

^ No. 23-20342

In the
United States Court of Appeals
For the Fifth Circuit

TARGETED JUSTICE, INCORPORATED; WINTER O. 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 DELAINEY FRALEY; SUSAN OLSEN; JIN KANG; JASON FOUST; H. F.,
Plaintiffs-Appellants,

v.

MERRICK B. GARLAND, *Attorney General of the United States, in his individual and official capacity*; FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER WRAY, *Director of Federal Bureau of Investigations, in his individual and official capacity*; CHARLES KABLE, JR., *Director of the Federal Bureau of Investigation's Terrorist Screening Center, in his individual and official capacity*; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; SECRETARY ALEJANDRO MAYORKAS, *Secretary of the Department of Homeland Security, in his individual and official capacity*; KENNETH WAINSTEIN, *Department of Homeland Security's Under Secretary for Intelligence and Analysis, in his individual and official capacity*,

Defendants-Appellees,

On Appeal from the United States District Court for the Southern District of Texas
Houston Division, USDC No. 4:23-CV-1013

PETITION FOR REHEARING EN BANC

April 5, 2024

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No. 23-20342

TARGETED JUSTICE, ET AL.,

Plaintiffs-Appellants

v.

MERRICK GARLAND ET AL.,

Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

The cause number and style of the case is No.23-00342, Targeted Justice et. Al. v. Garland, et. Al. (USDC Civil No. 4:23-CV-1013, Southern District of Texas).

The undersigned counsel certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:

Targeted Justice, Incorporated
Winter O. 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 Delainey Fraley
Susan Olsen
Jin Kang
Jason Foust
H. F., A minor

Defendants-Appellees:

Merrick B. Garland, and spouse
Federal Bureau of Investigation
Christopher Wray, and spouse
Charles Kable, Jr., and spouse
United States Department of Homeland Security
Secretary Alejandro Mayorkas, and spouse
Kenneth Wainstein, and spouse

Attorney for Plaintiffs-Appellants:

Ana Luisa Toledo

Appellate Counsel for Defendants/Appellees:

Sharon Swingle
Graham White

Additional Trial Counsel for Defendants:

Madeline McMahon
Jacob Bennet

Other Interested Parties Identified:

Stephen Glasheen
Infragard
Citizen Corps

Microsoft Corporation
Leidos Corporation
Lockheed Martin Corporation
Boeing Corporation
L3Harris Corporation

Furthermore, pages iv-viii of this document, is a list of Targeted Justice members that at this time have expressed in writing an interest in the outcome of this case and registered with the organization. Like Plaintiffs, they want to get their names removed off the TSDB as they do not represent a threat to national security and were improperly added to the list. The entire list is adopted by reference for the purpose of giving required notice under Rule 28.2.1.

Respectfully submitted.

Dated:

April 5, 2024

/s/ Ana Luisa Toledo
Ana Luisa Toledo
Counsel for Plaintiffs-Appellants

TARGETED JUSTICE MEMBERS WITH INTEREST IN THE CASE

Name-First	Name-Last	City	State
Tammy	Moorer	Birmingham	AL
Michael Ray	Hart	Moulton	AL
Jason	Rowan	Sylacauga	AL
Betty	Fomby	Talledega	AL
Scott Allen	Neal	Cabot	AR
Joshua David	Eagan	Hot Springs	AR
Daniel	Levac	HSV	AR
Eric Eugene	Fleming	Rogers	AR
James	Roe	Avondale	AZ
Dominic	Ruggiero, Jr.	Chino Valley	AZ
Krista	Brashear	Glendale	AZ
Jeri Alynn	Cooper	Goodyear	AZ
Stephanie Lynn	Ernst	Oro Valley	AZ
Janet	Przewlocki	Phoenix	AZ
Juan	Quinonez	Phoenix	AZ
Diana Louise	Brown	Sun City	AZ
Dennis Charles	Durbin	Wellton	AZ
Rosa	Barrera	Bakersfield	CA
Melissa	Carlin	Cabazon	CA
Stephen Allen	Bolin	Camarillo	CA
Shannon L.	Ramos	Carson	CA
Charlie	Rivera	Compton	CA
Ricky	Miller	Costa Mesa	CA
Clint	Marcus	Encino	CA
Shalini	Kaushik	Fremont	CA
Christopher Keeland	Fletcher	Goleta	CA
Peter	Kim	Hacienda Heights	CA
Catherine J.	Thomsen	Hermosa Beach	CA
Richard	Dioguardi	Homeland	CA
Joseph	LeMehaute	Igo	CA
Fiona Moire	McLean	La Jolla	CA
Jolin	Crofts	Los Angeles	CA
Rochelle	Jones	Los Angeles	CA
Rachel Hyette	Kremer	Los Angeles	CA
Brandon Paul	Luchini	Los Angeles	CA
Priscilla	Wyatt	Los Angeles	CA
Alexander Merritt	Lang	Mill Valley	CA

Amy Delaine	Atkisson	Mission Viejo	CA
Amie	Brodersen	Moreno Valley	CA
Harry	Sloan	Morro Bay	CA
Amy	Passantino	Oceanside	CA
Kerensa	Evans	Ojai	CA
Anthony Williams	Briones	Ontario	CA
Jason	Lee	Redondo Beach	CA
Matthew Arthur	Talbot	Riverside	CA
Kyle	Ferguson	Sacramento	CA
Ada-Luz	de Arce	San Francisco	CA
Adrian	Novoa	Santa Maria	CA
Michael	Duncan	Simi Valley	CA
Kristen	Uyemura	Torrance	CA
Maureen E.	Dizon	Tujunga	CA
Phillip	Hodge	Visalia	CA
Robert	Hsu	Walnut Creek	CA
Jamie Nicole	Carder	yuba city	CA
Steve	Kenney	Aurora	CO
Wayne	Metcalf	Byers	CO
Mari Margaret	DeLorme	Denver	CO
Rafael E	Garcia	Denver	CO
Ivan	Andazola	Greeley	CO
Alarie	Brandon	Greenwood Village	CO
Aeryn	Morgyn	Lakewood	CO
Bryant	Massey	Littleton	CO
Cassandra	Freier	Mead	CO
Joseph Edward	Arseneau III	Parker	CO
Ebony	Cunningham	Washington	DC
Ameha G,	Eshete	Washington	DC
Helen Dolores	Wix	Washington	DC
Rebecca	Grenewicz	Clearwater	FL
Stacey	Wartell	Coral Springs	FL
Sarah	Alexander	Daytona Beach	FL
Nola Roseann	Bishop	Defuniak Springs	FL
Marc	Wertheimer	Deland	FL
Michael Todd	Entress	Graceville	FL
Gretter	Teel (Lamas)	Hialeah	FL
Michael Thomas	Bieber	Jacksonville	FL
Jeffrey	Haney	Merritt Island	FL
Carmen T	Priester	Merritt Island	FL

Danielle Elizabeth	Hitchman	Miami	FL
Byron	Lampkin	Miami	FL
Sonya	Floyd	Orange Park	FL
Jahan Elijah	French	Orlando	FL
Jason	Payne	Palm Harbor	FL
Trezure	Johndrow	Ruskin	FL
Christopher Neal	Eckstein	Sarasota	FL
Candace April	Rifkin	Temple Terrace	FL
Maria	Smith	Trenton	FL
Lisa	Gutermuth	Venice	FL
Taytiana	Victoria	Winter Haven	FL
Darren	Burton	Atlanta	GA
Melba	Pinckney	Brunswick	GA
Albert Earl	Barnes III	Cairo	GA
Charles	Kown	Cartersville	GA
Larry	Richards	Columbus	GA
Shila	Williams	Covington	GA
Ernest Dewayne	da Silva	Decatur	GA
Quentin	Smith	Doraville	GA
Ciara Tashana	Rider	Gainesville	GA
Crystal Barefoot	Pomales	Hinesville	GA
Kevin	Davis	Jonesboro	GA
Dean	Reich	Marietta	GA
Shufrounia Victoria	Castleberry	Soperton	GA
Alika jeremiah	valderama	Kapolei	HI
Christopher Eric	Blake	Chicago	IL
Craig	Vanvleet	Elkgrove Village	IL
Saad Ahmed	Qureshi	morton grove	IL
Jason	Laba	Spring Grove	IL
Joseph	Welbaum	Streamwood	IL
Kathy Lynn	Owens	Gary	IN
Assad	Rutherford	Hammond	IN
Devonah K.	Blackwell	Indianapolis	IN
Lane	Walker	Paoli	IN
Michael	Brown	Spencer	IN
Christopher	Mettlen	Overbrook	KS
Caleb Nathaniel	Burchett	Hazard	KY
Christopher John	Martin	Louisville	KY
William	Marcia	Kenner	LA
David	Lucito	Opelousas	LA

Holly	Allison	Ringgold	LA
Kimberly A.	Colombo	Andover	MA
William	Brock	Dorchester	MA
Angelina C.	Couzelis	Haverhill	MA
Joseph	MacDonald	Milford	MA
Robert T	McEvoy	Quincy	MA
Phebe	Young	Revere	MA
Kimberly Anne	Colombo	Wakefield	MA
Paulette Ruth	Peterson	West Newbury	MA
Danielle Katherine	Laprise	Westport	MA
Christina	Myers	Cumberland	MD
Lenisa	Oreggio	Upper Marlboro	MD
Geoffrey	Gardner	Belding	MI
Nicole Jo	Beaudoin-Fisher	Byron	MI
Rochelle	Jonhnsen	Canton	MI
Robert Anthony	Francis	Detroit	MI
Rebecca Lynn	Dyar	Hattiesburg	MI
Nicholas David	Blough	Ludington	MI
Regina	Greenfield	Redford	MI
Shawn	Jones	Romulus	MI
Kristine Marie	Casey	Taylor	MI
Kyle	Timco	Utica	MI
Siobhan	Dietrich	Ypsilanti	MI
Young	On	Ypsilanti	MI
Lisa Kae	Davis	Duluth	MN
Elizabeth	Sara	Fladhammer	MN
Barbara Mary	Fix	Lakeland	MN
Deb	Kay-Verdon	White Bear Lake	MN
Alulia	Baca	Branson	MO
Alexander	Volkomirsky	Chesterfield	MO
John	Muller	Lathrop	MO
Roswell	Thomas	Mexico	MO
Joyce	Casey	Otterville	MO
Angela	Adams	Park Hills	MO
Clinton	Hunter	St Louis	MO
Kyle	English	Booneville	MS
Nikki	Scott	Jackson	MS
Corey Chase	Mclain	Lucedale	MS
Traci	Saxton	Great Falls	MT
Jared	Barth	Missoula	MT

Jacqueline	Iacovino	Asheville	NC
Kevin	Kennedy	Greenville	NC
Jeffrey Logan	Bost	Lincolnton	NC
Marcia	Torres	N.Wilkesboro	NC
Amber	McClelland	Raleigh	NC
John Matthew	Williams	Salisbury	NC
Lila Christina	Polutta	Whittier	NC
Virgie Robin	Smith	Wilmington	NC
Evan	Mosbrucker	Mandan	ND
Leslie	Whitehead	Kimball	NE
Rickey Devon	Strong	Omaha	NE
Allison Aimee	Ireland	Auburn	NH
Nils	Williams	Bloomfield	NJ
Jeremy Jason	Giliberti	Mount Laurel	NJ
Elizabeth M.	Williams	Vineland	NJ
Sedwyck	Brown	Williamstown	NJ
Christopher	Bernard	Albuquerque	NM
Angelina	Glenn	Albuquerque	NM
Darryl	Madrid	Albuquerque	NM
Zakerie	Montoya	Moriarty	NM
Jorge A.	Garcia-Urena	Henderson	NV
Israel Kojin	Goya	Henderson	NV
Marlyn	Payne	Las Vagas	NV
Yinling	Chan	Las Vegas	NV
Nichole	Dominy	Altona	NY
Sara	Martinez	Bronx	NY
Kiberly	McMichael	Bronx	NY
Gregory	Moore	Bronx	NY
Choycine CJ	Gibbs	Brooklyn	NY
Denise Michele	Gibbs	Brooklyn	NY
Tomeka	Horton	Brooklyn	NY
Mohammad	Hossain	Brooklyn	NY
John	Sahhar	Brooklyn	NY
Simeon Chayce	Small	Brooklyn	NY
Tanea	Smith	Brooklyn	NY
Samia	Campagne	Buffalo	NY
Brian	Robson	Buffalo	NY
Colin Lewis	Teeter	Central Square	NY
Matthew	Guzman	Hicksville	NY
Stephen Joseph	Zientara	Honeoye	NY

Mary	Nelson	Monticello	NY
Regina	Schwartz	New York	NY
Som	Schwartz	New York	NY
Eboni	Scott	New York	NY
Mohamed	Sultan	Queens	NY
Kevin Craig	Canada	Rome	NY
James	Crawford	Wyandanch	NY
Michelle C	DeVine	Cincinnati	OH
Ramona	Dupree	Cincinnati	OH
Talina	Dupree	Cincinnati	OH
Sarah Ann	Weaver	Circleville	OH
Shaun	Lairson	Hamilton	OH
Imiani	Mclemore	Holland	OH
James	Allen	No Royalton	OH
Cara Elizabeth	Obloy	Saint Clairsville	OH
Janet L	Obloy	Saint Clairsville	OH
Jaime l	Clapp	Warren	OH
Ryan	Leitner	Wauseon	OH
Nigel	Thacker	Claremore	OK
Eric Shawn	Skidgel	Edmond	OK
James Arelon	Harden	Norman	OK
Emily	Haught	Norman	OK
John	Reeves	Pryor	OK
Stephanie	Coughran	Tulsa	OK
Derek	Keenan	Happy Valley	OR
Rachel Walleah	Robertson	Lakeview	OR
Keith Gregory	Akers	Portland	OR
Tammy	Diehl	Bethlehem	PA
Jessica Renee	Miller	Gibsonia	PA
Christopher Allen	Pany	Irwin	PA
Janet	Lazarus	Ligonier	PA
Bryce	Wylie	McKeesport	PA
Stephen	Moleski	Philadelphia	PA
Laurel	Davies	Sayre	PA
Melissa	Keller	Waynesboro	PA
Robert E.	Johnson	North Providence	RI
Brian	Crumling	Myrtle Beach	SC
Matthew	Watford	West Columbia	SC
Andrew	Davelis	Colorado	TN
Kristine	Teresa	Cumberland Gap	TN

Christina Janette	Stephens	Murfreesboro	TN
Tony	Davenport	Rogersville	TN
William E.	Parrott	Whitesburg	TN
Dawn M.	Day	Austin	TX
Linda	Gibson	Austin	TX
Anish	Jhaveri	Austin	TX
Matthew L	Lumpkins	Bonham	TX
Caroline	Harris	Conroe	TX
Joshua Joseph	Moore	Dallas	TX
Makala	Wright	Dallas	TX
Joshua Eugene	Sears	Denison	TX
Charlotte	Bromaghim	El Paso	TX
Olga	Martinez	Fort Worth	TX
Thomas	Ferguson	Glade water	TX
John	Azar	Houston	TX
Derrick Lajuane	Page	Houston	TX
Kelly Deborah	Rucker	Houston	TX
Richard Jeffrey	Zagone	Houston	TX
Raymond	Becerra	Huntsville	TX
Zeke	Sparkman	Krugerville	TX
Robin	Bower	Livingston	TX
Marty	Smith	Missouri City	TX
Betty Louise	Evans	Nocona	TX
Velishia	Guillory	Port Arthur	TX
Daniel Rene	Benavides	San Antonio	TX
Yola	Yarwood	Spring	TX
Ryan William	Kellogg	Temple	TX
Ronald	Murphy	Waco	TX
Betty	Dougia	Canton	TX
Chantal Smart	Foerster	Orem	UT
Abdulkad	Mohamed	Salt Lake City	UT
Georgia	Fontana	Sandy	UT
John Michael	Fontana	Sandy	UT
Got Simon	Arop	South Salt Lake	UT
Joe	Reber	St George	UT
Michelle	Powell	Chesapeake	VA
Tyler Eric	Reed	Crimora	VA
Chad Steven	Eanes	Dublin	VA
Seo	Lee	Manassas	VA
Stephanie	Mancuso	Mount Sidney	VA

Stephen	Wells	Petersburg	VA
Algeania W	Freeman	Virginia Beach	VA
Abigail	McMullen	Wiliston	VT
Ingrid Katrina	Dickerson	Bothell	WA
Mariah	Sebastien	Edmonds	WA
Jonelle	Gallaway	Moses Lake,	WA
Matthew L.	Aguilar	Olympia	WA
Kayla	Szabo	Spanaway	WA
Tiffany Anne	Bryant	Tonasket	WA
Niles	Wittebrood	Madison	WI
Joseph Martin	Poore	Marinette	WI

RULE 35(B)(1) REQUIRED STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision, attached as the appendix of this petition, warrants *en banc* review under both Rule 35 criteria.

The panel’s decision contravenes the precedents contained in the following cases:

1) *White v. U.S. Corrections, LLC*, 996 F.3d 302 (5th Cir. 2021), that held that the Court must “accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff[s].”

2) *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that held that “the plausibility standard is not akin to a ‘probability requirement’.”

3) *Tellabs, Inc. v. Makor Issues and Rights, Ltd.* 551 U.S. 308 (2007) that held that “[w]hen ruling on Rule 12(b)(6) motions to dismiss, Courts must take the complaint in its entirety, as well as other sources. . . incorporated into the complaint by reference and matters of which a court may take judicial notice.)

4) *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), that held that intangible harms can be concrete and actionable such as damage to the person’s reputation resulting from the false disclosure to third parties that a person is a ‘suspected terrorist’.

5) *Missouri v. Biden*, ___ F.4th___, 2023 WL 2578260 (5th Cir.2023)
This case also contains Court precedent that the panel disregarded in this case

regarding the standing issue an injunction to halt *ultra vires* individual defendants' actions: "Parties are entitled to sue for injunctive relief against federal officials in their official capacity for actions beyond their statutory authority."

6) *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) that held that one plaintiff's standing is extensive to the rest by holding that "[i]t is not necessary for all plaintiffs to demonstrate standing"; rather, "one party with standing is sufficient to satisfy Article III case-or-controversy requirement.

7) *Ramming v. U.S.*, 281 F.3d 158 (5th Cir. 2001), that held that upon reviewing a district court's granting of a motion to dismiss for lack of subject matter jurisdiction, court precedent requires a review under a *de novo* standard. The panel applied an incorrect abuse of discretion standard of review to ratify the district court's dismissal with prejudice of the complaint.

8) *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470 (5th Cir. 1997) that held that as an exception to the exhaustion of remedies doctrine in the context of the Freedom of Information Act is not required when constitutes an exercise in futility or infringes upon constitutional rights, the doctrine is inapplicable.

Standing alone, the panel's legal error would justify an *en banc* review. However, I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance that have never been adjudicated by any court of the United States:

A. This case is the first to challenge before any court of the United States the unchecked, *ultra vires*, executive branch practice in excess of legal authority by defendant Federal Bureau of Investigation (FBI) of labeling innocent Americans such as plaintiffs as ‘suspected terrorists’ without reasonable suspicion for it, pursuant to ‘secret’ criteria, without giving them the due process required notice or opportunity to controvert their permanent inclusion in two unauthorized categories of the Terrorist Screening Database (TSDB) that defendant FBI acknowledges contain the names of individuals that do not represent a threat to national security and are thus not subjected to the additional screening that individuals on two other categories of the TSDB known as the ‘Watchlist’ undergo when traveling.

B. This case is the first to challenge the government defamation in violation of the Privacy Act resulting from Defendants’ distribution of the TSDB among 18,000 law enforcement agencies, over five hundred thirty-two corporations, 1,440 organizations and at least sixty countries through the National Crime Information Center (NCIC), including its two secret categories that label non-terrorists such as Plaintiffs as ‘suspected terrorists.’

Dated:

April 5, 2024

/s/ Ana Luisa Toledo

Ana Luisa Toledo

Counsel for Plaintiffs-Appellants

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STATEMENT OF ISSUES THAT MERIT EN BANC CONSIDERATION¹

1. Whether the panel erred by concluding that the district court's 'Memorandum and Order' (M/O) dismissing with prejudice the complaint for lack of subject-matter jurisdiction and denying pending motions as "moot", constituted an unappealable "interlocutory order", denying a full adjudication of the issues presented for review.

2. Whether the panel erred in collaterally confirming the district court's dismissal with prejudice of the complaint as 'frivolous' and 'fantastical' as part of its review of an issue not argued in Plaintiffs' opening brief and in violation of Plaintiffs' due process rights.

3. Whether the panel erred in refusing to review the district court's order denying as 'moot' the jurisdictional discovery.

INTRODUCTION

As plaintiff Winter O. Calvert laid on the floor, contorting in excruciating pain caused by a blood clot in his lungs, the Brazoria County deputy sheriff did not let the ambulance in the driveway until they had 'secured the premises' since they were told a suspected terrorist lived there. ROA.641 [¶¶ 397-398] The only occupants of the home were Calvert and his 87-year-old mother. ROA.402.

¹ Choosing the battles that fit within a 3,900-word limitation does not mean that Plaintiffs renounce to the full adjudication of the issues raised on appeal and reserve the right to argue them again. This is especially true of the issue regarding the district court's denial of basic fairness and the transfer of the case to the Houston division.

Almost one hour later, the officers allowed the ambulance in. ROA.642 [¶ 399] On his way to the hospital, Plaintiff Calvert heard the ambulance technicians screaming at the driver to hurry up. He almost did not make it.

Seeking protection from the constant crimes against her, her elderly parents and her pets, Plaintiff Karen Stewart, a retired NSA whistleblower, went to the Leon County Sheriff's office. After checking her name in her presence in a set of folders he kept on the trunk of his car, the deputy sheriff told her: "I am not allowed to help you" and left. ROA.638 [¶ 381], ROA.408.

Calvert's and Stewart's detailed pleadings regarding how they discovered their placement on the TSDB exceed F.R.Civ.Proc. 8's criteria. Yet the panel disregarded their allegations because they "have not seen" the list, curtailing Plaintiffs' due process right to discovery.

When *ultra vires*, unauthorized government action infringes on basic human and civil rights protected by the United States Constitution, separation of power justifies this Courts' *en banc* consideration.

STATEMENT OF THE CASE

Plaintiffs comprise eighteen individuals including three children that have no ties to terrorism. ROA.567 [¶ 27] In conjunction with Targeted Justice, Inc., an organization they belong to along with over 4,500 other individuals, they filed suit against the FBI, the Department of Homeland Security (DHS) and five public officials in their official and individual capacities. ROA.559.

The crux of Plaintiffs’ complaint is that Defendants FBI, Christopher Wray, and Charles Kable² listed and/or maintain them in two secret categories of the TSDB known as Handling Codes 3 and 4 (HC3/4) without notice or opportunity to controvert their nomination thereto. They contend that HC3/4 were not authorized by Congress or by the 2003 Homeland Security Presidential Directive 6 (HSPD-6) that authorized it, because they contain the names of individuals that Defendants recognize a) do not meet the required reasonable suspicion terrorist criteria; b) do not represent a threat to national security; and c) are thus not subjected to extraordinary screening measures when traveling. ROA.566 [¶¶ 23-24].

Defendants nationally distribute the TSDB including HC3/4 falsely labeling Plaintiffs and TJ Members as “suspected terrorists” through the National Crime Information Center (NCIC).

The complaint requested, *inter alia*, that the court declare unconstitutional and a violation of the Privacy Act Plaintiffs’ secret and defamatory classification as ‘suspected terrorists’ and its nationwide distribution. ROA.600 [¶ 188] Plaintiffs also asked the court to issue a permanent injunction prohibiting defendants from continuing this practice. ROA.668-682.

Plaintiffs further alleged that Defendants’ illegal inclusion of Plaintiffs in HC3/4 made them ‘targets’ of a weaponized government program that subjects them

² Two weeks after the filing of the complaint, Charles Kable retired. Defendants never informed the court nor have substituted defendant Kable with his successor, Steven Glasheen. F.R.App.P. 43.

to illegal surveillance, inordinate difficulties in daily life, and physical suffering. ROA.610-632, ROA.729, ROA.768. Plaintiffs buttressed their accurate, factual allegations about this program with an uncontroverted statement under penalty of perjury by Ted Gunderson, former FBI Senior Special Agent-in-Charge, who attested to its existence.³ ROA.685.

Nowhere in the complaint do Plaintiffs accuse Defendants of carrying out directed energy weapons and/or microwave auditory effect (voice to skull) attacks on them. Br.34 [¶ 20].

Plaintiffs further alleged that Defendants DHS, Kenneth Wainstein, and Alejandro Mayorkas are responsible for concocting and implementing the policy at the Fusion Centers that are notorious for perpetrating illegal surveillance, stalking, harassment, and civil rights violations against them. ROA.578-579 [¶¶ 66-67], Plaintiffs included as Exhibit 11 of the complaint was a Brennan Center for Justice report titled “Ending Fusion Centers Abuse” concluding that its “domestic intelligence model has undermined Americans’ privacy, civil rights, and civil liberties.” ROA.737.

Plaintiffs alleged that defendants’ conduct infringed on their Constitutional rights to be secure in their persons and property pursuant to the Fourth Amendment;

³ The complaint also alleged that most of the individuals placed on the illegal subcategories of the TSDB are women and/or people that hold politically conservative values. ROA.628 [¶¶ 328,330], ROA.630 [¶ 336]

to substantive and procedural due process rights contained in the Fifth and Sixth Amendments; to be free from cruel and unusual punishment under the Eighth Amendment; and the rights deriving from the Convention Against Torture and Article 32 of the Geneva Convention. ROA.577 [¶ 65] ROA.565 [¶¶ 18 and 21], ROA.567 [¶26], ROA. [¶ 30].

Early in the case, Defendants rolled out the ‘fanciful and fantastical’ language to describe the pleadings. Br.31. This prompted Plaintiffs to file on April 8, 2023 a Motion to Compel Limited Discovery (Motion to Compel) regarding their TSDB status. ROA.888. Defendants objected to producing to Plaintiffs their TSDB status information deeming it an unnecessary ‘fishing expedition’ prior to the Court’s resolution of their dispositive motion that they seemed to be certain would be granted. ROA.1164. The court disregarded the Motion to Compel, only to deny it as ‘moot’ upon dismissal. ROA.1638.

Official and Individual Capacity Defendants filed separate Motions to Dismiss under F.R.Civ.Proc 12(b)(1) and 12(b)(6). ROA.988, ROA.1587.

Nowhere in the record did Defendants or the district court discuss the legality of any of the following:

- a) Defendants’ *ultra vires* practice of labeling innocent Americans, such as Plaintiffs, as domestic terrorists, including them in the TSDB’s HC3/4 without reasonable suspicion criteria and continuously and massively disseminating it throughout the nation and sixty countries. Br.34.

- b) The ‘secret criteria’ used to place individuals in HC3/4. Br.34, ROA.1176 [¶ 8].
- c) The TSDB secret nomination process denying Plaintiffs notice and an opportunity to be heard.Br.27.
- d) The inexistence of a mechanism to be removed from the lists. ROA.601-602.

Exactly six months after the filing of the complaint, on July 11, 2023, the district court entered the M/O dismissing the complaint with prejudice ‘for lack of jurisdiction’ and dismissing the pending motions as ‘moot’. ROA.1619 fn.1. The M/O adopted defendants’ language deeming the pleadings as ‘fantastical’ and ‘bizarre’ and failed to discuss Plaintiffs’ allegations regarding the classification of innocent Americans as domestic terrorists and their illegal inclusion in HC3/4. ROA.1619.

On July 12, 2023, Plaintiffs filed a Notice of Appeal. ROA1641. Plaintiffs sought review of various orders included in the district court’s decision including the dismissal with prejudice of the complaint. *Id.*

Three months after the briefing concluded, the panel issued an opinion dismissing the appeal on jurisdictional grounds, holding that “[a]ll of the orders that the Plaintiffs appeal are interlocutory” and ‘unappealable’. App.3. The panel collaterally confirmed the district court’s dismissal with prejudice of the complaint as frivolous without adjudicating the merits of Plaintiffs’ arguments against it.

App.5. The panel’s confirmation of the judgment came about as a result of its review of a matter that Plaintiffs did not raise in the opening brief: the denial of the Request for Preliminary Injunction. App.3.

Plaintiffs request this Court reverse the panel’s decision and adjudicate the merits of the appeal.

ARGUMENT

A. The “Memorandum and Order” was a final, appealable decision.

The panel concluded that the district court’s ‘M/O’ dismissing the complaint for lack of jurisdiction with prejudice and denying pending motions as “moot”, constituted a non-appealable “interlocutory order”, denying Plaintiffs a full adjudication of all the issues presented for review. App.1

F.R.App.Proc 4(a)(7)(B) provides: “A failure to set forth a judgment or order on a separate document when required by F.R.Civ.Proc. 58(a) does not affect the validity of an appeal from that judgment or order.” The district court’s failure to enter a separate judgment containing its dismissal with prejudice of Plaintiffs’ complaint cannot act as an obstacle to the appeal.

Furthermore, a final decision is one that “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (citations omitted).

The district court's M/O containing the dismissal with prejudice for lack of subject matter jurisdiction constituted an appealable final judgment because it disregarded all of Plaintiff's substantive claims.

Moreover, upon the filing of the notice of appeal, this Court carried out a "jurisdictional review" indispensable to allow the appeal to proceed. The panel's conclusion that the Court lacked jurisdiction to evaluate the challenge to all the issues on appeal, issued three months after the submission of briefs and seven months after the filing of the notice of contravenes the Court's jurisdictional check and the basic notions of fairness.

Plaintiffs did not have to exhaust administrative remedies.

Plaintiffs did not have to, nor did they want to, carry out the "exhaustion of administrative remedies" the district court suggested.⁴ The district court erroneously imposed an "administrative stay" to force Plaintiffs to engage in an exercise in futility not mandated by this Court's precedent. The court's suggested course of action would have turned into a 'legal gotcha' game that would deprive plaintiffs of their day in court.

Upon filing this appeal, Plaintiffs exercised their right to refuse to accept the district court's "administrative stay". Following the court's procedural mechanism would allow for the clock to tick on Plaintiffs' time to appeal the dismissal of the

⁴ The district court copied the data for the 'exhaustion of remedies' from Official Capacity Defendants' Motion to Dismiss. ROA.1002.

complaint and related orders, while exhausting remedies they are not legally compelled to exhaust in the first place. The district court's use of unconventional procedural mechanisms that would deprive litigants of their due process rights merits reversal.

This Court's precedent in *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (5th Cir. 1997), precluded the district court from requiring Plaintiffs to exhaust administrative remedies. First, because the principal claims in this case entail constitutional challenges and implied constitutional law tort claims deriving from Defendants' illicit actions that would remain standing after exhaustion of the administrative remedy. *Id.* Furthermore, when the administrative remedy as in this case is plainly inadequate and constitutes an exercise in futility, the jurisprudential doctrine of exhaustion of remedies is inapplicable. *Id.*

Having filed suit, Plaintiffs acquired a right to discovery of the information about their TSDB status. This made it unnecessary to undergo the administrative process that has proved to be futile and was initiated for the sole purpose of drafting a most thorough complaint as practicable. ROA.570 [¶ 41], ROA.579 [¶ 71]

The filing of this appeal is a rejection of the district court's 'administrative stay' designed to preclude an appeal, depriving Plaintiffs of their due process rights.

Consequently, the panel erred when concluding that it did "*not have jurisdiction to review the order denying outstanding motions as moot or the transfer of the case to Houston*" and that the M/O was not a final, appealable decision.

This Court should reverse the panel’s opinion and adjudicate all the issues that Plaintiffs raised on appeal.

B. The panel’s collateral confirmation of the appealed decision violates due process and Court precedent.

While the panel concluded it lacked jurisdiction to review the M/O object of this appeal, it chose to review an issue that Plaintiffs did not brief on appeal: the denial of the Motion for Preliminary Injunction. ROA.321. Upon stating that it had jurisdiction to review the collateral order denying the preliminary injunction, the panel expressed that they also had “jurisdiction to review the district court’s dismissal of the APA claims, constitutional claims, and Privacy Act claims because they are intertwined with the injunction ruling”. App.3.

Applying an incorrect abuse of discretion standard of review and without considering the merits of Plaintiffs’ arguments for reversal, the panel collaterally affirmed the district court’s decision by concluding that it “properly dismissed the individual Plaintiffs’ constitutional and APA claims for lack of subject-matter jurisdiction because they are frivolous.” App.4.

In so doing, the panel violated Plaintiffs’ basic right to due process and contravened long-standing Supreme Court and Fifth Circuit precedent as discussed below.

First, Plaintiffs did not include in their opening brief any argument regarding the denial of the Preliminary Injunction. It was thus improper for the Panel to rule on an issue that was not properly before the court.

Second, the panel's adjudication of the denial of Preliminary Injunction that Plaintiffs did not include in their opening brief resulted in the collateral confirmation of the district court's dismissal with prejudice of the complaint without delving into, discussing, or controverting any of Plaintiffs' arguments on appeal that warranted the reversal of the complaint's dismissal.

In its review, the panel applied an erroneous abuse of discretion standard of review even though this Court evaluates *de novo* the district court's grant of a Rule 12(b)(1) motion for dismissal applying the same standard used by the district court. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001).

Upon confirming the district court's dismissal, the panel's decision demonstrated that it disregarded Court precedent imposing an obligation on the reviewing court to accept as true the well-pled facts of a complaint dismissed on F.Civ.Proc.R. 12(b)(1) grounds. The Court must "accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff[s]." *White v. U.S. Corrections, LLC*, 996 F.3d 302, 306–07 (5th Cir. 2021). Moreover, the panel disregarded the district court's failure to take the complaint in its entirety, "as well as other sources...incorporated into the complaint

by reference and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308 (2007).

The panel’s decision also overlooked *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that held that “the plausibility standard is not akin to a ‘probability requirement’ and that “[u]ltimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief.” *Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir.1998).

Upon concluding that the district court properly dismissed the individual Plaintiffs’ constitutional and APA claims for lack of subject-matter jurisdiction “*because they are frivolous*” (App.4), the Panel never explained how the listing of innocent Americans on HC3/4 despite Defendants’ admission that they do not meet the reasonable suspicion terrorist criteria is a frivolous claim. Neither does the panel explain the frivolity of Plaintiffs’ request for injunctive relief to order the elimination of HC3/4 from the TSDB that would not cause any governmental harm because, by FBI’s own admission, the people listed on those categories “do not represent a threat to national security.” ROA.592 [¶140]

The panel’s decision warrants reversal because it disregarded plaintiff’s right deriving from court precedent to demand a halt to Defendants’ *ultra vires* conduct. “Parties are entitled to sue for injunctive relief against federal officials in their

official capacity for actions beyond their statutory authority.” *Missouri v. Biden*, ___ F.4th ___, 2023 WL 2578260 (5th Cir.2023).

The panel disregarded F.R.Civ.Proc 8 precedent in the context of Calvert’s and Stewart’s well-pled allegations about how they learned they were on the TSDB. Standing of one or two plaintiffs is extensive to the rest since “[i]t is not necessary for all plaintiffs to demonstrate standing”; [rather] “one party with standing is sufficient to satisfy Article III case-or-controversy requirement.” *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

The panel did not explain how Plaintiffs’ alleged placement on the TSDB did not require giving Plaintiffs notice and an opportunity to be heard. “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Paul v. Davis*, 424 U.S. 693, 708 (1976). Hence, “where the State attaches ‘a badge of infamy’ to the citizen, due process comes into play.” *Id.*, 424 U.S. at 707 (citations omitted).

Upon concluding that the complaint was properly dismissed as ‘frivolous’, the panel also disregarded the Supreme Court’s decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) that held that intangible harms can be concrete and actionable such as damage to the person’s reputation resulting from the false disclosure to third parties that a person is a ‘suspected terrorist’.

The panel disregarded this Court’s precedent relevant to Plaintiffs’ Privacy Act and *Bivens*⁵ claims holding that the “damage to an individual’s reputation as a result of defamatory statements made by a state actor, accompanied by an infringement of some other interest, is actionable under § 1983.” *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995) (citations omitted). A plaintiff may bring a § 1983 due process claim under a “stigma plus infringement” theory by showing a stigmatizing statement plus a deprivation of a “life, liberty, or property interest.” *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991).

In the context of the *Bivens* claims set forth in the complaint, the panel also disregarded the well-pled allegations about electronic surveillance and hacking in violation of the Fourth Amendment. ROA319-321.

The panel’s decision to collaterally confirm a dismissal with prejudice under F.R.Civ.Proc.12(b)(1) contravenes circuit precedent that precludes it. “A jurisdictional dismissal must be without prejudice.” *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021). A court without jurisdiction cannot render a judgment “that carries *res judicata* effect—including, as relevant here, a dismissal with prejudice.” *Spivey v. Chitimacha Tribe of Louisiana*, 79 F.4th 444, 448 (5th Cir. 2023).

C. The panel erred in refusing to review denial as ‘moot’ of the limited jurisdictional discovery and other pending motions.

⁵ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)

The denial as moot of the Motion to Compel was not an interlocutory order because it was issued simultaneously with the dismissal of the complaint. ROA.888, ROA.1077. The panel erred in failing to review this issue briefed on appeal.

The panel's assessment of the interlocutory nature of the M/O disregarded circuit precedent that allows review of the district court's denial of the Motion to Compel limited discovery germane to the Court's jurisdiction. This Court recognizes the appealability of discovery orders. "We review a district court's discovery rulings, including the denial of a motion to compel, for abuse of discretion." *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004).

In prior cases involving individuals on the actual TSDB Watchlist, Plaintiffs have had access to the information that Defendants hide from innocent Americans that should not be on any terrorist list to begin with. *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019), *rev'd* 993 F.3d 208 (2021) (Counsel allowed to review TSDB), *Kovac v. Wray*, --F4th--, 2023 WL 2430147 (5th Cir.) (District court examined documents in camera review).

The limited discovery would have precluded the district court from dismissing the complaint regarding Plaintiffs as delusional because Plaintiffs' inclusion in HC3/4 would have become an uncontroverted fact at a pleading stage. The discovery of Plaintiffs' names in HC3/4 would have done away with Defendants' 'fantastical' and 'frivolous' language that the district court ultimately adopted.

Since the panel collaterally reviewed the district court's dismissal, it should have adjudicated the erroneous denial as moot of the request for discovery germane to the jurisdictional issue it ratified. Disregarding Plaintiffs' well-pled facts discussed above, the panel went on to state that Plaintiffs concocted their 'fantastical' allegations "due to their placement on a secret "blacklist" within the Terrorist Screening Dataset (TSDS)—which, according to their allegations, they have never seen or otherwise confirmed". App.4-5.

The discovery request would have not allowed the district court to dismiss of the complaint.

This matter was raised on appeal. Br.65.

Even though "[a]s a general matter, discovery orders do not constitute final decisions" under 28 U.S.C. § 1291, and therefore, are not immediately appealable, *Piratello v. Philips Elecs. N. Am. Corp.*, 360 F.3d 506, 508 (5th Cir. 2004), some discovery orders are immediately appealable. *Preble-Rish Haiti, S.A. v. BB Energy USA, LLC*, __F4th__, 2021 WL 5143757, at *2 (5th Cir. 2021)

The discovery Plaintiffs sought would have corroborated that Plaintiffs are listed on the illicit TSDB categories devoid of Congressional or Executive authority. ROA.888.

The refusal to produce evidence material to the administration of due process is an admission of the want of merit in the asserted defense. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). Defendant FBI's refusal to produce

Plaintiffs' TSDB status could be construed as an implied admission that Plaintiffs appear on the TSDB's HC3/4 object of the crux of this case. If none of the Plaintiffs appeared on HC3/4, Defendant FBI would not have opposed the discovery, and we would not be here today. Its refusal to do so speaks volumes.

In failing to review the denial of the Motion to Compel, the panel disregarded Court precedent that required Defendants to "show specifically how ... each [request] [was] not relevant or how each question is overly broad, burdensome or oppressive." *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir.1990).

D. Some final words

Defendants have gone the distance to curtail Plaintiffs' constitutional right to petition for redress of grievances, by including, but not limited to making false representations to the court. Instead of prosecuting the civil and human rights violations that Defendants have perpetrated upon Plaintiffs, a weaponized Department of Justice defends Defendants' *ultra vires*, unconstitutional abuse of power of illegally placing innocent Americans on HC3/4.

Defendant Merrick Garland and the Department of Justice are aware about these abuses. They have full access to the Terrorist Screening Center audit reports that document the irregularities in the TSDB nomination and listing process, some portions of which were made part of the record. ROA.380, ROA.385, ROA.1119.

The nefarious consequences resulting from being listed on HC3/4 of the TSDB range from the troubling (hacking, mail tampering), to the unspeakable, such as the microwave burns on one of Targeted Justice's founding members.



Defendants' weaponization of their agencies against innocent Americans end.

CONCLUSION

Plaintiffs petition the Court to follow Supreme Court and Fifth Circuit precedent, reverse the panel's decision that contravene those precedents and grant an *en banc* rehearing and adjudication of this appeal.

Respectfully submitted.

Dated:
April 5, 2024

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) or Federal Rule of Appellate Procedure 28.1(e). The petition contains 3,900 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The petition has been prepared in a proportionally spaced typeface using Microsoft Word Version in 14-point Time New Roman font.

Dated:

April 5, 2024

/s/ Ana Luisa Toledo

Ana Luisa Toledo

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on April 4, 2024, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished on all counsel of record by the appellate CM/ECF system.

Dated:

April 5, 2024

/s/ Ana Luisa Toledo

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