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

BRIEF OF AMICUS CURIAE ALAN MYGATT-TAUBER IN SUPPORT OF APPELLEES

May 17, 2021

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STATEMENT OF INTEREST[1]

Alan Mygatt-Tauber is an attorney and scholar with an interest in the extraterritorial application of the Constitution, including the appropriate application of the Constitution at the border and other liminal spaces, such as territories. He has a particular interest in the proper application of the original understanding of the Constitution, which shapes the appropriate understanding of the Constitution's reach at the border and beyond.

INTRODUCTION

There is a lively and on-going debate among scholars about the appropriate role of originalism in constitutional interpretation. But one thing all participants agree on is that if courts use originalism they should do it well. The panel opinion in this case does not. It cherry-picks historical quotations to justify its conclusion that the Government did not violate Appellees' due process rights, while ignoring all evidence to the

[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.

contrary. The Court should grant re-hearing, to ensure that bad historical analysis does not compromise important constitutional rights.

SUMMARY OF ARGUMENT

Following the Supreme Court's direction in *Kerry v. Din*, 576 U.S. 86, 94 (2015) (plurality opinion), the panel looks to history as its guide in determining the reach of the Due Process Clause and argues that there is a historical tradition limiting the right to travel. It claims to find this tradition in two sources: the Magna Carta and FEDERALIST NO. 12. But careful review of the sources cited shows that neither stands for the proposition asserted. The panel conflates two sections of the Magna Carta and, in doing so, reverses the protections provided by one, while misstating the exceptions in the other. It also relies on justifications for customs regimes to hold that the Department of Homeland Security, without Congressional approval, can burden the right to travel. The Supreme Court has held this right is "part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent v. Dulles*, 357 U.S. 116, 125 (1958). The panel's reliance on caselaw fails to uphold its originalist analysis.

ARGUMENT

I. The Panel Misreads the Magna Carta

The panel states that "the government has long had the ability to impose some regulations and delays on travel by citizens, particularly international travel." (Slip. op. at 19). It cites the Magna Carta's protection of the right of any person "to go out of our kingdom, and to return, safely and securely, by land or by water" but notes this right was qualified "by making it clear it must be done 'according to the laws of the land.'" *Id.* (citing MAGNA CARTA, ch. 42). While the panel is correct that the Magna Carta does not provide an unlimited right to travel, it errs when describing those limits. Clause 42[2] states that the right to travel has an exception for "those imprisoned and outlawed according to the law of the kingdom, and people from the land against us in war, and merchants who are dealt with as aforesaid." THE 1215 MAGNA CARTA: CLAUSE 42, *The Magna Carta Project*, trans. H. Summerson et al. available at http://magnacartaresearch.org/read/ magna_carta_1215/Clause_42 (last accessed 28 April 2021).

[2] Depending on the source, the provisions of the Magna Carta are referred to as Clauses or Chapters. In either case, they refer to the same text.

Contrary to the panel's declaration that the right to travel is subject to any "law of the land," the cited provision lists only three specific and narrow exceptions: 1) those imprisoned and outlawed according to our laws; 2) those from countries at whom we are at war; and 3) merchants. Appellees fall under none of these categories.

The panel may have conflated the restrictions in Clause 42 with those in the much more famous Clause 39. This provision of the Magna Carta provides that "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land." THE 1215 MAGNA CARTA: CLAUSE 39, *The Magna Carta Project*, trans. H. Summerson et al. http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39 (last accessed 29 April 2021). It was the end of this clause, referencing the "law of the land" that became—thanks to Lord Coke—synonymous with the American conception of Due Process of Law. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1607 (2019).

Even if the panel were correct that the "law of the land" restricted the right to travel, it would still not justify the Government's actions here. The Magna Carta restricts the right to travel only after providing the affected traveler due process of law. This makes sense. Under the panel's reading of "the law of the land" the Government could place any restrictions on the right to travel, irrespective of due process. This exception swallows the rule and leaves due process a hollow promise.

But even assuming the panel's interpretation of the phrase "law of the land" were correct, the Government still violated the Appellees' rights because Congress did not create the watchlist. The Supreme Court has ruled that the right to travel is a protected liberty interest. *Kent v. Dulles*, 317 U.S. 116, 125 (1958). "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. But here, that has not occurred. *See* Appellee's Petition for Rehearing En Banc, at 15-16; Final Brief of Appellees, at 4; J.A. 653. Instead, the Department of Homeland Security created the watchlist without Congressional approval. Unilateral executive action can never be the basis for burdening a fundamental right. The watchlist cannot even be said to fall under the panel's erroneous conception of "the law of the land."

II. The Panel's Reliance on Federalist No. 12 is Misplaced

The panel's use of American history is no more supportive of its reading than its reliance on English history. In support of its finding that the government can burden Appellees' right to travel at international borders without regard to due process, it turns to Alexander Hamilton's Federalist No. 12 (Slip. Op. at 20). But Federalist No. 12 concerns the proposed federal government's "tendency to promote the interest of revenue…." FEDERALIST NO. 12 (Alexander Hamilton), The Avalon Project, available at https://avalon.law.yale.edu/18th_century/fed12.asp (last accessed April 29, 2021). Hamilton urged the creation of a federal government to establish "rigorous precautions by which the European nations guard the avenues into their respective countries, as well by land as by water" to prevent "frequent evasions of the commercial regulations" of the various states. *Id.* In other words, Hamilton was concerned with smuggling goods; not holding people without due process.

Appellees do not dispute the federal government's power to impose customs laws to generate revenue. What they object to, and what

Federalist 12 does not address, is being added to a terrorist watchlist—which they cannot challenge—which burdens their right to travel.

Simply put, the panel relies on the fact that history allowed *some* restrictions on the right to travel to justify *any* such restrictions, short of a complete ban. This is not supported by the historical record.

III. The Panel's Reliance on Caselaw Does Not Support Its Originalist Analysis

The panel also looks to early case law to bolster its originalist analysis. It cites *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a dissent in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), and a discussion of the need for passports going back the War of 1812. These cases provide little support for the panel's opinion.

The panel points to *Gibbons* for the proposition that "the Constitution allowed for inspection laws that would place some burdens on domestic travel." Slip. Op. at 20. Ironically, the Supreme Court held that these inspection laws "form a portion of that immense mass of legislations which embraces everything within the territory of a State *not* surrendered to the General Government…." *Gibbons*, 22 U.S. (9 Wheat.) at 203 (emphasis added). Far from justifying government restrictions on

travel, *Gibbons* holds that the federal government lacks the power to conduct internal inspections. The Constitution reserves that power to the states.

The Passenger Cases are inapposite for two reasons. First, the panel relies on Chief Justice Taney's dissent. Slip. Op. at 20. Dissents do not reflect the law. Second, those cases dealt with quarantining a ship arriving from a port where a contagious disease is running rampant. Even the portion of the opinion the panel cites notes that a ship was "subjected to the delay and expenses *incident to that condition*…." *Passenger Cases*, 48 U.S. (7 How.) at 484 (Taney, C.J., *dissenting*) (emphasis added). It was the particular scenario, where the ship was potentially carrying a contagious disease, that allowed for this extraordinary delay.

Furthermore, in both *Gibbons* and *The Passenger Cases*, the restrictions at issue were enacted by state legislatures. Neither involved unilateral executive agency actions. In fact, from an originalist standpoint, the federal government could not have imposed either restriction because it lacked a general police power at the Founding. Stephen L. Carter, *Originalism and the Bill of Rights*, 15 HARV. J. L. & PUB. POL'Y

141, 146-47 (1992) ("[T]he Founders understood that the States possessed a general police power and the federal government did not…").

Finally, *Haig v. Agee* does not support the panel's conclusion. It merely notes that passports have been required since the War of 1812. Slip. Op. at 20-21. Appellees do not dispute this. More importantly, the Court in *Haig* held that the restriction on the right to travel at issue in that case required notice and an opportunity for a hearing, the very core of due process. 453 U.S. 280, 310 (1981). That is what Appellees seek here and that is what the panel denied them.

IV. Proper originalist analysis shows the Government oversteps here

While the Court has found Congress's authority over immigration to be plenary and that is unlikely to change, correct originalist analysis reveals that Congress originally lacked the power to regulate immigration at all. Nothing in the Constitution supports unfettered government power in this area.

Advocates of Congress's power to regulate immigration argue it exists in three clauses: the Naturalization Clause, the Foreign Commerce

Clause, or the Migration or Importation Clause. None of these clauses support the creation of a general right to regulate immigration.

First, the Naturalization Clause speaks to Congress's power to regulate who and how foreigners can become citizens, but not their right to freely travel. *See, e.g.*, Nelson Lund, *The Constitutionality of Immigration Sanctuaries and Anti-Sanctuaries: Originalism, Current Doctrine, and a Second-Best Alternative*, 21 J. OF CONST. L. 992, 995 (Mar. 2019) ("Article I, Section 8 does not refer expressly to immigration…During that debate [about naturalization in the first Congress], however, no one suggested that the Naturalization Clause gave Congress any power to control immigration itself.").

The Foreign Commerce Clause also does not provide a basis for restricting the movement of people. At the time of the Founding, the public meaning of commerce did not include regulating people's movement from place to place. Ilya Somin, *Immigration, Freedom, and the Constitution*, 40 HARV. J. L. & PUB. POL'Y 1, 6 (2017). As Professor Somin explains, the Foreign and Interstate Commerce Clause are the same. "Nobody at the time of the founding or for decades thereafter thought it gave Congress the ability to ban people from moving from one state to another." *Id.*; *see*

also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001). Yet the power to ban such interstate movement would be the inescapable corollary of holding that the Foreign Commerce Clause granted Congress power over immigration.

Finally, James Madison discussed the Migration or Importation Clause in Federalist No. 42 and disposed of any notion that it granted Congress the power to prevent people from coming to America. He noted that in arguing against the Constitution, "[a]ttempts have been made to pervert [the Migration or Importation] clause into an objection against the Constitution, by representing it…as calculated to prevent voluntary and beneficial emigrations from Europe to America." FEDERALIST NO. 42 (James Madison), The Avalon Project, available at https://avalon.law.yale.edu/ 18th_century/fed42.asp (last accessed April 30, 2021). The people at the time of the Founding were very concerned about the right to freely immigrate to the United States, and James Madison himself assured them that there was no intent to prevent it.

The Declaration of Independence also shows that the people who founded this country supported free immigration and would not grant unfettered power to restrict it to the federal government. One of the

complaints levelled against King George III, which justified dissolving our bonds of loyalty, was that "[h]e has endeavored to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising conditions on new Appropriations of Lands." DECLARATION OF INDEPENDENCE. The Founders believed that restricting immigration to America was an abuse of power, not something inherent in the status of a nation *qua* nation.[3]

While the Supreme Court has decided to take a different view of the Federal Government's power over immigration, this view fails an originalist examination. To the extent the panel argued that originalism supports unfettered executive action to burden the right to travel, it shows that its analysis is suspect and the full court should re-examine it.

[3] For further discussions of the originalist view of Congress's power over immigration, *see, e.g.*, Ilya Somin, "Does the Constitution Give the Federal Government Power Over Immigration?," *Cato Unbound,* Sept. 12, 2018 available at https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration#_ftn14 (last accessed April 30, 2021); Alex Nowrasteh, "The Law of Nations, Sovereign Power Over Immigration, and Asylum: It's Not as Clear as it Seems," *Cato At Liberty*, Dec. 7, 2018, available at https://www.cato.org/blog/law-nations-sovereign-power-over-immigration-asylum-its-not-clear-it-seems (last accessed April 30, 2021).

CONCLUSION

The Court should grant Appellees' petition for rehearing en banc in order to correct the panel opinion's misapplication of originalist doctrine to severely undermine a fundamental right.

Respectfully submitted,

May 17, 2021

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