

Re: Docket No. PCLOB-2022-0001

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

We are pleased to provide this response to the PCLOB's request for comments on the agenda for the upcoming public forum on privacy and liberties issues concerning the government's efforts to counter domestic terrorism. While we recognize the need to combat far-right violence more effectively, we are concerned that many of these efforts will erode core constitutional protections and work to the detriment of the very communities that are most affected by it. We ask, in particular, that the agenda include significant attention to the impacts of these efforts on First Amendment-protected activities and on racial, religious, and other minority groups, with specific attention to the topics discussed below. These impacts are often attributable to a framework that emphasizes ideology over action and affords broad discretion to law enforcement to conduct investigations and surveillance without requiring individualized suspicion of violent criminal activity. We then examine the intersection of these two areas of concern with the use of technology, namely social media tracking.

We also include here four Brennan Center reports touching on the topics discussed below that may be useful to the Board as it undertakes its work: 1) *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*; 2) *Community Investment, Not Criminalization*; 3) *Social Media Monitoring*; and 4) *National Security and Local Police*.¹ Please let us know if we can provide additional recommendations regarding resources or speakers who can speak to these impacts as the Board constructs its agenda for the forthcoming public forum.

1. Framework to address domestic terrorism captures ideology and other non-criminal activity

Our first area of concern is that federal law enforcement defines its mandate to address domestic terrorism too broadly, capturing activity protected by the First Amendment and opening the door to the targeting of minority communities.

a. Going beyond the statutory definition of domestic terrorism

Federal law defines domestic terrorism (DT) 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.² Departing from this statutory definition, counterterrorism agencies also use the supplementary "domestic violent extremism" (DVE) framework as part of their DT efforts, even though this term is not consistently defined across the government, creating confusion about precisely what activity is covered.³ The DVE framework opens the door for law

¹ Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security*, April 20, 2022, <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>; Harsha Panduranga, *Community Investment, Not Criminalization*, Brennan Center for Justice, June 17, 2021, <https://www.brennancenter.org/our-work/research-reports/community-investment-not-criminalization>; Faiza Patel et al., *Social Media Monitoring*, Brennan Center for Justice, updated March 11, 2020, <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>; and Michael Price, *National Security and Local Police*, Brennan Center for Justice, December 10, 2013, <https://www.brennancenter.org/our-work/research-reports/national-security-and-local-police>.

² 18 U.S. Code § 2331(5).

³ As a recent Department of Homeland Security (hereinafter DHS) document noted in recommending the adoption of a consistent definition of DVE: "Multiple definitions of domestic violent extremism and violent extremist activity are

enforcement to selectively target individuals based on activity protected by the First Amendment—that is, based on whether they are perceived to have “extremist” views rather than whether they have engaged in, or credibly threatened to engage in, violence that fits the legal definition of terrorism.

The Federal Bureau of Investigation’s (FBI) DVE framework—which the Department of Homeland Security (DHS) and the Intelligence Community have adopted—is organized around ideologies rather than a record of violence or operational links.⁴ It groups the documented threat of violent white supremacy with the largely unsubstantiated threat of Black separatism under the umbrella of Racially or Ethnically Motivated Violent Extremists,⁵ and includes within the Abortion-Related Violent Extremists classification a category of pro-choice DVEs, although there is no evidence that such a movement exists.⁶ As a result, in addition to centering ideology in place of suspicion of violent criminal activity, the DVE framework obscures serious threats of violence and elevates less serious or non-existent ones. Further, combining within a single category groups that do not work with each other—and in fact often stand in opposition—makes little sense if the goal of such a grouping is more efficiently pooling intelligence and law enforcement resources.

b. “Violence prevention” as law enforcement overreach

The same basic notion that factors untethered to suspicion of violent criminal activity are an appropriate focus of counterterrorism efforts plagues DHS’s violence prevention initiatives, coordinated by its Center for Prevention Programs and Partnerships (CP3), which was rolled out in May 2021.⁷ CP3 grows out of the countering violent extremism (CVE) programs of the Obama era, which relied on widely discredited theories of terrorist radicalization that painted Muslim religious practices and the expression of political grievances as precursors to terrorist violence.⁸ Although these programs have run for years, DHS’s evaluations of them have failed to measure whether they actually reduce violence, instead relying on proxies such as the number of trainings or the establishment of mechanisms for reporting.⁹

DHS officials have conceded that CVE was biased due to its focus on “specific religious and ethnic communities,” but the department has not grappled with the flaws in the underlying policy

currently being used by the Federal Government, including by the Federal Bureau of Investigation (FBI), ODNI [Office of the Director of National Intelligence], and DOD [Department of Defense].” U.S. DHS Office of the Chief Security Officer, *Report to the Secretary of Homeland Security Domestic Violent Extremism Internal Review: Observations, Findings, and Recommendations*, March 11, 2022, 8, <https://www.dhs.gov/sites/default/files/2022-03/Report%20to%20the%20Secretary%20of%20Homeland%20Security%20Domestic%20Violent%20Extremism%20Internal%20Review%20Observations%2C%20Findings%2C%20and%20Recommendations.pdf>.

⁴ Federal Bureau of Investigation (hereinafter FBI) and DHS, *Strategic Intelligence Assessment and Data on Domestic Terrorism*, May 2021, 5, <https://www.fbi.gov/file-repository/fbi-dhs-domestic-terrorism-strategic-report.pdf/view>; and Office of the Director of National Intelligence, (U) *Domestic Violent Extremism Poses Heightened Threat in 2021*, March 1, 2021, 4, <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.

⁵ FBI, “Domestic Terrorism Reference Guide: Racially or Ethnically Motivated Violent Extremism,” 2020, https://www.scribd.com/document/489466086/RMVE-FBI-Terrorism-Guide#from_embed.

⁶ Emily Shugerman and Spencer Ackerman, “The FBI Makes a Bizarre Claim about Pro-choice Terrorism,” *Daily Beast*, February 11, 2020, <https://www.thedailybeast.com/the-fbi-makes-a-bizarre-claim-about-pro-choice-terrorism>.

⁷ DHS, “Center for Prevention Programs and Partnerships,” accessed April 25, 2022, <https://www.dhs.gov/CP3>.

⁸ Faiza Patel and Megan Koussik, *Countering Violent Extremism*, Brennan Center for Justice, March 26, 2017, <https://www.brennancenter.org/issues/protect-liberty-security/government-targeting-minority-communities/countering-violent>.

⁹ See, e.g., Office for Targeted Violence and Terrorism Prevention (OTVTP), *FY2016 Grant Evaluations*, DHS, October 2021, https://www.dhs.gov/sites/default/files/2021-12/21_1220_st_CVE_Final_Report-10-4-21_0.pdf.

framework.¹⁰ Instead, through CP3, it has expanded the model with the goal of addressing a broader range of violence than only terrorism associated with Muslims, with “domestic violent extremism” as a point of stated emphasis.¹¹ Like CVE, CP3 also seeks—directly and through grants—to train law enforcement officials, educators, public health officials, social workers, and private citizens to identify and report people who show purported warning signs that they might commit an act of “targeted violence” or terrorism sometime in the future.¹² These supposed indicators include some combination of vague and commonplace characteristics like holding a grievance, having an “extremist” view, being socially isolated, and feeling hopeless.¹³

All of these signs are so overbroad as to be meaningless and allow for well-documented biases to inform who is perceived as dangerous.¹⁴ Indeed, directing law enforcement agents and their proxies to counter “radical” ideologies or identify ill-defined “concerning behaviors” will undoubtedly lead to the targeting of marginalized groups exercising their constitutionally protected rights to challenge the status quo, rather than white supremacists who have long been deeply embedded in powerful government institutions like law enforcement and the military. History provides ample evidence of this point: law enforcement has long treated as “radical” ideas that have stood in opposition to established structures of power, such as civil rights, labor organizing, or women’s suffrage.¹⁵

2. Dearth of safeguards for domestic intelligence collection

Since 9/11, intelligence collection and sharing programs have grown exponentially. While it is important to ensure that law enforcement agencies collect and share credible information about

¹⁰ Rupa Shenoy, “Critics Say Biden’s Plan to Combat Domestic Extremism Repeats Past Mistakes,” *World*, July 1, 2021, <https://theworld.org/stories/2021-07-01/critics-say-biden-s-plan-combat-domestic-extremism-repeats-past-mistakes>.

¹¹ DHS, “Center for Prevention Programs and Partnerships,” (under “CP3 Background”).

¹² See generally Panduranga, *Community Investment, Not Criminalization*.

¹³ See, e.g., DHS, *Notice of Funding Opportunity (NOFO) Fiscal Year 2022 Targeted Violence and Terrorism Prevention (TVTP) Grant Program*, April 4, 2022, 51, <https://www.dhs.gov/sites/default/files/2022-04/FY%202022%20TVTP%20Notice%20of%20Funding%20Opportunity.pdf> (listing “extremist ideology” and “specific grievance” as factors informing an assessment of whether an individual poses a threat); DHS, “FAQ Sheet: What Are Risk Factors and Indicators?” accessed April 25, 2022, https://www.dhs.gov/sites/default/files/publications/risk_factors_and_indicators.pdf (mentioning social isolation as a risk factor for violence); and Panduranga, *Community Investment, Not Criminalization*, Table 4 (reproducing a document used by a 2020 Targeted Violence and Terrorism Prevention grant recipient that lists “feelings of hopelessness” as a “concerning behavior” potentially indicative of violence).

¹⁴ Zaid Jilani and Jeremy Adam Smith, “How Challenging Stereotypes Can Save Black Lives,” *Greater Good*, June 8, 2020, https://greatergood.berkeley.edu/article/item/how_challenging_stereotypes_can_save_black_lives; Madeline Will, “Teachers Are as Racially Biased as Everybody Else, Study Shows,” *EducationWeek*, June 9, 2020, <https://www.edweek.org/teaching-learning/teachers-are-as-racially-biased-as-everybody-else-study-shows/2020/06>; Yesenia Merino, Leslie Adams, and William J. Hall, “Implicit Bias and Mental Health Professionals: Priorities and Directions for Research,” *Psychiatric Services* 69 (2018): 723-25, <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201700294>; and Phillip Atiba Goff, “Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds,” American Psychological Association, press release, 2014, <https://www.apa.org/news/press/releases/2014/03/black-boys-older>.

¹⁵ Martin Luther King, Jr. Research and Education Institute, “Federal Bureau of Investigation (FBI),” Stanford University, accessed April 25, 2022, <https://kinginstitute.stanford.edu/encyclopedia/federal-bureau-investigation-fbi>; Chip Gibbons, “Government Surveillance of Activists and Labor Organizers Is Alive and Well,” *Jacobin*, June 10, 2020, <https://www.jacobinmag.com/2020/06/government-surveillance-activists-labor-organizers-pinkertons>; Alli Hartley-Kong, “Radical Protests Propelled the Suffrage Movement. Here’s How a New Museum Captures That History,” *Smithsonian*, October 26, 2020, <https://www.smithsonianmag.com/history/radical-protests-propelled-suffrage-movement-heres-how-new-museum-captures-history-180976114/>; and Michael German, “Who’s a Radical Now?” American Civil Liberties Union, December 10, 2012, <https://www.aclu.org/blog/national-security/privacy-and-surveillance/whos-radical-now>.

actual threats of violence, the weakening of safeguards over the last two decades—combined with new and powerful tools for collecting information—have resulted in the collection and dissemination of false, biased, and unreliable information, with little accountability, often untethered from criminal activity, and focused on constitutionally protected speech. As the administration concentrates on domestic terrorism, the risks for Americans are magnified.

a. FBI

For the last two decades, the FBI has exercised increasingly broad authority to collect information about Americans not suspected of criminal activity. For example, the 2008 Attorney General’s Guidelines for Domestic FBI Operations (AG Guidelines), issued by Attorney General Michael Mukasey, permit agents to open “assessments” based only on a broadly defined “authorized purpose,” such as preventing crime or terrorism.¹⁶ During an assessment, agents may recruit and task informants, map communities on the basis of race and ethnicity, and conduct physical surveillance, database searches, and interviews.¹⁷ The jettisoning of one of the key reforms triggered by the 1975 investigation carried out by the Church Committee—the requirement of a factual predicate for investigations—has given the FBI immense discretion in selecting targets and has opened the door to targeting people on the basis of ideology, unwarranted intrusions of privacy, and racial, religious, and ethnic profiling.¹⁸

The AG Guidelines do bar investigations and surveillance “solely for the purpose of monitoring activities protected by the First Amendment.”¹⁹ But this has not served as an effective safeguard: it is easy to cite a pretextual but constitutionally neutral justification (for example, an unsubstantiated contention that a protest could turn violent) to collect information on Americans’ political organizing and religious practices. Likewise, the 2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity has done little to constrain these authorities—among other loopholes, it exempts “threats to national or homeland security,” permitting agents to consider protected traits without individualized suspicion of wrongdoing.²⁰

Indeed, the FBI has marked minority communities, activists, and protest movements for investigation. In the post 9/11 era, the FBI has routinely targeted Muslims absent suspicion of any criminal activity, infiltrating mosques and manufacturing terrorism prosecutions of young Muslim

¹⁶ Michael B. Mukasey, Department of Justice, *The Attorney General’s Guidelines for Domestic FBI Operations* (hereinafter *AG Guidelines*), September 29, 2008, 16-20, <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

¹⁷ *AG Guidelines*, 16-20; and FBI, *Domestic Investigations and Operations Guide* (hereinafter *DIOG*), updated September 28, 2016, § 4.3.3, <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version/fbi-domestic-investigations-and-operations-guide-diog-2016-version-part-02-of-02/view> (The DIOG, also issued in 2008 and last updated in September 2016, implements the 2008 AG Guidelines.).

¹⁸ Michael German and Emily Hockett, “Standards for Opening an FBI Investigation So Low They Make the Statistic Meaningless,” Brennan Center for Justice, May 2, 2017, <https://www.brennancenter.org/our-work/analysis-opinion/standards-opening-fbi-investigation-so-low-they-make-statistic>.

¹⁹ *AG Guidelines*, 13.

²⁰ Department of Justice, *Guidance For Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, December 2014, 4, https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf; see also Faiza Patel, “Recreating Old Loopholes: Thoughts on the Revised Guidance for Federal Law Enforcement,” *Lawfare* (blog), December 23, 2014, <https://www.lawfareblog.com/recreating-old-loopholes-thoughts-revised-guidance-federal-law-enforcement>.

men using sting operations.²¹ A leaked 2017 FBI intelligence assessment also described the creation of a new domestic terrorism category called “Black Identity Extremism,” based on the claim that some Black activists opposing police brutality may pose a violent threat to law enforcement.²² The term was used to justify a nationwide operation called “Iron Fist,” in which FBI agents engaged in enhanced surveillance and investigations of Black activists.²³

The Justice Department also exploited the FBI’s pervasive authorities to launch the “China Initiative.” The China Initiative targeted Chinese and Chinese-American scientists and technologists for investigation and selective prosecution based on their race and national origin (often referred to as a “nexus” to China), and encouraged academic institutions to closely monitor Asian students and faculty in a misguided effort to combat economic espionage.²⁴ The China Initiative was, commendably, ended in February 2022, with the Justice Department acknowledging that it “helped give rise to a harmful perception...that we in some way view people with racial, ethnic or familial ties to China differently.”²⁵ The department will continue investigating economic espionage without a program focused on one country, but questions remain, including regarding how it will proceed with pending cases brought under the prior framework.²⁶

b. DHS Office of Intelligence and Analysis (I&A)

DHS’s Office of Intelligence and Analysis (I&A) operates under permissive authorities as well. I&A undertakes surveillance in support of counterterrorism and other “authorized intelligence

²¹ Paul Harris, “The Ex-FBI Informant with a Change of Heart: ‘There Is No Real Hunt. It’s Fixed,’” *Guardian*, March 20, 2012, <https://www.theguardian.com/world/2012/mar/20/fbi-informant>; and Rozina Ali, “The ‘Herald Square Bomber’ Who Wasn’t,” *New York Times*, <https://www.nytimes.com/2021/04/15/magazine/fbi-international-terrorism-informants.html>.

²² Michael German, “FBI Black Identity Extremist Assessment Panel Discussion,” testimony before the Congressional Black Caucus, March 20, 2018, <https://www.brennancenter.org/our-work/research-reports/testimony-congressional-black-caucus-fbis-black-identity-extremism-report>.

²³ Michael German, “The FBI Targets a New Generation of Black Activists,” Brennan Center for Justice, June 26, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists>; and Defending Rights and Dissent, “Leaked FBI Documents Show FBI Developed ‘Iron Fist’ to Counter ‘Black Identity Extremists,’” September 5, 2019, <https://www.rightsanddissent.org/news/leaked-fbi-documents-show-fbi-developed-iron-fist-to-counter-black-identity-extremists/>.

²⁴ Christopher Wray, “The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States,” Remarks given at the Hudson Institute’s video event: “China’s Attempt to Influence U.S. Institutions,” Washington, D.C., July 7, 2020, <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states>; Letter from advocacy groups, community organizations and science organizations urging President-elect Joe Biden to end the Justice Department’s China Initiative, January 5, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/advocacy-groups-community-organizations-and-science-associations-urge>; and Patrick Toomey & Ashley Gorski, “A Chinese American Scientist and His Family Are Battling the FBI’s Profiling in Court,” American Civil Liberties Union, April 2, 2021, <https://www.aclu.org/news/national-security/a-chinese-american-scientist-and-his-family-are-battling-the-fbis-profiling-in-court/>.

²⁵ Matthew Olsen, “Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats,” remarks given at an event held by the National Security Institute and George Mason University, Washington, D.C., February 23, 2022, <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats>.

²⁶ Michael German and Alex Liang, “End of Justice Department’s ‘China Initiative’ Brings Little Relief to U.S. Academics,” Brennan Center for Justice, March 25, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/end-justice-departments-china-initiative-brings-little-relief-us>.

missions,” relying primarily upon open-source information.²⁷ This information is shared broadly with federal, state, local, tribal, and territorial agencies, shaping their perception of and response to activities within their jurisdictions. The office is not allowed to undertake intelligence activities “for the sole purpose of monitoring” constitutionally or legally protected activities, but this weak safeguard has failed in preventing overreach and abuses by I&A agents and officials.²⁸

Throughout I&A’s history, the office’s reports have periodically drawn criticism for targeting groups on the basis of protected characteristics or First Amendment-protected activity. A notable recent example is I&A’s dissemination of intelligence reports on journalists covering its monitoring of racial justice protestors in the summer of 2020. I&A conducted this surveillance of constitutionally-protected activity under the theory that the potential vandalization of monuments, memorials and statues posed a “significant threat to homeland security,” raising alarms regarding overreach in Congress and among the public.²⁹ A March 2022 report by DHS’s Inspector General noted that I&A published 366 reports in reaction to those protests, and also that it did not publish any reports between the November 2021 presidential election and the January 6 Capitol attack, a fact that raises serious questions about the office’s objectivity.³⁰

I&A works closely on efforts to counter domestic terrorism with fusion centers, which are hubs for sharing information between state, local and federal authorities.³¹ A decade ago, a 2012 bipartisan Senate investigation reported that fusion centers “yielded little, if any, benefit to federal counterterrorism intelligence efforts,” instead producing reams of low-quality information and putting scrutiny on Muslim groups engaging in innocuous activities such as hosting events on subjects like marriage and “positive parenting.”³² Reports of similar problems have persisted in the decade since then. For example, fusion centers have been caught monitoring racial justice and Muslim activism, Juneteenth celebrations, environmental advocates, and people demonstrating on issues ranging from women’s rights to the government response to Hurricane Maria in Puerto Rico.³³

²⁷ Office of Intelligence and Analysis (hereinafter I&A), Office of Intelligence and Analysis Intelligence Oversight Guidelines, DHS, January 19, 2017, 3–4, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.

²⁸ I&A, Intelligence Oversight Program and Guidelines, 2.

²⁹ Steven Vladeck and Benjamin Wittes, “DHS Authorizes Domestic Surveillance to Protect Statues and Monuments,” *Lawfare* (blog), July 20, 2020, <https://www.lawfareblog.com/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>; and Rep. Adam B. Schiff to Chad F. Wolf, acting secretary of homeland security, and Brian Murphy, acting under secretary for intelligence and analysis, July 22, 2020, https://intelligence.house.gov/uploadedfiles/20200722hpsci_chm_letter_to_dhs.pdf.

³⁰ Office of Inspector General, *I&A Identified Threats Prior to January 6, 2021, but Did Not Issue Any Intelligence Products Before the U.S. Capitol Breach*, DHS, March 2022, 9, 20, <https://www.oig.dhs.gov/sites/default/files/assets/2022-03/OIG-22-29-Mar22-Redacted.pdf>.

³¹ DHS, “Fusion Centers and Joint Terrorism Task Forces,” accessed April 25, 2022, <https://www.dhs.gov/fusion-centers-and-joint-terrorism-task-forces>; see generally DHS, “Fusion Centers,” accessed April 25, 2022, <https://www.dhs.gov/fusion-centers>.

³² Permanent Subcomm. on Investigations, S. Comm. on Homeland Security and Governmental Affairs, *Federal Support for and Involvement in State and Local Fusion Centers*, October 3, 2012, 27, 38, <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>.

³³ See, e.g., Micah Lee, “How Northern California’s Police Intelligence Center Tracked Protests,” *Intercept*, August 17, 2020, <https://theintercept.com/2020/08/17/blueleaks-california-ncric-black-lives-matter-protesters>; Mara Hvistendahl, “Austin Fusion Center Spied on Nonpolitical Cultural Events,” *Intercept*, November 30, 2020, <https://theintercept.com/2020/11/30/austin-fusion-center-surveillance-black-lives-matter-cultural-events>; Amanda

The federally established information-sharing mechanisms used by these centers also do not follow 28 C.F.R. Part 23, the federal rule requiring that the inclusion of personally identifiable information in criminal intelligence databases be supported by reasonable suspicion of criminal conduct or activity.³⁴ Further, I&A’s audits of these centers rely almost exclusively on self-reporting; it does not undertake any substantive review of the intelligence that fusion centers distribute, in contrast to the 2012 Senate investigation that unearthed systemic problems with fusion centers’ functioning.³⁵

3. Social media tracking

Social media tracking has become a go-to tool for security agencies, including in their efforts to combat domestic terrorism. According to the 2021 National Strategy for Countering Domestic Terrorism, the federal government intends to draw on “open-source information”—some of which will be derived from social media—to identify potential domestic terrorism threats.³⁶ While specific investigations supported by a factually-predicated suspicion of criminal activity may require law enforcement agencies to review social media, the broadscale monitoring of social media with the goal of identifying potential threats of violence or terrorism raises serious First Amendment and privacy concerns, and will have a disproportionate impact on communities that have historically borne the brunt of law enforcement overreach. In addition, there is little proof that it will work. Nevertheless, both the FBI and DHS have reportedly hired private firms and sought to leverage automated tools to help conduct such surveillance.³⁷

Peacher, “Why Is the State of Oregon Conducting Intelligence Work?,” OPB (Oregon Public Broadcasting), April 26, 2016, <https://www.opb.org/news/article/oregon-department-of-justice-intelligence>; Alleen Brown, “Tilting at Windmills: The FBI Chased Imagined Eco-Activist Enemies, Documents Reveal,” *Intercept*, August 24, 2020, <https://theintercept.com/2020/08/24/fbi-fusion-center-environmental-wind/>; Policing Project at New York University School of Law, “Press Release: Oregon Sued Over Domestic Spying Operation,” December 14, 2021, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61b89768c753e45b6d99f872/1639487337182/Oregon+TTTAN+Lawsuit+Press+Release+12.12.21+FINAL.pdf>; Ken Klippenstein, “How Homeland Security Blurs Jurisdictions,” *Nation*, December 17, 2020, <https://www.thenation.com/article/society/fusion-centers-dhs/>; and Isiah Holmes, “How Should Fusion Centers Be Used During Protests?,” *Wisconsin Examiner*, December 22, 2021, <https://wisconsinexaminer.com/2021/12/22/how-should-fusion-centers-be-used-during-protests>.

³⁴ Price, National Security and Local Police, 27–28; ODNI, “Information Sharing Environment (ISE) Functional Standard (FS) Suspicious Activity Reporting (SAR),” version 1.5.5, February 2015, https://www.dhs.gov/sites/default/files/publications/15_0223_NSI_ISE-Functional-Standard-SAR.pdf; and 28 C.F.R. § 23.20(c) (the federal rule requiring the inclusion of personally identifiable information connected to criminal intelligence information be supported by reasonable suspicion).

³⁵ DHS, “Fusion Center Annual Assessment Final Reports,” accessed April 25, 2022, <https://www.dhs.gov/fusion-center-annual-assessment-final-reports>; DHS, *2018 National Network of Fusion Centers Final Report*, 2018, https://www.dhs.gov/sites/default/files/publications/2018_national_network_of_fusion_centers_final_report.pdf.

³⁶ National Security Council, *National Strategy for Countering Domestic Terrorism*, White House, June 2021, 16–17, <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>). Administration officials have suggested in Congressional testimony that online surveillance is a key piece of proactively identifying threats of domestic terrorism. See, e.g., *Racially and Ethnically Motivated Violent Extremism: The Transnational Threat*, Hearing Before the H. Comm. on Homeland Security Subcomm. on Intelligence and Counterterrorism, 117th Cong. (2021) (testimony of John Cohen, Assistant Secretary of Homeland Security for Counterterrorism and Threat Prevention).

³⁷ Aaron Schaffer, “The FBI is spending millions on social media tracking software,” *Washington Post*, April 5, 2022, <https://www.washingtonpost.com/politics/2022/04/05/fbi-is-spending-millions-social-media-tracking-software/>; System for Award Management, “Social Media Exploitation,” accessed April 25, 2022, <https://sam.gov/opp/3175f72a55e54307b8c46d24ae10ff35/view>; System for Award Management, “Request for

When a government agency collects social media information, it has the ability to create detailed dossiers of Americans' views, including political matters that lie at the heart of First Amendment protections, as well as their social networks and even where they are located and the places they go. Indeed, a person's social media presence—their posts, comments, photos, likes, group memberships, and so on—can collectively reveal their ethnicity, political views, religious practices, gender identity, sexual orientation, personality traits, and vices.³⁸ Thus, as the FBI's investigations guide recognizes, “[o]nline information, even if publicly available, may still be protected by the First Amendment.”³⁹

Further, social media can reveal more about a person than they intend. Platforms' privacy settings change frequently and can be difficult to navigate, and even when individuals keep information private it can be disclosed through the activity or identity of their connections on social media. DHS has recognized this risk, categorizing social media handles as “sensitive personally identifiable information” that “could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual” if disclosed without consent.⁴⁰

People are likely to censor themselves if they think they are being watched by the government, including on social media, which can make them reluctant to speak about controversial or personal issues. This undermines everything from political speech to creative output to other forms of self-expression.⁴¹ Social media monitoring can also blur the line between scrutiny of constitutionally protected activity and examination of genuine threats of violence. There are myriad examples, for

Proposals - Social Media Exploitation - Amendment 2,” accessed April 25, 2022, <https://sam.gov/opp/63867a4d178d4717ac246d61c955cc05/view>; Directorate of Intelligence, *Attachment B—Statement of Work*, FBI, January, 21, 2022, <https://sam.gov/api/prod/opps/v3/opportunities/resources/files/80522f7489b047949b5f8d9a0a00400f/download?&status=archived&token=>; Ken Dilanian, “Why did the FBI miss the threats about Jan. 6 on social media?,” NBC News, March 8, 2021, <https://www.nbcnews.com/politics/justice-department/fbi-official-told-congress-bureau-can-t-monitor-americans-social-n1259769>; Lee Fang, “FBI Expands Ability to Collect Cellphone Location Data, Monitor Social Media, Recent Contracts Show,” *Intercept*, June 24, 2020, <https://theintercept.com/2020/06/24/fbi-surveillance-social-media-cellphone-dataminr-venntel/>; and Rachael Levy, “Homeland Security Considers Outside Firms to Analyze Social Media After Jan. 6 Failure,” *Wall Street Journal*, August 15, 2021, <https://www.wsj.com/articles/homeland-security-considers-outside-firms-to-analyze-social-media-after-jan-6-failure-11629025200>.

³⁸ Sophia Cope and Saira Hussain, “EFF to Court: Social Media Users Have Privacy and Free Speech Interests in Their Public Information,” Electronic Frontier Foundation, June 30, 2020, <https://www.eff.org/deeplinks/2020/06/eff-court-social-media-users-have-privacy-and-free-speech-interests-their-public>.

³⁹ DIOG §4.3.2 *Mandatory Review*, n.d., <https://www.brennancenter.org/sites/default/files/2022-04/File%207.pdf>.

⁴⁰ Privacy Office, “Privacy Threshold Analysis Version number: 01-2014,” DHS, January 2014, 4n2, <https://www.brennancenter.org/sites/default/files/2022-02/PTA%20for%20OI%20and%20OPR.pdf>; and Privacy Office, “Privacy Threshold Analysis (PTA) version number: 04-26,” DHS, March 14, 2017, 8, <https://www.brennancenter.org/sites/default/files/2022-03/PTA%202017%20SM%20as%20SPII.pdf> (noting that social media handles constitute “stand-alone Sensitive Personally Identifiable Information”).

⁴¹ See Elizabeth Stoycheff et al., “Privacy and the Panopticon: Online Mass Surveillance’s Deterrence and Chilling Effects,” *New Media & Society* 21 (2018); Dawinder S. Sidhu, “The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim Americans,” *University of Maryland Law Journal of Race, Religion, Gender & Class* 7 (2007); and Elizabeth Stoycheff, “Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring,” *Journalism & Mass Communication Quarterly* 93 (2016): 307-8. A recent lawsuit by the Brennan Center and the Knight First Amendment Institute against the State Department and DHS documents how the collection of social media identifiers on visa forms led a number of international filmmakers to stop talking about politics and promoting their work on social media because they were concerned that what they said online would prevent them from getting a U.S. visa or be used to retaliate against them. *Complaint, Doc Society v. Pompeo*, No. 1:19-cv-03632-TJK (D.D.C. December 5, 2019).

instance, of the FBI and DHS using social media to monitor people speaking out on issues from racial justice to the treatment of immigrants.⁴²

Nor is tracking what people say on social media likely to help identify national security threats with any reliability. DHS's internal assessments of its pilot programs using social media to screen certain applicants for immigration benefits found them practically useless, with officers having difficulty using social media to pinpoint fraud or national security concerns.⁴³ Further, as DHS has repeatedly acknowledged, it is difficult to locate and interpret true threats of violence on social media—unsurprisingly, as social media is highly context-specific and can be riddled with slang, jokes, memes, sarcasm, and references to popular culture.⁴⁴ Automated tools that claim to make judgments about which threats, calls for violence, or individuals actually pose a genuine threat of violence are also prone to error. As more than 50 technologists wrote in opposing an ICE proposal aimed at predicting whether a given person would commit a crime or terrorist act, these tools are simply not capable of making such determinations, both because such judgments are subjective and they are trying to predict statistically rare events.⁴⁵ Similar concerns apply to mechanisms used to flag images and videos, which generally lack the context necessary to distinguish a scenario in which an image is used for reporting or commentary from one where it is used with the intention of inciting violence.⁴⁶

⁴² See, e.g., Lee Fang, “Why was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest?” *Intercept*, March 12, 2015, <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest/>; Jason Leopold, “Emails Show Feds Have Monitored ‘Professional Protester’ DeRay Mckesson,” *Vice*, August 11, 2015, https://www.vice.com/en/article/qv58n3/emails-show-feds-have-monitored-professional-protester-deray-mckesson?utm_source=vicenewsletter; George Joseph, “Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson,” *Intercept*, July 24, 2015, <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/>; Ryan Devereaux, “Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests,” *Intercept*, April 29, 2019, <https://theintercept.com/2019/04/29/family-separation-protests-surveillance/>; Jimmy Tobias, “Exclusive: ICE Has Kept Tabs on ‘Anti-Trump’ Protesters in New York City,” *Nation*, March 6, 2019, <https://www.thenation.com/article/archive/ice-immigration-protest-spreadsheet-tracking/>; and José Olivares and John Washington, “ICE Discussed Punishing Immigrant Advocates for Peaceful Protests,” *Intercept*, June 17, 2021, <https://theintercept.com/2021/06/17/ice-retaliate-immigrant-advocates-surveillance/>.

⁴³ U.S. Citizenship and Immigration Services, “Social Media,” in *U.S. Citizenship and Immigration Services Briefing Book*, 181, www.dhs.gov/sites/default/files/publications/USCIS%20Presidential%20Transition%20Records.pdf. For further discussion of the pilot programs, see Patel et al., *Social Media Monitoring*, 30-31.

⁴⁴ See, e.g., *Examining the January 6 Attack on the U.S. Capitol*, Hearing Before the S. Comm. on Homeland Security and Governmental Affairs and the S. Comm. on Rules and Administration, 117th Cong (2021) (written testimony of Melissa Smislova, acting under secretary for intelligence and analysis, DHS) <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Smislova-2021-03-03.pdf>; see also Office of General Counsel, *Report on DHS Administrative Review into ICE’s A Open Source Collection and Dissemination Activities During Civil Unrest: Portland, Oregon, June through July 2020*, DHS, January 6, 2021, 33, <http://cdn.cnn.com/cnn/2021/images/10/01/internal.review.report.20210930.pdf>.

⁴⁵ Hal Abelson, professor, Massachusetts Institute of Technology, et al., to Elaine C. Duke, acting secretary of homeland security, DHS, November 16, 2017, <https://www.brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%202011.15.17.pdf>.

⁴⁶ Carey Shenkman, Dhanaraj Thakur, and Emma Llansó, *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Center for Democracy & Technology, May 2021, <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>.

Conclusion

We appreciate the opportunity to provide these comments and look forward to offering additional input and information as the PCLOB undertakes the important effort of addressing the privacy and liberties issues raised by the government's efforts to counter domestic terrorism. Please do not hesitate to let us know if we can provide any further information. We may be reached at patelf@brennan.law.nyu.edu (Faiza Patel), levinsonr@brennan.law.nyu.edu (Rachel Levinson-Waldman), and pandurangah@brennan.law.nyu.edu (Harsha Panduranga).

Respectfully submitted,

Brennan Center for Justice