IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TARGETED JUSTICE, INC.; a 501(c)(3) Texas Corporation, et al. Plaintiffs, vs. **MERRICK GARLAND** et al. Defendants.	Case No. H:23-cv-1013

PLAINTIFFS' OPPOSITION TO 'INDIVIDUAL CAPACITY DEFENDANTS' "MOTION TO DISMISS"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

I. Introduction

There is no controversy as to the fact that this case presents the challenge of navigating though unchartered waters. Existing case law falls short in the face of the atrocities that the well-pleaded facts of the Second Amended Complaint ("SAC") present.

However, this case presents the unique opportunity for this Court to use its Article III powers to end the secret blacklist for 300,000 American citizens and legal residents. The lack of legal consequences for the government operatives in the "Program's MKULTRA and COINTELPRO predecessors encouraged the repackaging of those operations into the highly illegal "Program" that Individual Capacity Defendants ("ICDs") enable while acting under color of law.

Seventeen plaintiffs are American citizens; one is a legal resident. Three are children. None is the subject of a criminal investigation. None meet the "reasonable suspicion" criteria to be classified as a terrorist. **Yet Individual Capacity Defendants even refuse to acknowledge that Plaintiffs' names improperly appear in the Terrorist Screening Data Base ("TSDB")**, a list that purports to comprise the names of known and suspected terrorists distributed among 18,000 state, local, county, city, university and college, tribal, and federal law enforcement agencies; 60 foreign governments; 1441 non-government entities including private employment, background check, and credit agencies and approximately 533 private entities. (Complaint ¶ 188.)

Contrary to ICDs representations in the introduction of its motion, in twenty years of existence, the TSDB has never stopped a single act of terrorism.[1] In the context of the well-pleaded facts of the SAC, it can be logically deduced that the TSDB was created for purposes other than

[1] *See* "Motion for Preliminary Injunction" [dkt 14] at page 3 ("Twenty years after its creation, defendant FBI recognizes it is not aware of a single incident of terrorism that the TSDB prevented. (Exh. 4, p. 104, lines 3-8; p. 177, lines 16-22).

preventing terrorism.

Far from the representations that ICDs make to the Court, this case does not entail national security. None of the Plaintiffs are known or suspected terrorists, as they have never encountered additional screening when traveling. SAC ¶¶ 165-166. Furthermore, the TSDB is not a classified document. SAC ¶ 78.

After describing the TSDB and its "No Fly and "Selectee" and "Expanded Selectee" lists, ICDs fail to discuss how the inclusion of innocent American citizens and legal residents such as Plaintiffs on a terrorist list does not amount to a violation of their constitutional rights.

Plaintiffs' pleadings and motions almost satisfy a Federal Rule of Civil Procedure Rule 56 standard even though only a Rule 12 standard suffices at this stage of the case.[2] The uncontroverted, official documents and uncontroverted facts submitted in support of the pleadings place this Court in the advantageous position of being able to corroborate at an early stage of the case the accuracy of the core claims included in the SAC and Motion for Preliminary Injunction.

ICDs' Motion to Dismiss should be denied because it: a) avoids discussing the SAC's fundamental claim which is a plausible one; b) disregards uncontroverted factual allegations; c) sets forth erroneous statements of fact; d) disregards the precedent that supports Plaintiffs' position and e) argues for dismissal based on legal precepts not applicable to the controversies in this case.

Among the Motion to Dismiss' glaring omissions that warrant its denial are the following:

Omission #1: ICD do not discuss the fact that Plaintiffs' principal claim is for Declaratory Judgment asking that the Court declare unconstitutional Defendants' actions under color of law. Namely their knowing, indefinite, and secret inclusion and retention of innocent civilians' names in the TSDB without meeting the "reasonable suspicion" standard to do so.

Omission #2: ICDs do not discuss the illegality of the "secret criteria" adopted and/or implemented by Defendants Wray and used to place non-terrorists in the TSDB, as stated by Samuel Robinson. Dkt. 54 Exhibit 1.

[2] Plaintiffs posit that as it pertains to the request for Declaratory Judgment and Preliminary Injunction regarding the elimination of non-investigative subjects' names from the TSDB, there is no controversy of material fact that precludes this Court from entering orders granting them without further delay.

Omission #3: ICDs do not discuss how Homeland Security Presidential Directive 6 ("HSPD-6" - Exhibit 7 of the SAC) only gives them executive, not Congressional, authority to carry out the Watchlisting of only known and suspected terrorists and not innocent, non-investigative subjects such as Plaintiffs.

Omission #4: ICDs do not discuss how the former Terrorist Screening Center (TSC) Deputy Director Timothy Groh admitted under oath that the TSDB contains as "exception" the names of many people that do not meet the terrorist criteria despite the legal authority for it.

Furthermore, the ICDs also incurred in the objectionable practice of setting forth erroneous statements of fact that could mislead the Court to erroneous conclusions.

An example of this is ICDs' statement asserting that Plaintiffs have a recourse for the removal of their names from the TSDB: "Plaintiffs concede that Congress has created at least some 'alternative remedial structures to address certain harms that may flow from inclusion in the TSDS and delegated control of that structure to the Transportation Security Administration and the TSC.'" (Dkt 60 p. 13). The truth is that existing remedial structures are only available to people classified as suspected terrorists that undergo delays or are prohibited from boarding a commercial aircraft because they are in the "No Fly" (Known terrorist - Handling Code 1) or "Selectee" ("Suspected Terrorists"- Handling Code 2) lists. SAC ¶¶ 197-202.

Plaintiffs alleged that they are not in any of those lists as they have never encountered problems when traveling since they do not meet the "reasonable suspicion" terrorist criteria. SAC ¶ 165. Only the people that encounter problems when traveling are entitled to seek redress through the "alternative remedial structures" in place. SAC ¶ 152. Therefore, contrary to what ICDs assert, none of the Congressionally created remedies to remove their names from the TSDB are available to Plaintiffs.

The uncontroverted facts and documents that Plaintiffs have submitted for the record in this initial stage provide this Court with the necessary basis to DENY both pending Motions to Dismiss, thus deciding to safely continue navigating this case to an ultimate safe harbor of liberty

and justice for all.

II. Summary of Individual Capacity Defendants' 'Motion to Dismiss'

ICDs' arguments for dismissal of the *Bivens* claim contained in the SAC can be summarized as follows:

I. Plaintiffs lack standing.

II. Failure to "plausibly" allege an injury under Bivens.

III. Failure to allege injury traceable to defendants.

IV. The Court lacks personal jurisdiction over defendants.

V. Plaintiffs failed to Plead a *Bivens* cause of Action.

a. New context
b. Special factors
    1. Alternative remedies
    2. National Security/Foreign Policy considerations

VI. Individual Defendants are Entitled to Qualified Immunity, Complaint fails to Establish Constitutional Violation and a violation of clearly established law.

ICDs' arguments for dismissal are inapplicable as most either rely on glaring omissions or incorrect representations of facts.

ICDs did not oppose any of the Declaratory and Injunctive remedies Plaintiffs alleged in the SAC.

III. Applicable Legal Standard

A. Jurisdiction

Federal Rules of Civil Procedure 12(b)(1), 12(b)(2) in a *Bivens* context

Plaintiffs hereby adopt by reference as if it were entirely reproduced herein the arguments regarding dismissal under F.R.Civ.Proc. 12(b)(1), 12(b)(2) and standing contained in "Plaintiffs' Opposition to Official Capacity Defendants 'Motion to Dismiss'" [Dkt. 47].

Dismissal is unwarranted. "[A] complaint must contain sufficient factual matter, accepted

as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Faced with a motion to dismiss under Rule 12(b)(1), a court must take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff. *Russell v. Harris County Texas*, 500 F.Supp.3d 577, 595 (S.D. Tx 2020); *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017); *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020).

A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject matter jurisdiction. *Venable v. La. Workers' Comp. Corp.,* 740 F.3d 937, 941 (5th Cir. 2013).

Furthermore, "Rule 12(b)(6) does not countenance...dismissals based on a judge's disbelief of a complaint's factual allegations" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). **A well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely**". *Id*. (Emphasis ours).

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, in particular, 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); *Funk v. Stryker Corp*., 631 F.3d 777, 783 (5th Cir. 2011).

Standing

Plaintiffs hereby adopt by reference as if it were entirely reproduced herein the argument regarding standing/injury-in-fact contained in "Plaintiffs' Opposition to Official Capacity Defendants 'Motion to Dismiss'" [Dkt. 47].

Article III standing requires: "(1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained

of; and (3) the likelihood that a favorable decision will redress the injury.*" Russell v. Harris County Texas, supra*, 500 F.Supp. at page 595, *quoting Stratta v. Roe*, *supra*, 961 F.3d at 349 and *Croft v. Governor of Tex*., 562 F.3d 735, 745 (5th Cir. 2009).

At this juncture, it is relevant to incorporate by reference the "Motion for Judicial Notice" (dkt. 61) whereby Plaintifffs brought to this Court's attention the Supreme Court's decision in *TransUnion LLC v. Ramirez*, ___US___, 141 S.Ct. 2190 (2021). In that case, the Supreme Court held that "various intangible harms can also be concrete." *TransUnion LLC v. Ramirez*, *supra*, 141 S.Ct. at 2204. "Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. **Those include, for example, reputational harms, disclosure of private information,** and intrusion upon seclusion." (Citations omitted, emphasis ours).

The TransUnion Court held that under longstanding American law, a person is injured when a defamatory statement "that would subject him to hatred, contempt, or ridicule" is published to a third party. *TransUnion LLC v. Ramirez*, *supra*, 141 S.Ct at 2208, quoting *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 13, (1990). **The labeling of Plaintiffs as potential terrorists, drug traffickers, or serious criminals produces a harm with a "close relationship" to the harm associated with the tort of defamation that qualifies as an injury-in-fact.** *Id*. (Emphasis ours).

The publication of false information about a person to third parties is "generally presumed to cause a harm, albeit not a readily quantifiable harm." *Id*. Citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) the Court. noted that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Id*.

B. Plaintiffs' Injuries Redressable Under Bivens

The first time the Supreme Court recognized an implied cause of action under the Constitution of the United States against federal agents was in the context of the protections

enshrined within the Fourth Amendment. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971). In Bivens, the Supreme Court held that even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the constitutional prohibition against unreasonable search and seizures.

The Fourth Amendment of the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "The Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, a violation of the Fourth Amendment occurs when government officers violate a person's "reasonable expectation of privacy." *Id* at 360.

In *Bivens,* the Supreme Court theorized that a right suggests a remedy. Thus it "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 66 (2001).

After the *Bivens* decision, the Supreme Court extended the constitutional implied cause of action in the context of the Fifth and Eighth Amendments of the United States Constitution. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

For standing purposes, therefore, an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. *TransUnion LLC v. Ramirez*, *supra*, 141 S.Ct. at 2205.

Accusing people of a crime or detaining them without probable cause constitutes an unreasonable seizure under the Fourth Amendment. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004).

C. The Court has Jurisdiction over Individual Defendants

A federal court has subject matter jurisdiction over a cause of action when it "has authority to adjudicate the cause" pressed in the complaint. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.,* 549 U.S. 422 (2007). Federal-question jurisdiction exists if a plaintiff's well-pleaded complaint raises a claim that arises under federal law. *Sinegal v. Big Horn Auto Sales*, 2022 WL 799908 (S.D. Texas 2022).

Likewise, general jurisdiction exists under 28 USC § 1331, when suing any federal official for their conduct in office federal courts have exclusive jurisdiction. This extends to public officials sued in their individual capacities such as ICDs.

Individuals have "a right to sue directly under the Constitution to enjoin ... federal officials from violating their constitutional rights." *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979). A plaintiff's choice of venue is to be respected. See *In re TS Tech USA Corp*., 551 F.3d 1320 (5th Cir.); 28 U.S.C. § 1404(a). Since most of the damages alleged occurred within the jurisdiction of the Southern District of Texas, 28 U.S.C. § 1391(b)(2) and (e)(1)(B) support this Court's exercise of the jurisdiction it has.[3]

An individual can bring a suit directly against a federal officer in two circumstances: (1) when the officer acts outside of his or her delegated statutory power; and (2) if the officer's conduct, while statutorily authorized, offends a provision of the Constitution. *Larson v. Domestic & Foreign Exchange Corp*., 337 U.S. 682, 689-91 (1949).

"[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quotations omitted).

[3] Eleven of the eighteen individual Plaintiffs are Targeted Justice members and volunteers that have sustained injury-in-fact and reside within the Southern District of Texas and Targeted Justice is a Texas corporation.

A court cannot impose a heightened pleading standard in *Bivens* actions just because they are high-ranking officials. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). The Supreme Court has asserted it "has never indicated that the requirements for establishing a *prima facie* case… also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.' *Swierkiewicz, supra,* 534 U.S. at 512.

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims". *Id*, citing *Scheuer v. Rhodes*, *supra*. "[T]o measure a plaintiff's complaint against a particular formulation of the *prima facie* case at the pleading stage is inappropriate". *Id*., quoting *Ring v. First Interstate Mortgage, Inc*., 984 F.2d 924, 927 (C.A.8 1993).

D. Plaintiffs' claims are within prior *Bivens* actions and/or call for recognition.

A *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "The purpose of *Bivens* is to deter the *officer*." *FDIC v. Meyer,* 510 U.S. 471, 485 (1994).

The Supreme Court recently noted that Congress had not foreclosed a damages remedy in "explicit" terms and that no "special factors" suggested that the Judiciary should "hesitat[e]" in the face of congressional silence. *Ziglar v. Abbasi*, 582 U.S. 120, 131(2017), quoting *Bivens*, *supra*, 403 US at 392. Thus, courts must "adjust their remedies so as to grant the necessary relief" when "federally protected rights have been invaded." *Id.*

"In appropriate circumstances, a federal court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress." *Davis v. Passman*, 442 U.S. 228, 245, (1979), quoting *Bivens*, *supra*, 403 U.S. at 396.

Although the Supreme Court has expressed that expanding the Bivens remedy is a "disfavored" judicial activity, it has not reneged in emphasizing that "It is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Ziglar v. Abassi*, *supra*, 582 US at 133, quoting *Iqbal*, *supra*, 556 U.S. at 675.

Courts must "adjust their remedies so as to grant the necessary relief" when "federally protected rights have been invaded." *Id.* 582 US at 132, quoting *Bivens*, *supra*, 403 U.S. at 392.

Reiterating the importance and validity of *Bivens* today, the Supreme Court in *Ziglar*, *supra*, 582 US at 134, expressed:

> "[I]t must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose. Bivens does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of Bivens in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."

The Supreme Court has held that faced with a *Bivens* claim, the court must decide if the case before it involves a "new context" that is distinct from the implied causes of action that the Supreme Court has already recognized. *Ziglar v. Abbasi*, 582 U.S. 120 (2017); see also, e.g., *Cantú v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019). One that is "different in a meaningful way from previous Bivens cases decided" by the Supreme Court. *Hernandez v. Mesa,* 140 S.Ct. 735, 743 (2020).

This "new context" analysis entails an evaluation of factors such as: "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the

risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.". *Zieglar v. Abbasi, supra*, 582 S.Ct. at 140.

The Supreme Court in *Zieglar* v. *Abbasi, supra,* also explained that upon deciding on whether to extend Bivens to a new context, the critical inquiry was the following: Is "the Judiciary ... well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed?" *Hernandez v. Mesa*, *supra*, 140 S.Ct. at 755-756, quoting *Zieglar v. Abbasi, supra.*

If the Court concludes the case presents a new Bivens context, the Court must then turn to the "special factors" analysis. And on whether to extend Bivens to a new context, the *Abbasi* Court identified as the critical inquiry: Is "the Judiciary ... well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed"? *Id*.

Despite the Supreme Court's hesitation in recognizing implied Bivens actions in other contexts, it is open to doing so. In *Ashcroft v. Iqbal*, *supra*, 556 US at 676, the Court did not close the door on Bivens new context by expressing: "…so we assume, without deciding, that respondent's First Amendment claim is actionable under Bivens."

Suits against "the individual official for his or her own acts" deter behavior incompatible with constitutional norms, a consideration key to the Bivens decision. *Zieglar v. Abbasi, supra.*

Bivens contexts

The Fourth Amendment of the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons…against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause…"

Searches and seizures of property secretly carried out against American citizens and

residents, without a warrant or with an improper warrant issued under the Foreign Intelligence Surveillance Act ("FISA"), 50 USC 1801-1885C, violate the Fourth Amendment. See **Exhibits 1**, **2** and **3**, and SAC exhibits 12 (FBI) and 13 (DHS). ICDs have publicly acknowledged incurring in the illegal collection of information on Americans.

Furthermore, carrying out the physical and electronic search and seizure of property and electronic data and communications without informing the individual also violates their substantive and procedural due process rights under the Fifth and Sixth Amendments of the United States Constitution.

Illegally adding a person to the TSDB without reasonable suspicion is equivalent to a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment" within society and therefore "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

Just as accusing people of a crime or detaining them without probable cause constitutes an unreasonable seizure under the Fourth Amendment, (*Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004)), so is the labeling of that person as a terrorist given the legal implications that entails.

Nothing is clearer than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry. *Dunaway v. New York*, 442 U.S. 200, 214-215 (1979), quoting *Davis v. Mississippi*, 394 U.S. 721, 726-727 (1969).

The arrest of a person without probable cause constitutes an unreasonable seizure under the Fourth Amendment. *Row v. Johnson Cnty, Tex*., 2020 WL 657684 (N.D.Tex. July 31, 2020).

The wrong of the detention of a person without probable cause continues for the duration of the detention. *Manuel v. City of Joliet III*, 903 F.3d 667, 670 (7th. Cir. 2018).

Pursuant to HSPD-6, a person is only supposed to be included in the TSDB if they meet the regulatory "reasonable suspicion" standard. This requires "articulable facts which, taken together with rational inferences, reasonably warrant the determination" that an individual "is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities." *Kovac v. Wray*, 363 F.Supp.3d 721, 733 (N.D. Tx. 2019).

When "Special factors" militate against the Court's jurisdiction

"[A] Bivens remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress." *Ziglar*, *supra*, 582 US at 135 (citations omitted).

The Supreme Court has not defined the phrase "special factors counselling hesitation". *Ziglar, supra*, 582 US at 136. The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative. *Id*.

The Court's inquiry when assessing the presence of "special factors" to be considered must concentrate on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id*. Therefore, for the court to be in a position to consider "special factor counselling hesitation," the defendant must place it in the position to make such analysis.

"If equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations." *Id*.

"National Security Concerns"

The Supreme Court has observed on numerous occasions that determinations relating to

national security fall within "an area of executive action in which courts have long been hesitant to intrude." *Lincoln v. Vigil,* 508 U.S. 182 (1993). Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." *Christopher v. Harbury,* 536 U.S. 403, 417 (2002).

However, "[t]here are limitations…on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security." *Ziglar*, *supra*, 582 US at 143. "Whatever power the United States Constitution envisions for the Executive ... in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake". *Id*., quoting *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

"National-security concerns must not become a talisman used to ward off inconvenient claims—a "label" used to "cover a multitude of sins." *Ziglar*, *supra*, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). (Emphasis ours). "This 'danger of abuse' is even more heightened given 'the difficulty of defining' the "'security interest' in domestic cases." *Id*., quoting *United States v. United States Dist. Court for Eastern Dist. of Mich*., 407 U.S. 297, 313–314 (1972)).

"The term "national security" lies at the very heart of our country's effort to identify those who would inflict upon the public irretrievable loss and irreparable mass harms." *Elhady v. Kable*, 993 F.3d 208 (2021).

Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U.S.C. § 553(b). *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ----, 140 S.Ct. 2367, 2384 (2020).

There is a balance to be struck between the restraint and judicial action since the "very fact

that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury. *Ziglar*, *supra*, 582 US at 146-147.

F. Qualified immunity

The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, (2001).

Qualified immunity shields Government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights," *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits "may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Government officials are entitled to qualified immunity with respect to "discretionary functions" performed in their official capacities. *Id.*

Whether a defendant can invoke qualified immunity turns on the "objective legal reasonableness" of the official's acts. *Harlow, supra,* 457 US at 819. The reasonableness of official action, in turn, must be "assessed in light of the legal rules that were clearly established at the time [the action] was taken." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987).

The two-pronged inquiry required to assess if the qualified immunity defense prospers entails two questions:

1. Do the facts, viewed in the light most favorable to the plaintiff, show that the conduct violated a constitutional right? *Cunningham v. Castloo*, 983 F.3d 185, 190 (5th Cir. 2020).

2. Was the right at issue clearly established at the time of the alleged misconduct? *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

The plaintiff must show that there was "sufficiently clear" at the time that every reasonable official would have understood that he was violating a right. *Batyokova* v. *Doege*, 994 F.3d 717, 726 (5th Cir. 2021). For the illegality to have been clearly established, it is **not necessary** that "the very action in question has previously been held unlawful." *Anderson, supra,* 483 US at 640.

The "clearly established law" rule is a 'demanding standard". *Roque v. Harvel*, 993 F.3d 325, 335 (5th Cir. 2021). There need not be an exact case "directly on the point" of the unlawfulness alleged, but the illegality of the conduct must be 'beyond debate'. *Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020). "For conduct to be objectively unreasonable in light of clearly established law, there need not be a case directly on point, but 'existing precedent must have placed the statutory or constitutional question beyond debate'. *Tucker v. City of Shreveport*, 998 F.3d 165, 173-174 (5th Cir. 2021).

In the context of assessing the applicability of qualified immunity, federal courts have the power under the Fourth Amendment to promulgate standards to measure "where the reasonableness ends" *Roque v. Harvel*, 993 F.3d 325, 332 (5th Cir. 2020). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna,* 577 U.S. ——(2015) (*per curiam*).

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). A court must then ask whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted." *Saucier v. Katz, supra,* 533 U.S. at 202, 205 (2001).

IV. Argument

A. Plaintiffs have alleged sufficient injury-in-fact to grant them standing.

ICDs begin their dismissal argument by relying on a glaring omission that, if mentioned, would defeat their argument. When describing the pleadings, ICDs skip the discussion of Plaintiffs'

fundamental claim: their improper inclusion in the TSDB. It is precisely this illicit act, its continued daily publication to thousands of people inside and out of the United States, and the consequences of being labeled a suspected terrorist that gives way to the grave constitutional injuries that ICDs are personally liable for. *TransUnion, LLC v. Ramirez, supra.*

This self-serving omission intends to exclude from the discussion the fact that defendants Wray and Kable every day knowingly unleash the chain of events that culminate in Plaintiffs' continuous and uninterrupted irreparable damages that constitute their injuries-in-fact. Namely: the illegal nomination, inclusion, retention and distribution of innocent civilians' names such as Plaintiffs' and TJ Members' in the TSDB's McCarthy lists comprising Handling Codes 3 and 4 categories despite their lack of the required "reasonable suspicion" to do so.

Just like the arrest of persons without probable cause is an illegal seizure of the person in violation of the Fourth Amendment, the illegal inclusion of an innocent civilian in the TSDB constitutes an unconstitutional seizure of their privacy that Plaintiffs request be declared unconstitutional under the Fourth Amendment.

ICDs are jointly liable to Plaintiffs for the constitutional deprivations and irreparable damages they have sustained as a result of their illicit conduct alleged in the SAC and detailed below.

Defendants Wray and Kable

On two occasions prior to the filing of this Complaint, Targeted Justice sent a letter to FBI, DHS and defendants Wray and Kable, first in 2019, demanding an extrajudicial cease and desist of such illegal practice. SAC ¶¶ 45, 69. Plaintiff TJ did not receive any reply thereto. ISC continued the unrestricted implementation of their highly unconstitutional practices.

Individual Capacity Defendants Wray and Kable have created, implemented, and enforced illegal policies that have resulted in the secret inclusion of hundreds of thousands of innocent

civilians in the TSDB. People such as Plaintiffs and TJ Members that do not meet the "Watchlisting Guidance" terrorist criteria. SAC, ¶ 26.

Plaintiffs repeatedly allege in the SAC that their names were added to the TSDB even though they did not meet the requirements to be on the list. They also alleged that Defendants Wray and Kable, under color of law, make the decision to carry out the continuous and widespread publication of the list. SAC ¶ 188.

The Supreme Court has held that being erroneously classified as a terrorist and the subsequent dissemination of that false information to third parties constitutes an injury-in-fact that satisfies Plaintiffs' standing requirement. *TransUnion LLC v. Ramirez, supra*.

Although the pleadings of the SAC are sufficient to deny the Motions to Dismiss, recent events have emerged to prove some of its most important allegations as true. Plaintiffs had asked the Court to take judicial notice of many such facts such as Defendants Wray's and Kable's policies and decisions to coerce FBI agents and offer financial incentives to classify innocent civilians as terrorists. Congressional testimony before the House of Representatives' Weaponization Committee has established that "FBI leadership pressured agents to reclassify cases as domestic violent extremism (DVE), and even manufactured DVE cases where they may not otherwise exist, while manipulating its case categorization system to create the perception that DVE is organically rising around the country." (Dkt. 58 Exhibit 1, page 2).

Just like many of the innocent civilians that whistleblowers recently testified before Congress were improperly classified as domestic terrorists, Plaintiffs and TJ Members allege they were improperly included and presently held hostage within the TSDB as retaliation for exerting their First Amendment rights or for other illicit motives.

Plaintiffs also asked the Court to take judicial notice of the fact that Mr. Gared O'Boyle, one of Defendant FBI's Whistleblowers testifying before Congress, asserted that the decision to

pressure agents to classify innocent people as domestic terrorists came from the high echelons of the agency. On May 18, 2023, Mr. O'Boyle asserted under oath: "*The FBI is set up in a way where line agents like me or line supervisors, even they are not going to be able to accomplish fixing such a vast problem from the inside of the FBI*." See dkt 58 ¶ 13.

Clearly, it is within the purview and authority of Defendants Wray and Kable to stop this illicit conduct they promulgated and enforced in the first place.

Similarly, under the Administrative Procedures Act, it is illegal for Defendants Wray and Kable to enforce a "secret criterion" affecting civilians civil rights. Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U.S.C. § 553(b). *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, supra*.

In a statement under penalty of perjury Defendant FBI agent Samuel Robinson stated that the criteria to place non-terrorists on the TSDB is "secret" See Exhibit 1 of dkt 54. Mr. Robinson provided the statement in support of Official Capacity Defendants' "Motion in Opposition to Limited Discovery" (Dkt. 54).

Plaintiffs posit that it is also an illegal practice that causes them irreparable damages for Defendants Wray and Kable to concoct and implement secret criteria to include and maintain innocent civilians' identities on a terrorist list. This is a deviation from the law that supports Plaintiffs' Bivens claims since both are acting under color of and in violation of law.

In contrast to Mr. Robinson's statement under penalty of perjury, former TSC Deputy Director Timothy Groh also stated under penalty of perjury in *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019), *rev'd* 993 F.3d 208 (2021), the following:

> "Additionally, the TSDB includes identifying information of certain individuals who are not categorized as known or suspected terrorists." (Emphasis ours). "Limited exceptions to the reasonable suspicion standard exist for the sole purpose of supporting certain screening functions of DHS and State (such as determining

> eligibility for immigration to the U.S.). Individuals included in the TSDB pursuant to such exceptions are not considered "known or suspected terrorists" and are not screened as such. As a result, any U.S. 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 but could be selected for other unrelated reasons such as random selection." (Emphasis ours). See SAC ¶ 24 and SAC Exhibit 2.

All Plaintiffs are American citizens except one, who is a legal resident. SAC, ¶ 26. In other words, Defendants admit that names have been secretly added to the TSDB without reasonable suspicion, in violation of regulations and the law. SAC ¶¶ 27, 29, 31, 33, 92. Therefore, Plaintiffs do not meet the reasons for the immigration "exception" that Mr. Groh asserted under oath.

Mr. Groh's and Mr. Robinson's contradictory versions of how innocent civilians end up in the TSDB without notice contrast with the official audit reports from the United States Department of Justice ("USDOJ") that do not mention any "exceptions" for "immigration purposes". These instrumentalities' audits of Defendant FBI's TSC document, *inter alia*, how TSDB nominations from FBI field offices do not comply with any regulations (Dkt. 47, Exh. 1) These documents also attest as to how non-investigative subjects are left to languish in the TSDB indefinitely, despite the absence of derogatory information linking them to terrorism (Dkt. 47, Exh. 1).

While all these official documents establish without a doubt the improper inclusion and permanent retention of innocent Americans on the TSDB, none of them discuss the illegality of including on the TSDB the names of innocent people for purposes unrelated to terrorism as required in HSPD-6. SAC ¶¶ 19, 21.

Said another way: Mr. Groh's assertion that the "limited exceptions" to the "reasonable suspicion" standard in open disregard of the mandate contained in HSPD-6 has never been discussed in an official USDOJ or Inspector General audit report of the TSC. SAC, Exhibit 2.

Likewise, the reports that Plaintiffs make reference to and/or include as exhibits in the SAC and the Motion for Preliminary Injunction [dkt 14] attest to the fact that the "known and suspected

terrorists" components of the TSDB only comprise less than .5% of the TSDB and that 97% of the list consists of Handling Codes 3 and 4 that "do not represent a terrorist threat". See Graph in Dkt. 14, page 10.

By including innocent civilians on the TSDB, Defendants Wray and Kable also promulgate, implement and facilitate the illegal searches and seizures with or without legal warrants that the FBI and DHS carry out against Plaintiffs in violation of the Fourth Amendment. SAC ¶¶ 567, 568.

The SAC also accurately pleads how Wray and Kable, acting under color of law, violate Plaintiffs' and TJ Members' constitutional rights by promulgating, implementing, and obtaining warrants issued under Section 702 of FISA, 50 U.S.C. § 1881a(b), despite the fact that they are American citizens and FISA was enacted to carry out surveillance on foreign nationals. SAC, ¶¶ 313, 567-569. Even the FISA Court that liberally issued the warrants against American people has denounced Defendants' abuse use of the FISA process. See **Exhibits 1, 2** and **3** and SAC Exhibit 9.

Recent events have further proved Plaintiffs' pleadings that they were illegally placed and/or continue to be illegally maintained in the TSDB roster at the behest of defendants Wray and Kable that have refused to remove non-investigative subjects from the McCarty list. The TSDB is liberally distributed to thousands of third parties, reaching hundreds of thousands of people, in violation of Plaintiffs' privacy and constitutional rights.

House of Representatives Resolution 406 petitions for the impeachment of Defendant Wray for, *inter alia,* "*facilitating the development of a federal police force to intimidate, harass, and entrap American citizens*." (Emphasis ours). See Dkt. 58, Exhibit 2.

The irregular and illicit actions by Wray and Kable set forth above constitute a violation of clearly established Plaintiffs' and TJ Members' constitutional rights under the First, Fourth, Fifth,

Sixth and Eighth Amendments. As such, they cannot invoke the qualified immunity as a shield from liability.

Merrick Garland

As the federal official called to supervise and ensure no citizens' civil rights are violated, Mr. Garland has acted under color of law in complicity and furtherance of Defendant Wray's and Kable's unconstitutional practices of illicitly placing innocent civilians on a terrorist list. SAC ¶¶ 64, 137.

Defendant Garland was apprised of the illegalities entailing the TSDB nominations and the "Program" of secret blacklisting by means of the December 21, 2022 letter that was also sent to codefendants Wray, Kable and Mayorkas. SAC ¶ 69.

Defendant Garland has intentionally refused to investigate defendant Wray's and Kable's illegal conduct geared at swelling the TSDB by classifying innocent civilians as domestic terrorists such as Plaintiffs and TJ Members. He has refused to follow up on the scathing conclusions of the TSC audit reports that preceded his tenure. SAC ¶ 136.

Furthermore, recently uncovered evidence revealed that Defendant Garland has personally pushed for the improper inclusion of innocent civilians in the TSDB. Defendant FBI line agents opposed Individual Capacity Garland's Memorandum directing federal law enforcement resources against parents. Dkt. 58, Exhibit 1, page 34.

This information prompted the Articles of Impeachment against Defendant Garland because the Congressional Committee concluded that: "*Attorney General Garland issued an October 2021 memorandum directing the targeting of parents by the Federal Bureau of Investigation*" … and "*…has disgracefully permitted the Department of Justice to target people of faith and those seeking to protect the sanctity of life*." See Dkt. 58, Exhibit 3.

Uncontroverted evidence has thus emerged that Defendant Garland is not only privy but

also a participant in the illegal activity of including innocent civilians such as Plaintiffs and TJ Members in the TSDB. *Id*.

Defendant Garland's Articles of Impeachment contained in the House Resolution 410 state that he facilitated "*the weaponization and politicization of the United States justice system against the American people*. Dkt 58, Exhibit 3.

Defendant Garland's use of his authority to defend, instead of investigating, the unconstitutional conduct under color of law by Individual Capacity Defendants in violation of law, the Constitution, and his oath of office has caused and continue to cause Plaintiffs and TJ Members irreparable damages. Since Mr. Garland's conduct is in contravention of clearly established law, qualified immunity does not shield him from suit.

Alejandro Mayorkas and Kenneth Wainstein

The SAC succinctly alleges that through the control of rogue and unconstitutional policies implemented in around 90 Fusion Centers throughout the nation, Defendants Mayorkas and Wainstein, acting under color of law willfully disregard Plaintiffs' and TJ Members' rights under the Fourth and Eighth Amendments of the United States Constitution. (Examples: SAC ¶¶ 69, 71, 73, 74, 209).

Unlike ICDs misrepresentations that "DHS...does not direct" Fusion Center activities, **Exhibit 4** of this motion attests to the contrary. The "Memorandum of Agreement" between the Department of Homeland Security and the City of Houston details the control that DHS exerts over the operations of the Fusion Center responsible for the targeting of most Plaintiffs.[4]

Defendants Mayorkas and Wainstein decide upon the policies and guidance implemented at the Fusion Centers. In this context, the "Memorandum of Agreement" creating the City of

[4] The only plaintiffs that are not targeted by the Houston Fusion Center are Dr. Leonid Ber, Karen Stewart, Jin Kang, Deborah Mahanger and daughter, Susan Olsen and Dr. Timothy Shelley.

Houston's fusion center only cites federal laws and regulations as the authority for its creation and operation. See **Exhibit 4** of this motion.

After codefendants Wray and Kable publish the TSDB including the names of innocent Americans such as Plaintiffs and TJ Members, fusion centers nationwide implement Defendants Mayorkas' and Wainstein's directives and policies. SAC ¶ 192. Defendants' Mayorkas' and Wainstein's directives unleash the plethora of vigilante harassment attacks against Americans such as Plaintiffs and TJ Members that should not be on the list in the first place. SAC ¶¶ 66, 67, 190, 191, 192, 255, 256, 260, 261, 268, 269 and SAC Exhibit 11.

It is a mathematically implausible coincidence that eighteen plaintiffs make similar allegations, and their names also appear in the TSDB.

Most of the statements of fact regarding irregularities, contradictions and illegalities alleged in the SAC emerge from official uncontroverted government documents and news articles. Uncontroverted documents thus support Plaintiffs well-pleaded facts regarding the illegal and nefarious purposes for their inclusion on the TSDB. Plaintiffs' SAC exceeds F.R.Civ.Proc 8's pleading requirements.

Despite ICD's assertion that the damages allegations are "fantastical", "implausible and "bizarre", the Court has an obligation to accept as true and correct all well-pleaded facts. "Rule 12(b)(6) does not countenance...dismissals based on a judge's disbelief of a complaint's factual allegations" *Bell Atlantic Corp. v. Twombly, supra.*

B. Plaintiffs did "plausibly" allege injuries under Bivens

Plaintiffs concede that the claims included in the SAC present both established and new contexts under Bivens. Despite the Supreme Courts' hesitation to endorse claims under new Bivens context, Plaintiffs contend that ICDs' egregiously unconstitutional conduct set forth in the SAC compels the recognition of Plaintiffs' claims under Bivens.

Privacy rights derive from the Fourth Amendment. Inasmuch as defendants distribute false information about Plaintiffs and TJ members that reaches hundreds of thousands of third parties, they cause palpable, irreparable damages in violation of the Fourth Amendment.

The SAC sets forth other constitutional rights violated when a person is secretly and permanently placed on a terrorist database. These include: a) Fifth Amendment due process right to liberty; b) Sixth Amendment right to due process and confront your accuser; c) The right to be free of cruel and unusual punishment under the Eighth Amendment. Particularly when the person has never been accused or convicted of a crime.

Claims that fall under current Bivens framework

Regarding the established Bivens contexts, the SAC contains recognized Bivens claims pertaining to illegal property and electronic searches and seizures. Paragraphs 68, 279, 280, 293, 326-328, 338, 341, 342, 345, 357, 583, 585, and 567 of the SAC are just a few of them.

Plaintiffs have coherently alleged how they have sustained Fourth Amendment violations after being added to the TSDB. Despite lacking "reasonable suspicion" to include innocent Americans on the TSDB, and/or "probable cause" to obtain an Article III Court-issued warrant against them, defendants Wray and Kable have unrestrictedly ordered the search and surveillance of Plaintiffs and TJ Members property and electronic communications through the misuse of the FISA Court. See SAC ¶310 and https://oig.justice.gov/sites/default/files/reports/21-129.pdf.

All of Plaintiffs' searches and seizures have been carried surreptitiously, without a warrant and/or with illegally permanently renewed FISA warrants. These searches and seizure are unreasonable, a violation of the Fourth Amendment and thus actionable under Bivens.

Call for acknowledgment of Claims under Bivens

ICDs egregiously unconstitutional conduct justifies that this Court recognize new Bivens context and grant Plaintiffs redress under Bivens.

The first of these contexts derives from the seizure under the Fourth Amendment of Plaintiffs' reputation, parallel to their privacy rights protected under the Fourth Amendment. By falsely designating Plaintiffs as terrorists and disseminating that false information to the law enforcement agencies, organizations and corporations on the TSDB distribution list, Defendants Wray and Kable have de facto seized Plaintiffs' reputation.

As discovery in the case progresses, Plaintiffs will be in the position to prove to the Court how their illegal inclusion on the TSDB resulted in a violation of the First, Fifth and Eighth Amendments. Currently under the absolute control of Defendants, this information to be discovered shall set the foundation that will compel the Court to extend Bivens in contexts never considered by any court.

No "National Security" matters are at stake.

Mr. Timothy Groh acknowledged that the "exceptions" to the terrorist criteria included in the TSDB do not constitute a terrorist threat. SAC ¶ 77 and SAC **Exhibit 2.**

USDOJ and USDOJ Inspector General reports discuss the need to remove non-investigative subjects from the TSDB.

Eliminating from the TSDB the names of people that should not have been there in the first place does not involve national security. It involves illegal, reckless, and perhaps criminal acts by the people responsible for it. Executive Order 13526 prohibits classifying under the shroud of national security any information that would uncover agency corruption or illegality. SAC ¶ 80.

Plaintiffs' Bivens claims do not involve national security because they are not a terrorist threat. They do involve serious malfeasance and illegality that cannot be concealed touting the label of "National Security".

C. Plaintiffs' injuries are traceable to defendants

The sole responsibility for Plaintiffs' and TJ Members' non-investigative subject status in

the TSDB falls on Defendants Wray and Kable. In open disregard of Plaintiffs' privacy and constitutional rights, these Defendants refuse to comply with their obligation under the law and remove from the TSDB the names of anyone that does not meet the "reasonable suspicion" criteria. SAC ¶¶ 110, 220, 247. In fact, Defendant Wray openly admits to carrying out "assessments" that constitute investigations of people and groups devoid of probable cause that do not require accusations of wrongdoing and for which he only needs an "authorized purpose" and a clear objective, according to the 2021 rule book. SAC ¶ 321 and SAC Exhibit 12 at page 5 of 12.

Despite this, Defendants Wray and Kable continue to distribute the list knowing it contains false derogatory information about plaintiffs, in violation of established law. SAC ¶ 188. The daily publication to tens of thousands of people of false, defamatory information on Plaintiffs classifying them as terrorists or suspected terrorists causes direct, irreparable damages exclusively attributable to ICDs.

Defendant Garland knows about these constitutional violations. He enables Defendants Wray's and Kable's policies for the illegal expansion of the TSDB by adding innocent civilians to it. As Attorney General who represents agencies before the courts, Defendant Garland facilitates the illegal processing of FISA warrants for the FBI to carry out perpetual illegal searches and seizures of Plaintiffs' property and electronic communications without probable cause in violation of the Fourth Amendment of the United States Constitution.

Moreover, the illegal inclusion of non-terrorist on the TSDB as Defendants Wray and Kable oversee entails a policy of sex discrimination that mostly targets women. SAC ¶¶ 332-333.

Defendants Mayorkas and Wainstein concoct, adopt, and implement the policies to carry out illegal searches and seizures on Plaintiffs' property and communications despite lack of reasonable grounds or probable cause. Disguised under "counterterrorism" operations, Defendants Mayorkas and Wainstein provide the platform, methodology and authority for the endless searches

and seizures carried out on Plaintiffs' property, and communications without probable cause or a valid warrant. SAC ¶¶ 256, 268, 272 and SAC Exhibit 13. Having violated clearly established law, they are not entitled to qualified immunity.

D. The Court has personal jurisdiction over defendants

Defendants are federal officials that create and implement policies throughout the fifty states and American territories.

Defendants incorrectly allege that the high-ranking nature of their positions deprives this Court of personal jurisdiction over them.

The appropriate inquiry Plaintiffs ask this Court to make when deciding upon the personal question jurisdiction are the following:

> But/for the policies and authority of defendants Wray and Kable, would any Defendant FBI agent dare classify as a terrorist anyone that does not meet the reasonable suspicion criteria in violation of their own regulations?
>
> But/for Wray and Kable's open disregard of Plaintiffs' constitutional rights, would they insist on retaining them in the TSDB despite the absence of reasonable suspicion linking them to terrorist activity?
>
> But/for Defendant Garland's endorsement of the inclusion of innocent Americans in the TSDB, would Defendants FBI, Wray and Kable get away with obtaining and endlessly renewing FISA warrants against Plaintiffs without probable cause?
>
> But/for Defendant Garland's endorsement of Wray and Kable's policies to include innocent civilians in the TSDB devoid of probable cause, would the latter continue to carry out such unconstitutional practice?
>
> But/for Defendants Mayorkas' and Wainstein's policies and procedures, would the Fusion Centers carry out the illegal monitoring, search and seizure of Plaintiffs, their property and their electronic communications?

The indubitable answer to the five questions above is "no". From there the Court can easily conclude that it has personal jurisdiction over defendants for the damages their illicit acts have produced Plaintiffs.

E. Individual Capacity Defendants are not entitled to qualified immunity

Qualified immunity shields federal official officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." Although Government officials are entitled to qualified immunity with respect to "discretionary functions" performed in their official capacities, it does not shield them from clearly illegal conduct.

The SAC sets forth Defendants' clear-cut and egregious illegal and unconstitutional conduct that includes, but is not limited to the following:

The preparation of the Original and SAC required the revision of thousands of pages that include, *inter alia*, statements under penalty of perjury and deposition transcripts produced in prior litigation; audit and government reports; and news articles. Contrary to Defendants' groundless assertion that the SAC is made up of "conclusory allegations", over eighty percent (80%) of its pleadings surpass F.Civ.Proc.Rule 8's well-pleaded facts requirement since they are uncontroverted material facts that derive from official government sources.

Defendants' Motion to Dismiss should be denied because it does not raise a single plausible argument that supports the dismissal of the SAC. Defendants failed to point out a single pleading that did not comply with the "well-pleaded facts" requirement. Reading all the well-pled facts in the light most favorably towards Plaintiffs, the Court should DENY Defendants' MTD.

V. Conclusion

In its obligation of accepting as true all the well-pleaded facts contained in the SAC, Plaintiffs respectfully request that this Court DENY ICDs' Motion to Dismiss and consequently ORDER them to Answer the SAC.

Respectfully submitted,

I CERTIFY: That I have filed this motion by means of the Court's CM/ECF platform that notifies all attorneys of record.

ANA LUISA TOLEDO
/s/*Ana Luisa Toledo*
Southern District of Texas No. 3825092
Attorney for Plaintiffs
PO Box 15990
Houston, TX 77220-1590
Tel. 832-247-3046; 340-626-4381
analuda@proton.me

***DATED** this 19th day of June, 2023*

Certificate of Conference

The undersigned counsel consulted with counsel for Individual Capacity Defendants to exceed the 25-page limit. No final agreement could be reached upon before the filing of this motion.

ANA LUISA TOLEDO

/s/*Ana Luisa Toledo*
Southern District of Texas No. 3825092
Attorney for Plaintiffs
PO Box 15990
Houston, TX 77220-1590
Tel. 832-247-3046; 340-626-4381
analuda@proton.me

***DATED** this 19th day of June, 2023.*