Nos. 20-1119, 20-1311

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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ANAS ELHADY, *et al.*,

*Plaintiffs – Appellees,*

v.

CHARLES H. KABLE, *et al.*

*Defendants – Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

District Court Case No. 1:16-cv-00375-AJT-JFA

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# BRIEF OF AMICI CURIAE THE RUTHERFORD INSTITUTE AND CATO INSTITUTE IN SUPPORT OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

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

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Rutherford Institute
(name of party/amicus)

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

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

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

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

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

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

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

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

Signature: /s/ Bradley D. Jones Date: June 1, 2020

Counsel for: The Rutherford Institute

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Signature: /s/ Bradley D. Jones Date: June 1, 2020

Counsel for: Cato Institute

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## INTEREST OF *AMICI CURIAE*

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides *pro bono* legal representation to individuals whose civil liberties are threatened and educates the public about constitutional and human rights issues.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and

[1] Pursuant to Fed. R. App. P. 29(a), *amici* represent that all parties have consented to the filing of this brief. The undersigned counsel further represent that no party or party's counsel have authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no party other than the *amici curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

As part of their mission, *amici* resists the erosion of fundamental civil liberties that many would ignore in a desire to enhance the ability of governmental authorities to detect, deter, and prosecute criminal activity. *Amici* believe that placing American citizens on a secret government database and curtailing their rights, without judicial review, creates a false sense of security while sanctioning unnecessary intrusions upon the personal liberties of those individuals and their families.

*Amici* are interested in this case because they are committed to ensuring the continued vitality of American constitutional protections and civil liberties.

## PRELIMINARY STATEMENT

Constitutional liberties cannot be curtailed by the executive branch's unilateral actions without meaningful judicial review. The Terrorist Screening Database ("TSDB" or colloquially the "Watchlist")

was created by the government to identify known or suspected terrorists. The Watchlist is based on undisclosed criteria, undisclosed information, and lacks an adversarial judicial or administrative process to challenge inclusion. The district court, on facts not reasonably in dispute, recognized that the placement on the Watchlist of the twenty-three individual Appellees (the "Twenty-Three Americans"), all of whom are Muslim, resulted in reduced employment opportunities, forceful arrests (often at gunpoint), arbitrary detentions, electronic seizures, and diminished ability to travel abroad and throughout the United States.

The government below argued that any additional process or review by the judiciary would be inconsistent with an effective Watchlist. On appeal, the government has retreated from that position and no longer argues that a person's placement on the TSDB is immune from judicial review. However, the government does not explain what that judicial review would entail and provides no basis to disturb the findings of the district court that meaningful review is currently unavailable and the Watchlist is constitutionally deficient.

When the government's unilateral actions deprive individuals of their liberty, the ability to meaningfully challenge the basis for that loss is a fundamental feature of our constitution. Without access to an adversarial process and review by a neutral arbiter, there is no mechanism to test the executive's judgments and no counterbalance to overreach.

Unquestioned deference to law enforcement or intelligence decisions removes the judiciary from the system of checks and balances and invites abuse. Frequently this has come at the expense of basic due process protections. Throughout our history, the judiciary has been repeatedly asked to defer to the government's judgment in the name of national security. Consistently, unquestioned deference has been a mistake.

The district court correctly found that the lack of procedural protections attending the Watchlist are constitutionally deficient and violate due process. Its judgment should be affirmed.

## ARGUMENT

### I. Unqualified Deference To The Government's Claim Of A National Security Interest Has Historically Been A Source Of Consistent Error.

Balancing national security with the protection of civil liberties is not a new challenge. Throughout American history the government has frequently sought deference from the courts on national security grounds. But where courts have given unqualified deference to the government, the decision to do so has frequently been a mistake. Judicial review is an important check on government actions that burden civil liberties. The judiciary is tasked with deciding the hardest questions of the day, including an appropriate role in national security cases.

#### 1. Our Constitutional Experience Has Demonstrated That The Government Consistently Overreaches When Unchecked by An Adversarial Process.

Throughout American history there has been a temptation to defer to fears of security threats over the protection of due process. *See* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 Am. J. Int'l L. 840, 840 (1989) ("[N]ational security [] has been a graveyard for civil liberties for much of our recent history."). Without a meaningful

adversarial process, it is easy for government action "to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004).

Concern for civil liberties during political turmoil was a familiar problem to America's founders. The Due Process Clause was added to the U.S. Constitution because the existing constitution failed to incorporate traditional procedural protections[2] for fundamental rights. *See* 2 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 109–12 (1836).

The founders were familiar with due process abuses that occurred under the English Monarchy. England's Star Chamber was often used at times of political and religious turmoil to prosecute sedition and other perceived threats to national stability. *See* Cyndia Susan Clegg, *Censorship and the Courts of Star Chamber and High Commission in England to 1640*, J. Modern Eur. Hist., Vol. 3, No. 1, at 77–78 (2005). The Star Chamber is now recognized as a prototypical example of

[2] The constitution's Due Process Clause derives from Clause 39 of the Magna Carta, which enshrined the right to judgment by one's peers and the law before imprisonment, loss of property, or forced exile. The Magna Carta was a reaction to arbitrary abuses of power by the English monarch in the wake of fighting a war abroad and insurrection at home. Eric T. Kasper, *The Influence of Magna Carta in Limiting Executive Power in the War on Terror*, Political Science Quarterly, Vol. 126, No. 4, at 554–557, 577 (Winter 2011-12).

judicial procedures that deny due process. But at the time, when Britain and Continental Europe were continually embroiled in religious conflict, "[t]he Star Chamber initially received widespread support from citizens who praised the strong government for ensuring security, peace, and order." Eric J. Walz, *The Star-Spangled Chamber: The Venire's Role in Satisfying the Sixth Amendment to the United States Constitution*, 46 Suffolk U. L. Rev. 701, 705 (2013).

Even while the constitution was young, the men who enshrined these rights struggled to implement its ideals out of fear for the nation's security. In 1798, only seven years after the ratification of the Bill of Rights, the United States passed the Alien and Sedition Acts. These Acts reduced immigration of certain minority groups and sharply curtailed speech and press critical of the Adams Administration. "The country was gripped by fear at the time, fear that the Jacobin revolutionaries of France would export their terror to the United States." Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 Wis. L. Rev. 257, 264 (2003). Notably, the sedition trials were marked by limited due process protections, including restrictions on the ability to question witnesses, the inability to challenge the constitutionality of the

Sedition Act, and defense counsel enduring ridicule by the presiding trial judge. *See* Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 Rutgers L. Rev. 725, 733–36 (2010).

These problems also continued in the 20th Century. After entering World War I, the United States repeated the mistakes of the Alien and Sedition Acts, enacting the Espionage Act of 1917 and the Sedition Act of 1918. These two Acts effectively made it "a crime for any person to criticize the government, the president, the draft, the war, the Constitution, or the United States' military" and resulted in the prosecution of more than 2,000 Americans. Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 Cal. L. Rev. 2203, 2204 (2007).

During World War II, the Supreme Court upheld the internment of Japanese-Americans based on a report prepared by the military, which claimed that the evacuations were a matter of military necessity. *Korematsu v. United States*, 323 U.S. 214 (1944). The *Korematsu* Court then, as this Court is asked to do now, deferred to the national security judgments of the military, finding it could not "reject as unfounded the judgment of the military authorities." *Id.* at 218 (citing *Hirabayashi v.*

*United States*, 320 U.S. 81, 93 (1943) (upholding a curfew placed on Japanese-Americans because the Court could not "sit in review of the wisdom of [the military's] action or substitute its judgment for theirs")).

That deference was a mistake. In 1980, Congress established The Commission on Wartime Relocation and Internment of Civilians to review the circumstances that led to Japanese Internment and the impact on American citizens. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96–317, 94 Stat. 964 (1980). "Omitted from the reports presented to the courts was information possessed by the Federal Communications Commission, the Department of the Navy, and the Justice Department which directly contradicted [the military's] statements." *Korematsu v. United States*, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984). As with prior episodes in our history, the failure of the American judiciary was accompanied by a weakening of due process protections. The Japanese-Americans forcibly removed from their homes "did not receive individualized hearings as to their danger to the war effort." Dorsen, *supra*, at 841.

Even in recent years, the government's claims to courts regarding its national security programs have been inaccurate and undercut due

process. In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) the Supreme Court considered a challenge to FISA applications issued against certain organizations. In defending the program, the Solicitor General represented to the Supreme Court that if information from the surveillance program is used "in a judicial or administrative proceeding[] against that person, it must provide advance notice of its intent to the tribunal and the person[.]" *Clapper v. Amnesty International USA*, Brief for the Petitioners, 2012 WL 3090949, *8 (2012). The Supreme Court relied on the Solicitor General's statement in the opinion, noting the importance of such disclosures in providing necessary judicial review. *Clapper*, 568 U.S. at 421–22. However, the Solicitor General's representation was at odds with the practices of prosecutors in national security cases, who were not alerting defendants of evidence gathered from the program. *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013, at A3. As a result, the Defendants' ability to challenge the evidence gathered against them was diminished.

These experiences highlight the need to be cautious in trading diminished process for the hope of national security. The Watchlist was

created in the years following the September 11 attacks. Homeland Security Presidential Directive 6 (Sept. 16, 2003). Preventing terrorism is a worthy goal, no less imperative than preventing insurrection during the European Wars of Religion, sedition following the American Revolution, sabotage by German or Japanese sympathizers during the World Wars, or securing state secrets in our present time. However, as the Star Chamber, the Alien and Sedition Acts, *Korematsu*, and other events in our history illustrate, there is a danger in over-deferring to the government's claims of national security exigency at the expense of civil liberties.

Americans whose lives are ruined by the government's decision to place them on a list of known or suspected terrorists also have an important interest to protect. Protecting their due process rights protects all Americans. *See McNabb v. United States,* 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards.").

2. An Adversarial Process Improves the Accuracy of the Government's Representations.

Adversarial review ensures that factual claims are tested and that decisions are made accurately. "Secrecy is not congenial to truth-

seeking and self-righteousness gives too slender an assurance of rightness." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171(1951) (Frankfurter, J., concurring). Allowing the aggrieved party to test the government's claims corrects inaccuracies and helps ensure that any deprivation of liberty is grounded in fact. "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id.* at 171–72.

In the absence of adversarial scrutiny, there is an understandable tendency for the government to be less accurate. A recent example of this in the national security context arose before the Foreign Intelligence Surveillance Court ("FISC"). Applications for foreign surveillance orders are habitually reviewed ex parte. *See* Kate Poorbaugh, *Security Protocol: A Procedural Analysis of the Foreign Intelligence Surveillance Courts*, 2015 Univ. of Ill. L. Rev. 1363, 1371 (2015). In December 2019, the Justice Department's Office of the Inspector General issued a comprehensive report. Upon review, the FISC found that applications that had been submitted to that court "contained significant factual inaccuracies and omissions," that were

"frequen[t] and serious[]," and left "little doubt that the government breached its duty of candor to the Court." *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Dkt. No. Misc. 19-02 at 1 (Foreign Intel. Surv. Ct. Mar. 5, 2020).

The current Watchlist process is entirely ex parte without an adversarial process or the ability for affected parties to scrutinize the government's actions. This inability to challenge Watchlist designations has life-altering consequences. In *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1157 (9th Cir.), *cert. denied sub nom.* 140 S.Ct. 424 (2019) the Ninth Circuit considered a case where a Stanford Ph.D. student was placed on the No Fly List due to government error. An FBI Special Agent "checked the wrong boxes, filling out the form exactly contrary to the form's instructions." *Id.* at 1157. "The government was well aware that [Dr. Ibrahim's] placement on the No Fly list was a mistake from the get-go." *Id.* at 1155. And yet, the government spent almost a decade vigorously contesting Dr. Ibrahim's efforts to correct the government's errors before at last conceding "that she poses no threat to our safety or national security, has never posed a threat to

national security, and should never have been placed on the No Fly list." *Id.* at 1153.

Individual liberties cannot be lost because a single government agent misread a form. Executive deference cannot extend so far. The constitution requires a meaningful opportunity to contest government actions that deprive citizens of liberty interests. Curtailing due process due to claimed security interests results in a less accurate process that ignores fundamental lessons learned from our history.

## II. The District Court Correctly Held That The Twenty-Three Americans Did Not Receive Sufficient Procedural Due Process.

"Any person could have the misfortune of being mistakenly placed on a government watchlist, and the consequences are severe." *Ibrahim*, 912 F.3d at 1179. The district court correctly held that the Twenty-Three Americans established that their procedural due process rights were violated by their placement on the Watchlist and their inability to obtain meaningful review. *See* [Dkt. No. 323 at 30].

A procedural due process claim requires a showing that the government: (1) deprived a person through state action; (2) of a liberty interest; (3) without due process of law. *Shirvinski v. U.S. Coast Guard*,

673 F.3d 308, 314 (4th Cir. 2012). When the government deprives persons of a liberty interest, whether "due process of law" was provided is a consideration of three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest given the procedures used, as well as the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest including the function involved and the burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The district court found that the Twenty-Three Americans challenging their placement on the TSDB were deprived of their liberty interests in their right to travel and reputations. [Dkt. No. 323 at 18–22]. The district court reviewed an extensive record and found that individuals on the Watchlist were subjected to multiple airport screenings, electronic searches, interrogations lasting seven hours or more, confiscations of cellular phones and other property, and forcible arrests often at gunpoint. [Dkt. No. 323 at 9–10]. All of which, understandably, forced the Twenty-Three Americans to refrain from exercising their right of international and interstate travel. *See* [Dkt.

No. 323 at 21–22]. The Twenty-Three Americans also suffered harm to their reputations through the government's dissemination of TSDB information to over 18,000 government entities and 533 private entities for a wide range of purposes, including purposes far removed from border security or air travel screening. [Dkt. No. 323 at 23–24]. The widespread dissemination of their status as known or suspected terrorists predictably triggers a response by law enforcement that substantially increases the risks these individuals face and impinges upon their fundamental rights.[3] [Dkt. No. 323 at 24]. The burdens on the Twenty-Three Americans are profound. Given the loss of their liberty interests, the constitution demands adequate due process procedures.

1. The District Court Correctly Found that Watchlist Determinations Are Not Subject to Meaningful Review.

The district court considered the availability of meaningful review in determining the risk of erroneous deprivations and the probative value of additional procedural safeguards under the second *Mathews*

[3] For instance, the government below argued that inclusion in the TSDB itself constitutes "reasonable suspicion for Fourth Amendment purposes." [Dkt. No. 311 at 38 n.27]. Thus, in the government's view, a person's status on the Watchlist, standing alone, satisfies the *Terry v. Ohio*, 392 U.S. 1 (1968) standard, providing individuals on the TSDB with less Fourth Amendment protections than all other Americans.

factor. The court found that DHS TRIP provided insufficient redress. [Dkt. No. 323 at 26–30]. "[I]t is undisputed that there is no independent review of a person's placement on the TSDB by a neutral decision maker[.]" [Dkt. No. 323 at 26–27]. When coupled with the government's limited factual disclosures and the Twenty-Three American's limited opportunity to respond, this lack of neutral review provided a substantial risk of erroneous deprivation. [Dkt. No. 323 at 27]. This was true regardless of the government's internal procedures. [Dkt. No. 323 at 27].

In its brief, the government contends that the district court's conclusion "misse[s] the mark." Gov't Br. at 53. On appeal, the government now states that it "does not argue that a person's alleged placement on the TSDB is immune from judicial review." Gov't Br. at 53. However, the evidence offered in support of summary judgment, the undisputed facts submitted by the parties, and the arguments raised below belie the government's contention.

The district court reviewed an extensive record, including declarations on behalf of the Department of Homeland Security, FBI, and TSA. [Dkt. Nos. 299-2, 299-3, 299-4, 299-5]. None described any

judicial review provided for TSDB determinations. The FBI's Acting Assistant Director of the Counterterrorism Division testified that providing notice of the basis for placement on the Watchlist and a meaningful opportunity to contest that status, even if limited to US persons, "would be a significant expansion" of the current DHS TRIP process. [Dkt. No. 299-3 at 10-11]. The Twenty-Three Americans submitted proposed undisputed statements of fact, alleging that "there are no 'adversarial hearings' regarding TSDB status," [Dkt. No. 304 at 34], which the government essentially did not dispute, [Dkt. No. 311 at 17]. Moreover, the government below argued that there is "no basis" to try to "impose a judicial standard of review" on Watchlist determinations. [Dkt. No. 311 at 43].

Given this record, the district court's conclusion that no judicial review is available was sound. [Dkt. No. 323 at 26–27]. Its finding is also supported by other district courts. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1142–43 (D. Or. 2014)*; see also Kovac v. Wray*, 363 F. Supp. 3d 721, 758 n.11 (N.D. Tex. 2019) ("[A]n individual's inclusion on the No Fly List or [TSDB] and the dissemination of that list are accomplished without any judicial involvement or review, and according to a standard

of proof that is far less than that typically required when the deprivation of significant constitutional liberties are implicated.").

2. Judicial Review is a Necessary Component of Due Process When The Government Curtails Basic Freedoms.

Deciding whether a citizen's constitutional rights have been impinged is an exercise of the judicial power of the United States. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835 (1986) (recognizing that the "essential attributes of judicial power" includes consideration of the "origins and importance of the right to be adjudicated"); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Impartial judicial review is an essential safeguard of constitutional rights. Particularly where national security is implicated, an understandable tension exists between the government's pursuit of security objectives and the protection of individual rights. *Hamdi*, 542 U.S. at 528. Judicial review of government action is essential to balance these interests. "[L]ike other claims conflicting with the asserted constitutional rights of the individual, the [government] must subject itself to the judicial process of having its reasonableness determined

and its conflicts with other interests reconciled." *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting).

While independent judicial review alone is not sufficient to satisfy due process, it is a foundational element. *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1294–95 (1975) (listing judicial review as one of the eleven basic elements in determining the sufficiency of procedural due process).

For this reason, decisions made by executive agencies are presumptively subject to judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). This requirement has also been codified by Congress. 5 U.S.C. §§ 701, 702 (providing judicial review of agency action under the Administrative Procedures Act absent narrow exceptions). Moreover, even decisions that may be made solely at the agency level must employ reasonable adversarial procedures where those decisions affect individual rights. *Gerator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979). "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the

procedures which have traditionally been associated with the judicial process." *Id.*

The government's brief claims that due process is satisfied because agencies must have internal procedures "to prevent, identify, and correct any errors" in TSDB nominations and reviews of all U.S. persons are conducted by the nominating agency and the Terrorist Screening Center. Gov't Br. at 50.

It is, of course, important for the Executive Branch to correct errors it becomes aware of and there is value in the government compiling an administrative record for subsequent review by an Article III court. But the government's own internal procedures cannot be the equivalent of an adjudication of a person's due process interests because the scope of a person's rights cannot be made by the same department accused of violating those rights. *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 176 (4th Cir. 2019), *as amended* (Oct. 31, 2019) ("[A] court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute.").

One-sided adjudications are also less effective. "Without knowledge of a charge, even simple factual errors may go uncorrected despite potentially easy, ready, and persuasive explanations." *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 982 (9th Cir. 2012).

The government argues that not disclosing Watchlist status or providing affected Americans with the evidence, if any, that supports their inclusion is justified because the "[g]overnment has compelling national-security reasons for withholding such information." Gov't Br. at 52. In compiling the administrative record, it may be the case that some materials are classified or privileged and must be withheld by the government. However, that is not a reason to provide no adversarial judicial or administrative process at all. Courts have experience balancing the rights of parties to contest the deprivation of important private rights with the government's interest in protecting national security, privileges, and classified information. *Latif*, 28 F. Supp. 3d at 1155-60 (collecting cases and summarizing approaches).

While applying due process will depend on the facts and circumstances of each specific case, in general withholding materials

designated as classified, as supported by an affidavit executed by the head of the department which has control over the matter, will comport with due process. *Al Haramain Islamic Found.,* 686 F.3d at 981 (collecting cases); *see also Jewel v. Nat'l Sec. Agency*, 965 F. Supp. 2d 1090, 1101 (N.D. Cal. 2013). However, where possible, an unclassified summary of the withheld, classified material should be provided. *Al Haramain Islamic Found.* 686 F.3d at 982-84 (discussing the benefits of an unclassified summary for both the government and aggrieved party). Under current procedures, individuals on the No Fly List may request unclassified summaries of the basis for their inclusion on the No Fly List. [Dkt. No. 323 at 8 n.9]. There is no reason unclassified summaries cannot be made available to all U.S. persons on the TSDB — absent compelling, case-specific justifications.

3. The Vague Inclusion Standard and Unlimited Agency Discretion Create a Substantial Risk of Erroneous Deprivation.

Due process is violated when a standard is so permissive that it provides unfettered latitude for government action. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974) (concluding that the absence of any ascertainable standards offends the Due Process Clause). Process has no value if a standard is broad to the point that no adversarial showing

is sufficient to defeat the government's claim. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). For individuals on the Watchlist, the inability to obtain meaningful judicial review is particularly acute given the lack of any other meaningful safeguards for due process, including a standard that would reasonably constrain the discretion of individual government agents.

The government's standards for adding an individual to the TSDB as a "suspected terrorist" is incredibly broad, encompassing any individual the government determines based "upon articulable intelligence or information, which, based on the totality of the circumstances and, taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting, in preparation for, in aid or in furtherance of, or related to, terrorist and/or terrorist activities." [Dkt. No. 323 at 4]. In determining whether this standard is met, the government considers, without solely relying on, a variety of innocuous conduct, including race, ethnicity, religious affiliation, and other First Amendment activities. [Dkt. No. 323 at 26].

The broadness of the Watchlist standard creates a significant risk that innocent people will be listed on TSDB despite having no connections to terrorism. Given the level of unbridled discretion provided to government agents, and the ability to consider innocuous conduct in adding people to the Watchlist, there is a profound risk innocent people will suffer an erroneous deprivation of their rights. It is "easy to imagine completely innocent conduct serving as the starting point for a string of subjective, speculative inferences that result in a person's inclusion." [Dkt. No. 323 at 26] (citing *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014)). This is a particular concern, here, where none of the Twenty-Three Americans in this case have ever been convicted, charged, or indicted for any criminal offense related to terrorism. [Dkt. No. 323 at 25].

The district court recognized that the risk of erroneous deprivation is higher when a government agent is asked to apply a "wide variety of information," assess "witness credibility and veracity," and make highly "fact-specific" determinations. [Dkt. No. 323 at 25] (citing *Mathews*, 424 U.S. at 343-44, *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 395 (4th Cir. 1990)). The nature of the

government's inquiry is central to evaluating the risk of erroneous deprivation. *Mathews*, 424 U.S. at 344 ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process[.]"). As inquiries become more fact-specific and more discretionary, there is a greater risk that individuals will be deprived of their rights based on choices made by a single, unaccountable government agent. This is why fact-specific determinations inherently present a "grave risk of erroneous deprivation." *Weller,* 901 F.2d at 395.

The government responds to the problems with the inclusion standard by asserting that Watchlist determinations are the judgments of "trained experts in the field" and national security judgments are entitled to deference. Gov't Br. at 51. But no matter how well trained an expert may be, it is incompatible with our constitution for individual liberties to be subject to the whims of a single government employee. Experts make mistakes — sometimes as simple as checking the wrong boxes on a form. *Ibrahim*, 912 F.3d at 1157-58. This is why deference to expertise is not unlimited and must be subject to review, particularly where mistakes can impose life-altering consequences.

Getting the standard right is important. Fundamental flaws in whether a person reasonably meets the minimum substantive criteria for Watchlist inclusion and a low evidentiary standard themselves create due process problems, which get "carrie[d] over to the judicial-review stage." *Latif*, 28 F. Supp. 3d at 1153. Sharply focused and easily documented criteria provide a standard against which an expert's judgments can be measured, allowing review to be effective and errors to be corrected.

The government also addresses the issue of erroneous deprivation by suggesting that Congress intended government databases associated with air travel to mistakenly identify some individuals as security threats so long as there are not a "large number of false positives." Gov't Br. at 51–52. Audits of the TSDB have, in fact, shown that the Watchlist includes a large number of false positives. A review of 68,669 Watchlist entries by the Office of Inspector General, identified that 23,911 (about 35 percent) of the sample were for individuals "who had originally been appropriately watchlisted but should have been removed from the watchlist after the case had been closed." U.S. Dept. of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of*

*Investigation's Terrorist Watchlist Nomination Practices*, Audit Report 09-25, at vi, 54 (May 2009). The benefit of adversarial review is the ability to correct these errors.

While no government system is perfect, that is not a compelling justification for wrongly depriving innocent people of their liberty. The government's acceptance of error, Gov't Br. at 51–52, is a poor substitute for the second prong of the *Mathews* test, which considers the risk of erroneous deprivation and the probative value of added safeguards. Constitutional due process does not demand perfection but it does require reasonableness. An adversarial process, applying a sharply-focused standard, provides an opportunity to test assumptions and correct errors, which as the government acknowledges will certainly be made. This error correction makes the TSDB more accurate and the Nation more secure.

4. The District Court Properly Considered the Government's Interest in National Security.

The third *Mathews* factor considers the government's interest and burden that additional procedures would entail. The district court understood that there exists a "profound, fundamental, and compelling government interest in preventing terrorist attacks, including by

maintaining and protecting the information necessary to prevent such attacks." [Dkt. No. 323 at 27]. But it also recognized that the Twenty-Three Americans have countervailing, fundamental interests in their liberty. Given these important interests, the court tailored its procedural due process analysis and concluded that the government did not need to provide pre-deprivation review. [Dkt. No. 323 at 28]. That decision is reasonable and is supported by other cases addressing post-deprivation review in the terrorism and national security context. *See e.g., Glob. Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002); *Gilbert v. Homar*, 520 U.S. 924, 930–31 (1997).

The district court thoughtfully balanced the due process issues in this case and identified that the current procedures are insufficient. [Dkt. No. 323 at 30]. The court allowed the government to propose additional procedures to address the insufficiencies identified. [Dkt. No. 323 at 30–31].

The limited holding that the current redress available to the Twenty-Three Americans is constitutionally deficient is correct. The opportunity to obtain meaningful, independent review is an essential component in due process. While national security is undoubtedly

important, security does not require the abandonment of longstanding principles of fairness and due process. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law").

The government argues providing additional or substitute procedures is unworkable. The government makes two primary arguments: (1) that because the Watchlist involves national security, the government's judgments "are entitled to deference;" and (2) additional procedures that may present unreasonable national security risk. Gov't Br. at 51, 54.

This misstates the inquiry. The government undoubtedly has important interests. However, due process requires considering whether additional procedural protections are reasonable in light of the risk that Americans will be erroneously deprived of their rights. The district court correctly held that the existing procedural protections are insufficient.

While protecting the nation is undoubtedly important, there is also a "danger that [government] officials will disregard constitutional rights in their zeal to protect the national security. . ." *Mitchell v.*

*Forsyth*, 472 U.S. 511, 523 (1985). As a result, it is important that national-security concerns "not become a talisman" to ward off inconvenient constitutional claims, particularly given the difficulty of defining the "security interest" in cases involving persons living domestically in the United States. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017).

The government cites *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) in arguing that its national security assessments are entitled to deference. Gov't Br. at 51. However, the organizations designated as foreign terrorist organizations in *Holder v. Humanitarian Law Project* had a right "[to] seek judicial review of that designation." 561 U.S. at 35. But the Twenty-Three Americans in this case have no opportunity for meaningful review of their designation as "suspected terrorists." As *Holder* recognized, "concerns of national security and foreign relations do not warrant abdication of the judicial role," including the obligation of the courts "to secure the protection that the Constitution grants to individuals." *Id.* at 34.

Providing procedures to contest Watchlist status is not incompatible with the ability to make informed national security

judgments. Allowing aggrieved persons a meaningful post-deprivation remedy ensures that the government's action is, in fact, based on judgments that were informed and made by experts in the field. "Deference to the executive's national security and military judgments is appropriate only where we have sufficient information to evaluate whether those judgments were logical and plausible." *Am. Civil Liberties Union v. United States Dep't of Def.*, 901 F.3d 125, 134 (2nd Cir. 2018), *as amended* (Aug. 22, 2018).

As our history has demonstrated, unbridled deference to national security too often leads to error. Amorphous standards and the lack of critical review can easily deprive citizens of liberty based on inaccurate information or untrue claims. It also results in a national security policy that fails to reflect and respond to true threats. Individual rights and American security both benefit by the judiciary insisting on appropriate procedural safeguards and the due process protections enshrined in the constitution.

## CONCLUSION

For these reasons, the opinion of the district court should be affirmed.

June 1, 2020

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

*Amici curiae* certify that this brief complies with the applicable type-volume limits. According to the word processor used to prepare this brief, Microsoft Word 2010, this brief contains 6,134 words, excluding those parts exempted by Fed. R. App. P. 32(f). The brief therefore complies with the volume limitations in Fed. R. App. P. 29(a)(5). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because has been prepared in a proportionally spaced typeface, Century Schoolbook, using 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2020, I electronically filed the foregoing document electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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