**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION**

TARGETED JUSTICE, INC.; a 501(c)(3) Texas Corporation, et al. Plaintiffs, vs. **MERRICK GARLAND** et al. Defendants.	Case No. 6:23-cv-00003

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT THEREOF

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TO THE HONORABLE COURT:

NOW COME the Plaintiffs, through their undersigned counsel, and respectfully allege and pray:

INTRODUCTION

Plaintiffs have been handed down a lifetime sentence to inclusion on a McCarthy-esque. blacklist, which operates under color of law and masquerades as a legitimate law-enforcement tool. This "blacklist" violates fundamental constitutional rights upon which a free and healthy society must exist. These rights deprived include the presumption of innocence, the right against illegal search and seizure and the rights to fundamental and procedural due process.

The victims of this apparatus are not limited to the estimated 300,000 American citizens and legal residents who have been permanently entered into this unconstitutional register. Rather, it concerns the evisceration of the individual's prerogative to exercise freely his constitutionally-protected rights to freedom of thought, speech and association. The ramifications of inclusion on this list are deep and troubling. We lay out below, in painstaking detail, the breathtaking toll this unconstitutional designation has taken on the Plaintiffs' lives and why it

compels that this Court issue a Preliminary Injunction ordering its elimination. If this court does not act imminently, Plaintiffs will continue to suffer the irreparable harm that they sustain on a daily basis.

How did we get here?

In response to the September 11, 2001 attacks, Former President George W. Bush issued the September 16, 2002 Homeland Security Presidential Directive 6 ("HSPD-6"). (Exh. 1). This directive instituted a policy designed to develop, integrate and maintain "thorough, accurate and current information" concerning individuals "known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of or related to terrorism (Terrorist Information...)" (Exh. 1).

HSPD-6 expressly mandated strict compliance with the provisions of the Constitution and applicable laws, including those protecting the rights of all American citizens. (Exh. 1).

On the same day, Attorney General John Ashcroft, Secretary of Homeland Security Tom Ridge, Secretary of State Colin Powell, Defendant Federal Bureau of Investigations Director Robert Mueller, and Director of Central Intelligence George Tenet announced the creation of the Terrorist Screening Center ("TSC") under the purview of Defendant FBI "*to consolidate terrorist watchlists and provide 24/7 operational support for thousands of federal screeners across the country and around the world*." (Exh. 2).

The stated purpose of the TSC was to "ensure that America's government screeners are working from the same unified set of anti-terrorist information and will provide a comprehensive anti-terrorist list **when a suspected terrorist is screened or stopped anywhere in the federal system.**" (Exh. 2). (Emphasis ours).

However, what evolved was the establishment of an ever-growing list of individuals the TSBD termed "non-investigative subjects" ("NIS"). The maintenance of such a list exceeds the

legal authority delegated to Defendant FBI and its TSC in HSPD-6 by including non-terrorists in a terrorist screening database.

The TSC is administered by Defendant FBI in coordination with Defendant Department of Homeland Security ("DHS"), the Department of State ("State"), the Department of Justice ("DOJ"), and the Office of the Director of National Intelligence ("ODNI"). *Beydoun v. Sessions*, (6th Cir. 2017); *Mokdad v. Lynch*, 804 F.3d 807, 809 (6th Cir. 2015). (Exh. 3, p. 3, ¶ 5).

The TSC develops and maintains the Terrorist Screening Data Base ("TSDB"). *Beydoun v. Sessions*, (6th Cir. 2017). The TSDB's only source of legal authority is the HSPD-6 presidential directive. (Exh. 3, p. 2. ¶ 5). HSPD-6's unambiguous, stated purpose is to "develop, integrate, and maintain thorough, accurate, and current information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism (Terrorist Information)". (Exh. 1).

Despite the fact that the official *raison d'etre* of the TSC and its TSDB is "...to protect America's communities and families by detecting, disrupting, and disabling terrorist threats..." and **"to protect the United Sates from Terrorist attacks",** reality has proven otherwise. (Exh. 2, emphasis ours). Twenty years after its creation, defendant FBI recognizes it **is not aware of a single incident of terrorism that the TSDB prevented**. (Exh. 4, p. 104, lines 3-8; p. 177, lines 16-22).

Two components of the TSDB jointly referred to as "the Watchlist" have been the subject of prior unsuccessful judicial challenges. "The TSDB has two primary components: the Selectee List and the No Fly List. Persons on the No Fly List are prevented from boarding flights that intend to fly into, out of, or even through United States airspace. By contrast, persons on the Selectee List are not barred from flying but are systematically subject to extra screening at airports and land border crossings." *Abdi v. Wray*, 942 F.3rd 1019 (10th Cir. 2019).

This case does not involve a challenge to any of the two first lists that make up the "Watchlist". Rather: this case is about a challenge to the other two TSDB components: Handling Codes 3 and 4, also referred to as "Non-investigative subjects" ("NIS). (Hereinafter jointly referred to as the "McCarthy blacklist").

This modern-day McCarthy blacklist comprises 97% of the TSDB records. (Exh. 5) It contains the names of unsuspecting people that don't meet the terrorist criteria. (Complaint, ¶¶ 15-16, Exh. 3, page 8, fn 7). The clear language of HPDS-6 precludes any wiggle room for the creation of any other "list" unrelated to the screening of known or suspected terrorists ("KST"). (Exh. 1) The McCarthy blacklist within the TSDB is illegal because it exceeds the agency's delegated authority. Unauthorized and illegal exertion of executive power such as this violates both the constitutional precept of Separation of Powers and the arbitrary and capricious standard that regulates agency action.

Former TSC deputy director Timothy Groh admitted under oath that over 90% of the people in the TSDB had never had an "encounter" with law enforcement. (Exh. 14, pp. 371-372). This means that most of the people in the TSDB are not only NIS but also are law-abiding citizens. **Nonetheless, they are listed in a terrorist database.**

The secret inclusion of non-terrorists such as Plaintiffs, TJ Members, and others similarly situated to them on this McCarthy blacklist, for an indefinite period of time, for unauthorized purposes infringes on their fundamental due process, property and liberty rights. Individuals have no means to remove their names from it. In USDOJ's 2009 TSC audit report the agency concluded the following:

> "[T]he FBI's policies regarding watchlist nominations for individuals who are not subjects of current FBI investigations do not fully address the FBI's responsibilities for maintaining the resulting watchlist records. The FBI's watchlisting policies do not address the need to update these records, and as a result it is unlikely that these records would be modified or removed from the

> watchlist. We recommended in our previous audit that the FBI improve its policies concerning subjects not under investigation that the FBI nominates to the consolidated terrorist watchlist, including adding a requirement for the modification and removal of non-investigative subjects from the watchlist. An FBI official told us that the FBI is the process of updating its watchlisting policy for subjects not under investigation in response to our previous audit and the new Attorney General Guidelines. (Exh. 6, p. 54).

These constitutional violations inflict irreparable harm on Plaintiffs, TJ Members and others similarly situated to them.

Plaintiffs will establish herein that the Court should grant this petition for Preliminary Injunction because there is no risk to Defendants in declaring this modern-day McCarthy blacklist unconstitutional. By Defendant FBI's own admission, the non-investigative subject component of the Terrorist Screening Database comprises the names of people that are not known or suspected terrorists. The irreparable harm its causes Plaintiffs and others similarly situated outweigh the unknown 'benefits' that could lurk behind this McCarthy blacklist.

STATEMENT OF THE NATURE OF THE PROCEEDING

This case seeks, *inter alia*, to have the Court hold unconstitutional the McCarthy blacklist within the TSDB known as the "non-investigative subject" ("NIS") list or Handling Codes 3 / 4 and/or any other list that does not include "Known and Suspected Terrorists" ("KST"). (Exh. 5., p. vii).

Pursuant to Defendant FBI, the categories within the TSDB: are the following:

Handling Code 1 - Outstanding Arrest Warrant

Handling Code 2 - Under Active Investigation

Handling Code 3 - Individual has Possible Ties to Terrorism

Handling Code 4 - Identity Provided has Possible Ties to Terrorism. (Complaint, ¶ 115; Exh. 7, p. 1)

Former TSC deputy director Timothy Groh admitted in a statement under Penalty of

Perjury that the last two lists of the TSDB contain the names of individuals who constitute "an exception" to the "reasonable suspicion standard" "who are not considered 'known or suspected terrorists'" and "are not screened as such". (Exh. 3, p. 7 fn. 7). Since they don't present a terrorist threat, "any US person who is in the TSDB pursuant to an exception to the reasonable suspicion standard **would not be required** to undergo heightened aviation security screening at airports on that basis." (Exh. 3, p. 7 fn. 7).

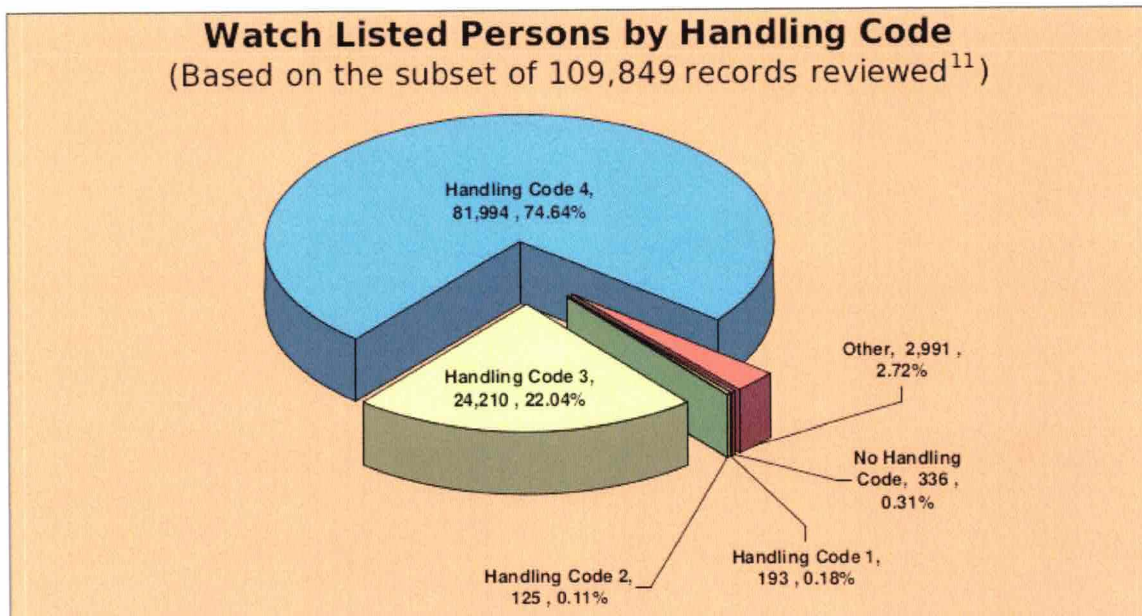
This McCarthy blacklist within the TSDB is illegal for many reasons. First, it exceeds the legal authority specified in the "Presidential Directive" that led to the creation of the TSDB. (Exh. 1). HSPD-6 authorized the creation of a terrorist screening system. No one that does not meet the "reasonable suspicion"standard of being a terrorist should not appear in any list within the TSDB. *Id*.

Thus, the existence of NIS/Handling Code 3 / 4 "lists" of non-terrorists within a terrorist database is an illicit exercise of a limited power delegated to an agency without Congress' consensus. This McCarthy blacklist thus represents an unconstitutional exercise of power by an agency created within Defendant FBI without any known or stated benefit that justifies preserving it.

The best evidence that proves that the McCarthy blacklists comprising Handling Codes 3 and 4 are for improper purposes unrelated to law enforcement is twofold. First: the individuals listed therein are allowed to travel and/or don't get rigorous screening when doing so. (App. 3, page 8, fn. 7). Second: Only the "Known or suspected Terrorist (KST) File" that constitutes the "Watchlist" part of the TSDB is included within the National Crime Information Center (NCIC) database that contains 14 other lists constantly available to law enforcement agencies through Defendant FBI's NCIC system. (Complaint, ¶¶ 142-147, Exhibit 3, page 11, ¶ 34).

Today, the unauthorized listing of non-terrorists in a terrorist screening database has reached significant proportions. In this context, the NSA confirmed that Defendant FBI maintained 200,000 "Targets" under warrantless surveillance. This amount represents 3.6% of the National Security Agency's Targets, or 5.5 million targets listed in the TSDB. (Exh. 13).

On information and belief, there are 32 times more non-terrorists listed in the TSDB than actual known and suspected terrorists. United States Department of Justice ("USDOJ") Audit reports of TSC operations carried out in 2005 and 2007 revealed that their sampling of the TSDB revealed that **only point twenty-nine percent (.29%) of its records belong to known and suspected terrorists.** (Exh. 5).



Source: TSC Management

Pursuant to the sampling carried out for a 2005 USDOJ Office of the Inspector General audit[1] entitled "Review of the Terrorist Screening Center", 99.71% of people listed in the TSDB don't meet the criteria to be in a terrorist database.

Defendant FBI has stated that the McCarthy blacklist list is maintained "...for the sole

1 https://oig.justice.gov/sites/default/files/legacy/reports/FBI/a0527/final.pdf

purpose of supporting certain special screening functions of DHS and State (such as determining eligibility for immigration to the U.S.)." (Exh. 3, p. 7 fn. 7).

However, when encountering a person listed in the Handling Codes 3 and 4 of the TSDB, law-enforcement agents are encouraged to go on a fishing expedition "on-scene investigation" to "[d]etermine if the individual is of law enforcement interest" and/or "[g]ain sufficient information to positively identify the individual. (Exh. 7, p. 3).

Defendants overlook the uncontroverted fact that HSPD-6 only authorized the TSDB as a terrorist screening tool. (Exh. 1). Defendants' inclusion of "other purposes" or lists is an act contrary to law.

Consequently, Defendants should be ordered to immediately eliminate and recall all the Handling Code 3 and 4 lists disseminated. Defendant FBI acknowledged in *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.Va. 2019), rev'd 993 F.3d 208 (4th Cir. 2021), that it shares the TSDB with over 18,000 federal, state and tribal law enforcement agencies, corporations and individuals to whom the lists are distributed. (Exh. 4, p. 103, lines 8-10), as well as 1441 non-government entities including private employment, background check, and credit agencies. (Complaint, ¶¶ 161, 163) Plaintiffs request the Court take judicial notice of these facts.

Another reason why the McCarthy blacklist within the TSDB is illegal is that once a person's name is included therein, it will permanently linger on it. (Complaint, ¶ 151, 155). In a 2009 audit of the TSC, USDOJ found Defendant FBI failed to observe its own policies mandating removal of NIS from the list. (Exh. 6, pages 36-37).

USDOJ's 2009 TSC audit covering from 2005 to 2008 TSC operations revealed that even though "FBI policy generally requires that subjects of closed terrorism investigations be removed from the "watchlist", "in 72 percent of the closed cases reviewed, we found that the FBI failed to remove subjects from the watchlist as required by FBI policy" (Exh. 6, p. iv-v). The report also

concluded that 35 percent of the identities in the TSDB "did not contain a current international terrorism, domestic terrorism, or bombing case designation." (Exh. 5, p. 54; Complaint, ¶ 192).

What makes the violation of non-investigative subjects' due process rights even more egregious is that Defendant FBI prevents individuals from asserting their constitutional right to challenge their inclusion on the list by denying in the first place, the information that they are on it. (Complaint, ¶¶ 336-337).

Substantive due process limits what the government may do in both its legislative and executive capacities. The Supreme Court has found substantive due process violations where government action has infringed a "fundamental" right without a "compelling" government purpose, as well as where government action deprives a person of life, liberty, or property in a manner so arbitrary it "shocks the conscience". *Washington v. Glucksberg*, 521 U.S. 702, 721–722 (1997); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Prior to the filing of this complaint, the individual Plaintiffs served on Defendant FBI and Defendant DHS Privacy Act requests asking for information about their inclusion in the TSDB. Their requests were denied. (Complaint, ¶¶ 58-61.)

The stated purpose for TSDB secrecy upheld in previous cases doesn't apply here. "The government has a general policy of not disclosing TSDB status, whether positive or negative, in response to inquiries...[because] [d]isclosure would disrupt and potentially destroy counterterrorism investigations because terrorists could alter their behavior, avoid detection, and destroy evidence." *Elhady v. Kable*, 993 F.3d 208 (2021).

Since Defendant FBI has admitted that NIS do not meet the "known or suspected terrorist" criteria, there are no grounds that justify the secrecy of the TSDB McCarthy blacklist. (Exh. 3, p. 7-8, fn. 7).

Unlike the individuals listed in the Watchlist components of the TSDB (KST) that have

survived previous judicial challenges, (Complaint, ¶¶ 171, 174), **Plaintiffs and TJ Members have no meaningful redress mechanism to challenge their eternal inclusion on the McCarthy blacklist.** The names languish eternally in the list as there is no mechanism for listed individuals to find out their name was ever included on the list nor for their removal from it.

As of 2017, Defendant FBI witness Timothy Groh, former Deputy Director of the TSC, asserted in *Elhady v. Piehota*, 303 F.Supp.3d 453 (E.D.Va. 2017), that the TSDB was estimated to contain 1.1 million records. (Complaint, ¶ 198). Based on information produced in previous litigation challenging the Watchlist, the TSDB is estimated to contain over 6 million records. If USDOJ's 99.71% trend of non-terrorists in the list is to be relied upon, this translates to an estimated total 5,982,600 names of non-terrorists included in the TSDB, 300,000 on U.S. soil.

The secret inclusion and indefinite retention of Plaintiffs' and TJ Members' names on a terrorist database constitutes a *per se* violation of their substantive due process rights protected under the United States Constitution that warrants the Court order its elimination.

These violations to the United States Constitution should be enough for the Court to issue the Preliminary Injunction sought herein to order Defendant FBI to recall all the Handling Code 3 and 4 lists distributed throughout the nation and the world, and order the immediate elimination of those components of the TSDB.

Plaintiffs ask that upon issuing the injunctive relief sought, the Court issue an order prohibiting Defendants from creating another secret list to transfer the names of non-investigative subjects to it in order to perpetuate their illegal targeting of individuals. (Complaint, ¶ 355). This, in light of the uncontroverted fact that a few months after Hon. Anthony Trenga of the Eastern District of Virginia in *Elhady v. Kable*, *supra*, held that the TSDB failed to provide constitutionally sufficient procedural due process, then-Attorney General William Barr

announced the creation of a new watchlist.[2]

STATEMENT OF THE ISSUE TO BE RULED UPON BY THE COURT

The issue before the Court requires the interpretation of constitutional precepts in the context of uncontroverted material facts. To wit: whether the Handling Code 3 and 4 lists within the TSDB that Defendant FBI has admitted, do not contain the names of known or suspected terrorists yet comprise 97% of its contents are an unconstitutional exercise of authority that warrants their elimination. (Complaint, ¶¶ 16-17).

Handling Code 1 (known terrorists) and Handling Code 2 (suspected terrorists) have been held to meet the minimum constitutional standards as they contain legal derogatory information criteria about the individuals listed therein. Complaint ¶¶ 115-126. *Elhady v. Kable*, 993 F.3d 208 (4th Cir.2021); *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017); *Abdi v. Wray*, 942 F.3rd 1019 (10th Cir. 2019).

Conversely, the McCarthy blacklists contained Handling Codes 3 and 4 categories are an unconstitutional exercise of agency power for the following reasons:

FIRST: They exceed the parameters of its legal authority that stems from the HSPD-6. (Exh. 1).

SECOND: Defendant FBI doesn't give individuals prior notice of nomination or inclusion in the TSDB, depriving the person of the most basic requirement of due process: the right to confront the evidence against them and their right to be heard. (Exh. 13, p. 183, lines 6-16). When considering that between 95 pecent to 98.5 percent of the nominations are approved, this lack of due process represents a significant attack on NIS' basic due process rights. (Exh. 14, p. 361).

THIRD: NIS are secretly and perennially placed on the list;

2 "Barr Unveils Plan to Prevent Mass Shootings", The Hill, 10/23/19. https://thehill.com/homenews/administration/467103-barr-unveils-plan-to-stop-mass-shootings/

FOURTH: Unlike Handling Codes 1 and 2, there is no recourse or redress procedure for individuals included in Handling Codes 3 or 4;

FIFTH: Law enforcement intervenes with NIS in Handling Codes 3 and 4 in "fishing expedition mode" to "in what seems to be an effort to file any possible charges against them; (Exh. 6).

SIXTH: There is no national security, legal reason or justification to maintain anyone on a secret McCarthy blacklist.

The Supreme Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "There are three distinct factors for a court to weigh in considering whether the procedural due process provided is adequate: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 2200 (5th Cir.2012), *quoting Mathews*, *supra*, 424 U.S. at 335, 96 S.Ct. 893.

Plaintiffs' and TJ Members' unequivocal deprivation of due process around the entire watchlisting process supports their ultimate success on the merits.

REQUIREMENTS OF A PRELIMINARY INJUNCTION

Plaintiffs meet the four-part test for a preliminary injunction.

A plaintiff seeking a preliminary injunction must establish injury-in-fact by demonstrating that it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Texas v. United*

States, 524 F.Supp.3d 598, 619 (S.D.Tex. Feb. 23, 2021), as amended and superseded by *Texas v. United States*, 2021 WL 723856, citing *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

A plaintiff seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that their substantial injury outweighs the threatened harm to the party whom they seek to enjoin; and (4) that granting the preliminary injunction will not disserve the public interest. *Planned Parenthood Ass'n of Hidalgo Cty. Tex., Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir.2012); accord *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular attention to the public consequences. *Weinberger v. Romero- Barcelo*, 456 U.S. 305, 312 (1982). Injunctive relief is proper when the plaintiff will suffer irreparable harm and there does not exist an adequate remedy at law. *Id*.

To meet the irreparable injury requirement, Plaintiffs must establish that irreparable injury is likely in the absence of an injunction. *Texas v. US*, *supra*, 565 F.Supp3d 351, 435 (S.D.Tex. 2021) *quoting Winter v. NRDC*, 555 U.S. 7, 20 (2008). Irreparably injury is one that "cannot be undone through monetary remedies." *Id*., quoting *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) and *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

When applying the four-part test, "a sliding scale is utilized, which takes into account the intensity of each in a given calculus. *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir.1975). The "sliding scale" approach favors issuing the injunction upon a lesser showing of harm when the likelihood of success on the merits is especially high. *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979). The Court's "delicate balancing of the probabilities of ultimate success at final hearing with the consequences

of immediate irreparable injury that possibly could flow from the denial of preliminary relief." *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958 (3d Cir.1984).

When the other factors weigh strongly in favor of an injunction, "a showing of some likelihood of success on the merits will justify temporary injunctive relief." *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir.1980).

The movant of a preliminary injunction need not prove his case in full at the preliminary injunction hearing, and the findings of fact and conclusions of law made at this stage are not binding at trial on the merits. *Univ. of Texas v. Camenish*, 451 U.S. 390, 395 (1981).

ARGUMENT

Plaintiffs satisfy each of the requirements for a preliminary injunction. Plaintiffs hereby adopt by reference as if it was reproduced herein the entire First Amended Complaint for Mandamus, Declaratory and Injunctive Relief and Damages.

I. Plaintiffs are likely to prevail on their claims.

Plaintiffs are likely to succeed on the merits by showing that one or more of the plaintiffs have standing, that the NIS/ Handling Codes 3 and 4 lists of the TSDB are unconstitutional and that the Court's failure to order their elimination will continue to cause Plaintiffs irreparable damages.

A. Plaintiffs Have Standing

"A plaintiff has standing to sue only where it satisfactorily shows it '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" 555 F.Supp.3d 351, 372 (S.D.Tex. 2021), *citing Spokeo, Inc. v. Robins*, supra, 578 U.S. at 338 (2016).

Plaintiffs' "personal stake in the outcome of the controversy" satisfies the injury-in-fact requirement. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Prior to the filing of this petition, Plaintiffs asked Defendant FBI to confirm Plaintiffs' TSDB status and to stipulate that all of their names are listed in the TSDB's NIS/ Handling Codes 3 or 4. (Exh. 12) In character with the Glomar responses sent to Plaintiffs in reply to their Privacy Act requests, Defendant FBI has refused to confirm or deny their status in the TSDB. (Complaint ¶ 58-60).

Defendant FBI's failure to reply doesn't prevent Plaintiffs from proving their standing. Two of the plaintiffs can prove to the Court their standing to challenge the NIS list within the TSDB. Winter Calvert and Karen Stewart will provide the Court with their testimony explaining how they learned their names appeared in the TSDB. (Complaint, ¶¶ 419-421.) Attached in support of this petition are Plaintiffs Winter Calvert's and Karen Stewart's statements under penalty of perjury. (Exh. 9 and 11).

B. Mathematical Implausibility and the Causal Relationship

There are seventeen plaintiffs in this case. They share three things in common:

a) They don't have ties to terrorism;

b) Their name appears in the NIS lists of the TSDB;

c) They suffer disabling Directed Energy Weapons attacks, Havana Syndrome Symptoms and, nine of the seventeen plaintiffs suffer from "Pulse-Modulated Voice Signature"(Voice-to-Skull). (Complaint, ¶¶ 238-260).

It is mathematically implausible that seventeen unrelated people all share these common denominators as mere random coincidence. The last of these is the source of continuous severe physical pain, suffering and irreparable damages.

The preponderance of the evidence favors the conclusion that there's a direct correlation between Plaintiffs' inclusion on the list, and the directed energy weapons attacks they suffer every day.

DEW attacks cause Plaintiffs, and TJ Members disabling pain and traumatic brain injury (TBI) that is permanent in character. The irreparable damages Plaintiffs will continue to sustain if the Court does not issue a Preliminary Injunction are both psychologically and physically traumatizing by causing Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI). The magnitude and nature of these damages are not susceptible to be repaired with a monetary award.

C. The Unconstitutionality of the NIS/Handling Code 3 and 4 TSDB categories

Defendant FBI, DHS and other agencies engendered the TSC. (Exh. 2). Defendant FBI through the TSC prepared and maintains the TSDB. The TSDB is not an act of Congress. Its legal authority derives exclusively from HSPD-6. (Exh. 1).

"The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

Defendants' excessively ample interpretation of HSPD-6 extended to the creation of a McCarthy blacklist of individuals for purposes other than those set forth in the executive order, thus surpassing the executive branch's separate and limited powers.

The Separation of Powers embedded within the United States Constitution requires a narrow interpretation of Executive Orders.

Plaintiffs won't challenge the legality of a TSDB created solely by fiat of an executive order. What its contrary to law is the deviation from the limited legal authority the HSPD-6 delegated on Defendant FBI. FBI misconstrued HSPD-6 as granting it the authority to create an illicit list within the TSDB that does not conform to the order, the law and the Constitution.

On the one hand, the officially-published regulations that are supposed to dictate the TSDB's contents don't match USDOJ's conclusions in audit reports nor Defendant FBI's

statements provided in recent litigation. (Complaint, ¶¶ 113-115).

On the other hand, HSPD-6 only authorizes the creation of a screening tool for "known or suspected terrorists". It does not authorize the creation of a McCarthy blacklist of individuals for any purpose.

Therefore, the NIS/ Handling Codes 3 / 4 categories that comprise 97% of the TSDB are illegal inasmuch as they exceed the authorized parameters contained in HSPD-6. Defendant FBI lacks the legal authority to make McCarthy blacklists of anyone who is "not considered 'known or suspected terrorists'". (App 3, p. 8, fn. 7).

Another reason why the Court should order the immediate elimination of the NIS/ Handling Codes 3 / 4 TSDB categories is that Defendant FBI deprived individuals listed therein of all substantive due process rights by:

a) denying individuals prior notice of nomination or inclusion in the TSDB;

b) denying individuals of the right to confront the evidence against them and their right to be heard;

c) Indefinitely including individuals on the TSDB;

d) Unlike Handling Codes 1 and 2, depriving individuals under NIS/Handling Codes 3 / 4 of a recourse for redress.

Yet another indication of the illegality behind the TSDB's McCarthy blacklist is the instructions given to law enforcement agencies when encountering any person listed therein. Agents are encouraged to engage in illegal searches and seizures to "[c]onduct an on-scene investigation" to "[d]etermine if the individual is of law enforcement interest; and/or [g]ain sufficient information to positively identify the individual." (Exh. 6, page 3).

In sum, even though Defendant FBI doesn't have the discretion to include in the TSDB only known and suspected terrorists, over 97% of the people on it do not meet that

criteria.

The facts set forth above buttress the conclusion that the TSDB's NIS/Handling Codes 3 / 4 is a dangerously unconstitutional exercise of power that compels an order for its immediate elimination.

<u>There is no legal reason or justification to nominate, include or maintain anyone on a secret McCarthy blacklist that exceeds the realms of a limited legally delegated authority.</u>

II. Plaintiffs Are Sustaining Irreparable Injuries

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, <u>Federal Practice and Procedure</u> § 2948.1 (3d ed. 2013). The focus of this inquiry is not so much the magnitude but the irreparability of the threatened harm. *Callaway, supra*, 489 F.2d at 575.

Currently, defendants control most of the evidence that Plaintiffs need to prove the organized stalking that results from being included on the McCarthy blacklist of the TSDB. When the facts about causation may be in the control of the putative defendant, then the plaintiff is more at the "mercy" of the defendant. *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988).

Even though Plaintiffs need to carry out discovery to prove defendants' role and joint liability in the damages alleged, they can currently prove that their placement in the secret McCarthy blacklist affects every aspect of their daily lives. From organized stalking that interferes with every day chores to electronic surveillance devoid of minimal constitutional parameters that extends to attorney-client privileged communications, Plaintiffs sustain irreparable damages due to being listed under these TSDB categories.

Plaintiffs and TJ Members can prove that placement on the McCarthy blacklist has caused them economic loss. An example of the economic difficulties that TJ Members and others similarly situated sustain include the disproportionately high homelessness rate of 14% compared to the national average of 0.5%. (Complaint, ¶ 305).

Plaintiffs have sustained and continue to suffer considerable physical pain and suffering at a torture level because of their inclusion in the McCarthy blacklist of the TSDB. Since the presentation of this case, the Directed Energy Weapons (DEW) attacks on Plaintiffs and TJ Members have substantially increased in intensity and frequency. (Exhibits 8-10). It is mathematically impossible for Civilians to have the equipment or the electrical capacity to own or fire a microwave beam weapon on anyone.

Plaintiffs' microwave attacks range from painful to disabling and they produce permanent damages. (Exh. 8, Exh. 9, Exh. 10, Complaint).

The National Academies of Science committee headed by Dr. David Relman concluded that the DEW are real, and likely the cause of Havana Syndrome.[3] (Complaint, ¶¶ 246-250). CIA Director William Burns admitted that it is "unlikely [that Havana Syndrome cases] have been caused by the use of a 'secret weapon' by a hostile state". (Complaint, ¶ 248).

The additional pain and suffering inflicted upon plaintiffs since January 11, 2023 warrant that the Court take urgent measures to prevent additional DEW attacks and the irreparable harm they perpetrate.

Since this complaint was filed, Plaintiff Devin Fraley's 3-year-old toddler H.F. began to

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3 See National Academies Of Sciences, Engineering, and Medicine, An Assessment Of Illness In U.S. Government Employees And Their Families At Overseas Embassies (David A. Relman and Julie A. Pavlin eds., The National Academies Press, 2020).
https://www.saferemr.com/2020/12/national-academy-of-sciences-report-on.html

show disturbing signs indicating that she is being attacked with Directed Energy Weapons every night. (Exh. 9.) The mother summarizes her daughter's observations as follows:

> H. has stopped having continuous sleep. When H. wakes up, her skin is red and hot, as if in a high fever except that she doesn't present any illness symptoms. By mid-morning, both the redness and temperature have disappeared.
>
> Also upon waking up, H. points her index finger to her forehead, as if complaining. She can barely speak, so she cannot communicate why she does that. As a victim of voice-to-skull, I believe she is being hit with the same technology.
>
> Always a happy, easy going girl, H. has sustained behavioral changes and has become uncharacteristically irritable. For the first time in her short life, she is hurting herself, deliberately bumping her head against the floor.

Plaintiff Fraley herself estimates that the intensity of the microwave attacks she sustains has increased in around 50%.

Plaintiff Dr. Len Ber's microwave attacks have increased to the point of not being humanly tolerable. (Exh. 10). Dr. Ber has a medical diagnosis of Havana Syndrome from Dr. Hoffner, the same doctor that diagnosed the CIA and State Department employees. (Complaint, ¶¶ 249, 382). He is in excruciating pain on a daily basis. His pain has significantly intensified after the filing of the case at bar.

Although his attacks increased upon the presentation of the instant complaint, they became intolerable after he coordinated and published an informative interview with Plaintiff Calvert and the attorney in the case. (Exh. 10).

Plaintiff Winter Calvert's microwave attacks have also increased substantially. (Exh. 9) His face and eyes are mercilessly attacked at night with DEW, causing a considerable swelling of his face. (Exh. 9).

Plaintiffs could flood the Court with similar accounts by Plaintiffs and TJ Members

asserting that since the filing of the complaint, their DEW attacks have increased to intolerable levels.

It is no coincidence.

Plaintiffs and TJ Members have two common denominators: 1) their names appear on the TSDB Handling Code 3 or 4 lists and 2) they are the victims of excruciatingly painful DEW attacks that keep them up at night and are a precursor of Havana Syndrome. Complaint, ¶¶ 238-252.

Plaintiffs have demonstrated "a substantial threat of irreparable injury if the injunction is not issued." Plaintiffs' deprivation of constitutional rights is sufficient to warrant the declaration of unconstitutionality of the TSDB's Handling Codes 3 and 4.

Moreover, the increase in Plaintiffs' already serious social and physical damages compel that this Court take urgent precautionary measures to prevent irreparable harm. Especially to the innocent children, that although under no circumstances could not be deemed a threat to national security, are being tortured with DEW. **There is no legal justification to have a 3-year old listed on a terrorist database.** Let alone subject her to torture.

In this context, Plaintiffs ask that the Court take judicial notice of the fact that in prior litigation, the USDOJ representative prevented TSC director from answering if the TSDB contained the names of children. (Exh. 13, pages 345-347 and p. 349).

This is not a case of a one-time harm worked by past events. It is ongoing every day and will continue until this court mandates the elimination of the TSDB's Handling Code 3 and 4 lists.

If the Court orders the unconstitutional McCarthy blacklist to be eliminated from the TSDB, Plaintiffs, TJ Members and others similarly situated will breathe a sigh of relief as the electronic torture they undergo every day is likely to stop. Without a list of Targets, the snipers

will lack Targets to fire at.

Conversely, absent a Preliminary Injunction, Plaintiffs will continue to sustain irreparable injuries.

While Plaintiffs seek compensation, every microwave attack to their bodies perpetrates cumulative damage that this Court has the capability and responsibility to bring to a halt. Although past harms can perhaps never be fully reversed, that is no reason to countenance the continued future infliction of such harms.

III. The Balance Of Equities And The Public Interest Favor An Injunction

The equitable factors favor a preliminary injunction not only because of the ongoing irreparable injury to the Plaintiffs while there's an absence of any irreparable injury to Defendants.

There's no equity to balance.

Defendant FBI has previously acknowledged that most of the records in the TSDB belong to people that *"are not considered 'known or suspected terrorists' and are not screened as such"*. (Exh. 3, p. 7 fn. 7). USDOJ audits have concluded that only 0.29% of the TSDB consists of KST. (Exh. 5). Consequently, 99.71% of individuals in the TSDB fall outside the bounds of its legally-authorized purpose.

Therefore, the elimination of the Handling Codes 3 and 4 lists from the TSDB should not cause any damages or loss to Defendants since they have acknowledged that the individuals listed therein do not represent a terrorist threat. Devoid of a legitimate purpose, benefit or legal authority, there is no apparent equity factor to weigh in favor of preserving the McCarthy list embedded into the TSDB.

The facts and the law favor Plaintiffs. This Court's issue of a Preliminary Injunction does not represent a threat to National Security since Defendant FBI has admitted no person in the

lists that comprise Handling Code 3 and 4 represent a terrorist threat. (Exh. 3, fn. 7). It is appropriate for the Court to issue a Preliminary Injunction when the defendant cannot prove it will sustain any significant damage from it and when it will prevent irreparable damage from occurring to Plaintiffs.

When the Court has before it uncontroverted material facts that only require the interpretation of the applicable law, there is no need to postpone the resolution of the controversy before its consideration. A "court may grant a permanent injunction without a trial on the merits if there are no material issues of fact and the issues of law have been correctly resolved." *Calmes v. United States*, 926 F. Supp. 582, 591 (N.D. Tex. 1996).

IV. The Injunction Should Apply Wherever Defendants May Act

Although most Plaintiffs reside within the Southern District of Texas, TJ Members span the four corners of our nation.

The Fifth Circuit has already held, this Court has the authority to enter a nationwide injunction preventing the Executive from unlawfully implementing a policy. See *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015). The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

A nationwide injunction is proper where a case presents a facial challenge, e.g., that the McCarthy blacklist of the TSDB violates the law. Because "[t]he scope of the injunctive relief is dictated by the extent of the violation established," a nationwide injunction of the McCarthy blacklist is proper. *Lewis v. Casey*, 518 U.S. 343, 360 & n.7 (1996). Moreover, it would be impracticable and nonadministrative to try to "confine" the preliminary injunction to Texas since some of the Plaintiffs reside outside of the state and there are thousands of people similarly situated to them residing throughout the United States.

Plaintiffs are likely to succeed on the merits. Since the challenged McCarthy blacklist serves no known legal program and is not authorized under the mechanism under which it was created, Defendants cannot ascertain that ordering its elimination would be detrimental to national security. Thus, the "balancing act" of equities favors granting the Preliminary Injunction in favor of Plaintiffs.

A nationwide injunction is needed to fully prevent the irreparable injury to Plaintiffs, TJ Members and those equally situated. It is a virtual certainty— easily more than a "substantial risk," that irreparable injury will occur if the preliminary injunction is not nationwide. *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2234, 2341 (2014).

The cases that have challenged before the legality of lists within the TSDB were limited to its portions containing the names of KST and have no effect on this Court's injunctive powers in this lawsuit. To our best information and belief, there is no pending claim in any other United States Court requesting the remedy herein.

CONCLUSION

This petition is grounded upon uncontroverted facts that demonstrate Defendants' illicit violation of fundamental constitutional rights. Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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***DATED** this 5th day of February, 2023.*

WORD COUNT CERTIFICATION

In compliance with this Court's briefing requirements contained in Rule 16(c), the undersigned hereby certifies that this motion contains 7254 words, exclusive of captions, certifications and signatures. Accordingly, a separate Motion for leave to file in excess of 5,000 words is being filed on this day.

Respectfully submitted,

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***DATED** this 5th day of February, 2023.*

CERTIFICATE OF ATTEMPT TO CONFERENCE

In compliance with Local Rule 7(d) and 15(a) of Hon. Drew B. Tipton's Court Proceedings, the undersigned attorney has made serious, timely and good faith efforts to confer with opposing counsel as set forth in the motion filed on this date. Despite the undersigned's extraordinary efforts, she was unable to confer with opposing counsel prior to the filing of this Petition for Preliminary Injunction.

Respectfully submitted,

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***DATED** this 5th day of February, 2023.*

CERTIFICATE OF SERVICE

I certify that on this date, this Plaintiffs' Motion for Preliminary Injunction was electronically filed with the Clerk of the Court using the CM/ECF system and served on usatxs.att@usdoj.gov, and the only attorney with the U.S. Department of Justice that made prior contact with the undersigned, **Myra Siddiqui**, Myra.Siddiqui@usdoj.gov, and by regular mail to: **Merrick Garland,** US Department of Justice, 950 Pennsylvania Avenue, Washington, DC 20535; **Christopher Wray and Federal Bureau of Investigation**, 935 Pennsylvania Avenue NW, Washington, DC 20535; **Alejandro Mayorkas, Kenneth Wainstain,** and **Department of Homeland Security**, 935 Pennsylvania Avenue NW, Washington, DC 20535; **Charles Kable, Jr.,** FBI Terrorist Screening Center, Federal Bureau of Investigations, 935 Pennsylvania Avenue NW, Washington, DC 20535.

Respectfully submitted,

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