

FIRST AMENDMENT LIMITATIONS ON POLICE SURVEILLANCE: THE CASE OF THE MUSLIM SURVEILLANCE PROGRAM

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This Note focuses on a single example of targeted domestic surveillance: the “Muslim Surveillance Program” of the New York City Police Department. In considering the constitutionality of the program, this Note attempts to articulate a general legal framework for regulating police surveillance targeting religious and political minorities. Part I discusses the Muslim Surveillance Program and its chilling effects on speech and association. Part II covers questions of standing, concluding that at least some plaintiffs have standing to challenge this program and similar programs of targeted surveillance. Finally, Part III assesses the legality of the program, arguing that while this surveillance is unregulated by the Fourth Amendment, it is subject to First Amendment challenge. The Note argues that a “First Amendment criminal procedure” could fill the gaps in Fourth Amendment coverage by providing for the protection of expressive behavior that is likely chilled by targeted police surveillance. Using the First Amendment to regulate domestic surveillance would require an extension of current case law, but would be a vindication of the central First Amendment value of protecting minority viewpoints, as well as the fundamental principles underlying Fourth Amendment jurisprudence, such as the right to privacy.

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|--|------|
| INTRODUCTION | 1787 |
| I. MAPPING MUSLIMS: CHILLING SPEECH AND ASSOCIATION | 1791 |
| A. <i>An Informant in Every Mosque</i> | 1792 |
| B. <i>The Normalizing and Chilling Effects of Post-9/11 Surveillance</i> | 1795 |
| II. CLEARING THE HURDLE OF STANDING | 1798 |
| A. <i>“Subjective” Chills Are Not Enough for Standing</i> ... | 1800 |
| B. <i>Establishing an Objective Chill</i> | 1803 |
| C. <i>Applying Standing Doctrine to the NYPD’s Muslim Surveillance Program</i> | 1805 |
| III. FIRST AMENDMENT DOCTRINE FOR FOURTH AMENDMENT PROBLEMS | 1810 |
| A. <i>The Holy Fourth Amendment</i> | 1810 |

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B. *The First Amendment as an Independent Brake on Police Behavior* 1814

C. *The Prohibition on Chilling First Amendment-Protected Conduct* 1817

D. *Applying the First Amendment to Domestic Surveillance* 1818

CONCLUSION 1823

INTRODUCTION

A specter is haunting Muslim communities in New York—the specter of surveillance.¹ As part of its “Muslim Surveillance Program,”² the New York City Police Department (NYPD) attempted to place police informants in every mosque in the metropolitan area, used undercover officers to keep tabs on activities at community gathering sites such as coffee shops and hookah bars, and compiled reports on activities as innocuous as a whitewater rafting trip of Muslim college students.³ This surveillance has had a significant chilling effect, causing many Muslims to shy away from participating in religious and community activities, refrain from expressing their political views, and even alter their personal appearances.⁴

This police activity is now the subject of a pending civil rights action, *Hassan v. City of New York*, and was at the center of two related suits that have reached a settlement agreement “in principle.”⁵

¹ This is, of course, a paraphrase of the famous opening lines of *The Communist Manifesto*. KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (David McLellan ed., Oxford University Press 1992) (1848) (“A spectre is haunting Europe—the spectre of communism.”).

² While perhaps “provocative[],” Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830, 857 n.120 (2014), this is the term used by litigants who are challenging this program. See, e.g., *Factsheet: The NYPD Muslim Surveillance Program*, ACLU, <https://www.aclu.org/factsheet-nypd-muslim-surveillance-program> (last visited Aug. 12, 2015).

³ See generally MATT APUZZO & ADAM GOLDMAN, *ENEMIES WITHIN: INSIDE THE NYPD’S SECRET SPYING UNIT AND BIN LADEN’S FINAL PLOT AGAINST AMERICA* (2013) (providing an overview of the efforts of the NYPD’s Intelligence Division to keep tabs on Muslims following 9/11). Goldman and Apuzzo initially reported the existence of the Muslim Surveillance Program in a series of articles for the Associated Press. See *infra* notes 28–32.

⁴ See *infra* Part I.B.

⁵ *Hassan* was filed by the Center for Constitutional Rights. This suit was dismissed for lack of standing by the district court, see *Hassan v. City of New York*, Civ. No. 2:12-3401 (WJM), 2014 WL 654604, at *1 (D.N.J. Feb. 20, 2014), and is currently pending review in the Third Circuit. The plaintiffs in *Hassan* alleged violations of the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment, and the Establishment Clause of the First Amendment. See First Amended Complaint ¶¶ 66–69, *Hassan v. City of New York*, No. 2:12-cv-03401-SDW-MCA (D.N.J. Oct. 3, 2012), available at http://ccrjustice.org/files/10_First%20Amended%20Complaint.10.3.2012.pdf

However, while it is an extreme example, it is far from the only instance of domestic surveillance chilling First Amendment-protected activities since the attacks of September 11, 2001.⁶ This Note focuses on the constitutionality of the Muslim Surveillance Program, but it is also more broadly concerned with articulating a general legal framework for regulating police surveillance targeting religious and political minorities.

There are two principal barriers to challenging political surveillance programs in court, one procedural and one substantive. The procedural issue surrounds the threshold question of subject matter jurisdiction. Suits against domestic surveillance have frequently foundered on the shoals of standing, as courts have dismissed them for failure to show a concrete injury or failure to show that this injury was caused by government action.⁷ The substantive problem is that while the Fourth and Fifth Amendments are the standard means of constitutional regulation of police investigation, domestic surveillance lies almost entirely outside of their reach.⁸

This Note offers solutions to both problems. While standing to sue over domestic surveillance could be—and has been—the subject of a separate article,⁹ this Note updates the discussion to deal with new case law and the specificities of targeted surveillance by *local* law enforcement. Litigants can establish standing to challenge the Muslim Surveillance Program by showing injuries such as diminished participation in political and religious activities or decreased employment prospects. They can also meet the injury-in-fact and “traceability” requirements for standing by establishing that they were deterred from freely exercising their First Amendment rights due to an objec-

[hereinafter *Hassan* Complaint]. Two other lawsuits dealing with the post-9/11 surveillance of Muslims by the NYPD, *Raza v. City of New York* and *Handschu v. Special Servs. Div.*, are being settled by the City of New York. See John Marzulli, *Deal Reached in Lawsuit over NYPD's Surveillance of Muslims*, N.Y. DAILY NEWS (June 22, 2015), <http://www.nydailynews.com/new-york/nyc-crime/deal-reached-lawsuit-nypd-surveillance-muslims-article-1.2266914> (reporting that a settlement had been reached in *Raza*, although further details remained to be worked out); Matt Sledge, *Despite the Settlement Talks, Don't Expect the NYPD to Stop Spying on Muslims*, THE NATION, (July 6, 2015), <http://www.thenation.com/article/despite-the-settlement-talks-dont-expect-the-nypd-to-stop-spying-on-muslims/> (mentioning that a “settlement in principle” has also been reached in *Handschu*). *Hassan* is not included in the settlement talks. See *id.*

⁶ See *infra* Part I (discussing other instances of domestic surveillance).

⁷ See *infra* Part II (discussing the legal standards that must be met to establish standing in these cases).

⁸ See *infra* Part III.A (describing the limited reach of these amendments in the domestic surveillance context).

⁹ For a comprehensive discussion of standing issues in cases of domestic surveillance, see Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

tively reasonable fear of the consequences of police surveillance.¹⁰ Unlike with previous suits challenging domestic surveillance programs, the NYPD's Muslim Surveillance Program does not raise separation of powers concerns, as only local law enforcement was involved.¹¹ Moreover, the normal rules of standing are relaxed in the First Amendment context.¹²

While it is widely accepted that certain Fourth Amendment cases implicate First Amendment values,¹³ this Note argues that the First Amendment can serve as an independent check on police behavior in cases of domestic surveillance where the Fourth and Fifth Amendments do not apply. The development of a "First Amendment criminal procedure" might begin to close the gaps in Fourth Amendment coverage by providing for the protection of First Amendment-protected behavior that is likely chilled by targeted police surveillance—such as freedom of expression, freedom of thought, freedom of association, and freedom of religion.¹⁴ Although First Amendment

¹⁰ See *infra* Part II.B.

¹¹ See *infra* notes 121–22 and accompanying text (discussing these separation of powers issues).

¹² See *infra* notes 122–26.

¹³ Supreme Court criminal procedure cases implicating First Amendment values within the past fifty years have generally been decided exclusively on Fourth Amendment grounds. See, e.g., *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986) (warrant for allegedly obscene videocassettes); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (warrant for photographic negatives held by newspaper), *superseded by statute*, Privacy Protection Act, 42 U.S.C. § 2000aa (2012); *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) (warrantless seizure incident to arrest of film that local sheriff deemed obscene); *Stanford v. Texas*, 379 U.S. 476, 486 (1965) (warrant for books and records of Communist Party). However, the Court has acknowledged that cases involving government surveillance potentially implicate both the First and Fourth Amendments. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972) ("National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime.").

¹⁴ The term "First Amendment criminal procedure" is borrowed from Daniel Solove, to whose work this Note is greatly indebted. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 132 (2007) (describing the historical and doctrinal basis for the proposition that the First Amendment can serve to regulate police conduct directly, rather than just informing the application of the Fourth Amendment). Other notable contributions to the literature on First Amendment regulation of domestic surveillance have been made by Linda Fisher, who has studied the application of the First Amendment to surveillance of political dissidents, see Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 628 (2004), and Katherine Strandburg, who has examined the implications of freedom of association doctrine on the legality of dragnet electronic surveillance, such as the NSA's metadata collection program, see Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association's Specificity Requirement*, 10 I/S J.L. POL'Y INFO. SOC'Y 327, 331 (2014) [hereinafter Strandburg, *Membership Lists*]; Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 741 (2008) [hereinafter Strandburg, *Freedom of*

and Fourth Amendment law are generally understood as distinct and detached domains, many seminal cases in the development of the Fourth Amendment deal with safeguarding First Amendment-protected activity from government incursion.¹⁵ Further, the First Amendment has been applied to limit government information gathering in a number of contexts where the Fourth Amendment does not apply.¹⁶ Directly regulating domestic surveillance under the First Amendment would require extending current case law, but it would vindicate the First Amendment's concern with protecting minority viewpoints,¹⁷ and better reflect fundamental Fourth Amendment principles, such as the right to privacy.¹⁸ Nonetheless, although the First Amendment's "chilling effects doctrine"¹⁹ can plausibly be extended to domestic surveillance, courts have rarely applied the First Amendment directly to regulate law enforcement activity.

The discussion below proceeds in three parts. Part I summarizes instances of targeted police surveillance in the wake of 9/11, focusing on the Muslim Surveillance Program, and attempts to identify the potential harms on First Amendment values caused by chilling or normalizing speech, thought, association, and religious practice. Part II

Association in a Networked World]. This Note builds on their work to attempt to analyze how First Amendment doctrine can be applied to regulate targeted surveillance. David Smith has also written about First Amendment issues with the post-9/11 surveillance of Muslim-Americans, but his primary focus was on how Muslims have been assigned a presumption of suspiciousness and dangerousness that effectively "racializes" all members of the community as a security threat. See David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 *UCLA J. ISLAMIC & NEAR E.L.* 85, 91–92 (2012).

¹⁵ See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 394 (1995) ("The most famous and important search and seizure cases of the eighteenth, nineteenth, and twentieth centuries involve government officials rummaging through private papers, subpoenaing private documents, or eavesdropping on telephone conversations."); see also Stanford, 379 U.S. at 482 (noting that the history underlying the adoption of the Fourth Amendment was "largely a history of conflict between the Crown and the press").

¹⁶ See *infra* Part III.B (providing examples of cases in which the First Amendment has been used to check police behavior).

¹⁷ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

¹⁸ See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (noting that the Fourth Amendment protects "justifiable," "reasonable," or "legitimate" expectations of privacy); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "the Fourth Amendment's right of privacy" is enforceable against the states through the operation of the exclusionary rule).

¹⁹ The chilling effects doctrine deals with the indirect results of governmental regulation. A chilling effect occurs when someone is deterred from First Amendment-protected activity X because of a fear of consequence Y as an indirect result of governmental action. See generally Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 *B.U. L. REV.* 685 (1978) (describing and analyzing this doctrine).

discusses possible standing problems facing a legal challenge to targeted surveillance. Finally, Part III addresses the difficulties with regulating domestic surveillance under current criminal procedure law and makes the case for extending First Amendment doctrine to fill this gap.

I

MAPPING MUSLIMS: CHILLING SPEECH AND ASSOCIATION

In recent years a “National Surveillance State” has emerged.²⁰ Law enforcement and intelligence agencies have gathered an unprecedented amount of information about each of us, creating databases of those with whom we communicate, where we are at any given moment, which websites we visit, and more.²¹ Simultaneously, local and national law enforcement agencies have conducted targeted surveillance of political and religious minorities, focusing much of their attention on Muslims.²² Intellectual privacy theory predicts that this kind of surveillance will have repressive and normalizing effects, causing individuals to self-censor their speech, their religious activi-

²⁰ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008) (“During the last part of the twentieth century, the United States began developing a new form of governance that features the collection, collation, and analysis of information about populations both in the United States and around the world. This new form of governance is the National Surveillance State.”).

²¹ See generally CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 10–12 (2007) (describing the massive amounts of personal information available to law enforcement via commercial data brokers); Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html (describing how intelligence agencies download audio and video chats, photographs, e-mails, and documents linked to foreign targets from the “central servers of nine leading U.S. Internet companies”); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> (reporting that Verizon turned over all call metadata to the NSA on a daily basis from April 25, 2013 to July 19, 2013); Peter Maass & Megha Rajagopalan, *That’s No Phone. That’s My Tracker.*, N.Y. TIMES, July 15, 2012, at SR 5 (“Cellular systems constantly check and record the location of all phones on their networks—and this data is particularly treasured by police departments and online advertisers. Cell companies typically retain your geographic information for a year or longer”); Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*, N.Y. TIMES, Sept. 2, 2013, at A1 (“For at least six years, law enforcement officials working on a counternarcotics program have had routine access, using subpoenas, to an enormous AT&T database that contains the records of decades of Americans’ phone calls”).

²² See *infra* notes 28–41 and supporting text (describing post-9/11 surveillance of Muslim-Americans).

ties, their reading, and even their thoughts.²³ This hypothesized chilling effect is borne out by empirical studies of the effects of post-9/11 surveillance.²⁴

A. *An Informant in Every Mosque*

While the sheer scale of domestic intelligence gathering is largely a post-9/11 development, there is a long history of targeted domestic surveillance. Much of what has occurred since 9/11 bears a certain resemblance to those practices unearthed by the Senate Committee led by Frank Church in the 1970s.²⁵ But while domestic surveillance in the twentieth century focused largely on Communists, anti-war protesters, civil rights activists, and other “subversives,” more recent surveillance has largely focused on religious minorities.²⁶ Although not an isolated case, the NYPD’s Muslim Surveillance Program provides a particularly stark example of this tendency.²⁷

²³ See *infra* notes 44–49 and accompanying text (summarizing the central tenets and predictions of intellectual privacy theory).

²⁴ See *infra* notes 50–63 and accompanying text (describing the effects of the Muslim Surveillance Program).

²⁵ See S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 5 (1976) (revealing that U.S. intelligence agencies conducted warrantless wiretapping for over forty years, spied on and attempted to disrupt civil rights and anti-war organizations, read millions of private telegrams, and compiled a government watch list containing hundreds of thousands of Americans based on their participation in lawful protests, among other things). For an excellent summary of the Church Committee’s main findings, see G. Alex Sinha, *NSA Surveillance Since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861, 868–73 (2013). For a description of the practices of local police “red squads,” focusing on New York, see FRANK DONNER, *PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* 155–96 (1990).

²⁶ Nonetheless, the case law and principles developed in earlier instances of targeted surveillance remain relevant. In fact, the Muslim Surveillance Program has been challenged on the grounds that it violated the permanent agreement to refrain from police surveillance based on First Amendment-protected activities that the City of New York entered into in *Handschu v. Special Services Division*, 605 F. Supp. 1384 (S.D.N.Y. 1985), to settle a suit resulting from previous surveillance of political activists conducted by the NYPD. See *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203(CSH), 2014 WL 407103 (S.D.N.Y. Jan. 30, 2014) (discussing how to deal with discovery disputes in ongoing litigation over whether NYPD surveillance and investigation of Muslim communities in the New York City area violated the previous court order). For background on the *Handschu* litigation, see Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735, 744–82 (1984) (detailing political surveillance and institutional reform in two states and six cities, including New York City). For a discussion of the “presumption of terrorism” and how Muslims have been racialized as security threats, see Smith, *supra* note 14, at 94–130.

²⁷ This is not to suggest that law enforcement surveillance of political activists has ceased altogether. To the contrary, there seems to have been a notable uptick in this surveillance after 9/11 as well. For example, in advance of the 2004 Republican National Convention, held in New York City, the NYPD sent teams of undercover officers to “cities across the country, Canada and Europe to conduct covert observations of people who

In August 2011, reporters for the Associated Press revealed that the NYPD had systematically been keeping tabs on the Muslim community in New York and nearby states.²⁸ Under the command of former CIA official David Cohen, the NYPD's Intelligence Division created a "Demographics Unit" that attempted to place a source in every mosque within a 250-mile radius of New York City.²⁹ Although they did not reach this goal, they did establish a network spanning from Newark, New Jersey, to Westchester County, New York.³⁰ The NYPD "dispatched teams of undercover officers, known as 'rakers,' into minority neighborhoods as part of a human mapping program They've monitored daily life in bookstores, bars, cafes and nightclubs. Police have also used informants, known as 'mosque crawlers,' to monitor sermons, even when there's no evidence of wrongdoing."³¹ They sent undercover agents or informants into over 250 mosques and identified 263 other "hot spots" throughout the

planned to protest at the convention, according to police records and interviews." Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, N.Y. TIMES, Mar. 25, 2007, at 1. The NYPD was also accused of spying on Occupy Wall Street activists and selectively targeting them by executing warrants for minor violations. See Joseph Goldstein, *Police Warrant Squads Were Used to Monitor Wall Street Protesters, Suspects Say*, N.Y. TIMES, May 3, 2012, at A29; Colin Moynihan, *Wall Street Protesters Complain of Police Surveillance*, N.Y. TIMES, Mar. 11, 2012, at A17; Adrian Chen, *NYPD Raids Activists' Homes Before May Day Protests*, GAWKER (Apr. 30, 2012, 10:51 PM), <http://gawker.com/5906500/nypd-raids-activists-homes-before-tomorrows-occupy-wall-street-protests>. The Boston Police Department and the Boston Regional Intelligence Center tracked the activities and videotaped the activities of anti-war groups such as CodePink and Veterans for Peace. ACLU OF MASS. & NAT'L LAWYERS GUILD, MASS. CHAPTER, POLICING DISSENT: POLICE SURVEILLANCE OF LAWFUL POLITICAL ACTIVITY IN BOSTON 1 (2012), available at http://www.aclum.org/sites/all/files/policing_dissent.pdf ("Officers monitor[ed] demonstrations, track[ed] the beliefs and internal dynamics of activist groups, and document[ed] this information with misleading criminal labels in searchable and possibly widely-shared electronic reports."). Undercover Maryland State Police officers spent at least 288 hours over fourteen months in 2005 and 2006 spying on anti-war and anti-death penalty groups. Nick Madigan, *Spying Uncovered*, BALT. SUN (July 18, 2008), <http://www.baltimoresun.com/news/maryland/bal-te.md.spy18jul18-story.html>. And in Denver, FBI agents monitored environmental and anti-war activists, as well as "an anarchist group that activists say was never formed." Nicholas Riccardi, *FBI Keeps Watch on Activists*, L.A. TIMES (Mar. 27, 2006), <http://articles.latimes.com/2006/mar/27/nation/na-fbi27>.

²⁸ See Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 23, 2011) <http://www.ap.org/Content/AP-in-the-News/2011/with-CIA-help-NYPD-moves-covertly-in-Muslim-areas> [hereinafter Apuzzo & Goldman, *With CIA Help*].

²⁹ Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, ASSOCIATED PRESS (Feb. 23, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/Newark-mayor-seeks-probe-of-NYPD-Muslim-spying>.

³⁰ *Id.*

³¹ Apuzzo & Goldman, *With CIA Help*, *supra* note 28.

city.³² Among other activities, “NYPD agents documented how many times a day Muslim students prayed during a university whitewater rafting trip, which Egyptian businesses shut their doors for daily prayers, which restaurants played Al-Jazeera, and which Newark businesses sold halal products and alcohol.”³³ Despite this enormous commitment of resources, in a 2012 deposition, NYPD Assistant Chief Thomas Galati admitted that the activities of the Demographics Unit “never led to a single lead or investigation.”³⁴

The NYPD’s Muslim Surveillance Program is not the only instance of Muslim targeting. Although law enforcement officials in other cities have generally shied away from such extensive monitoring of religious activity,³⁵ they also have kept tabs on First Amendment-protected activity in the period following 9/11. In 2009, the *Los Angeles Times* revealed that the FBI had placed informants in mosques in Orange County, California, which contributed to a climate of fear and suspicion among local Muslims.³⁶ The FBI was also accused of “using its extensive community outreach to Muslims and other groups to secretly gather intelligence in violation of federal law” in Northern California.³⁷ Moreover, the FBI conducted thousands of interviews of Muslims across the country after 9/11.³⁸ Agents used coercive tactics to obtain interviews, such as approaching individuals at work, interrogating aliens at the border as a condition of entry, and

³² Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, ASSOCIATED PRESS (Sept. 6, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>.

³³ MUSLIM AMER. CIVIL LIBS. COAL., ET AL., *MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS* 4, 8 (2013) [hereinafter *MAPPING MUSLIMS*] (summarizing NYPD documents obtained by the Associated Press), available at <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

³⁴ *Id.* at 9 (citing *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203 (CSH), Galati Dep. (S.D.N.Y. June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf).

³⁵ For example, Los Angeles abandoned a program to map Muslim communities intended to “identify potential hotbeds of extremism” in the face of community opposition. Richard Winton & Teresa Watanabe, *LAPD’s Muslim Mapping Plan Killed*, L.A. TIMES (Nov. 15, 2007), <http://articles.latimes.com/2007/nov/15/local/me-muslim15>.

³⁶ See Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES (Mar. 1, 2009), <http://articles.latimes.com/2009/mar/01/local/me-muslim1>.

³⁷ Jerry Markon, *FBI Accused of Spying on Muslims at Community Outreach Forums*, WASH. POST (Dec. 2, 2011), http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQA1qxyGO_story.html.

³⁸ Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 47–51 (2011). Estimates of the number of interviews go as high as half a million, although Sinnar suggests this is likely hyperbole. *Id.* at 47 & n.20.

threatening to arrest people if they did not cooperate.³⁹ And individuals were not only asked about their political and religious beliefs,⁴⁰ but were also targeted for interviews based on their First Amendment-protected activities, such as political speech.⁴¹

B. The Normalizing and Chilling Effects of Post-9/11 Surveillance

While the chilling effects of targeted surveillance are difficult to document—it is impossible to prove the counterfactual of how an individual would have acted under other conditions—it is hard to dispute that there have been some chilling effects. Indeed, it seems highly unlikely that widespread police surveillance would fail to chill some First Amendment-protected activities. This kind of scrutiny has both a deformative and a formative effect: It not only suppresses speech and behavior, but also causes a permanent self-censoring that eventually becomes second nature.⁴² This chilling effect is, at least to a large degree, a self-inflicted injury.⁴³ But its self-inflicted nature makes it no less damaging.

Surveillance threatens our autonomy to freely choose ideas and identities. When we are watched—or are afraid of being watched—we tend to stick to the road most traveled, becoming wary of exposing or experimenting with thoughts and behavior outside the mainstream.⁴⁴

³⁹ *Id.* at 50–52 (detailing various intimidation tactics used by the FBI to secure interviews).

⁴⁰ *Id.* at 53 (“FBI and CBP officers questioned numerous Muslims, including U.S. citizens, about their religious and political beliefs and activities . . .”).

⁴¹ *Id.* at 55 (“[I]ndividuals’ First Amendment activities sometimes triggered the selection decision.”).

⁴² See GEORGE ORWELL, 1984, at 4 (1949) (“There was . . . no way of knowing whether you were being watched at any given moment. . . . It was . . . conceivable that they watched everybody all the time. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, . . . every movement scrutinized.”); cf. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (arguing that there is a psychic injury caused by the self-censoring, or “covering” of elements of our identity from public view, that every individual undertakes out of fear of social disapprobation).

⁴³ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 202–03 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (“He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.”).

⁴⁴ Neil M. Richards, *The Dangers of Surveillance*, 126 *HARV. L. REV.* 1934, 1948 (2013) (“[W]hen we are watched while engaging in intellectual activities, broadly defined—thinking, reading, web-surfing, or private communication—we are deterred from engaging in thoughts or deeds that others might find deviant.”). While there has only been limited empirical research on the effects of surveillance, “existing studies suggest that surveillance causes conforming and other potential harms to First Amendment values.” Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of*

This threatens the freedom of thought, belief, and speech that lie at the core of the liberties protected by the First Amendment.⁴⁵ “Surveillance thus menaces our society’s foundational commitments to intellectual diversity and eccentric individuality.”⁴⁶

Pervasive surveillance undermines not only our personal privacy, but also the roots of free political and associational life. Intellectual privacy encourages the free dissemination and debate of various ideas and creates the preconditions for the exercise of reasoned choice among alternatives in the political sphere.⁴⁷ After all, “[t]he formation and reformation of political preferences . . . requires the opportunity to experiment with self-definition in private”⁴⁸ In short, “if we do not wish to live in communities governed by apathy, impulse, or precautionary conformism, we must produce individuals capable of governing themselves.”⁴⁹

A recent report on the effects of the NYPD’s Muslim Surveillance Program confirms the hypothesis that surveillance produces repressive and normalizing effects. According to the report, the Muslim Surveillance Program has resulted in the suppression of religious practice, as the often-visible surveillance creates a perception that “every mosque in New York City is subject to some form of surveil-

Surveillance, Beyond Chilling Speech, 49 U. RICH. L. REV. 465, 484 (2015) (discussing social science studies of conformity and surveillance).

⁴⁵ See Richards, *supra* note 44, at 1946 (“[T]he foundation of Anglo-American civil liberties is our commitment to free and unfettered thought and belief These commitments to the freedoms of thought, belief, and private speech lie at the foundation of traditional First Amendment theory, though they have been underappreciated elements of that tradition.”); see also Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 407–12 (2008) (arguing that intellectual privacy has “been protected by Anglo-American legal culture under a variety of names and guises” and underlies “cases that sketched out the basic blueprint of the modern First Amendment”); Solove, *supra* note 14, at 120 (“Understood broadly, the First Amendment aims to ensure freedom of thought and belief.”).

⁴⁶ Richards, *supra* note 44, at 1948; see also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000) (“Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines.”).

⁴⁷ Cohen, *supra* note 46, at 1426 (“Development of the capacity for autonomous choice is an indispensable condition for reasoned participation in the governance of the community and its constituent institutions—political, economic, and social.”); Solove, *supra* note 14, at 120 (“As Justice Brandeis argued, ‘freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,’ and ‘without free speech and assembly discussion would be futile.’” (citation omitted)). For a detailed discussion of the notion, often attributed to Justice Holmes, that a free “marketplace of ideas” plays a central role in a functioning democracy, see Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015).

⁴⁸ Cohen, *supra* note 46, at 1426.

⁴⁹ *Id.* at 1427.

lance.”⁵⁰ For individuals who may have precarious immigration statuses or other legal concerns, “the risk of subjecting oneself to being featured in a police file is reason enough to cease attending the mosque or praying with other Muslims”⁵¹ Moreover, almost all of the fifty-seven Muslims interviewed⁵² reported “that appearing Muslim, or appearing to be a certain type of Muslim, invites unwanted attention or surveillance from law enforcement.”⁵³ This “scrutiny of outward manifestations of ‘Muslim’ characteristics [such as wearing a head scarf, a hijab, or a full beard] led some interviewees or their friends to change their appearance and practice of religion.”⁵⁴ The widespread surveillance of religious communities has driven members of mosques to be suspicious of newcomers and their fellow congregants, as well as engage in self-censorship.⁵⁵ Moreover, interviewees reported that “the ever-present surveillance chills—or completely silences—their speech whether they are engaging in political debate, commenting on current events, encouraging community mobilization or joking around with friends. . . . [T]he surveillance program has, in fact, quelled political activism, quieted community spaces and strained interpersonal relationships.”⁵⁶ This has occurred in community spaces,⁵⁷ at demonstrations,⁵⁸ and even on college campuses,⁵⁹ the quintessential “formative and expressive space for American youth”⁶⁰ Finally, the widespread surveillance has resulted in a culture of suspicion, straining the ties that underlie associational life and making it difficult to form bonds of trust with each other.⁶¹

The effect of the Muslim Surveillance Program on Muslims in the New York City area is consistent with an enormous body of anecdotal

⁵⁰ MAPPING MUSLIMS, *supra* note 33, at 12–19 (quoting individuals in New York City expressing this sentiment).

⁵¹ *Id.* at 14.

⁵² *Id.* at 6. The authors, affiliated with CUNY School of Law, the Muslim American Civil Liberties Coalition, and the Asian American Legal Defense and Education Fund, drew on the resources of community organizations to identify interview subjects, and spoke with “Muslim religious figures, youth, business owners, mosque-goers, professionals, and law enforcement officers, including former NYPD Intelligence Division employees.” *Id.*

⁵³ *Id.* at 15.

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 17–18 (quoting interviewees who reported that attendance is down in mosques, religious teachers who are self-editing their curricula, and others who feel the need to censor their speech).

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 20–23.

⁵⁸ *Id.* at 23.

⁵⁹ *Id.* at 24–25, 39–45.

⁶⁰ *Id.* at 40.

⁶¹ *Id.* at 25–31.

evidence and studies suggesting that government investigative activities since 9/11 have deterred a significant number of Muslims across the United States from engaging in First Amendment-protected activities.⁶² At least some Muslim-Americans have avoided political demonstrations and gatherings, refrained from donating to potentially controversial charities or causes, avoided expressing political opinions, and altered their names or appearances.⁶³ Nonetheless, as the next section will detail, demonstrating that these changes in expressive behavior constitute a legally cognizable injury-in-fact caused by police surveillance can be a knotty problem.

II

CLEARING THE HURDLE OF STANDING

Before potential plaintiffs can challenge police surveillance programs on the merits as chilling First Amendment-protected conduct, they must first establish standing to do so, which has proven to be a significant obstacle. To show standing, a plaintiff has the burden of demonstrating three elements. “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not conjectural or hypothetical.’”⁶⁴ Second, the injury must be “fairly . . . trace[able] to the challenged action of the defendant” rather than the result of the “independent action of some third party not before the

⁶² See Sinnar, *supra* note 38, at 69–71 (collecting articles, surveys, and ethnographic studies). Similarly, a recent law review article found that “Muslims have changed their behaviors in response to the reality and perception of extensive surveillance. For example, individuals report signaling their Muslimness less openly, by praying at home rather than at the mosque, avoiding political conversation in mosques and other Muslim-specific spaces, or reducing donations to Muslim organizations.” Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 881 (2015).

⁶³ See Sinnar, *supra* note 38, at 69 & nn.152–59 (providing anecdotal evidence). But Sinnar notes that “while post-9/11 scrutiny of Muslims led some people to withdraw from activities that would identify them as Muslim, Arab, or South Asian, others became more engaged in civic and political life in an effort to dispel stereotypes and resist unfair treatment.” *Id.* at 70. Post-9/11 surveillance of political activists has likely had a similar chilling effect on their expressive behavior. For example, activists in Denver “said that since the surveillance documents became public, there had been a subtle chill, with some people avoiding protests for fear of ending up in an FBI file. Some activists think the FBI has been watching their groups to intimidate them.” Riccardi, *supra* note 27. This suggestion may sound paranoid, but it is not entirely implausible: “[I]n an earlier period of heightened fear over domestic and foreign threats, the FBI deliberately used interviews to suppress political speech and association by creating the impression that ‘there is an FBI agent behind every mailbox.’” Sinnar, *supra* note 38, at 44 (quoting *Socialist Workers Party v. Att’y Gen. of U.S.*, 642 F. Supp. 1357, 1389 (S.D.N.Y. 1986)).

⁶⁴ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted).

court.”⁶⁵ Third, it must be “‘likely’” rather than “‘speculative’” that the injury-in-fact “will be ‘redressed by a favorable decision.’”⁶⁶

Challenges to domestic surveillance programs have run into trouble with the first two prongs of this analysis—injury-in-fact and traceability. Indeed, while only a handful of surveillance suits have reached the Supreme Court, two such suits failed on standing grounds because the Court found that the plaintiffs could not show concrete injuries-in-fact; instead, the Court deemed any chilled behavior subjective and self-inflicted, as the alleged harm was too speculative.⁶⁷ Moreover, a federal district court recently granted a motion to dismiss *Hassan v. City of New York*—a suit against the NYPD’s Muslim Surveillance Program—on standing grounds, for failure to show injury-in-fact and traceability.⁶⁸

Because chilling effects are inherently indirect and, in one sense, can always be painted as subjective and self-inflicted, standing potentially poses a significant problem for any lawsuit based on a chilling effect. However, recent case law suggests that indirect chilling effects that are based on an *objectively reasonable* fear of *specific, concrete* consequences should be sufficient to establish standing.⁶⁹ In this light, I argue that the district court’s dismissal of *Hassan* resulted from a confused and crabbed reading of precedent. The objective chilling of First Amendment-protected activities experienced by both individual and group plaintiffs in *Hassan* was indeed an injury-in-fact, fairly traceable to the NYPD’s actions.

⁶⁵ *Id.* (internal quotation marks and alterations omitted).

⁶⁶ *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

⁶⁷ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1152 (2013); *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). The most notable recent domestic surveillance case not to be dismissed on grounds of standing was *Keith*, where the government unsuccessfully challenged a district court order to provide a criminal defendant charged with conspiracy to destroy government property with a copy of the statements produced by the warrantless wiretapping of his conversations. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972). The Court did not discuss the issue of standing, but it seems clear that warrantless wiretapping constitutes an injury-in-fact sufficient to give rise to standing to sue. *See Amnesty Int’l USA*, 133 S. Ct. at 1155 (Breyer, J., dissenting) (“No one here denies that the Government’s interception of a private telephone or e-mail conversation amounts to an injury that is ‘concrete and particularized.’”). As well, in a nonprecedential denial of an order to stay, Justice Thurgood Marshall held that the Socialist Workers’ Party had standing to sue over surveillance of their convention, but they failed to establish “a compelling case on the merits.” *Socialist Workers Party v. Att’y Gen.*, 419 U.S. 1314, 1319 (Marshall, Circuit Justice 1974).

⁶⁸ *Hassan v. City of New York*, Civ. No. 2:12–3401 (WJM), 2014 WL 654604, at *3–5 (D.N.J. Feb. 20, 2014).

⁶⁹ *See infra* Part II.B (summarizing the case law describing the objectively reasonable fear analysis).

A. “Subjective” Chills Are Not Enough for Standing

Any lawsuit challenging domestic surveillance programs must surmount the standing obstacles raised by *Laird v. Tatum* and *Clapper v. Amnesty International USA*.⁷⁰ This is not an impossible task, however, as the reasoning of *Laird* can be restricted to a relatively narrow set of facts, whereas *Amnesty International USA* was only dismissed because the Court found that the plaintiffs failed to show that they were actually targets of government surveillance.⁷¹ Both cases are readily distinguishable from the challenges to the Muslim Surveillance Program in *Hassan*.

In *Laird*, the Supreme Court held that the plaintiffs did not have standing to challenge an Army intelligence-gathering program.⁷² The Court noted that “[t]he information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation.”⁷³ The Court found that the plaintiffs’ alleged injury was merely conjectural. Distinguishing cases where chilling effects did amount to concrete injuries-in-fact, the Court stated that “[i]n none of these cases, however, did the chilling effect arise merely from the individual’s knowledge that a governmental agency was engaged in certain activities or from the individual’s concomitant fear that . . . the agency might in the future take some *other* and additional action detrimental to that individual.”⁷⁴ The Court concluded that a “speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to [plaintiffs]” is not an injury-in-fact.⁷⁵ In short, “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”⁷⁶

While labeling the plaintiffs’ claims a mere “subjective” chill may be conclusory and imprecise, *Laird* can and should be limited to sets of facts where the Government does not take affirmative action to collect information, but instead primarily puts together information that is already in the public domain, and where the harm is wholly

⁷⁰ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013); *Laird v. Tatum*, 408 U.S. 1 (1972).

⁷¹ See *Amnesty Int’l USA*, 133 S. Ct. at 1148 (“[R]espondents have no actual knowledge of the Government’s § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a.”).

⁷² 408 U.S. at 13 (holding that the respondents failed to meet standing requirements).

⁷³ *Id.* at 6.

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.* at 13–14.

speculative. As the Tenth Circuit noted, *Laird* is a case where the “[p]laintiffs did not allege any specific action of the Army directed against them nor any specific injury that they had suffered. Rather, they alleged only that the existence of the Army’s intelligence gathering system had a generalized chilling effect on their activities.”⁷⁷ This is not the case with the Muslim Surveillance Program, where the NYPD’s information collection was active, extensive, and targeted Muslims across the New York City metropolitan area.⁷⁸ Where plaintiffs can show an objectively reasonable fear of specific, concrete harm as a direct or indirect result of some affirmative governmental action, such as in *Hassan*, *Laird* should not bar standing. In fact, by establishing such an “objective” chill, individuals and organizations have successfully surmounted *Laird*’s apparent barrier to standing in subsequent cases, as discussed below.

Amnesty International USA is even easier to distinguish from *Hassan*. In this case, a class of lawyers, labor, and human rights organizations challenged the possible interception of their communications with foreign individuals under the authority of the FISA Amendments Act of 2008.⁷⁹ As the plaintiffs could not demonstrate to the majority’s satisfaction that any of their communications had been intercepted under the challenged statute, 50 U.S.C. § 1881a, the Court dismissed the claim on the grounds that “it is speculative whether the Government will imminently target communications to which respondents are parties,”⁸⁰ and “respondents have no actual knowledge of the Government’s § 1881a targeting practices.”⁸¹ The Court continued: “[b]ecause respondents do not face a threat of *certainly impending* interception under § 1881a, the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance, and our decision in *Laird* makes it clear that such a fear is insufficient to create standing.”⁸²

Whereas the *Amnesty International USA* Court deemed the plaintiffs’ fear of being monitored (and any resulting harm) abstract

⁷⁷ *Riggs v. City of Albuquerque*, 916 F.2d 582, 584–85 (10th Cir. 1990) (distinguishing *Laird* and holding that individuals who had in fact been the targets of police surveillance had standing to sue).

⁷⁸ See *supra* notes 28–33 (describing the Muslim Surveillance Program).

⁷⁹ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1145 (2013).

⁸⁰ *Id.* at 1148.

⁸¹ *Id.*

⁸² *Id.* at 1152 (emphasis added). In a footnote, the Court noted that “[i]n some instances, we have found standing based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.” *Id.* at 1150 n.5. However, the majority stated that the “respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here.” *Id.*

and subjective, given their inability to prove that they had been under surveillance, there is no dispute as to whether surveillance occurred in the case of *Hassan*. While the secrecy of surveillance programs has typically been a problem for those challenging them, especially given the government's frequent invocation of the state secrets privilege,⁸³ the existence of the Muslim Surveillance Program is now public knowledge. Nonetheless, the City of New York can still attempt to invoke the state secrets privilege or law enforcement privilege⁸⁴ to block discovery of information about whether a particular plaintiff is still under surveillance, although this tactic may not succeed.⁸⁵ To the extent that it is disputed that the surveillance program is ongoing, this might bar standing for injunctive relief, which requires a "sufficient likelihood" that the harm will recur.⁸⁶

⁸³ See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010) (engaging in a comprehensive survey of national security litigation from January 2001 to January 2009 and finding that the executive branch invoked the state secrets privilege in over a hundred cases). The state secrets privilege is "an evidentiary privilege that requires either the outright dismissal of a case or significant limitations on discovery where litigation would involve the disclosure of important state secrets." Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 968 (2008).

⁸⁴ The law enforcement privilege is a qualified privilege that arises from the common law, but is incorporated in state and federal statutory law. See *In re The City of New York*, 607 F.3d 923, 940–41 (2d Cir. 2010) (describing the qualified nature of the law enforcement privilege). The purpose of this privilege is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Id.* at 941 (quoting *In re Dep't of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988)).

⁸⁵ Indeed, a New York state trial court recently held that the NYPD cannot invoke the state secrets doctrine to block disclosure of information about the Muslim Surveillance Program under the New York State Freedom of Information Law. *Hashmi v. New York City Police Dep't*, 998 N.Y.S. 2d 596, 605 (Sup. Ct. 2014) (describing how the invocation of the state secrets doctrine in the context of the Muslim Surveillance Program would change the balance between the need for disclosure and the need for secrecy embodied in the original New York State Freedom of Information Law).

⁸⁶ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that the plaintiff did not have standing to seek injunctive relief with regard to the LAPD's practice of chokeholds because it was not sufficiently likely that he would be the future victim of a police chokehold). While the City of New York continues to defend the NYPD's actions in court under Mayor Bill de Blasio, new NYPD Commissioner Bill Bratton shuttered the Demographics Unit in 2014. See Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. TIMES, Apr. 16, 2014, at A1 (describing the City's decision to dismantle the controversial unit). However, the far larger NYPD Intelligence Division has continued to target mosques, track the trips of New Yorkers to Syria, and use Muslims as informants. See Sledge, *supra* note 5 (describing the continuing operations carried out by the Intelligence Division). Indeed, Ray Kelly, the previous NYPD commissioner, has suggested that the NYPD's counterintelligence operations have not changed since he left. See *id.*

B. *Establishing an Objective Chill*

As noted in Part II.A, subsequent case law confirms it is possible to surmount the standing problem of *Laird* by showing an “objective chill.” The leading case on point is *Meese v. Keene*.⁸⁷ The plaintiff in *Meese* was a California politician who wanted to show three Canadian films that had been labeled “political propaganda” by the Department of Justice, but refrained from doing so out of fear of being associated with this term.⁸⁸ He submitted affidavits containing the opinion of a political analyst and an opinion poll that indicated showing films labeled as political propaganda might risk injury to his reputation and hamper his re-election efforts, and sued on the grounds that this appellation deterred him from screening the films.⁸⁹ The Supreme Court found that the plaintiff presented a sufficient “‘claim of specific present objective harm or a threat of specific future harm’”⁹⁰ for standing.

In so doing, the Court clarified its conclusory assertion in *Laird* that the plaintiffs alleged only a “subjective” chill—and that such subjective chills are insufficient for standing. For, at least in one sense, chilling effects can always be pegged as subjective—they involve individuals who are deterred from some activity because of their fear of some consequence. But this fear, even if reasonable, is necessarily a subjective fear; any chilling effect is therefore, to some extent, a self-inflicted, indirect harm. *Meese* demonstrates that when a plaintiff alleges they were deterred from engaging in First Amendment-protected activity because of an *objectively reasonable* fear of a *specific* future or present harm as an indirect result of governmental action, this “objective” chilling effect is an injury-in-fact sufficient to give rise to standing.

Mosques, community spaces, or political organizations that lost membership or suffered a diminished capacity to carry out organizational functions due to police surveillance should easily be able to demonstrate an injury-in-fact. Under the logic of *Meese*, they should be able to allege a specific present harm or threat of future harm by pointing to the drop in their membership, decreased trust between religious leaders and their congregation, or other concrete indicia of a chilling effect. The best example of this is perhaps *Presbyterian Church (U.S.A.) v. United States*, in which the plaintiff alleged that an undercover Immigration and Naturalization Service (INS) investiga-

⁸⁷ 481 U.S. 465 (1987).

⁸⁸ *Id.* at 467.

⁸⁹ *Id.* at 473–74.

⁹⁰ *Id.* at 472 (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)).

tion of churches involved in the sanctuary movement “violated the First Amendment by abridging the churches’ right to free exercise of religion and their freedom of belief, speech, and association.”⁹¹ The church claimed that as “a result of the surveillance of worship services, members have withdrawn from active participation in the churches . . . clergy time has been diverted from regular pastoral duties, support for the churches has declined, and congregants have become reluctant to seek pastoral counseling and are less open in prayers and confessions.”⁹² Relying on *Meese*, the Ninth Circuit held that *Laird* did not control the case because the plaintiffs alleged more than a subjective chill.⁹³ The court of appeals elaborated:

The churches in this case are not claiming simply that the INS surveillance has “chilled” them from holding worship services. Rather, they claim that the INS surveillance has chilled *individual congregants* from attending worship services, and that this effect on the congregants has in turn interfered with the churches’ ability to carry out their ministries. The alleged effect on the *churches* is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is “distinct and palpable.”⁹⁴

Recent Supreme Court case law on standing has affirmed that even self-inflicted injuries taken out of a reasonable fear of a specific harm are sufficient to establish the requisite injury-in-fact and causation.⁹⁵ In a leading case on fear-based standing, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court held that where individuals refrained from certain activities because of an objectively reasonable fear, this was sufficient to provide standing.⁹⁶ In *Laidlaw*, the plaintiffs alleged that they had suffered concrete injuries because they refrained from fishing in and picnicking by a river due to their fear that the defendant was discharging pollutants in the rivers, which caused a change in the river’s smell and color.⁹⁷ The Court found that the plaintiffs had standing to bring suit because the “affidavits and testimony presented by [the plaintiffs] in this case assert that Laidlaw’s discharges, and the affiant members’ *reasonable*

⁹¹ 870 F.2d 518, 520 (9th Cir. 1989).

⁹² *Id.* at 521–22.

⁹³ *Id.* at 522.

⁹⁴ *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

⁹⁵ See generally Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445 (2011) (discussing disparate threads of fear-based standing case law and proposing a unified theory for allowing reasonable fear of harm to lead to cognizable injury-in-fact for Article III standing purposes).

⁹⁶ *Friends of the Earth, Inc. v. Laidlaw Envntl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

⁹⁷ *Id.* at 181–83.

concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."⁹⁸ In other words, the fact that the plaintiffs were injured *as a result of self-initiated changes in their behavior* is "fairly traceable" to the defendant's alleged polluting of the river because it was based on their *reasonable* fears of future harm, even though it could be argued that these injuries were self-inflicted.

C. *Applying Standing Doctrine to the NYPD's Muslim Surveillance Program*

By showing an "objective" chill of their First Amendment-protected activities, plaintiffs in cases of targeted domestic surveillance should be able to establish standing to sue, particularly in cases involving local or state law enforcement. While *Amnesty International USA* and *Laird v. Tatum* are potentially fatal precedent for cases implicating national security concerns, *Meese, Presbyterian Church*, and *Laidlaw* provide a path through this procedural thicket. Applying their principles to *Hassan* provides an illustration.⁹⁹

Despite the recent contrary ruling by the District of New Jersey,¹⁰⁰ plaintiffs like the mosques, student associations, businesses, and individuals represented in *Hassan* should have standing to sue over programs such as the NYPD's Muslim Surveillance Program.¹⁰¹ The allegations in the complaint for *Hassan* are sufficient to make out an injury-in-fact, at least for the purposes of a motion to dismiss.¹⁰² The district court summarily concluded that because "[t]he allegations in this Complaint mirror those in *Laird* . . . , the court finds that there was no injury-in-fact."¹⁰³ But cases decided after *Laird* such as *Meese* and *Presbyterian Church* have made it clear that the kinds of injuries

⁹⁸ *Id.* at 183–84 (emphasis added).

⁹⁹ Note that the discussion that follows is not a prediction of how *Hassan* will be resolved by the Third Circuit, only a statement of how it *should* be decided.

¹⁰⁰ *Hassan v. City of New York*, Civ. No. 2:12-3401 (WJM), 2014 WL 654604 (D.N.J. Feb. 20, 2014). An appeal to this decision has been briefed and argued in the Third Circuit, but has not yet been decided.

¹⁰¹ While this Note discusses the specific facts of *Hassan*, this standing analysis applies, *mutatis mutandis*, to other similarly situated plaintiffs in cases of targeted domestic surveillance.

¹⁰² The factual requirements for establishing standing depend on the stage of litigation as "each element [of standing] must be supported in the same way as any other matter . . . i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

¹⁰³ *Hassan*, 2014 WL 654604, at *4.

alleged by the plaintiffs in *Hassan*—injuries to reputation or employment prospects,¹⁰⁴ declines in business,¹⁰⁵ decreases in attendance at worship services,¹⁰⁶ interference with the ability of religious or social organizations to fulfill their mission,¹⁰⁷ and the deterrence of individuals from freely airing their opinions or participating in collective religious activities¹⁰⁸—are sufficient to establish standing.

The injuries suffered as a result of the NYPD's Muslim Surveillance Program have clear parallels in previous cases where courts found an injury-in-fact. Even without conducting an opinion poll as in *Meese*, individual plaintiffs can likely point to being approached by law enforcement at their home, workplace, or in public, and belonging to a population that has been branded a group of concern targeted by law enforcement to show they reasonably feared present or future harm to their careers or reputation.¹⁰⁹ Given this objectively reasonable fear, reacting by ceasing to engage in political activity, self-censoring speech, or ceasing to attend religious services should be sufficient for standing. Indeed, while the plaintiffs in *Laidlaw* alleged that they ceased to engage in leisure activities because of their fears of the unknown future consequences of the pollutants that were demonstrably discharged into a river, plaintiffs in cases like *Hassan* can allege that they ceased to engage in activities at the core of the First Amendment's protections because of their fears of the unknown future consequences of a clearly identifiable program of police surveillance.¹¹⁰ Although it may be difficult for any individual plaintiff to demonstrate that their freedom of association or speech was in fact chilled, as this requires some proof of how they would have acted under other conditions, organizational plaintiffs such as student associations or political groups can more easily show the effects of this chill, such as a decline in participation or the creation of a climate of fear and mistrust.¹¹¹ Moreover, mosques can likely demonstrate objective harms of a type directly analogous to those in *Presbyterian*

¹⁰⁴ Complaint at ¶¶ 13, 29, 32, *Hassan v. City of New York*, Civ. No. 2:12-3401 (WJM), 2014 WL 654604.

¹⁰⁵ *Id.* ¶¶ 19, 21.

¹⁰⁶ *Id.* ¶ 15.

¹⁰⁷ *Id.* ¶¶ 17, 23.

¹⁰⁸ *Id.* ¶¶ 13, 25, 27, 30.

¹⁰⁹ *See, e.g., id.* ¶ 13 (describing one complainant's "reasonable and well-founded fear" that police surveillance activity would affect their employment).

¹¹⁰ *See supra* notes 56-61 and accompanying text (describing the effects of police surveillance on core First Amendment religious activities).

¹¹¹ *See, e.g.,* MAPPING MUSLIMS, *supra* note 33, at 24 ("The stifling and self-censorship of both routine and political speech have especially dire consequences for college students as political activism, student organizing and academic pursuits are being derailed during the most formative years of a young person's life.").

Church, including decreased attendance at religious services and a chilling of conversations between congregants and religious leaders.¹¹²

Plaintiffs such as those in *Hassan* can also meet the second prong of the standing inquiry, causation or traceability. The district court in *Hassan* found that “Plaintiffs’ alleged injuries flow from the Associated Press’s unauthorized disclosure of the documents” revealing the NYPD’s secret surveillance program, not the surveillance itself, and thus their injuries are not fairly traceable to the NYPD.¹¹³ But even if the injuries only occurred after the Associated Press broke the story, which seems unlikely given the pre-existing perception among many Muslims of being under surveillance,¹¹⁴ the alleged changes in behavior still resulted from a fear of the surveillance, not from the press coverage in and of itself.

The mere fact that the details of the program were leaked does not negate causation for standing purposes. The district court in *Hassan* seems to be implicitly importing proximate cause analysis from tort law,¹¹⁵ but the “‘fairly traceable’ standard is lower than that of proximate cause [T]hat there is an intervening cause of the plaintiff’s injury may foreclose a finding of proximate cause but is not necessarily a basis for finding that the injury is not ‘fairly traceable’ to the acts of the defendant.”¹¹⁶ In fact, in *Bennett v. Spear*, the Supreme Court made it clear that “injury ‘fairly traceable’ to the defendant” does not require that “the defendant’s actions are the very last step in the chain of causation.”¹¹⁷ The Court noted that while “it does not suffice if the injury complained of is “‘th[e] result [of] the independent action of some third party not before the court,’ that does not exclude injury produced by determinative or coercive effect upon the action of

¹¹² See *id.* at 12–20 (describing the effects of this program on the practice of religion). “As a result [of NYPD surveillance], attendance at mosque . . . has become tantamount to placing oneself on law enforcement’s radar. The often visible presence of NYPD surveillance at many mosques has founded an assumption within the American Muslim community that every mosque in New York City is subject to some form of surveillance.” *Id.* at 12.

¹¹³ *Hassan*, 2014 WL 654604, at *4–5 (“Thus the injury, if any existed, is not fairly traceable to the City.”).

¹¹⁴ See *MAPPING MUSLIMS*, *supra* note 33, at 11 (“Investigative reporters gave the public documentation proving the existence and sweep of a secret intelligence program that communities had long suspected they were dealing with in their own experiences.”).

¹¹⁵ While the district court never states that it is employing proximate cause analysis, it discusses the actions of the newspaper as an intervening cause cutting off the chain of causation. *Hassan*, 2014 WL 654604, at *4–5 (“Plaintiff’s alleged injuries flow from the Associated Press’s unauthorized disclosure of the documents. The harms are not ‘fairly traceable’ to any act of surveillance.”).

¹¹⁶ *Rothstein v. UBS AG*, 708 F.3d 82, 91–92 (2d Cir. 2013) (collecting cases).

¹¹⁷ 520 U.S. 154, 168–69 (1997).

someone else.”¹¹⁸ *Hassan* is an ever more clear-cut case, as the Associated Press was not an independent tortfeasor, but instead was only the conduit by which information was disseminated. Indeed, to read the causation case law the way the district court did would effectively eliminate standing in all cases involving a chilling effect, where it is always the *indirect* effect of the government’s action that causes injury.¹¹⁹ For example, in *Meese v. Keene*, it was the anticipated hostility of the electorate to anyone showing films deemed political propaganda, not the labeling of the films as political propaganda by the Department of Justice itself, that caused the potential harm of damage to the plaintiff’s reputation and chances of re-election.¹²⁰

A final potential obstacle to standing in cases like *Hassan* is that courts treat national security cases differently. In practice, courts apply the supposedly transsubstantive test of standing varyingly depending on concerns such as separations of powers.¹²¹ And in cases involving potential threats to the nation, which goes to the heart of executive discretion and power, courts are likely to be far more rigid in applying the standard three-part standing inquiry to avoid reaching the merits of the matter.¹²² However, cases involving local or state law

¹¹⁸ *Id.* at 169 (alterations in original) (citations omitted).

¹¹⁹ *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (“It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner’s members may have upon participation by Alabama citizens in petitioner’s activities follows not from *state* action but from *private* community pressures.”).

¹²⁰ The injury-in-fact accepted by the Court as an adequate basis for standing in *Meese* was that the plaintiff’s “exhibition of films that have been classified as ‘political propaganda’ . . . would substantially harm his chances for reelection and would adversely affect his reputation in the community.” *Meese v. Keene*, 481 U.S. 465, 474 (1987). Thus, while the Court summarily concluded that this injury is fairly traceable to the government without any in-depth discussion of the question, *id.* at 476, logically the injury alleged by the plaintiff would have to be caused by the behavior of an intervening actor—the public—in reaction to the plaintiff’s action, rather than directly by the government’s actions.

¹²¹ *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 759–61 (1984) (holding that the causation prong of the standing inquiry must be applied more stringently in cases implicating separation of powers concerns), *abrogated in part by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

¹²² Indeed, this is one possible way of explaining the outcome in *Clapper v. Amnesty International USA*. In dicta, the Court noted that “[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (alteration in original) (citations omitted). The Court continued: “[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs” *Id.* The very next term, the Court unanimously held that the “credible threat of enforcement” of a statute criminalizing false speech during electoral campaigns was an injury-in-fact giving rise to standing despite this injury not being “certainly impending.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014). Another way of reconciling the divergent

enforcement do not present the same separation of powers concerns, as they do not put courts in the position of second-guessing the judgment of another department of the federal government.

Furthermore, countervailing concerns in cases involving First Amendment rights, not always present in national security cases, cut in favor of standing in cases like *Hassan*. Precisely because of the difficulty of showing causation in cases involving chilling of First Amendment-protected conduct—which is always, to some degree, a self-inflicted injury—the Court has developed looser standing rules in the First Amendment’s domain.¹²³ The overbreadth doctrine allows litigants to facially challenge government action as violating First Amendment rights—especially statutes criminalizing speech—even when they are not themselves directly affected by the action.¹²⁴ While the concept of a chilling effect arguably plays a part in a number of First Amendment doctrines,¹²⁵ it plays a central role in the overbreadth doctrine.¹²⁶ Indeed, the Court has explicitly justified the overbreadth doctrine in terms of a chilling effect, stating: “[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.”¹²⁷

outcomes in the two cases is in terms of the special solicitude the Court shows for First Amendment claims, but this reading also supports the contention that the plaintiffs in *Hassan* have standing to sue.

¹²³ See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (describing the overbreadth doctrine as a “departure from traditional rules of standing in the First Amendment area”).

¹²⁴ See *Broadrick*, 413 U.S. at 612 (“[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’” (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965))); see also Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 863 (1991) (“Against the background of the ordinary rule that no one can challenge a statute on the ground that it would be unconstitutional as applied to someone else, a First Amendment exception has emerged.”).

¹²⁵ See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *HARV. L. REV.* 554, 568–79 (1991) (arguing that the chilling effect explains First Amendment jurisprudence in the domains of defamation liability, vagueness, and time, place, and manner restrictions, as well as the overbreadth doctrine).

¹²⁶ See Fallon, Jr., *supra* note 124, at 855 (“First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a ‘chilling effect.’”). *But see* Henry Paul Monaghan, *Overbreadth*, 1981 *SUP. CT. REV.* 1, 3 (rejecting the contention that there is a “special First Amendment standing rule permitting litigants to raise the rights of ‘third parties’” and arguing that the overbreadth doctrine is instead justified by the right to be judged by a constitutionally valid rule of law, not the chilling effect).

¹²⁷ *United States v. Williams*, 553 U.S. 285, 292 (2008).

III FIRST AMENDMENT DOCTRINE FOR FOURTH AMENDMENT PROBLEMS

Even once they establish standing, plaintiffs challenging police surveillance programs face a further obstacle. The Fourth and Fifth Amendments provide the principal constitutional bulwarks regulating police activity and protecting individual privacy from governmental overreach.¹²⁸ But targeted domestic surveillance is effectively exempted from criminal procedure law.¹²⁹ Nonetheless, where the Fourth Amendment does not apply, courts have independently used the First Amendment to rein in government information gathering in a variety of contexts, from legislative investigations of subversive activities to overbroad subpoenas.¹³⁰

While First Amendment case law must be adapted to the context of police investigations, it has the potential to place significant limits on domestic surveillance. I argue that much like the Fourth Amendment, the First Amendment imposes a specificity requirement on government information gathering, requiring it to be sufficiently narrowly tailored to the interests at stake. And like the Fourth Amendment's reasonableness requirement—which might suffice to protect First Amendment values in many cases—the First Amendment weighs the government interest in data collection against the rights of the individuals subject to surveillance. This approach has the potential to give the government a certain margin to maneuver while vindicating the values at the heart of the Constitution. However, while many governmental information-gathering programs that cause chilling effects might survive strict scrutiny, the Muslim Surveillance Program would not. Counterterrorism is certainly a compelling interest, but the actions of the NYPD's Demographics Unit simply do not have an adequate nexus to this interest.

A. *The Holey Fourth Amendment*

The principal reason that police surveillance of expressive behavior cannot be effectively regulated by existing criminal procedure is the carve-out from Fourth Amendment protections for information that we expose to others. There are two interrelated doctrinal hooks to this, both premised on the lack of a reasonable expectation

¹²⁸ See Stuntz, *supra* note 15, at 394 (“Fourth and Fifth Amendment law are the traditional guardians of a particular kind of individual privacy—the ability to keep secrets from the government.”).

¹²⁹ See *infra* Part III.A (describing various carve-outs from Fourth Amendment protections).

¹³⁰ See *infra* Part III.B (describing such practices).

of privacy.¹³¹ The first, known as the third-party doctrine, relies on the notion that you assume the risk that anyone you speak to may relay information to the government without infringing upon any Fourth Amendment rights.¹³² The second, commonly known as the public observation doctrine, relies on the idea that you have no reasonable expectation of privacy in any behavior that is viewable from a lawful vantage point, even if only with the use of aids such as binoculars or helicopters.¹³³

Both doctrines can be thought of as logical outgrowths of the statement in *Katz v. United States* that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”¹³⁴ Yet, the canonical cases involving an assumption of the risk that those to whom you speak may testify against you or even record your conversations for later use against you in a criminal proceeding largely predate *Katz*,¹³⁵ although they were subsequently justified in terms of a lack of a reasonable expectation of privacy.¹³⁶ A common law version of the public obser-

¹³¹ See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (concluding that the Fourth Amendment’s protections attach whenever an individual has a “reasonable expectation of privacy” in the area searched or item seized). Whether there was a “reasonable expectation of privacy” is now the standard test for when the Fourth Amendment applies. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974) (“Supreme Court decisions since *Katz* have generally used this ‘privacy’ formulation to determine issues of the [F]ourth [A]mendment’s scope.”).

¹³² E.g., *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose . . .”). The third-party doctrine is widely viewed as misguided by academic commentators. See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563–64 (2009) (collecting sources that demonstrate the “frequent and apparently unanimous” opinion of legal scholars that “[t]he third-party doctrine is not only wrong, but horribly wrong”). And the “Court has never offered a clear argument in its favor. Many Supreme Court opinions have applied the doctrine; few have defended it.” *Id.* at 564. Nonetheless, it remains blackletter law. *Id.* at 563.

¹³³ In a representative case, the Court held that the use of a beeper to trace an individual’s movements in public was not a search because “[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *United States v. Knotts*, 460 U.S. 276, 281 (1983). For an overview of this doctrine, see David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 85–86 (2013) (collecting cases).

¹³⁴ 389 U.S. at 351.

¹³⁵ See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (declaring admissible the incriminating testimony of a witness conversation in a hotel room); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (allowing into evidence a recorder concealed by an IRS agent); *On Lee v. United States*, 343 U.S. 747, 753–54 (1952) (holding that there is no Fourth Amendment violation when a confidential informant is wearing a wire).

¹³⁶ See *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion) (“[H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are

vation doctrine also existed prior to the adoption of the Fourth Amendment.¹³⁷ Nonetheless, while there has been some recent movement in the direction of limiting the scope of these carve-outs from Fourth Amendment protection,¹³⁸ it may be difficult to eliminate them without doing away with the “reasonable expectation of privacy” framework that has been at the heart of Fourth Amendment jurisprudence since *Katz*.¹³⁹

Thus, as criminal procedure law currently stands, there are essentially no Fourth Amendment limits on the behavior of the NYPD’s

not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.”).

¹³⁷ See *Boyd v. United States*, 116 U.S. 616, 628 (1886) (“[T]he eye cannot by the laws of England be guilty of a trespass.” (quoting *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1066 (C.P. 1765))).

¹³⁸ Most notably, in *United States v. Jones*, five Justices found that “the use of longer term GPS monitoring [of an individual’s movements in public] in investigations of most offenses impinges on [reasonable] expectations of privacy.” 132 S. Ct. 945, 964 (2012) (Alito, J., concurring); *accord id.* at 955 (Sotomayor, J., concurring). See generally Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431, 432 (2013) (arguing that *Jones* is the latest in a line of cases where the Court has been slowly scaling back the third-party doctrine and “cautiously developing new standards of Fourth Amendment protections”). However, while the majority of Justices expressed openness in *Jones* to limiting the public observation doctrine in cases where technology allows “dragnet surveillance” of a type previously unimaginable, this casts little doubt on previously established carve-outs from Fourth Amendment protection for information exposed to law enforcement agents. The Court is unlikely to adopt any conception of the Fourth Amendment that prohibits staples of modern police work such as confidential informants, turncoat witnesses, and undercover officers. Cf. Stuntz, *supra* note 15, at 444–45 (arguing that subpoenas are basically unregulated by the Fourth and Fifth Amendments to protect the administrative state’s ability to regulate).

¹³⁹ But that it would be difficult does not mean it is impossible. In *Katz*, the Supreme Court noted that what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” 389 U.S. at 351–52. Further, Justice Sotomayor’s concurrence in *Jones* suggested that the third-party doctrine may be up for reconsideration. 132 S. Ct. at 957 (Sotomayor, J., concurring) (“I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.”). There is a viable argument that the third-party doctrine is in tension with *Katz* insofar as we *do* have a reasonable expectation of privacy in information that we relay to friends or companies, at least in some circumstances. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) (“Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”). *Katz* itself was a case where the police placed a listening device on the outside of a public telephone booth. 389 U.S. at 348. It seems inconsistent that the installation of this bug by the government violated *Katz*’s reasonable expectation of privacy in the content of his conversations, but it would not violate the Fourth Amendment for the person(s) whom *Katz* called to record the conversation for the government.

Demographics Unit.¹⁴⁰ The police are free to recruit confidential informants, follow individuals in public, place undercover agents in meetings, and make observations from any area open to the public, including public sidewalks and the inside of mosques or coffee shops.¹⁴¹

Although the Fourth and Fifth Amendments have historically served to protect First Amendment values,¹⁴² there is no authority for the proposition that the Fourth Amendment's reach extends to cases that otherwise would be outside its bounds when First Amendment values are at stake. A line of cases surrounding police regulation of alleged obscenity or radical literature stated that the Fourth Amendment must be applied with "scrupulous exactitude"—and suggested that its protections may be enhanced—when police actions affect First Amendment-protected conduct.¹⁴³ But subsequent Supreme Court decisions strongly implied that the Fourth Amendment analysis does not change depending on the type of location or material to be

¹⁴⁰ See *supra* notes 28–33 and accompanying text (describing actions of the NYPD's Demographics Unit).

¹⁴¹ See *supra* notes 132–37 and accompanying text (describing holes in Fourth Amendment protections).

¹⁴² See Stuntz, *supra* note 15, at 396–404 (describing the "substantive origins" of Fourth Amendment restrictions on searches and seizures in cases protecting pamphleteers critical of the Crown against prosecution).

¹⁴³ *E.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973) ("The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards." (citation omitted)); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (holding that a search warrant for the seizure of allegedly obscene materials was defective because it was based on the conclusory assertion of a police officer without judicial scrutiny into the factual basis for the determination that the films were obscene "and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression"); *Stanford v. Texas*, 379 U.S. 476, 485 (1965) ("[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the *most scrupulous exactitude* when the 'things' are books, and the basis for their seizure is the ideas which they contain." (emphasis added)); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 208 (1964) ("We conclude that the procedures followed in issuing the warrant for the seizure of the books, and authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books."); *Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri*, 367 U.S. 717, 731 (1961) (holding that warrants giving broad discretion to police officers to seize materials they viewed as obscene violated "the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled"); see also Conor M. Reardon, Note, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments*, 63 *DUKE L.J.* 735, 760 (2013) (summarizing this line of cases as "a collision between the state's power to seize and society's freedom to speak" in which "the Court has defined [heightened] procedural requirements with reference to First Amendment interests, not Fourth Amendment authority").

searched or seized.¹⁴⁴ Moreover, the Court has stated that “[a]bsent some action taken by government agents that can properly be classified as a ‘search’ or a ‘seizure,’ the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply.”¹⁴⁵

*B. The First Amendment as an Independent Brake
on Police Behavior*

Given the holes in present Fourth Amendment doctrine, the question is not so much whether First Amendment interests compel heightened Fourth Amendment requirements when their spheres overlap, but rather whether the First Amendment offers independent protections where Fourth Amendment doctrine fears to tread. Three separate lines of cases dealing with government information gathering suggest that the answer is “yes.” Although these cases “are mostly civil, their principles are just as relevant and applicable to criminal cases and to government information gathering for national security and other purposes.”¹⁴⁶

The Supreme Court has applied the First Amendment to prohibit the government from gathering information in a series of cases dealing with government regulation of and investigation into the activities of political activists during the height of the Cold War. The Court held that the government could not force applicants to the bar to disclose all of their organizational affiliations as a condition of admission;¹⁴⁷ require public school teachers to disclose all organizations they have belonged to or contributed to in the past five years as a condition of employment;¹⁴⁸ or compel civil rights organizations to disclose their membership rolls.¹⁴⁹ These cases held unconstitutional

¹⁴⁴ See *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986) (“We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.”); see also *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (holding that the same standard of probable cause was required for a warrant to seize photographic negatives from a newspaper as with any other evidence of a crime, stating that “[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.”).

¹⁴⁵ *Maryland v. Macon*, 472 U.S. 463, 468–69 (1985).

¹⁴⁶ Solove, *supra* note 14, at 143.

¹⁴⁷ *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971); *In re Stolar*, 401 U.S. 23, 30 (1971)

¹⁴⁸ *Shelton v. Tucker*, 364 U.S. 479 (1960).

¹⁴⁹ *E.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) (holding that the NAACP could not be compelled to disclose their membership records); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (holding that the NAACP could not be compelled to disclose their membership lists); *NAACP v. Alabama*, 357 U.S. 449,

government regulations, tax laws, and the proceedings of legislative committees, protecting not only civil rights activists but also members of political minorities such as the Communist Party. In so doing, they established the First Amendment protection of the right to free association, which has since been repeatedly reaffirmed.¹⁵⁰ In *DeGregory v. Attorney General of New Hampshire*, for example, the Supreme Court held that an individual could not be jailed for refusing to answer the questions of a state committee investigating subversive activities about his historical connections with the Communist Party where “[t]here is no showing of [an] ‘overriding and compelling state interest’ that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment.”¹⁵¹ While it is usually the privilege against self-incrimination that is invoked in refusing to provide testimony, “the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy.”¹⁵² This provides protection when the information requested is invasive, but not incriminating, and thus the Fifth Amendment privilege against self-incrimination is inapposite.¹⁵³

While there is no Supreme Court precedent on point, a second line of cases involving lower court decisions focused on subpoenas is also instructive. Although subpoenas are largely unregulated by the Fourth Amendment,¹⁵⁴ numerous cases “have concluded that the First

458–59 (1958) (holding that the NAACP could not be compelled to disclose their membership lists).

¹⁵⁰ While the right to free association does not appear in the First Amendment’s text, it has been recognized as a fundamental right. *E.g.*, *NAACP*, 357 U.S. at 460 (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment”); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (noting that while the right of free association “is not expressly included in the First Amendment[,] its existence is necessary in making the express guarantees fully meaningful”). This right has since been repeatedly reaffirmed and extended to nonpolitical contexts. *E.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (youth organization); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (civic organization).

¹⁵¹ *DeGregory v. Att’y Gen. of N.H.*, 383 U.S. 825, 829 (1966) (quoting *Gibson*, 372 U.S. at 546).

¹⁵² *Id.*; *see also Baird*, 401 U.S. at 6 (“[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.”).

¹⁵³ While the plaintiff in *Baird* asserted the Fifth Amendment as well as the First in refusing to answer a question about her present or past affiliation with the Communist Party in her application to join the Arizona bar, 401 U.S. at 14 (Blackmun, J., dissenting), it is presumably for this reason that the majority opinion did not even discuss the Fifth Amendment.

¹⁵⁴ *See United States v. Dionisio*, 410 U.S. 1, 9 (1973) (“[A] subpoena to appear before a grand jury is not a ‘seizure’ in the Fourth Amendment sense”). Under the third-party doctrine, subpoenas for any personal information held by a third party, such as a bank or a

Amendment requires special, tougher standards before a subpoena can be enforced to reveal an anonymous speaker's identity."¹⁵⁵ Similarly, lower courts "have required a 'compelling interest' for any subpoena pertaining to First Amendment activities, such as one's reading habits or speech."¹⁵⁶

Finally, in *Tabbaa v. Chertoff*, the Second Circuit found that the suspicionless border detention and search of Muslim-American conference attendees did not implicate the Fourth Amendment but significantly burdened the plaintiffs' First Amendment associational freedoms.¹⁵⁷ Accordingly, the court proceeded to analyze whether this search violated the First Amendment even though the plaintiffs had no reasonable expectation of privacy when crossing the border. Ultimately, the Second Circuit concluded that this intrusion was justified by the government's compelling interest in preventing terrorism.¹⁵⁸ Nonetheless, this case supports the view that courts can—and should—apply First Amendment scrutiny directly to law-enforcement activity when the protections of the Fourth Amendment do not apply.

As a policy matter, it is essential that the First Amendment be allowed to fill the gaps of Fourth Amendment jurisprudence. A central maxim of American law is that there is "no right without a remedy";¹⁵⁹ while the Fourth Amendment may generally serve to protect First Amendment rights, especially given the entwined history of

phone company, are not searches implicating the Fourth Amendment. *See, e.g.,* *United States v. Miller*, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose . . .").

¹⁵⁵ Solove, *supra* note 14, at 146; *id.* at 146 n.189 (collecting cases where courts considered First Amendment rights when attempting to obtain an individual's identity); *see also In re First Nat'l Bank*, Englewood, Colo., 701 F.2d 115, 119 (10th Cir. 1983) (holding that if a grand jury subpoena "would likely chill associational rights, the Government must show a compelling need to obtain documents identifying petitioners' members" and thus remanding for an evidentiary hearing).

¹⁵⁶ Solove, *supra* note 14, at 147 & n.196 (collecting cases challenging grand jury subpoenas on First Amendment grounds and requiring a clear demonstration of Government's important need and its connection to the information sought); *see also Strandburg, Freedom of Association in a Networked World, supra* note 14, at 791–92 & n.267 ("In numerous other cases, courts have struck down requests for disclosure of organizational membership that cut too broadly in relation to the government interests underlying the requests.").

¹⁵⁷ *See* 509 F.3d 89, 102–05 (2d Cir. 2007).

¹⁵⁸ *See id.* at 105–06.

¹⁵⁹ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

the two amendments,¹⁶⁰ it does not always do so, as discussed above in Part III.A. In those cases where it does not, an independent remedy must be recognized to give substance to the First Amendment right.

C. The Prohibition on Chilling First Amendment-Protected Conduct

While the surveillance programs discussed above do not directly curtail First Amendment-protected conduct, their indirect chilling effects raise major constitutional questions. The chilling effects doctrine recognizes that indirect effects of government action, and not solely direct restrictions on First Amendment freedoms, can violate the First Amendment.¹⁶¹ In Frederick Schauer's classic definition: "A chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."¹⁶² The nature of the government action and the First Amendment right in question matters little; this doctrine applies whether the deterrence stems from fear of criminal sanction or loss of privacy, and whether the right is enumerated in the First Amendment's text or has been read into it.¹⁶³

The chilling effects doctrine can easily be applied to the targeted surveillance described above. To the extent that police surveillance—or the fear thereof—causes individuals to self-censor their speech or stay away from religious services, a chilling of First Amendment rights has occurred. Moreover, the First Amendment right of free association encompasses private or group interactions and not just coming together for political purposes.¹⁶⁴ After all, the ability to freely exchange ideas with other individuals in the private sphere underlies

¹⁶⁰ See Stuntz, *supra* note 15, at 394–95 (discussing the common historical concern of the First, Fourth, and Fifth Amendments, to "limit[] government evidence gathering in order to guard individual privacy").

¹⁶¹ Schauer, *supra* note 19, at 693 ("If the chilling effect is to have any significance as an independent doctrine it must refer only to those examples of deterrence which result from the indirect governmental restriction of protected expression.").

¹⁶² *Id.* (emphasis deleted).

¹⁶³ See Solove, *supra* note 14, at 143 ("Courts have concluded that government information gathering indirectly inhibits or 'chills' First Amendment liberties in a wide range of contexts, including surveillance of political activities, identification of anonymous speakers, prevention of the anonymous consumption of ideas, discovery of associational ties to political groups, and enforcement of subpoenas . . .").

¹⁶⁴ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because . . . such relationships . . . safeguard[] the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.").

the ability to engage in more traditional forms of political activity in the public sphere.¹⁶⁵

“[T]he First Amendment protects unpopular and even ‘unreasonable’ expression.”¹⁶⁶ It protects the rights of subversives and cranks just as much as representatives of conventional wisdom. It protects the right of individuals to remain anonymous in their speech.¹⁶⁷ And it protects the right of people to search for, read, and view materials of their own choosing.¹⁶⁸ Although individuals may be more likely today to post anonymously in online forums than to write handbills, and to access websites rather than read books or view films, the principle remains the same: “The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power.”¹⁶⁹

D. *Applying the First Amendment to Domestic Surveillance*

The task of adapting the First Amendment to regulate domestic surveillance requires balancing the restrictions on the rights that it protects against the risks to national security. A certain degree of reasonableness balancing is baked into the First Amendment’s doctrinal framework.¹⁷⁰ However, there is a crucial difference from the Fourth Amendment context: While much of Fourth Amendment case law can be understood as an attempt to ensure a certain balance of forces between law enforcement and criminals in the face of technological change,¹⁷¹ more speech is an unvarnished good. Freedom of speech

¹⁶⁵ Cf. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972) (“Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.”).

¹⁶⁶ Strandburg, *Freedom of Association in a Networked World*, *supra* note 14, at 748 (distinguishing First Amendment protections from Fourth Amendment reasonable expectation of privacy standard).

¹⁶⁷ See *Talley v. California*, 362 U.S. 60, 63–65 (1960) (striking down ordinance requiring handbills to have “printed on them the names and addresses of the persons who prepared, distributed or sponsored them” as violating the right to anonymity); see also *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 357 (1995) (reaffirming the right to anonymity).

¹⁶⁸ See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels . . . [against] giving government the power to control men’s minds.”).

¹⁶⁹ *Keith*, 407 U.S. at 314.

¹⁷⁰ See *infra* notes 179–81 and accompanying text (arguing that the specificity requirement imposed by the First Amendment is similar to the reasonableness balancing that has been increasingly used in Fourth Amendment cases).

¹⁷¹ See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (“When new tools and new practices threaten to expand or contract police power in a significant way, courts adjust the level of Fourth Amendment protection to try to restore the prior equilibrium.”).

and association play a central role in our constitutional order because they are thought to underlie all other liberties.¹⁷²

The Supreme Court explained in *Buckley v. Valeo* that government action chilling the exercise of First Amendment rights is subject to strict scrutiny “even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct in requiring disclosure.”¹⁷³ *Buckley* requires that any government action that has chilling effects on First Amendment rights be narrowly tailored to achieve a compelling interest.¹⁷⁴ However, “[i]nfringements on [the right of free association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹⁷⁵ Moreover, while strict scrutiny has been deemed “strict in theory, and fatal in fact,”¹⁷⁶ empirical research indicates that a substantial number of government programs trenching on fundamental rights survive this level of review.¹⁷⁷ In any case where the government invokes national security, courts would almost certainly find there to be a compelling

¹⁷² See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (extolling “the transcendent value to all society of constitutionally protected expression”).

¹⁷³ See *Buckley v. Valeo*, 424 U.S. 1, 64–65, 75 (1976) (requiring that “exacting scrutiny” (strict scrutiny) be used when any government action has chilling effects on First Amendment rights).

¹⁷⁴ See *id.* at 64, 66, 81 (recognizing that substantial infringements on First Amendment rights must be significantly related to an important government interest).

¹⁷⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). While, strictly speaking, *Buckley* and *Jaycees* only deal with freedom of association claims, strict scrutiny is the general test for infringements on fundamental rights such as those protected by the First Amendment. See *Zablocki v. Redhail*, 434 U.S. 374, 388 (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”). *But see* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451–52 (2008) (noting that while “[e]lection regulations that impose a severe burden on associational rights are subject to strict scrutiny,” election regulations that impose “modest burdens” on associational rights need only be justified by important state regulatory interests); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (holding that “incidental” restrictions on free speech rights are only subject to intermediate scrutiny).

¹⁷⁶ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

¹⁷⁷ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812–13 (2006). Winkler notes that “strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right.” *Id.* at 844. However, “[t]he strict scrutiny survival rate in freedom of association cases is 33 percent,” the second highest rate in his study. *Id.* at 867.

interest;¹⁷⁸ the question would then be whether the government surveillance program was sufficiently narrowly tailored to this interest or whether there was a less intrusive alternative.

The First Amendment can be thought of as imposing a specificity requirement, somewhat analogous to the particularity requirement of the Fourth Amendment's Warrant Clause.¹⁷⁹ Acquisition of information by means of targeted or mass surveillance "must promote a specific compelling government interest; the information acquired must have a sufficiently close nexus to that interest; and acquisition must be necessary, in the sense that there are no substantially less burdensome means to achieve that interest."¹⁸⁰ This is essentially a balancing test, akin to the reasonableness balancing that has become increasingly common in Fourth Amendment cases:¹⁸¹ The greater the government's interest, the more likely governmental surveillance will be found constitutional. In other words, the more compelling the government's interest, the less narrowly tailored the program must be, or the greater the chilling effect can be.

Where the First and Fourth Amendment overlap, the First Amendment's specificity requirements might not impose any additional requirements on governmental action. While the Court has stated that the Fourth Amendment's requirements must be applied with "scrupulous exactitude" where First Amendment values are at stake, they are not necessarily heightened.¹⁸² Indeed, in cases of targeted surveillance, the First Amendment's specificity requirement would likely be satisfied by probable cause or even reasonable suspicion, depending on the degree to which the surveillance affects First Amendment rights.¹⁸³ Moreover, even if special Fourth Amendment

¹⁷⁸ See *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (citations omitted)).

¹⁷⁹ See Strandburg, *Membership Lists*, *supra* note 14, at 345–48 (arguing that the First Amendment imposes a specificity requirement on government collection of data implicating freedom of association rights).

¹⁸⁰ *Id.* at 345.

¹⁸¹ See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'" (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))); see also *Maryland v. King*, 133 S. Ct. 1958 (2013) (analyzing the Fourth Amendment reasonableness of a program to take the DNA of all felony arrestees by weighing the government's interest in this data against the minimal intrusion of a buccal swab).

¹⁸² See *supra* notes 143–45 and accompanying text (comparing cases that require the Fourth Amendment to be applied with "scrupulous exactitude" when police actions may affect First Amendment rights with subsequent decisions that do not require a heightened Fourth Amendment analysis).

¹⁸³ Cf. *Fisher*, *supra* note 14, at 661 ("In the political surveillance context, the application of balancing should result in a threshold presumption: a particular situation will

safeguards were required in some cases implicating First Amendment concerns, this could be done under the Fourth Amendment's reasonableness analysis, as a search or "seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."¹⁸⁴

Where the Fourth Amendment does not apply, however, governmental action must be narrowly tailored or subject to suit under the First Amendment. This requirement of narrow tailoring—or specificity—may be satisfied by judicial review of individual instances of domestic surveillance, much as with the Fourth Amendment.¹⁸⁵ It may serve prophylactic purposes to require First Amendment warrants for targeted surveillance, for example, although much like administrative search warrants, these might not require a showing of probable cause that a crime has been committed or evidence of criminality will be found.¹⁸⁶ Ultimately, however, the First Amendment review should generally take place at the programmatic level, as with a class action suit. After all, the chilling effect of surveillance is caused by the existence of a widespread program of surveillance—or the perception thereof—more than by isolated incidents.

There should be a presumption of unconstitutionality when police surveillance chills First Amendment-protected activity without producing any significant counterterrorism intelligence. Moreover, surveillance that causes a climate of fear among political and religious minorities must be put to a meaningful—and adversarial—test given

be presumed not to involve a sufficiently compelling state interest if there is no reasonable suspicion of criminal activity before a full investigation of First Amendment activity is conducted.”). Reasonable suspicion of criminality was adopted as the threshold for initiating police investigation into First Amendment-protected activities by Chicago, Detroit, and Seattle in response to police reform efforts in the 1970s. *See* Chevigny, *supra* note 26, at 755–56, 776, 779 (describing each city’s adoption of this standard).

¹⁸⁴ *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994) (arguing that the vehicle for “integrating First Amendment concerns explicitly into the Fourth Amendment analysis” is “constitutional reasonableness”).

¹⁸⁵ *See* Solove, *supra* note 14, at 163–64 (“[T]he lack of a textual basis under the First Amendment should not preclude importing warrants, probable cause, the exclusionary rule, and other concepts from the Fourth Amendment. . . . It is not at all unprecedented for the Court to pollinate one amendment with concepts from another.”).

¹⁸⁶ *Cf. Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 538 (1967) (holding under the reasonableness clause of the Fourth Amendment that administrative search warrants for safety inspections can be issued upon a showing of probable cause that “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling”). While no specific procedures are required by the text of the First Amendment, courts are free to impose such requirements in order to safeguard constitutional rights. Indeed, “[t]he Fourth Amendment’s exclusionary rule was shaped in *Weeks v. United States* and is not based on the text of the [Fourth] Amendment.” Solove, *supra* note 14, at 163.

that the First Amendment is intended to protect the rights of unpopular individuals and groups against the government. Judicial review is most essential when governmental action affects disfavored or unpopular minority groups that are unlikely to be able to vindicate their rights through the political process.¹⁸⁷ Muslim-Americans, subject to a racialized “presumption of suspicion” since 9/11,¹⁸⁸ are quintessential “discrete and insular minorities.”¹⁸⁹

In reviewing domestic surveillance programs, courts should engage in a rigorous testing of whether the means chosen by the government is the least restrictive means available to achieve the compelling interest invoked by the government. This is precisely what the Supreme Court has done in previous freedom of association cases. In *Bates*, for example, the Court found that the government had a compelling interest in enforcing its tax ordinances, while in *Gibson* the Court acknowledged that the government had a compelling interest in rooting out Communists in its midst.¹⁹⁰ In both cases, however, the Court proceeded to conduct a rigorous inquiry into the connection between this compelling interest and the government acquisition of information, holding that because there was an insufficient nexus between the two, the state action was unconstitutional.¹⁹¹ So too, the mere invocation of the talismanic words “national security” does not provide an adequate basis to justify dragnet surveillance.¹⁹² The inquiry into the nexus between even a compelling governmental

¹⁸⁷ See generally, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (setting forth the representation-reinforcement model of judicial review).

¹⁸⁸ Smith, *supra* note 14, at 120.

¹⁸⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire whether . . . prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” (emphasis added)).

¹⁹⁰ See *Gibson v. Fla. Legislative Investigative Comm.*, 372 U.S. 539, 549 (1963) (discussing prior holdings in which the government interest outweighed the individual rights of citizens affiliated with the Communist Party); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (“It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one.”).

¹⁹¹ See *Gibson*, 372 U.S. at 551 (“[T]he record in this case is insufficient to show a substantial connection between the Miami branch of the N.A.A.C.P. and Communist activities.”); *Bates*, 361 U.S. at 525 (“[W]e can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People.”).

¹⁹² *Cf. Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (“Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake.”).

interest and the means chosen to pursue this interest must be rigorous because to do otherwise “would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights.”¹⁹³

Viewed through the prism of the First Amendment, the NYPD’s Muslim Surveillance Program would not withstand strict scrutiny. Counterterrorism is certainly a compelling interest, but the type of indiscriminate surveillance of the Muslim community conducted by the NYPD is not narrowly tailored to this interest. Indeed, it is far from clear that having police officers report on events such as the whitewater rafting trips of college students or on which stores sell halal products served any counterterrorism function at all. Tellingly, in a deposition, NYPD Assistant Chief Thomas Galati was unable to point to a single investigative lead generated as a result of this activity.¹⁹⁴ To the contrary, the NYPD’s actions may have actually undermined counterterrorism efforts by making members of the targeted communities less likely to cooperate with police investigations of potential terrorist activity.¹⁹⁵

CONCLUSION

The harms of targeted surveillance are often intangible and diffuse, but no less real for that. They can be seen in the censoring of speech, the erosion of community, and the disengagement from political activity among Muslim-Americans since 9/11.¹⁹⁶ The NYPD’s Muslim Surveillance Program expressed blanket distrust for an entire population, indiscriminately marking Muslim-Americans as presump-

¹⁹³ *Gibson*, 372 U.S. at 558.

¹⁹⁴ See Galati Dep. 124:12–16, *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203(CSH) (S.D.N.Y. June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf (“I have never made a lead from rhetoric that came from a Demographics [Unit] report and I’m here since 2006. I don’t recall other ones prior to my arrival.”).

¹⁹⁵ See Samantha Henry, *NJ FBI: NYPD Monitoring Damaged Public Trust*, ASSOCIATED PRESS, Mar. 7, 2012, <http://www.ap.org/Content/AP-In-The-News/2012/NJ-FBI-NYPD-monitoring-damaged-public-trust> (“[T]he top FBI official in New Jersey said Wednesday that the [NYPD’s] surveillance of Muslims in the state has hindered investigations and created ‘additional risks’ in counterterrorism.”); see also Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 *LAW & SOC’Y REV.* 365, 368 (2010) (“We find a robust correlation between perceptions of procedural justice and both perceived legitimacy and willingness to cooperate among Muslim American communities in the context of antiterrorism policing.”).

¹⁹⁶ See *supra* notes 50–63 (discussing the effect of surveillance programs on individual Muslims and the greater Muslim community).

tively suspect in the eyes of the law¹⁹⁷—and indirectly stifling expressive activity.

While the Muslim Surveillance Program is unregulated by the Fourth Amendment, First Amendment case law provides a meaningful way for courts to provide judicial review. The doctrine, developed at the height of the Cold War to protect the freedom of expression and speech of civil rights activists and suspected Communists, remains good law and can plausibly be extended to the present situation. Under this framework, government action that has even the indirect effect of chilling First Amendment-protected behavior should be subject to strict scrutiny. And, in this case, such scrutiny should be fatal not only in theory but also in fact.

It is not the judiciary's role to ensure that law enforcement officers use the most effective tactics, but it is certainly appropriate for courts to intervene in cases like that of the Muslim Surveillance Program, where the actions of the police have so great a potential to chill the exercise of First Amendment rights while providing such paltry gains to the ostensible goal of preventing terrorist attacks. Indeed, such an indiscriminate and ineffective program could likely have only been put into place and maintained against members of a minority group, without the political power to oppose it effectively. As has long been recognized, it is in such cases that the need for searching judicial review is most acute. For, in the words of Justice Black, “[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”¹⁹⁸

¹⁹⁷ Cf. Smith, *supra* note 14, at 120 (“The FBI’s use of informants suggests that the government views Muslim individuals and Muslim groups with a presumption of suspicion. This presumption results from the stereotype that Muslims are untrustworthy, disloyal, and foreign, and that Muslims have an inherent potential for violence.”).

¹⁹⁸ *Chambers v. Florida*, 309 U.S. 227, 241 (1940). This is perhaps more an aspirational statement of how courts should function than an accurate description of how they typically do function. For a skeptical view of the notion that courts tend to protect the rights of the politically powerless, see, for example, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1933–34 (1995) (“[I]t is implausible to believe that either *Plessy* or *Korematsu* . . . could have come out the other way, given the background context of the decisions and the limited countermajoritarian inclinations and capacities of the justices. No Court decision in American history has been that countermajoritarian.”). Nonetheless, *Chambers* reflects an important tendency in how the judiciary itself conceives of its role. The Second Circuit recently struck a similar note in reinstating the claims against high-level Bush Administration officials made by a class of Muslims detained after 9/11 on immigration violations in *Turkmen v. Hasty*, 789 F.3d 218, 264 (2d Cir. 2015), stating that “[i]f there is

one guiding principle to our nation it is the rule of law. It protects the unpopular view, it restrains fear-based responses in times of trouble, and it sanctifies individual liberty regardless of wealth, faith, or color.”

