The United States has a history of exclusion, traumatization, and scapegoating of Asian Americans and immigrants under the pretext of national security. For far too long, Asian Americans and immigrants have been targeted as national security threats based on race, ethnicity, religion, or ancestry. From the incarceration of Japanese Americans, the surveillance and unjust prosecutions of Arab, Middle Eastern, Muslim, and South Asian (AMEMSA) communities following 9/11, to the profiling of Chinese American scientists, researchers, and scholars under the Justice Department’s “China Initiative,” Asian Americans face cyclical unjust targeting and are treated as ‘perpetual foreigners’ in the United States.

Our breadth of experts will provide a historical perspective and current state of play on the racial profiling of Asian American and AMEMSA communities from the incarceration of Japanese Americans to the Justice Department’s announcement to end the “China Initiative.” The racial profiling of Asian Americans did not start and will not end with the “China Initiative.” There is still much work to be done to address many of these concerns of racial bias and profiling including government accountability and substantive policy changes. We will turn to patterns within national security policies that create structures that promote racial bias and profiling of Asian Americans, Asian immigrants, and AMEMSA communities. We will describe recent national security programs that criminalize our communities, walk through the current advocacy efforts of Asian American and civil rights organizations, and draw connections from the historical treatment of Asian Americans and AMEMSA communities as perpetual foreigners.

Moderator:
Gisela Perez Kusakawa, Director, Anti-Racial Profiling Project, Asian Americans Advancing Justice | AAJC

Speakers:
Karen Korematsu, Founder & Executive Director, Fred T. Korematsu Institute
Spencer Reynolds, Counsel, Liberty & National Security Program, Brennan Center for Justice at NYU School of Law
John C. Yang, President & Executive Director, Asian Americans Advancing Justice | AAJC
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<tr>
<td>1</td>
<td>Stronger Rules Against Bias</td>
<td>The Brennan Center released this report on September 6 to highlight how DHS’s policy framework allows for profiling based on race, religion, and national origin, which has had a harmful impact in its counterterrorism activities, among other mission functions. The report offers an improved policy framework to close these loopholes.</td>
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<td>2</td>
<td>Focusing the FBI</td>
<td>This paper addresses the post-September 11 expansion of the FBI’s authority and its abuse of those authorities against American Muslims, Arab Americans, and other minority communities. The report offers recommendations to address these abuses going forward and redirect FBI’s focus to the abundance of violent white supremacist crime happening today.</td>
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<td>3</td>
<td>PCLOB Forum Comments</td>
<td>The Privacy and Civil Liberties Oversight Board hosted a forum to understand the impacts of the government’s approach to domestic terrorism on civil rights, civil liberties, and privacy. The Brennan Center submitted two sets of comments. This second piece focused on the false divide between “international” and “domestic” terrorism, its increasingly baseless justification, and the harmful impact it has had on American Muslims, and anyone the government thinks is Muslim—the broader AMEMSA community and people of color. Finally, and importantly as the government is assessing the issue, the Brennan Center talks about why expanding the international terrorism framework to cover violent American white supremacists is not the solution. This document really illustrates and unravels a central bias in the post-September 11 War on Terror.</td>
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<td>4</td>
<td>AAJC amicus brief on Dr. Xiaoxing Xi</td>
<td>This amicus brief addresses the widespread prevalence of racial discrimination and profiling against Asian Americans and immigrants, particularly scientists and academics of Chinese descent in the last decade, when Professor Xi was subjected to racially motivated actions alleged in his Complaint. That context reveals racial bias against persons of Chinese descent which has permeated federal agencies and influenced FBI training, investigations, and prosecutions, traumatizing families and undermining the credibility of our institutions. This brief is a stepping stone to the current policy efforts to update DOJ &amp; DHS profiling guidance and prevent discriminatory laws.</td>
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<td>5</td>
<td>AAJC’s Comment in response to Office of Science and Technology Policy Request for Input on NSPM-33 Implementation</td>
<td>This comment outlines how the mass profiling of Asian communities harms American citizens and immigrants creating feelings of estrangement by Asian Americans and immigrants and furthers the biased “perpetual foreigner” narratives. This document provides recommendations for implementation of disclosure requirements and is an introduction to current work to reform federal grant making agency policies that impact Asian Americans and immigrants.</td>
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<td>6</td>
<td>Freedom of Information Act (“FOIA”) Appeal, Request No. NFP-129274</td>
<td>This FOIA appeal addresses the information gathering and litigation efforts to address the treatment of Chinese Americans and immigrants as it relates to scrutiny, surveillance, and criminalization of communities.</td>
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<td>The Korematsu Legacy: “Stand up for what is right!”</td>
<td>by Advancing Justice – AAJC</td>
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<td>8</td>
<td>Amicus Brief - Darweesh v. NY</td>
<td>This amicus brief addresses the historical targeting and incarceration of Japanese Americans and walks us through Korematsu v. United States and other seminal cases.</td>
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DHS AT 20: AN AGENDA FOR REFORM

Stronger Rules Against Bias

A Proposal for a New DHS Nondiscrimination Policy

By Harsha Panduranga and Faiza Patel  UPDATED SEPTEMBER 15, 2022

The Department of Homeland Security (DHS) has a problem with discriminatory profiling. Too often, it relies on religious, ethnic, or racial stereotypes in carrying out its expansive counterterrorism mandate, as well as its other functions. DHS agents question Muslim travelers about their religious views when they enter the United States and single out Latino communities for detention and deportation. They detain Americans at the border simply based on their country of birth. Officers charged with identifying potentially risky travelers by looking for suspicious behaviors have said that the scientifically discredited program they used amounted to a back door for racial profiling. The administration has disavowed anti-extremism programs that wrongly assumed that Muslims are predisposed to terrorism, and yet DHS continues to fund similar initiatives.

President Joe Biden has made a strong commitment to ending discriminatory profiling. Recognizing the need for a “systematic approach to embedding fairness in decision-making processes,” he issued an executive order on his first day in office calling for a sweeping review of federal policies to align them with the principle of equity. Secretary of Homeland Security Alejandro Mayorkas has taken important steps toward implementing this directive and curbing profiling. In September 2021, Mayorkas issued guidelines for immigration enforcement, declaring that “race, religion, gender, sexual orientation or gender identity, [and] national origin . . . shall never be factors” when making decisions about whom to apprehend and deport. These guidelines incorporate critical protections to ensure compliance, such as audits of individual enforcement decisions to ensure consistency, the collection of comprehensive data on enforcement actions to facilitate systemic accountability, and a process for obtaining review of individual decisions.

But these measures are not enough. The administration must address biased practices across all DHS activities, including by shoring up the rules against discriminatory profiling that apply to the execution of the agency’s counterterrorism mandate. DHS’s current department-wide guidance on discriminatory profiling fails to cover religion, even as targeting of Muslims has been at the center of concerns about discriminatory profiling. That same guidance gives frontline agents discretion to inappropriately consider race, ethnicity, religion, national origin, and nationality. And it prescribes no means for measuring compliance, much less ensuring it. Another set of nondiscrimination rules, issued in 2014 by the Department of Justice (DOJ) — and which DHS claims to follow — exempts large swaths of DHS’s activities and effectively permits profiling in many situations.
DHS must strengthen its nondiscrimination rules, ensure that those rules cover all its activities, and develop effective accountability mechanisms. Building on our recommendations in A Course Correction for Homeland Security: Curbing Counterterrorism Abuses, this report proposes a model policy that would close current gaps. The secretary of homeland security has the authority to adopt such a policy and should waste no time in doing so.

Glaring Gaps in Current Guidance

In principle, DHS rejects discriminatory racial and ethnic profiling — which it defines as decision-making that relies on the unfounded assumption that a person is more likely to engage in wrongdoing because of his or her race or ethnicity — as a practice that is unfair, ineffective, and inconsistent with American values.

The rules related to discriminatory profiling that apply to DHS, which are memorialized across several overlapping documents, are intended to reflect this principle. The key publicly available policies are:

- **DHS’s 2013 Commitment to Nondiscriminatory Law Enforcement and Screening Activities.** This document, hereinafter referred to as the DHS Guidance, sets out the department’s overarching rules on nondiscrimination. It purports to cover DHS’s law enforcement, investigation, and screening activities. However, it does not mention the department’s intelligence functions, some of which are covered by the Intelligence Oversight Guidelines, discussed below. The DHS Guidance also does not cover certain traits (e.g., religion); affords too much discretion for the department’s agents to consider other traits (e.g., race, ethnicity, or national origin); and has no means for ensuring compliance.

- **The Justice Department’s rules on discriminatory profiling.** DOJ initially issued rules against discriminatory profiling by federal law enforcement in 2003. These rules did not include protections for national origin or religion and exempted activities in which discriminatory profiling frequently occurs, including those involving national security and border protection. In 2014, DOJ issued a revised version of these rules, which now covers traits such as religion, gender and gender identity, and sexual orientation. The DHS Guidance explicitly incorporates the 2003 rules, and DHS has said that it follows the 2014 revision. However, the DOJ rules exempt most DHS functions (e.g., the screening and inspection of travelers and immigrants, intelligence collection, and border security) and thus permit its officials, in the course of carrying out these functions, to consider traits that the policy claims to protect. As a result, the practical effect of DHS’s commitment to the 2014 DOJ rules is unclear. In May 2022, President Biden, responding to continued calls to strengthen the DOJ rules, ordered the attorney general and the secretary of homeland security to review their implementation and effects and consider whether they should be updated.

- **Intelligence Oversight Guidelines.** These rules govern DHS’s Office of Intelligence and Analysis (I&A), which carries out domestic surveillance and serves as a conduit for information between federal agencies and their state and local counterparts. The Intelligence Oversight Guidelines explicitly permit intelligence activities on the basis of a “reasonable belief” that considering a trait (e.g., being Muslim or Chinese) in conjunction with unspecified “other information” (possibly, e.g., that ISIS recruits Muslims or that China is a U.S. adversary) serves a legally authorized purpose, such as identifying terrorist threats. Consequently, these rules together effectively sanction discriminatory profiling.

- **National Counterterrorism Center Watchlisting Guidance.** This guidance, which applies to DHS, suffers from the same defect as the Intelligence Oversight Guidelines, stating that decisions to flag a person for inclusion on a federal terrorism watch list “shall not be based solely on race, ethnicity, national origin, or religious affiliation.”

- **Customs and Border Protection (CBP) directive.** As the DHS component charged with managing U.S. ports of entry, CBP has implemented the DHS Guidance with a directive that underscores the discretion that frontline personnel have to consider nationality. Unlike the DHS Guidance, the CBP directive does not address national origin.

Considering the shortcomings of this patchwork of policies, the department needs a clear, overarching policy — a revised version of the DHS Guidance — that comprehensively prohibits discriminatory profiling. The following sections detail further shortcomings with the existing rules.
Omission of Religion as a Protected Trait

The DHS Guidance fails to cover several personal traits that can be the basis of biased decision-making: religion, gender and gender identity, and sexual orientation. The omission of religion is especially striking given the department’s repeated reliance on policies, programs, and practices that traffic in stereotypes — in particular, casting Muslims as terrorists and subjecting them to surveillance, suspicion, and sometimes even detention. While DHS may need to consider an individual’s religion in certain cases (e.g., as part of an asylum application), it should not exercise unfettered discretion to consider religion in other ways (e.g., as a proxy for a propensity to break the law or commit violence).

It is well documented, for instance, that Muslims are significantly overrepresented relative to their share of the population on the main federal terrorism watch list, to which DHS nominates people and may consider religion in doing so. One court filing from 2013 offers a telling example: even as Muslims made up just over 1 percent of the overall U.S. population, Dearborn, Michigan — with a population of 100,000 that is roughly 40 percent Arab and Muslim — had the second-most residents on the watch list, behind only New York City (population 8.5 million). Legal challenges against discriminatory watch-listing have overwhelmingly been filed by American Muslims, who have presented evidence that their religion was a reason for their inclusion. The consequences of being placed on a federal terrorism watch list can be severe, ranging from the denial of immigration status or employment credentials to being detained, interrogated, and subjected to invasive searches and questioning at the border.

Race and Ethnicity Loopholes

The DHS Guidance formally limits consideration of an individual’s race or ethnicity in law enforcement and screening activities to “all but the most exceptional instances.” But it does not meaningfully constrain agents from considering those traits in practice and has no system for checking agents’ judgment.

According to the DHS Guidance, race and ethnicity may be used “only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest.” This methodology corresponds to constitutional protections and should, if faithfully applied, bar the biased use of race or ethnicity. National security is, however, the epitome of a compelling governmental interest, and protecting it is the stated purpose of a range of DHS counterterrorism programs and policies. Further, national security is a broad and elastic term that is too easily invoked to override constitutional rights. Even courts, which are supposed to be guardians of these rights, often defer to government agencies when national security is deployed as a policy justification. Given their mission, DHS officials may be disposed to take an expansive view of national security as well.

The constitutional standard requires that if a compelling governmental interest is established, a policy must be narrowly tailored — that is, it must promote that interest without affecting more people than is necessary to achieve it. To determine whether a policy is narrowly tailored, courts generally look into whether it is overinclusive (covering more people than necessary) or underinclusive (covering fewer people than necessary), and whether it is the least restrictive way of achieving the goal in question. For example, a policy that explicitly denied all Latinos entry into the United States for supposed national security reasons would clearly not meet this standard. Latinos overwhelmingly do not pose a security threat (making it overinclusive), while other people who could pose a threat would not be identified by the program (making it underinclusive). Moreover, less restrictive means, such as additional security screening based on objective threat indicators, could achieve the stated goal.

Leaving these difficult decisions — which even courts struggle with — in the hands of officials without even basic quality control checks can result in widespread bias in decision-making. For example, in apparent violation of the “exceptional instance” standard articulated in the DHS Guidance, Border Patrol has used markers such as speaking Spanish or a “Hispanic” appearance as grounds to investigate longtime Michigan residents for violations of immigration laws. Although the DHS Guidance seems to prohibit the use of these stereotypes, the practice persists and Border Patrol agents are not held accountable for violating it.

Finally, the DHS Guidance provides that “race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.” Using race or ethnicity to identify a particular individual who is suspected of criminal activity is not considered profiling because it does not involve the use of a protected characteristic to broadly make assumptions about the criminality of a group. But the DHS Guidance combined with the Justice Department rules are more permissive than the typical “suspect description” rule used by police. First, the DHS Guidance permits the use of race and ethnicity for “ongoing criminal activities, schemes or enterprises,” a broad category that the current DOJ rules expand even further to “threats to national or homeland security, violations of Federal immigration law, or authorized intelligence activities.” Second, the Justice
Department rules also allow consideration of race and ethnicity in scenarios that need only be specific in time or location, which opens the door to an expansive use of protected characteristics in ways that far exceed the traditional suspect description exception.

National Origin and Nationality Loopholes

The DHS Guidance places even fewer restrictions on the use of national origin (i.e., country of birth) and nationality (i.e., country of citizenship). It provides:

[Tools, policies, directives, and rules in law enforcement and security settings that consider, as an investigative or screening criterion, an individual’s simple connection to a particular country, by birth or citizenship, should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs, and such consideration should remain in place only as long as necessary.]

In other words, the guidance allows DHS to treat people as security risks based on where they were born or hold citizenship, including U.S. citizens who have been naturalized or are also citizens of other countries.

While the guidance requires such treatment to be “based on an assessment of intelligence and risk,” DHS’s risk assessment tools for identifying travelers who may be security threats or in violation of customs laws, for example, are opaque and unverifiable. There is no publicly available information about whether or how these rules account for bias in the underlying intelligence informing an assessment. But there is reason to question their accuracy: according to a former high-level DHS official, risk assessments that rely solely on travel history and demographic factors (e.g., national origin or nationality) yield a false positive rate of at least 97 percent. Of course, both national origin and nationality are easily used, in both policy and propaganda, as a stand-in for race, religion, and ethnicity. For example, President Donald Trump was able to accomplish a ban on travel and immigration by millions of Muslims by targeting countries with predominantly Muslim populations.

National origin and nationality, whether on their own terms or as proxies for other traits, can also be used at the operational level to improperly flag individuals as high-risk. For example, in January 2020, CBP’s Seattle field office instructed its agents to conduct heightened vetting on and inquire about the faith and ideologies of individuals who were born in, had traveled to, or held citizenship in Iran, Lebanon, or Palestine. The directive, which was subsequently disclosed, showed that the additional vetting was ordered in response to the U.S. drone strike that killed the Iranian general Qasem Soleimani. It appeared to be premised in part on the unfounded notion that people who were born in or were citizens of certain Muslim-majority countries — and especially those who belonged to the Shia sect of Islam — might retaliate for the killing. As a consequence, some 200 Iranian and Iranian American travelers were held for questioning about their “political views and allegiances” when crossing the border between Canada and Washington State.

DHS is authorized to consider nationality to administer several statutes, regulations, and executive orders, such as to determine a person’s legal immigration or travel authorization status. But it should not allow its agents to use nationality as a stand-in for a trait such as religion or ethnicity or as a proxy for the risk level a person poses.

Lack of Safeguards

DHS has not developed sufficient safeguards to constrain its agents’ broad discretion to consider protected traits. The DHS Guidance instructs department components to incorporate the document into their manuals and policies, train staff to follow its directives, and work with DHS’s Office for Civil Rights and Civil Liberties (CRCL) to develop “component-specific policy and procedures” for its implementation. It further directs components to ensure that staff are “held accountable” for meeting these standards. But aside from the complaint procedure run by CRCL — which is notoriously ineffective — DHS leadership has not instituted any meaningful accountability mechanisms.

Indeed, the department does not even measure whether its activities result in members of certain groups being disproportionately singled out relative to baseline demographic expectations. It is therefore unsurprising that DHS programs continue to be dogged by allegations of racial and ethnic profiling, even as the department formally condemns and bars such practices.

Conclusion

DHS has often stumbled in handling its counterterrorism portfolio and undertaken programs that by design or in effect target people based on assumptions about their race, religion, and ethnicity. This status quo both undermines constitutional values and makes us all less safe by letting prejudice rather than facts drive policy. A stronger nondiscrimination policy coupled with robust enforcement will help reorient the department and enable it to fulfill its stated commitment to equity. Below, we propose model guidance that would accomplish these objectives.
Model DHS Guidance on Discriminatory Profiling

This Guidance supersedes all of the Department of Homeland Security’s current guidance on the use of race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation in Department operations, including Secretary Napolitano’s 2013 memorandum, “The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities.”

The Department is fully committed to ensuring that all of its activities are conducted in an unbiased manner. Biased practices, as the Department and the Federal government have long recognized, are unfair, perpetuate negative and harmful stereotypes, and promote mistrust of authorities tasked with enforcing the laws and protecting homeland security. Moreover, practices based on bias are ineffective. By contrast, practices free from inappropriate considerations strengthen trust in our Department and help keep the Nation safe.

To ensure that we meet the highest standards across all of the Department’s activities, this Guidance defines the limited circumstances in which our agents may consider a person’s race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation. This Guidance also establishes training and accountability requirements to ensure that its contents are fully understood and implemented.

This Guidance is intended to address invidious profiling — that is, the illegitimate consideration of a protected trait as part of an assessment that may adversely affect a person. Invidious profiling would include, for example, a determination that a person poses a potential security threat and should be subjected to additional inspection, targeted for investigation, or denied a benefit that the Department administers based on consideration of a protected trait. The Department may consider protected traits when explicitly within its legal mandate to do so — for example, when checking passports at the border to verify a person’s country of citizenship or reviewing asylum claims based on religious persecution.

Definitions

>> Vetting, screening, benefit adjudication, and inspection. DHS assessments and vetting of individuals seeking to travel to the United States; its screening, inspection, and questioning of domestic and international travelers (e.g., at airports and ports of entry); reviews of applications relating to immigration status; and substantively similar activities.

>> Intelligence. The activity of accessing, collecting, retaining, analyzing, or disseminating information by any component of DHS (regardless of U.S. Intelligence Community membership) to inform any operational, policy, or strategic decision not directly connected to a predicated criminal investigation, including for purposes such as situational awareness (e.g., to identify and keep abreast of breaking events, including emerging crises); threat detection (e.g., to identify potential threats of violence and terrorism, including by specific individuals); generating tips and leads; and substantively similar purposes. Intelligence also means the products of these activities.

>> Watch-listing. DHS nominations of individuals to a federal terrorism watch list (whether administered by DHS or another agency); transmission of information to any agency or entity to inform the decision on whether to place an individual on a watch list; and administration of the redress process for individuals who have been improperly placed on a watch list.

>> Investigation. DHS scrutiny of a particular person or group for potential violations of criminal or civil laws, including for counterterrorism purposes.

>> Enforcement. DHS decisions to apply the law in a manner that affects a person’s legal or custodial status. For example, granting or denying a statutory benefit, arresting or apprehending a person, or initiating a prosecution or removal proceeding.

>> Stops and searches. Discretionary and checkpoint stops and searches by DHS agents that are undertaken outside of airports or ports of entry where a person is required to pass through a screening or inspection bottleneck. For example, this category includes immigration enforcement stops conducted by Border Patrol agents within U.S. territory.
A. Overview
DHS prohibits the consideration of an individual’s actual or perceived race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation (“protected traits”) in its vetting, screening, benefit adjudication, inspection, intelligence gathering, watch-listing, investigation, and enforcement activities, as well as in stops and searches, and in any other activities with the potential to generate adverse consequences for an individual, family, or entity subject to those activities (“covered activities”), whether automated or human-driven.

B. Exceptions
There are two narrow exceptions to this general prohibition:

1. A protected trait may be considered in the course of carrying out a covered activity when there is trustworthy information, specific and limited in time and location, that links persons possessing a covered trait to the description of individuals suspected of criminal activity. Protected traits may only be considered in conjunction with information not based on protected traits, and may themselves never form a basis for initiating a covered activity.

   - Example of permissible consideration: Homeland Security Investigations (HSI) has corroborated intelligence from a trusted informant that three people wanted for human trafficking offenses — two of whom are white males and one of whom is a South Asian male — will visit a university campus together in Boston during the afternoon hours of a particular day. HSI agents may visit the campus to find and investigate groups of individuals matching this description on that date. This scenario meets the above requirement because: 1) the information is trustworthy (i.e., HSI has corroborated the informant’s reporting against another credible source); 2) it is specific and limited in time and location (i.e., the information specifies a particular university campus at a particular time); and 3) it involves a description of three specific suspects who are alleged to have been involved in criminal conduct (i.e., identified suspects).

   - Example of impermissible consideration: The Department receives raw intelligence from the Central Intelligence Agency alleging that terrorist group X has said it intends to target the United States in 2022 by sending so-called “holy warriors” from Jakarta to ports of entry in the United States to smuggle illegal materials for explosives. In response, the Department creates a rule that sends people arriving from Jakarta to secondary inspection and subjects them to further questioning at the discretion of local agents about their religious practices, background, and schooling to explore whether they have a connection with the terrorist group. This Guidance bars this consideration of protected traits because: 1) the intelligence is not confirmed to be trustworthy (i.e., it is unevaluated raw intelligence that has not been corroborated or analyzed); and 2) it is not specific in time (i.e., it covers all of 2022) or location (i.e., it covers numerous ports of entry). Further, the protected traits form a basis of the investigative and intelligence activities of the Department, rather than merely describing in part an already-known subject.

2. A protected trait may be considered in the course of carrying out a covered activity if expressly required by a statute, regulation, or executive order, and if such consideration is narrowly tailored to fulfill the applicable legal requirement.

The Department implements and enforces statutes that require consideration of an individual’s protected traits, and in particular nationality — such as eligibility for the Visa Waiver Program, sanctions laws, unlawful entry provisions, and many more. Officials may establish an individual’s protected trait in the course of conducting covered activities connected to such laws. They may not, however, rely on a protected trait as a proxy for a propensity to engage in misconduct or to break the law, or any other inference outside of what the statute, regulation, or executive order strictly authorizes. For example, the Department may establish whether an individual is eligible for the Visa Waiver Program based on whether they are a national of a country that participates in the program. But the Department shall not create or operationalize connected risk assessments that consider a person’s nationality as a factor bearing on the risk they may pose, as this consideration is not explicitly authorized in statute.
Example of permissible consideration: An applicant for asylum must establish that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” (8 U.S.C. 1158). Under the standard articulated here, “narrow tailoring” means considering the relevance of the protected trait only to the extent necessary to determine whether an individual meets the legal criteria at issue. Thus, an official adjudicating an asylum claim based on religion may consider evidence establishing the applicant’s religion and its relevance to a claim that they will face persecution in their home country based on their religious identity.

Example of impermissible consideration: In the case described above, the official shall not look to an applicant’s religious beliefs or practices to determine whether they pose a security risk or would “fit” culturally in the United States, or to address other questions outside the scope of the defined inquiry.

C. Transparency
Within 180 days of the issuance of this Guidance, the Department’s General Counsel shall publish on the Department’s publicly accessible website a list of all laws, regulations, and executive orders that require it to consider a protected trait, which shall be updated annually, and shall include for each entry examples of permitted and prohibited considerations of the applicable protected trait.

D. Implementation by Components
All Department Components shall include this Guidance in all manuals, policies, directives, and guidelines regarding any activity in which the use of protected traits may arise in connection with covered activities. In addition:

- Within one year of the issuance of this Guidance, each Component, in coordination with and with the approval of the Department’s General Counsel and the DHS Office for Civil Rights and Civil Liberties (CRCL), shall implement specific policy and procedures to implement this Guidance, which shall be filed with CRCL and made available to the public.

- Each Component head shall ensure that all employees of the Component, including supervisors and managers, are trained on an annual basis to the standards set forth in this Guidance, and are held accountable for meeting those standards, including through termination of employment for serious or recurring violations. Each Component head shall disclose what accountability measures they have implemented as part of the policies and procedures filed with CRCL and made public as directed above. Components shall report identified violations to CRCL, which shall conduct a yearly audit to ensure compliance with this obligation. The results of this audit shall be included in CRCL’s reports to Congress, as described in the section below.

- Each Component head shall further, upon request, provide to CRCL any documentation relevant to evaluating compliance with this Guidance within 90 days of such request.

E. Ensuring Compliance
A Compliance Committee is hereby established, which shall be chaired by the Officer for CRCL and composed of the Department’s General Counsel; Chief Information Officer; Under Secretary for Strategy, Policy, and Plans; Under Secretary for Science and Technology; and Chief Privacy Officer.

Within one year of the date of the issuance of this Guidance, the Compliance Committee shall develop a plan to measure overall compliance with the Department’s policies against discriminatory profiling, including by identifying any disparate impacts that Department activities may generate. The Committee shall share the plan with the House and Senate Homeland Security Committees when it is finalized.

All Components shall assist the Committee by providing requested information and data within 90 days of such a request, which shall only be used for effectuating this Guidance, except to the extent otherwise required by law or policy.

In order to formulate the compliance plan, the Committee shall:

1. Develop a list of all Department programs and practices that qualify as covered activities under this Guidance. For example, a particular risk assessment to identify travelers coming to the U.S. who may pose a threat would qualify as a covered activity and would be listed as a relevant program or practice.
2. Develop a list of decision-making criteria or rules applicable to each of the Department programs and practices on the list of covered activities, noting any that explicitly consider protected traits or close proxies. For example, any rules — even if described categorically (e.g., a rule looking for travel patterns flagged as suspicious by intelligence sources) rather than as applied (e.g., a rule looking for a pattern of travel from Mecca, a likely close proxy for religion) — underlying the given risk assessment initiative would qualify as decision-making criteria. The Committee shall evaluate each of these against the standards articulated in this Guidance and issue recommendations to the Secretary to address any criteria or rules that do not comply, along with any other potential risks of bias.

3. Identify data inputs used to inform such decisions that explicitly reveal a protected trait (e.g., the ethnicity and race field on the N-400 Application for Naturalization) and issue a report to the Secretary evaluating whether and how the collection, retention, or dissemination of this data as currently practiced by the Department generates a risk of noncompliance with this Guidance.

4. Establish a panel of independent experts to provide advice on whether the data inputs identified by the Committee are sufficient to evaluate whether covered activities are producing disparate impacts on the basis of race, ethnicity, religion, national origin, nationality, and religion. In cases where sufficient data is available, the panel shall consider whether a particular covered activity disproportionately impacts individuals based on a protected trait relative to relevant demographic benchmarks, as determined by the panel of experts. To the degree that disparate impacts are identified in connection with covered activities, CRCL, in conjunction with Component heads, shall propose and implement a nondiscriminatory alternative within one year of such finding.

The Committee shall annually update its findings on the matters assessed in (1)–(3) above, at which time the disparate impact analyses described in (4), along with any appropriate follow-up actions, shall be conducted for any new covered activities.

F. Reporting

Not later than two years after the issuance of this Guidance, and annually thereafter, CRCL shall provide a written report on the implementation of and compliance with this Guidance to the Secretary of Homeland Security and the House and Senate Homeland Security Committees. The report shall be unclassified, and any redactions shall be accompanied by a published legal justification for withholding. The report may contain a classified annex only as necessary to protect legitimately classified information, and it shall provide an unclassified summary of any materials addressed in the classified annex. CRCL shall publish the report on the DHS website.
Endnotes


17 I&A, Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines, 2–4 (emphasis added).
19 NCTC, Watchlisting Guidance, 11 (emphasis added).
22 El Ali, No. 8:18-cv-02415, at 48, https://www.clearinghouse.net/chDocs/public/NS-MD-0002-0001.pdf (noting that “almost all — if not, all — legal challenges regarding designations on the federal terrorist watchlist have been filed by Muslims nationwide,” and listing examples of such lawsuits).
24 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
25 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
26 The constitutional standard described in the DHS Guidance is strict scrutiny. “[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” Adarand Constructors v. Penau, 515 U.S. 210, 226 (1995) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)) (internal quotation marks omitted).
27 Courts tend to defer to the judgment of the executive branch about whether a policy is justified by national security, often under the theory that they are ill-equipped to second-guess such judgments. See, e.g., Shirin Sinnar, “Courts Have Been Hiding Behind National Security for Too Long,” Brennan Center for Justice, August 11, 2021, https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long.
30 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
31 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
32 2014 DOJ Guidance, 4.
33 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1–2.
37 For example, CBP determines whether an individual is eligible for visa-free travel to the U.S. under the Visa Waiver Program (VWP), which is open to citizens of 40 countries. CBP therefore must consider a person’s nationality to determine whether they are eligible to travel to the U.S. under the VWP. CBP, “Visa Waiver Program,” DHS, last modified June 9, 2022, https://www.cbp.gov/travel/international-visitors/visa-waiver-program. Applicants for asylum must establish that they are refugees by verifying that their race, religion, nationality, membership in a particular social group, or political opinion has caused them to be persecuted. 8 U.S.C. §§ 1158(b)(1)(A)-(B).
38 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 2.
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ABOUT THE BRENNAN CENTER’S LIBERTY AND NATIONAL SECURITY PROGRAM

The Brennan Center’s Liberty and National Security Program works to advance effective national security policies that respect constitutional values and the rule of law, using research, innovative policy recommendations, litigation, and public advocacy. The program focuses on reining in excessive government secrecy, ensuring that counterterrorism authorities are narrowly targeted to the terrorist threat, and securing adequate oversight and accountability mechanisms.

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Focusing the FBI
A Proposal for Reform

By Michael German and Kaylana Mueller-Hsia  PUBLISHED JULY 28 2022
Introduction

The failure of the Federal Bureau of Investigation (FBI) and other law enforcement agencies to anticipate and prepare for the January 6, 2021, attack on the U.S. Capitol by far-right insurrectionists has elicited proposals to expand the bureau’s authority to investigate domestic terrorism. The FBI already received expansive new powers after the 9/11 terrorist attacks, and its current guidelines place few limits on agents’ ability to search broadly for potential threats. Confusion about the current scope of the bureau’s powers is understandable, however, as FBI leaders have regularly misstated their authorities in public testimony. These misstatements deflect FBI accountability by focusing overseers on filling perceived gaps in its authority rather than examining how the bureau uses, misuses, or fails to use the tools it already has.

The real problem is not that the FBI’s authorities are too narrow, but rather that they are overbroad and untethered to evidence of wrongdoing. After 9/11, the Department of Justice (DOJ) reduced or eliminated reasonable evidentiary predicates to justify broader collection and sharing of Americans’ personal information. This new domestic intelligence process replaced evidence-driven investigations of suspected criminal activities with mass data collection and untriaged reporting of speculative harms unsupported by facts. The sheer volume of threat reporting resulting from this system suffocates effective intelligence analysis, flooding law enforcement leaders with thousands of specious threat warnings a day. In addition to unjustified invasions of privacy, the high rate of false alarms that this process produces naturally dulls the response, and the disconnect from evidence of criminality opens the door to bias-driven law enforcement responses. As they have in the past, the FBI’s unbridled authorities have resulted in abuses of civil rights and civil liberties without improving its ability to identify and mitigate real threats.

Misinformation from FBI officials has confused the policy debate. When senators investigating the January 6 attack asked Jill Sanborn, then the assistant director of the FBI’s Counterterrorism Division, whether FBI agents monitored the multitude of threats made in public forums prior to the attack, Sanborn replied, “It’s not within our authorities.” Sanborn claimed that the FBI cannot collect information involving First Amendment–protected activities without a predicated investigation or a tip from a community member or law enforcement officer. These statements are inaccurate, yet they featured prominently in the Senate’s report on the security, planning, and response failures regarding the attack on the Capitol.

When FBI Director Christopher Wray later testified before Congress, he also claimed that FBI rules restricted agents’ authority to investigate threats to the Capitol posted online absent a criminal predicate and authorized purpose. Wray proposed addressing this purported deficit by expanding the FBI’s authorities: “If the policy should be changed,” he told the Senate Judiciary Committee, “... that might be one of the important lessons learned coming out of this whole experience.”

The FBI’s authorities are, however, a matter of public record. Contrary to Sanborn’s and Wray’s claims, agents are authorized to conduct intrusive investigations even when there is no authorized purpose, allegation, or information suggesting that criminal activity may occur.

Under current rules, bureau agents and analysts are authorized to monitor publicly available information even before opening investigations — and they in fact did so before the January 6 attack. A U.S. Government Accountability Office investigation confirmed that the FBI had received threat information posted on social media regarding potential violence at the Capitol from multiple sources prior to January 6. The FBI obtained this threat information through manual online searches, from other federal, state, and local law enforcement agencies, directly from the companies running social media platforms, and through open source analysis tools that search across platforms.

Misinformation about the scope of the bureau’s authority to investigate domestic terrorism obfuscates ongoing inquiries into the FBI’s failure to prepare for the January 6 attack, particularly as the Justice Department contemplates seeking new statutory powers and additional resources to fill these imagined gaps. Reforming the FBI requires restoring reasonable criminal predicates to compel the bureau to focus its investigative activities where evidence of criminal activity exists. This report details the expansive breadth of the FBI’s current investigatory authorities, examines how these overbroad authorities hinder the bureau’s ability to focus on true threats, and proposes reforms that Congress and the attorney general can undertake now to enhance the bureau’s effectiveness while protecting Americans from bias-based investigations and invasions of privacy.
Understanding FBI Investigatory Authorities

For almost 70 years, the FBI operated without a primary, consolidated source of authorities. In the 1970s, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (known as the Church Committee) discovered that the FBI had used covert intelligence tactics to target activists in the civil rights, antiwar, and women’s rights movements not based on criminal activity, but rather to “disrupt,” “discredit,” and “otherwise neutralize” individuals’ First Amendment–protected political activities.\(^8\)

To address the Church Committee’s revelations, Attorney General Edward Levi published the first guidelines governing the FBI’s investigative authorities in 1976: the Attorney General’s Guidelines for Domestic FBI Operations.\(^9\) The Levi Guidelines refocused the FBI on crime detection and prevention rather than political suppression by requiring reasonable criminal predicates to justify investigations. Justice Department officials later attested that these restraints effectively directed FBI resources toward investigating unlawful activities rather than monitoring disfavored political activities. Testifying before Congress in 1979, Attorney General Benjamin Civiletti stated that three years of experience with the Levi Guidelines had “demonstrated that guidelines can be drawn that are well understood by Bureau personnel and by the public and which can be extensively and productively reviewed by the appropriate congressional committees.”\(^10\)

Subsequent attorneys general modified and added to these guidelines over the years, but the greatest expansion of FBI authorities came in the wake of 9/11. President George W. Bush’s first attorney general, John Ashcroft, issued new guidelines in 2002 that permitted the FBI to attend First Amendment–protected gatherings such as religious events, political meetings, and protests without any suspicion of criminal activity, and to “conduct online search activity and access online sites and forums on the same terms and conditions as members of the public generally.”\(^11\)

President Bush’s third attorney general, Michael Mukasey, made even more significant changes to the FBI’s authorities, promulgating his Attorney General’s Guidelines for Domestic FBI Operations in September 2008, three months before Bush ceded power to President-elect Barack Obama.\(^12\) Three months later, the FBI established the Domestic Investigations and Operations Guide (DIOG), a regularly updated internal instruction manual for conducting investigations under the Mukasey Guidelines.\(^13\)

Current FBI Authorities

The Mukasey Guidelines’ most significant change to FBI authorities was the creation of a new type of investigation called an “assessment,” which requires no “factual predicate” to initiate, meaning no allegation or objective facts indicating that the target of the investigation may be involved in criminal activity or threaten national security.

Agents can open assessments so long as they state that they have an authorized purpose — namely, to prevent federal crimes or threats to national security, or to collect foreign intelligence. Agents are authorized to open 30-day assessments on their own initiative, without supervisory approval. A supervisor can authorize the renewal of an assessment for an unlimited number of 30-day extensions. Agents are permitted to employ a broad array of intrusive investigative methods during assessments, including searching public, commercial, and government records; conducting online searches; recruiting and tasking informants; conducting covert and overt interviews; conducting physical surveillance; and obtaining grand jury subpoenas for telephone or email subscriber information.

The FBI updated the DIOG in 2011, granting its agents additional investigative authorities that go beyond the scope of the Mukasey Guidelines.\(^14\) These included the authority to conduct “pre-assessments,” which allow agents to search publicly available records, online resources, subscription-based commercial databases, and government databases without even opening an assessment. Pre-assessments require no documentation stating the nature or purpose of these searches, and information obtained from them may be retained only if it is used to open an assessment or broader investigation, leaving little record of these searches. The 2011 DIOG revision also expanded the tactics available during assessments to include searching an individual’s trash to find compromising information to compel them to become an informant.

As a result of these expanded authorities, contrary to FBI officials’ post–January 6 claims, agents and analysts can search public social media feeds without even opening an assessment or predicated investigation or documenting the results of their searches.\(^15\) Upon opening an assessment — without any factual basis to suspect wrongdoing — an agent can also monitor (but not record) private internet communications by recruiting and tasking a cooperating witness or informant to act as a consenting party.
More intrusive tactics, as described below, are authorized during preliminary investigations, which require only “information or an allegation” that a criminal or national security threat may exist as a predicate to open a six-month investigation, based on a frontline supervisor’s approval. Two six-month extensions are available with higher-level approvals, for a total of 18 months. The “information or allegation” necessary to predicate opening a preliminary investigation does not have to reasonably indicate criminal activity or a threat to national security; the authorizing allegation may be speculative. There is no requirement to open an assessment prior to opening a preliminary investigation if the “information or allegation” predicate is met.

All investigative methods except those that require probable cause warrants (by definition, probable cause does not exist at this stage of investigation) may be utilized during a preliminary investigation, including the use of legal process to compel evidence production; mail covers; undercover operations; and consensual monitoring of communications. (Federal law requires only one party to a conversation to consent to the recording.)

“Information or an allegation” is already an extremely low threshold to subject an individual to a six-month preliminary investigation, but a 2010 DOJ inspector general report revealed that agents were making the required allegations themselves to target domestic advocacy groups, on their own speculation that the targeted individuals or groups might commit federal crimes in the future. The report noted that the Mukasey Guidelines would authorize such conduct.

Being subjected to a preliminary investigation of domestic or international terrorism carries real consequences for those targeted. FBI policy requires that subjects of terrorism-related preliminary investigations be placed on the Terrorist Screening Database (TSDB), commonly known as the terrorist watch list. The TSDB is accessible to customs, border, and immigration authorities as well as federal, state, and local law enforcement agencies, private contractors, and many foreign governments. Placement on the watch list can lead to travel restrictions, prolonged detentions, and increased risk of violence (as law enforcement may react to otherwise routine interactions with heightened alarm).

Only full investigations, which allow agents to employ all legal investigative methods, require articulable facts to establish a reasonable indication that criminal activity or a threat to national security has occurred, is occurring, or may occur in the future. This “reasonable indication” standard is still a low evidentiary bar — “substantially lower” than the probable cause necessary to obtain judicially authorized search warrants and nonconsensual electronic monitoring. “Reasonable indication” is similar to the “reasonable suspicion” standard that police use to “stop, question, and frisk” people on the street for investigative purposes. Agents may pursue court-authorized probable cause search warrants, wiretaps, and Foreign Intelligence Surveillance Court orders during a full investigation once sufficient evidence is obtained.

**Illusory Protections Against Bias-Based Investigations**

Given the FBI’s history of using its authority to target minority communities and suppress First Amendment–protected activities, the attorney general’s guidelines, the FBI’s DIOG, and the Justice Department’s policies all include provisions that claim to restrict such abuse. However, these protections are weak and provide little protection in practice.

The attorney general’s guidelines identify several “sensitive investigative matters” (SIMs), including investigations targeting public officials; investigations of religious or political organizations or prominent leaders of them; investigations with an academic nexus; and investigations of members of the news media. Investigations involving SIMs require notification and approvals from higher-level officials, which could in theory curb some abuse, but the standards for opening each type of investigation (i.e., assessments, preliminary investigations, or full investigations) remain unchanged, regardless of which FBI official ultimately approves the matter. Absent a requirement for objectively reasonable criminal predicates, the same institutional and individual biases that might drive an agent’s decision to open an improper investigation might also influence higher-level officials to approve one.

For example, after white supremacists stabbed protesters and a journalist at a racist rally in 2016, a San Francisco FBI agent opened a full investigation of an antiracist group for allegedly violating the rights of the Ku Klux Klan, which the agent described not as the oldest and most violent terrorist group in the United States, but as a group “that some perceived to be supportive of a white supremacist agenda.” Along with other errors in the opening memo, the Klan was not among the white supremacist groups present at the rally. Following SIM protocols, the San Francisco FBI’s chief division counsel and special agent in charge approved the investigation despite the memo’s questionable investigative premise and the agent’s inappropriate description of the Klan.

Moreover, internal FBI records show that agents routinely fail to comply with the SIM requirements. As part of a 2019 audit, the FBI’s Inspection Division examined a sample of 353 cases involving SIMs and identified 747 compliance errors, many of which involved failing to make the proper notifications and obtain the required approvals.
The Justice Department published another policy document, the *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (hereinafter referred to as the Racial Profiling Guidance), in 2014 to update and expand the guidance originally issued by Attorney General Ashcroft in 2002. The 2014 Racial Profiling Guidance prohibits the consideration of race, ethnicity, gender, national origin, religion, sexual orientation, and gender identity during “routine” and “spontaneous” law enforcement decisions, absent a specific subject description. However, it retains broad loopholes that allow consideration of these characteristics in circumstances involving threats to national security, violations of immigration laws, or authorized intelligence activities — the first and last of which constitute two of the FBI’s primary missions. Nor does the guidance bar profiling by state and local law enforcement officers who share intelligence with the FBI and work in partnership with agents on task forces and in intelligence fusion centers.

The only bright-line limit that the DIOG places on agents is the prohibition against conducting investigative activity based “solely” on race, gender, ethnicity, national origin, religion, sexual orientation, gender identity, or First Amendment–protected activities. The term “solely” is the infirmity, however, as an agent’s mere assertion of an authorizing purpose can justify an assessment of any person or organization based largely on these protected characteristics. For example, FBI policy and the Racial Profiling Guidance expressly permit mapping communities based exclusively on race and ethnicity, and tracking what it calls racial and ethnic “behaviors” and “facilities” without any individualized suspicion of wrongdoing. FBI memos authorizing these racial and ethnic mapping initiatives have relied on crude racial and ethnic stereotypes regarding the types of crimes that different groups might commit to justify collecting such data. The speculative possibility that a person or group may commit a crime or pose a threat in the future — which is arguably true of anyone — has proven sufficient to overcome this limitation in investigations targeting domestic advocacy groups.

FBI agents’ authority to monitor social media once they have initiated formal investigations is even broader. During assessments — which again require no factual predicate suggesting wrongdoing — agents can search, view, and save public social media postings and maintain them in intelligence databases. Further, agents can recruit and task informants to befriend the targets of these assessments and infiltrate organizations to track the public information they disseminate online. When agents deem it necessary to achieve the assessment’s purpose, and they determine that less intrusive methods will be ineffective, they may also task informants to use their access to the targeted individuals or organizations to obtain nonpublic information and monitor (but not record) electronic communications to which they are a party.

The massive volume of public information available online has proven irresistible to intelligence agencies, which after 9/11 envisioned achieving “total information awareness.” In addition to amending its rules to allow agents to search online platforms at will and without opening investigations, the FBI has awarded multimillion-dollar contracts to private companies to conduct social media monitoring services on its behalf. But too much information is as serious an impediment to effective intelligence analysis as too little, particularly when the information sources contain factual errors, satire, hyperbole, and intentional disinformation, as social media often does.

Just as published written materials in books and newspapers or broadcasts over television and radio can sometimes contain evidence or allegations of criminal wrongdoing that agents can use to initiate or further investigations, agents can and should utilize public social media posts when the facts indicate that they are relevant and sufficient to initiate or further properly predicated investigations of criminal activities or national security threats. But no one could reasonably suggest that having the FBI employ a team of agents to collect, digitize, and scour for vague indicators of wrongdoing every book, newspaper, magazine, newsletter, press release, and broadcast interview, song, poem, or speech published would be an effective or cost-efficient way to prevent crime or terrorism, especially given that more than half of the violent crime in the U.S. goes unsolved every year.

The same holds true for social media. Hoping that data mining algorithms and artificial intelligence could be used to effectively sort such massive data sets and accurately predict rare events like terrorist attacks defies statistical and mathematical realities. Obviously, the multiple forms of social media monitoring that the FBI and other law enforcement agencies conducted prior to January 6 was not helpful in preparing for the attack. Yet after the Capitol insurrection, the FBI invested an additional $27 million into social media monitoring software, effectively doubling down on a failed methodology.

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**Social Media Monitoring and Information Overload**

The attorney general’s guidelines and the DIOG do not specifically mention social media monitoring. Instead, they treat any content posted on public-facing social media platforms as publicly available information. As such, agents may search social media without articulating any basis to suspect criminal activity or opening an investigation of any kind.
Of course, public social media posts that express specific and credible threats, when brought to the FBI's attention, can by themselves be all the evidence necessary to justify opening a preliminary or full investigation, as would any other source of information indicating that a crime is taking place or in the works. Likewise, once the FBI opens a properly predicated investigation, agents may logically conclude that monitoring and recording public or private social media posts would be a fruitful investigative step to gather the evidence necessary for a prosecution. The question is not whether the FBI can ever monitor social media, but rather when and how law enforcement resources should be used in order to be effective.
Expanded FBI Authorities Harm Effective Intelligence Analysis

Scant evidence suggests that expanding the bureau’s investigative authorities has helped the FBI more effectively identify or prevent credible threats.\textsuperscript{38} The massive amount of data collected that is untethered to evidence of criminal activity overburdens FBI agents and analysts and obscures evidence of real threats. Individuals who were previously reported to the FBI as potential threats but were not stopped have perpetrated some of the most serious acts of mass violence since 9/11. In reality, the FBI’s expanded authorities have resulted in abusive investigations targeting nonviolent domestic advocacy groups and tens of thousands of assessments that invade innocent Americans’ privacy but lead nowhere — too often, while individuals and groups that do pose a threat fly under the radar.\textsuperscript{39}

\begin{flushleft}
\textbf{Deluge of Information Irrelevant to Identifying Criminal Activity}
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The FBI rarely measures the effectiveness of its methods.\textsuperscript{40} But independent studies of mass surveillance programs, like the bulk telephone metadata collection that the FBI and its partner intelligence agencies secretly undertook for more than a decade, determined their ineffectiveness in identifying and interdicting terrorist plots, despite previous claims to the contrary.\textsuperscript{41}

The little evidence that is publicly available about the FBI’s use of unpredicated investigative methods shows that the vast majority of assessments that agents conducted discovered no evidence of criminal activity to justify further investigation. In 2011, data obtained by the \textit{New York Times} via a Freedom of Information Act request showed that over the previous two years, the FBI “opened 82,325 assessments of people and groups in search of signs of wrongdoing.”\textsuperscript{42} Of those, only 3,315 (or barely 4 percent) found evidence to justify opening preliminary or full investigations — only a fraction of which would be likely to result in criminal charges or convictions. Instead of leading the FBI to evidence of dangerous crimes, this overbroad assessment authority has resulted in the collection of volumes of personal information about countless innocent persons and groups. Compelling the roughly 13,000 FBI agents to conduct tens of thousands of assessments that fail to detect criminal activity wastes resources better devoted to investigations that are properly justified with reasonable criminal predicates.

Most violent crime that occurs in the United States is not solved. Data published by the FBI reveals that law enforcement solved just 45.5 percent of violent crimes reported to police in 2019.\textsuperscript{43} Clearance rates for murders fell to almost 50 percent in 2020, down significantly from rates of around 70 percent seen in the 1980s, despite a relatively steady decline in the annual number of murders over that period.\textsuperscript{44} Rather than trying to analyze millions of social media postings to guess which among them might lead to a violent crime, law enforcement should start where there is evidence of criminal activity and follow logical leads to identify the perpetrators and hold them accountable.

Further evidence that broadscale social media monitoring is an ineffective methodology for detecting threats is that the FBI and other intelligence agencies did monitor and report social media posts warning of plans for violence at the U.S. Capitol prior to the January 6 attack, to no effect. FBI officials initially claimed that they had no warnings of the attack. However, a leaked memo dated January 5, 2021, from the FBI’s Norfolk, Virginia, office told a different story, reporting intelligence gleaned from social media:

An online thread discussed specific calls for violence to include stating “Be ready to fight. Congress needs to hear glass breaking, doors being kicked in, and blood from their BLM [Black Lives Matter] and Pantifa [sic] slave soldiers being spilled. Get violent. Stop calling this a march, or rally, or a protest. Go there ready for war. We get our President or we die. NOTHING else will achieve this goal.\textsuperscript{45}

The Norfolk memo circulated widely throughout the FBI and other relevant law enforcement agencies but prompted no response, likely because this type of fiery rhetoric on social media is commonplace. In her congressional testimony, Assistant Director Sanborn tactically acknowledged that FBI leaders were overwhelmed with intelligence threat warnings. Explaining why, as the head of the FBI’s counterterrorism division, she did not see the January 5 memo from Norfolk, Sanborn replied, “Thousands and thousands
of tips come in just like this one every day. And not all of those get elevated to senior leadership.”

It is extremely difficult to discern who among the millions of people engaging in hypervocal and offensive language online might actually present a real threat, absent more specific intelligence about the individuals involved, the context in which a posting was made, and the nature of the criminal activity that may be occurring. Criminal predicates serve as a triage system to ensure that threat information that is highlighted for investigative attention is supported by objective facts reasonably indicating that a particular individual or group is engaging in a defined criminal activity.

The Norfolk memo failed as an intelligence warning not because the information it presented was inaccurate — it was not — but because the methodology of conducting sweeping social media monitoring untethered to evidence of criminal activity is unsound. While agents should investigate information from any source that reasonably indicates that criminal activity is afoot, the FBI obviously cannot (and should not) react to every social media post in which an anonymous person advocates for “war.” Instead, it should focus on actual crimes, like the relatively unpolicied assaults, stabbings, and shootings that had become commonplace at far-right rallies across the country in the years, months, and weeks before the attack on the Capitol.

For instance, far-right militants, reportedly including three individuals who later participated in the Capitol breach, had attacked the Oregon state legislature just two weeks earlier, breaking windows, assaulting police officers, and beating journalists. Previous far-right violence like the Oregon attack should have triggered FBI investigations, which could have included monitoring relevant social media accounts. These investigations, in turn, could have put the Norfolk memo’s warning in a more useful context — and maybe even into the right hands to have precipitated an effective response. Reasonable criminal predicates serve dual purposes: protecting the innocent from abusive or unwarranted government scrutiny and focusing investigative resources where there is evidence of wrongdoing, thereby enhancing security while protecting individual rights.

High False Alarm Rate and Blunted Response

Just as false fire alarms can dull firefighters’ response times, conducting a high volume of investigations that do not detect evidence of criminal activity inevitably conditions agents to expect that their cases will lead to dead ends, increasing the chances that genuine threats will not receive thorough attention. FBI agents’ pursuit of tens of thousands of dead-end assessments each year may have contributed to the deficiencies seen in a number of terrorism investigations that missed credible evidence indicating that criminal activity was likely to occur, resulting in devastating acts of violence.

Information management failures were at the heart of the 2009 Fort Hood mass shooting, in which U.S. Army psychiatrist Nidal Hasan killed 13 Department of Defense (DOD) employees and wounded over 30 more in Fort Hood, Texas. The subsequent congressional investigation found that while the FBI and DOD “collectively had sufficient information” to recognize the potential threat that Hasan posed, including multiple inappropriate communications sent to the subject of an existing international terrorism full investigation, they failed to search the proper FBI databases and act on the evidence already in their possession. A member of the Webster Commission, which evaluated the FBI’s performance in the Hasan investigation, disclosed that after 9/11, the bureau struggled to adapt to the surge of intelligence data available to it. The Webster Commission cited agents being overburdened by the “crushing volume” of information collected as a causal factor undermining their ability to properly identify crucial pieces of evidence already in their possession that could have justified a more effective response.

The Hasan case was not unique. The FBI received timely warnings prior to several other mass shootings and terrorist attacks: The father of so-called underwear bomber Umar Farouk Abdulmutallab warned U.S. officials that his son was a threat before the latter successfully brought a bomb onto a U.S.-bound airplane. Multiple people warned the FBI about the terrorist activities of David Headley, who participated in deadly attacks in Mumbai. The FBI previously investigated both Omar Mateen, who killed 49 people in an Orlando nightclub, and Ahmad Rahami, who conducted bombings in New York and New Jersey. And Nikolas Cruz, who killed 17 students in a school shooting in Parkland, Florida, was reported to an FBI tip line without response.

Similarly, investigations following the Boston Marathon bombing in 2013 exposed that two years earlier, the Russian Federal Security Service sent a letter informing the FBI that one of the attackers, Tamerlan Tsarnaev, was a threat before the latter successfully brought a bomb onto a U.S.-bound airplane. Multiple people warned the FBI about the terrorist activities of David Headley, who participated in deadly attacks in Mumbai. The FBI previously investigated both Omar Mateen, who killed 49 people in an Orlando nightclub, and Ahmad Rahami, who conducted bombings in New York and New Jersey. And Nikolas Cruz, who killed 17 students in a school shooting in Parkland, Florida, was reported to an FBI tip line without response.

An FBI agent conducted an assessment of Tsarnaev based on the letter but failed to inquire about his alleged travel plans or contacts with the Russian terrorist suspects. The agent closed the assessment, determining that Tsarnaev was not a terrorist threat, but placed him on the terrorist watch list, indicating continuing concern. Here again, the volume of work created by the low threshold for initiating assessments may explain why the Tsarnaev investigation was cut short; it was just one of approximately 1,000 assessments that the Boston Joint Terrorism Task Force conducted that year alone.
“Iron Fist,” in which FBI agents conducted enhanced surveillance and investigations of Black activists.\textsuperscript{65} The Justice Department has also exploited the FBI’s pervasive authorities to launch a “China Initiative,” which targeted Chinese and Chinese American scientists and technologists for investigation and selective prosecution based on their race and national origin and encouraged academic institutions to closely monitor Asian students and faculty in a misguided effort to combat economic espionage.\textsuperscript{66}

Bias-based monitoring of advocacy groups’ social media accounts also drives inappropriate and overly aggressive policing of protest activities. For example, a Minnesota FBI Joint Terrorism Task Force officer used an informant to monitor the Facebook messages of a local group planning Black Lives Matter protests at the Mall of America, reporting the dates and times of events to local police without any reasonable indication of criminal activity, much less terrorism. Local police charged 11 of the protesters with misdemeanors for unlawful assembly and pursued restitution to recoup purported law enforcement and security costs totaling $65,000, a penalty clearly designed to inhibit future protests.\textsuperscript{67}

Social media can also be misleading and difficult to interpret, leading law enforcement officials to spread misinformation and divert security resources where no genuine threat exists.\textsuperscript{68} Across the country, law enforcement officials were besieged with intelligence reports about purported threats from Black Lives Matter and anti-fascist activists, which were often pulled off social media sites that broadcast intentional disinformation planted by white supremacists.\textsuperscript{69} These reports misdirected resources and amplified unnecessary fear during law enforcement emergencies.\textsuperscript{70}

### A Failed Methodology

The FBI’s failure to identify and prepare for the January 6 attack on the U.S. Capitol demonstrates many of the problems associated with authorizing investigations and intelligence collection unmoored from evidentiary criminal predicates.

The FBI had access to plenty of objective evidence — including social media posts with specific threats brought to the bureau’s attention by various sources, reporting in major newspapers, and dozens of previous acts of violence over several years — to establish more than a sufficient basis to conduct investigations of many individuals and groups involved in the Capitol attack. Members of the Proud Boys, whose leaders were later charged with planning the January 6 assault, had engaged in violence that resulted in several arrests during two Washington, DC, rallies in the previous two months, and at many other events across the country over the past four years.\textsuperscript{71} But bureau leaders chose not to prioritize investi-
gations into this criminal activity, leaving them ill-prepared to understand the nature of the threat to the Capitol even after it was detailed in FBI intelligence warnings.\textsuperscript{72} The problem was not a lack of authority, but the choice to prioritize the broad collection of “intelligence” unconnected to criminal activity over investigations into actual acts of far-right violence.

A Senate report investigating the January 6 attack noted that “neither the Department of Homeland Security (‘DHS’) nor the Federal Bureau of Investigation (‘FBI’) issued formal intelligence bulletins about the potential for violence at the Capitol on January 6,” and that the FBI did not “deem[] online posts calling for violence at the Capitol as credible.”\textsuperscript{73} Yet subsequent reporting has found thousands of publicly reported statements and online posts detailing plans to attack the Capitol leading up to January 6, including by individuals and groups like the Proud Boys with a history of committing violence at rallies supporting Donald Trump.\textsuperscript{74} Public posts included open discussion of violence against members of Congress, specific travel plans for the event, and instructions regarding how to leverage a mob to force police officers out of the way.\textsuperscript{75} FBI agents did not need to scour the dark corners of the web with social media monitoring tools to find these threats; a \textit{Washington Post} headline on January 5 read, “Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday’s Rally Against the 2020 Election.”\textsuperscript{76}

In addition to this public reporting, elected officials and concerned citizens made independent warnings directly to the FBI. The owner of a website devoted to the architectural infrastructure under Washington, DC, noticed a significant uptick in downloads of maps detailing tunnels under the Capitol, which he traced to suspected militia groups. He temporarily shut down his website and reported the information to the FBI. Lawyers for Parler, a social media platform frequently used by far-right militants, claimed to have reported more than 50 specific threats of violence to the FBI in advance of the January 6 attacks.\textsuperscript{77} On December 20, the FBI received a tip from a caller who reported that “Trump supporters were discussing online how to sneak guns into Washington to ‘overrun’ police and arrest members of Congress in January,” according to the \textit{Washington Post}.\textsuperscript{78} News media reports indicated that several members of the Proud Boys previously served as bureau informants, reporting on their anti-fascist opponents even as they perpetrated violence at rallies across the country.\textsuperscript{79} Two days before the attack, Senator Mark Warner, chairman of the Senate Intelligence Committee, reached out directly to the FBI deputy director to make sure that the bureau was seeing the threats. He was told that the FBI was prepared.\textsuperscript{80}

In each of these cases, the FBI had received information that was reasonably indicative of criminal activity, because either a crime had already occurred, credible warnings had been received, or specific threats of violence had been widely disseminated in public forums. But FBI managers did not take action, perhaps because they were overwhelmed by the vast number of potential threats they received, or because they gave too much credence to misinformation, or because they were simply uninterested in pursuing logical leads due to individual or institutional biases.

A week after the Capitol attack, the \textit{Washington Post} reported that “dozens” of people on the terrorist watch list — mostly violent white supremacists — had been in Washington on January 6 to attend the Trump rally.\textsuperscript{81} The terrorism watch list is notoriously bloated and error-prone; it contains more than L.9 million records entered by security officials without due process or transparency.\textsuperscript{82} But given the watch list nomination criteria, it is at least possible that some of these “dozens” of individuals were subjects of FBI terrorism investigations at the time of the assault on the Capitol.\textsuperscript{83} Some analysts have speculated that the Trump administration’s focus on anti-fascists as the primary domestic terrorist threat distracted the FBI from investigations of far-right violence, despite the fact that white supremacists and far-right militants commit more deadly crimes.\textsuperscript{84} This may be true; the lack of criminal predicates allows agents to prioritize terrorism investigations based on biased assumptions about who might commit violence, while all but ignoring evidence of actual crimes.

Moreover, law enforcement officials would naturally view demonstrations against police violence and racism with some hostility. In a memo to all bureau offices, the FBI deputy director called the 2020 protests against police violence and racism after the police killing of George Floyd a “national crisis” that he likened to the 9/11 terrorist attacks.\textsuperscript{85} Meanwhile, the FBI ignored increasing national violence committed by Proud Boys until after the January 6 attack on the Capitol. A May 2021 report required by the National Defense Authorization Act of 2020 confirmed that the FBI does not track the annual incidents of lethal and nonlethal violence committed by groups it categorizes as “domestic violent extremists.”\textsuperscript{86} If the FBI had been tracking the crimes committed by these disparate groups and opening investigations using those crimes as predicates, white supremacist and far-right violence would have been harder to ignore.

The FBI’s failure to properly investigate credible evidence of actual violence committed by far-right militants who later attacked the U.S. Capitol exemplifies why it is urgently necessary to narrow FBI authorities. Requiring evidentiary criminal predicates helps to prevent unreasonable — and ineffective — scrutiny based on racial profiling or other biases, and instead focuses FBI resources on investigations in which evidence reasonably indicates that criminal activity is taking place, such as the violence and threats of violence by far-right militants that preceded the events of January 6, 2021.
Recommendations

This section outlines critical reforms that will allow the FBI to more effectively identify serious threats of violence while eliminating the systemic abuses of civil rights and liberties seen in recent decades. The attorney general can and should implement these reforms forthwith, and Congress should codify them to prevent future attorneys general from loosening them once again.

Eliminate the assessment authority granted in the 2008 Mukasey Guidelines.

Because assessments often target persons and groups not suspected of wrongdoing, their intrusive investigative methods — namely, collecting personal information that can be retained indefinitely in FBI intelligence databases — are per se abusive. The low threshold for initiation and unlimited supervisory reauthorizations of assessments allows these investigations to persist far beyond what is necessary to determine whether information exists to substantiate an allegation. Investigations collecting tens of thousands of innocent individuals’ personal information do not assist in the detection of crime or national security threats, they only flood intelligence databases with irrelevant information and waste investigative resources that should be focused on actual crimes.


The purpose of a preliminary investigation — to substantiate the facts required to justify opening an investigation — should be accomplished in a short time period, using the least intrusive tactics possible. Preliminary investigations should be capped at 90 days, as in previous versions of the guidelines, and they should be authorized only to determine whether evidence can be obtained that establishes articulable facts providing a reasonable indication that criminal activity is occurring or may occur.

The FBI should revert to its previous terminology, “preliminary inquiry,” to differentiate from full investigations, which unleash the totality of investigative tactics. The tactics allowed under the purview of a preliminary inquiry should be limited to checking law enforcement databases and public information (including public social media posts where relevant) and interviewing complainants, victims, or witnesses if necessary. In extraordinary circumstances in which evidentiary requests are outstanding, the special agent in charge and the U.S. attorney should be allowed to authorize a one-time, 90-day extension.

Furthermore, opening a full investigation should require articulable facts establishing a reasonable indication that criminal activity is occurring or will occur. Full investigations should be based on reasonable criminal predicates and subjected to regular inspector general audits to ensure compliance with all laws, guidelines, and regulations.

Limit social media monitoring authorities.

The FBI should be prohibited from collecting public social media data based to a substantial degree on an individual’s or group’s exercise of First Amendment rights; their race, religion, ethnicity, or other category protected by law; or actual or perceived immigration status. Current regulations only prohibit investigations based solely on these factors.

Monitoring in advance of a planned public event — separate from social media analysis related to a criminal investigation — should be undertaken only to make determinations about the resources necessary to keep participants and the public safe, and only where there are articulable and credible facts describing the public safety concerns justifying the monitoring. When the event concludes, no information collected for public safety planning purposes should be collected unless it reasonably pertains to criminal conduct.

Social media data should not be collected for criminal investigations in the absence of specific and articulable facts showing reasonable grounds to believe that the data sought is relevant and material to an extant, ongoing criminal investigation.

Close loopholes that permit racial and ethnic profiling.

The DOJ Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity should be revised to:

- expressly ban racial and ethnic mapping, the use of census data to identify neighborhoods by race or ethnicity, and the tracking of racial and ethnic behaviors and facilities, all of which are authorized under the current guidance;
- remove existing loopholes that allow consideration of these characteristics in circumstances involving threats to national security, violations of immigration laws, or authorized intelligence activities; and
- extend the ban on the use of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to cover state and local law enforcement agencies that either receive federal funding or participate in federal task forces.

Finally, the Justice Department should publish a clear statement banning all consideration of protected factors absent a specific subject description.
More than 20 years have passed since 9/11, and U.S. national security policies are overdue for a reckoning. Streamlining the FBI’s powers should be a central part of this conversation. Some may argue that pursuing reform at the FBI in the wake of the assault on the Capitol is not possible or that it should not be a priority during the bureau’s crackdown on right-wing extremism. To the contrary, this is precisely the time to do so: the failure to prepare for an attack planned in public by far-right militant groups that had committed violence at numerous public rallies over the years demonstrates the urgent need for action to protect our democracy.

Unrest need not deter reform; instead, it only reinforces the need for ensuring that the FBI focuses its resources on genuine threats. The Church Committee successfully conducted its investigation amid rampant international terrorism. Reform was possible — and indeed essential — then, as it is now.87

Any expansion of FBI authorities would most likely be used against marginalized communities, as evidenced by the disproportionate targeting of Muslim and Arab American communities after the 9/11 attacks, along with the more recent targeting of peace activists, environmentalists, anti-fascists, and Black Lives Matter protesters, all while investigations of white supremacist violence have been deprioritized.88 It is time for the FBI to finally reverse its shift toward broad intelligence collection about innocent Americans and refocus on reasonable and evidence-based indications of violence and criminality.
Endnotes


3 Hearing on United States Capitol Attack, Day 2, Part 1, Hearing Before the Senate Rules Committee and Homeland Security Committee, 117th Cong. (2021) (Senator Kyrsten Sinema: “Was the FBI aware of these specific conversations on social media?” Jill Sanborn: “To my knowledge, no ma’am. . . . Under our authorities, being mindful of the First Amendment and our dual-headed mission to uphold the Constitution, we cannot collect First Amendment–protected activities without the next step which is the intent. So we’d have to have a predicated investigation that allowed us access to those commns and/or a lead or a tip or a report from a community citizen or a fellow law enforcement partner for us to gather that information.” Sinema: “So the FBI does not monitor publicly available social media conversations?” Sanborn: “Correct ma’am, it’s not within our authorities.”).


11 John Ashcroft, The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations §§ II.A.2.a, Department of Justice, 2002, 22, https://eric.orgprivacy/fbi/FBI-2002-Guidelines.pdf. The Ashcroft Guidelines also transformed “preliminary inquiries” — which allowed agents receiving “information or an allegation” suggesting the possibility of criminal activity 90 days to determine whether evidence sufficient to open a full investigation could be developed — into “preliminary investigations” that could be used to gather intelligence over 180 days, with two possible renewals, for an 18-month maximum. For a comparison of how consecutive versions of the attorney general’s guidelines have eroded oversight of the FBI and expanded its authority through the changes implemented by Attorney General Ashcroft, see DOJ Office of the Inspector General, FBI’s Compliance with AG’s Investigative Guidelines, 36–59.


16 DOJ Office of the Inspector General, A Review of the FBI’s
17 DOJ Office of the Inspector General, A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups, 187 (“We also found that FBI case agents sometimes did a poor job of documenting the predication for opening investigations. . . . As a result, in the absence of clear contemporaneous documentation, FBI agents and supervisors sometimes provided the OIG with speculative, after-the-fact rationalizations for their prior decisions to open investigations that we did not find persuasive.”).


20 DOJ Office of the Inspector General, FBI’s Compliance with AG’s Investigative Guidelines, 56.


25 DOJ, Guidance for Federal Law Enforcement Agencies, 1–2 (limiting application of guidance to “Federal law enforcement officers performing Federal law enforcement activities”); 2n2 (specifying that the guidance “does not apply to Federal non–law enforcement personnel, including U.S. military, intelligence, or diplomatic personnel, and their activities,” or “to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities”).

26 DIOG § 4.1.2 (“If a well-founded basis to conduct investigative activity exists, however, and that basis is not solely activity that is protected by the First Amendment or on the race, ethnicity, gender, national origin or religion, sexual orientation, or gender identity of the participants — FBI employees may assess or investigate these activities, subject to other limitations in the AGG-Dom and the DIOG.”). See also DIOG § 4.3.2.

27 DIOG § 4.3.3.2.2.


29 DOJ Office of the Inspector General, A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups, 186 (“The applicable standard in the Guidelines for predication was low, especially for preliminary inquiries, which required only the ‘possibility’ of a federal crime. In part as a result of this standard, we found in most cases that the FBI did not violate the Guidelines in opening these investigations.”).

30 This paper only addresses social media surveillance by the FBI; other uses of social media require context-specific analysis and are not addressed herein.

31 DIOG § 18.5.5.3 (“The doctrine of misplaced confidence provides that a person assumes the risk when dealing with a third party that the third party might be a government agent and might breach the person’s confidence.”).


43 FBI Uniform Crime Reporting Program, 2019 Crime in the United States, September 28, 2020, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019. The FBI modified the way it collects and presents this data in 2020 and it warns against year-to-year comparisons, but previous annual reports consistently indicate violent crime clearance rates of less than 50 percent of crimes reported to police. Research also indicates that less than half of violent crimes are reported to police. See, e.g., Gramlich, “Most Violent and Property Crimes in the U.S. Goes Unsolved.”


46 Barrett and Zapotosky, “FBI Report Warned of ‘War’ at Capitol.”


57 CIA, DOJ, and DHS Inspectors General, Unclassified Summary of Information Handling and Sharing, 9–10.

80 Allam et al., “Red Flags.”


83 Scahill and Devereaux, “Blacklisted.”


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ABOUT THE BRENNAN CENTER’S LIBERTY AND NATIONAL SECURITY PROGRAM

The Brennan Center’s Liberty and National Security Program works to advance effective national security policies that respect constitutional values and the rule of law, using research, innovative policy recommendations, litigation, and public advocacy. The program focuses on reining in excessive government secrecy, ensuring that counterterrorism authorities are narrowly targeted to the terrorist threat, and securing adequate oversight and accountability mechanisms.

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To the Members of the Privacy and Civil Liberties Oversight Board:

Thank you for the opportunity to participate in the PCLOB’s recent public forum on privacy and civil liberties issues concerning the United States government’s efforts to counter domestic terrorism. We appreciated the discussion of biases in the government’s enforcement of the terrorism regime and overreliance on ideology. Yet no discussion of the government’s approach to domestic violent extremism—and its impact on civil rights—is complete without considering the impact this framework has on Americans who may be regarded as having an ostensible foreign connection, based on their place of birth or that of their parents, for example, or even whether the faith they practice is considered “foreign.”

1. The PCLOB should reject the baseless disparate treatment imposed by the government’s current counterterrorism regime.

Counterterrorism agencies have typically relied on a framework that divides the world of ideological violence into two different categories: domestic terrorism and international terrorism. In both situations, U.S. laws generally define terrorism to mean activities that involve criminal violent acts committed with the apparent intent to intimidate or coerce a civilian population or the government. Departing from statute, agencies typically deploy the euphemism “violent extremist” to refer to people in the United States. The government further refers to persons it claims are involved with international terrorism due to an alleged foreign connection as “homegrown violent extremists,” while calling those perceived to be lacking such a connection “domestic violent extremists.”

The existing framework subjects Americans allegedly influenced by certain “foreign” ideologies to aggressive international terrorism investigations and prosecutions, using tools originally designed for use against hostile foreign agents, even if the actor operates solely in the United States. At the same time, the government’s approach ignores the transnational character of many forms of far-right violence, treating them as “domestic terrorism,” even when people perpetrating such violence appear to coordinate directly with foreign persons. Three cases, among many others, illustrate how this distinction is biased and politicized.

“International” Terrorism. Take, for instance, Harlem Suarez, a “homegrown violent extremist” convicted of attempting to use a weapon of mass destruction and providing material support to

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1 The U.S. Department of Justice uses two definitions in statute, one for international terrorism and the other for domestic terrorism. 18 U.S.C. § 2331(1) (international terrorism); (5) (domestic terrorism). Note that international terrorism includes “violent acts or acts dangerous to human life,” whereas domestic terrorism includes only “acts dangerous to human life.” The Department of Homeland Security relies on one definition for terrorism generally, which is tied to acts “dangerous to human life or potentially destructive of critical infrastructure or key resources.” 6 U.S.C. § 101(18). The DHS definition is further delineated in DHS policy. See, e.g. Office of Intelligence and Analysis (hereinafter I&A), Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines, DHS, January 19, 2017, https://www.dhs.gov/sites/default/files/publications/office-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf.

2 We will discuss this framework in greater detail in part 2 below.
ISIS. In 2015, Suarez, who was 23 years old at the time, knew little about ISIS until an FBI informant taught him the name of ISIS’s leader, introduced him to the group’s handbook, procured camera gear, and encouraged Suarez to participate in a recruitment video for ISIS. An FBI undercover agent then talked Suarez through a plan of attack, pointing him to a domestic target. By all accounts Suarez had struggled up to that point in his life, suffering “lifelong social and intellectual challenges” that may have made him especially susceptible to this direction and the flattery lavished upon him by his would-be coconspirators.

During the investigation, based on a review of court records, the FBI acquired technical and location information from Facebook, AT&T, and textPlus, a messaging service. The parties filed pre-trial motions related to the Classified Information Procedures Act (CIPA), including documents referring to classified national security information governed by the Foreign Intelligence Surveillance Act. These filings suggest the government relied on more aggressive terrorism investigative methods that are available when it asserts a foreign connection. We discuss these methods—and their inequitable use—in greater detail below.

In his search for ISIS members, Suarez found only the FBI, never making contact with anyone actually connected with ISIS. After months of being pursued doggedly, Suarez agreed to set off a bomb. The bomb turned out to be fake—given to him by another federal agent—but Suarez was nonetheless arrested exiting the vehicle where he picked up the package. At trial Suarez complained of being threatened by the demands of the various people working for the FBI.

Regardless, because of the availability of the homegrown violent extremism regime and international terrorism charges, Suarez was convicted and sentenced to life in prison.

“Domestic” Terrorism. In contrast, the government did not use its international terrorism tools against participants in a transnational white supremacist conspiracy, involving a Canadian and two Americans, and travel from Canada to Virginia to engage in violence to spark a “race war.”

The Base is a North American white supremacist organization. Patrik Mathews, a 29-year-old Canadian national, plotted with a fellow member of the Base “to use a pro-gun rights rally in Richmond, Virginia, to engage in mass murder and attacks on critical infrastructure.” He crossed


7 Aaronson, “The Unlikely Jihadi.”

8 Id.

the border into the United States and was subsequently arrested along with two Americans who helped conceal his presence in the country.

In contrast with its pursuit of Suarez, the government does not appear to have relied upon classified or national security information, as the court docket does not reveal any use of CIPA in its prosecution of Base members. The government instead relied on ordinary criminal investigative tools, including a Title III wiretap and search and tracking warrants.

Throughout this proceeding, prosecutors described the case as one involving domestic terrorism for the purpose of increasing the defendants’ sentences. Yet the defendants were ultimately convicted on federal weapons and related charges, not federal terrorism charges. And Mathews, who obtained and possessed illegal weapons and engaged in a conspiracy with fellow white supremacists—not undercover agents—was sentenced to nine years in prison as against Suarez’s life sentence. His two co-conspirators received sentences of nine and five years.

Non-Terrorism. When global politics come into play, U.S. counterterrorism policy can take an unexpected turn. Such is the case with the Azov Battalion, a Ukrainian paramilitary force currently fighting the Russian military. While allied in this conflict with U.S. government goals, the battalion is also a far-right, nationalist, and often white supremacist militia. In 2018 it carried out attacks against Roma and LGBTQ Ukrainians, constituting serious ideological violence. Its members are known to identify with Nazis and represent themselves as “national socialists.” At times, American lawmakers have lobbied the government to designate Azov as a foreign terrorist organization.

Azov makes up a significant part of the Ukrainian insurgency challenging the Russian military. Volunteers from around the world have signed up with Azov to support Ukraine. Even when Americans specifically seek to travel to Ukraine to join Azov, the U.S. government has not appeared to prohibit anyone from joining the fight alongside these Ukrainian white supremacists, though U.S. Customs and Border Protection officers have questioned Americans at ports of entry.

Government agencies have numerous reasons they may wish to speak to Americans transiting U.S. borders, but they appear not to have considered ideological actors traveling to join the Azov Battalion—currently seen as aligned with the West—as potential terrorists, let alone

11 DOJ, “Florida Man Convicted at Trial.”
homegrown violent extremists. The disparity between treatment of these Americans and Americans like Harlem Suarez is stark.

2. The divide between domestic and homegrown violent extremists is artificial and harms civil rights.

The government acknowledges the transnational nature of much “domestic” white supremacist violence, yet typically reserves the international terrorism label for American Muslims and Americans the government perceives as associating with Islamic terrorist groups. This is true even when those individuals are greatly attenuated from any behavior that transcends national borders, such as in the case of Harlem Suarez and many similarly situated investigative subjects.

Justifications for this divide carry forward the belief that so-called “domestic violent extremists” enjoy First Amendment rights that “homegrown violent extremists” do not. Government officials testify that domestic terrorism investigations and prosecutions are complicated by the fact that the First Amendment protects such actors’ ability to speak on and influence American political issues, and practice their chosen religion and beliefs freely. But these officials typically do not see these barriers when talking about American Muslims or individuals in the U.S. aligned with Muslim groups, even when their actions are limited to communicating with a federal

16 Then-Acting Director of the DOJ’s Counterterrorism Division Michael McGarrity stated the following in 2019 testimony to Congress: “In line with our mission to protect the American people and uphold the Constitution of the United States, no FBI investigation can be opened solely on the basis of First Amendment-protected activity. Thus, the FBI does not investigate mere association with groups or movements.” Confronting the Rise of Domestic Terrorism in the Homeland, Hearing Before the H. Comm. on Homeland Security, 116th Cong. (2019), https://www.congress.gov/event/116th-congress/house-event/LC64275/text?s=1&r=3. Similarly, Mary McCord, a former senior DOJ official, began 2020 testimony on the divide by stating: “There are marked differences in the tools available to investigate the financing of domestic and international terrorism. This is because the First Amendment protects the freedom of speech and peaceful assembly of individuals and organizations in the United States, while providing no such protections for foreign individuals and organizations. . . . Because of the rights protected by the First Amendment, there is no comparable designation scheme for domestic extremist organizations.” A Persistent and Evolving Threat: An Examination of the Financing of Domestic Terrorism and Extremism, Hearing Before the Subcomm. on National Security of the H. Comm. on Financial Services, 116th Cong. (2020) (testimony of Mary McCord, Legal Director, Institute for Constitutional Advocacy and Protection), 1, https://www.congress.gov/116/meeting/house/110369/witnesses/HHRG-116-BA10-Wstate-McCordM-20200115.pdf. The same concerns, apparently, do not extend to so-called homegrown violent extremists.
agent posing as a terrorist, consuming publicly available online media, sending money abroad, or offering non-violent training.

These justifications have, as a matter of policy, the effect of stigmatizing as foreign American Muslims and members of other communities perceived similarly by the government. Under the government’s logic, some Americans possess narrower rights to association, political belief, religious practice, and receipt of foreign speech than do others, based predominantly on their religion, nationality, and national origin.

American Muslims, bearing the burden of the “homegrown violent extremism” label, experience not only stigma but also very real, invasive investigative and prosecutorial techniques reserved for people with meaningful connections to a controlling foreign power: lower standards for electronic surveillance, more extensive records inquiries, the wider availability of material support charges, and aggressive sentencing enhancements during prosecution. The disparity in treatment has been well-catalogued and we will summarize only two key investigative aspects of the international terrorism regime.

**Electronic Surveillance Standards.** If a federal agent suspects an investigative subject of a crime related to domestic terrorism and seeks to conduct wiretap surveillance, the agent must go through

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19 Take the case of Nicholas Young, a Washington, D.C., police officer and American Muslim. The FBI engaged in a five-year sting operation and used several informants to befriend Young. After a two-year period, one informant pretended to join ISIS and Syria. The informant pleaded for money and Young sent him a $245 gift card. In response, the government charged Young with material support to ISIS and he was sentenced to 15 years in prison. German and Robinson, Wrong Priorities, 5.

20 The best-known case demonstrating the breadth of the material support statute is Holder v. Humanitarian Law Project, in which the Supreme Court held that an organization providing training on peaceful dispute resolution and political advocacy to foreign terrorists constituted material support to a foreign terrorist organization and was not protected by the First Amendment to the U.S. Constitution. Holder v. Humanitarian Law Project, 561 U.S. 1 (2009).

the ordinary process of convincing a judge there exists probable cause that a crime has been or will be committed.\(^22\) But if that same agent investigates someone—including an American—for international terrorism, then under the Foreign Intelligence Surveillance Act (FISA), the agent may seek approval from a secret court, showing only probable cause that the surveillance target is an “agent of a foreign power,” not that any crime has been or will be committed.\(^23\) And the standard for proving that an individual is an agent is quite broad, with the term understood to include those who knowingly engage in, aid, or abet international terrorism or preparatory activities “for or on behalf of” foreign powers,\(^24\) including persons who had no direct contact with a foreign terrorist organization. Indeed, FISA allows the government to label two people engaged in terrorism as a foreign power,\(^25\) meaning the requirement for participation is quite low.

Moreover, while judges may authorize ordinary wiretap surveillance for up to 30 days,\(^26\) FISA surveillance, once authorized, is good for 90 days against U.S. citizens and lawful permanent residents and 120 days against others.\(^27\) And while the government notifies targets following termination of conventional surveillance, it need not do so after FISA surveillance except where it seeks to use the evidence in a proceeding.\(^28\) Finally, FISA applications and ex parte proceedings are so secretive that defendants have no right to see the government’s application for a warrant and are thus greatly inhibited from challenging the surveillance.\(^29\)

Although FISA surveillance authorities would not apply to Americans supporting groups engaged only in domestic activities, the statutory scheme does reach Americans who themselves act only domestically with some tenuous connection to a foreign power. The electronic surveillance regime thus provides two sets of rules, one for Americans engaging in “domestic” political violence and a more aggressive one for Americans supposedly engaged internationally.

**Additional Investigative Methods.** The FISA electronic surveillance authority represents a significant disparity between domestic and homegrown violent extremism investigations, but other provisions have applied the same problematic construct. Section 215 of the PATRIOT Act—which was in effect for nearly twenty years before it lapsed in late 2020\(^30\)—permitted federal agents to access various tangible records to “protect against international terrorism” where the agent could show reasonable grounds to believe the records were relevant to an authorized investigation.\(^31\) These records included business records, phone records, and tax returns, the sorts of records that allow a


\(^{24}\) Id. § 1801(b)(2)(C), (E). See also Sinnar, “Separate and Unequal,” 1344 (discussing differences between FISA and conventional wiretap surveillance).


\(^{26}\) 18 U.S.C. § 2518(5).

\(^{27}\) 50 U.S.C. § 1805(d)(1).

\(^{28}\) Sinnar, “Separate and Unequal,” 1345 n.66 (citing In re Sealed Case) (discussing differences between the two regimes).

\(^{29}\) United States v. Daoud, 755 F.3d 479, 490 (7th Cir. 2014) (Rovner, J., concurring) (observing that FISA defendants “face an obvious and virtually insurmountable obstacle” to challenge a warrant because they cannot access the underlying affidavit, which they would need to show “deliberate or reckless material falsehoods” to overcome the warrant).


government agency to develop a deep understanding of a subject and its social network. Network analysis is no more or less useful in domestic terrorism investigations, yet these tools are not available to scrutinize those activities.

Section 215 requests required the government to apply to the FISA Court for approval, but other intrusive tools authorized for international investigations lack even this minimal oversight. National Security Letters, for instance, allow the FBI to acquire records from electronic communications providers and financial institutions based solely on a certification that the records support a national security investigation. Notably, those investigations include only international terrorism, and so would be permissible in inquiries into homegrown violent extremists but not domestic violent extremists.

3. Much of the legitimacy of “homegrown violent extremism” turns on the notion that Americans influenced from abroad should be treated as international actors. Yet the nature of today’s internet, which breaks down national barriers, renders this distinction meaningless.

Ideas, including ones that have been used to inspire or justify violence, flow quickly across internet fora and national boundaries. Although powerful political ideas have always transcended national lines—from the American and French revolutions to twentieth century authoritarian regimes across Europe—the case and speed of today’s communication is unparalleled. Anonymity and pseudonymity compound this effect: It is often impossible for a reader, lacking access to technical details, to understand where a speaker originates. And speakers can use this environment to create a persona that may appear to be from another country.

This online breakdown in national borders is true not only of Anwar Al-Awlaki’s video lectures or ISIS propaganda videos, materials the government considers drivers of international terrorism and homegrown violent extremism. It is also the case for white supremacist views, endemic not only to America but also Europe. Indeed, white supremacist speech originating in Europe, Russia, South Africa, Australia, or New Zealand is passed around just as freely, and events in these countries inspire acts in the United States. Yet, demonstrating its total commitment to this

32 One such example is the use of national flags on the Politically Incorrect channel on 4chan, the internet’s anonymous image board infamous for its use by violent white supremacist actors and reactionary trolls alike. Stephane J. Baele, Lewys Brace and Travis G. Coan, “Variations on a Theme? Comparing 4chan, 8kun, and Other chans’ Far-Right “/pol” Boards,” Perspectives on Terrorism 15 (2021): 65-80. https://www.jstor.org/stable/26984798?seq=1. The channel paints a mosaic of international participants by assigning users a flag corresponding with their country of origin, based upon their IP address. Knowledgeable users can manipulate their IP address, however, and thus their ostensible country of origin.


34 For example, violent white supremacists occasionally post their plots on 4chan and similar message boards such as 8chan, where the Christchurch, New Zealand, attacker Brenton Tarrant livestreamed his massacre.
absurd framing of the issue, the FBI has described the white supremacist attacks in Christchurch, New Zealand, as “domestic terrorism threats overseas.”³⁵

Given the lack of distinction based on national origin of speech and the broad accessibility of such information around the world, we cannot draw meaningful lines between domestic and international terrorism when it comes to the location from which the influence originates. Continuing to do so is untenable.

4. Notably, both the HVE and DVE frameworks define terrorism too broadly, departing from statute and capturing activity protected by the First Amendment.

Federal law defines domestic terrorism roughly as criminal acts dangerous to human life, occurring within the United States, that appear intended to target the public or influence government policy through intimidation or coercion.³⁶ But counterterrorism agencies depart from this definition, using the euphemisms “domestic” or “homegrown” violent extremism, as we have discussed. As the federal government itself recognizes, it does not define DVE consistently,³⁷ and this framework, as we pointed out in our prior comment, opens the door to targeting Americans based on their views, because it is explicitly oriented around ideology rather than violent action that satisfies the legal definition of terrorism.

Moreover, these agencies already have plenty to do, even without playing fast and loose with their authorities. With white supremacists engaging in significant violence and criminal activity, counterterrorism agencies need only “to start paying greater attention to the violent crimes these

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³⁶ 18 U.S.C. § 2331(5). The Department of Homeland Security relies on a definition of “terrorism” that has a similar threshold of harm, including also acts “potentially destructive of critical infrastructure or key resources.” 6 U.S.C. § 101(18).

The government does not need to fixate on religion, ethnicity, or ideology, or scour social media to find provocateurs, but should instead focus on the significant white supremacist criminal activity evading scrutiny today.

5. The PCLOB should issue two main recommendations.

It is long past time to eliminate the government’s reliance on “homegrown violent extremism,” a category of actor no more international than the many actors the government considers “domestic.” This false distinction ignores the reality of modern communication and influence, invites government agencies to target persons based on ideology, and disproportionately harms the civil rights of American Muslims.

Accordingly, as it reviews the government’s approach to these issues, the PCLOB should issue two main recommendations. First, the government should eliminate the DVE and HVE labels entirely, and investigate and prosecute Americans within the limits of existing terrorism or criminal laws, which do not reference particular ideologies.

Second, the government should reject distinctions—across its law enforcement, intelligence, and counterterrorism activities—between American actors based on the location of the persons or organizations who may have influenced their behavior. No person in the United States should be subjected to the enhanced investigative and surveillance techniques we describe above due to a supposed ideological link, sympathy, or viewpoint. Instead, the government should categorize subjects of terrorism investigations and prosecutions based on where their actions occur, consistent with the title 18 definitions.

6. Conclusion

We appreciate the opportunity to provide these additional comments as the PCLOB continues its efforts to protect the rights and liberties of Americans impacted by the government’s counterterrorism work. Please do not hesitate to contact us if we can provide any further information. We may be reached at pateli@brennan.law.nyu.edu (Faiza Patel), levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman), and reynoldss@brennan.law.nyu.edu (Spencer Reynolds).

Respectfully submitted,

Brennan Center for Justice

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 21-2798

XIAOXING XI, et al.,

Appellants,

v.

ANDREW HAUGEN, et al.,

Appellees.

On Appeal From The U.S. District Court for the Eastern District of Pennsylvania
The Honorable R. Barclay Surrick, United States District Judge


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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(b) and 28(a)(1) and Third Circuit Local Rule of Appellate Procedure 26.1, amici curiae Asian Americans Advancing Justice-AAJC and Asian Americans Advancing Justice-Asian Law Caucus state that neither amici, nor any others who have signed onto this brief, see Appendix A hereto, have publicly traded parent companies, subsidiaries, or affiliates, and that they do not issue shares to the public.

s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Dated: February 14, 2022
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IDENTITY AND INTEREST OF AMICI CURIAE

This brief is submitted by Asian-Americans Advancing Justice-AAJC (Advancing Justice-AAJC) and Asian-Americans Advancing Justice-Asian Law Caucus (Advancing Justice-ALC), members of a national nonprofit affiliation made up of five separate and independent organizations, including affiliates in Atlanta, Chicago, Los Angeles, and San Francisco, that routinely file briefs amici curiae on behalf of the communities they represent.¹

Advancing Justice-AAJC is a nonprofit, nonpartisan organization that seeks to promote a fair and equitable society for all by advocating for the civil and human rights of and empowering Asian-American, Native-Hawaiian, and Pacific-Islander communities. Since 1991, Advancing Justice-AAJC has fulfilled its mission through public-policy advocacy as well as public education and litigation. Advancing Justice-AAJC is one of the nation’s leading experts on issues of importance to the Asian-American community, including immigrants’ rights.

Advancing Justice-ALC is the oldest legal and civil rights organization in the country serving Asian and Pacific-Islander communities. In particular, its National Security and Civil Rights program defends those unjustly targeted by the government’s national security policies.

¹ Pursuant to Fed. R. App. P. 29, all parties consent to the filing of this brief. No party’s counsel authored any part of it and no person other than amici made a monetary contribution to its preparation or submission.
Advancing Justice-AAJC and Advancing Justice-ALC are here joined by 70 education groups, scientific and academic associations, civil rights groups, and community organizations (collectively, “Amici”), listed and described in full in Appendix A. Amici are all non-profit organizations and individuals with long-standing histories of advocating for interests directly relevant to this case, all concerned that the Government is targeting Asian-American scientists and researchers based on their ancestry rather than on suspected criminal activity. Amici believe that racially motivated investigations and prosecutions of Asian-American scientists and researchers will not only continue to devastate these professionals’ reputations, careers, and livelihoods, but will foment prejudice against Asian-Americans more generally.
ARGUMENT

I. Introduction

Appellant Dr. Xiaoxing Xi’s case is an example, among many, of the Government’s longstanding discriminatory targeting and surveillance of Asian-American and immigrant scientists and researchers, and particularly those of Chinese descent, based upon their ethnicity rather than suspected criminal activity, and of the terrible harm that results to them, their families, and the broader Asian-American community. Amici submit this brief to provide the context for Dr. Xi’s case, including the deeply problematic surveillance operations, investigations, and prosecutions that caused it. While the Court must decide this appeal based on the facts alleged in the Complaint, amici urge the Court, in doing so, to consider the widespread prevalence of racial discrimination and profiling against Asian-Americans, and particularly of Chinese-American scientists and academics during the last decade, when Professor Xi was subjected to the racially motivated actions alleged in the Complaint. That context reveals racial bias against persons of Chinese descent which has permeated federal agencies and influenced FBI training, investigations, and prosecutions, traumatizing families and undermining the credibility of our institutions. This discrimination has since intensified under DOJ’s “China Initiative,” which has spurred federal authorities to profile Chinese-American and immigrant scientists and researchers. These policies have resulted in
a chilling-effect on Asian-Americans and immigrants, deterring them from naturalizing as U.S. citizens, applying for federal grants, pursuing careers in STEM or within the federal government, and studying in the U.S. Many across the country fear facing heightened scrutiny due to their ethnicity and being subjected to the same discriminatory targeting as Dr. Xi. This context requires consideration in the determination of this appeal as it will be reflected in the Court’s decision.

II. The Government Often Targets Chinese-American Scientists and Researchers Based on Ethnicity.


There can be no question: in recent years, the Government has increased efforts to target Chinese-American scientists and researchers based on their ethnicity under both the Economic Espionage Act of 1996 (EEA),2 and especially the China Initiative. For more than a decade, the Government has disproportionately prosecuted people of Chinese and Asian descent under the EEA, suggesting, at the very least, the appearance of racial targeting. Although the EEA was intended to address economic espionage from all foreign governments following the Cold War,

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it is increasingly used to prosecute people of Chinese or Asian descent.\textsuperscript{3} Between 1996 and 2008, 16\% of defendants charged under the EEA’s provisions were of Chinese descent. Since 2009, that percentage has more than tripled.\textsuperscript{4} Moreover, significant racial disparities exist in sentencing. Of those convicted, individuals with Asian names received sentences twice as long than those with Western names, indicating that Asian-Americans face a justice system that is biased against them. Moreover, one in five people of Asian or Chinese descent charged are never convicted of any crime,\textsuperscript{5} lending credence to concerns of “pretexual prosecutions” based on weak evidence and stereotypes that Asians are spies.\textsuperscript{6}

1. The China Initiative

The Government’s intense scrutiny and targeting of Chinese-American scientists and researchers has worsened over the past several years under the “China Initiative,” launched in 2018. Although DOJ portrays the program as combatting economic espionage and theft of trade secrets,\textsuperscript{7} there can be no question but that under the Initiative, the FBI and other government agencies have targeted people

\textsuperscript{3} Id.
\textsuperscript{4} Id.
\textsuperscript{5} Id.
based on their Chinese ancestry. The result has been a reliance on racial profiling to improperly create suspicion against a group of people entirely as a result of their ancestry.

Under the Initiative, DOJ pushed “prosecutors across the country to focus on investigations of Chinese state-backed efforts to steal intellectual property.” The focus was on increasing the number rather than the merit of prosecutions, which have often lacked evidence of crime. Thus, in 2020, federal prosecutors confirmed that prosecutions would spike because prosecutors would be “creative,” not because there was credible evidence of economic espionage. This “creativity” has resulted in vast resources being funneled into investigating Chinese scientists and bringing weak, often unsuccessful, prosecutions based upon confusing and ever-changing policies regarding what information may be shared and must be disclosed by scholars. As a result, Chinese-American scientists and researchers—already victimized by inflammatory rhetoric from the highest levels of government—are caught in the same pattern of suspicion and targeted, racially motivated prosecutions.

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as have harmed Chinese and other Asian communities in the U.S. for more than 150 years.

2. Unsuccessful Prosecutions Are Too Often Products of Biased Decisionmakers and Training.

The increase in misguided prosecutions is a form of scapegoating, made possible by biased Government policy. In February 2020, FBI Director Christopher Wray called for a “whole-of-society” response to Chinese economic espionage and the threat of so-called “non-traditional collectors” (a euphemism for “spies”) to encompass individuals of Chinese descent, but more specifically, graduate students and researchers.\textsuperscript{10} In a Senate Intelligence Committee hearing on world threats, Chinese students and academics, in particular, were painted as national security threats regardless of any wrongdoing.\textsuperscript{11} This rhetoric, and the fixation on “non-

\textsuperscript{10} FBI Director Christopher Wray, \textit{Responding Effectively to the Chinese Economic Espionage Threat}, Remarks at DOJ China Initiative Conference (Feb. 6, 2020), https://www.fbi.gov/news/speeches/responding-effectively-to-the-chinese-economic-espionage-threat. Thus, Director Wray testified that “I would just say that the use of nontraditional collectors, especially in the academic setting, whether it’s professors, scientists, students, we see in almost every field office that the FBI has around the country. . . . So one of the things we’re trying to do is view the China threat as not just a whole-of-government threat but a whole-of-society threat on their end.”

traditional collectors” has the effect of focusing on people of Chinese descent, rather than on those committing State-sponsored acts of espionage.

Likewise, FBI training materials have included xenophobic language such as a presentation on “the Chinese” that warned: “Never attempt to shake hands with an Asian.” This training fosters the idea of Chinese- and Asian-Americans as “the threatening ‘other’” rather than as “fellow American[s],” and furthers the narrative of Asian-Americans as the “perpetual foreigner.”

Nor is the FBI alone. According to a recent study of over a dozen former federal investigators, “distrust of people of Chinese heritage [too often] drives decision-making at the FBI and other U.S. security agencies.” Specifically, Chinese scientists who work as federal employees and contractors appear to receive disproportionate scrutiny, and innocent familial or financial ties to China result in more denials of security clearances than is the case with respect to ties to any other country.

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14 *Id.* at 190–92.
15 *Id.*
16 *Id.*
B. The Government Has Increased Pressure on Academic Institutions and Federal Agencies to Target Chinese-American Academics.

The government’s racial bias has increased pressure on universities and academic institutions to report what were formerly routine administrative issues as federal criminal conduct. Specifically, FBI and other federal agencies have increasingly focused on universities, targeting Chinese-American scientists and researchers by conducting threat awareness sessions and circulating information on the threat of China and so-called “non-traditional collectors.” As a result, they have promoted racial bias in academic institutions, discouraging collaboration and encouraging universities to view researchers and scientists of Chinese descent differently than their colleagues. Thus, “it may be that DOJ suspicions that Chinese- and other Asian-Americans are more likely to commit industrial espionage . . . effectively creates a new crime, ‘researching while Asian.’”

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18 Open Hearing on Worldwide Threats: Hearing Before the S. Select Comm. on Intelligence, 115th Cong. 50 (2018) (statement of FBI Director Christopher Wray).
19 Kim, supra note 6, at 794.
By August 2021, DOJ confirmed 75 China Initiative cases, involving 143 individuals, 125 of whom were of Chinese descent.\textsuperscript{20} Cases related to actual EEA violations have decreased over time, while “research integrity cases”—those dealing with “students and academics who have been accused of failing to fully disclose relationships with Chinese entities, primarily on grant or visa forms,” as opposed to economic espionage or trade secret theft\textsuperscript{21}—have increased.\textsuperscript{22} Such cases often result from the failure to disclose minor outside contacts, demonstrating a marked shift in government scrutiny of academics.\textsuperscript{23} These continued investigations will disproportionately impact Asian- and Chinese-Americans, deterring them from pursuing careers in academia or STEM, applying for federal grants, or leading research projects out of fear of being targeted for criminal investigation due to their ethnicity.\textsuperscript{24}


\textsuperscript{21} Eileen Guo, \textit{In a further blow to the China Initiative, prosecutors move to dismiss a high-profile case}, MIT TECH. REV. (Jan. 15, 2022), https://www.technologyreview.com/2022/01/15/1043319/china-initiative-gan-cheng-mit/.

\textsuperscript{22} Guo, \textit{supra} note 20.

\textsuperscript{23} \textit{Id.}

C. Dr. Xi’s Case Repeats a Cycle of Anti-Asian Bias That Has Led To Weak and Unjust Prosecutions.

Dr. Xi, and scientists like him, are caught in the middle of the Government’s increasingly politicized rhetoric against China and the corresponding racial targeting of Chinese scholars. In considering this appeal, the Court should not ignore that this rhetoric and scrutiny are continuations of discriminatory policies against Asian-Americans that have characterized this nation’s history.

1. The United States’ Anti-Asian History

Today’s anti-Asian policies trace their roots back to the mid-19th century, when Chinese workers first migrated to the U.S. to work in gold mines, agricultural and garment industries, and as laborers building railroads on America’s west coast. The end of the 19th century marked a rise in anti-Chinese sentiment as Chinese immigrants were scapegoated for others’ lack of economic opportunity. This antipathy resulted in the 1875 Page Act, which barred immigrants deemed “undesirable” but primarily targeted Asian immigrants, particularly those from China. The Senate then passed the Chinese Exclusion Act—the first U.S.

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27 18 Stat. 477, 43 Cong. Ch. 141.
immigration law to bar an entire ethnic group—which effectively prohibited Chinese immigration to the United States for nearly 60 years and citizenship for 70 years.\textsuperscript{28}

The courts proved to be no refuge from this discrimination. Thus, the Supreme Court repeatedly upheld challenges to discriminatory laws against Chinese immigrants. \textit{See, e.g., Chae Chan Ping v. United States}, 130 U.S. 581 (1889) (holding that Congress had the authority to bar Chinese laborers from reentry into the U.S. even with certificates of residence). Most notably in 1942, President Roosevelt issued Executive Order 9066, authorizing the removal of people of Japanese ancestry from their homes and communities in the purported interest of “national security.” As a result, approximately 120,000 U.S. residents of Japanese ancestry, half of whom were children, were incarcerated in federal detention, in one of our nation’s most shameful episodes. Congress eventually acknowledged as much, stating that “these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission [on Wartime Relocation and Internment of Civilians], and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”\textsuperscript{29} And yet, the Supreme Court upheld Executive Order 9066 in a now infamous series of


\textsuperscript{29} 50 U.S.C. § 4202(a).

As Fred Korematsu said, decades later:

No one should ever be locked away simply because they share the same race, ethnicity, or religion as a spy or terrorist. If that principle was not learned from the internment of Japanese Americans, then these are very dangerous times for our democracy.\(^\text{30}\)

Yet, history repeats itself as persons of Asian descent continue to face cyclical scrutiny and scapegoating as national security threats; the China Initiative is just the latest iteration.\(^\text{31}\)


\(^{31}\) This Court, quoting the dissents in Korematsu in Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015), concluded that “to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights.” Id. at 309 (quoting Korematsu, 323 U.S. at 240 (Murphy, J., dissenting)). The Court wrote, in a passage as applicable here as there, “[w]e are left to wonder why we cannot see with foresight what we see so clearly with hindsight—that ‘[l]oyalty is a matter of the heart and mind[,] not race, creed or color.’” Id. (citing Ex parte Mitsuye Endo, 323 U.S. 283, 302 (1944)).

The legacy of over a century of exclusionary laws against Asian-Americans and the forcible detention of Japanese-Americans still casts a long shadow on America. One needs look no further than the countless prosecutions of innocent scientists, like Dr. Xi. For example, in December 1999, the Government prosecuted Wen Ho Lee, a Taiwanese-American scientist, accusing him of passing secrets to the Chinese government about a U.S. nuclear program despite lacking any evidence of espionage. See United States v. Wen Ho Lee, 79 F. Supp. 2d 1280 (D.N.M. 1999). Dr. Lee spent nine months in solitary confinement. In ultimately dismissing his case, the U.S. District Court apologized to him and criticized the Government’s conduct:

I believe you were terribly wronged by being held in custody pretrial . . . under demeaning, unnecessarily punitive conditions. I am truly sorry that I was led by our executive branch of government to order your detention last December. Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the executive branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its

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33 Id.
United States attorney for the district of New Mexico, who held the office at that time.\textsuperscript{34}

Likewise, in 2014, Sherry Chen, a Chinese-American hydrologist employed at the National Weather Service, was investigated by the Investigations and Threat Management Service (ITMS) of the Department of Commerce (DOC) and accused of espionage and providing false information.\textsuperscript{35} Ms. Chen had sent publicly available information to a former classmate in China and then connected him to a colleague for further information. The colleague reported her to security staff at DOC. During the course of the investigation, investigators asked Ms. Chen when she last saw a former classmate. She told them, “I think 2011” though they had actually met in 2012. Based upon these facts, prosecutors charged her with making a false statement.\textsuperscript{36} Though they later dropped the charges, they still sought to fire Ms. Chen. The federal Merit Systems Protection Board ruled in favor of her reinstatement and suggested that officials had concealed exculpatory evidence, but the Government has appealed this ruling and proceeded with her dismissal.\textsuperscript{37} Eight


\textsuperscript{35} Nicole Perlroth, Accused of Spying for China, Until She Wasn’t, N.Y. TIMES (May 9, 2015), https://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html.

\textsuperscript{36} Id.

\textsuperscript{37} Perlroth, supra note 40; Nicole Perlroth, Cleared of Spying for China, She Still Doesn’t Have Her Job Back, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/technology/sherry-chen-national-weather-
years later, Ms. Chen is still fighting for the right to return to work. Meanwhile, ITMS was dissolved in September 2021 after the Office of General Counsel found that it had engaged in investigations without proper authorization and with little oversight, and after a report by a Senate committee found that Chinese and Southeast Asian employees were disproportionately targeted by ITMS’s unauthorized investigations.

Despite this history, including the troubling prosecutions of scientists like Dr. Xi and Ms. Chen, the Government has continued to bring unsupported charges against Chinese scientists. For example, in July 2021, DOJ dropped five visa fraud cases against Chinese researchers originally accused of hiding ties to China’s military. While the decision to drop charges was appropriate, investigations and


prosecutions like these have had devastating effects, both on the individuals, whose lives and careers have been left in tatters, and on the Asian-American community at large, which suffers the constant fear of racial profiling. For example, neurologist Song Chen was one of the Chinese researchers and scientists who was arrested and charged, but against whom the case was dismissed after “a report by FBI analysts that questioned if the visa application question on ‘military service’ was clear enough.” Dr. Song had come to the U.S. to “help patients suffering from brain diseases,” but instead found herself enduring family separation including from her eight year old daughter. The resulting harm cannot be quantified. Nor is this an aberration: despite the growing number of unsuccessful cases criminalizing these types of administrative errors, DOJ continues to bring such cases.

Similarly, Cleveland Clinic doctor Qing Wang was arrested in March 2020 and accused of wire fraud and making false claims. In July 2021, federal


41 Id.


44 Allen-Ebrahimian, supra note 40.

prosecutors dropped all charges.\textsuperscript{46} However, his arrest not only terrified his wife and two daughters, but the community at large.\textsuperscript{47} “I didn’t do anything illegal,” said Wang, “[b]ut the China Initiative is still going on . . . [i]t creates such a fear in the community.”\textsuperscript{48} And, in September 2021, University of Tennessee at Knoxville Professor Anming Hu, the first academic to go to trial under the China Initiative, was acquitted of all charges\textsuperscript{49} after prosecutors, following nearly two years of surveillance, failed to find any evidence of spying or stealing technology or information for China.\textsuperscript{50} Instead, the charges were based on an alleged failure to disclose part-time summer work at the Beijing University of Technology.\textsuperscript{51} Although the evidence presented was found clearly insufficient to allow a reasonable jury to convict Dr. Hu of the crimes alleged,\textsuperscript{52} he described the period during which


\textsuperscript{47} Id.

\textsuperscript{48} Id.


\textsuperscript{51} \textit{Hu}, slip op. at 2.

\textsuperscript{52} \textit{Hu}, slip op. at 42.
he faced these charges as “the darkest time of [his] life”; the harm done was not undone by ending the criminal prosecution.

Then, just last month, the Government dropped all charges against Massachusetts Institute of Technology (MIT) engineering professor Gang Chen. Dr. Chen was first indicted for allegedly failing to disclose ties to China. The case was dismissed because, in fact, Dr. Chen was not required to disclose the affiliations. But like other Asian-Americans subject to the China Initiative, Dr. Chen had his “loyalty” questioned during a press conference and was scapegoated as a national security threat, causing him terrible trauma. According to Dr. Chen, “[f]or 371 days, my family and I went through a living hell.”

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55 *Id.*


57 Gang Chen, *I was arrested under the DOJ’s China Initiative. Congress must investigate the program*, BOSTON GLOBE (Jan. 21, 2022), https://www.bostonglobe.com/2022/01/21/opinion/i-was-arrested-under-dojs-china-initiative-congress-must-investigate-program/.
This brief recounts just a few examples, but the general point applicable to this case remains: racial bias permeates the Government’s approach to these cases and has led to a series of flawed and failed prosecutions against Chinese-American scientists and researchers. When DOJ charges a Chinese scientist, it often does so with great fanfare, issuing press releases and giving media interviews. These stories further pernicious narratives of Asian-Americans as disloyal and perpetual foreigners, narratives that persist even when defendants are ultimately exonerated, leaving profound effects not only on the targeted individuals and their families but also on the Asian-American community as a whole.58

III. The Government’s Racially and Politically Motivated Prosecutions of Chinese Scientists Cause Immeasurable Harm.

In addition to the community-wide harm the China Initiative causes to Asian-American communities in the U.S., no matter how deep their roots, the program also results in more specific harm, deterring Chinese-Americans and immigrants from naturalizing, applying for federal grants, pursuing careers in STEM in the federal


59 Lee, supra note 24; Dolgin, supra note 24.
government, and working and studying in the U.S., as scientists of Chinese origin face the fear of an increasingly hostile work environments.  

This fear is supported by data: A 2021 national survey by the University of Arizona and Committee of 100 revealed that 42.2% of Chinese scientists felt racially profiled by the U.S. Government. This stands in stark contrast to just 8.6% of non-Chinese scientists who felt profiled. The survey showed that an alarming 38.4% of Chinese scientists experienced difficulties obtaining research funding in the U.S. or faced professional challenges such as losing a promotion due to their race, nationality, or country of origin. And over half of Chinese scientists “report[ed] feeling considerable fear and/or anxiety that they are surveilled by the U.S. government.”

Across the country, the Government’s broad suspicion and aggressive tactics have intimidated academics and scientists of Chinese descent. For example, Jianzhu Chen, a U.S. citizen of Chinese descent and an immunologist who has worked at the MIT for a quarter century, was questioned by a U.S. customs agent upon returning to the U.S. about whether he worked for a foreign government. “It was quite

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60 Dolgin, supra note 24.
61 Lee, supra note 24.
62 Id.
63 Id.
64 Id.
65 Dolgin, supra note 24.
intrusive . . . [a]nyone of Chinese descent becomes a suspect.”

Another MIT engineering post-doc who was questioned about his involvement in a Chinese Talent Plan said that “[he] felt [he] was unfairly targeted just because [he’s] Chinese.” The arrest of Dr. Gang Chen further increased the environment of fear for many academics.

Moreover, investigations have interfered with funding opportunities for scientists of Chinese descent or projects involving scientists of Chinese descent. For example, Dr. Xi lost federal grants as a result of his investigations. Before his wrongful arrest and prosecution, he had nine federal grants; by 2019, he only had two. Although he still applies for funding, Dr. Xi is left to apply for joint projects with other scientists rather than as an individual. Indeed, this is the reality for many Chinese scientists in the current climate of intense scrutiny, in which it is assumed that scientists and researchers of Chinese descent are spies. Even collaboration, which was previously encouraged, is now something Chinese scientists fear, as Dr. Xi himself has said.

66 Id.
67 Id.
69 Id.
70 Id.
71 Id.
Concerns about the impact of these investigations, especially for members of the academy, are prevalent across universities. MIT, Yale, Stanford and at least eight other institutions have issued statements describing their concerns about the targeting of Chinese scientists and academics.\textsuperscript{72} On September 8, 2021, 177 Stanford faculty members wrote an open letter to Attorney General Garland stating their objections to the China Initiative,\textsuperscript{73} that letter has received the endorsement of 214 University of California Berkeley faculty members,\textsuperscript{74} 167 Temple University faculty members,\textsuperscript{75} and 198 Princeton University faculty members.\textsuperscript{76} Another letter was sent to President Biden from 13 different university associations representing 2,000 Asian-American and immigrant faculty and staff members across the country raising similar concerns.\textsuperscript{77}

\textsuperscript{72} Dolgin, \textit{supra} note 24.
\textsuperscript{74} Letter from University of California, Berkeley Faculty Members to Attorney General Garland, \textit{U.C. Berkeley} (Sept. 28, 2021), https://bit.ly/UCBerkeley2AG.
Caught in the crosshairs of unending investigations and prosecutions, many scientists, professionals, and academics of Chinese descent fear that their normal academic work will be criminalized under the Government’s broad net of suspicion. After the Government dismissed his case, Dr. Gang Chen described the invidious racism within our federal structures that perpetuates these harmful prosecutions against Asian-Americans:

There is no winner in what seems to me a politically and racially motivated prosecution: My reputation is tarnished, my family suffered, my institute lost the service of a professor and bore the financial burden of my legal defense, US taxpayers’ money was wasted, the ability of the United States to attract talents from around the world has plummeted, and the scientific community is terrified. . . . While I am relieved that my case has been dropped “in the interests of justice,” I respectfully request a thorough review of this matter by Congress and the US Department of Justice to hold individuals accountable for this glaring misconduct. . . . As a nation, we can be more true to our ideals—and a better world leader—by acknowledging our wrongdoings and learning from our mistakes rather than blindly pressing forward.\textsuperscript{78}

With this case, Dr. Xi shares this call for accountability for the many other Asian-American and immigrant scientists and researchers, particularly of Chinese descent, who have become collateral damage in an overzealous, misguided, and racially-based campaign which has instilled fear in Asian-American and immigrant communities for over a decade, and has continued a shameful course of

\textsuperscript{78} Chen, supra note 57.
discrimination which one would have hoped would not have persisted for almost two centuries but sadly, has.

**CONCLUSION**

For the foregoing reasons, and those presented by Appellants, the judgment of the District Court should be reversed.
Respectfully submitted,

Dated: February 14, 2022

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CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

The attached brief complies with the 6,500-word limit prescribed in Federal Rule of Appellate Procedure 32(a)(7) in that it contains 6,492 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(A)(7)(B)(iii). The attached brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, Times New Roman, using Microsoft Word with 14-point font. The text of the PDF copy of the attached brief is identical to the text in the paper copies, and a virus detection program, Sophos Endpoint Advanced, version 10.8.11.4, has been run on the file, and no virus was detected.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Dated: February 14, 2022

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg is a member in good standing of the Bar of United States Court of Appeals for the Third Circuit.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Dated: February 14, 2022
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 14, 2022, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court’s CM/ECF system. Per the Court’s guidance, seven copies of the Brief and Appendix will be delivered via FedEx.

I hereby certify that on February 14, 2022, I caused the foregoing Brief and Appendix to be served upon counsel of record through the Notice of Docketing Activity issued by this Court’s CM/ECF system.

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Dated: February 14, 2022
APPENDIX A

IDENTITIES AND INTERESTS OF AMICI CURIAE

Asian Americans Advancing Justice-AAJC and Asian Americans Advancing Justice-Asian Law Caucus are joined on this brief by the following 70 organizations (collectively, “Amici”):

- **18 Million Rising.** 18 Million Rising (18MR) connects the power of Asian Americans to digital-first organizing. We mobilize community power to fight injustice and create the future we all deserve. Since 2012, our online and offline advocacy and cultural campaigns have highlighted the struggles of Asian American communities while celebrating our resilience. Using digital-first organizing, 18MR responds to issues of the current political moment. We mobilize our people to speak up against injustice and take action. From policy change to shifting narratives, 18MR helps define the culture of Asian America today.

- **The American Association of University Professors (AAUP).** AAUP represents the interests of over 40,000 faculty, librarians, graduate students, and academic professionals and frequently submits amicus briefs in cases that raise issues important to higher education. *See, e.g., Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Kunda v. Muhlenberg Coll., 621 F.2d 532 (3d Cir. 1980).* AAUP defends academic freedom and the free exchange of ideas in higher education. AAUP has specifically addressed the threats to faculty and to academic freedom engendered by the unwarranted persecution of Chinese academics. *See National Security, the Assault on Science, and Academic Freedom, Academe Bulletin, (July-August 2018.)*

- **American Society for Biochemistry and Molecular Biology.** The American Society for Biochemistry and Molecular Biology is an international nonprofit scientific and educational organization that represents more than 12,000 students, researchers, educators and industry professionals. The ASBMB strongly advocates for strengthening the science, technology, engineering and mathematics (STEM) workforce, supporting sustainable funding for the American research enterprise, and ensuring diversity, equity and inclusion in STEM.

- **Asian American Pacific Islander (AAPI) Coalition of Wisconsin.** The Asian American Pacific Islander (AAPI) Coalition of Wisconsin unites AAPI leaders throughout the state, serving as a conduit for AAPI communities and local/municipal/state resources to come together to stand against racism, raise
the visibility of AAPIs, advocate for AAPI resources, and civically engage AAPIs throughout Wisconsin

- **AAPIs for Civic Empowerment Education Fund.** AAPIs for Civic Empowerment Education Fund (AAPI FORCE-EF) advances policies, campaigns, and issues that support working-class AAPIs through voter mobilization.

- **American Citizens for Justice/Asian American Center for Justice.** American Citizens for Justice/Asian American Center for Justice is a 501(c)(3) organization devoted to civil rights advocacy and education focused on the Asian American community. ACJ was founded in 1983 to seek justice in the Vincent Chin baseball bat beating death case and continues its civil rights work today.

- **APA Justice.** APA Justice Task Force is a non-partisan platform to build a sustainable ecosystem to address racial profiling issues and to facilitate, inform, and advocate on selected issues related to justice and fairness for the Asian American community.

- **APABA-PA.** The Asian Pacific American Bar Association of Pennsylvania (APABA-PA) is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys admitted or practicing in Pennsylvania, Northern Delaware, and Southern New Jersey. APABA-PA’s mission is to support the advancement of Asian Pacific American attorneys and to promote justice, equity, and legal access, especially for all Asian Pacific American communities.

- **APALA, AFL-CIO, Alameda County Chapter.** APALA, AFL-CIO, Alameda County Chapter, is a national API labor organization with chapters around the country. It is an advocacy and organizing group with multiple generations of workers and allies.

- **APAPA.** Asian Pacific Americans are one of the fastest-growing populations in the United States. But we are underrepresented when important decisions are made that affect everyone’s lives. APAPA has grown into a national organization, empowering our diverse communities, increasing voter engagement, and developing a new generation of API leaders in America. We collaborate with other diverse organizations, public officials, and community leaders to create awareness and support to fight hate crimes, address systemic racism, and provide opportunities for our collective voices to be heard. APAPA is a nonpartisan nonprofit with over 35 chapters across the country, and more chapters developing every year. Together, we are building a better world that is diverse, inclusive, and with representation from all voices and communities. APAPA spearheaded the Nationwide Unity Against Hate rally in 2021, backed by a coalition of over 180 diverse organizations, elected
officials, and community leaders. While this was a powerful show of solidarity, there is more work yet to come. We also believe in developing our next generation of leaders with over 250+ college interns a year through our national internship program.

- **Asian American Academy of Science and Engineering.** Asian American Academy of Science and Engineering is a non-profit organization whose mission is to advance leadership and excellence in science and technology of the United States, and to advocate for the voices and rights of Asian Americans and Pacific Islanders.

- **Asian American Federal Employees for Nondiscrimination (AAFEN).** Asian American Federal Employees for Nondiscrimination (AAFEN) promotes and protects the civil rights and civil liberties of current and former Asian American federal employees, contractors, grantees and armed services personnel with a focus on those who have experienced adverse employment action based on race, ethnicity, or national origin during escalating U.S.-Asia conflict.

- **Asian American Scholar Forum.** Asian American Scholar Forum (AASF) is an association of American scholars of Asian descent united to promote academic belonging, openness, freedom, and equality for all. AASF is guided by its commitment to the following values: Embracing belonging, inclusivity, diversity, and equality; promoting academic freedom, open science, and a healthy intellectual environment; advocating justice and fairness; empowering truth-seeking, communication, and mutual understanding; and advancing the public good to humanity.

- **Asian Americans Advancing Justice– Los Angeles.** Since 1983, Asian Americans Advancing Justice-Los Angeles has been one of the leading legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (AANHPIS). Today, the organization serves more than 15,000 individuals and organizations every year. The mission of Advancing Justice-LA is to advocate for civil rights, provide legal services and education, and build coalitions to positively influence and impact AANHPIS and to create a more equitable and harmonious society.

- **Asian Americans and Pacific Islanders for Justice San Antonio, TX.** Asian Americans and Pacific Islanders for Justice San Antonio, TX develops culturally- and linguistically-sensitive resources to address discrimination impacting the AAPI/ Pan-Asian community and organizing the AAPI/ Pan-Asian community for long-term mobilization with a trauma-informed approach within a community-care, restorative justice centered framework sensitive to the need for solidarity among communities of color.
• **Asian Americans United.** Asian Americans United exists so that people of Asian ancestry in Philadelphia exercise leadership to build their communities and unite to challenge oppression.

• **Asian Law Alliance.** The Asian Law Alliance is a non-profit law office founded in 1977 by law students from Santa Clara University School of Law. ALA’s mission is to provide equal access to the justice system to Asian and Pacific Islanders and low income residents of Santa Clara County. ALA provides legal services in the areas of public benefits, civil rights, domestic violence, landlord and tenant law, voting rights, and immigration law.

• **Asian Pacific American Labor Alliance (APALA), AFL-CIO.** Founded in 1992, the Asian Pacific American Labor Alliance (APALA), AFL-CIO, is the first and only national organization of Asian American and Pacific Islander (AAPI) workers, most of whom are union members, and our allies advancing worker, immigrant and civil rights. Since its founding, APALA has played a unique role in addressing the workplace issues of the 660,000 AAPI union members and in serving as the bridge between the broader labor movement and the AAPI community. Backed with strong support of the AFL-CIO, APALA has more than 20 chapters and pre-chapters and a national office in Washington, D.C. APALA is dedicated to promoting political education and voter registration programs among AAPIs, and to the training, empowerment, and leadership of AAPIs within the labor movement and APA community. Furthermore, APALA works to defend and advocate for the civil and human rights of AAPIs, immigrants and all people of color, and continues to develop ties within international labor organizations, especially in the Asia-Pacific Rim.

• **Asian Pacific Environmental Network.** Asian Pacific Environmental Network is an environmental justice organization with deep roots in California’s Asian immigrant and refugee communities. Since 1993, we’ve built a membership base of Laotian refugees in Richmond and Chinese immigrants in Oakland. Together, we’ve fought and won campaigns to make our communities healthier, just places where people can thrive.

• **Asian Pacific Islander Political Alliance.** The first and only statewide, Pan-Asian political organization in the Commonwealth, the Asian Pacific Islander Political Alliance’s mission is to build long-term power for APIs in Pennsylvania, by coordinating political, electoral, and legislative work to hold our elected officials accountable, engaging in culturally competent and linguistically accessible direct voter contact with our communities, and building solidarity with other aligned communities of color across the state.

• **Asian Texans for Justice.** Asian Texans for Justice (ATJ) was founded to be a voice for our state’s diverse Asian American Pacific Islander (AAPI)
community—to claim our space and inspire Texas to invest in our stories. We envision a future where AAPIs are a visible force shaping our state—free from discrimination, marginalization, and oppression. Our mission is to unite our community, train future leaders, and build solidarity across communities to advance equity, social justice, and civil rights for all.

- **Asian/American Political Alliance at Brown.** The Asian/American Political Alliance at Brown engages Brown University’s Asian and Asian American students in dialogue, activism, and community building through the question of what liberation means and looks like for people of the Asian diaspora.

- **Association of Chinese Professors at the Florida State University.** The Association of Chinese Professors at the Florida State University represents faculty of Chinese heritage at the Florida State University.

- **Association of Chinese Professors at Tulane University.** The Association of Chinese Professors at Tulane University is an association of professors with Chinese heritage at Tulane University. It is part of ALLAMEA under the university’s EDI office.

- **Case Western Reserve University Asian Faculty Association.** The number of Asian faculty is steadily growing at Case CWRU. Representing many distinct ethnic and cultural backgrounds, they enrich the university with their diverse perspectives. Their contributions are of tremendous value to the CWRU and Cleveland communities. Asian faculty members also face particular needs and challenges in their career development and growth. This concern was highlighted by a CWRU-wide faculty satisfaction survey. The data indicate that Asian faculty holds strong reservations and concerns for career advancement and promotion within CWRU. The Asian Faculty Association (AFA) was formed as an organization for faculty members to help each other and the institution leadership to address some of these needs and concerns. The mission of AFA is to provide a formal networking platform for Asian faculty to foster their growth—personal and professional. The AFA will also serve as the voice to represent and advocate for its members; and to increase the awareness of issues specific to the Asian faculty community.

- **Clear Project (CUNY School of Law).** The Creating Law Enforcement Accountability & Responsibility (CLEAR) project’s mandate is to support Muslim and all other client, communities, and movements in the New York City area and beyond that are targeted by local, state, or federal government agencies under the guise of national security and counterterrorism.

- **Center on Privacy & Technology at Georgetown Law.** The Center on Privacy & Technology at Georgetown Law is a think tank focused on privacy and surveillance law and policy—and the communities they affect. Privacy is not a luxury. It is a fundamental right under threat from both government and
corporate surveillance, especially for historically marginalized people. Through research and advocacy, we challenge that surveillance and work towards a world where privacy protects everyone.

- **Chinese for Affirmative Action.** Chinese for Affirmative Action was founded in 1969 to protect the civil and political rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian American and Pacific Islander community.

- **Chinese Progressive Association, San Francisco.** Founded in 1972, the Chinese Progressive Association, San Francisco educates, organizes and empowers the low income and working class immigrant Chinese community in San Francisco to build collective power with other oppressed communities to demand better living and working conditions and justice for all people.

- **Columbia University Asian Faculty Association.** Columbia University Asian Faculty Association (CUAFA). CUAFA was established on March 20th, 2021 in the wake of the arrest of Professor Gang Chen by DOJ's racially biased "China Initiative". The membership is open to all faculty of Asian and Pacific Islander heritage and allies at Columbia University. The mission of the Association includes (i) to advocate for its members as a representative body for the benefit of Columbia University and community at large; (ii) to foster intellectual and professional interaction among its members; (iii) to provide a support network and promote the career and leadership advancement of its members at Columbia University; (iv) to promote academic and cultural exchange between Columbia University and other institutions and organizations domestically and internationally. Now, the CUAFA has grown rapidly to 270 members including all Asian groups plus their allies, representing 850+ Asian faculty members in all academic units at Columbia University (www.cuafa.org).

- **Committee of 100.** Committee of 100 is a non-profit U.S. leadership organization of prominent Chinese Americans in business, government, academia, healthcare, and the arts focused on public policy engagement, civic engagement, and philanthropy. For over 30 years, Committee of 100 has served as a preeminent organization committed to the dual missions of promoting the full participation of Chinese Americans in all aspects of American life and constructive relations between the United States and Greater China.

- **Committee of Concerned Scientists, Inc.** The Committee of Concerned Scientists, Inc. is an independent organization of scientists, physicians, engineers, and scholars devoted to the protection and advancement of human rights and scientific freedom for colleagues around the world.
• **Defending Rights & Dissent.** Defending Rights & Dissent (DRAD) is a national nonprofit, nonpartisan organization that seeks to make real the promise of the Bill of Rights for all US persons. DRAD was founded in 1960 by Americans who were persecuted by the House Un-American Activities Committee. Throughout our history, we have fought national security policies that cast baseless suspicion on individuals and deprive people of civil liberties. DRAD advances our mission through advocacy, public policy, public education, and grassroots organizing.

• **Interfaith Movement for Human Integrity.** Interfaith Movement for Human Integrity is a California statewide organization of people of faith, congregations, and people impacted by inhumane immigration and incarceration systems. The Interfaith Movement for Human Integrity represents people of faith in Los Angeles County, the San Francisco Bay Area, and the Inland Empire. In the last two years, we have trained 1,800 people of faith to take leadership roles, engaged 200 faith communities, enlisted over 50 sanctuary churches, and reached more than 45,000 people.

• **Islamophobia Studies Center.** Islamophobia Studies Center is a research center dedicated to countering Islamophobia and all forms of civil rights violations.

• **Japanese American Citizens League Philadelphia Chapter.** Founded in 1929, Japanese American Citizens League is the largest and oldest Asian American civil rights organization in the United States. The Philadelphia Chapter was founded in 1947 by survivors of the wartime incarceration who resettled in Greater Philadelphia during the postwar era. Our organization works to educate the people of Philadelphia about the history and legacy of our Japanese American experience, and advocates for the civil and human rights of our collective peoples.

• **Mindful Peacebuilding.** Mindful Peacebuilding is an inclusive welcoming community offering a mindfulness-based approach to co-creating true peace and justice on our planet and in our communities, cultures, societies, and countries. We draw inspiration from the wisdom and compassion teachings of ancestral traditions and contemporary peacemakers such as Zen Master Thich Nhat Hanh as well as from young people, elders, and nature. We are open to all who wish to engage societal challenges in a mindful context.

• **Muslim Justice League.** Muslim Justice League (MJL) is a Massachusetts based non-profit whose mission is to organize and advocate for communities whose rights are threatened under the national security state in the United States. Led by Muslims, MJL’s organizing brings justice for ALL communities deemed “suspect.”
• **National Council of Asian Pacific Americans.** The National Council of Asian Pacific Americans (NCAPA) is a coalition of 38 national Asian American, Native Hawaiian and Pacific Islander (AA and NHPI) organizations around the country. Based in Washington D.C., NCAPA serves to represent the interests of the greater AANHPI communities, the fastest growing racial group in the nation, and to provide a national voice for Asian American, Native Hawaiian and Pacific Islander issues.

• **National Tongan American Society.** National Tongan American Society is a 501(c)3 that started in 1994 serving Native Hawaiian Pacific Islanders in areas such as Health, Civic Engagement, Education, Cultural Preservation and others.

• **Nikkei Progressives.** Nikkei Progressives is a grassroots, all-volunteer, multi-generational community organization. We formed in late 2016 partially in response to the Trump Administration’s expected attacks on the civil liberties of Muslim Americans, immigrants, and other minority groups and in recognition of the need to offer support and resistance. We care deeply about issues of justice and fairness within the Japanese American community and beyond.

• **Nikkei Resisters.** Nikkei Resisters is a coalition of community members based in the SF-Bay committed to remembering WWII atrocities to fight for liberation today.

• **NQAPIA (National Queer API Alliance).** The National Queer Asian Pacific Islander Alliance is the nation's leading organization empowering LGBTQ+ Asians and Pacific Islanders. We support a federation of grassroots community organizations; advance an intersectional justice and equity agenda; and ensure LGBTQ API representation in research and resources.

• **OCA-Asian Pacific American Advocates.** Founded in 1973, OCA-Asian Pacific American Advocates is a 501(c)(3) national member-driven nonprofit based in Washington, D.C. with 50+ chapters and affiliates across the U.S.

• **OCA-Asian Pacific American Advocates Greater Cleveland.** OCA-Asian Pacific American Advocates Greater Cleveland serves the AAPI community of Northeast Ohio to promote cultural heritage, active participation in civic and community affairs, securing justice, equal treatment, and equal opportunity.

• **OCA-Central Virginia.** OCA-Central Virginia is focused on the betterment of Chinese and other Asian Pacific Americans. The organization strives to foster development, leadership, and engagement through its various programs.

• **OCA-Detroit Chapter.** OCA-Detroit Chapter is dedicated to advancing the social, educational, political, and economic well-being of Asian Pacific Americans in the United States.
• **OCA-Greater Houston.** OCA-Greater Houston is the local chapter of OCA-Asian Pacific Americans, a national organization of community advocates dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs).

• **OCA-Greater Phoenix Chapter.** OCA-Greater Phoenix Chapter is a 501(c)(3) non-profit member of OCA National. The OCA Greater Phoenix chapter operates here in the valley by interacting with the local communities, promoting civic engagement, advancing inclusivity in education, countering anti-Asian hate, and developing leadership within the youth through educational programs.

• **OCA-Greater Washington DC Chapter.** OCA-DC, a chapter of OCA-Asian Pacific American Advocates, is dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans (APA). Our goals are to advocate for social justice, equal opportunity and fair treatment; promote civic participation, education, and leadership; advance coalitions and community building; and foster cultural heritage.

• **OCA Asian Pacific Advocates-Greater Seattle.** The Greater Seattle Chapter of OCA was formed in 1995 and since that time it has been serving the Greater Seattle Chinese and Asian Pacific American community as well as other communities in the Pacific Northwest. It is recognized in the local community for its advocacy of civil and voting rights as well as its sponsorship of community activities and events.

• **OCA-Greater Chicago.** OCA-Greater Chicago focuses on professional and leadership development and is dedicated to promoting the economic, professional, and social well-being of AAPIs in the Greater Chicago area.

• **OCA-Greater Los Angeles.** OCA-Greater Los Angeles is a chapter of OCA-Asian Pacific American Advocates, which is dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs).

• **OCA-Greater Tucson Chapter.** OCA Greater Tucson is a Chapter of OCA-Asian Pacific American Advocates, a national organization dedicated to advancing the social, political, and economic well-being of Asian American Pacific Islanders (AAPI).

• **OCA-Greater Philadelphia.** OCA-Greater Philadelphia (OCA-GP), founded in 2000 as a chapter of OCA Asian Pacific American Advocates, to serve the Asian Pacific American Communities of Southeastern Pennsylvania. OCA-GP hosted Professor Xi at its annual meeting and initiated the resolution at the OCA national board meeting to oppose the prosecution as unsupported racial profiling.
• **OCA-Silicon Valley.** OCA-Silicon Valley Chapter is a 501(c)(3) non-profit member of OCA National (formerly Organization of Chinese Americans). We are an active organization advocating on behalf of the cultural, educational and civil rights of Asian Pacific American in the greater Silicon Valley, California area. The OCA-Silicon Valley chapter operates here in the Bay Area by interacting with the local communities, promoting civic engagement, inclusivity in education, anti-Asian hate and voter registration.

• **OCA-Orange County Chapter.** OCA-Orange County is the local Orange County chapter of OCA-Asian Pacific Americans, a national organization dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs).

• **Presidents’ Alliance on Higher Education and Immigration.** The nonpartisan, nonprofit Presidents’ Alliance on Higher Education and Immigration brings college and university presidents and chancellors together on the immigration issues that impact higher education, our students, campuses, communities and nation. We work to advance just immigration policies and practices at the federal, state, and campus level that are consistent with our heritage as a nation of immigrants and the academic values of equity and openness. The Alliance is composed of over 500 presidents and chancellors of public and private colleges and universities, enrolling over five million students in 43 states, D.C., and Puerto Rico.

• **SF State Asian American Studies Faculty.** Faculty of Asian American Studies at San Francisco State University: Asian American Studies at SF State is the first such program in the nation. Founded in 1969 after the Black Student Union/Third World Liberation Front student strike, it offers an interdisciplinary field of study where students learn the histories, contributions, and diverse identities of Asian Americans in the United States.

• **Sikh American Legal Defense and Education Fund (SALDEF).** The Sikh American Legal Defense and Education Fund (SALDEF) is a national nonprofit, nonpartisan Sikh American civil rights organization. Our mission is to empower Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. Since 1996, we have worked to combat racial and religious profiling and discrimination against communities of color, informed by our values and the historic experiences of our community in the United States, including the Bellingham Riots of 1907, anti-immigrant sentiment and exclusion, and post-9/11 backlash.

• **Sikh Coalition.** The Sikh Coalition is the largest community based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to defend
civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs and other minority religious and ethnic groups can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. For almost two decades, the Sikh Coalition has also led efforts to combat and prevent discrimination and unlawful surveillance against Sikhs and other minorities by government agencies and officials. The Sikh Coalition is deeply concerned about issues of government intrusion and infringement on religious minorities, and joins this brief in the hope that this Court will prioritize the protection of those religious rights.

- **SMU Association of Asian and Pacific American Scholars & Allies.** Southern Methodist University (SMU) Association of Asian and Pacific American Scholars & Allies strives to promote diversity, inclusion, and equity on the SMU campus and beyond. It serves as a support network to ensure the success of faculty, staff, students, and other SMU community members of Asian and Pacific Islander descent. Among its members, AAPASA promotes friendship and engagement, as well as understanding between the Asian American and Pacific Islander (AAPI) communities and other groups on the SMU campus and in the Dallas area and beyond through educational, cultural, and social programs and activities.

- **South Asian Americans Leading Together (SAALT).** South Asian Americans Leading Together (SAALT) is a national movement strategy and advocacy organization committed to racial justice through structural change, focusing on transforming institutions while leveraging incremental change as a means to shift conditions and power.

- **The CAPA-CT (Chinese-American Professors’ Association in Connecticut).** The CAPA-CT is an association that provides professional opportunities for interdisciplinary conferences and facilitates institutional and cultural exchanges between entities of higher education in the state of Connecticut.

- **Tsuru for Solidarity.** Tsuru for Solidarity is a nonviolent, direct action project of Japanese American social justice advocates and allies working to end detention sites and support directly impacted immigrant and refugee communities that are being targeted by racist, inhumane immigration policies. We stand on the moral authority of Japanese Americans who suffered the atrocities and legacy of U.S. concentration camps during WWII and we say, “Stop Repeating History!” Never Again is NOW.

- **Union of Concerned Scientists.** The Union of Concerned Scientists is a national nonprofit organization that uses rigorous, independent science to solve our planet's most pressing problems. Joining people across the country,
we combine technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future.

- **United Chinese Americans (UCA).** UCA is a national coalition of Chinese American community organizations in the U.S."

- **University at Albany Asian Coalition of Professionals.** University at Albany Asian Coalition of Professionals (UA-ACP) was established in May 2021. It is a nonprofit organization with about 52 registered members at this time. Our members are mostly faculties and staff of Asian heritage at the University at Albany. ACP’s mission is as follows: (i) to foster intellectual and professional interactions among its members and to promote the career and leadership advancement of its members at UAlbany; (ii) to serve as a support network and to promote and protect the rights and interests of its members; (iii) to advocate for its members as a representative body for the good of UAlbany and the community at large; (iv) to promote academic and cultural exchange between UAlbany and other institutions domestically and internationally and to advance UAlbany’s academic excellence and internationalization; and (v) to promote diversity and inclusion, and to advocate against discrimination and social injustice at UAlbany.

- **University of Michigan Association of Chinese Professors (UM-ACP).** University of Michigan Association of Chinese Professors (UM-ACP) was founded in late 2002. The mission of this Association is to promote friendship and collaborations among Chinese professors at the University of Michigan. They exchange ideas on how to collaborate in research, teaching and education, at the University of Michigan and how to excel as an educator and researcher. UM-ACP builds a network for support to promote the common research interests among its members, and to promote academic and cultural exchange between China and the US.

- **Upaya Zen Center.** Upaya Zen Center is a Zen Buddhist Training Center integrating Zen practice and social action with wisdom and compassion to foster positive change in our world.
November 8, 2021

Submitted via email at researchsecurity@ostp.eop.gov

Director Eric Lander
President’s Science Advisor and Director of Office of Science and Technology Policy
Office of Science and Technology Policy
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue
Washington, DC 20504

Re: Office of Science and Technology Policy Request for Input on NSPM-33 Implementation

Dear Director Eric Lander:

Asian Americans Advancing Justice | AAJC (Advancing Justice | AAJC) respectfully submits this comment in response to the request for input on the National Security Presidential Memorandum (NSPM-33) implementation guidance by Director Eric Lander on behalf of the Office of Science and Technology Policy (OSTP). We write to provide our implementation recommendations and express our concerns about the mass profiling and discriminatory investigations and prosecutions of Asian American and Asian immigrant scientists, researchers, and scholars, particularly of Chinese descent. This conduct is ruining lives and having a broader chilling effect on the Asian American and Asian immigrant community.

Advancing Justice | AAJC is a national non-profit, non-partisan organization that works through policy, advocacy, education, and litigation to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC is one of the nation’s leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community including racial profiling and immigrants’ rights.

We appreciate this opportunity to comment on the implementation guidance and to share the harms resulting from the racial discrimination and profiling of Asian Americans and Asian immigrants working in science by federal government agencies. While the U.S. has a history of unjust prosecutions of Asian American and Asian immigrant scientists prior to the Trump administration, the Trump administration’s “China Initiative,” created a mandate and increased pressure on the FBI to scrutinize and target Asian Americans and Asian immigrants based on their ethnicity rather than criminal activity. This has led to prosecutions of many Asian Americans and immigrants for conduct that is minor, unrelated to espionage, and would not be subject to prosecution if the defendants were not people of Asian descent. Additionally, the FBI has collaborated with and at times pressured academic institutions and grantmaking agencies
resulting in the criminalization of scientists, researchers, and scholars of Asian descent across the country. Moreover, these entanglements and investigations have led to the dismissal, resignation and termination of Asian scientists as well as a growing fear among Asian Americans and Asian immigrants of being targeted and scapegoated based on their race, ethnicity, and national origin.

The pervasive racial bias and targeting of Asian Americans is not new, but a continuing reality that has been fueled in recent years by a growing xenophobic and racist backlash against immigrants. Despite being part of the fabric of American society for centuries, Asian immigrants and their descendants are viewed as “perpetual foreigners,” and not American. This racism has manifested itself at many points throughout U.S. history, including with the “Yellow Peril” and the Chinese Exclusion Act of 1882, the incarceration of over 120,000 Japanese Americans during World War II, and the scapegoating and violence directed against the Arab, Middle Eastern, Muslim, and South Asian communities after 9/11. Asian Americans are now living in the midst of the latest wave of resurgent xenophobia that is inextricably tied to this nation’s history. Not only are AAPI communities profiled by our own country as spies and terrorists, but the xenophobic rhetoric in our political discourse has also created a toxic atmosphere, emboldening those who would act on hate, terrorizing our communities.

Xenophobic, anti-immigrant, and racist rhetoric used by former President Trump and other elected officials fueled this resurgent xenophobia against immigrants and those of Asian descent. 1 Former President Trump and other elected officials blamed China for COVID-19, and called it the “Chinese virus,” “Wuhan virus,” “kung flu,” and “China plague.” Public health experts have advised that language that stigmatizes communities must not be used. 2 Public and government officials must be cautious of engaging in anti-China rhetoric and must challenge colleagues and peers who do so. The cost to the Asian American community is clear. A Pew Report published in July 2020 revealed similar findings, with a majority of Asian adults (58%) saying it is more common for people to express racist or racially insensitive views about people who are Asian than it was before the COVID-19 outbreak. 3

President Biden has made it clear that combating racism, xenophobia, and intolerance against Asian Americans will be an important priority for the administration. President Biden’s executive actions disavowed discrimination against the AAPI community, including signing a Presidential Memorandum to condemn and combat racism, xenophobia, and intolerance against Asian Americans and Pacific Islander in the United States on January 26, 2021. We are pleased with President Biden’s recommitment to these efforts in his recent announcement on actions to respond to anti-Asian violence, xenophobia and bias on March 30, 2021. We urge federal

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1 The Advancing Justice affiliation launched the Stand Against Hatred website in January 2017 in response to the increase in hate incidents against Asian Americans connected to this anti-Asian, anti-immigrant, and racist rhetoric from former President Trump’s presidential campaign in the 2016 election cycle.
agencies to follow President Biden’s commitment to combat racism and xenophobia against those of Asian descent and look forward to these efforts.

We are deeply concerned about the federal government’s investigations and prosecutions of Asian Americans and Asian immigrants, harming the lives of not just individuals, their families, and communities, but eroding the health of our democracy. Biased public statements by public officials combined with data and individual cases indicating that there have been unjust arrests and prosecutions of Asian Americans have raised red flags for us that federal agencies are engaged in biased investigations and policing. We encourage OSTP to consider our recommendations and exercise further oversight activities to end government activities that foster a climate of fear and targeting of the Asian American and immigrant community.

I. The Government Has Heavily Scrutinized and Racially Targeted Asian Americans and Asian Immigrants Particularly Through the “China Initiative”

The Government has been heavily scrutinizing and racially targeting Asian American and Asian immigrant scientists and researchers particularly with the “China Initiative.” Although the U.S. Department of Justice (“DOJ”) presents it as a national security measure meant to combat economic espionage by the Chinese government, the “China Initiative” has instilled fear within the Asian American and Asian immigrant community as an initiative that uses national security as a pretext to the racial profiling and targeting of Asian American and Asian immigrants, particularly those of Chinese descent. In its quest to protect national security, the Government casts a wider-than-necessary net and uses overly simplistic measures that are susceptible to abuse by law enforcement to the detriment of people of Chinese origin—citizens and immigrants alike.

The current social and political environment has created fear among our communities as rhetoric from public leaders encourages bias and fosters hate against Asian Americans and immigrants. One needs look no further than former President Trump’s choice to refer to the coronavirus as “‘kung flu,’ eliciting laughter and wild cheers” at rallies in Oklahoma and Arizona in late June 2020.

In yet another example, former President Trump, at a private event in 2018, “noted of an unnamed country that the attendee said was clearly China, ‘almost every student that comes over to this country is a spy.’” Senator Tom Cotton made similar remarks in 2020, stating broadly that Chinese students come to the U.S. “to steal [ ] property.” Finally, in an interview last year with Fox News, Secretary of State Michael Pompeo also made the following sweeping, dangerous statement: “[S]tudents that come here who have connections deeply to the Chinese state, they shouldn’t be here in our schools spying.” This rhetoric has alarmed academic

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institutions and raised concerns within the Asian American community. This rhetoric has translated into racially biased policies and government efforts such as the “China Initiative,” which create widespread fear among Asian American and immigrant scientists and promote bigotry against the greater Asian American community.

This is not a new phenomenon. For more than a decade, the Government has prosecuted people of Chinese and Asian descent at a disproportionate rate under the Economic Espionage Act of 1996 (“EEA”). Although the EEA was intended to address economic espionage from all foreign governments following the Cold War, it has increasingly been used to prosecute those of Chinese or Asian descent. Between 1996 and 2009, 17% of the defendants charged under the EEA’s provisions were of Chinese descent. Since 2009, that percentage has more than tripled, jumping to 52%. Moreover, Asian Americans and immigrants are overall more likely than any other racial group to be charged under the EEA, making up 62% of EEA defendants charged since 2009. For individuals of Asian descent who were prosecuted, the rate at which they were “acquitted at trial, pled guilty only to ‘false statements’ and released on probation, or, most often, had all charges dropped against them” was twice as high as individuals of any other race. Moreover, the updated report revealed that defendants with Asian names were more than twice as likely to be falsely accused of espionage, and defendants of Asian descent, including Chinese and South Asian descent were punished twice as severely as defendants of other races. C-100’s survey in collaboration with the University of Arizona also revealed a widespread chilling effect among those of Asian descent within the academic community. According to a Law 360 study, “[t]he China Initiative has increasingly targeted academics, but the overwhelming majority of them [are] accused of failing to disclose ties to Chinese institutions, not economic espionage.” The report found that “the prosecutors have not fared well with many defendants accusing investigators of engaging in misconduct to bolster what they are saying are weak cases.”

In November 2018, Former U.S. Attorney General Jeff Sessions launched the “China Initiative” to counter the threat of economic espionage and trade secrets theft conducted by or for the benefit of the “communist regime in China.” The White House mandate put great pressure on

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9 Id. at 753.
10 Id.
11 Id.
12 Id.
13 Id.
15 See Jenny J. Lee, Xiaojie Lee & C-100 Staff, Racial Profiling Among Scientists of Chinese Descent and Consequences for the U.S. Scientific Community, C-100 & UNIVERSITY OF ARIZONA (2021), C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf (committee100.org).
the FBI to scrutinize and target Asian Americans and Asian immigrants particularly of Chinese
descent based on their ethnicity rather than on suspicion of criminal activity. For example, In
2020 John Demers, the Justice Department’s Assistant Attorney General for National Security
stated that the DOJ wanted each of the country’s 94 U.S. Attorney’s districts to bring cases of
Chinese espionage or economic theft, without any apparent reason to believe that such crimes
were being committed in every district in the country. In practice, however, many of the
investigations and prosecutions under this initiative are not based upon evidence of economic
espionage and do not target individuals acting at the direction of or on behalf of the PRC
government or Chinese Communist Party. Instead, these investigations target people working in
science with any “nexus to China,” invoking implicit and exacerbating implicit bias, and
sometimes explicit bias against Asian Americans and immigrants. When the government fails to
find evidence of economic espionage, it then opts to charge people for lesser offenses such as
making false statements during the course of the investigation.

Federal prosecutors are also charging many Asian Americans and Asian immigrants with federal
crimes based on administrative errors or minor offenses such as failing to fully disclose conflict
of interest information to their universities or research institutions and other activities that are not
normally treated as crimes except under the pretext of combating economic espionage. As of
June 4, 2021, the DOJ’s own press releases about the “China Initiative” show that almost 90% of
the defendants are of Asian descent, and that a significant percentage of these cases include no
charges of economic espionage, trade secrets or what we have identified as espionage-related
-crimes. The rest of the prosecutions were for ancillary matters or minor crimes, such as making
false statements, and “lying” on university conflicts of interest forms. Still many others were
investigated by the FBI or NIH and not prosecuted yet faced employment consequences such as
terminations. The DOJ’s strategy is ineffective against combating security threats, but also
extremely harmful to the Asian American community. It has also damaged American leadership
in science and international collaboration on basic research.

Through rhetoric, rapidly changing policies, and targeted prosecutions, Asian American and
Asian immigrant scientists and researchers are again caught in a pattern of suspicion and racial
discrimination that has harmed Asian American communities in the United States for more than
150 years. We provide recommendations for the implementation guidance that address the
profiling and overcriminalization of our communities. Profiling does not make the United States
safer and serves only to undermine the very values and characteristics that propelled the United
States as a global leader in innovation, science, and technology.

II. History of Exclusion & The “Perpetual Foreigner”

18 Betsy Woodruff Swan, Inside DOJ’s Nationwide Effort to Take on China, POLITICO (Apr. 7, 2020),
19 See Information About the Department of Justice’s China Initiative and a Compilation of China-Related
Prosecutions Since 2018, U.S. DEP’T OF JUSTICE (Nov. 12, 2020),
20 Id.
21 Id.
At various times in our nation’s history, Asian Americans have borne the brunt of this country’s xenophobia. Asian Americans have been made the face of the “yellow peril,” the “spy,” and “the terrorist.” Despite being part of the fabric of American society for centuries, Asian immigrants and their descendants are still caught up in the construct of the “perpetual foreigner.” Regardless of being U.S. citizens and actively contributing to this nation’s advancement, these Americans were treated with suspicion due to their race. Their appearance, accents, and connections with their country of origin made them convenient targets of scapegoating and profiling based on race or ethnicity.

The suspicion of people of Asian origin is deeply embedded in American history. The very first immigration law barring a whole ethnic group based on their origin of descent was against Chinese immigrants. Enacted in 1882, the Chinese Exclusion Act represented the first major law to restrict immigration to the United States, halting Chinese immigration for over 60 years and prohibiting Chinese individuals already living in the country from gaining citizenship.\(^\text{22}\) Chinese immigrants faced severe limitations such as being required to carry a residence permit and the inability to bear witness in court.\(^\text{23}\) Instead only a ‘credible white witness’ could testify for them.\(^\text{24}\) The Chinese Exclusion Act was followed a decade later by the Geary Act, and then the 1921 Quota Act.\(^\text{25}\) Exclusionary laws changed the face of America. As a result, by 1960, there were only 877,934 Asian Americans in the U.S.\(^\text{26}\) That was a mere half of one percent of the American population.\(^\text{27}\) Motivated by economic anxiety and racial scapegoating, these laws undermined the valuable contributions of these immigrants.

Later extended to other Asian ethnic groups, racial scapegoating was embodied by the emergence in the 20\(^{\text{th}}\) century of “Yellow Peril” – a pejorative term demonizing people of East Asian descent and a political tool facilitating their exclusion from society.\(^\text{28}\) During World War II, U.S. military leaders without cause feared that American citizens of Japanese descent would execute acts of sabotage against the government. Following Japan’s attack on Pearl Harbor in December 1941, President Franklin D. Roosevelt issued Executive Order 9066, which permitted the military to infringe on their constitutional rights in the name of national security.\(^\text{29}\) Despite never having been accused of any crime and without trial or representation, approximately 120,000 Japanese Americans, half of whom were children, were incarcerated in federal detention

\(^{22}\) “Chinese Exclusion Act (1882),” http://ocp.hul.harvard.edu/immigration/exclusion.html


\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) IDINSIDE THE NUMBERS at 20.

\(^{27}\) IDINSIDE THE NUMBERS at 20.


\(^{29}\) Internment History, PBS (1999), http://www.pbs.org/childofcamp/history/.
centers. Over 5,000 American babies were born in detention, and about 2,000 died in incarceration as a result. Moreover, even as we strive to compete with China’s government economically, we must be aware of the language and impact on Asian Americans. In 1982, Vincent Chin, a young Chinese American was beaten to death by two white men who perceived him to be “foreign” and Japanese at a time when there were insecurities about booming Japanese auto manufacturers and a declining American auto industry. Asian Americans are now living in the midst of the latest wave of resurgent xenophobia.

III. Racist and Biased Rhetoric by FBI Officials Drives Racially Targeted Decision-Making and Training

The Government has shifted from a policy of engagement with China to an emphasis on the “threat” of China. Part of this shift includes the change in treatment of any individuals connected to China as the FBI adopts “a whole of society” approach toward all individuals of Asian descent. The FBI “view[s] the China threat as not just a whole of government threat, but [also] a whole of society threat” encompassing those of Asian descent, including civilians such as professors and academics. As recently as February 2020, FBI Director Christopher Wray called for a “whole-of-society” response to Chinese economic espionage and the threat of “non-traditional collectors,” singling out graduate students and researchers. FBI Director Chris Wray painted a broad brush for all persons of Chinese descent when he stated that the FBI “in almost every field office …around the country” sees counterintelligence risks in Chinese professors, scientists and students “across basically every discipline,” casting hundreds of thousands of Chinese professionals and students in academia as potential threats to the U.S.

This racially biased rhetoric from government officials in turn influences the decision-making, culture, and training at federal agencies. According to a recent study of over a dozen former federal investigators, “[the] distrust of people of Chinese heritage [too often] drives

35 Our organization signed a letter requesting a meeting with Director Wray on March 1, 2018 along with other civil rights organizations regarding his statement and we have yet to receive a meeting. See here for more information: http://www.committee100.org/press_release/community-organizations-call-for-meeting-with-fbi-director-christopher-wray-regarding-profiling-of-students-scholars-and-scientists-with-chinese-origins/.
decision-making at the FBI and other U.S. security agencies.” The report found that the FBI started an initiative that mapped out U.S. neighborhoods by race and ethnicity to monitor potential terrorists and spies in 2005. An FBI memo revealed that the FBI continued the initiative by doing an assessment for Chinese communities in San Francisco in 2009. Not only were strategic decisions and investigations based on this inherent distrust of those of Chinese descent, but training materials were created that perpetuated and created a culture of bias and distrust against Asian Americans and Asian immigrants.

According to former FBI agent Mike German, after September 11, “[X]enophobia . . . spread like a cancer” within the FBI and impacted FBI training materials for both Muslim Americans and Chinese Americans. One presentation on “the Chinese” warned, “Never attempt to shake hands with an Asian.” A counterintelligence presentation, in turn, “warn[ed] agents against giving too many compliments to a Chinese woman as it might suggest a romantic relationship is desired, [and] another [told agents] to never stare at or attempt to shake hands with an Asian.” This training fostered the idea of Asian Americans and Asian immigrants as “the threatening ‘other’” rather than as “fellow American[s],” and furthered the narrative of Asian Americans as the “perpetual foreigner” where “Asian Americans . . . are . . . more closely associate[ed] . . . with their ethnicity and national origin than their nationality, no matter how long they’ve been Americans.” The training is “more likely to implant bias than to educate agents about the complex behavior of spies.” These training materials, lack of diversity, and existing practices fostered an environment ripe for bias and profiling against Asian Americans. According to German, even Asian FBI agents and other federal agency employees of Asian descent have felt marginalized and targeted by the agencies they served.

IV. Racially Biased Prosecutions Particularly Under the DOJ’s “China Initiative” & the Criminalization of Asian Americans and Asian Immigrants Causes Harm & Chilling Effect on Asian American and Asian Immigrant Communities

Advancing Justice | AAJC has grown concerned that the DOJ had overreached with “China Initiative” leading to mass criminalization of Asian Americans and Asian immigrants. As a consequence of the White House’s mandate through the “China Initiative,” the FBI and federal agencies have put pressure on grantmakers, universities, and research institutions leading to

37 Id.
38 Id. The FBI memo was obtained by ACLU in 2011.
40 Id. at 83, 339.
42 Id. at 190–92.
43 Waldman, supra note 36.
45 Id. at 83 (The New Press 2019).
discriminatory and stigmatizing investigations of Asian Americans and Asian immigrants. The FBI has focused on federal grant agencies and academic institutions to target scientists and researchers of Asian descent by conducting threat awareness sessions and circulating information on the threat of China and these so-called non-traditional collectors. As a result, they have injected racial bias into these institutions, discouraged collaboration, criminalized connections to China, and encouraged these entities to view researchers and scientists of Asian descent differently than their colleagues because of race.

Despite the ongoing issues of implicit bias, discrimination, and race & ethnicity-based profiling, the U.S. government continues prosecutions efforts that cause immense harm to Asian Americans and Asian immigrants. American citizens such as Wen Ho Lee, Guoqing Cao, Shuyu Li, Sherry Chen, and Xiaoxing Xi have already suffered harm from these unwarranted investigations and prosecutions. The use of stereotypes and biases prevalent in the FBI is extremely harmful and leads to the wrongful prosecutions of individuals subjected to profiling. Former FBI agent German stated, “The [FBI] training is a form of othering, which is a dangerous thing to do to a national security workforce learning to identify the dangerous ‘them’ they’re supposed to protect ‘us’ from.” This danger of othering is all too real for many Asian Americans. Their cases show ongoing bias, discrimination, and race and ethnicity-based profiling of individuals of Asian descent by the U.S. Government.

In December 1999, the government prosecuted Wen Ho Lee, a Taiwanese American scientist, accusing him of passing secrets to the Chinese government about a U.S. nuclear program despite lacking evidence of espionage. Although Lee received restitution, great damage had been done. In addition to suffering from a damaged reputation, he spent nine months in solitary confinement and was denied basic legal protection under the law. At Mr. Lee’s dismissal hearing, federal District Court Judge James A. Parker apologized to him and reproached the Government’s conduct.

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46 FBI Director Christopher Wray’s Opening Remarks: China Initiative Conference, CIS (Feb. 6, 2020), https://www.csis.org/analysis/fbi-director-christopher-wray-openings-china-initiative-conference (According to FBI Director, the FBI now has “private-sector coordinators in each of the FBI’s 56 field offices who lead [their] engagement with local businesses and universities.” “[They] meet with these partners frequently, providing threat awareness briefings…”); see also Ana Swanson, A New Red Scare Is Reshaping Washington, N.Y. Times (July 20, 2019), https://www.nytimes.com/2019/07/20/us/politics/china-red-scare-washington.html (“Officials from the F.B.I and the National Security Council have been dispatched to Ivy League universities to warn administrators to be vigilant against Chinese students who may be gathering technological secrets from their laboratories to pass to Beijing.”).

47 Open Hearing on Worldwide Threats, supra note 32.


50 Id.

Despite the injustice in Mr. Lee’s case, the Government continues to bring indictments based on faulty and unclear grounds against Asian scientists. In 2013, a federal grand jury indicted two former Eli Lilly and Co. senior biologists, Guoqing Cao and Shuyu “Dan” Li, on charges of stealing nine drug discovery trade secrets and passing them to a Chinese drug company. The U.S. attorney’s office later requested the dismissal of all charges but neglected to specify the reasons for doing so.

In 2014, federal agents accused Sherry Chen, a Chinese American hydrologist, then employed at the National Weather Service, of using a stolen password to download information from a federal dam database and of lying about meeting with a high-ranking Chinese official. Ms. Chen had sent publicly available information to a former classmate in China and then connected him to a colleague for further information about his inquiry. The colleague reported her. During the course of the investigation, investigators asked Ms. Chen when she last saw a former classmate. She told them, “I think 2011” when they had actually met in 2012. Prosecutors then sought to convict her of making a false statement before later dropping all charges. While the DOJ dropped the case after finding no evidence of espionage, the United States Department of Commerce announced in 2015 its plan to fire Ms. Chen. Although the federal Merit Systems Protection Board in April 2018 ruled in favor of her reinstatement and suggested that Commerce Department officials had buried exculpatory evidence, the Department still plans to appeal the ruling and proceed with her dismissal.

In 2015, the DOJ accused Xiaoxing Xi, a Chinese American physics professor at Temple University, of sharing sensitive American-made technology with Chinese scientists. Without consulting with experts to understand the technology, FBI agents and prosecutors branded Mr. Xi as a Chinese spy. He was eventually vindicated after independent experts discovered that the information that he shared for academic purposes was not classified and perfectly lawful.

54 Kim, supra note 8, at 774.
55 Id.
56 Id.
57 Id.
60 Id.
However, once again, the damage to Mr. Xi’s reputation was done and to date, there has been no apology or compensation by the Government.

These cases lead us to believe that race and ethnicity-based profiling are indeed driving these prosecutions. Examined in conjunction, these cases validate a disturbing yet ongoing trend – the criminalization of Asian Americans in the name of national security. When a subset of the population is regarded as “perpetual foreigners” or as “the other,” national security arguments can easily overshadow civil and human rights considerations.

Wei Su, a former scientist for the U.S. Army, is an example of a government employee impacted by bias against Asian Americans. Despite 24 years of working for the Government without incident, Mr. Su found himself in the midst of an FBI investigation in 2011 when he was placed under surveillance, threatened with arrest, and stripped of his security clearance. Although the FBI began to interrogate him in 2011, Mr. Su believes that the investigations started much earlier. The investigation was eventually dropped. Then, in 2015, the Pentagon’s Consolidated Adjudications Facility (“CAF”) suspended his security clearance based on false evidence. For years, Mr. Su fought to clear his name. Finally, in May 2019, the CAF sent Mr. Su a letter rescinding the Pentagon’s previous letters that suspended and revoked his security clearance. According to this letter, the Pentagon’s previous letters suspending and revoking his security clearance were “not accurate.” Despite not doing anything wrong, Mr. Su found himself under investigation by the FBI, and his life upended. Even after CAF rescinded the Pentagon’s previous letters that suspended and revoked his security clearance, Mr. Su is still extremely cautious about his actions. To this day, Mr. Su does not know why the FBI investigated him.

Most recently, on September 9, 2021, a federal judge from the U.S. District Court for the Eastern District of Tennessee acquitted University of Tennessee (UT) Engineering Professor Anming Hu of all charges after his trial resulted in a mistrial when the jury deadlocked. The well-reasoned decision of the federal district recognized that the evidence presented clearly was insufficient to allow a reasonable jury to convict Dr. Hu of the crimes alleged. The decision came after the U.S. government’s announcement to retry the case in July despite serious concerns voiced by elected officials, civil rights groups, and the Asian American community over the FBI’s conduct during the course of its investigation of Professor Hu. This case exemplifies many of the concerns that community and civil rights groups have regarding the “China Initiative.”

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62 Waldman, supra note 36.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
Professor Hu is a Canadian national and immigrant of Chinese descent who was living and working in the U.S. on an H-1B visa with a pending application to become a U.S. lawful permanent resident. He is a husband and father of three children, and was under house arrest in Tennessee separated from his family living in Canada. Professor Hu’s case is indicative of the deep flaws of the Trump-era “China Initiative,” which often has initiated investigations of scientists, researchers, and scholars based merely on connections to China. Those connections are often ancestral or professionally legitimate, rather than actual evidence of espionage.

The prosecutions of Asian American scientists and ongoing investigations have harmed not just individuals but have rippled out into the Asian American community in the United States as a whole. As discussed below, the Government’s broad suspicion of Asian American and Asian immigrant scientists has created an environment of uncertainty and fear for the community across the country. Even individuals who have not been prosecuted have been driven from the country they consider home and have suffered immeasurable harm to their livelihood, relationships and personal health. Moreover, there is a pervasive “psychological fear” among scientists of Chinese origin in an environment that has increasingly become hostile to them. MIT mechanical engineer Gang Chen shared that “[t]he current atmosphere creates a lot of psychological fear.” A former MIT engineering postdoc who is now in Beijing described FBI investigations as “scary” and wished to remain anonymous. He was questioned about his involvement in China’s Thousand Talent Plan (“TTP”), and said that “[he] felt like [he] was unfairly targeted just because [he’s] Chinese.”

In Cincinnati, Ohio, there are reports of FBI intimidation and harassment of Chinese employees and professors at the University of Cincinnati. Eric Palmer, the Executive Director of the local chapter of the American Association of University Professors, stated that the FBI contacted at least three faculty members at the university in 2018 in connection to China’s Thousand Talents programs. According to Mr. Palmer, FBI agents harassed these individuals by showing up both at their workplace and at their homes. FBI agents then asked some faculty members “to turn over information about other Chinese national faculty members with at least an implicit threat that if they don’t, they will be investigated further.” Mr. Palmer considers the Government’s approach to be “scare and authoritarian tactics” where the Government “assum[es] Chinese scholars are trying to steal intellectual property” rather than determining whether “there’s credible information pointing to individuals and investigate on that basis.”

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71 Id.
73 Id.
74 Id.
75 Id.
77 Id.
78 Id.
79 Id.
80 Id.
The impact of these biases and profiling extends to international scholars, particularly to Asian students seeking to study and contribute to academia in the United States. FBI surveillance and prosecution of individuals of Asian descent has created a chilling effect at universities and fosters an environment of fear discouraging students from studying here. According to the State Department Open Doors report, there has been a 6.6% decrease in new international student enrollment in 2017/18 which was double the rate of decrease from the previous year. This marked “the first time America has seen a two-year decline,” and signified the shift in perception by international students of how welcoming the United States is. The loss of international students, including those from China, is a tremendous loss for the United States. Overall, foreign students contribute $39 billion to our country, and have created or supported more than 455,000 jobs just within the 2017-2018 academic year. Although Chinese students make up only 1.7% of the total U.S. higher education enrollment, they contributed to about $12 billion to the U.S. economy in 2016 according to the State Department’s Open Doors report. Many of these students go on to become citizens and have families here in the United States.

Concerns about the impact of these investigations on human lives and for the academic arena are prevalent across universities. MIT, Yale University, Stanford University and at least eight other institutions have issued statements detailing their concerns with the targeting of Chinese scientists and academics. However, many universities provide inadequate support to their faculty who find themselves targets of the U.S. Government. Caught in the middle of the investigations and prosecutions, many scientists, professionals, and academics of Asian descent fear they will be criminalized under the Government’s broad net of suspicion. “The investigations have left Chinese and Chinese-American academics feeling ‘that they will be targeted and that they are at risk,’” said Frank Wu, former president of C-100, a prominent Chinese American organization. “People are living in fear.” The damage from the Government’s overzealous prosecutions has already harmed Americans and has now permeated various facets of our society, creating an environment of fear and impacting the actions and abilities of Chinese scientists and researchers today to work and live in the United States.

V. Recommendations

The mass profiling of Asian communities harms American citizens and immigrants creating fear, feelings of estrangement by Asian Americans and immigrants and furthers the biased “perpetual foreigner” narratives amongst the majority population. We have provided the following recommendations to OSTP as they implement guidance for NSPM-33. We ask OSTP to take

81 Id.
82 Id.
83 LOSING TALENT 1, 1 (2019).
85 Dolgin, supra note 72.
87 Id.
appropriate measures with input from community members to address the racial profiling and targeting of Asian Americans and Asian immigrants.

1) We urge OSTP to work with the U.S. Department of Justice to end the Justice Department’s “China Initiative,” which is based upon the bigoted premise that all scientists of Chinese descent or with connections to China should be treated with suspicion and investigated without evidence of wrongdoing, does not continue to harm Asian American and Asian immigrant scientists, researchers, and scholars. While we recognize that there are legitimate threats from China’s government, there are serious concerns of the DOJ profiling Asian Americans and Asian immigrants and criminalizing integrity issues. We have called on the DOJ to end the initiative and review all “China Initiative” prosecutions and investigations closed prior to prosecution under the “China Initiative” to determine whether these cases targeted individuals based on their race, ethnicity, or ancestry, and, if so, take remedial action to prevent such profiling in the future.

2) OSTP should include the needs and concerns of Asian Americans in its efforts to address racial equity. It should engage with Asian American community leaders and community-based organizations to ensure a better understanding of the needs of the community and the impact of discrimination on Asian Americans. Federal agencies should increase engagement with civil rights organizations and impacted communities to minimize the impact of bias in hiring, admissions, and grant approvals.

3) OSTP must harmonize and implement uniform policies to bridge the gap between academia and U.S. government agencies about how to best protect U.S. interests in fundamental research while maintaining openness and successfully competing in the global marketplace for international scientific talent, particularly for disclosure requirements for conflicts of interests and commitments. Government grantmaking agencies such as NIH and NSF and universities should provide greater clarity in their guidelines and instruction regarding requirements for grant applications, disclosures, conflicts of commitments and conflicts of interests. Any policies and sanctions for failure to adhere to requirements or non-compliance should be clarified, standardized, and implemented uniformly. Government grantmaking agencies and universities can and should take steps to educate grantees and potential grantees about the need for disclosures and conflicts of interest, including as they relate to the activities with the Chinese government, Chinese universities and Chinese corporations or nationals.

4) OSTP must ensure transparency from federal agencies on their investigative process for violations of research integrity and how determinations are made for when these are shared with law enforcement. Federal grant-making agencies such as NIH and NSF are not law enforcement agencies and should minimize entanglements with the FBI. Integrity issues should not be criminalized or mistaken as national security concerns.

5) Any new rules or clarification of existing rules should be applied to conduct prospectively, as much as possible. People should not be punished for past, lawful
scientific collaboration with Chinese research institutions or honorary programs, by being summarily denied for any future federal government funding opportunities.

6) OSTP should discourage criminalization of unintentional, inadvertent and/or administrative errors. As new and clearer guidelines are created, faculty, staff and scholars should have the opportunity to adjust their previous forms and provide any additional disclosures without being prosecuted or facing negative employment consequences. Self-disclosures should be incentivized, and cases of non-disclosures should be handled on an individual basis. Most Asian American and immigrant scientists under surveillance under the “China Initiative” have nothing to hide and would openly share any of their past activities if they did not fear prosecution.

7) OSTP should review policies and take measures throughout the government to combat racial bias against Asian American and Asian immigrant scientists and federal employees, including but not limited to anti-bias training. OSTP must examine existing procedures to find ways to improve and eliminate bias, both explicit and implicit. To further these efforts, OSTP should provide adequate training or scientific consultation for federal agents and prosecutors handling these cases to prevent and minimize harmful errors. OSTP must increase engagement with the scientific community, civil rights organizations, and impacted communities to minimize the impact of bias in hiring, admissions, and grant approvals.

8) OSTP should encourage transparency from federal agencies on the implementation of guidance including any impacts such as chilling effects and the deterring of Asian Americans and immigrants from certain activities such as immigration, studying, and/or working in the United States.

9) OSTP should consider the initial implementation as a pilot and provide additional comment periods. As guidance is implemented for NSPM-33, OSTP should report in the first six months on the successes and failures of the implementation to stakeholders to continue the discussion on improvement. Asian American civil rights and community groups should be included in the discussion to address concerns of racial equity, bias, and profiling.

Thank you for the opportunity to submit this comment on the implementation of NSPM-33. Please do not hesitate to contact Gisela P. Kusakawa to provide further information on this comment.

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July 14, 2021

Director, Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

Re: Freedom of Information Act (“FOIA”) Appeal, Request No. NFP-129274

To Whom It May Concern,

This letter serves as an appeal (“Appeal”) of the decision of the Federal Bureau of Investigation (“FBI”) to administratively close FOIA Request No. NFP-129274 (the “Request”). See 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 28 C.F.R. § 16.8. The American Civil Liberties Union, American Civil Liberties Union Foundation (together, the “ACLU”), and Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”) submitted the Request on April 15, 2021, attached hereto as Exhibit A.¹ The Request sought records pertaining to the government’s efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers believed to have connections to China.

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

Asian Americans Advancing Justice | AAJC is a national, non-partisan, not-for-profit 501(c)(3) organization that works through policy advocacy, education, and litigation to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC is one of the nation’s leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community, including immigration and immigrants’ rights, census, hate incidents, language access, technology and telecommunications, and voting rights.
The FBI responded to the Request by letter dated April 29, 2021 (the “Response”), attached as Exhibit B. The Response states that “[t]he FBI Central Records System (CRS) is indexed according to investigatory interests, and it is not arranged in a manner that allows for the retrieval of information in the form you have requested. . . Therefore, your request is being administratively closed.” Exhibit B at 1.

The Response violates the requirements of FOIA. See 5 U.S.C. § 552(a)(3). The ACLU and Advancing Justice | AAJC appeal (1) the FBI’s failure to make the records described in the Request “promptly available,” id. § 552(a)(3)(A), and its inadequate explanation of its failure to do so; and (2) the FBI’s lack of “reasonable efforts,” id. § 552(a)(3)(C), to “review, manually or by automated means, agency records for the purpose of locating those records which are responsive to” the Request, id. § 552(a)(3)(D). This Appeal is timely submitted within ninety (90) days of the Response. 28 C.F.R. §16.8(a).

**Argument**

1. **The FBI must search for responsive records in the CRS.** There can be no serious question that the CRS contains records responsive to the Request, given the FBI’s extensive, publicly acknowledged investigations of “Chinese technology theft” pursuant to the “China Initiative.” Exhibit A at 5 n.26. The agency has a statutory obligation to identify these records “manually or by automated means.” 5 U.S.C. § 552(a)(3)(D). This is true regardless of how the CRS is indexed. See Rosenfeld v. U.S. Dep’t of Just., No. C 07-3240 MHP, 2010 WL 3448517, at *4 (N.D. Cal. Sept. 1, 2010) (“The FBI agent’s decision to index or not to index . . . does not inform the FOIA analysis.”); Colgan v. Dep’t of Just., No. 14-CV-740 (TSC), 2020 WL 2043828, at *5 (D.D.C. Apr. 28, 2020) (“[A]n agency’s FOIA duties are not limited to the ‘traditional’ or ‘routine’ procedures it uses to respond to FOIA requests. The FBI must engage in a search reasonably calculated to discover and release responsive records.”).

2. **The FBI must search for responsive records outside the CRS.** In addition to the CRS, the agency must search other databases or repositories reasonably likely to contain responsive records, including but not limited to the Electronic Surveillance (“ELSUR”) records system and the Electronic Case File (“ECF”) records system. Where technologically possible, the FBI must electronically search the text of the documents in the relevant records systems, rather than simply searching for agency-assigned index terms, “keywords,” or other metadata.2

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We note that, of the eight categories of records described in the Request, see Exhibit A at 5–6, all but one encompass records that are not necessarily of a “criminal investigative nature” and are “reasonably likely to reside outside the CRS.”¹ Shapiro v. DOJ, 34 F. Supp. 3d 89, 98 (D.D.C. 2014), aff’d by Shapiro v. DOJ, 893 F.3d 796 (D.C. Cir. 2018). For example:

- Category 1 of the Request seeks “[f]ormal or informal guidance, training materials, briefing materials, advisories, or presentations related to China or talent programs that were provided to educational institutions, scientific research institutions, or government agencies that conduct or fund scientific research.” Exhibit A at 5. As just one example, a presentation to an educational institution related to a Chinese talent program would fall within this category and would likely be housed outside the CRS.

- Similarly, Category 2 of the Request seeks correspondence related to “China, talent programs, peer review, or conflicts of interests with educational institutions, scientific research institutions, or government agencies . . . .” Id. Correspondence related to these topics may be totally divorced from criminal investigative action; indeed, even conflicts of interest in the university or research-institute setting may well be resolved administratively, without criminal investigation.

The FBI “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” Int’l Couns. Bureau v. United States Dep’t of Def., 101 F. Supp. 3d 48, 50–51 (D.D.C. 2015) (quoting Oglesby v. U.S. Dep’t of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)). Therefore, the FBI must not restrict its search to databases or locations containing records of criminal investigations.

3. In addition to conducting electronic searches, the FBI must work with knowledgeable agency personnel to manually identify responsive records. The Request seeks descriptive categories of records that may not be captured by electronic searches. For example, we understand that keyword searches of the CRS do not always search for specified terms in the text of CRS documents, but for tags or other metadata that the agency has chosen to associate with documents in the CRS.⁴ The Response suggests that, because of the way the CRS is indexed, such keyword searches will not, on their own, be an adequate method of identifying responsive records. Exhibit B at 1. Accordingly, in order to comply with FOIA, the FBI must confer with personnel whose work relates to the matters described in the Request in order to manually identify responsive records. See 5 U.S.C. § 552(a)(3)(D).

4. While it searches for other responsive records, the FBI should immediately produce the records described in categories 7 and 8 of the Request. Categories 7 and 8 of the

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¹ Category 6, unlike any of the other categories of requested records, is limited to “[c]riminal complaints or indictments . . . .” Exhibit A at 6.

⁴ Id.
Request seek “[r]ecords contained in the FBI production to the Senate Subcommittee on Investigations dated October 12, 2018,” and “[t]he FBI PowerPoint presentation titled, ‘Talent Plan Education Package Briefing,’” respectively. Exhibit A at 6. The FBI possesses these records, and it should be able to locate and produce them with relative ease.

Conclusion

For the above reasons, the ACLU and Advancing Justice | AAJC respectfully request that the FBI re-open its search for the records described in the Request and make those records promptly available. If the FBI withholds any responsive records or portions of responsive records, the ACLU and Advancing Justice | AAJC expect the FBI to explain why those withholdings are justified by specific FOIA exemptions. We expect the release of all segregable portions of otherwise-exempt material and a statement of the scope of any material withheld.

Thank you for your attention to this matter. We look forward to receiving a determination within twenty days of your receipt of this Appeal, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C. § 552(a)(6)(A)(ii). Please send the determination to:

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Respectfully submitted,

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Exhibit A
Re: Request Under Freedom of Information Act
Expedited processing and fee waiver/limitation requested

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)1 and Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”)2 submit this Freedom of Information Act request for records pertaining to the government’s efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers believed to have connections to China.3

I. Background

Although international scientific collaboration is commonplace and a valuable source of innovation for the United States, in the past several years, the U.S. government has pushed universities and research institutions around the country to closely scrutinize scientists who may have foreign ties—especially ties to China.4 As part of this campaign, the Federal Bureau

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1 The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

2 Asian Americans Advancing Justice | AAJC is a national, non-partisan, not-for-profit 501(c)(3) organization that works through policy advocacy, education, and litigation to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC is one of the nation’s leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community, including immigration and immigrants’ rights, census, hate incidents, language access, technology and telecommunications, and voting rights.

3 The ACLU and Advancing Justice | AAJC submitted a similar request to the FBI on March 17, 2020. That request was assigned reference number 1466706-000. By letter dated November 13, 2020, the FBI responded that it had been “unable to identify records responsive to [the] request.” The ACLU and Advancing Justice | AAJC intended to administratively appeal that determination, in light of the fact that the FBI plainly possesses responsive records—including, but not limited to, the specific FBI records identified in Categories 2(b), 3(d), 7, and 8. However, due to mail-processing errors related to the pandemic, the ACLU and Advancing Justice | AAJC were unable to appeal the FBI’s response. ACLU and Advancing Justice | AAJC accordingly submit the new FOIA request below.

of Investigation (“FBI”) has coordinated with agencies like the National Institutes of Health (“NIH”) to pursue investigations against scientists and researchers, many of whom are Chinese-Americans.⁵ For instance, Bloomberg reports that in 2018, the NIH, “working with the FBI, started probes into some 180 researchers at more than 70 hospitals and universities, seeking undisclosed ties to China.”⁶ The NIH “sent letters to over 10,000 institutions to warn against foreign nationals stealing intellectual property[.]”⁷ In a mid-2020 presentation to a “senior advisory panel,” Michael Lauer, the NIH’s head of extramural research, stated that 82% of those under investigation by the NIH were “Asian.”⁸

News outlets report that this heightened scrutiny has caused Chinese-American scientists to lose their research funding or be fired or forced to resign from research institutions.⁹ Yet as a Princeton University professor recently explained, the majority of cases in which researchers have been arrested based on purported ties to China “focus on fraud, not espionage; the researchers in question have allegedly failed to disclose affiliations and funding from Chinese entities. These relationships are generally not illegal in and of themselves, and in some instances are actively encouraged by the American university.”¹⁰ In general, new disclosure rules, inconsistent and potentially discriminatory enforcement, and shifting norms have produced confusion and concern among Chinese-American researchers.¹¹

The FBI has spearheaded this scrutiny of scientists and researchers, as reflected by FBI Director Christopher Wray’s many public remarks on the “China threat.” For instance,
during a hearing before the Senate Intelligence Committee in February 2018, Senator Marco Rubio asked Director Wray to expand on “the counterintelligence risk posed to U.S. national security from Chinese students, particularly those in advanced programs in the sciences and mathematics.”

Director Wray responded:

[T]he use of nontraditional collectors, especially in the academic setting, whether it’s professors, scientists, students, we see in almost every field office that the FBI has around the country. . . . So one of the things we’re trying to do is view the China threat as not just a whole of government threat, but a whole of society threat on their end. I think it’s going to take a whole of society response by us.

Relatedly, in November 2018, the Department of Justice (“DOJ”) announced the creation of a “China Initiative.” According to a DOJ “Fact Sheet,” one of the goals of the China Initiative is to “[d]evelop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities, and the defense industrial base) that are being coopted into transferring technology contrary to U.S. interests.” In July 2019, the FBI released an advisory entitled “China: The Risk to Academia,” in which it warned that certain “Chinese scholars may serve as collectors—wittingly or unwittingly—of economic, scientific, and technological intelligence from U.S. institutions to ultimately benefit Chinese academic institutions and businesses.” The advisory goes on to assert that “foreign adversaries have targeted” scholars with “divided loyalty to a country other than the United States” in attempting to “gain access to [universities’] research and development.”

This broad suspicion is particularly troubling given that DOJ has, in recent years, initiated multiple serious and highly damaging prosecutions against Chinese-American scientists on what were later revealed to be faulty grounds. Nevertheless, the government has continued

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13 Id.


16 FBI, China: The Risk to Academia 2 (2019).

17 Id. at 9.

to cite the threat of espionage to support a push for increased coordination between law enforcement agencies, defense agencies, and agencies involved in scientific research and grant-making. For instance, in September 2019, the Department of Health and Human Services (“HHS”) issued a report finding that one its subsidiary agencies, the NIH, “had not addressed . . . concerns about foreign threats to the integrity of the peer review process.” In response, NIH stated that it was already “working closely with federal partners,” including, among others, the Department of Defense and the FBI, “to update [its] peer review vetting guidelines.” NIH went on to confirm that it was working with “federal experts,” including the HHS Office of National Security, “to help develop a systematic, risk-based, data-driven approach to identifying peer review nominees who warrant additional scrutiny.”

News reports indicate that the government’s intensifying focus on scientists with ties to China has adversely affected individuals pursuing research in both private industry and academia. For example, according to a recent story published by Bloomberg Businessweek, “[t]he FBI is telling companies, universities, hospitals—anyone with intellectual property at stake—to take special precautions when dealing with Chinese business partners and employees who might be what [the director of the FBI] calls ‘nontraditional’ information collectors.” Along the same lines, “[v]isas for Chinese students and researchers are being curtailed, and more Chinese engineers and businesspeople, especially in the tech sector, are being detained at U.S. airports while border agents inspect and image their digital devices.”

The public record contains little information about how federal law enforcement and scientific agencies decide whom to scrutinize, investigate, or prosecute, and on what basis. For at least two reasons, the public has a strong interest in knowing more. First, the government’s efforts in this area may significantly affect the United States’ leadership role in scientific and technological innovation. Second, government measures that single out scientific professionals or students for adverse treatment based on their race or national origin violate the law.

Accordingly, through this FOIA request, the ACLU and Advancing Justice | AAJC seek information about the government’s efforts to scrutinize, investigate, prosecute, and otherwise

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19 HHS OIG Report, supra note 4, at 15.
20 Id. at 19.
21 Id.; see also Jeffrey Mervis, NSF Hopes Jason Can Lead It Through Treacherous Waters, Science, March 18, 2019, https://www.sciencemag.org/news/2019/03/nsf-hopes-jason-can-lead-it-through-treacherous-waters (hereinafter “NSF Hopes”) (reporting on National Science Foundation’s efforts to “examine how foreign influences may be warping the U.S. research enterprise”); Bill Priestap, Statement Before the S. Judiciary Comm., Subcomm. on Border Sec. & Immigration, Student Visa Integrity: Protecting Educational Opportunity and National Security (June 6, 2018), available at https://www.fbi.gov/news/testimony/student-visa-integrity-protecting-educational-opportunity-and-national-security (“[T]he more willing these schools are to engage with U.S. law enforcement as issues arise and suspicious circumstances become noticed, the more likely it is that the FBI and its partners can help to mitigate risk or minimize damage posed to these schools.”).
22 Waldman, The U.S. Is Purging Chinese Cancer Researchers From Top Institutions, supra note 5.
23 Id.
take measures against scientists who are believed to have connections to China and other nations.

II. Requested Records

Unless otherwise stated below, the ACLU and Advancing Justice | AAJC request the following records created on or after January 1, 2017:

1. Formal or informal guidance, training materials, briefing materials, advisories, or presentations related to China or talent programs that were provided to educational institutions, scientific research institutions, or government agencies that conduct or fund scientific research.

2. Correspondence related to China, talent programs, peer review, or conflicts of interest with educational institutions, scientific research institutions, or government agencies that conduct or fund scientific research, including but not limited to:
   a. lists of suspected talent program members;\(^{24}\)
   b. FBI or other government agency requests for information or investigations; and
   c. requests for access to individual employees’ communications.

3. Memoranda, briefing materials, policies, formal or informal guidance, training materials, advisories, or presentations concerning:
   a. China and scientific research institutions, educational institutions, grant funding, or peer review;
   b. talent programs;
   c. conflicts of interest or undisclosed sources of funding related to scientific research; or
   d. the Department of Justice’s China Initiative, including but not limited to its purpose, scope, progress, status, or effectiveness.\(^{25}\)

4. Records containing statistics about the number of assessments, investigations, or prosecutions related to China, or any subset of investigations or prosecutions related to China.\(^{26}\)

\(^{24}\) See Staff Report, Threats to the U.S. Research Enterprise, supra note 3, at 98.


\(^{26}\) See, e.g., Mark Hosenball and David Brunnstrom, To Counter Huawei, U.S. Could Take ‘Controlling Stake’ in Ericsson, Nokia: Attorney General, Reuters, Feb. 6, 2020, https://reut.rs/3IyMw3u (reporting that FBI Director Christopher Wray informed attendees at the Department of Justice China Initiative Conference that “the bureau has about 1,000 open investigations of Chinese technology theft across its 56 regional offices” and “span[ning] just about every industry sector”); The Latest: FBI Chief Wray Says China Poses a Serious Threat, U.S.
5. Records containing statistics about assessments, investigations, or prosecutions of scientists, researchers, or technologists.

6. Criminal complaints or indictments related to China and economic espionage, fraud, trade secrets, false statements, or talent programs.


8. The FBI PowerPoint presentation titled, “Talent Plan Education Package Briefing.”

With respect to the form of production, see 5 U.S.C. § 552(a)(3)(B), the ACLU and Advancing Justice | AAJC request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU and Advancing Justice | AAJC request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU and Advancing Justice | AAJC request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). The ACLU and Advancing Justice | AAJC are non-profit public interest groups primarily engaged in disseminating information about actual and alleged government activity, and the information is urgently needed to better understand federal agency actions against scientists believed to have connections to China and other nations.

A. The ACLU and Advancing Justice | AAJC are organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The ACLU and Advancing Justice | AAJC are “primarily engaged in disseminating information” within the meaning of the statute. See id. Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of requestors’ work and are among their primary activities. See ACLU v. Dep’t of Justice, 321 F. Supp. 2d 24, 29 n.5 (D.D.C.


27 See Staff Report, Threats to the U.S. Research Enterprise, supra note 3, at 93.

28 See also 28 C.F.R. § 16.5(e).

29 See also 28 C.F.R. § 16.5(e)(1)(ii).
2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).

The ACLU publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 850,000 people. The ACLU also publishes regular updates and alerts via email to over 3.9 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 4.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news, and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.

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30 Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” See, e.g., *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).


The ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests. The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See https://www.aclu.org/blog. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multimedia projects, including videos, podcasts, and interactive features. See https://www.aclu.org/multimedia. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including analysis about case developments and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multimedia features.34


The ACLU website includes many features on information obtained through the FOIA. The ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of its contents relating to government policies on rendition, detention, and interrogation. 35 The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. 36

Similarly, Advancing Justice | AAJC regularly releases and disseminates reports 37, press statements 38, comments 39, fact sheets 40, “know your rights” 41 information, and other materials that educate the public 42 on government policies and actions that impact Asian Americans and other vulnerable communities. Advancing Justice | AAJC frequently publishes blogs on

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Medium⁴³ and a range of news publications⁴⁴, such as The Hill⁴⁵ and NBC⁴⁶, on various issues impacting AAPIs, and regularly provides information on their website. On matters concerning Asian American issues, Advancing Justice | AAJC staff are often interviewed for news articles⁴⁷, and provide testimonies⁴⁸ in public hearings. Through its various outreach⁴⁹ and educational efforts⁵⁰, Advancing Justice | AAJC is able to reach thousands of individuals, including their 14,436 Twitter⁵¹ followers and 10,893 Facebook⁵² followers.

The ACLU and Advancing Justice | AAJC plan to analyze, publish, and disseminate to the public, at no cost, the information gathered through this Request. The records requested are not sought for commercial use.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II).⁵³ Specifically, they pertain to the government’s ongoing efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers perceived to have foreign connections. As noted in Part I, supra, these efforts are the subject of considerable public controversy. For example, writing in the Washington Post, the President of Columbia University rejected “the notion that university personnel—and perhaps students themselves—should be asked to monitor the

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⁵³ See also 28 C.F.R. § 16.5(e)(1)(ii).
movements of foreign-born students and colleagues,” calling it “antithetical to who we are.”54 In a public letter, the President of the Massachusetts Institute of Technology stated that subjecting “faculty members, post-docs, research staff and students” to heightened scrutiny “because of their Chinese ethnicity alone” is “corrosive” to the Institute’s “collaborative strength and open-hearted ideals.”55 And in response to remarks by Senator Marco Rubio and FBI Director Christopher Wray, see supra Part I, Congresswoman Judy Chu observed that “the growing perception that simply being of Asian ancestry or having ties to China makes you prone to espionage has created a culture of fear that has negatively impacted the Asian American community.”56 Thus, the records sought relate to a matter of widespread and exceptional public interest.

The need for these records is especially urgent because the government’s scrutiny of scientists and researchers appears to be intensifying. Reuters reported that during a February 6, 2020 conference at the Center for Strategic and International Studies, John Brown, the FBI’s assistant director of counterintelligence, informed attendees that the bureau “had arrested 24 people last year in China-related cases and another 19 already in 2020.”57 The week before, on January 28, the FBI arrested a prominent Harvard researcher for allegedly failing to disclose sources of Chinese funding; the New York Times reported that the arrest “signaled a new, aggressive phase in the Justice Department’s campaign to root out scientists who are stealing research from American laboratories.”58 A month before that, in December 2019, the FBI announced a $5.5 million settlement with the Van Andel Research Institute, resolving allegations that the Institute had “failed to disclose Chinese government grants that funded” two of its researchers.59 And a month before that, in November 2019, the Senate Permanent Subcommittee on Investigations released a 105-page report in which it stated, among other things, that “[f]ederal law enforcement and other relevant agencies should identify U.S.-based entities that serve as recruitment networks, platforms, or foreign government proxies that facilitate or broker in state-sponsored talent recruitment.”60 Also in November 2019, the New York Times reported that “[s]eventy-one institutions, including many of the most prestigious medical schools in the United States, are now investigating 180 individual cases involving potential

57 Hosenball and Brunnstrom, supra note 19.
60 Staff Report, Threats to the U.S. Research Enterprise, supra note 3, at 13.
theft of intellectual property.”61 “The cases,” according to the Times, “began after the N.I.H., prompted by information provided by the F.B.I., sent 18,000 letters last year urging administrators who oversee government grants to be vigilant.”62

The urgent need to inform the public about the government’s efforts in this area is underscored by the significant media interest in what few aspects of those efforts have been revealed to date.63 Given this media interest and lack of public information, there is a critical need to inform the public about the government’s widening efforts to scrutinize scientists and researchers. The requested records should be released now, before the government’s scrutiny of scientists and researchers further intensifies, to allow informed public debate while it may still have an impact. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the relevant implementing regulations.64

IV. Application for Waiver or Limitation of Fees

The ACLU and Advancing Justice | AAJC request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester[s].” 5 U.S.C. § 552(a)(4)(A)(iii).65 The ACLU and Advancing Justice | AAJC also request a waiver of search fees on the grounds that the ACLU and Advancing Justice | AAJC qualify as “representative[s] of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU or Advancing Justice | AAJC.

As discussed above, this Request concerns the government’s efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers perceived to have ties to China or other nations. Relatively little information is publicly available about this wide-ranging initiative. Consequently, the records sought are certain to contribute significantly to the public’s understanding of the government’s efforts—including their impact on members of the scientific community, the risks of profiling based on race and ethnicity, and the consequences for valuable innovation and scientific collaboration in the United States.

62 Id.
64 See 28 C.F.R. § 16.5(e)(1)(ii).
65 See also 28 C.F.R. § 16.10(k)(2).
The ACLU and Advancing Justice | AAJC are not filing this Request to further their commercial interest. As described above, information disclosed by the ACLU and Advancing Justice | AAJC as a result of this FOIA request will be available to the public, including the press, free of charge. The ACLU and Advancing Justice | AAJC intend to publish the records they receive on their websites and through other means of communication. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA’s fee waiver provision. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

**B. The ACLU and Advancing Justice | AAJC are representatives of the news media and the records are not sought for commercial use.**

The ACLU and Advancing Justice | AAJC also request a waiver of search fees on the grounds that the ACLU and Advancing Justice | AAJC qualify as “representatives of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU and Advancing Justice | AAJC meet the statutory and regulatory definitions of “representative[s] of the news media” because they are “entity[ies] that gather[] information of potential interest to a segment of the public, use[] [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also Nat’l Sec. Archive v. Dep’t of Def., 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); Serv. Women’s Action Network v. Dep’t of Def., 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); ACLU of Wash. v. Dep’t of Justice, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); ACLU, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU and Advancing Justice | AAJC regularly turn raw materials into press releases, statements, blogs, reports, and other publications for distributions to the general public at no charge. Requestors are therefore “representative[s] of the news media” for the same reasons [they] are “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to those of the ACLU and Advancing Justice | AAJC to be “representatives of the news media” as well. See, e.g., Cause of Action v. IRS, 125 F. Supp. 3d 145 (D.C. Cir. 2015); Elec. Privacy Info. Ctr., 241 F. Supp. 2d at 10–15 (finding

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66 See also 28 C.F.R. §§ 16.10(k)(2)(ii)–(iii).

67 See also 28 C.F.R. § 16.10(b)(6).
non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); Nat'l Sec. Archive, 880 F.2d at 1387; Judicial Watch, Inc. v. Dep't of Justice, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester). 68

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.” 69

For the reasons above, the ACLU and Advancing Justice | AAJC meet the requirements for a fee waiver here.

*   *   *

Pursuant to applicable statutes and regulations, the ACLU and Advancing Justice | AAJC expect a determination regarding expedited processing within 10 days. See 5 U.S.C. § 552(a)(6)(E)(ii); 28 C.F.R. § 16.5(e)(4) (DOJ, FBI).

If the Request is denied in whole or in part, the ACLU and Advancing Justice | AAJC ask that you justify all deletions by reference to specific exemptions to FOIA. The ACLU and Advancing Justice | AAJC expect the release of all segregable portions of otherwise exempt material. The ACLU and Advancing Justice | AAJC reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Charles Hogle
American Civil Liberties Union

68 Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. See, e.g., Elec. Privacy Info. Ctr., 241 F. Supp. 2d 5; Nat'l Sec. Archive, 880 F.2d at 1387; see also Leadership Conference on Civil Rights, 404 F. Supp. 2d at 260; Judicial Watch, Inc., 133 F. Supp. 2d at 53–54.

69 The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies' removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.
I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi).

Sincerely,

/s/ Charles Hogle
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Exhibit B
MR. CHARLES HOGLE  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
18TH FLOOR  
125 BROAD STREET  
NEW YORK, NY 10004

Request No.: NFP-129274  
Subject: China Scientific Research (On or After January 1, 2017)

Dear Mr. Hogle:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request. Please see the paragraphs below for relevant information about your request.

Your request for the above referenced subject is not searchable in our indices. The FBI Central Records System (CRS) is indexed according to investigatory interests, and it is not arranged in a manner that allows for the retrieval of information in the form you have requested. The FOIA does not require federal agencies to answer inquiries, create records, conduct research, or draw conclusions concerning queried data. Rather the FOIA requires agencies to provide access to reasonably described, nonexempt records. Therefore, your request is being administratively closed.

For questions on how to reasonably describe your request, please email us at foipaquestions@fbi.gov. You may also visit www.fbi.gov and select “Services,” “Information Management,” and “Freedom of Information/Privacy Act” for additional guidance.

If you are not satisfied with the Federal Bureau of Investigation’s determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP’s FOIA STAR portal by creating an account following the instructions on OIP’s website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked “Freedom of Information Act Appeal.” Please cite the FOIPA Request Number assigned to your request so it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. Alternatively, you may contact the FBI’s FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, the subject heading should clearly state “Dispute Resolution Services.” Please also cite the FOIPA Request Number assigned to your request so it may be easily identified.

Sincerely,

Michael G. Seidel  
Section Chief  
Record/Information  
Dissemination Section  
Information Management Division
The Korematsu Legacy: “Stand up for what is right!”

Press Conference on the Korematsu Incarceration Case, 1983 (Credit: Photo by Crystal K. Huie, Courtesy of the Fred. T. Korematsu Institute)
By Gisela Perez Kusakawa

More than 75 years has passed since the United States government forcibly removed and wrongfully incarcerated 120,000 U.S. residents of Japanese ancestry. **Over 5,000 American babies** were born in detention. **About 2,000 people died** in incarceration from a series of causes including **infectious diseases**, **bad sanitation**, or even **shooting** by guards. Human beings were placed behind barbed wire and reduced to **numbers on tags**. A young man by the name of Fred T. Korematsu refused to compromise his freedom and to be reduced to just a number.

Today, we commemorate the birthday of civil rights icon Fred T. Korematsu whose legacy for social justice has fundamentally changed our country and continues to be a beacon for social change to this day. Fred was an ordinary man who had extraordinary courage in the face of an executive order that wrongfully incarcerated **over 120,000 Japanese Americans**. Fred was the plaintiff in a lawsuit that challenged the constitutionality of **Executive Order 9066**, now widely condemned for the incarceration of Japanese Americans. Even in times when it was unpopular to stand up, Fred had the audacity to fight for his rights and the rights of others. His perseverance to make sure that the arc of the **moral universe** bends towards justice fundamentally changed our nation.

Fred was born in Oakland, California on January 30, 1919, He **remembered** saying the pledge of allegiance in school as a student. He **believed** in the American principles and ideals that he was taught in school. Fred never imagined that his own government would incarcerate Americans in detention camps simply based on their ethnicity.

However, the unimaginable happened. On February 19, 1942, President Franklin D. Roosevelt signed **Executive Order 9066**, which wrongfully incarcerated U.S. residents of Japanese descent. Everyone, including children and the elderly, was rounded up. Walter Yoshiharu’s grandfather was one of the estimated 2,000 people
Anna Kaku’s, were forced to live in horse stalls. Students missed their graduation ceremonies. The government shut down shops owned by Japanese Americans. There was no exception to the order. Even families of U.S. servicemen were rounded up and incarcerated.

There were those who resisted the unjust orders. Fred refused to be incarcerated for his ancestry, and resolved to continue to live his life in freedom. When his hometown, San Leandro, California, was declared “off-limits to all people of Japanese ancestry”, Fred remained. For Fred, “[he] was an American citizen, and [] had as many rights as anyone else.” However, on May 30, 1942, Fred was arrested on suspicion of having Japanese ancestry. He was then convicted for violating the Civilian Exclusion Order №34, which required all persons of Japanese ancestry to report to assembly centers where they would then be moved to incarceration camps. After being released from jail, Fred was relocated to the Tanforan assembly center which housed 7,800 civilians. There, Fred was forced to live in “a horse stall with a cot, a straw mattress and one light bulb hanging down.” Fred considered incarceration at the camps worse than jail.

Along with lawyers from the American Civil Liberties Union (ACLU) of Northern California, Fred fought his conviction, and took his case all the way up to the Supreme Court. In *Korematsu v. United States*, the U.S. Supreme Court held that Fred’s imprisonment was constitutional, and that the government action was justified as a military necessity. Justice Frank Murphy denounced the government’s actions in his dissent, writing that the treatment of those of Japanese descent was the “legalization of racism”. This ruling, which essentially would maintain the government’s right to incarcerate American citizens with no due process, would become a dark stain in American history.

Fred would carry the weight of the decision for years to come. His refusal to acquiesce to great injustice was not an easy one. There were those who saw him as a troublemaker, and his criminal record of saying no to Japanese American
After 40 years, his case was reopened, and Fred, at the age of 64, once again resisted the injustice of the Japanese American incarceration. A legal team of pro-bono attorneys, including Asian American Advancing Justice — Asian Law Caucus (at the time the Asian Law Caucus), reopened Fred's case. Even when offered a pardon that would clear his criminal record, Fred refused and said, “As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing. That is if they look like the enemy of our country. Therefore, I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American of any race, creed, or color.” On November 10, 1983, Judge Marilyn Hall Patel of the U.S. District Court for the Northern California overturned Fred's wrongful conviction.

Fred became “a symbol of principled resistance”. In 1998, he was awarded the Presidential Medal of Freedom. Before his passing, Fred warned, “Fear and prejudices against minority communities are too easy to evoke and exaggerate, often to serve the political agendas of those who promote those fears.” Fred's words echo in the chambers of today's political environment. His advice to speak up when you feel something is wrong, is more relevant than ever. “If you have the feeling that something is wrong, don't be afraid to speak up.”

Fred continues to inspire courage and a thirst for justice in the next generation. His torch for social justice lives on with his daughter, Karen Korematsu and a community of advocates. In 2009, Karen established the Fred T. Korematsu Institute to continue her father's legacy and work to advance racial equity, social justice and human rights for all.

“Speaking up for the civil rights of Asian Americans courses through her bloodline,” said John C. Yang, president and executive director of Advancing Justice | AAJC. “[H]er desire to make the world a better place for everybody is infectious.”

The lessons from the incarceration of Japanese Americans are particularly relevant
before great injustice to protect vulnerable communities. From the Muslim Ban to the modern-day detention system imprisoning families including children, we must remain vigilant of existing wrongs, stand up in solidarity, and speak up to prevent the past from repeating itself.

This week marked the third anniversary of the first Muslim Ban enacted by President Trump through Executive Order (EO) 13759. Following a nationwide temporary injunction, President Trump revoked the original order and signed EO 13780, dubbed Muslim Ban 2.0, on March 6, 2017. On September 24, 2017, when the time provisions of Muslim Ban 2.0 expired, the president issued Presidential Proclamation 9645, Muslim Ban 3.0. This third iteration is the current Muslim Ban and has been in effect since December 4, 2017 when the Supreme Court allowed the ban to go into full effect while litigation was pending. On June 26, 2018, the Supreme Court upheld the Muslim Ban allowing it to permanently remain in effect indefinitely.

The Muslim Ban has and continues to impact millions including thousands of Muslim Americans, Muslim immigrants and their loved ones. Over 170 million foreign nationals worldwide fall under the Muslim Ban. When the earlier iteration of the Muslim Ban was enacted, Karen and many following the legacy of Fred T. Korematsu decided to stand up against power, xenophobia, and Islamophobia. Karen, along with Jay Hirabayashi and Holly Yasui, submitted an amicus brief to the Supreme Court opposing the Muslim Ban and cautioned against “the Judiciary turn[ing] a blind eye to broad-scale governmental actions targeting particular racial, ethnic, or religious groups.” Asian Americans Advancing Justice and other organizations joined the amicus brief.

Karen was not afraid to speak up when the Supreme Court simultaneously upheld the Muslim Ban and overturned Korematsu v. United States. Even though the Supreme Court overturned Korematsu, Karen was not happy about the Supreme Court “replac[ing] one injustice with another.” “For the Supreme Court to overrule
Speaking at a rally against the Muslim Ban last year, Karen said, “My father never gave up hope that he would see justice. We need to work together and support each other. Don’t be afraid to speak up.”

We must learn from the mistakes of the past, and be vigilant to stand up before present injustices. Like Fred and Karen Korematsu, we must not be afraid to speak up. We must fight for our constitutional rights and that of vulnerable communities.

— — —

As we commemorate the life and legacy of Fred T. Korematsu, please help Korematsu’s legacy and passion for social justice continue at bit.ly/korematsu75. Stand up for what is right. Together, we can stop injustices like Japanese American incarceration and attacks on vulnerable communities from happening again.

Gisela Perez Kusakawa is the NAPABA Law Foundation Fellow at Asian Americans Advancing Justice | AAJC.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al.,

Petitioners,

and

PEOPLE OF THE STATE OF NEW YORK, by
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Intervenor-Plaintiff,

v.

DONALD TRUMP, President of the United States, et al.,

Respondents.

Civil Action No.
1:17-cv-00480
(Amon, J.)

BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
JAY HIRABAYASHI, HOLLY YASUI, KAREN KOREMATSU,
CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL AND NEW YORK BAR
ASSOCIATIONS OF COLOR, AS AMICI CURIAE IN SUPPORT OF THE RELIEF
Sought by Petitioners and Intervenor-Plaintiff

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INTEREST OF AMICI CURIAE

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Korematsu Center has a special interest in addressing government action targeted at classes of persons based on race, nationality, or religion. Drawing on its experience and expertise, the Korematsu Center seeks to ensure that courts understand the historical—and, at times, profoundly unjust—underpinnings of arguments asserted to support the exercise of such unchecked executive power.¹

Jay Hirabayashi, Holly Yasui, and Karen Korematsu are children of three Japanese Americans who challenged the government’s racial curfew and detention programs in the United States Supreme Court during World War II: Gordon Hirabayashi (see Hirabayashi v. United States, 320 U.S. 81 (1943)); Minoru Yasui (see Yasui v. United States, 320 U.S. 115 (1943)); and Fred Korematsu (see Korematsu v. United States, 323 U.S. 214 (1944)). Their interest is in reminding this Court of the legacy those judicial decisions had on their generation and will have on future generations, and the impact of judicial decisions that fail to protect men, women, and children belonging to disfavored groups in the name of national security. Guilt, loyalty, and threat are individual attributes. When these attributes are imputed to racial, religious, or national

¹ Amici curiae file this brief pursuant to the Court’s February 13, 2017 docket order granting their motion for leave to file.
origin groups, courts play a crucial role in ensuring that there is a legitimate basis. Disaster has occurred when courts have refused to play this role.

During World War II, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu stood largely alone. Here, their children are gratified to have such a broad coalition standing with them, and together, standing with those communities and individuals most directly harmed by the Executive Order:

Asian Americans Advancing Justice ("Advancing Justice") is the national affiliation of five nonprofit, nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

The Asian American Bar Association of New York ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian-American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By
combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The President’s Executive Order No. 13,769, which would curtail the rights of immigrants to be free from discrimination because of their race, national origin, or religion, raises issues central to AALDEF’s mission. In 1982, AALDEF testified before the U.S. Commission on Wartime Relocation and Internment of Civilians, in support of reparations for Japanese Americans forcibly relocated and imprisoned in camps during World War II. After 9/11, we represented more than 800 individuals from Muslim-majority countries who were called in to report to immigration authorities under the Special Registration (“NSEERS”) program. AALDEF is currently providing community education and legal counseling to Asian Americans affected by the challenged Executive Order.

The membership of amicus curiae the Hispanic National Bar Association (“HNBA”) is comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly participates as amicus curiae in cases concerning immigration and the protection of refugees.

LatinoJustice PRLDEF, Inc. (“LatinoJustice”) is a national not-for-profit civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice’s continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants’ rights, language rights, redistricting, and
voting rights. During its 45-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging multiple forms of racial discrimination by government actors including law enforcement practices that illegally target racial groups based upon their race, natural origin and immigration status.

The National Asian Pacific American Bar Association (“NAPABA”) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over seventy-five state and local Asian Pacific American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The National Bar Association (“NBA”) is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. Throughout its history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession. The NBA represents approximately 66,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.
The National Native American Bar Association’s (“NNABA”) core mission is advancing justice for Native Americans, Native Hawaiians and Alaska Natives, communities which have survived injustice in the American legal system for hundreds of years, often as a result of unchecked power and institutionalized discrimination. NNABA believes justice for all Americans is advanced when, as here, citizens stand together to examine the fairness of the actions of our institutions.

The South Asian Bar Association of North America (“SABA”) is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. SABA provides a vital link for the South Asian community to the law and the legal system. Within the United States, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Executive Order.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

History has taught us the risk of everlasting stains to this Nation’s constitutional fabric when the Judiciary turns a blind eye to broad-scale governmental actions targeting particular racial, ethnic, or religious groups. Notwithstanding that history, the federal government maintains that this Court should defer to the Executive’s determinations with regard to Executive Order No. 13,769, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States,” 82 Fed. Reg. 8977 (Jan. 27, 2017) (“Executive Order”). Respondents’ Memorandum of Law In Support of Motion to Dismiss the Petition, and In Opposition to Petitioners’ Motion for a Stay (D.E. #66-1), at 15-16. In other cases pertaining to the Executive Order, the federal government has even argued that the President has “unreviewable authority” to suspend the admission of “any class of aliens.” Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and

In support of its sweeping contention that the Executive Order is immune from judicial review, the federal government has invoked the so-called “plenary power” doctrine—a doctrine whose limited role in modern American jurisprudence cannot bear the weight the government places on it. The plenary power doctrine derives from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“*Chinese Exclusion Case*”), that were premised on racist and nativist precepts we now reject. In upholding a law that prohibited Chinese laborers from returning to the United States, the *Chinese Exclusion Case* relied on pejorative stereotypes to eschew judicial scrutiny.

Hearkening back to dissents from early cases, and informed by contemporary norms and the lessons of history, modern courts have refused to afford complete deference to executive and legislative decisions in the realm of immigration. *Amici* do not dispute that the Executive wields broad discretion with respect to national security considerations, nor do they challenge the Executive’s broad discretion to determine whether and in what circumstances particular aliens may be admitted into the United States. But (it should go without saying) that discretion is not without limits: it is bounded by the Constitution, and it is the role of the courts to ensure that such discretion is lawfully exercised.

As the Ninth Circuit recognized in refusing to stay an injunction blocking the Executive Order, judicial review is acutely important where, as here, the challenged action promulgates a broadly-applicable policy—particularly one that targets groups based on characteristics such as
race, religion, or national origin. Slip op. at 15-16. Such action, in the name of national security, is all too familiar to the Korematsu Center, which owes its existence to the forced relocation and incarceration during World War II of more than 110,000 men, women, and children of Japanese descent that was challenged—to no avail—in Korematsu v. United States, 323 U.S. 214 (1944). Decades later, upon finally vacating Mr. Korematsu’s conviction for defying the baseless military order, a federal court observed that the Korematsu precedent “stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees”; “national security must not be used to protect governmental actions from close scrutiny and accountability”; and courts “must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.” Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

That caution should be heeded here, and this Court should subject the Executive Order to appropriate judicial scrutiny.

ARGUMENT

I. THE “PLENARY POWER” DOCTRINE ORIGINATED FROM RACIST NOTIONS THAT COURTS NOW REJECT.

1. To the extent the Supreme Court ever recognized a truly “plenary” power that would preclude judicial review of any constitutional claims (which it has not), that conception is linked to racist attitudes from a past era and has long since fallen out of favor.

In the Chinese Exclusion Case, the Court upheld a statute preventing the return of Chinese laborers who had departed the United States prior to its passage. 130 U.S. at 581-582. Describing the reasons underlying the law’s enactment, the Court characterized Chinese laborers as “content with the simplest fare, such as would not suffice for our laborers and artisans,” and observed that they remained “strangers in the land, residing apart by themselves[,] . . . adhering
to the customs and usages of their own country” and unable “to assimilate with our people.” *Id.* at 595. “The differences of race added greatly to the difficulties of the situation.” *Id.* Residents of the West coast, the Court explained, warned of an “Oriental invasion” and “saw or believed they saw . . . great danger that at no distant day [the West] would be overrun by them, unless prompt action was taken to restrict their immigration.” *Id.*

Far from applying a skeptical eye to the law in light of the clear animus motivating its passage, the Court found that “[i]f the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.” *Id.* at 606. See also Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN AM. L. J. 13, 15 (2003). In reality, the “right of self-preservation” that the Court validated as justification for the government’s unbounded power to exclude immigrants was ethnic and racial self-preservation, not the preservation of borders or national security. 130 U.S. at 608; see *id.* at 606 (“It matters not in what form . . . aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.”). Similar racist and xenophobic attitudes are evident in decisions following the *Chinese Exclusion Case*. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (upholding requirement that Chinese resident aliens offer “at least one credible white witness” in order to remain in the country); *id.* at 730 (noting Congress’s belief that testimony from Chinese witnesses could not be credited because of “the loose notions entertained by the witnesses of the obligation of an oath” (quoting *Chinese Exclusion Case*, 130 U.S. at 598)).
2. While the Court’s early plenary power decisions were undoubtedly influenced by such attitudes now repudiated, the Court nonetheless recognized that the government’s sovereign authority is subject to constitutional limitations. See Chinese Exclusion Case, 130 U.S. at 604 (“[S]overeign powers[] [are] restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”). And even in those early years, the Court divided over the reach of the government’s plenary power in light of those limitations. Fong Yue Ting, which upheld a law requiring Chinese laborers residing in the United States to obtain a special certificate of residence to avoid deportation, generated three dissenting opinions. See 149 U.S. at 738 (Brewer, J., dissenting) (“I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens.”); id. at 744 (Field, J., dissenting); id. at 762 (Fuller, J., dissenting) (similar). Even Justice Field, who authored the Court’s opinion in the Chinese Exclusion Case, sought to limit the plenary power doctrine’s application with regard to alien residents:

As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our constitution.

Id. at 754 (Fields, J., dissenting).

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and grew. Dissenting in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), which upheld a provision permitting the deportation of resident aliens who were members of the Communist Party, Justice Douglas quoted Justice Brewer’s dissent in Fong Yue Ting, observing that it “grows in power with the passing years”:
This doctrine of powers inherent in sovereignty is one both indefinite and dangerous . . . . The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. at 599-600 (Douglas, J., dissenting) (quoting Fong Yue Ting, 149 U.S. at 737-738 (Brewer, J., dissenting)) (emphasis added).

In another McCarthy-era precedent, four Justices advocated for limitations on the plenary power doctrine. In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, despite his resulting detention at Ellis Island. In dissent, Justice Black, joined by Justice Douglas, reasoned that “[n]o society is free where government makes one person’s liberty depend upon the arbitrary will of another.” Id. at 217. “Dictatorships,” he observed, “have done this since time immemorial. They do now.” Id. Justice Jackson, joined by Justice Frankfurter, added that, while in his view the “detention of an alien would not be inconsistent with substantive due process,” such individuals must be “accorded procedural due process of law.” Id. at 224.

3. Perhaps reflective of the shift away from race-based characterizations and other outdated notions prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limits on the federal government’s authority over immigration matters.

For example, in Reno v. Flores, 507 U.S. 292 (1993), the Court held that, despite the broad power of the political branches over immigration, INS regulations must at least “rationally advance[e] some legitimate governmental purpose.” Id. at 306. In Landon v. Plasencia, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be
afforded due process in an exclusion proceeding, notwithstanding the government’s expansive discretion to exclude.  Id. at 33.  And in Zadvydas v. Davis, 533 U.S. 678 (2001), in response to the government’s contention that “Congress has ‘plenary power’ to create immigration law, and . . . the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area,” the Court observed that such “power is subject to important constitutional limitations.” Id. at 695 (citations omitted). “[F]ocusing upon those limitations,” the Court determined that the indefinite detention of aliens deemed removable would raise “serious constitutional concerns.” Id. at 695, 705. See also State of Wash. v. Trump, No. 17-35105, slip op. at 13-18 (9th Cir. Feb. 9, 2017) (collecting cases demonstrating reviewability of federal government action in immigration and national security matters).

Even the decisions on which the federal government has relied for its “plenary” power do not support its invocation in the present context. In fact, the Court’s most recent such decision supports the conclusion that, after more than a century of erosion, the “plenary power” doctrine as the federal government conceives it no longer exists. In Kerry v. Din, 135 S. Ct. 2128 (2015), the Court considered a due process claim arising from the denial without adequate explanation of a spouse’s visa application. Although it described the power of the political branches over immigration as “plenary,” Justice Kennedy’s concurring opinion in Din makes clear that courts may review an exercise of that power to ensure that the reason offered for the exclusion of an alien is “legitimate and bona fide.” Justice Kennedy explained that, although the Court in Kleindienst v. Mandel, 408 U.S. 753 (1972), had declined to balance the constitutional rights of American citizens injured by a visa denial against “Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,’” Kerry, 135 S. Ct. at 2139 (quoting Mandel, 408 U.S. at 766), the Court did
inquire “whether the Government had provided a ‘facially legitimate and bona fide’ reason for its action,” id. at 2140 (quoting Mandel, 408 U.S. at 770). And while as a general matter courts are instructed not to “look behind” the government’s asserted reason for its decision provided it is “bona fide and legitimate,” Justice Kennedy stated that exceptions to that rule would apply if the challenger made “an affirmative showing of bad faith.” Id. at 2141.

To be sure, Justice Kennedy’s opinion in Din acknowledged that the political branches are entitled to wide latitude and deference in immigration matters. But, as the Ninth Circuit recognized, Din (and Mandel before it) concerned an individual visa denial on the facts of that case. By contrast, the Executive Order sets a nationwide immigration policy, suspending visas, prohibiting entry, and foreclosing any adjudications for all aliens of certain nationalities. That distinction strongly militates in favor of a more rigorous review of the Executive Order. While it may be sensible for courts to defer to the judgment of the political branches when considering the application of immigration law to a particular alien, “the President’s promulgation of a sweeping immigration policy,” slip op. at 16—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more exacting judicial scrutiny.

All told, the proposition that courts may not review the Executive Order is unsupported by modern judicial precedent. Even in cases concerning individual visa denials, the Court has inquired as to whether the government offered a “legitimate and bona fide” reason for the denial and has indicated that courts may look behind the government’s asserted rationale in circumstances suggesting bad faith. Where, as here, the courts are asked to review a broadly-applicable policy—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—the Court’s cases demand a more searching judicial review.
Whatever the standard, this Court should reject the unsupported proposition that the President’s Executive Order is immune from judicial review.

II. **KOREMATSU STANDS AS A STARK REMINDER OF THE NEED FOR VIGILANT JUDICIAL REVIEW OF GOVERNMENTAL ACTION TARGETING DISFAVORED GROUPS IN THE NAME OF NATIONAL SECURITY.**

In contending that the President’s discretion to exclude “any class of aliens” is plenary and unreviewable—and, in any event, is justified by national security—the federal government has asked the courts to take its word for it. But the notion that the political branches might use national security as a smokescreen to discriminate against disfavored classes is not an unfounded concern. This Court need look no further than the tragic chapter in our Nation’s history that gave rise to *Korematsu v. United States*, 323 U.S. 214 (1944).

Almost exactly seventy-five years ago, on February 19, 1942, President Roosevelt issued Executive Order No. 9066, which authorized the Secretary of War to designate military areas from which “any or all persons” could be excluded and “with respect to which, the right of any person to enter, remain in, or leave” would be subject to “whatever restrictions the Secretary of War or the appropriate Military Commander may impose.” Executive Order No. 9066, “Authorizing the Secretary of War to Prescribe Military Areas,” 7 Fed. Reg. 1407 (Feb. 19, 1942). Although it did not explicitly refer to Japanese Americans, that order resulted in the forcible relocation and incarceration of more than 110,000 men, women, and children of Japanese descent. Fred Korematsu, one of those Japanese Americans, was convicted for defying the military’s invocation of the order. The Supreme Court upheld his conviction, along with the convictions of Gordon Hirabayashi and Minoru Yasui, thus effectively sanctioning Japanese-American incarceration during World War II on the purported basis of military necessity.
Korematsu v. United States, 323 U.S. 214 (1944); see also Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

The Court’s decision in Korematsu produced vigorous dissents, including one by Justice Murphy, who questioned the validity of the military interest the government advanced. Although acknowledging that the discretion of those entrusted with national security matters “must, as a matter of . . . common sense, be wide,” Korematsu, 323 U.S. at 234, Justice Murphy opined that “[i]t is essential that there be definite limits to military discretion” and that individuals not be “left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.” Id. In his view, the Order “clearly d[id] not meet th[is] test” as it relied “for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage.” Id. at 235. While conceding that “there were some disloyal persons of Japanese descent on the Pacific Coast,” Justice Murphy dismissed the “infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group” as nothing more than “th[e] legalization of racism.” Id. at 240-241, 242.

History has proven Justice Murphy right. More than a half-century after the Court’s decision, the Solicitor General acknowledged that, contrary to its representations, the federal government knew at the time of the mass incarcerations that only “a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody.” U.S. Dep’t of Justice, Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases; see also Neal K. Katyal, The Solicitor General and Confession of
The federal government’s revelation occurred decades after a district court reversed Mr. Korematsu’s conviction and found “substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court.” Korematsu, 584 F. Supp. at 1420. The Ninth Circuit made similar findings on its way to vacating Gordon Hirabayashi’s convictions. See Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987) (observing that, although the Supreme Court accepted the government’s contention that “the curfew was justified by military assessments of emergency conditions,” available materials demonstrated that “there could have been no reasonable military assessment of an emergency at the time, that the orders were based upon racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens”) (footnotes omitted).

The Supreme Court’s decision in Korematsu gave virtually a blank check to the Executive Branch to take action against disfavored minorities in the name of national security. Although the government asserted a facially valid justification for its action, that justification was later discredited. The revelation that the government’s unprecedented action was not in fact necessary is but one reason that Korematsu is not only widely understood as wrongly decided as a matter of law, but remains a black mark on our Nation’s history and serves as a stark reminder of the dire consequences that result when abuses go unchecked by the Judiciary. See, e.g., Michael Stokes Paulsen, Symposium: The Changing Laws of War: Do We Need A New Legal Regime After September 11?: The Constitution of Necessity, 79 NOTRE DAME L. REV. 1257, 1259 (2004)

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2 Like Korematsu and Hirabayashi, Yasui petitioned for a writ of error coram nobis dismissing his indictment, vacating his conviction, and declaring the military order unconstitutional. In Yasui’s case, the court granted the government’s motion to dismiss the indictment and vacate his conviction without finding that his constitutional rights had been violated. See Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985). Accordingly, Yasui’s conviction was invalidated, but without any findings of fact to prove the injustice he suffered.
(Complete “judicial acquiescence or abdication” of performing checks on Presidential power “has a name. That name is Korematsu.”).

Korematsu, along with Plessy v. Ferguson, is regarded as “embod[y]ing a set of propositions that all legitimate constitutional decisions must be prepared to refute.” Jamal Greene, The Anticanon, 125 HARV. L. REV. 379, 380 (2011). History may look similarly at this period if courts allow the Executive Order to evade robust review based on a plenary power doctrine rooted in outdated notions and xenophobia, or an unwillingness to apply healthy judicial skepticism to government action taken in the name of national security. This Court should not abdicate its duty to stand as a bulwark against governmental action that undermines our core constitutional principles.
CONCLUSION

For the foregoing reasons, this Court should grant the relief sought by Petitioners and Intervenor-Plaintiff.

Dated: February 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2017, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Eastern District of New York by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 16, 2017

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