

No. 23-20342

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

TARGETED JUSTICE, INCORPORATED; WINTER O. CALVERT; DR. LEONID BER; DR. TIMOTHY SHELLEY; KAREN STEWART; ARMANDO DELATORRE; BERTA JASMIN DELATORRE; J. D., A MINOR; DEBORAH MAHANGER; L. M., A MINOR; LINDSAY J. PENN; MELODY ANN HOPSON; ANA ROBERTSON MILLER; YVONNE MENDEZ; DEVIN DELAINEY FRALEY; SUSAN OLSEN; JIN KANG; JASON FOUST; H. F.,
Plaintiffs-Appellants,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER WRAY, DIRECTOR OF FEDERAL BUREAU OF INVESTIGATIONS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; CHARLES KABLE, JR., DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST SCREENING CENTER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; SECRETARY ALEJANDRO MAYORKAS, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; KENNETH WAINSTEIN, DEPARTMENT OF HOMELAND SECURITY'S UNDER SECRETARY FOR INTELLIGENCE AND ANALYSIS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,
Defendants-Appellees

MOTION TO STRIKE APPELLANTS' NONCONFORMING REPLY BRIEF

November 8, 2023

Ana Luisa Toledo
PO Box 15990
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Counsel for Plaintiffs-Appellants

MOTION TO STRIKE DEFENDANT-APPELLEE’S REPLY BRIEF

TO THE HONORABLE COURT:

COMES NOW the Plaintiffs-Appellants, through the undersigned counsel, and respectfully set forth and request:

1. On November 6th, 2023, Defendants-Appellees’ filed a reply brief that should be stricken from the record as it does not conform to the provisions of 5th Cir. R. 28.2.1, Rule 34 of the Federal Rules of Appellate Procedure and infringes on the duty of candor to the Court.

2. 5th Cir. R. 28.2.1 demands that counsel certify a “complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation, specifying a list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate.” (Emphasis ours).

3. Devoid of any signature as a certification to any court requires, the statement included in Defendants-Appellees’ Reply Brief reads as follows: “A certificate of interested persons is not required, as defendants-appellees are governmental parties. 5th Cir. R. 28.2.1.”

4. For the reasons set forth below, Defendants-Appellees’ certification is deficient and compels that their brief be stricken from the record.

5. First, the ‘Certificate of Interested Persons’ does not contain counsel’s electronic signature required in any certification that must be included in any certification made to the Court.

6. Second, the certification incorrectly asserts that none is required, “as defendants-appellees are governmental parties”. *see* Rb.ii. Both the official capacity and the individual capacity defendants are not considered “government” for 5th Cir. R. 28.2.1’s purposes. While it is correct that defendants FBI, DHS are deemed “governmental parties”, the official capacity defendants must be listed in the certification of interested parties to the case, as they have done in prior cases.

7. Furthermore, the Supreme Court has determined that officials sued for injunctive relief in their official capacities – such as in this case-- are “persons” subject to liability for civil rights violations under Section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 91 (1989).

8. Third, counsel for official capacity defendants in prior cases have correctly submitted 5th Cir. R. 28.2.1’s certification in prior similar cases before this Court. Appellants request that this Court take judicial notice of the “Certificate of Interested Persons” included in recent proceedings where some of the same defendants coincide with the ones in this case. To wit: Appeal number 20-10995, *Ghedi v. Mayorkas* and Appeal number 23-10284, *Kovac v. Wray*, (Examples Included as Exhibits 1 and 2 of this motion). Counsel in this case overlap with those

who appeared on behalf of Defendants-Appellees in both examples set forth above, where they complied with 5th Cir. R. 28.2.1's provisions, demonstrating familiarity with their legal obligation thereunder, and an intentional failure to comply with it.

9. The fourth reason why the 'certification' is deficient and warrants the striking of the brief stems from the fact that Defendants-Appellees also appear in their individual capacity. Individual capacity defendants are not deemed "governmental parties". Inasmuch as they could be held personally liable should Plaintiffs-Appellants succeed on the merits of this case; their personal assets could be affected. "Personal-capacity suits, ... seek to impose individual liability upon a government officer" for civil rights violations. *Hafer v. Melo*, 502 US 21, 25 (1991). Therefore, all individual capacity defendants and their respective spouses or partners, if applicable, had to be listed as "interested parties" in Defendants-Appellants' certificate of interested persons.

10. Furthermore, not only do counsel for Defendants-Appellees have an obligation to include in the certification any other person such that has joint vested financial interests with any of the individual capacity defendants. The rule specifies this includes: "a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation."

11. Defendants-Appellees disregarded their obligation to set forth the private persons or entities with vested financial interests on this Appeal. Plaintiffs-Appellants' Amended Complaint identified some private parties that may potentially have a vested financial interest if this Court declares illegal the inclusion of non-terrorists on a terrorist database such as the Leidos Corporation, InfraGard and Citizen Corps. ROA.589, ROA.600. Consequently, Defendants-Appellees must certify to this Court the names of all private persons and entities that financially benefit from placing non-terrorists on a terrorist database.

12. Given the national implications of this case, it is likely the list of persons and entities that meet these "interested persons" criteria are significant. If there are no additional private interested parties, counsel must certify this fact as well under their signature.

13. Another reason why Defendant-Appellees' certification does not conform to 5th Cir. R. 28.2.1 because it excludes people the rule expressly directs to be listed, such as the Plaintiffs-Appellants and the attorneys for all parties.

14. Defendants-Appellees' and their counsel's failure to submit a legally compliant certification of interested persons pursuant to 5th Cir. R. 28.2.1 renders their reply brief unacceptable and warrants it be stricken from the record as it interferes with this Court's responsibility to screen for any potential conflict of interest. Defendant-Appellant's noncompliance with the rule thus interferes with

Plaintiffs-Appellees right to due process by preventing the Court from detecting at an early stage of the case any potential conflict of interest.

15. There is yet another significant violation by Defendants-Appellees that warrants that the Court strike its Reply Brief. On October 28th, 2023, Plaintiffs-Appellants discovered that roughly two weeks after the filing of the complaint, on January 31, 2023, official capacity defendant Charles Kable retired as the Director of the Terrorist Screening Center. Under Federal Rule of Appellate Procedure 46, Federal Rule of Civil Procedure 11, and counsel's duty of candor towards this Court required that they substitute the official capacity defendant that is no longer in office.

16. Consequently, counsel for Defendants-Appellees also infringed their obligations under 5th Cir. R. 28.2.1 by failing to include Mr. Michael Glasheen in the certificate of interested persons. Although it seems Mr. Glasheen became the TSC director on June 26, 2023, Defendants-Appellees did not inform the District Court either and continued to file motions without substitution of official capacity defendant Kable for Mr. Steven Glasheen who substituted him, in violation of F.R.Civ.Proc. Rules 11 and 25(d) and their duty of candor to the court.

17. In light of the above, Defendants-Appellees' "Certification of Interested Persons" is intentionally deceptive and violates counsel's duty to "*ascertain and certify the true facts to the court.*" 5th Cir. R. 28.2.1(a). Defendants-Appellees' experienced counsel's deviation from this precept is inexcusable and calls for the

imposition of the sanctions the Court deems necessary to prevent any such conduct in the future.

WHEREFORE, Plaintiffs-Appellants request that this Court be apprised of the facts set forth herein and consequently:

- a) Order that Defendants-Appellees brief be stricken from the record for its numerous failures to conform to the rules set forth above.
- b) Impose the sanctions it deems necessary to prevent future deviations from this Court's rules and procedures.

RESPECTFULLY SUBMITTED,

Dated: November 8, 2023

/s/ Ana Luisa Toledo

Ana Luisa Toledo
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Houston, TX 77220-1590
(832) 247-3046
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on November 8, 2023, I electronically filed this motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

Dated: November 8, 2023

/s/ Ana Luisa Toledo
Ana Luisa Toledo

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains less than 2,600 words in 14-point Times New Roman font and does not exceed ten pages.

November 8, 2023

/s/ Ana Luisa Toledo
Ana Luisa Toledo

CERTIFICATE OF CONFERENCE

I certify that on November 7, 2023, I conferred with counsel for Defendants-Appellees about the filing of this motion and the remedy to be sought, and Mr. Graham White responded on their behalf that they opposed this motion.

November 8, 2023

/s/ Ana Luisa Toledo
Ana Luisa Toledo

TAB 1

No. 23-10284

EXHIBIT 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Adis Kovac; Bashar Aljame; Abraham Sbyti;
Suhaib Allababidi; Fadumo Warsame,
Plaintiffs-Appellants,

v.

Christopher Wray, Director of the Federal Bureau of Investigation, in his official capacity; Charles H. Kable, Director of the Terrorist Screening Center; in his official capacity; Deborah Moore, Director, Transportation Security Redress (OTSR); in her official capacity; Nicholas Rasmussen, Director of the National Counterterrorism Center, in his official capacity; David P. Pekoske, Administrator Transportation Security Administration (TSA); in his official capacity; Kevin K. McAleenan, Acting Commissioner United States Customs and Border Protection; in his official capacity,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney
General*

LEIGHA SIMONTON
United States Attorney

SHARON SWINGLE
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CERTIFICATE OF INTERESTED PERSONS

Adis Kovac, et al. v. Christopher Wray, et al., No. 23-10284

The undersigned counsel of record 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 in order that the judges of this court may evaluate possible disqualification or recusal.

s/Joshua Waldman
Joshua Waldman

Plaintiffs-appellants:

Adis Kovac; Bashar Aljame; Abraham Sbyti; Suhaib Allababidi; and Fadumo Warsame

Defendants-appellees:

Christopher Wray, Director of the Federal Bureau of Investigation, in his official capacity; Charles H. Kable, Director of the Terrorist Screening Center; in his official capacity; Deborah Moore, Director, Transportation Security Redress (OTSR); in her official capacity; Nicholas Rasmussen, Director of the National Counterterrorism Center, in his official capacity; David P. Pekoske, Administrator Transportation Security Administration (TSA); in his official capacity; Kevin K. McAleenan, Acting Commissioner United States Customs and Border Protection; in his official capacity

Counsel:

For plaintiffs-appellants:

Lena F. Masri, Gadeir I. Abbas, Justin Sadowsky, Hannah Mullen, CAIR Legal Defense Fund

For defendants-appellees:

Joshua Waldman, Sharon Swingle, U.S. Department of Justice

TAB 2

No. 20-10995

EXHIBIT 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABDULAZIZ GHEDI,

Plaintiff-Appellant,

v.

ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security;
DAVID PEKOSKE, in his official capacity as Administrator of the Transportation
Security Administration; TROY MILLER, Acting Commissioner, U.S. Customs and
Border Protection; MERRICK GARLAND, U.S. Attorney General;
CHRISTOPHER WRAY, in his official capacity as Director of the Federal Bureau of
Investigation; CHARLES KABLE, IV, in his official capacity as Director of the
Terrorist Screening Center,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF FOR APPELLEES

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Acting Assistant Attorney General

PRERAK SHAH
Acting United States Attorney

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CERTIFICATE OF INTERESTED PERSONS

Abdulaziz Ghedi v. Alejandro Mayorkas, et al., No. 20-10995

The undersigned counsel of record 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 in order that the judges of this court may evaluate possible disqualification or recusal.

s/Joshua Waldman
Joshua Waldman

Plaintiff-appellant:

Abdulaziz Ghedi

Defendants-appellees:

Alejandro Mayorkas, in his official capacity as Secretary of the Department of Homeland Security; David P. Pekoske, in his official capacity as Administrator of the Transportation Security Administration; Troy A. Miller, in his official capacity as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection; Merrick Garland, in his official capacity as Attorney General of the United States; Christopher A. Wray, in his official capacity as Director of the Federal Bureau of Investigation; Charles H. Kable, IV, in his official capacity as Director of the Terrorist Screening Center

Counsel:

For plaintiff-appellant:

Christina A. Jump, Allie J. Hallmark, Alyssa F. Morrison, Constitutional Law Center for Muslims in America

For defendants-appellees:

Joshua Waldman, Sharon Swingle, U.S. Department of Justice