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COMMENT

RACIALLY MOTIVATED SPYING PRETEXT: CHALLENGING THE FBI'S NEW REGIME OF RACIALIZED SURVEILLANCE

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This Comment critiques the Federal Bureau of Investigation's (FBI) surveillance policies against Black activism following changes in the FBI's threat terminology from "Black Identity Extremism" (BIE) in 2017 to "Racially Motivated Violent Extremism" (RMVE) in 2020. RMVE is a facially race-neutral category that includes both Black activists protesting racist violence and white supremacists who commit it. This change allowed the FBI to escape criticism of the BIE designation; however, the FBI's narrative that Black activism is dangerous persists, and its surveillance power over Black activists has only increased. To justify this move, the FBI has engaged in the novel practice of "counter-profiling." This entails grouping white supremacists and Black activists, then citing the rising threat of white supremacist violence to justify increased surveillance of all RMVEs, including Black activists—even though there is no reliable evidence of a violent extremist threat from Black activism. These FBI practices perpetuate a long history of racialized surveillance violating the Fourteenth Amendment because they demonstrate a racially discriminatory intent and use a racial classification that cannot survive strict scrutiny.

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I. INTRODUCTION

On October 6, 2017, *Foreign Policy* magazine reported on a leaked Federal Bureau of Investigation (FBI) Intelligence Assessment, issued on August 3, 2017, that said the FBI had begun tracking “Black identity extremists” (BIEs), whom the FBI claimed were a new and deadly threat to law enforcement nationwide.¹ The Assessment described Black Identity Extremism (BIE) as an ideologically-driven movement promoting lethal violence against law enforcement in response to “perceptions of police brutality against African Americans.”² The Assessment was widely criticized by civil rights activists and lawmakers who decried it as an attempt to obstruct the current movement for racial justice by disrupting and surveilling Black activists under the false pretense of a poorly-defined threat—a reboot of the FBI’s infamous actions during the Civil Rights Movement through the Counterintelligence Program (COINTELPRO).³

On July 23, 2019, FBI Director Christopher Wray testified before the Senate Judiciary Committee that the FBI had abandoned the term “Black identity extremist” and had reconceptualized its goal as stopping violence from “racially motivated violent extremists” (RMVEs), rather than investigating ideologies.⁴ The new RMVE category subsumed two of the FBI’s previous threat designations—BIEs and White Supremacy Extremists (WSEs).⁵ Weeks later, online media

¹ Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists’*, FOREIGN POL’Y (Oct. 6, 2017, 11:42 AM), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/> [<https://perma.cc/V8WP-KQ2L>]; COUNTERTERRORISM DIV., FED. BUREAU INVESTIGATION, INTELLIGENCE ASSESSMENT: BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS 1 (2017) [hereinafter 2017 Assessment], <http://assets.documentcloud.org/documents/4067711/BIE-Redacted.pdf> [<https://perma.cc/2QDR-E4FU>].

² 2017 Assessment, *supra* note 1, at 2.

³ Alice Speri, *The Strange Tale of the FBI’s Fictional ‘Black Identity Extremism’ Movement*, INTERCEPT (Mar. 23, 2019, 8:31 AM) [hereinafter, Speri, *The Strange Tale*], <https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/> [<https://perma.cc/DWT9-2M7F>].

⁴ Byron Tau, *FBI Abandons Use of Term ‘Black Identity Extremism’*, WALL ST. J., <https://www.wsj.com/articles/fbi-abandons-use-of-terms-black-identity-extremism-11563921355> [<https://perma.cc/9P8G-KDZR>] (July 23, 2019, 10:33 PM).

⁵ *Id.*; COUNTERTERRORISM DIV., FED. BUREAU INVESTIGATION, FBI STRATEGY GUIDE FY2018–20 AND THREAT GUIDANCE FOR RACIAL EXTREMISTS 17 (2018) [hereinafter 2018–20 Guidance], <https://www.scribd.com/document/421166393/FBI-Strategy-Guide-FY2018-20-and-Threat-Guidance-for-Racial-Extremists> [<https://perma.cc/7YGA-4QCF>].

outlet *The Young Turks* released leaked FBI documents including the FBI's Threat Guidance for Fiscal Years 2018–2020 for different forms of racial violence, showing the evolution of the FBI's threat terminology from BIEs and WSEs in 2018 to RMVEs in 2020.⁶ However, although the terms change for each year of the 2018–20 Guidance, the threat descriptions for each year fully incorporate the 2017 Assessment's definition of BIE.⁷ Thus, the term RMVE relies on the same racialized understandings of threats used in the 2017 Assessment and during the Civil Rights Movement.⁸ Under the guise of race neutrality, the 2020 Guidance gives the FBI even more power to aggressively surveil and target Black people who are perceived to be active in, or sympathetic to, racial justice movements, and the FBI's suspicions are often based on race alone.⁹

This Comment critiques the FBI's use of the “Alleged BIE Threat”¹⁰ in the 2017 Assessment and 2018–20 Guidance. Part II

⁶ 2018–20 Guidance, *supra* note 5, at 4, 8, 12, 17; Ken Klippenstein, *Leaked FBI Documents Reveal Bureau's Priorities Under Trump*, YOUNG TURKS (Aug. 8, 2019), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLD5cRR> [<https://perma.cc/PX8V-H9JF>]. The documents collectively are referred to as the “2018–20 Guidance,” but the documents within the 2018–20 Guidance for a specific year are referred to as the “2018 Guidance,” “2019 Guidance,” or “2020 Guidance.”

⁷ Klippenstein, *supra* note 6; 2017 Assessment, *supra* note 1, at 2 n.b.; 2018–20 Guidance, *supra* note 5, at 4, 12, 17. The 2017 Assessment states:

The FBI defines black identity extremists as individuals who seek, wholly or in part, through unlawful acts of force or violence, in response to perceived racism and injustice in American society and some do so in furtherance of establishing a separate black homeland or autonomous black social institutions, communities, or governing organizations within the United States. This desire for physical or psychological separation is typically based on either a religious or political belief system, which is sometimes formed around or includes a belief in racial superiority or supremacy.

2017 Assessment, *supra* note 1, at 2 n.b. Nearly all of this exact language is found throughout the 2018–20 Guidance. 2018–20 Guidance, *supra* note 5, at 4, 12, 17.

⁸ Klippenstein, *supra* note 6.

⁹ 2018–20 Guidance, *supra* note 5, at 20. The population of potential Black targets of FBI surveillance will be referred to as “Black activists” as shorthand in this Comment, but any Black person suspected of being active or sympathetic to racial justice movement may be targeted. See Andrew Cohen, *The FBI's New Fantasy: 'Black Identity Extremists'*, BRENNAN CTR. FOR JUST. (Oct. 11, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/fbis-new-fantasy-black-identity-extremists> [<https://perma.cc/SXX3-NVGC>].

¹⁰ In this Comment, “Alleged BIE Threat” refers to the alleged threat which the FBI named BIE, Black Racially Motivated Extremism (BRME), and RMVE (insofar as it covers Black targets), and “Alleged BIEs” refers to those accused or treated as being part of this threat; “WSE Threat” refers to the threat which the FBI named WSE, White Racially Motivated Extremism (WRME), and

provides background on the FBI's past and present surveillance tactics against civil rights activists and describes the flaws in the FBI's narrative of the Alleged BIE Threat. Part III identifies a novel justification for surveillance adopted by the 2020 Guidance, which this Comment calls "counter-profiling," where one group is more likely to commit a certain crime, but rather than focus on that specific group, law enforcement generalizes the threat as a pretense to target others who do not fit the profile. Part IV presents an Equal Protection Clause challenge to current FBI surveillance practices used against Black activists, examining both the FBI's invidious racial intent and its use of suspect classifications.¹¹ In sum, this Comment argues that the dedication of resources to the Alleged BIE Threat is irrational, the race-neutrality of the RMVE category is a sinister façade, and the FBI is engaged in racialized surveillance which violates the Constitution.

II. ORIGINS AND PRACTICES OF CONTEMPORARY ANTI-BLACK SURVEILLANCE

The history of anti-Black surveillance in the United States can be traced back to slavery. Overseers, patrols, police enforcing Black Codes, and white civilians deputized to capture those escaping slavery or challenging the racial order all engaged in surveillance of free and enslaved Black people to maintain white supremacy.¹² The FBI's invention of and response to the Alleged BIE Threat reinforces America's long history of racial control, albeit through new surveillance technologies.¹³ To

RMVE (insofar as it covers white targets). This Comment rejects the FBI's assessment that a BIE Threat exists, so it refers to this threat as only an "alleged" threat; however, this Comment agrees that the WSE Threat is real, so the word "alleged" is not needed here. See discussion *infra* Part II.B & IV.B.3.

¹¹ U.S. CONST. amend. XIV.

¹² Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY. U. POLICE STUD. ONLINE (Jan. 7, 2014), <https://plsonline.eku.edu/insideloook/brief-history-slavery-and-origins-american-policing> [<https://perma.cc/X6ZX-T8QF>]; Stacey Patton, *Trust Has Never Existed Between Cops and Black Communities*, DAME MAG. (Oct. 4, 2016), <https://www.damemagazine.com/2016/10/04/trust-has-never-existed-between-cops-and-black-communities/> [<https://perma.cc/E3S7-EL32>]; Claudia Garcia-Rojas, *The Surveillance of Blackness: From the Trans-Atlantic Slave Trade to Contemporary Surveillance Technologies*, TRUTHOUT (Mar. 3, 2016), <https://truthout.org/articles/the-surveillance-of-blackness-from-the-slave-trade-to-the-police/> [<https://perma.cc/57JM-7UH8>] (interview with Simone Browne, Professor of African and African Diaspora Studies, University of Texas at Austin).

¹³ Mohamed Hamaludin, "Black Identity Extremist" Label Just Another Excuse to Silence Activists, S. FLA. TIMES (Mar. 30, 2018),

illustrate the danger that this surveillance poses to Black activists and the context for a constitutional challenge, this section considers two questions. First, how does the FBI engage in racialized surveillance? Second, what is the threat that the FBI claims to address?

A. The Civil Rights Movement, COINTELPRO, and Contemporary Surveillance

The FBI's COINTELPRO became the archetype for a modern surveillance state that systematically works against Black activists to quell dissent. From 1956 to 1971, COINTELPRO operated "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of" civil rights groups using tactics such as wiretaps, blackmail, spreading disinformation, raiding offices and homes, fabrication of evidence and perjury at trials, vandalism, and both inciting and directly committing violence against its targets.¹⁴

Prominent targets included Dr. Martin Luther King Jr., Kwame Ture, the Black Panther Party (BPP), the Nation of Islam, the National Association for the Advancement of Colored People, and many others.¹⁵ Despite being explicitly non-violent, Dr. King was treated as the greatest threat to the country because the FBI viewed him as a potential messianic figure who could unite civil rights groups, and the FBI worried that "[i]n unity there is strength."¹⁶ Consequently, the FBI subjected Dr.

<http://www.sfltimes.com/opinion/black-identity-extremist-label-just-another-excuse-to-silence-activists> [<https://perma.cc/VN8Q-5L4B>] (drawing a line through slavery, segregation, and anti-Black violence by police and civilians, to FBI surveillance of Alleged BIEs as "a new way to legally curtail the freedom of African Americans," and "yet another effort at race control.").

¹⁴ Joshua D. Rothman, *The Security State, COINTELPRO, and Black Lives Matter*, WE'RE HIST., (Aug. 31, 2015), <http://werehistory.org/cointelpro/> [<https://perma.cc/38HZ-Z4JW>]; FINAL REPORT, S. REP. NO. 94-755, VOL. II, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, 10–13 (1976) [hereinafter Church Committee Report Vol. II]; FINAL REPORT, S. REP. NO. 94-755, VOL. III, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, 223, 824 (1976) [hereinafter Church Committee Report Vol. III].

¹⁵ See Church Committee Report, Vol. II, *supra* note 14 (detailing the extensive surveillance against these civil rights leaders and many more individuals and organizations). Kwame Ture was formerly known as Stokely Carmichael which is how the Church Committee Report refers to him. Karen Grigsby Bates, *Stokely Carmichael, A Philosopher Behind the Black Power Movement*, NAT'L PUB. RADIO (Mar. 10, 2014, 10:11 AM), <https://www.npr.org/sections/codeswitch/2014/03/10/287320160/stokely-carmichael-a-philosopher-behind-the-black-power-movement> [<https://perma.cc/2XDN-KL2K>].

¹⁶ J. Edgar Hoover, *The FBI Sets Goals for COINTELPRO*, SOC. HIST. FOR EVERY CLASSROOM, <https://herb.ashp.cuny.edu/items/show/814>

King to photographic and physical surveillance,¹⁷ bugged his hotel rooms, used the products of its surveillance to try to destroy his marriage, and sent “anonymous letters attempting to ‘blackmail him into suicide.’”¹⁸ The FBI also made the BPP a major target, subjecting the group to infiltration by informants and encouraging internal discord, violence, and conflicts with outside groups.¹⁹ Additionally, the FBI organized and conducted raids on the BPP in partnership with local police departments—in one such raid, the police killed Fred Hampton in what many argue was a targeted assassination.²⁰

In 1971, the FBI terminated COINTELPRO after activists broke into an FBI office and leaked incriminating documents to the press, leading to public outcry against the program.²¹ In 1975, Congress formed the Church Committee, which detailed and condemned the FBI’s pervasive racist and

[<https://perma.cc/PW2E-WHH8>] (last visited Nov. 10, 2020) (listing as a goal for COINTELPRO to “[p]revent the RISE OF A ‘MESSIAH’ who could unify, and electrify, the militant black nationalist movement,” and further noting that Dr. King “could be a very real contender for this position should he abandon his supposed ‘obedience’ to ‘white, liberal doctrines’ (nonviolence) and embrace black nationalism.”)

¹⁷ See RAYMOND P. SILJANDER & DARIN D. FREDRICKSON, *FUNDAMENTALS OF PHYSICAL SURVEILLANCE* 3 (3d ed. 2016) (“Physical surveillance is the direct visual observation of a person, object, activity, or location while remaining undetected.”).

¹⁸ Church Committee Report, Vol. II, *supra* note 14, at 10–11; Dia Kayyali, *The History of Surveillance and the Black Community*, ELEC. FREEDOM FOUND. (Feb. 13, 2014), <https://www.eff.org/deeplinks/2014/02/history-surveillance-and-black-community> [<https://perma.cc/RFJ6-PB4L>]; Gillian Brockell, *‘Irresponsible’: Historians Attack David Garrow’s MLK Allegations*, WASH. POST (May 30, 2019, 12:58 PM), <https://www.washingtonpost.com/history/2019/05/30/irresponsible-historians-attack-david-garrows-mlk-allegations/> [<https://perma.cc/SF7X-QLDS>] (The FBI sent a letter disparaging Dr. King as a fraud as well as recordings which allegedly proved his infidelity and threatened that he would be exposed if he did not commit suicide).

¹⁹ Kayyali, *supra* note 18 (“The FBI also specifically targeted the Black Panther Party with the intention of destroying it. They infiltrated the Party with informants . . . Agents sent anonymous letters encouraging violence between street gangs and the Panthers in various cities, which resulted in ‘the killings of four BPP members and numerous beatings and shootings,’ as well as letters sowing internal dissension in the Panther Party.”) (citing Church Committee Report Vol. III, *supra* note 14, at 188).

²⁰ *Id.*; Church Committee Report Vol. III, *supra* note 14, at 223; CHIP GIBBONS, *DEFENDING RTS. & DISSENT, STILL SPYING ON DISSENT: THE ENDURING PROBLEM OF FBI FIRST AMENDMENT ABUSE* 18 (2019).

²¹ Rothman, *supra* note 14; Mark Mazzetti, *Burglars Who Took on F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html> [<https://perma.cc/Y37K-Q3FM>].

illegal practices.²² Former FBI Director James Comey referred to COINTELPRO as “shameful” and “a dark chapter in the Bureau’s history.”²³ Director Wray claimed it was “something we’ve learned from.”²⁴ However, the current surveillance threat to Black activists substantially echoes COINTELPRO, with added danger from advanced surveillance technology.

The FBI’s contemporary surveillance of the Alleged BIE Threat is part of a strategy that the agency refers to in the 2018 Guidance as “IRON FIST.”²⁵ The FBI’s stated goal for this surveillance is to gain information about BIE facilitators, recruiters, motivations, tactics, structure, training, and membership to mitigate the perceived threat.²⁶ While the specific details of IRON FIST are not public, available information suggests that the FBI is engaging in a mix of old and new surveillance practices in response to the Alleged BIE Threat.²⁷

Following the Church Committee’s reports on COINTELPRO, then-Attorney General Edward Levy issued new Guidelines for Domestic FBI Operations to reduce abuses, but subsequent Attorneys General have significantly weakened the Guidelines by permitting lower thresholds to open and continue investigations and less justification to use intrusive tactics.²⁸ The

²² Rothman, *supra* note 14; Mazzetti, *supra* note 21.

²³ Jeanne Theoharis, *Comey Says FBI’s Surveillance of MLK Was “Shameful”—But Comey’s FBI Targeted Black Activists and Muslim Communities Anyway*, INTERCEPT (Apr. 24, 2018, 4:10 PM), <https://theintercept.com/2018/04/24/james-comey-mlk-martin-luther-king-surveillance-muslims/> [<https://perma.cc/3RRG-ZGF8>].

²⁴ Speri, *The Strange Tale*, *supra* note 3.

²⁵ 2018–20 Guidance, *supra* note 5, at 4. The FBI also had a strategy called “SUPREME RENDITION” to address the WSE Threat in 2018. *Id.* at 8. Presumably, both IRON FIST and SUPREME RENDITION have been folded into the FBI strategy to address RMVEs.

²⁶ *Id.* at 4.

²⁷ *Id.*; Alice Speri, *The FBI Spends a Lot of Time Spying on Black Americans*, INTERCEPT (Oct. 29, 2019, 10:07 AM) [hereinafter Speri, *FBI Spying*], <https://theintercept.com/2019/10/29/fbi-surveillance-black-activists/> [<https://perma.cc/627G-FHTD>]; Amna Toor, Note, “*Our Identity Is Often What’s Triggering Surveillance*”: *How Government Surveillance of #Blacklivesmatter Violates the First Amendment Freedom of Association*, 44 RUTGERS COMPUT. & TECH. L.J. 286, 299–301 (2018). See Nusrat Choudhury & Malkia Cyril, *The FBI Won’t Hand Over Its Surveillance Records on ‘Black Identity Extremists,’ so We’re Suing*, AM. CIV. LIBERTIES UNION (Mar. 21, 2019, 12:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/fbi-wont-hand-over-its-surveillance-records-black> [<https://perma.cc/2NRL-PXRH>] (ACLU and MediaJustice are suing the FBI for Freedom of Information Act (FOIA) violations over a FOIA request on surveillance of Alleged BIEs).

²⁸ GIBBONS, *supra* note 20, at 23; EMILY BERMAN, BRENNAN CTR. FOR JUST., DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 13–19 (Jan. 18, 2011), <https://www.brennancenter.org/sites/default/files/2019->

FBI continues to use informants to infiltrate Black activist groups and coordinates with local police, just as it did during COINTELPRO.²⁹ The Department of Homeland Security (DHS) has also become involved through Joint Terrorism Task Forces and fusion centers, which operate mostly in secrecy and have been known to surveil Black Lives Matter (BLM) protests.³⁰

New tools have exacerbated the surveillance problem. In 2008, the FBI gained the power to open “assessments” of individuals to begin intrusive surveillance—assessments do not need to be predicated on any factual basis or evidence of a threat and can be renewed an unlimited number of times.³¹ The 2018–20 Guidance explicitly demands the use of these assessments, which permit physical surveillance and the use of informants.³² Social media analysis has created a new avenue for information collection, and FBI documents explicitly state that FBI agents will proactively search social media and online news.³³ While social media has played a major role in promoting BLM and Black activism nationwide, it has also given the FBI a powerful tool for surveillance, disruption, and harassment of Black activists.³⁴

Law enforcement’s response to 2020’s racial justice protests has shown the FBI’s surveillance power in action.

08/Report_Domestic_Intelligence_Powers_Risks.pdf [https://perma.cc/FP4F-BQTM].

²⁹ 2018–20 Guidance, *supra* note 5, at 4, 19; Speri, *FBI Spying*, *supra* note 27; Chris Brooks, *After Barr Ordered FBI to “Identify Criminal Organizers,” Activists Were Intimidated at Home and at Work*, INTERCEPT (June 12, 2020, 6:00 AM), <https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee/> [https://perma.cc/DJ8Q-8S82].

³⁰ Toor, *supra* note 27, at 300; *Fusion Centers*, DEPT. HOMELAND SEC., <https://www.dhs.gov/fusion-centers> [https://perma.cc/DJ7T-CJ2J] (Sept. 19, 2019); Lee Fang, *Why Was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest?*, INTERCEPT (Mar. 12, 2015, 7:12 PM), <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest/> [https://perma.cc/3RDB-6Z4U].

³¹ Speri, *FBI Spying*, *supra* note 27; Michael German & Emily Hockett, *Standards for Opening an FBI Investigation So Low They Make the Statistic Meaningless*, JUST SEC. (May 2, 2017), <https://www.justsecurity.org/40451/standards-opening-fbi-investigation-statistic-meaningless/> [https://perma.cc/23S2-ZEP6].

³² Speri, *FBI Spying*, *supra* note 27; 2018–20 Guidance, *supra* note 5, at 5, 14, 19.

³³ Toor, *supra* note 27, at 299; 2017 Assessment, *supra* note 1, at 3; 2018–20 Guidance, *supra* note 5, at 19.

³⁴ Monica Anderson et al., *Activism in the Social Media Age*, PEW RES. CTR. (July 11, 2018), <https://www.pewresearch.org/internet/2018/07/11/activism-in-the-social-media-age/> [perma.cc/6PJL-A2FA] (describing the importance of social media for activism on racial justice by providing a platform for people to express their experiences, raise awareness, and organize actions).

Organizers have faced police intimidation at their homes and workplaces.³⁵ The FBI and local police have used facial recognition, advanced drones, “automated license plate readers[,] and Stingrays,” which “collect call, text, browsing and location data from phones.”³⁶ In one case, the FBI saw aerial footage of a protestor, searched for her in videos on Instagram and Vimeo, found where she bought her shirt on Etsy, looked for the LinkedIn profile of a customer who reviewed the shirt, and identified that it was the same protestor based on a visible tattoo—she was subsequently charged with felony arson and faces up to ten years in prison.³⁷ The surveillance apparatus of the FBI has never been more powerful.

Ironically, but not unsurprisingly, the Capitol insurrection on January 6, led by white supremacists and other far-right extremists, is being used as a justification to ramp up anti-protest laws across several states.³⁸ These laws are poised to be more heavily enforced against Black activists protesting racial injustice than WSEs—who police have been reluctant to restrain, as the country witnessed during the Capitol

³⁵ Brooks, *supra* note 29.

³⁶ Corinne Reichert, *House Dems Demand FBI, Others Stop Spying on Black Lives Matter Protests*, CNET (June 9, 2020, 4:18 PM), <https://www.cnet.com/news/house-dems-ask-fbi-others-to-stop-spying-on-black-lives-matter-protesters/> [<https://perma.cc/MA33-WZFG>]. See also Brooks, *supra* note 29; Katie Schoolov, *As Protests over the Killing of George Floyd Continue, Here’s How Police Use Powerful Surveillance Tech to Track Them*, CNBC, <https://www.cnbc.com/2020/06/18/heres-how-police-use-powerful-surveillance-tech-to-track-protestors.html> [<https://perma.cc/275N-A6ED>] (June 18, 2020, 8:46 AM); Peter Aldhous, *The FBI Used Its Most Advanced Spy Plane to Watch Black Lives Matter Protests*, BUZZFEED NEWS (June 20, 2020, 10:35 AM), <https://www.buzzfeednews.com/article/peteraldhous/fbi-surveillance-plane-black-lives-matter-dc> [<https://perma.cc/66PG-3HLQ>].

³⁷ Rudy Chinchilla, *Instagram, Etsy Sale, Tattoo: How FBI Found Woman Accused of Torching PPD Cars*, NBC PHILA., <https://www.nbcphiladelphia.com/news/local/instagram-etsy-sale-tattoo-how-fbi-found-woman-accused-of-torching-ppd-cars/2436832/> [<https://perma.cc/5VZL-F537>] (June 17, 2020, 5:27 PM).

³⁸ Alleen Brown & Akela Lacy, *State Legislatures Make “Unprecedented” Push on Anti-Protest Bills*, INTERCEPT (Jan. 21, 2021, 12:16 PM) [hereinafter Brown & Lacy, *State Legislatures*], <https://theintercept.com/2021/01/21/anti-protest-riot-state-laws/> [<https://perma.cc/W52W-XSBL>]; Alleen Brown & Akela Lacy, *In Wake of Capitol Riot, GOP Legislatures “Rebrand” Old Anti-BLM Protest Laws*, INTERCEPT (Jan. 12, 2021, 4:14 PM) [hereinafter Brown & Lacy, *Rebrand*], <https://theintercept.com/2021/01/12/capitol-riot-anti-protest-blm-laws/> [<https://perma.cc/BD9L-XML2>]; Meg O’Connor, *Republican Lawmakers Are Using the Capitol Riot to Fuel Anti-BLM Backlash*, APPEAL (Jan. 19, 2021), <https://theappeal.org/capitol-insurrection-anti-black-lives-matter-legislation/> [<https://perma.cc/D4PY-GUAB>].

insurrection itself.³⁹ In fact, many of the bills being pushed now are rebranded versions of bills that were written and promoted in response to the racial justice protests during the summer of 2020.⁴⁰ Several laws already exist to hold those like the Capitol insurrectionists accountable, but rather than enforce those laws against WSEs, states are working to increase the number of tools available to state and federal officers to criminalize Black activism.⁴¹

B. Deconstructing Racially Motivated Violent Extremism

When questioned by Congress, both the FBI and the Department of Justice have failed to clearly explain what BIE actually is, despite their confidence that it is a major threat.⁴² At best, this failure suggests that the threat is vaguely defined and poorly understood by those directing the FBI surveillance apparatus. At worst, it suggests the threat is intentionally opaque to hide nefarious racialized surveillance and policing practices which criminalize Black activism and endanger Black lives.

The shift to BIE terminology demonstrates the FBI's broadening narrative of a threat from Black activism, but it remains consistent with the FBI's historical practices. During COINTELPRO, the FBI described a threat using the term "Black Nationalist," and as recently as 2009, used the term "Black Separatists" to classify threats.⁴³ While these categories were

³⁹ Brown & Lacy, *State Legislatures*, *supra* note 38; Shaila Dewan et al., *Police Failures Spur Resignations and Complaints of Double Standard*, N.Y. TIMES, <https://www.nytimes.com/2021/01/07/us/Capitol-cops-police.html> [https://perma.cc/JAR5-G9AG] (Jan. 20, 2021).

⁴⁰ Brown & Lacy, *Rebrand*, *supra* note 38.

⁴¹ Brown & Lacy, *State Legislatures*, *supra* note 38; Brown & Lacy, *Rebrand*, *supra* note 38; O'Connor, *supra* note 38.

⁴² 2017 Assessment, *supra* note 1, at 2; Ryan J. Reilly, *Rep. Bass, Who Pressed Sessions on Black 'Extremist' Label, Wants FBI Report Trashed*, HUFFINGTON POST (Nov. 15, 2017, 11:31 PM), https://www.huffpost.com/entry/fbi-black-extremists-jeff-sessions_n_5a0b0f8de4b00a6eece47498 [https://perma.cc/HF8X-U8KM]; Associated Press, *WATCH: Lawmaker Asks Sessions Why There's an FBI Report About Black 'Extremists,' But Not One About Those Who Are White*, PUB. BROADCASTING SERV. (Nov. 14, 2017, 3:56 PM) [hereinafter Associated Press, *Sessions*], <https://www.pbs.org/newshour/politics/watch-lawmaker-asks-sessions-why-theres-an-fbi-report-about-black-extremists-but-not-one-about-those-who-are-white> [https://perma.cc/D82C-W2TP]; Adam Goldman & Nicholas Fandos, *Lawmakers Confront F.B.I. Director Over Report on Black Extremists*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/us/politics/fbi-black-identity-extremist-report.html> [https://perma.cc/QSR2-7H56].

⁴³ COINTELPRO, FED. BUREAU INVESTIGATION [hereinafter COINTELPRO, FBI], <https://vault.fbi.gov/cointel-pro> [https://perma.cc/EC2F-FC99] (last visited Sept. 12, 2020); FREEDOM OF INFORMATION AND PRIVACY

also overly broad and used to target civil rights activism, the terminology still attempts or pretends to focus on specific political ideologies, not general Black activism. The 2017 Assessment provides the first record of the term BIE, which reappears in the 2018 Guidance, using it to describe Black people who are likely to target law enforcement in retaliation for police brutality.⁴⁴ The term also encompasses those who support autonomous Black social institutions and communities, linking BIE to earlier threat designations such as “Black Separatist” and “Black Nationalist.”⁴⁵ The 2019 Guidance begins grouping BIEs and WSEs under the term “Racially Motivated Extremists” (RMEs), but explicitly distinguishes Black RMEs (BRMEs) from white RMEs (WRMEs).⁴⁶ The 2020 Guidance invents the category of RMVEs, which does not identify a particular racial group in the name.⁴⁷ The 2018–20 Guidance for BIEs, BRMEs, and RMVEs includes nearly identical threat definitions to the 2017 Assessment.⁴⁸ Although Director Wray publicly claims otherwise, the RMVE label is not focused only on violence; it repackages a historical fear of Black activism which the FBI attempts to justify with fearmongering over Black nationalism and separatism.⁴⁹

ACTS SUBJECT: (COINTELPRO) BLACK EXTREMIST 100-448006 SECTION 1, FED. BUREAU INVESTIGATION [hereinafter *FOIPA*, FBI], <https://vault.fbi.gov/cointelpro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-off/view> [<https://perma.cc/RQA5-C2FB>] (last visited Sept. 12, 2020); Michael German, *Manufacturing a “Black Separatist” Threat and Other Dubious Claims: Bias in Newly Released FBI Terrorism Training Materials*, AM. CIV. LIBERTIES UNION (May 29, 2012, 1:31 PM) [hereinafter German, *Black Separatist*], <https://www.aclu.org/blog/national-security/discriminatory-profiling/manufacturing-black-separatist-threat-and-other> [<https://perma.cc/SC98-4E2M>].

⁴⁴ 2017 Assessment, *supra* note 1, at 4 (“The FBI judges it is very likely BIE perceptions of police brutality against African Americans have become organizing drivers for the BIE movement since 2014, resulting in a spike of BIEs intentionally targeting law enforcement with violence. In all six targeted attacks since 2014, the FBI assesses it is very likely the BIE suspects acted in retaliation for perceived past police brutality incidents.”); *Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019), <https://apnews.com/9aa32033692547699a3b61da8fd1fc62> [<https://perma.cc/DF5F-4T8V>].

⁴⁵ 2017 Assessment, *supra* note 1, at 2 n.b.; *FOIPA*, FBI, *supra* note 43; German, *Black Separatist*, *supra* note 43.

⁴⁶ 2018–20 Guidance, *supra* note 5, at 4, 12.

⁴⁷ *Id.* at 17–18.

⁴⁸ *Id.* See *supra* text accompanying note 7 (BIE threat definition).

⁴⁹ 2018–20 Guidance, *supra* note 5, at 4, 12, 17–18; Tau, *supra* note 4; *FOIPA*, FBI, *supra* note 43; German, *Black Separatist*, *supra* note 43; Yohuru Williams, *The Coming War on ‘Black Nationalists’*, NATION (July 20, 2016),

The FBI defends increasing surveillance of Black activists—despite having scant evidence that they are domestic terror threats—by falsely equating them with WSEs who, based on the FBI’s evidence and recent incidents of violence, are real and serious threats.⁵⁰ In 2018, the FBI assessed the magnitude of the Alleged BIE Threat to be at Impact Level 2 and authorized a response at Mitigation Level B.⁵¹ After grouping BIE and WSE together into the RMVE category, the FBI upgraded the threat to Impact Level 1, which is the highest level and on par with ISIS, and authorized Mitigation Legal A as a response, which includes a “surge in investigative activity, or development of new operational capabilities.”⁵² To justify Impact Level 1, the FBI points only to terrorist acts perpetrated by WSEs, but the upgraded response allows more surveillance of all RMVEs, including Alleged BIEs.⁵³

Treating the WSE Threat⁵⁴ and Alleged BIE Threat as the same issue or as comparable issues is unjustifiable. The 2017 Assessment offers the FBI’s most substantial explanation of the Alleged BIE Threat, yet it fails to show that a coherent BIE movement or BIE ideology exists.⁵⁵ The Assessment gestures vaguely at activity during the 1960s and 1970s, but draws no connection from these half-century-old activities to the present day.⁵⁶ It does not identify any active BIE groups, leaders, or organized activity that demonstrate a legitimate BIE threat.⁵⁷

Instead, the 2017 Assessment points to six unconnected incidents committed by lone offenders that together killed a total

<https://www.thenation.com/article/archive/the-coming-war-on-black-nationalists/>.

⁵⁰ 2018–20 Guidance, *supra* note 5, at 20.

⁵¹ *Id.* at 6. In the 2018–20 Guidance, “Impact Level” refers to the magnitude of a threat, with Impact Level 1 being the highest, and “Mitigation Level” refers to the amount of effort and resources the FBI intends to dedicate to reducing that threat, with Mitigation Level A being the highest. *See id.* Applying Impact Level 2 and Mitigation Level B to the Alleged BIE Threat already appears excessive based on the limited available evidence of an Alleged BIE Threat, but that is even more apparent in the 2020 Guidance.

⁵² *Id.* at 6, 20.

⁵³ *Id.* at 20.

⁵⁴ *See supra* text accompanying note 10 (explaining this Comment’s use of the term “WSE Threat”)

⁵⁵ 2017 Assessment, *supra* note 1, at 4; Speri, *The Strange Tale*, *supra* note 3.

⁵⁶ 2017 Assessment, *supra* note 1, at 6; Speri, *The Strange Tale*, *supra* note 3; Theoharis, *supra* note 23.

⁵⁷ 2017 Assessment, *supra* note 1, at 4; Speri, *The Strange Tale*, *supra* note 3.

of eight people.⁵⁸ Four of these offenders had ties to Moorish Sovereign Citizen ideology, previously treated as Black Separatism; one offender had been visiting websites related to ISIS, Al Qaeda, and Al Shabaab, all of which have their own threat categories; and the last offender had no identified connection to “any international terrorism or domestic extremist groups.”⁵⁹ Following the 2017 Assessment, only one person, Rakem Balogun, has ever been arrested and charged as a BIE, and charges were dropped six months later.⁶⁰ In Balogun’s case, the FBI began surveillance after learning from far-right conspiracy theory website *Infowars* that Balogun protested against police brutality, continued surveillance because Balogun expressed anger toward the police in Facebook posts without making specific threats, and arrested Balogun for illegal firearm possession based on an incorrect reading of the law.⁶¹ Based on the FBI’s evidence, concerns over the Alleged BIE Threat are unsupported and exaggerated.

Compare these Alleged BIE incidents with the recent instances of WSE violence. The 2020 Guidance gives four examples of RMVE violence to justify Impact Level 1: the 1995 Oklahoma City Bombings which killed 168 people; the 2018 Pittsburgh synagogue shooting which killed eleven people; the 2019 Poway synagogue shooting which killed one person; and the 2019 Christchurch mosque shooting in New Zealand which killed fifty-one people.⁶² These acts of violence were all committed by

⁵⁸ 2017 Assessment, *supra* note 1, at 4–6.

⁵⁹ *Id.* at 4–6; Merrit Kennedy & Tanya Ballard Brown, *What We Know About the Dallas Suspected Gunman*, NAT’L PUB. RADIO (July 8, 2016, 2:42 PM), <https://www.npr.org/sections/thetwo-way/2016/07/08/485239295/what-we-know-about-the-dallas-suspected-gunman> [https://perma.cc/ZGA5-998S]; Michael Schwartz & William K. Rashbaum, *Attacker with Hatchet Is Said to Have Grown Radical on His Own*, N.Y. TIMES (Oct. 24, 2014), <https://www.nytimes.com/2014/10/25/nyregion/man-who-attacked-police-with-hatchet-ranted-about-us-officials-say.html> [https://perma.cc/66DU-R8ZJ].

⁶⁰ Martin De Bourmont, *Charges Dropped in First Case Against ‘Black Identity Extremist’*, DAILY BEAST (May 11, 2018, 5:05 AM), <https://www.thedailybeast.com/charges-dropped-in-first-case-against-black-identity-extremist> [https://perma.cc/7HKE-URZ3]. Balogun’s legal name is Christopher Daniels. *Id.*

⁶¹ Sam Levin, *Black Activist Jailed for His Facebook Posts Speaks Out About Secret FBI Surveillance*, GUARDIAN (May 11, 2018, 3:01 PM), <https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance> [https://perma.cc/6RVG-RS24].

⁶² 2018–20 Guidance, *supra* note 5, at 20; Janelle Bouie, Opinion, *The March of White Supremacy, From Oklahoma City to Christchurch*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/opinion/mcveigh-new-zealand-white-supremacy.html> [https://perma.cc/2YQL-A3WP]; Zack Beauchamp, *Poway and Pittsburgh: The Rise in Murderous Anti-Semitism*,

WSEs, although the Guidance refers to them as RMVEs.⁶³ Additionally, in 2019 (after the 2018–20 Guidance was released), a WSE shot and killed twenty-two people in El Paso.⁶⁴ These incidents follow other high-profile acts of WSE violence in recent years, such as the 2015 Charleston shooting of a historically Black church, killing nine people, and the 2017 Charlottesville white supremacist rally which killed one person.⁶⁵ The Capitol insurrection was also organized, led, and perpetrated by white supremacists.⁶⁶ Many of these offenders cite other WSEs as inspiration, refer to a common literature base, or recite the same mantras, showing a connected movement.⁶⁷

The FBI has recently been more vocal about the threat that WSEs represent, but the agency often uses generic language about extremist threats rather than naming specific white supremacist groups, claiming that it focuses only on violence, not

Explained, VOX (May 1, 2019, 11:40 AM), <https://www.vox.com/policy-and-politics/2019/5/1/18524103/poway-synagogue-shooting-anti-semitism> [<https://perma.cc/HDA6-3CDN>].

⁶³ 2018–20 Guidance, *supra* note 5, at 20; Bouie, *supra* note 62; Beauchamp, *supra* note 62.

⁶⁴ Elisha Fieldstadt & Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, But FBI Is Slow to Call It Domestic Terrorism*, NBC NEWS (Aug. 5, 2019, 3:49 PM), <https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206> [<https://perma.cc/FUS7-YFGS>].

⁶⁵ Lois Beckett, *A History of Recent Attacks Linked to White Supremacy*, GUARDIAN (Mar. 15, 2019, 7:22 PM), <https://www.theguardian.com/world/2019/mar/16/a-history-of-recent-attacks-linked-to-white-supremacism> [<https://perma.cc/AR2J-MLMV>]. The Charlottesville rally occurred nine days after the 2017 Assessment was issued. *Id.*

⁶⁶ Mallory Simon & Sara Sidner, *Decoding the Extremist Symbols and Groups at the Capitol Hill Insurrection*, CNN, <https://www.cnn.com/2021/01/09/us/capitol-hill-insurrection-extremist-flags-soh/index.html> [<https://perma.cc/3CCX-ESJN>] (Jan. 11, 2021, 10:07 AM).

⁶⁷ Fieldstadt and Dilanian, *supra* note 64 (“[T]he man suspected of gunning down 22 people at an El Paso, Texas, Walmart Saturday posted an anti-immigrant screed on an anonymous extremist message board, citing the Christchurch, New Zealand, mosque shooter . . . as an inspiration. In April, a man suspected of opening fire at a San Diego synagogue . . . posted a note online that . . . named the Christchurch shooter and the man accused of fatally shooting 11 people inside a Pittsburgh synagogue as inspirations . . . [A] 19-year-old man, suspected of killing three people at a Gilroy, California, food festival before killing himself, left a note on Instagram instructing followers to read a 19th-century white nationalist book.”); Bouie, *supra* note 62 (“[T]he accused Christchurch shooter made frequent references to ‘white genocide,’ . . . He recites the ‘14 words’—a white supremacist mantra . . . [T]he term ‘white genocide’ was coined by David Lane, a white supremacist responsible for the murder of a Jewish radio host in 1984. He, like [Oklahoma City bomber Timothy] McVeigh, was also inspired by [neo-Nazi author] William Pierce.”).

ideology.⁶⁸ This claim is dubious, not only because the FBI's threat definitions still reference ideological factors, but also because the FBI continues to target the Alleged BIE Threat despite lacking evidence of extremism or violence while downplaying the WSE Threat which has shown violent extremist tendencies.⁶⁹ The WSE Threat is verified and significant in a way that is incomparable to the Alleged BIE Threat and merits Impact Level 1 on its own. The RMVE threat comes from WSEs, not Black activists. Despite this, the FBI artificially groups the Alleged BIE Threat and WSE Threat together as RMVE to justify increasing surveillance of Black activists because of the same fears that motivated COINTELPRO—fears of Black unity, Black respectability, and Black revolution.⁷⁰

III. COUNTER-PROFILING: A NOVEL SURVEILLANCE JUSTIFICATION

The creation of the RMVE category marks an innovation in the justification for surveillance of Black people that this Comment calls “counter-profiling.” Counter-profiling can be defined as the practice of using a threat emanating from one population to justify increased policing of a different population that does not fit, and is sometimes the opposite of, the profile for that threat. Law enforcement's shift in focus from the threatening population to the targeted population is facilitated by generalizing the threat to create a narrative that anyone could be a threat, then using this narrative as a pretext for increased surveillance of the targeted population. Counter-profiling may occur as a result of malice, or it may come from an unconscious bias to view the targeted population as criminal and the threatening population as innocent. Regardless, the consequence is an unjust project of increased surveillance, policing, and punishment of the targeted population while the actual threat is not properly addressed.

Counter-profiling can be illustrated by the following hypothetical scenario. Imagine a teacher who has a favorite

⁶⁸ *FBI Oversight Before the H. Comm on the Judiciary*, 116th Cong. 3 (2020) (statement of Christopher Wray, Director of the FBI) (discussing the RMVE Threat without mentioning white supremacy); Marshall Cohen, *FBI Director Says White Supremacy Is a 'Persistent, Pervasive Threat' to the US*, CNN, <https://www.cnn.com/2019/04/04/politics/fbi-director-wray-white-supremacy/index.html> [https://perma.cc/K5TR-QQDP] (Apr. 4, 2019, 11:27 AM).

⁶⁹ 2018–20 Guidance, *supra* note 5, at 20.

⁷⁰ See Hoover, *supra* note 16 (declaring the FBI's goals to be preventing coalitions of civil rights groups because “[i]n unity there is strength,” preventing leaders from gaining respectability among the general public, and avoiding “a true black revolution”).

student, *W*, and least favorite student, *B*. *W* often causes a ruckus in class and has been bothering *B*. The teacher notices that *W* is acting out and *B* might be upset, so the teacher warns them that they will both be monitored closely. However, the teacher has a history of ignoring *W*'s misbehavior, while overly scrutinizing and punishing *B*. Although the teacher has evidence that *W* fits the misbehaving profile and is much more likely than *B* to cause a future ruckus, the teacher may instead choose to scrutinize *B*'s behavior. The teacher is grouping *W* and *B* together even though they are not collaborating; they are not engaged in similar activities; and *B* has not caused a problem. By doing so, the teacher has used the actions of *W* to create a pretext for greater surveillance of *B*, making *B* vulnerable to punishment from the teacher (and more harassment from *W*), while maintaining the outward appearance that they are treating both students equally. The teacher is surveilling students in a manner *counter* to the profile they have, or reasonably should have, developed for spotting misbehavior so that the disfavored student faces excessive punishment, while the favored student's misbehavior is ignored. Thus, the teacher has engaged in counter-profiling as a new way to justify punishing *B*.⁷¹

Grouping WSEs and BIEs into the RMVE category produces a similar outcome. Because the FBI's mitigation strategy is applied generally to RMVEs, the independent danger from WSEs changes the way that the FBI responds to Alleged BIEs.⁷² Recent WSE attacks have raised the RMVE threat to Impact Level 1, so the FBI is able to apply Mitigation Level A and its "surge in investigative activity, or development of new operation capabilities," to both suspected WSEs and BIEs.⁷³ Rising WSE violence leads the FBI to target Black people who are the opposite of the profile for racially motivated violence. In

⁷¹ Schools are a particularly useful context to illustrate counter-profiling because the increase in policing at schools in response to school shootings follows a similar pattern. The rise in shootings at K–12 schools, most of which are committed by white male students, have led more schools to increase police presence, but police resources are being allocated to schools with greater Black and Brown student populations because even though those students do not present the threat that schools are trying to address, those students are still seen as more dangerous. David Noriega & Tess Owens, *Nearly All Mass Shooters Since 1966 Have Had 4 Things in Common*, VICE (Nov. 19, 2019, 8:46 AM), https://www.vice.com/en_us/article/a35mya/nearly-all-mass-shooters-since-1966-have-had-four-things-in-common [https://perma.cc/4ECT-L4WM]; ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., WE CAME TO LEARN 23, 43 (2018), <https://advancementproject.org/wp-content/uploads/WCTLweb/index.html> [https://perma.cc/N62S-YS9L].

⁷² 2018–20 Guidance, *supra* note 5, at 18–20.

⁷³ *Id.* at 20.

this way, the FBI has weaponized race-neutrality to engage in racialized surveillance. Recent reports suggest that the DHS is now modeling this tactic of using race-neutral language to downplay the WSE Threat and emphasize left-wing threats.⁷⁴ The bills that have been introduced in various state legislatures to target Black activism following the Capitol insurrection show that state governments are contributing to this trend as well.⁷⁵ The FBI has not released documents detailing excessive surveillance of Black activists since the 2020 Guidance was implemented.⁷⁶ However, the FBI's history, including COINTELPRO and the response to recent protests, provides reason to be very suspicious of what the FBI does with increased surveillance power over racial minorities who act to protect their rights.⁷⁷

Counter-profiling differs from issues of colorblind racism, where structural disadvantages that people of color face due to race are ignored; or racial profiling, where a real but often exaggerated threat is unfairly attributed to an entire race due to the actions of a few individuals of that race. In this counter-profiling situation, there are no structural explanations or pattern of incidents to suggest Black communities engage in racially motivated violence because it simply does not happen. Any burden of surveillance falling on Black activists for RMVE is not only disproportionate relative to their risk of engaging in RMVE, but it is also unjustified in an absolute sense because the risk of such violence from Black activists is practically zero. The burden of surveillance falling on Black activists is not only facilitated by structural racial inequities; it is an invention of new racist policies. And, Black activists are not being excessively

⁷⁴ See Zachary Cohen, *Whistleblower Accuses Trump Appointees of Downplaying Russian Interference and White Supremacist Threat*, CNN (Sept. 9, 2020, 9:02 PM), <https://www.cnn.com/2020/09/09/politics/dhs-whistleblower-white-supremacist-threat/index.html> [<https://perma.cc/E23R-RCBU>]. An early draft of the DHS homeland threat assessment labels WSEs as the greatest terror threat, but later drafts replace that term with "Domestic Violent Extremists." A whistleblower has accused DHS leaders of directing officials to downplay the WSE Threat and emphasize threats from leftist groups. See also Matt Stieb, *FBI Won't Deliver Report on White-Supremacist Terror Threat Until After Election*, N.Y. MAG.: INTELLIGENCER (Oct. 26, 2020), <https://nymag.com/intelligencer/2020/10/fbi-wont-have-doc-on-domestic-terror-until-after-election.html> [<https://perma.cc/U23Z-9CBB>] (describing the Trump administration's plan to delay reports about the WSE Threat until after the 2020 election to uphold former President Trump's narrative about left-wing violence being a greater threat).

⁷⁵ Brown & Lacy, *State Legislatures*, *supra* note 38; Brown & Lacy, *Rebrand*, *supra* note 38; O'Connor, *supra* note 38.

⁷⁶ Speri, *FBI Spying*, *supra* note 27.

⁷⁷ Speri, *The Strange Tale*, *supra* note 3; Reichert, *supra* note 36.

targeted because the FBI believes they are “the right people”; they are being targeted even though the FBI knows they are the wrong people.⁷⁸

Law enforcement officers generally appear to suffer from dissonance when faced with evidence of white populations creating problems because white supremacist ideology has long been entrenched in law enforcement agencies.⁷⁹ There has been several examples in recent years of officers sympathizing with white supremacists rather than treating them as threats, which strongly suggests that law enforcement agencies are not taking the threat seriously and are not tailoring solutions to address problems in white communities.⁸⁰ In particular, the Capitol insurrection highlights that there is not only a difference in how law enforcement conducts itself in response to Black activists as compared to white supremacists, but also differences in preparedness—likely because police have difficulties seeing white supremacist rallies as posing a violent threat while Black

⁷⁸ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 602–05 (S.D.N.Y. 2013) (criticizing the New York Police Department for its stop-and-frisk policy which targeted Black people under the assumption that they were “the right people” to search for contraband, such as drugs or weapons).

⁷⁹ Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020) [hereinafter German, *Hidden in Plain Sight*], <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/23Q8-9EQ4>].

⁸⁰ See *id.* (“Portland police and DHS agents appeared inappropriately sympathetic to violent members of the far-right groups, while conducting mass arrests and indiscriminately using less-lethal munitions against antiracist and antifascist counterprotesters. DHS officers were captured on video soliciting the assistance of militia members to arrest antiracist protesters.”); Dewan, *supra* note 39 (“officers . . . cringed and retreated from—or posed for a selfie with—the mostly white pro-Trump mob.”); Jemima McEvoy, *Video of Police Ignoring Suspected Kenosha Shooter Sparks Calls of Injustice*, FORBES (Aug. 26, 2020, 7:17 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/08/26/video-of-police-ignoring-suspected-kenosha-shooter-sparks-calls-of-injustice> [<https://perma.cc/S8RB-85GQ>] (Kenosha police told armed white vigilantes at a protest following the shooting of Jacob Blake that their presence was appreciated, and after white teenager Kyle Rittenhouse shot three protestors, killing two, police ignored him at the scene); Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/G4HK-N82Y>] (“Cops would stand watch at [alt-right] events . . . [T]hey still tolerated them. . . . [C]ops were far less forgiving of . . . Black Lives Matter supporters, whose protests have been met by dozens of cops in riot gear, as well as sometimes members of a paramilitary support unit.”).

activism is always considered dangerous.⁸¹ For law enforcement agencies, it is far more palatable to say that the problem must be more general and that people of any background could be a threat. Such generalization gives the agencies cover to reject the profile of RMVEs as white supremacists and default to familiar biases that treat people of color as a threat, even when they clearly do not fit the RMVE profile. Additionally, a long history of racism in policing suggests a strong possibility that FBI is actively trying to obscure white supremacist violence to protect white populations and target Black populations.⁸² Beyond implicit bias, law enforcement has a serious, neglected problem of harboring white supremacists in its ranks—a problem which was recently on full display with several off-duty police participating in the Capitol insurrection.⁸³ If the FBI is engaged in counter-profiling to target Black activists, that provides more evidence that its response to the Alleged BIE Threat is irrational, haphazard, and harmful.

⁸¹ Dewan, *supra* note 39 (noting the failures of the Capitol police); Josh Margolin & Lucien Bruggeman, *Months Ahead of Capitol Riot, DHS Threat Assessment Group Was Gutted: Officials*, ABC NEWS (Jan. 9, 2021, 7:18 PM), <https://abcnews.go.com/US/months-ahead-capitol-riot-dhs-threat-assessment-group/story?id=75155673> [<https://perma.cc/87MD-RTPN>] (describing how the DHS Office of Intelligence and Analysis, which would have played a role in coordinating intelligence ahead of the Capitol insurrection, had its operations and staffing slashed in 2020); Leila Fadel, *'Now the World Gets to See the Difference': BLM Protestors on the Capitol Attack*, NAT'L PUB. RADIO (Jan. 9, 2021, 1:53 PM), <https://www.npr.org/2021/01/09/955221274/now-the-world-gets-to-see-the-difference-blm-protesters-on-the-capitol-attack> [<https://perma.cc/J4S8-QBQZ>] (discussing the difference in how the insurrectionists were treated compared to BLM protestors);

⁸² Kappeler, *supra* note 12; German, *Hidden in Plain Sight*, *supra* note 79; McEvoy, *supra* note 80; Reitman, *supra* note 80; Radley Balko, *There's Overwhelming Evidence that the Criminal-Justice System is Racist. Here's the Proof*, WASH. POST (Apr. 10, 2019), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/> [<https://perma.cc/MP3M-REVU>]; *Floyd*, 959 F. Supp. 2d at 589–624.

⁸³ German, *Hidden in Plain Sight*, *supra* note 79 (reporting that law enforcement throughout the country have ties to white supremacist organizations, yet there has been little response at the local, state, or federal level to protect communities of color from explicitly racist law enforcement); Tom Porter, *31 Police Officers Are Under Investigation over Their Suspected Involvement in the Capitol Riot, as Departments Face Pressure to Weed Out White Nationalists*, BUS. INSIDER (Jan. 25, 2021), <https://www.businessinsider.com/31-police-officers-investigated-suspected-capitol-riot-involvement-report-2021-1> [<https://perma.cc/7NTQ-CGYS>] (stating that, as of January 25, 2021, 31 police officers from departments nationwide are under investigation for involvement in the Capitol insurrection).

IV. FBI SURVEILLANCE OF BLACK ACTIVISTS
VIOLATES THE EQUAL PROTECTION
CLAUSE

The FBI is violating the Fourteenth Amendment by abusing its surveillance power to harass Black activists on the basis of race. Increased surveillance against Black activists is dangerous to their safety, to their rights, and to campaigns for racial justice.⁸⁴ While the FBI's surveillance of the Alleged BIE Threat has been challenged using tort law and the Freedom of Information Act (FOIA), a constitutional challenge to bring down this surveillance regime as a whole has, thus far, not been brought.⁸⁵ This section analyzes the efficacy of such a challenge using the Equal Protection Clause and finds that the FBI's surveillance of Black activists should be ruled unconstitutional.

An Equal Protection Clause challenge under the Fourteenth Amendment to FBI surveillance of the Alleged BIE Threat could take on two forms. The first form would argue that when considering the surrounding circumstances, the FBI's threat guidance demonstrates an invidious discriminatory purpose and is intended to increase surveillance of Black people and violate their civil rights without justification. The second form would argue that the FBI's threat guidance is a policy of discriminatory surveillance based on a racial classification that is not narrowly tailored to promote national security, and should therefore be rejected. Both should succeed.

A. The 2020 Guidance Demonstrates a Racially Discriminatory Intent

The FBI's 2020 Guidance should be struck down as a violation of the Equal Protection Clause because it was written with the discriminatory purpose of targeting Black activists for unjustified surveillance to undermine their civil rights. The documents that the FBI released in response to the American

⁸⁴ Nusrat Choudhury, *The Government Is Watching #BlackLivesMatter, and It's Not Okay*, AM. CIV. LIBERTIES UNION (Aug. 4, 2015, 10:30 AM), <https://www.aclu.org/blog/racial-justice/government-watching-blacklivesmatter-and-its-not-okay> [https://perma.cc/U7MW-3WDV].

⁸⁵ *MediaJustice, et al. v. Federal Bureau of Investigation, et al.*, AM. CIV. LIBERTIES UNION (Mar. 21, 2019), <https://www.aclu.org/cases/mediajustice-et-al-v-federal-bureau-investigation-et-al> [https://perma.cc/Y4FG-CEN8] (pending lawsuit for FOIA violations); *Gallagher v. FBI*, No. 3:19-CV-2250-K-BN, 2019 WL 5273238, at *3–4 (N.D. Tex. Sept. 23, 2019), *report and recommendation adopted*, No. 3:19-CV-2250-K, 2019 WL 5268517 (N.D. Tex. Oct. 16, 2019) (dismissing a tort claim for failure to show the FBI had waived sovereign immunity, and in part because Gallagher had a personal history as a serial litigator resulting in court sanctions).

Civil Liberties Union (ACLU) and MediaJustice’s FOIA request are heavily redacted, so it is difficult to find explicit evidence of the FBI’s discriminatory purpose.⁸⁶ However, this is not the only way to prove a discriminatory purpose. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court defined a multi-factor test for finding invidious intent even in facially race-neutral policies.⁸⁷ This requires a fact-intensive inquiry into the surrounding circumstances of an action. Courts review the policy’s impact, its historical background, the sequence of events leading up to it, departures from normal procedure, substantive departures showing decision-makers took an action that is contrary to what they normally consider important, and legislative or administrative history.⁸⁸ If a review of these factors demonstrates “a clear pattern, unexplainable on grounds other than race,” then the court can infer an invidious discriminatory purpose motivating the action which violates the Equal Protection Clause.⁸⁹

For nearly every factor in the *Arlington Heights* test, there is evidence of the FBI’s discriminatory intent. The impact of FBI policies from the 2017 Assessment to the 2020 Guidance is an increase in the surveillance of Black activists by broadening the scope of potential targets and dedicating more resources to such surveillance without a corresponding increase in the risk of violent extremism.⁹⁰ The FBI’s threat definitions also criminalize Black people acting to collectivize their experiences to cope with racism.⁹¹ Part of the definition of RMVEs includes attempts to further “autonomous black social institutions [or] communities,” which can be interpreted broadly enough to chill nearly any form of Black solidarity.⁹² For example, supporting Black-owned businesses may be seen as promoting autonomous Black social institutions, and joining racial justice organizations such as BLM could be seen as strengthening Black communities. Non-Black people can engage in these activities without fear, but Black people do so at the risk of FBI surveillance.

⁸⁶ Choudhury & Cyril, *supra* note 27; Speri, *FBI Spying*, *supra* note 27.

⁸⁷ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 2017 Assessment, *supra* note 1, at 2; 2018–20 Guidance, *supra* note 5, at 17–20.

⁹¹ Klippenstein, *supra* note 6; 2017 Assessment, *supra* note 1, at 2 n.b; 2018–20 Guidance, *supra* note 5, at 4, 12, 17.

⁹² 2018–20 Guidance, *supra* note 5, at 18.

The history and events leading up to the 2020 Guidance also shows that race is a significant factor in the FBI's decision-making. The historical background of current FBI surveillance includes a slew of illegal and unethical racially motivated FBI activity under COINTELPRO.⁹³ The 2017 Assessment coining the BIE terminology states that it was written as a response to the Ferguson Uprising and the rise of BLM in 2014.⁹⁴ The 2018 and 2020 Guidance reiterates this motivation even more explicitly.⁹⁵ Additionally, after the 2017 Guidance came out, there was a massive uproar over the BIE terminology in part for its explicit use of race.⁹⁶ In response, Director Wray publicly stated that the FBI had dropped that terminology and was shifting its focus to violence.⁹⁷ However, he failed to mention that the content of the guidance largely did not change, except to increase, not decrease, the FBI's surveillance power over the Alleged BIE Threat.⁹⁸ Director Wray's statement was severely misleading, but he achieved his intended goal of subduing public criticism, leading to headlines like "FBI Abandons Use of Term 'Black Identity Extremism,'" while the surveillance, in fact, became more aggressive.⁹⁹ From the 2018 to 2020 Guidance, the FBI moved incrementally toward racially neutral terminology and increased surveillance power while the threat definitions remained the same and the Alleged BIE Threat remained fictional.¹⁰⁰ The ways in which racial classifications are crafted and managed over time to disadvantage and violate the constitutionally guaranteed rights of racial minorities cannot be separated from a discriminatory intent.

Additionally, the FBI's counter-profiling of RMVE shows a tension between its stated interests and its actions.¹⁰¹ The FBI claims that its goal is to address violent extremism, but it dilutes its resources by chasing after a non-existent Alleged BIE Threat

⁹³ See generally Church Committee Report, Vol II, *supra* note 14; Church Committee Report, Vol III, *supra* note 14; GIBBONS, *supra* note 20.

⁹⁴ 2017 Assessment, *supra* note 1, at 4.

⁹⁵ *Id.*; 2018–20 Guidance, *supra* note 5, at 6, 18 ("The FBI first observed this activity following the August 2014 shooting of Michael Brown in Ferguson, Missouri, and the subsequent acquittal of police officers involved in that incident.").

⁹⁶ Speri, *The Strange Tale*, *supra* note 3; Associated Press, *Sessions*, *supra* note 42; Goldman & Fandos, *supra* note 42.

⁹⁷ Tau, *supra* note 4.

⁹⁸ 2017 Assessment, *supra* note 1, at 2; 2018–20 Guidance, *supra* note 5, at 4, 12, 18.

⁹⁹ Tau, *supra* note 4; 2018–20 Guidance, *supra* note 5, at 20.

¹⁰⁰ 2018–20 Guidance, *supra* note 5, at 4, 6, 8, 10, 12, 14, 17, 20.

¹⁰¹ See *supra* Part II.B (discussing how WSEs present the greatest threat, but the FBI chooses to surveil Black activists anyway).

instead of focusing on the WSE Threat, making it more difficult to address violent extremism. Director Wray also claimed that the FBI was not interested in policing ideology, but the 2020 Guidance continues to maintain ideological factors in its threat definition for RMVE.¹⁰² These decisions show a departure from the FBI's stated values of conducting unbiased investigations to prevent violence. While it is unknown whether the FBI departed from its normal procedures for issuing threat guidance, there is more than enough reason from other factors to believe the FBI is acting with discriminatory intent. The circumstances leading up to the 2020 Guidance show a "clear pattern, unexplainable on grounds other than race" which empowers courts to strike it down as discriminatory state action.¹⁰³

B. The 2020 Guidance Invokes a Suspect Classification and Fails Strict Scrutiny

The FBI uses race as a suspect classification in its 2020 Guidance. For this racial classification to be constitutionally permissible, the FBI must be able to show the classification survives strict scrutiny.¹⁰⁴ The strict scrutiny test requires that a classification using a protected characteristic, such as race, be narrowly tailored to promote a compelling governmental interest, such as national security.¹⁰⁵ However, the FBI's use of race is not narrowly tailored to serve the national security interests it claims, making it unconstitutional under the Equal Protection Clause. The FBI's dedication of resources to mitigate the Alleged BIE Threat is state action using a racial classification because the FBI's suspicion of a person under this threat guidance requires them to consider that person's race. The FBI would likely claim that the 2020 Guidance is racially neutral because of the shift in terminology from BIE to RMVE, and thus the surveillance policy should only be subject to the less searching rational basis review, which requires that a policy be rationally related to a legitimate state interest.¹⁰⁶

However, that claim of neutrality should be rejected. The 2020 Guidance on RMVEs is still a racial classification due to the racial language throughout the 2018–20 Guidance.¹⁰⁷ As the

¹⁰² Tau, *supra* note 4; 2018–20 Guidance, *supra* note 5, at 17.

¹⁰³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

¹⁰⁴ 16B AM. JUR. 2d *Constitutional Law* § 858 (2020).

¹⁰⁵ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

¹⁰⁶ *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955).

¹⁰⁷ 2018–20 Guidance, *supra* note 5, at 17.

Supreme Court held in *Adarand Constructors, Inc. v. Peña*, “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”¹⁰⁸ Promoting “national defense and safety” and protecting the US from attacks has been recognized as a compelling government interest since the earliest use of the strict scrutiny test in *Korematsu v. United States* to justify Japanese internment in 1944, and as recently as 2018 in *Trump v. Hawaii* (which abrogated *Korematsu*) to uphold the travel ban against several Muslim-majority countries.¹⁰⁹ Under rational basis review, surveillance of RMVEs would likely be upheld as rationally related to the legitimate state interest of national security based on the FBI’s description of a serious RMVE threat.¹¹⁰ However, if the RMVE threat definition is correctly identified as a racial classification, it would trigger strict scrutiny and be rejected because while national security is a compelling state interest, the 2020 Guidance is not narrowly tailored to promote it.

1. RMVE Terminology Is a Racial Classification

Despite the general nature of the term RMVE, the FBI’s 2020 Guidance on the RMVE Threat is still a racial classification. RMVE may appear race-neutral because any person can commit violent acts motivated by race and be classified as an RMVE threat, regardless of their own race.¹¹¹ That would be comparable to *Washington v. Davis*, where a federal employer’s qualification exam was not ruled racially discriminatory despite its disproportionately negative impact on Black applicants because it was facially neutral, and there was no apparent intent to discriminate.¹¹²

However, unlike the exam in *Davis*, the “Threat Definition” of RMVEs uses racial language to describe RMVEs, stating: “Some RMVEs are driven by a belief in the superiority of the white race Other RMVEs use force or violence . . . in an effort to establish a separate black homeland or autonomous black social institutions.”¹¹³ The FBI also has four pairs of codes listed under “FBI Requirements” and “Case Classifications”

¹⁰⁸ *Adarand*, 515 U.S. at 227.

¹⁰⁹ *Korematsu v. United States*, 323 U.S. 214, 216–18 (1944), *abrogated* by *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392, 2422 (2018).

¹¹⁰ 2018–20 Guidance, *supra* note 5, at 17.

¹¹¹ *Id.*

¹¹² *Washington v. Davis*, 426 U.S. 229, 245–48 (1976).

¹¹³ 2018–20 Guidance, *supra* note 5, at 17.

which distinguish RMVE cases based on whether the RMVE is white or Black.¹¹⁴ The absence of discussion of RMVE threats from people who are neither Black nor white further suggests that the FBI is intentionally focusing on certain racial groups. Although the name of the category is facially neutral, the FBI's RMVE policy explicitly identifies and responds to RMVEs differently based on their race.

Practically speaking, any investigation of RMVEs must inevitably include some element of racial suspicion. Unless someone is playing a character in a groundbreaking racial comedy sketch show or cartoon, they cannot be a WSE without being white and they cannot be a BIE without having a Black identity.¹¹⁵ The FBI has no way to cognize RMVEs outside of the framework of WSEs and BIEs. To suspect someone of being an RMVE requires the FBI to identify them as white or Black. Race is an integral element of the profile.

Additionally, RMVE terminology is an evolution of prior threat categories that were explicitly race-based, including BRME, WRME, BIE, WSE, Black Separatist, and Black Nationalist. The 2017 Assessment's references to activities in the 1960s demonstrate that the FBI believes there is a historical continuity between the civil rights groups who were targeted as threats during COINTELPRO based on race and the Alleged BIE Threat.¹¹⁶ Following the 2017 Assessment's lead, each year of the 2018–20 Guidance uses nearly the same definition of the Alleged BIE Threat.¹¹⁷ RMVE represents the same racialized threat using a colorblind label.

¹¹⁴ *Id.* at 21 (“FBI Requirements[;] USA-TERR-CTD-SR-0401-16 (U//FOUO) White Supremacist Extremists[;] USA-TERR-CTD-SR-0519-17 (U//FOUO) Black Separatist Extremists[.] Case Classifications[;] 100K (U) Terrorism Enterprise Investigation - Racially Motivated Violent Extremist (Black)[;] 100N (U) Terrorism Enterprise Investigation - Racially Motivated Violent Extremist (White)[;] 266K (U) Racially Motivated Violent Extremist (Black)[;] 266N (U) Racially Motivated Violent Extremist (White)[;] 336K (U) Preliminary Terrorism Enterprise Investigation - Racially Motivated Violence Extremist (Black)[;] 336N (U) Preliminary Terrorism Enterprise Investigation - Racially Motivated Violence Extremist (White)[.]”) (emphasis omitted).

¹¹⁵ See *Chappelle's Show* (Pilot Boy Productions, Marobu Productions, & Comedy Central Productions Jan. 22, 2003) (Dave Chappelle as “Clayton Bigsby,” a blind Black Ku Klux Klan leader in a sketch entitled “*Frontline: Clayton Bigsby*”); *The Boondocks* (Adelaide Productions, Rebel Base Productions & Sony Pictures Television 2005) (Gary Anthony Williams as “Uncle Ruckus,” a white-identifying Black man and white supremacist).

¹¹⁶ 2017 Assessment, *supra* note 1, at 6.

¹¹⁷ *Id.* at 2, 2 n.b; 2018–20 Guidance, *supra* note 5, at 4, 12, 18. See *supra* text accompanying note 7 (BIE threat definition).

2. The 2020 Guidance Is Not Narrowly Tailored to Promote National Security

Neither the RMVE category nor Mitigation Level A, which has been prescribed to address the RMVE Threat, are narrowly tailored to address the perceived national security risk from the people surveilled. One way to demonstrate that a racial classification is not narrowly tailored is to show that it is overinclusive.¹¹⁸ The RMVE category is overinclusive for two reasons. First, it includes both WSEs and Alleged BIEs, while the FBI's analysis of the threat shows that WSEs, not Alleged BIEs, are the reason why the threat is so significant.¹¹⁹ No incidents of Alleged BIE violence exist that necessitate including a BIE movement in the threat guidance.¹²⁰ Every year prior to 2020 during which these threats were maintained as separate categories and there was no significant rise in BIE violence shows that it is possible for the FBI to function and address the relevant threats without grouping them together.

Second, the definition of the Alleged BIE Threat alone is too broad. Most of the incidents of violence referenced in the 2017 Assessment were committed by Moorish Sovereign Citizen Extremists.¹²¹ Another was influenced by ISIS, Al Qaeda, and Al Shabaab.¹²² All of them were alleged to have ties to Black Separatist organizations.¹²³ Each of these groups can have a separate threat category because they are each associated with different risks of engaging in violence.¹²⁴ ISIS, Al Qaeda, and Al Shabaab already have their own threat categories,¹²⁵ and prior to 2016, the FBI defined "Black Separatism" as a distinct threat, although this category also could have been narrowed to identify specific threatening groups.¹²⁶ According to the FBI definition, anyone who has "perceived racism and injustice in American society" is a potential RMVE at a time when the entire country has witnessed hundreds of Black people being killed by the police each year and a criminal justice system that is structurally

¹¹⁸ Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 (1996) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989)).

¹¹⁹ 2018–20 Guidance, *supra* note 5, at 17, 20.

¹²⁰ Aleena Aspervil, Comment, *If the Feds Watching: The F.B.I.'s Use of a "Black Identity Extremist" Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection*, 62 HOW. L.J. 907, 942 (2019). See *supra* Part II.B (detailing the lack of evidence for the Alleged BIE Threat).

¹²¹ 2017 Assessment, *supra* note 1, at 4–5.

¹²² Schwirtz & Rashbaum, *supra* note 59.

¹²³ 2017 Assessment, *supra* note 1, at 4–5.

¹²⁴ Aspervil, *supra* note 120, at 941.

¹²⁵ 2018–20 Guidance, *supra* note 1, at 1–3.

¹²⁶ German, *Black Separatist*, *supra* note 43.

antagonistic toward Black life.¹²⁷ Black people are disproportionately vulnerable to FBI surveillance under this Guidance. While race may be relevant to detecting some violent threats, like WSE, the RMVE category goes too far by subjecting Black people to FBI suspicion and surveillance because of their race when they are not actually a threat.

Mitigation Level A is also inappropriate for the Alleged BIE Threat based on the FBI's own guidance. In the 2018 Guidance, when BIE was listed separately from WSE, the Alleged BIE Threat was at Impact Level 2 and Mitigation Level B.¹²⁸ After being grouped with WSEs in 2020, the threat was moved up to Impact Level 1 and Mitigation Level A, but the given justification for that change was recent attacks by WSEs, not Alleged BIEs.¹²⁹ If BIE was still listed separately, it would likely remain at Impact Level 2 and Mitigation Level B or be reduced because there have not been any recent Alleged BIE incidents even close to comparable to the WSE incidents that the FBI referenced. That would make the "surge in investigative activity, or development of new operational capabilities" required under Mitigation Level A an excessive response to the Alleged BIE Threat.¹³⁰ Additionally, this overpolicing often results in more police brutality that inspires more protests, which the FBI believes to be a threat; therefore, the FBI's 2020 Guidance undermines its own goals.¹³¹ The FBI's 2020 Guidance is a racial classification and is not narrowly tailored in its threat definitions or its strategy for combatting the national security threat it identifies, so it should be rejected as a violation of the Equal Protection Clause under strict scrutiny.

¹²⁷ 2018–20 Guidance, *supra* note 1, at 17; Balko, *supra* note 82; Gretchen Frazee, *Deadly Police Shootings Keep Happening. Data Could Be a Missing Piece*, PUB. BROADCASTING SERV. (Oct. 16, 2019, 4:08 PM), <https://www.pbs.org/newshour/nation/deadly-police-shootings-keep-happening-data-could-be-a-missing-piece> [<https://perma.cc/4ENJ-WWAZ>].

¹²⁸ 2018–20 Guidance, *supra* note 5, at 6.

¹²⁹ *Id.* at 20.

¹³⁰ *Id.*

¹³¹ See, e.g., Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across the US*, GUARDIAN (June 6, 2020, 4:00 AM), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> [<https://perma.cc/PGY9-QV8E>] (describing how the excessive response by police to protests against police brutality led to more acts of police brutality).

3. A Consistency Requirement to Review Guidance Targeting White Supremacy Extremism Under Strict Scrutiny Is Inappropriate

To avoid any ambiguity, this argument for the unconstitutionality of the FBI's surveillance of the Alleged BIE Threat does not apply to the agency's surveillance of the WSE Threat. There are two reasons for this: first, strict scrutiny is not the appropriate standard; and second, the latter policies would survive the narrow tailoring requirement. In *Adarand*, the Court held that the standard of review for racial classifications should be consistent, regardless of which race a classification burdens.¹³² The 2020 Guidance demonstrates why that is not an appropriate rule for evaluating racial classifications. Under the 2020 Guidance, WSEs and Alleged BIEs are both racially classified and appear to be treated the same.¹³³ However, there are significant differences in how the 2020 Guidance applies to WSEs and Alleged BIEs because the FBI measures extremism from different baselines based on a suspect's race. A consistent application of strict scrutiny obscures those baselines and creates a false equivalence between real WSEs and Alleged BIEs.

The different baselines can be seen throughout the 2018–20 Guidance. One example can be found in the names for the threats in the 2018 Guidance—BIE and WSE. The only nominal prerequisite for a Black person to be deemed an extremist is that they have a Black identity whereas the prerequisite for a white person is that they advocate white supremacy.¹³⁴ Therefore, all Black people are automatically eligible to be labelled a BIE whereas white people must take the additional step of advocating white supremacy. Additionally, as per the FBI threat definitions, a person would likely believe “in the superiority of the white race and [perceive] that the US Government is conspiring with Jews and other minority populations to bring about the race's demise,” to be a WSE.¹³⁵ A BIE need only “[perceive] racism and injustice in American society.”¹³⁶ The grievance that the FBI believes motivates Alleged BIE violence is the actual killings of innocent Black people by unaccountable white police officers, while the grievance motivating WSE violence is a fiction of white

¹³² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995).

¹³³ 2018–20 Guidance, *supra* note 5, 17–22. *See supra* Part IV.B.1 (the discussion of why RMVE terminology would be a racial classification applies to the WSE Threat as well).

¹³⁴ 2018–20 Guidance, *supra* note 5, at 4, 8.

¹³⁵ *Id.* at 8.

¹³⁶ *Id.* at 4.

genocide.¹³⁷ There is also no history of BIE violence, but centuries of history verifying the WSE Threat.¹³⁸ These are only a few reasons why the WSE Threat and the Alleged BIE Threat are not equivalent. The 2020 Guidance grouping them together is not an excuse for courts to evaluate them the same way. To do so would only bolster the false narrative that fighting racism is as bad as being racist.¹³⁹

Even if courts were to apply strict scrutiny to FBI guidance for the WSE Threat, it would likely survive the narrow tailoring requirement. Contrary to the Alleged BIE Threat, the WSE Threat is well-documented and defined in terms of specific movements and organizations, and the FBI's justification for its raised Impact Level and Mitigation Level is based on a rise in WSE violence.¹⁴⁰ The arguments against narrow tailoring for the Alleged BIE Threat do not apply to the WSE Threat.¹⁴¹ It would be irrational and unjust for a court to ignore all of the reasons why the Alleged BIE Threat and the WSE Threat should be evaluated differently.

V. CONCLUSION

The FBI works diligently to conduct surveillance of Black activists fighting against oppression, both presently and historically. This Comment offers a way to understand what the FBI is doing and what makes it unlawful. Answering those questions will be crucial to challenging predatory surveillance practices that unjustly and unconstitutionally target Black activists. As the Biden-Harris administration begins to evaluate how it will respond to “domestic violent extremism,” with an explicitly stated interest in challenging white supremacy,

¹³⁷ *Id.* at 4, 8; Bouie, *supra* note 62.

¹³⁸ Bouie, *supra* note 62; Michael E. Miller, *The War of Races: How a Hateful Ideology Echoes Through American History*, WASH. POST (Dec. 27, 2019, 6:55 AM), <https://www.washingtonpost.com/history/2019/12/27/war-races-how-hateful-ideology-echoes-through-american-history/> [https://perma.cc/5UM5-KJ45]. See *supra* Part II.B (disputing the idea of an Alleged BIE Threat).

¹³⁹ See, e.g., Dan Merica, *Trump Says Both Sides to Blame amid Charlottesville Backlash*, CNN, <https://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html> [https://perma.cc/PLR6-BL84] (Aug. 16, 2017, 1:14 AM) (former President Trump claimed that “both sides” were to blame when a march of alt-right members, Ku Klux Klan members, and neo-Nazis assaulted counter-protestors, killing one).

¹⁴⁰ Bouie, *supra* note 62; Beckett, *supra* note 65; 2018–20 Guidance, *supra* note 5, at 20.

¹⁴¹ See *supra* Part IV.B.2 (discussing the arguments against narrow tailoring for the Alleged BIE Threat).

continued vigilance is necessary.¹⁴² Old policies must be changed. And new policies must not become retrogressive tools that undermine the very people doing the groundwork to dismantle white supremacy. The federal government should not be allowed to repeat the mistakes and abuses of COINTELPRO. It should not be able to turn racist violence against Black people into a pretext for more surveillance of Black people by weaponizing a façade of race neutrality. The FBI's response to Black activism shows a discriminatory intent and cannot withstand strict scrutiny, constituting a violation of the Equal Protection Clause. Discussion of an Alleged BIE Threat in any form should be abandoned.

¹⁴² Julian E. Barnes & Hailey Fuchs, *White House Orders Assessment on Violent Extremism in U.S.*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/capitol-riot-domestic-extremism.html> [<https://perma.cc/6UC8-T3TT>]; Chris McGreal, *Racism Is in the Bones of our Nation: Will Joe Biden Answer 'Cry' for Racial Justice?*, GUARDIAN (Jan. 25, 2021, 3:00 AM), <https://www.theguardian.com/world/2021/jan/25/joe-biden-pledged-racial-justice> [<https://perma.cc/W2E7-WHZB>].