No. 19-251

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF PETITIONER

LENA F. MASRI
Counsel of Record
GADEIR I. ABBAS
CAROLYN M. HOMER
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave., S.E.
Washington, D.C. 20003
(202) 742-6420
ldf@cair.com

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Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

CAIR Foundation, Inc. (d/b/a "Council on American-Islamic Relations" or "CAIR") is a 501(c)(3) not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1994, the Council on American-Islamic Relations ("CAIR") has a mission to enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims. A significant component of CAIR's work is combatting Islamophobia and harmful stereotypes that falsely associate American Muslims with terrorism. To that end, CAIR regularly challenges the constitutionality of the federal terrorist watchlist system, which surveils the associations of innocent American Muslims in order to condemn them to second-class citizenship. On September 4, 2019, in a challenge brought by CAIR, the Eastern District of Virginia granted summary judgment that the federal terrorist watchlist violates the Due Process Clause.

[1] Pursuant to this Court's Rule 37.6, Amicus Curiae state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from Amicus Curiae and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), Amicus Curiae note that Petitioner filed a blanket consent letter to amicus briefs with the Clerk of Court, and counsel for Respondent consented to this brief via email. Counsel for the parties were given timely notice of the filing of this Brief.

SUMMARY OF ARGUMENT

The First Amendment limits government power to collect sensitive associational information. These First Amendment restrictions apply to governments alone: they are not dependent upon any risk of public disclosure or public harassment.

Pursuant to longstanding precedent, freedom of association claims require exacting scrutiny. Under exacting scrutiny, the government must prove it has a compelling governmental interest in collecting the associational information that it cannot achieve more narrowly. *The Americans for Prosperity Foundation v. Becerra* opinion abandons this heightened legal standard, effectively converting exacting scrutiny into rational basis review. The panel's analytical shift threatens not only donor disclosure cases, but also assessment of other associational claims. Certiorari is necessary to resolve the Ninth Circuit's split from other courts of appeals and define the proper exacting scrutiny standard.

For the last decade, the Council on American-Islamic Relations has litigated constitutional challenges to the federal terrorist watchlist system. At its core, the federal watchlist system is a sprawling network map of American Muslims' associations. The federal government's various watchlist programs label thousands of innocent Americans each year as known, suspected, or potential terrorists. Once subjected to this stigmatizing label, individuals, their families, and their associates experience intrusive scrutiny. Adverse consequences of placement include surveillance, border detentions, interrogation about religious practices, denials of employment creden-

tials, and electronic device searches. The federal government imposes these punishments on innocent American Muslims without criminal investigations, without warrants, and without arrests or convictions for any crimes. The federal government further withholds the criteria for placing citizens on the terrorist watchlist, while refusing to disclose either the fact of their placement or the underlying basis of the "suspect terrorist" label.

Because the federal terrorist watchlist system relies heavily on associations and affiliations in its operations, it imposes a severe burden on protected First Amendment activity. Government action that wreaks such associational havoc must be evaluated under exacting scrutiny as defined by the Supreme Court's prior precedents, not the lesser akin-to-rational-basis standard adopted by the Ninth Circuit.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE EXACTING SCRUTINY REQUIRES GOVERNMENTS TO DEMONSTRATE A COMPELLING INTEREST AND NARROW TAILORING WHEN COLLECTING ASSOCIATIONAL INFORMATION.

The Supreme Court has long held that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). First Amendment associational rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more

subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Freedom of association can only be overridden "by regulations adopted to serve compelling state interests … that cannot be achieved through means significantly less restrictive of associational freedoms." *Jaycees*, 468 U.S. at 623; *accord Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

This test is known as "exacting scrutiny." But although this Court recently reiterated the exacting scrutiny standard for associational claims, the Ninth Circuit ignored it. *See* Pet. App. 96a (Ikuta, J., dissenting) (lamenting a panel decision "contrary to the reasoning and spirit of decades of Supreme Court jurisprudence"). Exacting scrutiny requires judicial evaluation of whether state action "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2465 (2018). The *Janus* majority rejected a proposed alternative standard – namely whether a government "could reasonably believe that [agency action] serves its interests" – because it amounted to "rational-basis review." *Id*. at 2465. Such "minimal scrutiny is foreign to our free-speech jurisprudence." *Id*.

While using the words "exacting scrutiny," the Ninth Circuit twists their meaning into something more resembling a judicial rubber stamp. In its first error, the Ninth Circuit downplays the need for a state's interest to be "compelling." *See* Pet. App. at 17a-23a. Instead, a state's interest must only be "important." *Id*. The panel then measures that "importance" not by reference to the government's actual need for the associational information, but rather by

reference to how much the government's wholesale collection actually harms plaintiffs' associations later. *See id.* at 23a-39a. If the government hoovers up associational information for internal, nonpublic use alone, then the panel's reasoning finds no harm to plaintiffs and no constitutional problem. *See id.* at 22a, 39a.

This is backward reasoning. The First Amendment requires the government to proactively justify its need for collection of associational data – not force members of the public to later prove that mass collection harmed their associations. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 6-7 (1971) ("When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest."). A plaintiff's reasonable fears and prospective chilling effects are enough to show First Amendment harm. The question is not what post-hoc harms occurred, but whether the challenged government collection action "would have the practical effect of discouraging the exercise of constitutionally protected political rights" in the future. *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958)).

As an illustrative example, in 2013 The Guardian published an infamous National Security Agency slide touting that agency's goal to "Collect it All."[2]

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[2] *See, e.g.*, Alexander Abdo and Jameel Jaffer, "The courts stood up to NSA mass surveillance. Now Congress must act." THE GUARDIAN (May 9, 2015), available at https://www.theguardian.com/commentisfree/2015/may/09/the-courts-stood-up-to-nsa-mass-surveillance-now-congress-must-act (linking to copy of slide).

In ensuing litigation, the Second Circuit held that the NSA's mass metadata collection program exceeded its statutory authority, while also raising "daunting" and "serious" constitutional concerns. *ACLU v. Clapper*, 785 F.3d 787, 808, 824-825 (2d Cir. 2015). The Second Circuit concluded the act of government collection alone – not any proven downstream harm to secretly monitored citizens – implicated the First Amendment. *Id*. at 802. "When the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential 'chilling effect' is created at that point." *Id*.

In its second diversion from precedent, the Ninth Circuit abandons any semblance of less-restrictive means or narrow tailoring. *AFPF*, Pet. App. at 16a, 22a. The Ninth Circuit refers to plaintiffs as "mistaken" and the district court as "erroneous" for engaging in any assessment as to whether the Attorney General demanding tens of thousands of confidential donor lists a year, in order to use a handful, was "more burdensome than necessary." *Id*. at 16a, 22a. It is only by making the district court's factual findings legally irrelevant that the panel could set aside the abundant evidence that "the Attorney General does not use the Schedule B in [his] day-to-day business," "seldom use[s] Schedule B when auditing or investigating charities" and in the scant handful of occasions where the donor lists were relied on, they were "obtained from other sources." Pet. App. at 45a (district court judgment). "Even if the Attorney General can achieve his goals through other means," the Ninth Circuit summarizes, "nothing in the substantial relation test requires him to forgo the most efficient and effective means of doing so, at least not

absent a showing of a significant burden on First Amendment rights." *AFPF*, Pet. App. at 23a.

This is contrary to precedent. Government efficiency is not an excuse for mass violations of First Amendment rights. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."). The *AFPF* opinion missteps by latching onto a statement of First Amendment law applied only in election cases – where the government's interest in fair elections is high and where donor disclosure is presumptively the least restrictive means. *See* Petition for Certiorari at 2-3, 21-23. The Ninth Circuit falters further by reinterpreting that election standard as weaker then classic exacting scrutiny, and then by extending its reformulated-to-rational-basis standard to all First Amendment freedom of association claims. Exacting scrutiny requires the government to prove both a compelling interest and narrow tailoring, *Jaycees*, 468 U.S. at 623, but the Ninth Circuit abandoned both prongs. As five dissenters from *en banc* review noted, exacting scrutiny's "robust protection of First Amendment free association rights was desperately needed here." Pet. App. 78a.

II. CERTIORARI IS WARRANTED BECAUSE THE NINTH CIRCUIT'S RATIONAL BASIS TEST HINDERS CONSTITUTIONAL SCRUTINY OF THE FEDERAL TERRORIST WATCHLIST.

CAIR and its members' experiences with the federal terrorist watchlist emphasizes the need for robust legal protections for associational claims.

Following the September 11, 2001 attacks, the federal government consolidated its various security watchlists into the Terrorist Screening Database.[3] The watchlist has since sprawled in scope and adverse effects. In 2005, the watchlist listed 288,000 individuals; by 2017 it had ballooned to 1,160,000.[4] In 2008, Customs and Border Protection reported just 1 border interception per day "for terrorism related/national security concerns"; by 2017, CBP flagged 1607 individuals per day for "suspected national security concerns."[5] Since the creation of the consolidated watchlist, American Muslims have routinely reported targeted, discriminatory, and harassing experiences in airports, at land borders, by law enforcement, and when applying for government credentials and licenses.[6] To CAIR's knowledge, every

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[3] *See generally*, "About the Terrorist Screening Center," FEDERAL BUREAU OF INVESTIGATION, available at https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc.

[4] *Compare Terrorist Watch List Screening*, GAO-08-110 at 24, GOVERNMENT ACCOUNTABILITY OFFICE (October 2007), available at https://www.gao.gov/assets/270/268006.pdf *with* Declaration of TSC Deputy Director for Operations Timothy P. Groh at 2 (July 5, 2018), publicly filed at *Elhady v. Kable*, No. 1:16-cv-00375, Dkt. 253-2.

[5] *Compare On a Typical Day in Fiscal Year 2008*, CUSTOMS AND BORDER PROTECTION, available at https://www.cbp.gov/newsroom/stats/previous-year/fy08/fy08-typical-day; *with On a Typical Day in Fiscal Year 2017*, CUSTOMS AND BORDER PROTECTION, available at https://www.cbp.gov/newsroom/stats/typical-day-fy2017.

[6] *See, e.g.,* Memorandum of Understanding Between the Transportation Security Administration and The Terrorist Screening Center Regarding the use of Terrorist Information for Security Threat Assessment Programs, Addendum A (May 12, 2006), publicly filed at *Elhady v. Kable*, No. 1:16-cv-00375

challenge to the watchlist has been brought by Muslims, often with multiple if not dozens of Muslim plaintiffs per case.[7]

The federal terrorist watchlist system rests on a foundation of bulk collection and analysis of American Muslims' associations. As the Eastern District of Virginia recognized on September 4, 2019, the Terrorist Screening Center may "consider an individual's travel history, associates, business associations, international associations, financial transactions, and study of Arabic as information supporting a nomination to the TSDB." *Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019). "The vagueness of the standard for inclusion in the TSDB, coupled with the lack of any meaningful restraint on what constitutes grounds for placement on the Watchlist, constitutes,

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(E.D. Va.), Dkt. 253-11, Exhibit 30 (providing list of passenger, aviation employee, and government credential screening programs against which TSA crosschecks the watchlist).

[7] *See, e.g.*, Complaints in *Rahman v. Chertoff*, No. 05-cv-3761 (N.D. Ill.); *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 06-cv-00545 (N.D. Cal.); *Scherfen v. U.S. Dep't of Homeland Security*, No. 3:08-cv-1554 (M.D. Pa.); *Latif v. Holder*, 3:10-cv-00750 (D. Or.); *Shearson v. Holder*, No. 1:10-cv-1492 (N.D. Ohio); *Mohamed v. Holder*, No. 1:11-cv-50 (E.D. Va.); *Abdallah v. JetBlue Airways Corp.*, No. 12-cv-1050 (D.N.J.); *Mokdad v. Holder*, 2:13-cv-12038 (E.D. Mich.); *Fikre v. FBI*, 3:13-cv-00899 (D. Or.); *Tarhuni v. Holder*, 3:13-cv-00001 (D. Or.); *Tanvir v. Tanzin*, No. 13-CV-6951 (S.D.N.Y.); *Ege v. U.S. Dep't of Homeland Security*, No. 13-1110 (10th Cir.); *Beydoun v. Lynch*, No. 14-cv-13812 (E.D. Mich.); *Kadura v. Lynch*, No. 14-cv-13128 (E.D. Mich.); *Long v. Lynch*, 1:15-cv-01642 (E.D. Va.); *Bazzi v. Lynch*, 16-cv-10123 (E.D. Mich.); *Elhady v. Piehota*, No. 1:16-cv-375 (E.D. Va.); *Amiri v. Kelly*, No. 17-cv-12188 (E.D. Mich.); *Abdi v. Wray*, No. 2:17-cv-622 (D. Utah); *Kovac v. Wray*, 3:18-cv-110 (N.D. Tx.); *El Ali v. Sessions*, 8:18-cv-02415 (D. Md.).

in essence, the absence of any ascertainable standard for inclusion and exclusion, which is precisely what offends the Due Process Clause. *Id.* (internal citations omitted).

The Terrorist Screening Center's pervasive use of associational information causes overwhelming network effects in Muslim communities. The Arab-American city of Dearborn, Michigan is second only to New York City for its total number of watchlistees, despite having a population of less than 100,000.[8] In Dearborn, stories of closed bank accounts, shuttered charities, surveilled mosques, and planted bugs abound.[9] As a different Ninth Circuit panel noted last year, presence on a federal watchlist has "actual and palpable consequences," including the likely tendency of watchlist status to cause "acquaintances, business associates, and perhaps even family members" to shun individuals the government has dubbed suspected terrorists. *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1040 (9th Cir. 2018). In *Fikre*, the plaintiff's "No Fly List" designation centered around government investigation of his association with a specific Portland mosque. *Id.* at 1035.

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[8] Jeremy Scahill and Ryan Devereaux, "Watch Commander," THE INTERCEPT (Aug. 5, 2014), available at https://theintercept.com/2014/08/05/watch-commander/.

[9] *See generally*, Christopher Mathias, Rowaida Abdelaziz, Hassan Khalifeh, and Afaf Humayun, "The City That Bears The Brunt Of The National Terror Watchlist," HUFFINGTON POST (Oct. 3, 2017), available at https://www.huffingtonpost.com/entry/dearborn-michigan-terror-watchlist_us_59d27114e4b06791bb122cfe.

Leaked to the media in 2014,[10] the 2013 Watchlisting Guidance governs all intelligence agency and law enforcement operations surrounding the watchlist.[11] The 2013 Watchlisting Guidance has no qualms about relying on affiliations and associations in order to classify American citizens as terrorists. "Individuals identified as associates or affiliates" of watchlisted individuals can, on that basis alone, be nominated as suspected terrorists.[12] Watchlisted individuals' foreign family members are themselves added to the watchlist, for the purposes of denying passports and visas. 2013 Watchlisting Guidance at 22-23, 32, 42-43. The Watchlisting Guidance instructs government officers to document watchlisted individuals':

- "Immediate family members." *Id.* at 5, 75.
- "Known associates." *Id.* at 5, 75.
- "Traveling associates." *Id.* at 66.
- "Membership cards." *Id.* at 68.
- "Cell phone [contact] list and speed dial numbers." *Id.* at 68.

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[10] *See* Jeremy Scahill and Ryan Devereaux, "The Secret Government Rulebook for Labeling you a Terrorist," THE INTERCEPT (July 23, 2014), available at https://theintercept.com/2014/07/23/blacklisted/.

[11] The 2013 Watchlisting Guidance has been superseded by the 2015 and then 2018 Watchlisting Guidance, which have not been publicly disclosed. CAIR understands the current Watchlisting Guidance to be substantially similar to prior iterations.

[12] *See* March 2013 Watchlisting Guidance at 38-39, available at https://theintercept.com/document/2014/07/23/march-2013-watchlisting-guidance/.

- "Social networking accounts." *Id.* at 69.
- "Any additional biographic or biometric identifiers to enhance identity matching" of watchlisted individuals' associates, family members, or persons listed in their paper documents. *Id.* at 67.

In furtherance of the watchlist, CBP copies the complete contents of watchlisted individuals' phones each time they cross the border.[13] As a matter of policy, "the presence of an individual on a government-operated and government-vetted terrorist watch list" justifies a complete "advanced search" to "review, copy, and/or analyze [the] contents" of any electronic device. CBP Directive No. 3340-049A at § 5.1.4. This associational documentation feeds further enhanced government scrutiny and surveillance. In CAIR's experience, American Muslims are often flagged for secondary inspections and enhanced screenings due to being listed as contacts in watchlisted family members' and friends' phones.

In the summer of 2018, the *Boston Globe* reported on associational harms extending far beyond even the Terrorist Screening Database's collection of "known or suspected terrorists.[14] The Transportation Security Administration's previously undisclosed "Quiet Skies" program attempts to identify

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[13] *See* Border Searches of Electronic Devices, U.S. CUSTOMS AND BORDER PROTECTION, CBP Directive No. 3340-049A (January 4, 2018), available at https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

[14] *See* Jana Winter, "Welcome to the Quiet Skies," BOSTON GLOBE (July 28, 2018), available at https://apps.bostonglobe.com/news/nation/graphics/2018/07/tsa-quiet-skies/.

"unknown or partially known terrorists" by assigning Federal Air Marshalls to tail individuals with "affiliations" and "associations" with "watch listed terrorism suspects."[15] Federal Air Marshals then document who the tailed individuals travel with, converse with, and meet with at airports and on flights.[16] The Transportation Security Administration has since bragged to Congress that it nominates individuals to the main federal terrorist watchlist as a result of Quiet Skies surveillance.[17]

Due to these federal watchlist programs, American Muslims, their family members, their coworkers, and their travelling companions are routinely labeled and punished as terrorists despite lacking any criminal record or pending criminal investigation. One of CAIR's pending constitutional challenges to the federal terrorist watchlist system details family, business, and associational harms to 40 Muslim plaintiffs. *El Ali v. Barr*, 8:18-cv-02415 (D. Md.) (Second Amended Complaint). It includes a First Amendment freedom of association claim. *See id.*

In the spring of 2018, the federal Massachusetts district court permitted a comparable First Amendment associational claim to survive the motion to

[15] *See id.* (link to March 2018 Quiet Skies bulletin), available at https://assets.documentcloud.org/documents/4620695/Doc-Bulletin-2.pdf.

[16] *See id.* (link to behavioral checklist), available at https://assets.documentcloud.org/documents/4620696/Doc-Checklist-2.pdf.

[17] *See* Senate Committee Testimony of TSA Administrator David Pekoske at 1:08 (Sept. 5, 2018), available at https://www.c-span.org/video/?451104-1/transportation-security-administration-oversight&start=3762.

dismiss phase, in a challenge brought by the ACLU. *Alasaad v. Nielsen*, No. 17-cv-11730, 2018 WL 2170323, at *23 (D. Mass. May 9, 2018). There the district court concluded that the government's "motivation to search and retain [p]laintiffs' devices [is] to examine expressive or associational material," and when the government seizes "confidential lists of organizational members and supporters," then plaintiffs plausibly allege a "substantial burden [on] travelers' First Amendment rights." *Id.* at *23-24 (cleaned up). Summary judgment on that matter is pending.

It bears repeating: nomination to and presence on a federal terrorist watchlist is not the result of criminal investigation and bears no relationship to arrests or convictions for any crime. *See, e.g.*, *Latif v. Holder*, 28 F. Supp. 3d 1134, 1152–53 (D. Or. 2014) (finding "high risk of erroneous deprivation" of watchlisted individuals' "constitutionally-protected interests" due in part to the "low evidentiary threshold" for watchlist nominations). Watchlist consequences flow without probable cause and without execution of any warrant. *See, e.g.,* CBP Directive No. 3340-049A § 5.1.4. A federal court this month found the combination of associational harms from the government labeling Muslims as "suspected terrorists," the vague innocent-conduct and association-based criteria for watchlist nominations, and the complete lack of notice of watchlist placement or an opportunity to learn of or challenge the reasons for that status, violated the Due Process Clause. *Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019).

And yet, the federal government continues to defends its watchlist programs with arguments strikingly similar to those adopted by the California

Attorney General and endorsed by the *AFPF* panel. Specifically, the federal government regularly asserts that dissemination of associational information and "terrorist" labels to government officials alone cannot, as a matter of law, impair liberty or cause constitutional harm. *See, e.g., Elhady v. Kable*, No. 1:16-cv-00375, Motion to Dismiss, Dkt. 29 at 33-35 (E.D. Va. Nov. 4, 2016). In the federal government's view, the admission that its associational watchlisting programs have ensnared zero threats does not affect its rational basis for enacting them.[18]

Watchlist litigation is illustrative as to why robust application of exacting scrutiny is necessary to constitutional protections of fundamental liberties. The watchlist, like the membership disclosures in *NAACP v. Alabama*, chills American Muslims' associations due to the federal government's collection of relational data and imposition of adverse consequences alone. Subjecting governments to only rational basis review creates a world that permits sweeping associational surveillance.

CONCLUSION

Americans for Prosperity Foundation's petition for a writ of certiorari should be granted, so as to define the proper exacting scrutiny standard for First Amendment associational claims.

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[18] *See, e.g.,* Jana Winter, "TSA official tells Congress that Quiet Skies surveillance has yet to foil any threats," BOSTON GLOBE (Sept. 5, 2018), available at https://www.bostonglobe.com/metro/2018/09/05/tsa-official-tells-congress-that-quiet-skies-surveillance-has-yet-foil-any-threats/PDS8O2lZl2j2xJRngvHK0O/story.html.

LENA F. MASRI
Counsel of Record
GADEIR I. ABBAS
CAROLYN M. HOMER
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave., S.E.
Washington, D.C. 20003
(202) 742-6420
ldf@cair.com

September 25, 2019 *Counsel for Amicus Curiae*