No. 21-

IN THE

Supreme Court of the United States

KHALID M. TURAANI,

Petitioner,

v.

CHRISTOPHER WRAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Privacy Act prohibits unlawful disclosures by government officials to those with no need to know. Petitioner Khalid Turaani brings this action in response to statements by federal officers to third parties that he is the subject of a federal investigation and that "we don't like the company he keeps." These disclosures have a coercive chilling effect on Mr. Turaani's right to make lawful constitutional purchases, including exercising his Second Amendment rights, and also damage his reputation in the community.

Mr. Turaani brought suit in 2017 for infringement on his Second Amendment rights. Dismissing his Second Amendment claims, the district court noted then that "Turaani is correct that the FBI agent violated 28 C.F.R. § 25.8(g)(2) [the Privacy Act] by disclosing that Turaani was the target of an FBI investigation." Mr. Turaani next brought suit under the Privacy Act in 2019 after more disclosures. The district court dismissed his Privacy Act claims, applying the same analysis the prior court had for his Second Amendment claims. The Sixth Circuit affirmed.

The question presented is:

Whether the standing analysis for Privacy Act improper disclosure claims requires determining if the plaintiff sufficiently alleged an "adverse effect" to satisfy traceability, as recognized by previous decisions of this Court, as opposed to requiring allegations of a "command" or "compulsion." If so, does a plaintiff demonstrate that adverse effect by alleging that the government's improper disclosures produced a determinative or coercive effect on a third party who refuses to do business with the plaintiff?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Khalid Turaani was the Plaintiff in the district court case in this matter, as well as the Appellant before the Sixth Circuit. Defendants in the prior proceedings were Christopher Wray, in his official capacity as Director of the Federal Bureau of Investigation, Charles H. Kable, IV, in his official capacity as Director of the Terrorist Screening Center, and Jason Chambers in his individual capacity. Respondents at this level of the proceeding remain the same.

RELATED CASES

Turaani v. Wray, No. 20-1343, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 18, 2021.

Turaani v. Wray, No. 19-11768, U.S. District Court for the Eastern District of Michigan, Southern Division. Judgment entered Feb. 20, 2020.

Turaani v. Sessions, No. 17-14112, U.S. District Court for the Eastern District of Michigan, Southern Division. Judgment entered June 7, 2018.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Page

CIRCUIT COURT CASES

Page

Page

DISTRICT COURT CASES

STATUTES

Page

RULES

REGULATIONS

Page

SECONDARY SOURCES

Petitioner Khalid M. Turaani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at *Turaani v. Wray*, 988 F.3d 313 (6th Cir. 2021). Pet. App. 1a-8a. The district court's opinion is reported at *Turaani v. Wray*, 440 F. Supp. 3d 733 (E.D. Mich. 2020). Pet. App. 9a-21a. The prior district court opinion is reported at *Turaani v. Sessions*, 316 F. Supp. 3d 998 (E.D. Mich. 2018). Pet. App. 22a-49a.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on February 18, 2021. Per this Court's Order on March 19, 2020 extending the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment, Petitioner timely filed this Petition on July 16, 2021, within 150 days of that judgment. The jurisdiction of this Court is proper under 18 U.S.C. § 1254(1).

PERTINENT PROVISIONS

CONSTITUTIONAL PROVISION

Article III, Section 2 provides in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their

> authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party . . . .

U.S. CONST. art. III, § 2.

STATUTORY PROVISIONS

The Privacy Act of 1974, 5 U.S.C. § 552a(g)(1) provides in relevant part:

> Civil Remedies. Whenever any agency
>
> ***
>
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> > the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1).

Title 28, Section 25.8 of the Code of Federal Regulations, The National Instant Criminal Background Check System, provides in relevant part:

System safeguards.

> (g) The following precautions will be taken to help ensure the security and privacy of NICS information when FFLs contact the NICS Operations Center:
>
> ***
>
> The NICS Representative will only provide a response of "Proceed" or "Delayed" (with regard to the prospective firearms transfer), and will not provide the details of any record information about the transferee. In cases where potentially disqualifying information is found in response to an FFL query, the NICS Representative will provide a "Delayed" response to the FFL. Follow-up "Proceed" or "Denied" responses will be provided by the NICS Operations Center during its regular business hours.

28 C.F.R. § 25.8(g)(2).

INTRODUCTION

This case turns on an individual's fundamental right to privacy free from government interference and unlawful disclosures, as the Privacy Act protects. Petitioner Khalid Turaani is a law-abiding U.S. citizen, yet government

agents have repeatedly made improper disclosures to third parties that he is under federal investigation, and that the government "doesn't like the company he keeps," in violation of the Privacy Act. These violations interfere with his lawful exercise of his constitutional rights and harm his reputation in the community.

Mr. Turaani attempted to exercise his constitutional right to purchase a firearm, in both 2017 and 2018. Each time, his purchase attempt resulted in a three- day delay instruction. During those three days in 2017, an FBI agent called the seller's place of business and informed the seller that Mr. Turaani was the subject of a federal investigation. That seller then refused to sell Mr. Turaani the firearm, specifically stating that he was not going to sell a gun to someone after an FBI agent called and said the person is under investigation. During the three-day window in 2018, an FBI agent approached the second seller at the seller's home, and volunteered that "we don't like the company he [Mr. Turaani] keeps." Unsurprisingly, the second seller also chose not to sell a firearm to Mr. Turaani, despite his undisputed qualifications to purchase one.

Mr. Turaani brought suit after the first incident, alleging infringements of his Second Amendment rights. The Honorable Gershwin A. Drain dismissed those claims but noted that Mr. "Turaani is correct that the FBI agent violated 28 C.F.R. § 25.8(g)(2) by disclosing that Turaani was the target of an FBI investigation."[1] After the second incident, Mr. Turaani brought this action for violations of the Privacy Act. The district court and

1. *Turaani v. Sessions*, 316 F. Supp. 3d 998, 1010 (E.D. Mich. 2018). Pet. App. 37a- 38a.

Sixth Circuit both held that Mr. Turaani did not meet the standard traceability requirements to establish standing, applying the same test Judge Gershwin Drain had to his Second Amendment claim, without discussion of the specific requirements under the Privacy Act itself. The lowers courts' rulings grant the government a free pass to disseminate a person's confidential information to third parties with no consequences, even when those disclosures infringe on a person's constitutional rights. The lower courts' holdings disregard the stated protections afforded to individuals by an Act of Congress, and provide no boundaries on governmental disclosure of private and unsubstantiated claims made by federal officials.

STATEMENT OF THE CASE

I. Improper Disclosure Under the Privacy Act

Congress passed the Privacy Act of 1974 to "protect the privacy of individuals identified in information systems maintained by Federal agencies." *Doe v. Chao*, 540 U.S. 614, 618 (2004); *see also* 5 U.S.C. § 552a(e)(10). Under the Act, agencies must establish safeguards to protect from disclosure of records that "could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 294- 95 (2012). The Act not only "gives agencies detailed instructions for managing their records[, but also] provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements." *Chao*, 540 U.S. at 618.

Subsection (g)(1)(D) is the "catch-all" provision of the Privacy Act, which provides a cause of action when an agency fails to comply "in such a way as to have an adverse effect on the individual." 5 U.S.C. § 552a(g)(1)(D). To maintain a suit for improper disclosure under this catch-all provision, a plaintiff must demonstrate (1) agency disclosure; (2) of a "record" contained in a "system of records"; (3) that hadan "adverse effect" on the plaintiff; and that it (4) was "willful or intentional." *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992) (citing § 522a(g)(1)(D)); *Chao*, 540 U.S. at 624- 25 (explaining that "adverse effect" is "a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing").

II. NICS Background Checks and the Stated Limits

To facilitate the background checks needed for individuals to purchase firearms, the FBI manages the National Instant Criminal Background Check System ("NICS") and the NICS Index. 18 U.S.C. § 922(t)(1); 28 C.F.R. § 25.3. The NICS Index "contain[s] information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm." 28 C.F.R. § 25.2.

In response to a background check, the government may only issue dealers one of the three following directives: "proceed," "denied," or "delayed." *Id.* § 25.6(c)(iv). It may not disclose the details of a prospective buyer's record or indicate why NICS issued its directive. *Id.* §§ 25.6(d), 25.8(g)(2) (prohibiting NICS from "provid[ing] the details of any record information about the transferee"). When a check results in a "delayed" directive, the sale may not

proceed for three business days. If NICS makes no final determination regarding the prospective purchaser's eligibility to purchase a firearm during that three days, the status automatically defaults to "proceed." 18 U.S.C. § 922(t)(1)(B)(ii). The dealer may then proceed with the sale. *Id.*

NICS began utilizing government watchlist records in 2004.[2] Since then, all NICS searches with potential or valid matches to government watchlist records automatically receive a "delayed" directive, to give NICS additional time to research whether the prospective buyer should be prohibited from purchasing a firearm under § 922(g). Inclusion on a government watchlist is not one of the disqualifying factors under § 922(g), or any federal law.[3] *Id.*

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2. In 2003, the U.S. government created the Terrorist Screening Database, which contains identifying information of persons designated by one or more agencies as known or suspected terrorists, or as having affiliations with any persons designated by one or more agencies as known or suspected terrorists. *Overview of the U.S. Government's Watchlisting Process and Procedures as of January 2018* at 3-4. According to the Terrorist Screening Center, nomination for inclusion in the watchlist must meet only the very vague and subjective standard of "an individual who is reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on articulable and reasonable suspicion." Aff. of Christopher Piehota, *Mohamed v. Holder*, Case No. 1:11-cv-0050, Dkt. No. 22-1 at 6 n.5 (E.D. Va. June 3, 2011). This standard does not require probable cause, reasonable suspicion or any criminal convictions. *Id.*

3. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-703T, *Terrorist Watchlist Screening: FBI Has Enhanced its Use of Information from Firearm and Explosives Background Checks to Support Counterterrorism Efforts* at 1 (May 5, 2010); *see also*

As with all "delayed" directives, if NICS makes no further determination about a person who may be on a government watchlist, the status automatically rolls to "proceed." *Id.*

III. The Government Improperly Disclosed Confidential Information to Third Parties Regarding Mr. Turaani

Mr. Turaani is a United States citizen of Palestinian national origin. Pet. App. 25a, 45a. He has no criminal convictions, history of mental illness, or otherwise disqualifying criteria that would prevent him from purchasing a firearm.[4] He is a prominent figure in his community and abroad, and involved in several nonprofit organizations that assist the Palestinian American and Muslim communities.[5]

U.S. GOV'T ACCOUNTABILITY OFF., *Update on Firearm and Explosives Background Checks Involving Terrorist Watchlist Records* at 1 (Mar. 7, 2016) ("Under federal law, there is no basis to automatically prohibit a person from possessing firearms or explosives because they appear on the terrorist watchlist"). In June 2016, the U.S. Senate voted down two proposed gun control measures seeking to limit or ban the sale of firearms to persons on the terrorist watchlist. *See* Shield Act, S. Amdt. 4749, 114th Con. (2016); S. Amdt. 4720, 114th Cong. (2016); *see also* 162 CONG. REC. 98, S4346 (daily ed. June 20, 2016) (statement of Sen. Chuck Grassley) ("If we actually had a list that contained only actual terrorists, I would gladly support [the gun measure]. What we really have are these flawed watch lists that contain errors and are at the same time both under- and over-inclusive").

4. Pl.'s Original Compl. ¶¶ 17-27, ECF No. 1.

5. *Id.* at ¶ 37.

In June 2017, Mr. Turaani attempted to purchase a firearm from a seller in his community. *Id*. at 25a. Many individuals in Mr. Turaani's community regularly visit this same seller, including several with whom Mr. Turaani does business.[6] When Mr. Turaani attempted his 2017 purchase, the NICS background check returned a "delayed" response. *Id*. at 26a-27a. An individual then immediately called the seller, while Mr. Turaani was still at the counter, and identified himself as an FBI agent. *Id*. The individual on the phone informed the seller that Mr. Turaani was "under active government investigation" and not to sell him the firearm at that time.[7] Despite the NICS status automatically defaulting to "proceed" after three days, the seller informed Mr. Turaani that he was not comfortable making any sales to Mr. Turaani because an FBI agent had told him Mr. Turaani was under federal investigation. *Id*. at 27a. Mr. Turaani has returned to that seller's place of business for target practice, and has seen that the seller attached a large note in black marker to Mr. Turaani's paperwork on file which instructs any store clerk coming into contact with Mr. Turaani not to sell him a firearm under any circumstance.[8]

In August 2018, Mr. Turaani again attempted to purchase a firearm from a different local firearms seller. *Id*. at 2a. As before, the NICS background check produced a "delayed" response. *Id*. The seller advised Mr. Turaani to contact him again after the three-day period, specifically stating he would sell Mr. Turaani the firearm, since the

6. *Id*. at ¶71.

7. *Id*. at ¶64.

8. *Id*. at ¶70.

delayed notification is something the seller had seen before. *Id.*

When Mr. Turaani followed up at the end of the week, however, the seller informed him that FBI agent Jayson Chambers showed up at the seller's place of business (which was also the seller's residence) a day after the attempted purchase. *Id.* at 3a. The FBI agent told the seller that the FBI "does not like the company that [Mr. Turaani] keeps." *Id.* at 2a. The agent also showed the seller a photograph of Mr. Turaani and another individual who appeared to be of Middle Eastern descent. *Id.* The agent left his contact information and asked the seller to pass it along to Mr. Turaani. *Id.* at 11a. The agent's communications to the firearm seller exceeded the permissible scope of disclosures under the relevant regulations. 28 C.F.R. §§ 25.6(d), 25.8(g)(2). Because of the agent's disclosures, the seller refused to sell Mr. Turaani a firearm, stating that he was no longer comfortable doing so after the agent's visit and statements about Mr. Turaani. Pet. App. 3a.

The government's improper disclosures damaged Mr. Turaani's Second Amendment right to bear arms, his privacy interests, his reputation and chosen employment, and caused him emotional distress.[9]

IV. The District Court Dismissed Mr. Turaani's Suit Without Considering the Specific Claims Raised Here

On June 13, 2019, Mr. Turaani filed this lawsuit, alleging that Respondents Wray and Kable violated the

9. *See generally id.*

Privacy Act; the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); and Mr. Turaani's liberty interest in his reputation under the stigma- plus doctrine. Pet. App. 9a. Mr. Turaani further alleged that Respondent Chambers violated 42 U.S.C. § 1981. *Id.* In his Complaint, Mr. Turaani sought injunctive and declaratory relief, actual damages, and the $1,000 statutory award.[10] Respondents moved to dismiss all claims under Rule 12(b)(1) for lack of standing and Rule 12(b)(6) for failure to state a claim. *Id.* at 10a. Respondents' standing argument relied on the assertion that Mr. Turaani failed to meet the fairly-traceable requirement because his injury was caused by the independent actions of a third party, namely the firearm seller.

The traceability element "looks to whether the defendant's actions have a 'causal connection' to the plaintiff's injury." *Id.* at 4a (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Where a plaintiff's injury is indirectly caused by a third party, the defendant's actions must have "had a 'determinative or coercive effect' upon the third party" to satisfy the traceability requirement. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

The district court granted the motion to dismiss all claims on the grounds of lack of standing, concluding that Mr. Turaani failed to establish traceability because he did not allege a "determinative or coercive" government action inhibiting his ability to purchase a firearm. *Id.* at 20a. In its ruling, the district court did not undertake an individualized standing analysis for each claim. And it did not consider the "adverse effects" Mr. Turaani

10. *See generally* Pl.'s Original Compl., ECF No. 1.

alleged under the Privacy Act, including violations of his Second Amendment rights, invasion of privacy, harm to his reputation and chosen employment, and emotional distress.[11]

V. The Sixth Circuit Affirmed the District Court, Also Ignoring the Specific Nature of Privacy Act Disclosure Claims

The Sixth Circuit affirmed the dismissal, also holding that Mr. Turaani did not meet the second element of standing—traceability. Pet. App. 7a-8a. According to the circuit court, Mr. Turaani's injuries "result[ed] from [a] third party's voluntary and independent actions" that were not "cajole[d], coerce[d], [or] command[ed]" by the government defendants. *Id.* at 6a (quoting *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017)).

The Sixth Circuit purportedly distinguished this case from *Parsons v. U.S. Department of Justice*, where the DOJ labeled the fans of a certain musical group as a "gang," causing local and state law enforcement to harass them. 801 F.3d 701, 714 (6th Cir. 2015); Pet. App. at 6a-7a. The plaintiffs in *Parsons* met the traceability element "because of the cooperative relationship between local and [federal] law enforcement" that may cause local law enforcement to "feel compelled to follow the lead of federal law enforcement and take action pursuant to information provided by the Department of Justice." *Id.* (quoting *Vapor Tech. Ass'n v. U.S. Food & Drug Admin.*, 977 F.3d 496, 502 (6th Cir. 2020) (per curiam)). According to the

11. The district court concluded that Mr. Turaani sufficiently alleged an injury in fact. Pet. App. 13a.

court, "the tie between local and federal law enforcement is closer than . . . the relationship between independent firearms dealers and FBI agents." *Id.* at 7a. This conclusion ignores the direct violation of the Privacy Act as pled by Mr. Turaani in thislawsuit. The Sixth Circuit's conclusion also ignores a myriad of federal laws relating to firearm sales and the federally established connection between sellers and the FBI through NICS background checks and directives. This conclusion further ignores the practical chilling effect on any seller of an FBI agent calling or appearing, and making statements that Mr. Turaani was under investigation or that the FBI "[doesn't] like the company he keeps." And, the reasoning ignores the additional matters raised by Mr. Turaani, including his reputation in the community and right to work in his chosen profession in his community unhindered by government interference.

Like the district court, the Sixth Circuit did not evaluate whether Mr. Turaani's alleged injuries constituted "adverse effects" to meet the traceability requirement for an improper disclosure claim under the catch-all provision unique to the Privacy Act, the statute under which he brought his claims in this lawsuit. This petition follows.

REASONS FOR GRANTING THE PETITION

In taking an overly narrow view of Article III standing, the lower courts departed from the usual course of judicial proceedings and undermined the Privacy Act's remedy for improper government disclosures. To demonstrate Article III standing at the pleadings stage, plaintiffs must allege (1) an injury in fact that is (a) concrete and particularized

and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of, meaning the injury is "fairly traceable" to the government's action; and (3) the injury can be redressed by a favorable decision.[12] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also Bennett v. Spear*, 520 U.S. 154, 169 (1997) (holding that the plaintiff had standing to challenge an agency environmental opinion where the opinion "play[ed] a central role in [another] agency's decisionmaking"). In the context of Privacy Act claims, this Court recognizes that the "adverse effect" element "acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing." *Chao*, 540 U.S. at 624-25. The unique nature of Privacy Act improper disclosure claims demands that courts apply the adverse effects analysis to determine standing and permit plaintiffs to "open the courthouse door." *Chao*, 540 U.S. at 625.

The Sixth Circuit did not consider the adverse effects analysis to determine standing. Nor did it recognize that the very purpose of improper disclosure claims under the Privacy Act is to prevent the government from disseminating confidential information to third parties, because the dissemination itself causes adverse effects and actual damages. Holding that a foreseeable action of third parties in response to the government's disclosure breaks the chain of causation renders the Privacy Act's

12. This Court in *Lujan* noted that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." 504 U.S. at 561 (internal quotation marks omitted).

protection against disclosures worthless. This cannot be what Congress intended.

I. A Circuit Split Exists as to Whether Adverse Effects Determine Standing in Privacy Act Disclosure Claims

The Sixth Circuit's ruling deepens an existing circuit split as to whether a plaintiff's allegations of "adverse effects" under the catch-all provision of the Privacy Act for improper disclosure claims meet the traceability element of standing. This Court's holding in *Doe v. Chao* provides guidance. In *Chao*, the government unlawfully disclosed the plaintiff's social security number after he filed for workers' compensation benefits. 540 U.S. at 616-17. The primary question for this Court was whether plaintiffs must prove actual damages to qualify for the Privacy Act's statutory award of $1,000. *Id.* at 616. This Court answered yes, holding that a plaintiff must allege more than "merely [] an intentional or willful violation of the Act providing some adverse effect." *Id.* at 626-27. To qualify for the $1,000 award, the plaintiff must suffer actual damages. *Id.* at 627. In parsing the Act's language, the Court further explained that its interpretation did not

> deprive the language recognizing a civil action by an adversely affected person of any independent effect, for it may readily be understood as having a limited but specific function: the reference in § 552a(g)(1)(D) to "adverse effect" acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a

> civil action without suffering dismissal for want of standing to sue.

Id. at 624-25 (internal citation omitted). *Chao's* explanation of "adverse effect" as a term of art identifying standing cites to and comports with this Court's prior holding in *Director, Office of Workers' Compensation v. Newport News Shipbuilding & Dry Dock Co.*, as well as several statutes using that same language to describe an "adversely affected" party as one entitled to judicial review. 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts"). Therefore, under this Court's precedent, "an individual subjected to an adverse effect has injury enough to open the courthouse door" and therefore has standing to sue under the Privacy Act. *Chao*,540 U.S. at 625.

Four circuits—the First, Third, Fifth, and Eleventh—follow the same reasoning as this Court articulated in *Chao*, and read the Privacy Act to include a standing requirement based on the plaintiff's alleged adverse effects. The Sixth Circuit, along with the Fourth Circuit, ignores the statutory text and this Court's precedent, creating a conflict with the other circuits.[13]

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13. The remaining circuits (the Second, Seventh, Eighth, Ninth, Tenth and D.C. Circuits) have taken no position on this precise issue (*but see Tozzi v. Dep't of Health & Hum. Servs.*, 271 F.3d 301, 309 (D.C. Cir. 2001) (requiring a showing only that government action was a "substantial factor" motivating third party action in a case brought under the APA challenging HHS's designation of a product as a "carcinogen") and *Mendia v. Garcia*,

A. Four circuits apply the reasoning in *Chao* and consider adverse effects to decide whether the plaintiff has standing

Applying the reasoning in *Chao* and the statutory interpretation of "adverse effects" in other statutes, four circuits expressly consider the plaintiff's alleged adverse effects to determine Article III standing.

In *Quinn v. Stone*, the Third Circuit considered whether there were disputed issues of fact regarding the adverse effect element. 978 F.2d at 135-36. While *Quinn* actually preceded *Chao*, it applied the same logic to find that the plaintiffs had standing. The husband-wife plaintiffs in *Quinn* alleged that the Letterkenny Army Depot improperly disclosed their private information while investigating whether the couple had illegally obtained two sets of hunting licenses. *Id.* at 130-31. The plaintiffs alleged adverse effects in the form of damage to their reputations and occupational losses, emotional anguish, and stress-related health issues resulting from the government's disclosure. *Id.* at 131. The court explained that "the adverse effect requirement of (g)(1)(D) is, in effect, a standing requirement" and held that the plaintiffs' "allegations [were] sufficient to satisfy the Act's adverse effect standing requirement." *Id.* at 135-36 (noting that emotional distress and embarrassment can be sufficient to confer standing); *see also Campeau v. Soc. Sec. Admin.*, 575 F. App'x 35, 38 (3d Cir. 2014) (following

768 F.3d 1009, 1013 (9th Cir. 2014) ("To plausibly allege that the injury was not the result of the independent action of some third party, the plaintiff must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions")).

Chao but holding that the plaintiff's voluntary decision to travel to the agency headquarters to obtain records did not constitute an adverse effect).

Three other circuits follow the rationale of *Quinn* and *Chao*. In *Speaker v. U.S. Department of Health & Human Services Centers for Disease Control & Prevention*, the Eleventh Circuit considered whether a tuberculosis patient had standing to bring improper disclosure claims under the Privacy Act. 623 F.3d 1371, 1382 (11th Cir. 2010). In that case, the plaintiff alleged that CDC officials disclosed his illness and quarantine status to law enforcement, news media, and the general public without his consent. *Id*. at 1375. The court held that the plaintiff alleged multiple injuries to satisfy the adverse effect standing requirement, including reputational damage, emotional distress, and strain on his marriage. *Id*. at 1382-83 (citing *Chao*, 540 U.S. at 624). And the First Circuit, following *Quinn*, concluded that in addition to alleging the willful or intentional agency disclosure of a record contained "in a system of records," a plaintiff asserting improper disclosure under the Privacy Act must show an "adverse effect." *Orekoya v. Mooney* 330 F.3d 1, 5 (1st Cir. 2003), *abrogated on other grounds by Chao*, 540 U.S. at 618. Further, the adverse effect "requirement contains two components: (i) an adverse effect standing component (ii) a causal nexus between the disclosure and the adverse effect." *Id*. (citing *Quinn*, 978 F.2d at 131). The Fifth Circuit in *Sweeney v. Chertoff* applied the same logic, though it came to a different conclusion based on the facts before it. 178 F. App'x 354, 357-58 (5th Cir. 2006) (holding that the plaintiff's lost pay resulted from his own insubordination and was therefore not fairly traceable to the government's violation of the Privacy Act).

B. The Sixth Circuit's decision below and the Fourth Circuit do not consider the adverse effects in deciding standing

The Sixth Circuit did not consider Mr. Turaani's alleged adverse effects as part of its standing analysis. Instead, it jumped to the generic standing analysis and ignored the adverse effects altogether.[14]

The decision below renders the adverse effect element of a Privacy Act claim for improper disclosure irrelevant, despite this Court's and other circuits' recognition that a plaintiff alleging "adverse effects" arising from the government's disclosure satisfies the injury-in-fact and causation requirements for standing. *See, e.g.*, *Chao*, 540 U.S. at 624; *Quinn*, 978 F.2d at 135 (noting that "the adverse effect requirement of (g)(1)(D) is, in effect, a standing requirement").

Under the Sixth Circuit's reasoning, a plaintiff can only bring an improper disclosure claim if the government not only discloses confidential information to a third party which causes an injury, but also "cajoles, coerces, or commands" the third party to injure the plaintiff. Pet. App. 5a. The Sixth Circuit's holding effectively eliminates the "disclosure" element and replaces it with a "command" element, which is not a part of the catch-all provision nor Article III standing precedent.

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14. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (explaining that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

The Sixth Circuit is not alone. In *Beck v. McDonald*, the Fourth Circuit expressly rejected *Chao's* explanation that "adverse effect" is a term of art identifying a plaintiff who meets the injury in fact and traceability elements. 848 F.3d 262, 273 (4th Cir. 2017). The alleged disclosure in *Beck* arose out of a data breach of personal medical information. *Id*. at 266-67. In addition to arguing that the increased risk of identity theft and costs to prevent identity theft established Article III standing, the plaintiffs alleged "emotional upset" and "fear of identity theft" as adverse effects to demonstrate standing under *Chao*. *Id.* at 272-73. The Fourth Circuit rejected the plaintiffs' allegations:

> We decline to interpret dicta in *Chao* discussing the plaintiff's "conclusory allegations" that he was "torn . . . all to pieces" by the unauthorized disclosure of his social security number as support forthe proposition that bare assertions of emotional injury are sufficient to confer Article III standing.

Id. at 266-67 (holding that the risk of future identity theft and associated costs did not confer standing). In so holding, the Fourth Circuit effectively rejected this Court's conclusion in *Chao* that "an individual subjected to an adverse effect has injury enough to open the courthouse door." *Chao*, 540 U.S. at 625.

Both the Fourth and Sixth Circuit holdings strip the Privacy Act's adverse effects language of any significance to decide standing for improper disclosure claims. Because these rulings comport with neither this Court's precedent nor the purpose of the Act and conflict with rulings in multiple other circuit courts, certiorari is appropriate.

II. The Sixth Circuit Applied a Narrow View of Traceability Not Consistent with the Statute or This Court's Precedent

The Sixth Circuit's narrow interpretation of traceability leaves improper disclosure plaintiffs without a remedy any time their injuries arises out of the foreseeable reaction by a third party to disclosures by government agents with the appearance of authority. While discussing traceability, *Lujan v. Defenders of Wildlife* explained that the plaintiff's alleged injury must not be "the result of the independent action of some third party not before the court." 504 U.S. at 561. But this Court further clarified traceability based on third-party action in *Bennett v. Spear*, where a Fish and Wildlife Service ("FWS") opinion serving an "advisory function" had a "powerful coercive effect on the action agency" at issue. 520 U.S. 154, 169 (1997). This Court recognized that "[t]he action agency is technically free to disregard [FWS's opinion] and proceed with its proposed action, but it does so at its own peril," and held that the plaintiffs had standing to challenge the opinion under the Endangered Species Act and the APA. *Id.* at 170 (finding standing where plaintiff irrigation districts alleged that water restrictions recommended by the FWS opinion would "adversely affect" them). *Bennett* expressly stated that causation "doesn't require a showing . . . that the defendant's actions are the very last step in the chain of causation" when the defendant's actions "produce [a] determinative or coercive effect upon the action of someone else." *Id.* at 169. The words used in *Bennett* do not require that the government action be a command or directive to a third party, only that it produce a determinative or coercive effect on a third party. *Id.*

Mr. Turaani alleged that after FBI agents twice improperly disclosed information suggesting Mr. Turaani is on a government watchlist or has committed illegal acts, the sellers felt uncomfortable proceeding with the sales.[15] Both sellers acknowledged their previous intent to sell Mr. Turaani the firearms, and could have done so based on the NICS "delay" automatically reverting to "open" status. Pet. App. 2a-3a, 26a-27a. Similar to *Bennett*, the sellers were "technically free to disregard" the FBI agents' disclosures and sell the firearms to someone whom the FBI suggested has terrorist ties. 520 U.S. at 170. But the agents' conduct produced a coercive effect, and interfered with the sales.[16]

The lower courts erroneously suggested that *Bennett* mandates direct causation or that the defendant must command the third party. Pet. App. 4a-5a, 16a- 17a. The Sixth Circuit distorted *Bennett's* reasoning to "require[] that the government cajole, coerce, command" to establish traceability in a case involving third-party action. *Id*. at 5a (citing *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (concluding that that the plaintiff's harms did not arise out of a third party "acting under the *command* of [the defendants], but rather from [its] voluntary choice") (emphasis in original)). Referring to the FBI agents' communications to the firearm sellers,

15. Pl.'s Original Compl., ¶¶ 52, 68-69, ECF No. 1.

16. In *Coker v. Barr,* a court within the Tenth Circuit explained that where the plaintiff alleged that he was labeled as someone "known or suspected to be linked to terrorism" in a defamation action, "it is hard to imagine a greater stigma than being associated with terrorism in our post-9/11 world." No. 19-cv-02486-RBJ, 2020 U.S. Dist. LEXIS 255249, at *23 (D. Colo. Sept. 15, 2020).

the Sixth Circuit opined that "[c]ontact does not equal coercion" and "passing along information, and ambiguous information at that, is a distant cry from forcing action." *Id.* at 4a. These conclusions disregard this Court's holdings in *Bennett*, circuit courts' interpretations of *Bennett*, and Congress' articulated intent in the context of Privacy Act improper disclosure claims.

Contrary to the decision below, the Third Circuit in *Pitt News v. Fisher* applied *Bennett* and found that a student newspaper had standing to challenge a law prohibiting newspapers from running advertisements about alcoholic beverages. 215 F.3d 354, 358 (3d Cir. 2000). The government argued that the newspaper's injury was not fairly traceable to the enforcement of the act "because the harm felt by the newspaper results from the independent acts of third parties," when advertisers decided to cancel their contracts. *Id.* at 360. The court rejected this argument, holding that "but for" the law, advertisers would not have chosen to stop paying for advertisements. *Id.* at 360-61.

The Fifth Circuit in *Brackeen v. Haaland* also recently reinforced *Bennett's* reasoning, holding that plaintiffs demonstrated traceability when the government's rule regarding custody of American Indian children "induc[ed] state officials to apply [the federal Indian law] through the leverage of child welfare funds." 994 F.3d 249, 372 (5th Cir. 2021); *see also Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 377-78 (5th Cir. 2021) (finding standing where toy manufacturers alleged government's prohibition on phthalates was a "substantial factor" in causing their lost sales); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (holding that traceability only requires that the defendants "significantly contributed"

to the plaintiff's injury). *Brackeen* did not require direct causation, nor did it require "cajoling" or "commanding" as the Sixth Circuit demanded.

In *Tozzi v. Dep't of Health & Hum. Servs.*, the D.C. Circuit considered whether the plaintiff had standing to challenge the government labeling its product a "carcinogen." 271 F.3d 301, 309 (D.C. Cir. 2001). The court explained that "where, as here, the alleged injury flows not directly from the challenged agency action, but rather from independent actions of third parties, we have required only a showing that 'the agency action is at least a substantial factor motivating the third parties' actions.'" *Id.* at 308 (quoting *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987)). The D.C. Circuit found the plaintiff met the traceability requirement because the "inherently pejorative and damaging" label exponentially increased the likelihood of harm, even where the government did not command any third party to do anything. *Id.* at 309. The Ninth Circuit also applied the approach utilized in both *Bennett* and *Tozzi*. *See, e.g., Skyline Wesleyan Church v. Cal.Dep't of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020) (finding causation based on government directive requiring insurers to change their coverage, and plaintiff's loss of the type of coverage it wanted); *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (finding that "[t]o plausibly allege that the injury was not the result of the independent action of some third party, the plaintiff must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions") (internal citations and quotation marks omitted)); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (finding individual pharmacists had standing to challenge

state anti-discrimination rules based on the expectation that the rule would result in employers terminating pharmacists who objected to the rules).

The holding in *Tozzi* applies well to improper disclosure claims, where a government agent's disclosure of confidential and often personal or pejorative information may not technically command a third-party to take a harmful action, but certainly serves as a "substantial factor motivating" the action. *See* 271 F.3d at 308. This occurred with Mr. Turaani, as he alleged that the sellers informed him they would have sold Mr. Turaani the firearms if the agents had not improperly disclosed information.

The Sixth Circuit took *Bennett's* "coercive effect" holding to an improper extreme that shuts the courthouse doors on any plaintiff who cannot allege a near- literal command by the government to a third party. Pet. App. 4a-6a; *see also Crawford*, 868 F.3d at 457 (affirming dismissal because the plaintiff could not point to a "command"). That is not what this Court held or intended in *Bennett*, nor does this stringent test reflect the intent of Congress to hold the government accountable for improper disclosures.

III. This Case Presents Important and Recurring Questions Which Can Be Resolved by a Ruling from This Court

Mr. Turaani's situation highlights the severe consequences of a narrow interpretation of traceability in improper disclosure cases. Mr. Turaani alleges that the government's disclosure caused him not only harm to his reputation, profession, and emotional distress,

but also a violation of his fundamental rights under the Second Amendment. The government did not interfere with a nebulous privacy interest; it infringed on a citizen's constitutional rights. That infringement, coupled with the important purpose of the Privacy Act's improper disclosure remedy, necessitates clarity on whether plaintiffs may seek relief for government disclosures to third parties.

In passing the Privacy Act, Congress found that "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems." 5 U.S.C. § 552a note (Congressional findings and statement of purpose). The Act's purpose includes (a) "permit[ting] an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent" and (b) "subject[ing the government] to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." *Id.* Congress' stated purpose makes clear that it recognized a person's concern as tohow such governmental disclosures can cause harm which reaches beyond the disclosure itself. *Id.* As described by the U.S. Government Accountability Office, the Privacy Act provides a basis to "safeguard the privacy of individuals about whom information is shared among government agencies and by those agencies with the private sector." Decision of Comptroller Gen. Walker, U.S. GOV'T ACCOUNTABILITY OFF., *Summary of Recommendations – The 9/11 Commission Report*, 2004 U.S. Comp. Gen. LEXIS 278, *17-18 (Sept. 9, 2004).

The Sixth Circuit's ruling triggers important questions given this Court's holding in *Chao*, where this Court concluded that a plaintiff cannot recover the Privacy Act's $1,000 statutory award for an improper disclosure without actual damages and pecuniary losses. 540 U.S. at 618. The plaintiff in *Chao* alleged that he was "'greatly concerned and worried' about the disclosure of his Social Security number and its potentially 'devastating' consequences." *Id.* But the plaintiff did not allege that the government disclosed the information to any other agency or third party, nor did he allege any actual damages arising out of the disclosure; instead, the disclosure he complained of existed in a vacuum. *Id.*; *see also Cooper*, 566 U.S. at 302- 03 (holding that mental and emotional harm alone do not constitute "actual damages" under the Privacy Act). The *Chao* holding limits Privacy Act awards for improper disclosure to plaintiffs who can show both adverse effects and actual damages. Both of these requirements, along with the statutory history and stated purpose of the Privacy Act, demonstrate that the Privacy Act addresses dissemination of confidential information to someone else.[17] When that someone else is a third party, the coercive effect produced by the government's disclosure provides plaintiffs with standing and access to the courthouse doors even absent a direct command by the government actor. *Bennett*, 520 U.S. at 170; *Tozzi*, 271 F.3d at 308. The

17. Both *Chao* and *Cooper* recognize the parallels between the Privacy Act's improper disclosure penalties and common-law torts of libel and slander. *Chao*, 540 U.S. at 625; *Cooper*, 566 U.S. at 296; *see also TransUnion LLC v. Ramirez*, 594 U.S. __ (2021) (finding that standing exists for dissemination of credit reports containing alerts identifying the plaintiffs as potential terrorists). Those parallels extend beyond the damages provision, as reflected in Congress's findings and stated purpose of the Act. *See* 5 U.S.C. § 552a note (Congressional findings and statement of purpose).

Sixth Circuit's ruling represents a departure from the usual course of judicial proceedings sufficient to necessitate this Court's review. Stephen M. Shapiro, et al., SUPREME COURT PRACTICE § 4.15 (11th ed. 2019) (noting that the Court grants certiorari to exercise its "supervisory power" in cases where the lower court conflicts with its precedent and departed from the accepted course of judicial proceedings) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 470 (1982) ("Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari.")).

Bennett's test on standing reflects the longstanding principle that "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972) (holding that college president's denial of recognition of a student organization was a substantial burden on freedom of association). The Privacy Act protects individuals from government actors improperly disclosing private information that adversely affects individuals' "employment, insurance, and credit, [] right to due process, and other legal protections." 5 U.S.C. § 552a note (Congressional findings and statement of purpose) (recognizing that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States"). When courts fail to effectuate these constitutional and statutory protections, abuse by federal law enforcement officials remains unchecked. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971)[18]

18. The Sixth Circuit has held that the Privacy Act precludes *Bivens* claims because the Act serves as a comprehensive scheme

(discussing, in the context of a Fourth Amendment claim, the great capacity for harm from the "invocation of federal power by a federal law enforcement official"); *Amos v. United States*, 255 U.S. 313, 317 (1921) (explaining that the plaintiff's wife could not have waived the warrant requirement due to the law enforcement official's "implied coercion").

CONCLUSION

Privacy rights are paramount among protections afforded United States citizens. Protection from unlawful government interference in the exercise of an individual's rights ranks among the highest rights afforded to our citizens, particularly when the rights the individual seeks to exercise are themselves constitutionally protected. The Privacy Act protects the rights of individuals from improper disclosures by government actors, due largely to the color of authority carried by these actors and the coercive nature of these disclosures. The Sixth Circuit unjustly narrowed the test articulated by this Court for an individual to establish standing to bring a claim under the Privacy Act for improper disclosure by a government official, subjecting Petitioner and others like him to an erroneously burdensome higher standard of demonstrating that the government official both made an improper disclosure and commanded or directed a third party to act on it. This heightened standard

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providing a meaningful remedy for improper government disclosures. *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 (6th Cir. 2002) (concluding that "because the Privacy Act is a comprehensive legislative scheme that provides a meaningful remedy for the kind of wrong [plaintiff] alleges that he suffered, we should not imply a *Bivens* remedy").

conflicts with the plain language of the statute itself and this Court's precedent, as well as the holdings of majority of the Circuits which have considered the issue. Allowing the holdings of the lower courts in this matter to stand subjects the constitutional rights of Petitioner and others like him to subjective assessment by future judges in a way intended neither by the Constitution nor Congress. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

Petitioner Khalid M. Turaani therefore respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 18, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-1343

KHALID M. TURAANI,

Plaintiff-Appellant,

v.

CHRISTOPHER WRAY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; CHARLES H. KABLE, IV, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TERRORIST SCREENING CENTER; JASON CHAMBERS, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Port Huron.
No. 3:19-cv-11768—Robert H. Cleland, District Judge.

Decided and Filed: February 18, 2021

Before: BOGGS, SUTTON,
and NALBANDIAN, Circuit Judges.

Appendix A

OPINION

SUTTON, Circuit Judge. Khalid Turaani tried to buy a firearm at a gun show. But after an FBI agent expressed concerns about Turaani to the gun dealer, the purchase fell through. Turaani sued. Instead of suing the dealer, however, he filed the action against various officials at the FBI, from the agent who approached the dealer to the Director. The district court granted the government's motion to dismiss for lack of standing. Because Turaani's injury cannot be fairly traced to the government's conduct, we affirm.

In 2018, Turaani went to a gun show in Birch Run, Michigan. He approached a dealer to buy a gun. When the dealer ran Turaani's name through the National Instant Criminal Background Check System, he received a "delay" response, R.1 at 10, requiring the dealer to wait three days before completing the sale. *See* 28 C.F.R. § 25.6(c)(1)(iv)(B). The dealer told Turaani about the hold.

The next day, FBI agent Jason Chambers went to the dealer's house, which doubled as his place of business, to speak to him about Turaani. Chambers wanted to see what information Turaani had provided about himself and explained that "we have a problem with the company" Turaani "keeps." R.1 at 11. He showed photographs of Turaani with another person of apparent Middle Eastern descent, whom the dealer did not recognize. And Chambers left his contact information with the dealer.

Turaani followed up with the dealer a few days later to purchase the gun. The dealer explained that he had received a visit from the FBI. While he "technically could sell the gun" because the three-day delay had passed without further prohibitions on the sale, the dealer told Turaani that he was "no longer comfortable doing so." R.1 at 12.

Turaani sued. He brought claims under the Privacy Act, the Administrative Procedure Act, the stigma-plus doctrine, and 42 U.S.C. § 1981, alleging that the government infringed his rights. He sued the Director of the FBI, agent Chambers, and Charles Kable, who maintains the government's Terrorist Screening Database, all collectively referred to as the FBI. The government moved to dismiss the lawsuit for lack of standing. *See* Fed. R. Civ. P. 12(b)(1). The district court granted the motion. It reasoned that Turaani's response to the government's motion focused on his "right to obtain a weapon" and the direct and indirect injuries that flowed from the dealer's decision not to sell him one. R.19 at 7. Because the dealer's decision not to sell the gun was an independent choice the government did not require, the district court explained, Turaani failed to show that his injury was traceable to the FBI's actions. This appeal ensued.

The U.S. Constitution limits the "judicial Power" to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. To meet that requirement, a plaintiff must show that he has "suffered an injury in fact," the injury is "traceable" to the defendant's action, and a favorable decision likely will redress the harm. *Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). Each element is an "irreducible constitutional minimum." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Turaani and the government spar over the second element, traceability, which looks to whether the defendant's actions have a "causal connection" to the plaintiff's injury. *Lujan*, 504 U.S. at 560. Indirect harms typically fail to meet this element, *see Warth v. Seldin*, 422 U.S. 490, 505, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), because harms "result[ing] from the independent action of some third party not before the court" are generally not traceable to the defendant, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). That means that, unless the defendant's actions had a "determinative or coercive effect" upon the third party, the claimant's quarrel is with the third party, not the defendant. *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *see also Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017).

Gauged by these considerations, Turaani's injury stems from the actions of the gun dealer, not the FBI. Take stock of what the FBI did. Agent Chambers visited the dealer to "speak with" him about Turaani. R.1 at 11. That does not suffice. Contact does not equal coercion. Chambers then asked to see the information Turaani provided when he tried to purchase the gun. That is not enough. Else, every law-enforcement inquiry could generate a lawsuit premised on an inquiry. Chambers then showed the dealer a photograph of Turaani with an

unknown man of apparent Middle Eastern descent, adding that he had concerns "with the company" Turaani "keeps." *Id.* That is not enough either. Passing along information, and ambiguous information at that, is a distant cry from forcing action. An indirect theory of traceability requires that the government cajole, coerce, command. *See Crawford*, 868 F.3d at 457. Venturing vague concerns does none of the above.

Think of it this way. Would Turaani have a case against a gun-control advocacy group if it had run an advertisement inspiring the dealer to stop selling firearms? It is hard to see how. Even if such an ad campaign caused Turaani's sale to fall through, his harm would arise from the dealer's "voluntary choice." *Id.* What of a court decision that increased the risks of liability for gun dealers but did not prohibit gun sales? That court decision might affect a dealer's decision to sell a gun, but the choice not to sell the gun would be traceable only to the dealer's voluntary action, not to the court's decision, which still permitted gun sales.

Courts should not "presume either to control or to predict" the "unfettered choices made by independent actors not before the courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989). A third party's "legitimate discretion" breaks the chain of constitutional causation. *Id.*; *see also Simon*, 426 U.S. at 42-43. Agent Chambers left the dealer with that discretion. He did not command or coerce; he explained only the reason for the inquiry. Article III demands more.

Turaani pushes back, claiming that the FBI's actions amounted to a sufficient cause of the dealer's decision not to sell the gun. But, in doing so, he never refutes the applicability of *Crawford*. It says that "an injury that results from the third party's *voluntary and independent* actions" does not establish traceability; the government must do more, say by establishing a "*command*" of the third party's actions. *Crawford*, 868 F.3d at 457. Turaani never asserts that Chambers commanded the gun dealer not to go through with the sale. The dealer instead exercised his discretion after speaking with Chambers. Because Chambers did not compel his chosen course of conduct, we are left only with the kind of attenuated causal chain that fails to meet Article III's requirements. Turaani's reliance on a "chain of contingencies," in all its rippling glory, creates "mere speculation," not a traceable harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

Parsons v. U.S. Department of Justice, 801 F.3d 701 (6th Cir. 2015), does not alter this conclusion. After the Department of Justice labeled the fans of a musical group a "gang," local and state law enforcement began harassing the fans, prompting a lawsuit by them against the federal government. *Id.* at 706-09. In agreeing that Article III causation existed for the claims, the court reasoned that it is "possible to motivate harmful conduct without giving a direct order to engage in such conduct." *Id.* at 714. But because of the cooperative relationship between local and national law enforcement, local law enforcement "may feel compelled to follow the lead of federal law enforcement and take action pursuant to information provided" by the

Department of Justice. *Vapor Tech. Ass'n v. U.S. Food & Drug Admin.*, 977 F.3d 496, 502 (6th Cir. 2020) (per curiam). Just as the tie between local and federal law enforcement is closer than the connection "between courts and litigants," *id.*, so the same is true of the relationship between independent firearms dealers and FBI agents. No compulsion occurred here.

Turaani argues that other injuries, such as reputational harm and violations of his privacy, suffice to show an Article III injury because they can be traced to the FBI's actions. But the only injury Turaani targeted in his response to the government's motion to dismiss was his inability to purchase a firearm. By failing to meaningfully identify his other injuries to the district court, he forfeited those arguments. *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 525 (6th Cir. 2020).

To the extent Turaani preserved arguments about other injuries—say reputational harms flowing from the FBI's alleged violation of the Privacy Act—that does not change things either. The key reputational harm he identified was his inability to purchase a firearm, which comes full circle back to the traceability problem already established. And while Turaani asserted in his complaint that his standing in the community suffered due to Chambers' comments, he offered no specifics supporting that claim. Generalized allegations of reputational harm are not enough without alleging "specific, concrete facts" showing a "demonstrable" injury. *Warth*, 422 U.S. at 508; *see also Parsons*, 801 F.3d at 711.

While this lack of specificity and other forfeitures may undermine today's claim, they do not prohibit Turaani from attempting to buy a gun again. If, at that point, he runs into similar problems and wishes to concretely complain about these other alleged injuries, nothing would prohibit him from doing so—if he meets Article III's requirements. Turaani, for what it is worth, has not been shy about protecting his rights. In 2017, he brought an action against similar parties for similar conduct. *See Turaani v. Sessions*, 316 F. Supp. 3d 998, 1004 (E.D. Mich. 2018).

We affirm.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, DATED FEBRUARY 20, 2020

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 19-11768

KHALID M. TURAANI,

Plaintiff,

v.

CHRISTOPHER A. WRAY, CHARLES H. KABLE, IV, and JAYSON R. CHAMBERS,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff Kahlid M. Turaani sues Defendants Christopher A. Wray, Director of the Federal Bureau of Investigation ("FBI"), Charles H. Kable, IV, Director of the Terrorist Screening Center ("TSC"), and Jayson R. Chambers, an FBI agent. (ECF No. 1, PageID.3-4, ¶¶ 5-7; ECF No. 14, PageID.101.) Plaintiff asserts violations of the Privacy Act, 5 U.S.C. § 552a(b), the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, procedural due process, and 42 U.S.C. § 1981. (ECF No. 1, PageID.17-25, ¶¶ 81-123.) Defendants allegedly prevented Plaintiff from purchasing a firearm by approaching the would-be seller and disclosing confidential information about Plaintiff.

Appendix B

Defendants move to dismiss the complaint for lack of standing and for failure to state a claim. (ECF No. 14.) Plaintiff has responded. (ECF No. 17.) The court finds a hearing unnecessary. E.D. Mich. L.R. 7.1(f)(2). For the reasons provided below, Defendants' motion will be granted and the case will be dismissed.

I. BACKGROUND

The following are facts as alleged in Plaintiff's complaint. In a motion to dismiss, the court accepts Plaintiff's factual allegations as true but makes no overt finding as to truth or falsity. *Kardules v. City of Columbus*, 95 F.3d 1335, 1347 (6th Cir. 1996) (discussing standing); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (regarding failure to state a claim).

On Sunday, August 5, 2018, Plaintiff attended a gun show in Birch Run, Michigan. (ECF No. 1, PageID.10, ¶ 39.) While there, Plaintiff attempted to purchase a firearm. (*Id.*, ¶ 41.) The seller of the firearm received a "delay" response from the National Instant Criminal Background Check ("NICS"), a system designed and operated by the FBI to conduct rapid background checks for proposed firearm purchases. 28 C.F.R. § 25.6(c)(1)(iv)(B) ("A 'Delayed response . . . indicates that the firearm transfer should not proceed pending receipt of a follow up 'Proceed' response from NICS or the expiration of three business days . . . whichever occurs first."). (*Id.*, ¶ 42.) The seller informed Plaintiff that the gun could not be sold *at that time*, but that Plaintiff could return in three days to complete the purchase. (*Id.*, PageID.10-11, ¶¶ 43-44.)

Plaintiff does not contest that the FBI background check and a "delay" response were ordinary and legal.

Plaintiff contacted the seller at the end of the week. (*Id.*, PageID.11, ¶ 45.) The seller told Plaintiff that an FBI agent, believed to be Defendant Chambers, visited the seller's place of business the day after Plaintiff's purchase inquiry. (*Id.*) The agent asked the seller what Plaintiff had "filled out himself regarding the attempted purchase," told the seller that "we have a problem with the company [Plaintiff] keeps," and showed the seller a photograph of Plaintiff "in a suit" with another individual believed to be "of Middle Eastern descent," asking the seller if he recognized the other individual. (*Id.*, ¶¶ 46-48.) The agent then left contact information, including an email address for "JR Chambers," and asked that the seller pass the information along to Plaintiff. (*Id.*, PageID.12, ¶ 51.)

When Plaintiff contacted the seller some time later, the seller told Plaintiff that he chose to not sell the gun to Plaintiff, even though enough time had passed to allow a legally cleared transaction, *i.e.*, Plaintiff's background check was now listed as "open" after the three day "delay" period. (*Id.*, ¶ 52.) The seller explained to Plaintiff that he "was no longer comfortable [selling Plaintiff the weapon] because of the visit by and statements made by the FBI agent regarding Plaintiff." (*Id.*)

II. STANDARD

Article III Section 2 of the U.S. Constitution limits judicial power to cases and controversies. *Spokeo, Inc.*

v. Robins, 136 S.Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "Standing to sue is a doctrine rooted in the traditional understanding of a case and controversy." *Id.* "The Supreme Court has enumerated the following elements necessary to establish standing:

> First, Plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Parsons v. United States DOJ, 801 F.3d 701, 710 (6th Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). When reviewing a motion to dismiss on the basis of standing, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Kardules*, 95 F.3d at 1347 (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). The plaintiff does, however, bear the burden of establishing standing and must "clearly allege facts demonstrating each element." *Parsons*, 801 F.3d at 710 (quoting *Warth*, 422 U.S. at 518).

Appendix B

III. DISCUSSION

Standing has three elements: injury in fact, traceability, and redressability. *Parsons*, 801 F.3d at 710. For injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct. at 1548 (citations removed). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* (citations removed). To be concrete, an injury "must be *de facto*; that is, it must actually exist." *Id.*

The requirement of alleging an injury-in-fact is met in this case. Plaintiff is alleging a violation of his right to purchase a firearm. (ECF No. 1, PageID.16, ¶¶ 91 (For Plaintiff's Privacy Act claim: "[B]ut for the actions of Defendants, the gun seller would have sold Plaintiff the gun after the delay notification expired."), 111-13 (Plaintiff's procedural due process claim), 123 (Plaintiff's § 1981 claim).) In Plaintiff's response to Defendants' motion, Plaintiff relies only upon this injury to establish standing.[1] (ECF No. 17, PageID.139 (emphasis and

1. The court will take Plaintiff's arguments as they are presented, as it is not the job of the court to search out and develop other potentially successful issues or strategies. *Estate of Barnwell v. Grigsby*, -- Fed. App'x --, 801 Fed. Appx. 354, 2020 U.S. App. LEXIS 2109, 2020 WL 290425, at *13 (6th Cir. 2020) (citing *Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1154-55 (6th Cir. 2010)) ("[A]n issue not raised in an opening brief is deemed waived."); *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citations removed) ("Issues averted to in a perfunctory manner, unaccompanied by some effort at developing argumentation, are deemed waived. It is not sufficient

citations removed) ("Plaintiff's Complaint challenges the prohibited disclosure and interference by the FBI and/or its agents that make any sale of a firearm impracticable following the delay notification the NICS search produces when Plaintiff attempts to purchase a firearm."); *id.*, PageID.141 ("Plaintiff's complaint satisfies [the] traceability requirement, as it sufficiently demonstrates that but for Defendants' prohibited disclosures and interference with Plaintiff's attempted gun purchase, the seller would have sold Plaintiff the firearm.").) Being denied the right to purchase a firearm is concrete and real. *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("[T]he Second Amendment conferred an individual right to keep and bear arms"); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 282-84 (6th Cir. 1997) (finding injury-in-fact to where manufacturers and middlemen could not engage in firearm commercial transactions). It is also particularized to Plaintiff himself. *Magaw*, 132 F.3d at 282-84.

The court's finding conforms to the reasoning of another judge of this court who dismissed a very similar lawsuit filed by Plaintiff in 2018, in part for lack of standing. *Turaani*, 316 F.Supp.3d 998 (Drain, J.). There too Plaintiff alleged that FBI agents made an illegal communication to a gun seller supposedly revealing that Plaintiff was under FBI investigation. *Id.* at 1005-06. Plaintiff also included a claim that he was harmed due to a three-day

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for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones.").

delay, initiated by NICS.[2] 28 C.F.R. § 25.6(c)(1)(iv)(B). After the three-day delay, the seller allegedly refused to sell a firearm to Plaintiff, despite being legally entitled to do so. *Id.* Plaintiff alleged that the seller would not sell Plaintiff a firearm due to the FBI's communication. *Id.* The lawsuit named an FBI agent, the U.S. Attorney General, the Director of the FBI, the Director of the TSC, and the Deputy Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives as defendants. *Id.* at 1004. The court found that Plaintiff had alleged an injury in fact. *Id.* at 1007. The court reasoned that the "constructive denial," in which the gun seller was influenced by the call from the FBI to not sell Plaintiff a weapon, was particularized because it "impact[ed] [Plaintiff's] individual right to obtain a firearm." *Id.* The injury was concrete because "[Plaintiff] contend[ed] that the delay transpired and that the store clerk continues to deny his request to purchase the gun." *Id.* Additionally, the court found that the three-day delay itself constituted an injury in fact. *Id.*

The central issue in dispute is traceability. When "standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," the plaintiff must "adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)).

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2. Here, Plaintiff affirmatively states that he "does not challenge the three-day delay . . . in this suit." (ECF No. 17, PageID.139.)

Crawford v. S. Dep't of Treasury, 868 F.3d 438, 457 (6th Cir. 2017) is especially instructive. The plaintiffs in *Crawford* challenged the Foreign Account Tax Compliance Act ("FATCA"), as well as other newly enacted banking statutes and international agreements. The new laws mandated that foreign financial institutions ("FFIs") disclose banking information of Americans and threatened significant fines if the institutions did not comply. The plaintiffs alleged that foreign banks refused to provide financial services to them and required additional disclosures, more than what the law demanded, due to increased compliance costs. The court classified the plaintiff's alleged harms as "indirect" and affirmed dismissal of the complaint for lack of standing. *Id.* at 456. The court reasoned that "Plaintiffs' alleged harms arise not from the FFIs' acting under the *command* of FATCA or an IGA, but rather from the FFI's voluntary choice to go *above and beyond* FATCA and the IGAs." *Id.* at 457 (emphasis in original). It added that "although an injury 'produced by' a defendant's 'determinative or coercive effect' upon a third party . . . may suffice for standing, an injury that results from the third party's voluntary and independent actions or omissions does not." *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (citing *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)). The court used the law that barred doctors from performing abortion procedures in the Supreme Court case *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) as an example of a "determinative or coercive effect." *Id.*

Taking the allegations in Plaintiff's complaint as true, Plaintiff has failed to establish traceability. *Kardules*,

95 F.3d at 1347. Plaintiff's essential argument is that Defendants' actions, by organizing and effectuating a background-check review process and their discussion with Plaintiff's commercial counterpart, brought about the seller's reluctance to sell Plaintiff a firearm. Thus, Plaintiff was allegedly denied the right to obtain a weapon. What Plaintiff misses is any factual allegations tying a "determinative and coercive" government action, approaching the force of law, to his inability to purchase a gun. *Crawford*, 868 F.3d at 457. It may be true that an FBI agent, potentially Defendant Chambers, approached the seller and disclosed confidential information that *could* impact a seller's decision. However, merely acting to potentially influence the "voluntary and independent" decision of a third-party does not itself create a direct and traceable injury. *Id.* (denying standing for plaintiffs who allegedly lost access to foreign bank accounts due to the banks' attempts to avoid increased compliance costs incurred by a new law); *ACLU v. NSA*, 493 F.3d 644, 666-70 (6th Cir. 2007) (finding traceability lacking where plaintiffs alleged that an illegal government wiretap program chilled overseas parties from talking to plaintiffs via phone); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-46, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (ruling that plaintiffs lacked standing to sue the government for denial of medical care allegedly due to a tax incentive provided to hospitals); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (Despite government actors requesting authorization for surveillance ex parte and plaintiffs claiming that it there is an "objectively reasonable likelihood" that a court would approve a request for surveillance, the Court

noted its "reluctan[ce] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment" and found redressability lacking).

Plaintiff includes no allegations that the FBI applied force or coercion, or otherwise called upon legal authority to command the seller to cutoff transactions with Plaintiff. *Crawford*, 868 F.3d at 457 (finding legal *commands* directed at third-party doctors sufficient to establish standing for patients of those doctors); *Turaani*, 316 F.Supp.3d 998 (ruling an authoritative *directive* not to sell Plaintiff a weapon for three days traceable to the government); *Mich. Bldg. & Constr. Trades Council v. Snyder*, 846 F. Supp. 2d 766, 778 (E.D. Mich. 2012) (finding standing where a contracting party "do[es] not have discretion" to contract under the law and "there are no breaks in the chain of causation between . . . the government action and the asserted injury.").

The seller's statement to Plaintiff that he was motivated to refuse a firearm sale with Plaintiff following, or even due to, a discussion with the FBI cannot alone establish requisite "compulsion." (ECF No. 1, PageID.12, ¶¶ 52, 55.) An assertion of influence short of a "determinative and coercive effect" is insufficient. *Crawford*, 868 F.3d at 457. If this were not true, a plaintiff need only allege that a third party was motivated to bring about a harm because of the separate and distinct actions of a defendant, however attenuated may have been the "effect," and however free to act was the third party. An assailant motivated by a deranged reading of a children's novel could make the

novel's author liable to victims, and a customer could sue the government for losing business with a bank due to admittedly increased compliance costs. *Crawford*, 868 F.3d at 456-57. This would expand the scope of judiciability far beyond what has been established in this circuit and by Supreme Court jurisprudence. *Crawford*, 868 F.3d at 456-57; *Lujan*, 504 U.S. at 562.

In sum, Plaintiff's allegations are that the FBI, acting through Defendant Chambers, approached the seller, asked if Plaintiff filled out forms, told the seller "we have a problem with the company [Plaintiff] keeps," showed the seller a photo of Plaintiff with an individual "of Middle Eastern descent," and left contact information. (ECF No. 1, PageID.11-12, ¶¶ 46-51.) Plaintiff admits that the seller was legally entitled to sell the gun three days later, and presents neither allegations nor suggestions of reasonable inference that the seller was commanded, threatened, or coerced by the FBI. (*Id.*, PageID.12, ¶ 52; ECF No. 17, PageID.140.) Instead, Plaintiff's allegations show only that the seller purposefully and in the exercise of his own free will chose not to engage commercially with Plaintiff. That is a decision left to the seller and the seller alone. It was the result of the "unfettered choice[]" and "broad and legitimate discretion," even if the seller's explanation to Plaintiff referenced the seller's contact with the FBI. *Lujan*, 504 U.S. at 562. (ECF No. 1, PageID.12, ¶¶ 52, 55.) Plaintiff has failed to "adduce facts showing that those choices [were] made in such a manner as to produce causation" and has failed establish standing. *Lujan*, 504 U.S. at 562.

The court's finding conforms to the reasoning of the court in Plaintiff's prior lawsuit. *Turaani*, 316 F.Supp.3d 998. There the court reasoned that Plaintiff's injury of failing to buy a firearm after the three-day delay period "is solely the result of the store proceeding with an abundance of caution or, as the Sixth Circuit has stated, going 'above and beyond' the law. Such 'voluntary and independent' conduct by a third-party is insufficient to adequately allege standing." *Id.* at 1009 (quoting *Crawford*, 868 F.3d at 457). Notwithstanding the legality of the disclosure, there, like here, Plaintiff's alleged injury was only indirectly related to the defendants' actions and was instead the result of a third-party's choice, free from legal compulsion.

To be clear, the first *Turaani* court found that Plaintiff did have an injury traceable to the government by the FBI *command* to withhold sale of a firearm for three days. *Id.* There, the government affirmatively ordered the store clerk, under the color of the FBI's legal authority, to deny Plaintiff the purchase of a weapon. Here, Plaintiff is not challenging the directed three day "delay" in Plaintiff's firearm purchase, and has not presented a harm traceable to a "determinative and coercive" government action. *Crawford*, 868 F.3d at 457. (ECF No. 17, PageID.139.)

The court's decision also complies with *Crawford*. *Crawford*, 868 F.3d 438. The Sixth Circuit rejected the claim that a plaintiff could sue government officials for losing access to financial services, allegedly caused by the reaction of foreign banks to a higher level of government regulation. *Id.* Those reactions were not mandated or

compelled by law. *Id.* at 459. The court reasoned that "a foreign bank's choice either not to do business with [a plaintiff] . . . is a choice voluntarily made by the bank and is not fairly traceable to FATCA." *Id.* Similarly, a gun seller's choice to not do business with Plaintiff was a voluntary decision and was not a result of coercion or government force. Plaintiff's proffered injury lacks traceability to Defendants' actions. *Lujan*, 504 U.S. at 562.

The parties themselves devote no argument to the issue of redressability, and with traceability lacking, the court need not address it.

IV. CONCLUSION

The injury Plaintiff relies on to establish standing is not traceable to the actions of Defendants. Plaintiff has no standing, within the facts of this case, to sue Defendants for being denied the right to acquire a firearm. Accordingly,

IT IS ORDERED that Defendants Christopher A. Wray, Charles H. Kable, IV, and Jayson R. Chambers' Motion to Dismiss (ECF No. 14) is GRANTED. The case is DISMISSED.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: February 20, 2020

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JUNE 7, 2018

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 17-cv-14112

KHALID TURAANI,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS, III,
IN HIS OFFICIAL CAPACITY, *et al.*,

Defendants.

United States District Court Judge
Gershwin A. Drain

United States Magistrate Judge
R. Steven Whalen

June 7, 2018, Decided;
June 7, 2018, Filed

Appendix C

Opinion and Order Granting Official-Capacity Defendants' Motion to Dismiss [10] and Dismissing Complaint as to Individual-Capacity Defendant without Prejudice

I. Introduction

Plaintiff Khalid Turaani commenced this action on December 20, 2017. Dkt. No. 1. In the Complaint, he contends that the Defendants improperly delayed (by three days) his right to purchase a firearm and constructively denied him that right. *See id.* The Defendants are an Unnamed FBI Agent, in his individual capacity, and the following individuals in their official capacity: Jefferson B. Sessions, III, the Attorney General of the United States of America; Christopher A. Wray, the Director of the Federal Bureau of Investigation; Charles H. Kable, IV, the Director of the Terrorist Screening Center; and Thomas E. Brandon, the Deputy Director, Head of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Turaani asserts a defamation claim against the Unnamed FBI Agent in his individual capacity (Count I). He also maintains that the official-capacity Defendants violated his right to procedural due process under the Fifth Amendment (Count II); substantive due process under the Fifth Amendment (Count III); and equal protection under the Fifth Amendment (Count IV). Additionally, Turaani alleges that the official-capacity Defendants violated the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), (Count V), and he asserts a claim for injunctive and declaratory relief under 28 U.S.C. §§ 2201, 2202 (Count VI).

Appendix C

On April 5, 2018, the official-capacity Defendants moved to dismiss Counts II-VI of the Complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief may be granted. Dkt. No. 10. Turaani responded to the motion on April 26, 2018. Dkt. No. 12. The official-capacity Defendants replied in support of the motion on May 23, 2018. Dkt. No. 16.

Presently before the Court is the official-capacity Defendants' Motion to Dismiss Counts II-VI of the Complaint for Lack of Subject-Matter Jurisdiction and Failure to State a Claim [10]. The Court held a hearing on this motion on Monday, June 4, 2018. For the reasons detailed below, the Court will GRANT the official-capacity Defendants' Motion to Dismiss [10]. The Court lacks subject-matter jurisdiction over certain claims asserted by Turaani. The Court also concludes that Turaani has failed to state a claim on Counts II-VI. That is, the Court will dismiss his claims regarding procedural due process (Count II), substantive due process (Count III), equal protection (Count IV), the Administrative Procedure Act (Count V), and injunctive and declaratory relief (Count VI).

Additionally, as the claims against the official-capacity Defendants will not survive the motion to dismiss and the individual-capacity Defendant (the Unnamed FBI Agent) has yet to receive service, the Court will DISMISS Count I WITHOUT PREJUDICE.

II. Background

Plaintiff Khalid Turaani is a United States citizen domiciled in Michigan. Dkt. No. 1, p. 2 (Pg. ID 2). He is the legal owner of three firearms, firearms which he purchased between 2000 and 2016. *Id.* at p. 9 (Pg. ID 9). This case concerns his inability to buy a fourth firearm, in 2017 and from Target Sports Orchard Lake in Michigan.

A. Firearm Background Check Procedures

On June 24, 2017, after discussing Turaani's request to purchase a firearm with an FBI agent, a clerk at Target Sports Orchard Lake refused to sell Turaani a gun. *Id.* at p. 10 (Pg. ID 10). By way of background, the Brady Act, 18 U.S.C. §§ 921 *et seq.*, requires that federal firearms licensees ("FFL") contact the National Instant Criminal Background Check System ("NICS") before selling a firearm to any person. *Id.* at p. 5 (Pg. ID 5); *see generally* 28 C.F.R. § 25.1 *et seq.* The FBI manages the NICS, and in Michigan, FFLs directly contact the FBI with certain information about the potential purchaser. Dkt. No. 1, p. 5 (Pg. ID 5); *see also* Dkt. No. 10, pp. 17-18 (Pg. ID 78-79). Using that information, a search is run in certain databases, including the National Crime Identification Center ("NCIC"). Dkt. No. 10, p. 18 (Pg. ID 79). The NCIC, in turn, includes a sub-file on Known or Appropriately Suspected Terrorists ("KST"). Dkt. No. 1, p. 12 (Pg. ID 12); *see also* Dkt. No. 10, p. 18 (Pg. ID 79). Plaintiff alleges that, on the date of the firearm transaction, he was on a No Fly List or Watch List, and thus, he was on a KST list. Dkt. No. 1, p. 9 (Pg. ID 9).

When a person on a KST list initiates a firearm transaction, the background check results in a "delay" response. 28 C.F.R. § 25.6(c)(1); *see also* Dkt. No. 10, p. 19 (Pg. ID 80). To be sure, residence on a KST list, standing alone, does not prohibit a person from legally owning a firearm. *See* 18 U.S.C. § 922(g); *see also* Dkt. No. 10, p. 19 (Pg. ID 80). Rather, a delay response suspends the transaction for three days while authorities further investigate the individual. Dkt. No. 10, p. 19 (Pg. ID 80); *see also* 28 C.F.R. § 25.6(c)(1)(iv)(B). A person may complete the firearm transaction if the NICS responds "proceed" or three days have passed from the delay response, whichever occurs first. 28 C.F.R. § 25.6(c)(1)(iv)(B).

Conversely, a "deny" response occurs where federal or state law prohibits a person from obtaining a firearm. *See id.* at § 25.6(c)(1)(iv)(C); *see also* 18 U.S.C. § 922(g), (n). If a person passes the background check, NICS will respond "proceed." 28 C.F.R. § 25.6(c)(1)(iv)(A).

B. Turaani's Experience at Target Sports Orchard Lake

As Target Sports Orchard Lake is an FFL, it contacted the FBI when Turaani initiated the firearm transaction. Dkt. No. 1, p. 10 (Pg. ID 10). A store clerk began a NICS background check on Turaani, including running Plaintiff's name through the relevant databases. *Id.* Turaani maintains that an FBI agent then called the store clerk, informed him that Turaani was the subject of an FBI investigation, and instructed him to delay the transaction. *Id.* Following the FBI's directions, the store

clerk delayed the transaction. *Id.* at pp. 10-11 (Pg. ID 10-11). The FBI, however, did not contact the store clerk again regarding Turaani's transaction and, of course, three days have passed since Turaani attempted to purchase the firearm. *Id.* at p. 10 (Pg. ID 10). Therefore, Turaani may legally purchase the gun. *See* 28 C.F.R. § 25.6(c)(1)(iv)(B).

But Turaani contends that he has not been able to purchase a gun from Target Sports Orchard Lake. He alleges that the store will not sell him a gun until the FBI has informed the store that he never was, or is no longer, under investigation by the FBI. Dkt. No. 1, pp. 10-11 (Pg. ID 10-11). He also asserts that because the store clerk knows that he is or was under investigation by the FBI, this news will spread throughout his Orchard Lake community and thereby damage his reputation. *Id.* at pp. 16-17 (Pg. ID 16-17).

III. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a court to assess whether a plaintiff has stated a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "[E]ven though the complaint need not contain 'detailed' factual allegations, its 'factual allegations must

be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true.'" *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

A court must construe the complaint in favor of a plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. *Twombly*, 550 U.S. at 570. But, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 668, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To survive a Rule 12(b)(6) motion, a plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548 (quoting *Twombly*, 550 U.S. at 553-54). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal citations and quotations omitted). Instead, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal citations and quotation marks omitted). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679. (internal citations and quotation marks omitted).

IV. Discussion

The Plaintiff raises five claims against the official-capacity Defendants. He contends that they violated his right to procedural due process (Count II), to substantive due process (Count III), and to equal protection of the laws (Count IV). He also maintains that their actions contravened the APA (Count V), and he raises an independent claim for injunctive and declaratory relief (Count VI). The Court will find that Plaintiff lacks standing to assert claims regarding certain harms. In addition, the Court will hold that none of these counts will survive the Motion to Dismiss.

A. Standing

Turaani principally claims that he has suffered harm as a result of both the three-day delay of his firearm purchase and the "constructive denial" of his Second Amendment right. The Court will find that it has subject-matter jurisdiction over his claims regarding the three-day delay of his Second Amendment rights. Conversely, the Court will conclude that it lacks subject-matter jurisdiction over Plaintiff's constructive denial claim.

"Federal courts," the Sixth Circuit has noted, "have constitutional authority to decide only 'cases' and 'controversies.'" *Crawford v. Dep't of Treasury*, 868 F.3d 438, 452 (6th Cir. 2017) (quoting U.S. CONST. art. III § 2) (citing *Muskrat v. United States*, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911)). "And there is no case or controversy if a plaintiff lacks standing to

sue." *Duncan v. Muzyn*, 885 F.3d 422, 427 (6th Cir. 2018) (citing *Spokeo, Inc. v. Robins*, U.S. , 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)). "A claimant bears the burden of establishing standing and must show it 'for each claim he seeks to press.'" *Hagy v. Demers & Adams*, 882 F.3d 616, 620 (6th Cir. 2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)). If a claimant fails to establish standing, a court must dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1). *Lyshe v. Levy*, 854 F.3d 855, 858 (6th Cir. 2017) (citing *Allstate Ins. Co. v. Glob. Med. Billing, Inc.*, 520 F. App'x 409, 410-11 (6th Cir. 2013)).

"The 'irreducible constitutional minimum' of standing comprises three elements: (1) an injury-in-fact, which is (2) fairly traceable to the defendant's challenged conduct, and that in turn is (3) likely redressable by a favorable judicial decision." *Duncan*, 885 F.3d at 427 (quoting *Spokeo, Inc.*, 136 S. Ct. at 1547).

1. Injury-in-fact

An injury-in-fact has two components, and Turaani has adequately alleged them both. First, "an injury-in-fact must be 'particularized,' meaning it 'affect[s] the plaintiff in a personal and individual way.'" *Id.* (second alteration in original) (quoting *Spokeo, Inc.*, 136 S. Ct. at 1548). Second, it "must be 'concrete,' meaning that it 'actually exist[s].'" *Id.* (alteration in original) (quoting *Spokeo, Inc.*, 136 S. Ct. at 1548).

Turaani has plausibly pleaded injury-in-fact for both the three-day delay and the constructive denial

of his ability to purchase the firearm. These harms are particularized, as they impact his individual right to obtain a firearm. They are also concrete. He contends that the delay transpired and that the store clerk continues to deny his request to purchase the gun, although the mandated three-day delay has ended.

2. Causation

Not all of Turaani's alleged injuries are fairly traceable to Government conduct, however. Specifically, Turaani properly pleads this element for the three-day delay contentions, but does not for the constructive denial allegations. Accordingly, he has standing for claims involving the three-day delay, but he lacks standing for claims concerning the constructive denial.

"[A] plaintiff generally lacks standing to seek its redress," the Sixth Circuit has explained, "[w]hen a plaintiff's alleged injury is the result of 'the independent action of some third party not before the court[.]'" *Crawford*, 868 F.3d at 455 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)) (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013); *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004)).

Turaani argues that his injuries are fairly traceable to Government conduct because the Government (1) delayed (by three days) his right to obtain a firearm and (2)

constructively denied him the ability to purchase the gun. According to Turaani, the constructive denial occurred through the store clerk's decision to halt the transaction until the FBI has confirmed that Turaani is not, or never was, the subject of an FBI investigation. Dkt. No. 1, p. 19 (Pg. ID 19).

First, Turaani plausibly pleads standing for the three-day delay because he alleges that the FBI called the store clerk and instructed the clerk to delay the transaction. This instruction obligated the store clerk to pause the transaction until the FBI had responded "proceed" or "deny," or three days had passed from the delay response, whichever had occurred first. 28 C.F.R. § 25.6(c)(1)(iv)(B).

Yet his allegation that the Government "constructively denied" his right to purchase a firearm is not fairly traceable to Government conduct. Turaani maintains that no law prohibits him from obtaining a firearm and that, after the three-day delay, the law permitted him to complete the transaction. Therefore, the store clerk's voluntary and independent actions have caused him harm, not Government conduct. This finding is fatal to Turaani's constructive denial claim.

And as the Government argues, *Crawford* is illustrative. There, the relevant plaintiffs were current or former American citizens with international ties, largely residence abroad. 868 F.3d at 445. The plaintiffs sued several government actors. They alleged, among other things, that because of certain regulations which applied to them as United States taxpayers having foreign

accounts, some foreign financial institutions ("FFI") had refused to do business with them or mandated that they disclose information not required by the disputed regulations. *Id.* at 456.

The Sixth Circuit acknowledged that these claims involved "indirect harm," which "is an injury caused to a plaintiff when the defendant's unlawful conduct harms a third party who in turn causes the plaintiff's harm[.]" *Id.* at 456 (citations omitted). After categorizing the harm alleged, the *Crawford* panel held that these plaintiffs lacked standing. The court reasoned that "[s]everal of [p]laintiffs' alleged harms ar[ose] not from FFIs' acting under the command of [the contested regulations], but rather from the FFIs' voluntary choice to go above and beyond [the regulations]." *Id.* at 457. "FFIs may do so," the court explained, "by choosing not to do business with certain individuals, whether to protect their own interests in [regulatory] compliance or for some other reason." *Id.* at 457.

A similar situation has transpired here. Like the *Crawford* plaintiffs, Turaani pleads indirect harm. In particular, he maintains that the Government has "constructively denied" him the ability to purchase the firearm because the store clerk refuses to sell him the firearm. And here, as in *Crawford*, all agree that the law is not forcing the store clerk to refuse Turaani's request. In other words, there is no dispute that Turaani may legally possess a firearm and that he was legally able to complete the firearm transaction once three days had passed from the delay response. The "constructive denial,"

then, is solely the result of the store proceeding with an abundance of caution or, as the Sixth Circuit has stated, going "above and beyond" the law. Such "voluntary and independent" conduct by a third-party is insufficient to adequately allege standing. *Id.* at 457 (emphasis omitted) (citing *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)).

Accordingly, Turaani has not plausibly alleged that his inability to purchase a gun from the store clerk is fairly traceable to Government action. Conversely, Turaani has adequately pleaded that the three-delay in the firearm transaction is fairly traceable to the official-capacity Defendants' conduct.

3. Redressability

Finally, standing requires redressability, and Turaani has plausibly alleged this element for the alleged three-day delay. "A claimant satisfies Article III's redressability requirement by showing there is 'a likelihood that a court decision in the [claimant's] favor will redress the injury alleged.'" *United States v. Hall*, 877 F.3d 676, 682 (6th Cir. 2017) (quoting *Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir. 1995)). Here, Turaani requests that the Court prevent the Government from delaying his firearm transaction. Therefore, an order from the Court would redress this harm.

In light of the above, Turaani has standing for claims involving the three-day delay of his firearm transaction.

He lacks standing, however, to assert harm regarding the official-capacity Defendants' constructive denial of his right to purchase the gun.

B. Procedural Due Process (Count II)

Plaintiff has not plausibly alleged a procedural due process claim. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). And "the deprivation of property by state action is not itself unconstitutional[.]" *Id.* (internal quotation marks omitted) (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995)). Rather, "what is unconstitutional is the deprivation of such an interest without due process of law." *Id.* (internal quotation marks omitted) (quoting *Kukulinsky*, 61 F.3d at 485).

Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." *Unan v. Lyon*, 853 F.3d 279, 291 (6th Cir. 2017) (internal quotation marks omitted) (quoting *Rosen v. Goetz*, 410 F.3d 919, 928 (6th Cir. 2005)). It is a function of "weigh[ing] the private interest at stake; 'the risk of an erroneous deprivation'; the government's interest, including the burden of imposing additional procedural requirements; and 'the probable value, if any, of additional or substitute procedural safeguards.'" *Id.* (quoting

Mathews, 424 U.S. at 335). Finally, plaintiffs asserting procedural due process claims must also properly plead prejudice. *Shoemaker v. City of Howell*, 795 F.3d 553, 563 (6th Cir. 2015) (quoting *Graham v. Mukasey*, 519 F.3d 546, 549-50 (6th Cir. 2008)).

As an initial matter, Plaintiff's procedural due process claim fails because he has not adequately alleged prejudice. Prejudice requires well-pled allegations "that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations." *Id.* (quoting *Graham*, 519 F.3d at 549-50). First, because Turaani appeared on a No Fly List or Watch List, the FBI would have delayed the firearm transaction regardless of any alleged due process violations. Specifically, 28 C.F.R. § 25.8(g)(2) provides that "[i]n cases where potentially disqualifying information is found in response to an FFL query, the NICS Representative will provide a 'Delayed' response to the FFL." Turaani's status on the aforementioned-security lists constitutes "potentially disqualifying information." Indeed, Plaintiff acknowledges that all firearm transactions involving persons on such lists are delayed. Dkt. No. 1, p. 12 (Pg. ID 12).

Second, he fails to properly plead prejudice for the "constructive denial" claim. After the expiration of the three-day delay, the law permitted him to complete the firearm transaction. Therefore, as outlined in the Court's standing analysis, he does not assert prejudice from the official-capacity Defendants' conduct. Instead, he asserts prejudice from the store clerk's actions.

Beyond prejudice, the relevant considerations also indicate that Turaani has not adequately alleged a procedural due process violation.

1. Private Interest

Turaani's interests at stake are his Second Amendment right and his reputation. Dkt. No. 12-1, p. 16 (Pg. ID 128). Only the former interest warrants due process protection, however.

Due process, of course, protects Turaani's Second Amendment right to possess a gun. All agree that he may legally possess a firearm.

Due process does not recognize Turaani's interest in his reputation, however. Ordinarily, "[t]he Due Process Clause of the [Fifth] Amendment protects an individual's liberty interest in their 'reputation, good name, honor, and integrity.'" *Crosby v. Univ. of Ky.*, 863 F.3d 545, 555 (6th Cir. 2017) (quoting *Quinn v. Shirey*, 293 F.3d 315, 319 (6th Cir. 2002)). But there are two limitations to this interest. First, "the alleged damage must be tied to '[s]ome alteration of a right or status 'previously recognized by state law.'" *Id.* (quoting *Quinn*, 293 F.3d at 319). Second, "[t]hat liberty interest is impugned when a state actor 'stigmatize[s]' an individual by means of 'voluntary, public dissemination of false information' about the individual." *Id.* (quoting *Quinn v. Shirey*, 293 F.3d at 320).

Turaani is correct that the FBI agent violated 28 C.F.R. § 25.8(g)(2) by disclosing that Turaani was the

target of an FBI investigation. That provision mandates that the FBI "only provide a response of 'Proceed' or 'Delayed' (with regard to the prospective firearms transfer)," and demands that the FBI "not provide the details of any record information about the transferee." *Id.*

But he fails on the second step. He does not plausibly allege that the FBI agent made a false statement. Indeed, the Complaint is absent of allegations indicating that was not under investigation by the FBI. Turaani instead maintains that the statement at issue "falsely created the impression that Plaintiff has committed or will be charged with a crime." Dkt. No. 1, p. 16 (Pg. ID 16). What is more, Turaani pleads facts suggesting that he was the target of an FBI investigation during the relevant period. In particular, he asserts that when he attempted to purchase the firearm, he was on a No Fly List, a Watch List, or both. *Id.* at pp. 9, 19 (Pg. ID 9, 19). Turaani, then, has not plausibly pleaded that the FBI agent made a false statement. Therefore, the Court will only recognize his Second Amendment interest.

2. Government Interest

The Government has a "compelling" interest in the regulation of firearms sales. *See Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016) (en banc) (citing *Washington v. Glucksberg*, 521 U.S. 702, 735, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); *United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 264, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)).

3. Probable Value of Additional Safeguards

Additional safeguards would have little probable value for the three-day delay, the constructive denial, and the disclosure that he was the target of an FBI investigation. The three-day delay complied with federal regulations and did not violate his procedural due process rights. There is no dispute that Plaintiff was on a Watch List or No Fly List, and that inclusion on such lists triggers a delay response. *See* 28 C.F.R. § 25.8(g)(2); *see also* Dkt. No. 1, p. 12 (Pg. ID 12). Thus, additional safeguards would not be particularly valuable.

Additional safeguards would likewise have little to no value for the constructive denial claim: The official-capacity Defendants are not preventing him from completing the firearm transaction. The store clerk, rather, is the reason he has not purchased the firearm.

Lastly, additional safeguards for the allegedly improper disclosure would have minimal probable value. The rule prohibiting such disclosures is clear and the FBI takes precautions to prevent these occurrences, including through limiting NICS access "to the initiation of a NICS background check in connection with the proposed transfer of a firearm" and having the FBI "periodically monitor telephone inquiries to ensure proper use of the [NICS] system." 28 C.F.R. § 25.8(g)(1), (3).

In light of the above, Turaani's procedural due process claim will not survive the motion to dismiss.

C. Substantive Due Process (Count III)

Plaintiff asserts a substantive due process claim, which is best understood as a Second Amendment challenge to the three-day delay of the firearm transaction. This claim is unmeritorious.

"Substantive due process is 'the doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed.'" *In re City of Detroit, Mich.*, 841 F.3d 684, 699 (6th Cir. 2016) (quoting *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014)). "The class of interests it protects," the Sixth Circuit has explained, "is 'narrower than those protected by procedural due process.'" *Id.* (quoting *Range*, 763 F.3d at 588 n.6). Indeed, "[s]ubstantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (internal quotation marks omitted) (quoting *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012)). The fundamental rights contemplated by substantive due process "are 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 700 (quoting *Glucksberg*, 521 U.S. at 721). "Substantive-due-process claims are 'loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience.'" *Doe v. Miami Univ.*, 882 F.3d 579, 597 (6th Cir. 2018) (quoting *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997)).

Turaani's claims largely relate to the former. He asserts that the Government infringed upon his Second Amendment rights, and all agree that substantive due process protects Second Amendment rights. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. And it secures "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Tyler*, 837 F.3d at 685 (internal quotation marks omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)).

In this Circuit, courts conduct a two-part analysis when deciding Second Amendment challenges. *See United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012). "The first step 'asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.'" *Tyler*, 837 F.3d at 685 (quoting *Greeno*, 679 F.3d at 518). Here, because all agree that Turaani may legally possess a firearm, there is no dispute that the burden that 28 C.F.R. § 25.6(c)(1)(iv)(B) imposes on Turaani falls within the scope of the Second Amendment.

The next step in the *Greeno* framework requires that courts "ascertain the appropriate level of scrutiny and examine the 'strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.'" *Tyler*, 837 F.3d at 686 (quoting *Greeno*, 679 F.3d at 518). Turaani argues that strict scrutiny applies to his challenge, whereas the Government counters that intermediate scrutiny is appropriate.

The Court will find that the Government takes the better view. Indeed, the Plaintiff cites to no authority showing that courts have applied strict scrutiny to a Second Amendment challenge. Numerous courts, on the other hand, have applied intermediate scrutiny to Second Amendment challenges. *See, e.g.*, *Stimmel v. Sessions*, 879 F.3d 198, 206 (6th Cir. 2018) (rejecting plaintiff's request to apply strict scrutiny because "his position runs counter to the clear preference of most appellate courts for applying intermediate scrutiny to [18 U.S.C.] § 922(g) challenges.").

To be sure, the appropriate level of scrutiny turns on "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Tyler*, 837 F.3d at 690 (internal quotation marks omitted) (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)) (citing *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)). 28 C.F.R. § 25.6(c)(1)(iv)(B), as applied here, comes close to the core Second Amendment right. *See id.* at 685 (citing *Heller*, 554 U.S. at 635). Yet "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test." *Id.* at 691 (internal quotation marks omitted) (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015)).

What is more, this regulation barely burdens Turaani's Second Amendment right. Unlike laws that prohibit gun ownership and thereby impose a substantial burden on the right, this regulation simply required Turaani to wait three days before completing the firearm transaction. *Id.*

at 692 (concluding a law that prohibited gun ownership by certain individuals placed a substantial burden on those persons' Second Amendment rights). This minimal burden suggests that it would be unwise for the Court to apply strict scrutiny to the regulation contested here.[1]

The Court will apply intermediate scrutiny, and in doing so, will determine that 28 C.F.R. § 25.6(c)(1)(iv)(B) does not violate Plaintiff's Second Amendment right. "While the vocabulary of intermediate scrutiny varies across courts, 'all forms of the standard require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.'" *Id.* at 693 (quoting *Chovan*, 735 F.3d at 1139; citing *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988)). "All that is required is a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (internal quotation marks omitted) (quoting *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003)).

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1. To the extent Plaintiff contends that this regulation violates his substantive due process rights because it shocks the conscience, the minimal burden imposed by this regulation belies his argument. Typically, behavior that shocks the conscience is an act "'intended to injure' without any justifiable government interest[.]" *See Range*, 763 F.3d at 590 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848-49, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). The circumstances here are inapposite.

As noted in Part IV, Section B.2 of this decision, the Government has a compelling interest in regulating gun sales. *See id.* And here, there is a reasonable fit between 28 C.F.R. § 25.8 and the Government interest in regulating firearm sales. The Government uses the three-day delay to investigate the potentially disqualifying information identified in the NICS. Therefore, this regulation reasonably fits the Government's objective of ensuring that unqualified persons do not obtain guns.

For the above-stated reasons, the Court is unpersuaded by Turaani's Second Amendment and substantive due process arguments contesting 28 C.F.R. § 25.8.

D. Equal Protection (Count IV)

Turaani's equal protection claim will also not survive the motion to dismiss. Equal protection challenges regarding the federal government, and therefore asserted under the Fifth Amendment, are subject to the same standard as challenges to state action, which relate to the Fourteenth Amendment. *Stimmel*, 879 F.3d at 212 (citing *United States v. Angel*, 355 F.3d 462, 471 (6th Cir. 2004)). "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Id.* (internal quotation marks omitted) (quoting *Ctr. for Bio—Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)). "In determining whether individuals are similarly situated," the Sixth Circuit has instructed that "a court should not demand exact correlation, but should

instead seek relevant similarity." *Id.* (internal quotation marks omitted) (quoting *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012)).

Turaani is of Palestinian origin and is a practicing Muslim. Relying on these characteristics, he contends that he is similarly situated to other Palestinians and practicing Muslims. The Court is unconvinced.

As the official-capacity Defendants argue, the relevant similarity here is residence on a national security list, e.g. a Watch List or No Fly List. *See* Dkt. No. 10, pp. 40-41 (Pg. ID 101-02). The Complaint lacks facts indicating that the Government has treated him differently than it has treated other individuals on those lists. For example, Turaani concedes that when individuals on such lists initiate firearm transactions, their transactions are "automatically delayed." Dkt. No. 1, p. 12 (Pg. ID 12). His failure to plead specific facts suggesting that the Government has treated him differently than other individuals on national security lists is fatal to his equal protection claim. *See, e.g., Hall v. Callahan*, 727 F.3d 450, 457 (6th Cir. 2013) (dismissing equal protection claim because plaintiffs failed to identify similarly situated groups and to explain how the contested statute treated them differently than similarly situated individuals). Consequently, the Court will grant the official-capacity Defendants' Motion to Dismiss on Turaani's equal protection claim.

E. APA (Count V)

According to Turaani, the official-capacity Defendants violated the APA because they "either deleted the

[transaction] records too early or wrote that the NTN was invalid in order to reach the time period when records may be purged." Dkt. No. 1, p. 14 (Pg. ID 14). Additionally, Plaintiff alleges that he appealed the "constructive denial" of the transaction eight-seven days after it occurred. These arguments are unavailing.

"The APA authorizes aggrieved individuals to seek judicial review of agency decisions, subject to certain conditions." *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 632 (6th Cir. 2016) (citing 5 U.S.C. § 702). And it "requires [courts] to uphold agency action unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *ECM BioFilms, Inc. v. Fed. Trade Comm'n*, 851 F.3d 599, 612 (6th Cir. 2017) (internal quotation marks omitted) (quoting *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 667 (6th Cir. 2013)).

Turaani maintains that an APA violation occurred here because the transaction files were not preserved for eight-seven days after he had attempted to purchase the firearm. But taking his allegations as true, as the Court must, the Government's conduct was not unlawful. Under 28 C.F.R. § 25.9(b)(ii), "NICS Audit Log records relating to transactions in an open status, except the NTN and date, will be destroyed after not more than 90 days from the date of inquiry."[2] In sum, ninety days is the outer limit

2. Turaani's transaction was under "open status" as the FBI directed the store clerk to delay the transaction and never followed up with a "proceed" or "deny" response. 28 C.F.R. § 25.2 defines "open" as "those non-canceled transactions where the FFL has not

at which the NICS may preserve a transaction file. The deletion of his audit log records after eighty-seven days, then, was not unlawful.

To the extent that the Government failed to keep a record of his NTN and date, as this provision requires, Turaani has plausibly alleged that the Government erred. But any error was harmless, given that the FBI appropriately deleted the rest of his file and the NTN and date offer relatively little insight into the transaction here. *See ECM BioFilms, Inc.*, 851 F.3d at 612 (noting that courts "appl[y] a harmless-error rule to APA cases, such that a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination." (citing *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997); *Rabbers v. Comm'r Soc. Sec. Admin.*, 582 F.3d 647, 654-55 (6th Cir. 2009))).

Therefore, Turaani has not adequately pleaded a violation of the APA.

F. Injunctive and Declaratory Relief (Count VI)

In his last count, Turaani requests injunctive and declaratory relief as an independent cause of action. Dkt. No. 1, pp. 27-28 (Pg. ID 27-28). Perhaps realizing that injunctive and declaratory relief are remedies and

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been notified of the final determination." The section continues, in relevant part, that "[a]n 'open' response does not prohibit an FFL from transferring a firearm after three business days have elapsed since the FFL provided to the system the identifying information about the prospective transferee." *Id.*

not independent causes of action, Turaani retracts this count in his response to the Motion to Dismiss. Dkt. No. 12-1, p. 25 (Pg. ID 137). He is right to do so. *See Goryoka v. Quicken Loan, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013) (rejecting claims for quiet title and injunctive relief because "these requests are remedies and are not separate causes of action."). Thus, the Court will grant the official-capacity Defendants' Motion to Dismiss the count for injunctive and declaratory relief.

V. Conclusion

The Plaintiff raises several claims against the official-capacity Defendants. He maintains that they abridged his right to procedural due process (Count II), substantive due process (Count III), and equal protection (Count IV). Turaani also argues that the official-capacity Defendants failed to comply with the APA (Count V), and he asserts as a standalone count a claim for injunctive and declaratory relief (Count VI). In response, the Government moved to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted [10]. The Court will GRANT the Motion to Dismiss [10]. In particular, the Court will find that Plaintiff lacks standing to raise claims regarding the constructive denial of his rights. Even though he has standing for other allegations of harm, his claims will not survive the Motion to Dismiss. On Counts II-VI of the Complaint, the Court will conclude that Turaani has failed to state a claim upon which relief may be granted. Given this finding and the lack of service as to the individual-capacity Defendant (the Unnamed FBI Agent), the Court will DISMISS Count I WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated: June 7, 2018

/s/ Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge