UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Targeted Justice, Inc.; Winter Calvert; Dr. Leonid Ber; Dr. Timothy Shelley; Karen Stewart; Armando Delatorre; Berta Jasmin Delatorre; J.D., a minor; Deborah Mahanger; L.M., a minor; Lindsay J. Penn; Melody Ann Hopson; Ana Robertson Miller; Yvonne Mendez; Devin Delaney Fraley; H.F., a minor; Susan Olsen; Jin Kang; and Jason Foust,

Plaintiffs,
v.

Merrick B. Garland, Attorney General of the United States, in his official capacity; Federal Bureau of Investigation; Christopher Wray, Director of the Federal Bureau of Investigation, in his official capacity and personal capacity; Charles Kable, Jr., Director of the Federal Bureau of Investigation's Terrorist Screening Center, in his official capacity and personal capacity; Department of Homeland Security; Alejandro Mayorkas, Secretary of the Department of Homeland Security in his official capacity and personal capacity; Kenneth L. Wainstein, Department of Homeland Security's Under Secretary for Intelligence and Analysis, in his official capacity and personal capacity.,

Defendants

CIVIL NO. 4:23-cv-1013

Individual Defts. Garland, Wray, Mayorkas, Kable, IV., and Wainstein's Mtn. to Dismiss

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INDIVIDUAL DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(1), (2) & (6)

Nature of the Proceeding & Summary of the Argument

The Terrorist Screening Dataset (TSDS)[1] "lies at the very heart of our country's effort to identify those who would inflict upon the public irretrievable loss and irreparable mass harms," making it "vital to public safety". *Elhady v. Kable*, 993 F.3d 208, 213 (4th Cir. 2021). Targeted Justice, Inc. and eighteen of its members ("Plaintiffs") challenge a subset of the TSDS that they claim includes individuals who are subject to "Directed Energy Weapon" attacks, "voice-to-skull" technology, and other implausible tactics. And Plaintiffs have not only sought injunctive relief against the United States: they have also asked the Court to take the disfavored step of implying a *Bivens* damages remedy against individual federal employees, including some of the nation's highest-ranking Cabinet members and other officials.

The instant motion is filed on behalf of Attorney General Merrick Garland, DHS Secretary Alejandro Mayorkas, FBI Director Christopher Wray, DHS Undersecretary Kenneth Wainstein, and former Terrorist Screening Center (TSC) Director Charles Kable, IV ("Individual Defendants") in their personal capacities. Plaintiffs' *Bivens* damages claims must be dismissed for four reasons. First, the Court lacks subject-matter jurisdiction because Plaintiffs fail to plausibly allege an injury fairly traceable to the Individual Defendants. Second, the Court lacks personal jurisdiction over the Individual Defendants in Texas. Third, separation of powers, national security, and other concerns preclude the extension of *Bivens* to Plaintiffs' claims. Finally, the Individual Defendants are entitled to qualified immunity because Plaintiffs fail to adequately allege that the Individual Defendants violated the Constitution, let alone that they violated clearly

[1] The Second Amended Complaint ("SAC") calls the TSDS the "Terrorist Screening Database (TSDB)."

established constitutional law. The Court should grant the Individual Defendants' motion and dismiss the SAC with prejudice.

Background[2]

I. The TSDS

In response to the significant threat to our nation's security posed by international terrorism, President George W. Bush issued Homeland Security Presidential Directive 6 ("HSPD-6"), an Executive Order that required the Attorney General to develop "an organization to consolidate the Government's approach to terrorism screening" in coordination with other agencies. Following that directive, the Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence established the TSC to create, maintain, and manage the TSDS, "the federal government's consolidated watchlist of known or suspected terrorists." *Elhady*, 993 F.3d at 213. The TSC is "a multi-agency center administered by the FBI." *Id.* The TSC routinely coordinates with the National Counterterrorism Center (NCTC), DHS sub-agencies, the Department of State, and the Office of the Director of National Intelligence. *Id.*; *see also* Fed. Bur. of Investigation, *Overview of the U.S. Government's Watchlisting Process and Procedures* (Sept. 2020), attached hereto as Exhibit A.

[2] The facts recited above are drawn from the SAC, documents incorporated into it by reference, and other sources of judicially noticeable material, such as government websites, congressional reports, and agency reports. *See Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (noticing government website); *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981) (noticing "agency records and reports."). Additionally, the Individual Defendants ask the Court to take judicial notice of the Watchlisting Overview document, which was released by the U.S. Government in January 2018 following an inter-agency review process. This official Government document provides an authoritative description of watchlisting policies and procedures and is properly subject to judicial notice. See, *e.g., Terrebonne*, 646 F.2d at 1000 n.4; *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).

Persons are generally considered for inclusion in the TSDS as "known or suspected terrorists" after being "nominated" by a law enforcement, intelligence, or other government agency, which must base such nomination upon "articulable intelligence or information which creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage in…terrorist activit[y]." *Elhady*, 993 F.3d at 213-14. Before an individual is placed in the TSDS, a multi-step process is followed that includes review by the nominating agency, review by the NCTC or the FBI (depending upon whether the nomination relates to international or domestic terrorism), and finally, review by TSC staff. *Elhady*, 993 F.3d at 214; *see also* Ex. A. TSC considers a "broad variety of factors" when deciding whether to add a name to the database. *Id.* Information used in the TSDS nomination process must be credible and may come from (1) law enforcement, (2) immigration records, (3) the homeland security and intelligence communities, (4) U.S. consulates or embassies abroad, or (5) foreign partners with whom the Government has an arrangement to share screening information. Ex. A. Nominations must not be based solely on the individual's race, ethnicity, or religious affiliation, nor solely on beliefs and activities protected by the First Amendment. *Id.*

To maintain thorough, accurate and current information, the TSDS is subjected to rigorous and ongoing quality control measures to ensure that nominations continue to satisfy the criteria for inclusion, and that the information supporting the nomination is reliable and up to date. *Id*. Nominating agencies must also have procedures to prevent erroneous nominations of U.S. persons and conduct an annual review of their nominations of U.S. persons to remove those who should no longer be included. *Id.*; *Elhady*, 993 F.3d at 215.

II. The No-Fly List & Other TSDS Subset Lists

The TSDS includes subset lists that are populated by nominations which satisfy certain additional criteria. These subset lists include the "No-Fly," "Selectee List," and "Expanded Selectee List," which prevent a person from flying or subject them to additional screening at airports. *Abdi v. Wray*, 942 F.3d 1019, 1023 (10th Cir. 2019). Persons on these lists may also be subject to additional screening should they seek employment in sensitive industries, such as the airline industry or industries dealing with nuclear material. *Elhady*, 993 F.3d at 215.

Congress has prescribed a statutory redress inquiry process for those who believe they have been unfairly or incorrectly delayed, denied boarding, or identified for additional screening at transportation hubs, due to inclusion on the No-Fly, Selectee, or Expanded Selectee Lists. *See* 49 U.S.C. §§ 44926(a), (b)(1); 44903(j)(2)(C), (j)(2)(G)(i). That statutory scheme is administered via DHS's Traveler Redress Inquiry Program (DHS TRIP).[3]

III. Fusion Centers

In general, fusion centers—which Plaintiffs characterize as part of a "DHS Fusion Centers Network" (Dkt. 26 at ¶124)—are "collaborative effort[s] of two or more agencies that provide resources, expertise and information to the center with the goal of maximizing their ability to detect, prevent, and respond to criminal and terrorist activity." Dept. Homeland Security, *National Fusion Centers Fact Sheet*.[4] State and major urban area fusion centers are "state-owned and operated centers that serve as focal points in states and major urban areas for the receipt, analysis, gathering and sharing of threat-related information between State, Local, Tribal and Territorial,

[3] DHS TRAVELER REDRESS INQUIRY PROGRAM (DHS TRIP), https://www.dhs.gov/dhs-trip (last visited May 26, 2023).
[4] NATIONAL NETWORK OF FUSION CENTERS FACT SHEET, https://www.dhs.gov/national-network-fusion-centers-fact-sheet (last visited May 26, 2023).

federal and private sector partners." Dept. Homeland Security, *Fusion Centers*.[5] DHS deploys personnel to support fusion center operations but does not direct their activities. *Id.*

IV. Plaintiffs' Allegations

Plaintiffs are eighteen individuals and Targeted Justice, an organization. The SAC alleges that the Defendants have collaborated in an "illegal covert human experimentation and persecution program" known as "The Program." *See* Dkt. 26 at ¶¶ 9, 34, 248-55. According to the SAC, the individual plaintiffs are "Targeted Individuals"–*i.e.*, victims of The Program–while Targeted Justice is an organization that represents the interests of Targeted Individuals. *See id.* at ¶¶ 14, 43, 177.

The thrust of the SAC is that "Targeted Individuals" have been ensnared in The Program through the TSDS. *See id.* at ¶ 18. Plaintiffs allege that the "Targeted Individuals" have been: (a) improperly placed in the TSDS, where they are the "experimental subject roster" for the Program, and (b) subjected to numerous abuses, including "directed energy" attacks carried out by "microwave weapons." *See id.* at ¶¶ 15, 18, 281-85.

Plaintiffs further allege, without basis or explanation, that their names were entered into the TSDS under "Categories Three and Four," which Plaintiffs claim are designated for "Non-Investigative Subjects" who pose no terrorist threat and are not subject to limitations on their right to travel. *See* Dkt. 26 at ¶¶ 21, 26, 165-66. Plaintiffs contend that they were nominated to the TSDS without due process and for improper reasons, such as their political conservatism, their sex, or their involvement in a "contentious divorce." *Id.* at ¶¶ 109, 328, 336.

Plaintiffs make bizarre claims about the consequences of their inclusion in the TSDS, including (1) that they have been targeted with "Directed Energy" weapons, (2) that they receive

[5] FUSION CENTERS, https://www.dhs.gov/fusion-centers (last visited May 26, 2023).

telepathic messages from "voice-to-skull" technology, (3) that they are victims of "gang" or "organized stalking," (4) that they have developed Havana Syndrome, (5) that the Government disclosed their private information to potential employers, (6) that they are remotely monitored and subject to constant electronic surveillance, (7) that unknown individuals break into their homes, (8) that law enforcement refuses to assist them, and (9) that these activities are part of a "human experimentation" program. *Id.* at 74-110. Plaintiffs allege that these actions violate their First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, along with the United Nations Convention Against Torture (CAT) and the Geneva Convention.

Plaintiffs do not allege that *any* of the Individual Defendants personally stalked, assaulted, spied upon, experimented upon, or tortured them. Rather, Plaintiffs assert that each of the Individual Defendants failed in a "ministerial" or supervisory duty by maintaining unconstitutional policies that permitted their inclusion in the TSDS and the allegedly related harms. *Id.* at ¶¶ 63-67. While Plaintiffs generally claim that Individual Defendants Wray and Kable "nominate and/or maintain them in the [TSDS]," they include no facts to plausibly suggest that they were nominated to the TSDS, let alone that they were nominated by Wray or Kable rather than by one of the other actors allegedly able to nominate persons for inclusion in the TSDS. *Id.* at ¶¶ 119; 109 (alleging that former employers and spouses nominated some Plaintiffs to the TSDS).

Procedural History & Statement of Issues

This is an action for damages (under *Bivens*), declaratory relief, and injunctive relief. This motion addresses the individual-capacity *Bivens* claims only. The proceeding is currently in the pre-Answer pleading stage and comes before the Court on a motion to dismiss.

The following legal issues are before the Court: (1) whether Plaintiffs have plausibly alleged standing to bring individual-capacity *Bivens* claims; (2) whether Plaintiffs have alleged

any basis for this Court to exercise personal jurisdiction; (3) whether special factors and separation-of-powers concerns prohibit expansion of the *Bivens* remedy to Plaintiffs' claims; and (4) whether the Individual Defendants are entitled to qualified immunity.

Legal Standards

Dismissal under Fed. R. Civ. P. 12(b)(1) is appropriate when a court lacks subject-matter jurisdiction over a plaintiff's claim. "Dismissal for lack of subject-matter jurisdiction is proper only when the claim is so completely devoid of merit as not to involve a federal controversy." *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (cleaned up). A claim "fails that test" (i.e., does *not* involve a justiciable controversy) when the plaintiff "does not 'plausibly allege all jurisdictional allegations.'" *Ghedi v. Mayorkas*, 16 F.4th 456, 463 (5th Cir. 2021) (quoting *Brownback*, 141 S. Ct. at 749). The "same plausibility standard that applies in the Rule 12(b)(6) context also applies to Rule 12(b)(1)." *Id.*

Dismissal under Fed. R. Civ. P. 12(b)(2) is appropriate when a court lacks personal jurisdiction over a defendant. Personal jurisdiction exists if the forum's "long-arm statute extends to the defendant and exercise of such jurisdiction is consistent with due process." *Sangha v. Navig8 ShipManagement Priv., Ltd.*, 882 F.3d 96, 101 (5th Cir. 2018) (citations omitted). The plaintiff bears the burden of establishing a *prima facie* case of personal jurisdiction over each defendant. *Id.* "[J]urisdictional allegations must be accepted as true, [but] acceptance does not automatically mean that a *prima facie* case for jurisdiction has been presented." *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 812 (5th Cir. 2006).

Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when a complaint fails "to state a claim upon which relief can be granted." To survive a motion under Rule 12(b)(6), 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). A complaint meets this standard only if it "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).

Argument

I. Plaintiffs Lack Standing

Standing is an essential element of federal jurisdiction. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Thus, the Court must dismiss any complaint that does not "plausibly allege" standing's three elements: "(1) 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." *Ghedi*, 16 F.4th at 464. Consistent with the plausibility standard, Courts need not consider allegations that are "clearly out of the realm of reality" when assessing standing. *Smith v. Osborne*, No. 4:18-cv-906-ALM-CAN, 2019 WL 4383337, at *3 (E.D. Tex. Aug. 18, 2019), *adopted by* 2019 WL 4345735 (E.D. Tex. Sept. 12, 2019); *see also Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989) (permitting dismissal of "patently insubstantial" claims under Rule 12(b)(1)).

Plaintiffs here lack standing to pursue their *Bivens* claims for two reasons. First, Plaintiffs fail to plausibly allege an "injury" sufficient to confer standing. Plaintiffs' allegations about "directed energy assaults," rogue government stalkers, "voice-to-skull technology," and similar oddities are precisely the type of fantastical allegations that courts in the Fifth Circuit find insufficient to invoke federal jurisdiction. *See Dilworth v. Dallas Cmty. Coll.*, 81 F.3d 616, 617 (5th Cir. 1996) ("When a plaintiff's complaint is facially frivolous and insubstantial, it is insufficient to invoke the jurisdiction of a federal court."); *see also, e.g.*, *Deng v. Fed. Bur. of Investigation Agencies*, No. 2:20-cv-154-Z-BR, 2021 WL 742297, at *2-4 (N.D. Tex. Jan. 26, 2021), *adopted by* 2021 WL 735207 (N.D. Tex. Feb. 25, 2021) (finding no jurisdiction over complaint despite "factually frivolous" allegations of stalking and illegal surveillance by the FBI,

use of technology to "transmit [the plaintiff's] voice-waves," and involuntary implantation of medical devices); *Osborne*, 2019 WL 4383337, at *3 (dismissing case for the same reason despite allegations that "neighbors, coworkers, and various federal agencies and officials have developed technology to direct radiation towards Plaintiff's residence to 'cook' Plaintiff and his family and satellite technology to track their every movement"); *Hamilton v. United States*, No. 4:16-cv-964, 2017 WL 11698489, at *3 (S.D. Tex. Mar. 31, 2017), *adopted by* 2019 WL 4345735 (E.D. Tex. Sept. 12, 2019) (doing the same and emphasizing that "fanciful claims, bizarre conspiracy theories, or allegations of fantastic government manipulations of the plaintiff's will or mind are generally subject to dismissal under Rule 12(b)(1)."") (cleaned up). This Court should similarly find that Plaintiffs' claims fail to plausibly allege an injury for standing purposes.

Second, Plaintiffs fail to allege an injury that is fairly traceable to the Individual Defendants. Shorn of its dramatic spin, the SAC essentially alleges that Plaintiffs' names were entered into the TSDS without due process, and that their information was distributed to law enforcement agencies and other entities with access to the TSDS. *See* Dkt. 26 at ¶¶ 159, 187-190. Even assuming *arguendo* that these allegations are plausible (they are not),[6] they are insufficient to establish standing because they do not allege an injury *fairly traceable* to the Individual Defendants. *Ghedi*, F.4th at 464. As noted previously (*supra* at 6), Plaintiffs include no specific allegations that *any* of the Individual Defendants—all of whom are high level officials—personally nominated them to the TSDS or knew and disclosed anything about them, nor is it plausible that Cabinet and Cabinet-adjacent officials would personally handle individual TSDS nominations. *Cf.* Ex. A (describing the TSDS nomination process). Instead, Plaintiffs emphasize that *anyone* may

[6] The Individual Defendants adopt and incorporate the Official-Capacity Defendants' argument that Plaintiffs failed to plausibly allege their inclusion in the TSDS. Dkt. 41 at 21-23

nominate someone to the TSDS—several Plaintiffs ascribe their nominations to the malicious acts of a "former spouse" (Dkt. 26 at ¶¶ 98, 109, 118). Consequently, Plaintiffs' claims resemble those of the *Ghedi* plaintiff, who sued federal agency leaders for illegal searches performed by line agents and other "third part[ies] not before the Court." *Ghedi*, 16 F.4th at 465-66. In ruling on those claims, the Fifth Circuit held that it could not "reasonably infer that the heads of DHS, TSA, or CBP… ever have caused the kind of Fourth Amendment violation Ghedi alleges." *Id.* at 466. This Court should likewise hold that that Plaintiffs' injuries—which were allegedly caused by private citizens and unknown government actors—are not "fairly traceable" to the Individual Defendants.

II. This Court Lacks Personal Jurisdiction Over the Individual Defendants

The complaint in this case is notably silent on the black-letter law proposition that a plaintiff must establish personal jurisdiction over each *Bivens* defendant. *Walden v. Fiore*, 571 U.S. 277 (2014). The mere "fact that federal government officials enforce federal laws and policies on a nationwide basis is not sufficient. . .to maintain personal jurisdiction in a lawsuit which seeks money damages against those same governmental officials in their individual capacities." *Vu v. Meese*, 755 F. Supp. 1375, 1378 (E.D. La. 1991); *see also Smith v. Carvajal*, 558 F. Supp. 3d 340, 349 (N.D. Tex. 2021) ("It is not reasonable to suggest that federal. . .officials may be hauled into court simply because they have regional and national supervisory responsibilities. . .within a forum state.") (quotations and citations omitted). Rather, Plaintiffs must support their claim of personal jurisdiction by plausibly alleging that the Individual Defendants have "minimum contacts" with Texas sufficient to subject them to "general" or "specific" jurisdiction. *Sangha*, 882 F.3d at 101. The SAC fails to do this.

General jurisdiction exists when a defendant's contacts with the "state are so continuous and systematic as to render [him] essentially at home in the forum state." *Id.* at 101-02. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Goodyear Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Plaintiffs do not make any allegations about the Individual Defendants' residence during the time period in question, and admit that they work in D.C. *See* Dkt. 7 (service documents). Thus, this Court lacks general jurisdiction over the Individual Defendants.

Plaintiffs likewise fail to allege "minimum contacts" sufficient to establish specific jurisdiction. Specific jurisdiction may exist "over a nonresident defendant whose contacts with the forum state are singular or sporadic only if the cause of action asserted arises out of or is related to those contacts." *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016) (citations and quotations omitted). To establish specific jurisdiction, Plaintiffs must show that the Individual Defendants "purposefully directed [their] activities at [Texas], and the litigation results from alleged injuries that arise out of or relate to those activities." *Sangha*, 882 F.3d at 101 (citations omitted). When performing this analysis, the Court "looks to the defendant's contacts with the forum not. . . with persons who reside there." *Walden*, 571 U.S. at 285. Thus, "the mere fact that [a defendant's] conduct affected plaintiffs with connections to the forum state does not suffice to authorize jurisdiction." *Id.* at 291.

Plaintiffs' do not allege that the Individual Defendants "traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to" Texas, let alone that they had in-state contacts related to this litigation. *Walden*, 571 U.S. at 289. Instead, they allege that the Individual Defendants supervised nationwide programs from Washington, D.C. or "accepted" nominations there that "affected Plaintiffs with connections" to Texas. *Id.*; *see also* Dkt. 26 at ¶¶ 63-67. Thus,

Plaintiffs' claim of personal jurisdiction rests solely upon their allegation that they suffered injury in Texas from the Individual Defendants' actions outside the forum. In *Walden*, the Supreme Court held that such allegations could not establish "intentional contact" with a forum state and therefore could not support jurisdiction. 571 U.S. at 286, 291; *see also Smith*, 558 F. Supp. 3d at 349 (declining to find personal jurisdiction based on national supervisory authority); *Vu*, 755 F. Supp. at 1378 ("[E]nforce[ment] of federal laws and policies is not sufficient. . .to maintain personal jurisdiction."). This Court should do likewise.

III. Plaintiffs Fail to Plead a Viable *Bivens* Cause of Action

Plaintiffs ask the Court to undertake the "disfavored judicial activity" of creating a new damages remedy under *Bivens* against high-ranking federal officials based on never-before-recognized legal theories. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). Creating a new cause of action under *Bivens* is a "significant step under separation-of-powers principles." *Id*. Although federal courts once took that step with frequency in certain contexts, the Supreme Court has since "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022) (citing *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020)). When a court expands the *Bivens* remedy, it necessarily "determine[s] that it has the authority . . . to create and enforce a cause of action for damages" and thereby encroaches on an area over which "Congress"—not the Judiciary—has "substantial responsibility." *Abbasi*, 137 S. Ct. at 1856; *Egbert*, 142 S. Ct. at 1802 ("At bottom, creating a cause of action is a legislative endeavor."). Thus, "courts must refrain from creating the [*Bivens*] remedy" if there is "any rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 142 S. Ct. at 1803; *Abbasi*, 137 S. Ct. at 1858.

A court faced with a *Bivens* claim must determine (1) whether the claim extends *Bivens* into a new context, and if so, (2) whether "special factors" cause the Court to "hesitate" to create a new *Bivens* claim. *Id.* "While [Supreme Court] cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803.

The special factors inquiry in this case leads inexorably to one conclusion: separation-of-powers principles preclude the extension of *Bivens* to cover Plaintiffs expansive claims. Indeed, the application of the Supreme Court's settled *Bivens* jurisprudence to Plaintiffs' claims is so clear that this Court could summarily dismiss Plaintiffs' individual-capacity claims based upon *Abbasi* alone. In *Abbasi*, the Supreme Court declined to imply a *Bivens* remedy against "high executive officials in the Department of Justice" who were sued based upon their alleged creation and "adoption of a formal policy" mandating the detention of "hundreds of illegal aliens. . . pending a determination whether [they] had a connection to terrorism." 137 S. Ct. at 1851, 1860. In reaching this conclusion, the Court squarely held that "*Bivens* is not a proper vehicle for altering an entity's policy" and may not be used to "challenge the conduct of a particular Executive Official in a discrete instance" if that challenge "would call into question the formulation and implementation of a general policy." *Id.* at 1860. These and other statements in *Abbasi* squarely prohibit the current action, which attempts to challenge alleged counterterrorism policies by way of a damages action against high-level Executive Officials.

If the Court chooses not to dismiss based upon *Abbasi* alone, the Court must dismiss Plaintiffs' claims for the reasons below.

A. Plaintiffs' *Bivens* Claims Present a New Context

The Supreme Court has recognized *Bivens* claims in only three narrow contexts: in *Bivens*, 403 U.S. at 388 (Fourth Amendment claim for unreasonable, warrantless search and seizure in a home by federal narcotics agents); in *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment claim based on a Congressman's firing of a female staffer on the basis of sex); and in *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment claim for deliberate indifference to a federal prisoner's life-threatening asthma). Outside these contexts, the Supreme Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 137 S. Ct. at 1857 (quotations and citations omitted).

A case presents a "new context" if it is "different in a meaningful way" from these three contexts or "involves a new category of defendants." *Hernandez*, 140 S. Ct. at 743. The "meaningfully different" standard is open-ended: a case may be "meaningfully different" because of, *inter alia*, "the statutory or other legal mandate under which the [defendant] officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 137 S. Ct. at 1860. "A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernandez*, 140 S. Ct. at 743.

Plaintiffs' claims differ meaningfully from the claims in *Bivens*, *Davis*, and *Carlson* because none of those cases: dealt with terror watchlists and attendant national security concerns; were filed against high-ranking or Cabinet-level officials; involved the FBI or DHS; challenged broad executive policies; proceeded under the First, Sixth and Fourteenth Amendments; or implicated international treaties, like CAT and the Geneva Convention. Even if Plaintiffs try to negate these differences by shoehorning their claims under the Fourth, Fifth, and Eighth

Amendments, none of their claims resemble those addressed in *Bivens, Davis* or *Carlson*. *See, e.g., Hernandez*, 140 S. Ct. at 743; *Cantu v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019) ("No one thinks *Davis* . . . means the entirety of the Fifth Amendment's Due Process Clause is fair game in a *Bivens* action."); *see also* Dkt. 47 at 1 (Plaintiffs' admission that their allegations are "unique in their kind"). As in *Abbasi,* the new context inquiry is "easily satisfied." 137 S. Ct. at 1865.

B. Special Factors Preclude Expansion of the *Bivens* Remedy

The special factors inquiry centers on separation-of-powers concerns and focuses "on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-58. To "be a special factor counseling hesitation, a factor must cause a court to hesitate before answering that question in the affirmative." *Id.* at 1858. And courts *must* hesitate if there is "any rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 142 S. Ct. at 1805.

1. Alternative Remedies

"[I]f there is an alternative remedial structure present in a . . . case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858. Alternative remedies can take many forms, including "injunctions and . . . other form[s] of equitable relief," state and federal tort law remedies, and administrative claims. *Id.* at 1865; *see also Oliva v. Nivar*, 973 F.3d 438, 443-44 (5th Cir. 2020) (recognizing an "administrative process" and the Federal Tort Claims Act as components of an alternative remedy scheme). "[S]o long as Congress or the Executive has created a remedial process that it finds sufficient . . . the courts cannot second-guess that calibration by superimposing a *Bivens* remedy," even if they "independently conclude that the government's procedures are not as effective as a damages

remedy." *Id.*; *see also Egbert*, 142 S. Ct. at 1807 ("[T]he question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts.").

Here, Plaintiffs acknowledge that "Congress enacted acts and regulations [*sic.*] to incorporate due process guarantees to the individuals listed in the 'No-Fly' and 'Selectee' List[s]," which are part of the TSDS. Dkt. 26 at ¶ 197. They also identified multiple statutory procedures (including the DHS TRIP process described above) that are available to individuals to challenge their placement on those sub-lists and address various consequences of inclusion in the TSDS. *See id*. at ¶¶ 197-201. Thus, Plaintiffs concede that Congress has created at least some "alternative remedial structures" to address certain harms that may flow from inclusion in the TSDS and delegated control of that structure to the Transportation Security Administration and the TSC. *Egbert*, 142 S. Ct. at 1804. Indeed, Plaintiffs' allegations—which cite legislation, Congressional reports, investigations, and testimony about terrorism—confirm that "Congressional interest" in the TSDS and fusion centers "has been frequent and intense," and therefore that Congress's decision *not* to create the individual damages remedy Plaintiffs seek here was "likely not inadvertent." *Abbasi*, 137 S. Ct. at 1862; *see* Dkt. 26 at ¶¶ 92, 134, 196-202, 209, 269; *see also* Dkt. 2 at ¶¶ 64, 168, 170, 179, 186, 206 (references to Congressional actions in Plaintiffs' FAC). Consequently, Plaintiffs' protests that Congress's chosen remedies do not apply to them or omit procedural protections do not empower this Court to upset the balance Congress has struck by imposing a novel *Bivens* remedy. *See Egbert*, 142 S. Ct. at 1806-07 ("[W]e have never held that a *Bivens* alternative must afford rights to participation or appeal.").

Additionally, the Privacy Act, not *Bivens*, is the process Congress created to address unauthorized maintenance or use of federal records maintained on individuals covered by an agency record system. Five circuit courts have concluded that the "Privacy Act is a comprehensive

remedial scheme" that displaces claims arising from "improper collection and retention of agency records," as well as the "creation, maintenance, and dissemination of false records by agency employees." *Fazaga v. FBI*, 965 F.3d 1015, 1057-58 (9th Cir. 2020), *rev'd in part on other grounds by* 142 S. Ct. 1051 (2022); *Liff v. Off. of Inspector Gen. for Lab.*, 881 F.3d 912, 918-924 (D.C. Cir. 2018); *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 & n.7 (6th Cir. 2002); *Chesser v. Chesser*, 600 F. App'x 900, 901 (4th Cir. 2015); *Abuhouran v. Soc. Sec. Admin.*, 291 F. App'x 469, 472 (3d Cir. 2008). While Plaintiffs again contend that certain Privacy Act remedies are unavailable to them or inadequate to their purposes (*see, e.g.*, Dkt. 26 at ¶¶ 72, 75), this argument is unavailing. *Egbert*, 142 S. Ct. at 1807; *Fazaga*, 965 F.3d at 1057-58 (the "lack of relief against some potential defendants does not disqualify the Privacy Act as an alternative remedial scheme" for *Bivens* surveillance claims).[7]

A lawsuit for injunctive relief —which Plaintiffs have filed here—offers a third mechanism to address complaints about the TSDS and other counterterrorism programs. The Supreme Court has stated that challenges to "large-scale policy decisions" are appropriately addressed via "injunctive relief" and emphasized that *Bivens* claims are "not a proper vehicle for altering an entity's policy." *See Abbasi*, 137 S. Ct. at 1860; *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

Further, to the extent Plaintiffs claim to be the victims of conduct that constitutes stalking, vandalism, assault, false imprisonment, or the like, Congress has decided that such state-law claims should be channeled through the FTCA. *See* 28 U.S.C. § 2674; *see e.g.*, Dkt. 26 at ¶¶ 258, 280

[7] Moreover, Plaintiffs' admitted use of the Privacy Act to request information and records about themselves suggests that it offers "an avenue for *some* redress," even if that redress comes in the form of a response that Plaintiffs allege is insufficient. *Fazaga*, 965 F.3d at 1058; Dkt. 26 at ¶ 72 (Plaintiffs received responses to Privacy Act requests, in which DHS and FBI "denied having any responsive documents").

(alleging that unknown individuals committed the torts of stalking, property damage/vandalism, trespass/"surreptitious entry," etc.); 284 (torts of harassment and battery); 369 (torts of "kidnapping, sexual battery, false imprisonment, [. . . and] petty theft"). The Fifth Circuit has squarely held that a plaintiff's ability to bring an FTCA claim is another special factor that supports the existence of an "alternative remedial structure" and precludes expansion of the *Bivens* remedy. *Oliva*, 973 F.3d at 443. Similarly, state tort laws may offer direct remedies for torts committed by non-federal personnel, including the fusion centers' "State, Local. . .and private sector partners." *See* Dept. Homeland Security, *Fusion Centers*; *Abbasi*, 137 S. Ct. at 1865 (state tort law can furnish an alternative remedy); *Wilkie v. Robbins*, 551 U.S. 537, 551 (2007) (declining to imply a *Bivens* remedy where the plaintiff "had a civil remedy for damages in trespass."); *accord Malesko*, 534 U.S. at 72-73 (declining to imply a *Bivens* remedy for "federal prisoners in private facilities [who] enjoy a parallel [state] tort remedy that is unavailable to prisoners in Government facilities.").

Finally, even if Plaintiffs are dissatisfied with all the potential remedies Congress (and the states) provided, that does not mean that any conceivable misconduct would go unchecked. In *Egbert*, the Supreme Court held that the availability of an agency grievance procedure—even one that did not permit judicial review or allow a complainant to participate in the disciplinary process—precluded a *Bivens* remedy. 142 S. Ct. at 1807. Here, Plaintiffs have access to grievance procedures both with respect to DHS and the FBI, that are comparable to those available in *Egbert*. *See, e.g.*, 5 U.S.C. App. 3 § 8E (providing that "any component" of the Department of Justice that receives a "nonfrivolous allegation of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice . . . shall report that information to the Inspector General [of the Department]," and authorizing the Inspector General to "investigate allegations of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice," "refer

such allegations to the Office of Professional Responsibility," or refer them to "the internal affairs office of the appropriate component" of the Department for disciplinary action.). Any person, including Plaintiffs, may report alleged misconduct, and the Department's Office of the Inspector General (OIG) provides a link on its public website to report allegations of wrongdoing. *See* HOTLINE, https://oig.justice.gov/hotline (last visited May 26, 2023). Similar procedures apply to DHS, which contains Offices of Privacy and Civil Rights that coordinate with the DHS Inspector General to investigate complaints of misconduct touching on their respective areas of concern. *See* 6 U.S.C. § 142 (privacy); 6 U.S.C. § 345 (civil rights); *see also* PROVIDE FEEDBACK OR MAKE COMPLAINTS TO DHS, https://www.dhs.gov/provide-feedback-or-make-complaints-dhs (last visited May 26, 2023) (online resource for reporting complaints).

In summary, the remedies Plaintiffs describe in their Complaint (49 U.S.C. §§ 44926, 44903, DHS TRIP), the Privacy Act, federal suits for injunctive relief, the FTCA, state tort law, and statutorily mandated agency procedures for reporting and investigating misconduct, combine to form a robust structure for claims related to the implementation of FBI and DHS's counterterrorism programs. This Court should not disturb the coequal Branches' comprehensive remedial scheme by supplementing those avenues with a new *Bivens* remedy.

2. Other Special Factors

In addition to these alternative processes, this case presents many other "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Abbasi*, 137 S. Ct. at 1858; *Egbert*, 142 S. Ct. at 1805. First, this case concerns matters of national security policy, which "is the prerogative of the Congress and President." *Abbasi*, 137 S. Ct. at 1861 ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other Branches.'"). Courts "traditionally have been reluctant to intrude

upon the authority of the Executive in . . . national security affairs" and have consistently treated the existence of national security concerns as a reason not to extend *Bivens*. *Id.*; *see also Egbert*, 142 S. Ct. at 1804-05 ("Because matters intimately related to . . . national security are rarely proper subjects for judicial intervention, we affirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.") (internal quotation marks and citation omitted); *Cantu*, 933 F.3d at 424 (national security is a special factor). These concerns are especially acute in this case, which uses *Bivens* as a vehicle to alter alleged policies of the FBI and DHS. *Abbasi*, 137 S. Ct. at 1862-63. (*Bivens* "is not a proper vehicle for altering an entity's policy," and "Congress, not the Judiciary" must decide what "balance [should be] struck between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation.").

Relatedly, discovery in this case could set-off "an inquiry into sensitive issues of national security" and call for disclosure of national security information. *Abbasi*, 137 S. Ct. at 1842. As the Supreme Court held in *Dep't of the Navy v. Egan*, the President's authority "to classify and control access to information bearing on national security. . .flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." 484 U.S. 518, 527 (1988). And the harms associated with improper disclosure or publication of such information in this case are substantial. *See Elhady*, 993 F.3d at 215 (disclosure of information related to the TSDS "would disrupt and potentially destroy counterterrorism investigations because terrorists could alter their behavior"). This Court should refrain from causing these harms and avoid using its authority to interfere with Cabinet officials' exercise of a core Executive power.

Third, this Court should hesitate before wading into matters of foreign affairs. Here, Plaintiffs invoke CAT and the Geneva Convention, Dkt. 26 at ¶ 564, despite Congress's decision not to make either treaty enforceable by way of a private action for damages. *See Renkel v. U.S.*, 456 F.3d 640, 641-44 (6th Cir. 2006) (CAT does not create a private right of action); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (Geneva Convention does not create a private right of action); *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 116-17 (D.D.C. 2007) (collecting cases to show that the Geneva Convention was not "intended. . .to create a private right of action in domestic courts."). This Court should defer to the Legislative and Executive Branches' authority to make treaties and determine how they are enforced domestically.[8]

In light of the many special factors outlined above, the Court "must refrain" from expanding the *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1858.

IV. The Individual Defendants are Entitled to Qualified Immunity

Even if the Court is inclined to recognize a new *Bivens* remedy, Plaintiffs' claims would be barred under the doctrine of qualified immunity. Executive officials performing official duties are generally entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Once a defendant raises qualified immunity, "the burden is on the plaintiff to prove that the government official is not entitled to qualified immunity." *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013). To carry this burden, Plaintiffs must allege (1) that each defendant personally violated a constitutional right; and (2) that the claimed right was "'clearly established at the time of the

[8] For instance, Congress and the Executive have made CAT a basis for relief in immigration proceedings (*see* 8 C.F.R. § 208.18) and chosen to implement many of the Geneva guarantees through the Military Commissions Act of 2006 and the Detainee Treatment Act. *See In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 107 n.23, 117. Yet Congress has never recognized a private cause of action for damages under those acts or treaties. *Id.* at 107 n.23

alleged violation.'" *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)), *cert. denied*, 142 S. Ct. 2571 (2022).

A *Bivens* defendant is entitled to qualified immunity if a plaintiff fails to "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. The doctrines of vicarious liability and *respondeat superior* do not apply in *Bivens* actions. *Id.* at 680-81. As discussed above, Plaintiffs do not allege that the Individual Defendants did anything to them personally. Rather, their entire theory of liability rests upon their claim that the Individual Defendants (1) supervised or oversaw others, (2) failed in their "ministerial" duties by allowing an unconstitutional program to exist, or (3) might have nominated someone to the TSDS. *See* Dkt. 26 at ¶¶ 63-67. Thus, the SAC fails to plausibly allege the Individual Defendants' personal involvement in any constitutional violations. And Plaintiffs may not save their deficient Complaint by asserting that the Individual Defendants created or were "instrumental" in the implementation of supposedly unconstitutional policies, since allegations of that sort are conclusory and "disentitled to the presumption of truth." *Iqbal*, 556 U.S. at 680-81.

Likewise, the complaint fails to establish a constitutional violation. As discussed, most of Plaintiffs' allegations are too "patently insubstantial" to survive Rule 12(b)(1) review (to say nothing of review under Rule 12(b)(6)), and the Court may disregard them. *Neitzke*, 490 U.S at 327 n.6; *Iqbal*, 556 U.S. at 678. Once these allegations are removed, the SAC consists of a constitutional challenge to Plaintiffs' alleged inclusion on the TSDS and the Government's maintenance of that database. But four circuit courts, including the Fifth Circuit, have upheld the constitutionality of the TSDS, and Plaintiffs identify no case to support their claim that the TSDS or fusion centers are inherently and obviously unconstitutional. *See Ghedi*, 16 F.4th at 456; *Elhady*, 993 F.3d at 208; *Abdi*, 942 F.3d at 1019; *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017).

Additionally, Plaintiffs' random constitutional theories of recovery are legally deficient or otherwise improper because, *inter alia*: (1) Plaintiffs were not criminally prosecuted, so the Sixth Amendment cannot apply (*see* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy [several rights].")); (2) the Eighth Amendment applies only to persons convicted of crimes (*Palermo v. Rorex*, 806 F.2d 1266, 1271-72 (5th Cir. 1987)); (3) the Fourteenth Amendment applies to state, not federal, actors (*San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 642 n.21 (1987)); (4) the SAC's discrimination theory includes no facts suggesting that the Individual Defendants "adopted a policy because of, not merely in spite of, its impact on an identifiable group" (*Iqbal*, 556 U.S. at 681); and (5) Plaintiffs do not allege the elements of First Amendment retaliation (and *Egbert* expressly held that the First Amendment cannot give rise to a *Bivens* cause of action).

Lastly, the Individual Defendants are immune from liability because even if there were personal participation and a properly alleged constitutional violation, Plaintiffs fail to allege a violation of *clearly established* law. "For purposes of determining whether [a] right [or law] is clearly established, '[t]he relevant question . . . is . . . whether a reasonable officer could have believed his or her conduct to be lawful, in light of clearly established law and the information the . . . officers possessed.'" *Keller v. Fleming*, 952 F.3d 216, 225 (5th Cir. 2020) (citations omitted). "In other words, Plaintiffs must point this court to a legislative directive or case precedent that is sufficiently clear such that every reasonable official would have understood that what he is doing violates that law." *Id*. Plaintiffs may do this by identifying "controlling [Supreme Court or Fifth Circuit] authority—or a robust consensus of persuasive authority—that defines the contours of the right in question. . .with a high degree of particularity." *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018) (citations omitted).

No such authority has been—or can be—identified here. As discussed above, four Circuit Courts of Appeal have upheld the TSDS, and Plaintiffs do not identify a single case that deems the TSDS or fusion centers unconstitutional. *Cf.* Dkt. 26 at 43 (acknowledging prior, unsuccessful legal challenges to the TSDS). These facts *alone* establish that Plaintiffs have not borne their burden to show that the Individual Defendants violated clearly established law. *See Fleming*, 952 F.3d at 225. Qualified immunity thus warrants dismissal with prejudice.

Conclusion

The claims against the Individual Defendants are fundamentally flawed for multiple independent reasons. The Court should grant the Individual Defendants' motion, dismiss all claims against them with prejudice, and terminate them from this action.

Respectfully Submitted,

DATED: May 30, 2023

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CERTIFICATES OF SERVICE & CONFERENCE

I certify that on May 30, 2023, the foregoing and its attachments (Proposed Order & Exhibit A) were filed and served on Plaintiffs and counsel of record through the Court's electronic filing system (ECF). I further certify that this filing, a motion under Fed R. Civ. P. 12(b), is exempt from the Local Rules' Conference Requirements. *See* S.D. Tex. L.R. 7.1D.

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