UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TARGETED JUSTICE, INC., *et al.*,

Plaintiffs,

v.

MERRICK GARLAND, *et al.,*

Defendants.

Civil Action No. 4:23-cv-01013

OFFICIAL CAPACITY DEFENDANTS' COMBINED PARTIAL MOTION TO DISMISS UNDER RULES 12(b)(1) AND 12(b)(6) AND OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDING

Plaintiffs—eighteen individuals and an organization called Targeted Justice, Inc.—allege that a small subset of the Terrorist Screening Database ("TSDS") comprises individuals who are subjected to routine surveillance, stalking, and microwave weapon attacks. Plaintiffs appear to allege that they are in this purported subset of the TSDS.

Plaintiffs seek relief against the Official Capacity Defendants[1] under the Constitution and the Administrative Procedure Act ("APA"), including an injunction that would appear to order these Defendants to abolish this purported TSDS subset and to remove Plaintiffs' names from it. Thirteen of the individual Plaintiffs also bring claims under the Privacy Act, alleging that the Federal Bureau of Investigation ("FBI") and Department of Homeland Security ("DHS") provided inadequate responses to their Privacy Act requests. Additionally, Plaintiffs have filed a motion for a preliminary injunction involving only their constitutional and APA claims and again request that Defendants "eliminate" the subset of the TSDS they challenge. These baseless claims are unsupported and implausible, and should be dismissed.

First, Plaintiffs' constitutional and APA claims should be dismissed as to the Official Capacity Defendants under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6). At the threshold, the Court has no jurisdiction over these claims because they are so patently frivolous and insubstantial that they are insufficient to invoke the Court's jurisdiction. Plaintiffs also fail to plausibly allege that they have suffered any injury caused by any government conduct and thus lack Article III standing. Targeted Justice also has not established either organizational or associational standing. Accordingly,

[1] This motion is brought on behalf of Defendants FBI, DHS, Garland, Wray, Mayorkas, Kable, and Wainstein in their official capacities only. Wray, Mayorkas, Kable, and Wainstein intend to file a separate motion to dismiss the individual-capacity claims against them. Garland has not been served in his individual capacity, and Plaintiffs recently advised the Court that they do not intend to pursue their individual-capacity claims against Garland. *See* ECF No. 36.

these claims should be dismissed under Rule 12(b)(1). The Court should also dismiss the constitutional and APA claims pursuant to Rule 12(b)(6) because Plaintiffs have failed to plausibly allege either that they are in the TSDS or that Defendants violated Plaintiffs' constitutional rights.

Second, this Court should dismiss several of the Plaintiffs' Privacy Act claims. The Privacy Act claims brought by Winter Calvert and Ana Robertson Miller against FBI and DHS and by Armando Delatorre and Lindsay Penn against FBI should be dismissed under Rule 12(b)(6) because these Plaintiffs fail to allege that the agencies provided insufficient responses to their Privacy Act requests. The Privacy Act claims brought by Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley and Jason Foust against FBI should be dismissed for failure to exhaust administrative remedies, as these Plaintiffs do not allege that they appealed their responses from the agencies. And the Privacy Act claims brought by L.M. against FBI should be dismissed because she has failed to comply with agency regulations, so she has also failed to exhaust her administrative remedies.

Third, this Court should deny Plaintiffs' motion for preliminary injunction. For the reasons already stated, Plaintiffs utterly fail to show that they are likely to succeed on the merits of their constitutional and APA claims. Plaintiffs also fail to establish any irreparable harm warranting an injunction, because any harm they allege could not conceivably have resulted from any action taken by Defendants against them. And the public interest weighs heavily against any injunction that would impact the TSDS, which serves to protect the United States against terrorist threats, in the face of these fantastical allegations.

For these reasons, the Court should grant Official Capacity Defendants' partial motion to dismiss and deny Plaintiffs' motion for preliminary injunction.

FACTUAL BACKGROUND

I. Statutory and Regulatory Background

This lawsuit purports to put at issue aspects of the Government's terrorist watchlist system, including the TSDS. While there is entirely no basis to the claims raised, the Government describes the watchlisting system for the Court's background.

Several different components of the federal government work together to secure the United States and its borders and aviation system from terrorist threats. The FBI investigates and analyzes intelligence relating to both domestic and international terrorist activities. *See* 28 U.S.C. § 533; 28 C.F.R. § 0.85(l). It also administers the Terrorist Screening Center ("TSC"), a multi-agency Executive Branch organization established by Presidential Directive in 2003 and tasked with, *inter alia*, "consolidat[ing] the Government's approach to terrorism screening and provid[ing] for the appropriate and lawful use of Terrorist Information in screening processes." Homeland Security Presidential Directive/HSPD-6 (Sept. 16, 2003), https://fas.org/irp/offdocs/nspd/hspd-6.html (last visited April 18, 2022).

DHS is charged with "prevent[ing] terrorist attacks within the United States," 6 U.S.C. § 111(b)(1)(A), and "reduc[ing] the vulnerability of the United States to terrorism," *id.* § 111(b)(1)(B); *see also id.* § 202(1) (charging DHS with the responsibility of "[p]reventing the entry of terrorists and the instruments of terrorism into the United States"). Within DHS, TSA is responsible for securing all modes of transportation, with a focus on preventing terrorist attacks against civil aviation and other methods of transportation. *See* 49 U.S.C. § 114(d). TSA is further responsible for day-to-day federal security screening operations for passenger air transportation, *id.* § 114(e)(1), and for developing "policies, strategies, and plans for dealing with threats to transportation security," *id.* § 114(f)(3).

A. The Terrorist Screening Dataset, the No Fly List, the Selectee List, and the Expanded Selectee List.

As part of its duties, the TSC maintains the Terrorist Screening Dataset ("TSDS"),[2] which is "the federal government's consolidated watchlist of known or suspected terrorists." *Elhady v. Kable*, 993 F.3d 208, 213 (4th Cir. 2021). Inclusion in the TSDS results from a multi-step assessment, based on analysis of available intelligence and investigative information about an individual. Exhibit 1, "Overview of the U.S. Government's Watchlisting Process and Procedures as of September 2020" ("Watchlisting Overview"), at 3.[3] The FBI receives, reviews, and forwards to the TSC "nominations" of individuals with a nexus to domestic terrorism for inclusion in the TSDB. *Id.* The National Counterterrorism Center, a component of the Office of the Director of National Intelligence, does the same for nominations of individuals with a nexus to international terrorism. *Id.* TSC then determines whether those nominations will be accepted. *Id.* For a nomination to be accepted, it must include enough identifying information to allow screeners to determine whether the individual is a match to a record in the TSDS, and enough information to satisfy a reasonable suspicion that the individual is a known or suspected terrorist. *Id.*

The "reasonable suspicion" standard for inclusion in the TSDS is satisfied only where there exists "articulable intelligence or information which, based on the totality of the circumstances and, taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting[,] in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities." *Id.* at 4. Mere guesses, hunches, or the reporting of suspicious activity alone are not sufficient to establish reasonable

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[2] Until recently, the TSDS was known as the Terrorist Screening Database or the "TSDB," and the terms are used interchangeably in this brief, the accompanying exhibits, and case law.

[3] The Watchlisting Overview document was released by the U.S. Government following an inter-agency review process, and provides an official, authorized description of watchlisting policies and procedures. The Court may properly take judicial notice of this public document. *See, e.g.*, *Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) ("[J]udicial notice may be taken of public records and government documents available from reliable sources."), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017).

suspicion. *Id.* Nor can inclusion in the TSDS be based solely on an individual's race, ethnicity, or religious affiliation, nor solely on beliefs or activities protected by the First Amendment. *Id.*

The TSDS contains subsets of data, known as the No Fly List, the Selectee List, and the Expanded Selectee List. Inclusion on any of these lists requires satisfaction of additional criteria distinct from, and over and above, that required for designation as a known or suspected terrorist and inclusion in the TSDS generally. *Id.*

The Government does not publicly disclose whether an individual is in the TSDS. Such status is protected by the law enforcement privilege, and the identities of those on the No Fly, Selectee, and Expanded Selectee lists are also statutorily protected as Sensitive Security Information ("SSI") pursuant to 49 U.S.C. § 114(r). *See*, *e.g.*, *Blitz v. Napolitano*, 700 F.3d 733, 737 n.5 (4th Cir. 2012); *Scherfen v. U.S. DHS*, No. 3:CV-08-1554, 2010 WL 456784, at *8 n.5 (M.D. Pa. Feb. 2, 2010) ("Because the TSDB status of Plaintiffs can neither be confirmed nor denied, this Court cannot discuss ... the contents of [documents revealing Plaintiffs' status] submitted for *in camera* review[.]"); *see also* 49 C.F.R. § 1520.5(b)(9)(ii) (SSI includes "[i]nformation and sources of information used by a passenger or property screening program or system, including an automated screening system"). However, in certain limited circumstances, a U.S. citizen or lawful permanent resident ("U.S. person") who purchases an airline ticket, is denied boarding, subsequently applies for redress regarding that denial through DHS TRIP, and is on the No Fly List after a redress review, will receive a letter providing his or her status on the No Fly List and the opportunity to receive additional information. *See* Ex. 1 at 9.

B. Individuals in the TSDS Who Are Not Known or Suspected Terrorists.

A separate, limited subset of individuals in the TSDS falls within exceptions to the reasonable suspicion standard, and therefore, individuals in this subset are not categorized as known or suspected terrorists. Second Am. Compl. Ex. 2, Decl. of Timothy P. Groh, ¶ 10 n.3, ¶ 22 n.7, ECF No. 26-2.[4] The cited Declaration explains that these exceptions exist for the sole purpose of supporting certain

[4] Even though Plaintiffs have amended their complaint only once, Plaintiffs refer to their new complaint as the "*Second* Amended Complaint," *see* Second Am. Compl. at 2. Defendants will also refer to it as such.

special screening functions of DHS and the Department of State, such as determining eligibility for immigration to the U.S. *Id.* ¶ 22 n.7. Unlike those on the No Fly List, the Selectee List, and the Expanded Selectee List, these individuals are not required to undergo any heightened security screening at airports. *Id.*[5]

Plaintiffs refer to this subset of individuals as "Non-Investigative Subjects," or "NIS," *see, e.g.*, Second Am. Compl. ¶ 21, but this term is not used by any Defendant. Plaintiffs also allege that these individuals are listed under "'Handling Codes 3 and 4' subcategories of the TSDB." *Id.* ¶ 25; *see also id.* ¶¶ 154-60. It appears that Plaintiffs rely on an undated Baltimore Police Department document to support this characterization. *See* Second Am. Compl. Ex. 10, ECF No. 26-10. But this document merely sets out various ways that law enforcement should handle encounters with individuals who may be a positive match with TSC information in the National Crime Information Center, a national law enforcement database. *Id.* The document does not mention persons in the TSDS as an exception to the reasonable suspicion standard. *See id.* The document also does not state that when an individual's information comes up as Handling Code 3 or 4, that means an individual is listed as an exception in the TSDS, *i.e.* someone who is not a known or suspected terrorist. *See id.*

II. This Lawsuit

On January 12, 2023, eighteen individual Plaintiffs—Leonid Ber, Timothy Shelley, Karen Stewart, Winter Calvert, Armando Delatorre, Jasmin Delatorre, a minor referred to as J.D., Deborah Mahanger, a minor referred to as L.M., Lindsay Penn, Melody Ann Hopson, Ana Robertson Miller, Yvonne Mendez, Devin Delainey Fraley, a minor referred to as H.F., Susan Olsen, Jing Kang and Jason Foust—and an organization, Targeted Justice, Inc., filed suit against FBI, DHS, U.S. Attorney

[5] Plaintiffs also assert that the "Expanded Selectee List" includes individuals who are not known or suspected terrorists. Second Am. Compl. ¶ 155. This is incorrect. As the Groh declaration explains, the "Expanded Selectee List consists of individuals who meet the reasonable suspicion standard for TSDB inclusion and for whom the TSDB record contains a full name and a full date of birth." Decl. of Timothy P. Groh ¶ 11 n.5.

General Merrick Garland in his individual and official capacities, FBI Director Christopher Wray in his individual and official capacities, former TSC Director Charles Kable, IV[6] in his individual and official capacities, DHS Secretary Alejandro Mayorkas in his individual and official capacities, and DHS Undersecretary for Intelligence and Analysis Kenneth L. Wainstein in his individual and official capacities. *See* Am. Compl., ECF No. 2. On March 29, 2023, the Court granted Plaintiffs leave to file the second amended complaint. ECF No. 35.

Plaintiffs do not allege that they are on the No Fly List or the Selectee List. Rather, they contend that they are listed in the TSDS as part of the subset of people who fall within the exception to the reasonable suspicion standard. *See* Second Am. Compl. ¶¶ 26, 239, 247. According to Plaintiffs, individuals in this group—who they refer to as "Targeted Individuals"—"undergo a lifetime of covert human experimentation that targets and tortures them in many instances to their death." *Id.* ¶ 29.

All nineteen Plaintiffs challenge this category of the TSDS as violating the Administrative Procedure Act, *id.* ¶¶ 548, 554-55, as well as the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment, *id.* ¶¶ 549-50. Leonid Ber, Timothy Shelley, Karen Stewart, Winter Calvert, Armondo Delatorre, Deborah Mahanger, L.M., Ana Robertson Miller, Melody Ann Hopson, Yvonne Mendez, Devin Fraley, Jason Foust, and Lindsay Penn[7] also bring challenges under the Privacy Act, arguing that FBI and DHS[8] provided inadequate responses to their Privacy Act requests concerning records about TSDS information. *Id.* ¶¶ 554-55. Plaintiffs request a "mandamus" that directs Defendants to,

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[6] The second amended complaint incorrectly names Charles Kable, IV as "Charles Kable, Jr."

[7] Plaintiffs do not allege that Jasmin Delatorre, J.D., Susan Olsen, H.F., or Jin Kang submitted Privacy Act requests. *See* Second Am. Compl. ¶ 71.

[8] While the second amended complaint contains allegations that some Plaintiffs submitted Privacy Act requests to the Department of Justice ("DOJ") *see* Second Am. Compl. ¶ 71, Plaintiffs do not allege that any responses provided by DOJ were inadequate, *see id.* ¶ 72 ("Defendant FBI and/or Defendant DHS refused to produce meaningful information in response to Plaintiffs' Privacy Act requests."); *id.* ¶ 555 ("Defendants FBI and DHS violated the Freedom of Information/Privacy Acts, for failing to timely and thoroughly respond to Plaintiffs' requests."). Accordingly, Official Capacity Defendants do not construe Plaintiffs as alleging that DOJ violated the Privacy Act.

among other things, "adhere to the strictest observance of the law and Constitution, looking out for individual's civil rights, and consequently abstain from continuing to violate Plaintiffs' and [Targeted Justice's] liberty and property interests without due process of law in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution." *Id.* ¶ 553a. They also request a permanent injunction ordering Defendants to remove them and other members of Targeted Justice from the TSDS, to "[e]liminate from the TSDB the blacklisting Handling Codes 3 and 4 categories," to "[r]ecall and recover" the dissemination of the category of the TSDS to which Plaintiffs purport to belong, to order FBI to produce Plaintiffs' "original nomination form and complete dossier," and to compel Defendants to submit to a Court monitoring system. *Id.* ¶¶ 559-60. Plaintiffs also request damages against the individual Defendants. *Id.* ¶¶ 562-74.[9]

On February 5, 2023, Plaintiffs filed a motion for a preliminary injunction. Pls.' Mot. for Prelim. Inj. & Mem. in Supp. Thereof, ECF No. 14 ("Pls.' PI Mot."). The preliminary injunction motion appears to concern only Plaintiffs' constitutional and APA claims. Plaintiffs request a nationwide preliminary injunction ordering the "elimination" of the part of the TSDS to which Plaintiffs claim to belong—the category of individuals who are not considered known or suspected terrorists. *Id.* at 24.

STATEMENT OF THE ISSUES

(1) Should Plaintiffs' constitutional and APA claims be dismissed pursuant to Rule 12(b)(1)?

(2) Should Plaintiffs' constitutional and APA claims be dismissed pursuant to Rule 12(b)(6)?

[9] To the extent the second amended complaint purports to assert constitutional claims for money damages against the individual defendants in their official capacities, these claims are barred by sovereign immunity and should be dismissed on this basis. *See Gibson v. Fed. Bureau of Prisons*, 121 F. App'x 549, 551 (5th Cir. 2004) (unpublished per curiam).

(3) Should the Privacy Act claims of Winter Calvert, Ana Robertson Miller, Armando Delatorre, Lindsay Penn, Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley, Jason Foust, and L.M. against FBI be dismissed?

(4) Should the Privacy Act claims of Winter Calvert and Ana Robertson Miller against DHS be dismissed?

(5) Should this Court deny Plaintiffs' motion for a preliminary injunction?

STANDARD OF REVIEW

I. Motion to Dismiss

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden to establish a court's jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

Under both Rule 12(b)(1) and Rule 12(b)(6), to survive a motion to dismiss, a complaint must contain "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). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as . . . factual allegation[s]" are "disentitle[d] . . . to th[is] presumption of truth." *Id.* at 678, 681 (citation omitted).

While courts apply the plausibility standard under both rules, "in examining a Rule 12(b)(1) motion, a district court is empowered to find facts as necessary to determine whether it has jurisdiction." *Machete Prods., LLC v. Page*, 809 F.3d 281, 287 (5th Cir. 2015). Accordingly, "the district court may consider evidence outside the pleadings and resolve factual disputes." *In re Compl. of RLB*

Contracting, Inc. v. Butler, 773 F.3d 596, 601 (5th Cir. 2014). In considering a Rule 12(b)(6) motion, courts may also consider "documents attached to the complaint," *Gomez v. Galman*, 18 F.4th 769, 775 (5th Cir. 2021) (quoting *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019)), as well as "documents incorporated into the complaint by reference," *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)).

"Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982). In addition, "the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)). Thus, a claim may also be dismissed under Rule 12(b)(1) for a lack of subject-matter jurisdiction if it is "patently insubstantial." *Best v. Kelly,* 39 F.3d 328, 330 (D.C. Cir. 1994).

II. Preliminary Injunction

Preliminary injunctions are extraordinary remedies, *Cherokee Pump & Equipment, Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994), "not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion." *Black Fire Fighters Ass'n v. City of Dall.*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that a balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (movant bears "the burden of persuasion" on all requirements). The movant's failure to demonstrate any of the factors is sufficient to deny injunctive relief, *Allied Mktg. Grp., Inc. v. CDL*

Mktg., Inc., 878 F.2d 806, 809 (5th Cir. 1989), and "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule[,]" *Miss. Power & Light*, 760 F.2d at 621.

SUMMARY OF THE ARGUMENT

This Court should dismiss Plaintiff's constitutional and APA claims, which are based entirely on implausible, unfounded allegations. To begin, the Court lacks jurisdiction to hear these claims. Plaintiffs' allegations are so "facially frivolous and insubstantial," they are "insufficient to invoke the jurisdiction of a federal court." *Dilworth v. Dall. Cnty. Cmty. Coll. Dist.*, 81 F.3d 616, 617 (5th Cir. 1996). Moreover, Plaintiffs have failed to plausibly allege Article III standing because they have not plausibly alleged that they have suffered any injuries caused by their purported inclusion in the TSDS. They lodge only fanciful and baseless claims of injury, such as "threats to their lives," and a "remote/directed energy attack known as 'Pulse-Modulated Voice Signature' or 'Microwave Auditory Effect.'" *See* Second Am. Compl. ¶¶ 278, 296. Any medical conditions Plaintiffs may actually be suffering from were not caused by Defendants' conduct. And Targeted Justice has not met the requirements for organizational or associational standing. Because Plaintiffs have no standing, this Court further lacks jurisdiction over these claims, and they should be dismissed pursuant to Rule 12(b)(1).

The Court should also dismiss these claims under Rule 12(b)(6) because Plaintiffs have failed to plausibly allege that they are even in the TSDS, or that they are otherwise entitled to any relief on their constitutional or APA claims. Moreover, the second amended complaint—which is comprised of only conclusory statements or implausible, fantastical allegations—fails to plausibly allege facts that would support any of their constitutional or statutory claims.

This Court should dismiss several Plaintiffs' Privacy Act claims. The Privacy Act claims brought by Winter Calvert and Ana Robertson Miller against FBI and DHS and brought by Armando

Delatorre and Lindsay Penn against FBI should be dismissed for failure to state a claim under Rule 12(b)(6) because these Plaintiffs do not allege that FBI or DHS issued any improper response to their requests. Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley, and Jason Foust do not allege that they appealed any response they received from the FBI, so their Privacy Act claims against FBI should be dismissed for failure to exhaust administrative remedies before filing suit. And the Privacy Act claims brought by L.M. against FBI should be dismissed because she has failed to comply with agency regulations, so she has also failed to exhaust her administrative remedies.

Finally, Plaintiffs fall well short of demonstrating they are entitled to preliminary injunctive relief. Plaintiffs are unlikely to succeed on the merits of their constitutional and APA claims. And Plaintiffs, who have not alleged any plausible injury caused by Official Capacity Defendants, have not established they are at any risk of suffering imminent, irreparable harm that can be remedied by this Court. The public interest strongly favors the denial of any injunctive relief against the Official Capacity Defendants with respect to the TSDS, which exists to protect the United States from possible terrorist threats and attacks. Accordingly, the Court should dismiss Plaintiffs' constitutional and APA claims against the Official Capacity Defendants; dismiss the Privacy Act claims brought by Leonid Ber, Karen Stewart, Timothy Shelley, Winter Calvert, Armando Delatorre, Lindsey Penn, Ana Robertson Miller, Devin Fraley, and Jason Foust against FBI and those brought by Winter Calvert and Ana Robertson Miller against DHS; and deny Plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. Plaintiffs' Constitutional and APA Claims Should Be Dismissed.

A. Plaintiffs' Constitutional and APA Claims Should Be Dismissed Under Rule 12(b)(1) Because They Are Patently Insubstantial.

A Court may dismiss a case under Rule 12(b)(1) when a complaint is "patently insubstantial" and contains claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit."

Neitzke v. Williams, 490 U.S. 319, 327 n.6 (1989) (citation omitted); *see also Dilworth*, 81 F.3d at 617 ("When a plaintiff's complaint is facially frivolous and insubstantial, it is insufficient to invoke the jurisdiction of a federal court."); *Best*, 39 F.3d at 330 & n.3 (describing Rule 12(b)(1)'s "substantiality" doctrine). "Allegations suggesting bizarre conspiracy theories, fantastic government manipulations of their will or mind, and any sort of supernatural interventions are dismissible under Rule 12(b)(1)." *McCastle v. United States*, No. 4:15-cv-420, 2016 WL 7496170, at *2 (E.D. Tex. Nov. 15, 2016), *report and recommendation adopted*, 2016 WL 7626595 (E.D. Tex. Dec. 30, 2016).

This case involves claims that are "essentially fictitious" and properly dismissed under Rule 12(b)(1). *Best*, 39 F.3d at 330. In *Roum v. Fenty*, the court dismissed under 12(b)(1) claims of "a vast and intricate conspiracy" involving federal and local officials "to surveil, experiment upon, kidnap, and poison" him. 697 F. Supp. 2d 39, 41 (D.D.C. 2010). The plaintiff in *Roum* made substantially similar allegations to Plaintiffs' here: that government officials had, among other things,

> "illegally tapped his phones; conducted daily physical searches of his residence and property; falsely labeled him a terrorist; contaminated his bed and clothing with radioactive chemicals, poisoned his food and toothpaste, planted radioactive nano-technology in his home . . . disseminated his private information to police departments and foreign intelligence agencies . . . and denied his FOIA request for access to any files" that the FBI, Central Intelligence Agency or the Department of Justice had about him.

Id. Here, Plaintiffs assert that, due to their alleged inclusion in the TSDS, they "suffer painful [Directed Energy Weapons] attacks as well as attacks from other unidentified remote weaponry and instruments of harm," Second Am. Compl. ¶ 285, and these attacks have caused them to develop "Havana Syndrome" and to endure "physical assaults and burns," *id.* ¶¶ 286, 295. Plaintiffs also claim that they have experienced "another kind of remote/directed energy attack known as 'Pulse-Modulated Voice Signature' or 'Microwave Auditory Effect'" that "operates twenty-four hours a day in a continuous flow of computer-generated derogatory verbiage to obliterate the person's psyche such as: 'You're

stupid'; 'You're fat'; 'Why don't you kill yourself?,' *id.* ¶¶ 296, 301, that Defendants have "illegally intercepted, recorded, listened in, [and] stolen electronic communications" from Plaintiffs, *id.* ¶ 320, and that FBI and DHS have carried out "organized stalking" and "psychological torture" against Plaintiffs, *id.* ¶¶ 258, 261. Additionally, they allege that they are:

> "subjected to illegal and unconstitutional phone taps, illegal re-routing of business and private phone calls for harassment purposes, surreptitious entry into home, office and vehicle, virtual surveillance in the home conducted by illegal placement of miniature remote, wireless cameras (often accessible through the internet), illegal internet spyware, illegal GPS tracking (often through their own mobile phones), regular fixed and mobile surveillance, mail misdirection, mail theft and tampering, financial and employment sabotage, slander campaigns, poisoning, assaults and murder," and "illegal set-ups on drug charges[.]"

Id. ¶ 14. Just as in *Roum*, "[t]hese allegations are precisely the type of unrealistic assertions that this Court must dismiss for lack of jurisdiction." 697 F. Supp. 2d at 42.

This case strongly resembles other cases in which courts have dismissed fantastical, conspiracy-laden claims under Rule 12(b)(1). *See, e.g.*, *McCastle*, 2016 WL 7496170, at *1-2 (dismissing allegations that during the plaintiff's hernia surgery, government officials conspired with doctors to implant devices into his body to see the future); *Adams v. DOJ*, No. MC-12-305, 2012 WL 3257801, at *6 (S.D. Tex. July 23, 2012) (dismissing allegations that government hacked the plaintiff's devices and placed him on the Terrorist Watch List); *Lawrie v. Lemoore Air Force Base*, No. 1:12-CV-0091 AWI GSA, 2012 WL 2617601, at *1 (E.D. Cal. July 5, 2012) (dismissing allegations that the plaintiff was injured after an attack by James "Whitey" Bulger and his brain was implanted with a chip); *Baszak v. FBI*, 816 F. Supp. 2d 66, 67 (D.D.C. 2011) (dismissing allegations that after the plaintiff predicted and warned the FBI about the September 11, 2001 attacks, government officials surveilled him); *Curran v. Holder*, 626 F. Supp. 2d 30, 34 (D.D.C. 2009) (dismissing allegations that federal government was conducting video and electronic surveillance of plaintiff and listed her on TSA's watch list). Like in these cases, Plaintiffs' allegations that they are subjected to government surveillance, financial

sabotage, and attacks from advanced weapons are "conspiracy theories that are patently insubstantial." *Adams*, 2012 WL 3257801, at *6. Accordingly, Plaintiffs' constitutional and APA claims are insufficient to invoke the jurisdiction of this Court and should be dismissed under Rule 12(b)(1).

B. Plaintiffs Have No Standing to Bring Their Constitutional and APA Claims, and They Should Be Dismissed Pursuant to Rule 12(b)(1).

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *DaimlerChrysler Corp.*, 547 U.S. at 341). One element of this limitation is that a plaintiff must have standing to sue, a requirement that is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of alleging facts that establish the three elements that constitute the "irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560—namely, that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Where, as here, the case involves deciding "whether an action

taken by one of the other two branches of the Federal Government was unconstitutional," the "standing inquiry [is] especially rigorous." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

1. Plaintiffs Have Not Plausibly Alleged Any Injury Caused By Defendants' Conduct.

Plaintiffs' alleged injuries are based on invented beliefs about government conduct and do not plausibly allege any injury sufficient to sustain Article III standing at the pleading stage. Plaintiffs concede that, unlike those on the No Fly or the Selectee Lists, they "do not face undue hardship or heightened scrutiny when traveling." Second Am. Compl. ¶ 165; *see also id.* ¶ 242 (Plaintiffs "don't encounter problems when traveling"). Instead, Plaintiffs allege that they are in a subset of the TSDS for individuals who are *not* "known or suspected terrorists." *Id.* ¶¶ 25, 119, 162, 220, 239. And, according to Plaintiffs, these individuals are "non-consenting participants in an experimentation and torture program" run by the government, *id.* ¶ 176, and "undergo daily various forms of torture[,] including [Directed Energy Weapons] attacks [ ] and organized stalking" by the government, *id.* ¶ 267.

Plaintiffs' baseless claims of injury cannot support a cognizable Article III injury. Surviving the pleading stage "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Throughout the second amended complaint, Plaintiffs contend that, "[o]n information and belief," they are being subjected to an organized campaign to torture them psychologically and physically. *See, e.g.*, Second Am. Compl. ¶¶ 250, 253-55, 267, 278, 280, 285, 286, 303, 319. It is plainly insufficient for Plaintiffs to merely invoke "information and belief" as the basis for such unfounded allegations. *See Margetis v. Furgeson*, No. 4:12-cv-753, 2015 WL 6688063, at *8 (E.D. Tex. Sept. 29, 2015) (rejecting Plaintiffs' allegations as implausible because "Plaintiffs merely offer that their contentions are 'on information and belief' but put forth no facts to support their belief"), *aff'd*, 666 F. App'x 328 (5th Cir. 2016). Even Plaintiffs' less fanciful claims of injury, such as "stigmatization that broadly precludes individuals from a chosen trade or business," Second Am.

Compl. ¶ 183, or "blacklist[ing]" them "from employment, their professions, and communities," *id.* ¶ 342, have no supporting "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678.

Plaintiffs also have provided no support whatsoever to infer that any of their alleged medical injuries were caused by Defendants. While Plaintiffs assert that they have been suffering from various medical ailments, such as tinnitus, and burns, *see* Second Am. Compl. ¶¶ 295, 304; *see also id.* ¶¶ 346-546 (describing physical and medical conditions of individual Plaintiffs), the second amended complaint contains no plausible allegations that these conditions are the result of any placement in the TSDS. Plaintiff makes the bald assertion that "the inclusion of Individual Plaintiffs' names and that of TJ members on the TSDB . . . causes them to suffer everything from cumulative inconveniences to serious reputational damage, threats to their lives or substantial limitations on privacy and freedom of action." *Id.* ¶ 278. But these conclusory statements—which are grounded in broad-based conspiracy theories—do not plausibly connect Defendants to any medical conditions Plaintiffs may have. *See Morgan v. Swenson*, 659 F.3d 359, 370 (5th Cir. 2011) (Courts "do not presume true a number of categories of statements, including legal conclusions; mere labels; [t]hreadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement." (citations omitted)); *see also McCastle*, 2016 WL 7496170, at *3 ("Plaintiff has failed to state any non-conclusory facts showing Defendants caused harm to him."). Thus, there is simply no basis from which this Court can infer that Plaintiffs have plausibly alleged an injury that was caused by any purported placement on the TSDS. Since Plaintiffs have failed to plausibly allege an injury-in-fact caused by the conduct challenged in this suit, they have no standing to bring their constitutional and APA claims. These claims should therefore be dismissed under Rule 12(b)(1).

2. Targeted Justice Has Not Established Organizational or Associational Standing.

This Court should dismiss Targeted Justice as a Plaintiff for the additional reason that it has failed to establish standing either on behalf of itself or its purported members. An association has standing either (1) by "its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy," or (2) "in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth*, 422 U.S. at 511. Targeted Justice claims that it "appears on its own behalf and on behalf of its over 3,500 members," Second Am. Compl. ¶ 43, so it presumably seeks to establish both organizational and associational standing. It has not met its burden for either.

First, Targeted Justice lacks organizational standing because it has not demonstrated any direct injury to the organization itself. "[A]n organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). It is not enough when the organization has suffered "simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And the "mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994). The second amended complaint is devoid of any allegations that Targeted Justice has had to divert resources based on any plausible conduct by Defendants. Targeted Justice's website, *see* Second Am. Compl. ¶ 44, merely links to this case, *see* https://www.targetedjustice.com/. Indeed, it is unclear from the second amended complaint what exactly Targeted Justice's primary activities are. *See also La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d

298, 305 (5th Cir. 2000) (rejecting organizational standing because organization did not provide specific examples of projects or efforts organization had to change as a result of defendant's conduct).

Second, Targeted Justice has also failed to show associational standing. Where an organization is suing on behalf of its members, the organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Targeted Justice fails the first prong of the *Hunt* test because it is not even clear that it has any members. The second amended complaint does not identify a single member of Targeted Justice and fails to allege facts that would establish that any identifiable member has standing in his or her own right. While Targeted Justice purports to have 3,500 members, Second Am. Compl. ¶ 43, such bare allegations, standing alone, are insufficient to establish that these unidentified "members" in fact display the indicia of membership necessary to allow the organization to represent their interests in this lawsuit. *See Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994) (rejecting claim of associational standing because plaintiffs did not allege a single member of the organization "actually suffered" any injury). Moreover, the second amended complaint does not specifically allege that any of the individual Plaintiffs are actually members of Targeted Justice. *See* Second Am. Compl. ¶¶ 47-60; *id.* ¶¶ 346-546. And for the reasons previously explained, none of the individual Plaintiffs have standing to bring suit in their own right. *See supra* Section I.B.1. Any "members" of Targeted Justice who also allege they are "Targeted Individuals" would lack standing to bring suit for the same reasons as the individual Plaintiffs.

Targeted Justice also does not have any indicia of membership. "If the association seeking standing does not have traditional members, as here, the association establishes its standing by proving that it has 'indicia of membership': its members elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 n.9 (5th Cir. 2012) (quoting *Hunt*, 432 U.S. at 344-45). The second amended complaint identifies none of the indicia of membership required to meet *Hunt*'s first prong. *See* Second Am. Compl. ¶¶ 43-44; *see also Tex. Indigenous Council v. Simpkins*, No. SA-11-CV-315-XR, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014) (holding that organization had not demonstrated indicia of membership because organization had no members beyond one individual who "alone makes all membership decisions").

Targeted Justice also fails *Hunt*'s third prong. This lawsuit challenges a small subset of the TSDS, and determining whether each member of Targeted Justice has plausibly alleged placement in the TSDS—and thus that they have standing to bring suit at the pleading stage—"requires the participation of individual members in the lawsuit," *Hunt*, 432 U.S. at 343. Accordingly, because Targeted Justice cannot establish either organizational or associational standing, Targeted Justice should be dismissed as a plaintiff in this action.

C. Plaintiffs' Constitutional and APA Claims Should Also Be Dismissed for Failure to State a Claim Under Rule 12(b)(6).

Plaintiffs assert that their inclusion in the TSDS violates the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and the APA. *See* Second Am. Compl. ¶ 550. All of these claims hinge on Plaintiffs' allegations that they are listed in the TSDS and that this violates Plaintiffs' constitutional rights. *See, e.g.*, *id.* ¶ 335 (Defendants "violate . . . the Constitution" by "including [Plaintiffs] in the TSDB[.]"). But Plaintiffs have failed to plausibly allege that they are in the TSDS, and they have therefore failed to state a claim that Defendants have violated their constitutional rights by including

them in the database. None of Plaintiffs' unfounded and fantastical allegations about Defendants' alleged constitutional violations come anywhere close to "stat[ing] a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plaintiffs' constitutional and APA claims therefore should also be dismissed under Rule 12(b)(6).

1. Plaintiffs Have Not Plausibly Alleged That They Are in the TSDS.

Plaintiffs contend that they are included in the TSDS as individuals who are not "known or suspected terrorists," because they allegedly fall into a category of "[l]imited exceptions" that exist "for the sole purpose of supporting special screening functions of DHS and State (such as determining eligibility for immigration to the U.S.)." Second Am. Compl. ¶¶ 23-25, 158 (citation omitted). But nowhere in the second amended complaint do Plaintiffs provide any facts supporting the assertion that they are listed in the TSDS in such any category. Plaintiffs claim that they are listed in the TSDS based only on "information and belief," *id.* ¶ 236, but "[a]s a rule, an 'information and belief' allegation cannot stand on its own; rather, it must be accompanied by sufficient additional detail to make the allegation 'plausible on its face.'" *McLin v. Twenty-First Jud. Dist.*, 614 F. Supp. 3d 278, 288 (M.D. La. 2022) (quoting *Twombly*, 550 U.S. at 551, 557). The second amended complaint contains no such detail. Instead, without any supporting facts, Plaintiffs claim that they were "placed on the TSDB . . . for engaging in the legitimate exercise of First-Amendment protected rights," Second Am. Compl. ¶ 108, or "after undergoing a contentious divorce, a child custody battle, or the filing of charges against a stalking former spouse," *id.* ¶ 109. These do not constitute plausible allegations that Plaintiffs would fall into a category of individuals on the TSDS that exists only to support "special screening functions of DHS and State [such as determining eligibility for immigration to the U.S.]." *Id.* ¶ 26.

Further, the second amended complaint contains no allegations supporting the inference that *each* Plaintiff is listed in the TSDS. *See Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)

(Courts "will not strain to find inferences favorable to the plaintiff.") (citation omitted). Plaintiffs provide only bare assertions—without any supporting facts—that they are "included" in the TSDS. *See, e.g.*, Second Am. Compl. ¶ 349 (Leonid Ber); *id.* ¶ 367 (Timothy Shelley); *id.* ¶ 378 (Karen Stewart); *id.* ¶ 394 (Winter Calvert); *id.* ¶ 412 (Armando Delatorre, Berta Jasmin Delatorre, and J.D.); *id.* ¶¶ 425-26 (Deborah Mahanger and L.M.); *id.* ¶ 436 (Lindsay Penn); *id.* ¶ 454 (Melody Ann Hopson); *id.* ¶ 469 (Ana Robertson Miller); *id.* ¶¶ 480, 490 (Devin Fraley and H.F.); *id.* ¶ 498 (Susan Olsen); *id.* ¶ 508 (Yvonne Mendez); *id.* ¶ 527 (Jin Kang); *id.* ¶ 537 (Jason Foust). Such rank speculation, without any supporting facts whatsoever, does not suffice to plausibly allege TSDS placement. *See Iqbal*, 556 U.S. at 678 (A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'") (quoting *Twombly*, 550 U.S. at 557).

In their motion for a preliminary injunction, Plaintiffs contend that two Plaintiffs, Winter Calvert and Karen Stewart, have submitted declarations that explain "how they learned their names appeared in the TSDB." Pls.' PI Mot. at 15. But these two declarations do not contain any such details. Calvert explains that, when he suffered a medical emergency due to blood clots and a pulmonary embolism, officers prevented an ambulance from entering the premises because a "suspected terrorist" lived there. Pls.' PI Mot., Ex. 9, Winter Calvert's Statement Under Penalty of Perjury ¶¶ 3-4, ECF No. 14-9 ("Calvert Decl."). While he contends that he has experienced "microwave attacks" and hacking of his electronic devices, *id.* ¶¶ 6-7, nowhere in the declaration does Calvert claim he is in the TSDS. And Stewart claims that when she went to the sheriff to "get help with [ ] electronic attacks," she "walked out into the parking lot, retrieved between 12-20 folders from his own personal car trunk" and "acknowledged [that] he had MY folder but then said it indicated 'he was not allowed to help (me).'" *Id.* Ex. 11, Karen Stewart's Statement Under Penalty of Perjury ¶¶ 3-5, ECF No. 14-11 ("Stewart Decl."). Stewart does not ever reference the TSDS, and this purported

encounter in no way explains whether she is in the TSDS. Because Plaintiffs have not made any plausible allegations that they are listed in the TSDS, they cannot plausibly state a claim for relief on the basis that their TSDS placement is violating their rights under the Constitution and the APA.[10]

2. Plaintiffs Have Not Plausibly Alleged That Defendants Violated the Constitution or the APA.

Plaintiffs do not come close to properly stating a claim under the Constitution or the APA. The entire second amended complaint is filled only with conclusory statements devoid of any factual support, *see, e.g.*, Second Am. Compl. ¶ 384 ("Plaintiff Stewart's inclusion in the TSDB prompted illegal break-ins to her home, vandalizing of her property, physical and electronic surveillance, and organized stalking for over two decades in violation of her rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution[.]"), or implausible, fantastical assertions, *see, e.g.*, *id.* ¶ 29 (inclusion in the TSDS has subjected Plaintiffs to "a lifetime of covert human experimentation that targets and tortures them in many instances to their death."). Plaintiffs' unadorned assertions that Defendants have violated their constitutional rights does not suffice to state a claim under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of

[10] Plaintiffs also attempt to support their allegations by suggesting that individuals in the category of exceptions to the TSDS comprise 97 percent of the TSDS. *See, e.g.*, Second Am. Compl. ¶¶ 25, 163. Plaintiffs do not provide any citation for this claim in the second amended complaint, but it appears they may be inferring this conclusion from Exhibit 5 of their Motion for a Preliminary Injunction, which is a 2005 report from the U.S. Department of Justice's Office of the Inspector General ("OIG"). Pls.' PI Mot. Ex. 5, 2005 USDOJ Audit Report of the TSC (fragments), at 2, ECF No. 14-5. The OIG report explains that each watchlist record contains a "handling code" that correlates with certain "instructions on what to do when a suspected terrorist is encountered." *Id.* Based on the subset of records reviewed by the OIG, 22.04 percent were categorized at Handling Code 3, and 74.64 percent were categorized at Handling Code 4, *id.* at 3, and this appears to be how Plaintiffs have calculated the 97 percent figure. But as explained, Handling Codes 3 and 4 have nothing to do with the subset of individuals listed as exceptions in the TSDS—those who are not known or suspected terrorists. The OIG report does not even mention this subset. On the face of the second amended complaint, therefore, Plaintiffs have not plausibly alleged that Handling Codes 3 and 4 are coextensive with those in the TSDS who are watchlist exceptions, or that individuals in this category comprise 97 percent of the TSDS, let alone that *they* fall into this category.

action, supported by mere conclusory statements, do not suffice."). And any additional facts that Plaintiffs did include in the second amended complaint, such as their claims that they are victims of a government conspiracy to stalk and attack them, *see* Second Am. Compl. ¶¶ 211-345, are plainly implausible. *See supra* Section I.A. Plaintiffs have not conceivably alleged "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

In sum, Plaintiffs have no standing to bring their constitutional and APA claims and they have fallen woefully short of stating plausible claims. Accordingly, Plaintiffs are unlikely to succeed on the merits of their constitutional and APA claims, and they should be dismissed.

II. The Court Should Dismiss Under Rule 12(b)(6) the Privacy Act Claims Brought by Leonid Ber, Karen Stewart, Timothy Shelley, Winter Calvert, Armando Delatorre, L.M., Lindsey Penn, Ana Robertson Miller, Devin Fraley, and Jason Foust Against FBI and the Privacy Act Claims Brought by Winter Calvert and Ana Robertson Miller Against DHS.

The Court should also dismiss a number of Plaintiffs' Privacy Act claims under Rule 12(b)(6).[11]

First, Winter Calvert, Armando Delatorre, Lindsay Penn and Ana Robertson Miller's Privacy Act claims against FBI and Winter Calvert and Ana Robertson Miller's Privacy Act claims against DHS should be dismissed for failure to state a claim under Rule 12(b)(6). These Plaintiffs allege only that they submitted requests for records under the Privacy Act, but not that FBI or DHS failed to issue responses, that any response was inadequate, or that the agencies withheld any records:

- Winter Calvert submitted requests to FBI on December 1, 2022 and to DHS on December 2, 2022. Second Am. Compl. ¶ 71.d. He makes no allegations about FBI or DHS's responses.
- Armando Delatorre submitted a request to FBI on November 11, 2022. *Id.* ¶ 71.e. He makes no allegations about FBI's response.

[11] Official Capacity Defendants do not at this time move to dismiss the Privacy Act claims of Deborah Mahanger, Melody Ann Hopson, or Yvonne Mendez against FBI, or the claims of Leonid Ber, Karen Stewart, Timothy Shelley, Deborah Mahanger, L.M., Lindsay Penn, Melody Ann Hopson, Yvonne Mendez, Devin Fraley, or Jason Foust against DHS.

- Ana Robertson Miller submitted requests to FBI and DHS on December 4, 2022. *Id.* ¶ 71.i. She makes no allegations about FBI or DHS's responses.

- Lindsay Penn submitted requests to FBI and DHS on January 11, 2023. *Id.* ¶ 71.m. She alleges that DHS responded, *id.* ¶ 73, but she makes no similar allegations about FBI's response.

A plaintiff must show that an agency has improperly withheld agency records to state a Privacy Act claim. *See* 5 U.S.C. § 552a(g)(3); *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (a court's jurisdiction over a FOIA claim is "dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records."). Accordingly, these Plaintiffs have failed to state a claim for relief, and the Privacy Act claims of Winter Calvert, Armando Delatorre, Lindsay Penn and Ana Robertson Miller against FBI and the claims of Winter Calvert and Ana Robertson Miller against DHS should be dismissed.

Second, Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley, and Jason Foust's Privacy Act claims against FBI should be dismissed because they do not allege that they appealed the responses they received from the agencies, so they have failed to exhaust their administrative remedies. A plaintiff must exhaust all administrative remedies before bringing a Privacy Act claim in federal court; otherwise, their claims are subject to dismissal under Rule 12(b)(6). *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 474-78 (5th Cir. 1997); *see also Barouch v. DOJ*, 962 F. Supp. 2d 30, 67 (D.D.C. 2013) ("As with FOIA, once a Privacy Act request has been processed, a plaintiff is required to exhaust all administrative remedies before bringing an action to compel disclosure of documents."). Courts have repeatedly dismissed cases for failure to exhaust administrative remedies when an agency issues a response to a Privacy Act request, but the plaintiff files suit before appealing that response. *See Kearns v. Fed. Aviation Admin.*, 312 F. Supp. 3d 97, 107 (D.D.C. 2018); *Lopez v. Nat'l Archives & Recs. Admin.*, 301 F. Supp. 3d 78, 87 (D.D.C. 2018); *Barouch*, 962 F. Supp. 2d at 67; *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 888 F. Supp. 2d 189, 193 (D.D.C. 2012). FBI also has a regulation requiring requestors to

appeal any response from the agency before filing suit in court. *See* 28 C.F.R. § 16.45(c) (FBI regulation requiring that those who "wish to seek review by a court of any adverse determination or denial of a request . . . must first appeal it under this section.").

Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley, and Jason Foust do not allege that they appealed the responses they received from FBI about their Privacy Act requests:

- Leonid Ber alleges that he sent a request to FBI on November 29, 2022, Second Am. Compl. ¶ 71.a., and that FBI responded to his request, *id.* ¶ 352; Ex. 2.[12] He does not allege that he appealed the response.

- Karen Stewart alleges that she sent a request to FBI on January 4, 2023 and to DHS on November 26, 2022, *id.* ¶ 71.b., and that FBI responded to her request, *id.* ¶ 379; Ex. 3. She does not allege that she appealed the response.

- Timothy Shelley alleges that he sent a request to FBI on December 31, 2022, *id.* ¶ 71.c., and that FBI responded to his request, *id.* ¶ 368; Ex. 4. He does not allege that he appealed the response.

- Devin Fraley alleges that she sent a request to FBI on December 12, 2022, *id.* ¶ 71.k., and that FBI responded to her request, *id.* ¶ 482; Ex. 5. She does not allege that she appealed the response.

- Jason Foust alleges that he sent requests to FBI on December 3, 2022, *id.* ¶ 71.l., and that FBI responded to his request, *id.* ¶ 538; Ex. 6. He does not allege that he appealed the response.

They have therefore failed to exhaust their administrative remedies, and Leonid Ber, Karen Stewart, Timothy Shelley, Devin Fraley, and Jason Foust's Privacy Act claims against FBI should be dismissed.

Third, L.M.'s Privacy Act claims against FBI should be dismissed because she did not comply with FBI regulations, and she therefore also failed to exhaust her administrative remedies. A plaintiff's failure to comply with applicable agency regulations is considered failure to exhaust administrative remedies. *Taylor*, 127 F.3d at 474 (Plaintiff's failure to present a request a request that did not comport

[12] Official Capacity Defendants have attached FBI's response letters as exhibits because they are incorporated in the complaint by reference. The Court may consider any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint. *See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). These are the final responses to Plaintiffs' requests.

with Privacy Act regulations "constituted a failure to exhaust administrative remedies because, as a technical matter, the [agency] never denied a properly framed request for access to records."). L.M. alleges that she submitted a Privacy Act request from FBI on December 2, 2022, Second Am. Compl. ¶ 71.h., and that FBI responded to her request, *id.* ¶ 427; Ex. 7. However, FBI's response, incorporated into the complaint, requests additional information establishing that the requestor is the parent or guardian of L.M., a minor. *Id.* This is consistent with FBI's regulations. *See* 28 CFR 16.41(e). The second amended complaint does not allege that this information was ever provided. Accordingly, L.M. has failed to exhaust her administrative remedies, and her Privacy Act claims against FBI should be dismissed.

In sum, pursuant to 12(b)(6), the Court should dismiss:

- The Privacy Act claims brought by Leonid Ber, Karen Stewart, Timothy Shelley, Winter Calvert, Armando Delatorre, L.M., Lindsey Penn, Ana Robertson Miller, Devin Fraley, and Jason Foust against FBI; and
- The Privacy Act claims brought by Winter Calvert and Ana Robertson Miller against DHS.

III. Plaintiffs Have Not Established They Are Entitled to a Preliminary Injunction.

This Court should also deny Plaintiffs' motion for a preliminary injunction against the Official Capacity Defendants. As noted, Plaintiffs appear to only seek a preliminary injunction concerning their APA and constitutional claims, and not their Privacy Act claims. *See* Pls.' PI Mot. at 16-18. Plaintiffs cannot meet any of the requirements for a preliminary injunction and have entirely failed to show they are entitled to the "extraordinary remedy" of preliminary injunctive relief. *See Cherokee Pump & Equip.*, 38 F.3d at 249.

A. Plaintiffs Are Not Likely to Succeed on the Merits of Their Constitutional and APA Claims.

For the reasons stated above, *see supra* Section I., Plaintiffs are not likely to succeed on the merits of their constitutional and APA claims. The Court lacks jurisdiction to hear these claims for

multiple reasons: (1) they are patently insubstantial; (2) Plaintiffs have no standing because they have not plausibly alleged any injury caused by Defendants' conduct; and (3) Targeted Justice has no organizational or associational standing. Plaintiffs have also failed to state a claim under Rule 12(b)(6). They do not plausibly allege that they are even in the TSDS, and they have not plausibly alleged any constitutional or APA violation. For the same reasons that the Court should dismiss Plaintiffs' constitutional and APA claims, Plaintiffs are not likely to succeed on the merits.

B. Plaintiffs Have Failed to Establish That They Are Likely to Suffer Imminent Irreparable Harm Caused by Defendants Absent a Preliminary Injunction.

Plaintiffs must show that, in the absence of a preliminary injunction, they are "likely to suffer irreparable harm[;]" *i.e.*, harm for which there is no adequate remedy at law. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (citation omitted). That showing must demonstrate that irreparable harm is *likely*, not merely possible, *Winter*, 555 U.S. at 20; "[s]peculative injury is not sufficient" to make "a clear showing of irreparable harm," *Holland Am. Ins.*, 777 F.2d at 997. Moreover, "the irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). Plaintiffs have fallen far short of this standard here.

As explained, Plaintiffs have identified no harm at all—let alone imminent irreparable harm—that is plausibly caused by any of Defendants' alleged conduct. *See supra* Section I.A.-B. In their motion for a preliminary injunction, Plaintiffs first argue that they are suffering from harm such as "organized stalking that interferes with every day chores," "electronic surveillance devoid of minimal constitutional parameters that extends to attorney-client privileged communications," and "physical pain and suffering at a torture level." Pls.' PI Mot. at 18-19. But the declarations submitted in support do not contain any facts connecting Plaintiffs' various conditions to any government action

whatsoever, let alone placement in the TSDS. *See* Pls.' PI Mot., Ex. 8, Devin Fraley's Statement Under Penalty of Perjury, ECF No. 14-88 ("Fraley Decl.") (describing perceived microwave attacks); *id.*, Calvert Decl. (describing "medical emergency" ascribed to microwave attacks and perceived surveillance of electronics); *id.* Ex. 10, Len Ber's Statement Under Penalty of Perjury, ECF No. 14-10 ("Ber Decl.") (describing perceived Havana Syndrome); *id.* Stewart Decl. (claiming that she has suffered "electronic attacks"). It is simply not plausible that this Court can address any of this alleged harm by issuing a preliminary injunction, nor would any such relief on this basis be remotely warranted. Because Plaintiffs have failed to demonstrate any irreparable harm, this factor also weighs in favor of Defendants.

C. The Balance of the Equities and the Public Interest Weigh Strongly Against Preliminary Relief.

A party seeking a preliminary injunction must also demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. These two "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the balance of equities and the public interest cut decidedly against issuing an emergency injunction.

Plaintiffs ask this Court to enjoin Defendants from including a category of individuals in the TSDS, *see* Pls.' PI Mot. at 22—a category in which Plaintiffs have not even plausibly alleged that they belong. But, as should be apparent, the public interests would be deeply harmed should the Court enter any injunctive relief that would impact the operations of the TSDS—especially where is no plausible alleged connection between the Plaintiffs and the watchlisting system. The Government's interest in safeguarding national security are set forth in detail in a declaration attached to Plaintiffs' second amended complaint and motion for a preliminary injunction. *See generally* Decl. of Timothy P. Groh. And it is plain that "no governmental interest is more compelling than the security of the

Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see Elhady*, 993 F.3d at 228 ("[T]he Government's interest in combating terrorism is an urgent objective of the highest order.") (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010)); *Mohamed v. Holder*, 995 F. Supp. 2d 520, 527 (E.D. Va. 2014) ("It is among the most compelling of governmental duties to protect our country from its enemies, foreign and domestic."). Indeed, even if Plaintiffs had plausibly alleged they are in the TSDS, they have not plausibly alleged any harm that has resulted from this designation to justify an injunction over how the TSDS operates. The public interest clearly weighs against any preliminary injunctive relief in this case which, instead, should be summarily dismissed.

CONCLUSION

For the foregoing reasons, this Court should: (1) dismiss Plaintiffs' constitutional and APA claims; (2) dismiss the Privacy Act claims brought by Leonid Ber, Karen Stewart, Timothy Shelley, Winter Calvert, Armando Delatorre, L.M., Lindsey Penn, Ana Robertson Miller, Devin Fraley, and Jason Foust against FBI and the Privacy Act claims brought by Winter Calvert and Ana Robertson Miller against DHS; and (3) deny Plaintiff's motion for a preliminary injunction.

DATED: April 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 12, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to counsel of record.

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