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, Director of the Terrorist Screening Center, in his official capacity, et al.,

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of Virginia
Case No. 1:16-cv-00375-AJT-JFA
Hon. Anthony J. Trenga

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST[1]

Amicus curiae the Electronic Frontier Foundation (EFF) is a member-supported, nonprofit civil-liberties organization that has worked for over thirty years to ensure that technology supports freedom, justice, and innovation for all the people of the world. With over 30,000 members, EFF represents the interests of those impacted by new technologies both in court cases and in broader policy debates, and actively encourages and challenges the government and courts to support privacy and safeguard individual autonomy to ensure that new technologies enhance civil liberties rather than abridge them.

This case directly implicates EFF's mission of promoting government transparency and protecting electronic privacy and free speech. Individuals in the federal government's Terrorist Screening Database ("the Watchlist") find their rights to travel, privacy, and free speech infringed with minimal process—without any knowledge of their inclusion in the database. As an organization dedicated to protecting such rights, EFF has unique insight into the stigma and harms

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or their counsel has made any monetary contributions to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

caused by the government's conduct, which will help inform this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the liberty of people whom the United States government brands as terrorists—thereby impacting every facet of their lives, ranging from their movements to their livelihoods—with almost no process at all. The panel decision splits with prior decisions of this Court and with authoritative decisions of other U.S. Courts of Appeals—to the detriment of essential liberties enjoyed by the American people.

Under the *Paul v. Davis* stigma-plus test, the government infringes a protected liberty interest when it harms a person's reputation and alters their rights or legal status. 424 U.S. 693, 711–12 (1976); *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 501 (4th Cir. 2018). Plaintiffs contend that when the government surreptitiously placed them on the Watchlist and subjected them to a variety of harms—such as longer, more intrusive, and more dangerous encounters with law enforcement at every level of government; denial of immigration benefits; and significant burdens on economic opportunities—it infringed their protected liberty interests under *Paul*.

The panel rejected Plaintiffs' argument on two grounds, in each case splitting with decisions of this and other Circuit Courts.

First, this circuit and the D.C., Seventh, and Ninth Circuits have held that the government "publicly" discloses derogatory information when it makes the information available to other government agencies, both within and across sovereigns.[2] Yet the panel held that even though the government shared its "terrorist" determination with tens of thousands of state and local police departments, private security forces, foreign governments, and federal agencies, it did not "publicly" disclose the label. *Elhady v. Kable*, 993 F.3d 208, 225–26 (4th Cir. 2021).

Second, this circuit and the D.C., Second, Seventh, and Ninth Circuits have held that plaintiffs need show only that the government "*impaired*" or "tangibl[y] burden[ed]" their rights or status—not that it "fully extinguish[ed]" them—to

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[2] *See Cannon*, 891 F.3d at 503–04; *Sciolino v. City of Newport News*, 480 F.3d 642, 648 n.4, 649 (4th Cir. 2007); *Ledford v. Delancey*, 612 F.2d 883, 886–87 (4th Cir. 1980); *Humphries v. Cty. of Los Angeles*, 554 F.3d 1170, 1188 (9th Cir. 2009), *rev'd on other grounds*, 562 U.S. 29 (2010); *Dupuy v. Samuels*, 397 F.3d 493, 511–12 (7th Cir. 2005); *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1113 (D.C. Cir. 1985).

make out a stigma-plus claim.[3] Yet the panel held that even though being on the Watchlist harms people in countless ways, none of those harms amounted to an "alter[ation]" in Plaintiffs' legal rights or status. 993 F.3d at 226–28.

If the panel's decision stands, the government will be free to brand people terrorists based on their race, religion, national origin, and First Amendment activities—and on that basis seize them, search them, deny them benefits, and impair their ability to earn a livelihood. The Constitution does not permit this, and the full court should hear this case and correct the panel's error. *See* Fed. R. App. P. 35(b)(1).

[3] *Cannon*, 891 F.3d at 502-03 (quoting *Ledford*, 612 F.2d at 886–87) (emphasis added in *Cannon*); *Humphries*, 554 F.3d at 1188; *Dupuy*, 397 F.3d at 511–12; *Doe*, 753 F.2d at 1108–09; *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994).

ARGUMENT

A due process claim for reputational harm has two elements: (1) that the government "placed a stigma on [the plaintiff's] reputation" and (2) that the government "'distinctly altered or extinguished' [the plaintiff's] legal status." *Cannon*, 891 F.3d at 501; *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting *Paul*, 424 U.S. at 711). The panel misapplied both prongs.

I. The panel's "public disclosure" analysis conflicts with decisions of this Court and other federal courts of appeals.

The panel erroneously held that even though the government broadcasts the Watchlist to thousands of government agencies and private companies across the country and around the world, it does not "publicly disclose" that information. 993 F.3d at 225–26. It offered two rationales. First, it held that disclosure to government actors—of *any* government—could never be "public disclosure." *Id.* Second, it held that plaintiffs must show "specific instances" of private parties accessing derogatory information to show disclosure. *Id.* at 226.

Both rationales create intra- and inter-circuit splits and are wrong on the merits.

A. Disclosure to other government agencies is public disclosure.

The panel held that "[t]he federal government's intragovernmental dissemination of [Watchlist] information to other federal agencies and components . . . is not 'public disclosure' for purposes of a stigma-plus claim." *Id.* at 225. It cited only one case for this proposition: *Asbill v. Housing Auth. of Choctaw Nation*, which concerned the contents of a termination letter sent directly to the employee facing termination. 726 F.2d 1499, 1501, 1503 (10th Cir. 1984). Then, citing no authority, the panel extended *Asbill* to cover "disclosure to state or tribal law enforcement agencies." 993 F.3d at 225–26.

This cannot be squared with the Court's prior decisions. In *Cannon*, for example, this Court held that disseminating derogatory information to other employees *of the same town* was public disclosure. 891 F.3d at 503. *Shirvinski* held that communication within the government about the unsuitability of a contractor would be public disclosure. 673 F.3d at 315–16. The panel thus created an intra-circuit split by holding that "intra- or inter-departmental" communications could not "create[] a constitutional claim." 993 F.3d at 225–26.

It also created a circuit split. The D.C. Circuit has held that "communicat[ion] to other government agencies" is

sufficient disclosure. *Doe*, 753 F.2d at 1111. So have the Seventh and Ninth Circuits. *Dupuy*, 397 F.3d at 511–12 (communication to "any federal agency"); *Humphries*, 554 F.3d at 1175–76, 1188 ("government agencies, employers, and law enforcement entities").

The panel's decision also overlooks the government's disclosure to private entities and other sovereigns. Even if intra-government communications are excluded, nothing justifies excluding communications to *other* governments, including state, local, tribal, and foreign governments, which are entirely separate sovereigns. *Cf. Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (affirming the dual-sovereigns doctrine). The government undisputedly discloses the Watchlist to over 18,000 law-enforcement agencies at all levels of government, as well as another 533 private entities. JA 151. That is more than enough to create a "constitutionally cognizable stigma." *See Cannon*, 891 F.3d at 503.

B. Derogatory information is disclosed when it is "made available" to others.

The panel also held that the government's disclosure to private employers was insufficient because Plaintiffs had not produced "specific instances" where employers had accessed or used the information. 993 F.3d at 226. It cited only one case

from this Court, *Sciolino v. City of Newport News*, but *Sciolino* squarely rejected the panel's conclusion: "[W]e . . . reject the City's contention that a plaintiff must allege a *specific instance* of actual dissemination." 480 F.3d at 649 (emphasis added).[4]

Rather, in this circuit, harmful assertions are sufficiently disclosed if they are "availab[le] upon request" and there is a "likelihood" that someone will inspect them. *Cannon*, 891 F.3d at 503–04. The same rule holds in other circuits. *See, e.g.*, *Humphries*, 554 F.3d at 1188 (information disclosed when "made available to other identified agencies"); *Dupuy*, 397 F.3d at 511–12 ("available to any federal agency"); *Doe*, 753 F.2d at 1113 ("available to prospective employers or other government personnel"). The panel decision here created a circuit split where none existed before and thus merits en banc review.

II. The panel's "plus factor" analysis conflicts with decisions of this Court and other federal courts of appeals.

Under the stigma-plus test, the government must also alter or extinguish some right or legal status to inflict cognizable injury. This is the "plus" requirement. *Shirvinski*,

[4] Notably, the author of the *Sciolino* dissent is also the author of the panel opinion. *See* 480 F.3d at 653–54 (arguing for an actual-dissemination standard); *Elhady*, 993 F.3d at 226 (same).

673 F.3d at 315. The panel held that Plaintiffs had failed this requirement because they had not shown "full denial[]" of a right or privilege and because the government had not "*mandate[d]* that private entities deny people such privileges." 993 F.3d at 226-27.

Both these rationales create splits within and outside of this Circuit. They are also wrong on the facts.

A. Government need not fully or compulsorily extinguish a person's right or status to create a "plus factor."

As this Court has held, the government need only "impair[]" a right or status to create a "plus factor." *Cannon*, 891 F.3d at 502–03. *Impairment* does not mean *mandatory full denial*: "[T]his Court does not—and has not—required that a disclosure 'effectively foreclose' future [benefits] for the disclosure to be actionable." *Cannon*, 891 F.3d at 503 (summarizing this Court's decisions in *Sciolino*, *Ledford*, and *Ridpath*); *see also Ridpath v. Board of Governors*, 447 F.3d 292, 309–11 (4th Cir. 2006) (reassigning a government employee "to a position outside his field of choice"—even with a significant pay increase—was sufficient impairment).

In devising its contrary rule, the panel ignored *Cannon*, *Sciolino*, *Ledford*, and *Ridpath*, and instead relied exclusively

on two cases from the Sixth and Tenth Circuits. *Elhady*, 993 F.3d at 226–28. But the weight of authority from other circuits accords with this Court's prior decisions. A plaintiff's rights or status need not be fully or compulsorily extinguished—only "tangibly burdened"—to satisfy the "plus factor." *See Humphries*, 554 F.3d at 1187–88; *Dupuy*, 397 F.3d at 511–12; *Doe*, 753 F.2d at 1108–09; *Valmonte*, 18 F.3d at 1001. Because the panel's holding conflicts with the decisions of both this circuit and others, the full court should review this case.

B. People on the Watchlist suffer numerous "plus factors," including deprivation of legal rights and physical and economic harms.

The "plus factor" requirement is easily satisfied here. When a person is labeled a known or suspected terrorist, their entire life changes. Routine traffic stops become more difficult and more dangerous. Electronic devices are more likely to be searched and copied both within the interior and at the border. Immigration benefits become nearly impossible to obtain. Securing credit and employment becomes harder. Each of these—and certainly all of them together—amounts to a change in legal status and diminishment in legal rights.

1. Encounters with law enforcement become longer, more difficult, more intrusive, and more dangerous.

The Fourth Amendment forbids police from detaining individuals for longer than "the time needed to handle the matter for which the stop was made." *Rodriguez v. United States*, 575 U.S. 348, 350 (2015). For people on the Watchlist, however, the federal government directs state and local law enforcement to ignore this right. When police pull someone over, they query the driver's name against several databases, including the Watchlist.[5] If a driver is on the Watchlist, the system will "instruct[] the officer to call the [Terrorist Screening Center]," where federal agents will ask the officer to prolong the stop and gather as much information as possible.[6] About 1,800 such encounters take place every year across the country.[7]

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[5] *See* U.S. Senate Permanent Subcommittee on Investigations, *Federal Support for and Involvement in State and Local Fusion Centers* 43–44 (Oct. 3, 2012), https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf.

[6] *Id.*

[7] FBI, *US Law Enforcement Encounters of Watchlisted Individuals Almost Certainly Yield Opportunities for Intelligence Collection* (Oct. 23, 2019), https://www.scribd.com/document/445400976/FBI-Watchlist.

In addition, police departments themselves direct officers to conduct longer and more intrusive stops for those on the Watchlist, including requesting backup or bomb units and refusing to release the individual until cleared by DHS. *E.g.*, JA 700–02.[8] Similarly, being on the Watchlist can turn an arrest for a minor crime into a life-changing event.[9]

2. Electronic devices are more likely to be searched and seized.

Because electronic devices such as cell phones contain "the sum of an individual's private life," law enforcement in the interior of the country ordinarily must obtain a warrant before searching them. *See Riley v. California*, 573 U.S. 373, 393–94 (2014). Although several Circuit courts continue to grapple with how the Fourth Amendment applies to border searches in the digital age, this Court has held that "forensic" border searches of electronic devices require, at minimum, reasonable

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[8] *See also, e.g.*, Martin de Bourmont & Jana Winter, *Exclusive: FBI document reveals local and state police are collecting intelligence to expand terrorism watch list*, Yahoo! News (Feb. 7, 2020), https://news.yahoo.com/exclusive-fbi-document-reveals-local-and-state-police-are-collecting-intelligence-to-expand-terrorism-watch-list-100017370.html.

[9] Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, The Intercept (Mar. 15, 2016), https://theintercept.com/2016/03/15/terrorist-watchlist-errors-spread-to-criminal-rap-sheets/.

suspicion. *See United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

But those on the Watchlist find these rights impaired as well. In the interior, the FBI expressly directs police to search and copy devices carried by Watchlisted individuals and to report their findings back to the federal government.[10] At the border, U.S. Customs and Border Protection claims that being on a "government-operated and government-vetted terrorist watchlist," without more, gives rise to reasonable suspicion or a national-security concern (which allows for suspicionless search). CBP Directive No. 3340-049A § 5.1.4 (Jan. 4, 2018). Thus, being on the Watchlist means being subjected to intrusive device searches at the border without any evidence of wrongdoing.

3. Immigration and economic benefits are denied.

Those on the Watchlist suffer many other harms that are more fully explored in EFF's amicus brief before the panel, Dkt. 57:

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[10] *See* FBI, *Watchlisting Guidance* 58–79 (Mar. 2013), https://assets.documentcloud.org/documents/1227228/2013-watchlist-guidance.pdf.

- They are presumptively denied immigration benefits, even supposedly nondiscretionary benefits such as naturalization. Dkt. 57 at 23-25.
- They are often fired from or denied jobs that require travel, entry into military bases, Customs seals, or Transportation Worker Identification Credentials. Some have been denied access to banks and credit. Dkt. 57 at 25-26; *see, e.g.*, Brief for Respondent at 7, *Ramirez v. TransUnion LLC*, No. 20-297 (U.S. Mar 3, 2021) (consumer denied credit for car purchase after being labelled a terrorist by the federal government).[11]

* * *

The examples above are far from a complete list of the harms people suffer from being on the Watchlist. Whether the Constitution permits government to inflict such harm without any process is an exceptionally important question. It should be answered by the full Court.

[11] *Available at* https://www.supremecourt.gov/DocketPDF/20/20-297/170894/20210304111351491_20-297BriefForRespondent.pdf.

CONCLUSION

For all these reasons, the Court should review this case en banc.

Dated: June 10, 2021

Respectfully submitted,

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