Nos. 20-1119, 20-1311

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANAS ELHADY, et al.,
Plaintiffs-Appellees,
v.
CHARLES H. KABLE, IV, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia
Case No. 1:16-cv-00375-AJT-JFA

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ARAB AMERICAN INSTITUTE, BRENNAN CENTER FOR JUSTICE, CENTER FOR CONSTITUTIONAL RIGHTS, CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY PROJECT, AND THE SIKH COALITION IN SUPPORT OF PLAINTIFFS-APPELLEES

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DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1119, 20-1311 Caption: Elhady, et al., v. Kable, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Civil Liberties Union, American-Arab Anti-Discrimination Committee, Arab American Institute,
(name of party/amicus)

Brennan Center for Justice, Center for Constitutional Rights, Creating Law Enforcement Accountability & Responsibility Project, and the Sikh Coalition

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Patrick Toomey Date: 06/02/2020

Counsel for: American Civil Liberties Union

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide non-profit, non-partisan organization of approximately two million members and supporters dedicated to defending the principles of liberty and equality embedded in the U.S. Constitution and this nation's civil rights laws. Founded in 1920, the ACLU and its affiliates have long defended individual rights and liberties from unwarranted government intrusion in the name of national security. In the last two decades, the ACLU has represented and supported racial, religious, and other minority communities in numerous federal court challenges to discriminatory national security measures, including watchlisting, and the stigma and other abuses that result.

The **American-Arab Anti-Discrimination Committee** ("ADC") is the country's largest Arab American civil rights organization. Founded in 1980, ADC is committed to protecting the rights of Arabs in the United States. ADC houses a Pro Bono Legal Department which offers direct services to impacted community members, and has engaged in lawsuits which challenge discriminatory policies and practices by the federal government. The watchlist itself is a violation of the Constitution which adversely impacts Arab communities, including those who are members of ADC. ADC has worked with, and represented, Arab Americans who have been impacted by the watchlist practices of the federal government. The practice of engaging in profiling based on ethnicity and national origin in watchlist practices has a detrimental impact on Arabs and Arab Americans.

The **Arab American Institute** ("AAI") is a national community-based civil rights organization that represents the interests of nearly 3.7 million Arab Americans. AAI works to protect civil rights and liberties of all by conducting research, developing policy, and advocating for changes to create a more equitable union. As a trusted resource, AAI hears directly from community members on a range of issues affecting Arab Americans. One recurring concern has been government watchlisting programs. Watchlists disproportionately target Arab Americans and embrace profiling based on ethnicity and national origin. AAI has worked with community members who have suffered the many adverse consequences of being watchlisted without receiving from the government any reason or a scintilla of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

evidence. Our community members have no procedural due process protections, and to date, no adequate remedy. Further, the federal government has given foreign governments access to highly prejudicial watchlist information and has acknowledged placing individuals on the watchlist at the request of foreign governments. Government watchlisting violates the constitutional rights of Arab Americans at home and threatens their safety abroad.

The **Brennan Center for Justice at NYU School of Law** is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice. The Center's Liberty and National Security ("LNS") Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values. Among other things, the LNS Program works to combat racial, religious, and ethnic profiling in counterterrorism and immigration laws and policies, and advocates for greater transparency and accountability for national security laws and policies.

The **Center for Constitutional Rights** ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has a long history of representing victims of government targeting based on profiling criteria rather than individualized suspicion. *See, e.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (NYPD stop-and-frisk policies); *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (NYPD program of suspicionless surveillance of Muslims in New Jersey); *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017) (post-9/11 abuse of immigration detention powers based on religion and national origin). The Center is currently counsel to three Muslim-American men the FBI attempted to coerce into serving as spies on their religious communities by abuse of the no-fly listing process—either placing them on the list and conditioning their removal on their agreement to spy on their fellow Muslim-Americans, or placing them on the list after they refused to do so. The Supreme Court will hear oral argument on the case, *Tanzin v. Tanvir*, No. 19-71, in the fall.

The **Creating Law Enforcement Accountability & Responsibility** ("CLEAR") project's mandate is to support Muslim, Arab, South Asian, and all other communities in the New York City area and beyond that are targeted by local, state, or federal government agencies under the guise of national security and counterterrorism. The CLEAR project was founded in 2009 and is housed at the City University of New York School of Law, within Main Street Legal Services, Inc., the clinical arm of the law school. In over a decade of work, CLEAR has

represented more than 150 watchlisted individuals who have faced law enforcement scrutiny, intensive questioning about their religious and political beliefs, invasive searches, as well as the denial of licensing and other benefits or opportunities. Along with CCR, CLEAR currently represents three U.S. Muslims that the FBI placed or kept on the federal No Fly List because they refused to become informants and to spy on their faith communities. The Supreme Court will hear oral argument in the case, *Tanzin v. Tanvir*, No. 19-71, in the fall.

The **Sikh Coalition** is the largest community-based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. For almost two decades, the Sikh Coalition has also led efforts to combat and prevent the bias-based profiling of Sikhs at U.S. airports and ports of entry, including through religious rights violations and discriminatory searches. The Sikh Coalition is deeply concerned about the expansion of government watchlists and how these lists disproportionately affect minority communities, without meaningful transparency or due process, and with harmful consequences. The Sikh Coalition joins this brief in the hope that this Court will protect individual rights by curtailing the misuse of these watchlists.

INTRODUCTION

During the twentieth century's periods of conflicts abroad and heightened social and political tensions domestically, the federal government repeatedly used watchlists to monitor and stigmatize disfavored people and groups, resulting in harms to fundamental rights and liberties. In doing so, it also wrongly targeted immigrants, communities of color, and those engaged in First Amendment-protected activities. Courts and the public eventually repudiated these blacklists, but the current watchlisting system represents a return to—and expansion of—this shameful practice. Today's terrorism watchlist is massive, shrouded in secrecy, and disseminated to 18,000 law enforcement agencies and over 500 private entities. Watchlisted people face a range of consequences, including prolonged police encounters and unlawful searches, invasive questioning regarding religious beliefs and First Amendment-protected activities, and prolonged detention at ports of entry. Muslims are disproportionately targeted for these abuses, which implicate equal protection and First, Fourth, and Fifth Amendment rights.

Despite these serious and recurring harms, the standard for watchlist placement is lower even than the "reasonable suspicion" required for brief investigatory police stops. The Constitution and lessons from our nation's past mandate that, if the government is to use watchlists, they must be subject to

stringent due process safeguards, and the standard for placement must be exacting—requirements that today's watchlisting system fails to meet.

ARGUMENT

I. U.S. History Shows Watchlists Are Disfavored and Must Be Subject to Rigorous Safeguards Against Abuse and Overreach.

A. The government's past use of watchlists.

The federal government has long relied on watchlists to identify people with disfavored beliefs and probe the loyalty of immigrants and other "outsiders." Following World War I, as the Red Scare gripped the country, Attorney General A. Mitchell Palmer established the General Intelligence Division ("GID") within the Department of Justice ("DOJ") to gather information on purported "subversives" and suppress dissent. Headed by J. Edgar Hoover, the division created an index of more than 450,000 people believed to espouse radical or communist views. *See* Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* 79 (2001). Thousands of indexed individuals, mostly immigrants, were then seized in the "Palmer Raids." They were held for months without trial and interrogated without access to counsel, and 249 were summarily deported. *See* Harlan Grant Cohen, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. Rev. 1431, 1460 (2003).

Although the GID was shut down in 1924 after legal scholars and lawyers raised concerns about its constitutionality, it was resurrected as the Custodial

Detention Index before World War II.[2] This index included individuals who the Federal Bureau of Investigation ("FBI") determined would be a "menace to the public peace and safety of the United States Government" if not detained during war or national emergency. S. Rep. No. 94-755, at 413 (1976); *see also* James McDonald, *Democratic Failure and Emergencies: Myth or Reality?*, 93 Va. L. Rev. 1785, 1823 (2007). People were placed on the list "because their previous activities indicate[d] the possibility but not probability that they will harm the national interest." Betty Medsger, *The Burglary: The Discovery of J. Edgar Hoover's Secret FBI* 252 (2014). It included primarily people of Japanese, German, and Italian ancestry who were categorized according to the level of security threat they allegedly posed. When the war broke out, the FBI detained over 9,000 people on this list pursuant to President Roosevelt's executive orders. *See* Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of*

[2] *See* Nat'l Popular Gov't League, *Report upon the Illegal Practices of the United States Department of Justice* 3–9 (1920), https://bit.ly/2XLKzQ0 (GID's activities likely violated, *inter alia*, the Fourth and Fifth Amendments); *see also History: Palmer Raids*, Fed. Bureau of Investigation, https://bit.ly/36W0csp (last visited June 1, 2020) ("The constitutionality of the entire operation was questioned, and Palmer and Hoover were roundly criticized for the plan and for their overzealous domestic security efforts."); 1 *A Counterintelligence Reader: American Revolution to World War II* 157 (Frank J. Rafalko ed., Military Bookshop 2011), https://bit.ly/2yNV10N (Attorney General Harlan Fiske Stone disbanded GID, instructing that the Bureau "be limited to investigations of violations of the law").

Executive Power, 8 NYU J.L. & Liberty 396, 419 (2014). The government also used the index to identify Japanese Americans for internment. David Cole, *Enemy Aliens* 93 (2003). By 1966, a variant of the index had grown to 26,000 names and included anti-war and civil rights activists. *Id.* at 102.

Even before the notorious World War II-era detention and internment programs, those of Japanese, German, and Italian ancestry were targeted through an expansive "enemy alien registration" program that sought to identify "the small minority of alien enemies who may be contemplating trouble."[3] The FBI arrested more than 3,200 registered individuals based on their purported "doubtful or divided loyalties" and brought them before civilian hearing boards to prove their fealty to the country.[4] Failure to do so resulted in continued detention, internment, or deportation.[5] Registration also carried ancillary consequences. The 1.1 million people on federal registration lists were required to undergo additional screening

[3] Francis Biddle, U.S. Att'y Gen., Public Address: Identification of Alien Enemies 1 (Feb. 1, 1942), https://bit.ly/2XJxuXo (registration program targeted "all German, Italian and Japanese aliens, 14 years or older" in the country). *Cf. Alien Registration Forms on Microfilm, 1940-1944*, U.S. Citizenship & Immig. Servs. (Jan. 2, 2020), https://bit.ly/2XEUDKw ("enemy alien registration" program was a subset of broader Alien Registration Act program to "create a registry of all aliens in the country").

[4] Biddle, *supra* n.2, at 2; *see also World War II Enemy Alien Control Program Overview*, Nat'l Archives (July 12, 2018), https://bit.ly/3ewdjTB (many immigrants were "interned based on weak evidence or unsubstantiated accusations of which they were never told or had little power to refute," "[f]ew, if any, of those deported received any sort of a hearing" and "did not know the specific reasons for their deportation").

[5] Biddle, *supra* n.2, at 3.

before domestic travel, banned from air travel, and prohibited from possessing cameras, radios, and firearms.[6]

After World War II, during a new wave of hysteria, the federal government turned again to watchlists to target alleged communists for suspicion, scrutiny, and worse. President Truman issued an executive order that established a sweeping federal-employee loyalty program and gave rise to an infamous "Attorney General's list" of more than 200 purportedly communist and "subversive" organizations. *See* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 San Diego L. Rev. 1, 12–13 (1991). Under this program, people were watchlisted if a loyalty review board found that "reasonable grounds exist for belief" that a person is disloyal to the U.S. government. Exec. Order No. 9,835, 12 F.R. 1935 (1947) (finding could be based on "[m]embership in, affiliation with or sympathetic association" with designated "subversive" groups). Federal employees brought before the review boards were told only that accusations stemmed from suspected associations with communists; they received no other reasons or evidence. The D.C. Circuit concluded that due

[6] Dep't of Justice, *Regulations Controlling Travel and Other Conduct of Aliens of Enemy Nationalities* (1942), https://bit.ly/3cc5916; *see also* Magdalena Krajewska, *Documenting Americans: A Political History of National ID Card Proposals in the United States* 65–67 (2017) (explaining consequences of registration under Enemy Alien Control Program); Erin Blakemore, *Why America Targeted Italian-Americans During World War II*, History.com (Jan. 14, 2019), https://bit.ly/3djB15i (same).

process did not require any additional protections because employees lacked a liberty interest in government jobs. *See Bailey v. Richardson*, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951). In 1972, however, the Supreme Court observed that its decisions in the intervening years had "thoroughly undermined" that holding. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 n.9 (1972). While the boards operated, they targeted people based on association and political beliefs, with severe consequences, including a prohibition against federal employment and denial of passports. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.L. L. Rev. 1, 8 (2003) (listing civil penalties stemming from alleged communist association).

Congress initiated its own investigations into alleged communists, primarily through the House Un-American Activities Committee ("HUAC"). The committee compiled a list of more than one million suspected communists and, between 1945 and 1957, subpoenaed thousands of people to testify publicly about their alleged associations and knowledge of the political activities of friends and acquaintances. *See* Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 355 (2004). Witnesses faced accusations from unidentified informants and were denied the opportunity to confront their accusers or present their own witnesses. In justifications that harbinger those of the

executive branch today, HUAC maintained that procedural safeguards were unnecessary because a congressional hearing is not a criminal trial, and no liberty or property interests were at stake. However, those who were named or appeared before the committee were often fired from their jobs and faced widespread stigma. *See* Cole, *supra* p. 6, at 22; Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 Minn. L. Rev. 1669, 1683 (2001) (Hollywood directors and producers who invoked Fifth Amendment and refused to testify before HUAC were ostracized, placed on notorious "Hollywood blacklist," and unable to find meaningful employment for years).

History has borne out the dangers and unlawful consequences of these watchlists, which scholars, historians, and the public have thoroughly repudiated. *See, e.g.*, Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* x (1998) (the McCarthy era is "the most widespread and longest lasting wave of political repression in American history."). Despite anti-communist fervor at the time, the Supreme Court issued a series of opinions invalidating egregious executive blacklisting and affirming due process rights. In 1951, the Court noted that designation of organizations by the loyalty review boards could "cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation," and it held that the Attorney General lacked

authority to make such designations arbitrarily and without adequate protections "against unfounded accusations of disloyalty." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 136, 139 (1951). Later, the Court also narrowed or struck down legislative measures permitting guilt by association and criminalizing advocacy by disfavored groups. *See, e.g.*, *Scales v. United States*, 367 U.S. 203, 224–25 (1961) ("In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (striking down statute "purport[ing] to punish mere advocacy" and requiring government to show speech was intended and likely to incite "imminent lawless action"). The Court also invalidated measures that imposed civil penalties on the basis of association or belief. *See, e.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1964) (legislation barring Communist Party members from obtaining U.S. passports swept "too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment"); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-communist loyalty oath for public employees); *United States v. Robel*, 389 U.S. 258, 265–66 (1967) (statute prohibiting employment of communists at

defense facilities violated First Amendment because it "casts its net across a broad range of associational activities").

The government's past use of watchlists to stigmatize and penalize countless citizens and noncitizens is now widely viewed as a dark phase in our history. Yet, the government has again resurrected this practice.

B. The current watchlisting system.

The current national security watchlisting system is of a piece with watchlists of the past. It is predicated on the same notion of guilt by aspersion or association, and it relegates disfavored individuals and groups to second-class status, subjecting them to stigma and other harmful consequences without due process. *See* Daniel, J. Steinbock, *Designating the Dangerous: From Blacklists to Watch Lists*, 30 Seattle U. L. Rev. 65, 90 (2006) (noting that communist-era blacklists and current watchlists share flawed "notion that we should attempt to identify those people who are most likely to threaten us, to label them as such, and to bar them from the places and activities where they could do the most harm").

Today's watchlisting system is massive in scope, size, and secrecy. Before September 11, 2001, the government watchlisted a very small number of individuals it believed posed a danger to aviation safety.[7] In 2003, President Bush issued a directive to consolidate the government's approach to screening people

[7] ACLU, *Fact Sheet: Federal Watchlists* (Nov. 2004), https://bit.ly/2MdJZVF.

suspected of terrorism connections.[8] The directive led to the current Terrorist Screening Database ("TSDB").

The federal watchlisting system has now ballooned to include over one million individuals. The TSDB, or master watchlist, includes sublists such as the No Fly List, Selectee List, and Expanded Selectee List. Although the executive branch has largely kept secret the numbers of people watchlisted, periodic disclosures or leaks illustrate the rapid growth of these watchlists.

Approximate Total Number of People on Watchlists [Number of "U.S. Persons"—citizens and lawful permanent residents]			
	TSDB	**No Fly List**	**Selectee List**
2004	**158,000*[9]** [unavailable]	**[unavailable]** [unavailable]	**[unavailable]** [unavailable]
2007[10]	**400,000** [unavailable]	**34,230*** [unavailable]	**[unavailable]** [unavailable]
2013[11]	**680,000*** [unavailable]	**47,000** [800]	**16,000** [1,200]
2016[12]	**1,000,000** 5,000	**81,000** 1,000	**28,000** 1,700
2017[13]	**1,160,000** 4,640	**[unavailable]** [unavailable]	**[unavailable]** [unavailable]

[8] Homeland Security Presidential Directive—6, Integration and Use of Information to Protect Against Terrorism, 39 Weekly Comp. Pres. Doc. 1234 (Sept. 16, 2003).

[9] *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 989 (9th Cir. 2012). Entries marked with an asterisk reflect the total number of watchlisting records, which may be greater than the number of unique persons on the watchlist.

[10] *Id.*

[11] Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama's Secret Terrorism Tracking System by the Numbers*, Intercept, Aug. 5, 2014, https://bit.ly/2XJBqHE.

[12] Nat'l Counterterrorism Ctr. & FBI, Joint Response to Congressional Questions Regarding TIDE and TSDB (June 17, 2016), https://bit.ly/3dm7Oqu.

[13] Br. of Appellees 4, ECF No. 33.

Just as the watchlists have grown exponentially, so has the number of agencies and entities to which records are distributed. Today, watchlist information is disseminated to 18,000 federal, state, local, and tribal law enforcement agencies, and more than 500 private entities. *See* Dist. Ct. Op. at 7, *Elhady v. Kable*, No. 1:16-cv-00375 (E.D. Va. Sept. 4, 2019), ECF No. 323. It is also shared with scores of foreign governments, who can nominate non-U.S. persons for watchlist placement.[14]

The purposes for which the watchlist is used have also metastasized—from an initial stated focus on aviation security to wide-ranging use for risk assessments, border detention and searches, federal background checks, visa processing and immigration benefits determinations, and passport issuance and renewal.[15] The FBI exports TSDB information to myriad databases and systems that federal agencies and local law enforcement can use to impose additional burdens on listed individuals or subject them to heightened scrutiny. For instance, the State Department uses TSDB information through the Consular Lookout and Support System to review visa and passport applications. U.S. Customs and Border

[14] FBI, *Terrorist Screening Center: Frequently Asked Questions* 1 (Jan. 2017), https://bit.ly/2AqxjYQ ("TSC FAQs"); Office of Inspector Gen., Dep't of Homeland Sec., No. OIG-09-64, *Role of the No Fly and Selectee Lists in Securing Commercial Aviation* 16 (2009) ("2009 OIG Report"); Pls.' Mem. in Supp. of Summ. J. ¶ 8, *Elhady*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), ECF No. 304.

[15] ACLU, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences* 6–8 (Mar. 2014), https://bit.ly/3gxtJwR.

Protection ("CBP") uses the watchlist in its TECS system to screen travelers at the border, determine admissibility, and refer travelers for heightened, "secondary" inspection.[16] Nearly 20 other federal agencies use TECS, including the Internal Revenue Service and the Drug Enforcement Administration.[17] U.S. Citizenship and Immigration Services automatically subjects watchlisted applicants for naturalization, lawful permanent residence, and other immigration benefits to a review process that can result in extensive delays or denial. *See* Defs.' Answer at 21, *Wagafe v. Trump*, No. 2:17-cv-00094-RAJ (W.D. Wash. July 12, 2017), ECF No. 74. The FBI's National Crime Information Center ("NCIC") database contains a Known or Suspected Terrorist ("KST") File, populated with information from the TSDB.[18] The KST File can be accessed by "virtually every criminal justice agency nationwide" and used during traffic stops and other law enforcement encounters.[19]

In short, TSDB information is disseminated to a web of federal and local agencies, which rely on it to make determinations with grave consequences for designated individuals.

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[16] 2009 OIG Report, *supra* n.14, at 14.
[17] Gov't Accountability Office, No. GAO-08-110, *Terrorist Watchlist Screening* 15 n.21 (2007), https://bit.ly/2MiCJrx.
[18] TSC FAQs, *supra* n.14, at 2.
[19] FBI, *Services: National Crime Information Center (NCIC)*, https://bit.ly/2ZRB3gP (last visited June 1, 2020).

II. The Consequences of Watchlist Placement Can Be Severe, Implicating Equal Protection and First and Fourth Amendment Rights.

The government consistently discounts the harms that result from placement on the watchlist. It does so in part by keeping secret not just key watchlisting criteria, interpretations, and reasons for placement on the watchlist, but also details about use. *See* Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 Harv. L. Rev. 1566, 1569 (2016) ("By publicly promoting a known [reasonable suspicion] standard but concealing its actual interpretation, the national security executive hinders meaningful evaluation of the extent to which its actions comport with individual rights, democratic values, and the law itself."). In this way, it uses secrecy as both a shield, to keep courts and the public in the dark about how it uses watchlist information, and as a sword, to disavow and downplay harms that watchlisted individuals experience.

What we know about the government's use and dissemination of watchlist information makes clear that it implicates First and Fourth Amendment as well as equal protection rights. The process that is due must be considered in light of these weighty consequences.

The government does not dispute that the watchlist is disseminated to thousands of state, local, and federal law enforcement agencies and private entities. *See* Dist. Ct. Op. at 7, ECF No. 323. Nor is there serious question that

consequences from broad dissemination include prolonged law enforcement stops, invasive screening at airports, and abusive detention at the border.

A. Policing and law enforcement encounters.

Watchlisted individuals have experienced increased law enforcement scrutiny in a range of contexts. They have been subjected to potentially unlawful searches, seizures, and surveillance because of how widely TSDB information is shared.[20] As noted above, watchlist information is exported via the FBI's KST File to every law enforcement entity in the country. During routine encounters such as traffic stops, police officers query the FBI's NCIC database. If the stopped individual is listed in the KST File, the search yields an alert that the person is watchlisted as a terrorism suspect. The officer is then instructed to call the Terrorist Screening Center ("TSC") and provide additional information about the subject that can be used to "enhance existing watchlist records."[21] This information can include vehicle details, travel plans and history, and the identities and other

[20] Watchlist notations may also be included in criminal rap sheets and lead to adverse consequences in the criminal legal system, including denial of bail or parole and harsher sentences. *See* Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, Intercept, Mar. 15, 2016, https://bit.ly/2TUSyJb.

[21] Office of Inspector Gen., Dep't of Justice, Audit Report No. 14-16, *Audit of the FBI's Mgmt. of Terrorist Watchlist Nominations* 5 (2014) ("2014 OIG Report"); *see also* Nat'l Counterterrorism Ctr., *Watchlisting Guidance* 70 (2013), https://bit.ly/3djQDWj ("2013 Watchlisting Guidance").

details of travel companions.[22] The TSC must consult with the FBI to determine what action should be taken. This additional layer of verification inevitably prolongs the stop and prompts heightened scrutiny and suspicion.

Predictably, these watchlist notations open the door to unlawful searches and seizures. The example of Amir Meshal, a U.S. citizen who has never been charged with a crime, is illustrative. As a result of his placement on the No Fly List, Mr. Meshal has been the target of lengthy police stops during which officers have searched his vehicle and person. *See, e.g.*, Decl. of Amir Meshal, *Latif v. Lynch*, No. 3:10-cv-00750 (D. Or. Aug. 7, 2015), ECF No. 270. Officers have made clear that the prolonged stops and searches are the consequence of his watchlist placement. *Id*. ¶¶ 17, 22. These stops can last an hour or longer and are protracted because responding officers have called canine units to conduct explosives and narcotics searches of Mr. Meshal's vehicle. *Id*. ¶¶ 15, 18. When traveling with him, Mr. Meshal's family members have also been searched and detained. *Id*. ¶ 20. These experiences have left Mr. Meshal and his wife "scared and humiliated" and underscore the harmful impact of watchlist placement on people's everyday lives. *Id*. ¶ 22.

[22] ACLU & Yale Law Sch. Civil Liberties & Nat'l Sec. Clinic, *Trapped in a Black Box: Growing Terrorism Watchlisting in Everyday Policing* 2 (Apr. 2016), https://bit.ly/2Mb7uil.

The significant risk that innocent people will be subjected to intense scrutiny or lengthy, intrusive law enforcement stops is compounded by lax nomination criteria, *see infra* Section III, and the fact that individuals who are not the subject of an open investigation but have been referred by other federal agencies or foreign governments can still be watchlisted.[23] As in the past, the watchlist functions not as a mechanism for identifying violations of the law, but as a means of monitoring individuals and collecting information about them.

B. Harms to First Amendment rights.

Watchlisting also implicates First Amendment rights, because protected activity or status can serve as a basis for placement on the list. The government's watchlisting guidance permits agencies to nominate people to the TSDB as long as such nominations are not "based *solely* on the individual's race, ethnicity, or religious affiliation, nor *solely* on beliefs and activities protected by the First Amendment." Exhibit 16 to Defs.' Opp. to Pls.' Second Mot. to Compel, *Elhady*, No. 1:16-cv-00375 (E.D. Va. Apr. 27, 2018), ECF No. 196-16 (emphasis added). Protected speech and activity therefore can be one factor leading to watchlisting. Additionally, the vagueness of the watchlisting criteria, *see infra* Section III, further opens the door to watchlisting on First Amendment-protected grounds. Unsurprisingly, plaintiffs in litigation challenging No Fly List placement have

[23] 2014 OIG Report, *supra* n.14, at 66.

alleged that they were put on the list in part because of First Amendment-protected statements that were misinterpreted or misunderstood. *See, e.g.*, Mem. in Supp. of Pl. Steven Washburn's Renewed Mot. for Partial Summ. J. at 12, *Latif v. Holder*, No. 3:10-cv-00750 (D. Or. Apr. 17, 2015), ECF No. 219.

Watchlist placement can also prompt government interrogation of speech and religious beliefs, as was the case for Zainab Merchant. Ms. Merchant is a U.S. citizen, journalist, and graduate student who for years experienced humiliating and prolonged searches when she sought to board an airplane or re-enter the United States, likely due to her watchlist status.[24] On several occasions, Transportation Security Administration ("TSA") and CBP officers questioned her about her journalistic activities and religious beliefs. During a March 2017 encounter, for example, CBP officers questioned her about an article she had written for her multimedia website that was critical of CBP's actions during a previous border search.[25] The officers also asked about her religion and political opinions, such as whether she was an Ismaili Muslim, supported ISIS, or knew anyone who was an ISIS supporter.[26] She was again questioned about her writings during another encounter later that year.[27] Other journalists, particularly those who are Arab or

[24] Admin. Compl. Re: Repeated Detention, Search, and Intrusive Questioning of U.S. Citizen at Multiple U.S. Airports and Ports of Entry (Aug. 14, 2018), https://bit.ly/3dej7AR.
[25] *Id.* at 3–4.
[26] *Id*. at 3.
[27] *Id*. at 4.

Muslim, have similarly faced intrusive questioning and searches upon re-entry to the United States.[28] Such repeated incidents raise the concern not only that protected speech can serve as a basis for watchlist placement, but also that federal officials take watchlist status as license to interrogate people about First Amendment-protected activities.

C. Prolonged border detention and interrogation.

Watchlist status also prompts prolonged border detention and interrogation. CBP receives watchlist information through TECS, its master system for screening travelers and determining admissibility. Watchlisted people can be "subjected to additional screening" by CBP to "determine the potential threat they pose, with related actions taken, if needed."[29] These "related actions" are left to CBP officers' discretion. *See* Br. of Appellees 8. CBP's authority to search and detain travelers at the border is subject to constitutional constraints, and the mere fact that a person is at a border or port of entry does not justify invasive searches absent any indication

[28] *See* Harrison Jacobs, *Muslim-American Reporter Describes 'Dehumanizing' Treatment at US Border*, Business Insider, Sept. 24, 2013, https://bit.ly/3chydUZ; Ahmed Shihab-Eldin, *Davos to Detention: Why I Hate Coming Home to America*, Huff. Post, Jan. 28, 2014, https://bit.ly/3djNypm.

[29] No. GAO-08-110, *supra* n.16, at 4. DHS has granted access to its synchronized copy of the TSDB to the Office of Intelligence and Analysis and U.S. Immigration and Customs Enforcement, and expanded the watchlist "to include individuals who may pose a threat to national security . . . and who do not otherwise satisfy the requirements for inclusion in the TSDB." Dep't of Homeland Sec., DHS/ALL-027(e), *Privacy Impact Assessment Update for the Watchlist Serv.* 2–3 (May 2016), https://bit.ly/2ZSz2RF.

of criminal activity. Nevertheless, even without any such indication, CBP officers conduct invasive searches of watchlisted people when they seek to cross the border.

The experience of a Somali-American family at the U.S.-Canada border provides an example. In 2015, Abdisalam Wilwal, Sagal Abdigani, and their three young children were returning from a trip to Canada when they were detained and questioned for approximately ten hours. *See* Am. Compl. ¶ 2, *Wilwal v. Nielsen*, No. 17-cv-02835 (D. Minn. Oct. 12, 2017), ECF No. 25. At the North Dakota border crossing, Mr. Wilwal presented the CBP officer with the family's passports and, a few moments later, several officers emerged with their guns drawn. *Id.* ¶¶ 29, 31. The officers ordered Mr. Wilwal out of the van and handcuffed him. *Id.* ¶ 32. They held Mr. Wilwal, handcuffed, for approximately ten hours. At one point he fell unconscious from lack of food and water, requiring medical attention. *Id.* ¶¶ 52–53. In addition to asking him routine questions about his travels, the officers asked him about his religion. *Id.* ¶¶ 59–60. Ms. Abdigani and the children were also separately detained the entire time. *Id.* ¶ 65. The family subsequently learned that the incident occurred because of Mr. Wilwal's placement on a terrorism watchlist. *Id.* ¶ 86.

The experience has had a lasting impact on the family. Ms. Abdigani describes the children as "traumatized" and says, "we are all too scared to travel

again."[30] After the Wilwal family sued, a federal district court held that "considering the totality of the circumstances," it would be reasonable to conclude that "the CBP agents' conduct was excessive and unreasonable," in violation of the family's Fourth Amendment rights, and that the family had plausibly alleged that they were "subjected to a heightened search because Mr. Wilwal's name appeared on a watchlist." Mem. Op. at 13, 27, *Wilwal*, No. 17-cv-02835 (D. Minn. Sept. 27, 2018), ECF No. 52.

The Wilwal-Abdigani family's experience illustrates the perils of using watchlist status as a proxy for dangerousness. Even as the government claims that CBP does not have a policy requiring the use of firearms or handcuffs to detain watchlisted individuals, *see* Br. of Appellees 8, there is little doubt that the officers responded this way to Mr. Wilwal and his family because he was watchlisted. *See also* Pls.' Mem. in Supp. of Summ. J. ¶ 30, ECF No. 304 (CBP assigns "armed and dangerous" notation to TSDB listees). They had no colorable justification for this excessive use of force and prolonged detention.

D. Racial, religious, and national origin targeting.

The government does not disclose the demographics of people subjected to watchlisting. However, publicly available information and accounts from Muslims

[30] Sagal Abdigani, *My Family and I Were Detained at Gunpoint and Then Held for Hours at the U.S.-Canada Border. I'm Afraid That It Will Happen Again.*, ACLU (July 13, 2017), https://bit.ly/2Mbfv6V.

like the Plaintiffs in *Elhady* and other cases make clear that at least in the United States, Muslims and people of Arab and South Asian origin are disproportionately targeted. *See, e.g.*, Scahill & Devereaux, *supra* n.10 (revealing that, as of 2014, the city of Dearborn, Michigan, with a population of only 96,000 people—forty percent of whom are of Arab descent—had more residents on the watchlist than cities like Houston and Chicago, with populations in the millions). This is perhaps unsurprising given the disproportionate and discriminatory focus of post-9/11 national security measures on Muslim, South Asian, and Arab communities—as seen in other government policies and programs and documented by scholars and community representatives.[31] Watchlist placement, therefore, together with the consequences of extra screening and possible detention at the border and ports of entry, raises equal protection concerns.

Indeed, recent federal policies and agency guidance permitting discriminatory profiling exacerbate the likelihood that Muslims and people of Arab

[31] *See generally* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 Mich. L. Rev. 1333, 1350–51, 1366 (2019); Penn. State Law Rights Working Grp., *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy* (May 2012), https://bit.ly/2TW3iXV. *See also* Order Dismissing Case, *Raza v. City of New York*, No. 1:13-cv-03448 (E.D.N.Y. Mar. 20, 2017), ECF No. 130 (approving settlement in challenges to New York City Police Department's suspicionless surveillance of Muslims); *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015) (holding that Muslim plaintiffs had plausibly alleged NYPD surveillance program violated Equal Protection and First Amendment rights, and concluding that "[w]hat occurs here in one guise is not new. We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind.").

or South Asian descent are disproportionately watchlisted. In 2014, the DOJ issued updated guidance on the use of race by federal law enforcement agencies that prohibited federal officers from considering race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity "to any degree" when making routine law enforcement decisions.[32] Nevertheless, the guidance permits bias-based profiling at the border and in national security contexts. For example, the guidance explicitly permits profiling based on religion, race, ethnicity, or national origin when a federal law enforcement agency—including the FBI—has "trustworthy information" connecting a person to an (undefined) "threat to national or homeland security . . . or an authorized intelligence activity."[33] Trustworthy information may be determined by officers based on an extremely low threshold—"the totality of the circumstances."[34] The DOJ guidance also specifically states that it "does not apply to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities."[35] The Department of Homeland Security's similar guidance and exemption opens the door for CBP and TSA agents to target and search travelers because of their race, religion, ethnicity, or other protected

[32] Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 2 (Dec. 2014), https://bit.ly/2XiC7Zv.
[33] *Id*.
[34] *Id*.
[35] *Id*. at 2 n.2.

characteristics.[36] These exceptions help explain why Plaintiffs and others who are watchlisted are disproportionately Muslim or of Arab or South Asian descent.

Individuals' private interests at stake as a result of watchlist placement are high and should not be underestimated. The government must not attach any liberty-infringing consequences to watchlist status without an adequately stringent standard for placement on the watchlist and time-honored due process protections against government abuse and overreach.

III. Given the History and Consequences of Watchlisting, Any Standard for Placement Must Be High, Narrow, and Specific, Which the Current Standard Is Not.

If the government is to use a watchlist, it must be narrowly constructed, given the harms that result from placement. The watchlist standard, however, is extremely low, vague, and overbroad, permitting use of unreliable and uncorroborated information.

Placement in the TSDB requires "reasonable suspicion that the individual is a known or suspected terrorist." Exhibit 16 to Defs.' Opp. at 3, ECF No. 196-16. This standard is satisfied with "articulable intelligence or information which, based on the totality of the circumstances and, taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is engaged, has

[36] Dep't of Homeland Sec., *Fact Sheet: U.S. Department of Justice Racial Profiling Guidance* (Dec. 2014), https://bit.ly/36JqOg3.

been engaged, or intends to engage, in conduct constituting in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities."[37] *Id.* at 4. This vague and confusing standard sets a very low threshold for watchlist placement. Phrases such as "related to" and "in aid of" easily encompass First Amendment-protected speech and association, or conduct that is entirely unwitting. Indeed, this standard resurrects the prospect of guilt by association that the Supreme Court rejected in *Scales*. 367 U.S. 203; *cf. supra* Section I at 8.

The watchlisting standard is even lower than what is required for a brief investigatory police stop. Courts have acknowledged that reasonable suspicion in that context is a relatively low standard. *See Alabama v. White*, 496 U.S. 325, 330 (1990) (explaining that reasonable suspicion is "a less demanding standard than probable cause" because it "can arise from information that is less reliable than that required to show probable cause"); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (level of suspicion is "considerably less" than preponderance of the evidence); *I.N.S. v. Delgado*, 466 U.S. 210, 217 (1984) (reasonable suspicion requires "some minimal level" of objective justification). *See also* Jeffrey Kahn, *The*

[37] The current criteria for Selectee List placement are not public. According to leaked March 2013 Watchlisting Guidance, Selectee List placement requires that a person be a member of a terrorist organization and be "associated" with terrorist activity. *See* 2013 Watchlisting Guidance at 54. Expanded Selectee List criteria are far less exacting and include anyone who meets the "reasonable suspicion standard for TSDB inclusion." Br. of Appellants 4–5, ECF No. 30. This could include nearly everyone in the TSDB.

Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and Terry v. Ohio, 26 Wm. & Mary Bill Rts. J. 383, 386 (2017) (in the watchlisting context, the government has "consistently fought to adopt the reasonable suspicion standard while casting aside the structural check that the Supreme Court deemed essential to its constitutional use: the judiciary"). The watchlist placement standard fails to satisfy even this low bar.[38]

Given the indeterminacy of the watchlisting standard and the range of consequences resulting from watchlist placement, *supra* at Section II, the current standard also falls well short of what due process requires. "Clarity in regulation," the Supreme Court has held, "is essential to the protections provided by the Due Process Clause of the Fifth Amendment," which "requires the invalidation of laws that are impermissibly vague." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A law is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Constitution requires greater certainty as to the meaning of a measure that "might induce individuals to forego

[38] In *Terry v. Ohio*, the Supreme Court held that the reasonable suspicion standard could justify investigatory stops because the consequences of such stops are "strictly circumscribed" by place and time. 392 U.S. 1, 26 (1968). The watchlisting standard falls short of the very low threshold set forth in *Terry*, yet the consequences of watchlisting are anything but circumscribed—they are severe and lasting.

their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

The watchlist placement criteria fail to provide adequate notice of proscribed conduct and do not provide the required clarity. Watchlisted individuals have no way of determining what actions run afoul of the imprecise predicate criteria. This is particularly troubling because watchlisting may amount to a penalty for First Amendment-protected conduct, speech, beliefs, or associations. The Supreme Court has emphasized that government action restraining constitutional rights is subject to a heightened clarity requirement—one that the watchlist fails to meet. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected right."); *see also United States v. Williams*, 553 U.S. 285, 304 (2008); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–74 (1997). The heightened standard applies whenever a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," "operates to inhibit the exercise of (those) freedoms," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted), or has "a potentially inhibiting effect on speech." *Cramp v. Bd. of Pub. Instruction of Orange Cty.*, 368 U.S. 278, 287 (1961).

It is vital that watchlist placement occur only pursuant to a rigorous, narrow standard, with due process protections to safeguard against errors and unfairness.

Decades of due process decisions demonstrate that such protections can be provided without imposing undue burden on the government. Although property interests are generally regarded as less weighty than liberty interests, *see Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 495 (1976), the Supreme Court has routinely mandated more rigorous process for property deprivations—including "timely and adequate" notice and an actual hearing—than the government provides here. *Goldberg v. Kelly*, 397 U.S. 254, 267, 270 (1970) (termination of welfare benefits); *see also Lindsey v. Normet*, 405 U.S. 56, 66, 84 (1972) (evictions); *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (temporary school suspension); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19–20 (1978) (cancellation of subsidized utility services); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (recovery of excess Social Security payments); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (termination of public employment). Given the weightier liberty interests at stake from watchlist placement, the government can and should provide necessary procedural protections.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision.

Dated: June 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits of Federal Rules of Appellate Procedure 32(a)(7) and 29(b)(4) because it contains 6,471 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: June 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filings system.

Dated: June 2, 2020

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