. *Ratification*

To overcome the Government's clear statutory authority, the Plaintiffs argue Congress cannot authorize — or more properly perhaps, ratify — a previously unauthorized agency action. That is both factually and legally mistaken. It is factually mistaken because the Government's clear statutory authority existed at least six years before any alleged injury to the Plaintiffs, the earliest of which occurred in 2013. "Agency actions must be assessed according to the statutes and regulations in effect at the time of the relevant activity." *Texas v. EPA*, 829 F.3d 405, 430 (5th Cir. 2016). It is legally mistaken because, even if the initial creation of individual agencies' lists prior to 2001 or 2004 were not authorized, Congress's ratification of their creation, maintenance, and use would "give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United*

States, 300 U.S. 297, 301–02 (1937). This is a long-settled principle.[8]

IV. *Other Watchlist uses*

The Plaintiffs' final contention is that the relevant statutes do not authorize the entirety of the Watchlist program and its uses. Specifically, the Plaintiffs argue Congress never authorized the Government to maintain or administer the Watchlist for use in immigration proceedings, traffic stops, permitting, licensing, and firearm purchases. As a result, being on the Watchlist "ensnar[es] [the Plaintiffs] in an invisible web of consequences imposed indefinitely and without recourse." This, they say, makes the entirety of the Watchlist program beyond the scope of congressional authorization.

The fundamental reason the Plaintiffs' argument fails is they lack standing to raise it. The Plaintiffs bear the burden of demonstrating they satisfy the familiar Article III standing requirements of (1) an injury in fact that is (2) fairly traceable to the defendant's challenged conduct and (3) will likely be redressable by a favorable opinion. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The alleged injury in fact must be both "concrete," meaning "it must actually exist," and "particularized," meaning "it must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–40 (2016) (quotation marks and citation omitted).

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[8] *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Charlotte Harbor & N. Ry. Co. v. Welles*, 260 U.S. 8, 11–12 (1922); *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878).

Future injury may be sufficient for Article III standing, but the "threatened injury must be *certainly impending*"; "allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quotation marks and citations omitted). Furthermore, "standing is not dispensed in gross"; "the right to complain of *one* administrative deficiency [does not] automatically confer[] the right to complain of *all* administrative deficiencies" from which the plaintiff has not been injured. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (emphasis in original).

Here, the Plaintiffs failed to show that they have suffered any adverse consequence unrelated to airport security resulting from their alleged placement on the Watchlist. The Plaintiffs are United States citizens, and their alleged injury is being subject to enhanced airport screenings because of their purported placement on the Watchlist. Any immigration consequences of their alleged placement, therefore, do not personally or concretely injure the Plaintiffs. *See Spokeo*, 578 U.S. at 339–40. Although it is possible the Plaintiffs could be injured if their alleged placement on the Watchlist adversely affects them during a traffic stop, firearm purchase, or license application, they have not demonstrated that such injuries have occurred or are "*certainly impending*." *Clapper*, 568 U.S. at 409 (emphasis in original). Instead, the only personal injury they allege is having to undergo TSA's enhanced screenings at airport security and, in Plaintiff Kovac's case, being prevented from boarding a flight.

To avoid this conclusion, the Plaintiffs argue that "once an agency's power is called into question by a plaintiff who has suffered [an] Article III injury,

courts consider the full range of the agency's asserted power, *even if the plaintiff has not been harmed by every aspect of the agency's congressionally unauthorized actions*." As support for this broad proposition, the Plaintiffs cite two Supreme Court cases involving major questions. *See Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). Neither case, however, supports the Plaintiffs' proposition.

In *Alabama Association of Realtors*, the Supreme Court held the Center for Disease Control and Prevention's ("CDC") eviction moratorium exceeded its statutory authority. 594 U.S. at 759–60. Although the Plaintiffs here concede that the moratorium applied to the plaintiffs in that case, they argue it supports their proposition because the Court discussed the penalties the CDC could impose on violators even though none of the plaintiffs suffered such a penalty. *Id.* at 764–65. There, the Court was discussing what the CDC itself said would be the penalties for moratorium violators in the order under review. *Id.* at 765 (citing 86 Fed. Reg. 43,244, 43,252 (Aug. 6, 2021)). Because the plaintiffs themselves would be subject to such penalties if they violated the order, the "application of the regulations by the Government [would] affect *them*" in a personal and concrete way. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493–94 (2009) (emphasis in original). Here, there is no indication that the Plaintiffs themselves have been or are likely to be subject to the Government's maintenance and use of the Watchlist apart from airport security.

In *Utility Air Regulatory Group*, the Supreme Court held that the Environmental Protection Agency ("EPA") exceeded its statutory authority by treating

greenhouse gases as a "pollutant" under a statutory regime regulating the permit needs of certain emission sources. 573 U.S. at 325–26. At one point, the Court discussed the "numerous small sources not previously regulated" under the Clean Air Act, such as "large office and residential buildings, hotels, large retail establishments, and similar facilities," that the EPA predicted could be regulated if it chose to regulate greenhouse gases. *Id.* at 310 (quoting 73 Fed. Reg. 44,354, 44,498–99 (July 30, 2008)). The Plaintiffs here use this discussion to support their proposition because the Court "did not pause to ask whether the challenged regulations' effect" on the previously unregulated entities "would injure petitioner Utility Air Regulatory Group."[9]

The Plaintiffs' reliance on this case, however, is misplaced. To start, the quoted discussion is the Court's review of the EPA's prior concerns over *possible* regulation of greenhouse gases articulated in an advanced notice of proposed rulemaking. *Id.* at 310. The discussion says nothing about the actual effects of the final rules the petitioners challenged. *See id.* at 311–13 (describing the final rules). More importantly, the Utility Air Regulatory Group members were subject to the challenged final rules because they were electric utilities. *See* 75 Fed. Reg. 31,514, 31,514 (June 3, 2010); Brief for Petitioner Utility Air Regulatory Group at x, *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (No. 12-1146), 2013 WL 6512952, at *x. Although the Supreme Court did not address standing extensively, it concluded the petitioners

[9] The Plaintiffs overlook the fact that there were numerous petitioners in that case, including several states. *Id.* at 313. Only one of the petitioners had to demonstrate standing to satisfy Article III. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

had standing because the rules essentially imposed a new permitting regime for greenhouse gases discharged above an administratively created emissions threshold. *See Utility Air Regul. Grp.*, 573 U.S. at 325. This, the Court said, was an impermissible "rewriting of the statutory thresholds" that "went well beyond the bounds of [the EPA's] statutory authority." *Id.* at 325–26 (quotation marks and citation omitted).

Here, the Plaintiffs do not argue or suggest that they have been or are likely to be imminently injured by use of the Watchlist in situations unrelated to airport security. Accordingly, they lack standing to challenge the Government's use of the Watchlist in such circumstances. *See Summers*, 555 U.S. at 493–94. The cases they cite do not support the sweeping proposition that they can challenge *all* uses of the Watchlist because they are injured by only *one* of them. *Lewis*, 518 U.S. at 358 n.6. Indeed, "[i]t would be quite strange to think that a party experiences an Article III injury by *not* being affected by an unlawful action . . . or not being *more* affected by such action." *Department of Educ. v. Brown*, 600 U.S. 551, 564 (2023) (emphasis in original).

Our conclusion that the Plaintiffs have no standing as to the Watchlist uses unrelated to airport security should not be read as also implying a lack of statutory authority. We simply have no constitutional authority to review an issue for which no actual controversy is presented.

* * *

The Government's creation, maintenance, and use of the Watchlist in screening passengers in commercial air travel does not exceed its statutory authority in violation of 5 U.S.C. § 706(2)(C). Because the

Government's statutory authority in this case is unambiguous, we do not reach the issue of whether the major questions doctrine applies in this case.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT, N.D. TEXAS, DALLAS DIVISION

Civil Action No. 3:18-CV-0110-X

ADIS KOVAC, *et al*.,

Plaintiffs,

v.

CHRISTOPHER WRAY, *et al*.,

Defendants.

Signed March 9, 2023

MEMORANDUM OPINION AND ORDER

BRANTLEY STARR, UNITED STATES DISTRICT JUDGE

Adis Kovac, Bashar Al-Jame, Suhai Allababidi, Abraham Sbyti, and Faduma Mohamed Warsame (collectively, "the Passengers") experienced rigorous screening at airports. Convinced that they are on the terrorist watchlist, the Passengers sued the leaders of several agencies[1] (collectively, "the Government"). The

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[1] The Passengers sued, among others, Christopher Wray, the Director of the Federal Bureau of Investigation ("FBI"); Charles H. Kable, the Director of the Terrorist Screening Center ("TSC"); Deborah Moore, the Director of the Transportation Security Administration ("TSA") and the Department of Homeland Security ("DHS"); Nicholas J. Rasmussen, director of the National Counterterrorism Center ("NCTC").

Government and the Passengers both move for summary judgment. [Doc. Nos. 90, 96]. For the reasons explained below, the Court DENIES the Passengers' motion for summary judgment and GRANTS the Government's motion for summary judgment.

I. Background, Issues, and Standard of Review

The Court describes (A) the watchlist, (B) redress procedures for those potentially on the watchlist, (C) the Passengers' factual allegations, (D) this case's procedural posture, and (E) the relevant standard of review.

A. The Watchlist

For years, the Government has sought to stymie terrorists' ambitions to harm the United States and its people. An obvious initial step in thwarting terrorists is to ascertain their identities and to keep an eye on them. Accordingly, before 2003, "nine [United States] agencies maintained twelve different terrorist watchlists" to keep track of suspected terrorists.[2] But recognizing the drawbacks of such a diffused approach in the wake of 9/11, President George W. Bush issued an executive order calling for the creation of the Terrorist Screening Center ("TSC"), which he tasked with "consolidat[ing]" the Government's watchlists into a singular list of "terrorist identity information."[3] The FBI administers the TSC "in coordination" with DHS.[4]

Several agencies collaborate to create, maintain, and enforce the watchlist. Initially, any United States

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[2] Doc. No. 91 at 17.

[3] *Id.* at 8, 16. The Government calls that watchlist the Terrorist Screening Dataset or "TSDS." But given the deluge of acronyms in this case, the Court declines to pile on another one and instead refers to the TSDS simply as "the watchlist."

[4] *Id.* at 2.

agency with "a reasonable suspicion that [an] individual is a known or suspected terrorist" can send a nomination to the National Counterterrorism Center ("NCTC") for that individual's inclusion on the watchlist.[5] The NCTC maintains a terrorist database and "serves as the primary organization ... for analyzing and integrating all intelligence ... pertaining to terrorism."[6] After the NCTC reviews a nomination, the TSC also reviews the nomination. Once an individual is on the watchlist, the Transportation Security Administration ("TSA")—an entity within DHS—takes the reins. Specifically, the TSA sets up shop in airports and "compar[es] passenger information to the ... terrorist watchlist."[7] If a person is on the watchlist, TSA agents may subject him to enhanced screening or deny him admittance to the airport's "sterile area" altogether.[8]

The watchlist has several subset lists, and placement on them is contingent on "heightened substantive derogatory criteria."[9] Two subsets are relevant here. First, the Selectee List consists of individuals who may receive heightened screening at airports. "[T]he criteria for inclusion on the Selectee List are not public."[10] Second, the No-Fly List consists of individuals who may not board flights over United States airspace. The criteria for inclusion on the No-Fly List are public.

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[5] *Id.* at 21.

[6] *Id.*

[7] 49 U.S.C. § 44903(j)(2)(C)(ii).

[8] Doc. No. 91 at 74. "Sterile" is only a term for security. Medically, airports are anything but sterile.

[9] Doc. No. 90 at 12.

[10] Doc. No. 91 at 23.

B. Redress Procedures

A person who suspects he's on the watchlist may file a "Traveler Inquiry Form" with the TSC, describing his "experience[ ]" and "provid[ing] any comments or additional information that [he] deem[s] relevant to the inquiry, including any exculpatory information."[11] The TSC then reviews that information and "make[s] a new determination as to whether the individual continues to satisfy the standard for inclusion in the [watchlist]."[12]

But the TSC leaves the passenger in the dark. Specifically, the TSC generally doesn't divulge whether a person is on the watchlist. Consequently, the TSC concludes the redress process by providing the passenger with a cryptic statement that it "ha[s] made any corrections to records that [its] inquiries determined were necessary."[13] And a passenger can't infer his placement on the watchlist from his enhanced screening by the TSA because passengers may experience enhanced screening for a variety of reasons, many of which have nothing to do with the watchlist.

That secrecy largely vanishes for passengers on the No-Fly List. In 2014, a court held that the government has to provide individuals "with notice regarding their status on the No-Fly List and the reasons for placement on that List."[14] Accordingly, when a passenger on the No-Fly List seeks redress, DHS now "inform[s] the applicant of his or her status on the [No-Fly] list"

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[11] *Id.* at 63.

[12] *Id.* at 64–65.

[13] Doc. No. 96 at 15.

[14] *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014).

and, "where possible," provides "an unclassified summary of information supporting" that status.[15]

C. The Passengers

The Passengers are United States citizens who, collectively, experienced four issues in their travels. First, some had trouble obtaining boarding passes. For instance, Allababidi and Warsame had trouble printing their boarding passes at self-serve kiosks. Likewise, Allababidi and Al-Jame, after some delays, each received a boarding pass containing an SSSS designation.[16]

Second, some alleged that they experienced enhanced screening at TSA checkpoints. For instance, TSA agents asked Al-Jame "to take off [his] shoes, [his] belt, and empty everything" in his pockets.[17] Agents then conducted a "full body search" on Al-Jame and "swabbed [his] hands."[18] Likewise, Allababidi asserts that TSA agents spent an hour "going through every single item" of his carry-on luggage.[19]

Third, federal agents interrogated some of the Passengers. For instance, when Al-Jame returned from Jordan, two TSA officers "interrogated [him] about

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[15] Doc. No. 91 at 6.

[16] The TSA instructs aircraft operators to put "SSSS" (short for Secondary Security Screening Selection) on a person's boarding pass to indicate that the individual must undergo enhanced screening.

[17] *Id.* at 99.

[18] *Id.*

[19] *Id.* at 104; *see also id.* at 99 (contending that Al-Jame's "carry-on bag was searched extensively and swabbed"); *id.* at 128, 136 (contending that Sbyti and Warsame similarly received "extra screening").

[his] trip [and] ... [his] life."[20] Similarly, when Allababidi returned from Mexico, "agents asked [him] [a] bunch of questions."[21]

Fourth, agents denied some of the Passengers boarding altogether. For instance, on multiple occasions, agents "barred [Kovac] from boarding the plane" or did "not allow[ ] [him] to get a boarding pass."[22] Although the Government later confirmed that Kovac was on the No-Fly List, it has since removed him from that list.

D. Procedural Posture

Initially, the Passengers brought claims under the Due Process Clause, the Equal Protection Clause, the Non-Delegation Doctrine, and the Administrative Procedure Act ("APA"). But the Court has whittled the case down.

First, the Court dismissed the Passengers' equal-protection and non-delegation claims.[23] Further, the Court dismissed the Passengers' due-process claims but only to the extent the Passengers alleged a reputational liberty interest.[24] Second, upon learning that the Government removed Kovac from the No-Fly List, the Court dismissed Kovac's due-process claims to the extent he alleged a liberty interest in the right to travel.[25] Third, the Court dismissed the Passengers' due process claims to the extent the Passengers

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[20] *Id.* at 99.

[21] *Id.* at 104.

[22] Doc. No. 96 at 12 (cleaned up); *see also* Doc. No. 91 at 93 (contending that Al-Jame that he "was denied flight boarding"). The Government eventually allowed Al-Jame to fly.

[23] *See* Doc. No. 12 at 55–56 (hereinafter *Kovac I*).

[24] *Id.* at 55.

[25] *See* Doc. No. 43 at 10 (hereinafter *Kovac II*).

alleged a "liberty interest in nonattainder," there-by terminating the Passengers' sole remaining due-process theory.[26] Fourth, to resolve the remaining APA claims, the Court allowed the Government to file portions of the administrative record "under seal and for *ex parte, in camera* review only."[27]

Consequently, only the APA claim remains. The Passengers aver that the watchlist violates the APA in three ways. First, under the major-questions doctrine, they contend that Congress never authorized the Government to create or maintain a watchlist. Second, they argue that their supposed placement on the watchlist is arbitrary and capricious because the government had no reasonable basis for that placement. Third, they contend that the redress process is arbitrary and capricious because it deprives passengers of a meaningful opportunity to correct erroneous information.

E. Standard of Review

A court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[28] "A decision is arbitrary or capricious only when it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[29] "This narrow standard of review does not seek the court's independent judgment" but rather "asks only whether the

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[26] *See* Doc. No. 57 at 12 (hereinafter *Kovac III*).

[27] Doc. No. 81 at 12 (hereinafter *Kovac IV*).

[28] 5 U.S.C. § 706(2)(A).

[29] *Yogi Metals Grp., Inc. v. Garland*, 38 F.4th 455, 458 (5th Cir. 2022) (cleaned up).

agency engaged in reasoned decision making based on consideration of the relevant factors."[30]

APA claims may only seek equitable relief and get tried to judges—not juries. The Court's review is limited to the administrative record,[31] rendering the Court akin to an appellate tribunal over the agency.[32] What courts would consider to be fact issues in a non-APA case they consider to be legal issues in an APA case, so summary judgment is the appropriate mechanism for a district court to resolve an APA claim.[33] Because both sides moved for summary judgment, the Court can resolve the remaining claim here.

II. Analysis

The Court considers the (A) major-questions doctrine arguments and (B) APA arguments.

A. Major-Questions Doctrine

"Congress enacts laws that define and ... circumscribe the power of [executive agencies] to control the

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[30] *Id.*

[31] 5 U.S.C. § 706; *see also Luminant Generation Co. v. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013) (recognizing that, in APA cases, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (cleaned up)).

[32] *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal").

[33] *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (holding that issues that appellant argued were disputes of fact precluding summary judgment were issues of law in the context of agency review), *cert. denied*, 519 U.S. 1077, 117 S.Ct. 737, 136 L.Ed.2d 676 (1997).

lives of the citizens."[34] Sometimes, however, agencies "defy Congressional limits" and aggrandize powers to themselves that Congress never granted.[35] Thankfully, a judicial bulwark helps hobble administrative power grabs: The major-questions doctrine recognizes that there are "extraordinary cases ... in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[36]

In such cases, the current patchwork of applicable caselaw obligates courts to employ a two-pronged analysis. First, a court must determine whether the agency asserted "the power to make decisions of vast economic and political significance."[37] Second, if the asserted power has significance, a court treats the power grab "with skepticism" and requires the agency to "point to clear congressional authorization permitting its action."[38] A bevy of non-exhaustive factors

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[34] *Chamber of Com. of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360, 387 (5th Cir. 2018).

[35] *Id.*

[36] *W. Virginia v. E.P.A.*, —— U.S. ——, 142 S. Ct. 2587, 2608, 213 L.Ed.2d 896 (2022) (cleaned up).

[37] *Brown v. U.S. Dep't of Educ.*, No. 4:22-CV-0908-P, 640 F.Supp.3d 644, 664 (N.D. Tex. Nov. 10, 2022) (Pittman, J.) (cleaned up), *cert. granted before judgment sub nom. Dep't of Educ. v. Brown*, —— U.S. ——, 143 S. Ct. 541, 214 L.Ed.2d 310 (2022).

[38] *Brown*, 640 F.Supp.3d at 665 (cleaned up); *see also Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, —— U.S. ——, 141 S. Ct. 2485, 2489, 210 L.Ed.2d 856 (2021). The Government contends that the law-of-the-case doctrine bars the Passengers' major-questions argument. Doc. No. 100 at 7–8. It doesn't. In rejecting the Passengers' non-delegation argument, the Court held that Congress had provided the agencies with "a general

helps determine clear authorization, including whether the agency (1) relies on a "cryptically delegated" power, (2) "lack[s] the requisite expertise," (3) "relies on an unheralded power," (4) receives a "transformative [power] expansion," (5) "fundamental[ly] revis[es]" the law, and (6) regulates subject matter "with a unique political history."[39] The Court considers each prong in turn.

1. Vast Economic and Political Significance

"[T]he economic and political significance of [an] assertion" of authority can "provide a reason to hesitate before concluding that Congress ... confer[red] such authority."[40] It's not clear why the Supreme Court requires clear congressional authorization only for *major* questions or *significant* assertions of authority. It seems like the separation of legislative power in Article I from executive power in Article II (subject to checks and balances like the presidential veto) means that agencies should always have clear congressional authorization when they act to avoid "lord[ing] it over the people without proper authority."[41] Although some questions are obviously major based on the number of people who may feel the impact of the government regulation,[42] in some cases, it's unclear why the

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policy" regarding the watchlist. *Kovac I*, at 54. But the Court didn't decide whether this is a major-questions case or whether Congress clearly authorized the agency action at issue. Accordingly, there's no "rule of law enunciated by a federal court" that necessarily dictates the Court's major-questions analysis. *Morrow v. Dillard*, 580 F.2d 1284, 1289 (5th Cir. 1978).

[39] Josh Blackman, *Gridlock*, 130 Harv. L. Rev. 241, 266 (2016) (cleaned up).

[40] *W. Virginia*, 142 S. Ct. at 2608 (cleaned up).

[41] *Chamber of Com.*, 885 F.3d at 387.

[42] *See, e.g.*, *N.F.I.B. v. O.S.H.A.*, 595 U.S. 109, 142 S. Ct. 661, 665, 662, 211 L.Ed.2d 448 (2022) (finding an agency's vaccine mandate

Supreme Court considered an agency power grab to be particularly major or significant.[43] For instance, when an agency asserted authority to regulate tariff rates, the Supreme Court stressed that that authority had "enormous importance."[44] It seems like what should be significant is not how many Americans the regulation impacts but instead that the regulation was without authorization from the people's elected representatives.[45]

In any event, the Court concludes that the watchlist has vast political significance under the Supreme Court's current formulation of the major-questions doctrine. The watchlist consists of over a million people, and the Government could place an unlimited number of people on it.[46] Further, the liberty intrusions that flow from the watchlist are significant. To maintain the watchlist, the Government "collect[s] a vast array of identifying information about an

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was a politically "significant encroachment into the lives—and health—of a vast number of employees" where it impacted "roughly 84 million workers"); *see also id.* at 667 (Gorsuch, J., concurring) ("The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance."). The Passengers contend that a major-questions case need not have economic significance—it can have purely political significance. Doc. No. 101 at 7. The Court agrees.

[43] Blackman, *supra* note 39, at 283 ("Why were the tariff rates in *MCI* and refundable tax credits in *King* so significant? Without any further explication, these seem like mundane attributes of well-worn regulatory schemes.").

[44] *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994).

[45] *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

[46] Doc. No. 91 at 41 n.9 (providing data from 2017).

individual."[47] Further, in this case alone, TSA agents executed a "full body search" on one Passenger and swabbed his carry-on bag.[48] Government agents likewise interrogated many of the Passengers. The Government can also "distribut[e] watch list information to thousands of other entities, and perhaps even impos[e] adverse immigration consequences on listees."[49] Thus, the watchlist has vast political significance.[50]

2. Clear Congressional Authorization

Regardless, Congress clearly authorized the watchlist. Each relevant consideration demonstrates that authorization.

Cryptically Delegated: Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[51] For instance, when the Food and Drug Administration ("FDA") asserted the "authority to regulate tobacco products" based on a statutory provision allowing the FDA to ensure the

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[47] Doc. No. 101 at 8. The Passengers also assert that the Government "den[ies] some access to commercial flights that cross United States airspace altogether." *Id.* But only Kovac previously claimed he was on the No-Fly List, and, since the Government removed him from that list, this Court has found that "Kovac's claims stemming from his presence on the No-Fly List are moot." *Kovac II*, at 9. Accordingly, the Court declines to consider Kovac's being barred from flights.

[48] Doc. No. 91 at 104.

[49] Doc. No. 101 at 8.

[50] Even supposing that the watchlist doesn't present a major question, the Court would reach the same result because Congress clearly authorized the watchlist.

[51] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

"safety" of certain products, the Court concluded that "Congress could not have intended to delegate a decision of such ... significance to an agency in so cryptic a fashion."[52] In short, Congress doesn't "hide elephants in mouseholes."[53]

Here, Congress clearly authorized the Government to create and maintain the watchlist. Specifically, Congress authorized "[t]he Administrator of the [TSA] and the Director of the [FBI] jointly [to] assess current and potential threats to the domestic air transportation system," including "individuals with the capability and intent to carry out terrorist ... acts."[54] And Congress authorized the TSA Administrator and FBI Director "jointly [to] decide on and carry out the most effective method for continuous analysis and monitoring of [those] security threats."[55] In short, Congress authorized the TSA and the FBI to identify potential terrorists and pick a method for monitoring them. There's nothing cryptic about that command: Congress gave clear statutory authorization for the creation and maintenance of a list enumerating suspected terrorists.[56]

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[52] *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

[53] *Whitman*, 531 U.S. at 468, 121 S.Ct. 903.

[54] 49 U.S.C. § 44904(a).

[55] *Id.*

[56] The list of Congressional commands authorizing a watchlist could go on. For instance, Congress charged the TSA with "establish[ing] procedures for notifying ... airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism." 49 U.S.C. § 114(h)(2). Congress also tasked DHS with "[p]reventing the entry of terrorists and the instruments of terrorism into the United States." 6 U.S.C. § 202(1).

Further, Congress clearly authorized the TSA's use of the watchlist during airport screening. Specifically, Congress authorized the TSA "to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security" and to "prevent [such] individual[s] from boarding an aircraft[ ] or take other appropriate action with respect to [those] individual[s]."[57] That's clear authorization for the TSA's use of the watchlist to screen airline passengers.

The Passengers disagree. First, they contend that the Government can't locate any specific language authorizing the watchlist. But the Passengers only come to that conclusion by ignoring the specific statutory language authorizing the watchlist. For instance, the Passengers cite 49 U.S.C. § 44904(a), but they omit its requirement that the TSA and FBI identify "individuals with the capability and intent to carry out terrorist ... acts."[58]

Second, the Passengers obliquely contend that Congress didn't "*expressly* authorize[ ]" the TSC or the watchlist.[59] Presumably, the Passengers are peeved that none of the statutes expressly says "watchlist" or "Terrorist Screening Center." But the test isn't whether the Government adopted Congress's preferred nomenclature in labeling its terrorism apparatuses. The test is whether Congress "authoriz[ed] an agency to exercise [the] powers" at issue.[60] And Congress clearly—not cryptically—authorized the watchlist.

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[57] 49 U.S.C. § 114(h)(3)(A)–(B).

[58] Doc. No. 96 at 21 (quoting 49 U.S.C. § 44904(a)).

[59] *Id.* at 22 (emphasis added).

[60] *Alabama Ass'n*, 141 S. Ct. at 2489 (cleaned up).

Expertise: "When an agency has no comparative expertise in making certain policy judgments, ... Congress presumably would not task it with doing so."[61] For instance, when the Occupational Safety and Health Administration ("OSHA") "ordered 84 million Americans to [ ] obtain a COVID-19 vaccine," the Supreme Court concluded that OSHA's "sphere of expertise" involves "hazards that employees face at work"—not "public health more generally."[62]

Tellingly, the Passengers ignore this consideration. The TSA's sphere of expertise includes identifying "individuals known to pose ... a risk of ... terrorism."[63] DHS has expertise in "prevent[ing] terrorist attacks."[64] And the FBI has expertise in "detect[ing] ... crimes against the United States."[65] Accordingly, the Government possesses the expertise necessary to create and maintain a terrorist watchlist.

Unheralded Power: "When an agency claims to discover in a long-extant statute an unheralded power ..., [courts] typically greet its announcement with a measure of skepticism."[66] For instance, in striking

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[61] *W. Virginia*, 142 S. Ct. at 2612–13 (cleaned up).

[62] *N.F.I.B.*, 142 S. Ct. at 665.

[63] 49 U.S.C. § 114(h)(2); *cf. Pellegrino v. United States of Am. Transp. Sec. Admin., Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 170 (3d Cir. 2019) (recognizing that "TSOs ... perform the screening of all passengers and property[ ] to protect travelers from hijackings, acts of terror, and other threats to public safety" (cleaned up)).

[64] 6 U.S.C. § 111(b)(1)(A).

[65] 28 U.S.C. § 533(1).

[66] *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (cleaned up). *But see Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (discovering a substantive right to privacy in the long-

down OSHA's vaccine mandate, several Justices found it "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind."[67] Similarly, when the Center for Disease Control and Prevention ("CDC") imposed an eviction moratorium, the Court noted that "no regulation premised on [the statutory provision at issue] has even begun to approach the size or scope of the eviction moratorium."[68]

Tellingly, the Passengers also ignore this consideration, likely because the TSC has maintained the watchlist for nearly two decades.[69] Before that, "nine [ ] agencies maintained twelve different [ ] watchlists."[70] Accordingly, the authority to create and maintain a

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extant Due Process Clause because "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees").

[67] *N.F.I.B.*, 142 S. Ct. at 666 (Gorsuch, J., concurring) ("Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals."); *see also BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Labor*, 17 F.4th 604, 619 (5th Cir. 2021) (Duncan, J., concurring) ("OSHA issued it under an emergency provision addressing workplace 'substances,' 'agents,' or 'hazards' that it has used only ten times in the last 50 years and never to mandate vaccines."); *Texas v. Becerra*, 575 F. Supp. 3d 701, 715–16 (N.D. Tex. 2021) (Kacsmaryk, J.) ("CMS itself admits that said statutory provisions have never been invoked or used to implement a vaccine mandate."), *appeal dismissed*, No. 22-10049, 2022 WL 2752370 (5th Cir. Jan. 24, 2022).

[68] *Alabama Ass'n*, 141 S. Ct. at 2489.

[69] *Kovac I*, at 3.

[70] Doc. No. 91 at 17.

watchlist is not premised on a novel reading of a long-extant statute.

Transformative Power Expansion: Courts distrust an agency's power grab if it "would bring about an enormous and transformative expansion in [the agency's] regulatory authority."[71] Transformative expansions occur where an agency has "never before" exercised such a "sweeping authority."[72] For instance, OSHA's vaccine mandate constituted a transformative expansion because it gave OSHA authority over the medical decisions of "84 million Americans," which was "simply not part of what the agency was built for."[73]

The Passengers don't attempt to argue that the watchlist is a transformative power expansion, so they've forfeited any such argument. On the arguments before it, the Court cannot conclude that the watchlist is a transformative power expansion. The watchlist existed for nearly two decades, and it drew from "twelve [existing] terrorist watchlists."[74]

Fundamental Revision of the Law: Where a power grab would constitute "a fundamental revision of the statute" granting the agency power, courts conclude that the asserted power "was not the idea Congress

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[71] *Util. Air*, 573 U.S. at 324, 134 S.Ct. 2427.

[72] *Florida v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1303 (11th Cir. 2021) (Lagoa, J., dissenting); *see also BST Holdings*, 17 F.4th at 619 (Duncan, J., concurring) (concluding that OSHA lacked authority to impose a vaccine mandate where "OSHA issued it under an emergency provision addressing workplace 'substances,' 'agents,' or 'hazards' that it has used only ten times in the last 50 years and never to mandate vaccines").

[73] *N.F.I.B.*, 142 S. Ct. at 665 (cleaned up).

[74] Doc. No. 91 at 17.

enacted into law."[75] For instance, when the Department of Education ("DOE") authorized "$400 billion in student loan forgiveness," the Northern District of Texas concluded that the DOE's asserted authority would effectively "rewrite title IV [ ] to provide for loan forgiveness."[76]

The Passengers ignore this consideration, and for good reason. Congress required the TSA and FBI to identify individuals "with the capability and intent to carry out terrorist ... acts" and to "carry out the most effective method for continuous analysis and monitoring of" those individuals.[77] The watchlist implements that grant of authority—it doesn't revise it.

Unique Political History: Sometimes the subject matter of an agency's asserted authority has a "unique political history" suggesting that Congress didn't grant the agency authority to regulate the matter in question.[78] For instance, when the FDA regulated tobacco products, the Court noted that Congress had "created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area."[79]

Predictably, the Passengers ignore this consideration. Congress didn't create a regulatory system for watchlists outside of the FBI, DHS, and TSA. And instead of precluding those agencies' involvement in

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[75] *MCI Telecommunications*, 512 U.S. at 231–32, 114 S.Ct. 2223.

[76] *Brown*, 640 F.Supp.3d at 666 (cleaned up).

[77] 49 U.S.C. § 44904(a).

[78] *Brown & Williamson*, 529 U.S. at 159, 120 S.Ct. 1291.

[79] *Id.* at 159–60, 120 S.Ct. 1291.

the watchlist, Congress has repeatedly ratified it. For instance, Congress directed the TSA to "compar[e] passenger information ... to the automatic selectee and no fly lists."[80] Likewise, Congress directed DHS, "in consultation with the Terrorist Screening Center, [to] design and review ... operating procedures for the collection ... of data ... in the no fly and automatic selectee lists."[81] Accordingly, the political history confirms that Congress authorized the watchlist.

In sum, while the watchlist's political significance makes it a major question, Congress clearly authorized the list and TSA's use of it. Accordingly, the Court rejects the Passengers' major-questions argument.

B. Arbitrary and Capricious Review

The Court next analyzes the Passengers' arguments that (1) their alleged watchlist placement and (2) the watchlist redress procedures are arbitrary and capricious.

1. Alleged Watchlist Placement

The Passengers maintain that there's no "reasonable basis for the Government to place them on the watch list."[82] Under arbitrary and capricious review, agencies must "articulate a satisfactory explanation for [their] action[s] including a rational connection between the facts found and the choice made."[83] The Government has filed a classified supplement to its briefing for the Court's *ex parte, in camera* review,

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[80] 49 U.S.C. § 44903(j)(2)(C)(i); *see also id.* § 44903(j)(2)(C)(v).

[81] 49 U.S.C. § 44903(j)(2)(E)(iii).

[82] Doc. No. 96 at 24.

[83] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (cleaned up).

purportedly showing that, "to the extent that one or more Plaintiffs was or is in the [watchlist] ..., any such placements were supported by evidence."[84]

After carefully considering that classified information, the Court concludes that any challenged Government action was neither arbitrary nor capricious.[85] And any agency making such a watchlist nomination did not do so "solely based on race, ethnicity, national origin, religious affiliation, or First Amendment protected activities," as the Passengers allege.[86]

Accordingly, the Court GRANTS the Government's motion for summary judgment as to any placement on the watchlist and DENIES the Passengers' motion for summary judgment as to any placement on the watchlist.

2. Redress Process

The Passengers complain that the redress process for individuals who believe they are on the watchlist does not provide such individuals "with any information about their apparent inclusion on the [watchlist]."[87] Here's why that could be relevant: Congress requires the redress process to allow passengers to "correct information contained in [a] system" referred to as "the advanced passenger prescreening system."[88] Thus, the argument goes, an

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[84] Doc. No. 90 at 21. The classified information is securely kept in a sensitive compartmented information facility—not in the Court's garage.

[85] Nothing in this opinion should be construed as confirming or denying the Passengers' status on or off the watchlist.

[86] Doc. No. 1 at 46.

[87] Doc. No. 96 at 25 (emphasis omitted).

[88] 49 U.S.C. § 44903(j)(2)(C)(iii)(I); *id.* § 44903(j)(2)(C)(i) (recognizing that the passenger prescreening system "allow[s] the [DHS] to assume the performance of comparing passenger

individual must know his watchlist status "in order for an individual to correct erroneous information" in that system.[89] The Government's failure to provide the Passengers' watchlist status, they argue, is therefore "arbitrary and capricious" in that it "entirely fail[s] to consider an important aspect of the problem."[90]

But the Government has not failed to consider the Passengers' ability to correct information in the pre-screening system. For instance, Passengers sometimes experience enhanced screening when the Government "misidentifie[s]" them because their "name is ... similar to the name of a different individual who is included in the" watchlist.[91] Accordingly, the Government directs individuals seeking redress to "produce ... at least one piece of government-issued photo identification."[92] In such cases, photo identification allows the Government to "prevent future misidentification by ... *correcting information* in the traveler's record."[93]

Further, the Government directs Passengers seeking redress to provide any "exculpatory information."[94] That too helps correct erroneous information, because the "TSC reviews th[at] ... exculpatory information ... to make a new determination as to whether the

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information ... to the automatic selectee and no fly lists, utilizing all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government").

[89] Doc. No. 96 at 25.

[90] *Motor Vehicle*, 463 U.S. at 43, 103 S.Ct. 2856.

[91] Doc. No. 91 at 64 (cleaned up).

[92] *Id.* at 63.

[93] *Id.* (emphasis added).

[94] *Id.*

individual continues to satisfy the standard for inclusion in the [watchlist]."[95]

But regardless, the Government declines to disclose watchlist status for good reason.[96] Inclusion on the watchlist hinges on "highly sensitive national security and law enforcement information."[97] Disclosure of that information could provide terrorists "with valuable insight into the specific ways in which the Government goes about detecting and preventing terrorist attacks."[98] Even "[c]onfirmation that an individual is not in the [watchlist] would be of considerable value to terrorist groups," as it would allow them "to confirm which individuals ... are more likely to evade detection and escape scrutiny."[99] Tellingly, courts have repeatedly recognized the logic of that rationale.[100]

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[95] *Id.* at 64–65.

[96] *Shrimpers & Fishermen of the RGV v. United States Army Corps of Eng'rs*, 56 F.4th 992, 996 (5th Cir. 2023) (recognizing that an agency's action is not arbitrary and capricious when the agency "articulate[s] a satisfactory explanation for its action" (cleaned up)).

[97] Doc. No. 91 at 41.

[98] *Id.*

[99] *Id.* at 43.

[100] *See, e.g.*, *Elhady v. Kable*, 993 F.3d 208, 215 (4th Cir. 2021) ("For example, if a terrorist group knew that some of its operatives were *not* in the [watchlist], it could craft a plan sending those operatives through an airport or border while helping other members avoid detection."); *Gordon v. F.B.I.*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005) ("Requiring the government to reveal whether a particular person is on the watch lists would enable criminal organizations to circumvent the purpose of the watch lists by determining in advance which of their members may be questioned."); *Wright v. Fed. Bureau of Investigation*, No. 3:20-CV-173-G-BN, 2020 WL 7345678, at *6 (N.D. Tex. Nov. 13, 2020) (Horan, M.J.) (approving, in the context of a Freedom of

In sum, the Government has implemented the congressional mandate that passengers be able to correct information in the prescreening system. But, for good reason, it does so without divulging a passenger's watchlist status. The Passengers lodge three main objections.

First, the Passengers attempt to shoot the moon, maintaining that Congress's information-correcting requirement entitles them to even more information—in particular, all "information [ ] in the [terrorist] databases" concerning the Passengers.[101] But that argument improperly conflates the *prescreening system* with the Government's *terrorism database*. The prescreening system—the information of which the Passengers are entitled to correct—is a system that "compar[es] passenger information ... to the automatic selectee and no fly lists, utilizing all appropriate records in the ... terrorist watchlist."[102] Because the Government doesn't import the entirety of the NCTC's terrorism database into the prescreening system, Congress didn't provide the Passengers free rein to snoop through the terrorist databases.

Second, the Passengers cite *Latif v. Holder*, which held that the Government's redress procedure was arbitrary and capricious as applied to individuals on

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Information Act request, the FBI's refusal to "confirm[ ] [ ]or den[y] the existence of any watchlist information, because the mere acknowledgment of the existence or non-existence of responsive records would trigger harm"), *report and recommendation adopted*, No. 3:20-CV-0173-G-BN, 2020 WL 7344707 (N.D. Tex. Dec. 14, 2020) (Fish, J.).

[101] Doc. No. 96 at 25.

[102] 49 U.S.C. § 44903(j)(2)(C)(i).

the "Mo–Fly [*sic*] List."[103] That case is inapposite. To begin, *Latif* erroneously conflated the prescreening system—which passengers are entitled to correct—and the terrorism databases—which passengers have no statutory right to correct.[104] Moreover, the court didn't mention any governmental explanation for its nondisclosure of an individual's No-Fly List status. In contrast, the Government here provides swaths of declarations explaining its rationale. Accordingly, the Court declines to follow *Latif*.

Third, the Passengers note that the Government informs passengers seeking redress of their No-Fly List status. Because the congressional mandate for a redress procedure is the same for individuals on the No-Fly List and the Selectee List, the argument goes, the Government's disclosure to individuals on the No-Fly List "highlights the illegality of its refusal to provide other affected passengers with any information at all."[105]

But the implied proposition in the Passengers' argument is that an agency must afford every subset of individuals the same level of redress procedures. Tellingly, the Passengers provide no precedent demanding such strict homogeneity. That's probably because they can't. The APA only requires courts to confirm that an agency has "a satisfactory explanation for its

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[103] 28 F. Supp. 3d 1134, 1163 (D. Or. 2014).

[104] *Id.* (requiring that a passenger be able "to correct erroneous information in the government's *terrorism databases*" (emphasis added)).

[105] Doc. No. 96 at 26.

action."[106] The Court declines to impose a one-way ratchet on the Government.

Moreover, the Government has provided multiple satisfactory explanations as to why it alerts individuals of their No-Fly List status. As courts have noted, "[t]he No Fly List is the most restrictive category" because individuals in that category may not board "flights through U.S. airspace."[107] Thus, the Government explains that the "enhanced procedures" for those on the No-Fly List are "due to the substantially greater imposition that placement on the No Fly List entails for affected persons."[108]

Additionally, the Government notes that "a traveler may receive heightened screening for multiple reasons," so heightened screening doesn't effectively alert the screened passenger that he is on a watchlist.[109] But when the Government bars a person from boarding an airplane altogether, the cat's out of the bag. The barred passenger all but knows he's on the No-Fly List, so there's little point in the Government keeping up a charade when the barred passenger seeks redress. In contrast, "[t]he majority of passengers designated for enhanced security screening are so designated for reasons other than [watchlist] status," so a person subject to enhanced screening wouldn't know whether the Government suspects his involvement with terrorist activities.[110]

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[106] *Shrimpers*, 56 F.4th at 996 (cleaned up).

[107] *Elhady*, 993 F.3d at 214.

[108] Doc. No. 100 at 17.

[109] Doc. No. 100 at 17.

[110] Doc. No. 91 at 71.

Because the Government's redress procedure is not arbitrary and capricious, the Court GRANTS the Government's motion for summary judgment as to the Passengers' APA claim concerning redress procedures and DENIES the Passengers' motion for summary judgment as to the Passengers' APA claim concerning redress procedures.

III. Conclusion

The Court DENIES the Passengers' motion for summary judgment and GRANTS the Government's motion for summary judgment.

IT IS SO ORDERED this 9th day of March, 2023.