No. _____

IN THE

Supreme Court of the United States

WILLIAM C. BOND,

Petitioner,

v.

UNITED STATES OF AMERICA; JOHNNY L. HUGHES, United States Marshal; KEVIN PERKINS, Special Agent in Charge; ROD J. ROSENSTEIN, United States Attorney; and UNKNOWN NAMED MARYLAND U.S. JUDGES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether when denying a pro se litigant leave to amend the complaint, a district court must provide a reason for that denial (as held by the Third, Seventh, Ninth, Eleventh, and D.C. Circuits), or whether a district court need not provide a justifying reason when denying a pro se litigant leave to amend the complaint if that reason is apparent from an analysis of the record (as held by the First, Fourth, Fifth, and Tenth Circuits).

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The opinion of the Court of Appeals for the Fourth Circuit (App. A) is reported at *Bond v. United States*, 742 F. App'x 735 (4th Cir. 2018). The opinion of the District Court for the District of Maryland (App. B) is reported at *Bond v. Hughes*, No. 1:16-cv-02723-DAF, 2017 WL 4507499 (D. Md. Aug. 1, 2017).

JURISDICTION

The Court of Appeals for the Fourth Circuit entered judgment on August 2, 2018. On October 22, 2018, Chief Justice Roberts granted an extension of time to file this Petition until December 17, 2018. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES OF CIVIL PROCEDURE

This case concerns the explanation a district court must give when denying pro se litigants leave to amend their complaint. Federal Rule of Civil Procedure 15(a)(2) addresses amendments not made as a matter of course, and provides that:

> In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(2).

INTRODUCTION

This case raises fundamental issues concerning whether pro se litigants have meaningful access to federal court. In line with three other circuits, the decision below held that when denying a pro se litigant leave to amend the complaint, the district court need not identify the justifying reason for that denial if the reason for the denial is apparent from an investigation and analysis of the litigation record. Five circuits have held the opposite, ruling that a district court must identify the reason for denying a pro se litigant leave to amend in the denial order, itself. This circuit split has serious, practical implications for pro se litigants who bring cases in the jurisdictions that do not require district courts to provide a reason when denying leave to amend. Absent notice of their pleading deficiencies, very few pro se litigants can parse the record and identify how to successfully amend their complaints.

This circuit split is especially problematic because the majority of pro se litigants bring claims seeking remedies for violations of the U.S. Constitution and federal civil rights statutes. *See infra* p. 17. These litigants—who are predominantly women, minorities, and the poor—are four times more likely than represented parties to have their cases dismissed under Federal Rule of Civil Procedure 12(b)(6). *See infra* p. 17. Serious due process concerns arise when courts dismiss civil rights claims brought by vulnerable populations and protected classes because, without representation, these litigants cannot interpret the record to identify how to successfully amend their complaints. For most pro se litigants, it will be unreasonably difficult, if not impossible, to review the record and identify the reasons in the record that the

court denied leave to amend. The minority rule requires that pro se litigants undertake an investigation and analysis that would be difficult for many fledgling attorneys.

Additional due process concerns arise from the circuit split, itself. As a practical matter, the ability to amend a complaint and thus proceed to the merits depends on the geographical location of the pro se litigant. Pro se litigants in the circuits adhering to the minority rule are at a distinct and arbitrary disadvantage.

Whether pro se litigants are entitled to an explanation identifying the reason that they have been denied leave to amend their complaints presents an issue of national importance that impacts nearly one-third of all federal civil litigants. *See infra* p. 17. This problem will only worsen as the cost of counsel continues to rise, forcing even more ordinary citizens to seek legal protections without the aid of counsel. *See infra* pp. 17–18.

Neutral stakeholders, including the federal judiciary, have voiced concerns about the serious obstacles pro se litigants face and their inability to successfully plead otherwise meritorious claims on their first attempt. The Honorable Lois Bloom has observed that "the legally untrained face special difficulties in navigating and carrying out the arcane requirements of pleading." Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475, 483 (2002). The Second Circuit Task Force on Gender, Racial and Ethnic Fairness similarly acknowledged that "fundamental notions of justice require that the circuit adopt practices to assist such

litigants in presenting their claims as clearly as possible and in using the required court procedures properly." John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts,* 1997 Ann. Surv. Am. L. 117, 300. The American Bar Association similarly recognizes that pro se litigants may require "reasonable accommodations" from the district courts hearing their cases in order "to ensure pro se litigants the opportunity to have their matters fairly heard." Am. Bar Ass'n, *Model Code of Judicial Conduct* R. 2.2 cmt. 4 (2014) (explaining that such reasonable accommodations do not violate Rule 2.2's requirement that judges remain impartial).

Requiring district courts to identify a reason when denying pro se litigants leave to amend is a logical accommodation that would visit minimal burden upon the district courts while making them more transparent and thus more accessible. This Court should hear this case and resolve whether district courts must include the reason for denial in the order denying a pro se litigant leave to amend. Providing an explanation can make the difference between a pro se litigant having a meritorious case heard and that same litigant—who typically is a vulnerable individual bringing a core constitutional claim—being blocked from the court at the pleading stage. The outcome of a case should not depend on the location of the court in which the claim is brought.

STATEMENT OF THE CASE

I. THE DISTRICT COURT DENIES PETITIONER'S MOTIONS TO REOPEN HIS CASE AND TO FILE A SECOND AMENDED COMPLAINT.

On July 29, 2016, Petitioner filed a complaint in the United States District Court for the District of Maryland alleging that federal government officials and employees violated his First Amendment and due process rights under the U.S. Constitution.[1] *See generally* Compl. at 3, *Bond v. Hughes*, No. 1:16-cv-02723-DAF (D. Md. July 29, 2016), ECF No. 1. Petitioner's grievances stem from prior unsuccessful lawsuits that involved the unauthorized use of his manuscript. *See generally id.* ¶¶ 1–23, 88–99. His legal claims focus on the federal government's interference with his public protest of the federal judiciary and its unauthorized surveillance of him. *See id.* ¶¶ 24–48, 51–61, 73–76, 79–81. Petitioner appeared pro se at all times in the district court proceedings. *See Bond v. Hughes*, No. 1:16-cv-02723-DAF (D. Md.) (Civil Docket).

On April 12, 2017, the district court granted Respondents' Motion to Dismiss the Complaint (the "MTD Order") and ordered "the Clerk to remove this case from the court's docket." *Bond v. Hughes*, No. 1:16-cv-02723-DAF (D. Md. Apr. 12, 2017), ECF No. 22 (App. D at 36a). The MTD Order identified

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[1] The truth of Petitioner's allegations is not implicated by the filing of this petition for a writ of certiorari, and Counsel of Record makes no argument concerning the truth of Petitioner's allegations.

curable pleading deficiencies, including that: (a) the "body of the Complaint fails to identify" misconduct by the relevant named defendants; (b) "Plaintiff has not expressed how any named Defendants trampled on his constitutional rights," rendering them "entitled to qualified immunity"; and (c) "Plaintiff has furnished this court with no evidence of a chilling effect on his speech." *Id*. at 22a–35a.

On May 9, 2017, Petitioner moved the district court to reopen the case pursuant to Federal Rule of Civil Procedure 59(a) (the "First Motion to Reopen").[2] *See* Mot. to Reopen Case & to File Am. Compl., *Bond v. Hughes*, No.: 1:16-cv-02723-DAF (D. Md. May 9, 2017), ECF No. 24. Petitioner attached a proposed First Amended Complaint ("FAC") to the First Motion to Reopen. *See id.*

The First Amended Complaint added substantive amendments responding to the MTD Order, including that the Respondents were entitled to qualified immunity because the complaint did not allege the individual actions taken by Respondents that deprived Petitioner of his constitutional rights. *See* App. D at 34a–35a. Among other amendments, the First

[2] When deciding a post-judgment motion to reopen a case and for leave to file an amended complaint, district courts within the Fourth Circuit apply the same legal standard applied in a prejudgment motion for leave to amend the complaint. "The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to Fed. R. Civ. P. 15(a)." App. A at 2a (quotation marks omitted) (quoting *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011)).

Amended Complaint: (a) removed the defendants that the district court ruled were subject to qualified immunity; (b) added as defendants the individual agents from the FBI and U.S. Marshals Service who interrogated Petitioner before his protest and who told him he was under surveillance; (c) added facts alleging how the newly named defendants' actions and interrogations muted Petitioner's protest; and (d) eliminated three of the six causes of action. *See* FAC at 1, 12, ¶¶ 12–42. The Government did not oppose Petitioner's First Motion to Reopen. *See Bond v. Hughes*, No. 1:16-cv-02723-DAF (D. Md. May 23, 2017), ECF No. 25 (App. C).

On May 23, 2017, the district court issued a two-paragraph order (the "First Denial Order") denying the motion in two sentences:

> For reasons expressed in the Memorandum Opinion and Order and Judgment Order already filed, *see* Doc. Nos. 22–23, the court hereby **DENIES** Plaintiff's Motion to Reopen Case and to File an Amended Complaint. Consequently, the court also **DENIES** Plaintiff's request to vacate the court's Memorandum Opinion and Order and Judgment Order already filed. *See* Doc. Nos. 22—23.

Id. at 10a.

On June 20, 2017, Petitioner filed a second motion to reopen his case and file a second amended complaint, citing both Federal Rules of Civil Procedure 59(e) and 60(b) (the "Second Motion to Reopen"). *See* Mot. to Reopen Case & for Leave to File Second Am. Compl., *Bond v. Hughes*, No. 1:16-cv-02723-DAF (D. Md. June 20, 2017), ECF No. 26. Petitioner included a

proposed Second Amended Complaint ("SAC"). *See id.* The Second Amended Complaint included all of the changes in the First Amended Complaint and further alleged how and why the federal law enforcement interrogations of Petitioner before his protest diminished "the robustness" of his protest. *See* SAC ¶¶ 35–36. The Second Amended Complaint named the federal judges (who were previously identified as "Unknown Named Maryland U.S. Judges" and then as "Three Maryland U.S. Judges"). These judges presided over Petitioner's prior unsuccessful lawsuits, and the Second Amended Complaint alleged that they conspired to ensure his negative litigation outcomes based on undisclosed personal relationships and biases. *Id.* at 1–2.

On August 1, 2017, the district court denied Petitioner's Second Motion to Reopen in a two-page decision (the "Second Denial Order") that held in relevant part: "For reasons expressed in the Memorandum Opinion and Order and Judgment Order already filed, *see* Doc. Nos. 22-23, and in the Order denying the re-opening of this case, *see* Doc. No. 25, yet again the court **DENIES** Plaintiff's Motion to Reopen Case and to File an Amended Complaint. *See* Doc. No. 26." *See* App. B at 7a–8a. Without offering any further analysis, the Court stated that "Petitioner's repeatedly unmeritorious supplications are squandering the Third Branch's limited resources." *Id.* at 8a. Petitioner was barred from filing any future motions in the case. *Id.*

Neither the First Denial Order nor the Second Denial Order acknowledged the substantive amendments in the First Amended Complaint or the Second Amended Complaint, including the newly named defendants and the specific factual allegations

identifying the personal actions of those defendants that caused Petitioner to mute his speech. *See* App. C at 10a; App. B at 7a–8a. Not once—in its MTD Order, First Denial Order, or Second Denial Order—did the district court acknowledge the liberal pleading standard afforded to pro se litigants as set forth by this Court in *Erickson v. Pardus*. *Compare* 551 U.S. 89, 94 (2007) (explaining that pro se complaints must be "held to less stringent standards" (quotation marks omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))), *with* App. B (failing to discuss pro se pleading standard), App. C (same), *and* App. D (same).

II. THE FOURTH CIRCUIT AFFIRMS THE DISTRICT COURT'S DENIAL OF PETITIONER'S SECOND MOTION TO REOPEN HIS CASE.

On September 29, 2017, Petitioner appealed the Second Denial Order, arguing primarily that the district court's failure to provide any reason or explanation for denying Petitioner leave to amend was an abuse of discretion. *See* Appellant's Br. at 32–43, *Bond v. United States*, No. 17-2150 (4th Cir. Mar. 19, 2018), ECF No. 24. On appeal, Petitioner was represented by counsel. *See* Appearance of Counsel, *Bond v. United States*, No. 17-2150 (4th Cir. Jan. 3, 2018), ECF No. 17; Appearance of Counsel, *Bond v. United States*, No. 17-2150 (4th Cir. Dec. 21, 2017), ECF No. 15.

In a per curiam decision, the Fourth Circuit affirmed the Second Denial Order. *See* App. A. The Fourth Circuit agreed with Petitioner that the district court did "not explicitly state" the reasons for its denial of Petitioner's Second Motion to Reopen. *Id.* at 4a. It held, however, that there was no abuse of discretion because the Second Denial Order cited the First Denial

Order and the MTD Order: "Because the district court's rationale—futility—for denying the second motion to amend was apparent in light of the August 1 order's reliance on the April 12 opinion, the district court's failure to specifically articulate that rationale does not amount to an abuse of discretion." *Id.*

The Fourth Circuit reiterated its rule that as "long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion." *Id.* (quotation marks omitted) (quoting *In re PEC Sols.,* 418 F.3d 379, 391 (4th Cir. 2005)). The Fourth Circuit also rejected Petitioner's argument that the Second Amended Complaint's proposed amendments were not futile, holding that the "bare assertions in the proposed second amended complaint that" Petitioner "curtailed or diluted his First Amendment activity do not amount to sufficient allegations that he suffered objective harm to his rights under that Amendment." *Id.* at 5a. Like the district court below, the Fourth Circuit never acknowledged the liberal pleading standard afforded to pro se litigants. *Id.* at 2a–6a.

REASONS FOR GRANTING THE PETITION

A district court's obligation—or lack thereof—to provide an explanation when denying pro se litigants leave to amend is an important federal question that multiple circuit courts have decided in opposing manners. This Court should grant certiorari under Supreme Court Rule 10(a) and resolve the current circuit split.

I. THIS COURT SHOULD DETERMINE THE DISTRICT COURTS' OBLIGATION WHEN DENYING A PRO SE LITIGANT LEAVE TO AMEND.

A. The Circuit Courts Are Split, Creating Two Opposing Rules Governing District Courts' Denials of Leave to Amend for Pro Se Litigants.

In *Foman v. Davis*, this Court ruled that, absent "any apparent or declared reason" such as undue delay, prejudice, or futility, plaintiffs should be given leave to amend their complaints. 371 U.S. 178, 182 (1962). This Court further explained that the "outright refusal to grant the leave without any justifying reason appearing for the denial" is an abuse of discretion. *Id.* *Foman v. Davis* did not address whether that "justifying reason" must be set forth in the district court's denial order or if it is sufficient for the "justifying reason" to be apparent in the record but not identified by the district court's denial order. The circuit courts have split on this question with respect to pro se litigants, and this circuit split is a matter of national importance, worthy of this Court's attention.

1. Four Circuits Do Not Require District Courts to Include a Reason When Denying Pro Se Litigants Leave to Amend If That Reason Is Apparent in the Record.

In the First, Fourth, Fifth, and Tenth Circuits, a district court does not have to explain the reason for denying a pro se litigant leave to amend if the reason for that denial is apparent from an analysis of the record.

The First Circuit explained this rule: "We review the denial of leave to amend a complaint for an abuse of discretion, deferring to the district court if any adequate reason for the denial is apparent from the record." *Movitz v. Home Depot U.S.A., Inc.*, 82 F. App'x 230, 230 (1st Cir. 2003) (per curiam) (affirming district court's denial of pro se motion for leave to amend based on futility). Similarly, in the Fourth Circuit, as "long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion." *In re PEC Sols.,* 418 F.3d at 391 (quotation marks omitted) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999)).

The decision below clarifies that the Fourth Circuit applies this standard to both pro se litigants and represented litigants, confirming for the first time that *In re PEC Solutions* applies to pro se litigants as well. App. A at 4a. The decision below also confirms that this rule requires pro se litigants to independently analyze and extrapolate from prior judicial rulings, thus requiring an individual with no legal training to investigate the judicial record and deduce the court's reasoning on multiple bases.

Indeed, in the decision below, the Fourth Circuit, itself, undertook the very analysis that would be required of a pro se litigant, reasoning that because the Second Denial Order cited the First Denial Order and the MTD Order, "the only relevant basis for" the district court's "decision was a determination that the proposed second amended complaint was futile." *Id.* The First Denial Order did not, itself, mention futility but instead incorporated the reasons set forth in the district court's 28-page opinion (which was based on

numerous reasons, including but not limited to futility). *See* Apps. C and D.

In the Fifth Circuit, a "district court's failure to adequately explain its denial of leave to amend is 'not fatal to affirmance if the record reflects ample and obvious grounds for denying leave to amend.'" *Spence v. Nelson*, 603 F. App'x 250, 253–54 (5th Cir. 2015) (per curiam) (quoting *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014)) (affirming denial of pro se motion for leave to amend, in part, because "the record supports the denial"). While the Tenth Circuit requires district courts to provide justifying reasons when denying pro se litigants leave to amend, the failure to do so is harmless error if that reason is apparent from the record. *See, e.g.*, *Jurgevich v. McGary*, 63 F. App'x 448, 451–52 (10th Cir. 2003) (ruling that because pro se plaintiff's proposed amended complaint was futile, the district court's failure to provide reasons for denying the proposed amendment was harmless).

2. Five Circuits Require District Courts to Provide Justifying Reasons in the Order Denying Pro Se Litigants Leave to Amend.

In the Third, Seventh, Ninth, Eleventh, and D.C. Circuits, district courts must provide justifying reasons when denying pro se litigants leave to amend. The failure to include an explanation in the order is an abuse of discretion even if the reason is apparent in the record.

The D.C. Circuit has "emphasized that a proper exercise of discretion requires that the district court provide reasons" for denying pro se litigants leave to

amend. *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("Turning then to the Rule 15(a) issue, we find error in the district court's complete failure to provide reasons for refusing to grant leave to amend."). The Seventh and Eleventh Circuits employ the same rule. *See, e.g.*, *Phillips v. Ill. Dep't of Fin. & Prof'l Regulation*, 718 F. App'x 433, 436 (7th Cir. 2018) (mem.) ("Dismissal with prejudice and without an explanation of why" the pro se plaintiff "did not deserve a chance to resolve the ambiguity through an amended complaint was an abuse of discretion."); *Higdon v. Tusan*, 673 F. App'x 933, 937 (11th Cir. 2016) (per curiam) ("We also conclude that the court abused its discretion by denying" the pro se plaintiff "a chance to amend his complaints, without a showing of a substantial reason to deny leave to amend.").

The Third Circuit recently held that it can be reversible error for a district court to fail to provide an explanation when denying a pro se plaintiff leave to amend a civil rights complaint. In *Flynn v. Department of Corrections*, the Third Circuit criticized the district court because it "did not say in its opinion that all of the pleading deficiencies" in the pro se plaintiff's "complaint were incurable; in fact, neither the opinion nor the accompanying order said anything about the efficacy of an amended pleading at all." 739 F. App'x 132, 136 (3d Cir. 2018) (per curiam) ("The District Court thus erred when it (1) failed to offer Flynn an opportunity to amend and (2) did not say why.").

As the Ninth Circuit has explained when employing the same rule for pro se and in forma pauperis litigants, the rules in these circuits are not a formalistic requirement. These rules are substantive and intended to protect pro se litigants' rights: "The

requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors." *Noll v. Carlson*, 809 F.2d 1446, 1448–49 (9th Cir. 1987) ("Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings."), *superseded on other grounds by statute as stated in Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc); *see also Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (explaining that, "before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively").

B. This Court Has Never Addressed the Question Presented.

This Court has not yet addressed whether district courts must articulate a reason when denying pro se litigants leave to amend. The current circuit split on the question presented is a direct result of this Court's silence.[3] This Court has cited *Foman v. Davis* just

[3] This Court declined to hear a previous case raising a similar issue. *See* Pet. for Writ of Cert. (the "*Pellegrini* Petition"), *Pellegrini v. Analog Devices, Inc.*, No. 08-741, 2008 WL 5182890 (U.S. Sept. 30, 2008). The *Pellegrini* Petition, which was brought pro se, asked this Court to consider whether the reason provided by the district court (futility) was sufficient where the record did not support a futility finding. *Id.* at *14–21. Similarly, this Court declined

twelve times since deciding the case.[4] Only two instances concern pro se litigants and neither of them

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to hear a previous case, also brought pro se, which asked this Court to consider only whether the denial of that pro se litigant's leave to amend was an abuse of discretion. *See* Pet. for Writ of Cert. (the "*Tuvell* Petition"), *Tuvell v. Microsoft Corp.*, No. 00-1784, 2001 WL 34125133, at *9 (U.S. May 29, 2001). While the *Pellegrini* and *Tuvell* Petitions raised similar questions to the one at issue in the instant Petition, the pro se litigants in both instances sought the application of *Foman v. Davis* to their specific cases, and did not address the circuit split raised in the question presented here, which has further matured and deepened since the filing of the *Pellegrini* and *Tuvell* Petitions.

[4] *See Krupski v. Costa Corciere S. p. A.*, 560 U.S. 538, 553 (2010); *Scarborough v. Principi*, 541 U.S. 401, 416 (2004); *Becker v. Montgomery*, 532 U.S. 757, 768 (2001); *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995); *Smith v. Barry*, 502 U.S. 244, 248, 250 (1992); *FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co.*, 498 U.S. 269, 276 n.6 (1991); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *Schiavone v. Fortune*, 477 U.S. 21, 27, 39 n.6 (1986); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59, 67 (1982); *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 387 (1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 335 (1971); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 158 n.17 (1964).

Foman v. Davis has also been cited in five of this Court's dissenting opinions. *See Gonzalez v. Thaler*, 565 U.S. 134, 166 (2012) (Scalia, J., dissenting); *Mayle v. Felix*, 545 U.S. 644, 666 (2005) (Souter, J., dissenting); *Schlup v. Delo*, 513 U.S. 298, 348 (1995) (Scalia, J., dissenting); *Collins v. Byrd*, 510 U.S. 1185, 1289 (1994) (mem.) (Scalia, J., dissenting); *Torres*, 487 U.S. at 320, 322–23 (Brennan, J., dissenting).

involves leave to amend the complaint. *See Becker v. Montgomery*, 532 U.S. 757, 767–68 (2001) (holding that a pro se litigant's failure to sign notice of appeal does not require dismissal); *Smith v. Barry*, 502 U.S. 244, 248–50 (1992) (holding that a pro se litigant's filing, intended to serve as an appellate brief, could qualify as functional equivalent of notice of appeal). In both *Becker* and *Barry*, this Court recognized the unique difficulties a pro se litigant faces and issued rulings that did not permit technical errors to prevent a pro se litigant from seeking redress. *Becker*, 532 U.S. at 767–68; *Barry*, 502 U.S. at 248–50.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

A. Whether a District Court Must Provide a Pro Se Litigant Sufficient Notice of Pleading Deficiencies Is an Important National Question.

The question presented implicates fundamental principles of due process worthy of this Court's attention. The majority of pro se plaintiffs bring claims seeking protection of basic rights, including constitutional and civil rights claims. Bloom & Hershkoff, *supra*, at 479–81; David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC Directions 5, 5 (1996). The pool of pro se litigants disproportionately comprises women, minorities, and the poor—groups historically subject to unfavorable treatment and to whom the courts have provided legal protections and avenues of redress. *See* Doyle et al., *supra*, at 297–98. Nearly one-third of all complaints filed in federal court are filed by pro se litigants. *See, e.g.*, U.S. Courts, *U.S. District Courts—Civil Pro Se*

and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2017, at 1.[5]

The predominant reason these litigants proceed pro se is their inability to afford counsel. *See, e.g.*, Hon. Jed S. Rakoff, Learned Hand Medal Speech (May 2, 2018).[6] The increasing cost of counsel is problematic because, as the federal judiciary knows firsthand, successfully proving a case in federal court without representation is extraordinarily difficult. *See id.* (noting most working-class Americans would not qualify as indigent, but cannot afford lawyers); *see also* Hon. Patricia M. Wald, *Becoming A Player: A Credo for Young Lawyers in the 1990s*, 51 Md. L. Rev. 422, 428 (1992) ("In a recent ABA study, forty percent of low-income households surveyed had civil legal problems in the last twelve months but could not obtain counsel."). Moreover, for many of these litigants the potential monetary damages are too uncertain or small for attorneys to take their cases on a contingency basis. *See* Doyle et al., *supra*, at 300.

As district court judges themselves have recognized, "federal programs to provide civil counsel are underfunded and severely restricted," resulting in "a crisis in unmet legal needs which disproportionately harms racial minorities, women, and those living in poverty." Colum. L. Sch. Hum. Rts. Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases—Response to the Fourth Periodic Report of the*

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[5]http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2017.pdf.

[6]http://fingfx.thomsonreuters.com/gfx/breakingviews/1/863/1123/Hon.%20Jed%20S.%20Rakoff%20speech.pdf.

United States to the United Nations Human Rights Committee 301 (Aug. 2013).[7] Pro se litigants face steep obstacles and unique challenges when pleading their cases in federal court. As Judge Sweet observed, "every trial judge knows" that "the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be both litigants and impartial judges on any issue of genuine complexity." Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 Seattle J. for Soc. Just. 609, 617 (2004) (quoting Hon. Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505–06 (1998)). Perhaps unsurprisingly then, a federal court is four times more likely to grant a motion to dismiss against a pro se plaintiff than a represented plaintiff. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U.L. Rev. 553, 621 (2010).

These convergent factors create a situation where many individuals from protected classes and vulnerable populations are forced to seek civil rights protection from the courts for serious legal injuries, without attorney assistance. They are left to interpret the law and write their pleading documents—and in some circuits, left to decipher why their pleadings fall short, all without counsel. The question presented invokes these very concerns of due process and access to justice because the rule adopted by the majority of the circuits provides significant assistance to pro se litigants, with minimal additional effort by the courts,

[7]https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15241_E.pdf.

at the juncture of these litigants' suit that is most crucial: when they are pleading their claims.

Requiring a district court to provide the justifying reason for denying a pro se plaintiff leave to amend would ensure that the pro se plaintiff can understand the basis of that denial and offer further amendments if the claims are, in fact, meritorious. Without notice of the pleading deficiencies, however, vulnerable individuals with meritorious claims may be blocked from accessing the courts because they are unable to comply with the technical requirements of the Federal Rules of Civil Procedure. Especially because the majority of pro se litigants bring claims sounding in constitutional and civil rights injuries, seeking basic protections from the federal court system, the question presented is an important one that this Court should decide.

B. The Question Presented Will Recur Absent Intervention from This Court.

Due to increasing pro se litigation, the question presented will recur absent intervention from this Court. Nearly one-third of all federal civil cases are brought by pro se litigants, and "pro se litigation shows no sign of subsiding." Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 591–93 (2011); *see also* U.S. Courts, *U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District, during the 12-Month Period Ending September 30, 2017*, *supra*, at 1–5. This number will only increase as the cost of legal services continues to become too expensive for average individuals. *See supra* pp. 17–18.

The amount and frequency of pro se litigation also appear to have influenced the district court in this

case. When denying Petitioner's Second Motion to Reopen, the district court worried that, "were Petitioner's conduct repeated on a nationwide scale, the work of the Federal Judiciary might come to a grinding halt."[8] App. B at 8a. Yet, the majority of circuit courts that require an explanation when denying leave to amend crafted a careful rule that balances the burden on the courts with the obligations to the pro se litigant. The Ninth Circuit instructs that a "statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs." *Noll*, 809 F.2d at 1448–49. District courts "need draft only a few sentences explaining the deficiencies," so that a pro se litigant is on notice of how to cure a pleading deficiency if the facts are available to cure that deficiency. *Id.* For example, in a "42 U.S.C. § 1983 action where the pro se plaintiff failed to allege that the defendant acted under color of state law, the court need point out only that the complaint fails to state a claim because it fails to allege facts sufficient to show that the defendant acted under color of state law." *Id.* at 1449.

[8] Interestingly, some empirical studies suggest that the perception of the burden created by pro se litigants may be worse than the reality. *See, e.g.*, Schneider, *supra*, at 597–98 (discussing empirical evidence and studies demonstrating the "lighter burden" pro se cases place on the judiciary and that cases with represented parties consume more judicial time than pro se cases and settle at the same rate).

III. THE QUESTION IS CLEANLY PRESENTED BY THE DECISION BELOW.

This case is an ideal vehicle to reconcile the circuit split and decide whether district courts must provide pro se litigants with a reason when denying leave to amend. The facts and procedural posture cleanly tee up the question presented. Petitioner sought leave to amend his complaint twice and was twice denied. The Fourth Circuit agreed with Petitioner that the Second Denial Order did not provide any analysis whatsoever but, instead, referred only to the record. *See* App. A at 4a. Thus, the decision below confirms that in the Fourth Circuit, district courts apply the same standard as articulated in *In re PEC Solutions*, to pro se litigants and represented litigants alike, deepening the circuit split on this issue: In holding that the sole reference to the record was sufficient reasoning and not an abuse of discretion, the Fourth Circuit relied on *In re PEC Solutions* which sets forth the rule that district courts need not provide reasons when denying leave to amend. *Id.* Thus, the decision below squarely presents the question whether a district court should be required to provide pro se litigants an explanation when denying them leave to amend their complaints.

Separately, this case also is an excellent vehicle for the question presented because Petitioner's proposed amendments in the Second Amended Complaint were not futile. Thus, application of the Fourth Circuit's rule to Petitioner's case should have resulted in reversal of the district court's decision because the record did not support a finding that the Second Amended Complaint was futile. The Fourth Circuit ruled that the Second Amended Complaint was futile based on its reasoning that the Second Amended Complaint failed to assert

proper standing for Petitioner's First Amendment injuries. It held that the Second Amended Complaint's allegations of the chilling effect Respondents' actions had on Petitioner were subjective and insufficient to show that Petitioner "suffered an objective harm" to his First Amendment rights. *Id.* at 5a–6a. These rulings were error.

The Second Amended Complaint sufficiently alleges that Petitioner censored himself as a result of an objectively credible government threat. Petitioner alleged that he was twice interrogated by FBI agents and a deputy U.S. Marshal before his planned public protests and that during these interrogations Petitioner was questioned about what it would take to "make the scheduled courthouse protests go away." SAC ¶¶ 16, 28. Petitioner also alleged that the government agents threatened to return and arrest him for possessing a firearm that he repeatedly told them he did not own. *Id.* ¶¶ 26–27, 31–32, 36–41.

In the Fourth Circuit, self-censorship satisfies standing if it was caused by a credible threat of government action that "is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (alteration in original) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)). Here, the alleged government acts—including threatening arrest—constitute credible threats from an objective standpoint, and thus satisfy standing.

The Second Amended Complaint also sufficiently alleges "self-censorship" necessary to constitute an injury-in-fact as a result of those threats. To establish an injury-in-fact, the objective threat need only

interfere with the First Amendment activity and it is not necessary to eliminate it. *Id.* (explaining that "a claimant 'need not show she ceased those activities altogether' to demonstrate an injury in fact" (quoting *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 2007))). Petitioner alleged that the government threats had the effect of "diluting plaintiff's demonstration planning" and that it "chilled and curtailed the robustness" of Petitioner's First Amendment activity "as one would expect following visits from interrogating law enforcement personnel asking 'What will it take to get you to shut up?'" SAC ¶¶ 35, 122. These allegations are sufficient to show both standing and an injury-in-fact under First Amendment jurisprudence. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 11 (1972) (explaining that this Court has recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2150

WILLIAM C. BOND,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

JOHNNY L. HUGHES, UNITED STATES MARSHAL; KEVIN PERKINS, SPECIAL AGENT IN CHARGE; ROD J. ROSENSTEIN, UNITED STATES ATTORNEY; UNKNOWN NAMED MARYLAND U.S. JUDGES,

Defendants.

July 30, 2018, Submitted
August 2, 2018, Decided

Appendix A

Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:16-cv-02723-DAF). David A. Faber, Senior District Judge.

Before TRAXLER, DUNCAN, and WYNN, Circuit Judges.

PER CURIAM:

William C. Bond has noted an appeal from the district court's April 12, 2017, opinion and order dismissing his civil action, its May 23, 2017, order denying his post-judgment motion to reopen the case and file an amended complaint, and its August 1, 2017, order denying his second post-judgment motion to reopen the case and file an amended complaint. Bond confines his appeal to challenging the district court's denial in the August 1 order of the second motion to amend. We affirm.

A district court may not grant a post-judgment motion to amend a complaint unless the court first vacates its judgment pursuant to Fed. R. Civ. P. 59(e) or 60(b). *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470 (4th Cir. 2011). "To determine whether vacatur is warranted, however, the court need not concern itself with either of those rules' legal standards. The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to Fed. R. Civ. P. 15(a)." *Id.* at 471. That is, the "court should evaluate a postjudgment motion to amend the complaint under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or

futility." *Id.* (internal quotation marks omitted). "Futility is apparent if the proposed amended complaint fails to state a claim under the applicable rules and accompanying standards: A district court may deny leave if amending the complaint would be futile—that is, if the proposed amended complaint fails to satisfy the requirements of the federal rules." *Id.* (internal quotation marks and alteration omitted).

We review for abuse of discretion a district court's decision to deny a motion to amend a complaint. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 112 (4th Cir. 2013). "A district court abuses its discretion by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation." *Id.* (internal quotation marks omitted).

The district court's April 12 opinion and order dismissed Bond's initial complaint brought pursuant to *Bivens v. Six Unkown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), on the bases that: the complaint failed to state claims for relief; jurisdiction was lacking over Bond's claims against Defendants in their official capacities; Bond lacked standing to bring a claim for a violation of the First Amendment; qualified immunity barred Bond's constitutional claims; and, to the extent Bond was bringing any claims under the Federal Tort Claims Act, those claims were barred on account of his failure to exhaust administrative remedies. The August 1 order denied Bond's second motion to amend "[f]or the reasons expressed in" the April 12 opinion.

Bond argues that the district court abused its discretion by denying his second motion to amend without providing a relevant justification for doing so. After review of the record and the parties' briefs, we reject this contention as without merit. "As long as a district court's reasons for denying leave to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion." *In re PEC Sols., Inc. Sec. Litig.*, 418 F.3d 379, 391, 125 Fed. Appx. 490 (4th Cir. 2005) (internal quotation marks omitted). The August 1 order does not explicitly state whether Bond's second motion to amend was being denied for prejudice, bad faith, or futility. Nevertheless, given that the August 1 order relies on the rationales articulated in the April 12 opinion, we conclude that the only relevant basis for its decision was a determination that the proposed second amended complaint was futile. *See Katyle*, 637 F.3d at 471; *Perkins v. United States*, 55 F.3d 910, 916-17 (4th Cir. 1995) (upholding denial of leave to amend where proposed amendments could not withstand motion to dismiss). Because the district court's rationale-futility-for denying the second motion to amend was apparent in light of the August 1 order's reliance on the April 12 opinion, the district court's failure to specifically articulate that rationale does not amount to an abuse of discretion.

Bond also contends that the First Amendment violation asserted in the proposed second amended complaint was not futile because his allegations satisfied his obligation to establish his standing by alleging an injury in fact. In cases raising claims alleging violations of the First Amendment, injury in fact may be established

by a showing of "self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (internal quotation marks omitted). This chilling effect, however, "cannot 'arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruit of those activities, the agency might in the future take some *other* and additional action detrimental to that individual.'" *Id.* at 236 (quoting *Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)). In other words, "[s]ubjective or speculative accounts" of a chilling effect or "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." *Id.* (internal quotation marks and alterations omitted). The chilling effect must have some objective manifestation and be "objectively reasonable." *Id.*

We conclude after review of the record and the parties' briefs that Bond's bare assertions in the proposed second amended complaint that he curtailed or diluted his First Amendment activity do not amount to sufficient allegations that he suffered an objective harm to his rights under that Amendment. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (in evaluating whether to dismiss complaint for lack of jurisdiction, a court is to take as true facts alleged in complaint, as it would do in evaluating whether to dismiss for failure to state a claim); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (noting that "bare assertions" and "formulaic" recitations of elements of claims are conclusory and thus

not entitled to be assumed true when a court is deciding whether to dismiss for failure to state a claim). We thus find no abuse of discretion by the district court in its denial as futile of Bond's second effort to amend his claim for a violation of the First Amendment.

We also reject as without merit Bond's remaining arguments in support of overturning the district court's judgment. Bond's suggestions that the district court ignored new allegations in the proposed second amended complaint and failed to consider the exhibits appended to this complaint find no support in the record. We also reject as lacking in any merit Bond's contentions that the district court erred by failing to liberally construe the proposed second amended complaint and that the Defendants named in this complaint were not protected by qualified immunity. We further deem abandoned Bond's summarily-made contention that his proposed second amended complaint was not futile because it was not presented in accordance with Fed. R. App. P. 28(a)(8)(A). *See Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 n.7 (4th Cir. 2015).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 1, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

Civil Action No.: 1:16-02723-DAF

WILLIAM C. BOND,

Plaintiff,

v.

JOHNNY L. HUGHES, *et al.*,

Defendants.

August 1, 2017, Decided
August 1, 2017, Filed

MEMORANDUM OPINION AND ORDER

For reasons expressed in the Memorandum Opinion and Order and Judgment Order already filed, *see* Doc. Nos. 22-23, and in the Order denying the re-opening of this case, *see* Doc. No. 25, yet again the court **DENIES** Plaintiff's Motion to Reopen Case and to File an Amended Complaint. *See* Doc. No. 26. Therefore, the court also **DENIES** Plaintiff's request to vacate the court's Memorandum Opinion and Order and Judgment Order already filed. *See id.*

Plaintiff already has been "admoni[shed]" that "[he] should take care not to lose credibility by filing vexatious and frivolous complaints." Doc. No. 25. This is because "every paper filed with the Clerk of this [c]ourt, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the [c]ourt's [stewardship] responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *In re McDonald*, 489 U.S. 180, 184, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989) (per curiam); *see also Martin v. District of Columbia Court of Appeals*, 506 U.S. 1, 1, 113 S. Ct. 397, 121 L. Ed. 2d 305 (1992) (per curiam) (applying this principle to "notorious abuser[s]" of the judicial system). This is the second time that Petitioner has asked the court to re-open this case. The court has again refused to do so. Petitioner's repeatedly unmeritorious supplications are squandering the Third Branch's limited resources; the aggregation principle informs the court that were Petitioner's conduct repeated on a nationwide scale, the work of the Federal Judiciary might come to a grinding halt. Additionally, Petitioner's conduct is damaging his own interests.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to counsel of record and Plaintiff, *pro se*. The Clerk is directed not to accept any further motions to vacate the court's opinion and order or to reopen this action.

IT IS SO ORDERED this 1st day of August, 2017.

Appendix B

Enter:

/s/ David A. Faber
David A. Faber
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE, FILED MAY 23, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

Civil Action No.: 1:16-02723-DAF

WILLIAM C. BOND,

Plaintiff,

v.

JOHNNY L. HUGHES, *et al.*,

Defendants.

ORDER

For reasons expressed in the Memorandum Opinion and Order and Judgment Order already filed, *see* Doc. Nos. 22—23, the court hereby **DENIES** Plaintiff's Motion to Reopen Case and to File an Amended Complaint. Consequently, the court also **DENIES** Plaintiff's request to vacate the court's Memorandum Opinion and Order and Judgment Order already filed. *See* Doc. Nos. 22—23.

The Clerk is directed to forward a copy of this Order to counsel of record and Plaintiff, *pro se*.

Appendix C

IT IS SO ORDERED this 23rd day of May, 2017.

Enter:

/s/ David A. Faber
David A. Faber
Senior United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE, FILED APRIL 12, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

Civil Action No.: 1:16-02723-DAF

WILLIAM C. BOND,

Plaintiff,

v.

JOHNNY L. HUGHES, *et al.*,

Defendants.

April 12, 2017, Decided
April 12, 2017, Filed

MEMORANDUM OPINION AND ORDER

Pending before the court is Plaintiff's Complaint against various federal officials in Maryland. *See* Doc. No. 1. The Defendants are the United States Marshal for the District of Maryland, the Special Agent in Charge of the Federal Bureau of Investigation ("FBI"), and the United States Attorney for the District of Maryland. Plaintiff alleges cover-ups, surveillance and entrapment based on conclusory allegations and little basis in fact or, for that matter, law. Plaintiff also seeks $15 million from Government Defendants for compensatory damages and

$30 million from them for punitive damages—and he does so 6 times. Plaintiff appears to seek a total of $270 million. Plaintiff's allegations are unavailing.

In addition, Plaintiff is a frequent litigant before this court. Typically, he alleges various blanket but unspecific violations of his legal rights. He is now admonished that his continuing to file frivolous and vexatious lawsuits may result in an order denying him further access to the court on such matters.

I. FACTUAL BACKGROUND

For several years, Plaintiff has protested what he claims to be "'provable corruption' in the Maryland U.S. courthouse." *Id.* In April 2013, Plaintiff created a public relations campaign named the "Baltimore Corruption Wire." He also created the phrase "White Guerilla Family" to refer to certain members of the Maryland federal judiciary. *Id.*

Plaintiff alleges that principally due to his protests and corruption allegations he has been interviewed and surveilled by federal agents. Plaintiff further alleges that members of the judiciary and other federal officials have conspired to violate his First Amendment and due process rights. *See id.* Plaintiff premises his causes of action on the United States Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In particular, Plaintiff alleges the following six unconstitutional acts:[1]

1. To the extent Plaintiff's Complaint alleges any statutory claims, the court addresses them in footnote 2, *infra*.

Appendix D

- *Count I* - On July 19, 2013 and July 30, 2013, federal agents questioned plaintiff "regarding the potential safety of various government officials and federal judges," in an effort to "prevent and/or to intimidate plaintiff's planned demonstrations . . .." Doc. No 1.

- *Count II* - Plaintiff alleges that he met with "activists" in July of 2013 to plan a protest at the U.S. District Courthouse, but that the activists "were undercover U.S. government agents sent (1) with the clear intention to sabotage plaintiff's U.S. courthouse protests in any way possible and (2) to criminally entrap plaintiff by attempting to engage plaintiff in discussions of violence against federal officials[.]" Doc. No. 1.

- *Counts III & IV* - Plaintiff alleges in the fall of 2013, a Deputy U.S. Marshal informed Plaintiff that he had been under surveillance since 2010. Plaintiff alleges that this surveillance violated his constitutional rights. *See* Doc. No. 1.

- *Count V* - Plaintiff alleges that on September 29, 2015, a Deputy U.S. Marshal "invade[d]" his pro se litigant work and attempted to criminally entrap him." Doc. No 1.

- *Count VI* - Plaintiff alleges that the Defendants "have at all times since 2001 until present been in an extended conspiracy to deprive plaintiff of his First Amendment & due process rights," and that "[w]hen a new U.S. Attorney was assigned to Maryland in 2006, part of his assignment

> was to continue to ignore and/or cover-up the aforementioned conspiracy against plaintiff." Doc. No 1.

With respect to each count, Plaintiff alleges that "[t]hese intentional, knowing, bad-faith, and illegal acts by the defendants caused plaintiff great worry, anxiety, fear, sleeplessness, etc., amongst many other things, as it was clear to plaintiff that his enemies would stop at nothing to defeat his constitutional rights." Doc. No 1. Subsequently, the United States filed its Motion to dismiss Plaintiff's Complaint, or, in the alternative, substitute the United States as the sole Defendant and dismiss the Complaint. *See* Doc. No. 16.

II. APPLICABLE LEGAL STANDARDS

Next, the court articulates the legal standards pertinent to Rules 12(b)(1), 12(b)(6) and 8(a)(2) of the Federal Rules of Civil Procedure ("Civil Rules"), respectively.

A. Rule 12(b)(1)

The court commences its analysis with subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) asks "whether the court has the competence or authority to hear the case." *Davis v. Thompson*, 367 F. Supp. 2d 792, 799 (D. Md. 2005). Prior to reaching the merits of a case, a federal court first must determine that it has jurisdiction over the claim presented. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31, 127

S. Ct. 1184, 167 L. Ed. 2d 15 (2007) *(citing Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). When a defendant moves to dismiss under Rule 12(b)(1), the plaintiff bears the burden of proving that subject matter jurisdiction exists. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) *(citing Richmond, Fredericksburg & Potomac R.R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991)). The requirement that the plaintiff establish subject matter jurisdiction "as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94-95 *(quoting Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)). Hence, "[t]he objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) *(citing* Fed. R. Civ. P. 12(b)(1)).

In circumstances where a defendant challenges subject matter jurisdiction, "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans*, 166 F.3d at 647 *(quoting Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768); *see also Williams v. U.S.*, 50 F.3d 299, 304 (4th Cir. 1995) (When considering exhibits beyond the pleadings, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.") (internal quotation omitted). Under such circumstances, "the court may look beyond

the pleadings and the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003) (quotation omitted), *aff'd*, 85 F. App'x 960 (4th Cir. 2004). The court may properly grant a motion to dismiss for lack of subject matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." *Davis*, 367 F. Supp. 2d at 799 *(citing Crosten v. Kamauf*, 932 F. Supp. 676, 679 (D. Md. 1996)).

Dismissal for lack of subject matter jurisdiction tests whether the court has the authority to hear a case or controversy. After all, the "[f]ederal courts are courts of limited jurisdiction, constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." *Gill v. PNC Bank et al.*, Civil Action No. TDC-14-0677, 2015 U.S. Dist. LEXIS 16779, 2015 WL 629004, at *3 (D. Md. Feb. 11, 2015) *(quoting In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998)) (internal quotation marks omitted). The federal courts are not like the state courts, which retain general jurisdiction. It follows that this court, as a federal court, is empowered to exercise jurisdiction only when the Constitution and federal law so permit.[2]

2. Generally speaking, courts should not be in the philosopher-king business of worrying about consequences so long as the law commands their behavior. In fact, "judges should . . . strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases

Appendix D

There is a constitutional provenance at the heart of this principle. Article III limits the subject matter jurisdiction of federal courts to "cases" and "controversies." *See Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Consistent with the "cases" and "controversies" requirement, plaintiffs must demonstrate that they have standing to bring, and maintain, suit in federal court *throughout the duration of litigation*. In fact, the United States Supreme Court has cast the doctrine of mootness as intertwined with standing: "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). This is because the federal courts "are not permitted to render an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S. Ct. 459, 89 L. Ed. 789 (1945). So true is this that "[t]he Supreme Court has made clear that standing is an essential and unchanging part of that case-or-controversy requirement, one that states fundamental limits on federal judicial power in our system of government." *Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011) *(quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Allen*, 468 U.S. at 750) (citations and internal quotation marks

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based on their own moral convictions or the policy consequences they believe might serve society best." Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 Case W. Res. L. Rev. 905, 906 (2016).

omitted). To satisfy the standing requirement, a plaintiff must demonstrate:

> (1) that he has suffered an "injury in fact" that is (a) particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Doe, 631 F.3d at 160 *(citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

Furthermore, a plaintiff cannot demonstrate standing by stating that he or she brings suit on behalf of the general public. "Plaintiffs may not establish their standing to bring suit merely because they disagree with a government policy or because they share the 'generalized interest of all citizens in constitutional governance.'" *Moss et al. v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 604-05 (4th Cir. 2012) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)). Therefore, a plaintiff may not predicate her standing to sue "upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Raffety v. Prince George's Cnty. et al*, 423 F. Supp. 1045, 1052 (D. Md. 1976) *(quoting Schlesinger*, 418 U.S. at 220) (internal quotation marks omitted).

Appendix D

B. Rule 12(b)(6)

"[An] important mechanism for weeding out meritless claims," dismissal for failure to state a claim upon which relief can be granted is premised on Rule 12(b)(6) of the Civil Rules. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471, 189 L. Ed. 2d 457 (2014). A Rule 12(b)(6) defense asserts that even if all the factual allegations in a complaint are true, they still remain insufficient to establish a cause of action. This might be because prevailing law governing the adjudicator is set against such a cause of action. This court is also mindful that "[w]hether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract." *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

"The purpose of a Rule 12(b)(6) motion is to test the [legal] sufficiency of a complaint; importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999) (citations and internal quotation marks omitted). A plaintiff must allege "'enough facts to state a claim to relief that is plausible on its face'" and "'raise a right to relief above the speculative level.'" *Wahi v. Charleston Area Med. Ctr.*, Inc., 562 F.3d 599, 615 n.26 (4th Cir. 2009) *(quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

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The United States Supreme Court has maintained that "[w]hile a complaint . . . does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations and internal quotation marks omitted). The court need not "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Courts must also take care not conflate the veracity or even accuracy underlying the allegations that a plaintiff has leveled against a defendant with the allegations' likelihood of success. While "the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action," 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004), "assum[ing]" of course "that all the allegations in the complaint are true (even if doubtful in fact)," *Twombly*, 550 U.S. at 555, it is also the case that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). Therefore, courts must allow a well-pleaded complaint to proceed even if it is obvious "that a recovery is very remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). This is the United States Supreme Court's teaching in *Twombly*. *See Twombly*, 550 U.S. at 555.

C. Rule 8(a)(2)

Rule 8(a)(2) of the Civil Rules provides that "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) *(citing* Federal Rule of Civil Procedure 8(a)(2)). Rule 8(a)(2) requires plaintiffs to furnish only "a short and plain statement of the claim showing that the pleader is entitled to relief," so that "the defendant [might have] fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Thus, it is clear that Rule 8(a)(2) tends to interplay with Rule 12(b)(6) of the Civil Rules, which governs motions to dismiss.

Cognizant of these principles, the court advances to analyze Plaintiff's claims.

III. DISCUSSION

A. Plaintiff Has Stated No *Bivens* Action Against Defendants in their Individual Capacities; Plaintiff May Not Maintain a *Bivens* Action Against Defendants in their Official Capacities.

(1) *Individual Capacities*

Plaintiff bases his case on *Bivens*. In *Bivens*, the United States Supreme Court recognized a private cause of action for certain kinds of constitutional violations. In the Supreme Court's words, "[t]he very essence of civil

liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 *(quoting Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803)). But Plaintiff must still satisfy the requirement that a *Bivens* claim has to state sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As such, Plaintiff "must plead that *each Government-official defendant* . . . has violated the Constitution." *Id.* at 676 (emphasis added). The Supreme Court also has asserted that "[i]ndividual government officials 'cannot be held liable' in a *Bivens* suit 'unless they themselves acted [unconstitutionally].'" *Wood v. Moss*, 134 S. Ct. 2056, 2070, 188 L. Ed. 2d 1039 (2014) *(citing Iqbal*, 556 U.S. at 683); *Danser v. Stansberry*, 772 F.3d 340, 349 (4th Cir. 2014) ("liability may be imposed based *only* on an official's own conduct.") (emphasis added).

Here, Plaintiff has not stated a *Bivens* claim against any of the Defendants. The body of the Complaint fails to identify SAC Perkins and Marshal Hughes. The Complaint contains no content explaining how either of these Defendants may have violated Plaintiff's constitutional rights. To the extent that they are named as supervisors of the federal agents discussed in the Complaint, *Bivens* does not permit respondeat superior liability. *See Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) ("In a *Bivens* suit, there is no respondeat superior liability."); *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995) ("[T]here is no *respondeat superior* liability under *Bivens*. Defendants are liable for their personal acts only."). Thus,

Plaintiff plainly has failed to state a *Bivens* claim as to SAC Perkins and Marshal Hughes.

With respect to U.S. Attorney Rod Rosenstein, Plaintiff's Complaint states: "[w]hen [Rosenstein] was assigned to Maryland in 2006, part of his assignment was to continue to ignore and/or cover-up the aforementioned conspiracy against Plaintiff." Doc. No. 1. Plaintiff, however, has supplied no facts at all to support his allegation that Rosenstein, *himself*, did anything to violate Plaintiff's constitutional rights. Plaintiff's conclusory allegations—he calls it a "cover-up" and a "conspiracy" but nothing more, Doc. No. 1,—fail to state a claim. *See Iqbal*, 556 U.S. at 681 *(citing Twombly*, 550 U.S. at 554-55). Therefore, Plaintiff has failed to state a *Bivens* claim against U.S. Attorney Rosenstein.

(2) *Official Capacities*

The United States Court of Appeals for the Fourth Circuit maintains that "a *Bivens* action does not lie against either agencies or officials in their official capacity." *Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2002) *(citing FDIC v. Meyer*, 510 U.S. 471, at 484-86, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)); *see also Curtis v. Pracht*, 202 F. Supp. 2d 406, 419 (D. Md. 2002). Accordingly, to the extent that Plaintiff's claims against the Defendants are deemed to be based on their official capacities, *Bivens* is not helpful to Plaintiff. Consequently, this Court lacks jurisdiction over such claims. In order to comprehensively treat the claims presented, the court will address the remaining salient questions.

B. Plaintiff has No Standing to Bring a First Amendment Claim.

Plaintiff alleges that the unnamed FBI agents interviewed him to "prevent and/or to intimidate plaintiff's planned demonstrations at the Baltimore U.S. courthouse on August 4, 2013." Doc. No. 1. Under Fourth Circuit jurisprudence, an indispensable element of standing for purposes of First Amendment claims is that a plaintiff must demonstrate some injury-in-fact. "In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (citations omitted). In that context, "the chilling effect cannot 'arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruit of those activities, the agency might in the future take some other and additional action detrimental to that individual.'" *Id.* at 236 *(quoting Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)). Indeed, the Fourth Circuit impresses upon us that "'[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm [.]'" *Cooksey*, 721 F.3d at 236 *(quoting Laird*, 408 U.S. at 13-14).

There is a *raison d'être* behind all this. This court's adjudicative competence has limits. One of those limits is that our Nation's federal courts may not be "transform[ed] . . . into forums for taxpayers' generalized grievances

about the conduct of government." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 612, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) (plurality opinion) (citations and internal quotation marks omitted). Such a drastic move "would open the Judiciary to an arguable charge of providing government by injunction." *Id.* (citations and internal quotation marks omitted). This aperture "would [also] deputize federal courts as virtually continuing monitors of the wisdom and soundness of Executive action, and that, most emphatically, is not the role of the judiciary." *Id.* (citations and internal quotation marks omitted). This course of conduct would not satisfy Article III, which limits the jurisdiction of the federal courts to "cases" and "controversies."

Plaintiff has furnished this court with no evidence of a chilling effect on his speech. Plaintiff does not seriously contest that the reason for the interviews was concern about the safety of federal judges and other government officials due to Plaintiff's communications with them. *See* Doc. No. 1. However, never does Plaintiff allege that the agents forbade him from protesting nor did they take any actions to prevent the protests. Other than Plaintiff's own speculation that the interviews were for the purpose of preventing him from protesting, he provides no evidence that his speech was chilled or that he self-censored himself. He certainly did not do the latter. Quite the contrary, Plaintiff appears to admit that subsequently he protested for several weeks. *See* Doc. No. 1. There is no allegation whatsoever that any of the named Defendants did anything at all to restrict Plaintiff's First Amendment rights.

Accordingly, Plaintiff's First Amendment claim should be, and now is, dismissed.

C. Plaintiff Fails to State a Due Process Transgression.

The Due Process Clause of the Fifth Amendment states: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. 5. There are two types of due process claims: (1) procedural due process claim which alleges a denial of fundamental procedural fairness, *see Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); or (2) substantive due process, which alleges the exercise of power without any reasonable justification in the service of a legitimate governmental objective. *See Rucker v. Harford Cty.*, 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992); *see also Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

Under prevailing jurisprudence, substantive due process remains a fluid and flexible concept. Violations of substantive due process take place only in circumstances where the government's actions in depriving a person of life, liberty, or property are so unjust that no amount of fair procedure can redeem their constitutionality. "[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). "Asserted denial is to be tested by an appraisal of the totality of

facts in a given case." *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942). This means that "[something] which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.* In one of those rare dissents that subsequently gained much currency, the second JUSTICE Harlan once explained:

> [T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (adopted by joint opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848-49, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). Plaintiff has asserted only conclusory allegations of perceived due process violations. For example, even though Plaintiff states that he was informed by a Deputy U.S. Marshal that he was being surveilled, Plaintiff does not indicate how, if at all, his due process rights were violated. Moreover, there also exists no allegation that the government conducted electronic surveillance of Plaintiff's home telephone without obtaining a warrant. Additionally, Plaintiff fails

to attribute any unconstitutional act (or omission) to the named Defendants. Accordingly, Plaintiff's due process claim is not meritorious.

As discussed below, none of the counts alleged by Plaintiff suffices to state a claim for violating due process.

Count I: Plaintiff alleges several law enforcement visits to him, "especially [an] attempt to arrest [P]laintiff for illegal weapons possession." Doc. No. 1. Plaintiff further alleges that "the timing" of these alleged actions was "intended with [only] one goal . . . in mind: to prevent and/or to intimidate [P]laintiff's planned demonstrations at the [United States Courthouse in Baltimore]." Doc. No. 1. Notably, Plaintiff does not mention a specific legal violation.

Plaintiff's Count I must be dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies. With respect to Rule 12(b)(6), Plaintiff fails to state a claim upon which relief can be granted because Plaintiff quite simply states no claim. He refers vaguely to blanket "constitutional rights" at one point but no more. Doc. No. 1. Moreover, whether a complaint must be dismissed for failure to state a claim "depends on whether the allegations in the complaint suffice to establish [a requisite] ground, not on the nature of the ground *in the abstract*." *Jones*, 549 U.S. at 215 (emphasis added). Neither in the abstract nor in the allegations contained in the Complaint has Plaintiff stated a claim on whose basis relief might be available.

This brings the court to the Rule 8(a)(2) deficiency: "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 677-78 *(citing* Federal Rule of Civil Procedure 8(a)(2)). Here, "the allegations are conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. The alleged law-enforcement visits might have been supported with ample probable cause and/or compelling governmental interests, not necessarily conducted, if conducted they were, with the goal of intimidating Plaintiff (as he alleges). *See* Doc. No. 1. The Complaint is speculative and it glosses over that legitimate possibility. Just like in *Ashcroft*, Plaintiff's omission as to the *reasons* impelling the alleged governmental conduct render his complain deficient. 556 U.S. at 680-81.

Furthermore, if there exist "more likely explanations [for alleged defendant actions or omissions]," then "the[] [conduct alleged] do[es] not plausibly establish th[e] purpose[s]," motives and/or reasons that a plaintiff alleges guided the defendant(s). *Id.* at 681. Here it is more likely that Defendants visited Plaintiff and/or sought to arrest him because of *bona fide* and perfectly lawful concerns about illegal conduct on Plaintiff's part, rather than any retaliation Defendants wanted to inflict on Plaintiff. Accordingly, Count I is dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

Count II: Plaintiff alleges that "[a] 'black lives matter' type activist contacted [him]" and then proceeded to "offer[] to help with the planned protests, including by providing 'bodies' to protest, money for advertising, and

grassroots help in the 'black' community . . .." Doc. No. 1. But then, Plaintiff alleges, on the appointed protest day neither this "activist" nor his "wife" nor the 50 or more "bodies" Plaintiff had been promised showed up. Doc. No. 1. Plaintiff points to his own "[i]nformation and belief" that this "'activist' and his 'wife' were undercover U.S. government agents sent . . . with the clear intention to sabotage" the planned protests and "to criminally entrap Plaintiff by attempting to engage [P]laintiff in discussions of violence against federal officials . . .." *Id.*

Plaintiff states no actual legal claim. Consequently, Count II is dismissed for failure to state a claim under Rule 12(b)(6) of the Civil Rules. Moreover, for reasons similar to the court's Count I analysis, here Plaintiff states only "conclusory" allegations that are grounded solely in conjecture and speculation without any basis in fact. *Ashcroft*, 556 U.S. at 681. Plaintiff's Complaint neglects to consider the distinct possibility, and one that is far likelier than the conspiracy theory Plaintiff advances, that a genuine or even impersonator of a "Black Lives Matter" activist did interact with Plaintiff prior to the protest's appointed hour but, for reasons unbeknownst to Plaintiff, turned out to be a no-show on the protest's appointed hour.

This court has no warrant to hale federal officials, or for that matter *any* defendants, before the judicial system on such flimsy and legally deficient bases. This is impermissible under Rule 8(a)(2) of the Civil Rules. As a result, Plaintiff's Count II must be dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

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Count III: Plaintiff alleges that a deputy U.S. marshal (DUSM) was "spy[ing]" on Plaintiff since Plaintiff filed a similar suit against the U.S. Attorney for the District of Maryland in 2010. Doc. No. 1. Here, Plaintiff mentions due process as the basis for Count III. However, it is the Fourth Amendment, instead of due process, that is the appropriate basis for challenging governmental acts of surveillance. "Substantive due process analysis is . . . inappropriate in . . . [a] case only if . . . [a] claim is covered by the Fourth Amendment." *Lewis*, 523 U.S. at 843; *see also Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). Thus, Count III does not survive the standard required by Rule 12(b)(6).

In addition, once again Plaintiff states only "conclusory" allegations that are grounded solely in conjecture and speculation without any basis in fact. *Ashcroft*, 556 U.S. at 681. This is quite like the court's aforementioned observations concerning Counts I and II. Count III thus falls short of satisfying Rule 8(a)(2) as well. Count III must be dismissed on account of both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

Count IV: Plaintiff alleges that the same DUSM "told [P]laintiff about how his surveillance of [P]laintiff continued in 2012, after [P]laintiff had lost his home, his dog, all his possessions, etc., and was living in an unelectrified 'squat' in a derelict building." Doc. No. 1. Plaintiff mentions "due process and civil rights" as the bases for this count. For the reasons given in the court's Count III analysis, Plaintiff's Count IV must be dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

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Count V: Plaintiff alleges that the same DUSM endeavored "to invade [Plaintiff's] *pro se* litigant work product" in a *qui tam* action Plaintiff had filed against various Government Defendants earlier. Doc. No. 1. Plaintiff further alleges that the DUSM "work[ed] in tandem with [a] U.S. judge . . . to criminally entrap" Plaintiff. *Id.* Here, Plaintiff does not even state a single legal basis for the claim. Moreover, the allegations are just "conclusory." *Ashcroft*, 556 U.S. at 681. For reasons materially indistinguishable from the ones already given in the earlier analyses, Count V must be dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

Count VI: Plaintiff alleges that "a federal judge [acted] with malice aforethought to have a 2001 federal case assigned to him, which he planned, in advance, to sabotage." Doc. No. 1. Two other federal judges are alleged to have helped in covering this up. *Id.* According to Plaintiff, there was also a vast judicial conspiracy to "thwart his actions [repeatedly.]" *Id.* Here, while Plaintiff alleges that certain Government Defendants "have at all times since 2001 until present been [involved] in an extended conspiracy to deprive [P]laintiff of his First Amendment [and] due process rights, his liberty, and his right to his own property, if not other constitutional deprivations," Plaintiff does not assert a cognizable legal right this alleged conspiracy actually violates. For reasons materially indistinguishable from the ones already given in the earlier analyses, Count VI must be dismissed for both Rule 12(b)(6) and Rule 8(a)(2) deficiencies.

Consequently, all of Plaintiff's due process claims fail. They must be dismissed. The same, the court already has

explained, is true of the First Amendment claim—on the basis of standing. In short, all of Plaintiff's claims are to be dismissed.[3]

D. Defendants are Entitled to Qualified Immunity.

Qualified immunity protects federal officials from liability in *Bivens* suits unless a plaintiff can plead "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). In order to satisfy the first prong, a plaintiff *must* allege sufficient facts that "each Government-official defendant, through the official's own *individual actions*, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added). As for the second prong, the right's delineations must be "sufficiently definite,"

3. It is difficult to understand whether Plaintiff's Complaint incorporates any claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2679(d)(1). The court grants the United States' motion to be substituted in place of individual Defendants as to the FTCA claim. (Doc. No. 16-1.) Any tort claim must be dismissed because Plaintiff failed to exhaust administrative remedies. The FTCA provides that a plaintiff must exhaust administrative remedies by, inter alia, filing a claim with the "appropriate Federal agency." 28 U.S.C. § 2675(a). A tort claim against the United States is "forever barred" unless it is presented in writing to such agency within two years after the claim accrues. 28 U.S.C. § 2401(b). Plaintiff has not submitted a claim to any federal agency with respect to any tort claims. Consequently, Plaintiff's FTCA claim incorporating tort causes of action shall be forever barred.

so "that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014). The reason is simple: Before subjecting a federal official who was trying her mortal best to suit for actions committed in the course and/or pursuit of duty, the law must be certain that she had had adequate notice that her conduct was *ultra vires*.

Here, Plaintiff cannot show that Defendants are not entitled to qualified immunity because he has not sufficiently pleaded the first element—that any of the Defendants violated his constitutional rights. Indeed, Plaintiff has not expressed how any named Defendants trampled on his constitutional rights. Thus, Defendants are entitled to qualified immunity. The claims leveled against them must be dismissed.

IV. CONCLUSION

This Complaint reads rather like a political thriller. And like other novels, in this Complaint there seem to be far too much fiction, precious little fact, and copious innuendo—in short, too many conclusory allegations—to commend it for its veracity or even its plausibility. This is not a salutary feature.

Plaintiff, it seems, is intent on draining the Federal Judiciary of our "limited resources." *Zatko v. California*, 502 U.S. 16, 18, 112 S. Ct. 355, 116 L. Ed. 2d 293 (1991) *(per curiam)*. The court, therefore, repeats its admonition that Plaintiff should take care not to lose credibility by

filing vexatious and frivolous complaints. The reason is simple: "[E]very paper filed with the Clerk of this [c]ourt, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the [c]ourt's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." In *re McDonald*, 489 U.S. 180, 184, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989) *(per curiam); see also Martin v. District of Columbia Court of Appeals*, 506 U.S. 1, 1, 113 S. Ct. 397, 121 L. Ed. 2d 305 (1992) *(per curiam)* (applying this principle to "notorious abuser[s]" of the judicial system). Plaintiff's becoming such a notorious abuser helps no one, least of all Plaintiff himself.

The United States' Motion to be substituted in place of individual Defendants as to the Federal Tort Claims Act ("FTCA") claim is **GRANTED**. *See* Doc. No. 16. The United States' Motion to Dismiss this Complaint is **GRANTED** in full. *See id.* Plaintiff having provided the court with no convincing reasons, Plaintiff's Motion to Stay and/or Toll Plaintiff's Opposition to the Defendants' Forthcoming Response to the Complaint is **DENIED**. *See* Doc. No. 15. Plaintiff's Motion for Discovery is **DENIED**. *See* Doc. No. 18. Defendants' Consent Motion for an Extension of Time to Respond to Pending Motions Doc. Nos. 15 and 18 is **GRANTED**. *See* Doc. No. 19. The court **DIRECTS** the Clerk to remove this case from the court's docket.

The Clerk is further directed to forward a copy of this Memorandum Opinion and Order to counsel of record and Plaintiff, *pro se.*

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IT IS SO ORDERED this 12th day of April, 2017.

Enter:

/s/ David A. Faber
David A. Faber
Senior United States District Judge