No. 20-1119, 20-1311

United States Court of Appeals for the Fourth Circuit

ANAS ELHADY, ET AL.,
PLAINTIFFS-APPELLEES

v.

CHARLES H. KABLE, ET AL.,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 1:16-CV-00375 HON. ANTHONY J. TRENGA, PRESIDING

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FIREARMS POLICY FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Fourth Circuit Local Rule 26.1, *amici* make the following declarations:

Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization, has no parent organization, and issues no stock.

Firearms Policy Foundation (FPF) is a nonprofit organization, has no parent organization, and issues no stock.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of *amici*.

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INTEREST OF *AMICI CURIAE*[1]

Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

Firearms Policy Foundation (FPF) is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

The present case concerns *amici* because due process of law is a cornerstone of our constitutional system necessary to a free society respectful of individual liberties. The government's use of secret lists to take away rights from people in America—including the right to keep and bear arms—cannot reconcile with our Constitution's guarantees. *Amici* herein show how these lists and related government enforcement actions threaten the fundamental rights of all Americans, including their members and supporters.

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. Counsel for the parties did not author this brief in whole or in part. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The deprivation of a right is a serious consequence. Our Republic is grounded in the guarantee that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST AMEND. V; *see also* U.S. CONST AMEND. XIV. *Amici* believes that, at minimum, the due process requirement means that those fundamental rights of Americans—including the rights to speak, associate, travel, and keep and bear arms—cannot, consistent with our Constitution and founding principles, be summarily removed from an individual by their mere placement in a top secret list, without any procedural protections or substantive adjudication.

The watchlist here at issue is inherently unreliable. Its standards for inclusion are so lax and overgrown with false positives that it covers some 1.2 Million people. *Amici* submits that it is inevitable that, given the circumstances, many—if not *most*—of the names on the watchlist are undeserving of the profound defamation that accompanies placement on the list. The record is replete with examples of mistaken identity, inclusion based on constitutionally protected activity, and government agents exaggerating dangers. Because this defamation includes the deprivation of fundamental rights, whatever process is due, it is more than an unaccountable check behind closed doors.

Amici specifically discuss the degree to which the fundamental, individual right to keep and bear arms is presently affected, and threatened to be further

affected, by such lists. Already, inclusion in the Terrorist Screening Database (TSDB) infringes upon the right to keep and bear arms at the state and federal level. This alone is a serious deprivation usually reserved for conviction of a serious crime, not an unreliable accusation based only on "reasonable suspicion" that the owner of a name may be involved with something.

There is no doubt the government has a serious interest in national security. But that general interest alone cannot carry the day when this Court is faced with a wholesale abrogation of fundamental rights.

ARGUMENT

I. Watchlists Without Proper Due Process Controls Threaten the Fundamental Rights of Americans

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As the Supreme Court recognized when applying these principles to the fight against terrorism, "*Mathews* dictates that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (internal quotation marks omitted). These constraints require that those subject to government power be provided "notice of the reasons for the deprivation, an explanation of the evidence

against him, and an opportunity to present his side of the story." *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

At minimum, this standard must mean that the fundamental rights of Americans to speak, associate, travel, and bear arms in their own defense, cannot be abridged by secret lists complied according to arbitrary standards—or what's worse, by standards rooted in ethnic background, political affiliation, or religious confession. Yet that is precisely what the programs at issue in this case amount to.

As the district court found, the Government claims the power to place anyone on a watchlist where there is a "reasonable suspicion that the individual is a known or suspected terrorist." *Elhady v. Kable*, 391 F. Supp. 3d 562, 569 (E.D. Va. 2019). The end result is a list so overgrown with false positives that it now covers some 1.2 Million people, including some 4,600 citizens and permanent residents. Given the lax standards for inclusion, *amici* submit that it is inevitable that most of those names, including those of our fellow countrymen, don't deserve the defamation, since "the incentive structures surrounding terrorist watch lists push agents and agencies to exaggerate dangers, putting names on watch lists that do not belong there." Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFFALO LAW REVIEW 461, 463 (2013).

Moreover, the deprivations are not even limited to those people who met such a minimal standard to have their name put on the list. They are applied to anyone unfortunate enough to *share a name* with someone who met the low bar for inclusion. Such was the fate of Senator Edward "Ted" Kennedy, who was repeatedly stopped at airports because the government had listed "T. Kennedy" as a potential terrorist alias. Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, NEW YORK TIMES, Aug. 20, 2004.[2] The same befell the wife of Senator Ted Stevens, who had to convince security personnel that while her name was Catherine Stevens, she was a different person than the 1970s male pop singer Cat Stevens, who ended up on the government's list after converting to Islam. Joe Sharkey, *Jumping Through Hoops to Get Off the No-Fly List*, NEW YORK TIMES, Feb. 14, 2006.[3] David Nelson, the son of 1950s Television's Ozzie and Harriet, was likewise hassled for sharing a name with someone suspected of less dedication to Freedom, Mom, and Apple Pie. *Id.*

As the district court found, even those names on the watchlist not expressly barred from boarding flights are still subject to deprivation. *Elhady*, 391 F. Supp. at 570. This includes restrictions on travel, since the list is consulted when issuing

[2] https://www.nytimes.com/2004/08/20/us/senator-terrorist-a-watch-list-stops-kennedy-at-airport.html
[3] https://www.nytimes.com/2006/02/14/business/jumping-through-hoops-to-get-off-the-nofly-list.html

passports and visas, and other immigration decisions. *Id.* It includes restrictions on employment, not just in sensitive government positions but any number of private sector positions in industries such as transportation and infrastructure. An individual's presence on a watchlist is disseminated to local law enforcement across the country, subjecting citizens to the risk of discriminatory treatment in any interaction they have with the police. *Id.* Despite being based on only "reasonable suspicion," they are even included in the criminal history considered by courts when making bail and sentencing determinations, influencing the view of judges who may not realize just how flimsy a thread this federal determination of terrorist status hangs on. Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, THE INTERCEPT, Mar. 15, 2016.[4]

As harmful as the watchlist is to those it ensnares, it could perhaps be justified by a sufficient government showing of significant interest in its perpetuation. Yet this government interest still falls short. The prevention of terrorist attacks is of course a valid and laudable goal. But violations of due process are not automatically "offset by the circumstances of war or the accusation of treasonous behavior." *Hamdi*, 542 U.S. at 530. As the plurality opinion explained in *Hamdi*, the role for the court in this context is to "consider the interest of the erroneously detained

[4] https://theintercept.com/2016/03/15/terrorist-watchlist-errors-spread-to-criminal-rap-sheets/

individual." *Id*. The Court cited *Carey v. Piphus*, 435 U.S. 247, 259 (1978), for the proposition that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." For this reason, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Id*. at 266. *Hamdi* involved a greater deprivation than the present case, but the fact that the government has not yet subjected those on the terrorist watchlist to indefinite detention does not undermine Appellees' "absolute" right to legal process. That some names on the government's list may in fact belong to people guilty of terrorist acts is of no moment, because this Court's duty is to address the risks to those erroneously defamed.

Names are added to the list "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, terrorism and/or terrorist activities." *Elhady*, 391 F. Supp. at 568. And the government takes a broad view of what activities allow them to make a rational inference that they reasonably suspect someone might engage in conduct related to terrorism, including an express policy of considering race, ethnicity, religion, and political or ideological beliefs. *Id*. at 569.

And since the inclusion decisions are secret and not subject to independent review, citizens are at the mercy of law enforcement's view of what might be "related to" terrorist activity—including, apparently, opposition to the death penalty or the Iraq War. *See* Lisa Rein, *Md. Police Put Activists' Names On Terror Lists*, Washington Post, October 8, 2008.[5]

Lack of independent review renders any entry on the list, even those for which profound intelligence exists, suspect and unreliable, because there is no basis on which to trust the government's determination other than blind faith in the integrity and competence of law enforcement—a blind faith *amici* submit is unwarranted, and which the Due Process clause should not countenance. Our commitment to due process means, at minimum, a commitment to reject the arbitrary unreviewed authority of officials to undermine the right of each American to exercise the privileges and immunities that the constitution guarantees them. As discussed in Section II, *infra*, *amici* are particularly concerned about the threat such unaccountable watchlists pose to the fundamental right of citizens to bear arms. This court should find that these risks to liberty are too great to be overcome by vague gestures toward some talismanic interest in "national security."

[5] https://www.washingtonpost.com/wp-dyn/content/article/2008/10/07/AR2008100703245.html?sid=ST2008100703347&s_pos=

II. Unaccountable Government "Watchlists" Have Been Invoked to Undermine Second Amendment Rights

As the district court found, an individual's placement on the watchlist can "reasonably be expected to affect any interaction an individual on the Watchlist has with law enforcement agencies and private entities that use TSDB information to screen individuals . . . [including] firearm purchases." *Elhady*, 391 F. Supp. at 580. The watchlist therefore imposes a stigma for which the Appellees are entitled to redress, since individuals have rights with respect to governmental defamation where that defamation alters or extinguishes a right or status. *Paul v. Davis*, 424 U.S. 693, 711 (1976). And the district court's invocation of firearms is not merely hypothetical, since in addition to the broad range of consequences Appellees have suffered, this breed of secret watchlist has been invoked, time and time again, as sufficient justification for the categorical denial of the fundamental right to keep and bear arms.

Firearms are, no doubt, serious implements. Their proper use requires responsibility and care, but their importance to ordinary Americans is no less serious now than it was at the time of the founding. Indeed, firearms are overwhelmingly relied on by Americans to ensure the "protection of one's home and family[.]" *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). This fundamental right—like all those guaranteed by our Constitution—ought never be treated as a second-order concern. Rather, the protection of such rights demands robust respect for due

process ahead of any abrogation. To do otherwise would render such rights a mere privilege.

A. The Watchlist Has Been Used to Stifle Second Amendment Rights at the Federal Level

It ought surprise no one that the watchlist has led to consistent attempts to limit access to firearms—not due to logical relationship or normal operation of law, but due to the constant, unrelenting drone of calls to use the watchlist to prohibit firearm transactions. The current trend to invoke the watchlist in these situations may have roots in a 2010 report from the Government Accountability Office (GAO) which noted with concern that the suspected membership "in a terrorist organization does not prohibit a person from possessing firearms…under current federal law." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-703T, TERRORIST WATCHLIST SCREENING (2010). It is unclear why this was a surprise to the GAO, since it is well settled that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST AMEND. V *see also* U.S. CONST AMEND. XIV. And since it was well understood by 2010 that "the right to keep and bear arms" was a protected liberty interest. U.S. CONST AMEND. II. Still, though, the Department of Justice in April 2007 had "proposed legislative language to Congress that would provide the Attorney General with discretionary authority to deny the transfer of firearms…to known or suspected [terrorists.]" U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*.

Having one's right to keep and bear arms affected by inclusion in the TSDB is far from speculative. The right to "keep and bear" necessarily includes the right to acquire a firearm, as it is quite difficult to "keep" or "bear" a concept. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms")(internal quotation marks omitted); *Ezell v. City of Chi.*, 651 F.3d 684, 704 (7th Cir. 2011)("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.") With this in mind, note that all persons attempting to purchase firearms in interstate commerce

> must undergo an NICS Background Check. As part of that procedure, prospective customers must complete a firearms transaction record known as the ATF Form 4473, which elicits personal information and propounds questions to certify that the customer is qualified to possess a firearm under the enumerated Brady Act factors. The Form 4473 information is then compared against databases from multiple agencies, including the Federal Bureau of Investigation's National Crime Information Center ("NCIC"). Since 2004, the NCIC has incorporated data from the TSDB. When the background check produces a "match" with any NCIC records, including those that may also reside in the TSDB, the application is delayed while NICS agents research the transaction to determine whether the individual would be prohibited by law from receiving or possessing a firearm.

Robinson v. Sessions, 721 F. App'x 20, 22 (2d Cir. 2018), cert. denied, 138 S. Ct. 2584 (2018). At a minimum, then, we know individuals' firearms purchases are delayed by their inclusion in the TSDB. As other circuits have held, it is no answer to the abrogation of a right to say it can be done some*place* else. *See Ezell*, 651 F.3d at 697 (rights cannot be forbidden merely because they can be exercised elsewhere)

(citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)). In the same way, denying individual rights without due process ought not be ignored because they might possibly be exercised at some other *time*.

And, were this Court to rubber stamp these watchlists, there is no reason to suspect the imposition on Second Amendment rights would be limited to a temporal inconvenience. Just a few years ago, some 170 members of congress held a day-long sit-in on the house floor to demand legislation that would explicitly make terror-watchlist status grounds for denying the right to purchase a firearm altogether. *See* Rachael Bade, Heather Caygle and Ben Weyl, "Democrats stage sit-in on House floor to force gun vote," Politico, June 6, 2016.[6] Such proposals remain a live controversy, with many organizations opposed to the right to bear arms proposing watchlist-based restrictions on gun purchases. *See* EVERYTOWN FOR GUN SAFETY, "Everytown to Air TV Ad Urging Congress to Close the Terror Gap," Dec. 15 2015[7]; GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, "Terrorist Watchlist."[8] This Court can therefore take no solace in the idea that a ruling upholding the TSDB will not allow the federal government to abridge this fundamental right.

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[6] https://www.politico.com/story/2016/06/democrats-stage-sit-in-on-house-floor-to-force-gun-vote-224656

[7] https://everytown.org/press/everytown-to-air-tv-ad-urging-congress-to-close-the-terror-gap/

[8] https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/terrorist-watchlist/#federal

B. The Watchlist Abridges the Right to Keep and Bear Arms in Several States

The liberty interest here deprived goes deeper than just an individual's relationship with the federal government. Throughout the country, individuals are subject to various levels of state involvement in the exercise of their rights. *Silvester v. Becerra*, 138 S.Ct. 945, 945–46 (2018) (Thomas, J., dissenting from denial of certiorari) (exploring the state of firearm waiting periods and background checks throughout the country, including California's, which searches "at least six databases").

In some jurisdictions, the law has come to "disqualif[y] people on the federal Terrorist Watchlist from obtaining a firearm identification card or a permit to purchase a handgun[.]" *State v. Harper*, 229 N.J. 228, 240 (N.J. 2017). It is well settled that handguns are central to the Second Amendment "because they are 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family[.]'" *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3023 (2010) (quoting *Heller*, 128 S.Ct. 2783). Yet states continue to use unaccountable secret lists to deny citizens these basic tools of self-defense.

There is therefore no doubt that people who find themselves on one of the many secret lists the government maintains and circulates suffer a deprivation of a protected liberty interest. It is no exaggeration that in some parts of the country, they lose the "core," and effectively the entirety of a fundamental, constitutionally

enumerated right. As Justice Thomas so aptly put it, the courts ought not "be in the business of choosing which constitutional rights are '*really worth* insisting upon,'" and this severe deprivation, without ever being convicted or accused of a crime, combined with others, ought make clear the severity of this issue. *Silvester*, 138 S.Ct. 945 (Thomas, J., dissenting from denial of certiorari) (quoting *Heller*, 128 S.Ct. at 634) (emphasis in original). It is clear those unjustly placed on the terrorist watchlist suffer a panoply of liberty deprivations, and *Amici* submit that the rights deprived by the TSDB, including the right to keep and bear arms, are "really worth insisting upon."

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,139 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point font.

/s/ Reilly Stephens
June 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

/s/ Reilly Stephens
June 2, 2020