No. 20-1119, 20-1311

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ANAS ELHADY, ET AL.,

Plaintiffs-Appellees,

v.

CHARLES H. KABLE, ET AL.,

Defendants-Appellants.

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

PETITION FOR EN BANC REHEARING

May 14, 2021

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FRAP RULE 35(b)(1) STATEMENT

En banc consideration is necessary because this case involves questions of exceptional importance, including (1) whether the federal government's secret watchlist more than a million names long violates Appellees' Due Process right to travel by ensuring listees are treated as suspected terrorists as they travel by air and cross the US border and (2) whether this watchlist, which brands innocent people as terrorists without meaningful recourse and shares this branding with tens of thousands of entities outside the federal government, violates Appellees' Due Process stigma-plus rights.

En banc consideration is also necessary because the Panel's decision conflicts with *Sciolino v. City of Newport News*, 480 F.3d 642, 647 (4th Cir. 2007), as well as *Paul v. Davis*, 424 U.S. 693 (1976), *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), *U.S. v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019), *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

INTRODUCTION

Twenty years ago, for the first time in history, the federal government created a watchlist targeting more than one million people. It is a secret list, with rules and practices that remain largely hidden. To be on this secret watchlist, the federal government need not even suspect that its targets are involved in criminal activity.

That is how this so-called terrorist watchlist became just a list of innocent people—mostly Muslim. Indeed, the government has never accused Appellees of any criminal activity.

Once on the list, the Government does not have to tell you why it put you on the list. The Government does not have to give you a hearing about your placement. The Government does not have to even tell you if you are on it. But the Government will share its list with federal agencies, state and foreign governments, and even private companies—tens of thousands of entities in total.

With a watchlist status, the federal government will subject you, your family, and anyone else who may be traveling with you to a segregated and humiliating screening process every time you try to fly. It will detain and handcuff you—sometimes at gunpoint—for six to twelve hours

at land borders, confiscating and searching your electronics. It will, as a practical matter, ban you from all sorts of licenses and even entire professions—like Anas Elhady's dream of being a police officer. For these reasons, Judge Trenga declared the watchlist program in its current incarnation unconstitutional.

The Panel denies none of this. Still, the Panel asserts, these facts do not rise to conduct that would give individuals any due process rights at all. But the Panel barely relies on any precedent for this extraordinary position at all. Instead, and although neither side briefed the case in this way, the Panel relies on its own sense of originalism, citing to the Federalist Papers, Blackstone, and a Judge Taney dissent. The Court should hear this case en banc because the issues in this case and the constitutional rights at issue are too important to be decided by a panel relying on a novel construction of Constitutional rights.

The Court should also hear this case en banc because the Panel's analysis, particularly its "stigma-plus" analysis, deviates from actual Fourth Circuit law, Supreme Court precedent, and the law of other Circuits. Indeed, in the Panel's only significant reliance or discussion of any

Fourth Circuit case, *Sciolino v. Newport News*, the Panel essentially adopted the opinion's dissent (which the Panel author also wrote).

Its holding that the stigma-plus test only applies to a right to employment conflicts with the Supreme Court's decision in *Paul* itself (as well as all Circuits who have addressed the issue). Its holding that stigma-plus requires mandatory consequences goes against *Sciolino*, as well as decisions in the Second, Ninth, and Tenth Circuits. And its holding that stigma-plus dissemination must be to a private entity is contrary to a decision of the Ninth Circuit. En banc reconsideration is appropriate to harmonize the analysis with this Circuit's prior caselaw as well as the decisions of the Supreme Court and other circuits.

ARGUMENT

I. The Court of Appeals takes a brand new approach to an important issue.

Beyond a brief and irrelevant discussion in *Willis v. Town Of Marshall*, 426 F.3d 251, 265 (4th Cir. 2005), the Panel's decision is the first Fourth Circuit holding of any kind regarding the right to travel. The Panel leverages this vacuum to issue a decision that insulates the unprecedented and consequential power the Government applies to

individuals they decide in accordance with secret rules and practices to brand as terrorists without any sort of judicial review.

Rather than apply Supreme Court cases, the Panel's decision retreats to originalist first principles. The Panel (at 20) cites Chief Justice Taney's dissent in the *Passenger Cases*, 48 U.S. 283, 484 (1849), for the proposition that the "State" can impose a quarantine at the border, but that decision and Judge Taney meant individual States, who can use their police power (not any border power) to quarantine illnesses, much as we see today with Covid-19. The Panel also relies (at 20 & 26) on Federalist #12, purportedly about the right to secure borders. But Federalist #12 was merely about the union's need for security in ports and at sea to prevent smuggling so the fledgling union would have a revenue source.

The Panel should have looked to the Supreme Court's many cases on the right to travel. These so-called "right to travel cases" announce a clear rule that the Panel disregarded: that "any classification which serves to penalize the exercise of that right to travel" violate the right unless the classification satisfies strict scrutiny. *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972) (cleaned up). The Supreme Court has also consistently applied an "actually deters" standard for determining when

penalization occurs. *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 257 (1974); *see also Dunn*, 405 U.S. at 340. Despite the Supreme Court precedents, the Panel casually discards this test as "subjective."

Even when the panel does rely on generalized Supreme Court caselaw, it ignores Fourth Circuit law more directly on point. So, for instance, the Panel (at 20) cites *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977), for the general principle that there is a broad "border exception" to Constitutional rights. But this Circuit has clarified that the border exception must be used for and interpreted in light of "the United States' sovereign authority over its borders," *U.S. v. Aigbekaen*, 943 F.3d 713, 722 (4th Cir. 2019), such as inadmissible contraband, immigration, or border-related crime, all inapplicable here.

The decision also discounts what it calls "extreme encounters with law enforcement" as outliers. But if the Panel had meant to hold only that some Appellees have suffered some constitutionally-significant injury, its reversal was error. Instead, the Court should have reached the merits as to those Appellees. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (court may proceed to merits if one plaintiff has standing). What it did instead—suggest that because some Appellees may not have had the

same egregious consequences as others, none have Due Process rights—breaks new ground and contravenes *Bostic*.

The Panel separately suggests (at 24-25) that any other decision would create a circuit split with *Abdi v. Wray*, 942 F.3d 1019, 1031, 1032 n.3 (10th Cir. 2019), and *Beydoun v. Sessions*, 871 F.3d 459, 467 (6th Cir. 2017). Respectfully, the Panel overstates those opinions because the Tenth and Sixth Circuit decided them on their narrow facts.

Indeed, the Tenth Circuit expressly stated in *Abdi* that the *Elhady* facts "are distinguishable from the case [the Tenth Circuit] consider[ed]." *Id.* at 942 F.3d at 1032 n.3 (declining to take "any views" on the outcome here). Further, although the Panel claimed (at 24-25) that the claims in *Abdi* involved one delay of "about a half hour" and another of 48 hours, the latter was not a 48-hour detention. Instead, he was just unable to board an airplane for 48 hours. *Id.* at 1026. This is miles from the hours of detention and interrogation alleged at the border here.

Similarly, in *Beydoun*, the Court's only reason for finding a lack of travel-related standing as to one plaintiff was insufficient detail: "*Beydoun* has not attempted to provide any information about when those delays occurred, how long the delays were, what type of enhanced

screening he was subjected to, or indeed any information beyond general allegations that he has been prevented from traveling." 871 F.3d at 467. As to the other *Beydoun* plaintiff, he merely alleged "instances when he has been delayed or subjected to additional screening, with delays ranging from ten minutes to one hour in duration." *Id.* These are more like commonplace delays suffered by airport users generally and have little in common with the six-to-twelve-hour delays at the border here and humiliating searches at the gate, never mind the arresting at gunpoint and confiscation of electronics alleged here. JA 443-450; *see generally Salloum v. Kable,* 19-cv-13505, 2020 WL 7480549, at *7 (E.D. Mich. Dec. 18, 2020) (explaining limited reach of *Beydoun*).

II. The Panel ignores Fourth Circuit precedent and would create a Circuit Split with other Courts.

The Supreme Court's stigma-plus test is the test for determining when government defamation is constitutionally actionable. To avoid making all defamation by government actors a constitutional violation, the Supreme Court held in *Paul v. Davis*, 424 U.S. 693 (1976), that, to bring such a constitutional action, an individual must show a (1) stigmatic statement, (2) some type of dissemination, and (3) other

governmental action adversely affecting the plaintiff's interest (the so-called "plus").

A. The Panel's "public dissemination" holding is not derived from Fourth Circuit caselaw and would create a circuit split.

The Panel's stigma-plus analysis purportedly relies on two Fourth Circuit cases: *Sciolino*, 480 F.3d 642; *Shirvinski*, 673 F.3d 308. The Panel cites *Shirvinski* (at 31) for the noncontroversial proposition that a plus factor must be "a state action that distinctly altered or extinguished his legal status." Neither side disputes this.

The Panel cites *Sciolino* (at 30-31) for the proposition that the parties must show "adequate 'public disclosure' by the government." This is uncontroverted. But according to the Panel, "intragovernmental dissemination of TSDB information to other federal agencies and components, to be used for federal law enforcement purposes, is not 'public disclosure' for purposes of a stigma-plus claim."

Scioliono's holding does not address the entity receiving the "disclosure," so the Panel relies instead on *Asbill v. Housing Auth. of Choctaw Nation*, 726 F.2d 1499, 1503 (10th Cir. 1984), a Tenth Circuit case. *Asbill* (involving a state government) provides no description of what

intragovernmental dissemination was insufficient or analysis why, and instead relies without elaboration on the Supreme Court's decision in *Bishop v. Wood,* 426 U.S. 341, 348 (1976). Yet *Bishop* involved no dissemination before the alleged injury. This supposedly ironclad rule, incompatible with *Sciolino*, is made up of whole cloth without explanation.

Here, the Terrorism Screening Center broadcasts TSDB status to TSA and CBP agents, who routinely arrest and detain listees for hours at a time based on that information. TSDB status is also disseminated throughout the federal government for use in applications for HAZMAT licenses, PreCheck and Global Entry status, custom seals, entry to military bases and certain parts of airports, Transportation Worker Identification Credentials, flight schools, gun sales and licenses, banking, immigration, and government benefits. JA 462-64, 694, 749-50. This dissemination alters the lives of listees, imposing consequences that strike at the heart of the Due Process clause.

Neither *Sciolino* nor any other Fourth Circuit case stand for a requirement that there must be disclosure made to a private entity. *Sciolino* simply held that the dissemination prong is met, regardless of actual dissemination, when the government makes information available to

others who may use that information in a way that injures the individual. 480 F.3d at 649-50. The reason for this—almost prescient about the secrecy of the TSDB—is that requiring a showing of dissemination would defeat the right when plaintiffs "would not even know if the prospective employer has learned of the charges." *Id.* at 650. This analysis makes the Panel's disregard of Anas Elhady's inability to obtain a job as a police officer particularly inexplicable.

By adopting this rule, the Panel creates a circuit split with the Ninth Circuit. In *Humphries v. Los Angeles*, the Ninth Circuit found that a state sex offender registry that third parties would screen job applicants against was tantamount to a stigma-plus disclosure:

> [First, certain] benefits are explicitly conditioned on ***the agency*** checking the [list] and conducting an additional investigation. Second, information in the [list] is specifically made available to ***other identified agencies***: state contracted licensing agencies overseeing employment positions dealing with children, persons making pre-employment investigations for peace officers, child care licensing or employment, adoption, or child placement, [among other entities]

554 F.3d 1170, 1188, *as amended* (Jan. 30, 2009), *rev'd on other grounds*, 562 U.S. 29 (2010) (citations omitted and emphasis added).

* * *

Of course, even if "public" meant outside the federal Government, it is unquestioned that TSC provides this information to state governments, local law enforcement, and private entities. JA 468, 700-01, 733-34, 737, 743-44, 751. The Panel majority has two responses, and both conflict with caselaw.

B. The Panel's restriction of stigma-plus to the employment context is contrary to Supreme Court caselaw.

One, the stigma-plus test only applies in the context of employment. But this conflicts with *Paul*. *Paul* explained that there was a "plus" factor in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), when the dissemination "deprived the individual of a right previously held under state law the right to purchase or obtain liquor in common with the rest of the citizenry." 424 U.S. at 708. The Panel's analysis also conflicts with various circuits who have applied stigma-plus to other contexts, *Humphries*, 554 F.3d at 1188 (adoption); *Resistance of Iran v. Dept. of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (right to bank accounts); *Doe v. DOJ*, 753 F.2d at 1109 (DC Circuit, 1985) (government contracts); *Little v. City of North Miami*, 805 F.2d 962, 969 (11th Cir. 1986) (business reputation), *Marrero v. City of Hialeah*, 625 F.2d 499, 516-19 (5th Cir. 1980) (either business

goodwill or loss of Fourth Amendment rights sufficient), or required no particular, context at all, *Doe v. Dept. of Pub. Safety*, 271 F.3d 38, 57 (2d Cir. 2001), *rev'd on other grounds*, 538 U.S. 1 (2003).

C. The Panel's "mandatory" analysis is contrary to Fourth Circuit precedent and creates a circuit split with the Second, Ninth, and Tenth Circuits.

Relying on a throwaway line of dicta from *Abdi*, the Panel held (at 33) that "the government's act of including names in the TSDB does not mandate that private entities deny people such privileges." Instead, it "merely makes information available to private entities, like companies handling nuclear power, and then those companies make their own choices." But *Sciolino* held that plaintiffs do not have to prove a consequence, just "a likelihood that prospective employers will inspect his personnel file." 480 F.3d at 645. Instead, the Panel's analysis adopts what the ***dissent***, by the Panel author, argued in *Sciolino*: "The [14th Amendment] makes it actionable for states to 'deprive' a person of 'life, liberty, or property,' but not to create a 'likelihood' of such a deprivation." *Id.* at 657 (Wilkinson, J., dissenting).

This Court should grant rehearing en banc to cabin the decision to existing Supreme Court precedent as well as preserve the majority opinion in *Sciolino* from being usurped by the dissent.

The Panel's mandatory consequence requirement also creates a circuit split with the Ninth, Second, and Tenth Circuits. In *Humphries*, the Ninth Circuit applied a rule showing that all which is needed is a "tangible burden" on the "ability to obtain a right or status." 554 F.3d at 1188. So the mere fact that government agencies and others need to consult a list before making decisions was enough to show a change in status, even if the consequences for being on the list were not mandatory. Like *Humphries*, the Second Circuit in *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994), made clear the only mandatory occurrence is for a third party to consult a child abuse list before making certain decisions, and not the subsequent consequences: "The deprivation stems from the fact that employers ***must*** consult the list before hiring *Valmonte*, and if they choose to hire her must state the reasons in writing to the state." *Id.* The Tenth Circuit follows *Valmonte*. *Brown v. Montoya*, 662 F.3d 1152, 1169 (10th Cir. 2011).

In *Humphries*, *Valmonte*, and *Brown*, like in *Sciolino* and unlike in the Panel's decision, the holding was no "mandatory" deprivation was required. The Court should correct the Panel opinion's divergence.

III. The Panel's description of important constitutional facts in this case is erroneous.

The Panel also made many errors in describing the record as it relates to the watchlist and its effects. Although factual error alone does not typically warrant en banc review, courts have particular obligations to review facts necessary to enforce a constitutional right. *Crowell v. Benson*, 285 U.S. 22, 46 (1932). Among the errors the panel made:

- Conflating length of detention with the normal delay caused by missing a flight, *see* § I, above; *see also* JA 443-450.
- Conflating length of detention at land borders (which are consistently six-to-twelve hours) with detentions and delays at the airport. *Compare* Slip Op. at 12 n.2 *with* Appellee Brief at 5-8 with 8-11.
- Conflating evidence that some plaintiffs were only on a part of the watchlist or have been removed from the watchlist as evidence that they did not suffer harms while on the watchlist. Slip Op. at 21-22; *see, e.g.,* JA 281 (Coleman's issues were uniform between 2015 and September 2017 with no issues after); Dkt. 305-6 320:16-321:20 (Kadura taken off list in 2016).
- Assuming that Congress created the procedure for watchlist placement, and therefore deference is warranted, when Congress never, in fact, authorized the watchlist or any procedure relating to it. Compare Slip Op. 36-37 *with* Appellee Brief at 63-66.

> Congress merely and after the fact directed DHS to "establish a procedure … to appeal [No Fly and selectee] determination[s] and correct information" and "ensure" there is not "a large number of false positives," without providing any contours to that process. Pub. L. 108-458, Section 4012(a)(I).[1]

IV. The Panel's suggestion of alternative remedies is incorrect.

Finally, although the Panel does not appear to directly rely on these errors, the Panel erred by suggesting (at 13-14 & 28-29) that even under its decision Appellees could bring "as applied" challenges, or may challenge particular treatment of or applications under the watchlist. This is incorrect and of no comfort to the Appellees.

The Panel here held that the facts Appellees allege does not give them the ability to challenge, on Due Process grounds, the constitutionality of the watchlist. But the Panel provides no reason why an as applied challenge might create standing, and the caselaw confirms there should be no difference between the two in the context of standing to assert a Due Process challenge. *See County Ct. of Ulster County, N. Y. v. Allen*,

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[1] This finding was part of dicta that Congress was entitled to broad deference on whether the TSDB program provides sufficient due process, an issue the Panel did not reach (because it found no entitlement to process). Slip Op. 34-37. The issue goes well beyond the redress procedures and includes the vague and arbitrary standard for placement in the first instance and the inadequate internal review standard. Appellee Brief at 50-63. The Court may remand to the Panel to decide this issue, remand to a new Panel, or may decide the issue for itself en banc.

442 U.S. 140, 155 (1979) (whether individual has standing to assert a facial challenge depends on whether there was "constitutional defect in the application of the statute to a litigant"). Instead of standing, the distinction "goes to the breadth of the remedy employed by the Court." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

This case illustrates why. In asserting a Due Process challenge, Appellees are challenging whether the Government had the right to put them on a secret list that causes a range of pernicious and dangerous effects based on a vague standard covering innocent conduct, without notice, a neutral arbiter, or any meaningful opportunity to be heard. If Appellees have suffered any constitutional injury, in either a facial or an as applied challenge, the question becomes what process Appellees received and whether it was sufficient. Here, the Panel's decision was that none of the Appellees have suffered any constitutional injury, so it does not matter what process they received. But that analysis would apply equally to an as applied or a facial claim. And if the Panel had meant to hold only that some Appellees have suffered some constitutionally-significant injury, its reversal was in error under *Bostic*, 760 F.3d at 370 (claim can proceed even if only some plaintiffs have standing); *see also* § I, above.

The Panel also suggested that Appellees may still bring challenges to specific effects caused by the watchlist without challenging the watchlist itself. But this also provides little comfort to the Appellees. Take the most outrageous and pervasive effect of the watchlist—detentions at the border (and most prominently land borders). Appellees cannot seek effective injunctive relief in the six-to-twelve hours they are detained, even if their electronics were not confiscated. Nor can they get prospective relief, if only because the Panel (incorrectly) suggested that there is no certainty of future detentions. *See* § III, above. And Appellees likely cannot seek damages for detention under *Bivens* because it would constitute a "new context." *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). Even if the unthinkable (but hardly unlikely) scenario occurs and a border agent shoots and kills Frljuckic (who the Government invariably detains at gunpoint every time he crosses a land border because the watchlist system has incorrectly labeled him armed and dangerous, JA 287), *Hernandez* specifically found a border shooting to be a new context. No help there.

CONCLUSION

This case presents novel questions regarding a constitutionally suspect watchlist that acts in such a wide variety of ways it does not fit

neatly into traditional approaches of constitutional analysis.[2] This is perhaps why the Panel took such a first-principles approach to reach its incorrect conclusion – there was simply nothing applicable there. Mindful of the problems with its dismissive approach, the Panel suggests other ways Appellees could challenge the watchlist. But all of these appear to be dead ends.

Without review today, it could be another decade before the Courts come to some consensus about how individuals may challenge an opaque secret watchlist raising a host of constitutional issues. Appellees have waited long enough. The Court should grant rehearing en banc to review and correct the Panel's approach.

[2] Of course, if the Court finds either a travel-related Due Process right or a stigma-plus Due Process right, it can proceed to the merits of the case on that finding alone, obviating the need to explore the contours of the other constitutional issue.

Respectfully submitted,

Date: May 14, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This petition 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 this petition has been prepared in a proportionately spaced typeface, Century Schoolbook, using Microsoft Office's Word 2019, in 14-point font.

Date: May 14, 2021

/s/ Lena Masri
Lena F. Masri

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed Petition for Rehearing en Banc with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 14th day of May 2021.

/s/ Lena Masri
Lena F. Masri