No. 21-1032

In The

Supreme Court of the United States

JASON T. BERRY,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION; and
AGENT MARK HASTBACKA, Special Agent, FBI,
in his individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, petitioner Jason T. Berry respectfully petitions for rehearing of the Honorable Court's March 7th, 2022 denial of his petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.

REASONS FOR REHEARING

A petition for rehearing before the Court must illustrate "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." Rule 44.2.

1. The FBI background and specialization of respondent Mark Hastbacka is relevant and noteworthy in relation to his unusual actions in this case.

The genesis of the petitioner's present case was a "voicemail message that FBI agent Mark Hastbacka left for his parents regarding him." (Pet. for Cert. at 3) Agent Hastbacka's call came after "the appellant filed a civil suit in New Hampshire courts naming FBI Task Force member [Thomas] Harrington as a party." *Id.* Mainstream Media and Journalism sources reveal that respondent Mark Hastbacka has had a productive and commendable career in the FBI. He was featured

in an episode of the CBS television series "The FBI Declassified" named "The Swindling Seductress" on October 27th, 2020, years after this suit was filed. His investigations were featured in the January 15th, 2013 book *The Terror Factory* by investigative journalist Trevor Aaronson. His efforts investigating IRA members in Florida were discussed in the 2000 article "The Emerald Ire" in the *Broward-Palm Beach New Times*. Just recently, "NBCBoston" covered his January 14th, 2022 criminal complaint against two women involved in the January 6th, 2021 capital riots. Also this past January, he was scheduled to give a speech on "The hunt for and capture of Ghislaine Maxwell" at *Infragard Boston Member Alliance*. The FBI website describes Infragard as "a partnership between the FBI and the private sector." All of these mainstream media accounts describe respondent Hastbacka as organizing sophisticated criminal investigations, many times utilizing informants.

In the "FBI Declassified" episode in 2020, Agent Hastbacka described "33 years" of investigating cases and crimes. It is noteworthy that he began investigating the career criminal profiled in the television episode in "early 2017", within temporal proximity to his locating the undisclosed identities, names, address, and home phone number of the petitioner's parents after petitioner sued a fellow FBI member. *The Terror Factory* also outlines questionable FBI tactics for securing cases and prosecutions, many of which could be considered "parallel construction." "Parallel

Construction" is a controversial investigative tactic first revealed in a *Reuters* article on August 5th, 2013.

In the middle of his storied career investigating suspected terrorists, IRA members, and career con artists, respondent Hastbacka also somehow procured multiple forms of undisclosed personal information about the petitioner and his family seemingly spontaneously. The record here indicates that in the middle of at least one robust national investigation, Agent Hastbacka also somehow received and responded to petitioner's simple Privacy Act request in the same day. (Pet.App.125) As indicated since the outset of litigation, the petitioner has "never been arrested, charged, or indicted, or notified of any formal or informal official investigation into [his] conduct." (Pet.App.61, Affidavit)

The petitioner has not at any time during litigation cast aspersions on Agent Hastbacka, and would not do so. His laudable career is objectively acknowledged here. However, his unprecedented actions occurring during a lawsuit against another FBI employee deserve consideration in the context of an ongoing history of questionable tactics re-occurring either to a greater or lesser degree within the FBI culture. In the final report of the *1976 Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, chairman and Senator Frank Church described a history of severe *reflexive* actions taken against perceived political or legal opponents of the FBI. Senator Church outlined that in the efforts of the FBI to defend itself "[u]nsavory and vicious tactics have been employed – including anonymous attempts

to break up marriages, disrupt meetings, ostracize persons from their professions, and provoke target groups into rivalries."

Both the "FBI and Agent Hastbacka have never denied that they subjected the appellant and his parents to some form of search, surveillance, or investigation." (Pet.App.96) Furthermore, the respondents "have not at any time cited any legal, procedural or statutory authorization." (Pet. for Cert. at 13) Throughout litigation the petitioner has discussed that the "loved ones of any individual represent one of the few constant sources of support, relief, and comfort in life" and the "only constant" and "most important." (Pet.App.151) The facts of this case represent an "unauthorized invasion of this part of an individual's existence" by "an agent of an agency with vast and prolific powers and authorities." (*Id.*) The Supreme Court has "frequently emphasized the importance of the family" and "the integrity of the family unit." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Courts have further established that "privacy interests do indeed implicate a fundamental liberty interest, specifically their interest in preserving their lives and the lives of their family members" *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069 (6th Cir. 1998).

Limone v. Condon, 372 F.3d 39, 49 (1st Cir. 2004) established that there was a "plausible inference" that two agents "stationed at the FBI's Boston office" were in regular communication and even shared "records." It is well established in this litigation that respondent Hastbacka and FBI Task Force Member Thomas

Harrington, whom the petitioner had recently sued, work out of the Bedford, N.H. office of the Boston FBI. (Pet.App.124,125) The record indicates that the other historical authorities in this matter aside from Agent Hastbacka have transferred to positions elsewhere (including Rome, Italy in March of 2016). (Pet.App.71,100) Agent Hastbacka's legally questionable actions involving petitioner's family during a legal dispute between the petitioner and a fellow FBI employee remain unaddressed and unresolved and deserve greater consideration. There are well established "concrete constitutional guidelines for law enforcement agencies and courts to follow" that provide "constitutional rights of the individual against overzealous police practices." *Miranda v. Arizona*, 384 U.S. 436, 442, 444 (1966).

2. The case displays multiple ongoing Fourth Amendment concerns that will cause irreparable harm if allowed to persist.

Petitioner's April 6th, 2021 Motion discussed that the "circumstances, when considered in totality, display that . . . the FBI took the unprecedented and intrusive step of actually *visiting the appellant's home* to return the original FOIA request." (Pet.App.44) As indicated, an "opened and unsealed envelope or package is *prima facie* evidence that it was not delivered by the U.S. Postal Service." (*Id.* at 47) At the "'very core'" of the Fourth Amendment is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*,

569 U.S. 1, 6 (2013). The Fourth Amendment "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity" or "enter a man's property to observe his repose from just outside." *Id.* More significantly, the circumstances here involve petitioner's right to request legal information, not that "exigent circumstances exist" allowing that "officers may enter private property without a warrant." *Caniglia v. Strom*, 593 U.S. ___ (No. 20-157, May 17, 2021). Examples of when officers may "enter a home without a warrant" include "reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen." *Id.* (Kavanaugh, J., concurring). Furthermore, the Court has "declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home." *Collins v. Virginia*, 584 U.S. ___ (2018) (slip op., at 8). The Court's general historical precedents establish that "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant", and that general "expectation" is "obvious" and "justifiable." *U.S. v. Karo*, 468 U.S. 705, 714 (1984).

The petitioner's 2021 motions demonstrate a plethora of mail obstructions including a loan payment, credit card payment, and legal materials that occurred immediately following the First Circuit's January denial of rehearing. (Pet.App.43-65) The Petitioner has been experiencing "unprecedented delays and obstructions in my use of the U.S. Mail" that began

"around July of 2013." (Pet.App.61, Affidavit) The 2016 USPS document confirms "information compiled for law enforcement purposes" regarding the petitioner's mail that he cannot have explanation for so as not to risk "unwarranted invasion of the personal privacy of third parties." (Pet.App.65) It is significant that for years the petitioner's privacy in personal mailings is being invaded, but he cannot know by who or why to protect "unwarranted invasion of the personal privacy of third parties." (*Id.*) Incidentally, on February 14th, 2022, petitioner informed both the Court and the respondents that the Court's January 21st mailing did not arrive until approximately one week later around the 28th. This is noteworthy, as it may or may not be evidence of more intrusion and delay now during Supreme Court litigation.

This Court has historically established Fourth Amendment protections in citizen's mail, asserting that "[letters] and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy." *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984). Further, the "Fourth Amendment requires that they obtain a warrant before examining the contents" of any person's mail. *Id.* Therefore, if "letters and documents can thus be seized and held", then "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value." *Weeks v. U.S.*, 232 U.S. 383, 394 (1914).

The petitioner's District Court complaint outlined that the respondents also acquired undisclosed

"information regarding his personal cell phone." (Pet.App.121) As discussed in his July 3rd, 2017 request for preliminary injunction in this matter, the petitioner "at no time voluntarily revealed his own phone number." (District Court Document Number 8). Of note, within days of the January 29th, 2021 denial of the petition for rehearing en banc (Pet.App.3) the petitioner's cell phone had "been completely disabled." (Pet.App.78) The Court has recently held that any "cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Riley v. California*, 134 S.Ct. 2473, 2591 (2014).

Any form of ongoing and "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *U.S. v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010). Other courts have previously "recognized prolonged surveillance of a person's movements may reveal an intimate picture of his life." *Id.* Any ongoing monitoring of an individual generates a "wealth of detail about [their] familial, political, professional, religious, and sexual associations." *U.S. v. Jones*, 132 S.Ct. 945, 955 (2012). Such "governmental interference" also allows for officials to intrude "minutely into the past conduct of the petitioner, thereby making his private life a matter of public record." *Sweezy v. N.H.*, 354 U.S. 234, 246, 250 (1957). The mere "[a]wareness that the Government may be watching chills associational and expressive freedoms", and the very nature of "the Government's unrestrained power to assemble data that

reveal private aspects of identity is susceptible to abuse." *U.S. v. Jones*, 132 S.Ct. 945, 956 (2012) (Sotomayer, J., concurring).

The record indicates ongoing intrusion into almost every aspect of the petitioner's life following his complaint about an FBI member, including the most important relationships, official confirmation of mail monitoring, official discussion of undisclosed cell phone information, and evidence of the FBI personally returning a request for information at the petitioner's home between his doors. The evidence of various official intrusions resembles a modern day version of the "reviled 'general warrants' and 'writs of assistance' of the colonial era" which allowed the British "unrestrained search" and "arbitrary claims." *Carpenter v. U.S.*, 138 S.Ct. 2206, 2213 (2018). The result will represent a sort of *unserved lifetime warrant* establishing "tireless and absolute surveillance." *Id.* at 2218. Acknowledging the evidence of Fourth Amendment abuses occurring to the present day, there is clear likelihood that in the event of case closure "irreparable harm [will] result from the denial." *Conkright v. Frommert*, 129 S.Ct. 1861, 1862 (2009). The absence of any avenue to "prevent these injuries constitutes irreparable harm." *Maryland v. King*, 133 S.Ct. 1, 3 (2012).

CONCLUSION

Based on the aforementioned legal issues, the petitioner respectfully requests that this Court grant the petition for rehearing and order full briefing and argument on the merits of this case.

Respectfully submitted,

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CERTIFICATE OF PETITIONER

Pursuant to Rule 44, Rules of the Supreme Court, petitioner hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

JASON T. BERRY