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Submitted to the U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

For a Hearing on Discrimination and the Civil Rights of the Muslim, Arab, and
South Asian American Communities

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I thank the U.S. House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties for holding this important hearing on discrimination affecting Muslim, Arab, and South Asian American communities. I submit this written statement to urge the committee to reexamine a set of policies that have long subjected these communities to profiling, surveillance, and prosecution in the name of counterterrorism.

I am a law professor at Stanford University. I research and teach on national security law, civil rights and liberties, and civil procedure. My scholarly work addresses the legal treatment of political violence, including terrorism and hate crimes, and national security oversight through courts and executive agencies.¹ Prior to my initial appointment at Stanford Law School in 2009, I served as a civil rights lawyer for the Asian Law Caucus and the Lawyers' Committee for Civil Rights in San Francisco, where I primarily addressed discrimination facing U.S. Muslim, South Asian, and Middle Eastern communities.

I. Flawed Counterterrorism Policies Affecting U.S. Communities

For over two decades, U.S. policies undertaken in the name of preventing terrorism have undercut the liberty and equality of U.S. Muslim, South Asian, and Middle Eastern individuals and communities. After twenty years of use by security agencies against communities long racialized as a threat, many of these policies now appear to be a normal feature of the security landscape. But it is long past

¹ For examples, please see Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149 (2020); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991 (2018); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016); and Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

time for policymakers and the public to reconsider them—and end practices that treat racial and religious communities as dangerous, subject individuals to scrutiny without an adequate factual basis or opportunity to clear their names, or target for “anticipatory” prosecution individuals deemed to present a future threat.

In the weeks after September 11, 2001, the U.S. government adopted an aggressively preventative approach to terrorism both within and beyond the United States. Within the United States, law enforcement agencies redefined their mission to focus on preventing rather than prosecuting acts of terrorism.² Beyond our borders, our government launched a global “war on terror” against al Qaeda and other groups, relying on new doctrines of “preemption” to justify lethal force to prevent possible terrorist attacks, even when they were not imminent.³ The executive branch embraced the idea that preempting terrorism required exceptional deviations from ordinary law,⁴ including torture, indefinite detention, and warrantless surveillance. The costs of this approach for human rights, civilian lives, and our economy are becoming increasingly clear. For instance, last fall, the Costs of War Project at Brown University estimated that U.S. post-9/11 wars and counterterrorism operations have led to the direct deaths of at least 897,000 people, including over 364,000 civilians, and at the cost of \$8 trillion.⁵

Policies adopted in the name of preventative counterterrorism have several fundamental flaws, despite the intuitive appeal of focusing on prevention. First, these policies have long defined the threat in racial and religious terms that subject U.S. Muslim communities to sweeping surveillance and investigation. Racial and religious profiling characterized the response to 9/11 from the beginning. In the months following the attacks, federal officials detained hundreds of Muslim immigrants for months as terrorist suspects, despite the fact that racially based tips, rather than individual grounds for suspicion, had prompted many arrests.⁶ None of the hundreds of detainees were charged with any connection to the

² Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–28 (2005).

³ LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM” 173-75 (2013).

⁴ See Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. OF PA. J. CONST. L. 1001, 1051-52 (2004).

⁵ Neta C. Crawford, Co-Director, Costs of War Project, The U.S. Budgetary Costs of the Post-9/11 Wars (Sept. 1, 2021); Stephanie Savell, et. al, Co-Director, Costs of War Project, United States Counterterrorism Operations 2018–2020 (Feb. 2021); Costs of War Project, Human Cost of Post-9/11 Wars, at <https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll> (Sept. 1, 2021).

⁶ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. REV. 379, 388 (2017).

attacks.⁷ In 2002 and 2003, the Bush administration required thousands of immigrant men from a list of twenty-five countries—almost all majority-Muslim—to report to government offices to be registered, interrogated, and fingerprinted.⁸ Although these dragnet measures did not lead to terrorism convictions, they resulted in significant deportations and fear in immigrant Muslim communities, in addition to sending the public message that these communities at large presented a threat.⁹

This focus on Muslim communities, writ large, did not end with the immediate post-9/11 period. Nor is it a partisan problem, limited to the Bush or Trump administrations. Rather, the intense scrutiny of these communities has defined U.S. counterterrorism for the past twenty years. The Federal Bureau of Investigation, New York Police Department, and other law enforcement agencies have mapped the location and institutions of Muslim communities, recruited legions of informants to report on their activities, solicited intelligence through community outreach programs, conducted wide-scale “voluntary interviews,” and extensively monitored Internet activity—all with precious little oversight.¹⁰ As Professor Amna Akbar has described, law enforcement agencies institutionalized theories of radicalization that “transformed the project of counterterrorism intelligence gathering into one squarely focused on gathering as much information as possible about Muslim life in the United States, with a particular emphasis on political and religious cultures of Muslim communities.”¹¹

Although the FBI claims that its activities are limited to investigating specific threats, its own agents and paid informants have at times attested to sprawling surveillance of Muslim communities. In a case now before the U.S. Supreme Court on the state secrets privilege and the Foreign Intelligence Surveillance Act, a former FBI informant declared under oath that the FBI directed him to spy on the Southern California Muslim community at large. He asserted that FBI agents told him that Islam threatened national security and instructed him to “gather information on people who practice Islam in Orange County—not terrorists, spies,

⁷ See Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. REV. 379, 423-25 (2017) (addressing absence of terrorism convictions arising out of post-9/11 immigrant detentions).

⁸ See RIGHTS WORKING GROUP & PENN STATE LAW CENTER FOR IMMIGRANTS’ RIGHTS, *THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY* 4 (2012).

⁹ For more on the failure of these programs to generate terrorism convictions, see, e.g., Sinnar, *The Lost Story of Iqbal*, *supra* note 7, at 414–27 (2017) (addressing post-9/11 detentions); Rights Working Group, *supra* note 8, at 31 (addressing NSEERS).

¹⁰ Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 854–68 (2013).

¹¹ Akbar, *supra* note 10, at 845.

or even ordinary criminals.”¹² The informant recorded thousands of hours of conversations with hidden recording devices, encouraged community members to visit “jihadist” websites, and spoke of his interest in violence—leading alarmed Muslim community members to obtain a restraining order against him and, ironically, report him to the FBI.¹³

In a similar vein, Terry Albury, a 16-year FBI counterterrorism agent who worked in the San Francisco Bay Area and Minneapolis, described how he and other agents routinely surveilled mosques and Muslim institutions, interrogated travelers at airports on the basis of their national origin, protracted investigations despite finding no threat, and pressured people into becoming informants.¹⁴ Albury described a culture of Islamophobia and anti-Black racism within the FBI, along with professional incentives to demonstrate high numbers of informants and investigations.¹⁵

Importantly, the FBI’s internal guidelines license many of these practices, such as investigating activity without an individualized basis for suspicion or using race as a factor in investigations. For instance, the FBI has the explicit authority to conduct “assessments” of potential criminal activity with “no particular factual predication.”¹⁶ Thus, without demonstrating any specific basis for suspicion, agents can take steps including tracking the movements of individuals or deputizing undercover informants to report on their activities.¹⁷ In addition, FBI guidelines permit the use of race or ethnicity as factors in collecting intelligence and opening investigations, so long as they are not the “sole” factor, and permit field offices to identify and map the demographics of ethnic communities in their localities.¹⁸

Beyond treating racial and religious communities as a threat, a second problem with the government’s counterterrorism programs is that they flag people as

¹² Brief for the Respondents at 10, *FBI v. Fazaga*, No. 20-828 (U.S. argued Nov. 8, 2021), 965 F.3d 1015 (9th Cir. 2020), *cert granted by* 141 S. Ct. 2720 (U.S. June 07, 2021).

¹³ *Id.* at 11-12.

¹⁴ Janet Reitman, *I Helped Destroy People*, N.Y.T. MAGAZINE, Sept. 1, 2021. Albury pled guilty to leaking classified documents about the FBI’s counterterrorism practices to the media, an action he said he took because “the reality of what I was a part of hit me in a way that just shattered my existence. There is this mythology surrounding the war on terrorism, and the F.B.I., that has given agents the power to ruin the lives of completely innocent people based solely on what part of the world they came from, or what religion they practice, or the color of their skin. And I did that.”

¹⁵ *Id.*

¹⁶ DEP’T OF JUSTICE FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 5.1 (as released Mar. 2, 2016 and updated Sept. 28, 2016) [DIOG], https://www.justsecurity.org/wp-content/uploads/2019/03/FBI.DIOG_.pdf

¹⁷ *Id.* at 5.9.1. Assessments require an “authorized purpose” and “clearly defined objective” but no specific factual predication.

¹⁸ *Id.* at 4.3.1, 4.3.3.2.1, and 4.3.3.2.2.

dangerous based on expansive standards and little opportunity for redress. The best example of this is the terrorist watchlisting system, which affects hundreds of thousands of people who can do little to contest their inclusion. The government’s Terrorist Screening Database, the largest centralized watchlist, reportedly lists 1.2 million people including 4,600 U.S. citizens or lawful permanent residents.¹⁹ Depending on which subset of the centralized watchlist applies, people on these lists can be barred from flying, detained at airports and land borders, denied visas to unite with family in the United States, interrogated in the course of routine police traffic stops, and scrutinized by public and private employers.²⁰

In one example, U.S. Customs and Border Protection officials detained Abdisalam Wilwal, Sagal Abdigani, and their four children, all U.S. citizens, for eleven hours at the Canadian border after Wilwal’s name apparently appeared on a terrorist watchlist.²¹ During the encounter, border officials pointed guns at the family, interrogated Wilwal about his religious beliefs and practices, told the 14-year-old to strip for a search, and denied food to the four children (ages 5, 6, 8, and 14) for six hours.²² Handcuffed, isolated, and terrified, Wilwal passed out four hours into the detention.²³

Despite these potentially serious consequences, the standard for inclusion in the terrorist watchlist is both exceedingly low and riddled with exceptions.²⁴ The general standard requires only “reasonable suspicion” of a “relationship” to terrorist

¹⁹ *Elhady v. Kable*, 391 F. Supp. 3d 562, 568 (E.D.Va., 2019) (noting approximate numbers as of June 2017), *rev’d and remanded*, 993 F.3d 208 (4th Cir. 2021). The Terrorist Identities Datamart Environment, an intelligence database that houses classified and unclassified information from which names are “exported” to the TSDB, contained a significantly larger number of U.S. citizens and permanent residents (16,000 as of February 2017). Nat’l Counterterrorism Ctr., Terrorist Identities Datamart Environment 1-2 (2017), at https://www.dni.gov/files/NCTC/documents/features_documents/TIDEfactsheet10FEB2017.pdf.

²⁰ See *Elhady v. Kable*, 391 F. Supp. 3d at 569-70 (describing agencies that use watchlists for various purposes).

²¹ Abigail Hauslohner, *U.S. Family Suing Federal Government After 11-Hour Detention On Canadian Border*, WASH. POST, July 13, 2017.

²² Complaint at 3, 7, 8, 14, 17, *Wilwal v. Nielsen* (D. Minn. July 13, 2017), 346 F. Supp. 3d 1290 (D. Minn. 2018).

²³ *Id.* at 13. The family settled the case for damages and a change in certain CBP practices. *Wilwal v. Nielsen – Lawsuit Challenging Abusive Border Detention Of American Family*, ACLU, Updated Sept. 29, 2020, <https://www.aclu.org/cases/wilwal-v-nielsen-lawsuit-challenging-abusive-border-detention-american-family>. For other examples of serious watchlisting encounters, see *Elhady v. Kable*, 993 F.3d 208, 216–17 (4th Cir. 2021).

²⁴ See Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1592-97 (2016); Jeffrey Kahn, *The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and Terry v. Ohio*, 26 WM. & MARY BILL RTS. J. 383 (2017).

activities, not articulable suspicion of any crime.²⁵ Security officials within the FBI's Terrorist Screening Center (TSC), not judges or neutral decision-makers, decide whether a person meets that standard, and the TSC accepts into the database 99% of the names submitted to them by intelligence agencies.²⁶ For non-citizens being screened for visas or immigration purposes, the government's Watchlisting Guidance dispenses with the "reasonable suspicion" requirement altogether. Instead, it allows the watchlisting of people merely "described by sources as 'terrorists,' 'extremists,' 'jihadists,'" or other similar labels, even without corroboration.²⁷ Reviewing watchlisting criteria, one district court observed that "it is not difficult to imagine completely innocent conduct serving as the starting point for a string of subjective, speculative inferences that result in a person's inclusion on the No Fly List."²⁸

Moreover, cases regularly suggest that the government is using the threat of watchlisting to pressure people into informing on community members. In *Tanzin v. Tanvir*, a damages case that the Supreme Court permitted to move forward under the Religious Freedom Restoration Act, three Muslim men alleged that FBI agents added them to the No Fly List because they refused to spy on their religious communities.²⁹ Other lawsuits over the years arising in various parts of the country have made similar allegations.³⁰ Rather than a targeted tool to exclude

²⁵ See Declaration of Timothy P. Groh, Dep. Dir. of Terrorist Screening Ctr. (Mar. 11, 2019) at 8, *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021) (stating standard for TSDB inclusion as requiring "articulable intelligence or information which, based on the totality of the circumstances and, taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting, in preparation for, in aid or in furtherance of, or *related to*, terrorism and/or terrorist activities") (emphasis added).

²⁶ *Elhady v. Kable*, 993 F.3d 208, 214 (4th Cir. 2021).

²⁷ *Sinnar, Rule of Law Tropes*, *supra* note 24, at 1594. This information is based on the leaked 2013 Watchlisting Guidance, the last version to be made public. A more recent declaration filed in the *Elhady* litigation confirms that the government continues to use exceptions to the reasonable suspicion standard for certain immigration purposes. Declaration of Timothy P. Groh, Dep. Dir. of Terrorist Screening Ctr. (Mar. 11, 2019) at 7, *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021).

²⁸ *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014).

²⁹ *Tanzin v. Tanvir*, 141 S. Ct. 486, 487 (2020) (interpreting the Religious Freedom Restoration Act to permit damages suits against federal officials in their individual capacities). See also Adam Liptak, *At Supreme Court, a Case on Abuse of the No-Fly List*, N.Y. TIMES, Feb. 24, 2020 (describing Muhammad Tanvir's allegation that, after he refused to become a government informant, FBI agents placed him on the No Fly List, preventing him from flying home from his job making deliveries as a long-haul truck driver and from visiting his sick mother).

³⁰ See, e.g., Charlie Savage, *Testing an Opaque Security Power, Michigan Man Challenges 'No-Fly List'*, N.Y. TIMES, Apr. 6, 2021 (alleging that U.S. citizen was placed on the No Fly List after refusing to become an FBI informant); Jeffrey Kahn, *Terrorist Watchlists*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 71, 90 (David Gray & Stephen E. Henderson, eds., 2017) (citing additional cases involving allegations of FBI agents offering to remove people from watchlists if they agreed to become government informants).

known threats, such as those who threaten airline safety, the watchlists have become a bloated infrastructure for harassment and coercion.

Furthermore, most people on the terrorist watchlist have no meaningful procedure to get off the list. While the government marginally improved notification procedures for U.S. citizens and permanent residents on the No Fly List after a court struck down the prior procedures as unconstitutional, those revised procedures do not apply to the broader terrorist watchlist.³¹ In other words, even U.S. citizens who suffer an ordeal like Abdisalam Wilwal and Sagal Abdigani have a limited ability to contest their inclusion in the Terrorist Screening Database. If they file a complaint through the congressionally established DHS Traveler Redress Inquiry Program (DHS TRIP), they will not be told whether they are on the watchlist, let alone why.³² If a false allegation made its way into intelligence files, they would never know. It is nearly impossible to contest the basis for a watchlisting decision that remains entirely secret.

A third critical flaw with counterterrorism practices affecting Muslim, Arab, and South Asian communities is that they rely on “anticipatory prosecution”—the preemptive targeting of individuals whom the FBI alleges may present a threat in the future. In a signature move, the FBI sends confidential informants and undercover agents to approach people whom they deem sympathetic to terrorism, often as a result of their online speech, and then furnishes opportunities and inducements to act upon those sympathies. Prosecutors then charge those who take the bait with material support to terrorism or other criminal offenses.³³ These sting operations have frequently targeted individuals who are young, mentally ill, financially insecure, or otherwise vulnerable, and informants have offered financial rewards, fake religious guidance, and psychological pressure to overcome these

³¹ *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (holding that existing procedures for contesting No Fly List status violated due process); *Elhady v. Kable*, 993 F.3d 208, 218-19 (4th Cir. 2021) (observing that district court asked parties to brief whether procedures required by *Latif v. Holder* should be extended to parties on TSDB, while reversing decision).

³² *Elhady v. Kable*, 993 F.3d 208, 215, 218 (4th Cir. 2021).

³³ One quantitative study of terrorism prosecutions concluded that 55% of 580 post-9/11 terrorism prosecutions “involved an informant or undercover agent in some capacity before the crime was committed,” and that “[p]articularly with regard to jihadi and left-wing defendants, the average case involving informants has numerous indicators of possible entrapment or outrageous government conduct.” Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 673 (2015). See also CENTER ON NAT. SEC. AT FORDHAM LAW, *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES: THE ISIS CASES* 24 (2017) (stating that 62% of ISIS-related prosecutions from March 2014 to August 2017 are known to have used undercover agents or informants).

individuals' reluctance.³⁴ The question, of course, is whether the government is preempting real threats or leading manipulable individuals to embrace criminal actions they never would have taken on their own.³⁵

Federal judges have expressed concern about the FBI's role in generating some of these cases. At the sentencing of James Cromitie, an impoverished New Jersey man who was offered \$250,000 by an informant in a persistent 11-month campaign to instigate a terrorist plot, a federal judge observed, "I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept." Despite sentencing Cromitie to a mandatory minimum sentence of 25 years, she opined, "Only the government could have made a terrorist out of Cromitie, whose buffoonery is positively Shakespearean in scope."³⁶ In spite of the government's role in facilitating these crimes, defendants have little chance of proving unlawful entrapment at trial: inflammatory evidence related to their speech or beliefs, procedural irregularities in informant tactics, and racialized fears of terrorism together "result in the almost complete incapacitation of a key procedural protection against government abuses."³⁷

U.S. tolerance for entrapment stands in sharp contrast to the approach of several European countries, which typically prohibit undercover operations in which the

³⁴ HUMAN RIGHTS WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS* 27-41 (2014) (describing cases involving defendants with intellectual disabilities, mental health impairments, and financial trouble); *United States v. Cromitie*, 727 F.3d 194, 211 (2d Cir. 2013) (describing informant's offer of incentives including "\$250,000, a barber shop at a cost of \$70,000, a BMW, and an all-expense-paid, two-week vacation to Puerto Rico"); *United States v. Daoud*, 980 F.3d 581, 585-86 (7th Cir. 2020) (describing undercover agent's provision of fake religious guidance purporting to endorse violence); *United States v. Hayat*, 2019 WL 176342, at *2 (E.D. Cal. Jan. 11, 2019) (describing paid informant's pressure on individual to attend a terrorist training camp in decision recommending vacating criminal conviction on the basis of ineffective assistance of counsel).

³⁵ One terrorism researcher points out that terrorist attacks are "very low base rate events" that generate "an enormous number of false positives," but that "special agents and juries cannot fully appreciate the ramifications of introducing older and authoritative FBI agents provocateurs that influence impressionable young men to do things such as detonating bombs that they would never have done on their own." Marc Sageman, *The Stagnation in Terrorism Research*, 26 *TERRORISM & POL. VIOLENCE* 565, 575 (2014).

³⁶ Graham Rayman, *Newburgh 4 Terror Case: Judge Sentences Three to 25 Years in Prison, U.S. Constitution Shivers*, *VILLAGE VOICE* (June 29, 2011); *United States v. Cromitie*, 727 F.3d 194, 210-12 (2d Cir. 2013) (finding that informant's efforts to persuade Cromitie to commit a crime qualified as inducement, but sustaining conviction, in a 2-1 decision, under a broad interpretation that defendant was "predisposed" to commit the crime).

³⁷ Jesse J. Norris, *Accounting for the (Almost Complete) Failure of the Entrapment Defense in Post-9/11 US Terrorism Cases*, 45 *L. & SOC. INQUIRY* 194, 218 (2020).

government contrives offenses and steers criminal activity, partly because of historical concern about state surveillance of political dissidents.³⁸

Across these and other counterterrorism practices, an overarching problem is that courts too often insulate these programs from real scrutiny. Courts often refuse to hear constitutional challenges to national security policies or apply a deferential standard of review, claiming that judges should not second-guess political judgments in national security matters.³⁹ In part because of such reasoning, the U.S. Supreme Court has ruled that human rights groups lack standing to challenge a National Security Agency surveillance program, that immigrants detained after September 11, 2001, cannot seek damages against high-level government officials responsible for the detentions, and that the Trump administration’s travel ban does not violate the First Amendment Establishment Clause—despite evidence of animating hostility towards Muslims.⁴⁰ The Supreme Court is now considering whether the “state secrets” doctrine shields the government in cases stemming from torture at a secret CIA “dark site” abroad and FBI surveillance of Muslims.⁴¹ In a society professing commitment to the rule of law, neither courts nor Congress should give carte blanche to the national security decisions of executive agencies.

II. Impact on Muslim, South Asian, and Middle Eastern Communities

Two decades after the onset of the U.S. wars on terror, Muslim, South Asian, and Middle Eastern Americans continue to face high levels of discrimination. In a 2017 Pew Research Center national survey of U.S. Muslims, about half of respondents reported experiencing at least one act of discrimination in the prior year, including nearly one in three who reported being “treated with suspicion” and one in five who reported being “singled out by airport security.”⁴² Those numbers rose for U.S. Muslim women and among those who say their appearance identifies them as

³⁸ Jacqueline Ross, *Anti-Terror Stings and Human Subjects Research: The Implications of the Analogy for Notions of Entrapment and for the Pursuit of Strategic Deterrence*, 47 N.Y.U. J. INT’L L. & POL. 379, 388-89 (2015).

³⁹ Shirin Sinnar, *Procedural Experimentation & National Security in the Courts*, 106 CAL. L. REV. 991, 993 (2018). See also Shirin Sinnar, *Courts Have Been Hiding Behind National Security for Too Long*, Brennan Ctr. for Justice (Aug. 11, 2021), at <https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long>.

⁴⁰ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013); *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017); *Trump v. Hawaii*, 138 S.Ct. 2382 (2018).

⁴¹ *United States v. Husayn (Abu Zubaydah)*, No. 20-827 (U.S. argued Oct. 6, 2021), 938 F.3d 1123 (9th Cir. 2019), cert granted by 141 S.Ct. 2564 (U.S. Apr. 26, 2021); *FBI v. Fazaga*, No. 20-828 (U.S. argued Nov. 8, 2021), 965 F.3d 1015 (9th Cir. 2020), cert granted by 141 S. Ct. 2720 (U.S. June 07, 2021).

⁴² Pew Research Ctr., *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream* (July 26, 2017).

Muslim.⁴³ Other national polling shows consistently high levels of U.S. Muslims reporting religious discrimination, and that half of Muslim families say their children in public school faced bullying in the past year because of their religion.⁴⁴

The pervasive racialization of Muslim, South Asian, and Middle Eastern communities as “terrorists” over the past two decades has also magnified fears of hate violence for those communities, including for Sikh Americans. In 2012, a white supremacist who had been active in a neo-Nazi skinhead gang shot dead six Sikh worshippers at the Sikh Temple of Wisconsin.⁴⁵ Between 2015 and 2017, multiple reports documented a surge in hate violence directed at South Asian, Muslim, and Arab communities.⁴⁶ The advocacy group South Asian Americans Leading Together observed that this “wave of hate violence against South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities” occurred at a level “not seen since the year after the attacks of September 11, 2001,” amid anti-immigrant and racial rhetoric that created a “palpable and unparalleled atmosphere of hate and suspicion.”⁴⁷

Discrimination and hate violence affecting Muslim, South Asian, and Middle Eastern communities in schools, work, and on the streets have a relationship to government counterterrorism policies. Academic studies suggest that government rhetoric and policies towards particular groups can affect private discrimination and hate violence.⁴⁸ For instance, hostile rhetoric from elites targeting particular racial groups can embolden people to engage in hate violence against those

⁴³ Id.

⁴⁴ Institute for Social Policy and Understanding, American Muslim Poll, Fifth Anniversary Collection 2015-2020 87-89 (2021).

⁴⁵ A.C. Thompson, *Sikhs in America: A History of Hate*, PROPUBLICA, Aug. 4, 2017.

⁴⁶ Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES, Sept. 17, 2016 (noting highest level of anti-Muslim hate crimes since the post-9/11 aftermath, based on police department data analyzed by the Center for the Study of Hate and Extremism at California State University-San Bernardino).

⁴⁷ SOUTH ASIAN AMERICANS LEADING TOGETHER, COMMUNITIES ON FIRE: CONFRONTING HATE VIOLENCE AND XENOPHOBIC POLITICAL RHETORIC 3 (2018).

⁴⁸ See Laura Dugan & Erica Chenoweth, *Threat, Emboldenment, or Both? The Effects of Political Power on Violent Hate Crimes*, 58 CRIMINOLOGY 714 (2020). Dugan and Chenoweth studied the relationship between U.S. federal government speech and policies supporting or opposing racial minorities and federal violent hate crime statistics between 1992 and 2012. They found support for two hypotheses drawn from earlier literature: the “political threat hypothesis,” which “predicts that violent backlash against specific groups is triggered by political gains made by those groups,” and the “emboldenment hypothesis,” which predicts increases in hate crimes “triggered by government elites who signal supremacy over those groups, emboldening some members of the dominant group to commit violent action.” Id. at 716. The study concluded that, in their data, federal actions against immigrants and Latinx persons emboldened violent hate crimes committed against them, but that federal speech and actions supporting Black people catalyzed violent backlash. Id. at 742.

communities.⁴⁹ Studies have also shown an increase in hate crimes following political events that change perceptions of social norms, such as the acceptability of anti-immigrant or racist views.⁵⁰ As legal scholars have long argued, government speech and policies that treat racial, ethnic, or religious communities as suspicious or dangerous encourage ordinary people to do the same.⁵¹

III. Moving Forward

Congress must revisit and roll back discriminatory counterterrorism policies. Restoring rights and liberties is not simply a job for the courts. Indeed, courts often insist that it is Congress, not the courts, which should assess the value of security policies against their harm.⁵² While courts very much have a role to play, *all* branches of government have an independent responsibility to ensure that security policies align with democratic principles and rights and liberties.

As a first step, Congress should ensure that neither it, nor the administration, expands harmful counterterrorism policies in the name of addressing domestic terrorism. Much of the policy discussion on responding to new terrorist threats fails to consider, let alone correct, the excesses of prevention that have characterized U.S. counterterrorism. Although addressing political violence from white supremacists, anti-government militias, and others requires leadership and prioritization from a range of government agencies, it does not call for establishing

⁴⁹ Id. at 743 (“Indeed, our results confirm evidence from other studies suggesting that hate speech among elites can motivate hate crimes among constituents.”).

⁵⁰ For example, a number of empirical studies attributed a spike in hate crimes in England and Wales to the unexpected “Brexit” referendum vote to leave the European Union, which was associated with anti-immigrant sentiment. See, e.g., Daniel Devine, *Discrete Events and Hate Crimes: The Causal Role of the Brexit Referendum*, 102 SOC. SCI. Q. 374, 374, 383 (2021); Joel Carr et al., *Love Thy Neighbour? Brexit and Hate Crime*, IZA Institute of Labor Economics 2-5 (Nov. 2020), <http://ftp.iza.org/dp13902.pdf>; Facundo Albornoz et al., *The Brexit Referendum and the Rise in Hate Crime; Conforming to the New Norm*, Nottingham Interdisciplinary Centre for Economic and Political Research Working Paper (Nov. 9, 2020), <https://www.nottingham.ac.uk/research/groups/nicep/documents/working-papers/2020/nicep-2020-06.pdf>. See also Karsten Müller and Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* at 3-4 (July 24, 2020), available at SSRN: <https://ssrn.com/abstract=3149103> (finding a “strong time series correlation between Trump’s tweets on Islam-related topics and the number of anti-Muslim hate crimes after the start of his presidential campaign, even after controlling for general attention paid to topics associated with Muslims.”).

⁵¹ Legal scholars have theorized a relationship between the over 1,000 hate crimes targeting Muslim, South Asian, Sikh, and Arab communities in the months after September 11, 2001 and the explicit racial profiling of the U.S. government. See Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582-83 (2002).

⁵² See, e.g., *Elhady v. Kable*, 993 F.3d 208, 225-27 (4th Cir. 2021).

new federal terrorism crimes, penalties, surveillance authorities, or “countering violent extremism” programs that expand law enforcement surveillance.

Second, Congress should conduct a holistic review of counterterrorism policies affecting U.S. Muslim, South Asian, and Middle Eastern communities, including FBI surveillance measures, terrorist watchlisting, and the use of informants and sting operations. That review should address not only oversight and accountability mechanisms, such as audits and complaint processes, but also fundamental questions related to the value of individual programs. It is long past time to undo the harm of preventative counterterrorism programs in favor of approaches to public safety that do not sacrifice the equality, well-being, and rights and liberties of these and other communities.