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

Abdisalam Wilwal, et al.,

Plaintiffs,

v.

Elaine Duke, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs Abdisalam Wilwal ("Mr. Wilwal"), Sagal Abdigani, and their four children are American citizens who were purportedly delayed in crossing the border from Canada to the United States on March 30, 2015. Plaintiffs allege that they were delayed because Mr. Wilwal's name appeared in a database maintained by the Terrorist Screening Center ("TSC"), thereby allegedly requiring that he undergo additional scrutiny before being permitted to enter the United States. Based on these allegations, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), the Federal Tort Claims Act ("FTCA") and the Fourth and Fifth Amendments, seeking multiple forms of relief. First, Plaintiffs seek an order from this Court enjoining the Government from "searching and interrogating" Plaintiffs when they cross the border into the United States in the future. Second, Plaintiffs seek an order directing the Government to remove Mr. Wilwal from TSC's database. Third, Plaintiffs seek notice of the reasons for Mr. Wilwal's alleged inclusion in the database and a meaningful opportunity to challenge his alleged inclusion. Fourth and finally, Plaintiffs seek monetary damages arising out of certain tort claims. Plaintiffs' claims fail for several different reasons and should be dismissed under Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction, under Rule12(b)(6) for failure to state a claim upon which relief can be granted, and under Rule 12(b)(7) for failure to join a required party.

First, Plaintiffs lack Article III standing to bring claims for future equitable relief. To establish standing, Plaintiffs must, at a bare minimum, demonstrate a concrete injury that is actual or imminent; the possibility of future injury is not enough. Plaintiffs' speculation that they may be delayed at the border at some time in the indefinite future is

plainly insufficient. As an initial matter, being delayed at the border does not by itself give rise to a cognizable injury, as that is a routine occurrence experienced by many travelers when crossing international borders. Further, Plaintiffs can only guess as to whether they might experience similar delays if they were to cross the border in the future, and in any event have not alleged concrete plans to do so. Because Plaintiffs' claims for forward looking equitable relief are based on nothing more than speculation, Plaintiffs fail to satisfy the injury-in-fact requirement for standing, requiring that their equitable claims be dismissed under Rule 12(b)(1).

Second, Plaintiffs' claims related to the DHS Traveler Redress Inquiry Program ("DHS TRIP") redress process should be dismissed because Plaintiffs have failed to join a required party and because this Court lacks subject matter jurisdiction over Plaintiffs' claims. The Transportation Security Administration ("TSA") administers DHS TRIP through which individuals can seek redress for travel-related difficulties. Because Plaintiffs' procedural due process claim and co-extensive APA claim challenge the sufficiency of the DHS TRIP redress process, Plaintiffs' claims should be dismissed for failure to join TSA as a required party. And even if TSA had been joined, Congress has provided the Courts of Appeals with exclusive jurisdiction to review orders issued by TSA, including challenges to the adequacy of the DHS TRIP redress process. Accordingly, this Court lacks subject matter jurisdiction over Plaintiffs' claims related to Mr. Wilwal's alleged inclusion in the TSC database.

Third, even if this Court had jurisdiction to adjudicate Plaintiffs' claims, Plaintiffs have failed to allege claims on which relief can be granted. Plaintiffs have not alleged a

plausible claim that their border inspection violated the Constitution. In addition, Plaintiffs' procedural and substantive due process claims fail because Plaintiffs have failed to plausibly allege the violation of a cognizable liberty interest or fundamental right. Plaintiffs' APA claims are coextensive with their constitutional claims and fail for similar reasons.

Fourth, Plaintiffs have failed to state valid claims under the FTCA. Under North Dakota law, plaintiffs cannot recover for official conduct supported by proper legal authority. Here, law-enforcement officers engaged in constitutional practices that were reasonable and warranted. Even as factually alleged, their actions do not rise to the level of tortious conduct under state substantive law.

Accordingly, the Court should dismiss Plaintiffs' claims for lack of jurisdiction, failure to state a claim, and failure to join a necessary party.

BACKGROUND

I. Statutory and Regulatory Framework

A. Border Inspection

U.S. Customs and Border Protection ("CBP"), a component of the Department of Homeland Security ("DHS"), exercises authority under a wide array of statutes to stop, search, and examine persons, baggage, conveyances, and merchandise arriving in and departing from the United States. *See, e.g.*, 19 U.S.C. §§ 482, 1461, 1496, 1499, 1581, 1582; 6 U.S.C. § 211; 8 C.F.R. pt. 287; 19 C.F.R. pt. 162; *see also United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) ("[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining

persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." (citation omitted)). All travelers seeking to enter the U.S. must present themselves for inspection at the border. 19 U.S.C. §§ 1433(b), 1459(a); 8 U.S.C. § 1225(a)(3); 19 C.F.R. § 148.11; 8 C.F.R. § 235.1(a). CBP's responsibilities include preventing the entry of terrorists and instruments of terrorism into the U.S.; securing the borders; "reduc[ing] the vulnerability of the … [U.S.] to terrorism," carrying out immigration enforcement functions; and enforcing customs and agricultural laws, all while "ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce." 6 U.S.C. § 202; *see id.* § 111, 215, 231, 251.

B. Terrorist Screening Center

The Terrorist Screening Center (TSC), "a multi-agency center administered by the FBI, is the U.S. Government's consolidated counterterrorism watchlisting component responsible for the management and operation of the Terrorist Screening Database," or TSDB. *See* https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc. "The [TSDB] is a single database that contains sensitive national security and law enforcement information concerning the identities of those who are known or reasonably suspected of being involved in terrorist activities." *Id.* "The TSC uses the [TSDB] to support front-line screening agencies in positively identifying known or suspected terrorists who are attempting to obtain visas, enter the country, board an aircraft, or engage in other activities." *Id.*

C. The Redress Program for Travel Difficulties

The DHS TRIP is the central processing point for travelers who have inquiries or

seek resolution regarding alleged difficulties they experienced during screening and inspection at transportation hubs or at U.S. borders. *See* http://www.dhs.gov/dhs-trip ("DHS TRIP Website"). This includes "screening problems at ports of entry" and issues related to the TSDB. *Id.* Pursuant to statutory authority, TSA established and administers DHS TRIP. 49 U.S.C. § 44903(j)(2)(C)(iii)(I); *see also* 49 U.S.C. §§ 44903(j)(2)(G)(i), 44926(a) (establishing a redress process for individuals identified as a threat under the regimes utilized by TSA, CBP and other offices or components of DHS). TSA has promulgated regulations governing the DHS TRIP process. 49 C.F.R. §§ 1560.201-.207. Under these regulations, travelers initiate the redress process by submitting a redress inquiry form. 49 C.F.R. § 1560.205(b); *see also* DHS TRIP Website. Depending on the issues presented, DHS TRIP coordinates with other government agencies, which may include CBP, as necessary. *See* Step 2: How to Use DHS TRIP, https://www.dhs.gov/step-2-how-use-dhs-trip ("To process your request, DHS TRIP will share . . . information within [DHS] and outside the Department with components or entities that can help address the underlying issues regarding your redress request."). If the traveler's name is a match or near match with a name on the TSDB, "TSA, in coordination with the TSC and other appropriate Federal law enforcement or intelligence agencies, if necessary, will review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response." 49 C.F.R. § 1560.205(d).

II. Plaintiffs' Factual Allegations

Plaintiffs allege that, after visiting family in Canada, they drove to the port of

entry in Portal, North Dakota, arriving at approximately 6:00 a.m. Am. Compl., ECF No. 25 ¶ 28. After Plaintiffs presented their identification documents, CBP agents allegedly approached Plaintiffs' vehicle with their guns drawn. *Id.* ¶¶ 28, 31. Mr. Wilwal was placed in handcuffs, and he and his family were escorted inside. *Id.* ¶¶ 32, 68. Plaintiffs allege that Mr. Wilwal was referred for additional scrutiny, known as secondary inspection, and placed in handcuffs because his name appeared on a federal terrorism-related watchlist. *Id.* ¶ 37.

Plaintiffs allege that at approximately 10:30 a.m., Mr. Wilwal began to feel lightheaded and passed out on the floor. *Id.* ¶ 52. When he regained consciousness, paramedics had arrived. *Id.* ¶ 53. Mr. Wilwal declined to go to the hospital, and CBP agents changed the position of his handcuffs so that his arms were in front of his body. *Id.*

At approximately 3:00 p.m., Mr. Wilwal was told that two Homeland Security Investigations ("HSI") officers had arrived at the station. *Id.* ¶ 56. Plaintiffs allege that the CBP officers had notified HSI officers "that they had detained the Wilwal family," and the CBP officers continued to detain Plaintiffs "at the HSI officers' request." *Id.* ¶ 56. Plaintiffs further allege that the HSI officers traveled to Portal from Minot, North Dakota. *Id.* The HSI officers questioned Mr. Wilwal for approximately forty-five (45) minutes. *Id.* ¶ 61. Plaintiffs allege that Ms. Abdigani and the children were not allowed to leave the border station while Mr. Wilwal was being inspected. *Id.* ¶ 65. CBP officers offered the children candy and gave them hamburgers but did not provide food to Ms. Abdigani. *Id.* ¶ 73. At approximately 4:40 p.m., HSI officers informed the CBP

officers that they could remove Mr. Wilwal's handcuffs and that he could leave. *Id.* ¶ 62. Mr. Wilwal and his family left immediately after he was released. *Id.*

STANDARD OF REVIEW

A. Rule 12(b)(1)

"A motion to dismiss pursuant to Rule 12(b)(1) challenges the Court's subject matter jurisdiction and requires the Court to examine whether it has authority to decide the claims." *Damon v. Groteboer*, 937 F. Supp. 2d 1048, 1063 (D. Minn. 2013). In deciding a motion under Rule 12(b)(1) the Court must first "distinguish between a 'facial attack' and a 'factual attack.'" *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In other words, in a facial challenge, the court "determine[s] whether the asserted jurisdictional basis is patently meritless by looking to the face of the complaint, and drawing all reasonable inferences in favor of the plaintiff." *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005) (citations omitted).

B. Rule 12(b)(6)

Rule 12(b)(6) provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994). Any ambiguities concerning

the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman v. Diana Corp.*, 825 F. Supp. 870, 880 (D. Minn. 1993).

A pleading must relate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009).

C. Rules 12(b)(7) and Rule 19

Under Rule 12(b)(7) a party may move to dismiss a complaint for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). For the purposes of a Rule 12(b)(7) motion, the court must accept the complaint's allegations as true, and may also consider matters outside the pleadings when determining whether Rule 19 requires that a party be joined. *Omega Demolition Corp. v. Hays Grp.*, 306 F.R.D. 225, 227 (D. Minn. 2015). The defendant seeking dismissal for failure to name a party carries the burden of "producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *Sykes v. Hengel*, 220 F.R.D. 593, 596 (S.D. Iowa 2004) (quoting *De Wit v. Firstar Corp.*, 879 F. Supp. 947, 992 (N.D. Iowa 1995)).

ARGUMENT

I. Plaintiffs Lack Standing to Seek Prospective Relief

A single, allegedly delayed border crossing over two years ago does not provide Plaintiffs with standing to seek future injunctive and declaratory relief. Article III of the

Constitution confines federal courts to adjudicating only "actual cases or controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). "No principle is more fundamental to the judiciary's proper role in our system of government than [this] constitutional limitation." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). One aspect of this case-or-controversy limitation is the requirement of standing. The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To meet this burden, a plaintiff must show: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that a favorable ruling will redress the alleged injury. *Young Am. Corp. v. Affiliated Comput. Servs.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan*, 504 U.S. at 560–61). An injury in fact is a judicially cognizable injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560–61 (citation omitted). To establish an injury in fact, a future injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[A]llegations of possible future injury are not sufficient." *Id.* (citation omitted).

By limiting the judicial power to instances where specific individuals have suffered concrete injuries, standing requirements "serve[] to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* at 408. A court's standing inquiry should, therefore, be "especially rigorous when reaching the merits of the dispute" would compel it "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* (citation omitted).

A. Plaintiffs Do Not Allege a Likelihood of Future Injury

Plaintiffs' past alleged injuries cannot provide standing to seek future injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief[.]" (citation omitted)). Rather, a controversy exists only when a plaintiff establishes the existence of a "real and immediate threat" that he will be subjected to the same conduct that precipitated the litigation. *Id.* at 103. In the absence of such allegations, Plaintiffs cannot establish that there is a "real and immediate threat" that they will undergo additional screening and inspection if they now choose to cross the border. *See id.*; *FTC v. Johnson*, 800 F.3d 448, 451 (8th Cir. 2015) (same). Indeed, declaratory relief must be predicated on a live, ongoing controversy; such relief is not available when, as here, Plaintiffs simply seek to test the legality of a past action. *See, e.g.*, *Alvarez v. Smith*, 558 U.S. 87, 91, 92-93 (2009) (case seeking a declaration that past seizures of property were unconstitutional was not a justiciable case or controversy).

In this case, Plaintiffs, pursuant to Claims One through Seven (constitutional and APA claims), seek prospective injunctive and declaratory relief, including an injunction against future searches and seizures. Am. Compl., ECF No. 25 ¶¶ 94-107. To have standing with regard to these claims, Plaintiffs must show that a future injury is certainly imminent, and this they cannot do. At most, the Amended Complaint alleges that Plaintiffs have experienced "stress and anxiety about the prospect that they will be subjected to lengthy and abusive detentions at border stations, airports, or ports of entry in the future." Am. Compl., ECF No. 25 ¶ 89. But the mere "prospect" of injury —

i.e., possible future injury, *Clapper*, 568 U.S. at 409 — is not sufficient under the doctrine of standing; rather, the alleged injury must be "certainly impending." *Id.* There is no indication in the Amended Complaint as to why such future "detentions" are likely, beyond a vague statement that Plaintiffs are "concerned that CBP and/or HSI will use the information collected during the border detention to expand the duration or scope of inspections or stops of the Plaintiffs . . . ." *Id.* ¶ 91. Plaintiffs' standing for declaratory and injunctive relief thus reduces to a subjective concern that some indeterminate future travel may be subject to an inspection of "expand[ed] duration." *See id.* These allegations are insufficient to establish a certainly impending future injury, which would justify injunctive or declaratory relief. *See, e.g.*, *Lyons*, 461 U.S. at 111 (holding that a plaintiff must show a "sufficient likelihood that he will again be wronged in a similar way . . . ."); *Smook v. Minnehaha Cty.*, 457 F.3d 806, 815–16 (8th Cir. 2006) ("[A]ttempting to anticipate whether any of the plaintiffs would actually be detained and strip searched would take us 'into the area of speculation and conjecture.'") (citation omitted).[1]

In a similar vein, while the Amended Complaint alleges that Mr. Wilwal may, in 2015, have been listed on a "federal terrorism-related watchlist," Am. Compl., ECF No.

[1] Even generously assuming that Plaintiffs allege a likelihood of future similar detentions of multiple hours at a border, they provide no plausible basis upon which such injury is likely to occur. The Amended Complaint concedes that the family has "not attempted to travel outside the United States since March 30, 2015," Am. Compl., ECF No. 25 ¶ 89, such that any assumption about future injury must be solely predicated on one border inspection from nearly two and a half years ago. This is not enough to presume a likelihood of future injury. *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037-39 (8th Cir. 2000) (holding that plaintiff must "demonstrate 'a real and immediate threat that she would again' suffer similar injury in the future") (citation omitted).

25 ¶ 37, there is no factual allegation in the Amended Complaint that Mr. Wilwal remains on any such watchlist, or indeed, any reason to believe that Plaintiffs are likely to be detained and questioned during future international travel. In sum, the Amended Complaint fails to plausibly allege that Plaintiffs face imminent harm, and they, therefore, lack standing to bring claims seeking injunctive and declaratory relief. *See Clapper*, 568 U.S. at 409 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.") (citation omitted).

B. The Absence of Any Concrete Travel Plans Also Defeats Standing

Plaintiffs lack standing as to their claims for prospective relief for the additional reason that the Amended Complaint fails to set forth any specific plans or dates for future travel. In *Lujan v. Defenders of Wildlife*, the Court held that a vague "intent" to travel, resulting in possible future injury "is simply not enough." 504 U.S. at 564. That is, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id*.

Here, Plaintiffs have alleged nothing more than a vague desire to travel internationally at some point in the future. As the Amended Complaint states, "[a]ll four children want to travel to Canada to see their cousins, but the family is afraid to do so." Am. Compl., ECF No. 25 ¶ 89. However, the bald statement that a plaintiff "wants to" travel to a certain location where they may experience injury is "insufficient to satisfy the

requirement of imminent injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Bernbeck v. Gale*, 829 F.3d 643, 647–48 (8th Cir. 2016) ("The concept of immediacy is stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control."). Plaintiffs' vague desire to travel at some unspecified time cannot support a finding of certainly imminent injury resulting from such travel.

II. This Court Lacks Subject Matter Jurisdiction over Plaintiffs' Claims Challenging the DHS TRIP Redress Process

To the extent that Plaintiffs challenge the adequacy of the DHS TRIP redress process concerning travel difficulties related to the terrorist watchlist, or seek connected relief, the Court lacks jurisdiction over such claims. 49 U.S.C. § 46110 provides for "exclusive" jurisdiction in the courts of appeal to review orders issued "in whole or in part" by TSA, including claims "inescapably intertwined" with TSA orders. *See id.* § 46110(a), (c); *Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012) (holding that the court of appeals has jurisdiction to review "TSA's final orders"); *see also Ligon v. LaHood*, 614 F.3d 150, 154–57 (5th Cir. 2010) (discussing the "inescapably intertwined" doctrine in reference to 49 U.S.C. § 46110 and collecting cases); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994) (litigant must proceed exclusively through a statutory scheme where (1) such intent is "fairly discernible in the statutory scheme," and (2) the litigant's claims are "of the type Congress intended to be reviewed within [the] statutory structure") (citation omitted).

TSA is responsible for managing DHS TRIP, and, pursuant to congressional

mandate, TSA has promulgated those regulations governing the DHS TRIP process. *See* 49 U.S.C. §§ 44903(j)(2)(C)(iii), 44903(j)(2)(G)(i), 44926(a) (establishing a redress process for individuals identified as a threat under the regimes utilized by TSA, CBP and other offices or components of DHS); 49 C.F.R. §§ 1560.201-.207. Further, the TSA regulations establishing and governing the DHS TRIP process constitute a final order within the meaning of 49 U.S.C. § 46110. *See Mokdad v. Lynch*, 804 F.3d 807, 812 (6th Cir. 2015) (finding that challenges to the adequacy of the DHS TRIP redress process amount to a challenge to a TSA order); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) (finding the word "order" for purposes of special review statutes to be construed broadly to permit direct review of regulations in courts of appeals).

While the Eighth Circuit has not directly opined on this precise issue, well-reasoned opinions in other circuits are persuasive that district courts lack jurisdiction over challenges to the DHS TRIP process. For instance in *Mokdad*, the plaintiff challenged the adequacy of procedures for contesting his alleged placement on the Government's No Fly List. 804 F.3d 807. However, the court held that "[t]o the extent that [plaintiff] challenges the adequacy of the redress process, his claims amount to a challenge to a TSA order." *Id*. at 811. There, as here, plaintiff had not named TSA as a Defendant, such that the *Mokdad* court had no choice but to dismiss those claims for failure to join a necessary party. The same result should follow here. *Id.* at 812; *see also* Fed. R. Civ. P. 19.

Even if TSA were a party to the case, however, the result would be the same. District courts have followed *Mokdad*'s compelling decision, holding that they "lack[]

subject matter jurisdiction over any challenges . . . to the adequacy of the DHS TRIP redress process . . . ." *Bazzi v. Lynch*, No. 16-10123, 2016 WL 4525240, at *5 (E.D. Mich. Aug. 30, 2016); *Kadura v. Lynch*, No. CV 14-13128, 2017 WL 914249, at *8 (E.D. Mich. Mar. 8, 2017) (same); *Beydoun v. Lynch*, No. 14-CV-13812, 2016 WL 3753561, at *4 (E.D. Mich. July 14, 2016) *aff'd sub nom. Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017) (same).[2]

Plaintiffs' Amended Complaint is replete with references and challenges to the available redress process for placement on a terrorism watchlist. The very first paragraph of the Amended Complaint avers that "the government has refused to provide a fair and meaningful process to challenge placement on the watchlist – in violation of the Fifth Amendment guarantee of due process." Am. Compl., ECF No. 25 ¶ 1. Plaintiffs' Fourth and Seventh Claims, alleging Procedural Due Process and APA violations respectively, are direct challenges to the adequacy of available redress procedures. *See, e.g.*, *id*. ¶ 99 ("[I]n refusing to provide him with a meaningful opportunity to challenge his placement on the watchlist and its consequences, [Defendants] violated Mr. Wilwal's right to procedural due process"); *id*. ¶ 106 ("Defendants' failure to provide . . . a meaningful opportunity to contest his continued retention on it . . . should be set aside as unlawful pursuant to 5 U.S.C. § 706"). In

[2] Defendants acknowledge that certain other decisions have held to the contrary. *See Ege v. DHS*, 784 F.3d 791, 796 (D.C. Cir. 2015); *Arjmand v. DHS*, 745 F.3d 1300, 1302-03 (9th Cir. 2014); *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012); *Ibrahim v. DHS*, 538 F.3d 1250, 1255 (9th Cir. 2008). However, the reasoning of these cases is unpersuasive. As explained in *Mokdad* and the dissenting opinion in *Ibrahim*, DHS TRIP was created pursuant to TSA statutory directives identified herein and was formally established by TSA regulations. *Mokdad*, 804 F.3d at 811-12; *Ibrahim*, 538 F.3d at 1259-60 (R. Smith, J., dissenting).

addition, much of Plaintiffs' requested relief constitutes the precise redress requested for Mr. Wilwal's alleged placement on a watchlist. *See id.* Prayer for Relief (B)(c) (requesting that Defendants provide Mr. Wilwal with "notice of the reasons for his placement on the master watchlist and a meaningful opportunity to contest his continued retention on it").

To the extent that any of Plaintiffs' claims or requests for relief constitute a challenge to the adequacy of available redress procedures, Plaintiffs thereby challenge the sufficiency of the DHS TRIP process. Plaintiffs appear to recognize this fact, as they describe the DHS TRIP process in detail in Paragraphs 46-47 of the Amended Complaint, and later claim that while they made submissions to DHS TRIP, they have not received a "final response from DHS TRIP." Am. Compl., ECF No. 25 ¶ 87. 49 U.S.C. § 46110(c) provides the courts of appeal with "exclusive jurisdiction" over challenges to TSA final orders, such as the TSA regulations establishing the redress process. Thus, Plaintiffs' Claims Four and Seven, along with all other claims for relief or other challenges to the adequacy of the DHS TRIP process, should be dismissed for lack of jurisdiction.

III. Plaintiffs Have Failed to State a Claim upon Which Relief Can Be Granted

Even if this Court finds that Plaintiffs have standing, the case should still be dismissed because Plaintiffs have failed to state a claim.

A. Claims One and Three: Unconstitutional Seizure

Plaintiffs' first and third claims allege that Plaintiffs' detention "constituted an unreasonable seizure in violation of the Fourth Amendment to the U.S. Constitution."

Am. Compl., ECF No. 25 ¶¶ 94, 97. The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As relevant here, the Supreme Court has emphasized that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. This authority derives from the fact that "since the beginning of our Government," Congress "has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Id*. at 153 (citation omitted); *see also United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). The Supreme Court has stated "[t]ime and again" that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Flores-Montano*, 541 U.S. at 152-53 (quoting *Ramsey*, 431 U.S. at 616).

Accordingly, the Government has the authority to perform border searches without a warrant, probable cause, or reasonable suspicion. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). The Supreme Court has only ever found one narrow exception to Customs officials' broad authority, whereby reasonable suspicion was required in the context of a detention to determine whether a traveler was smuggling drugs in her "alimentary canal." *Id.* at 541. The Court has explicitly reserved the question of whether any heightened suspicion would be required to justify other kinds of

personal searches such as "strip, body cavity, or involuntary x-ray searches." *Id*. at 541 n.4; *see also United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013) (holding that any heightened suspicion requirement is reserved for searches that are "so destructive, particularly offensive, or overly intrusive . . . as to require particularized suspicion." (citation omitted)); *United States v. Smasal*, No. CRIM. 15-85, 2015 WL 4622246 (JRT/BRT), at *6 (D. Minn. June 19, 2015) ("Non-routine searches . . . have been deemed to include strip searches, body cavity searches, removal of artificial limbs, and drilling holes into various objects."). Here, Plaintiffs do not allege that they were subjected to any type of invasive personal searches. As a consequence, there can be little doubt that the detention and questioning of Plaintiffs was a constitutional search by Homeland Security officials. *See, e.g., United States v. Oyekan*, 786 F.2d 832, 835 (8th Cir. 1986) ("[N]o question is raised that the customs officials acted within constitutional norms in initially detaining and questioning the two women.").[3]

To the extent that Plaintiffs allege that the duration of their detention somehow constituted a Fourth Amendment violation, the Supreme Court has "consistently rejected hard-and-fast time limits" concerning detention in the border context. *Montoya de Hernandez*, 473 U.S. at 543. "Instead, common sense and ordinary human experience

[3] Indeed, the broad authority of Government officials to conduct searches at the border precludes this Court from granting Plaintiffs' Prayer for Relief (B)(a-b), seeking an injunction against "arresting, seizing, detaining, searching, or interrogating" Plaintiffs at the border. Given that border searches "are not subject to any requirement of reasonable suspicion, probable cause, or warrant," *Montoya de Hernandez*, 473 U.S. at 538, Government officials cannot be barred from conducting searches as a matter of discretion or based on purported matches to a terrorism "watchlist" or association with a person on such a "watchlist." *See also Kashamu v. DOJ*, 846 F.3d 934, 936 (7th Cir. 2017) (holding that suit lacked merit where request to enjoin plaintiff's "abduction abroad" was predicated on "lawful" conduct).

must govern over rigid criteria." *Id*. (citation omitted). In this case, Plaintiffs allege that they arrived at the port of entry in the tiny town of Portal, North Dakota at 6:00am on March 30, 2015. Am. Compl., ECF No. 25 ¶ 28. Thereafter, Plaintiffs state that Mr. Wilwal was detained because his name "appeared on a federal terrorism-related watchlist." *Id.* ¶ 37. Plaintiffs further concede that CBP officers contacted HSI officials to conduct questioning, and those HSI officials in turn requested that the CBP officers continue to detain Plaintiffs until they were able to travel from Minot, North Dakota, to question Mr. Wilwal. *Id.* ¶ 56. Once the HSI officials arrived, Plaintiffs admit that the interview process lasted only 45 minutes, at which point Plaintiffs were released and left the port of entry. *Id.* ¶¶ 61-62.

Here, common sense and ordinary experience make it plain that several circumstances contributed to the length of Plaintiffs' detention. Plaintiffs allege that they arrived at the small border crossing in Portal, North Dakota in the early morning hours and that Mr. Wilwal's name appeared on a federal terrorism watchlist. They alleged that Homeland Security Investigators were called to question Mr. Wilwal and had to travel to Portal from Minot, North Dakota, nearly one hundred miles away. Under such circumstances, the detention of Plaintiffs until the necessary inspection could be performed constituted a border search well within the broad constitutional authority of customs officials. To hold otherwise would require CBP officers to forego inspection of travelers simply because circumstances might lengthen the time required for questioning, a clearly untenable proposition. Thus, in this instance, in which neither Mr. Wilwal nor his family was subject to any invasive or destructive searches, but merely detained so that

questioning could occur, Plaintiffs have not stated a claim for a Fourth Amendment violation. *See, e.g.*, *Tabbaa v. Chertoff*, 509 F.3d 89, 100–01 (2d Cir. 2007) (upholding detention of six hours where "common sense and ordinary human experience suggest" that the time was needed for "CBP to complete the various steps at issue here, including vehicle searches, questioning, and identity verification, all of which we have already found to be routine").

B. Claim Two: Excessive Force

Plaintiffs next contend that Mr. Wilwal was subject to excessive use of force, in violation of the Fourth Amendment. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009) (citation omitted).

Here, the basis for Plaintiffs' excessive force claim is unclear. The Second Claim for Relief avers that the "excessive force" used caused Mr. Wilwal "pain and physical injury," Am. Compl., ECF No. 25 ¶ 96, but the Amended Complaint fails to set forth any factual allegation of pain or physical injury on the part of Mr. Wilwal. Defendants and this Court are therefore left to guess at the allegations underlying Plaintiffs' claim. This claim should be dismissed on vagueness grounds, for failing to set forth a plausible claim upon which relief can be granted. *See Iqbal*, 556 U.S. 662.

To the extent Plaintiffs might have alleged that (1) the use of handcuffs on Mr. Wilwal during his detention, or (2) the CBP officers' initial brandishing of weapons was excessive, both of these allegations similarly fail to state a claim for relief.

The Supreme Court has characterized the use of handcuffs standing alone, even for an extended period, as a "marginal intrusion." *Muehler v. Mena*, 544 U.S. 93, 99 (2005). The Eighth Circuit has also addressed this issue, holding in *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003) that "for the application of handcuffs to amount to excessive force[,] there must be something beyond allegations of minor injuries." *See also Hanig v. Lee*, 415 F.3d 822, 824 (8th Cir. 2005) (same); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (finding no excessive force in "allegations of pain as a result of being handcuffed" for two hours, "without some evidence of more permanent injury"). Despite a vague invocation of "injury," Plaintiffs do not allege any actual harm resulting from the use of handcuffs. The Amended Complaint does not allege that the handcuffs caused Mr. Wilwal discomfort or pain during his period of detention, let alone that they caused him significant injuries. Thus, as a matter of law, Plaintiffs may not state a claim for excessive force based on the use of handcuffs.

Similarly, Plaintiffs cannot state a claim for relief based upon the fact that CBP officers allegedly drew their firearms in effectuating the seizure here. As the Eighth Circuit has squarely held, a claim of a Government official "drawing his gun and pointing it . . . without any indication [the official] intended or attempted to fire the gun, does not rise to the level of a constitutional violation." *Edwards v. Giles*, 51 F.3d 155, 157 (8th

Cir. 1995); *see also Rodriguez v. Vega*, No. 5:14-CV-05161, 2015 WL 4241042, at *2 (W.D. Ark. July 13, 2015) (same); *Crowley v. Benton Cty.*, No. 05-5098, 2006 WL 3053005, at *4 (W.D. Ark. Oct. 26, 2006) (same). As Plaintiffs have not alleged that CBP officers intended or attempted to fire their guns, they have not stated a claim of excessive force based on their allegation that CBP officers drew their guns.

C. Claim Four: Procedural Due Process

Plaintiffs next contend that Defendants violated Plaintiffs' procedural due process rights by "failing to provide Mr. Wilwal with a constitutionally adequate redress process . . . ." ECF No. 25 ¶ 100. Leaving aside that this direct challenge to TSA's DHS TRIP redress process must be brought in a court of appeals, 49 U.S.C. § 46110, Plaintiffs fail to state a cognizable claim. "To make out a claim for a violation of procedural due process, the plaintiff has the burden of showing that '(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest.'" *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 965–66 (8th Cir. 2015) (quoting *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012)). In this case, Plaintiffs allege that an inadequate redress process has infringed Mr. Wilwal's "liberty interest in travel, entry into the United States, and freedom from unconstitutional seizure." Am. Compl., ECF No. 25 ¶ 100.

As an initial matter, Mr. Wilwal's interest in "freedom from unconstitutional seizure" is coextensive with Claim One, his Fourth Amendment Claim, asserting that he was subject to an unconstitutional seizure. Thus, for the same reasons that he cannot

state a claim for an unconstitutional seizure, he cannot show the deprivation of a protected liberty interest on those grounds.

Next, Mr. Wilwal cites his interest in "travel" and "entry into the United States." Yet the Amended Complaint does not allege that Mr. Wilwal was ever prevented from traveling or barred from entry into the United States.[4] At most, the Amended Complaint could be read to allege that Mr. Wilwal was deprived of a protected liberty interest because his travel and entry into the United States were delayed. While the Eighth Circuit has not directly addressed this unusual type of claim, multiple courts of appeals have concluded that allegations like those put forth by Mr. Wilwal do not amount to a deprivation of the right to travel. For example, in *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007), the Sixth Circuit determined that a law causing "inconvenience" for the traveler, like the travel delays at issue here, did not amount to a constitutional "denial of the right to travel." *See also Beydoun*, 2016 WL 3753561, at *5 ("[P]laintiff's allegations do not rise to the level of a due process violation, because he alleges that he can still fly after additional screening and has not been deterred from flying."); *Green v. TSA*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash.

[4] Although there is a fundamental right to interstate travel, *see Saenz v. Roe*, 526 U.S. 489 (1999), "the freedom to travel outside the United States must be distinguished from the right to travel within the United States," *Haig v. Agee*, 453 U.S. 280, 306 (1981). The freedom to travel internationally is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment" and is "subordinate to national security . . . considerations." *Haig*, 453 U.S. at 306-07; *see also Perryman v. HHS*, No. 8:11CV175, 2011 WL 2559715, at *1 (D. Neb. June 28, 2011) ("[T]he freedom to travel abroad is less important than the freedom to travel interstate, which is virtually unqualified.").

2005) (holding in the context of a challenge to enhanced security screening that "Plaintiffs do not have a right to travel without any impediments whatsoever"). The Third Circuit reached the similar conclusion that the "right to travel is . . . not constitutionally offended" by a "law which may cause some inconvenience." *United States v. Shenandoah*, 595 F.3d 151, 162-63 (3d Cir. 2010), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012).

Even in the context of interstate travel, which, unlike international travel, is a fundamental right, the courts have specifically held that travel delays ranging from a few hours up to one day do not unconstitutionally burden the right to travel. *See, e.g., Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 51 (2d Cir. 2007) (upholding law banning certain ferry travel to an island thereby making interstate travel "longer and more expensive"); *Torraco v. Port Auth*., 615 F.3d 129, 141 (2d Cir. 2010) (holding that a delay of "a little over one day . . . was a minor restriction that did not result in a denial of the right to travel"); *City of Houston v. FAA*, 679 F.2d 1184, 1186-99 (5th Cir. 1982) (upholding regulation limiting use of airport so that certain passengers must use connecting flights or land at a more distant airport).

Of course, the right to interstate travel is not implicated by a delay at the border. At most, such delay implicates interests in international travel. Plaintiffs allege only that, on one occasion, they were subject to a delay in their international travel from Canada to the United States. Inconvenience, inspections, or delays at borders and ports of entry, like those described by Plaintiffs, do not amount to a constitutionally cognizable violation of the right to travel. *See, e.g., League of United Latin Am. Citizens*, 500 F.3d

at 535. Without a constitutionally protected liberty interest, Plaintiffs "cannot establish a due process violation." *Mulvenon v. Greenwood*, 643 F.3d 653, 657 (8th Cir. 2011).[5]

D. Claim Five: Substantive Due Process

Plaintiffs follow their procedural due process claim with its even more demanding relative, a substantive due process claim. To state an as-applied substantive due process claim, Plaintiffs "must demonstrate both that the [Government's] conduct was conscience-shocking, and that the [Government] violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Karsjens v. Piper*, 845 F.3d 394, 408 (8th Cir. 2017) (quoting *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (en banc)) (internal quotations omitted). The Eighth Circuit has "explained that the alleged substantive due process violations must involve conduct 'so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Id.* (quoting *Moran*, 296 F.3d at 647).

Plaintiffs fail to allege either a fundamental right violated by the Government, or

[5] Even if Plaintiffs could somehow allege the deprivation of a protected liberty interest in delay-free international travel, their claim would still lack merit. "'[T]he Government need only advance a rational, or at most an important, reason' for restricting international travel." *Risenhoover v. Wash. Cty. Cmty. Servs.*, 545 F. Supp. 2d 885, 890 (D. Minn. 2008) (quoting *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996)). There can be no doubt that the United States has an important reason to conduct border inspections, which may lead to incidental delays in international travel. *Flores-Montano*, 541 U.S. at 153 ("It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.").

that any of the Government's actions were shocking to the conscience. Plaintiffs vaguely claim that the placement of Mr. Wilwal "on the master watchlist, and in arresting, detaining, incarcerating, and interrogating him on that basis, violated his right to substantive due process . . . ." Am. Compl., ECF No. 25 ¶ 101. Yet, Plaintiffs entirely omit any mention of a fundamental right, the violation of which might support a substantive due process claim. Where Defendants cannot even speculate as to the basis of Plaintiffs' claim, it is self-evident that Plaintiffs have not stated a claim upon which relief can be granted.[6]

Further, even if Plaintiffs had cited the violation of a fundamental right as required, they would still fail to make out a substantive due process claim. The conduct of the Government officials in this case comes nowhere near the "brutal and inhumane abuse of official power," required for Government behavior to shock the conscience. *See Karsjens*, 845 F.3d at 408; *see also Hall v. Ramsey Cty.*, 801 F.3d 912, 918 (8th Cir. 2015) (holding that pressing detainee against a wall and twisting "his arm behind his back," "likely" resulting in injury, was not conscience-shocking). Here, Plaintiffs have not alleged Government action "inspired by malice or sadism" which could be said to shock the conscience. *See Karsjens*, 845 F.3d at 408. As a result, Plaintiffs have failed to state a claim for a substantive due process violation.

[6] Even if Mr. Wilwal were to allege that his alleged placement on a terrorism watchlist violated his right to travel, because it caused him delays and inconveniences, that claim would be meritless. As noted above, the right to international travel is not fundamental and so cannot support a substantive due process claim. *Haig*, 453 U.S. at 306. In addition, in the context of interstate travel, where a fundamental right might be implicated, any delays which are "incidental or negligible . . . do no implicate the right to travel." *Beydoun*, 871 F.3d at 468.

E. Claim Six: Violation of Administrative Procedure Act (all Plaintiffs)

Plaintiffs' first Administrative Procedure Act ("APA") claim is too vague to entitle them to any relief. The Amended Complaint does not identify what agency action it is asking the court to review and/or set aside. The Sixth Claim for relief states that "Defendants' actions in adopting or implementing policies or practices that permit, or failed to prevent, Defendants' abuse of Plaintiffs, constituted final agency action within the meaning of the Administrative Procedure Act." Am. Compl., ECF No. 25 ¶ 103. But Plaintiffs never once identify which "policies" or "practices" are in fact final agency action under the APA. Further, the Sixth Claim goes on to state that "Defendants' unlawful seizure, unnecessary and extended restraint, and search of the Plaintiffs, as set forth above, was arbitrary, capricious . . . and outside the Defendants' statutory authority." *Id.* ¶ 104. Thus it is entirely unclear whether Plaintiffs are challenging the adoption of unspecified policies or practices, or if this claim attacks the "seizure," "restraint," and/or "search" of the Plaintiffs, or some combination of all of the above. Such a vague pleading should be dismissed under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See id*. at 679 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009) ("[T]he complaint must include sufficient factual allegations to provide the grounds on which the claim rests."). Defendants and this Court should not be forced, again, to guess at the foundation for Plaintiffs' claims. Rather, the Sixth Claim should be dismissed.

Even if it reaches the merits here, the Court should dismiss the APA claim because

it seeks review of a matter committed to agency discretion. Namely, if the APA claim is a challenge to Defendants' alleged determination that Plaintiffs should be subject to certain screening or inspection because of his alleged placement on a "terrorism-related watchlist", *see* Am. Compl., ECF No. 25 ¶ 1, it implicates the "determination of which individuals may warrant additional security inspection at our nation['s] borders [which] is a matter that is committed to the discretion of the law enforcement agencies involved in the intelligence evaluation and screening processes," and cannot be reviewed under the APA. *Shearson v. Holder*, 865 F. Supp. 2d 850, 866 (N.D. Ohio 2011); *see also Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference" accorded to the "political branches with respect to matters of national security").

As a final point, even if the application of certain security procedures at the nation's borders was not committed to agency discretion, the scope of judicial review under the APA is narrow and deferential, and a court cannot substitute its judgment for the agency. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, if the agency's decision was supported by a rational basis, it must be affirmed. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Plaintiffs have not alleged how their inspection or detention was arbitrary, capricious, or an abuse of discretion or otherwise violated the APA. Plaintiffs have, therefore, failed to state a valid APA claim.

F. Claim Seven: Violation of the Administrative Procedure Act (Mr. Wilwal)

Plaintiffs also allege in Claim Seven that Defendants violated the APA by refusing to provide Mr. Wilwal "with a constitutionally adequate process for obtaining redress for

his placement on the master watchlist." Am. Compl., ECF No. 25 ¶ 105. Mr. Wilwal's APA claim, however, is coextensive with his fourth claim of relief alleging a violation of his procedural due process rights and fails for the same reasons. As an initial matter, as explained above, DHS TRIP, which provides a redress process for individuals who have travel-related difficulties, was created by TSA, and Mr. Wilwal has failed to name TSA as a Defendant. *Supra* Section II. In addition, the Court lacks subject matter jurisdiction over Mr. Wilwal's claim because Congress has granted exclusive jurisdiction to the courts of appeals to review final TSA Orders, like those establishing DHS TRIP. *See id.* Finally, under the APA's deferential standard of review, Mr. Wilwal has failed to allege a plausible claim that the TSA orders establishing DHS TRIP are not supported by a rational basis. The Court should, therefore, dismiss Claim Seven under Rules 12(b)(1), 12(b)(6), and 12(b)(7).

IV. Plaintiffs' FTCA Claims Should Be Dismissed For Failure to State a Claim Upon Which Relief Can Be Granted.

In addition to their constitutional and APA claims, Plaintiffs bring three tort claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* Plaintiffs allege false arrest/false imprisonment and assault. Mr. Wilwal also brings a separate claim for battery. The FTCA waives the sovereign immunity of the United States only to the extent that state law would impose liability on a private individual. *Sorace v. United States*, 788 F.3d 758 (8th Cir. 2015). Whether a private person analogue exists is based on the law of the place where the relevant act or omission

occurred. *Id.*; 28 U.S.C. § 1346(b)(1).[7] Here, all relevant conduct occurred in North Dakota, so the substantive law of North Dakota applies to Plaintiffs' tort claims. *LaFrombosie v. Leavitt*, 439 F.3d 792 (8th Cir. 2006) (affirming the "law of the place" refers to law of the state where events occurred).

A. False Arrest/False Imprisonment

Under North Dakota law, to prove a claim for false arrest/false imprisonment, "plaintiffs must demonstrate that they were subject to total restraint against their will by means of physical barriers or by threats of force which intimidated them into compliance with orders." *Copper v. City of Fargo*, 905 F. Supp. 680, 700 (D.N.D. 1994). "However, plaintiffs are not entitled to recover if the arrest is supported by proper legal authority."[8] *Id*; *cf. Cervantes v. United States*, 330 F.3d 1186, 1188 (9th Cir. 2003) (applying California law to FTCA claims for false arrest and false imprisonment by customs agents, but federal law for determining probable cause). Because CBP officers acted pursuant to

[7] To the extent Plaintiffs' claims are more properly characterized as constitutional torts, they are not cognizable under the Federal Tort Claims Act. *Washington v. DEA*, 183 F.3d 868, 873 (8th Cir. 1999) ("Because the 'law of the place' refers to state law, and state law cannot provide liability for the violation of a federal constitutional right, constitutional wrongs cannot be remedied through the FTCA.") (citation omitted).

[8] The Eighth Circuit has yet to identify the private person analog for uniquely law-enforcement functions, such as effectuating search warrants or border inspections. *See Washington*, 183 F.3d at 873 (dismissing FTCA because "the application process for, and execution of, a search warrant has no private analogue. Thus, there is no comparable situation to the instant case where a private individual could be held liable under state law."). Some courts analogize law-enforcement functions to citizen's arrest. *See Mayorov v. United States*, 84 F. Supp. 3d 678 (N.D. Ill. 2015); *Watson v. United States*, 133 F. Supp. 3d 502 (E.D.N.Y. 2015). In North Dakota, "[a]n arrest pursuant to a state statute providing for a citizen's arrest, although made without a warrant, is valid if reasonable cause exists." *State v. Iverson*, 187 N.W.2d 1, 21 (N.D. 1971) (citation omitted). Thus, even if the court were to examine the CBP officers' conduct by analogizing it to a citizen's arrest, such conduct would not be cognizable in tort if a legally reasonable basis existed.

proper legal authority, Plaintiffs' false arrest/false imprisonment claims should be dismissed.

As noted previously, *see supra Sec. III*, the United States government retains plenary authority to conduct wide-ranging, suspicionless border searches and seizures of travelers entering the country and their belongings to ensure compliance with customs, immigration, and other federal laws at the border. *See Montoya de Hernandez*, 473 U.S. 531. Delays lasting multiple hours have been deemed constitutional. *Flores-Montano*, 541 U.S. 149*; see also Tabbaa*, 509 F.3d at 100 ('"[C]ommon sense and ordinary human experience' suggest that it may take up to six hours for CBP to complete the various steps at issue here, including . . . questioning, and identity verification, all of which we have already found to be routine.").

Here, CBP officers did not falsely arrest or imprison Plaintiffs because they were acting within their legal authority to conduct a border search. Government officers were acting within their broad legal authority in conducting an inspection and detaining Plaintiffs while they obtained necessary information and HSI agents had an opportunity to question Mr. Wilwal. Considering the time required for HSI agents to travel to Portal, North Dakota, "[c]ommon sense and ordinary human experience" suggests the length of the detention was reasonable and therefore lawful under the circumstances. *Montoya de Hernandez*, 473 U.S. at 543 (citation omitted). As a result, the interaction does not constitute a false arrest/false imprisonment under North Dakota law.

B. Assault/Battery

Plaintiffs have failed to state a cause of action for assault or battery. In North

Dakota, "[a] person commits assault if that person willfully causes bodily restraint or harm to another or places another in immediate apprehension of bodily restraint or harm." N.D.J.I.-Civil C-12.00 (1999). An assault must be unjustifiable and willful conduct. *Binstock v. Fort Yates Pub. Sch. Dist. No. 4*, 463 N.W.2d 837, 841 (N.D. 1990).

Plaintiffs allege that CBP officers surrounded their vehicle with their weapons drawn and ordered Mr. Wilwal out of the vehicle. Am. Compl., ECF No. 25 ¶ 31. Ms. Abdigani and her children were not handcuffed. Ms. Abdigani drove their vehicle to the CBP station, where the family remained until Mr. Wilwal could be interviewed by HSI officers. The children were given hamburgers and candy. Am. Compl., ECF No. 25 ¶ 73. Ms. Abdigani was told to leave her mobile phone in the vehicle, and when she used her son's phone to call 911, a CBP officer took the phone and notified the 911 dispatcher of the situation. *Id.* ¶¶ 67, 74-75. CBP officers conducted a pat-down search of Ms. Abdigani and her son who carried the mobile phone into the station. *Id.* ¶ 76-77.

Assuming the truth of these allegations for purposes of Rule 12, Plaintiffs' subjective fear does not elevate the CBP officers' conduct to an assault. Rather, the issue is whether the officers acted reasonably under the circumstances. In *Washington v. DEA*, 183 F.3d 868, 874 (8th Cir. 1999), DEA agents broke down plaintiffs' front door using a battering ram, entered the home with their weapons drawn, and threatened to shoot the 72-year-old husband if he disobeyed their orders. The couple was detained while the agents conducted a thorough search of the house. *Id.* at 872. While assessing the plaintiffs' FTCA claims for assault and battery, the Eighth Circuit reasoned that "while this show of force may have intimidated the [Plaintiffs] and offended their

sensibilities, it was not unreasonable under the circumstances." *Id.* at 874.

Here, Plaintiffs have failed to identify any unjustifiable and willful conduct that constitutes an assault. Law-enforcement officers are permitted to take precautions to ensure officer safety. While Plaintiffs may have been worried, CBP officers acted reasonably in proceeding with care. *Id*. Nor do any CBP officers' conduct at the station rise to the level of an assault. Not only were CBP officers justified in preventing Plaintiffs from using their mobile phones until the investigation concluded, but the denial of phone access is not tortious conduct. CBP officers conducted pat-down searches of Ms. Abdigani and her son. A pat-down search, however, is not "so destructive, particularly offensive, or overly intrusive . . . as to require particularized suspicion." *Cotterman*, 709 F.3d at 963 (citation omitted). Pat-down searches are not uncommon at ports of entry, and the timing and location of the searches in this case do not change that calculus. *Id.* at 962 ("Time and distance become relevant to determining whether there is an adequate nexus to a recent border crossing only after the subject or items searched have entered.").

Moreover, Mr. Wilwal has failed to state a claim for battery. Under North Dakota law, "A person commits battery if that person: (1) intentionally causes a harmful or offensive contact with another or places another in immediate apprehension of such contact; and (2) directly or indirectly results in harmful or offensive contact with the other person." N.D.J.I C-12.10 (2014); *see also Wishnatsky v. Huey*, 584 N.W.2d 859, 862 (N.D. Ct. App. 1998) (finding defendant's "rude and abrupt" conduct did not rise to the level of a battery).

As noted above, the basis for Mr. Wilwal's excessive force claim is unclear. *See supra Sec. III.* Similarly, his factual allegations do not state a cause of action for battery. Mr. Wilwal alleges that he was handcuffed during the encounter. Am. Compl., ECF No. 25 ¶ 32. But just as the Supreme Court has noted that being handcuffed for an extended period of time is a "marginal intrusion," *Muehler*, 544 U.S. at 99, placing Mr. Wilwal in handcuffs during the investigation was a reasonable and prudent step taken by the CBP officers.

Likewise, Mr. Wilwal alleges that, at approximately 10:30 a.m., he passed out because he "remained anxious about his family's safety and had been giving nothing to eat or drink since the beginning of his detention." Am. Compl., ECF No. 25 ¶ 52. Mr. Wilwal's alleged subjective anxiety about the inspection at the border does not rise to the level of a battery. Nor does not being fed for four hours: Mr. Wilwal was detained at 6:00 a.m. and passed out at approximately 10:30 a.m. *Id.* He was given immediate medical care after he passed out and was asked if wanted to be taken to the hospital. *Id.* ¶ 53. When he declined to go to the hospital, CBP officers changed the position of his handcuffs and provided him with water. *Id.* Such prudent and professional conduct does not constitute battery.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion to dismiss.

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Respectfully submitted,

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