

No. 10-05

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA EX REL. WALTER MONDALE

*v.*

SULEMAN2003, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA*

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**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

Since this Court's ruling in *devTools v. United States*, a multitude of lawsuits based on the violations of procedural due process stemming from *Tools* has appeared against the United States. Procedural due process, however, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). As such, the questions presented are:

- Whether the District Court abused its discretion when it issued a preliminary injunction erroneously under the test affirmed in *United States v. Incels Union*, 10 U.S. \_\_\_\_ (2020).
- Whether this Court should clarify its precedent in *Tools v. United States*, 9 U.S. 113, and its announced constitutional right to “seek employment.”

(I)

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## **OPINIONS BELOW**

The order by the District Court is unreported. It is recorded as 4:20-2216, and is reproduced as Appendix A.

## **JURISDICTION**

The order by the District Court granting plaintiffs' preliminary injunction was issued on September 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1292(a)(1).

## **STATEMENT**

The National Security Threat status and its counterpart the Executive Branch Blacklist has been increasingly put under scrutiny in face of a fundamental right to seek employment in the United States. *Tools v. United States*, 9 U.S. 113, 116 (2020), see also *Caldwell v. United States*, 9 U.S. 85 (2020). These classifications block employment of the targeted individual within the Executive Branch of the United States.

The National Security Threat status is provided by the National Security Act of 2020, Pub. L. 80-6, §105.

Respondents are members of a clan known as VEIN. VEIN's goal is simple: to commit as many crimes as possible within the District of Columbia. VEIN National Security Threat Declaration, at 1. On August 30<sup>th</sup>, 2020, a document was released declaring the entirety of the VEIN clan as a National Security Threat. They sought to be employed within an executive department, but were barred due to their declaration on August 30, 2020. They promptly filed suit under 5 U.S.C. 702, which states that individuals adversely affected or aggrieved by agency action within the meaning of a relevant statute are "entitled to judicial review thereof." Citing this Court's recent decision in *Tools v. United States*, 9 U.S. 113 (2020), respondents claimed that their due process rights were violated when they were not offered an ability to defend themselves or present any evidence that would vindicate them.

Respondents then moved for a preliminary injunction barring enforcement of their National Security Threat statuses, arguing that under the principle of *stare decisis*, they would succeed on the merits, that they would be unduly harmed otherwise, but did not give any explanation on how the balance of equities tipped in their favor, nor argued that the public interest was in barring enforcement of the National Security Threat statuses.

The District Court granted the preliminary injunction, 4:20-2216, explaining that the plaintiffs were likely to succeed on the merits because the case "involves a clearly-defined area of law" and that the public interest was satisfied because not granting the injunction would allegedly "set a dangerous precedent by refusing to

swiftly act on unilateral violations of citizens' constitutional rights by the Executive Branch." *Id.*

### ARGUMENT

A preliminary injunction is never awarded as of right. *United States v. Incels Union*, 10 U.S. \_\_\_, \_\_\_ (2020) (slip op. at 7) (quoting *Winter v. National Resources Defense Council*, 555 U.S. 7, 24 (2008)). The District Court for the District of Columbia abused its discretion by erring in its analysis of the succession of respondents on the merits of their case, as well as considering the overall public interest regarding the National Security Threat.

So long as any other "process that would have afforded petitioners their due process rights" is provided, *Tools*, 9 U.S. at 117 (2020), respondents cannot claim that their due process rights were violated. In this case, respondents could have their NST statuses revoked if they left the VEIN clan. Freedom of choice between "membership in the organization and employment... might be limited," *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967), but this limitation can always be rectified through the discretion of the individual in question.

#### I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING THE PRELIMINARY INJUNCTION

A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Incels Union, supra*, at \_\_\_ (slip op. at 3) (quoting *Cooter & Gell v. Hartman, Corp.*, 496 U. S. 384, 405 (1990)). The court abused its discretion in issuing an injunction. Specifically, it erred in analyzing the probability of success on the merits and the overall public interest.

For a plaintiff's request for a preliminary injunction to move forward, he must establish that he is (1) likely to

succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Incels, supra*, at \_\_\_\_ (slip op. at 7) (quoting *Winter*, 555 U.S., at 20).

Fundamentally, the touchstone of due process is protection of the individual “against arbitrary action of government.” *Caldwell v. United States*, 9 U.S. 85, 99 (2020) (quoting *Wolf v. McDonnell*, 418 U.S. 539, 558 (1974)). When a process implicates the Due Process Clause’s protection of “liberty,” it must be “attended by nonarbitrary processes.” *Id.*

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Tools*, 9 U.S., at 116-117, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Respondents base their case on the basis that a National Security Threat unnecessarily interferes with their constitutional right to seek employment in the United States. Respt’s. Civ. Compl., at 1. They claimed that under *Tools, supra*, that proceedings were required in order to convince the court that the policy pointed in the government’s favor using the procedural due process test.

Respondents err on this point. First, the main error with the Executive Branch Blacklist challenged in *Tools* centered on the second question: whether there was a risk of an erroneous deprivation of such interest through the



procedures used *and* the probable value of additional or substitute procedural safeguards. In that case, the President did not provide petitioners with any methods to challenge his blacklist, nor was an alternative established.

Respondents also err in believing that procedural due process is rigid and that a strict procedure is required for every case. Particularly contradicting to their conclusion is *Mathews*, where the Court reaffirmed the truism that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." 424 U.S., at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961)) (internal quotations omitted). "[Procedural] [d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972)). In such, procedural due process should be determined on a case by case process.

In *Tools*, this Court found that so long as any other "process that would have afforded petitioners their due process rights" is provided, *Tools v. United States*, 9 U.S. 113, 117 (2020), respondents could not claim that their due process rights were violated. Here, respondents easily have a clear alternative other than litigation to have their NST statuses revoked: that they leave the VEIN clan's group. This alternative is *explicitly* mentioned in the release announcing the declaration of the clan as a National Security threat. As a result, respondents cannot claim that their due process rights were violated when they can easily regain their rights by leaving the offending clan. They would not be likely to succeed on the merits because a viable alternative is available for them to regain their right.

Not to mention, the *Mathews* test would easily be in favor of upholding the National Security Threat status

imposed on the VEIN clan in this case. First, as *Tools* recognized, the private interest affected by the National Security Threat and its counterpart, the Executive Branch Blacklist, was the right to seek employment. Second, as we discussed, respondents' NST statuses could be revoked if they had left the VEIN clan. Freedom of choice between "membership in the organization and employment... might be limited," *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967), but this limitation can always be rectified through the discretion of the individual in question. This immediately negates any negative effect of the VEIN clan's national security statuses, for an alternative is widely available. Third, the government is interested in preserving national security, as we discuss below, *infra*, at 8, and because national security is crucial in times where the integrity of employees may be questioned, it is a compelling interest that should be upheld. In the National Security Threat context, as the Court previously recognized, swift and decisive action is important. *Caldwell, supra*, at 100.

For one, the public interest most likely would not prefer that members of the VEIN clan, whose job is to undermine security and commit as many crimes in the District of Columbia, for example, to work with other employees within the Executive Branch. These concerns will especially flare if a member of a well-known criminal syndicate were to be promoted to a position of power within a department, where they could easily reveal information to other members of the syndicate, undermining national security. This inherent risk is a compelling interest for allowing National Security Threats in the current context to exist.

**CONCLUSION**

The District Court clearly abused its discretion when it granted respondents a preliminary injunction based on an “erroneous view of the law,” *Cooter & Gell, supra*.

The petition for a writ of certiorari should be granted, and the order of the District Court granting a preliminary injunction to respondents should be vacated.

Respectfully submitted.

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SEPTEMBER 2020

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

---

No. 4:20-2216

SULEMAN2003, ET AL.

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UNITED STATES OF AMERICA EX REL.  
WALTERMONDALE

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MEMORANDUM OPINION AND ORDER ON THE MOTION  
FOR A PRELIMINARY INJUNCTION

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KAKASHIHATAKE\_07, District Judge:

The motion for a preliminary injunction is granted.

The Court finds that (1) Plaintiffs have demonstrated that they are likely to succeed on the merits, as the case involves a clearly-defined area of law; (2) that irreparable harm to Plaintiffs' due process right to seek employment would be suffered were an injunction not issued; (3) that the balance of equities tips in Plaintiffs' favour; and (4) that an injunction is in the public interest, as we would set a dangerous precedent by refusing to swiftly act on unilateral violations of citizens' constitutional rights by the Executive Branch.

Pursuant to the Administrative Procedure Act, 5 U.S. Code § 706, the Court holds Plaintiffs' "national security

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threat” designation contrary to constitutional right and dissolves it.

It is so ordered.