No. 17-

IN THE

Supreme Court of the United States

WILLIAM ROBINSON, *et al.*,

Petitioners,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

An individual is not permitted to ship, possess, or receive a firearm if that person has been disqualified as a matter of federal law. 18 U.S.C. §922(g). A federally-licensed dealer is prohibited from transferring a firearm to a non-licensed individual prior to the successful completion of a NICS background check. 18 U.S.C. §922(t); 27 CFR §478.102(a); 27 CFR §478.124(a). The NICS background check is facilitated through the customer and FFL completion of the ATF Form 4473, including confidential, personal information and identifying firearms information. 18 U.S.C. §922(t)(1)(A) and (C); 27 CFR §102(a)(3); 27 CFR §478.124(a) and (c). The sale of the firearm can only be denied if a matching record is located that establishes that the customer has suffered a disqualifying event. 18 U.S.C. §922(g); 18 U.S.C. §922(t)(1)-(2); 27 CFR §478.102(a); 27 CFR §478.124(a) and (c); 28 CFR §25.1; 28 CFR §25.2; 28 CFR §25.6(c)(1). In order to determine whether an individual purchase should be denied, the FBI performs a records check through such records as may match a statutory disqualification. 28 CFR §25.3; 28 CFR §25.6(c)(1). More than 222 million firearms background checks have been run by the FBI since October 1998, the inception of the National Instant Background Check System ("NICS").

The question presented is:

Whether the Petitioners have standing to assert that the statutory disqualifications for the purchase of a firearm found at 18 U.S.C. §922(g)(1)-(9) serve as the limitation for the databases and records that may be searched by the Respondents during a NICS background check?

PARTIES TO THE PROCEEDING

Petitioners are William Robinson, Stephen J. Aldstadt, David Bardascini, Michael P. Carpinelli, George Curbelo, Jr., Wayne Denn, William R. Fox, Sr., Tim Flaherty, Don Hey, Garry Edwards Hoffman, Raymond Kosorek, Michael R. Kubow, Thomas J. Lorey, Thomas A. Marotta, Michael Mastrogiovanni, Kenneth E. Mathison, Terrence J. McCulley, Doug Negley, Jim Nowotny, Jacob Palmateer, John E. Prendergast, Harold W. Schroeder, Edward J. Stokes, John W. Wallace, Leslie H. Wilson, Christopher S. Zaleski, Mattie D. Zarpentine, Shooters Committee for Political Education, New York Revolution, Gun Rights Across America – New York, NY2A.org, and Fulton County NY Oath Keepers. All petitioners were plaintiffs and appellants below.

Respondents are Jefferson B. Sessions III, Attorney General of the United States of America, in his official capacity; Christopher Wray, Director of the Federal Bureau of Investigation, in his official capacity; Christopher M. Piehota, Director of the Terrorist Screening Center, in his official capacity; Thomas E. Brandon, Deputy Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, in his official capacity. All respondents were defendants and appellees, below.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

There is no parent or publicly held company owning 10% or more of any corporate party's stock, including Petitioners Shooters Committee on Political Education. The following Petitioners are unincorporated associations of individuals: "Gun Rights Across America – New York," "New York Revolution," "NY2A.org," and "Fulton County NY Oath Keepers."

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Petitioners respectfully seek a writ of certiorari that this Court reverse the order of the United States Court of Appeals for the Second Circuit to grant standing to the Petitioners to proceed on the merits to obtain a permanent injunction against the Respondents' unauthorized use of customer information during NICS background checks.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is a Summary Order, available at 2018 U.S. App. LEXIS 1144, and is reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court of the Western District of New York is reported at 260 F.Supp.3d 264 and is reproduced at App. 11a.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on January 18, 2018. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 CFR §25.1 – "…National Instant Criminal Background Check System (NICS) to be contacted by any…licensed dealer of firearms for information as to whether the transfer of a firearm to any person who is not licensed under 18 U.S.C. 923 would be in violation of Federal…law."

28 CFR §25.2 – "NICS means the National Instant Criminal Background Check System, which an FFL must, with limited exceptions, contact for information on

whether receipt of a firearm by a person who is not licensed under 18 U.S.C. §923 would violate Federal…law."[1]

18 U.S.C. §922(g): "It shall be unlawful for any person who…[(1) through (9)]…to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm…; or to receive any firearm… which has been shipped or transported in interstate or foreign commerce."

28 CFR §25.6(c)(1): "The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:…(iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and (iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check: (A) "Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III; (B) "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal…law; (C) "Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. §922…"

28 CFR §25.2 – "*Proceed* means a NICS response indicating that the information available to the system at the time of the response did not demonstrate that transfer of the firearm would violate federal or state law…"

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1. ***N.B.:*** this lawsuit focuses upon the match of records for violations of federal law. Any statute or regulation also referencing "state law" is edited, accordingly.

28 CFR §25.2 – "*Denied* means denial of a firearm transfer based on a NICS response indicating one or more matching records were found providing information demonstrating that receipt of a firearm by a prospective transferee would violate 18 U.S.C. §922…"

INTRODUCTION

In 1993, the Brady Act[2] mandated the creation of a computerized system for presale background checks with the objective to match the customer's identity to specified disqualifying records that would prohibit the attempted purchase of a firearm at a federally-licensed dealer. This system, known as the "NICS background check," or "NICS," launched in 1998.

A "disqualifying event" is defined at 18 U.S.C. §922(g)(1)-(9),[3] as follows:

> (1) Whether the person has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) Whether the person is a fugitive from justice;
>
> (3) Whether the person is an unlawful user of or addicted to any controlled substance…;

2. "The Brady Handgun Violence Prevention Act," Pub. L. 103-159, 107 Stat. 1536, 18 U.S.C. §§921-922, 925A (1993).

3. The Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-618, 82 Stat. 1213-2, 18 U.S.C. §§921, *et seq.* (1968) (a/k/a "The Gun Control Act of 1968").

(4) Whether the person has been adjudicated as a mental defective or has been committed to a mental institution;

(5) Whether the person, being an alien, meets certain criteria;

(6) Whether the person has been discharged from the Armed Forces under dishonorable conditions;

(7) Whether the person, having been a citizen of the United States, has renounced his or her citizenship;

(8) Whether the person is subject to a court order that is related to a crime of domestic violence and meets certain criteria; and/or,

(9) Whether the person has been convicted in any court of a misdemeanor crime of domestic violence in a manner that meets certain criteria.

The statutes and their implementing regulations grant limited and specific authority to the Federal Bureau of Investigation ("FBI") to search relevant records that could match one or more of said federal disqualifiers. The interface for this background check is conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") at the point of attempted customer purchase of a firearm at a Federal Firearms Licensee ("FFL").

The Respondents admitted on appeal that day-to-day operations of the NICS background check include comparisons of a customer's personal information against databases unrelated to the 18 U.S.C. §922(g) statutory

disqualifiers. More than 222 million times since 1998, the Respondents have compared the personal information of firearms customers throughout America against the "Terrorist Screening Database" ("TSDB").

Respondents acknowledge that a match of a customer to the TSDB could not block the sale of a firearm because being blacklisted as an alleged "terrorist" is not a disqualifying event. The Respondents' routine operations of NICS, as tied into the TSDB, is unauthorized by Congressional statute and is unsupported by judicial warrant. It amounts to domestic spying.

The Petitioners are individuals and organizations of individuals who provided their personal information through federally-licensed dealers to the ATF/FBI for the specific and limited purpose of the NICS background check. The Petitioners were not notified, nor did they provide consent, for their private information to be compared against any database unrelated to disqualifying factors at federal law.

The courts below erred in dismissing the Petitioners' case for lack of standing, saying the Petitioners have suffered no harm. The lower courts failed to appreciate that the Respondents harmed the Petitioners every time the Respondents used the Petitioners' personal information for non-statutory purposes. The Respondents treated the Petitioners as a suspect class, equating these law-abiding American gun owners with "terrorists."

The Respondents have demonstrated awareness that their conduct is illegal. For more than ten years, various United States Attorney Generals and various Directors of Respondent agencies have sought Congressional approval

to do precisely what the Respondents now admit they went ahead and did without that authorization. Congress has actively and repeatedly refused to confer the authority sought by the Respondents for the very data trolling in which they now admit they are actively engaged.

The intervention of this Court is necessary to reverse the courts below and to grant the Petitioners standing to proceed with their lawsuit, seeking a permanent injunction against the unlawful and unconstitutional practices of the Respondents during the NICS background check.

STATEMENT OF THE CASE

A. The NICS Background Check System as a Matter of Law

The purpose of the NICS background check is to determine whether a customer is disqualified as a matter of federal law from the purchase of a firearm. 28 CFR §25.1. Every time a person seeks to purchase a firearm through a federally-licensed dealer ("FFL"), the customer is required to undergo a NICS background check. 18 U.S.C. §922(g); 18 U.S.C. §922(t); 27 CFR §478.102(a); 27 CFR §478.124(a). The customer fills out the ATF Form 4473[4] to include personal information,[5] such

4. For purposes of this Petition, references to the "ATF Form 4473" mean to refer to the current version of the form found at A161-166 (adopted April 2012). Note that all such forms since inception are part of the Joint Appendix below at A91-A166.

5. "Personal information," as used herein, signifies a level of data collection that exceeds standard consumer information. (*See, Whalen v. Michaels Stores, Inc.*, 689 Fed. Appx. 89, 2017 U.S. App. LEXIS 7717 (2d Cir., May 2, 2017)).

as the date of birth, place of birth, height, weight, gender, ethnicity, race, and the optional Social Security Number. 27 CFR §478.124(c)(1)-(2); 28 CFR §25.7. The ATF Form 4473 includes a list of questions that mirror the statutory disqualifying factors. [A161, questions "11.a" through "11.l."] The customer is required also to sign the form as a certification of accuracy, punishable at law. [A-162.] 27 CFR §478.124(c)(1); 27 CFR §478.128.

The FFL is responsible for sections of the ATF Form 4473 with identifying customer information plus firearms identification information, and the FFL then conducts the interface with the ATF. 18 U.S.C. §922(t)(1)(A) and (C); 27 CFR §478.102(a); 27 CFR §478.124(c)(3)-(5).

The FBI is authorized to access, use, and retain specified data for a search limited to the query of whether the customer is disqualified as a matter of federal law to receive the firearm upon completion of the sale at the FFL. 28 CFR §25.3; 28 CFR §25.6(c)(1); 28 CFR §25.9.

The only factors that constitute a disqualification at federal law from the purchase of a firearm are enumerated at 18 U.S.C. §922(g)(1)-(9), as follows:

(1) Whether the person has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) Whether the person is a fugitive from justice;

(3) Whether the person is an unlawful user of or addicted to any controlled substance…;

(4) Whether the person has been adjudicated as a mental defective or has been committed to a mental institution;

(5) Whether the person, being an alien, meets certain criteria;

(6) Whether the person has been discharged from the Armed Forces under dishonorable conditions;

(7) Whether the person, having been a citizen of the United States, has renounced his or her citizenship;

(8) Whether the person is subject to a court order that is related to a crime of domestic violence and meets certain criteria; and/or,

(9) Whether the person has been convicted in any court of a misdemeanor crime of domestic violence in a manner that meets certain criteria.

Thus, the implementing regulations authorize the FBI to search only such records as may match a disqualifying event record in order to stop the sale at the FFL, as follows:

- 28 CFR §25.1 – "…National Instant Criminal Background Check System (NICS) to be contacted by any…licensed dealer of firearms for information as to whether the transfer of a firearm to any person who is not licensed under 18 U.S.C. 923 would be in violation of Federal…law." (emphasis added)

- 28 CFR §25.6(c)(1): "The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:…(iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and (iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check: (A) "Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III; (B) "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal…law; (C) "Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. §922…" (emphasis added)

- 28 CFR §25.2 – "*Proceed* means a NICS response indicating that the information available to the system at the time of the response did not demonstrate that transfer of the firearm would violate federal…law…"

- 28 CFR §25.2 – "*Denied* means denial of a firearm transfer based on a NICS response indicating one or more matching records were found providing information demonstrating that receipt of a firearm by a prospective transferee would violate 18 U.S.C. §922…" (emphasis added)

The NICS background check system, as a matter of law, is thus harmonious. Since 1968, the ATF Form 4473 has only asked the customer questions that relate to the statutory disqualifying factors. 27 CFR §478.124(c). [A91-A166.] If there is a match of the customer to a disqualifying record, the customer is so notified of the denial by the FFL and is given a Transaction Number. Upon request, the customer is informed in writing by the ATF of the statutory basis for the denial. Brady Act, Sec. 103(f), (g); 28 CFR §25.10. There is a statutory opportunity even to seek a federal court order to correct an erroneous NICS §922(g) record. 18 U.S.C. §925A; 28 CFR §25.10(f).

B. Factual Background – the NICS Background Check System as Operated by the Respondents

There are no material facts in dispute. The Respondents admit they investigate every firearms customer as a potential "terrorist." As of December 2014, the FBI has run 222,363,898 NICS transactions against the TSDB.[6] [A168.] Whether the TSDB or any other extraneous data set, the Respondents exceed their limited statutory and regulatory authority when a customer's personal information is used for any purpose other than an attempted match to a disqualifying record.

The amount of data contrived between the FBI and the TSC against American gun owners puts this illegal program on the scale of telephony metadata, as described in *ACLU v. Clapper*:

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6. NICS Firearm Background Checks: Month/Year (November 30, 1998 to commencement of this lawsuit in December 2015), available at https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view.

> "The sheer volume of information sought is staggering; while search warrants and subpoenas for business records may encompass large volumes of paper documents or electronic data, the most expansive of such evidentiary demands are dwarfed by the volume of records obtained pursuant to the orders in question here."

785 F.3d 787, 813 (2d Cir. 2015).

This NICS-to-TSDB cross-check is, like the former telephony metadata collection, "ongoing on a daily basis" with "no foreseeable end point, no requirement of relevance to any particular set of facts, and no limitations as to subject matter or individuals covered." *Id.*, at 814.

The FBI's excessive behavior against firearms customers extends beyond the computer. It also involves snatching the ATF Form 4473 in paper form from the FFL, using ATF agents in the field. The ATF Form 4473, which remains a largely paper document, is maintained by the FFL on site. 27 CFR §478.124(b); 27 CFR §478.129(b). The ATF Form 4473 contains information which may not be transmitted to the ATF during the initial contact preceding the purchase, such as the customer's identification information and the manufacturer and/or importer, model, serial number, type, and caliber or gauge of the firearm(s). [A-163, Section D.] 27 CFR §478.124(c)(3)-(5). The FBI has been training its operatives to use ATF operatives to go on-site to the FFL to fraudulently obtain the physical documents through the excuse of the otherwise appropriate ATF onsite inspection. [A-15; A-216; A-222; A-233; A-237, A-238.] 18 U.S.C. §923(g)(1)(B)(ii)(I); 27 CFR §478.23(b); 27 CFR §478.121.

What the FBI appears to do during these unauthorized activities includes sharing the information with numerous third parties, unauthorized by Congress. The third parties include unauthorized agencies, foreign governments, and private contractors. [A-16; A183-184; A-222; A-223; A-241; A-282; A-312, ftnt. 15.] These data transfers violate the spirit and the letter of the law, which articulates a legal right of privacy to the benefit of the customer during the NICS background check process and any subsequent appeals. 28 CFR §25.1.

The Respondents have placed "…the legitimate force of its criminal enforcement powers…" behind the label of "terrorist" and hoisted it upon the American gun owner. *Meese v. Keene*, 481 U.S. 465, 477 (1987). This case does not relate to 50 U.S.C. §1881a ("Section 702", the FISA[7]/ FISA Amendments Act[8] provisions about intelligence-gathering activities on foreign operatives abroad). This NICS-to-TSDB connection has nothing to do with "non-U.S. persons located abroad." *Clapper v. Amnesty Int'l. USA*, 568 U.S. _____, 133 S. Ct. 1138,1144 (2013); 50 U.S.C. §1881a(d)(1)(A)-(B). It amounts to domestic spying.

The FBI rationale for this improper data grab is as weak as the information "may be useful." [A-222; A-232; A-273; A-279.]

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7. The Foreign Intelligence Surveillance Act, Pub. L. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36, §1801 *et seq.* (1978).

8. FISA Amendments Act, Pub. L. No. 110-261, 122 Stat. 2436, 50 U.S.C. §1881a (2008).

The data grab is a wasted civil rights violation. A warrant for individual information can be requested under 18 U.S.C. §923(g)(1)(B)(i); 27 CFR §478.23(a). The FBI approach cannot lead to a denial of a firearms purchase, nor does it have value for any future prosecution. U.S. Const. Amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

C. Litigation History

Under Article III, Congress established courts "…to adjudicate cases and controversies as to claims of infringement of individual rights…by the exertion of unauthorized administrative power." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576 (1992) (herein *"Lujan, II"*), citing *Stark v. Wickard,* 321 U.S. 268, 281 (1944).

For a court to have jurisdiction to determine a given case or controversy, a plaintiff must have standing. "Standing" consists of three elements at its "irreducible constitutional minimum." *Lujan II, id.,* 560. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 578 U.S. _____, 136 S. Ct. 1540, 1547 (2016), citing *Lujan II, supra,* 560-561; *Mountain v. PulsePoint, Inc.,* 684 Fed. Apx. 32, 2017 U.S. App. LEXIS 5262 (2d Cir., March 27, 2017); *Ross v. AXA Equitable Life Ins. Co.*, 680 Fed. Appx. 41, 2017 U.S. App. LEXIS 3239 (2d Cir., February 23, 2017).

The instant appeal concerns the first element of standing, the "injury in fact." To demonstrate an "injury in fact," the Petitioners must show that at least one of them

suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan II, supra* at 560.

"This requirement applies with special force when a plaintiff files suit to require an executive agency to "follow the law"; at that point, the plaintiff must prove that he "has sustained or is immediately in danger of sustaining a direct injury as a result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public." *Spokeo, supra* at 1552 (Thomas, J., concurring), citing *Ex parte Levitt,* 302 U.S. 633, 634 (1937) (*per curiam*).

The Second Amendment to the United States Constitution is a fundamental right, guaranteed to the individual. U.S. Const., Amends. II and XIV; *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The Second Amendment is the modern civil rights movement. It has been formally recognized as "fundamental," but is still finding its place within a fully-integrated Bill of Rights. Justice Thomas recently characterized it as "this Court's constitutional orphan." *Silvester v. Becerra*, 583 U.S. ___, p.13 (2018, Thomas J., dissenting) (*per curiam*), citing *Heller*, *supra*, at 634.

This Court should treat questions of standing involving the Second Amendment with the reverence afforded litigants pursuing the protection of the Free Speech Clause (*see, e.g., Paton v. LaPrade,* 524 F.2d 862, 868 (3d Cir. 1975), finding a closed FBI file originating from a mail intercept to the Socialist Workers Party to be

a "plain enough" injury), the Establishment Clause (*see, e.g., Moss v. Spartanburg Cty. Sch. Dist. Seven,* 683 F.3d 599, 607 (4th Cir. 2012), finding non-Christian parents receiving promotional letters describing the content of a course taught at a public school who experienced "feelings of marginalization and exclusion" as "outsiders" were found to have "cognizable forms of injury"), the Association Clause (*see, e.g., Ozonoff v. Berzak,* 744 F.2d 224, 228 (1st Cir. 1984), finding a loyalty oath requirement for employment with WHO a "type of likely effect upon political activity and association [that] has led the Supreme Court in the past to find genuinely threatened, or actual, 'injury.'"), and the environment (*see, e.g., MA v. EPA,* 549 U.S. 497, 526 (2007), finding standing for a litigant focused on the rise in sea levels associated with global warming as a "nevertheless real" risk of "catastrophic harm.").[9]

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9. Please read this argument as distinguished from that made by the Plaintiffs in *Kachalsky v. Co. of Westchester,* 701 F.3d 81, 92 (2d Cir. 2012), wherein the Second Circuit Court of Appeals wrote that it was "imprudent" for the Plaintiffs to request the wholesale applicability of First Amendment rights to Second Amendment interpretation. The argument made by Petitioners herein speaks to the value of the Second Amendment to the Petitioners as the perspective for the understanding of their "injury-in-fact." Petitioners are not insensitive to the "hard-won" First Amendment rights reference of the Second Circuit Court of Appeals (*id.*), particularly considering early losses under the Espionage Act of 1917, such as *Schenck v. U.S.,* 249 U.S. 47 (1919), *Abrams v. U.S.,* 250 U.S. 616 (1919), *Frohwerk v. U.S.,* 250 U.S. 616 (1919), and *Debs v. U.S.,* 249 U.S. 211 (1919), which, arguably, meant it took until *Brandenburg v. Ohio,* 395 U.S. 444 (1969) to enliven the Free Speech Clause. Petitioners note, simply, that such cases were determined on the merits, and it is standing that is sought in the instant appeal.

Neither the Second Circuit Court of Appeals, nor the District Court, viewed the Respondents' actions against the Plaintiff as causing any harm. The Second Circuit Court of Appeals went so far as to say that the unauthorized use of Petitioners' personal information by the Respondents did not constitute an "unreasonable search" or a "breach of privacy." App. pp. 7a-8a.

But the Second Circuit Court of Appeals conclusion is based upon grave errors of law. The Second Circuit Court of Appeals wrote that "Incorporating the TSDB into the NICS Background Check protocol is merely one method that the Government may use to determine whether a prospective purchaser possesses a disqualifying attribute." App. 8a, ftnt. 2. This is legally false. The disqualifying factors at 18 U.S.C. §922(g)(1)-(9) do not include being listed as an alleged "terrorist" in the TSDB.

The Second Circuit Court of Appeals was also mistaken that an individual is disqualified from purchasing a firearm unless the customer is found to be "…qualified to possess a firearm under the enumerated Brady Act factors." App. pp. 4a-5a. This, too, is legally false. It is the reverse of the fundamental principal of the Brady Act: the individual is presumed qualified unless there is a matching record to establish a disqualification.

The litigation history of this case contains judicial errors that will, if allowed to stand, mislead and misinform courts, counsel, and the public alike. The Second Circuit Court of Appeals decision gives the Executive branch Respondents an unjustified victory, based upon a misunderstanding of law in a watershed case.

REASONS FOR GRANTING THE PETITION

I. The Case Presents a Watershed Issue

This case presents an important question of federal law that has not been, but should be, settled by this Court. U.S.Sup.Ct. Rule 10(c). The intervention of this U.S. Supreme Court is necessary to define the limits of the use by the Respondents of personal data submitted by the Petitioners for the sole purpose of the NICS background check.

The FBI is limited by statute in its access, use, and retention of personal information supplied by customers in order to conduct a firearms purchase at an FFL. 28 CFR §25.3; 28 CFR §25.6(c)(1); 28 CFR §25.9. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Lujan II, supra* at 577. The Respondents are aware of these limitations. [A-11, A-12; A167; A-176; A-188; A204-205; A-213; A-254; A-266.]

NICS is not an all-purpose dataset for general background checks by any requesting agency or office. 28 CFR §25.6(j); 28 CFR §25.9(b)(3). Access to the NICS Index for purposes unrelated to NICS background checks are limited to specified agencies in connection with issuance of a firearm-related or explosives-related permit or license or in connection with ATF civil or criminal law enforcement activity relating to the Gun Control Act or the National Firearms Act.[10] 18 U.S.C. §923(g)(1)(B);

10. The National Firearms Act, 48 Stat. 1236, I.R.C. ch. 53, §5801, *et seq.* (1934).

27 CFR §478.23(a); 28 CFR §25.6(a) Indeed, there are monetary and other civil penalties for state and local agencies, FFLs, and individuals who misuse or conduct unauthorized access to NICS. 18 U.S.C. §924; 27 CFR §478.128; 28 CFR §25.11.

The Second Circuit Court of Appeals Summary Order, if left to stand, is a dangerous precedent. It amounts to permission for Executive agencies to exceed background check limitations defined by Congress in the Brady Act. The lower court decision gives the impression that it would allow Executive branch agencies to use any and all available records during a NICS background check. Such a reading could include, but not be limited to, medical records at the Department of Veterans Affairs, beneficiary records at the Social Security Administration, accident and injury claims under Worker's Compensation through the Department of Labor, medical records and benefit records through the Centers for Medicare and Medicaid Services, income tax and banking records through the Department of the Treasury, asset and liability data through the Bankruptcy Court, Passport use through the Immigration and Naturalization Department, voter registration claims through the Department of Justice, child support and alimony arrears through the Office of Child Support Enforcement, medical and ethnicity records through the Bureau of Indian Affairs, benefit information through Department of Housing and Urban Development, federal employee human resource files, and more.

The extrapolation of the Second Circuit Court of Appeals decision could ultimately extend beyond the NICS background check system. It could be cited by the Executive branch to support the use of any type of

available record for any background check. The Second Circuit Court of Appeals decision could set the stage for use of a fully-integrated federal Executive branch computer that searches every available record every time a person has any contact with the federal government for any purpose, no matter how specific that point of contact or how specific the corresponding search authorization.

This Court has not hesitated in the past to intervene on behalf of citizens when the Executive branch exceeds its authority, even in the face of national security arguments. "[A]uthority and expertise in national security matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of armed conflict. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). In the case of *U.S. v. Robel*, 389 U.S. 258, 263 (1967), this Court found that even where there was statutory authority given from Congress, an argument "…to further the 'national defense' cannot "remove constitutional limitations safeguarding essential liberties"," *citing Home Bldg. & Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934).

"Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004) (plurality opinion). "[T]he federal judiciary retains the authority to adjudicate constitutional challenges to executive action." *WA v. Trump, supra* at 1164.

II. Congress Already Denied the Authority Sought by Respondents

While this Court has not previously ruled on the limits of Executive branch data trolling during a NICS background check, Congress has repeatedly denied such authority to the Respondents. Various efforts to enact a "tenth disqualifying factor" were proposed in numbered bills in Congress from 2007 through 2015, but none passed.

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb…" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

As of the commencement of this action in December 2015, the U.S. Senate rejected Bill S.551, sponsored by Sen. Feinstein to prevent individuals on the TSDB from purchasing a firearm. Sen. Lautenberg and Rep. King from 2007 to 2013 proposed similar bills ("Denying Firearms and Explosives to Dangerous Terrorists Act," *see, e.g.,* S.34/H.R. 720 and S.Amdt. 734 to S.649). The U.S. Senate also voted down a 2015 effort to revive the failed 2013 Manchin-Toomey Bill. Other efforts to advance legislation towards either a tenth disqualifying factor or discretionary authority for the Attorney General also failed. Other proposals included a 2013 bill by Rep. Moran, H.R.21, the "NRA Members' Gun Safety Act of 2013." In addition, Rep. King proposed a bill to require the Attorney General to promulgate regulations to preserve records of terrorist and gang-related positive matches at H.R. 1168. A separate series of bills by Sen. Lautenberg and Rep. King went under the title of "Terrorist Apprehension and Record Retention Act of 2005 (S.578/H.R.1225) and later the "Preserving Records of Terrorists &

Criminals Transactions Act (S.2935 and S.2820). This is a representative list, only, not an exhaustive list.

Where Congress "has repeatedly declined" to grant that which the Executive desires to do, the Executive cannot simply undertake that which Congress "has repeatedly declined." *County of Santa Clara v. Trump*, 275 F.Supp.3d 1196, 1213 (N.D.Cal., April 25, 2017). It is "…a violation of the Constitution's separation of powers principles." *Id.*

There is good reason for the prior Congressional refusals: by sharp contrast to 18 U.S.C. §922(g)(1)-(9), the TSDB is the no man's land of Due Process. Created in 2003, the TSDB is the "master terrorist watchlist, for both international and domestic terrorists, maintained by the TSC for the U.S. government." [A174, ftnt. 5; A183.] The TSDB "…contains information about individuals known or suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities." [A167, ftnt. 4; A-227.] Very little is known about TSDB nominations. [A-183.] Perhaps all that can be said about it with certainty is that the TSDB amalgamates a dozen different "watch lists," including the "Violent Gang and Terrorist Organization File." [A-274; A-185.]

The TSDB fails to meet the minimum Due Process Clause requirements guaranteed through the already-enacted "disqualifying factors." The Respondents have persistently resisted efforts from Congress to glean the metric for the nomination of an individual or organization to be classified as a "terrorist" for purposes of the TSDB. [A-183.] In response, Congress resisted requests to expand the list of disqualifications for use of a database

not known to meet Due Process Clause requirements: the TSDB.

The Office of the United States Attorney General has demonstrated awareness of the Congressional limitations imposed upon the use of the NICS background check system and its customer data. During a hearing of the U.S. Senate Judiciary Committee on December 6, 2001, in response to questions from U.S. Sen. Schumer, U.S. Attorney General Ashcroft said:

> "I believe that the United States Congress, in enacting the law which created this database, limits the lawful use of this database, and I believe that it is my responsibility to live within the law. I don't want to hear two messages from this Committee, not both in the same day or not on a variety of different days, not that you want me to enforce some laws and not other laws, and you want me to ignore laws or respect some rights and not other rights."
>
> Adding: "The law is as the Congress wrote it, and I intend to enforce the law as it has been written and signed by the President."[11]

Ashcroft was not the only U.S. Attorney General to testify accurately that only Congress can authorize uses for NICS data. In 2005, U.S. Attorney General Alberto Gonzales said:

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11. Hearing before the U.S. Senate, Committee on the Judiciary, Anti-Terrorism Policy Review, testimony of witness John Ashcroft, Attorney General (December 6, 2001 at 2:27, *et seq.*). Transcript of testimony available at: https://www.c-span.org/video/?167674-1/antiterrorism-policy-review.

> "…it is up to Congress to determine who is able to possess a firearm in this country. Congress designates certain categories of people, based upon various action, that make them disabled from owning a firearm."
>
> Adding: "But in that list of disabilities is not the word 'terrorist.'"[12]

Unfortunately, even this lip service faded as the years went by and the Respondents went unchallenged. In 2010, FBI Assistant Director Daniel Roberts testified before the U.S. Senate Homeland Security Committee concerning the routine use of NICS data for TSDB cross-checks. Roberts' written statement ends:

> "In summary, the FBI, working with its partner agencies through the JTTF, has and will use every lawful and appropriate investigative and analytical tool at its disposal to scrutinize and monitor any attempt by a watchlisted KST to acquire a firearm or obtain an alternate firearm or an explosives permit." [A205.]

In the same breath, Roberts responded to a question from U.S. Sen. Lieberman with:

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12. Hearing before the U.S. House of Representatives, Committee on the Judiciary, Patriot Act reauthorization, testimony of witness Alberto Gonzales, Attorney General (April 6, 2005). Transcript of testimony and submission of printed statement available at https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg20390/html/CHRG-109hhrg20390.htm.

> "That's correct. We are limited to the 10 prohibitors – that are in the Brady Act."[13]

This Court has previously denied standing to litigants where the assurance given was "Surveillance under §1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment." *Clapper, supra* at 1144.

This same reassurance was given by the FBI as recently as June 7, 2017 in a hearing before the U.S. Senate Select Intelligence Committee that "We cannot use 702 as a vehicle to bypass other laws or to target U.S. persons."[14] There was repetitive reference to "incidental" collection of information about an American citizen during surveillance of a "foreign intelligence target," described as occurring 10% of the time during the course of data collection. *Id.,* at :43. Testimony included former Acting FBI Director Andrew McCabe who said, "When the FBI seeks electronic surveillance collection on a U.S. person we go to the FISA Court and get a Title 1 FISA Order to do so." *Id.,* at 1:29. McCabe acknowledged that he would

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13. Hearing before the U.S. Senate, Committee on the Domestic Counterterrorism, testimony of witness Daniel Roberts, Assistant Director, Criminal Justice Information Services Division, FBI (May 5, 2010, panel two, at 28:30). Testimony with transcript available at: https://www.c-span.org/video/?293332-2/domestic-counterterrorism-panel-2.

14. Hearing before the U.S. Senate, Senate Select Intelligence Committee, testimony of witness Michael S. Rogers, Director, National Security Agency (June 7, 2017 at 00:42). Transcript of testimony and video available at https://www.c-span.org/video/?429451-1/senators-express-frustration-national-security-officials-answers-russia-probe.

be the person who would pursue the warrant for a U.S. person, either here or outside the United States, stating "We are the U.S. person agency." *Id.,* at 1:30.

All of the June 7, 2017 falsehoods given to Congress and the public were pulled back on July 27, 2017 when the U.S. Department of Justice submitted in its answering brief to the Second Circuit Court of Appeals. Within that document, the US DOJ admitted the FBI's wholesale use of the TSDB to investigate those who seek to lawfully purchase a firearm.

The NICS-TSDB cross-check is the newest form of "publicly acknowledged" national surveillance. As the FBI bluntly admitted to the U.S. Senate: "Our efforts to identify watchlisted KSTs[15] attempting to obtain firearms includes, but is not limited to, use of the National Instant Criminal Background Check System (NICS) process." [A-202.] It is distinct from other publicly-acknowledged FISA surveillance like PRISM (see, *Schuchardt v. Pres. of the U.S.,* 839 F.3d 336, 338 (3rd Cir. 2016)) and Upstream (see, *Wikimedia Found. v. NSA/Central Sec. Serv.*, 2017 U.S. App. LEXIS 8957, 10 (4th Cir., May 23, 2017)). This NICS-to-TSDB surveillance targets American gun owners on U.S. soil.

The questions presented by this lawsuit do not fall under the political question doctrine. *Japan Whaling Ass'n. v. Am. Cetacean Soc'y.*, 478 U.S. 221, 230 (1986). The Petitioners agree with Congress; they do not seek to shift some kind of political debate into the courtroom.

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15. "KST" stands for "Known or Appropriately Suspected Terrorists."

U.S. v. Richardson, 418 U.S. 166, 179 (1974). The Petitioners are suing to enforce the law and restrict the Respondents' conduct against them. It is the Respondents that are unwilling to listen to a Congress that has spoken – again and again.

It is going to take a ruling from the Judiciary to constrain the Executive to the limited applications of power for which the Legislature so clearly intended to restrict its operations. To protect the Petitioners' civil rights, the Judiciary has only to direct the Respondents to cease and desist activity for which they have no legal authority in the first place.

III. The Respondents Admit the Petitioners' Material Allegations

The Government's Appellate Counsel freely admits the basic operations of the NICS-to-TSDB cross-check program. [Resp.Ans.Br., pp. 1, 4-5, 7-10.] This was not admitted by Department of Justice Counsel at the District Court, below. [A50-A51, *see* 6-1, p. 3.]

Appellate Counsel for US DOJ correctly articulated that the only way to "deny" an intended purchase of a firearm at an FFL is to identify a record that disqualifies a person under 18 U.S.C. §922(g)(1)-(9). [Resp.Ans. Br., pp. 2-3.] As stated by Appellate Counsel to the Government:

- The NICS check is used "…to determine whether the individual attempting to purchase a firearm falls into one of the categories of persons prohibited from receiving or possessing firearms under federal or state law (emphasis added)"

[6-1, Def.Memo., pp. 3-4, incl. ftnt. 1, which sets out, long hand 18 U.S.C. §922(g)(1)-(9).]

- "Congress subsequently enacted the Brady Handgun Violence Prevention Act (citation omitted), to prevent transfers of firearms to those prohibited from firearm possession by federal or state law." (emphasis added) [Resp.Ans.Br., p. 3; *see, also,* Resp.Ans.Br., p. 2, ftnt. 1.]

- "The [Brady] Act provides that, '[n]otwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate [the Gun Control Act] or State law.'" (citation omitted, emphasis added, parenthetical in the original) [Resp.Ans.Br., p. 6.]

- "It prohibits the government … except with respect to persons, prohibited by [federal] or State law, from receiving a firearm." (citation omitted, emphasis added) [Resp.Ans.Br., p. 6.]

- The Attorney General has authority to "…secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate [federal or state] law…" (citation omitted, emphasis added, parenthetical in the original) [Resp.Ans.Br., p. 19.]

The quotes of Appellate Counsel contain the very words that prove the Petitioners' arguments: the Respondents are restricted in its NICS activities to data relevant to

the disqualifying factors enumerated at federal law under 18 U.S.C. §922(g)(1)-(9).

Counsel to the Respondents further conceded: "A match with the KST File does not legally prohibit an individual from possessing a firearm and cannot provide the basis for a purchase denial." [Resp.Ans.Br., p. 8 and p. 1; *see, also,* Resp.Ans.Br., p. 5 ("If a background check reveals no record indicating that the prospective purchaser is a prohibited person, the NICS indicates to the licensed dealer that it may proceed with the sale," citing 28 CFR §25.6(c)(1)(iv)(A)); *see, also,* Resp.Ans.Br., p. 5 ("If the NICS determines that the purchaser is a prohibited person, it directs the licensed dealer to deny the sale," citing 28 CFR §25.6(c)(1)(iv)(C)).]

These arguments of law are mirrored through the government interface with the gun-buying public. There is no question on the ATF Form 4473 asking the customer whether he or she is a "terrorist" or an "alleged terrorist" or is listed in the TSDB or is listed on the "no-fly list." [A91-166.] Indeed, Appellate Counsel is correct, "The purchaser also must certify that he or she is not prohibited by federal law from possessing firearms, 27 CFR §478.124(c)(1)…" [Resp.Ans.Br., p. 4 (emphasis added).] Since 1970, the ATF Form 4473 has corresponded to the federal statutory disqualification events and has served both as the notification and as the covenant between the American gun owner and the Federal Government. [A91-166.]

IV. The Courts Below Exonerated Illegal Agency Conduct

To say that an American suffers no harm when he or she is compared to or associated with a "terrorist" is to ignore the cultural context of this nation going into and certainly after 9/11. It also ignores federal, criminal, statutory constructs around "violent acts or acts dangerous to human life," that appear to be intended "to intimidate or coerce a civil population" or to "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. §2331. To be a "terrorist" is to be associated with 9/11, the World Trade Center, the U.S.S. Cole, the U.S. Embassies in Kenya and Tanzania. It is to be akin to nameless "detainees" locked up without trial in Guantanamo Bay, who were routed through CIA black sites. It is to irradiate terrorism threat advisory scales that make unattended backpacks suspicious and crockpots lethal. You could not say the word "terrorist" in 2015 in America and ignore "…the realities of public reaction to the designation…" *Meese, supra* at 486 (Blackmun, dissenting). "It simply strains credulity" for a court to assert that "terrorist" is a neutral classification." *Id.,* at 490 (Blackmun, J., dissenting).

To link even the casual firearms owner with terrorist activity and then to disregard any results condones a targeted smear campaign against the American gun owner. There is no other class or group or segment of the American population that is the subject of this type of unlawful surveillance during this time period.

December 2015, when this lawsuit was filed, was the last effort on the Hill to debate in the U.S. Senate potential

authorizing legislation. The language from U.S. Sen. Feinstein and Schumer, in particular, went to the bully pulpit and the mainstream media under the heading of a "terror gap" putting this country at risk because of the National Rifle Association.

The Second Circuit Court of Appeals affirmed the District Court's dismissal under Fed.R.Civ.P. 12(b)(1). The District Court in its Opinion highlighted "…the Chief Executive's most important constitutional duty is to "take Care that the Laws be faithfully executed"…" App. 31a. The Courts below failed to hold the Executive to the letter of the law. Const. Art. I, §8, cl. 1.

The District Court found that the Petitioners' allegations "…demonstrate that known or suspected terrorists listed in the TSDB who have purchased or seek to purchase firearms have sustained or are in imminent danger of sustaining an injury as a result of the challenged conduct." App. 26a. Hypothetically, yes, an individual "matched" between NICS and the TSDB, assuming such a claim could be made out, might create a different lawsuit, such as to challenge the constitutionality of a "terrorist" statute under 18 U.S.C., Ch. 113B, challenge the basis for inclusion on the TSDB, or challenge the use of the TSDB to obstruct an otherwise lawful purchase of a firearm or explosives.

This Court should resist the urge to analyze this case as a "No-Fly List" case,[16] wherein courts have been

16. The "No-Fly List" is a subset of the consolidated "Terrorist Screening Database," all of which is maintained by the Terrorist Screening Center. *Latif v. Sessions,* 2017 U.S. Dist. LEXIC 60960, 3 (D.Or., April 21, 2017).

struggling to define deductive *indicia* that a person is on a watchlist, based upon the behavior of the TSA and other law enforcement officers at the airport. App. 30a, "Plaintiffs do not even allege that their NICS background checks have resulted in "delayed" transactions, a fact that might give rise to a reasonable inference that they have been the object of the challenged conduct." *See, e.g., Ibrahim v. Dep't. of Homeland Sec.,* 62 F.Supp.3d 909, 992-933 (N.D.Cal. 2014); *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) ("a traveler's subjection to heightened searches while entering the United States can be an indicator that an individual is on a terrorist watchlist.").

For the Circuit Court and the District Court to find that only a person who is a known, alleged "terrorist" named in the TSDB has standing "…is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [the law]." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 181 (2000). This U.S. Supreme Court reversed the lower court decision in *Laidlaw,* because it demanded the plaintiffs show damage to the environment, rather than focusing on the injuries claimed by the plaintiffs to be suffered individually. The "gist" of the inquiry must be whether the complaining party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Schlesinger v. Reservists Comm. To Stop the War,* 418 U.S. 208, 217-218 (1974), citing *Baker v. Carr,* 369 U.S. 186 (1962); *Richardson, supra,* 181 (1974) (Powell, J., concurring).

If this Court declines this request for the Writ of Certiorari, it affirms a ruling that makes the Second Amendment the least desirable of all civil rights, instead of a right necessary to the scheme of ordered liberty. *Palko v. CT,* 302 U.S. 319 (1937), *rev'd. Benton v. MD,* 395 U.S. 784 (1969).

V. The Petitioners Have Standing, as do Millions of American Gun Owners

The Petitioners are intimately familiar with the NICS, have participated in it for decades and for countless transactions, and bring a sharp attack upon illegal government activity. The Petitioners are competent witnesses, if not experts, fully capable of framing the issues and the facts in a manner appropriate for judicial review and adjudication. Their concern is that the conduct of the Respondents is "calculated to destroy the essence of the Second Amendment of the United States Constitution and the spirit of those who would support and exercise it, in order that this last line of defense for the Bill of Rights would fall as surely as have other of the Plaintiff's civil liberties." [A-39, ¶113.] The Petitioners possess the necessary "specificity," "adverseness," and "vigor" "…to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Schlesinger, supra* at 218.

The Courts below missed the greater harm being committed: the mere fact that Respondents are handling every gun owner like a suspected terrorist exceeds the scope of statutory authority conferred upon the Respondents by Congress. Respondents are treating American gun owners with a presumption that the

person at the counter is the worst kind of international murderer. Not a hunter. Not a recreational sportsman. Not a competition shooter. Not a father with his daughter, continuing traditions passed down through generations. Not a Veteran or law enforcement officer maintaining his or her skills. But, a terrorist.

In support of its analysis, the District Court cites to *Clapper, supra* and to *ACLU v. NSA,* 493 F.3d 644 (6th Cir. 2007). [App. 28a, ftnt. 6.] It stated, "In *Clapper,* the plaintiffs failed to offer evidence that their communications would be monitored." [*Id.*] Here, the Petitioners allege and offer proof that their ATF Form 4473 has been monitored at least for the purpose of the illegal cross-check to the TSDB. The District Court further stated regarding *ACLU v. NSA,* "…the plaintiffs did not have standing to do so because they lacked evidence that their communications had been intercepted." [*Id.*] Here, the Respondents do not even try to hide the fact that every ATF Form 4473, including those submitted by the Petitioners, have been "intercepted" for the illegal purpose of at least the cross-check to the TSDB.

The Petitioners are directly and concretely harmed as soon as the FBI receives, analyzes, and shares their personal information.

> "This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for

> a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by the parties who argue within the context, is capable of making decisions."

Schlesinger, supra at 221. The Petitioners were and continue to be directly injured by the illegal actions of the Respondents.

CONCLUSION

This Petition for a Writ of Certiorari should be granted so that this Court can grant the standing necessary for the Petitioners to proceed with this watershed issue on the limitations of personal information use by the Respondents when conducting NICS background checks.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

17-1427-cv

WILLIAM ROBINSON, STEPHEN J. ALDSTADT, DAVID BARDASCINI, MICHAEL CARPINELLI, GEORGE CURBELO, JR., WAYNE DENN, WILLIAM R. FOX, SR., DON HEY, GARRY EDWARD HOFFMAN, RAYMOND KOSOREK, MICHAEL R. KUBOW, THOMAS J. LOREY, THOMAS A. MAROTTA, MICHAEL MASTROGIOVANNI, KENNETH E. MATHISON, TERRENCE J. MCCULLEY, JIM NOWOTNY, JOHN E. PRENDERGAST, HAROLD W. SCHROEDER, EDWARD J. STOKES, JOHN W. WALLACE, LESLIE H. WILSON, CHRISTOPHER S. ZALESKI, MATTIE D. ZARPENTINE, TIM FLAHERTY, DOUG NEGLEY, JACOB PALMATEER, SHOOTERS COMMITTEE FOR POLITICAL EDUCATION, NEW YORK REVOLUTION, GUN RIGHTS ACROSS AMERICA — NEW YORK, NY2A.ORG, FULTON COUNTY-NY OATH KEEPERS, AND ALL THOSE OTHER INDIVIDUALS WHO ARE SIMILARLY SITUATED,

Plaintiffs-Appellants,

Appendix A

LARRY PRATT, GUN OWNERS OF AMERICA, INC.,

Plaintiffs,

-v.-

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ANDREW MCCABE, ACTING DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATIONS, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, CHRISTOPHER M. PIEHOTA, DIRECTOR OF THE TERRORIST SCREENING CENTER, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, BYRON TODD JONES, ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants-Appellees.

January 18, 2018, Decided

Appeal from a judgment of the United States District Court for the Western District of New York (Geraci, *J.*).

Appendix A

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of January, two thousand eighteen.

PRESENT: DENNIS JACOBS,
REENA RAGGI,
PETER W. HALL,
Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

William Robinson and his co-plaintiffs appeal from the judgment of the United States District Court for the Western District of New York dismissing their claim that various United States law enforcement agencies jeopardize

the constitutional rights of prospective American gun owners by mishandling their personal information in the course of conducting routine background checks. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

The appellants are a collection of individuals and organizations committed to Second Amendment advocacy. They allege that the Government violates First, Second, Fourth, Fifth, and Fourteenth Amendment protections, along with the Administrative Procedure Act, 5 U.S.C. § 705, when the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") subjects potential firearm purchasers to background checks that cross-reference their personal information with the Terrorist Screening Database ("TSDB"), a master watchlist of individuals known or suspected of having terrorist ties. They frame the alleged screening practices as an unlawful expansion of The Brady Handgun Violence Prevention Act (the "Brady Act"), Pub. L. No. 103-159, 107 Stat. 1536 (1993), which created the National Instant Criminal Background Check System ("NICS Background Check") to prevent the transfer of firearms to individuals barred from firearm possession by federal or state law. 18 U.S.C. §§ 922(t),(g),(n).

All persons attempting to purchase firearms must undergo an NICS Background Check. *See* 18 U.S.C. §§ 922(t), 923(a). As part of that procedure, prospective customers must complete a firearms transaction record known as the ATF Form 4473, which elicits personal information and propounds questions to certify that

the customer is qualified to possess a firearm under the enumerated Brady Act factors. 27 C.F.R. § 478.124; 28 C.F.R. § 25.7(a); 18 U.S.C. § 922(g)(1)-(9), (n) (setting forth ten conditions that render an individual ineligible to purchase a firearm). The Form 4473 information is then compared against databases from multiple agencies, including the Federal Bureau of Investigation's National Crime Information Center ("NCIC"). *See* 28 C.F.R. § 25.6(c)(1)(iii). Since 2004, the NCIC has incorporated data from the TSDB.[1] *See* J. App'x at 271-72. When the background check produces a "match" with any NCIC records, including those that may also reside in the TSDB, the application is delayed while NICS agents research the transaction to determine whether the individual would be prohibited by law from receiving or possessing a firearm. *See* 28 C.F.R. § 25.6(c)(1)(iv)(B). If the agent confirms that the customer fits one of the disqualifying conditions spelled out in 18 U.S.C. §§ 922(g), (n), the application is denied; if no prohibiting information is discovered (or three business days go by without a response), the sale proceeds. *Id.* § 25.6(c)(1)(iv)(B)-(C).

Appellants allege that this so-called "NICS-to-TSDB connection" procedure exceeds the agency's statutory authority and "amounts to domestic spying." Appellant's Br. at 25. The individual appellants allege that the defendants' conduct caused them to suffer a

1. The Brady Act provides that "the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate [18 U.S.C. §§ 922(t), (n)] or State law." Pub. L. No. 103-159, § 103(e)(1).

particularized constitutional deprivation because they each provided information on Form 4473s in the course of routine firearm purchases and would like to continue making such purchases in the future. The appellants do not allege, however, that they were denied firearms or they suffered delay in purchase; they do not claim to be listed in the TSDB; nor do they contend that any of their information has been compiled or retained beyond the screening period in violation of law. *See* 18 U.S.C. § 922(t)(2)(C); 28 CFR § 25.9(b)(1). The district court therefore concluded that "Plaintiffs fail to demonstrate that they have been, or will be, personally injured by the challenged conduct" and dismissed the complaint for lack of standing. *Robinson v. Sessions*, 260 F. Supp. 3d 264, 274 (W.D.N.Y. 2017).

"The existence of standing is a question of law that we review *de novo*." *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004). To have standing, a party must allege "such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (internal citation and quotation marks omitted). The "irreducible constitutional minimum of standing" requires that "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and

quotation marks omitted). The "injury in fact" standing requirement "applies with special force" where, as here, "a plaintiff files suit to require an executive agency to 'follow the law'; at that point, the citizen must prove that he 'has sustained or is immediately in danger of sustaining a direct injury as a result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552, 194 L. Ed. 2d 635 (2016) (quoting *Ex parte Levitt*, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493 (1937) (per curiam)); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 490, 496-97, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (requiring a "concrete interest" affected by the challenged conduct for standing to vindicate a procedural right).

The appellants fail to identify a direct injury in fact that they have sustained or will sustain as a result of the alleged Government conduct. They discuss at length why (in their view) the inclusion of TSDB data in the NICS Background Check is unauthorized, wrong, and even unconstitutional. But we do not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Lujan*, 504 U.S. at 581 (Kennedy, *J.* concurring); *accord Spokeo*, 136 S. Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). The appellants do not explain how they *themselves* have been subjected to any harm by the challenged conduct, such as the deprivation of a Second Amendment right to bear arms or a Fourth Amendment protection against

unreasonable searches or breach of privacy.[2] *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)(holding that plaintiffs unable to allege that their communications were actually monitored under challenged statute lacked standing); *see also Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 665-66, 673 (6th Cir. 2007)(opinion of Batchelder, *J.*).[3]

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2. For the same reason, we reject the appellants' assertion that they will suffer a cognizable injury in fact because NICS forces them to "choose" between their Second and First or Fourth Amendment rights. This is, in effect, an argument that the appellants are at risk of suffering the same constitutional harms alleged here in the future. Since the appellants fail to demonstrate that they have been or will imminently be subject to the challenged conduct, their unsubstantiated fears of a speculative harm or a 'chill' on Second Amendment activity are insufficient to confer standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013); *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

3. Appellants argue that they have been suffering injury because the Government has exceeded its statutory authority and incorporated the TSDB into the NICS Background Check. In appellants' view, comparing their Form 4473 information against a database incorporating the TSDB—standing alone—is a cognizable injury. Appellants' theory of harm, however, is incongruous. The Brady Act provides the Government with the authority to access any search criteria that will enable it to determine whether a prospective purchaser is prohibited by the Gun Control Act from purchasing a firearm. *See* Brady Act, Pub. L. No. 103-159, § 103(e)(1), 107 Stat. 1536, 1542 (1993). Incorporating the TSDB into the NICS Background Check protocol is merely one method that the Government may use to determine whether a prospective purchaser possesses a disqualifying attribute. Appellants therefore fail to identify how the Government's search procedure causes them

There is no evidence that any of these appellants were unable to purchase a firearm, were delayed in purchasing a firearm, or were listed on the TSDB such that their information was allegedly compromised.[4] At most, the complaint articulates "a highly attenuated chain of possibilities" that could, in combination with a number of unpled facts, perpetrate the alleged constitutional harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013); *see also Summers*, 555 U.S. at 495-96. The standing of the appellants cannot be inferred from the speculative theory that were they to appear on the TSDB, their Form 4473 information might cross-reference to a file on the NCIC, which could result in a delay or denial in their transaction. *See Clapper*, 568 U.S. at 413-14 (declining to endorse a standing theory requiring a chain of speculation).

The appellants also argue that they are harmed by the perceived stigma of the association of gun owners with terrorists. They posit that the inclusion of a TSDB file in one of the databases cross-referenced by the NICS Background Check amounts to labeling all gun owners as terrorists, and thereby creates a direct reputational

injury. *See Baur v. Veneman*, 352 F.3d 625, 636-37 (2d Cir. 2003) ("While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing.").

4. The individual appellants are joined by several non-profit corporations and unincorporated associations. Since the organizational appellants' standing can only be sustained as an extension of the standing of individual members, their claims must also fail. *See Sierra Club*, 405 U.S. at 733-34.

injury. *See Allen v. Wright*, 468 U.S. 737, 754-55, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (stating that injury premised on stigma "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct"), *abrogated in part on other grounds* by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

As the Government points out, this argument is facially incoherent as it suggests that the (unchallenged) criminal background checks done under the Brady Act brand all gun owners as felons or sexual miscreants. More importantly, a valid theory of stigmatizing injury rests on discriminatory conduct within a defined class of persons, not an "abstract stigmatic injury" affecting all gun owners. *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1025 (2d Cir. 1989) (quoting *Allen*, 468 U.S. at 755-56). Like the plaintiff clergy in *In re U.S. Catholic Conference*, the appellants' "self-perceived 'stigma' does not amount to a particularized injury in fact" because they "have neither been personally denied equal treatment under the law nor in any way prosecuted by" any government agency. *Id.* at 1026.

For the foregoing reasons, and finding no merit in Robinson's other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

/s/

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED APRIL 10, 2017

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

Case # 15-CV-6765-FPG

WILLIAM ROBINSON, *et al.*,

Plaintiffs,

v.

JEFF B. SESSIONS, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Defendants.

April 10, 2017, Decided;
April 10, 2017, Filed

DECISION AND ORDER

INTRODUCTION

This is a challenge to the constitutionality of government conduct allegedly taken in the course of conducting background checks pursuant to the Gun Control Act, 18 U.S.C. §§ 921-931 (1968), and the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). The Gun Control Act bans

certain persons from possessing firearms. *See* 18 U.S.C. § 922(d)(1)-(9). The Brady Act establishes a national instant criminal background check system ("NICS") and requiring that federally licensed firearms dealers consult it before transferring firearms to potential purchasers. *See* Pub. L. No. 103-159.

Plaintiffs are a collection of individuals and associations who are "outspoken critics against government infringement of Second Amendment and additional civil liberties." ECF No. 3, ¶ 75. Defendants are the Director of the Federal Bureau of Investigation, the Director of the Terrorist Screening Center, the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Attorney General of the United States.[1] ECF No. 3.

Plaintiffs allege that, in February 2004, Defendants began searching the Consolidated Terrorist Screening Database ("TSDB") in the course of conducting NICS background checks. ECF No. 3, ¶ 19. Plaintiffs further allege that, when a potential firearms purchaser matches a person listed in the TSDB, Defendants compile, retain, and disclose the potential purchaser's personal information for counterterrorism purposes. *Id.* at ¶¶ 24-30. Plaintiffs do not allege that they were denied firearms, that they are listed in TSDB, or that Defendants have compiled, retained, or disclosed their personal information. Rather,

1. Attorney General Jeff B. Sessions should be substituted for former Attorney General Loretta Lynch, and Bureau of Alcohol, Tobacco, Firearms and Explosives Director Byron Todd Jones should be substituted for former Director Thomas E. Brandon as defendants in this case. *See* FED. R. CIV. P. 25(d).

Plaintiffs allege that each Plaintiff "has completed" the form that initiates an NICS background check since February 2004 and that each Plaintiff "wants to continue" to purchase firearms through federally licensed dealers. *Id.* at ¶ 81. Plaintiffs also allege that Defendants' conduct has forced them to choose between their First and Second Amendment rights, *id.* at ¶ 84, and has branded them as terrorists or potential terrorists. *Id.* at ¶ 80. Plaintiffs challenge the search of the TSDB and subsequent data collection under the Second Amendment, Procedural and Substantive Due Process, the Fourth Amendment, the Equal Protection Clause, and the Administrative Procedure Act. *Id.* at ¶¶ 111-38.

Defendants contend as a threshold matter that Plaintiffs lack standing to bring this challenge in federal court. ECF No. 6-1 at 7-12. Defendants also argue that the lawsuit lacks merit because Plaintiffs fail to plead a cognizable claim under any of their six causes of action. *Id.* at 12-25. In response, Plaintiffs moved for summary judgment. ECF No. 9-7. For the reasons explained below, the Court finds that Plaintiffs do not have standing to challenge the counterterrorism actions that Defendants take in the course of conducting NICS background checks.

BACKGROUND

The Gun Control Act regulates the manufacture and sale of firearms and ammunition. *See* 18 U.S.C. §§ 921-31. In particular, it prohibits federally licensed firearms dealers from selling firearms to certain categories of individuals, such as any person under 21 or any person

convicted of a felony. *See, e.g., id.* at § 922(b), (d), (g). In 1993, Congress gave greater effect to those prohibitions by enacting the Brady Act. Pub. L. No. 103-159, 107 Stat. 1536. The Brady Act requires federally licensed firearms dealers to initiate criminal background checks to determine whether state or federal law prohibits potential purchasers from purchasing or possessing firearms before selling to them. *See id.* at § 103(b). To facilitate those background checks, the Brady Act directed the Attorney General to establish the NICS. *See id.* at § 102(a). The Attorney General delegated management of the system to the Federal Bureau of Investigations ("FBI"). *See* 28 C.F.R. § 25.3 (2015). Accordingly, the NICS is managed by the FBI Criminal Justice Information Services Division's NICS Operations Center. *Id.*

NICS Background Check Procedure Under the Brady Act

An NICS background check proceeds in two stages. On the front end, the dealer collects information from the potential purchaser and provides some of that information to the NICS Operations Center. *See* 27 C.F.R. § 478.124 (2012). The dealer obtains from each potential purchaser a completed firearms transaction record ("Form 4473"). *See id.* Form 4473 asks for certain identifying information, such as the purchaser's name, sex, address, date of birth, height, race, and country of citizenship. *Id.* The dealer then contacts the NICS Operations Center and provides the purchaser's name, sex, date of birth, and state of residence to initiate the background check. *See* 28 C.F.R. § 2.57(a).

On the back end, the NICS Operations Center[2] uses the potential purchaser's information to search FBI-maintained databases—such as the NICS index, the National Criminal Information Center's Violent Gang and Terrorist Organization File ("VGTOF"), and the Interstate Identification Index—for signs that the potential purchaser is prohibited from purchasing or possessing firearms. *See id.* at § 25.6. If that search produces disqualifying information, the NICS Operations Center informs the dealer that the transaction should be denied. *Id.* at (c)(1)(iv)(C). If that search produces no signs of disqualifying information, the NICS Operations Center informs the dealer that the transactions may proceed. *Id.* at (c)(1)(iv)(A). If the search produces information that indicates the potential purchaser *might* be disqualified from purchasing or possessing a firearm, the NICS Operations Center informs the dealer that the transaction must be delayed pending further research.[3] *Id.* at (c)(1)(iv)(B).

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2. In some states, Brady Act background checks are processed by designated state and local criminal justice agency point-of-contacts. *See* 28 C.F.R. §§ 25.2, 25.6(a), (d). In New York, all Brady Act background checks are processed by the FBI. Bureau of Alcohol, Tobacco, Firearms and Explosives, *Permanent Brady State Lists* (Sept. 22, 2016), https://www.atf.gov/rules-and-regulations/permanent-brady-state-lists .

3. Upon receiving a "delayed" response, the dealer must wait up to three business days to receive a subsequent "proceed" or "denied" response. 28 C.F.R. 25.6(c)(1)(iv)(B). If the dealer does not hear from the NICS Operations Center within three business days, the dealer may complete the transaction. *Id.*

Appendix B

Maintenance of Records Related to NICS Background Checks

These background check procedures produce two types of records: Form 4473 and NICS transaction records. As noted above, Form 4473 contains the potential purchaser's personal information. 27 C.F.R § 478.124(c)(1). It also requires the dealer to record certain transactions details, including the date on which the dealer contacted the NICS Operations Center, the unique number assigned by the NICS Operations Center to the transaction, and the result of the background check. *Id.* at (c)(3). If the sale of the firearm is completed, the dealer must also record the manufacturer, importer, type, model, caliber, and serial number of the firearm sold. *Id.* In the case of a completed sale, the dealer is required to keep a copy of the Form 4473 for 20 years. *Id.* If the sale is not completed, the dealer is only required to keep a copy of the form for five years. *Id.*

NICS transaction records include the NICS index and audit log. 28 C.F.R. § 25.9(a)-(b). The index documents transactions that the background check finds would violate state or federal law. *Id.* at (a). The audit log, which is generated automatically, records certain information about each background check that the NICS Operations Center conducts. *Id.* That information includes the date and time of the inquiry, the potential purchaser's identifying information, and the unique number assigned to the transaction. *Id.* While the NICS Operations Center retains the index of transactions that would violate state or federal law indefinitely, the center continuously purges information—other than the unique number and date

of each transaction—from the audit log. *Id.* at (a)-(b). Information regarding denied transactions remains in the audit log for ten years. *Id.* at (b)(1)(i). Information about delayed transactions remains in the audit log for 90 days. *Id.* at (b)(1)(ii). The most sensitive information, identifying information connected to approved transactions, is destroyed within 24 hours. *Id.* at (b)(1)(iii).

Just as it regulates retention of these records, the Brady Act regulates access to them. The government may access a completed Form 4473 in only three circumstances: during a routine inspection of the dealer, when the dealer goes out of business and is not replaced by a successor, or in the course of a criminal investigation. 18 U.S.C. § 923(g). Similarly, the NICS index may only be accessed for purposes unrelated to NICS background checks when providing information related to issuing a firearm permit, in response to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity, or for the purpose of disposing firearms in the possession of a government agency. 28 C.F.R. § 25.6(j). The NICS audit log, however, may only be accessed for administrative purposes, such as analyzing system performance, and to support investigations and inspections of dealers. *Id.* at § 25.9(b).

Background Checks Involving Terrorist Watch List Records

On September 16, 2003, President George W. Bush directed the Attorney General to establish an organization

to streamline terrorist watch list records generated and maintained by various federal agencies. Press Release, Office of the Press Secretary, President George W. Bush, Homeland Security Presidential Directive on Integration and Use of Screening Information (Sept. 16, 2003), https://fas.org/irp/offdocs/nspd/hspd-6.html . Accordingly, the Attorney General established the Terrorist Screening Center ("TSC"). 49 C.F.R. § 1560.3 (2008). In line with the President's command, the TSC consolidated various terrorist watch lists into the Terrorist Screening Database ("TSDB"). *Id.*

Plaintiffs allege that, shortly after the TSC created the TSDB, the NICS Operations Center began searching the TSDB when conducting NICS background checks. ECF No. 3, ¶ 19. Plaintiffs allege that, when the NICS Operations Center finds that a potential firearms purchaser matches a known or suspected terrorist listed in the TSDB, the NICS Operations Center illegally compiles, retains, and discloses information about that sale. *Id.* at ¶¶ 25-30. Specifically, Plaintiffs allege that "[t]he FBI republishes the confidential, personal information from the NICS [background checks] to numerous other agencies, foreign governments, and private contractors." ECF No. 3, ¶ 29. Further, Plaintiffs allege that these practices are not in fact related to counterterrorism, that Defendants have "misled" the public under the guise of "national security," and that Defendants actually intend "to create a national registry of firearms owners and firearms." ECF No. 9-7 at 3.

Appendix B

Plaintiffs provide no factual support for their conclusory allegations of national security "smoke and mirrors," *see* ECF No. 3, ¶ 36, wide FBI disclosures of confidential information to foreign governments and private contractors, *see id.* at ¶ 29, and the government's desire to create a registry of gun owners. *See id.* at ¶¶ 42-47. However, in support of their allegations that Defendants take antiterrorism, investigative measures in the course of conducting NICS background checks, Plaintiffs cite the testimony of a former Attorney General, an FBI statement to Congress, Government Accountability Office reports and correspondence, and Congressional Research Service reports. *See generally*, ECF Nos. 12-13; *see also* ECF No. 9-7 at 9-18. As discussed in greater detail below, those exhibits suggest that the NICS Operations Center searches the TSDB during NICS background checks and compiles, retains, and discloses information related to transactions involving known or suspected terrorists.

Plaintiffs' allegations and exhibits suggest that, in the early 2000s, the FBI changed its policies surrounding the role of terrorism-related intelligence in NICS background checks. *See* ECF No. 9-7 at 10 (citing U.S. Gov't Accountability Office, GOA-05-127, Gun Control and Terrorism: FBI Could Better Manage Firearm-Related Background Checks Involving Terrorist Watch List Records (2005) [hereinafter GOA 2005]). While terrorism-related intelligence had always been present in the databases searched during NICS background checks, NICS agents conducting firearms background checks had not always been notified when a potential

purchaser matched a known or suspected terrorist. *See* GOA 2005 at 7 ("Although NICS checks have included searches of terrorist records in VGTOF, NICS personnel . . . historically did not receive notice when there were hits on these records."). Further, the terrorism-related intelligence present in the databases searched during NICS background checks became more robust after the TSC consolidated the various terrorists watch lists into the TSDB.[4] *Id.* at 11. ("[T]he FBI and TSC have implemented procedures that allow all eligible records in the [TSDB] to be added to the VGTOF and searched during NICS background checks.").

Additionally, Plaintiffs' allegations and exhibits suggest that, when the NICS Operations Center discovers a match between a potential firearms purchaser and a name listed in the TSDB, Defendants take certain investigative measures. *See* ECF No. 9-7 at 10 (citing *Terrorist and Guns: The Nature of the Threat and Proposed Reforms Before Comm. On Homeland Sec. and Gov't Affairs*, 111th Cong. 24-26 (2010) (statement of Daniel D. Roberts,

4. According to the FBI, NICS Operations Center was not previously notified of a match between a potential purchaser and a known or suspected terrorist because being a known or suspected terrorist did not disqualify the potential purchaser from owning or possessing a gun. GOA 2005 at 7. However, the Bureau changed its policy, and enhanced the terrorist-intelligence included in the databases it searches during NICS background checks, because the file on the known or suspected terrorist is sometimes more accurate and up-to-date. *Id.* (noting that an audit of NICS transactions revealed that, "[i]n one instance involving a VGTOF record, . . . an FBI field agent had knowledge of prohibiting information not yet entered into the automated databases checked by NICS").

Assistant Dir., Criminal Justice Info. Servs. Fed. Bureau of Investigation) [hereinafter Statement of Daniel D. Roberts]). When there is a match between a potential firearms purchasers and a known or suspected terrorist, the NICS agent conducting the background check informs the dealer that the transactions is "delayed" for further research. *See* Statement of Daniel D. Roberts. The NICS agent then attempts to gather more information about the potential purchaser from the dealer and contacts the FBI's Counterterrorism Division. *Id.* The Counterterrorism Division determines whether there the FBI is currently investigating the potential purchaser and, if so, whether the casefile contains any information that would disqualify the potential purchaser from purchasing or possessing a firearm under the Gun Control Act. *Id.* Regardless of whether the transaction is completed, the encounter is noted and the information is disclosed to counterterrorism and foreign intelligence agencies at the state and federal level. *Id.* ("In this situation, in a given investigation, the attempt may, in combination with other factors, lead to enhanced investigative methods, such as surveillance . . . . In addition, this new piece of intelligence is provided to the National Counterterrorism Center and, in turn, to the U.S. Intelligence Community. Federal and state law enforcement partners are also notified as appropriate.").

DISCUSSION

Plaintiffs argue that, by searching the TSDB in the course of conducting NICS background checks and compiling, retaining, and disclosing a potential purchaser's personal information when a match is found,

Defendants violate the Second Amendment, Procedural and Substantive Due Process, the Fourth Amendment, the Equal Protection Clause, and the Administrative Procedure Act. ECF No. 3 at ¶¶ 111-38. Before reaching the merits of Plaintiffs' arguments, the Court must ensure that Plaintiffs have standing to challenge this conduct. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) ("We have an obligation to assure ourselves of litigants' standing under Article III."); *Ontario Pub. Serv. Emps. Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27, 34 (2d Cir. 2004) ("In order for our court to properly reach the merits of the case . . . we must first find that the parties involved have met the basic requirements of standing."). The Court finds they do not.

I. Article III Standing

Article III of the Constitution limits the jurisdiction of the Federal Judiciary to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. In doing so, Article III enshrines "the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler*, 547 U.S. at 340. The doctrine of standing enforces Article III's case-or-controversy requirement. *Id.* at 342; *see also Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 133 S.Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the power of the political branches."). To that end, the doctrine of standing establishes an "irreducible constitutional minimum," which ensures that a plaintiff

has alleged a "particularized" injury that affects the plaintiff in a "personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

The irreducible constitutional minimum of standing requires three things: First, the plaintiff must allege "an injury in fact"—a harm suffered by the plaintiff personally that is "concrete and actual or imminent, not conjectural or hypothetical." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Second, the plaintiff must demonstrate a "fairly traceable" causal connection "between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* Finally, there must be "a likelihood that the requested relief will redress the alleged injury." *Id.; see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that injury fairly can be traced to the challenged conduct and is likely to be redressed by a favorable decision.") (internal quotation marks and citations omitted).

Beyond that irreducible constitutional minimum, the Supreme Court has identified certain prudential standing limitations. One of those limitations is that "when the asserted grievance is a generalized grievance shared in substantially equal measure by all or a large class

of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). That is because "other governmental institutions" may be more competent to address "questions of wide public significance." *Id.* at 500. Another of those limitations is that the power to seek judicial review belongs to "those who have a direct stake in the outcome," rather than "concerned bystanders who will use it simply as a vehicle for the vindication of value interests." *Diamond v. Charles*, 476 U.S. 54, 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (internal quotation marks omitted). Underlying each of these prudential limitations is a fundamental principle of our democracy— "The province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803).

In line with that democratic prerogative, the standing inquiry is "especially rigorous" where reaching the merits of a dispute involves deciding "whether an action taken by one of the other two branches of Federal Government was unconstitutional." *See Clapper*, 133 S. Ct. at 1147. The inquiry is more rigorous still where reaching the merits of the dispute involves "intelligence gathering and foreign affairs." *Id.* at 1147 (citing *United States v. Richardson*, 418 U.S. 166, 188, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974) (finding the plaintiff lacked standing to compel the Central Intelligence Agency to publish information regarding how it spends its funds), *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) (finding the plaintiff lacked standing to challenge the Armed Forces Reserve membership of

members of Congress), and *Laird v. Tatum*, 408 U.S. 1, 11-16, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) (finding the plaintiff lacked standing to challenge an intelligence-gathering program)).

Plaintiffs suggest three bases for standing to contest the constitutionality of the challenged conduct. ECF No. 3. First, Plaintiffs argue that the challenged conduct directly invades their legally protected interests because each Plaintiff "has completed an ATF Form 4473 since February 2004" and "wants to continue to purchase firearms through federally-licensed dealers." ECF Nos. 3, ¶ 80; 9-7 at 37-87. Second, Plaintiffs suggest that they have standing because the challenged conduct has forced them "to choose [among] their Second Amendment rights, their First Amendment rights, and other, valuable civil liberties." *Id.* at ¶ 84; 9-7 at 39. Third, Plaintiffs' Amended Complaint seems to suggest that Plaintiffs have been injured because the challenged conduct stigmatizes them as "terrorists and potential terrorists." ECF No. 3, ¶ 125. Each basis for standing is addressed below.

a. Direct Invasion of Interests

Plaintiffs' first assert standing on the basis of a direct invasion into their personal interests. *See* ECF No. 9-7 at 37. Plaintiffs allege that, since February 2004, when conducting NICS background checks, Defendants have searched databases containing counterterrorism intelligence and information. ECF No. 3, ¶¶ 19, 24. Plaintiffs further allege that, when a match between a potential purchaser and a known or suspected terrorist

is found, the FBI has compiled, retained, and disclosed to third parties the potential purchasers' confidential information. ECF No. 3, ¶¶ 25-30. Plaintiffs allege that this conduct has injured them directly because each Plaintiff has completed a Form 4473 since February 2004 and wants to purchase firearms from federally licensed dealers in the future. ECF No. 3, ¶ 81.

In response to those allegations, Defendants argue that completing Form 4473 and wanting to purchase firearms in the future does not confer standing on Plaintiffs. Defendants argue that Plaintiffs fail to allege "that they have ever had their own personal information gathered" or that "their own personal information was ever improperly disclosed to other law enforcement agencies or to a private entity." ECF No. 6-1 at 10-11.

The Court agrees with Defendants. Plaintiffs' allegations demonstrate that known or suspected terrorists listed in the TSDB who have purchased or seek to purchase firearms have sustained or are in imminent danger of sustaining an injury as a result of the challenged conduct. But Plaintiffs do not allege that *they* are listed as known or suspected terrorists in the TSDB. Nor do Plaintiffs allege facts that would raise a plausible inference that they are listed as known or suspected terrorists in the TSDB. Simply put, Plaintiffs' allegations do not demonstrate that the challenged conduct harms them personally.

To challenge a government policy or program, a plaintiff must demonstrate either that they have been

subjected to the challenged conduct or that they are substantially likely to be subjected to the challenged conduct in the future.[5] In *O'Shea v. Littleton*, the Supreme Court found that the plaintiffs did not have standing to challenge racial discrimination in their city's issuance of bond and imposition of criminal sentences because they had only alleged "general assertions or inferences" that they would be subjected to the challenged conduct. 414 U.S. 488, 497-98, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). There, the plaintiffs' alleged injury relied on speculation that the plaintiffs would be arrested and then subsequently treated in a discriminatory manner.

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5. To be clear, a plaintiff must demonstrate standing to seek each form of relief sought. *Allen v. Wright*, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88, 188 L. Ed. 2d 392 (2014) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); *see also Laidlaw*, 528 U.S. at 185 ([A] plaintiff must demonstrate standing separately for each form of relief sought."). Accordingly, to seek damages for past conduct, Plaintiffs must demonstrate that they have been injured by the challenged conduct in the past, *see City of Los Angeles*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (finding the plaintiff, who had been choked by a police officer, had standing to seek damages for the past conduct), and to seek an injunction to prevent future conduct, Plaintiffs must demonstrate that a substantial likelihood that they, personally, will be the object of the challenged conduct in the future. *Id.* (finding that same plaintiff did not have standing to seek injunctive relief because he could not demonstrate a sufficient likelihood that "he would suffer future injury from the use of chokeholds by police officers"). Plaintiffs here seek both forms of relief but demonstrate neither type of injury.

Id. Because the plaintiffs' allegations did not point to any imminent prosecutions contemplated against them, or even suggest that the plaintiffs expected to violate any criminal laws, the Court found the threat of injury from the challenged conduct was "too remote to satisfy the case-or-controversy" requirement. *Id.* at 498.

More recently, in *Clapper v. Amnesty USA*, the Supreme Court found that a group of attorneys, journalists, and human rights organizations did not have standing to challenge a government surveillance program because they could not demonstrate that their communications would be intercepted.[6] *Clapper*, 133 S.Ct. at 1138. The

6. Plaintiffs attempt to distinguish the conduct challenged in *Clapper*. *See* ECF No. 9-7 at 8, 38-39. To be sure, the regulatory framework at issue in *Clapper* merely allowed federal officials to *apply* for authorization to engage in the surveillance that the plaintiffs feared. *Clapper*, 133 S.Ct. at 1149. In contrast, Plaintiffs challenge investigatory practices that have been put in place. *See* ECF No. 3, ¶¶ 19-30. Thus, the injury in *Clapper* was even more hypothetical and conjectural. *Clapper*, 133 S.Ct. at 1149. But this is a distinction without a meaningful difference. In *Clapper*, the plaintiffs failed to offer evidence that their communications would be monitored. *Id.* at 1148. Although the structure of the regulatory framework further undermined the plaintiff's theory of standing, the Court emphasized that the plaintiffs had "set forth no specific facts" demonstrating that their communications would be monitored. *Id.* at 1149. Indeed, in emphasizing that failure, the Court cited the Sixth Circuit's decision in *American Civil Liberties Union v. National Sec. Agency*, 493 F.3d 644 (2007). The plaintiffs in *ACLU* sought to challenge an actual program of surveillance that the President had already authorized. *ACLU*, 493 F.3d at 648 n.1. But the court found the plaintiffs did not have standing to do so because they lacked evidence that their communications had been intercepted. *Id.* at 655-656, 673-674. Similarly, here, Plaintiffs challenge a policy

Court rejected the plaintiffs' theory that their injury was concrete and imminent because their contacts abroad were the type of individuals whom the policies at issue would target. *Id.* at 1148. Indeed, the Court highlighted a plaintiff's statement that he had "no choice but to *assume*" that his communications with his foreign contacts "*may* be subject to government surveillance." *Id.* (emphasis added in original).

Like the plaintiffs in *O'Shea* and *Clapper*, Plaintiffs fail to demonstrate that they have been, or will be, personally injured by the challenged conduct. Plaintiffs assert that they can establish a direct and personal injury flowing from the challenged conduct because they each have completed Form 4473 and want to continue to purchase firearms from federally licensed dealers in the future. But Plaintiffs are not challenging provisions of the Brady Act or even NICS background checks generally. Rather, Plaintiffs challenge the antiterrorism measures that they allege have become a routine part of some NICS background checks. The problem is, Plaintiffs do not allege facts that demonstrate they have been, or will be, personally affected by those measures.

Plaintiffs have not alleged that the FBI has compiled, retained, or disclosed their personal information. Plaintiffs have not alleged that they are listed in the TSDB

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that they allege has already been authorized and put into effect. Plaintiffs put themselves one step closer to the policy at issue than did the plaintiffs in *Clapper*. But like the plaintiffs in both *Clapper* and *ACLU*, Plaintiffs in this case have failed to allege facts that demonstrate they have been, or likely will be, the object of that policy. That failure thwarts their theory of standing.

as known or suspected terrorists. Plaintiffs do not even allege that their NICS background checks have resulted in "delayed" transactions, a fact that might give rise to a reasonable inference that they have been the object of the challenged conduct.[7] Just as Plaintiffs do not allege that they have been subjected to the antiterrorism measures that they challenged, they do not allege that they will, in the future, be subjected to that conduct. Like the plaintiffs in *O'Shea*, Plaintiffs here do not point to any imminent counterterrorism investigations contemplated against them. Nor do Plaintiffs suggest that they expect to behave in a manner that might lead to a counterterrorism investigation. Further, like the plaintiffs in *Clapper*, the affidavits of Plaintiffs in this case rely on speculation that they *might be* subjected to the challenged conduct.

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7. Plaintiffs allege that, "[w]hen the FBI believes that a potential customer is a match to someone in the [TSDB], . . . the FBI uses the 'delay' sequence to create a three business-day window to elicit further information about the potential customer, including, but not limited to, learning the manufacturer, model, and serial number of the potential firearm to be purchased." ECF No. 3, ¶ 33. Plaintiffs also provide exhibits that support this allegation. *See, e.g.*, Statement of Daniel D. Roberts (explaining that, when a potential purchaser matches a known or suspected terrorist listed in the TSDB, "the NICS examiner informs [the dealer] the transaction is delayed for further research and transfers the transaction to the NICS Command Center"); *see also* GOA 2005 at 2 ("[A]ll NICS transactions with potential or valid matches to terrorist watch list records are automatically delayed to give NICS personnel the chance to further research the transaction for prohibiting information before a response (e.g., proceed or denied) is given to the initiator of the background check."). But Plaintiffs do not allege that, when they have attempted to purchase firearms, their NICS background checks resulted in delayed transactions.

See, e.g., ECF No. 9-3 (Affidavit of Michael P. Carpinelli) ("*What if* my name is slipped on the [TSDB]? I *would* lose my right to defend myself, my family, my community, my livelihood.") (emphasis added). Because the injury that Plaintiffs assert is necessarily contingent on Plaintiffs being deemed known or suspected terrorists, these failures are fatal to Plaintiffs' theory of standing.

Plaintiffs also argue that if the Court finds that they do not have standing, Defendants' conduct could not be challenged. ECF No. 9-7 at 40. That argument is both legally and factually flawed. First, it is well established that the argument that "no one would have standing to sue" is not itself a reason to find standing. *Clapper*, 133 S. Ct. at 1154 (citing *Valley Forge Christian College*, 454 U.S. at 489). Second, this decision does not shield Defendants from judicial review. This decision merely requires, consistent with the irreducible, constitutional minimum requirements of standing, that a plaintiff seeking judicial review demonstrate that they have been injured by the challenged conduct. "The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Rather, the doctrine of standing shields the constitutional prerogatives of the executive—including the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed,"—from unnecessary interference by plaintiffs whose rights are not personally violated. *See Laird*, 408 U.S. at 15.

b. Chilling Effect

Plaintiffs next assert standing based on the effect of the challenged conduct on the exercise of their constitutional rights. *See* ECF No. 9-7 at 39. Plaintiffs allege that Defendants' conduct forces them to choose between their First and Second Amendment rights, among other civil liberties. ECF No. 3, ¶ 84. Plaintiffs claim "the actions of the Defendants create immediate and total interference with the statutory and public expectations regarding the purchase of a firearm." ECF No. 9-7 at 39. Defendants argue in response that Plaintiffs have fallen short of demonstrating a concrete and particularized injury because they have not identified "a single instance on which they were precluded from exercising their civil liberties." ECF No. 6-1 at 11.

The Court finds this to be an insufficient basis for standing. The injury asserted under this theory of standing does not arise directly from Defendants' conduct; rather, under this theory Plaintiffs are injured because the possibility that Defendants will intercept their personal information for counterterrorism purposes has chilled the exercise of their constitutional rights. But the possibility that Defendants will intercept their personal information for counterterrorism purposes is still too remote to confer standing.

Allegations of a remote, "subjective chill" do not satisfy Article III's case-or-controversy requirement. *Laird*, 408 U.S. at 13-14. In *Laird*, the plaintiffs argued that their exercise of their First Amendment rights was

being "chilled by the mere existence, without more, of [the Army's] investigative and data-gathering activity." *Id.* at 10. While acknowledging that prior cases have held that constitutional violations may arise from the chilling effect of "regulations that fall short of a direct prohibition against the exercise of First Amendment rights," the Supreme Court declared that none of the plaintiffs in those cases asserted chilling effect arising "merely from the individual's knowledge that a governmental agency was engaged in certain activities." *Id.* at 11. Noting that the plaintiffs had not connected the existence of the surveillance program to their own speech, the Court held that the plaintiffs' allegations of a subjective chill were "not an adequate substitute for a claim of specific present objective harm or a threat of a specific future harm." *Id.* at 13-14.

Like the plaintiffs in *Laird*, Plaintiffs here allege that the exercise of their constitutional rights has been chilled by the mere existence of the challenged conduct. *See* ECF No. 3, ¶ 84. Plaintiffs allege that they are "being forced to choose between their Second Amendment rights, their First Amendment rights, and other, valuable civil liberties." *Id.* But Plaintiffs fail to demonstrate any likelihood that they will be subjected to the government actions they fear. Mere knowledge that NICS background checks trigger counterterrorism efforts when some individuals attempt to purchase firearms is not enough. *See Laird*, 408 U.S. at 11. Just as in *Larid*, the chilling effect here is too remote to confer standing on Plaintiffs.

c. Stigmatization

Plaintiffs' Amended Complaint seems to suggest a third basis for standing. Plaintiffs suggest that Defendants conduct injures firearms purchasers because it associates them with terrorists. Plaintiffs submit that searching the TSDB in the course of conducting an NICS background check "result[s] in their stigmatization as terrorists and potential terrorists." ECF No. 3, ¶ 125. Defendants argue that Plaintiffs' alleged stigma is not sufficient to demonstrate an injury because Plaintiffs "have not made any assertion of harm flowing from such alleged stigmatization." ECF No. 6-1 at 11. The Court agrees that Plaintiffs' alleged stigma is not a sufficient basis for standing.

An injury rooted in the stigmatizing effect of government conduct "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (collecting cases). In *Allen*, the Supreme Court held that the African American plaintiffs did not have standing based on a stigma resulting from discrimination against other African Americans. *Id.* at 761. The Court found such an injury to be "abstract" and "not judicially cognizable." *Id.* at 755.

Here, Plaintiffs seem to suggest that they have been stigmatized as "terrorists and potential terrorists" because other potential firearms purchasers, whom the FBI considers known or suspected terrorists, have had some of their personal information compiled, retained,

and disclosed. *See* ECF No. 3, ¶ 125. But Plaintiffs do not allege that they have been subjected to the conduct that creates the stigma. For that reason, Plaintiffs' alleged stigma, like the stigma asserted in *Allen*, is not "judicially cognizable." *Id.* at 755.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss (ECF No. 6) is GRANTED. Plaintiffs' Amended Complaint is dismissed without prejudice, and the Clerk of the Court is directed to close the case.

IT IS SO ORDERED.

Dated: April 10, 2017
Rochester, New York

/s/ Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court