NO.

IN THE

Supreme Court of the United States

MARLENE A. DOUGHERTY, doing business as,
LAW OFFICE OF MARLENE A. DOUGHERTY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; UNKNOWN JOHN AND
JANE DOE(S), EMPLOYED BY DHS,
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

MARLENE DOUGHERTY
Pro se, Counsel of Record
LAW OFFICE OF MARLENE A. DOUGHERTY
314 E. 8th Street
Brownsville, Texas 78520
marlene@mdjd180.com
(956) 542-7108

December 18, 2023

QUESTIONS PRESENTED

1. Resulting from a national emergency, the attack on the United States on September 11, 2001, Congress enacted emergency provisions for means to easier investigate threats to the United States. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq., as amended* (not limited to those). Congress created protections for the rights of United States persons, by providing a waiver of sovereign immunity thus subject matter jurisdiction in the district courts for violations of the statutes by the United States (unauthorized access, or exceeding authorized access to electronic, wire, and computer systems causing damage or injury) notwithstanding language in the original statutes, §2520 and §2707 prohibiting the same. 18 U.S.C. §2712(a). Referencing the FTCA's notice requirements. 18 U.S.C. §2712(b). Applying the rules of statutory construction to the statutes, 18 U.S.C. §2712, is the controlling statute. *Al-Haramain Islamic Foundation, Inc. v. Obama,* 705 F.3d 845, 851-852 (9th Cir. 2012) (reviewing the overall scheme). Subject matter jurisdiction exists under federal question jurisdiction. 28 U.S.C. §1331, by §2712's waiver of sovereign immunity and authorization to file in a district court. *Id.* 18 U.S.C. §1030, also authorizes suit against the United States for a violation of that statute despite the circuitous statutory language. Subject matter jurisdiction exists for a statutory claim under any of the three statutes through 28 U.S.C. §1331, federal question. The court of appeals affirmed but modified the judgment of the district court to dismiss without prejudice three statutory claims for lack of subject

matter jurisdiction, ignoring that subject matter jurisdiction exists as long as it can be gleaned from the statutory text. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). (Pet. App. 8a-13a, 28a-32a, and 43a). The claims should have instead been dismissed for failure to exhaust administrative remedies. (Pet. App. 12a-13a, 43a).

Q. Does 18 U.S.C. §2712, amending, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*, provide a clear waiver of sovereign immunity and subject matter jurisdiction for a violation notwithstanding 18 U.S.C. §2520(a), and §2707(a) (originally excluding the United States); and, despite its circuitous language does 8 U.S.C. §1030 provide a waiver of immunity against the United States, thus subject matter jurisdiction pursuant to 28 U.S.C. §1331 for statutory claims against the United States?

2. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq., as amended*, provide guidelines regarding law enforcement tools to conduct investigations, setting out civil and criminal penalties for a statutory violation. *Id.* The statutory language is written in a manner that each act constituting a violation can be criminally sanctioned, yet the court of appeals did not give the same consideration to civil causes under 18 U.S.C. §2712 despite its singular language "discover the violation", instead conglomerating all acts as one and denying jurisdiction as untimely. (Pet. App. 20a, 32a-35a, and 43a).

Q. Does 18 U.S.C. §2712, as a matter of statutory construction provide for a cause of action for each individual violation of the statute; which limitations can be tolled until such time that, given reasonable

diligence by a plaintiff working against a defendant who deliberately conceals their act(s), a defendant can be identified?

3. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*, are nondiscretionary statutes, requiring adherence to the statutes, Constitution, and other laws. *Id.* 18 U.S.C. §2517(8), not limited to that, only allows use of information lawfully obtained, to use in official duties, and subject to limitations on unauthorized disclosures. 18 U.S.C. §2518(5), provides for the limitations of authorized warrant orders to 30 days, only extended upon application, while §2518(10)(c) implies a remedy, outside of a statutory one, for constitutional violations of Chapter 119. *Id.* 18 U.S.C. §2701, and §2708, imply a remedy, outside of a statutory one, for constitutional violations of Chapter 121. *Id.* Nothing in 18 U.S.C. §2712, prohibits a remedy for constitutional violations which are outside of the statutory nonconstitutional violations and remedies. *Id.* (Pet. App. 16a-19a, 24a-26a).

Q. Where an individual employed by, or acting on behalf of the United States, violates the provisions of a nondiscretionary statute, such that the conduct raises a clear constitutional violation, do 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.,* imply a remedy under U.S. Const., art. III §2, by 28 U.S.C. §1331 jurisdiction, such that *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971) should be extended in this case for violations rising to *First, Fourth* and *Fifth Amendment* violations in individual capacity case, and 28 U.S.C. 1346(b) for official capacity cases?

4. Qualified immunity is a judicially created immunity from suit where an identified official must affirmatively claim immunity by providing evidence that they were acting within the scope of their official duties and did not violate a clearly established statutory or constitutional right. *Harlow v. Fitzgerald*, 475 U.S. 800 (1982); *Pearson v. Callahan,* 555 U.S. 223, 231-32, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The Doe(s) in this case were not identified, the U.S. Attorney declined to accept service on their behalf, and stated that with the court's intervention they would provide information, yet early discovery to aid in Doe identifications was disallowed, and the claim was dismissed with prejudice. (Pet. App. 5a-8a, 20a-21a, and 35a-37a). *Dougherty v. DHS, et al*, No. 22-40665, Appellant's Proposed Sufficient Brief, at 35, and 52 (5th Cir. Sep. 19, 2023).

Q. When Doe defendants do not enter an appearance and the U.S. Attorney also claims immunity without identifying the Doe(s), or providing evidence that they are entitled to immunity, should a case be dismissed without prejudice or early discovery be allowed to aid in identifying the Does?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the case caption on the cover page.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporation is a party to this case.

RELATED PROCEEDINGS

Dougherty v. DHS, et al, No. 22-40665 (5th Cir. 2023), *per curiam*. Davis, Southwick, Oldham, *Circuit Judges*. Judgment entered September 19, 2023.

Dougherty v. DHS, et al, No. 1:21-cv-154, 2022 WL 2067827 (S.D. Tex. Jun. 8, 2022), amended and superseded by, *Dougherty v. DHS, et al*, No. 1:21-cv-154, 2022 WL 3104870 (S.D. Tex. Aug. 4, 2022)(on rehearing). Judgment entered August 4, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Marlene A. Dougherty doing business as, Law Office of Marlene A. Dougherty, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit for legal error.

OPINIONS BELOW

The mandate issued on November 13, 2023 (Pet. App. 1a-2a); the unpublished decision of the court of appeals modified and affirmed the district courts order dismissing three claims without prejudice for lack of subject matter jurisdiction and all others with prejudice. (Pet. App. 3a-21a).

Final Judgment was entered by the district court on Aug. 4, 2022. (Pet. App. 22a).

The published decision of the district court was modified dismissing the *SCA* claim without prejudice, all other claims with prejudice. (Pet. App. 23a-38a (Amended Order)). The district court's findings on the Rule 59(e) motion are entered as a separate order. (Pet. App. 39a-42a)). The original decision of the district court dismissing all claims with prejudice is published (Pet. App. 43a-58a).

JURISDICTION

A United States District Court has original jurisdiction over all civil actions arising under the Constitution, laws, and treaties of the United States. 28 U.S.C. §1331. (Pet. App. 140a). A United States District Court has jurisdiction over cases for damages for willful violations of Chapters 119, and 121, of Title 18, against the United States. 18 U.S.C.

§2712.(Pet.App.140a).

Waiver of sovereign immunity in the case is provided by U.S. Const, art. III §2, as applied in *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), through 28 U.S.C. §1331; 18 U.S.C. 2712; and 18 U.S.C. §1030(e) (definitions) and (g) (authorizing suit). The district court denied jurisdiction dismissing all claims with prejudice. (Pet. App. 58a). On a motion for reconsideration the order was modified dismissing the SCA claim without prejudice, and all others with prejudice. (Pet. App. 38a, 42a). Final judgment was entered on August 4, 2022 (Pet. App. 22a). A timely notice of appeal was filed. (Pet. App. 8a).

The United States court of appeals for the Fifth Circuit has jurisdiction of appeals of final decisions of district courts within its area. 28 U.S.C. §§1291, and 1294(1). The Fifth Circuit, as requested, modified the decision dismissing all statutory claims without prejudice, but all other claims with prejudice. (Pet. App. 21a). The decision of the court of appeals was entered on September 19, 2023. (Pet. App. 1a). As a pro se petitioner no motion to stay the mandate was filed, which mandate issued on November 13, 2023. (Pet. App. 2a).

The petition is timely filed by depositing it with the U.S. Postal Service, for delivery within 3days, postage pre-paid, within 90 days of the entry of judgment. Sup. Ct. R. 13.1, and 29.2. The Supreme Court has jurisdiction under the U.S. Const., art. III §2, 28 U.S.C. §1254(1).

The court of appeals has sanctioned the departure of the district court from the usual course of judicial proceedings in its failure to apply the sound rules of

statutory construction "the later in time rules" in modifying statutes, such that it calls for this Court's supervisory power, and the court of appeals has decided an important question of federal law that has not been decided by this Court, but should be – that 18 U.S.C. §2712, waives sovereign immunity for claims under 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*, thus subject matter jurisdiction is appropriate for such claims in the U.S. District Court. 18 U.S.C. §2712(a), (Pet. App. 140a); 28 U.S.C. §1331, (Pet. App. 140a); but see, (Pet. App. 4a (dismissing no jurisdiction)). Sup. Ct. R. 10(a), and (c).

The court of appeals also sanctioned the district court's departure from the rules of construction in deciding that the statutory claims' limitations has run by conglomerating all acts into one course of conduct for the statutory claims despite the statutes referring to a singular violation as actionable. (Pet. App. 19a). The Court should decide this very important issue because the court of appeals' reading of the limitations statute means that once a government actor violates the statutes they can do so *ad infinitum* once they get past the two year point if no notice was sent. 18 U.S.C. §2712(b)(2)(""The" claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover "the" violation" (Pet. App. 136a)); 18 U.S.C. §1030(g)("No action may be brought under this subsection unless such action is begun within 2years of the date of the "the act" complained of or the date of the discovery of "the damage"(Pet. App. 69a)). Notice under the FTCA, per 18 U.S.C. §2712(b)(1), was given on the date that suit was filed, October 7,

2021. (Pet. App. 12a). Any act going back two years from the date of filing should be considered a valid claim which could be able to be filed in the district court after the U.S. has denied the claim, or after 6months. 18 U.S.C. §2712(b)(2).

The statutory language of the nondiscretionary statutes, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*, speaks only to "nonconstitutional violations" of the statutes implying that remedies could otherwise be had for violations that rise to Constitutional ones. 18 U.S.C. §2518(10)(c)(Pet. App. 109a); 18 U.S.C. §2708 (Pet. App. 132a-133a); 18 U.S.C. §2712(d)(Pet. App. 137a). The court of appeals found that the statutory remedies are all that are available under 18 U.S.C. §2712. (Pet. App. 15a-17a). The court of appeals decision is also internally inconsistent because it states no subject matter jurisdiction under the statutory claims and denies other remedies alleged to be constitutional violations, because Congress provided statutory remedies. (Pet. App. 4a, 6a n.1, 15a-17a).

Relatedly, the court should review whether an employee of an agency of the United States who violates the statute(s) and who conceals their identity can also claim immunity through a U.S. Attorney who: 1. declines to accept service on their behalf; and, 2. without providing any evidence as is required to make such a claim. (Pet. App. 19a-20a). Where cyber activity is involved it is near impossible to identify the individual actor(s) who operate under concealment. *Id.* To then allow them to escape discovery seems to run against all forms of fairness which our judicial system is founded on. U.S. Const., art. III (in general).

STATUTORY PROVISIONS INVOLVED

The following are contained in the accompanying appendix:

18 U.S.C. § 1330 - Fraud and related activity in connection with computers.

18 U.S.C. §2510, *et seq.* – CHAPTER 119—Wire and Electronic Communications Interception and Interception of Oral Communications.

18 U.S.C. §2701, *et seq.* – CHAPTER 121—Stored Wire and Electronic Communications and Transactional Records Access.

Jurisdictional Statutes

18 U.S.C. §2712

28 U.S.C. §1331

28 U.S.C. §1346(b)

Constitutional Provisions

U.S. Const., art. III §2

U.S. Const., amend. I

U.S. Const., amend. IV

U.S. Const., amend. V

INTRODUCTION

The first question presents an important question of federal law that has not been and should be decided by this Court. Sup. Ct. Rule 10(c). The subject of a circuit split; district courts are also inconsistent as to whether 18 U.S.C. § 2712, provides a waiver of sovereign immunity for violations of Chapters 119 and 121 of Title 18, and for certain *FISA* violations, notwithstanding the exemptions in 18 U.S.C. §§2520 and 2707. Sup. Ct. Rule 10(a).

Dougherty relied on the plain and clear text of the statute to bring her claims. 18 U.S.C. § 2712. Construing waiver of immunity under certain sections of *FISA,* with mention of the *ECPA* the Ninth Circuit states that it unequivocally waives immunity. *Al-Haramain Islamic Foundation, Inc. v. Obama,* 705 F.3d 845, 851-852 (9th Cir. 2012). Cited by the Fifth Circuit in denying a *Bivens* remedy, we find the Fourth Circuit in agreement. *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019)("Congress has created several private causes of actions under various statutes governing the surveillance and the integrity of personal computing devices, including the SCA, FISA, and the CFAA."). (Pet. App. 17a-18a). The court of appeals believes "the express language of § 2520 prohibits claims against the United States brought under that section, regardless of whether immunity is waived for claims raised under § 2712.", *citing*, *Thomas v. Seth,* 317 F.App'x 279, 282 (3rd Cir. 2009)(unpublished per curiam). (Pet. App. 10a-11a*n. 13). Unlike this case, Thomas was denied because he conceded prior consent for his calls to be monitored and recorded and it was not even clear the provider could be considered the United States. *Thomas v. Seth,* 317 F.App'x at 282. Dougherty claimed immunity was waived, in her jurisdictional statement citing §2712, and referring to the same in Claims I & II in the plea for entitlement to relief, but also included the §2520, and §2707 respectively. The Supreme Court should decide this issue as a matter of statutory construction.

On October 7, 2021, notice was given, and suit was filed alleging claims pursuant to 18 U.S.C. § 2510, *et*

seq.—The Electronic Communications Privacy Act (*ECPA*); 18 U.S.C. § 2701, *et seq.—The Stored Communications Act* (*SCA*); 18 U.S.C. § 1030—*The Computer Fraud and Abuse Act* (*CFAA*); Chapter 15 of *The Texas Business and Commerce Code—Texas Free Enterprise and Antitrust Act* of 1983 (a combination, or conspiracy to interfere with lawful business activities); a *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971) action for the deprivations of rights; and for *Temporary and Permanent Injunctive Relief.* (Pet. App. 4a). The injunctive relief under 18 U.S.C. §1030(g) did not require Notice, thus Dougherty filed her Complaint, the denial of injunctive relief was waived on appeal. (Pet. App. 8a n.3). Tort claim notice as required by 18 U.S.C. § 2712 for the *ECPA-WTA*—18 U.S.C. § 2510, *et seq., ECPA-SCA*—18 U.S.C. § 2701, *et seq.,* and the complaint were concurrently filed. (Pet. App. 52a). Dougherty did not file a motion to voluntarily dismiss in order to satisfy the notice requirements. (Pet. App. 11a-12a). Nonetheless, the claims should have been dismissed without prejudice for failure to exhaust administrative remedies, not for a lack of subject matter jurisdiction because sovereign immunity is waived by clear statutory language authorizing jurisdiction in the district court. 18 U.S.C. §2712; 28 U.S.C. §1331.

STATEMENT

I. Legal Background

The first question presents an important question of federal law that has not been and should be

decided by this Court. Sup. Ct. Rule 10(c). The subject of a circuit split; district courts are also inconsistent as to whether 18 U.S.C. § 2712, provides a waiver of sovereign immunity for violations of Chapters 119 and 121 of Title 18, and for certain *FISA* violations, notwithstanding the exemptions in 18 U.S.C. §§2520 and 2707. Sup. Ct. Rule 10(a). The court of appeals acknowledges that §2712 provides a waiver. (Pet. App. 9a). Ignoring the tenets of statutory construction it then finds that §2520 creates an ambiguity that is construed in favor of the government. *Id.* The court of appeals cites to an unpublished per curiam decision, *Thomas v. Seth,* 317 F.App'x 279, 282 (3rd Cir. 2009). Seth's claim under the Wiretap Act was disallowed because he conceded prior consent for his calls to be monitored and recorded. *Thomas v. Seth,* 317 F.App'x at 282. "[B]arring certain conditions not present in this case" the U.S. is exempt from liability. *Id.* Unlike Thomas, Dougherty did not authorize DHS' monitoring, recording, disclosure and dissemination of her calls, or the access to her devices or to the information stored therein – her claims are not against the phone and internet companies, but the DHS. (Pet. App. 4a-6a). The statute is explicit in its language waiving sovereign immunity. *Al-Haramain Islamic Foundation, Inc. v. Obama,* 705 F.3d 845, 851-852 (9th Cir. 2012) ("Congress included explicit waivers with respect to certain sections of FISA as part of the USA PATRIOT Act, 18 U.S.C. § 2712(a)"). The same explicit waivers are included for Chapters 119 and 121 of Title 18. 18 U.S.C. § 2712(a). This Court has previously stated as long as waiver can be clearly discernable from the statutory text with the use of

traditional interpretive rules waiver is found. *Richlin Security Service Co. v. Chertoff,* 533 U.S. 571, 589, 128 S. Ct. 2007, 170 L.Ed.2nd 960(2008); *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). *Dougherty v. DHS, et al*, No. 22-40665, *Appellant's Proposed Sufficient Brief,* pp. 23-26 (5th Cir. Dec. 20, 2022). A basic tenet of statutory construction informs that the last in time controls; the statutory scheme must be considered as a whole. *Food and Drug Admin. V. Brown Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291 (2000); generally *Rodriguez v. United States, 480 U.S.,* 480 U.S. 522, 524 (1987). In dismissing all statutory claims without prejudice the court of appeals found no subject matter jurisdiction exists. (*Pet. App.* 9a-11a) (citing *Voinche v. Obama,* 744 F. Supp. 2d 165, 175-176 (D.D.C. 2010); and *Lott v. United States,* No. 4:10-2862, 2011 WL 13340702, at *4 (S.D. Tex. May 31, 2011), *report and recommendation adopted,* No. 10-2862, 2011 WL 13340701 (S.D. Tex. June 17, 2011). Neither *Voinche*, nor *Lott* discuss 18 U.S.C. § 2712. *Thomas* notes that §2712 authorizes suit, but only after following the procedural requirements of the *FTCA* as noted in §2712, however, the conditions of liability were not present in that case. *Thomas v. Seth,* No. 07-2203, 2008 WL 11476024, at *5 n. 8 (E.D. Pa. Aug. 28, 2008, *aff'd*, 317 F. App'x 279, 282 (3rd Cir. 2009). In, *Jewel v. Nat. Sec. Agency,* 965 F. Supp. 2d 1090 (N.D.CA 2013) the court analyzes the statute's construction and finds that it unequivocally waives immunity under the *WTA* and *SCA. Jewel v. Nat. Sec. Agency,* 965 F. Supp. 2d, at 1107-1108; see also, *Ins. Safety Consultants, LLC v. Nugent,* No. 3:15-cv-2183-S-BT, 2017 WL 735460 (N.D. Tex. Sept.

12, 2018), *rep. & rec. adopted,* No. 3:15-cv-S-BT (N.D. Tex. Sept. 30, 2018), (limitations runs when unlawful access occurs or when discovered, allowing some claims and disallowing others as untimely). The *Voinche* court has since acknowledged the authorization of suit for *FISA* violations cited in §2712, with references to the *WTA. Page v. Comey,* Civ. No. 1:20-3460-DLF, ECF 115, at 10, 14-16 (D.D.C. Sept. 1, 2022) (complaint doesn't conclusively reveal when reasonable discovery of every alleged violation could be made, declining to dismiss on limitations). In opposing *Al-Haramain,* the court of appeals found limitations barred the claims even if administrative remedies were followed. (Pet. App. 9a-12.a). A reversal from the "with prejudice" dismissal to one "without prejudice" is a pyrrhic victory with the finding that subject matter jurisdiction does not exist instructing to file in a court of competent jurisdiction. (Pet. App. 12a-13a, n. 20). Clearly, as several courts have found, subject matter jurisdiction and waiver of sovereign immunity are stated under §2712. *Id.* Instead a dismissal for failure to exhaust administrative remedies entered preserving the right to return to U.S. District Court because everything about §2712 is clear that it pertains to the United States waiver of immunity and jurisdiction in the district court. 18 U.S.C. §2712(a)-(e).

The language of the *Computer Fraud and Abuse Act* (*CFFA*), 18 U.S.C. §1030, also provides a waiver of sovereign immunity albeit in less clear terms, because a "governmental entity" includes the United States, and a governmental entity is a person, an aggrieved person may bring a claim against said

person "who" violates the statute. 18 U.S.C. §§1030(a), (e)(9), (12), and (g). (Pet. App. 59a, 68a-69a). See, *Dougherty v. DHS, et al*, No. 22-40665, *Appellant's Proposed Sufficient Brief,* pp. 34-37, and *Appellant's Reply Brief,* pp. 12-13. This Court has previously stated as long as waiver can be clearly discernable from the statutory text with the use of traditional interpretive rules waiver is found. *Richlin Security Service Co. v. Chertoff,* 533 U.S. 571, 589, 128 S. Ct. 2007, 170 L.Ed.2nd 960(2008); *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). See also, *Attkisson v. Holder*, 925 F.3d at 621.

18 U.S.C. §1030, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq., as amended,* by §2712 are nondiscretionary criminal statutes which set out civil actions for violations. *Id.* The language is written in a manner that each act constituting a violation can be criminally sanctioned, yet the court of appeals did not give the same consideration to civil causes under 18 U.S.C. §2712 despite its singular language discover "the violation", instead conglomerating all acts as one and denying jurisdiction as untimely. *Id.,* at (b)(2) (Pet. App. 19a *5, 136a). Dougherty is prejudiced by that interpretation; 18 U.S.C. §2712, refers to "the claim", "the violation" terms which are construed in accordance with their natural and ordinary meaning – here, singular act, "any willful violation", "such a violation" *Id.,* at (a); (Pet. App. 135a-136a) *Dougherty v. DHS, et al*, No. 22-40665, *Appellant's Proposed Sufficient Brief,* pp. 27-29 (5th Cir. Dec. 20, 2022). Each new violation or discovery thereof would constitute a new claim from which limitations runs. *Id., citing, Sewell v. Bernardin,* 795 F.3d 337, 341

(2nd Cir. 2015); *Ins. Safety Consultants, LLC v. Nugent,* No. 3:15-cv-2183-BT, 2017 WL 735460 (N.D. Tex. Dec. 30, 2019); and *Page v. Comey,* Civ. No. 1:20-3460-DLF, ECF 115, at 10, 14-16 (D.D.C. Sept. 1, 2022). To read §2712 as the court of appeals does creates an egregious prejudicial interpretation which supports that "no violation", unless noticed within two years from the very first violation, could be remedied and serial violator(s) would be free to continue to impart injury without recourse. (Pet. App. 19a). In this case the notice provided on Oct. 7, 2021, pursuant to §2712(b)(2) remains pending before DHS, and Dougherty should be allowed to file a new cause of action. (Pet. App. 30a-31a, 136a).

Working against a defendant who conceals their act(s), too, should provide for the tolling of limitations for each individual violation of the statute, tolled until such time that, given reasonable diligence by a plaintiff, a defendant can be identified. *Dougherty v. DHS, et al,* No. 22-40665, *Appellant's Proposed Sufficient Brief,* pp. 29-34 (5th Cir. Dec. 20, 2022).

18 U.S.C. §1030, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*, are nondiscretionary criminal statutes requiring adherence to the letter of the statutes, constitution, and other laws, which if violated provides a clearly stated cause of action. *Id.,* at §2712. The court of appeals sated that sovereign immunity is only implied. (Pet. App. 9a, n.8, citing, *Freeman v. United States*, 556 F.3d 326, 333 (5th Cir, 2009), citing, *United States v. Gaubert,* 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); *Berkovitz v. United States,* 486 U.S. 531, 536-37,108

S.Ct. 1954, 100 L.Ed.2d 531 (1988) (discretionary function exception). The statutes involved contain only the presentment requirement. 18 U.S.C. §2712(b)(1). (Pet. App. 136a). The defenses identified in the *ECPA*'s *WTA* against unlawful disclosures under §2511(1)(c), (e)(i), are contained in §2520(d). (Pet. App. 77a-79a, 113a). §2520(g) informs that disclosure other than authorized by §2517 is improper and is a violation. (Pet. App. 96a-99a, 114a). The only exceptions identified in the *ECPA*'s *SCA* against unlawful disclosure or exceeding authorized access and obtaining, altering, or preventing authorized access do not belong to the United States, but to the service provider or the customer. 18 U.S.C. §§2701(a)(2), (b)(1), and (c), 2703(e), 2707(e). (Pet. App. 116a-117a, 121a, 131a-132a). A limited exception exists for the United States under §2707(g). (Pet. App. 132a). 18 U.S.C. §§2517(7), and (8), not limited to that, only allow use of information "lawfully" obtained, to use in official duties, and subject to limitations on unauthorized disclosures. (Pet. App. 98a-99a). 18 U.S.C. §2518(5), provides for the limitations of authorized orders to 30 days, only extended upon application, while §2518(10)(c) implies a remedy, outside of a statutory one for constitutional violations of Chapter 119. (Pet. App. 103a-104a, 109a) §2518(9) seems to be the authorized use and disclosure of communications. (Pet. App. 108a). 18 U.S.C. §2708, implies a remedy, outside of a statutory one, for constitutional violations of Chapter 121. (Pet. App. 132a-133a). It seems nothing in the language of 18 U.S.C. §2712 prohibits a remedy for constitutional violations which are not within the purview of this section,

being that they are outside of the statutory remedies for nonconstitutional violations. *Id.,* at (d). (Pet. App.137a).

It appears as a matter of statutory construction, that an individual employed by, or acting on behalf of the United States, who violates the provisions of the nondiscretionary statute, such that the conduct raises a constitutional violation can be sued outside of the statutes because, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.,* imply a remedy under the U.S. Const, art. III by 28 U.S.C. §1331 jurisdiction, for those violations rising to *First, Fourth* and *Fifth Amendment* violations. The United States through the tort claims act, and the individuals in their individual capacities through 28 U.S.C. §1331. (Pet. App. 15a-18a); *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971). The court of appeals found this is not available, citing to *Attkisson v. Holder*, 925 F.3d at 621. (Pet. App. 18a).

The Doe defendants were not identified; the U.S. Attorney declined to accept service on their behalf, and stated that with the court's intervention they would provide information, yet early discovery to aid in Doe identification(s) was disallowed, and the claims were dismissed with prejudice. (Pet. App. 19a-20a). The judicially created "qualified immunity" from suit, where an identified high level official must affirmatively claim immunity by providing evidence that they were acting within the scope of their official duties and did not violate a clearly established statutory or constitutional right, has procedural requirements for a Doe defendant to benefit by the defense. *Harlow v. Fitzgerald*, 475 U.S. 800, 806-808 (1982); *Pearson v. Callahan,* 555 U.S. 223, 231-32,

129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The Doe defendants did not enter an appearance, the U.S. Attorney declined to accept service for the Doe(s), yet also claimed immunity without identifying the Doe(s), or providing evidence that they are entitled to such immunity. *Harlow v. Fitzgerald*, 475 U.S. 800, 806-808. Where DHS was found signed in to the law office domain as the controlling organization which gave them access to all other programs housed therein, coupled with the injuries identified in the complaint the Doe defendant(s) should have been required to follow the mandates of *Harlow*. *Id.* The court of appeals dismissed with prejudice. (Pet. App. 2a).

II. Proceeding Below

Dougherty practices immigration law and related litigation in Brownsville, Texas. (Pet. App. 3a-6a, 44a-46a, 54a-55a). She has brought deceptive practices act and other claims against other immigration practitioners, both attorneys and those engaged in the unauthorized practice of law. (Pet. App. 44a). She has brought claims against the DHS for their USCIS employee's(s') prior referrals to unauthorized practitioners that proved detrimental to the immigrants involved. *Dougherty v. DHS,* No. 22-40665, *Pet. Prop. Suff. Brief,* at 10-11. She has suffered outrageous acts of retaliation as a result of her work including intrusions into her personal and business privacy, interference with her rights under the U.S. Const. amend. I, IV, and V, unlawful disclosures of private communications, not limited to those things. *Id.;* (Pet. App. 54a-57a). Computer

intrusions were investigated on several occasions without findings of apparent issues nor was the identity of any suspected intruder known. (Pet. App. 5a, 45a-46a). Incidents were at least twice reported to the FBI without resolution. (Pet. App. 6a). On October 7, 2019, a phone message was received from a number that was purported to be a former client's but is believed to be spoofed and sounded like a police dispatch informing where Dougherty was going. (Pet. App. 5a, 45a). Other incidents occurred after that call. (Pet. App. 44a-45a). On or about June 14, 2021, she found the USDHS ICE OPLA signed in as the controlling organization to her office's domain through which her Outlook and Microsoft Office programs are managed. (Pet. App. 6a). Signing OPLA out caused the immediate loss of access to a yahoo/AT&T e-mail account on her cell phone, but which had been used for notifications. *Dougherty v. DHS,* 1:21-cv-154, ECF 7, pp 9-10 (S.D. Tex. Dec. 22, 2021).

A civil action was filed in the U.S. district court seeking injunctive relief under 18 U.S.C. § 1030(g), as there was no notice requirement in the statutory language. (Pet. App. 6a). Concurrently, notice was sent under 18 U.S.C. §2712. (Pet. App. 12a). On Dec. 22, 2021, amended complaint was filed and the United States was summoned; alleging an "action to recover damages caused by Defendants' retaliation for plaintiff's lawful defense of undocumented immigrants." *Dougherty v. DHS,* 1:21-cv-154, ECF 7, 2 (S.D. Tex. Dec. 22, 2021). Alleging claims under 18 U.S.C. § 1030, 18 U.S.C. § 2510 *et seq., as amended,* 18 U.S.C. § 2701 *et seq.*, the Texas Conspiracy in restraint of trade statute, Tex. Bus. &

Comm. Code Chapter 15 (4 year limitations), and the common law. *Dougherty v. DHS,* 1:21-cv-154, ECF 7, at 3. To remedy "unlawful access to plaintiff's stored information on a protected computer." *Id.,* at 3. "[U]nlawful interception and dissemination of oral communications." *Id.*, "[U]nlawful control over plaintiff's Domain, Office 365, e-mails, phone, and cell phone." *Id.* "[A]ttempts to use the unlawful access and/or control to alter documents and to otherwise adversely affect the plaintiff's lawful business activities." *Id.* "[I]ncluding but not limited to" interfering with "clients' access to the courts by altering briefs, written by plaintiff to be filed with the court" and " in contravention of plaintiff's first amendment right to practice immigration law and related litigation." *Id.* "Interference with plaintiff's right to engage in religious activities" *Id.* "[F]ourth amendment right to be free of unlawful searches and seizures" *Id.* "[F]ifth ... amendment right[ ] to equal protection. *Id.* "[I]n retaliation for plaintiff's lawful actions taken on behalf of her clients, and/or because of her race." *Id.* For "outrageous acts, [of] generalized harassment in her business and personal life with intrusions into privacy." *Id.* The factual allegations are set out in more detail in the Complaint. *Id.,* 1-2, 4-16. Paragraphs 1-45 of the amended complaint were incorporated into each cause of action. *Id.,* at 16, ¶¶46-90, 17, ¶¶97-141, 18 §§146-190, 195-246, 19, ¶¶251-302, 20, ¶¶307-358, 31, ¶¶364-414(incorporating ¶¶1-51)).

The amended complaint stated, in Claim I, *ECPA's WTA* "[p]ursuant to 18 U.S.C. §§2520 ((a) & (g)), & 2712, plaintiff is entitled to relief..." and in Claim II, *ECPA's SCA* "[p]ursuant to 18 U.S.C. §§2707 & 2712

plaintiff is entitled to relief..." *Dougherty v. DHS,* 1:21-cv-154, ECF 7, at 17, ¶96, 18, ¶145. Yet the request for relief eliminated any reference to §2712. *Dougherty v. DHS,* 1:21-cv-154, ECF 7, at 25-26. In reviewing the amended complaint to draft this petition it is easy to see that the amended complaint is far from artfully pled, containing omissions, overstating facts and making conclusory allegations. *Dougherty v. DHS,* 1:21-cv-154, ECF 7 (S.D. Tex. Dec. 22, 2021). The court of appeals dismissed with prejudice the Texas law based antitrust claim, and the Constitutional claim for failure to state a claim. (Pet. App. 18a).

Despite dismissing the federal statutory claims without prejudice, without this Court's intervention, the dismissal amounts to one with prejudice based on the finding that no subject matter jurisdiction exists because sovereign immunity is not waived, and because limitations has run. (Pet. App. 9a *2-11a). But see, the opposite position as to waiver of immunity in finding that Congress legislated against a *Bivens* remedy in the context of this case because it provided the statutory remedies. (Pet.App.17a-18a). See also, the statutory language that refers to the singular relating to a violation and accrual. 18 U.S.C. §2712(a)("Any person who is aggrieved by "any willful violation"), and 18 U.S.C. §2712(b)(2) ("The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover "the violation"")(internal quotes added).

REASONS FOR GRANTING THE WRIT

III. A Difference of Opinion among the Circuit Courts of Appeals Exists as to Whether 18 U.S.C. §2712 Provides a Waiver of Immunity Notwithstanding §2520, and 2707.

Congress enacted statutes to make it easier for law enforcement to investigate threats to the United States. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.* (not limited to those).

Congress also considered protections for the rights of United States persons, and amended the statutes by providing a waiver of sovereign immunity thus subject matter jurisdiction in the district courts for violations of the statutes, authorizing suit against the United States (unauthorized disclosures of intercepted calls, unauthorized access, or exceeding authorized access to electronic, wire, and computer systems causing damage or injury) notwithstanding language in the original statutes, §2520 and §2707 prohibiting the same. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq., as amended.* 18 U.S.C. §2712(a). Notice to the Agency must be provided prior to filing suit. *Id.,* at (b)(2).

We need the availability of law enforcement tools identified in the statutes to aid law enforcement in their public protection and national security responsibilities. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.*

We also must protect citizens and other U.S. persons from law enforcement overreach. *Id, as amended.* 18 U.S.C. §2712.

The allegations in the Complaint sound outlandish, and it appears as though another country's laws have been at play, not those of the United States. Scholars on the subject have said it best:

> "As with criminal malware, the infection of someone's computer with policeware is an extremely far-reaching measure. It basically enables police to take remote control without the computer user's knowledge, allowing copying, transmitting, altering, or removing data, turning on the webcam and microphone, etc. Hackers speak of this level of user rights in terms of "I own you," and the idea of law enforcement agencies "owning" someone might well be seen as "deeply disturbing." Ivan Škorvánek, Bert-Jaap Koops, Bryce Clayton Newell, and Andrew Roberts, *"My Computer Is My Castle": New Privacy Frameworks to Regulate Police Hacking*, 2019 BYU L. Rev. 997, 1008 (2020).[1]

If this Court agrees with the court of appeals then there would be no redress for the following either: In Nov. 2022, someone accessed my computer while I was using it. I traced the IP address to Microsoft (the extent of my tracing abilities), unfortunately, I forgot to first reset my systems to kick the hacker out prior

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[1] Available at: https://digitalcommons.law.byu.edu/lawreview/vol2019/iss4/7 (a discussion of access laws in various countries including the United States).

to checking the address. My SonicWALL device which had been sending me reports was immediately disabled, the report from which I obtained the IP address was the last or near last report received. I later learned that all activity reports that I had been saving, were deleted from storage in my Microsoft Outlook e-mail. I have a portable surveillance camera that uses the Wi-Fi network, the voice monitoring function was not enabled when installed. The camera was disabled and access lost shortly after installation, and was later restored, and lost again. Sometime in 2022 I noticed the noise of the camera as though it was capturing activity. In Dec. 2022, I discovered the noise I had been hearing was because the camera's audio function had been enabled. Access to the camera on the web is no longer available. I unplugged the power source to the device and have left it unplugged. In Apr. 2023, I downloaded a job announcement from USAjobs.gov and thought I saved it to a USB drive. I later could not locate it on the USB, so I downloaded it again. While working on related documents I accessed the document and at some point clicked on a link for more information, the file folder the documents were in immediately became inaccessible. I moved some client file folders from the USB, but was not able to save them all (not all of my files were on the USB), it has become inaccessible. I lost an important litigation file that I had been researching and preparing. As a former police officer it is difficult for me to believe that someone working for DHS presumably conducting an investigation, would complete those destructive acts. Microsoft is, however, how they could easily access my domain

which I inadvertently found them signed into in June 2021. (Pet. App. 6a). Even if it is only one officer acting destructively, it is one too many, and that is all that the statutes require, one actor, one violation, and one injury. 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq., as amended*, by 18 U.S.C. §2712. No officer can exceed authorized access, presuming an authorized warrant, to damage files, prevent access, or interfere with an employment opportunity. *Id.* To be clear, neither is such conduct authorized without a warrant. *Id.*

Because, 18 U.S.C. §2712 is the later enacted statute, the Court should apply the rules of statutory construction to find that §2712, is the controlling statute which waives sovereign immunity. *Al-Haramain Islamic Foundation, Inc. v. Obama,* 705 F.3d 845, 851-852 (9th Cir. 2012). Subject matter jurisdiction exists as long as it can be gleaned from the statutory text. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). A district court of the United States has subject matter jurisdiction. 18 U.S.C. §2712(a). Subject matter jurisdiction exists for claims arising under the Constitution, laws, or treaties of the United States. 18 U.S.C. §1331. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). "Congress has created several private causes of actions under various statutes governing the surveillance and the integrity of personal computing devices, including the SCA, FISA, and the CFAA." *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019). The claims should have instead been dismissed for failure to exhaust

administrative remedies, not for lack of subject matter jurisdiction. 18 U.S.C. §2712(b)(1).

A. The Tenets of Statutory Construction Require a Finding that Each Singular Act which Violates a Statute has Its Individual Accrual of a Claim.

18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.,* statutory language is written such that each act constituting a violation can be criminally sanctioned. *Id.*

18 U.S.C. §2712's singular language states:

> "...Any person who is aggrieved by "any willful violation"...In any such action, if a person who is aggrieved successfully establishes such "a" violation..." *Id.,* at (a) (internal quotes added).

The statute further states:

> "the claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover "the violation"". *Id.,* at (b)(2) (internal quotes added).

Noted by this Court to use the indefinite article "a" is to usually define the singular. *Niz-Chavez v. Garland,* 593 U.S. __, 141 S.Ct. 1474, 1480-1484 (2021)(a notice to appear is one document). This Court has also recently considered the term "any" to

be given an expansive meaning. *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022)("the word 'any' has an expansive meaning."" *Babb* v. *Wilkie*, 589 U. S. ___, ___, n. 2 (2020) (slip op., at 5, n. 2);... Webster's Third New International Dictionary, at 97 (defining "any" as "one or some indiscriminately of whatever kind"). As used in §2712 "any willful violation" should likewise be considered expansively because read together with the final sentence, if the aggrieved establishes "such "a" violation", makes clear that it refers to one act, or any one act. See, *Ins. Safety Consultants, LLC v. Nugent,* No. 3:15-cv-2183-S-BT, 2017 WL 735460 (N.D. Tex. Sept. 12, 2018), *rep. & rec. adopted,* No. 3:15-cv-S-BT (N.D. Tex. Sept. 30, 2018), (construing limitations to run when unlawful access occurs or when discovered, allowing some claims and disallowing others as untimely). *Page v. Comey,* Civ. No. 1:20-3460-DLF, ECF 115, at 10, 14-16 (D.D.C. Sept. 1, 2022) (complaint doesn't conclusively reveal when reasonable discovery of every alleged violation could be made, declining to dismiss on limitations). Many of the acts identified in the amended complaint are pending administrative remedies as notice was sent on October 7, 2021. (Pet. App. 30a-31a).

B. No Discretionary Function Exists Under 18 U.S.C. §§2712, or 1030 claim(s) because they are Civil Actions for Violation(s) of Nondiscretionary Criminal Statutes.

Law enforcement tools set out in 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.,* are nondiscretionary statutes, requiring adherence to the

statutes, constitution, and other laws. *Id.* The statutes involved contain only the presentment requirement. 18 U.S.C. §2712(b)(1). The statute has its own procedural requirements. *Id.,* at (b)(2)-(5). As well as its own remedies. *Id.,* at (a). The statutes have their own exceptions and defenses interspersed throughout. 18 U.S.C. §1030, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq. as amended,* by §2712. The plain language of the statutes does not afford the judicially created "qualified immunity" from suit, where an identified high level official must affirmatively claim immunity by providing evidence that they were acting within the scope of their official duties and did not violate a clearly established statutory or constitutional right. *Harlow v. Fitzgerald,* 475 U.S. 800, 806-808 (1982); *Pearson v. Callahan,* 555 U.S. 223, 231-32, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The statutory exceptions and defenses should be the only means to avoid liability, because Congress wrote them into the statutes just as they wrote waivers of sovereign immunity into the statutes, and neither can be ignored when applying the law as it is found. *Niz-Chavez v. Garland,* 593 U.S. __, 141 S.Ct. 1474, 1480 (2021), citing, *Wisconsin Central Ltd. V. United States,* 585 U.S. __, __, (2018), and *Lamie v. United States Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)(the statutes are read as written by Congress).

The defenses identified in the *ECPA*'s *WTA* against unlawful disclosures under §§2511(1)(c), (e)(i), are contained in §2520(d). *Id.* §2520(g) informs that disclosure other than authorized by §2517 is improper and is a violation. *Id.* The only exceptions identified in the *ECPA*'s *SCA* against unlawful disclosure or

exceeding authorized access and obtaining, altering, or preventing authorized access do not belong to the United States. 18 U.S.C. §§2701(a)(2), (b)(1), and (c), 2703(e), 2707(e). A limited exception exists for the United States under §2707(g) ("Improper disclosures ... shall not apply to information previously lawfully disclosed (prior to the commencement of a civil action ...) ..."). *Id.* 18 U.S.C. §§2517(7), and (8), not limited to that, only allow use of information lawfully obtained, to use in official duties, and subject to limitations on unauthorized disclosures. *Id.* 18 U.S.C. §2517(8), not limited to that, only allows use of information lawfully obtained, for use in official duties, and subject to limitations on unauthorized disclosures. *Id.* No discretion adheres to violating nondiscretionary criminal statutes whose terms make that clear. 18 U.S.C. §1030, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq. as amended,* by §2712.

1. Violations that Rise to Constitutional Violations Should be Remedied under 28 U.S.C. §1331 against the Individual Capacity Doe(s), and 28 U.S.C. §1346(b) against the United States.

Where an individual employed by, or acting on behalf of the United States, violates the provisions of a nondiscretionary statute, such that the conduct raises a constitutional violation, 18 U.S.C. §2510, *et seq.,* and 18 U.S.C. §2701, *et seq.,* imply a remedy under U.S. Const, art. III, by 28 U.S.C. §1331 jurisdiction, such that *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971) could be

extended in this case for violations rising to *First, Fourth* and *Fifth Amendment* violations. "As the Court explained in *Abbasi,* the *Bivens* decision created an implied cause of action, permitting civil suits for damages for constitutional violations by federal officials where Congress had not indicated that such a remedy was foreclosed. *Id.* at 1854." *Attkisson v. Holder*, 925 F. 3d 606, 620 (4th Cir. 2019). "Congress has created several private causes of actions under various statutes governing the surveillance and the integrity of personal computing devices, including the SCA, FISA, and the CFAA." *Attkisson v. Holder*, 925 F.3d at 621. Although, the court of appeals in this case, and in *Attkisson* declined to apply *Bivens,* the Court should consider the issue as important to both the integrity of our law enforcement institutions and to remedying the Constitutional violations by them against U.S. citizens. 18 U.S.C. §2518(5), provides for the limitations of authorized warrant orders to 30 days, only extended upon application, while §2518(10)(c) implies a remedy, outside of a statutory one, for constitutional violations of Chapter 119, because it speaks only to nonconstitutional remedies. *Id.* 18 U.S.C. §2701, and §2708, imply a remedy, outside of a statutory one, for constitutional violations of Chapter 121, because it speaks only to nonconstitutional remedies. *Id.* Nothing in 18 U.S.C. §2712(d), prohibits a remedy for constitutional violations which are outside of the statutory nonconstitutional violations and remedies "within the purview of this section". *Id.* When officers are shielded from liability for bad acts they are emboldened to continue, surely a remedy for Constitutional violations will help to temper those

acts as provided for by Congress in 28 U.S.C. §1331 (as to Doe(s) individual capacity), and 28 U.S.C. §1346(b)(as to United States, and Doe(s) official capacity). *Id.*

CONCLUSION

The petition for writ of certiorari should be granted to resolve a circuit split whether the district court has subject matter jurisdiction under 18 U.S.C. §2712, by a waiver of sovereign immunity for violations of Chapter 119 and 121, of Title 18, notwithstanding §§2520 and 2707.

The petition for writ of certiorari should be granted to settle that "the violation" means "each act" constituting "a violation", not a conglomeration of acts, and a claim is timely if prior to filing suit in the federal district court the procedural requirements of §2712 are satisfied within two years of "the act" or "the violation" complained of, even if earlier act(s) cannot be included.

The petition for writ of certiorari should be granted to determine the implications of the statutory terms "the only remedies for nonconstitutional violations" of the statutes as the terms of the statute implies that Constitutional claims may be brought outside of the statutory claims because Constitutional claims are not within the purview of the nonconstitutional statutory violations and their associated remedies.

The petition should be granted to settle that when no Doe has been identified, but a government agency has been identified as signed in and controlling a plaintiff's domain, that the agency must identify responsible individuals before being able to claim defenses without presenting evidence, or the claim

should be dismissed without prejudice for failure to exhaust administrative remedies, thereby allowing a later return to court if necessary.

The resolution of these issues are important questions that the Court should resolve because there is both an important governmental interest in the use of the statutory tools to conduct investigations and an equally compelling one to ensure that U.S. persons statutory and Constitutional rights are not violated when the tools are utilized.

Respectfully Submitted,

/s/ Marlene A. Dougherty
MARLENE DOUGHERTY
Pro se, Counsel of Record
Fed. ID. 38142

LAW OFFICE OF MARLENE A. DOUGHERTY
314 E. 8th Street
Brownsville, Texas 78520
marlene@mdjd180.com
(956) 542-7108

NO.

IN THE

Supreme Court of the United States

MARLENE A. DOUGHERTY, doing business as, LAW OFFICE OF MARLENE A. DOUGHERTY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNKNOWN JOHN AND JANE DOE(S), EMPLOYED BY DHS,

Respondents.

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

PETITIONER'S APPENDIX

MARLENE DOUGHERTY
Pro se, Counsel of Record
LAW OFFICE OF MARLENE A. DOUGHERTY
314 E. 8th Street
Brownsville, Texas 78520
marlene@mdjd180.com
(956) 542-7108

December 18, 2023

INDEX TO APPENDICES

Respectfully submitted,

/s/ Marlene Dougherty

MARLENE DOUGHERTY

Pro se, Counsel of Record

LAW OFFICE OF MARLENE A. DOUGHERTY

314 E. 8th Street

Brownsville, Texas 78520

marlene@mdjd180.com

(956) 542-7108

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 22-40665

Marlene A. Dougherty, *doing business as* Law Office of Marlene A. Dougherty,
Plaintiff—Appellant,

versus

United States Department of Homeland Security; Unknown John and Jane Does, Employed by DHS,
Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:21-CV-154

Before Davis, Southwick, and Oldham, *Circuit Judges*

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the amended judgment of the District Court is AFFIRMED as MODIFIED. Specifically, we modify the judgment to state that Dougherty's ECPA and CFAA claims against DHS are dismissed without prejudice. We otherwise AFFIRM the

No. 22-40665

District Court's judgment that Dougherty's SCA claims are dismissed without prejudice and the remainder of her claims are dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Nov 13, 2023
Attest: s/
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

No. 22-40665

Marlene A. Dougherty, *doing business as* Law Office of Marlene A. Dougherty,
Plaintiff—Appellant,

versus

United States Department of Homeland Security; Unknown John and Jane Does, Employed by DHS,
Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:21-CV-154

Before Davis, Southwick, and Oldham, *Circuit Judges*.

Per Curiam:*

Plaintiff-appellant, Marlene A. Dougherty, proceeding *pro se*, filed suit against Defendants Appellees, the Department of Homeland Security ("DHS") and unnamed DHS officers ("Unnamed Defendants"), alleging that Defendants unlawfully accessed and tampered with her computer network

and telecommunications systems, in violation of her rights under the

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

First, Fourth, and Fifth Amendments, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2523, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the Stored Communications Act, 18 U.S.C. §§ 2701-2712, and state law. The district court dismissed Dougherty's amended complaint for lack of subject matter jurisdiction and for failure to state a claim. We AFFIRM but MODIFY THE JUDGMENT to dismiss without prejudice Dougherty's claims over which we lack subject matter jurisdiction.

I. BACKGROUND

Dougherty is an attorney practicing immigration law in Brownsville, Texas. She characterizes her practice as focusing on the "lawful defense of undocumented immigrants" who are "victims of the unauthorized practice of immigration law." As part of this work, Dougherty contends that she regularly appears before "the immigration agencies" and often is required to criticize "employees of the [a]gencies, including immigration judges."

In light of Dougherty's advocacy, she contends that DHS has retaliated against her by "unlawfully monitoring . . . her electronic and aural communications" and interfering in her "right to

practice law on behalf of undocumented immigrants."

As detailed in her amended complaint and attached exhibits, Dougherty alleges that she first became aware of this alleged unlawful monitoring in 2010 and continued to experience problems through 2021.

Specifically, in 2010, Dougherty's amended complaint implies that her phone conversation with a client about a filing fee payment was intercepted and resulted in her checks not being returned with a "receipt number" from DHS. In early 2018, Dougherty states that she mentioned her concern about these checks in conversation at her office and afterwards her checks "began to be blacked out." Also in 2018, Dougherty noticed

"changes to information stored in her QuickBooks," unauthorized edits to a legal brief, and the loss of computer access to her email account.

From 2019-2020, Dougherty had repeated issues registering for and signing into DHS-run websites and accounts. In October of 2019, Dougherty alleges that she received an anonymous voicemail that noted "where [she] was going [and] mischaracterizing her private religious activities." She further asserts that a year later an anonymous user posted on Twitter details from Dougherty's private conversation with her mother. On June 14, 2021, Dougherty alleges she "inadvertently found that the Office of the Principal Legal Advisor (OPLA)[,] a division of ICE[,] was logged in to and was the control organization to [her] Office 365 and Outlook Mail." And within the past two years,

Dougherty alleges that she has received phone messages "in which law enforcement could be heard in the background."

Dougherty has reported the above issues several times throughout the years. In 2016, 2018, and 2020, she hired security experts to investigate the alleged unauthorized access and surveillance. Additionally, Dougherty has twice reported these issues to the Federal Bureau of Investigation ("FBI"), but no issues were found with her devices.

On October 7, 2021, Dougherty filed her original complaint seeking damages, injunctive relief, and a temporary restraining order. After the district court denied her request for a temporary restraining order, Dougherty filed her amended complaint—the operative pleading for this appeal—reasserting claims against DHS and the Unnamed Defendants.[1]

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[1] Dougherty's amended complaint does not state whether she is asserting claims against the Unnamed Defendants in their official or personal capacities. However, Dougherty's opening brief on appeal clarifies that she intended to sue the Unnamed Defendants in their individual capacities. To the extent she also intended to sue the officers in their official capacities, such claims would face the same fate as those brought against

Specifically, Dougherty's amended complaint asserts claims under the Electronic Communications Privacy Act ("ECPA"), the Computer Fraud and Abuse Act ("CFAA"), and the Stored Communications Act ("SCA") against DHS and the

Unnamed Defendants. She additionally brings claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[2] and a state-law antitrust claim against the Unnamed Defendants.

On January 11, 2022, Dougherty issued third-party subpoenas to AT&T and Twitter in order to identify the Unnamed Defendants. In response, Defendants filed an emergency motion to quash these subpoenas as prematurely issued under Rule 45 of the Federal Rules of Civil Procedure. After giving Dougherty a chance to respond, the district court granted Defendants' motion to quash and denied Dougherty's request for expedited discovery.

On February 28, 2022, Defendants moved to dismiss Dougherty's claims for lack of subject matter jurisdiction and for failure to state a claim.

On March 1, 2022, the district court heard arguments on the Defendants request for a stay of discovery pending the court's resolution of the pending motion to dismiss. The court granted the stay, citing the strength of Defendants' motion to dismiss and Dougherty's lack of any allegation "that ties these particular defendants to the specific technological issues that . . . [she] allege[d]."

The district court also granted Defendants' motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6), dismissed Dougherty's claims with prejudice, and denied her request for a temporary and permanent injunction.

DHS. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." (citation omitted)).

[2] 403 U.S. 388 (1971).

Dougherty moved to amend the judgment, which the district court granted in part, agreeing with Dougherty that the dismissal of her SCA claims should have been without prejudice. As amended, the district court's judgment dismissed with prejudice Dougherty's ECPA and CFAA claims and dismissed without prejudice her SCA claims.[3] Dougherty timely appealed.

II. DISCUSSION

On appeal, Dougherty reasserts her claims and argues that the district court erred by dismissing them with prejudice and by denying her early discovery to identify the DHS agents. We address these contentions in turn.

A. Rule 12(b)(1)

1. Standard of Review

A dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) is reviewed *de novo*, applying the same standard as the district court.[4] "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction."[5] "When a Rule 12(b)(1)motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[6]

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[3] The district court again denied Dougherty's request for injunctive relief in its amended order. Although Dougherty appeals this order, she does not brief the issue of injunctive

relief. Accordingly, she has "waived or abandoned this issue on appeal." *Al-Ra'id v. Ingle*, 69 F.3d 28, 31 (5th Cir. 1995).

[4] *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019) (citing *Musslewhite v. State Bar. of Tex.*, 32 F.3d 942, 945 (5th Cir. 1994)).

[5] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam) (citation omitted).

[6] *Id.* (citing *Hitt v City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)).

2. Sovereign Immunity

The district court correctly dismissed Dougherty's ECPA and CFAA claims against DHS because the Government has not waived sovereign immunity under either statute. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."[7] And because sovereign immunity goes to the court's subject matter jurisdiction, "Congress's waiver of [it] must be unequivocally expressed in statutory text and will not be implied."[8]

Here, Dougherty asserts that DHS violated the ECPA's prohibition on the unauthorized interception and disclosure of wire, oral, or electronic communications, codified at 18 U.S.C. § 2511. Although "[s]ection 2511 is ... primarily a criminal provision," § 2520(a) "expressly allows private civil suits by any person whose electronic communication is intercepted in violation of 'this chapter' of the statute."[9] Section 2520(a) states that an aggrieved party has a cause of action against "the person or entity, *other than the United States*, which engaged in that violation."[10] Because Dougherty seeks relief under § 2520(a), which expressly bars relief against

the United States and its agencies, the district court correctly dismissed her claim for lack of subject matter jurisdiction.[11]

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[7] *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted).

[8] *Freeman v. United States*, 556 F.3d 326, 335 (5th Cir. 2009) (internal quotationmarks and citation omitted).

[9] *DIRECTV, Inc. v. Bennett*, 470 F.3d 565, 566-67 (5th Cir. 2006) (per curiam).

[10] 18 U.S.C. § 2520(a) (emphasis added).

[11] *See Voinche v. Obama*, 744 F. Supp. 2d 165, 175-76 (D.D.C. 2010) (dismissing plaintiff's claims against federal agencies and officers because under § 2520 "the United States is specifically exempted" (internal quotation marks and citation omitted)).

However, as Dougherty points out, another section of the ECPA, titled the Stored Communications Act, does provide a cause of action for money damages against the United States. Specifically, 18 U.S.C. § 2712 permits suits against the United States for willful violations of the SCA and "chapter 119" of title 18.[12] However, like other courts, we determine that the express language of § 2520 prohibits claims against the United States brought under that section, regardless of whether immunity is waived for claims raised under § 2712.[13]

Dougherty has similarly failed to demonstrate that the United States has waived sovereign immunity for claims under the CFAA. The CFAA provides a civil cause of action to "[a]ny person who suffers damage or loss by reason of a violation of this section."[14] Dougherty argues that because the statute defines "person" to include the United States and its agencies, the Government has waived

sovereign immunity because DHS is a "'person' 'who' can be sued for a violation of the statute." We find this argument not only misreads the statute, but also falls short of the requirement that

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[12] Chapter 119 includes 18 U.S.C. §§ 2510-2523.

[13] *See Thomas v. Seth*, 317 F. App'x 279, 282 (3d Cir. 2009) (per curiam) (unpublished) ("[T]he Wiretap Act exempts the United States . . . from liability, barring certain conditions not present in this case." (citing 18 U.S.C. §§ 2520(a) and 2712)); *see also Lott v. United States*, No. 4:10-2862, 2011 WL 13340702, at *4 (S.D. Tex. May 31, 2011), *report and recommendation adopted*, No. 10-2862, 2011 WL 13340701 (S.D. Tex. June 17, 2011) ("Although a person may bring a civil cause of action under the Federal Wiretap Act under some circumstances, the United States is specifically excepted as a permissible defendant." (citing 18 U.S.C. § 2520(a)). Even assuming there was ambiguity between § 2520 and § 2712 regarding the Government's waiver of sovereign immunity, we "construe any ambiguities in the scope of a waiver in favor of the sovereign." *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012).

[14] 18 U.S.C. § 1030(g).

Congress's waiver of sovereign immunity be "unequivocally expressed in statutory text."[15]

Accordingly, because the United States has not expressly waived its sovereign immunity for claims under § 2520 and § 1030, the district court correctly dismissed these claims against DHS for lack of jurisdiction.

3. Administrative Exhaustion

Dougherty alleges that DHS violated § 2701(a) of the SCA by gaining access to her electronic communications while the messages were in storage

with her email providers. As noted above, although the SCA allows for suits against the United States for willful violations of the Act, § 2712 preconditions such suits on compliance with an administrative scheme. Specifically, a plaintiff may file suit against the United States "only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act."[16]

Under the Federal Tort Claims Act ("FTCA"), "a plaintiff must give notice of his claim to the appropriate federal agency."[17] Such notice "is a jurisdictional prerequisite to filing suit under the FTCA."[18] Dougherty's amended complaint does not allege that she presented her claim to DHS prior to filing suit. Instead, she asserts that she satisfied the jurisdictional prerequisite by serving DHS with notice on the same day she filed suit. We find this argument unavailing in light of § 2712's explicit requirement that a

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[15] *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)).

[16] 18 U.S.C. § 2712(b)(1).

[17] *Cook v. United States*, 978 F.2d 164, 165-66 (5th Cir. 1992) (per curiam) (citations omitted).

[18] *Id.*

plaintiff can bring suit "*only after* a claim is presented to the appropriate department."[19] Accordingly, the district court correctly held that it lacked subject matter jurisdiction over Dougherty's SCA claim against DHS.

4. Dismissal Without Prejudice

The district court dismissed Dougherty's claims against DHS for lack of subject matter jurisdiction. Specifically, the court dismissed her ECPA and CFAA claims with prejudice and her SCA claims without prejudice.

However, this Court has made "clear that a jurisdictional dismissal must be *without* prejudice to refiling in a forum of competent jurisdiction."[20] Because "[t]his rule applies with equal force to sovereign-immunity dismissals,"[21] the district court erred when it dismissed Dougherty's ECPA and CFAA claims with prejudice.

B. Rule 12(b)(6)

1. Standard of Review

We review the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*.[22] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[23] In considering a motion to dismiss, "a district court must limit itself to the contents of the pleadings, including

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[19] 18 U.S.C. § 2712(b)(1) (emphasis added).

[20] *Carver v. Atwood*, 18 F.4th 494, 498-99 (5th Cir. 2021) (citing *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020)).

[21] *Id.* (citing *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996)).

[22] *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc).

[23] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

attachments thereto."[24] Although "pro se complaints are held to less stringent standards," this Court has made clear that even for *pro se* litigants "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[25]

2. Chapter 15 of the Texas Business & Commerce Code Claim

Dougherty additionally alleges that Unnamed Defendants violated the Texas Business and Commerce Code § 15.05(a) by conspiring to "reduce the output" of her legal practice. Under § 15.05(a), "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful."

The district court dismissed this claim on the grounds that Dougherty had failed to state a claim against the Unnamed Defendants "absent actionable identifying information" regarding the identity of the defendants or sufficient information to render it conceivable that discovery would prove fruitful in uncovering their identities.

On appeal, Dougherty does not dispute that she has not plausibly alleged a state-law antitrust claim and instead argues that dismissal should be without prejudice, allowing her to refile and obtain discovery to identify the unknown officers. We agree that Dougherty's amended complaint does not "contain sufficient factual matter, accepted as true," to state a Texas antitrust claim against the Unnamed Defendants.[26]

Even setting aside the fact that Dougherty's amended complaint lacks any identifying information about the Unnamed Defendants, the complaint

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[24] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (citing Fed. R. Civ. P. 12(b)(6)).

[25] *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (internal quotation marks and citations omitted).

[26] *Iqbal*, 556 U.S. at 678 (citation omitted).

fails to survive a Rule 12(b)(6) motion for the independent reason that it is devoid of any allegations that these officers were part of an antitrust conspiracy that resulted in significant market control over the relevant industry. The totality of Dougherty's allegation under this claim is that "[t]he Doe Defendants violated . . . § 15.05(a) by acting in combination and/or conspiring in their acts to reduce the output of plaintiff's lawful business activities which are in opposition to the unauthorized practice of immigration law and to remedy the injury thereby imposed." Notably lacking is any allegation—plausible or otherwise—that the Unnamed Defendants were conspiring to unreasonably restrain trade, which is an essential element of the Texas antitrust statute.[27] Accordingly, Dougherty has failed to state a plausible state-law antitrust claim against the Unnamed Defendants.

3. Bivens *Claims*

Finally, Dougherty brings claims under *Bivens* against the Unnamed Defendants for violating her

First, Fourth, and Fifth Amendments by "exceeding every state and/or federal statut[e] . . . which concerns wiretaps, protected information, and computer access." The district court dismissed Dougherty's *Bivens* claims after concluding there was no "compelling argument" to extend *Bivens* to this new context.

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[27] *See In re Champion Printing & Copying, L.L.C.*, No. 21-51234, 2023 WL 179851, at *4 (5th Cir. Jan. 13, 2023) (per curiam) (unpublished) (analyzing claims filed under Texas Business and Commercial Code § 15.05(a) and noting that under that provision "plaintiffs cannot 'demonstrate the unreasonableness of a restraint merely by showing that it caused [one person] economic injury." (citing *Regal Ent. Grp. v. iPic-Gold Class Ent., LLC*, 507 S.W.3d 337, 348 (Tex. App.—Houston [1st Dist.] 2016, no pet.)). Unpublished opinions issued in or after 1996 are "not controlling precedent" except in limited circumstances, but they "may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

The Supreme Court has set forth a two-step inquiry to determine whether a cognizable *Bivens* remedy exists. At step one, the court must determine whether a claim "presents a new *Bivens* context."[28] A *Bivens* claim arises in a "new context" if "the case is different in a meaningful way from previous *Bivens* cases decided by" the Supreme Court.[29] If a case arises in a new context, "a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'"[30]

As to the first step, we agree with the district court that Dougherty's claims arise in a "new *Bivens* context." The Supreme Court has never recognized a First Amendment *Bivens* claim, and Dougherty's Fourth and Fifth Amendment *Bivens* claims differ meaningfully from previous *Bivens* cases involving those constitutional provisions.[31] As recognized by the Fourth Circuit, "a claim based on unlawful electronic surveillance presents wildly different facts and a vastly different statutory framework from a warrantless search and arrest."[32]

At the second step, we find that "special factors" counsel hesitation against recognizing a new *Bivens* remedy. Specifically, because "Congress has provided alternative remedies for aggrieved parties in [Dougherty's]

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[28] *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017).

[29] *Id.*

[30] *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (quoting *Ziglar*, 582 U.S. at 136).

[31] In *Bivens*, the Court created an implied damages remedy under the Fourth Amendment for an allegedly unconstitutional search and seizure. 403 U.S. at 389. And in *Davis v. Passman*, the Court recognized a *Bivens* remedy in a Fifth Amendment gender discrimination case. 442 U.S. 228, 230 (1979).

[32] *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019).

position," that "independently foreclose a *Bivens* action."[33] As evidenced by Dougherty's federal statutory claims, "Congress has created several private causes of actions under various statutes governing the surveillance and the integrity of personal computing devices, including the SCA,

FISA, and the CFAA."[34] Accordingly, we affirm the district court's dismissal of Dougherty's First, Fourth, and Fifth Amendment *Bivens* claims with respect to the Unnamed Defendants.

4. Dismissal With Prejudice

Dougherty argues that the district court erred in dismissing her state-law antitrust claim and *Bivens* claims with prejudice given that she has not been able to conduct discovery into the identity of the Unnamed Defendants. Although the decretal language in the district court's amended order did not explicitly dismiss these claims with or without prejudice, "a dismissal is presumed to be with prejudice unless the order explicitly states otherwise."[35]

"Generally[,] a district court errs in dismissing a *pro se* complaint for failure to state a claim under Rule 12(b)(6) without giving the plaintiff an opportunity to amend."[36] However, dismissal without prejudice is not required "if the plaintiff has already pleaded his 'best case.'"[37] We find that Dougherty has pleaded her "best case." She has presented her arguments several times before the district court in both her initial and amended

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[33] *Egbert*, 142 at 1806.

[34] *Attkisson*, 925 F.3d at 621.

[35] *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 n.8 (5th Cir. 1993) (citations omitted).

[36] *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (per curiam) (citing *Moawad v. Childs*, 673 F.2d 850, 851-52 (5th Cir. 1982)).

[37] *Brewster v. Dretke*, 587 F.3d 764, 768 (5th Cir. 2009) (per curiam) (citation omitted).

complaint, as well as her opposition to the Defendants' motion to dismiss and her Rule 59(e) motion to "alter or amend" the district court's order. Despite these opportunities, Dougherty remains unable to state plausible antitrust and *Bivens* claims against the Unnamed Defendants.

Further, Dougherty's appellate filings fail to identify "what facts [s]he would have added or how [s]he could have overcome the deficiencies found by the district court if [s]he had been granted an opportunity to amend."[38] Although Dougherty contends that she would not refile these claims without identifying the Unnamed Defendants, she does not explain how uncovering the identity of the officers would cure the deficiencies in her *Bivens* claims or her failure to even allege the basic components of an antitrust conspiracy. Therefore, because Dougherty has failed to show the district court erred in dismissing her *Bivens* and antitrust claims presumably with prejudice.

5. Statute of Limitations

Dougherty's complaint also appears to assert violations of the ECPA, CFAA, and SCA against the Unnamed Defendants in their individual capacities. The district court dismissed these claims as time barred under 18 U.S.C. § 2520(e) (ECPA), 18 U.S.C. § 1030(g) (CFAA), and 18 U.S.C. § 2707(f) (SCA). We find no reversable error in the district court's dismissal of Dougherty's ECPA, SCA, and CFAA claims against the Unnamed Defendants.

C. Entitlement to Discovery

Finally, Dougherty asserts the district court abused its discretion in staying discovery pending resolution of Defendants' motion to dismiss and

38 *Goldsmith v. Hood Cnty. Jail*, 299 F. App'x 422, 423 (5th Cir. 2008) (per curiam) (unpublished).

granting Defendants' motion to quash her third party subpoenas. The district court explained that the subpoenas were premature under the Federal Rules, and that the court had concerns about potential First Amendment issues as to the Twitter subpoena. We review a district court's order to stay discovery pending a dispositive motion for abuse of discretion.[39] And we review a district court's grant of a motion to quash a subpoena under the same standard.[40] As the party seeking discovery, Dougherty bears the burden of showing its necessity.[41]

A plaintiff is not entitled to jurisdictional discovery "if the record shows that the requested discovery is not likely to produce the facts needed to withstand" a motion to dismiss.[42] In this case, we are unable to see how discovery into the identities of the Unnamed Defendants would have impacted our dismissal of Dougherty's claims on the grounds of sovereign immunity, exhaustion, timeliness, failure to plausibly state an antitrust injury, and the creation of a new *Bivens* context. Accordingly, we can discern no abuse of discretion in the district court's decision to grant a motion to stay discovery and quash Dougherty's third-party subpoenas.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's amended judgment as modified. Specifically, we modify the judgment to state that Dougherty's ECPA and CFAA claims against DHS are dismissed without

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[39] *Davila v. United States*, 713 F.3d 248, 263-64 (5th Cir. 2013) (citation omitted); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

[40] *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994).

[41] *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009) (citation omitted).

[42] *Davila*, 713 F.3d at 264.

prejudice. We otherwise affirm the district court's judgment that Dougherty's SCA claims are dismissed without prejudice and the remainder of her claims are dismissed with prejudice. AFFIRMED AS MODIFIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARLENE A DOUGHERTY, §
Plaintiff, §
VS. §C.A. No. §1:21-CV-154

U.S. DEPARTMENT OF HOMELAND SECURITY, et al., §
Defendants. §

FINAL JUDGMENT

In accordance with the Court's Amended Order and Opinion (Doc. 32), Final Judgment is entered in favor of Defendant United States Department of Homeland Security and the unnamed defendants as to all of Plaintiff Marlene A. Dougherty's causes of action. Plaintiff Marlene A. Dougherty takes nothing in this lawsuit against the United States Department of Homeland Security or the unnamed defendants.

Each party shall be responsible for its own fees and costs.

The Clerk of Court is directed to close this matter.

Signed on August 4, 2022.

s/
Fernando Rodriguez, Jr.
United States District Judge

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARLENE A DOUGHERTY, §
Plaintiff, §
VS. §C.A. No. §1:21-CV-154

U.S. DEPARTMENT OF HOMELAND SECURITY, et al., §
Defendants. §

AMENDED ORDER AND OPINION

Plaintiff Marlene A. Dougherty filed this civil action against the United States Department of Homeland Security and several unidentified DHS employees for allegedly unlawfully accessing and tampering with her computer network and telecommunications systems. Dougherty pursues claims under the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), and 18 U.S.C. § 1030 (Computer Fraud and Abuse Act ("CFAA")), which prohibits fraud in connection with computers. In addition, Dougherty alleges a Texas state-law conspiracy claim and a *Bivens* action against the unnamed defendants.

The United States challenges the Court's subject matter jurisdiction over Dougherty's causes of action on the grounds that the ECPA and CFAA do not waive the United States's sovereign

immunity, and that Dougherty failed to exhaust her administrative remedies as to her SCA claim. In addition, the United States argues that the statute of limitations bars Dougherty's claims under the ECPA and CFAA, and that the causes of action against the Doe Defendants fail under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court concludes that Dougherty's claims do not survive the motion to dismiss.

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I. Allegations and Procedural History[1]

Since 2004, Plaintiff Marlene A. Dougherty has practiced immigration law in Brownsville, Texas, "serving those who are the victims of the unauthorized practice of law, or the ineffective assistance of prior counsel." (Am. Complt., Doc. 7, ¶ 5)

DHS has targeted Dougherty "in retaliation for [her] lawful actions taken on behalf of her clients, and/or because of her race." (*Id.* at ¶ 1) This retaliation has included a "pattern and practice of excessive and unlawful investigations of plaintiff including unauthorized interceptions and disclosures of aural communications, and wrongful allegations disseminated to third parties to interfere in plaintiff's protected lawful business and personal activities." (*Id.* at ¶ 12) Specifically, Dougherty's "aural communications have been intercepted and disclosed", "her stored communications have been accessed and altered", and "pleadings and other documents that she has written to be filed with the Courts have been accessed and altered". (*Id.* at ¶ 17) For example, in December 2018, she returned to a draft of a legal document on her computer system

after a several-hour break, and discovered that someone had altered and "tampered" with the draft. (*Id.* at ¶ 22) The recurring intrusions have rendered her practice of law "extremely time consuming and difficult as citations to materials in her documents for the federal court are changed without authorization". (*Id.*) She also has been "locked out" of several online accounts with immigration agencies and has experienced difficulties registering for and signing into DHS-related accounts. (*Id.* at ¶¶ 24–26) In addition, she has received an anonymous voice message detailing her private religious information, and was targeted by an anonymous Twitter "parody"

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[1] For purposes of considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court accepts a plaintiff's well-pleaded allegations as true, but does not accept as true legal conclusions couched as factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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account. (*Id.* at ¶¶ 33–35). She maintains that "[a]ll appearances are that the acts are in retaliation for plaintiff's work on behalf of her clients." (*Id.* at ¶ 32)

Dougherty specifies that these unwanted and unlawful actions have been ongoing "since at least 2010." (*Id.* at ¶ 36) In 2016, she retained a security expert "to review suspected unauthorized computer and document access, as citations and designations to exhibit pages would change and plaintiff repeatedly had to redo them." (*Id.* at ¶ 19) Two years later, she hired an outside organization to "run a security check", which she repeated in 2020. (*Id.* at ¶¶ 21, 23) By no later than 2018, she suspected interference with her QuickBooks account, leading

her to manually maintain her office finances. (*Id.* at ¶ 30–31)

Within the past two years, she received anonymous voice messages "in which law enforcement could be heard in the background", including one message in which a "raging" law enforcement officer referred derogatorily to her and an officer made a lewd, disturbing statement. (*Id.* at ¶ 39) Since she filed her lawsuit, however, these "abusive timewasting phone calls" have ceased. (*Id.* at ¶ 45)

In October 2021, Dougherty filed her Original Complaint, in which she requested a temporary restraining order to prevent Defendants from destroying potential evidence related to this case. (Complt., Doc. 1) The Court denied the TRO request. (Order, Doc. 3) Dougherty then amended her Complaint. (Am. Complt., Doc. 7) The United States now moves under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss each of Dougherty's causes of action contained in the First Amended Complaint. (Motion, Doc. 24)

II. Analysis

A. Standard of Review

Dismissal under Rule 12(b)(1) is proper where "the court lacks the statutory or constitutional power to adjudicate the case." *Home Builder's Ass'n of Miss., Inc. v. City of Madison*, 143 F. 3d 1006, 1010 (5th Cir. 2014). The plaintiff bears the burden of proving that a

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district court has jurisdiction by a preponderance of the evidence. *Ramming v. United States*, 281 F.3d

158, 161 (5th Cir. 2001). "[I]f the defense merely files a Rule 12(b)(1) motion, the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). When a Rule 12(b)(1) motion is filed alongside other Rule 12 motions, "the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming*, 281 F.3d at 161.

To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 12(b)(6). A plaintiff satisfies the facial plausibility standard by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations in the complaint are not required to be thoroughly detailed, but must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A court considers only the allegations in the complaint and must accept them as true, viewing them in the light most favorable to the plaintiff. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). If the allegations are sufficient "to raise a right to relief above the speculative level," the court will not dismiss the cause of action. *Twombly*, 550 U.S. at 555.

B. Claims against DHS

Dougherty alleges claims against DHS under the ECPA, the SCA, and the CFAA. She alleges that

DHS violated the ECPA by intentionally intercepting, disclosing, and using her communications without her consent, so as to stalk and harass her. (Am. Compl., Doc. 7, ¶ 93–95) As to the SCA, she alleges that DHS intentionally gained control of her online accounts and accessed and controlled her electronic communications while those communications were stored

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with email providers. (*Id.* at ¶ 144) And as to the CFAA, she alleges that DHS intentionally and without authorization accessed her protected computer to obtain information. (*Id.* at ¶ 193)

The United States argues that the Court lacks subject matter jurisdiction over each of these three statutory claims. For the following reasons, the Court agrees.

1. Sovereign Immunity

The United States advances the initial argument that the ECPA and CFAA do not waive the United States's sovereign immunity. (Motion, Doc. 24, 4, 6)

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). The statutory text must "unequivocally" waive the immunity, and courts construe any ambiguities in favor of immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* at 290–91. "The party claiming federal subject matter jurisdiction has the burden of proving it

exists." *Peoples Nat. Bank v. Off. of Comptroller of Currency of U.S.*, 362 F.3d 333, 336 (5th Cir. 2004).

First, the Court concludes that the ECPA does not waive the United States's sovereign immunity. This statute authorizes an individual to assert a claim against a "person or entity, other than the United States." 18 U.S.C. § 2520(a). The express exclusion of suits against the United States is unambiguous, and courts have relied on this text to dismiss ECPA claims alleged against the United States. S*ee, e.g., Merisier v. Johnson Cnty., Tex.*, No. 4:20-CV-00520-SDJ-CAN, 2021 WL 1720153, at *4 (E.D. Tex. Feb. 4, 2021), *rep. & rec. adopted*, No. 4:20-CV-520-SDJ, 2021 WL 1709913 (E.D. Tex. Apr. 29, 2021) ("[A]ny potential claim [under 18 U.S.C. § 2520] against [Defendant] in his official capacity is precluded by sovereign immunity".); *Lott v. United States*, No. 4:10-CV-2862, 2011 WL 13340702, at *4 (S.D. Tex. May 31, 2011), *rep. & rec. adopted*, No. CV H-10-2862, 2011 WL 13340701 (S.D. Tex. June 17, 2011) ("Although a person may bring a civil

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cause of action under [18 U.S.C. § 2520] under some circumstances, the United States is specifically excepted as a permissible defendant.").

Dougherty claims that a circuit split exists as to whether the United States can be sued under the ECPA. (Response, Doc. 26, 5–6 (relying on *Whitaker v. Barksdale Air Force Base*, No. 14–2342, 2015 WL 574697, at *5 & n.10 (W.D. La. Feb. 11, 2015))) But *Whitaker* does not help her. That case concerned whether the ECPA allows suits against *state* government entities, noting that a circuit split exists as to that issue. *Whitaker*, 2015 WL 574697, at *5 &

n.10. In contrast, on the matter of whether the ECPA waived the federal government's sovereign immunity, the Louisiana district court was clear: "The plain text of 18 U.S.C. § 2520(a) demonstrates unmistakably that the federal government has not waived its sovereign immunity to permit a suit for civil damages under ECPA against itself or its agencies." *Id.* at *8.

Second, Dougherty fails to demonstrate that the CFAA waives the United States's sovereign immunity for suit under that statute. While she correctly notes that the word "person" in the statute includes the United States government and its agencies, she identifies no statutory text suggesting the waiver of the United States's sovereign immunity, much less doing so unequivocally. As Dougherty has failed to satisfy her burden of proving subject matter jurisdiction under this section, the Court must dismiss Dougherty's CFAA claim for lack of subject matter jurisdiction.

2. Administrative Exhaustion

The United States also argues that the Court lacks subject matter jurisdiction over Dougherty's SCA claim because she failed to exhaust her administrative remedies. (Motion, Doc. 24, 5)

Through the SCA, Congress created an avenue for claimants to seek money damages from the United States for willful violations of the statute. 18 U.S.C. § 2712(a). The plaintiff, however, can commence the lawsuit "only after a claim is presented to the appropriate department or

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agency *under the procedures of the Federal Tort Claims Act*". 18 U.S.C. § 2712(b)(1) (emphasis

added). Under the FTCA, a claimant may not initiate an action against the United States for money damages "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing". 28 U.S.C. § 2675(a). "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." *Id.* "Furnishing notice is a *jurisdictional* prerequisite to filing suit under the FTCA." *Cook v. U.S. on Behalf of U.S. Dep't of Lab.*, 978 F.2d 164, 166 (5th Cir. 1992) (emphasis added).

Dougherty's allegations fail to demonstrate that she satisfied the procedural requirements. She contends in her Response that she satisfied the notice requirement because on the same day she filed this lawsuit, she "e-mailed Notice of Claim by providing a full copy of the Civil Cover sheet demanding a sum certain, Original Verified Complaint and all Exhibits". (Response, Doc. 26, 8) These steps, however, do not satisfy the applicable procedural requirements. The FTCA requires that the claimant present the notice, and then not initiate a lawsuit until the earlier of the agency adjudicating the claim or the elapse of six months. By presenting her notice on the same day as filing her lawsuit, Dougherty failed to follow the procedural requirements.

In her Response, Dougherty relies on *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982). This decision, however, does not support her cause. In that case, the claimant voluntarily dismissed his

civil suit because he had not presented notice to the agency. After he presented his notice and the agency denied the claim, the claimant re-filed the lawsuit in a federal district court. *See Williams*, 693 F.2d at 556. In contrast, Dougherty presented her notice to the agency on the same day as filing her lawsuit, falling far short of the statutory requirement. As a result, the Court lacks jurisdiction over her SCA claim.

3. Statute of Limitations

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The United States also contends that the applicable statutes of limitations bar Dougherty's causes of action under the ECPA and CFAA. (Motion, Doc. 24, 5, 7) Again, the Court concludes that the United States presents a valid argument.

Under the ECPA, any action against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues", or six months after final denial. 18 U.S.C. § 2712(b)(2). The claim "shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation." *Id.* Similarly, the CFAA requires claimants to file their lawsuit "within 2 years of the date of the act complained of or the date of the discovery of the damage." 18 U.S.C. § 1030(g). "A claim accrues when the plaintiff knows or has reason to know of the injury giving rise to the claim." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 583 (5th Cir. 2020); *see also Ins. Safety Consultants, LLC v. Nugent*, No. 3:15-CV-2183-S-BT, 2018 WL 4732430, at *3 (N.D. Tex. Sept. 12, 2018), *rep. & rec. adopted*, No. 3:15-CV-2183-S-BT, 2018 WL 4725244

(N.D. Tex. Sept. 30, 2018) (explaining that under the ECPA, CFAA, and SCA, "[t]he statute of limitations [] begins to run on the date the unlawful access occurs or when unlawful access is discovered.").

Dougherty filed her lawsuit on October 7, 2021. In her First Amended Complaint, she alleges that someone has monitored her computer "since at least 2010". (Am. Complt., Doc. 7, ¶ 36) In 2016, she hired security experts because she suspected unlawful surveillance. (*Id.* at ¶ 19) She describes multiple specific instances of alleged misconduct in 2018. (*See, e.g., id.* at ¶ 30 (changes to QuickBooks account), ¶ 22 (changes to legal brief), ¶ 36 (blacking out of checks), ¶ 32 (loss of access to judiciary application account)) In response to the 2018 incidents, she again hired security consultants that same year. (*Id.* at ¶ 21)

Accepting Dougherty's allegations as true, she concedes that she knew of tampering with her computer systems no later than 2016 when she hired security consultants to investigate the suspected unauthorized access. In 2018, she "noticed" changes to her electronic information and

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again took responsive actions to uncover the cause. That same year, she altered her accounting practices based on her suspicions. Based on these allegations, Dougherty's claims accrued no later than 2018, significantly more than two years before she filed her lawsuit. As a result, the statute of limitations bars her causes of action under the ECPA and CFAA.[2]

Dougherty concedes that these statutes contain a two-year statute of limitations, but she argues that

the continuing-violation doctrine saves her claims. (Response, Doc. 26, 9 (citing *Klehr v. AO Smith Corp.*, 521 U.S. 179, 189 (1997))) Under that doctrine, "each overt act that is a part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at earlier times." *Klehr*, 521 U.S. at 189. Her reliance on *Klehr*, however, is misplaced. The Supreme Court in that decision based the continuing-violation doctrine on the specific statutory language applicable to antitrust cases. *See id.* ("Antitrust law provides that, in the case of a continuing violation . . . each overt act that is part of the violation and that injures the plaintiff . . ." (cleaned up)) (citing *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 815 F.2d 270, 278 (3d Cir. 1987) ("Moreover, each time a plaintiff is injured by a continuing conspiracy to violate the antitrust laws a new cause of action for damages accrues.")). Dougherty points to no statutory provision or case law suggesting that the continuing-violation doctrine, or a similar principle, applies to claims under the ECPA or CFAA, and the Court has found none.

C. Doe Defendants

Dougherty alleges two causes of action against the Doe Defendants: (1) a claim under Section 15.05(a) of the Texas Business and Commerce Code, alleging that these defendants violated the statute "by acting in combination and/or conspiring in their acts to reduce the output of plaintiff's lawful business activities which are in opposition to the unauthorized practice of

[2] The same analysis would apply to Dougherty's SCA claim, to which a two-year statute of limitations also applies. *See* 18 U.S.C. § 2712(a), (b)(2) (creating two-year statute of limitations for both ECPA and SCA claims).

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immigration law and to remedy the injury thereby imposed"; and (2) a *Bivens* action on the grounds that these defendants "violated plaintiff's constitutionally protected rights by their activities described herein, and/or by exceeding every state and/or federal statutory authority which concerns wiretaps, protected information, and computer access, to monitor plaintiff's activities and disrupt her business, her personal life, and to cause personal injury." (Am. Complt., Doc. 7, ¶¶ 305, 361)

The United States seeks dismissal of each cause of action. First, the United States argues that the state-law conspiracy claim is "unworkable" because Dougherty "alleges no identifying information about the government employees who are allegedly engaged in a retaliatory conspiracy against her." (Motion, Doc. 24, 7) Second, the United States argues that courts have not extended *Bivens* in the context of Dougherty's lawsuit and the fact that Congress has "legislated extensively in this area" counsels against doing so. (*Id.* at 9–11)

Dougherty fails to respond to the United States's arguments, and the Court finds that they are well-founded. First, Dougherty offers no information to identify the Doe Defendants, aside from a reference to someone named "George". (Am. Complt., Doc. 7, ¶ 39 (acknowledging that "[w]hat department, Agency, or Prosecutor's Investigator is unknown")) At times, courts permit claimants to engage in discovery to identify unnamed defendants,

but the plaintiff must provide sufficient information to render it conceivable that discovery would prove successful to identify the defendants. *See Thomas v. State*, 294 F. Supp. 3d 576, 619 (N.D. Tex. 2018), *rep. & rec. adopted*, No. 3:17-CV-0348-N-BH, 2018 WL 1254926 (N.D. Tex. Mar. 12, 2018) (citing *Murphy v. Kellar*, 950 F.2d 290, 293 (5th Cir. 1992)). Dougherty's allegations fall short of doing so, and any discovery would represent a fishing expedition. Absent any actionable identifying information, Dougherty has failed to state a claim against the Doe Defendants. *See, e.g., Richardson v. Avery*, No. 3:16-CV-2631-M-BH, 2018 WL 5269860, at *7 (N.D. Tex. Oct. 1, 2018), *rep. & rec. adopted sub nom. Richardson v. Avery* #994, No. 3:16-CV-2631-M, 2018 WL 5267577

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(N.D. Tex. Oct. 23, 2018) (dismissing claims against unknown defendants for failure to state a claim due to failure to provide identifying information or allege actions that would provide a basis for identification).

Second, as the United States Supreme Court recently held, "there is no *Bivens* action for First Amendment retaliation." *Egbert v. Boule*, 596 U.S. ___ (June 8, 2022). And while she relies on the Supreme Court's Fourth and Fifth Amendment *Bivens* precedents, the facts in those cases differ materially from Dougherty's allegations. (Motion, Doc. 24, 9–10 (citing *Bivens v. Six Unknown Named Agents of Federal Nureau of Narcotics*, 403 U.S. 388 (1971) and *Davis v. Passman*, 442 U.S. 228 (1979))) She points to no analogous jurisprudence in which a federal court permitted a *Bivens* action based on factual allegations similar to her own. As a general

matter, extending *Bivens* into new factual and legal territory represents a "disfavored" judicial exercise. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). And in the absence of any compelling argument, the Court declines to fashion a new *Bivens* remedy here.

Finally, to the extent Dougherty asserts her federal ECPA, SCA, and CFAA claims against the Doe Defendants, these causes of action suffer the same fatal flaws discussed previously in connection with those claims against the United States.

D. Temporary and Permanent Injunctive Relief

In her current pleading, Dougherty requests injunctive relief, based on the alleged violations of the federal statutes by the United States and on the Texas state-law claim and *Bivens* action against the Doe Defendants. (Am. Complt., Doc. 7, ¶¶ 421, 422) As the Court has concluded that all of Dougherty's claims are subject to dismissal, she cannot succeed on a claim for injunctive relief based on those causes of action. *See ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008) (noting that injunctive relief requires the plaintiff to demonstrate irreparable injury); *Enter. Int'l, Inc. v. Corporación Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470 (5th Cir. 1985) ("Because Rule 65 confers no jurisdiction, the district court must have both subject matter

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jurisdiction and in personam jurisdiction over the party against whom the injunction runs.").

III. Conclusion

For the reasons explained in this Amended Order and Opinion, it is:

ORDERED that Defendant Department of Homeland Security's Motion to Dismiss (Doc. 24) is **GRANTED**;

ORDERED that Plaintiff Marlene A. Dougherty's causes of action within her First Amended Complaint (Doc. 7) under the ECPA and the CFAA against the United States Department of Homeland Security and the unnamed "Doe" defendants are **DISMISSED WITH PREJUDICE**; and

ORDERED that Plaintiff Marlene A. Dougherty's causes of action within her First Amended Complaint (Doc. 7) under the SCA against the United States Department of Homeland Security and the unnamed "Doe" defendants are **DISMISSED WITHOUT PREJUDICE**.

Signed on August 4, 2022.

s/

Fernando Rodriguez, Jr.
United States District Judge

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARLENE A DOUGHERTY,	§	
Plaintiff,	§	
VS.	§	C.A. No.
	§	1:21-CV-154
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,	§	
Defendants.	§	

ORDER

Plaintiff Marlene A. Dougherty filed this civil action against the United States Department of Homeland Security and several unidentified DHS employees for allegedly unlawfully accessing and tampering with her computer network and telecommunications systems. Dougherty pursued claims under the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), and 18 U.S.C. § 1030 (Computer Fraud and Abuse Act ("CFAA")), which prohibits fraud in connection with computers. In addition, Dougherty pursued a Texas state-law conspiracy claim and a *Bivens* action against the unnamed defendants. (Am. Complt., Doc. 7)

After the United States moved to dismiss Dougherty's Amended Complaint (Mtn. to Dismiss,

Doc. 24), the Court concluded that the ECPA and CFAA do not waive the United States's sovereign immunity and that those claims were in any event time barred, and that Dougherty had failed to exhaust her administrative remedies under the Federal Tort Claims Act ("FTCA"), precluding her cause of action under the SCA. (Opinion, Doc. 28) The Court additionally dismissed all causes of action against the unnamed defendants on the ground that Dougherty's petition lacked sufficient identifying information to permit discovery. (*Id.*)

Under Federal Rule of Civil Procedure 59(e), Dougherty now moves to alter or amend the Court's Order and Opinion, lodging fourteen separate objections to the Court's decision. (Motion, Doc. 29) Dougherty primarily challenges the Court's summary of her allegations and causes of 1/3

action, and to the Court's interpretation of the law and its application to the facts in this matter. (*See id.*) She also requests that the Court amend its ruling to dismiss her causes of action without prejudice, as she claims she "is prejudiced by the dismissal of her Complaint with prejudice". (*Id.* at 8 (underlining in original))

A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). The Fifth Circuit has held that "such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (citing *Simon v. United States*, 891 F.2d 1154, 1159

(5th Cir. 1990)). Such motions serve "the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence" and are an "extraordinary remedy that should be used sparingly." *Id.* (citations omitted). A 'manifest error' is "one that is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Puga v. RCX Sols., Inc.*, 922 F.3d 285, 293 (5th Cir. 2019) (quoting *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004)) (cleaned up). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quotation marks omitted).

The Court finds that the bulk of Dougherty's arguments do not support relief under Rule 59. At times, she requests revisions to the Order and Opinion that amount to line editing of the decision. (*See, e.g.*, Motion, Doc. 29, 2 (requesting that in a description of Dougherty's legal practice, the Order and Opinion should also reference her "pro bono activities and 'for the most part' which makes allowances for cases not brought on behalf of victims")) Elsewhere, she repeats the legal arguments that she previously presented and which the Court did not find persuasive. She fails to demonstrate a manifest error of fact or law, newly discovered or previously unavailable evidence, manifest injustice, or an intervening change in controlling law. As a result, the Court

finds her arguments meritless. *See, e.g., Eldridge v. Thaler*, No. CIV.A. H-05-1847, 2013 WL 3294099, at

*2 (S.D. Tex. June 28, 2013) ("[D]isagreements with this court's interpretation of the evidence, relevant law, and the application of that law to the facts of this case, are appropriately pursued on appeal, but such disagreements do not establish manifest error.").

The Court agrees, however, that the dismissal of her SCA claim should be without prejudice, as the Court dismissed the cause of action for failure to exhaust administrative remedies under the FTCA. When a district court dismisses a claim for failure to exhaust administrative remedies, "the dismissal is without prejudice to the claimant's right to return to court after it has exhausted its administrative remedies." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004).

For the reasons explained in this Order and Opinion, it is:

ORDERED that Plaintiff Marlene A. Dougherty's Motion to Alter or Amend the Judgment and For Leave to Amend the Pleadings and Supplemental Pleading (Doc. 29) is **GRANTED IN PART** and **DENIED IN PART**.

The Court will separately issue an Amended Order and Opinion in accordance with this Order, including the dismissal without prejudice of the cause of action under the SCA. In light of this ruling, the Court declines leave to file an amended complaint in this lawsuit.

Signed on August 4, 2022.

s/

Fernando Rodriguez, Jr.

3/3 United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARLENE A DOUGHERTY,	§	
Plaintiff,	§	C.A. NO.
VS.	§	1:21-CV-154
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,	§	
Defendants.	§	

ORDER AND OPINION

Plaintiff Marlene A. Dougherty filed this civil action against the United States Department of Homeland Security and several unidentified DHS employees for allegedly unlawfully accessing and tampering with her computer network and telecommunications systems. Dougherty pursues claims under the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), and 18 U.S.C. § 1030 (Computer Fraud and Abuse Act ("CFAA")), which prohibits fraud in connection with computers. In addition, Dougherty alleges a Texas state-law conspiracy claim and a *Bivens* action against the unnamed defendants.

The United States challenges the Court's subject matter jurisdiction over Dougherty's causes of action on the grounds that the ECPA and CFAA

do not waive the United States's sovereign immunity, and that Dougherty failed to exhaust her administrative remedies as to her SCA claim. In addition, the United States argues that the statute of limitations bars Dougherty's claims under the ECPA and CFAA, and that the causes of action against the Doe Defendants fail under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court concludes that Dougherty's claims do not survive the motion to dismiss.

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I. Allegations and Procedural History[1]

Since 2004, Plaintiff Marlene A. Dougherty has practiced immigration law in Brownsville, Texas, "serving those who are the victims of the unauthorized practice of law, or the ineffective assistance of prior counsel." (Am. Complt., Doc. 7, ¶ 5)

DHS has targeted Dougherty "in retaliation for [her] lawful actions taken on behalf of her clients, and/or because of her race." (*Id.* at ¶ 1) This retaliation has included a "pattern and practice of excessive and unlawful investigations of plaintiff including unauthorized interceptions and disclosures of aural communications, and wrongful allegations disseminated to third parties to interfere in plaintiff's protected lawful business and personal activities." (*Id.* at ¶ 12) Specifically, Dougherty's "aural communications have been intercepted and disclosed", "her stored communications have been accessed and altered", and "pleadings and other documents that she has written to be filed with the Courts have been accessed and altered". (*Id.* at ¶ 17)

For example, in December 2018, she returned to a draft of a legal document on her computer system after a several-hour break, and discovered that someone had altered and "tampered" with the draft. (*Id.* at ¶ 22) The recurring intrusions have rendered her practice of law "extremely time consuming and difficult as citations to materials in her documents for the federal court are changed without authorization". (*Id.*) She also has been "locked out" of several online accounts with immigration agencies and has experienced difficulties registering for and signing into DHS-related accounts. (*Id.* at ¶¶ 24–26) In addition, she has received an anonymous voice message detailing her private religious information, and was targeted by an anonymous Twitter "parody"

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[1] For purposes of considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court accepts a plaintiff's well-pleaded allegations as true, but does not accept as true legal conclusions couched as factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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account. (*Id.* at ¶¶ 33–35). She maintains that "[a]ll appearances are that the acts are in retaliation for plaintiff's work on behalf of her clients." (*Id.* at ¶ 32)

Dougherty specifies that these unwanted and unlawful actions have been ongoing "since at least 2010." (*Id.* at ¶ 36) In 2016, she retained a security expert "to review suspected unauthorized computer and document access, as citations and designations to exhibit pages would change and plaintiff repeatedly had to redo them." (*Id.* at ¶ 19) Two years later, she hired an outside organization to "run a security check", which she repeated in 2020. (*Id.* at

¶¶ 21, 23) By no later than 2018, she suspected interference with her QuickBooks account, leading her to manually maintain her office finances. (*Id.* at ¶ 30–31)

Within the past two years, she received anonymous voice messages "in which law enforcement could be heard in the background", including one message in which a "raging" law enforcement officer referred derogatorily to her and an officer made a lewd, disturbing statement. (*Id.* at ¶ 39) Since she filed her lawsuit, however, these "abusive timewasting phone calls" have ceased. (*Id.* at ¶ 45)

In October 2021, Dougherty filed her Original Complaint, in which she requested a temporary restraining order to prevent Defendants from destroying potential evidence related to this case. (Complt., Doc. 1) The Court denied the TRO request. (Order, Doc. 3) Dougherty then amended her Complaint. (Am. Complt., Doc. 7) The United States now moves under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss each of Dougherty's causes of action contained in the First Amended Complaint. (Motion, Doc. 24)

II. Analysis

A. Standard of Review

Dismissal under Rule 12(b)(1) is proper where "the court lacks the statutory or constitutional power to adjudicate the case." *Home Builder's Ass'n of Miss., Inc. v. City of Madison*, 143 F. 3d 1006, 1010 (5th Cir. 2014). The plaintiff bears the burden of proving that a

district court has jurisdiction by a preponderance of the evidence. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "[I]f the defense merely files a Rule 12(b)(1) motion, the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). When a Rule 12(b)(1) motion is filed alongside other Rule 12 motions, "the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming*, 281 F.3d at 161.

To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 12(b)(6). A plaintiff satisfies the facial plausibility standard by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations in the complaint are not required to be thoroughly detailed, but must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A court considers only the allegations in the complaint and must accept them as true, viewing them in the light most favorable to the plaintiff. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). If the allegations are sufficient "to raise a right to relief above the speculative level," the court will not dismiss the cause of action. *Twombly*, 550 U.S. at 555.

B. Claims against DHS

Dougherty alleges claims against DHS under the ECPA, the SCA, and the CFAA. She alleges that DHS violated the ECPA by intentionally intercepting, disclosing, and using her communications without her consent, so as to stalk and harass her. (Am. Compl., Doc. 7, ¶ 93–95) As to the SCA, she alleges that DHS intentionally gained control of her online accounts and accessed and controlled her electronic communications while those communications were stored

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with email providers. (*Id.* at ¶ 144) And as to the CFAA, she alleges that DHS intentionally and without authorization accessed her protected computer to obtain information. (*Id.* at ¶ 193)

The United States argues that the Court lacks subject matter jurisdiction over each of these three statutory claims. For the following reasons, the Court agrees.

1. Sovereign Immunity

The United States advances the initial argument that the ECPA and CFAA do not waive the United States's sovereign immunity. (Motion, Doc. 24, 4, 6)

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). The statutory text must "unequivocally" waive the immunity, and courts construe any ambiguities in favor of immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* at 290–91. "The party claiming federal subject

matter jurisdiction has the burden of proving it exists." *Peoples Nat. Bank v. Off. of Comptroller of Currency of U.S.*, 362 F.3d 333, 336 (5th Cir. 2004).

First, the Court concludes that the ECPA does not waive the United States's sovereign immunity. This statute authorizes an individual to assert a claim against a "person or entity, other than the United States." 18 U.S.C. § 2520(a). The express exclusion of suits against the United States is unambiguous, and courts have relied on this text to dismiss ECPA claims alleged against the United States. S*ee, e.g., Merisier v. Johnson Cnty., Tex.*, No. 4:20-CV-00520-SDJ-CAN, 2021 WL 1720153, at *4 (E.D. Tex. Feb. 4, 2021), *rep. & rec. adopted*, No. 4:20-CV-520-SDJ, 2021 WL 1709913 (E.D. Tex. Apr. 29, 2021) ("[A]ny potential claim [under 18 U.S.C. § 2520] against [Defendant] in his official capacity is precluded by sovereign immunity".); *Lott v. United States*, No. 4:10-CV-2862, 2011 WL 13340702, at *4 (S.D. Tex. May 31, 2011), *rep. & rec. adopted*, No. CV H-10-2862, 2011 WL 13340701 (S.D. Tex. June 17, 2011) ("Although a person may bring a civil

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cause of action under [18 U.S.C. § 2520] under some circumstances, the United States is specifically excepted as a permissible defendant.").

Dougherty claims that a circuit split exists as to whether the United States can be sued under the ECPA. (Response, Doc. 26, 5–6 (relying on *Whitaker v. Barksdale Air Force Base*, No. 14–2342, 2015 WL 574697, at *5 & n.10 (W.D. La. Feb. 11, 2015))) But *Whitaker* does not help her. That case concerned whether the ECPA allows suits against *state* government entities, noting that a circuit split exists

as to that issue. *Whitaker*, 2015 WL 574697, at *5 & n.10. In contrast, on the matter of whether the ECPA waived the federal government's sovereign immunity, the Louisiana district court was clear: "The plain text of 18 U.S.C. § 2520(a) demonstrates unmistakably that the federal government has not waived its sovereign immunity to permit a suit for civil damages under ECPA against itself or its agencies." *Id.* at *8.

Second, Dougherty fails to demonstrate that the CFAA waives the United States's sovereign immunity for suit under that statute. While she correctly notes that the word "person" in the statute includes the United States government and its agencies, she identifies no statutory text suggesting the waiver of the United States's sovereign immunity, much less doing so unequivocally. As Dougherty has failed to satisfy her burden of proving subject matter jurisdiction under this section, the Court must dismiss Dougherty's CFAA claim for lack of subject matter jurisdiction.

2. Administrative Exhaustion

The United States also argues that the Court lacks subject matter jurisdiction over Dougherty's SCA claim because she failed to exhaust her administrative remedies. (Motion, Doc. 24, 5)

Through the SCA, Congress created an avenue for claimants to seek money damages from the United States for willful violations of the statute. 18 U.S.C. § 2712(a). The plaintiff, however, can commence the lawsuit "only after a claim is presented to the appropriate department or

agency *under the procedures of the Federal Tort Claims Act*". 18 U.S.C. § 2712(b)(1) (emphasis added). Under the FTCA, a claimant may not initiate an action against the United States for money damages "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing". 28 U.S.C. § 2675(a). "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." *Id.* "Furnishing notice is a *jurisdictional* prerequisite to filing suit under the FTCA." *Cook v. U.S. on Behalf of U.S. Dep't of Lab.*, 978 F.2d 164, 166 (5th Cir. 1992) (emphasis added).

Dougherty's allegations fail to demonstrate that she satisfied the procedural requirements. She contends in her Response that she satisfied the notice requirement because on the same day she filed this lawsuit, she "e-mailed Notice of Claim by providing a full copy of the Civil Cover sheet demanding a sum certain, Original Verified Complaint and all Exhibits". (Response, Doc. 26, 8) These steps, however, do not satisfy the applicable procedural requirements. The FTCA requires that the claimant present the notice, and then not initiate a lawsuit until the earlier of the agency adjudicating the claim or the elapse of six months. By presenting her notice on the same day as filing her lawsuit, Dougherty failed to follow the procedural requirements.

In her Response, Dougherty relies on *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982). This

decision, however, does not support her cause. In that case, the claimant voluntarily dismissed his civil suit because he had not presented notice to the agency. After he presented his notice and the agency denied the claim, the claimant re-filed the lawsuit in a federal district court. *See Williams*, 693 F.2d at 556. In contrast, Dougherty presented her notice to the agency on the same day as filing her lawsuit, falling far short of the statutory requirement. As a result, the Court lacks jurisdiction over her SCA claim.

3. Statute of Limitations

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The United States also contends that the applicable statutes of limitations bar Dougherty's causes of action under the ECPA and CFAA. (Motion, Doc. 24, 5, 7) Again, the Court concludes that the United States presents a valid argument.

Under the ECPA, any action against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues", or six months after final denial. 18 U.S.C. § 2712(b)(2). The claim "shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation." *Id.* Similarly, the CFAA requires claimants to file their lawsuit "within 2 years of the date of the act complained of or the date of the discovery of the damage." 18 U.S.C. § 1030(g). "A claim accrues when the plaintiff knows or has reason to know of the injury giving rise to the claim." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 583 (5th Cir. 2020); *see also Ins. Safety Consultants, LLC v. Nugent*, No. 3:15-CV-2183-S-BT, 2018 WL

4732430, at *3 (N.D. Tex. Sept. 12, 2018), *rep. & rec. adopted*, No. 3:15-CV-2183-S-BT, 2018 WL 4725244 (N.D. Tex. Sept. 30, 2018) (explaining that under the ECPA, CFAA, and SCA, "[t]he statute of limitations [] begins to run on the date the unlawful access occurs or when unlawful access is discovered.").

Dougherty filed her lawsuit on October 7, 2021. In her First Amended Complaint, she alleges that someone has monitored her computer "since at least 2010". (Am. Complt., Doc. 7, ¶ 36) In 2016, she hired security experts because she suspected unlawful surveillance. (*Id.* at ¶ 19) She describes multiple specific instances of alleged misconduct in 2018. (*See, e.g., id.* at ¶ 30 (changes to QuickBooks account), ¶ 22 (changes to legal brief), ¶ 36 (blacking out of checks), ¶ 32 (loss of access to judiciary application account)) In response to the 2018 incidents, she again hired security consultants that same year. (*Id.* at ¶ 21)

Accepting Dougherty's allegations as true, she concedes that she knew of tampering with her computer systems no later than 2016 when she hired security consultants to investigate the suspected unauthorized access. In 2018, she "noticed" changes to her electronic information and

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again took responsive actions to uncover the cause. That same year, she altered her accounting practices based on her suspicions. Based on these allegations, Dougherty's claims accrued no later than 2018, significantly more than two years before she filed her lawsuit. As a result, the statute of limitations bars her causes of action under the ECPA and CFAA.[2]

Dougherty concedes that these statutes contain a two-year statute of limitations, but she argues that the continuing-violation doctrine saves her claims. (Response, Doc. 26, 9 (citing *Klehr v. AO Smith Corp.*, 521 U.S. 179, 189 (1997))) Under that doctrine, "each overt act that is a part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at earlier times." *Klehr*, 521 U.S. at 189. Her reliance on *Klehr*, however, is misplaced. The Supreme Court in that decision based the continuing-violation doctrine on the specific statutory language applicable to antitrust cases. *See id.* ("Antitrust law provides that, in the case of a continuing violation . . . each overt act that is part of the violation and that injures the plaintiff . . ." (cleaned up)) (citing *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 815 F.2d 270, 278 (3d Cir. 1987) ("Moreover, each time a plaintiff is injured by a continuing conspiracy to violate the antitrust laws a new cause of action for damages accrues.")). Dougherty points to no statutory provision or case law suggesting that the continuing-violation doctrine, or a similar principle, applies to claims under the ECPA or CFAA, and the Court has found none.

C. Doe Defendants

Dougherty alleges two causes of action against the Doe Defendants: (1) a claim under Section 15.05(a) of the

Texas Business and Commerce Code, alleging that these defendants violated the statute "by acting in combination and/or conspiring in their acts to reduce the output of plaintiff's lawful business activities

which are in opposition to the unauthorized practice of

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[2] The same analysis would apply to Dougherty's SCA claim, to which a two-year statute of limitations also applies. *See* 18 U.S.C. § 2712(a), (b)(2) (creating two-year statute of limitations for both ECPA and SCA claims).

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immigration law and to remedy the injury thereby imposed"; and (2) a *Bivens* action on the grounds that these defendants "violated plaintiff's constitutionally protected rights by their activities described herein, and/or by exceeding every state and/or federal statutory authority which concerns wiretaps, protected information, and computer access, to monitor plaintiff's activities and disrupt her business, her personal life, and to cause personal injury." (Am. Complt., Doc. 7, ¶¶ 305, 361)

The United States seeks dismissal of each cause of action. First, the United States argues that the state-law conspiracy claim is "unworkable" because Dougherty "alleges no identifying information about the government employees who are allegedly engaged in a retaliatory conspiracy against her." (Motion, Doc. 24, 7) Second, the United States argues that courts have not extended *Bivens* in the context of Dougherty's lawsuit and the fact that Congress has "legislated extensively in this area" counsels against doing so. (*Id.* at 9–11)

Dougherty fails to respond to the United States's arguments, and the Court finds that they are well-founded. First, Dougherty offers no information to identify the Doe Defendants, aside from a reference to someone named "George". (Am.

Complt., Doc. 7, ¶ 39 (acknowledging that "[w]hat department, Agency, or Prosecutor's Investigator is unknown")) At times, courts permit claimants to engage in discovery to identify unnamed defendants, but the plaintiff must provide sufficient information to render it conceivable that discovery would prove successful to identify the defendants. *See Thomas v. State*, 294 F. Supp. 3d 576, 619 (N.D. Tex. 2018), *rep. & rec. adopted*, No. 3:17-CV-0348-N-BH, 2018 WL 1254926 (N.D. Tex. Mar. 12, 2018) (citing *Murphy v. Kellar*, 950 F.2d 290, 293 (5th Cir. 1992)). Dougherty's allegations fall short of doing so, and any discovery would represent a fishing expedition. Absent any actionable identifying information, Dougherty has failed to state a claim against the Doe Defendants. *See, e.g., Richardson v. Avery*, No. 3:16-CV-2631-M-BH, 2018 WL 5269860, at *7 (N.D. Tex. Oct. 1, 2018), *rep. & rec. adopted sub nom. Richardson v. Avery* #994, No. 3:16-CV-2631-M, 2018 WL 5267577

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(N.D. Tex. Oct. 23, 2018) (dismissing claims against unknown defendants for failure to state a claim due to failure to provide identifying information or allege actions that would provide a basis for identification).

Second, as the United States Supreme Court recently held, "there is no *Bivens* action for First Amendment retaliation." *Egbert v. Boule*, 596 U.S. ___ (June 8, 2022). And while she relies on the Supreme Court's Fourth and Fifth Amendment *Bivens* precedents, the facts in those cases differ materially from Dougherty's allegations. (Motion, Doc. 24, 9–10 (citing *Bivens v. Six Unknown Named*

Agents of Federal Nureau of Narcotics, 403 U.S. 388 (1971) and *Davis v. Passman*, 442 U.S. 228 (1979))) She points to no analogous jurisprudence in which a federal court permitted a *Bivens* action based on factual allegations similar to her own. As a general matter, extending *Bivens* into new factual and legal territory represents a "disfavored" judicial exercise. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). And in the absence of any compelling argument, the Court declines to fashion a new *Bivens* remedy here.

Finally, to the extent Dougherty asserts her federal ECPA, SCA, and CFAA claims against the Doe Defendants, these causes of action suffer the same fatal flaws discussed previously in connection with those claims against the United States.

D. Temporary and Permanent Injunctive Relief

In her current pleading, Dougherty requests injunctive relief, based on the alleged violations of the federal statutes by the United States and on the Texas state-law claim and *Bivens* action against the Doe Defendants. (Am. Complt., Doc. 7, ¶¶ 421, 422) As the Court has concluded that all of Dougherty's claims are subject to dismissal, she cannot succeed on a claim for injunctive relief based on those causes of action. *See ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008) (noting that injunctive relief requires the plaintiff to demonstrate irreparable injury); *Enter. Int'l, Inc. v. Corporación Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470 (5th Cir. 1985) ("Because Rule 65 confers no jurisdiction, the district court must have both subject matter

jurisdiction and in personam jurisdiction over the party against whom the injunction runs.").

III. Conclusion

For the reasons explained in this Order and Opinion, it is:

ORDERED that Defendant Department of Homeland Security's Motion to Dismiss (Doc. 24) is **GRANTED**;

ORDERED that Plaintiff Marlene A. Dougherty's causes of action within her First Amended Complaint (Doc. 7) are **DISMISSED WITH PREJUDICE**.

The clerk of the Court is directed to close this matter.

Signed on June 8, 2022.

s/

Fernando Rodriguez, Jr.
United States District Judge

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