No. 24-_____

In the Supreme Court of the United States

TARGETED JUSTICE, INCORPORATED, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ana Luisa Toledo, Esq.
Counsel of Record
Attorney at Law
P.O. Box 15990
Houston, TX 77220-1590
(832) 247-3046
ana@anatoledo.com

July 23, 2024 *Counsel for Petitioners*

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QUESTION PRESENTED

The No-Fly and Selectee lists of the Terrorist Screening Database (TSDB) known as "handling codes 1 and 2" make up the terrorism watchlist that contains the names of alleged "known and suspected terrorists."

There are two additional subcategories within the TSDB, handling codes 3 and 4, that contain the identities of hundreds of thousands of U.S. citizens labeled as "suspected terrorists" despite respondents' acknowledgment that they do not pose a threat to national security. Without due process or redress mechanism for removal therefrom, individuals who do not meet the "reasonable suspicion" terrorist criteria are permanently placed on these subcategories.

Petitioners sought Declaratory Judgment and Injunctive Relief, challenging their inclusion on the TSDB, requesting the court to order the removal of their names therefrom. The district court dismissed with prejudice the complaint for lack of subject matter jurisdiction, The court of appeals affirmed.

THE QUESTION PRESENTED IS:

Whether this Court's holding in *Fed. Bureau of Investigation v. Fikre* warrants reversal of the court of appeals' decision affirming the district court's dismissal with prejudice, for lack of subject matter jurisdiction, deeming "fantastical" and "frivolous" Petitioners' complaint challenging respondents' unlawful practice of permanently placing them and hundreds of thousands of U.S. citizens who the government admits do not meet the "reasonable suspicion" terrorist criteria and do not represent a threat to national security or aviation, on the TSDB's handling codes 3 and 4 devoid of any substantive or procedural due process or redress mechanism to be removed therefrom.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Targeted Justice, Incorporated
- Winter O. Calvert
- Dr. Leonid Ber
- Dr. Timothy Shelley
- Karen Stewart
- Armando Delatorre
- Berta Jasmin Delatorre,
- 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

Respondents and Defendants-Appellees below

The following are Respondents in both their individual and official capacities:

- Merrick B. Garland, Attorney General of the United States
- Christopher Wray, Director of Federal Bureau of Investigations
- Charles Kable, Jr.,[1] Director of the Federal Bureau of Investigation's Terrorist Screening Center
- Alejandro Mayorkas, Secretary of the Department of Homeland Security,
- Kenneth Wainstein, Department of Homeland Security's Under Secretary for Intelligence and Analysis

The following Federal Entities:

- Federal Bureau of Investigation
- United States Department of Homeland Security

[1] Even though Official Capacity Defendant Charles Kable, Jr. retired as of January 31, 2023, two weeks after the filing of this case, respondents never moved to substitute him for his successor, Mr. Michael Glasheen as was required under Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c)(2).

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner Targeted Justice states that it is a non-stock 501(c)(3) nonprofit corporation, it does not have a parent corporation. There is no parent company associated with Targeted Justice, nor is there any subsidiary or sister division.

LIST OF PROCEEDINGS

Fifth Circuit Court of Appeals

No. 23-20342

Targeted Justice, et al., *Appellants* v. Merrick Garland et al., *Appellees*.

Date of Final Opinion: March 8, 2024

Date of Denial of Rehearing *En Banc*: April 24, 2024

United States District Court for the Southern District of Texas

No. 4:23-cv-01013

Targeted Justice, et al., *Plaintiffs* v. Merrick Garland et al., *Defendants*.

Date of Final Judgment: July 11, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The United States District Court for the Southern District of Texas dismissed Petitioners' complaint with prejudice for lack of subject matter jurisdiction under F.R.Civ.P. 12(b)(1). *Targeted Justice, Inc., et al. v. Merrick B. Garland et al.*, 4:23-cv-01013. App.7a. (Memorandum and Order entered on July 11, 2023 was not published in the Federal Supplement but is available at 2023 U.S. Dist. LEXIS 118525). The Fifth Circuit Court of Appeals denied Petitioners' appeal, affirming the district court's dismissal with prejudice of the complaint. *Targeted Justice, Inc., et al. v. Merrick B. Garland et al.*, No. 23-20342 (March 8, 2024). App.1a. (*Per Curiam* unpublished opinion available at 2024 U.S. App. LEXIS 5734).

JURISDICTION

The court of appeals entered judgment on March 8, 2024. App.1a. On April 24, 2024, the court denied Petitioners' timely petition for a rehearing *en banc*. App.34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the Appendix to this petition. App.36a.

- U.S. Const. Amend. IV. App.36a
- U.S. Const. Amend. V. App.36a
- 28 U.S.C. § 1291. App.36a
- 28 U.S.C. § 1292. App.37a
- Fed. R. App. P. 4(a)(7)(B). App.37a
- Homeland Security Presidential Directive/HSPD –6—Directive on Integration and Use of Screening Information to Protect Against Terrorism. App.37a.

STATEMENT OF THE CASE

A. Legal Background

Respondent Federal Bureau of Investigation (FBI) administers the Terrorist Screening Center (TSC), a multi-agency entity that consolidates the United States government's terrorist watchlists under a single database—the Terrorist Screening Database ("TSDB"), created pursuant to the Homeland Security Presidential Directive-6 (HSPD-6)—Directive on Integration and Use of Screening Information to Protect Against Terrorism, 39 Weekly Comp. Pres. Doc. 1234 (Sept. 16, 2003). App.37a. The unambiguous legal authority that this

executive order conferred on the agency implementing it, the FBI, was limited to the adoption of a policy to "develop, integrate, and maintain thorough, accurate, and current information about individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism (Terrorist Information)." *Id.*

HSPD-6 only authorized the inclusion on the TSDB of the identities of individuals "when there is 'reasonable suspicion' that he or she is a known or suspected terrorist." App.37a; *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 765 (9th Cir. 2022) *aff'd Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024), *quoting Kashem v. Barr*, 941 F.3d 358, 365 (9th Cir. 2019). Known and suspected terrorists are listed on the TSDB's handling codes 1 and 2 subcategories that are publicly known as the No Fly List and the Selectee List, respectively, and jointly comprise what is commonly referred to as the "terrorist watchlist." App.85a ¶ 153. The individuals on these lists are either prohibited from flying within, to, from, and over the United States, or must undergo enhanced security screening before being allowed to board a flight. *See* 49 U.S.C. 114, 44901, 44903; (codified in relevant part at 49 C.F.R. 1560.105). The United States Department of Justice Office of the Inspector General (OIG) audit reports of the TSC reveal that this watchlist containing the names of "known and suspected terrorists" in the No Fly and Selectee lists represents only 0.29% of the TSDB. App.86a ¶ 161.

There are two little-known subcategories of the TSDB known as handling codes 3 and 4 that, according to the OIG, together comprise 97% of the names in the database. App.50a ¶ 25. These subcategories contain the

identities of individuals whom Respondent FBI admits do not represent a terrorist threat to civil aviation or national security, and do not meet the reasonable suspicion terrorist criteria required under 58 Fed.Reg. 48,452 (codified in relevant part at 28 C.F.R. 23.20). App.49a ¶ 23, App.87a ¶¶ 162-163. Children as young as 3-years-old appear on these two categories. App. 59a.¶ 52, App.87a ¶ 168, App.158a ¶ 489.

A General Accounting Office report on the TSC found that only 1% of the nominations to the TSDB are rejected. App.75a ¶ 112. A 2009 Audit Report of the TSC carried out by the OIG concluded that "many of the [TSDB] nominations . . . were processed with little or no information explaining why [or how] the subject may have a nexus to terrorism;" 35% of the nominations to the lists were outdated; many people were not removed in a timely manner; and tens of thousands of names were placed on the list without an adequate factual basis. App.74a ¶ 111, App. 99a ¶ 224.

According to a statement under penalty of perjury signed by Mr. Samuel Robinson in his capacity as Associate Deputy Director for Operations of the TSC, and submitted on behalf of Respondent FBI in this case in support of its opposition to the limited jurisdictional discovery Petitioners sought, individuals that are nominated to the non-watchlist categories of the TSDB represent an exception to the reasonable suspicion criteria, and are listed under agency secret criteria. D. Ct. Doc. 54-1 at 4 (May 5, 2023).

Mr. Robinson's specific words were the following:

> "In other words, these individuals are not considered "known or suspected terrorists" (KSTs) and are not screened as such. As a

> result, any U.S. person who is in the TSDS[1] pursuant to an exception to the reasonable suspicion standard would not generally be subject to heightened aviation security screening at airports. In order to maintain the effectiveness of these special screening functions, details regarding the method by which individuals are identified for watchlisting exceptions must not be disclosed and are properly categorized as law enforcement sensitive." (Emphasis provided.)

Mr. Robinson's statement under penalty of perjury admitting respondent FBI's clear violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706 was made part of the record in this case.

Unlike the individuals on the No Fly and Selectee lists that discover that they are listees when they are denied boarding an aircraft or subjected to extraordinary screening measures prior to traveling, individuals placed on the handling code 3 and 4 subcategories are not supposed to find out about their inclusion on the TSDB, nor have a redress mechanism for their removal from it. App.97a ¶¶ 215-216.

Respondent FBI distributes the TSDB through the National Crime Information Center (NCIC) to 18,000 law enforcement agencies and third parties

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[1] Federal judicial records reflect that on or around November 2023, respondents began referring to the TSDB as the TSDS, acronym for "Terrorist Screening Dataset". *See Kovak v. Wray*, 660 F. Supp. 3d 555 (N.D.TX. 2023) fn 3. Without evidence in support thereof, the district court accepted respondent's statement that they use these terms "interchangeably" despite lack of legal reference or evidence demonstrating this fact. App.9a.

that comprise more than 532 corporations, 1,440 organizations and at least 60 countries. App.91a ¶ 188. This practice violates the Privacy Act through the dissemination to third parties of Petitioners' private information, including the governmental label of "suspected terrorist" applied to them. App.91a ¶ 187.

Even though there is substantial case law demonstrating that being listed on the TSDB affects major aspects in an individual's life, Congress has failed to enact the TSDB into law in the twenty years of its existence.

B. Factual and Procedural Background

The court of appeals' and district court conclusions of fact and law do not correlate to the well-pleaded facts of the complaint and the exhibits submitted in support thereof, including respondent FBI's uncontroverted admissions of fact in this and prior litigation.

1. Petitioners' Complaint

Targeted Justice, Inc., is a 501(c)(3) human rights organization that carries out grassroots organizing, and publishes a newsletter with more than 15,000 subscribers. App.56a ¶ 44. The organization represents the interests of thousands of individuals in the United States and from around the world. Targeted Justice joined 18 of its members, 17 U.S. citizens and one legal resident,[2] in the filing of this case against Respondent FBI, the Department of Homeland Security (DHS) and five public officials in their official and individual capacities. (App.37a.)

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[2] Upon filing an amended complaint, an additional plaintiff, the minor daughter of Petitioner Fraley, was added as claimant.

Two of the Petitioners set forth in the complaint specific factual allegations about the circumstances under which they discovered that their names appeared the TSDB's handling codes 3 and 4 that do not contain the identities of known and suspected terrorists. App.140a ¶¶ 397-398, App.137a ¶ 381.

The first one, Petitioner Winter O. Calvert alleged that as he was laying on the floor of his home, contorting in excruciating pain caused by a blood clot in his lungs, a Brazoria County deputy sheriff showed up before an ambulance, refusing to allow it drive up to his home until he could "secure the premises" since he had been told that a suspected terrorist lived in that house. App.140a ¶¶ 397-398. The only occupants of the home were Calvert and his 87-year-old mother. App.140a ¶ 399. It took almost one hour for the officers to finish their inspection and allow the ambulance to drive in, while Petitioner Calvert anguished on the floor. *Id*. On the way to the hospital, Plaintiff Calvert heard the ambulance technicians screaming at the driver to hurry up, afraid he would not make it alive to the hospital. Petitioner Calvert almost died. *Id*.

The second Petitioner that realized that the onset of a pattern of stalking, harassment and home break-ins was directly correlated to her listing on the TSDB is retired National Security Agency whistleblower Karen Stewart. Seeking protection from the constant crimes perpetrated against her, her elderly parents and pets, Petitioner Stewart went to the Leon County Sheriff's office seeking help. After checking for her name in front of her in a set of folders he kept in the trunk of his car, the deputy sheriff told her that he was not allowed to help her, walking away. App.137a ¶ 381.

Law enforcement officials entering into contact with an individual in any of these two subcategories are advised against telling the person that they are on the list. *See* App.88a ¶ 169.

Prior to, and after discovering their names had been added a terrorist database without due process, Calvert and Stewart have never being subjected to enhanced screening when flying. App.87a ¶ 166. Unlike most people improperly added to the TSDB's handling codes 3 and 4 without reasonable suspicion, Calvert and Stewart were fortunate to find out the reason behind the anomalous events happening in their lives were due to their inclusion therein.

Petitioners allege that since the FBI acknowledges that individuals listed in the TSDB's handling codes 3 and 4 have no ties to terrorism, they have a right to pursue their substantive and procedural due process claims to challenge their nomination thereto and obtain an order prohibiting respondents from perpetuating their unlawful practice of listing non-terrorist on a terrorist list. App.53a ¶ 36. "[W]here 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). Moreover, "where the State attaches 'a badge of infamy' to the citizen, due process comes into play." *Id*., 424 U.S. at 707 (citations omitted). Concrete, actionable, intangible harms such as damage to the person's reputation resulting from the false disclosure to third parties that a person is a "suspected terrorist" confers standing to the person sustaining that injury. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). "Under longstanding American law, a person is injured when a defam-

atory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party". *Id.*, 594 U.S. at 432 (citations omitted).

Petitioners allege that they are placed on the TSDB's handling codes 3 and 4 despite not meeting the reasonable suspicion criteria, as punishment for the legitimate exercise of First Amendment protected rights, including whistleblowers, political activists, and scientists opposed to government policy. App.74a, ¶¶ 108,109. Petitioners allege that the TSDB's handling codes 3 and 4 subcategories constitute a roster for an illegal program that respondents closely collaborate in. App.48a ¶ 18.

As a result of their unlawful inclusion on the TSDB, Petitioners and TJ members allege to have been subjected to a largely secret, covert program disguised under a shroud of plausible deniability that perpetrates stigmatic government action upon them. App.105a ¶ 255. The eighteen Petitioners alleged facts and damages common to all. Symptoms and situations that an average person would deem "implausible." Petitioners aver, *inter alia*, that respondent Department of Homeland Security-controlled National Network of Fusion Centers perpetrate on them the wide array of harm they encounter on a daily basis including, but not limited to: constant harassment known as gang stalking, organized stalking, or overt harassment that includes the use of organized stalkers to carry out the vandalizing of personal property; surreptitious break-ins into domicile; tampering with postal mail, computer, telephone and electronic communications; spreading false and defamatory rumors about the individual in the neighborhood and work place to attain their

virtual ostracizing from society. App.61a ¶ 62, App.106a ¶ 258.

Petitioners sought forward-looking relief in the form of a permanent injunction prohibiting respondents from keeping their names on the TSDB without reasonable suspicion and a declaratory judgment confirming the violation of their substantive and procedural due process rights upon being included in handling codes 3 and 4. App.79a ¶ 131, App.171a ¶ 548.

Petitioners sought a court order providing for their removal from handling codes 3 or 4 and the elimination of those two subcategories of the TSDB to prevent the real, immediate and uninterrupted threats, persecution and damages that being listed on either of the two secret, unauthorized categories of the TSDB represents for them, Targeted Justice members, and hundreds of thousands of non-terrorists that respondents have secretly added to these lists. App.179a ¶ 559.

Petitioners requested the court to issue an injunction prohibiting respondents from continuing to engage in their unchecked and unconstitutional exercise of power in excess of HSPD-6's authority of placing non-investigative subjects on the TSDB and sharing false, private information about them throughout the nation. App.79a ¶ 132, App.171a 548, App.177a ¶ 555.

Furthermore, Petitioners also requested that the court prohibit respondents from making up a new list to circumvent any order providing for the removal of their names from or the total elimination of the TSDB's handling codes 3 and 4. App.179a ¶ 559(c).

2. Respondents' Motions to Dismiss

Respondents filed motions to dismiss in their official and individual capacities. They argued for the dismissal of the complaint under F.R.Civ.P. 12(b)(1) and 12(b)(6) asserting, *inter alia*, that the allegations of the complaint were "fanciful" and "fantastical." However, respondents did not controvert with any evidence or sworn statement the veracity of Petitioners' well-pled, factual allegations set forth in the complaint.

Early in the case, prior to filing their motion to dismiss, respondents rolled out in a motion for extension of time to reply to the Motion for Preliminary Injunction the "highly speculative and unfounded claims" language to characterize the allegations of the complaint. D.C. Doc. 16 (February 22, 2023). Petitioners then attempted to carry out limited discovery about their TSDB status. When respondents refused to produce the information, Petitioners filed a "Motion to Compel Limited Discovery". D.C. Doc.37 (April 8, 2023). For three months and until the dismissal of the complaint, the district court did not issue an order to respondents instructing them to produce Petitioners' TSDB status despite the fact that on prior cases, courts have either granted access to the TSDB or inspected the TSDB in chambers. *See Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019), *rev'd* 993 F.3d 208 (2021), (counsel allowed to inspect the list) and *Kovac v. Wray*, 363 F.Supp.3d 721 (2019) (court examined TSDB in chambers).

Respondents argued that Petitioners failed to "plausibly allege" that they were listed in the TSDB,

even though they repeatedly did so throughout the complaint.[3]

Devising a legal gotcha proposal, respondents suggested that some Petitioners exhaust their administrative remedies regarding the Privacy Act requests on their TSDB status. This, in spite of the uncontroverted fact that when it comes to "[i]ndividuals in the Database who are not also on the No Fly List . . . [t]he government neither confirms nor denies a person's inclusion in or deletion from the Database. Nor does the government provide individuals in the Database with the underlying reasons or intelligence justifying the individual's inclusion in the Database." *Fikre v. Fed. Bureau of Investigation*, *supra*, 35 F.4th at 766. Ultimately, the district court adopted this suggestion when instructing Petitioners to exhaust administrative remedies that they were not legally compelled to exhaust. App.32a.

3. The District Court's Dismissal

The day after the individual capacity defendants filed their motion to dismiss (D.C. Doc. 73, July 10, 2023), the district court entered its "Memorandum

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[3] Complaint paragraphs applicable to all plaintiffs and TJ members alleging illegal inclusion in the TSDB App.50a-App.51a ¶¶ 26-29, App.52a ¶¶ 31-33, App.57¶ 46, App.68a ¶ 77, App.70a ¶¶ 84-86, App.77a ¶ 119, App.77a ¶ 120, App.77a ¶ 122, App.78a ¶ 129, App.79a ¶¶ 132-134,App.80a ¶ 137, App.87a 167-168, App.90a ¶ 182-183, App.91a ¶ 187-188, App.92a ¶ 191, App.97a ¶¶ 215-217, App.101a ¶¶ 236-237, App.102a ¶¶ 238-241, App.103a ¶ 245-246, App.104a ¶ 249, App.105a ¶ 255, App.106a ¶ 258, App.108a ¶ 266, App.109a ¶ 267, App.112a ¶ 278-280, App.113a ¶ 285, App.118a ¶¶ 303-304, App.118a ¶ 307, App.121a ¶ 318, App.123a ¶ 325, App.125a ¶ 334, App.126 ¶ 335, App.128a ¶ 342. Does not include each Petitioner's individual pleadings.

and Order" adopting respondents' "fantastical" and "bizarre" characterization of the pleadings, dismissing the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). App. 23a. Although the dismissal was not on the merits because it was for lack of subject matter jurisdiction, the district court entered it with prejudice, precluding Petitioners–including three children–from ever seeking redress for the constitutional violations and harm they alleged. App.18a.

Upon dismissing the complaint, the district court did not accept as true Petitioners Calvert's and Stewart's factual allegations about how they found out that they were on the list. Instead, the district court concluded that Petitioners lacked standing because they could not allege to be on a list "that they have not produced, do not possess, and apparently have not seen." App.19a.

Along the dismissal of the complaint, the district court denied as "moot" the "Motion to Compel Limited Discovery" regarding Petitioners' TSDB status that had been presented three months earlier. App.8a fn.1.

Although the district court's order dismissing the entire complaint did not leave anything for the court to adjudicate, the court did not enter a separate judgment. Instead, it provided that the case was "stayed and administratively closed until [Petitioners] administratively exhaust" their Privacy Act claims. App.33a. The district court instructed Petitioners to file an amended complaint within 30 days of exhausting non-jurisdictional administrative remedies that were not necessary since Plaintiffs did not have to exhaust administrative remedies under *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (5th Cir. 1997).

4. Petitioners' Appeal

Petitioners invoked the court of appeals' jurisdiction under 28 U.S.C. §§ 1291 and 1292.

Petitioners argued for the reversal of the district court's "Memorandum and Order" because upon dismissing the complaint, the district court failed to accept as true all the well-pled and uncontroverted facts set forth in the complaint and refused to read them in the light most favorable to Plaintiffs-Petitioners. *Warth v. Seldin*, 422 U.S. 490, 495 (1975); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

Petitioners asked the court of appeals, *inter alia*, to reverse the denial of the request for declaratory judgment under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 706 challenging Defendants' unauthorized and unconstitutional practice of including in the TSDB the names of Plaintiffs and TJ members and disseminating it extensively throughout the nation and around the world in violation of the Privacy Act provisions. 5 U.S.C. § 502(a).

Petitioners raised as one of the issues on appeal reviewable under 28 U.S.C. § 1292 the district court's failure to compel respondents to provide the former the limited discovery request regarding their TSDB status. After all, Petitioners argued, if their names did not appear on the TSDB, the dismissal would have been automatic, curtailing any possibility of any appeal. Conversely, if respondent FBI certified that Petitioners' names appear in the TSDB's handling codes 3 and 4 subcategories, the district court could not have dismissed the case as "fantastical."

A three-judge panel of the Fifth Circuit Court of Appeals affirmed the district court's dismissal with

prejudice of the complaint on subject-matter jurisdictional grounds and ordering the exhaustion of administrative remedies even though this Court has held that a federal court cannot require a plaintiff to exhaust administrative remedies before seeking judicial review of a final agency action under the APA where neither the relevant statute nor an agency rule imposes such a requirement. *Darby v. Cisneros*, 509 U.S. 137 (1993). App.1a. Since the dismissal was for lack of subject matter jurisdiction, the court of appeals did not review the other grounds for dismissal. App. 6a fn.2.

In its opinion, the court of appeals echoed the district court concluding that Petitioners could not allege being on a list "they have never seen or otherwise confirmed", despite the latter's right to carry out the jurisdictional discovery that the district court denied as moot upon dismissing the complaint. App.5a.

Applying an erroneous standard of review,[4] and disregarding its obligation to deem as true the well-pled

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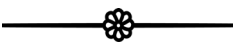
[4] The court of appeals also erred by concluding that it did not have jurisdiction to review the appeal, reasoning that the district court's "Memorandum and Order" was not a final, appealable order under 28 U.S.C. § 1291 even though it disposed of all claims against all parties. ("A 'final decision' by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'") *Catlin v. United States*, 324 U.S. 229, 233 (1945) quoting *St. Louis I.M. & S. R. Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883). The court of appeals choose instead to review the district court's denial of an issue that was not briefed on Appellants-Petitioners' opening brief: the Motion for Preliminary Injunction. Choosing to review that issue under 28 U.S.C. § 1292, the court of appeals applied an abuse of discretion standard to review the denial of the preliminary injunction, and did not discuss any of the issues that Petitioners raised on appeal. App.4a.

facts of a complaint dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(a)(1), the court of appeals affirmed the district court's dismissal with prejudice of the complaint for lack of subject matter jurisdiction, echoing the "fantastical" language, and holding that it had "properly dismissed the individual Plaintiffs' constitutional and APA claims for lack of subject-matter jurisdiction because they are frivolous." App.3a.

Petitioners' timely petition for rehearing was denied on April 24, 2024. App.34a.



REASONS FOR GRANTING THE PETITION

I. The Lower Court's Dismissal of Petitioners' Complaint with Prejudice for Lack of Subject Matter Jurisdiction Contravenes This Court's Decision in *Fikre*, and Violates Petitioners' Substantive and Procedural Due Process Rights and Therefore Both Lower Courts' Decisions Must Be Reversed.

A. The Court of Appeals Erred in Confirming the District Court's Dismissal of the Complaint

A court with jurisdiction has a "virtually unflagging obligation" to hear and resolve questions properly before it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

A sufficient complaint "must claim that the plaintiff is entitled to relief under a valid legal theory." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555

(2007), this Court held that federal pleading rules require that a complaint contain "only a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint must contain sufficient factual matter, accepted as true, to state "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plausibility does not equate to possibility or probability; it lies somewhere in between. *Id*., 556 U.S. at 663. Plausibility simply calls for enough factual allegations to raise a reasonable expectation that discovery will reveal evidence to support the elements of the claim. *Bell Atl. Corp. v. Twombly*, *supra*, 550 U.S. At 556.

Although Plaintiffs bear the burden of establishing jurisdiction, they are only required to present *prima facie* evidence. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, (2016).

"The general rule" for Rule 12(b)(1) motions challenging subject-matter jurisdiction is to take allegations "as true unless denied or controverted by the movant" 5C C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1363, p. 107 (3d ed. 2004).

The district court disregarded its obligation to "take[s] the well-pled factual allegations of the complaint as true and view[s] them in the light most favorable to the plaintiff" when ruling on a Rule 12(b)(1) motion to dismiss. *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020). Likewise, the court of appeals had an obligation to deem as true the pleadings in a complaint dismissed as a result of a motion to dismiss on F. R. Civ. Proc. 12(b)(1) grounds. *See Gibbs v. Buck*, 307 U. S. 66, 72 (1939)."The reviewing Court must accept the allegations in the complaint as true for

purposes of its decision." *Hernandez v. Mesa*, 582 US 548, 550 (2017).

Fifth Circuit precedent compelled the district court to weigh in Petitioners' well-pleaded facts. "A complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.'" *Id*., *quoting Cicalese v. Univ. Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019). "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).

Fifth Circuit precedent also compelled the district court to take into consideration the other sources such as the uncontroverted documents that were "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 U.S. 308 (2007).

When an erroneous "suspected terrorist" label threatens a person's safety or life, as in the case of Petitioners, the concrete harm goes beyond the intangible but redressable reputational harm, to clear, irreparable harm that triggers a person's due process rights. ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The district court did not accept as true the wellpled facts of the complaint and failed to read them in the light most favorable to Petitioners. App.23a. Instead,

it inverted the legal presumptions and without a shred of evidence, accepted respondents' characterizations of the pleadings as "fantastical" and "bizarre" even though they failed to controvert them.

Petitioners Calvert and Stewart alleged specific facts in the complaint that establish *prima facie* their personal stake in the outcome of this case. Their pleadings demonstrate that as a result of being listed on the TSDB, they have "suffered, or will suffer, an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). (Citations omitted). These two Petitioners' standing to sue is extensive to the other plaintiffs in the case. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

Despite this, the court of appeals adopted the district court's assertion that Petitioner Calvert and Stewart lacked standing because they "have never seen or otherwise confirmed" the TSDB handling codes 3 and 4 blacklist. App.5a. Upon affirming the district court's "Memorandum and Order," the court of appeals did not accept the allegations of the complaint as true as it had an obligation to do under *Gibbs v. Buck*, *supra*. However, both Calvert's and Stewart's pleadings satisfied Article III's injury in fact requirements by demonstrating "(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

This Court's recent opinion in *Fikre*, *supra*, buttresses Petitioners' petition for certiorari since they also challenge their listing on the TSDB's handling codes

3 and 4 subcategories without reasonable suspicion on due process grounds. In *Fikre*, this Court affirmed the Ninth Circuit's decision in *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762 (9th Cir. 2022), concluding that the plaintiff had a right to proceed with his procedural due process challenge of the government's decision to include him on the TSDB's No Fly List subcategory without reasonable suspicion.

Both lower courts disregarded specific, uncontroverted, factual allegations of the complaint, most of which are supported by uncontroverted government documents, articles and declarations such as respondents' admissions of, *inter alia*, placing non-terrorists on the TSDB (App.49a ¶ 23, App.50a ¶ 25); carrying out warrantless searches and seizures (App.61a ¶ 61); performing warrantless electronic surveillance of U.S. Persons (App.118a ¶ 306); obtaining improper Foreign Intelligence Surveillance Act (FISA) Court warrants against U.S. Persons (App.61a ¶ 61); and making "assessments" on U.S. citizens and legal residents, (App.122a ¶ 320.)

A review of the court of appeals' and the district court's decisions *vis a vis* the actual pleadings of the complaint reveals irreconcilable scenarios between the courts' interpretation of the pleadings and the facts contained therein. App.1a, App.7a and App.42a. A dispassionate review of the complaint reveals not only that the complaint is not "fantastical," "fanciful," "bizarre," or "frivolous," but that it is detailed, factual, and well-documented beyond the requirements of F. R. Civ. Proc. 8. Contrary to what the court of appeals concluded, nothing about Petitioners' complaint is "attenuated and unsubstantial as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous,

plainly unsubstantial, or no longer open to discussion." *Hagan v. Lavine*, 415 U.S. 528, 536-37 (1974).

The lower courts' decision to discard Petitioners' complaint as "fantastical" interferes with their due process right to challenge being labeled a domestic terrorist, with the wide-ranging repercussions set forth in the complaint that this governmental defamation brings about.

The court of appeals opinion warrants reversal for failing to deem as true the well-pled facts of the complaint dismissed on F.R.Civ.Proc. 12(b)(1) grounds.

B. This Court's Confirmation of *Fikre v. Fed. Bureau of Investigation* Warrants the Issuance of This Petition for *Certiorari*

The court of appeals' opinion was issued on March 8, 2024. Eleven days later, this Court issued its opinion in *Federal Bureau of Investigations v. Fikre*, *supra*, holding, *inter alia*, that a plaintiff's complaint was not moot, allowing him to proceed with his challenge to his unlawful placement on the TSDB's No Fly List without reasonable suspicion on due process grounds including lack of notice or opportunity to controvert the designation. Upon reversing the district court's dismissal of the complaint as moot, the court of appeals held:

> "We reverse the district court's dismissal on mootness grounds of Fikre's substantive due process and non-stigma-related procedural due process No Fly List claims. We also vacate the district court's dismissal of Fikre's stigma-plus procedural due process claim and remand to the district court to consider,

> in the first instance, whether Fikre has stated a viable stigma-plus procedural due process claim considering both his past placement on the No Fly List and his alleged inclusion in the Database." *Fikre v. Fed. Bureau of Investigation*, *supra*, 35 F. 4th at 778.

The Ninth Circuit remanded to the district court to consider in the first instance whether Fikre "stated a viable procedural due process claim when his placement on the No Fly List is also considered." *Fikre v. Fed. Bureau of Investigation*, *supra*, 35 F. 4th at 776.

This Court affirmed. In so doing, it opened the door for Petitioners to proceed with their challenge to their unlawful inclusion in the TSDB without reasonable suspicion.

This Court's opinion confirming the court of appeals' decision in *Fikre* warrants reversal of the court of appeals' decision.

Substantive due process under the Fifth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). "Those protected rights and interests include those that "are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*., 521 U.S. at 720–21.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

"To state a procedural due process claim, a plaintiff must allege "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Fikre v. Fed. Bureau of Investigation*, 35 F. 4th at 776 (citations omitted).

Respondent FBI has abrogated to itself the power of including non-terrorist Americans to the TSDB, in excess of the limited legal authority that HSPD-6 granted and in violation of individuals' constitutional rights.

Petitioners' secret nomination and placement on a terrorist database without notice, opportunity to controvert the nomination or a redress mechanism to be removed from a list violate both substantive and procedural due process constitutional rights. The TSDB's widespread distribution throughout the nation, including government and private actors subjects individuals on handling codes 3 and 4 to false governmental stigmatization through their labeling as "suspected terrorists", dangerous traitors to this nation.

Pursuant to this Court's confirmation of the Ninth Circuit Court of Appeals' decision in *Fikre*, *supra*, the court of appeals' opinion should be reversed, and the case remanded to the district court to allow Petitioners to challenge on substantive and procedural due process grounds their inclusion on the TSDB without reasonable suspicion, notice or redress mechanism.

C. Other Considerations National Importance Warrant the Reversal of the Court of Appeals' Decision

The post 9/11 war on terror has become a war on Americans. Being listed on the TSDB forever changes the life of the person, converting him or her to a second-class citizen whether they readily become aware of it or not. HSPD-6 did not authorize the inclusion in the TSDB of any person that did not meet the terrorist criteria. Petitioners thus have the right to be removed from it.

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1 (2013) (citations omitted). At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id. quoting Silverman v. United States*, 365 U.S. 505, 511 (1961).

Petitioners' pleadings allege with specificity stalking, surveillance, breakings and physical attacks that followed their unconstitutional placement on the TSDB. They do not have to undergo such governmental-sponsored abuse because they are innocent civilians wrongfully added to a terrorist database without reasonable suspicion for it.

Taking as true the facts alleged in the complaint for purposes of reviewing a dismissal for lack of

subject matter jurisdiction on a motion to dismiss, the court of appeals had to conclude that they sufficiently pled a clear violation of their rights under the Fourth Amendment that prohibits unreasonable searches and seizures of their persons and property. App.36a.

The issue at hand supports this petition for certiorari because it has implications of nationwide importance. Allowing the district court's and the court of appeals' decisions to stand enables the danger of a police state, where non-terrorists listed on the TSDB such as Petitioners are subjected to constant physical and electronic surveillance without the required probable cause, in violation of the Fourth Amendment including organized stalking harassment, defamation, invasion of privacy, social isolation, destruction of personality, and even refusal of a timely medical help as in the case of Petitioner Calvert. This is all carried out covertly, in abuse of delegated administrative authority, shielded under plausible deniability, using "secret criteria", and in open disregard of basic due process rights.

What the lower courts deem "fantastical" are the same tactics used in documented illegal programs that intelligence agencies operated for decades without restraint, such as those documented in *C.I.A. v. Sims*, 471 U.S. 159, 161–62 (1985) (summarizing the background of the MK ULTRA program[5]) and *Socialist Workers Party v. Attorney General of the United*

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[5] *See* generally Church Committee, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S.Rep. No. 94–755, 94th Cong., 2d Sess., Book I, at 392–411 (1976) (commonly identified as the Church Committee Report).

States, 458 F.Supp. 895 (S.D.N.Y.1978), *vacated and remanded on other grounds sub nom. In re Attorney General of the United States*, 596 F.2d 58 (2nd Cir.1979), *cert. denied*, 444 U.S. 903 (1979)(summarizing the illegal FBI COINTELPRO operations carried out against plaintiffs.)

Prior to the courts' recognition of the existence of these programs, anyone denouncing them were called conspiracy theorists. For decades, its victims passed away with no recourse.

The illegal government stigmatization and discrimination against 97% of the individuals on the TSDB that have become second-class citizens make this case one of a utmost importance to the future of our nation. It was a flagrant error for the district court to dismiss it, and for the court of appeals to affirm it. Beyond Petitioners' claims, this case presents the imminent danger for every individual innocently basking under the perceived protection of the Constitution of the United States, unaware of the fact that these tactics could any day be unpredictably and permanently unleashed against them.

The curtailment of handling codes 3 and 4 second class citizens is no longer a secret. Former Senator Trey Gowdy brought it to the public's attention when grilling a DHS official about the unrestricted placement of U.S. Citizens on the TSDB,[6] specifically asking:

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[6] December 10, 2015 House Committee on Oversight and Government Reform hearing, accessible at: https://townhall.com/tipsheet/mattvespa/2015/12/14/brutal-trey-gowdy-takes-dhs-official-to-the-woodshed-over-due-process-n2093012

"What process is afforded a US citizen—not someone who's overstayed a visa, not someone who crossed a border without permission—but in the American system, what process is currently afforded an American citizen before they go on that list?

. . . and when I say process, I'm actually using half of the term "due process" which is a phrase we find in the Constitution, that you cannot deprive people of certain things without due process.

My question is: Can you name another constitutional right that we have that is chilled, until you find out it's chilled, and then you have to petition the government to get it back?

My question is: What process is afforded a United States citizen before that person's constitutional right is infringed?

My question is: How about the First Amendment? How about we not let them set up a website or a Google account? How about we not let them join the church until, until they can petition government to get off the list?

How about not get a lawyer? How about the Sixth Amendment? How about you can't get a lawyer, until you petition the government to get off the list?

Or my favorite: How about the Eighth Amendment? We're going to subject you to cruel and unusual punishment, until you petition the government to get off the list.

> Is there another constitutional right that we treat the same way for American citizens that we do the Second Amendment? Can you think of one, can you think of one?"[7]

Sen. Gowdy's line of questioning of Ms. Kelly Ann Burriesci demonstrates that is no longer a secret that the TSDB has been weaponized to curtail the most fundamental constitutional rights of large swaths of the population.

Petitioners urge the court to grant this petition for certiorari, and consequently reverse the court of appeals opinion, paving the way for plaintiffs to exert their right to challenge on substantive and procedural grounds respondents' uncontroverted and unconstitutional conduct in excess of legal authority of including innocent civilians on a terrorist list for purposes, other than those for which the TSDB was created.

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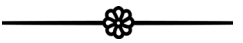
7 *See* www.townhall.com, *Brutal: Trey Gowdy Takes DHS Official To The Woodshed Over Due Process*, Town Hall, December 14, 2015. (Last accessed July 21, 2024).



CONCLUSION

For the reasons set forth above this Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals should be granted as to the question presented for review.

Respectfully submitted,

Ana Luisa Toledo, Esq.
Counsel of Record
Attorney at Law
P.O. Box 15990
Houston, TX 77220-1590
(832) 247-3046
ana@anatoledo.com

Counsel for Petitioners

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