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; Federal Bureau of Investigation; Christopher Wray, Director of Federal Bureau of Investigations; Charles Kable, Jr., Director of the Federal Bureau of Investigation's Terrorist Screening Center; United States Department of Homeland Security; Secretary Alejandro Mayorkas, Secretary of the Department of Homeland Security; Kenneth Wainstein, Department of Homeland Security's Under Secretary for Intelligence and Analysis,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

September 7, 2023

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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 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

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 purpose of giving required notice under Rule 28.2.1.

September 7, 2023

/s/ Ana Luisa Toledo
Ana Luisa Toledo

Counsel for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Due to the unprecedented and momentous issues this case presents, Plaintiffs-Appellants requests the Court grant an oral argument and it be held *en banc*. Never has a Court of Appeals adjudicated the controversies this appeal presents.

The lives of hundreds of thousands of Americans, coupled with the safety and protection of the Court's Honorable Judges called to defend the U.S. Constitution justifies an *en banc* oral argument.

Plaintiffs-Appellants posit that the volume of the pleadings, motions and important matters at stake render an oral argument beneficial for the Court's consideration of the complex factual background and important constitutional issues in this case.

Plaintiffs-Appellants particularly request oral argument on the following grounds:

1. This appeal presents the novel question of whether the practice of including in the Terrorist Screening Database ("TSDB") the names of innocent Americans such as Plaintiffs-Appellants that Defendant-Appellees admit do not constitute a terrorist threat, represents *ultra vires,* unconstitutional exercise of government power that interferes with Americans' basic liberty and property rights.
2. Whether it constitutes a violation of the Constitution of the United States and the Privacy Act, Privacy Act, 5 USC § 552(a)(4)(B), the practice of

disseminating to at least 18,000 law-enforcement, 1441 organizations, 533 corporations, and 60 countries, a terrorist database, labeling innocent Americans --including toddlers-- as suspected terrorists, even though Defendants-Appellants acknowledge they do not represent a terrorist threat.

3. Whether the district court erred in refusing to issue a Preliminary and Permanent Injunction despite Plaintiffs-Appellants' likeliness of success on the merits as well as Defendants-Appellees' failure to set forth any government injury that would result from removing the names of innocent Americans improperly included in the TSDB.

Given the urgency of the irreparable damages that Plaintiffs-Appellants and TJ Members continue to endure, an *en banc* oral argument will allow the parties to assist the Court in the statutory and factual analysis required to resolve the appeal in the most thorough and expeditious manner pursuant to Supreme Court and Fifth Circuit precedent.

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INTRODUCTION

Unlike dozens of prior cases challenging the Terrorist Screening Database ("TSDB"), this case calls for a different legal analysis. This appeal is not about the plight of individuals that undergo inordinate obstacles and hours of additional screening when traveling because their names appear in a "terrorist watchlist" that contains the names of alleged "known and suspected terrorists" (KST).

This case is about the right of Americans to be free from defamatory government labels that infringe upon their most fundamental constitutional, civil and human rights.

The names of Plaintiffs along those of hundreds of thousands of individuals, including toddlers and grandmothers, that Defendant FBI admits do not represent a threat to national security, yet they appear on the TSDB under a 'secret exception'. ROA.566 [¶¶ 23-24]. Since they do not present a 'terrorist threat", they are not denied boarding or subjected to additional screening when traveling, precluding them from discovering they are on a terrorist list devoid of grounds or legal authority for it. Unbeknownst to them, when encountering a routine traffic stop, the law enforcement agents treat them as 'suspected terrorists and are instructed to "conduct an on scene investigation" without telling the person. ROA.735.

The placement of innocent Americans such as Plaintiffs on a terrorist list is an illegal abuse of authority. Homeland Security Presidential Directive 6 (HSPD-6)

authorized the TSDB, stating its purpose was "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...)". ROA.565 [¶ 19]. HSPD-6 did not provide room for secret exceptions or the inclusion of non-terrorists on the list for any other purposes. ROA.723.

Defendants' *ultra vires*, permanent placement of unsuspecting Americans on the TSDB include people that do not meet the required criteria of having been arrested, indicted, tried, sentenced, or convicted of any terrorist offense. ROA.593 [¶ 147], ROA.594 [¶ 151]. The 'secret exception' to the 'reasonable suspicion' standard that Defendants are supposed to observe when placing anyone on the list are not Congressional mandates and are self-imposed processes and procedures within the Executive Branch. *Ibrahim v. Department of Homeland Security*, 62 F.Supp.3d 909, 928 (N.D.CA 2014).

Defendant FBI's ubiquitous distribution of the TSDB, across the nation, through its National Crime Information Center (NCIC), imposes on Plaintiffs the 'suspected terrorist' label anywhere they go. "Once derogatory information is posted to the TSDB, it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *Ibrahim v. Department of Homeland Security*, *supra*, 62 F.Supp.3d at 926.

The United States Department of Justice's (USDOJ) audits of Defendant FBI's Terrorist Screening Center (TSC) describe the four main categories within the TSDB. USDOJ's sampling revealed that KSTs are listed in handling codes 1 and 2 of the TSDB and comprise less than half percent (.29%) of the entire list. Those that do not meet the terrorist reasonable suspicion standard included in handling codes 3 and 4 comprise 97% of it. ROA.596. The secret, unauthorized exceptions are the rule. ROA.595 [¶ 161].

In June 2016, Kelli Ann Burriesci, Defendant Department of Homeland Security's (DHS) then-Deputy Assistant Secretary, admitted before Congress that "there's not a process afforded a citizen prior to getting on the list". ROA.583. In that exchange, former Senator Trey Gowdy raised questions that Plaintiffs ask the Court to ponder over when evaluating the merits of this appeal:

> "What process is afforded a US citizen -- not someone who's overstayed a visa, not someone who crossed a border without permission--but in American system, what process is currently afforded an American citizen before they go on that list?
>
> …and when I say process, I'm actually using half of the term 'due process' which is a phrase we find in the Constitution that you cannot deprive people of certain things without due process…
>
> My question is: can you name another constitutional right that we have that is chilled until you find out it's chilled and then you have to petition the government to get it back?
>
> My question is: what process is afforded a United States citizen before that person's constitutional right is infringed ...My question is: how about the First Amendment? How about we not let them set up a website or a Google account how about we not let them join the church until, until they can petition

> government to get off the list? How about not get a lawyer? How about the Sixth Amendment? How about you can't get a lawyer until you petition the government to get off the list? **Or my favorite: how about the Eighth Amendment? We're going to subject you to cruel and unusual punishment until you petition the government to get off the list.**
>
> Is there another constitutional right that we treat the same way for American citizens that we do the Second Amendment can you think of one, can you think of one?"[1] (Emphasis in original delivery).

Ms. Burriesci remained deafeningly silent.

Plaintiffs' unconstitutional inclusion on the TSDB follows them everywhere, perniciously interfering with all aspects of their lives. The 'suspected terrorist' label imposes burdens ranging from distressing inconveniences such as being unable to wire to money to relatives to life-threatening situations such as having emergency ambulatory care blocked.

The district court deemed the Amended Complaint 'fantastical' and 'bizarre', disregarding the germane and uncontroverted facts surrounding Defendants' *ultra vires*, indefensible conduct of labeling innocent Americans as 'suspected terrorists'.

As victims of such illegal government overreach, Plaintiffs come before the Court to request it reverse the district court's decision that relies on erroneous conclusions of fact, is contrary to law, disregards long-standing Court precedent, fundamental rights and threatens to perpetuate a caste of second-class citizens in the United States for whom the bells of the United States Constitution do not toll.

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[1] See www.townhall.com, "Brutal: Trey Gowdy Takes DHS Official To The Woodshed Over Due Process," December 14, 2015.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the action arises under the Constitution, laws and treatises of the United States of America; 28 U.S.C. 1346(a)(2) because it includes claims against agencies of the United States; Article III Section 2 of the United States Constitution because the rights sought to be protected herein are secured by the United States Constitution; the Mandamus Act, 28 U.S.C § 1361; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; the Court's equitable jurisdiction to issue an Injunction to compel an officer or employee of the above-named federal agencies to perform his or her duty under F.R.Civ.Proc 65 and 28 U.S.C. § 1361. ROA.569-570.

Exactly six months after the filing of the complaint, on July 11, 2023, the district court entered a final Memorandum and Order dismissing with prejudice the Amended Complaint and denying the Motion for Preliminary Injunction. ROA.1619. The district court also denied as "moot" motions that had been pending for months. Footnote at ROA.1619-1920, ROA.1638.

On July 12, 2023, Plaintiffs-Appellants filed a timely notice of appeal. ROA.1640.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are the following:

1. Whether the district court erred in dismissing with prejudice the complaint by disregarding its well-pled, factual allegations of the Amended Complaint and dismissing it under F.R.Civ.Proc.12(b)(1), adopting incorrect conclusions of fact and law to reach the conclusion that Plaintiffs-Appellants did not meet the Article III injury-in-fact requirement and thus lacked standing.

2. Whether the district court erred in dismissing with prejudice the Amended Complaint by concluding Plaintiffs-Appellants failed to state a claim upon which relief could be granted and thus dismissal was appropriate under F.R.Civ.Proc. 12(b)(6).

3. Whether the district court erred in dismissing the Declaratory Judgment claims under 28 U.S.C. §§ 2201-2202 and 5 USC §§ 706 challenging Defendants' *ultra vires* and unconstitutional practice of including in the TSDB the names of Plaintiffs and TJ Members while disseminating it extensively throughout the nation and around the world, in violation of 5 U.S.C. § 502(a).

4. Whether the district court erred in dismissing the Petition for Injunction under F.R.Civ.Proc 57 and 65 requesting that Plaintiffs' and TJ Members' names be eliminated from the TSDB, ordering the immediate elimination of the handling

codes 3 and 4 categories from the TSDB, and recall and recover the distributed lists with the illegal categories 3 and 4.

5. Whether the district court erred in dismissing the Declaratory Judgment claim under 28 U.S.C. §§ 2201-2202 requesting it hold that the illegal placement of Plaintiffs and TJ Members, on the TSDB, correlates to the constitutional abuses they undergo.

6. Whether the district court erred in dismissing the Writ of Mandamus under 28 U.S.C § 1361 requesting that Defendants-Appellees be ordered to adhere to the letter of HSPD-6, their oaths of office and the Constitution of the United States when adding names to the TSDB.

7. Whether the district court erred in denying, as moot, the request for limited discovery regarding Plaintiffs' TSDB status that would have done away with its conclusion that Plaintiffs-Appellants did not plead sufficient injury-in-fact and lacked Article III standing.

8. Whether the Court erred in concluding that Targeted Justice, Inc. lacked associational standing.

9. Whether the district court erred in refusing to issue a preliminary and permanent Injunction despite Plaintiffs' probability of success on the merits of proving that the names of innocent Americans that do not pose a terrorist threat must

be removed from the TSDB and Defendants' failure to establish any concrete government injury that would result from it.

10. Whether the district court erred upon refusing to take judicial notice of uncontroverted facts deriving from official government documents attached to the Amended Complaint and subsequent motions filed that buttressed Plaintiffs' allegations and arguments at a pleadings stage of the case.

11. Whether the district court erred in concluding that it did not have personal jurisdiction over Individual Capacity Defendants (ICD).

12. Whether the district court denied Plaintiffs equal, fair, and unbiased treatment and adjudication of their claims, including its *sua sponte* decision to change the venue from where Plaintiffs originally chose to file the complaint.

STATEMENT OF THE CASE

I. Procedural Background

Prior to presenting this case, Plaintiffs carried out the due diligence of submitting to Defendants DHS, FBI and USDOJ Privacy Act requests asking for their TSDB information. ROA.579. The agencies denied all of the requests under various pretexts. ROA.580 [¶¶ 72-73].

On January 12, 2023, Plaintiffs-Appellants presented a complaint before the United States District court for the Southern District of Texas, Victoria Division.[2] ROA.15. On March 15th, Plaintiffs-Appellants filed an Amended Complaint. ROA.559. Defendants were sued in their official and individual capacities for their failure to carry out their non-discretionary duties inherent to their positions, as well as for their violation of Plaintiffs' constitutional rights. ROA.576-578. Defendant agencies FBI and DHS were sued under the Privacy Act for their failure to provide Plaintiffs' TSDB information and disseminating false information about Plaintiffs. ROA.575.

Plaintiffs asked the district court to take judicial notice of the thirteen exhibits submitted in support of the pleadings as well as of other uncontroverted, official government documents that were subsequently filed with the court pursuant to under Rule 201 of the Federal Rules of Evidence. ROA.1552, ROA.1347. The district court only referenced one of the documents included along the Amended Complaint to incorrectly assert that the TSDB's handling codes terminology did not come from Defendants. ROA.1621. Conversely, the district court refused to take judicial notice of other crucial and uncontroverted official government documents expressing they

[2] The original complaint filed on January 11, 2023 (ROA.1646) was amended to remove the last names of the two Plaintiffs-Appellants minors at the time were abbreviated to their initials. Thus an "Amended Complaint" with identical pleadings was filed on January 12, 2023. ROA.15. For convenience purposes, the first Amended Complaint will be deemed as the 'original complaint' and the second Amended Complaint simply as 'Amended Complaint'.

constituted "hearsay" even though they were submitted at a pleadings stage in support of Plaintiffs' position. ROA.1627.

On February 5, Plaintiffs filed a Motion for Preliminary Injunction. ROA.321. Deeming the motion 'meritorious', on February 24, the Court granted the Motion to File Excess Pages. ROA.430. On February 22, Defendants requested an extension of time to reply to the preliminary injunction simultaneous to their motion to dismiss. ROA.425. Within two days after the filing of the motion for extension of time, on February 24, in deprivation of Plaintiffs' statutory right to oppose the request, the Court granted it. ROA 431. On March 1st, Plaintiffs filed a Motion for Reconsideration including 82 emails from TJ Members. ROA.447. Defendants did not file an opposition. For months, the district court did not rule on it. Upon dismissing the case five months later, the motion for reconsideration was deemed dismissed as "moot." ROA.1619.

On February 25, the Court unexpectedly issued *sua sponte* an order requesting the parties to submit a brief on venue. ROA.433. Plaintiffs opposed the transfer of the case, requesting that their choice of venue be respected. ROA.546. In their memorandum, Defendants acknowledged that "…venue appears to be proper in the Victoria Division based on the alleged residence of some individual Plaintiffs…" ROA.553. Plaintiffs filed their Amended Complaint on March 15th. ROA.559. Three

days later, on March 18, the district court, Victoria Division, entered the order transferring the case to the Houston. ROA.786.

Two days before the transfer order, March 16, 2023, Plaintiffs had filed an unopposed Motion for Leave to File the Amended Complaint that had been filed the day before. ROA.781. Ten days after the transfer of the case to Houston, the district court still had not granted the unopposed motion for leave to file Amended Complaint. It was not until Plaintiffs' attorney contacted the district court about it that it entered an order granting the leave to file document requested. ROA.885

Disregarding court procedures and rules, the district court never entered a new F.R.Civ.Proc.16 order after the case was transferred to the Houston division.

As soon as summons were served on the United States Attorney in Houston in the second week of January, 2023, Plaintiffs began extrajudicial attempts to obtain from Defendants limited discovery regarding Plaintiffs' TSDB status. ROA.889. After weeks of Defendants' disregard of the requests, on April 8, Plaintiffs filed a "Motion to Compel Limited Discovery". ROA.888. Plaintiffs sought urgent discovery to inspect the TSDB status of the eighteen plaintiffs due to Defendants' assertions that the pleadings contained "highly speculative and unfounded claims", "fantastical allegations" and "conspiracy theories". ROA.425, ROA.552. Defendants filed a belated opposition to the Motion to Compel that the district court did not reject. ROA.1164. Plaintiffs duly opposed it. ROA.1077. It included a

statement under penalty of perjury signed by Samuel Robinson, Associate Deputy Director at the FBI's TSC.[3] ROA.1173. This document reiterated Plaintiffs' contention that that non-terrorist non-investigative subjects (NIS) are placed in the TSDB under "secret criteria" and protected under the "law enforcement privilege". ROA.1176. The district court did not rule on the motion for three months. Upon dismissing the Amended Complaint, the district court denied as "moot" the request for limited discovery even though one of its conclusions was that Plaintiffs lacked standing and "have not produced, do not possess, and apparently have not seen" a list "they allege to be in". ROA.1627-1628.

Official Capacity Defendants (OCD) filed a motion to dismiss containing serious misrepresentations of fact and law. ROA.988. Plaintiffs duly opposed both motions, calling the district court's attention to the false statements contained therein. ROA.1083, ROA.1091, ROA.1449. The district court did not reference Plaintiffs' oppositions thereto nor expressed objection to Defendants' false assertions in violation of F.R.Civ.Proc.11. Moreover, the district court adopted some of Defendants incorrect assertions as its conclusions such that the term "Dataset" is equivalent to "Database".[4] ROA.1620.

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[3] In an unusual timing, Mr. Samuel Robinson was promoted to Associate Deputy Director of the FBI's Terrorist Screening Center on the day that Defendants' motion was due, and signed the statement the day after.

[4] See #6 under "False and Misleading Statements" below.

On May 2, Plaintiffs opposed OCD's Motion to Dismiss filed on April 12. ROA.1083. On May 30, ICDS filed their Motion to Dismiss. ROA.1302. Plaintiffs filed an Opposition and surreply to ICD's motions. ROA.1083, ROA.1449. The district court's Memorandum and Order does not reference to any of these filings by Plaintiffs. ROA.1619.

Plaintiffs filed three Motions for judicial notice. One giving notice of the controlling case *TransUnion v Ramirez*, *,* —— U.S. ———, 141 S. Ct. 2190, 2220 (2021). ROA.1347. The second giving notice of Defendant FBI's whistleblowers' testimony and the Articles of impeachment issued against Defendants Garland and Wray. ROA.1201. The third one included a USDOJ Memorandum specifying the circumstances under which the state secrets privilege is applicable. ROA.1552. The Court refused to take judicial notice of the official, uncontroverted documents filed. ROA.1627. Although it agreed to take judicial notice of *TransUnion v Ramirez*, *supra*, the district court incorrectly asserted that its holding was not applicable to this case. See footnote 2 at ROA.1630.

Exactly six months after the presentation of the case, on July 11, the district court entered the Memorandum and Order dismissing with prejudice the case. ROA.1619.

II. Legal Background

As a reaction to the September 11, 2001 terrorist attacks, on September 16, 2003 President George W. Bush signed the HSPD-6, consolidating pre-existing terrorist lists into a uniform Terrorist Screening Database. ROA.350. The Terrorist Screening Center (TSC) is an operation under the purview of Defendant FBI that develops and maintains the Terrorist Screening Data Base (TSDB). ROA.565 [¶ 22].

Handling codes 1 and 2 are the only two legitimate HSPD-6 authorized categories within the TSDB. They include the names of KSTs. These comprise what is commonly referred to as "the watchlist" used to screen passengers at airports. ROA.594.

HSPD-6 is clear: it did not give the executive authority to create any other list or category within the TSDB including people that do not meet terrorist criteria. ROA.723. The directive specified that its implementation mandated strict compliance with the provisions of the Constitution and applicable laws, including those protecting the rights of all American citizens. ROA.723. The ever-growing list of individuals on the TSDB in NIS categories exceeds the legal authority that the executive order delegated to Defendant FBI by including non-terrorists in a terrorist screening database without Executive or Congressional approval. ROA.582 [¶ 85].

Despite this, Defendants and their predecessors, acting under color of law, included and/or maintain names within the TSDB that belong to Americans that do not represent a threat to national security and are not screened as such. ROA.582 [¶

84], ROA.605 [¶ 220]. Defendant FBI and USDOJ refer to these individuals as 'non-investigative subjects' (NIS) but their inclusion on the TSDB's handling codes 3 and 4 labels them as 'suspected terrorists' to the world. ROA.599. Defendants concede that these innocent Americans such as Plaintiffs and TJ Members make it to the TSDB under "watchlisting exceptions" created by executive fiat for "the limited purpose of supporting specific screening functions" such as "determining eligibility for immigration to the United States". ROA.1175 [¶ 8]. All but one of the Plaintiffs are American citizens. ROA.572-575.

Former TSC Deputy Director Timothy Mr. Groh stated under penalty of perjury that "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." See footnote 7 at ROA.698.

The TSDB is not a classified document. Instead, it is labeled "For Official Use Only/Law Enforcement Sensitive". ROA.599.

Defendant FBI distributes it by means of the NCIC to over "18,000 state, local, county, city, university and college, tribal, and federal law enforcement agencies and approximately 533 private entities," including "the police and security forces of private railroads, colleges, universities, hospitals, and prisons, as well as animal welfare organizations; information technology, fingerprint databases, and forensic analysis providers; and private probation and pretrial services." *Elhady v.*

Kable, 391 F. Supp. 3d 562, 580 (E.D. Va. 2019), *rev'd on other grounds* 993 F.3d 208 (4th Cir. 2021) system. ROA.560. Consequently, recipients' millions of employees of the recipients get access to it. Defendant FBI's distribution of each Plaintiff's watchlist status advises recipients that the person "has possible ties to terrorism". ROA.144.

Once included in the list, there is no way out to get out of it. ROA.598 [¶ 178]. Congress provided a futile redress process for KSTs that face travel inconveniences, but not one for NIS listed on the TSDB that are not detained or thoroughly screened at airports. ROA.601-602 [¶¶ 198-202]. Because they were never supposed to find out.

Defendants have not provided a legitimate and constitutional reason for adding to the TSDB, the names of American citizens that do not represent a terrorist threat and are not subject to screening or immigration proceedings.

A 2007 United States Government Accountability Office Report found that Defendant FBI rejects only approximately one percent (1%) of all nominations to the TSDB. ROA.586. This report also revealed that 45% of the TSDB records related to redress complaints reflected that the information on the individuals used to include them on the list was inaccurate, incomplete, outdated, and/or that they had been incorrectly included. ROA.603.

Likewise, 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 KST. ROA.604. Thus, for every KST listed in the TSDB, there are 334 NIS non-terrorists listed on the TSDB. ROA.595 [¶ 161].

The Department of Justice's Office of The Inspector General's May 2009 Audit Report 09-25 "The Federal Bureau of Investigation's Terrorist TSDB Nomination Practices" found that 35% of the nominations to the lists were outdated, many people were not removed in a timely manner, and tens of thousands of names were placed on the list without an adequate factual basis. ROA.606. USDOJ's OIG also concluded that FBI field offices send TSDB nominations to the TSC without complying with agency regulation. ROA.1093.

On September 2014, former Transportation Safety Administration's Christopher Piehota testified before the House of Representatives that by 2013 the TSDB had 500,000 records and in 2014 the list contained 800,000 identities. ROA.607 [¶¶ 227-228]. In just 9 months, Defendant FBI was able to process and approve 300,000 new entries to the TSDB.

This is consistent with the USDOJ's Office of the Inspector General's conclusion in Audit Report 08-16 that Defendant FBI does not comply with its own regulations when adding people to the TSDB. ROA.1093.

Plaintiffs asked the Court to take judicial notice of recent whistleblower testimony in Congress has revealed that Defendant FBI supervisors pressure special agents to classify as domestic terrorists people that do not meet the criteria. ROA.1201. The Court declined to do so asserting it constituted hearsay, despite Fifth Circuit precedent to the contrary. ROA.1627.

An example of the consequences of being illegally placed on the TSDB that Plaintiffs alleged is how Defendants FBI and DHS, and/or Defendants Wray, Kable, Mayorkas and Wainstein, acting under color of law, unconstitutionally authorize, enable and/or carry out physical and electronic surveillance and organized stalking against them, sometimes using private actors such as the National Network of Fusion Centers, InfraGard, citizen watch groups such as Citizen Corps, Sheriffs, and Police Departments. ROA.612.

Plaintiffs alleged that the National Network of Fusion Centers ("Fusion Centers") is a rogue law-enforcement operation devoid of required legal authority for the nature of the work it carries out virtually unsupervised and without limits or controls. ROA.612 [¶ 256]. The Fusion Centers Network under the direct funding, purview, and control of Defendants Mayorkas and Wainstain have become the Stasi arm of Defendant DHS. An October 3, 2012, the Senate's Permanent Subcommittee on Investigations issued a report after a two-year investigation that led the

Commission to conclude that Fusion Centers "have too often wasted money and stepped on Americans' civil liberties." ROA.615 [¶269].

Plaintiffs also alleged how under Defendants Wray and Kable discretion and purview under the color of law, Defendant FBI publicly admitted that it has abused its authority and carried out "assessments" against unsuspecting Americans as defined in section 20.2 of the 2021 FBI rule book, "Domestic Investigations and Operations Guide".[5] ROA.626 [¶ 320]. These "assessments" include illegally intercepted, recorded, listened in, stolen electronic communications and files in collaboration with the Central Intelligence Agency (CIA) and National Security Agency (NSA) for FBI probes that may involve surveillance without court orders against people not accused of any crimes. ROA.626 [¶ 320], ROA.756.

The facts set forth above are but an extract of the extensive, thoroughly researched, and detailed pleadings that the district court in its decision deemed "fantastical and, on their face, devoid of merit." ROA.1627. They not only exceed F.R.Civ.Proc. 8's requirements, but some actually meet F.R.Civ.Proc. 56's summary judgment "uncontroverted material facts" threshold.

Moreover, Plaintiffs alleged that Defendant Garland has failed his non-discretionary duty to ensure that the civil rights violations found in USDOJ and OIG audit reports of the TSC were corrected. ROA.591 [¶¶ 135-137]. Plaintiffs

[5] As reported in the January 10, 2023, Washington Times Article.

submitted uncontroverted Congressional documents concluding that Defendant Garland fostered the improper classification of innocent Americans as domestic terrorists through infiltration of school board meetings. ROA.1204.

The Court also again declined to take judicial notice of these facts, erroneously concluding that they constitute "hearsay". ROA.1627.

III. Plaintiffs-Appellants

Seventeen of the Plaintiffs are American citizens. Jasmin Berta Delatorre is a legal resident. ROA.567. Twelve of them live within the Southern District of Texas. ROA.571. Three of them are the minor children of Plaintiffs Delatorre (Age 3), Mahanger (Age 9) and Delaney (Age 4).

Plaintiffs are law-abiding citizens. None of them meet the terrorist criteria. ROA.567 [¶ 26]. They discovered their secret inclusion on the TSDB after their lives were suddenly, strangely, and overwhelmingly disrupted.

Plaintiffs have three things in common. First, they are certain their names appear in the TSDB handling codes 3 and 4 that fall outside of HSPD-6's limited legal authority. ROA.567 [¶ 27].

The second thing Plaintiffs have in common is that they never encounter problems, obstacles or "enhanced" screening procedures when traveling. ROA.596 [¶ 165].

The third thing that Plaintiffs have in common, is that their illegitimate classification as a suspected terrorist interferes with their most basic civil rights. ROA.569 [¶ 36].Since their inclusion in the TSDB, Plaintiffs' find it more difficult or even impossible to find a job as they find themselves blacklisted from employment, their professions, and communities. ROA.631.

It is mathematically implausible that eighteen Plaintiffs have nothing in common, except having evidence of extraordinary inconveniences and damages, while they also appear in the TSDB yet do not encounter travel obstacles. ROA.1151.

Plaintiff **Winter O. Calvert** is an engineer. Defendants' improper inclusion of him on the TSDB almost cost him his life. In December 2016, Mr. Calvert sustained a medical emergency while staying at his mother's house. ROA.641 [¶ 397]. As he laid on the floor suffering from what he later learned was dangerous blood clots and a pulmonary embolism, two Brazoria County deputy sheriffs did not allow the ambulance to drive up the driveway to take him to a hospital, despite his critical condition. ROA.641 [¶ 398]. While Plaintiff Calvert laid on the floor in excruciating pain and on the brink of death, the deputy sheriffs asserted that they would not allow the medics into the premises until they "secured the area" because they had been informed that a "suspected terrorist" lived there. ROA.641-642. It took the officers critical minutes to finish their inspection. Defendants' illegal labeling of Plaintiff

Calvert as a suspected terrorist, almost cost him his life as he barely made it to the hospital. ROA.642 [¶ 399].

Like the rest of the Plaintiffs, Calvert has undergone house break-ins, illegal surveillance of his phone calls, property, and communications as well as computer hacking, even though he has never been accused, indicted, arrested, tried, convicted or sentenced of any crime. ROA.641-642.

Calvert has never been stopped at the airport for additional screening or interrogation. ROA.573.

Since 2017, Calvert has been an activist on behalf of Targeted Individuals and founding member of Targeted Justice. ROA.573.

Plaintiff **Karen Stewart** is a retired National Security Agency ("NSA") Intelligence Analyst-turned whistleblower. ROA.573. Towards the summer of 2016, she visited the Leon County Sherriff's office in Florida seeking assistance for the brutal organized stalking she was undergoing. ROA.638. She observed how the officer on duty retrieved what seemed to be 12-20 folders and searched for her name on them. ROA.408. When the man perused through the folders, he expressed that he was not allowed to help Plaintiff Stewart. ROA.408.

Aside from severe organized stalking, computer hacking and house, break-ins planned and carried out under the authority and direction of Defendants Department of Homeland Security (DHS), Mayorkas and Wainstein, Plaintiff Stewart also

undergoes painful DEW attacks that have substantially impaired her health. ROA.639. Plaintiff Stewart believes she was placed on the TSDB in retaliation for her whistleblowing activities relating to the NSA. ROA.638.

Despite Plaintiffs Calvert's and Stewart's pleadings contained in the Amended Complaint and their statements under penalty of perjury included in support of the Motion for Preliminary Injunction explaining how they discovered they were on the TSDB list, ROA.401, ROA.407. The district court erroneously concluded that: "*they do not allege how they obtained this information*." ROA.1629.

Although only these two plaintiffs can testify how they learned of their inclusion on the list, they satisfy the Article III requirement for all plaintiffs. "Both the Supreme Court and the Fifth Circuit have made clear, "it is not necessary for all [p]laintiffs to demonstrate standing; rather "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. US*, 809 F.3d 134, 151 (5th Cir. 2015). The Court only needs to "conclude only that one plaintiff in the present case satisfies standing with respect to each claim." *Brackeen v. Haaland*, 994 F.3d 249, 291 (5th Cir. 2021).

IV. Plaintiffs' Claims

Plaintiffs' claims mainly derive from their placement in illegal, unauthorized categories of the TSDB. ROA.569 [¶ 36]. The district Court failed to address and adjudicate this medullar issue.

The first cause of action that the district court dismissed but failed to address entails a request pursuant to the Declaratory Judgment Act, 28 USC §§ 2201-2202, F.R.Civ.Proc. 57, and 5 USC §§ 702,706, asking the district court to declare unconstitutional and devoid of legal authority the NIS/Handling Codes 3 / 4 subcategories of the TSDB, order the immediate elimination of handling codes 3 and 4 from the TSDB; recall all versions of the distributed lists containing handling codes 3 and 4; order Defendants to grant Plaintiff full access to their records within the TSDB; grant Plaintiffs access to all historic versions of the TSDB's handling codes 3 and 4; grant attorney's fees and costs. ROA.668.

The second cause of action also pursuant to the Declaratory Judgment Act, 28 USC §§ 2201-2202, F.R.Civ.Proc. 57, and 5 USC § 706, requested that the district court declare that there is a direct correlation between the inclusion of Plaintiffs and TJ Members in the TSDB's handling codes 3 and 4 and the unusual and difficult conditions they face as non-consenting subjects of "The Program". ROA.670.

The third claim for relief requested the district court to issue a Writ of Mandamus ordering OCDs to comply with the mandatory constitutional duty that makes them responsible for "tak[ing] Care that the laws be faithfully executed." U.S. Const. Art. II, § 3. ROA.672.

The fourth cause of action requested that the district court issue a Declaratory Judgment pursuant to 28 USC §§ 2201-2202, F.R.Civ.Proc. 57, and 5 USC § 706,

declaring that Defendants violated the Privacy Act by failing to fulfill Plaintiffs' requests thereunder. ROA.673.

The fifth claim petitioned for a National Injunction requesting that Plaintiffs' and TJ Members' names be eliminated from Handling codes 3 and 4 and that those subcategories be altogether eliminated from the TSDB as they lack legal authority. In this claim, Plaintiffs also requested the district court for the creation of a monitoring system to ensure Defendants did not circumvent any order to eliminate the illegal TSDB categories, creating another illegal list with the names they remove from the TSDB. ROA.675.

The sixth cause of action entailed a demand under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the payment of damages for each individual Plaintiff. ROA.676. ICD are also federal public officials acting under color of federal authority that have disregarded their duty to adhere to the laws and Constitution. ROA.676. In so doing, Defendants have deprived the individual Plaintiffs of their civil rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. ROA.676.

On February 5, Plaintiffs filed a Motion for Preliminary Injunction. ROA.318. In this motion, Plaintiffs-Appellants asked the district court to issue a preliminary injunction ordering the immediate removal of NIS from the TSDB to prevent further

irreparable harm. ROA.318. Since Defendants had previously acknowledged that NIS do not represent a terrorist threat, Plaintiffs argued that the district court did not have to carry out a balancing of interests because the government could suffer no harm from removing the names of non-terrorists from the TSDB since they do not represent a terrorist threat and were illegally placed on it in the first place.

V. The Decision

The district court's decision warrants reversal on many grounds. ROA.1619. The first of these is that it relied on erroneous conclusions of fact and misrepresentations to reach its unsound decision as set forth below. Before discussing the errors of law that warrant reversal, it is opportune to set forth the mischaracterizations of the pleadings and false statements that the district court adopted to reach an erroneous result that warrants reversal.

The following false (FS) and misleading (MS) statements and conclusions of fact and/or law warrant the reversal of the district court's decision. Without them, the Court would not have been able to reach its erroneous conclusions of law.

A. False and misleading statements

1. FS: "[T]he plaintiffs plead only conclusory allegations that they are on the alleged "blacklist," much less harmed by their inclusion in that list." ROA.1635. Stewart's and Calvert's pleadings and statements under penalty of perjury describing

how they learned of their inclusion on the list meet F.R.Civ.Proc.8's requirements.ROA.402, ROA.407.

2. MS: In its opening statement, the district court stated that "plaintiffs allege that a massive government surveillance and security program has inflicted grave physical and psychological injury on them". ROA.1619. This opening sentence mischaracterizes the controversy by leaving out Plaintiffs' main claim: their secret and illegal inclusion on the TSDB. By mischaracterizing the controversy and framing it in a conspiratorial narrative, the district court omitted from its introduction the gist of at least 173 paragraphs of factual, documented, well-grounded pleadings of the Amended Complaint dedicated to describing the secret, unconstitutional, private nomination, vetting and inclusion process used to label innocent Americans such as Plaintiffs as suspected terrorists and carry out its distribution throughout the nation and 60 countries. ROA.581-612.

3. FS: "Only harms attributable to agency action are subject to review under the Administrative Procedure Act. The plaintiffs' Amended Complaint does not meet that [APA] standard." ROA.1636. Plaintiffs have the right to invoke illegal abuses of authority under APA in their request for Declaratory Judgment. ROA.673.

4. FS: "The following summary is taken from the plaintiffs' Amended Complaint." ROA.1620. This list of false statements and misrepresentations corroborates that the district court did not take its summary of the pleadings based

on the well-pled facts of the Amended Complaint. Instead, it accepted as true and incorporated into its decision the false and misleading statements that Defendants included in their motions. ROA.998, ROA.1587. This, despite the fact that Plaintiffs set forth in writing evidence and arguments that established the inaccuracy of some of the most crucial assertions by Defendants that the district court adopted as true. ROA.1078, ROA.1091.

5. FS: "[T]he Terrorist Screening Dataset, [is] formerly and interchangeably known as the Terrorist Screening Database." ROA.1620. Neither Plaintiffs alleged this, nor is any legal authority that supports this conclusion.[6] The district court accepted as true and adopted this incorrect statement of fact whose only legal 'authority' is footnote 2 of OCD's Motion to Dismiss. ROA.999. Defendants continuously repeated this assertion without the Court's request for its authority. ROA.1620.

6. FS: "[T]he plaintiffs allege that they are included in the Terrorist Screening Dataset" (ROA.1620) and "Instead, they allege that their names are included in the "'Handling Codes 3 and 4' subcategories of the [Dataset] that

[6] A Westlaw search reflects that the first time any court adopted the term "Dataset" was on November 7, 2022 in *Nur v. Unknown CBP Officers*, 2022 WL 16747284, 1, ---F4th--- (2022). The district court reached this erroneous conclusion devoid of legal authority. Instead, it relied on the declaration of Samuel P. Robinson, the same official that submitted in this case a statement under penalty of perjury asserting, *inter alia*, that the terms "Database" and "Dataset" are interchangeable and that non-terrorists are placed on the TSDB pursuant to a secret exemption. ROA.1173. Mr. Robinson is not Congress not the President and does not have the legal authority to set the law.

constitutes 97% of the identities in the entire dataset." ROA.1622. Plaintiffs consistently made reference to the correct legal term Terrorist Screening Database in the Amended Complaint and the subsequent motions. Yet the district court's Memorandum and Order makes reference to "dataset" on nineteen occasions, and only on one occasion does it mention the correct term "database" to incorrectly assert that the terms are interchangeable. ROA.1619. No statutory authority or executive order makes any reference to this change.[7] Plaintiffs' Amended Complaint makes 27 references to the Terrorist Screening Database, and 393 references to "TSDB", (ROA.559). Nowhere in the original complaint (ROA.1646) nor the first Amended Complaint (ROA.15.) did Plaintiffs ever aver the term "Dataset". In all of Plaintiffs' pleadings and submissions, on only one strange and inexplicable instance did the word "Dataset" strangely appear: in paragraph 25 of the Amended Complaint. ROA.567.

7. MS: When referring to the TSDB, the district court asserted that "The Dataset [sic] contains the names of known or suspected terrorists" (ROA.1621), but refrained from mentioning the gist of the controversy: the uncontroverted fact admitted by Defendant FBI that people that do not meet the terrorist criteria and do

[7] This is no trivial mistake. The difference between the actual database and a made-to-order dataset extracted from it threatens to curtail Plaintiffs' right to obtain information on their illegal placement on the TSDB. It is Plaintiffs' contention that Defendants introduced the misleading term "Dataset" in a likely attempt at limiting the information that the latter have a right to discover to prove their claims, such as when were they first placed in the TSDB and under what false premises.

not represent a threat to national security are also placed on the list under 'secret criteria'. ROA.1176 [¶ 8].

8. MS: "The plaintiffs refer to this subset of names—individuals subject to exceptions to the 'reasonable suspicion' standard—as 'non-investigative subjects.'" ROA.1623. The court inappropriately makes it seem as if Plaintiffs made up this term when it even though it is a term coined by Defendants. See ROA.1120.

9. FS: "The plaintiffs allege that Wray, Kable, Mayorkas, and Wainstein have disclosed the Dataset, including the plaintiffs' names, to "at least 18,000 state, local, county, city, university and college, tribal, and federal law enforcement agencies," foreign governments, and various private organizations. ROA.1624. What Plaintiffs alleged was that Defendant FBI through is National Crime Information Center ("NCIC") system distributed the TSDB. ROA.600.

10. MS: Inappropriate demand at a pleadings stage, the district court discarded Plaintiffs' well-pled facts, doubting that Plaintiffs are on the TSDB as they "have not produced, do not possess, and apparently have not seen" the list they allege exists while simultaneously denying as "moot" the Motion to Compel limited discovery on that issue. ROA.1627-1628.

11. FS: The district court erroneously concluded that "[o]nly Calvert and Stewart … (Docket Entry No. 26 ¶ 166), but they do not allege how they obtained this information." ROA.1692. However, paragraphs 397 to 399 and 380 of the

Amended Complaint set forth precisely what the district court stated was not alleged. ROA.638, ROA.642. Furthermore, both Calvert and Stewart submitted uncontested statements under penalty of perjury along the Motion for Preliminary Injunction wherein they elaborated on their original allegations as to how they learned they were on the TSDB. ROA.401, ROA.407.

12. False statement: "Only Calvert and Stewart allege that their names are included on a 'blacklist,'. This is a false statement. All Plaintiffs alleged to be on the TSDB. See summary of claims in footnote 1 in ROA.1080.

13. False statement: The district court erroneously concluded that "The plaintiffs' 'handling code' terminology is drawn from a Baltimore Police Department document". ROA.1629. This is another false representation that Defendants made to the district court that Plaintiffs warned the district court about. The "handling code" terminology comes from United States Department of Justice Audit Report 05-27, portions of which were submitted as Exhibit 5 in support of the Motion for Preliminary Injunction. ROA.381. A graph extracted from that report was included as part of the pleadings. ROA.596. The Baltimore Police Department document was included as Exhibit 10 of the Amended Complaint to demonstrate the instructions Defendants impart to police departments across the nation when they make a NCIC inquiry and detect a positive match to a person in the TSDB. ROA.733. While agents are prohibited from telling innocent Americans they are on the TSDB,

Defendants encourage police departments to "[c]ontact the Watch Center and be guided by their directions", and "conduct an on-scene investigation". ROA.735.

14. FS: The district court adopted Defendants' false assertion that "[T]he plaintiffs refer to this subset of names—individuals subject to exceptions to the "reasonable suspicion" standard—as "non-investigative subjects." ROA.1623. The term "non-investigative subjects" is contained in USDOJ's and OIG's audit reports of the TSC. ROA.1120.

15. FS: The district court erroneously concluded as well that "[t]he plaintiffs' alleged harm is not only undefined, it is not traceable to the defendants' conduct." ROA.1630. This conclusion is geared at challenging the standing traceability requirement. The Amended Complaint clearly establishes how Defendants are responsible not only for illegally and secretly placing Plaintiffs on the TSDB knowing they do not represent a terrorist threat, but also responsible for distributing it throughout the nation and in sixty countries. ROA.565, ROA.577-578, ROA.601.

16. FS: The district court incorrectly asserted that "[t]he plaintiffs primarily argue that the motion to dismiss improperly asks the court to resolve disputed facts." ROA.1629. An examination of the motions to dismiss and the oppositions thereto proves that this is a false statement. Plaintiffs' claims are primarily based on uncontroverted material facts that derive from official

government documents. Conversely, the government did not produce a single document to controvert them.

17. MS: "The plaintiffs acknowledge that the classifications made by the relevant federal agencies, the DHS and the FBI, correspond neither with each other nor with those described by the Baltimore Police Department." ROA.1629. Plaintiffs pleaded the well-documented conflicting versions of the categories in the TSDB to precisely establish the ultra vires, illegal and inconsistent actions by Defendants upon handling the TSDB exceeding the legal authority contained in HSPD-6. ROA.723.

18. FS: "The plaintiffs' alleged harm is not only undefined, it is not traceable to the defendants' conduct" and "[t]he allegations that the contents of the blacklist have been disclosed to others do not sufficiently plead the plaintiffs have suffered a cognizable injury-in-fact." ROA.1630. A cursory review of the Amended Complaint corroborates the falsity of this statement because it clearly alleges that Defendants FBI, Wray and Kable are responsible for the inclusion and maintenance of names in the TSDB. ROA.565, ROA.567, ROA.568, ROA.582, ROA.583.

19. FS: "While the interests Targeted Justice seeks to protect are "germane" to its purpose, it has not pleaded facts demonstrating that its members would otherwise have standing to sue in their own right." ROA.1630. On at least 125 occasions throughout the complaint, the pleadings read: "Plaintiffs and TJ

Members", making it clear that Plaintiffs and TJ members are in the same position as victims of Defendants' illegal conduct. See e.g, ROA.567-569.

20. FS: "The complaint here alleges that the defendants are using vast power to regularly broadcast messages directly into the minds of individuals who appear to have little in common other than the belief that they are targets of a government conspiracy." ROA.1628. This is a false statement because nowhere in the complaint do Plaintiffs allege that Defendants perpetrate on them the patented microwave auditory ('Frey') effect. This statement is also misleading because it omits the actual common factor among all plaintiffs crucial to their claims: that they are innocent Americans improperly placed on a terrorist database. ROA.569, ROA.668-669. This statement is also tends to demonstrate the district court's disrespect and prejudice against: Plaintiffs by implying that they hold false "beliefs' about a "government conspiracy". This statement is also misleading because not all Plaintiffs claim to suffer from microwave auditory effect. ROA.632, ROA.636, ROA.645, ROA.646, ROA.659, ROA.652, ROA.657, ROA.662.

21. MS: "The complaint is littered with references to the unlawfulness of government programs that are simply unrelated to the harms the plaintiffs assert." ROA.1628. This statement overlooks four principal claims for relief out of six (First, Third, Fourth and Fifth) that pertain to the uncontroverted facts surrounding the ultra

vires placement of innocent Americans on a terrorist list that is widely circulated throughout the nation among public and private actors.

22. MS: "[T]he Amended Complaint does not allege facts that could show [Ber's] standing to sue." ROA.1630. Plaintiff Ber alleged to be illegally included in the TSDB that is widely distributed through the nation. ROA.632. As such, he established *prima facie* a concrete harm that grants him standing.

This is not an exhaustive list of the erroneous conclusions of fact contained in the district court's decision. It only contains the most salient ones that warrant reversal. Without the false and misleading conclusions of fact listed above, the district court would not have been able to reach the errors of law discussed below.

B. Legal Errors that Warrant Remanding

The district court erroneously concluded it lacked jurisdiction under Article III and that Plaintiffs lacked standing for failure to allege injury-in-fact, erroneously dismissing the Amended Complaint under F.R.Civ.Proc. 12(b)(1). ROA.1627. The district court erroneously concluded that Plaintiffs lacked injury-in-fact. In so doing, the district court expressed: "[t]he court agrees with the defendants that the allegations of the Amended Complaint are fantastical and, on their face, devoid of merit." ROA.1630. In an inappropriate language, the district court also asserted: "The complaint has problems beyond its bizarre and incredible allegations. The plaintiffs lack standing to assert their claims." ROA.1628.

The district court erred upon denying "as moot" the limited discovery Plaintiffs requested on their TSDB status three months before the case's dismissal. ROA.1638. This discovery would have precluded from the district court from concluding that Plaintiffs lacked standing.

The district court erred upon refusing to take judicial notice of uncontroverted, official documents, most of which were generated by defendants themselves. "While the court may take judicial notice of the existence of these records, it cannot take notice of the facts they assert—which is what the plaintiffs desire". ROA.1627. By denying unopposed motions to take judicial notice of uncontroverted, official documents that buttressed Plaintiffs' pleadings deeming them as "hearsay". ROA.1627.

Furthermore, the district court erroneously concluded that Plaintiffs failed to state a claim, dismissing under F.R.Civ.Proc. 12(b)(6). ROA.1633.

The district court erroneously concluded that Targeted Justice lacked associational standing. ROA.1630.

The district court failed to adjudicate the Declaratory Judgment claims requesting that the court declare illegal the practice of including innocent Americans such as Plaintiffs on the TSDB, disseminating the TSDB with false information labeling Plaintiffs as suspected terrorists, and the request to have them removed from the list.

The district court failed to adjudicate or even mention the Writ of Mandamus against the OCD.

The district court erroneously concluded it lacked personal jurisdiction over the ICD in order to dismiss Plaintiffs' Bivens' claims. ROA.1632.

Another error of law is the denial as 'moot' of the Motion to Compel Limited Discovery on Plaintiffs' TSDB status. ROA.1638.

SUMMARY OF THE ARGUMENT

The district court's decision warrants dismissal. It reaches factual conclusions contrary to the well-pled facts of the Amended Complaint. The district court failed to accept as true all well-pled and uncontroverted facts of the Amended Complaint, reading them in the light most favorable to Plaintiffs-Appellants.

The Amended Complaint sufficiently sets forth Plaintiffs' and TJ Members' *prima facie* claims of injury-in-fact stemming from the inclusion of their names in the TSDB labeling them as 'suspected terrorists' and its subsequent extensive distribution to third parties nationwide. Under Supreme Court precedent, a person labeled 'suspected terrorist' in front of third parties suffers a concrete harm that produces injury-in-fact required for Article III standing.

The Amended Complaint' well-pled facts stand uncontroverted. They not only establish the ultra vires classification of Plaintiffs as suspected terrorists, but also trace it to Defendants' conduct.

Plaintiffs alleged six claims that include Declaratory Judgment, Mandamus and Injunction surrounding the illegal placement of innocent Americans in the TSDB.

The district court's decision warrants reversal because it did refrained from addressing Plaintiffs' injury-in-fact in the context of being falsely labeled as domestic terrorists in violation of their constitutional rights.

Plaintiffs have pled sufficient injury-in fact to confer Article III standing and vacate the district court's July 11, 2023 Memorandum and Order.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal for failure to state a claim under Rule 12(b)(1) and Rule 12(b)(6). *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011).

De novo review is appropriate for the district court's dismissal of the Declaratory Judgment. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891 (5th Cir. 2000).

De novo review is appropriate for the district court's dismissal of the Writ of Mandamus. *Mendoza-Tarango v. Flores*, 982 F.3d 395 (5th Cir.2011).

De novo review is appropriate for the district court's denial of an Injunction. *Whirlpool Corporation v. Shenzhen Sanlinda Electrical Technology*, 2023 WL 5498069, ---F.4th-- (5th Cir. 2023).

De novo review is also appropriate regarding the district court's determination of its lack of personal jurisdiction over individual-capacity Defendants-Appellees. *Fielding v. Hubert Media*, 415 F.3d 419 (5th Cir.2005).

A district court's denial of a plaintiff's request for jurisdictional discovery is reviewed for abuse of discretion. *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014).

Abuse of discretion standard applies to the review of the district court's refusal to take judicial knowledge of the documents. *Taylor v. Charter Medical Corp*., 162 F.3d 827 (5th Cir. 1998).

Abuse of discretion review applies as well as the district court's decision to change the venue of the case. *In Re: Horseshoe Entertainment*, 337 F.3d 429 (5th Cir. 2003).

ARGUMENT

I. F.R.Civ.Proc. 12(b)(1)

Nowhere in the Memorandum and Order did the district court include the following (or a similar) citation: "When deciding a motion to dismiss for want of standing, the trial court must "accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 495 (1975); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

A complaint must contain sufficient factual matter, accepted as true, to state "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plausibility does not equate to possibility or probability; it lies somewhere in between. *Id.*, 556 U.S. at 663. Plausibility simply calls for enough factual allegatio ns to raise a reasonable expectation that discovery will reveal evidence to support the elements of the claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Even if it strikes the court that actual proof of the asserted facts is improbable, and that recovery is unlikely, a well-pleaded complaint may proceed. *Missouri v. Biden*, 2023 WL 2578260, 8, --- F.Supp.3d ---- (5th Cir. 2023).

Plaintiffs must allege facts that support the elements of the cause of action in order to make out a valid claim." *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152–53 (5th Cir. 2010). The notice pleading requirements of F.R.Civ.Proc. 8 and case law do not require an inordinate amount of detail or precision." *Missouri v. Biden*, *supra*. Further, "a complaint need not pin plaintiff's claim for relief to a precise legal theory. F.R.Civ.Proc. 8(a)(2). "Courts must focus on the substance of the relief sought and the allegations pleaded, not on the label used." *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013).

Although Plaintiffs bear the burden of establishing jurisdiction, they are only required to present *prima facie* evidence. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, (2016); *Luv n' care, Ltd. v. Insta–Mix, Inc.*, 438 F.3d 465, 469 (5th Cir.), *cert.*

denied, 548 U.S. 904 (2006). All relevant factual disputes must be resolved in the plaintiff's favor. *Spokeo, supra*.

"When standing is challenged on the basis of the pleadings, [the Court] must accept as true all material allegations of the complaint and ... construe the complaint in favor of the complaining party." *Ass'n of Am. Physicians & Surgeons v. Tex. Med. Bd*., 627 F.3d 547, 550 (5th Cir.2010). General factual allegations of injury resulting from the defendants' conduct suffice at the pleading stage, or on a motion to dismiss, the Court must presume that general allegations embrace those specific facts that are necessary to support the claim." *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir.2009).

The "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992) (citations omitted); *Gilbert v. Donahoe*, 751 F.3d 303, 312 (5th Cir. 2014).

The injury-in-fact requirement requires a plaintiff make a showing of having suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical. *Missouri v. Biden, supra*, at p. 10.

To establish traceability, a plaintiff must show a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv. Prot. Corp*., 503 U.S. 258, 268 (1992).

The redressability element of the standing analysis requires that the alleged injury is "likely to be redressed by a favorable decision." *Lujan, supra*, 504 U.S. at 560–61.

A. Plaintiffs alleged Injury-in-Fact

Despite the mandatory, exhaustive character of the controlling standard demanding to take as "true all well-pled facts and read the complaint in the light most favorable to plaintiffs", the only statement that the district court included in the entire decision, devoid of any citation and that barely echoes it was the following: "The court acknowledges it is required to take the well-pleaded complaint allegations as true." ROA.1629.

As discussed above, the district court the Court adopted erroneous conclusions of the fact, omitted relevant information and misrepresented some of the pleadings to reach its conclusion. Conversely, the district court accepted as true the false

contentions that Defendants included in their Motion to Dismiss and incorporated some of them into its decision, even though Plaintiffs had debunked them in detail in their replies.

"Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and explained that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact." *TransUnion LLC v. Ramirez, supra*, —— U.S. ——, 141 S. Ct. at 2220 (citations omitted).

In *TransUnion LLC*, *supra*, a credit reporting company disseminated to third parties such as banks and car dealerships credit reports labeling plaintiffs as "suspected terrorists". Defendant TransUnion later alleged it was a mistake, but the information sharing to third parties transpired for about six months. Consequently, Plaintiff Ramirez was denied a loan in a new car. The Supreme Court held that plaintiffs had standing because they sustained a concrete harm by concluding that "various intangible harms—like reputational harms—can also be concrete" injuries under Article III. *TransUnion LLC, supra*, 141 S.Ct. at 2200. Thus, the Court held that falsely labeling a person as a suspected terrorist and disseminating that information to third parties produces sufficient injury-in-fact to confer standing.

"The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo, supra*, 578 US at 341, 342.

"Congress' failure to enact a redress statute does not deprive a plaintiff from asserting a claim. Congress' creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than, for example, Congress's enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment." *Transunion LLC, supra,* 141 S.Ct. At 2205.

In this case, Plaintiffs clearly alleged that they are being wronged because of Defendants' illegal inclusion of them in the TSDB under a secret exception to the 'reasonable suspicion' standard and its subsequent and constant dissemination to third parties through the NCIC. Pursuant to the Supreme Court's holding in *TransUnion*, *supra*, Defendants' disclosure to third parties that Plaintiffs and TJ Members are suspected terrorists generates sufficient injury-in-fact to grant them Article III standing.

Despite the Supreme Court's clear language in *TransUnion*, the district court erroneously concluded:

> "TransUnion does not apply to this case. In *TransUnion LLC v. Ramirez,* the parties stipulated that TransUnion maintained incorrect credit report information for all class plaintiffs. The Court held that those plaintiffs whose incorrect credit information was not distributed to third parties did not suffer "concrete harm." (Citations omitted). ROA. Fn2 at 13.

Contary to the plaintiffs in *TransUnion*, the Plaintiffs in this case do sustain continuous harm from the constant false and defamatory publication to third parties that they are 'suspected terrorists.'

Despite the Supreme Court's clear language in *TransUnion LLC, supra,* the district court expressed that "[t]he allegations that the contents of the blacklist have been disclosed to others do not sufficiently plead that the plaintiffs have suffered a cognizable injury-in-fact." ROA.1630. This conclusion constitutes an incorrect conclusion of law inconsistent that warrants reversal.

Plaintiffs' Amended Complaint also meets the traceability of their harm to defendants, complying with the second standing requirement: Defendants –not the National Park Service or any other official or instrumentality of the United States--illegally place them for life in the TSDB labeling them as suspected terrorists, that is continuously distributed to third parties across the nation and around the world. It is "'substantially probable that the challenged acts of the defendant, not of some absent third party' caused [and continues to cause] the injury alleged." *Ass'n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 513 (D.D.C. 2021), *aff'd sub nom*. Ass'n of Am. *Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028 (D.C. Cir. 2022).

Finally, Plaintiffs' claims for relief clearly comply with the redressability element of the standing analysis. If Defendants are ordered to stop their

unconstitutional and unauthorized inclusion of innocent Americans such as Plaintiffs and TJ Members in the TSDB, they will no longer suffer the concrete harm that they allege derives from the distribution of false information about them labeling them as suspected terrorists.

The pleadings of the Amended Complaint firmly establish that plaintiffs have been concretely harmed by Defendants. The uncontroverted facts upon which Plaintiffs derive their injury-in-fact from where all other claims rise. To wit: their inclusion pursuant to secret criteria on a terrorist database that is widely disseminated to hundreds of thousands –if not millions—of third parties working in the government, corporations and organizations that make up everyday life.

Plaintiff have alleged sufficient personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Warth v. Seldin, supra*, 422 U.S. at 498–99.

The district court's decision warrants reversal because it mischaracterized the pleadings to reach an erroneous outcome. In so doing, it failed to adhere to long-standing court precedent that called for the denial of both motions to dismiss.

B. Jurisdictional Discovery

The district court abused its discretion when refusing to grant the limited discovery requested regarding Plaintiffs' TSDB status. ROA.888. On prior cases

involving actual KSTs, the district courts have either granted counsel access to examine the TSDB or requested to inspect it in camera. For three months, the district court failed to adjudicate the matter, preventing Plaintiffs from seeking revision from this Court prior to the Court's dismissal. See *Elhady v. Kable, supra* (Counsel allowed to review TSDB), *Kovac v. Wray*, --F4th--,2023 WL 2430147 (5th Cir.)(District court held *in camera* review).

As stated above, the district court erroneously concluded that Plaintiffs failed to plausibly plead that they were on the TSDB, "they lack standing to pursue claims of harm based on their alleged inclusion in such a list." ROA.1628. Plaintiffs posit that the district court refused to order the limited discovery because the information on their TSDB status as NIS in handling codes 3 and 4 would have precluded dismissal. This is likely the reason why the district court incorrectly concluded that Calvert and Stewart had not alleged how they had learned they were on the TSDB. ROA.1630.

The district court's denial of discovery constitutes a clear abuse of discretion as it tends to indicate it had decided to dismiss the Amended Complaint and thus could not allow Plaintiffs to discover evidence that could jeopardize that result.

C. Court erred in refusing to take Judicial Notice

Upon ruling on a motion to dismiss, Courts "…must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on

Rule 12(b)(6) motions to dismiss, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007).

The courts may rely upon "documents incorporated into the complaint by reference and matters of which a court may take judicial notice"—including public records. *Missouri v. Biden*, *supra*, *citing Norris v. Hearst Tr*., 500 F.3d 454, 461 (5th Cir. 2007). It is proper for the court to take judicial notice of matters of public record. *Id.; Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011).

The district court also erred upon refusing to take judicial notice of uncontroverted, public, official documents that Plaintiffs submitted in support of their pleadings and arguments asserting they constituted 'hearsay'. ROA.1627. In so doing, the district court incorrectly averred that "[w]hile the court may take judicial notice of the existence of these records, it cannot take notice of the facts they assert—which is what the plaintiffs desire". *Id*.

Along the complaint, Plaintiffs submitted as exhibit 2 of the complaint a statement under penalty of perjury of former TSC director Timothy Groh submitted in *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019), *rev'd* 993 F.3d 208 (2021), admitting that there are persons on the TSDB that do not meet the terrorist criteria, do not represent a terrorist threat and are not screened as such. See footnote 3 at ROA.694 and footnote 7 at ROA.697. Coupled with the limited discovery requested,

this document is enough not only to overcome the motion to dismiss threshold but could even meet the summary judgment standard in favor of Plaintiffs. The district court made no reference to it, even though it had an obligation to do so.

Aside from the exhibits included along the Amended Complaint (ROA.683) and the Motion for Preliminary Injunction, (ROA.348), on May 22, Plaintiffs asked the court to take judicial notice of uncontroverted, official such as, *inter alia*: Defendant FBI whistleblower testimony regarding the improper swelling of the TSDB through the illicit classification of innocent Americans as domestic terrorists. ROA.1201. Plaintiffs also asked the court to take judicial notice of Defendant Garland's memorandum instructing the FBI to infiltrate school meetings and Catholic churches in search for domestic terrorists. ROA.1204.

The documents Plaintiff sought to have the Court take judicial notice of are relevant, germane, authentic, uncontroverted, official government documents that tend to buttress Plaintiffs' contention that Defendants engage in *ultra vires* and illegal conduct by placing innocent Americans on the TSDB.

It constitutes an abuse of discretion that warrants reversal for the district court to have refused to take judicial knowledge of the documents filed with the court.

In conclusion, Plaintiffs' well-pled complaint set forth sufficient elements of injury-in-fact that confers them Article III standing to sue.

II. F.R.Civ.Proc. 12(b)(6)

The district court's dismissal under Proc.12 (b)(6) also warrants reversal because the Court evaded its responsibility to analyze and discuss all the claims of the Amended Complaint.

A Rule 12(b)(6) dismissal will not be affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

A motion to dismiss pursuant to Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). "[W]hen standing is challenged on the basis of the pleadings," 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). Dismissing the complaint "is not appropriate unless the plaintiff[s'] pleadings on their face show, beyond a doubt, that the plaintiff[s] cannot prove any set of facts sufficient to entitle [them] to relief." *Motient Corp. v. Dondero*, 529 F.3d 532, 535 (5th Cir. 2008).

To survive a motion to dismiss, a complaint must contain sufficient factual matter which, when taken as true, states "a claim to relief that is plausible on its face." *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018).

Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Id.*, quoting *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011).

In its Memorandum and Order the district court only stated: "The court acknowledges it is required to take the well-pleaded complaint allegations as true and agrees with the defendants that the plaintiffs clearly lack standing," leaving out "in the light most favorable to Plaintiffs." ROA.1629. Contrary to precedent, what the district court chose to read in the most favorable light were Defendants' unsupported and controverted contentions contained in their Motions to Dismiss.

A. Plaintiffs' Plausible Claims

The District Court failed to address the merits of Plaintiffs' Declaratory Judgment and Injunctive claims seeking to enjoin Defendants from violating the Constitution, the Administrative Procedure Act and the Privacy Act. Likewise, it did not discuss the Writ of Mandamus. For this reason, the decision warrants reversal and remand for the adjudication of these claims.

Declaratory Judgment

The district court disregarded Plaintiffs' requests for Declaratory Judgment and for Permanent Injunction. Plaintiffs specifically asked the Court to declare it illegal for defendants to include any innocent American like them in the TSDB under

a secret exception and to order also asked for the handling codes 3 and 4 of non-investigative subjects be eliminated as they constitute Defendants' *ultra vires* exercise of authority. Plaintiffs also requested the court to declare that under the Privacy Act, Defendants are precluded from disseminating false information labeling Plaintiffs as suspected terrorists.

Permanent Injunction

Parties are entitled to sue for injunctive relief against federal officials in their official capacity for actions beyond their statutory authority. In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), the Supreme Court held that Plaintiffs can sue officials in federal court for an injunction barring them from violating the Constitution. *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

Writ of Mandamus

Federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). *In re Paxton*, 60 F.4th 252, 255 (5th Cir. 2023). One such writ is mandamus, an extraordinary remedy used to correct "a judicial usurpation of power" or a "clear abuse of discretion." *In re Paxton*, s*upra, citing Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004).

Before the writ can issue, three conditions must be met: (1) the petitioner must show his right to the writ is clear and indisputable; (2) the petitioner must have no

other adequate means of obtaining relief; and (3) the issuing court must be satisfied in its own discretion that the writ is appropriate under the circumstances. *Cheney*, *supra*, 542 U.S. at 380–81. Those stringent standards are satisfied here. Paxton

Violating a non-discretionary duty necessarily creates a clear right to relief because Defendants lacked authority to deviate from that duty. *Id.*

The district court's dismissal warrants reversal and remand for the appropriate adjudication of all claims.

III. Targeted Justice Has Associational Standing

If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *Warth v. Seldin, supra*, 422 US at 515.

"An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Association of American Physicians & Surgeons, Inc. v Texas Medical Board,* 627 F.3d 547 (5th Cir 2010).

An association can file an equitable action for declaratory and injunctive relief if its members meet the injury-in-fact criteria.

Throughout the lawsuit, on at least occasion, the pleadings read: "Plaintiffs and TJ Members…" TJ members' claims were included with, and equated to Plaintiffs' claims as it pertains to the first five causes of action. There is no room for doubt that the pleadings reflect that Targeted Justice's membership's claims are similar to those jointly alleged with Plaintiffs, establishing standing.

IV. Individual Capacity Defendants and Bivens

Erroneously asserting that "[n]o allegations in the complaint suggest that the individual-capacity defendants reside in Texas or that they directed suit-related conduct specifically to Texas," the district court inappropriately concluded that it lacked personal jurisdiction against ICD.

Plaintiffs get to choose where to file their lawsuits from multiple permissible forums. In suits against the federal government or officials, Congress authorizes plaintiffs to bring suit in their district of residence. *Texas v. Garland*, 2023 WL 4851893, 12, ---F4th—, (5th Cir. 2023).

Upon concluding that it did not have personal jurisdiction over defendants, the district court entered into an inapplicable analysis, as if ICD were private persons.

The district court's analysis is flawed. ICD's actions in violation of established law impact national policy and violate the civil rights of innocent Americans living

across the nation. As such, federal courts have jurisdiction to adjudicate cases filed in Plaintiffs' venue such as this one.

V. Plaintiffs Were Denied Basic Fairness

The procedural irregularities of this case coupled with the clearly erroneous conclusions of fact and law indicate that Plaintiffs were denied a fair adjudication of their claims.

The facts set forth in this brief tend to demonstrate that the district court held an adverse bias against Plaintiffs that resulted in the curtailment of their rights as litigants and culminated in the severely flawed decision warranting reversal.

Plaintiffs challenge the District Court's *sua sponte* transfer to the Houston Division and request this Court reverse it. The transfer was unjustified, no party asked for it, Plaintiffs opposed it and even Defendants acknowledged that the venue was correct. Unrequested change of venue constituted an abuse of discretion that warrants reversal because there was no articulated reason or good cause for it. Neither the interests of justice nor convenience of the parties justified the transfer.

Once transferred to Houston, the Court did not issue a Rule 16 Order. Motions went unresolved for months, declared "moot" by reason of dismissal. Even when motions went unopposed such as the Motions for Judicial Notice, the district court disregarded them in violation of its own procedures or denied them against Court precedent.

Plaintiffs' motions went unresolved for months while Defendants' extension of time to reply to the Motion for Preliminary Injunction, curtailing Plaintiffs' right to duly oppose it, was granted in an expedited two days. ROA.431.

After weeks of unresolved motions, Plaintiffs reminded the court of their pendency, upon opposing yet another extension requested by Defendants. ROA.1550.

Other indication of the district court's bias against Plaintiffs is that nowhere in its Memorandum and Order does it make any direct reference to the two Oppositions to Motion to Dismiss, the Surreply to the Opposition to Preliminary Injunction they filed. For this reason, Plaintiffs individually listed their implicit denials in the Notice of Appeal.

Another instance that demonstrates disparate treatment on the part of the district court towards Plaintiffs is that for three months it refused to adjudicate Plaintiffs' limited discovery requests to corroborate their TSDB status. ROA.888. This was an important matter, as the Court ultimately dismissed the case on jurisdictional grounds concluding that plaintiffs had not established the injury-in-fact that derives from being publicly labeled a suspected terrorist.

The most convincing indication of the district court's prejudice against Plaintiffs lies in the false statements and misrepresentations it adopted in its opinion to justify the Amended Complaint's dismissal. Aside from adopting the

condescending and pejorative "fantastical" language used by defendants, the district court uncharacteristically took the disrespectful language a step further such as when it expressed that "the complaint is 'littered with…'. ROA.1628. This uncharacteristic choice of words from the district court used against Plaintiffs demonstrates a prejudiced animus. After an exhaustive search and review of the district court's previous decisions, Plaintiffs could not find a single case where the district court treated litigants with such objectionable language.

Finally, within one day of Individual Capacity Defendant's filing of their reply to their Motion to Dismiss, the district court issued its judgment.

The district court's deviation from established procedure affected Plaintiffs' right to petition for redress of grievances and equal access to justice.

Plaintiffs ask the Court to examine the procedural irregularities set forth above and those that emerge from the record and upon adjudicating this matter, order the case to be assigned to be remanded to the venue where Plaintiffs correctly chose to file it.

CONCLUSION

HSPD-6 was supposed to be a law-enforcement tool to protect this great nation. Instead, it has been turned into a weapon of the government to curtail dissention. The last paragraph of HPSD-6 expresses those good intentions that went amiss in its implementation:

> Looking at the faded names of Hancock and Adams and Jefferson, Franklin, and others, you can better see the bravery behind the stirring words declaring independence. It was one thing to nod in agreement as the text was read and approved. It's quite another to take the quill and add your name, becoming at that instant the enemy of an empire. And each of the signers, as his pen moved across the page, had not only reached a great turning point in his own life but in the life of the world. The true revolution was not to defy one earthly power but to declare principles that stand above every earthly power, the equality of each person before God and the responsibility of government to secure the rights of all. ROA.724.

Plaintiffs respectfully request that this Court stand for these admirable values and consequently REVERSE the district court's dismissal of Plaintiffs' Amended Complaint, remand the case to the Victoria Division where the case was originally filed and order Defendants to immediately produce for Plaintiffs' inspection a complete, unaltered and unredacted version of the TSDB's handling codes 3 and 4 categories.

Respectfully submitted,
Date: September 7, 2023

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CERTIFICATE OF COMPLIANCE

This document complies with type-volume limits of Fed. R. App. R. 32(7)(b) because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 13,000 words.

This complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font and the footnotes in the same font, 12-point typeface.

/s/ Ana Luisa Toledo
Ana Luisa Toledo

CERTIFICATE OF SERVICE

I hereby certify that, on September 7, 2023, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ Ana Luisa Toledo
Ana Luisa Toledo