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*; FEDERALBUREAU OF INVESTIGATION; CHRISTOPHER WRAY, Director ofFederal 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*; UNITEDSTATES DEPARTMENT OF HOMELAND SECURITY; SECRETARYALEJANDRO 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,

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

USDC No. 4:23-CV-1013

**PETITION FOR REHEARING EN BANC**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

April 5, 2024 *Ana Luisa Toledo*

PO Box 15990

Houston, TX 77220-1590

*Counsel for Plaintiffs-Appellants*

No. 23-20342

TARGETED JUSTICE, ET AL.,

Plaintiffs-Appellants

v.

MERRICK GARLAND ET AL.,

Defendants-Appellees

**CERTIFICATE OF INTERESTED PERSONS**

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

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

**Plaintiffs-Appellants:**

Targeted Justice, Incorporated

Winter O. Calvert

Dr. Leonid Ber

Dr. Timothy Shelley

Karen Stewart

Armando Delatorre

Berta Jasmin Delatorre

J. D., A minor

Deborah Mahanger

L. M., A minor

Lindsay J. Penn

Melody Ann Hopson

Ana Robertson Miller

Yvonne Mendez

Devin Delainey Fraley

Susan Olsen

Jin Kang

Jason Foust

H. F., A minor

**Defendants-Appellees:**

Merrick B. Garland, and spouse

Federal Bureau of Investigation

Christopher Wray, and spouse

Charles Kable, Jr., and spouse

United States Department of Homeland Security

Secretary Alejandro Mayorkas, and spouse

Kenneth Wainstein, and spouse

**Attorney for Plaintiffs-Appellants:**

 Ana Luisa Toledo

**Appellate Counsel for Defendants/Appellees:**

 Sharon Swingle

 Graham White

**Additional Trial Counsel for Defendants:**

 Madeline McMahon

 Jacob Bennet

 **Other Interested Parties Identified:**

 Stephen Glasheen, Director of the Terrorist Screening Center

 Infragard

 Citizen Corps

 Microsoft Corporation

 Leidos Corporation

 Lockheed Martin Corporation

 Boeing Corporation

 L3Harris Corporation

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

*Respectfully submitted.*

*Dated:*

April 5, 2024 /s/ Ana Luisa Toledo

 Ana Luisa Toledo

 *Counsel for Plaintiffs-Appellants*

**RULE 35(B)(1) REQUIRED STATEMENT**

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

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

1. *White v. U.S. Corrections, LLC*, 996 F.3d 302 (5th Cir. 2021), that held that the Court must “accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff[s].”
2. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that that held that “the plausibility standard is not akin to a ‘probability requirement”.
3. *Tellabs, Inc. v. Makor Issues and Rights, Ltd*. 551 US 308 (2007) that held that ‘[w]hen ruling on Rule 12(b)(6) motions to dismiss, Courts must take the complaint in its entirety, as well as other sources…incorporated into the complaint by reference and matters of which a court may take judicial notice.)
4. *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), that held that intangible harms can be concrete and actionable such as damage to the person’s reputation resulting from the false disclosure to third parties that a person is a ‘suspected terrorist’.
5. *Missouri v. Biden*, \_\_\_ F.4th\_\_\_, 2023 WL 2578260 (5th Cir.2023) This case also contains Court precedent that the panel discarded in this case regarding the standing issue an injunction to halt *ultra vires* individual defendants’ actions: “Parties are entitled to sue for injunctive relief against federal officials in their official capacity for actions beyond their statutory authority.”
6. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) that held that one plaintiffs’ standing is extensive to the rest by holding that “[i]t is not necessary for all plaintiffs to demonstrate standing”; rather, “one party with standing is sufficient to satisfy Article III case-or-controversy requirement.
7. *Ramming v. U.S.,* 281 F.3d 158 (5th Cir. 2001), that held that upon reviewing a district court’s granting of a motion to dismiss for lack of subject matter jurisdiction, court precedent requires a review under a *de novo* standard. The panel applied an incorrect abuse of discretion standard of review to ratify the district court’s dismissal with prejudice of the complaint.
8. *Taylor v. U.S. Treasury Dep’t,* 127 F.3d 470 (5th Cir. 1997) that held that as an exception to the exhaustion of remedies doctrine in the context of the Freedom of Information Act is not required when constitutes an exercise in futility or infringes upon constitutional rights, the doctrine is inapplicable.

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

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

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

*Dated:*

April 4, 2024 /s/ Ana Luisa Toledo

 Ana Luisa Toledo

 Counsel for Plaintiffs-Appellants

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**STATEMENT OF ISSUES THAT MERIT EN BANC CONSIDERATION**[[1]](#footnote-1)

1. Whether the panel erred by concluding that the district court’s ‘Memorandum and Order’ (M/O) dismissing with prejudice the complaint for lack of subject-matter jurisdiction and denying pending motions as “moot”, constituted an unappealable “interlocutory order”, denying a full adjudication of the issues presented for review.
2. Whether the panel erred in collaterally confirming the district court’s dismissal with prejudice of the complaint as ‘frivolous’ and ‘fantastical’ as part of its review of an issue not argued in Plaintiffs’ opening brief and in violation of Plaintiffs’ due process rights.
3. Whether the panel erred in refusing to review the district court’s order denying as ‘moot’ the jurisdictional discovery.

**INTRODUCTION**

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

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

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

When *ultra vires*, unauthorized government action infringes on basic human and civil rights protected by the United States Constitution, separation of power compels the Courts’ intervention.

**STATEMENT OF THE CASE**

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

The crux of Plaintiffs’ complaint is that Defendants FBI, Christopher Wray, and Charles Kable[[2]](#footnote-2) listed and/or maintain them in two secret categories of the TSDB known as Handling Codes 3 and 4 (HC3/4) without notice or opportunity to controvert their nomination thereto. They contend that these two categories of the TSDB were not authorized by Congress or the 2003 Homeland Security Presidential Directive 6 (HSPD-6) that authorized it, because they contain the names of individuals that Defendants recognize a) do not meet the required reasonable suspicion terrorist criteria; b) do not represent a threat to national security; and c) are thus not subjected to extraordinary screening measures when traveling. ROA.566 [¶¶ 23-24].

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

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

Plaintiffs further alleged that Defendants’ illegal inclusion of Plaintiffs in HC3/4 made them ‘Targets’ of a weaponized government program that subjects them to illegal surveillance, inordinate difficulties in daily life, and physical suffering. ROA.610-632. Plaintiffs buttressed their accurate, factual allegations regarding with an uncontroverted statement under penalty of perjury by Ted Gunderson, former FBI Senior Special Agent-in-Charge, who attested to its existence.[[3]](#footnote-3) ROA.685.

Nowhere in the complaint do Plaintiffs accuse Defendants of carrying out directed energy weapons and/or microwave auditory effect (voice to skull) attacks on them. App.1.

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

Plaintiffs alleged that defendants’ conduct infringed on, their Constitutional rights to be secure in their persons and property pursuant to the Fourth Amendment; to substantive and procedural Due Process rights contained in the Fifth and Sixth Amendments; to be protected from cruel and unusual punishment under the Eighth Amendment; and their rights deriving from the Convention Against Torture and Article 32 of the Geneva Convention. ROA.577 [¶ 65] ROA.565 [¶¶ 18 and 21], ROA.567 [¶26], ROA. [¶ 30].

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

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

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

1. Defendants’ *ultra vires* practice of labeling innocent Americans such as Plaintiffs as domestic terrorists, including them in the TSDB’s HC3/4 without reasonable suspicion criteria and continuously and massively disseminated throughout the nation and sixty countries. ROA.
2. The secret criteria used to place individuals in HC3/4. ROA.
3. The secret nomination process to the TSDB without giving Plaintiffs notice and an opportunity to be heard. ROA.
4. The inexistence of a mechanism to be removed from the lists. ROA.

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

On July 12, 2023, Plaintiffs filed a Notice of Appeal. ROA. Plaintiffs sought review of various orders included in the district court’s decision including the dismissal with prejudice of the complaint. ROA.1640.

Three months after the briefing of this case concluded, the panel issued an opinion dismissing the appeal on jurisdictional grounds, holding that “[a*]ll of the orders that the Plaintiffs appeal are interlocutory*” and ‘unappealable’. App.3. The panel maneuvered to collaterally confirm the district court’s dismissal with prejudice of the complaint as frivolous without adjudicating the merits of Plaintiffs’ arguments against it. App. \_\_This unorthodox confirmation of the judgment came about by the panel’s review of a matter that Plaintiffs did not raise in the opening brief: the denial of the Request for Preliminary Injunction. App.3.

The panel’s decision warrants reversal.

**ARGUMENT**

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

The panel concluded that the district court’s ‘M/O’ dismissing the complaint with prejudice and denying pending motions as “moot”, constituted an “interlocutory order” not susceptible to appeal, denying Plaintiffs a full adjudication of all the issues presented for review.

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

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

The district court’s M/O containing the dismissal with prejudice for lack of subject matter jurisdiction of Plaintiffs’ complaint was a final judgment susceptible to appeal because it discarded all of Plaintiff’s claims.

Moreover, upon the filing of the appeal, the Court carried out a “jurisdictional review” after which it allowed the appeal to proceed. [Appeal Dkt.016] The panel’s conclusion that the Court lacked jurisdiction to evaluate the challenge to all the issues on appeal, issued three months after the submission of briefs and seven months after the filing of the notice of contravenes the Court’s jurisdictional check and the basic notions of fair play.

**Plaintiffs did not have to exhaust ‘administrative remedies’**

Plaintiffs did not have to, nor did they want to, carry out the “exhaustion of administrative remedies” the district court suggested.[[4]](#footnote-4) The district court had not authority to impose an “administrative stay” to force Plaintiffs to engage in an exercise in futility not mandated by law. The tactic was nothing but a game of ‘legal gotcha’ directed at depriving plaintiffs of their day in court.

Upon filing this appeal, Plaintiffs exercised their right to refuse to accept the district court’s “administrative stay”. The district court created this procedural mechanism to would allow the clock to tick on Plaintiffs’ time to appeal the dismissal of the complaint and related orders, while exhausting remedies they are legally not compelled to exhaust in the first place. The district court use of legal maneuvers to deprive litigants of their due process rights compels reversal.

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

Plaintiffs have a right to discovery of the information about their TSDB status, making it unnecessary to undergo the administrative process that has proved to be futile and was initiated for the sole purpose of drafting the most thorough complaint possible. ROA. [¶ 41], ROA. [¶ 71]

By filing the appeal, Plaintiffs rejected the district court’s ‘administrative stay’ designed to deprive them of their due process rights by precluding an appeal at all costs.

The panel thus erred when concluding that it did “not have jurisdiction to review the order denying outstanding motions as moot or the transfer of the case to Houston” and that the “M/O” was not a final decision susceptible of appeal.

The panel’s opinion compels reversal and proceeding with the Court’s adjudication of all the issues that Plaintiffs raised on appeal.

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

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

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

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

The panel’s decision disregards multiple precedents.

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

Second, the panel’s adjudication of the denial of Preliminary Injunction that was not briefed resulted in the collateral confirmation of the district court’s dismissal with prejudice of the complaint without delving into, discussing, or controverting any of Plaintiffs’ arguments on appeal requesting the reversal of the complaint’s dismissal. Opening Br.

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

The panel disregarded Court precedent applicable to the dismissal of complaint on motions to dismiss.

Court precedent that imposes an obligation on the reviewing court to accept as true the well-pled facts of a complaint dismissed on F.Civ.Proc.R. 12(b)(1) grounds. Upon a dismissal on a motion to dismiss, the Court must “accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff[s].” *White v. U.S. Corrections*, *LLC*, 996 F.3d 302, 306–07 (5th Cir. 2021). Moreover. when ruling on a motion to dismiss, Courts must take the complaint in its entirety, “as well as other sources…incorporated into the complaint by reference and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues and Rights, Ltd*., 551 US 308 (2007).

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

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

The panel disregarded plaintiff’s right deriving from court precedent to demand a halt to Defendants’ *ultra vires* conduct. “Parties are entitled to sue for injunctive relief against federal officials in their official capacity for actions beyond their statutory authority.” *Missouri v. Biden*, \_\_\_ F.4th\_\_\_, 2023 WL 2578260 (5th Cir.2023).

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

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

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

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

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

The panel’s decision to collaterally confirm a dismissal with prejudice under F.R.Civ.Proc. 12(b)(1) contravenes circuit precedent that precludes it. “A jurisdictional dismissal must be without prejudice.” *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021). “When a court has jurisdiction, its judgment power includes the power to reach the merits of a party’s claim, to adjudicate those merits, and to render a judgment that carries res judicata effect—including, as relevant here, a dismissal with prejudice.” *Spivey v. Chitimacha Tribe of Louisiana*, 79 F.4th 444,448 (5th Cir. 2023) A court can issue with-prejudice dismissal only when it has jurisdiction and with-prejudice dismissal carries res judicata effect., 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2373 (4th ed. 2009).

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

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

Under the panel’s assessment of the interlocutory nature of the M/O, it disregarded circuit precedent upon declining to review the district court’s denial as moot of the Motion to Compel Limited Discovery. ROA.888, ROA. This Court recognizes the appealability of discovery orders. “We review a district court’s discovery rulings, including the denial of a motion to compel, for abuse of discretion.” *Wiwa v. Royal Dutch Petroleum Co*., 392 F.3d 812, 817 (5th Cir. 2004).

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

The district court denied the Motion to Compel because the limited discovery would have prevented it from dismissing the complaint regarding Plaintiffs as delusional because Plaintiffs’ inclusion in HC3/4 would have become an uncontroverted fact at a pleading stage. The discovery of Plaintiffs’ names in HC3/4 would have done away with the district court ‘fantastical’ and ‘frivolous’ language that the panel ultimately adopted.

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

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

Even though “[a]s a general matter, discovery orders do not constitute final decisions” under 28 U.S.C. § 1291, and therefore, are not immediately appealable, *Piratello v. Philips Elecs. N. Am. Corp*., 360 F.3d 506, 508 (5th Cir. 2004), some discovery orders are immediately appealable. *Preble-Rish Haiti, S.A. v. BB Energy* USA, LLC, \_\_F4th\_\_\_, 2021 WL 5143757, at \*2 (5th Cir. Nov. 4, 2021

Plaintiffs’ Motion to Compel would have corroborated that Plaintiffs are listed on the illicit TSDB categories devoid of Congressional or Executive authority. ROA.888.

Defendants asked for yet another extension to reply that Plaintiffs opposed. ROA.1077.

This matter was raised on appeal. Op.Br.46.

The refusal to produce evidence material to the administration of due process is an admission of the want of merit in the asserted defense.” *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 ( ) In this case, Defendant FBI’s insistence on refusing to produce Plaintiffs’ TSDB status implies an admission that Plaintiffs appear on the TSDB’s illicit HC3/4 object of the crux of this case. Stated another way: if none of the Plaintiffs appeared on those illegal categories of the TSDB, Defendant FBI would have no qualms about at least allowing an *in camera* review and do away with this case. Its refusal to do so speaks volumes.

In failing to review the denial of the Motion to Compel, the panel disregarded Court precedent that requires that Defendants had to “show specifically how ... each [request] [was] not relevant or how each question is overly broad, burdensome or oppressive.” *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir.1990). Defendants failed to identify how the production of the TSDB status on 18 individuals would not be relevant or would constitute undue burden. The panel should have reversed the district court’s decision.

**D. A final word**

 The record demonstrates that Defendants have gone the distance to curtail Plaintiffs’ right to redress of grievances. Instead of prosecuting the civil and human rights violations that Plaintiffs have sustained at the hands of Defendants, the weaponized Department of Justice attorneys defend Defendants’ ultra vires, unconstitutional abuse of power of illegally placing innocent Americans on the TSDB.

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

The nefarious consequences resulting from being listed on HC3/4 of the TSDB range from the obnoxious to the unspeakable, such as the microwave burns on one of Targeted Justice’s founding members:



It is quite disturbing as well that prior to 2004 when the first Terrorist Screening Database was distributed, federal courts did not register a single case alleging “Voice-to-skull” torture. Since 2004, federal courts have dismissed 86 cases by plaintiffs alleging suffering from it, 98% of which go unpublished. Attached as Appendix 2 is a table that summarizes the research the undersigned prepared to demonstrate the rise of an alarming trend that is clearly not ‘fantastical’.

**CONCLUSION**

 Plaintiffs petition the court to follow Supreme Court and Fifth Circuit precedent, reverse the panel’s decision in violation of those precedents and grant an *en banc* rehearing of this matter.

Respectfully submitted.

Dated:

April 4, 2024 /s/ Ana Luisa Toledo

 Ana Luisa Toledo

 Counsel for Plaintiffs-Appellants

**CERTIFICATE OF COMPLIANCE**

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

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

Dated:

April 4, 2024 /s/ Ana Luisa Toledo

 Ana Luisa Toledo

 Counsel for Plaintiffs-Appellants

**CERTIFICATE OF SERVICE**

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

*Dated*:

April 4, 2024 /s/ Ana Luisa Toledo

 Ana Luisa Toledo

 Counsel for Plaintiffs-Appellants

1. Picking the battles that fit within a 3,900-word limitation does not mean that Plaintiffs renounce to the full adjudication of the issues raised on appeal and reserve the right to argue them again. This is especially true of the issue regarding the district court’s denial of basic fairness since the transfer of the case to the Houston division. Op.Br. [↑](#footnote-ref-1)
2. Two weeks after the filing of the complaint, Charles Kable retired. In contravention of F.R.App.P. 43, Defendants never informed the court or asked to substitute defendant Kable with his substitute, Steven Glasheen. [↑](#footnote-ref-2)
3. The complaint also alleged that most of the individuals placed on the illegal subcategories of the TSDB are middle-aged women and/or people that hold politically conservative values. ROA.628 [¶¶ 328,330], ROA.630 [¶ 336] [↑](#footnote-ref-3)
4. Not coincidentally, the district court’s idea for the ‘stay’ contained an identical copy of Defendants’ assertions regarding Plaintiffs’ Privacy Act requests contained in Official Capacity Defendants’ Motion to Dismiss. ROA. [↑](#footnote-ref-4)