Nos. 20-1119, 20-1311

In the United States Court of Appeals for the Fourth Circuit

ANAS ELHADY, ET AL.,
Plaintiffs-Appellees,

v.

CHARLES H. KABLE IV, ET AL.,
Defendants-Appellants,

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

BRIEF OF PROFESSOR JEFFREY D. KAHN AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

Jeffrey D. Kahn*
SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW
3315 Daniel Ave.
Dallas, TX 75205
(214) 768-2792
jkahn@smu.edu

* *Academic affiliation provided for identification purposes only*

Andrew T. Tutt
R. Stanton Jones
Stephen K. Wirth
Shira V. Anderson
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

June 2, 2020

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,

Jeffrey D. Kahn
(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/ Andrew Tutt Date: 06/02/2020

Counsel for: Jeffrey D. Kahn

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE OF AMICUS CURIAE

Jeffrey D. Kahn has been studying terrorist watchlists and the Terrorist Screening Center since 2006.[1] He is the author of *Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists* (University of Michigan Press, 2013; paperback 2014) among other works. In 2013, he testified as an expert witness for the plaintiff in *Ibrahim v. Department of Homeland Security*, No. 06-0545-WHA (N.D. Cal. 2013). He files this brief in support of appellees to clarify appellants' depictions of the Terrorist Screening Database and Terrorist Screening Center.

SUMMARY OF ARGUMENT

Appellants present an incomplete and misleading array of assurances about the Terrorist Screening Database (TSDB) and the Terrorist Screening Center (TSC) that compiles it. Appellants depict a standards-based, process-oriented, intra-governmental information sharing system with multiple levels of quality control. The reality is starkly different. Like all self-praise, these

[1] Pursuant to Rule 29(4)(E)(i)-(iii) of the Federal Rules of Appellate Procedure, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* and his counsel made a monetary contribution to its preparation or submission. Appellees granted their blanket consent to the filing of *amici curiae* briefs on May 18, 2020. Appellants consented to the filing of this brief on May 19, 2020.

descriptions are based on self-determined standards riddled with exceptions. As a result, legal precedents that appellants deploy are at best *non sequiturs*, since they are predicated on normal administrative procedures and expectations of transparency and neutrality absent from the operation of this irregular entity and its uniquely injurious work product.

ARGUMENT

I. The Terrorist Screening Database

Appellants depict the TSDB as a small[2] and innocuous,[3] yet carefully built[4] and rigorously standards-based[5] system of intra-governmental records.[6] None of these claims is wholly true or, in some cases, true at all. In fact, the TSDB is an enormous and powerful system that emerged in the chaotic tumult

[2] "Less than 0.5% of all the persons on the TSDB are U.S. citizens or lawful permanent residents, or approximately 4,600 individuals." Appellants' Br. at 2.

[3] "The TSDB neither contains any classified information nor includes the derogatory information upon which a person's status may be based." Id. at 4.

[4] "Before an individual is added to the TSDB, the nomination undergoes a careful multi-step review process by the federal agency nominating the individual; the NCTC or FBI; and TSC." *Id.* at 2-3.

[5] "The nomination must rely upon articulable intelligence or information which, … creates a reasonable suspicion … ." *Id.* at 3 (emphasis added).

[6] "TSC exports various subsets of the TSDB to different federal agencies, which use that information for various screening and other security functions." *Id.* at 4; "The Government does not publicly disclose plaintiffs' TSDB status … ." *Id.* at 19.

following the attacks of September 11, 2001. No statute created it and no published regulations bind its users to follow their own rules. Its self-imposed constraints, secretly issued merely as "guidance," are a Swiss cheese confection of exceedingly low standards riddled with multiple exceptions to their application.

A. The TSDB, by Origin and Design, Has No Statutory or Regulatory Foundation but Nevertheless Affects the Lives and Livelihoods of Millions of Americans

Nature abhors a vacuum and the nature of government watchlists is one of continuous expansion. In the beginning, there was no TSDB. Immediately after the terrorist attacks of September 11, 2001, the United States Government seized on decades-old authority granted the Federal Aviation Administration (FAA) to issue "Security Directives" that warned airlines not to carry persons believed to present a "specific and credible threat" to civil aviation security. *Report of the President's Commission on Aviation Security and Terrorism* 78-79, 86-87 (1990); Jeffrey Kahn, *Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists* 133-34 (2013). This power was grounded in statute. Act of Sept. 5, 1961, Pub. L. No. 87-197, § 4, 75 Stat. 466, 467-68.

Understandably, FBI agents began to use Security Directives the day after the September 11 attacks to rapidly expand the dozen or so names such

directives identified on that awful day as presenting a "specific and credible threat" to aviation security. *9/11 Commission Report* 83 (2004). According to a high-level internal TSA memorandum:

> [Early on September 12, 2001, A]t the request of the FBI, the FAA issued SD-108-01-06/EA 129-01-05, which included a list of individuals developed by the FBI as part of the *Pentbom* investigation. … The FBI "controlled," both administratively and operationally, the contents of the list and added or removed names in accordance with the *Pentbom* investigation. The FAA received the list from the FBI and disseminated it to air carriers, without any format or content changes. FAA, in essence, acted as a conduit for the dissemination of their "watchlist."[7]

Kahn (2013), at 140 (quoting TSA Memorandum on "TSA Watchlists" dated Oct. 16, 2002, from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence to Associate Under Secretary for Security Regulation and Policy).

With the creation of the Transportation Security Administration (to which the FAA's responsibility for aviation security was transferred by statute in November 2001), the TSA Under Secretary was authorized "to issue Security Directives without providing notice or an opportunity for comment in order to protect transportation security." *Gilmore v. Gonzales*, 435 F.3d 1125,

[7] *Pentbom* was the code name for the FBI's investigation into the 9/11 attacks.

1131 n.4 (9th Cir. 2006). A newly named "No Fly List" was built on those security directives but expanded from specific threats to civil aviation security to include individuals "who may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(B). The disjunctive grew TSA's Security Directive-issued lists to include individuals who present no threat to civil aviation at all.

But where do the names on these lists come from? They are subsets of the Terrorist Screening Database (TSDB) housed at the FBI's Terrorist Screening Center. The TSDB is not issued as a Security Directive or under any other legal authority possessed by the TSA. Indeed, no statutes or published regulations created it, and none regulate its use.[8] It is entirely a product

[8] In the district court, Deputy Director for Operations Timothy P. Groh averred that Congress "mandated greater sharing of terrorist information among federal departments and agencies, while still protecting privacy and civil liberties," citing § 1016 of the Intelligence Reform and Terrorism Prevention Act, codified at 6 U.S.C. § 485. Groh Declaration at ¶ 4, Docket # 299-4. That section does not reference the TSDB or TSC, let alone establish limits on them. Other than requiring, in 2005, some reports and guidelines that lack any indication of obligation, it provides only hortatory instructions to the Director of National Intelligence to "create an information sharing environment … consistent with applicable legal standards relating to privacy and civil liberties" and, "to the greatest extent practicable, ensure that the ISE provides the functional equivalent of, or otherwise supports, a decentralized, distributed and coordinated environment that … incorporates protections for individuals' pri-

of a 2003 presidential directive and associated memoranda of understanding that by their own terms neither provide new legal authority for action *by* the federal government nor any right enforceable *against* it. *See* Homeland Security Presidential Directive-6 (Sept. 16, 2003).[9]

Although its origin is not mandated by any statute, the TSDB nevertheless exists and it is not small. By February 2006, the number of records in it had risen to 400,000. Jeffrey Kahn, *Terrorist Watchlists, in The Cambridge Handbook of Surveillance Law* 88 (2017) (citing U.S. Department of Justice, Office of the Inspector General, *Follow-Up Audit of the Terrorist Screening*

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vacy and civil liberties," 6 U.S.C. § 485(b)(1)(A) & (2)(H); and directs the program manager responsible for federal government information sharing to "ensure the protection of privacy and civil liberties" when he or she assists "in the development of policies, as appropriate, to foster the development and proper operation" of the information sharing environment. 6 U.S.C. § 485(f)(2)(B)(viii).

[9] "This directive does not alter existing authorities or responsibilities of department and agency heads to carry out operational activities or provide or receive information. This directive is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit enforceable at law or in equity by any party against the United States, its departments, agencies, entities, officers, employees or agents, or any other person."

Center 7 (2007)). The TSDB currently contains records concerning approximately 1.2 million individuals. *Elhady v. Kable*, 391 F.Supp.3d 562, 568 (E.D. Va. 2019).[10]

Though originally created ostensibly with a narrower purpose in mind, the existence of such a massive and growing database led to laws and regulations that expand its compass without establishing any standards or criteria subject to traditional rulemaking procedures (or even authorizing their exemption from notice-and-comment rulemaking, as was the case with Security Directives newly issued by the TSA). In addition to those entities already described by appellees in the district court,[11] the TSDB may be checked to regulate owners and purchasers of a common fertilizer;[12] vet personnel at select

[10] Appellants do not dispute this statistic. *See* Defendant's Statement Identifying Facts Recited in the Court's September 4, 2019 Order That Are Disputed, *Elhady v. Kable*, 1:16-cv-00375, Docket # 338 (Dec. 16, 2019).

[11] Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment, *Elhady v. Kable*, 1:16-cv-00375, Docket # 304 (E.D. Va. Mar. 11, 2019) at ¶¶ 90-94; 97-110; and 117-21.

[12] For example, ammonium nitrate facilities and purchasers of ammonium nitrate (a common fertilizer but also an ingredient in bombs) are subject to registration requirements that include a check and periodic recheck against the Terrorist Screening Database (which may result in denial or revocation of registration). *See* 6 U.S.C. § 488a(i).

chemical facilities;[13] issue permits to maritime workers;[14] license commercial drivers;[15] and credential foreign nationals working in certain government sectors.[16] Even eligibility for health services established for both first responders to the World Trade Center on September 11 and certain survivors of those terrorist attacks may be subject to a TSDB check.[17] These uses envelop mil-

[13] The Chemical Facility Anti-Terrorism Standards Program requires covered facilities to undertake vetting of personnel through the Terrorist Screening Database. *See* 6 U.S.C. § 622(d)(2). This may be done directly or via existing programs that already vet through the TSDB. *See* 80 Fed. Reg. 79058 (Dec. 18, 2015).

[14] Those seeking to obtain or renew a federal-issued Transportation Worker Identification Credential (TWIC) for access to secure maritime facilities and vessels are subject to security threat assessments based on a search of terrorist watchlists and related databases, 49 C.F.R. § 1572.7(a)(2), which may result in denial or immediate revocation of these essential credentials for commercial shipping, 49 C.F.R. § 1572.5(a)(3) & (b).

[15] Those seeking to obtain or renew a state-issued Hazardous Materials Endorsement (HME) are subject to the same security threat assessments described *supra* note 14.

[16] For example, foreign nationals applying for a Common Access Card (CAC) at the Department of Defense are subject to a name check against the TSDB. *See* 32 C.F.R. § 156.6(e)(3)(ii), 32 C.F.R. § 157.6(a)(4)(i)(B), and 32 C.F.R. § 161.7(c)(3)(ii).

[17] 42 U.S.C. § 300mm-21(a)(5) ("No individual who is on the terrorist watch list maintained by the Department of Homeland Security shall qualify as an eligible WTC responder. Before enrolling any individual as a WTC responder in the WTC Program under paragraph (3), the Administrator, in consultation with the Secretary of Homeland Security, shall determine whether the individual is on such list."); 42 U.S.C. § 300mm-21(a)(4) (substantially the same

lions of Americans in TSDB-linked assessments on which their jobs and livelihoods, not to mention their free movement, depend.[18] There may be other programs in which the TSDB is actively consulted, but hidden from view, such as in the popular Global Entry Trusted Traveler Program used annually by over 1.4 million people.[19]

Expansion of the TSDB was entirely predictable. In fact, this heady ambition was memorialized in a 2009 PowerPoint slide shared by Timothy

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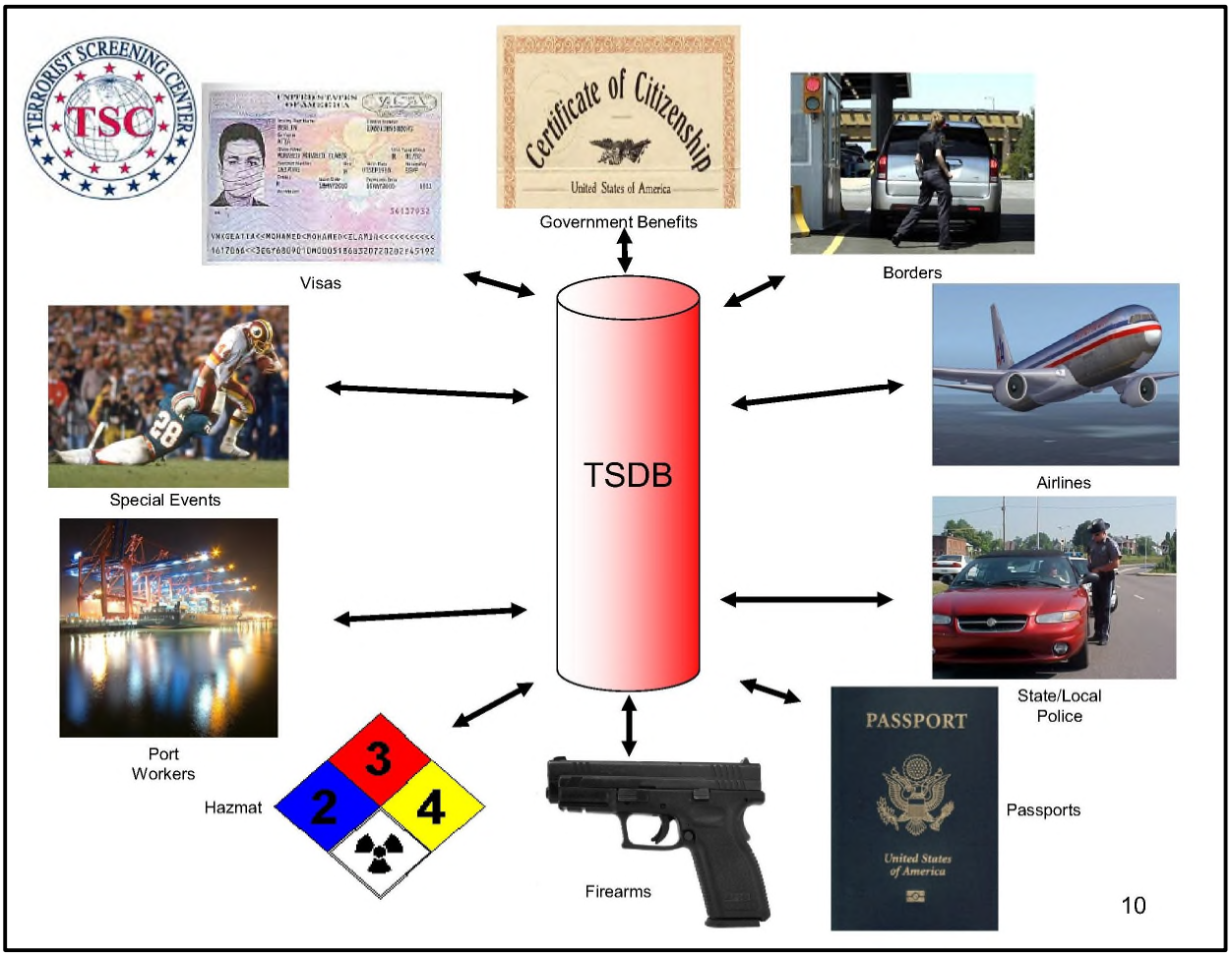
language for eligible WTC survivors); Final Rule, World Trade Center Health Program, 81 Fed. Reg. 90926, 90928 (Dec. 15, 2016) (identifying TSC as the entity that conducts the screening).

[18] In 2015, there were two million currently active TWIC cards and 3.3 million enrollments from longshoremen, truckers, railroad employees, maintenance personnel, mariners, and others. Transportation Security Administration, Transportation Worker Identification Credential (TWIC®) Information for the Military to Mariner Initiative 2-3 (April 24, 2015), *available at* https://www.cmts.gov/downloads/TWIC.pdf.

[19] The popular Global Entry program run by U.S. Customs and Border Protection is a good example. The proposed rule for this program included as a disqualifying factor: "The applicant has been identified on a Government watch list." This was changed to a recitation of the standard for inclusion in the TSDB: "The applicant is known or suspected of being or having been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism"; *Compare* Notice of Proposed Rulemaking, 74 Fed. Reg. 59932, 59939 (Nov. 19, 2009) (proposed 8 C.F.R. § 235.7a(c)(2)(vii)) *with* Final Rule, 77 Fed. Reg. 5681, 5690 (Feb. 6, 2012) (adding 8 C.F.R. § 235.12(b)(2)(vi)). The change occurred without any reference or comment, under the heading "Changes from the NPRM." *Id.* at 5687. Customs and Border Patrol estimate the number of annual respondents to this program to be 1,414,434 persons. *See* 83 Fed. Reg. 32674, 32675 (July 13, 2018).

Healy, then the Director of the Terrorist Screening Center and the lead official responsible for its establishment in 2003:



It is thus a *non sequitur*, at best, for appellants to rest on the fact that the TSDB "neither contains any classified information nor includes the derogatory information." Appellants' Br. at 4. Like a card catalog to a vast library, the TSDB is the entry point for all who seek those details. Card catalogs are not supposed to contain the substance of the works they tag; their purpose is to show the way to those who would use those sources. As appellants note in

the very next paragraph, this is precisely what happens: "TSC exports various subsets of the TSDB to different federal agencies, which use that information for various screening and other security functions." *Id.* This sorting and export function is based on derogatory and often classified information to which the TSDB is linked.

A shared card catalog was a sensible response to the 9/11 Commission's finding that intelligence agencies jealously hoarded information and fought endless turf battles about access to it, contributing to the intelligence failure on September 11, 2001. *9/11 Commission Report* at 417; Kahn (2017) at 76. But when the Government uses its vast repositories not to inform an intra-government information network, but to execute its own extra-judicial decisions to limit the liberty of suspect citizens, its card catalog is no longer merely a useful information source.[20] It is an unadjudicated blacklist.[21]

[20] Appellants' assertion that "[t]he Government does not publicly disclose plaintiffs' TSDB status," Appellants' Br. at 19, is undercut by its admission that "[t]he Government provides access to some TSDB data to private entities … But in those instances disclosure are [sic] not made broadly to the public …." Appellants' Br. at 44.

[21] Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wisc. L. Rev. 1203, 1206 (2010) ("Persons appearing on a blacklist are not treated as suspected wrongdoers, but as confirmed wrongdoers who face consequences as a result.").

B. Appellants' Assurance of Rigorous Procedures and Standards Are Pie-Crust Promises: Easily Made and Easily Broken

Because no statute or regulations constrain the use of the TSDB, the watchlisters feel free to establish procedures and standards as they wish—and to disregard them when such self-constraint is no longer preferred. Appellants assert that TSDB nominations are subject to multiple levels of review. Appellants' Br. at 3, 8-9. But appellants are silent as to whether such review is required by statute or regulation because it is *not* subject to any such enforceable legal authority. Appellants are similarly coy regarding the source for the standard they use to add someone to the TSDB. *Id.* at 3. The result is a very low hurdle for nominations to pass and, when even that low bar proves to be an undesired barrier, unfettered freedom to exempt nominations altogether.

This has always been the case. In its first review of the TSC, the Justice Department's Inspector General determined that "the TSC process for including a name in the TSDB was more of an acceptance than nomination. TSC staff did not review the majority of the records submitted unless an automated error occurred while the records were uploaded to the database." U.S. Department of Justice, Office of the Inspector General, *Review of the Terrorist*

Screening Center 42 (2005). The first TSC Director, Donna Bucella, candidly explained that:

> [T]o err on the side of caution, individuals with any degree of a terrorism nexus were included on the consolidated watch list, as long as minimum criteria was met (*i.e.*, the person's name was partially known plus one other piece of identifying information, such as the date of birth). The Director further explained that one of the benefits of watch listing individuals who pose a lower threat was that their movement could be monitored through the screening process and thereby provide useful intelligence information to counterterrorism investigators.

Id. at viii-ix. Even two years later, a follow-up inspection by the Inspector General's Office found that "[d]espite being responsible for removing outdated or obsolete data from the TSDB, however, the TSC did not have a process for regularly reviewing the contents of the TSDB to ensure that the database does not include records that do not belong on the watchlists." U.S. Department of Justice, *Follow-Up Audit of the Terrorist Screening Center* 18 (2007).

Facing both OIG audits and growing litigation pressure, multi-agency working groups and other bodies developed what became known as "watch-listing guidance" for evaluating nominations.[22] But the "reasonable suspicion"

[22] The March 2013 Watchlisting Guidance is an unclassified but "for official use only/sensitive security information" document that was published in 2014 by *The Intercept*, a blog operated by the investigative journalist Glenn Greenwald. Jeremy Scahill & Ryan Devereaux, *Blacklisted: The Secret Government*

standard that emerged is no real constraint. The standard was inspired by *Terry v. Ohio*, 392 U.S. 1 (1968), which established this test for brief, warrantless stop-and-frisk detentions. But contrary to *Terry's* essential separation-of-powers holding, these groups never intended that a neutral magistrate should ever evaluate how the watchlisters transplanted this test to watchlisting decisions. Kahn (2013), at 170 (citing the author's interview with General Counsel to the Terrorist Screening Center); Jeffrey Kahn, *The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and* Terry v. Ohio, 26 Wm. & Mary Bill Rts J. 383, 386-87, 395-97 (2017).

Appellants confirm that, with only minor (yet expansive) variation in the definitions used, a person may be placed in the TSDB upon a finding that there is a "reasonable suspicion" that he or she is a "suspected terrorist," *viz*. "rea-

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Rulebook for Labeling You a Terrorist, The Intercept, July 23, 2014, *available at* https://theintercept.com/2014/07/23/blacklisted/. Appellants acknowledge the existence of a 2013 version of the Guidance, as well as a newer 2015 version, and that "[w]hile the 2015 Watchlisting Guidance includes information not contained in previous versions, much of the information in previous versions remains accurate and would provide similar (although somewhat less complete) insight into the details of the watchlisting enterprise." Decl. of Timothy P. Groh Submitted In Camera, Ex Parte in Response to Plaintiffs' Second Motion to Compel, *Elhady v. Kable*, 1:16-cv-00375, Docket # 308-19 (E.D. Va. Mar. 12, 2019), at ¶ 23.

sonably suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of, or related to Terrorism and or Terrorist Activities." *Compare March 2013 Watchlisting Guidance* at § 1.24 & App. 1(W) *with* Appellants' Br. at 3. Terrorist Activities are defined to include non-violent, facilitative or supporting activities "such as providing a safe house, transportation, communications, funds, transfer of funds or other material benefit …." *March 2013 Watchlisting Guidance* at § 1.15. The conclusion that these are invidious, rather than harmless or unknowing, actions is based on only a "reasonable suspicion" that such information is correct. *Id.* at § 1.24.2 & App. 1(U).

In Judge Trenga's words, "an American citizen can find himself labeled a suspected terrorist because of a 'reasonable suspicion' based on a 'reasonable suspicion.'" *Mohamed v. Holder*, 995 F.Supp.2d 520, 531-32 (E.D. Va. 2014).

Although appellants assert that "[t]he nomination *must* rely upon articulable intelligence or information which … creates a reasonable suspicion," Appellants' Br. at 3 (emphasis added), this is not true. For example, "[l]imited exceptions to the reasonable suspicion standard exist for the sole purpose of supporting certain special screening functions of DHS and State (such as determining eligibility for immigration to the U.S.)." Decl. of Timothy P. Groh,

Elhady v. Kable, 1:16-cv-375, Docket # 299-4, at 7-8, n.7. Likewise, a nominator may use an "expedited" procedure for individual nominations in "exigent circumstances" (an undefined term) by calling a toll-free telephone number after normal duty hours to "telephonically complete a Terrorist Screening Center Expedited Nomination Request Form" and follow up within 72 hours with documentation providing the basis for watchlisting. *See March 2013 Watchlisting Guidance* at §§ 1.58.3-1.58.4.

In fact, select officials can order a "temporary, threat-based expedited upgrade" that results in entire "categories of individuals to be temporarily upgraded in watchlist status." *Id.* at § 1.59. No "reasonable suspicion" standard is applied. The initial direction need not even be in writing and may be renewed and extended for thirty-day periods. *Id.* at §§ 1.59.2-1.59.3. There is no exception to this exception for U.S. persons, although they are granted an "expedited procedure … to ensure their watchlisting status is appropriate (including whether continued categorical watchlisting may be warranted based on the nature of the threat)." *Id.* at § 1.59.6. There is even an exception for individuals identified as terrorists under agreements with foreign governments, in which case a committee will decide, "country by country, prior to the

final agreement" whether that data will "be presumed to meet the standard for inclusion in TSDB" or undergo additional vetting. *Id.* at § 3.13.3.

Unsurprisingly given this *laissez-faire* approach, most nominations are successful. Thus, for example, nominations to the TSDB more than doubled between fiscal years 2009 and 2013, while the percentage of rejected nominations rose from slightly more than 0.2 percent in 2009 (508 rejections out of 227,932 nominations) to only slightly more than one percent in 2013 (4915 out of 468,749). Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories, *Mohamed v. Holder*, 1:11-cv-00050-AJT-TRJ (E.D. Va. March 28, 2014) (Docket No. 91-3).

The March 2013 Watchlisting Guidance absolves the official who applies the reasonable suspicion standard of any responsibility to verify the information he or she uses to add a person to the TSDB:

> Nominating Agencies should implement processes designed to ensure that nominations are free from errors, that recalled or revised information is reviewed regularly, and that necessary corrections to nominations based on those revisions/retractions are made. Nominating Agencies should, to the extent possible given the nature of the reporting, verify the accuracy and reliability of the information included in nominations.

March 2013 Watchlisting Guidance at § 1.24.2. If an FBI agent submits a nomination form to the TSC to request that an individual be placed on the

TSDB, the information on the form is assessed *as is*. This abdication renders rather empty the "biannual review of all U.S. persons in the TSDB to ensure that the underlying information supports the nomination." Appellants' Br. at 3. The information is *presumed* accurate as submitted.

The only No Fly List case to receive a trial in federal court, *Ibrahim v. Dep't of Homeland Security*, No. 3:06-cv-0545 (WHA), provides concrete evidence of how poorly this pass-the-buck approach to accuracy works in practice.[23] Dr. Rahinah Ibrahim was a graduate student at Stanford University when she was unexpectedly approached by FBI Special Agent Kevin Michael Kelley. The Government conceded at trial that Dr. Ibrahim did not at that time, nor at any other time, present any threat of domestic terrorism or any other threat to civil aviation security or national security. *Ibrahim v. Dep't of Homeland Security,* 62 F.Supp.3d 909, 915-17 (N.D. Cal. 2014).

A month *prior* to meeting her, in November 2004, Agent Kelley nominated Dr. Ibrahim to several terrorist watchlists, including the TSDB. He did this through a written form. Agent Kelly admitted at trial that he misunderstood the instructions on the form and nominated Dr. Ibrahim to the wrong

[23] Prof. Kahn testified as an expert witness on these topics on behalf of the plaintiff in *Ibrahim*.

lists, nominating her to the No Fly List and other watchlists completely by mistake. According to the district court, Agent Kelley "checked the wrong boxes, filling out the form exactly the opposite way from the instructions on the form." The district court found this to be the "bureaucratic analogy to a surgeon amputating the wrong digit." *Ibrahim*, 62 F.Supp.3d at 928.

As a result, when Dr. Ibrahim attempted to fly to an academic conference from San Francisco International Airport, she was handcuffed and lodged in a holding cell (though in need of wheelchair assistance) and humiliated in front of her fourteen-year-old daughter. *Ibrahim*, 62 F.Supp.3d at 917. Her student visa was then revoked and she was forbidden to return to the United States. *Id.* Given that "suspicious adverse effects continued to haunt Dr. Ibrahim" long after the Government claimed to correct this error, the district court found that "there is reason to doubt that the error and all of its echoes have been traced and cleansed from all interlocking databases." *Id.* at 929.[24] Agent Kelley's single botched TSDB submission caromed "extensively through the government's interlocking complex of databases, like a bad credit

[24] As one example of these "on-the-list-off-the-list machinations," Dr. Ibrahim's daughter "was not allowed to fly to the United States even to attend this trial [almost nine years later] despite the fact that her daughter is a United States citizen." *Id.*

report that will never go away." *Id.* at 928. Agent Kelley would not realize his mistake for *eight years*—so much for oversight, biannually or otherwise. The error was not caught when Agent Kelley filled out the form, when TSC officials mechanically entered his information, or when TSA and other agency officials acted on it. One can only wonder what vetting process could confirm Dr. Ibrahim on multiple watchlists when not only was she negligently added to the list in the first place, but also when (as the court found and the Government conceded) Dr. Ibrahim was at no time a threat of any kind. Neither routine nor *ad hoc* oversight procedures caught the error. Only at Agent Kelley's September 2013 deposition, permitted to proceed only after vigorous objections by government counsel, did Agent Kelley realize his monumental blunder. *See Ibrahim v. Dep't of Homeland Security*, 912 F.3d 1147, 1162-63 (9th Cir. 2019) (en banc).

The nature of the form Agent Kelley bungled is indicative of the nature of the watchlisting enterprise itself. A blank copy of this form appears below.[25]

[25] Both the District Court, *Ibrahim*, 62 F.Supp.3d at 916, and the Court of Appeals, *Ibrahim*, 912 F.3d at 1158, were sufficiently struck by the nature of this form as to reproduce copies of Agent Kelley's erroneously completed version of it. The Court of Appeals also reproduced a blank copy, *id.* at 1157, the source for this image.

It is recommended that the subject **NOT** be entered into the following selected terrorist screening databases:

- ☐ Consular Lookout and Support System (CLASS)
- ☐ Interagency Border Information System (IBIS)
- ☐ TSA No Fly List
- ☐ TSA Selectee List
- ☐ TUSCAN
- ☐ TACTICS

...

The case agent will also nominate any terrorist screening database into which the subject should not be entered. If no databases are selected, then the subject will be added by the TSC to all appropriate databases.

The form presented a list of watchlists with the presumption that a nomination would be made to *all* of them. The form instructed the FBI agent to positively *opt out* of those watchlists to which the FBI agent did not recommend the subject be added. An opt-out construction is entirely expected, given the culture that prevailed at the Terrorist Screening Center, the FBI unit responsible for watchlisting.

II. The Terrorist Screening Center

"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341

U.S. 123, 170 (1951) (Frankfurter, J., concurring) (footnote omitted). Unfortunately, that is precisely the environment in which the work of the TSC is done.

A. The TSC Insulates Itself from Ordinary Sources of Oversight and Accountability, Creating an Institutional Culture in Need of Judicial Review

Like the TSDB that it compiles, the TSC was created by executive directive, not statute, "to consolidate the Government's approach to terrorism screening[.]" HSPD-6 at ¶ 1; HSPD-11 at ¶ 2 (the TSC "was established and is administered by the Attorney General pursuant to HSPD-6"). Neither the TSC nor the FBI, within which the TSC is administered, promulgates regulations that would subject its organizational and operational choices to notice-and-comment rulemaking. To the contrary, what regulations exist exempt the TSC from various provisions of the Privacy Act. *See, e.g.*, 28 C.F.R. §16.96(s)(4) & (6)-(8) (FBI) and 6 C.F.R. Pt. 5, App. C (DHS). In place of any statutory requirements, the FBI provides unenforceable assurances that the TSC's self-regulation will suffice. *See, e.g.*, 28 C.F.R. §16.96(s)(7) (exempting the TSC from the Privacy Act requirement to maintain records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination," 5 U.S.C. § 552a(e)(5),

because, *inter alia*, "[t]he restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts. *The TSC has, however, implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible*." (emphases added)).

The Terrorist Screening Center does not accept redress inquiries directly from the public.[26] The FBI has not disclosed the physical location of the TSC, which was only revealed by accident to be in Vienna, Virginia. Tom Jackman, *Vienna Tormented by FBI Building's Non-Stop Buzz*, Wash. Post, June 21, 2012. Although the building lacks any visible signs, newspaper accounts can now be confirmed using Google Maps because the Center's former director dramatically revealed during an interview on CNN that its employee entrance is ornamented with a three-story tall sculpture taken from the rubble of the World Trade Center's North Tower. *Exclusive Interview with Terrorist*

[26] https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc.

Screening Center Director Christopher Piehota, CNN (Apr. 6, 2016).[27] The interview began by highlighting the sculpture:

As this image from Google Maps better illustrates, the sculpture is placed so that employees must file past it each morning on their way from the secure parking lot to the building entrance.

[27] http://www.cnn.com/videos/politics/2016/04/06/exclusive-interview-with-terrorist-screening-center-director-christopher-piehota-origwx-allee.cnn.

This sobering opportunity for reflection at the start of the work day is hardly accidental. In his interview, TSC Director Christopher Piehota explained the purpose of this sculpture to his CNN interviewer: "It reminds us daily of the importance of what we do." *Id.* at 00:20-00:41.

Nor is the sculpture the only reminder. Once inside the building, these reminders continue. CBS News reported that "[t]hroughout the Terrorist Screening Center are placed artifacts from various terrorist attacks including Oklahoma City federal building, the USS Cole bombing, and the World Trade

Centers. All sober reminders of how important their work is." Bob Orr, *Inside a Secret U.S. Terrorist Screening Center*, CBS Evening News, Oct. 1, 2012, 9:03 PM.[28]

Four years later, in his 2016 interview, Director Piehota escorted his CNN interviewer through this macabre museum and showed CNN's audience the images his staff see each morning. Again, his message was very clear. As he somberly observed standing in front of another piece of the wreckage from the World Trade Center, "the remnants were put here to remind our staff of our mission, which is to prevent acts of terrorism. Keeps us mindful of the threat that is still out there. Each remnant or each artifact shows you the evolution of terrorism." *Id.* at 00:20-00:41.

[28] https://www.cbsnews.com/news/inside-a-secret-us-terrorist-screening-center/.

Since this building is not accessible to the public, this museum's purpose is not to educate anyone who does not work at the TSC. Tellingly, none of the exhibits shown in this interview concerned the *successful* use of the TSDB or other terrorist watchlists to prevent acts of terrorism. Some exhibits predated the existence of the TSC.[29] Others, like the "Underwear Bomber" on Northwest Airlines Flight 253 on Christmas Day 2009, actually demonstrate the *failure* of the TSC to use its watchlisting tools effectively.

[29] In addition to these exhibits, the FBI has posted a time-lapse video that shows individuals (who must be TSC employees, given the guarded nature of the facility) praying as shadows, cast by three flagpoles that once stood in front of the World Trade Center, pass over a 9/11 memorial at a security gate to the

The message to the employees passing these artifacts of intelligence failures seems clear: Do not err on the side of caution; do not interrogate too rigorously the judgments of those who send you names of people to be watchlisted. There will be no reward (and there is too much at risk) to question the reasons for adding someone who has been placed on the watchlist. The reasonable suspicion standard is meant to accord deference to the reasonable suspicion of FBI agents, not to provide an independent, neutral adjudication of their claims.

B. Legal Precedents That Accord Discretion to Predict Future Conduct Rely on Transparency and Neutrality That the TSC Eschews in Favor of Unconstitutionally Vague Standards Riddled with Exceptions

Appellants rely on a single case that rejected a vagueness challenge to the (for now) four published criteria used to compose the No Fly List. They seek the same result for their "reasonable suspicion" standard as applied to "the underlying reasons or intelligence on which a person's TSDB status may

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TSC building. These shadows cross the memorial once each year at the precise times the four hijacked planes crashed. *See* FBI TSC video, *available at* https://www.fbi.gov/video-repository/160906-terrorist-screening-center-sept11-memorial.mp4/view. There is no doubt that the mourners paying their respects are sincere. The sculpture and artifacts are vivid reminders of threats to our national security. But these monuments to vigilance in no way create the presence of mind needed for dispassionate adjudication of evidence.

be based," although appellants decline to disclose what they are. Appellants' Br. at 53, 11 (citing *Kashem v. Barr*, 941 F.3d 358, 365-66, 369-77 (9th Cir. 2019)).

The *Kashem* plaintiffs' argument was that the criteria were vague "because they are based on a threat assessment involving a prediction of future criminal conduct." *Kashem*, 941 F.3d at 371. Rejecting this position, the court principally relied on *Schall v. Martin*, 467 U.S. 253 (1984) (finding that a juvenile's pretrial detention based on "an experienced prediction" by a Family Court judge of future criminal conduct is not unconstitutionally vague); *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (describing judges' prediction-driven roles in bail and sentencing decisions; parole boards in parole decisions; and juries in capital sentencing decisions); and *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2561 (2015) (noting in dicta and as "a general matter" the constitutionality of laws that require a judge or jury to gauge "the riskiness of conduct in which an individual defendant engages *on a particular occasion*.") (emphasis in original).

Such courtroom or administrative board activities employ not just special expertise but a predilection for transparency and adversarial proceedings. *Schall v. Martin*, 467 U.S. at 279 ("Given the right to a hearing, to counsel, and

to a statement of reasons, there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute."). The judges, jurors, and parole board members charged with making these decisions do so in open forums where their work is observed, assessed, critiqued and sometimes overturned by others in a judicial hierarchy. What could look *less* like the operation of the secretive TSC than such open and rules-based proceedings? And, compared to the artifacts of terrorism that anonymous TSC analysts pass on their way into a secure facility, the judges and quasi-judicial figures in these cases may pass the ubiquitous statues of blindfolded Lady Justice that dot courthouses throughout the country. All institutions use physical cues to sculpt the attitude desired for those that enter their buildings, for good reason.

A vagueness analysis is an "objective inquiry" into "whether the law gives 'a person of ordinary intelligence fair notice of what is prohibited,'" *Kashem*, 941 F.3d at 371 (citing *U.S. v. Williams*, 553 U.S. 285, 304 (2008)). In *Williams*, Justice Scalia observed: "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is … [Unconstitutionally vague statutes require]

wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306.

The Ninth Circuit rejected a vagueness challenge to the four No Fly List criteria, which rely on application of the reasonable suspicion standard to statutory definitions of domestic and international terrorism. *Kashem*, 941 F.3d at 365-66. Arguably, there is no indeterminacy there "of precisely what that fact is." The criteria rely on statutes that define with particularity the multiple elements of international and domestic terrorism. 18 U.S.C. § 2331(1) & (5). Indeed, the criteria are sometimes further limited to such threats when applied to aircraft or government facilities.

But there is abundant indeterminacy regarding precisely what facts render someone suspicious enough for inclusion in the TSDB. What is "conduct constituting, in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities"? Appellants' Br. at 3. The March 2013 Watchlisting Guidance states that "terrorism and/or terrorist activities" "combine elements from various federal definitions" but identifies none in particular. *March 2013 Watchlisting Guidance* at App. 1(Y). What might "aid … further[], or relate[] to" those unspecified statutory definitions? The Guidance unhelpfully posits that "to be reasonable, suspicion should be as clear and as

fully developed as circumstances permit." *Id.* at § 3.5. Sometimes, the Guidance seems to broaden in ill-defined ways appellants' formulaic "conduct constituting" criteria. For example, the Guidance supports a reasonable suspicion of individuals who are "sympathizers and supporters" of a designated terrorist organization when support is "operational in nature" and not "merely ideological." *Id.* at § 3.13.8.1. Similarly, an inference of reasonable suspicion may arise because of the "frequency, duration, or manner" of contact and other unspecified "malevolent or illicit factors that can be articulated that would support" a reasonable suspicion. *Id.* at § 3.13.4.1.2 & 3.13.4.1.4.

In any event, the numerous exceptions to applying the reasonable suspicion standard mean that inclusion on the TSDB may depend on none of the twists and turns expanding the vague contours of "reasonable suspicion" at all. *See supra* Part I.B. "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" *SEC v. Chenery*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

June 2, 2020

Respectfully submitted,

s/ *Andrew Tutt*

Andrew T. Tutt
R. Stanton Jones
Stephen K. Wirth
Shira V. Anderson
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Jeffrey D. Kahn*
SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW
3315 Daniel Ave.
Dallas, TX 75205
(214) 768-2792
jkahn@smu.edu

* *Academic affiliation provided for identification purposes only.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ *Andrew Tutt*
Andrew T. Tutt

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I hereby certify that a true and correct copy of the foregoing document was filed electronically on June 2, 2020, and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
Andrew T. Tutt