No. 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, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

PAGE PROOF BRIEF OF APPELLEES

May 26, 2020

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APPELLEES' DISCLOSURE STATEMENT

Appellees Anas Elhady, Osama Hussein Ahmed, Ahmad Ibrahim Al Halabi, Michael Edmund Coleman, Murat Frljuckie, Adnan Khalil Shaout, Wael Hakmeh, Saleem Ali, Samir Anwar, John Doe No. 2, John Doe No. 3, Shahir Anwar, Baby Doe 2, Yaseen Kadura, Hassan Shibly, Ausama Elhuzayel, Donald Thomas, Ibrahim Aawd, Muhammad Yahya Khan, Hassan Fares, Zuhair El-Shwehdi, John Doe No. 4, and Mark Amri are all natural persons with nothing to disclose.

Under Local Rule 26.1(a)(2)(B)-(C), no publicly held corporation, master limited partnership, real estate investment trust, or any other legal entity has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

Respectfully submitted,

Date: May 26, 2020

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1. Did the five Appellees who did not use DHS TRIP lose their due process cause of action when (1) Congress did not make theDHS TRIP mandatory, (2) there is no judicial review available of that process, and (3) the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of appellees' lawsuit?

2. Does a terrorist watchlist, which consistently requires Government agents to detain listees at borders and airports for long hours, interrogate them, search and often confiscate their electronics (among other consequences), implicate the travel-related liberty interest protected by the Due Process Clause?

3. Does a terrorist watchlist system, which discloses to thousands of federal, state, and foreign governmental and even private entities that listees are "known or suspected terrorists," implicate the stigma-plus liberty interest protected by the Due Process Clause when disclosure causes a host of publicly-imposed consequences ranging from travel-related detentions to being treated as terrorists in law enforcement encounters to a loss of a range of benefits and licensures,?

4. Does the watchlist process violate the Due Process clause when it includes a standard that is (1) entirely subjective, (2) covers completely innocent activity, (3) is met over 99 percent of the time, and (4) contains no notice, opportunity to be heard, neutral-arbiter, or judicial review either pre or post deprivation?

INTRODUCTION

The federal government's terror watchlist pits the life-altering consequences imposed on the 23 citizens in this case against an unprecedented watchlisting program run amok. With more than one million entries, the watchlist has never included a single person who has committed or attempted to commit an act of terrorism in the U.S. while on the list. It is just a list of innocent people—mostly Muslim.

This is because, to make the list, you do not need to be accused, or even reasonably suspected of, any criminal activity. As the district court observed, none of the Appellees have been accused or reasonably suspected of such conduct. "[T]here is no evidence or contention, that any of these plaintiffs…have been convicted, charged, or indicted for any criminal offense related to terrorism, or otherwise." It is an unexpected

feature of a "terror" watchlist that one need not be suspected of terrorism to be listed.

And once on the list, you cannot learn why the Government put you there. The Government will not even confirm that it listed you, though it will share its list with federal agencies, state and foreign governments, and even private companies. You do not get any ability to review or question the Government's evidence or otherwise challenge your placement in any meaningful way.

Instead, you get hours-long, humiliating screening every time you try to fly, if you can fly at all. Crossing the border, you are detained—sometimes in front of your family or your boss, sometimes in handcuffs, sometimes with a gun pointed in your face, or your child's face, or your parent's face—for six to twelve hours. The Government goes through, downloads, and often confiscates your phone. Through its watchlist, the Government imposes a kind of second-class status on listees.

Yet the Government suggests that this watchlist does not even implicate the Constitution. The District Court disagreed. It found the watchlist process violates the Constitution's guarantee of Due Process. This Court should affirm.

STATEMENT OF THE CASE

A. The Government creates the watchlist without Congressional authority

By executive order, the Government created the Terrorism Screening Database, known as the watchlist or the TSDB, in 2003. [Dkt. 307].[1] There is no Congressional authorization for either the watchlist or the agency that administers it, the Terrorist Screening Center, or TSC. *Id.* As of 2017, there are approximately 1,160,000 individuals on the watchlist, of which 4,640 are U.S. Persons. [Dkt. 308-24 3].

B. Appellees suffer due to placement

By placing Appellees on the watchlist, the Government shatters the lives of innocent Americans—who have not been charged, arrested, or convicted of any terrorism-related offense—by branding them as "known or suspected terrorists."

Government agents have arrested and handcuffed many Appellees, often at gunpoint and sometimes in front of their children. [Dkt. 304 20-27, 30-38]. Agents have searched and seized their phones and computers. [Dkt. 304 25-27]. The Government repeatedly disrupts their travel plans

[1] Broader support for the facts are included in Appellees' Motion for Summary Judgment. [Dkt. 304 13-49].

at airports with prolonged, frightening, and invasive detentions, screenings, and interrogations. [Dkt. 304 20-27, 30-38]. Some Appellees have been denied the right to even board their flights. [Dkt. 304 51]. All these consequences are attributable to the watchlist and the various annotations that accompany Appellees' entries on it.

Appellees lack the space in this brief to account for all the traumatic experiences they have suffered due to the watchlist. The summary judgment briefs and attached exhibits provide a fuller account. But some examples give a taste of what life is like on the watchlist for the 23 citizens in this case.

Land Border Incidents

When the Appellees cross the land border, trauma ensues. The Government detains them, often in handcuffs, sometimes at gunpoint, for anywhere between six to twelve hours. [Dkt. 304 20-27]. The Government interrogates them, sometimes about their religious beliefs. [Dkt. 304 37-38]. The Government searches their phones and computers, demanding their passwords. [Dkt. 304 25-27]. Sometimes the Government seizes these electronics altogether. *Id.*

When border agents ordered Anas Elhady out of his car in April

2015 and handcuffed him, it was not his first time. [Dkt. 305-1 49]. But it would be the most harrowing.

Agents detained Elhady in a freezing room without shoes or jacket. [Dkt. 305-1 49-50]. About every hour, CBP officers would interrogate him about his family and friends. [Dkt. 305-1 50]. Elhady pleaded to be let out, crying "I'm freezing to death. Please let me out or let me out, at least in the waiting room." *Id.* Ultimately, he passed out from the cold, requiring hospitalization. [Dkt. 305-1 50-51].

Even then, in the ambulance and at the hospital, border agents kept him shackled. *Id.* Elhady was traumatized, thinking "I can die and … nobody would know what happened to me." *Id.* Because of the trauma, Elhady stopped crossing land borders altogether and stopped flying for more than a year. [Dkt. 305-1 35, 51-52].

Ahmad Halabi, an Air Force veteran, was detained returning from vacation at Niagara Falls. [Dkt. 305-11 22]. CBP handcuffed him and took him into custody in front of his entire family, where an officer seized his phone. [Dkt. 305-11 22-23]. Like Elhady, Halabi was detained in a brightly lit, freezing cell, without shoes, and left alone for hours. *Id.* He had "flashbacks of the time being in Guantanamo" where Halabi was

previously stationed, as "that's how prisoners were in that holding cell." *Id.*

Acting in accordance with the watchlist annotations assigned to Murat Frljuckic, border agents have arrested him at gunpoint five times [Dkt. 306 49-50, 68, 69, 79, 83-84, 104]; *see also* [Dkt. 299 31]. Frljuckic was understandably terrified of the danger this created not only for him but also his loved ones. [Dkt. 306 70]. "[T]hey handcuffed me in front of my four-year-old kid. He was crying so much. That was the hardest part." Ex. 11 at 47.

Upon arriving at the U.S.-Canada border, Frljuckic once told an officer that he is always taken into custody and asked him not to panic. [Dkt. 306 84]. Yet still CBP officers surrounded Murat's car, drew guns in his direction, handcuffed him, and again took him into custody in front of his family, this time for six hours. [Dkt. 306 84-85]. One CBP officer told him that if he were to cross the border, make a U-turn, and try to cross back, border agents would again detain and handcuff him at gunpoint. [Dkt. 306 86]. Frljuckic has stopped crossing the border or travelling by air to avoid these terrifying encounters [Dkt. 306 105-106].

When John Doe 3 and his entire family were detained and

handcuffed, it shattered his family. Fearing their own government, they made a collective decision that John Doe 3 would leave the country and emigrate to Germany. [Dkt. 306-23 10, 12, 18].

After border agents confiscated University of Michigan Professor Adnan Shaout's phone, he discerned added malware when they returned it. [Dkt. 306-6 6-7, 15, 51].

Government agents repeatedly detained and handcuffed Yaseen Kadura at the border. [Dkt. 305-6 17-18, 44, 47-48, 62-63]. Twice, the Government seized and refused to return his phone, instead offering to trade his phone and promises to mitigate his "travel issues" if he agreed to work for the FBI. [Dkt. 305-6 54]. Once, Kadura's watchlist status directed border agents to aggressively search his father and brother as well. "I saw them put my dad up against the wall, pat him down, feel up his junk just like they felt up mine, just like they felt up my brother's." [Dkt. 305-6 38]. "[O]ne of the worst memories of my life is seeing my dad have to go through that because of me." [Dkt. 305-6 40].

Airport Experiences

Since 2006, Hassan Shibly, a civil rights leader with professional relationships with (among others) former Commissioner of CBP Gil

Kerlikowske and former Senior Advisor to President Barack Obama Valerie Jarrett, has routinely been pulled aside for secondary screening. [Dkt. 305-17 22-23, 25, 29, 33, 49, 57, 60, 64; Dkt. 304 31]. Each time, he faces long delays, and must undergo intrusive interrogations (oftentimes resulting in missed flights). *Id.* This has happened at least 20 times by air and once after a cruise. *Id.* His treatment has caused him humiliation in front of family members, business leaders, executives and friends that have traveled with him. *Id.* Once, his grandmother fainted after seeing the way officers treated him. [Dkt. 305-17 22-23]. "[Y]ou don't want your grandma seeing you in handcuffs no matter what, because it hurts her heart." *Id.*

More than once, after being detained for an interrogation before boarding a flight with his family, Shibly urged his wife to take the children and board the flight without him because he wanted to save them from the "long-term traumatic impact" of having to "see their parents consistently being targeted by their own government. [Dkt. 305-17 34]. Given Shibly's access to other highly protected spaces, this makes no sense: "I can go meet the president, I can go meet Valerie Jarett, and the top President advisors and get into the White House complex without

any extra screening, but I can't get on [a] flight to get there." [Dkt. 305-17 25].

Zuhair El-Shwehdi has missed connecting flights and been forced to spend multiple nights in a hotel. [Dkt. 304 34; 306-20 20]. El-Shwehdi now avoids traveling by air whenever possible. *Id.*; [Dkt. 306-20 10-13, 38, 54]. Every year, El-Shwehdi and his family drive from Dayton to Atlanta (an 8-hour, 500-mile drive) two to three times per year to visit his cousin, despite being disabled, including problems from two hip replacements. *Id.* El-Shwehdi has also driven from Ohio to Virginia at least twice to attend funerals. *Id.* Because of the watchlist, El-Shwehdi did not travel to Libya for his brother's or his brother-in-law's funeral. *Id.*

After being invited to Malaysia as a guest of the Office of the Prime Minister of Malaysia, Michael Coleman missed his three-and-a-half-hour connection due to lengthy screening and interrogations. [Dkt. 305-14 20-21]. On another occasion, after returning from an international trip, Coleman's name was announced on the loudspeaker upon landing and he was escorted off the plane in front of the rest of the passengers. [Dkt. 305-14 28-29]. After subjecting his students to secondary screening when they travel with him, Coleman now books his ticket separately from them to

avoid the stigma and humiliation, and to protect them from watchlist placement. [Dkt. 305-14 19, 24, 38].

Some Appellees have been denied boarding altogether. The FBI told Osama Ahmed that he was on the No Fly List and would be removed only if he agreed to be an FBI informant. [Dkt. 305-9 10]. John Doe 4 could not fly from Detroit to Morocco to meet his fiancée's family for the first time. [Dkt. 306-25 11]. Ausama Elhuzayel could not fly from Los Angeles, California to Dominica to spend time with his wife and family. [Dkt. 305-20 35]. Donald Thomas tried to move to Malaysia with his family and personal belongings but could not fly from Sacramento. [Dkt. 305-24 12, 48-55]. Mark Amri could not fly to Las Vegas from California for business purposes. [Dkt. 306-4 13-15]. Kadura could not fly to Libya to visit his mother to observe a religious occasion. [Dkt. 305-6 51].

Because of these experiences, many Appellees are deterred from flying entirely while others only fly when absolutely necessary. [Dkt. 304 22-25, 30, 33-37]. Collectively, Appellees have missed weddings, funerals, and professional opportunities, among other things that require travel. [Dkt. 304 25, 34, 35-36, 52].

C. The watchlist makes travel a nightmare

These consequences were not random. They were the result of the specific consequences imposed by a person's watchlist status.

CBP and the Coast Guard use the watchlist to screen passenger and crew manifests for ships traveling through American waters and seaports. [Dkt. 307-6 23]. CBP uses the watchlist to deem foreign national listees inadmissible to the United States, to deny listees boarding on international flights, or to recommend to foreign governments that they deny listees boarding on international flights. [Dkt. 306-30 17; Dkt. 308-13 12]. CBP may deny boarding to Americans located abroad based on watchlist status, even if the American is not designated as "No Fly." *Id.*

Once an individual reaches a U.S. port of entry, CBP alerts initial inspection officers if the individual is on a watchlist and requires secondary inspection. [Dkt. 306-30 19, 22-23]. CBP officers may pat listees down, search their wallets and copy their contents, search their cars, and search their electronics. [Dkt. 306-30 69, 73; Dkt. 306-31 91; Dkt. 308-14 6]. CBP also often calls ICE agents and FBI agents in to participate in secondary inspection interviews and investigations of

listees. [Dkt. 306-30 74; Dkt. 306-31].

CBP policy also provides that listee status alone justifies an "advanced search" of their electronic devices. [Dkt. 308-14 6]. An advanced search entails the physical connection of the electronic device to CBP equipment to review, copy, and analyze the electronic device's contents. *Id.* CBP policy prohibits it from performing the advanced search of the electronic device in the listee's presence, or from informing the listee that the electronic device's information has been searched, copied, or conveyed to other agencies. [Dkt. 308-14 9]. If a listee has any travelling companions, CBP documents the identities of the associated companions. [Dkt, 306-30 70; 307-2 125]. CBP also searches and copies the contents of the traveling companions' electronic devices. *Id.*

The TSA considers listees to be high-risk travelers who must undergo additional security screenings before boarding an aircraft. [Dkt. 307-15 15-19]. Listees are subject to an "embarrassing and time consuming" process where they must obtain TSC's permission to board a plane. [Dkt. 307-4 21]. Listees are unable to use internet, curbside, and airport kiosk check-in options. [Dkt. 307-15 15-19, 54-55]. TSA requires listees' boarding passes be stamped "SSSS." *Id.* Once listees receive their

boarding passes, they must undergo onerous screening at the airport security checkpoint. *Id.* These screenings include, on top of the procedures applied during a typical screening experience: advanced imaging technology; hand-wands; pat-downs; a physical search of the interior of a passenger's carry-on luggage, electronics, and shoes; and an explosives trace detection search of the passenger's items. *Id.* When listees fly internationally, TSA informs foreign governments that the United States has annotated a listee's watchlist entry to require U.S.-defined enhanced screening. [Dkt. 306-32 21].

TSA, along with CBP, identifies associates of listees and designates those associates as "high-risk" and thereby required to undergo burdensome screening. [Dkt. 306-30 50].

Airplanes with listees on board may be barred from entering American airspace. [Dkt. 306-30 16-17; Dkt. 307-6 20-22]. International flights have been diverted and delayed because of a passenger's watchlist status. *Id.*

D. The watchlist is broadly distributed

To impose these and other consequences on listees, the Government must distribute the watchlist broadly. Along with disseminating

watchlist information broadly within the Government, it also makes watchlist information available to tens of thousands of public and private entities, state, local, and tribal law enforcement agencies, courts, and more than 60 foreign governments. [Dkt. 304 44-45; Dkt. 308-16 9, 17, 56-58; Dkt. 308-17 25; Dkt. 308-21; Dkt. 308-32]; 28 C.F.R. § 20.3(g). The Government discloses watchlist status to for-profit companies in the commercial aviation, port, trucking, chemical manufacturing, and the nuclear power industry, among other sectors. Id.

The Government also discloses the watchlist to more than 500 private entities, including private universities, hospitals, and railroads, as well as information technology and fingerprint database providers. *Id.* Some Appellees have connections to these entities. [Dkt. 304 at 42].

Much, though not all, of this dissemination takes place through the National Crime Information Center ("NCIC"). [Dkt. 306-31 24, 38-41].

The NCIC transmits watchlist information, along with a handling code, to tens of thousands of public and private entities. [Dkt. 308-6].

E. Watchlist status alters listees' legal status

The Government "require[s]" persons who identify a listee via the NCIC to treat listees as "known or suspected terrorists," with specific

consequences. [Dkt. 308-6 2-3]. Those consequences put the lives of the 23 Appellees in danger during even routine law enforcement encounters. [Dkt. 323 24]. *See* Dkt. 306-25 31]. (detaining officer told John Doe 4 "if he would have pulled me over he would have shot me").

If a foreign national is a listee, the State Department may deny their visa application and deem them inadmissible. [Dkt. 307-8 13]. The Government may also deem a foreign national inadmissible if a family member is a listee. [Dkt 306-30 87]. If a foreign national from a Visa Waiver Program county is a listee, the Department of State denies or revokes their ESTA waiver that would otherwise allow them to travel to the U.S. visa-free. [Dkt. 308-1 9]. If a foreign national from a Visa Waiver Program country is related to a listee, the Government may deny or revoke their ESTA waiver on that basis. [Dkt 306-30 88].

DHS's U.S. Citizenship and Immigration Services uses watchlist information to deny immigration, asylum, and naturalization applications. [Dkt. 307-6 27-28]. DHS and CBP will not allow listees to obtain Pre-Check and Global Entry status. [Dkt. 306-29 39-42; Dkt. 306-30 87].

Government agencies such as State, DHS, CBP, and FBI use the

watchlist to screen employees and contractors and deny them employment, approval as a contractor, or access to a clearance. [Dkt. 304 39-41]. The Government uses watchlist status in background investigations. *Id.* The Government also screens individuals for airport identification, including some airport employees, vendors, taxi drivers, and shuttle bus drivers, and for individuals applying for or maintaining Transportation Worker Identification Credentials. *Id.* The Government uses watchlist status to restrict military base access. [Dkt. 308-12 6].

The Government screens individuals applying for HAZMAT transportation licenses, for eligibility to attend flight school, for FAA airman certificates, and for customs seals. [Dkt. 304 39-41]. The Government screens private employees against the watchlist for the following industries: aviation, port authorities, nuclear facilities, chemical facilities, and hazardous material transportation. Private entities in these industries may have to block listees from accessing sensitive information or physical areas. *Id.* Listees who are applicants to or employees of these private entities may be ineligible for employment or specific job responsibilities with access to sensitive information or physical areas. *Id.*

The Government excludes listees from benefits administered by the Overseas Private Investment Corporation, USAID, World Trade Center Health Program, and Afghanistan Reconstruction programs. [Dkt. 308-30].

The FBI uses the watchlist to conduct background checks on individuals seeking to purchase firearms or obtain firearm licenses. GAO-05-127. The FBI imposes a mandatory 3-day waiting period for the purchase of a firearm if the purchaser is on the watchlist. *Id.* Further delays can result, taking as much as 10 months. *Id.* Some states use watchlist status to deny purchase of a firearm altogether. N.J. Stat. § 2C:58-3(c)(9). FinCen uses the watchlist to identify the financial associates of listees, and to nominate those financial associates to the watchlist. [Dkt. 308-5].

These consequences have impacted the 23 citizens in this case. Appellees have suffered severe travel-related consequences as described above in Section B. Appellees have foreign national family members whose immigration cases stalled. Al Halabi's immigration petition for his wife was delayed for more than 10 years, requiring him to move to Dubai to live with his wife. [Dkt. 305-11 37-38]. Dr. Hakmeh's immigration

petition for his wife took five years. [Dkt. 305-15 68]. Baby Doe's mother's citizenship application was delayed for more than two years. [Dkt. 305-4 23-24]. Elhady's and John Doe 4's immigration petition for their wives are still pending. [Dkt. 305-1 62; Dkt. 306-25 44].

Ahmed, who worked at Detroit Metro Airport, lost the Customs seal he needed for his job. [Dkt. 305-9 20-21]. Shibly's gun permit was delayed. [Dkt. 305-17 75].

John Doe 4 was once detained by local police, who would not allow him a phone call due to watchlist status. [Dkt. 306-25 30-31.]

F. The watchlist lacks process or rigor

The Government designates listees as "known or suspected terrorists." [Dkt. 308-12 3]. The Government uses the following inclusion standard for its watchlist: "a reasonable suspicion that the individual is engaged, has 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." *Id.* Each watchlist entry is annotated so that particular consequences are applied to listees, including "Do Not Fly." [Dkt. 299-2 6].

Various federal agencies and even foreign governments can "nominate" citizens to the watchlist by submitting identity and derogatory information about the prospective listee to TSC. [Dkt. 308-12 4].

TSC reviews nominations and decides whether to accept, reject, or modify them. *Id.* TSC may consider an individual's "race, ethnicity, or religious affiliation" as well as their "beliefs and activities protected by the First Amendment, such as freedom of speech, free exercise of religion, freedom of the press, freedom of peaceful assembly, and the freedom to petition the government for redress of grievances" as information supporting a watchlist nomination. [Dkt. 308-12 5; 306-31 79]. TSC may also consider an individual's travel history, associates, business associations, international associations, financial transactions, and study of Arabic. [Dkt. 323 5].

Although terrorism is criminally defined, 18 U.S.C. § 2331, TSC's inclusion standard does not require evidence that an individual has, is, or will engage in criminal activity. [Dkt. 323 5; Dkt. 304 17].

TSC does not notify individuals about their nominations or additions to the watchlist and will neither confirm nor deny watchlist status. [Dkt. 308-12 10]. *Id.* Listees have no opportunity to rebut the

information on which their watchlist status is based. [Dkt. 306-27 61]. The lone exception is for No Fly List American listees . [Dkt. 308-12 10]. This limited exception was judicially required. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161–63 (D. Or. 2014).

DHS TRIP is the mechanism the Government uses to satisfy Congress's instruction to create a redress system for "individuals who believe they have been delayed or prohibited from boarding a commercial aircraft;" it also applies to other travel-related (and only travel-related) difficulties. 49 U.S.C. § 44926; [Dkt. 308-12 8]. DHS TRIP inquiries which relate to the watchlist are forwarded to the TSC Redress Office. [Dkt. 308-12 9]. The TSC Redress Office then decides whether to remove the individual from the Watchlist. [Dkt. 308-12 9-10]. Unless annotated No Fly, the Government does not inform filers of either their initial watchlist status or the outcome of their filing. *Id.*

Over the last decade, TSC has handled an average of more than 373,000 requests per year to alter the watchlist, including over 113,000 requests to add names. [Dkt. 308-16 22-23]. The Government has rejected about 1,700 per year, for an acceptance rate of over 99%. *Id.*

35 employees handle these requests. *Id.*[2] Assuming each employee works 2,000 hours per year, exclusively on nominations (implausible), that would still be over five requests per employee each hour (closer to seven based on 2018 data).

And so watchlist records include misidentifications and erroneous information. [Dkt. 307-7 78]. The TSC regularly finds quality assurance problems with watchlist data. *Id.* It is normal for new information to surface that refutes or discredits the original information supporting a listee's status. [Dkt. 307-6 41]. And adverse experiences and outcomes occur during watchlist screening because individuals are misidentified as listees. [Dkt. 307-4].

The Government has never publicly identified an act of terrorism the watchlist helped prevent. *E.g.* [Dkt. 306-30 86]. The FBI knows how many acts of terrorism have been committed in the United States, and whether each perpetrator of a U.S. act of terrorism was listed on the watchlist at the time of the act. [Dkt. 306-31, 30]. FBI has never publicly identified, and there is no evidence in the record, that any terrorism

[2] Up to 90 individuals have the authority to process removals (which, unlike additions, requires two individuals to sign off). [Dkt. 306-28 96].

perpetrators were listed on the watchlist at the time they committed their crime. [Dkt. 306-31 47].

G. The District Court finds the watchlist unconstitutional

Appellees brought this case in 2016. Last year, the District Court granted Appellees summary judgment on its procedural due process claims. [Dkt. 323]. The District Court certified its liability decision for appeal while holding proceedings on the appropriate remedy. *See* [Dkt. 366]. This Court then stayed those proceedings pending appeal.

SUMMARY OF ARGUMENT

Although most of the twenty-three Appellees filed DHS TRIP inquiries, five Appellees did not. The Government suggests that those who did not cannot bring a Due Process challenge because they failed to exhaust their process. But neither Congress nor any agency has made DHS TRIP a mandatory process. And the Supreme Court has already spoken: these circumstances preclude an exhaustion requirement.

Because of the substantial effects Appellees suffer every time they cross a border or travel by plane, the watchlist implicates Appellees' movement-related rights. This includes being held from six to twelve hours after being handcuffed and detained—frequently at gunpoint—and

having their phone searched and seized. There is no border exception to the Due Process Clause for these actions. It also includes the onerous and humiliating screening the Government imposes at airports.

The watchlist also implicates Appellees' constitutional liberty rights under the stigma-plus test. The Government shares watchlist status with federal, state, foreign, and private entities. In sharing that information, the Government declares them "known or suspected terrorists." The resulting dissemination alters Appellees' legal status by making them eligible for searches, seizures, and dangerous law enforcement interactions. It also alters Appellees' legal status by making the ineligible for a host of government benefits, government jobs, licenses, and private jobs that require various forms of clearance and access.

Although Appellees have a right to procedural due process, the watchlist process does not provide it. The Constitution requires notice, but the Government provides none. The standard for inclusion is so low as to give the Government complete discretion as to who to put on the list. Individuals placed on the list are then not given any opportunity to be heard.

The District Court found the watchlist process unconstitutional. This Court should affirm.

ARGUMENT

I. *Darby's* holding means that this Court cannot require Appellees to exhaust DHS TRIP

The Government asserts (at 46-48) that this Court must dismiss the claims of five Appellees who did not file with DHS TRIP. But the Supreme Court does not allow courts to impose an exhaustion requirement on APA claims unless expressly required by statute or, if certain conditions are met, by agency rule. *Darby v. Cisneros*, 509 U.S. 137 (1993); No statute or rule requires exhaustion here. See [Dkt. 323 16-17]; *see also Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014); Crooker v. TSA, 323 F. Supp. 3d 148, 157 (D. Mass. 2018); *Kovac v. Wray*, 363 F. Supp. 3d 721, 747 (N.D. Tex. 2019).

Even if this Court overlooks *Darby*, the Court could still proceed to the merits because most Appellees have exhausted DHS TRIP, rendering this a theoretical exercise. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (court may proceed to merits if one plaintiff has standing).

The Government's reliance on *Shearson v. Holder*, 725 F.3d 588, 594 (6th Cir. 2013)—a case that does not regard an APA claim—is

misplaced. *Darby* did not preclude the Sixth Circuit's discretion to require DHS TRIP exhaustion—which they required, not as a general matter, but instead only based on the specific facts of that case. *Shearson*, 725 F.3d at 594; *see also Kovac*, 363 F. Supp. 3d at 747 (explaining *Shearson*). Here, Darby controls, and no exhaustion is required.

Nevertheless, the Government suggests (at 47) that Appellees do not suffer a due process violation until they go through the DHS TRIP process and find it inadequate. Courts have consistently rejected this argument. Instead, since administrative remedies—which regard particular outcomes rather than agency-wide processes—are always inadequate to address procedural due process challenges to those processes, such challenges are particularly immune from administrative exhaustion requirements. *See Bangura v. Hansen*, 434 F.3d 487, 494 (6th Cir. 2006) ("Exhaustion of administrative remedies may not be required in cases of non-frivolous constitutional challenges to an agency's procedures."); *see also Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (holding that appellee was not required to exhaust state administrative remedies where "the question of the adequacy of the administrative remedy ... was for all

practical purposes identical with the merits of appellees' lawsuit"); *McCray v. Burrell*, 516 F.2d 357, 365 (4th Cir. 1975) (similar).

Here, Plaintiffs squarely challenge the watchlist's inclusion standard and procedural protections, which goes beyond the DHS TRIP's inadequacies. The Government's cases, in contrast, all involve processes that were concededly adequate. For instance, in *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 437 (4th Cir. 2002), there was no allegation that the ignored processes were inadequate. *See also Mora v. Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008); *Kendall v. Balcerzak*, 650 F.3d 515, 530 (4th Cir. 2011).

II. The watchlist violates due process

When due process rights are implicated, Courts must balance "three distinct factors," i.e., "the private interest that will be affected by the official action," "the risk of an erroneous deprivation," "and finally, the Government's interest" in limiting process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). But no balancing is necessary when less than a minimal threshold of process exists. *D.B. v. Cardall*, 826 F.3d 721, 740, 743 (4th Cir. 2016).

A. The watchlist injures Appellees' travel-based liberty rights

1. The watchlist injures Appellees' travel-based liberty rights at the border

The District Court found that Appellees suffered a deprivation of liberty based on treatment at the border. [Dkt. 323 20-21]. The Court explained that "several Plaintiffs refrain from exercising their right of international travel because of the treatment they have been subjected due to their Watchlist status when attempting to fly internationally or cross the border." [Dkt. 323 20-21]. The District Court concluded that the burdens imposed by the watchlist were "unreasonable," and "actually deter travel." *Id.*; *see N.Y. v. Soto-Lopez,* 476 U.S. 898, 903 (1986) (plurality opinion) (cleaned up).

Unreasonable undersells it. The District Court's example of Elhady is a good one. [Dkt. 323 9-10, 21]. In 2014, Elhady was handcuffed at the border, then locked in a freezing cell for hours. Eventually, Elhady passed out from the cold and required hospitalization.

Elhady's experience is merely illustrative. As described above in the statement of the case (at § B), the Government has—repeatedly, not incidentally—arrested (often at gunpoint), handcuffed, and detained

Appellees for long hours in front of their family. Appellees have had their electronics and those of family members searched, seized, and copied. They have repeatedly had their travel disrupted by long and invasive secondary inspections, causing them to regularly miss connecting flights and often making travel for business, family, or religion impossible.

These consequences are unreasonable. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *Hurtado v. California*, 110 U.S. 516, 527 (1884). They are unusual. *See Minnesota Senior Fed'n v. U.S.*, 273 F.3d 805, 810 (8th Cir. 2001) (liberty interest in travel turns on whether individuals are treated equally). And they are unrelated to any right the border affords the Government.

American citizens like Appellees have an absolute right to return to the country. *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984). And the Government cannot invoke the Fourth Amendment's "border exception" based on a "generalized interest in law enforcement and combatting crime." *United States v. Kolsuz*, 890 F.3d 133, 143 (4th Cir. 2018). Instead, "the Government must have individualized suspicion of an offense that…[is] transnational." *U.S. v. Aigbekaen*, 943 F.3d 713, 721-722 (4th Cir. 2019). The Government does not claim such suspicion. Nor is there

generalized, unchecked "national security" exception to Appellee's rights. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 190 (D.D.C. 2015).

The Government claims (at 29-32) that these searches and seizures are routine, relying on *United States v. Flores Montano,* 541 U.S. 149 (2004), and *Tabbaa v. Chertoff,* 509 F.3d 89 (2d Cir. 2007).

Flores held that a delay of "one to two hours" at a land border is a "routine" search that does not require probable cause. 541 U.S. at 155 n.3. No detention was discussed. The Government's treatment of listees, involving guns, handcuffs, and searches and seizures of listees' phones, causes significantly more than a two-hour delay and is anything but routine.

Tabbaa, whose extension of *Flores* has never been adopted by this Circuit, allowed a single four-to-six-hour delay at a land border. 509 F.3d at 100. The single four-to-six-hour delay was only permitted because it was the time necessary to perform the vehicle searches, basic questioning, and identity verification necessary in that specific case. *Id.* at 100. The Court specifically disclaimed that its approval would extend to situations where the border search was "non-routine," *id.* at 100-101. And, like in *Flores*, there was no detention involved.

So *Tabbaa* only approved a single incident with an unusually long delay that resulted from routine border search elements, such as questioning, pat-downs, fingerprinting, and photographs. *Id.* at 92; *see also Mireles v. U.S.*, 2016 WL 4992026, at *9 (S.D. Tex. July 29, 2016), *report and recommendation adopted*, 2016 WL 5080448 (Sept. 15, 2016); *Arjmand v. DHS*, 2018 WL 1755428, at *6 (C.D. Cal. Feb. 9, 2018) (distinguishing *Tabbaa*). The Government (at 33) cites *United States v. Nava*, 363 F.3d 942, 945-46 (9th Cir. 2004), to claim handcuffing is routine, but that case merely said handcuffing is allowed in a detention without it rising to an arrest.

The Government separately suggests (at 37) we should ignore CBP policy because it has changed. Before January 2018, the Government suggests, it did not require any basis for searching electronic devices. But the current policy is still one where watchlist status alone justifies the search of electronics. That other individuals—but ***not*** Appellees—now have rights to avoid searches and seizures of electronic policies under CBP policy along with the Constitution—is meaningless. If anything, CBP's change in policy confirms, not casts doubt on, the alteration of legal status.

2. The watchlist injures Appellees' travel-based liberty rights at airports

As the District Court also held, "[i]nclusion in the TSDB also burdens an individual' s right to interstate travel," which "is well established as a fundamental right." [Dkt. 323 21]. "The right accords all persons the freedom to travel domestically uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro*, 394 U.S. at 629.

As described above in the statement of the case (at § B), Appellees suffer lengthy and invasive secondary screening when they fly. The process can be harrowing, humiliating, and dangerous. Given the inevitable screening, and though Appellees arrive hours earlier than recommended to catch their flights to accommodate their extraordinary screening, they still regularly miss flights and connections because of lengthy detention and onerous screening. Mark Amri was searched six times and chemically tested another four times on his way to his deposition in this case. *See also* [Dkt. 306-4 19-24]. Appellees have been physically removed from airplanes after boarding, in front of the other passengers. They have even been denied boarding altogether. As a result, several Appellees stopped flying altogether; others travel much less.

3. The watchlist's impact is constitutionally significant

"Travel abroad, like travel within the country, may be necessary for a livelihood." *Kent v. Dulles*, 357 U.S. 116, 126 (1958). "It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values." *Id.* The ability not just to travel but to travel by the normal interstate manner "without imprisonment or restraint" is protected by the Constitution. *Kerry v. Din*, 135 S. Ct 2128, 2133 (2015) (plurality opinion) (citing Blackstone and the Magna Carta). So, when infringement of the right "actually deters travel," due process must be afforded. *Soto–Lopez*, 476 U.S. at 903. When—every time you cross the border—you are handcuffed and detained six to twelve hours, or have a gun pointed at you and your family, it reasonably deters travel. And Appellees' travel has been deterred. As the District Court held, this implicates the Constitution. [Dkt. 323 20].

The "actually deters" standard the district court adopted is consistent with, if not more demanding than, this Court's and the Supreme Court's precedents. In *Zablocki v Redhail,* for example, the Supreme Court confronted a law that conditioned a person's right to marry on their ability to pay their child support obligations. 434 U.S. 374, 388 (1978).

Nowhere did the Supreme Court require proof that marriage was made impossible. Similarly, in the First Amendment context, this Court held that a "change-in-behavior" was "an extraordinary showing of injury" that was beyond what a litigant must show to demonstrate an injury-in-fact. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1088 (4th Cir. 1997).

These cases bolster the Supreme Court's on-point pronouncement in *Shapiro*. In *Shapiro,* the Supreme Court stated that the freedom to travel across the United States precluded not only laws that "restrict this movement" but also laws which "unreasonably burden" it. 394 U.S. at 629. The District Court's "actually deters" standard is an application of *Shapiro* to the facts of this case.

The Government (at 28) cites *MSF*, 273 F.3d at 810, to argue that the "actually deters travel" test was "dicta." *MSF* does reject the "actually deters" test, but only in favor of a test determining whether a citizen is "treated equally" to other citizens. *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (liberty interest in equal treatment under the law). Here, an "equal treatment" test leads to the same conclusion as an "actually deters" test. By the Government's own admission, people on the watchlist are not treated like people who are not.

The Government separately cites (at 28) *Pollack v. Duff*, 793 F.3d 34, 47 (D.C. Cir. 2015), but that case (involving a tax) merely finds that marginal costs of travel borne by all travelers does not implicate the "equal protection principle" of the Due Process clause. The Government also quotes *Matsuo v. United States,* 586 F.3d 1180, 1183 (9th Cir. 2009), as holding that "not everything" that deters travel qualifies, but *Matsuo* (a challenge to the Government's use of locality pay for federal employees) was simply referring to the Government's ability to "tax" travel. *Matsuo*, relying on *MSF*, again looked to whether the deterrence was borne equally by all people. *Id.* at 1184. Here, it is not.

The Government's remaining cases arguing against a liberty interest in travel fall into one of two buckets. In one bucket is additional challenges to airport restrictions, which again involve routine regulation of airport travel applying to everyone, rather than the targeted singling out of individuals. *E.g., Southold v. East Hampton*, 477 F.3d 38, 51-54 (2d Cir. 2007); *Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982); *see also Torraco v. PATH*, 615 F.3d 129, 132 (2d Cir. 2010) (plaintiffs only brought statutory claim).

The other bucket contains challenges to watchlists that failed to allege the extent of their delays, or where the challenger suffered only marginal delays. *E.g., Abdi v. Wray*, 942 F.3d 1019, 1031, 1032 n.3 (10th Cir. 2019); *Beydoun v. Sessions*, 871 F.3d 459, 467 (6th Cir. 2017). These cases differ as Appellees' significant and repeated delays have been established and go well beyond marginal.

B. The watchlist deprives Appellees' of their constitutionally-protected reputational interest

Relying on the "the numbers of entities who have access to [the watchlist] and the wide range of purposes for which those entities use the information," the District Court held that the watchlist deprived Appellees of their reputational interests. [Dkt. 323 22-24]. The district court applied *Paul's* stigma-plus test to the defamation-based claims, explaining that, in order to bring a constitutional action for reputational injury, a litigant must show a (1) "stigmatic statement...[that] affect[s] one's standing in the community," (2) "some type of dissemination or publication of the statement," and (3) "other government action adversely affecting the plaintiff's interests." [Dkt. 323 22]; *see also Paul*, 424 U.S. at 708-09.

1. The watchlist is stigmatizing

The Government (at 43) does not dispute that being labeled a "known or suspected terrorist" is stigmatizing, instead contending only that there is no "public disclosure" of this stigmatizing designation. The Government adopts this position for a good reason: it is self-evident that, when the government labels someone a "known or suspected terrorist," this designation "might seriously damage [their] standing and associations in his community." *State Colleges v. Roth,* 408 U.S. 564, 573 (1972). *Id.* The Government merely disputes that this stigmatizing label amounts to a disclosure under *Paul*'s stigma-plus test.

2. The watchlist's stigmatizing label is publicly disclosed and broadly disseminated to third parties

This Court has expressly rejected a "public disclosure" requirement. *Sciolino v. Newport News*, 480 F.3d 642, 650 (4th Cir. 2007). "[A] plaintiff need not allege that [stigmatizing information] has actually been disseminated." *Id.* As if responding to the Government's position advocating for such a requirement, the Fourth Circuit "reject[ed] [the] contention that a plaintiff must allege a specific instance of actual dissemination." *Id.* at 650. To sustain a reputation-based claim, it is enough for litigants to show a "likelihood that prospective employers…or the public at large"

will learn of the stigmatizing information. *Id.* This is found when the Government puts stigmatizing information in a file and it is the practice of others to "inspect the file." *Id.*; *compare with* Statement of Facts § B-E, *above*. This describes the NCIC to a T.

Here, beyond other federal agencies, the Government disseminates the watchlist to more than 60 foreign governments, to more than 500 private entities including private correctional facilities, animal shelters, the private police departments of two privately incorporated communities, data processing firms, hospitals, various pretrial services companies, and every single local, state, and tribal law enforcement entity in the country. [Dkt. 308-32.]. Thousands upon thousands of people from each of these entities are expected, as part of their course of business, to "inspect" Appellees' file and impose consequences because they are supposedly "known or suspected terrorists."

And the operation of the watchlist—imposing its distinctive consequences in public—means that the "public at large" learns about a listee's status. "[A]ny member of the general public who would actually witness a person being excluded from boarding might draw an adverse inference concerning that person's reputation." [Dkt. 323 22.] (quoting *Mohamed v.*

Holder, 2015 WL 4394958, at *6 (E.D. Va. July 16, 2015). The District Court observed that a person's watchlist status "would become known to those outside of government," including a "person's actual or prospective employer," "extended family members," as well as "members of religious, professional or social organizations." *Id.*

This observation rings true for the 23 citizens in this case. Kadura, for example, was handcuffed for four to five hours at the border within eyesight of other travelers who were "looking at [him] like this is El Chapo." [Dkt. 305-6 62]. Another time, agents made such a public spectacle while handcuffing him, a traveler filmed it. [Dkt. 305-6 44]. As the statement of the case noted (at § B), Frlujuckic (repeatedly) and John Doe 3 were handcuffed at gunpoint in front of their entire families. Al Halabi, a veteran, was handcuffed in front of his entire family. *Id.* Shibly's grandmother fainted from the sight of agents handcuffing him. *Id.* Elhady, Amri, and others were repeatedly detained and humiliated in full public view. *Id.*; *see also* [Dkt. 306-30 90] (Government's detention of listees always occurs in public view).

The watchlist's disclosure-by-consequences mechanism affects all listees. When Mr. El-Shwehdi travels across the country by land rather

than by plane to avoid detention and humiliation at the airport, when his family travels to weddings and funerals without him, his disfavored status gets disclosed to his children, his wife, his brothers and sisters, along with his friends. When Shibly and his wife debate traveling separately through an airport to shield their children from the aggressive screening and detention his watchlist status entails, his family learns of his watchlist status. [Dkt. 305-17 25, 41-42].

And particularly in the Muslim-American community, the watchlist's viral effect causes additional stigmatization. Because listees are now "known or suspected terrorists," individuals who are associated with them now also fall under the inclusion standard. *See* § D(1), *below*. Friends, family, and associates of listees can be, and often are, placed on the watchlist. To avoid being placed on the list themselves, Appellees' associates must maintain social distance. *Compare with* Restatement (Second) of Torts § 572 cmt. c (diseases are defamation per se when they have "an obvious tendency to exclude him from society, to prevent his employment in many fields and to cause him to be avoided by a good many people for a long period of time").

So several Appellees, including El-Schwehdi, Shibly, Coleman, Amri, and others, have missed business travel, vacations, and family events. *Id.*; *see also* [Dkt. 304 25, 34, 35-36, 52]. They refuse to fly with family, associates, and even their own students. *Id.* Or in Shibly's case, friends refuse to travel with him. [Dkt. 305-17 31-34]. As Coleman explained, "[i]f they're subjected to secondary along with me, that's a factor that I have to worry about, stigma for me in the community and then also their…sensitivities. Are they going to be afraid to travel with me? Are their families going to be afraid for them to travel with me? Are they going to be placed on a list?" [Dkt. 305-14 19.]

Likewise, the watchlist imposes a "likelihood that prospective employers" will learn of listees' disfavored status. In fact, Ahmed—who worked at Detroit Metro Airport—had a permission revoked by the Government that made it impossible to do his job in the manner his employer wanted. Dkt. 305-9 20-21]. His employer certainly knew that the Government assigned him a disfavored status. And though he studied criminal justice and aspires to a job in law enforcement, Elhady refrains from applying for government jobs, because he knows that agencies use the watchlist to screen "government employees and contractors" as well as

"private sector employees with transportation and infrastructure functions." [Dkt. 305-1 68; Dkt. 323 23].

All of this means that the watchlist is not like the "intra-government dissemination" the Government claims was at issue in *Asbill v. Choctaw Nation*, 726 F.2d 1499, 1503 (10th Cir. 1984), the watchlist is disseminated more broadly. And this Court rejected *Johnson v. Martin*, 943 F2d 15, 16 (7th Cir. 1991), in *Sciolino*. 480 F.3d at 649. *Estrella v. Menifee*, 275 F. Supp. 2d 452, 458 (S.D.N.Y. 2003), in contrast, is not a stigma-plus case at all.

1. **The watchlist causes a "plus" under *Paul***

To satisfy the plus prong, a party must show a "state action that distinctly alter[s] or extinguishe[s] his legal status." *Shirvinski v. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012). As the District Court held, this "state action" includes "any other government action adversely affecting the plaintiff's interests." [Dkt. 323 22] (quoting *Doe v. DPS ex rel. Lee*, 271 F. 3d 38, 55 (2d Cir. 2001), *rev'd on other grounds*, 538 U.S. 1 (2003)). The stigma-plus test is separately met when the Government deprives individuals "of a right previously existing under state law or the U.S.

Constitution." *Tebo v. Tebo*, 550 F.3d 492, 504 (5th Cir. 2008); *see Clark v. Township of Falls*, 890 F.2d 611, 619 (3d Cir. 1989) (similar).

Here, the plus factor is met in three separate ways.

a. There is a plus, because watchlist takes away listees' constitutional rights

The facts show that the Government's decision to assign Appellees a watchlist status and annotate it in various ways means that they will be subject to consistent searches, seizures, and humiliating screenings. Appellees are also now subject to search, seizure, and downloading of electronic devices at the border. CBP Directive 3340-049A § 5.1.4; *see also Tebo*, 550 F.3d at 504 (loss of constitutional right qualifies); *Clark*, 890 F.2d at 619 (same).

As Section A above explained, the watchlist has taken away, among other rights, the right to avoid search and seizure of their cell phones absent reasonable suspicion, *Kolsuz*, 890 F.3d at 143; *see also* CBP Directive 3340-049A § 5.1.4, to avoid travel burdens except on equal terms of any other citizen, *MSF*, 273 F.3d at 810, and to avoid unreasonably long or intrusive detentions at the border, *United States v. Montoya de Hernandez*, 473 U.S. 531, 543 (1985). These changes to Appellees' rights qualify as a plus, even if the Court finds they do not rise to the level of a

movement-related right deprivation. *Tebo*, 550 F.3d at 504 (loss of constitutional right qualifies); *Clark*, 890 F.2d at 619 (same).

b. The watchlist alters Appellees' legal status by excluding listees from various government benefits, jobs, and licenses

Even beyond the loss of constitutional rights, the extent of "other government action" is omnipresent. The watchlist inflicts an array of legal consequences that separately and in the aggregate amount to a change in legal status. Those legal consequences include exclusion from the following: certain types of government and private employment, HAZMAT licenses, PreCheck and Global Entry status, custom seals, entry to military bases and certain parts of airports, Transportation Worker Identification Credentials, flight school, and the ability to buy a gun in some places. It delays and may block entirely security clearances and gun permits. It impedes access to the financial system. *E.g.*, [Dkt. 308-5]. And it delays and may block access to immigration benefits.

Appellees have suffered due to these changes in legal status. As discussed above in Section E of the Statement of Facts, Elhady and John Doe 4 submitted still-pending immigration application for their wives that will continue to be delayed and subject to a disfavored process

because of the watchlist. The Government delayed Halabi's wife's immigration petition for more than 10 years, forcing the couple to live outside the United States for many years. Similarly, the citizenship applications for Baby Doe's mother and Dr. Hakmeh's wife were delayed years because of their status on the watchlist. Shibly's gun permit was delayed.

Even if Appellees had not suffered these specific consequences, they would still satisfy the plus prong. The test for determining constitutional injury requires a stigmatizing dissemination and a change in legal status. It does not require a stigmatizing dissemination, change in legal status, and then additional injury resulting from the change in legal status. *See Resistance of Iran v. Dept. of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (allegation that organization's bank accounts now at risk of cancellation or revocation enough); *see also Sciolino*, 480 F.3d at 650 (actual dissemination not required). Because the array of exclusions, limitations, and segregated processes the Government imposes on listees, their watchlist designation amounts to a change in Appellee's legal status.

c. Watchlist status causes "other government action adversely affecting the plaintiff's interests"

While the loss of one's constitutional rights, as well as one's legal entitlement to seek government jobs, benefits, and licenses, qualify as "other government action adversely affecting the plaintiff's interest," it is enough for Appellees to show an "indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." *Doe*, 271 F. 3d at 55; *see also Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 688 n.14 (4th Cir. 2000). ("defamatory statements" are "actionable" when "accompanied by a harm to a more tangible interest").

The "other government action" is simply "non-trivial state involvement that removes the plaintiff's complaint from the realm of traditional state-law defamation." *Doe,* 271 F. 3d at 55. There is no "threshold of substantiality" requirement." *Id.* As the Supreme Court put it in *Siegert,* the plus must be something beyond "damage flow[ing] from injury caused by the defendant to a plaintiff's reputation." *Siegert v. Gilley,* 500 U.S. 226, 234 (1991). Here, Appellees easily meet this standard.

As the District Court explained, the watchlist's dissemination "triggers an understandable response by law enforcement in even the most routine encounters," which "substantially increases the risk faced" by the listee. [Dkt. 323 24].

Listees get screened at the airport, detained at the border, and held up during traffic stops. When the Government transmits watchlist information to law enforcement in dealing with a listee, for example, TSC guidance requires state and local officers to "immediately request back-up units" and "use extreme caution when approaching and conversing with the individual." [Dkt. 308-6 2-3]. Officers are warned of "the possible presence of, or materials for constructing, explosives, weapons, and weapons of mass destruction." Increasing the potential for tragedy, when some listees attempt to cross the border, border agents receive notice that Appellees are "armed and dangerous." [Dkt. 306-30 36-37, 59, 64-66]. The predictable result is that weapons are drawn. *Id.*; *see also* Statement of the Case, § B, *above*. This state action is exactly of the kind the Supreme Court had in mind in *Paul* where it established the "plus" prong to prevent the due process clause from becoming a "font of tort law." *Paul*, 424 U.S. at 701.

d. The Government's arguments misstate the stigma-plus test as well as the record in this case

The Government (at 41) makes the argument that Appellees cannot rely on change of status alone because they seek a "post-deprivation remedy," and the district court only afforded one. This is wrong on both counts. Appellees challenge the whole watchlist system. [Dkt. 304 63-68]. The District Court was not using the phrase "post-deprivation" remedy to mean when a concrete injury occurred. It instead used "deprivation" to identify when Appellees were placed on the watchlist [Dkt. 323 28-29] (comparing pre-deprivation period under Foreign Terrorist Organization designation as when entity is "under consideration for designation") (citation omitted). The District Court also noted that "[t]he vagueness of the standard for inclusion [on the watchlist], coupled with the lack of any meaningful restraint on what constitutes grounds for placement … is precisely what offends the Due Process Clause." [Dkt. 323 26]. A remedy aimed at imposing a constitutionally-permissible inclusion standard is certainly not a "post-deprivation remedy." And, as this interlocutory appeal illustrates, the scope of the remedy is a different question from whether Appellees suffered a constitutional injury anyway.

The Government separately argues (at 41-42) that the watchlist does not change any status because the various things watchlist status allows government and third parties to do does not require it. This is wrong because the watchlist is itself a change of status. But it is also wrong because prosecutorial discretion always exists. Prior to being placed on a watchlist, Appellees had, among other rights, the right to avoid search and seizure of their cell phones absent reasonable suspicion, *Kolsuz*, 890 F.3d at 143, to avoid enhanced secondary screening except on equal terms of any other citizen, *MSF*, 273 F.3d at 810; *see also Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 489 (1st Cir. 1979), and the ability to seek occupational licenses, employment, and entry on to military bases on equal footing of others, *Rodriguez*, *id.* Eliminating those rights at the discretion of the Government is precisely what offends the Constitution. *Phillips v. Vandygriff*, 711 F.2d 1217, 1226–27 (5th Cir. 1983), *on reh'g in part*,724 F.2d 490 (1984); *see also Kamenesh v. City of Miami*, 772 F. Supp. 583, 587 (S.D. Fla. 1991) (change in employment status from entitled to discretionary is an alteration in legal status).

The Government's argument of a mandatory consequence beyond watchlist placement itself focuses on language in *Abdi*. *Abdi* asserts in a

footnote that there must be "mandated" action on another party. 942 F.3d at 1034 n.4. *Abdi* describes this requirement as coming from *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), but that case says nothing about such a requirement. *Abdi* instead seems merely be referencing the "alteration of legal status" test that *Paul* derives from *Constantineau*. *See* 942 F.3d at 1033. To the extent that *Abdi* was making a broader claim, this Court should not adopt a test based solely on an unsupported footnote, in dicta, of a case from another circuit, who's legal or policy basis remains unexplained.

The Government's purported requirement of mandatory consequences is also contrary to the rule that the plus test is met whenever change in status has resulted "as a practical matter." *Humphries v. L.A.*, 554 F.3d 1170, 1188 (9th Cir. 2009), *as amended* (Jan. 30, 2009), *rev'd on other grounds*, 562 U.S. 29 (2010); *see Ridpath v. Marshall U.*, 447 F.3d 292, 314 (4th Cir. 2006) ("effectively excluded" enough); *Cannon v. Bald Head Island*, 891 F.3d 489, 502 (4th Cir. 2018) (suggesting "effectively excluded" unnecessary and applying a restricted-future-opportunities standard); *see also Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (fact that statute did not bar employment did not eliminate liberty injury

given practical results and risks created by list placement). Here, the record shows that regardless of whether the Government uses mandatory language in its external guidance for watchlist consequences, it treats these consequences as mandatory as a practical matter. Frljuckic and Al Halabi were told as much by Government officials. [Dkt. 305-11 23; Dkt. 306 86].

Finally, even if the Government was right that mandatory consequences are necessary, the record shows the watchlist indeed imposes mandatory consequences. For instance, state law enforcement's escalation of encounters with listees is "required." [Dkt. 308-6 2-3]. CBP prohibits listees from learning about electronic searches performed on their devices. CBP Directive 3340-049A § 5.4.2.5. Some states bar listees from purchasing firearms. *See* N.J. Stat. § 2C:58-3(c)(9). And the Government has conceded that watchlist placement "may result in ***ineligibility*** for certain access or certain positions or denial of benefits." [Dkt. 308-30] (emphasis added).

C. The lack of process alone renders the watchlist unconstitutional

Once the threshold of a constitutional right has been identified, there are certain "basic requirements" that are minimally required of any

process for it to be constitutionally legitimate. *D.B.*, 826 F.3d at 743. These include "notice of the reasons for the deprivation, an explanation of the evidence against him, and an opportunity to present his side of the story." *Id.* (citation omitted) (cleaned up). The "three-factor framework established in *Mathews*" only applies in the first instance when those basic requirements are met, and additional process is sought. *Id.*

As the District Court held, the watchlist fails to provide these basic requirements, and the Government's process fails the *Mathews* balancing test. [Dkt. 323 17-30].

The Government also suggests (at 52-53) that national security can be waved as a talisman to dispense with the due process requirements of notice or a hearing. But none of their three cases stand for such a bold proposition. *Jifry v. FAA*, 370 F.3d 1174, 1184 (D.C. Cir. 2004), relying heavily on the lack of due process rights of aliens with insubstantial contacts to the United States, found that a process that gave notice, a determination before a neutral arbiter, and judicial review satisfied due process. The D.C. Circuit has since clarified that *Jifry* only applies to "emergency" situations that "imminently threaten life or physical property." *Sorenson Commun. Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

Global Relief Foundation v. O'Neill excused pre-deprivation notice and hearing because of national security issues but did so by relying on the existence of a post-deprivation process. 315 F.3d 748, 754 (7th Cir. 2002), And *In re NSA Telecomm. Records Litig.* only permitted the Court—based on a particularized, not blanket, determination by the Attorney General himself—to allow in camera disclosure of certain limited evidence in an otherwise normal judicial proceeding. 671 F.3d 881, 901 (9th Cir. 2011). The decision presumes many hallmarks of judicial review that the watchlist lacks.

D. The risk of error is tremendous

The District Court also correctly found that the risk of erroneous deprivation to be "high," and that "the currently existing procedural safeguards are not sufficient to address that risk." [Dkt. 323 27].

The "nature of the relevant inquiry" is "central to the evaluation of any administrative process" aimed at determining that scheme's risk of erroneous deprivation. *Mathews*, 424 U.S. at 343.

An administrative inquiry that is "sharply focused and easily documented" will have a lower risk of erroneous deprivation than an inquiry that regards a "wide variety of information" and which raises issues of

"witness credibility and veracity." *Mathews*, 424 U.S. at 343-44. Determinations that, by their nature, are "fact specific" present a "grave risk of erroneous deprivation," requiring more process. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 395 (4th Cir. 1990).

1. The inclusion standard is unconstitutional

The reason for the impermissibly high risk of erroneous application starts with the inclusion standard, which is the antithesis of "sharply focused." An individual may be added to the watchlist when the Government "reasonably suspects" that one has acted "in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities." [Dkt. 323 4, 25-26]. *Mohamed* described this standard as a "reasonable suspicion based on a reasonable suspicion standard." *Mohamed*, 995 F. Supp. 2d at 532. "It is not difficult to imagine completely innocent conduct serving as the starting point for a string of subjective, speculative inferences that result in a person's inclusion." *Id.* The inclusion standard is unmoored from actual criminal conduct, because it requires a "reasonable suspicion" that an individual be "related to" or "in aid" of terrorism, which does not show the person is suspected of "unlawful conduct" in any way. *Mohamed*, 995 F. Supp. 2d at 531.

"This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). A standardless test is no more permissible to deprive a liberty right as it is for determining criminal guilt. *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 714 (D. Idaho 2016) (applying *Smith* in context of a *Mathews* challenge to agency action).

Nor do clarifying regulations make the standard workable. Instead, the Government's clarifications just provide itself with more discretion. The Government may consider an individual's "race, ethnicity, or religious affiliation" as well as their "beliefs and activities protected by the First Amendment, such as freedom of speech, free exercise of religion, freedom of the press, freedom of peaceful assembly, and the freedom to petition the government for redress of grievances." [Dkt. 308-12 5; Dkt. 306-31 79]. The Government may also "consider an individual's travel history, associates, business associations, international associations, financial transactions, and study of Arabic as information supporting a nomination to the TSDB." [Dkt. 323 5]. The lack of any meaningful restraint on what constitutes grounds for placement is fatal to the watchlist's viability.

Once a person meets this broad standard, they are classified as a "known or suspected" terrorist, even though they are not suspected of any crime. [Dkt. 308-12 3]; *compare with* 18 U.S.C. Ch. 113B ("Terrorism"). So individuals they associate with now may also now be fairly said to have "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." This can spread throughout the local community. *See* Christopher Mathias, et al., *The City That Bears The Brunt Of The National Terror Watchlist*, Huffington Post, Oct. 3, 2017.[3]

Even if the Government applied a real *Terry*-style "reasonable suspicion" standard, that standard would be inadequate. *Terry* "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." *Montoya de Hernandez*, 473 U.S. at 541(discussing *Terry*). The watchlist, in contrast, has far-reaching and substantial effects. While *Montoya de Hernandez* allowed a more invasive search at the border, this was due only to the facts and circumstances of the individual case. *Id.* at

[3] https://www.huffpost.com/entry/dearborn-michigan-terror-watchlist_n_59d27114e4b06791bb122cfe.

544 (the "length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country"). Here, the detention and other deprivations of liberty are systematic.

The "reasonable suspicion" test as applied to border detentions also requires a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981), *quoted in part by Montoya de Hernandez*, 473 U.S. at 541. Yet the Government's inclusion standard only requires that reasonable suspicion that an individual is "engaged in conduct constituting, in preparation for, in and of or related to terrorism and terrorist activities." Being engaged in conduct "related to terrorism" goes far beyond criminal conduct. So it cannot be justified, even at the border, by *Cortez* and *Montoya de Hernandez*. And there is neither a "particularized" showing of that suspicion for individuals in practice nor an appropriate tailoring of the intrusion to the individual situation of each defendant.

"[D]ue process places a heightened burden of proof on the State in civil proceedings in which the "individual interests at stake ... are both 'particularly important' and 'more substantial than mere loss of money.'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v.*

Kramer, 455 U.S. 745, 756 (1982)). "[T]he risk of erroneous deprivation of a fundamental right may not be placed on the individual." *Tijani v. Willis*, 430 F.3d 1241, 1245 (9th Cir. 2005). As explained in *Addington v. Texas*, 441 U.S. 418, 423-24 (1979), due process is satisfied in purely monetary cases by a preponderance standard, is "protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment" in criminal cases, and is satisfied by an "intermediate standard" such as "clear and convincing" is appropriate to safeguard those rights that fall in between. Reasonable suspicion—especially here when it acts as no standard at all—does not cut it.

The Government claims (at 53) that the Ninth Circuit in *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), recently upheld "similar criteria" under the No Fly List. Although *Kashem* was wrongly decided, that case involved a very different standard. The No Fly List standard requires the reasonable suspicion to be that the individual is reasonably suspected of being a threat to violate 18 U.S.C. § 2331(1) or (5) by committing "an act of terrorism." In contrast, the watchlist standard requires reasonable suspicion that an individual is "engaging in, has engaged in, or intends to engage in conduct constituting, in preparation for, in aid of, or related

to terrorism and /or terrorist activities." Terrorism is not a defined or limited term. Even if it were limited to mean acts criminalized by 18 U.S.C. § 2331(1) or (5), "aid of" or "related to" is so broad to cover almost any (and particularly innocent) conduct. *See Mohamed,* 995 F. Supp. 2d at 532 (innocent charitable donations, study or reporting of terrorist activities, membership in a lawful social or religious organization, and even the study of Arabic fits covered under the standard).

2. The Government's internal processing is inadequate

The Government claimed below that nominations were the result of "highly individualized assessments." [Dkt. 311 41]. In truth, as explained above in the statement of the case (at § F), such assessments take place at least a rate of five per hour (seven in 2018). The real rate is probably much higher.

The quantitative data available confirms the process is irredeemably riddled with errors. Either despite or because of the minimal levels of resources put into the nomination and review process, the default position of the government is simply to accept all nominations. As a result, for the last decade, TSC has accepted over 99% or more of the hundreds of thousands of watchlist nominations it receives each year. [Dkt. 308-16

23]. A 99% approval rate shows there is an essentially non-rebuttable presumption of placement that does not constitute review adequate required by due process. *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1104 (S.D. Tex. 2017) (99 percent rejection of bail adjustment claims show process is unconstitutionally "futile"); *cf. Ford v. Quarantillo*, 142 F. Supp. 2d 585, 587 (D.N.J. 2001) ("Due process cannot be satisfied by 'rubber stamp' denials"); *Minney v. OPM*, 130 F. Supp. 3d 225, 234 (D.D.C. 2015) ("predetermined outcome" does not constitute due process).

The Government's tale of a well-safeguarded and accurate nomination and review policy flies in the face of the facts described in *Ibrahim v. DHS*, 912 F.3d 1147 (9th Cir. 2019). There, the Ninth Circuit explained a decade of the Government defending a series of errors that would be comical if not tragic, where an FBI agent accidentally nominated a Stanford graduate student who indisputably was not a security risk for a No Fly List, and then repeatedly kept re-adding her and her daughter to the list each time the error was caught and one of them removed. *Id.* at 1164; *see also Latif v. Holder*, 28 F. Supp. 3d 1134, 1155-56 (D. Or. 2014). The Government's evidence-free assurances about the safeguards in their system are simply inconsistent with the facts in *Ibrahim*.

Nor does it appear the Government's rigorous process includes any effective way to incorporate new information about its nominations. The evidence instead shows that every time Appellees triggered detention, interrogation, or secondary inspection, the failure to find a threat to national security in any way had no subsequent effect on their watchlist status. The very next time they crossed a border or tried to board an airplane, the Government subjected them to the same conduct. *See* [Dkt. 304 23, 31, 33, 36-37; Dkt. 313 10, 12, 16-26, 28, 31-35] (showing that Appellees' experiences were repeated and regular rather than one off). So, by the fifth time in a row Frljuckic was arrested at gunpoint while crossing a border, [Dkt. 299 31], the Government should have learned from his previous four detentions. Yet, instead of attempting to correct the problem each time it occurred, the Government told Frljuckic he could make a "u-turn" and expect to receive the same treatment yet again. [Dkt. 306 86].

3. **There is no notice or opportunity to be heard**

DHS TRIP is, at best, a black box; and few of Appellees' complaints resulted in meaningful changes to their treatment. Instead, the only successful effort appears to have been through suing in court. [Dkt. 313 9,

13-14, 16-20; 23, 34, 38]. After that, as the Government itself asserts, some Appellees' watchlist-related travel problems went away. [Dkt. 299 19-25, 27-28, 34, 36]; *see also Tarhuni v. Sessions*, 2018 WL 3614192 (D. Or. July 27, 2018) (same in that case). But filing lawsuits against the watchlist should not be required for the Government to alter an innocent person's watchlist status. *See Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018) (removal from No Fly List after filing suit does not moot challenge constitutional challenge to the watchlist system).

The DHS TRIP process is inadequate for many reasons Even after filing, listees are never told that they are on the watchlist, nor are they told the factual basis for their inclusion. [Dkt. 308-12 10]. They have no access to evidence or ability to question witnesses. Nor does anything in the DHS TRIP process require the Government to consider exculpatory information. Nor is there a neutral arbiter.

Likewise, the DHS TRIP process is inadequate because an individual cannot invoke it without first suffering a travel-related harm. But, as noted above in the statement of the case and at Section E, watchlist status imposes a wide range of non-travel deprivations, including employment, credentialing, immigration, gun ownership, associational, law-

enforcement, and electronic property-based harms. This does not meet the minimum requirements of due process. *D.B.*, 826 F.3d at 743.

The Government asserts (at 53) that it "does not argue that a person's alleged placement on the TSDB is immune from judicial review, which would provide the kind of independent review the district court erroneously thought was lacking." But how is that review created, except by lawsuits against watchlist? The Government cannot create subject-matter jurisdiction by consent. And absent a final order—which is never provided by the Government—there can be no review under either the APA or its TSA equivalent, 49 U.S.C. § 46110 *See* 5 U.S. Code § 704 (action only judicially reviewable if it is "final agency action" or review is otherwise provided by statute); *see also Foster v. EPA*, 2015 WL 5786771, at *6 (S.D.W. Va. Sept. 30, 2015) (noting that no court has ever held that post-deprivation review under the APA alone is enough to satisfy due process).

Yet the Government does not even suggest what the path for judicial review might be. After all, this is an appeal from grant of summary judgment, years into this case, and the Government is still describing watchlist status as "alleged."

E. The Government has limited interest in an ineffective watchlist not legislatively enacted

The third *Mathews* factor is the Government's interest, not in regulating conduct itself, but in limiting additional process. 424 U.S. at 335. As the District Court found, whatever interest the Government has here is insufficient to justify the watchlist's lack of process. [Dkt. 323 27-30].

The Government argues that it should be given endless deference to infringe Appellees' rights because of its important interest in stopping terrorism. Appellees do not dispute that stopping terrorism is an important Government interest. But given the error rate, the consequences, and the lack of operational effectiveness, the watchlist, the Government's processes for nominating and removing individuals from the watchlist, the Government's policies for imposing adverse consequences on listees, and the utter lack of redress including notice or hearings regarding watchlist status are not reasonably calculated to meet any anti-terrorism goal.

As noted above in the statement of the case, the Government does not dispute that it cannot point to any evidence that the watchlist has stopped a terrorist attack or was otherwise effective at combating terrorism. As the Government admits, it has never "publicly identified a

perpetrator of a U.S. act of terrorism as having been listed on the TSDB at the time of the act." [Dkt. 306-31 47]. And the Government has put nothing in the record to suggest that placement on the watchlist operates any better than random selection in identifying perpetrators of or preventing acts of terrorism, even though Appellees have requested the data which would confirm or deny this conclusion and have shown this conclusion would be easily determinable based on information in the Government's possession. [Dkt. 253; Dkt. 253-1; Dkt. 313 6]. Any interest the Government would have in using a watchlist to monitor potential terrorists is, in fact, undermined by the high risk of erroneous deprivations. *Humphries*, 554 F.3d at 1194 (although government may have a compelling interest in general, it cannot have a compelling interest in a process for furthering that goal when the process constitutes a high risk of error).

The Government suggests (at 51-52) that national security gives them infinite deference, rendering due process or judicial review unnecessary. But *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010), made clear that the Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to

secure the protection that the Constitution grants to individuals."[4] And such deference is particularly unwarranted here in the absence of any Congressional authorization for the watchlist in the first place. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

"[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role." *HLP*, 561 U.S. at 34. Yet, by creating a watchlist with far-ranging consequences, without even acknowledging to those individuals they are on the watchlist, much less providing them with judicial review, that is exactly what the Government is asking this Court to do.

And without unlimited deference, the Government's watchlist does not pass constitutional muster. How could it? The harm to Appellees and others on the list is enormous and omnipresent. There is neither process nor rigor in placement. And the Government has provided nothing supporting a need for such a list—not a success story, not any analysis, not even Congressional instruction—other than a demand to be trusted.

[4] *Rahman v. Chertoff*, 530 F.3d 622, 627–28 (7th Cir. 2008), cited by the Government, is a case about class certification, with little relevance to the merits here.

Constitutional rights should not rest on mere trust. The watchlist is unconstitutional.

CONCLUSION

The Court should affirm the district court's opinion. It should also make clear that no remedy will be sufficient without providing meaningful notice and opportunity to be heard by a neutral arbiter, based on a standard that is concrete and tied solely to specific criminal conduct.

APPELLEES REQUEST ORAL ARGUMENT.

Respectfully submitted,

Date: May 26, 2020

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