

NO. 20-1119, 20-1311

**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

**BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF
PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT
COURT**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

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Muslim Advocates

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1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
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If yes, identify all parent corporations, including all generations of parent corporations:
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If yes, identify entity and nature of interest:
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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/ Matthew W. Callahan

Date: June 2, 2020

Counsel for: Muslim Advocates

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus curiae **Muslim Advocates**, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

Muslim Advocates files this brief with the consent of all parties.

RULE 29(a)(4)(E) STATEMENT

This Brief was drafted in whole by *amicus curiae* Muslim Advocates; no counsel to any party to the present case contributed to the drafting of this Brief. No party to the present case, nor any counsel to any party to the present case, contributed money to fund the preparation and submission of this Brief. No person, other than *amicus curiae* Muslim Advocates, contributed money intended to fund the preparation and submission of this Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's terrorist watchlists are a source of constant fear for the Muslim community. The government's terrorist watchlists create a secret and separate society of individuals who are harassed, mistreated, and targeted for special investigation—all without notice or a meaningful chance to challenge the evidence against them. A great deal of evidence, both statistical and anecdotal, reveals the majority of the individuals targeted by these watchlists are Muslim. This targeting disrupts the lives of countless innocent Muslims who are targeted for nothing more than exercising their constitutional right to the freedom of exercise.

Unfortunately, this is not the first time in history that a community has experienced this. Time and again, the government has attempted to suppress the rights of disfavored groups. The courts have often served as the last line of defense against these attempts. This Court must once again rise to that challenge and affirm the decisions of the district court.

ARGUMENT

I. The terrorist watchlists, as currently constituted, terrorize the Muslim community.

The government may not admit it, but the fact that the government's terrorist watchlists are made up mostly of Muslims is an open secret. U.S. Customs & Border Protection ("CBP") has not released data about the actual or perceived religious affiliation of individuals selected for Secondary Screening, but

considerable evidence shows that CBP agents have a long history of engaging in unlawful religious profiling against travelers they perceive to be Muslim. For example, a January 2017 survey of more than 3,500 individuals, including 800 Muslims, found that Muslims are more than twice as likely as the general public to be stopped at the border for Secondary Screening and extra scrutiny.¹ Survey participants were asked, “Were you stopped at any time in the past year by US border officials for additional questioning upon your return from international travel?” In response, 30% of Muslims reported being selected for additional questioning, compared to 12% of non-Muslims. The difference between the responses of Muslim and non-Muslim respondents is statistically significant.

In the same survey, nearly 70% of Muslims interviewed reported that their appearance easily identified them as Muslim at the time they were stopped.² Upon information and belief, CBP agents use indicators, such as country of origin, name, perceived ethnicity, and/or religious garb, to identify travelers they perceive to be Muslim. A 2017 Pew Research Center phone survey of a representative sample of 1,001 American Muslims found that nearly one in five U.S. Muslims (18% of

¹ See Dalia Mogahad & Youssef Chouhoud, *American Muslim Poll 2017: Muslims At The Crossroads* 13-14, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING (2017), <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf>.

² *Id.* at 13.

those surveyed) responded “yes” when asked if they had experienced being “singled out by airport security because you are a Muslim” during the previous year.³ The rate at which travelers perceived to be Muslim are selected for Secondary Screening cannot be explained by CBP’s policy of randomly selecting certain travelers for heightened screening. Muslims make up approximately 1% of the American population, yet represent a far greater percentage of individuals who are required to undergo Secondary Screening.

This disproportionate targeting of the Muslim community imposes great costs on Muslim travelers, including emotional and physical distress, stigma, and lost time. U.S. Customs and Border Protection (“CBP”) agents have subjected Muslims from all walks of life to this religious profiling, including people as diverse as a NASA scientist;⁴ an acclaimed composer;⁵ a National Public Radio

³ Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream: Findings from Pew Research Center’s 2017 Survey of U.S. Muslims* 13, 76, 172 (July 26, 2017), <http://www.pewforum.org/wp-content/uploads/sites/7/2017/07/U.S.-MUSLIMS-FULL-REPORT-with-population-update-v2.pdf>.

⁴ Maria Gallucci, *NASA Scientist Born in U.S. Says Border Agents Made Him Turn Over His Phone and Pin Code*, MASHABLE (Feb. 12, 2017), <https://mashable.com/2017/02/12/nasa-scientist-detained-at-houston-airport/>.

⁵ Charlotte England, *American Muslim Composer Detained for Hours at New York Airport After Trip to UK*, INDEPENDENT (Apr. 29, 2017), <https://www.independent.co.uk/news/world/americas/american-composer-mohammed-fairouz-detained-us-airport-a7708761.html>.

journalist;⁶ a combat veteran NYPD officer;⁷ the son of famous American boxer Muhammad Ali;⁸ the family of an Afghan citizen who was granted a visa because of his ten years of work in support of the U.S. military efforts in Afghanistan;⁹ and two doctors from Canada attempting to bring their three children through the U.S. border to visit Disneyland.¹⁰

Discriminatory treatment during air travel is so common for Muslims that, on social media, travelers share stories of such discrimination under the hashtag “#flyingwhileMuslim.”¹¹ A 2009 report produced by Muslim Advocates describes

⁶ Harrison Jacobs, *American Muslim Reporter Describes “Dehumanizing” Treatment at US Border*, BUSINESS INSIDER (Sept. 24, 2013), <https://www.businessinsider.com/sarah-aburrahman-detained-at-us-border-2013-9>.

⁷ Nicholas Kulish, *Police Officer, Combat Veteran, Muslim and J.F.K. Detainee*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/nyregion/muslim-police-officer-combat-vet-and-detained-without-explanation.html>.

⁸ Danielle Lerner, *Muhammad Ali Jr. Questioned by Immigration Officials at Florida Airport*, COURIER JOURNAL (Feb. 25, 2017), <https://www.courier-journal.com/story/news/2017/02/24/muhammad-ali-jr-detained-immigration-fla-airport/98376180/>.

⁹ Jennifer Medina, *U.S. Frees Visa-Holding Afghan Family It Detained for 4 Days*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/afghan-family-visa-immigration-detention.html>.

¹⁰ Nicholas Keung, *Disney Vacation Turns to Nightmare for Mississauga Family*, TORONTO STAR (Mar. 3, 2015), <https://www.thestar.com/news/immigration/2015/03/03/disney-vacation-turns-to-nightmare-for-mississauga-family.html>.

¹¹ See, e.g., Sarah Amy Harvard (@amyharvard_), TWITTER (Dec. 21, 2016, 12:17 PM), https://twitter.com/amyharvard_/status/811666824530104320 (listing 26 different news stories about Muslims getting searched or kicked off of flights for

specific examples of discriminatory treatment against Muslims at the border. The report, *Unreasonable Intrusions: Investigating the Politics, Faith, & Finances of Americans Returning Home*,¹² documented dozens of cases where Muslim travelers were searched, interrogated about their political beliefs, religious activities, lawful associations, and private business or financial information, and had their electronic devices seized by CBP agents—all without any evidence, or even suspicion, of wrongdoing.

For example, upon driving across the U.S.-Canada border on a road trip from Connecticut to Michigan, “Munir,” a well-respected Arab-American community leader from the Detroit area, was forcefully dragged from and thrown against his car, handcuffed, and separated from his wife and their young children. Munir was detained for over four hours, during which he was aggressively interrogated about his work, his political activities, his country of origin, and his ethnicity. Munir asked

innocuous behavior); Maysoon Zayid (@maysoonzayid), TWITTER (Mar. 7, 2018, 7:25 AM), <https://twitter.com/maysoonzayid/status/971406410138472448>; Namira Islam (@namirari), TWITTER (July 13, 2017, 6:40 AM), <https://twitter.com/namirari/status/885494216440328194>.

¹² Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home* (Apr. 2009), https://www.muslimadvocates.org/files/Unreasonable_Intrusions_2009.pdf. Note that this report was filed by co-counsel in this case.

to call his lawyer, but CBP agents denied him access to counsel. Officers confiscated his cell phone and his laptop.

Similarly, CBP agents detained “Malik,” a 61-year-old U.S. citizen, when he flew from Canada to Texas. Agents seized three flash drives and searched his laptop. These devices contained correspondence relating to Malik’s political and religious activities, as well as business information. Agents interrogated Malik about his faith, asking questions such as, “What’s your religion?” and “How often do you pray?” This conduct has continued to the present day.¹³ For example, in March 2017, NBC profiled 25 individuals who experienced in-depth searches of their cellular phones

¹³ See, e.g., *New York-Based Designer Karim Rashid Held at JFK Airport by US Border Entry*, ARCH2O, <https://www.arch2o.com/new-york-based-designer-karim-rashid-held-jfk-airport-us-border-entry/> (last visited Feb. 12, 2019); Eric Kiefer, *Muslims Profiled at Newark Airport Felt Like “Animals”*: Group, NEWARK PATCH (June 11, 2018), <https://patch.com/new-jersey/newarknj/muslims-profiled-newark-airport-felt-animals-zoo-cair>; Lubana Adi, *My Phone Was Searched at LAX, Which Apparently is the New Normal*, L.A. TIMES (Apr. 7, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-adi-fourth-amendment-airport-cellphone-search-20170407-story.html>; Ashifa Kassam, *Afghan-Canadian Doctor Detained at U.S. Border and Asked About “Tribal Chief,”* GUARDIAN (Mar. 1, 2017), <https://www.theguardian.com/world/2017/mar/01/canada-doctor-sardar-ahmad-us-border-detained>; Murtaza Hussain, *Complaints Describe Border Agents Interrogating Muslim Americans, Asking for Social Media Accounts*, INTERCEPT (Jan. 14, 2017), <https://theintercept.com/2017/01/14/complaints-describes-border-agents-interrogating-muslim-americans-asking-for-social-media-accounts>.

at the border.¹⁴ Some had also been questioned about their religion and ethnic background. Of those 25 travelers, 23 were Muslim.

Because of this discriminatory watchlisting, Muslims are forced to live with the stigma of knowing that simply by virtue of their religious identity and affiliation, they are more likely to be subjected to discriminatory treatment at the hands of federal officials. Many Muslims have also come to expect that, on any given trip, they could be selected for additional screening and subjected to invasive and improper interrogation and search, for no reason other than their faith, and they are compelled to budget additional hours of time each time they travel to ensure they account for this elevated risk.

II. Fear of terrorism does not justify the deprivation of fundamental rights.

Unfortunately, minorities in the United States have faced similar discrimination in the past. Fear is a powerful motivator for stripping individuals indiscriminately of basic liberties—particularly those individuals who seem similar to those we fear. Our nation has experienced such fear-driven deprivations of civil liberties throughout its history – and each time history has judged it harshly.

¹⁴ Cynthia McFadden et al., *American Citizens: U.S. Border Agents Can Search Your Cellphone*, NBC NEWS (Mar. 13, 2017), <https://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>.

Shortly after the birth of the United States, Congress passed the Alien and Sedition Acts – laws aimed primarily at an unpopular immigrant community “to criminalize unpopular and unpatriotic actions,” William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U.L. Rev. 1, 16 & nn. 99-104 (Oct. 2000). These laws expired in 1801, and Thomas Jefferson pardoned the dozens of individuals who had been imprisoned for sedition – but the Acts are widely recognized as having unconstitutionally deprived people of their rights under the First Amendment. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (discussing the “broad consensus” that the Sedition Act was unconstitutional).

Unfortunately there have been far too many such episodes since 1801, where fear has resulted in the deprivation of basic rights in violation of the Constitution. The 19th Century experienced the Know Nothing Movement and the Chinese Exclusion Acts. The early 20th Century suffered the Palmer Raids in which thousands of foreigners were rounded up for potential ties to terrorism.

During World War II, Jehovah’s Witnesses were banned by law from distributing literature door-to-door. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court held that such targeting of a religious minority was illegal. In invalidating the law, the Court acknowledged that “Jehovah's Witnesses are not above the law.” *Id.* at 116 (quotation marks omitted). But that did not end the inquiry:

[T]he present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation.

Id. And because the law targeted protected conduct, the Court applied strict scrutiny, concluding that “the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations.” *Id.*

In the 1950s, fear of Communism erupted in the requirement of loyalty oaths, grossly infirm loyalty-security proceedings and witch-hunting hearings before the House Un-American Activities Committee. People (many wholly innocent) lost their livelihoods and their reputations, being impugned by the government without any due process protections. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harvard C.R.-C.L. L. Rev. 1, 20-22 (Winter 2003); *Peters v. Hobby*, 349 U.S. 331 (1955). Over time, many of the statutes that formed the basis of the loyalty-security programs of the 1950’s either were repealed, declared unconstitutional by the Supreme Court or rendered unenforceable by Supreme Court decisions. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956). But of course this all was too late for the many victims of McCarthyism.

In the late 1960s, the Federal Bureau of Investigation initiated its Counter Intelligence Program (COINTELPRO), targeting vaguely defined groups opposing

the Vietnam War or promoting civil rights of African-Americans. *Hobson v. Wilson*, 737 F.2d 1, 11 (D.C. Cir. 1984). With little regard for whether the target groups' activities were legal and protected by the First Amendment, the FBI infiltrated the groups, and attempted to discredit them and create animosity toward and among them, sometimes setting the stage for violent physical attacks. *Id.*; see also *Select Comm. to Study Gov'tal Operations with Respect to Intell. Activities, Final Rept.*, S. REP. No. 94-755, Book II, 8-10 (Intelligence Activities and the Rights of Americans) (1976) [hereinafter "Senate Report"] (detailing the scope of the COINTELPRO activities). According to the Senate Report, the FBI was aware of the illegality of the program, but was concerned "only for 'flap Potential.'" *Id.* at 13. One witness explained: "It was my assumption that what we were doing was justified by what we had to do ... the greater good, the national security." *Id.* at 14. The Senate found that "the legal questions involved in intelligence programs were often not considered [or] were intentionally disregarded in the belief that because the programs served the 'national security' the law did not apply." *Id.* at 137.

Toward the end of the COINTELPRO era, the Supreme Court decided that the Executive Branch had violated individuals' rights by engaging in warrantless wiretapping to collect information that it "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 300 (1972). In a

concurring opinion, Justice Douglas recognized that “we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era.” *Id.* at 329 (1972). Each of these fear-driven decisions to strip people of their rights has been roundly criticized once the “national seizure of paranoia” subsides.

Unfortunately, fear returns, and the cycle begins anew. It is up to the courts to protect basic constitutional rights in the face of these baser instincts. As explained by the Supreme Court in a case about the due process rights of a United States citizen who allegedly fought on the side of the Taliban against the United States:

It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

In the years since the September 11, 2001 terrorist attack, the Supreme Court has resisted pressure from the government to take away the due process rights of individuals believed to be terrorist or sympathetic to their cause. It has repeatedly refused to deny due process to individuals accused of supporting al-Qaeda or the Taliban. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The terrorist watchlists challenged in this case are yet another example of the willingness on the part of the government to toss away due process rights in the face

of fear. As Plaintiffs have demonstrated, watchlisted individuals are subjected to terrifying and invasive treatment. The government claims they must use administrative procedures to challenge their presence on a watchlist without ever being told that they are on a watchlist. They must rebut charges that they are not told about, based on evidence that is not shared with them. And they must live in the fear that every time they travel they may be hauled off by armed security for reasons they cannot guess. This Court should also ensure that the basic rights to travel and to due process of law of all people in the United States are protected as required by the Constitution.

An individual's placement on a Watchlist, with no mechanism or opportunity for justifying her removal from it, cannot be accepted in a society founded on due process and the rule of law. To find otherwise would be to accept that, as in Kafka's *The Trial*, the best to be hoped for is to be neither acquitted nor convicted, but to merely continue on in a state of qualified freedom. Franz Kafka, *The Trial* 161 (Breon Mitchell, trans., Schocken Books 1998) (1925).

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the district court.

Dated: June 2, 2020

Respectfully submitted,

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

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(s) /s Matthew W. Callahan

Party Name Muslim Advocates

Dated: June 2 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2020, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT** was electronically filed with the Clerk of Court using the Court's CM/ECF system, which will send notification to all counsel of record that this document has been filed and is available for viewing and downloading.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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- Retained Court-appointed(CJA) CJA associate Court-assigned(non-CJA) Federal Defender
Pro Bono Government

COUNSEL FOR: Muslim Advocates

(party name) as the

- appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/ Matthew W. Callahan
(signature)

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