

**COUNTERING FREE SPEECH:  
CVE PILOT PROGRAMS’ CHILLING EFFECT ON  
PROTECTED SPEECH AND EXPRESSION**

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## INTRODUCTION

If you have ever planned to travel abroad to a “suspicious” country, taken photos of government properties, or used several messaging apps, you may be reported for planning to commit violent extremism.<sup>1</sup> In recent years, the United States government announced Countering Violent Extremism (CVE) programs to prevent people from turning to violent radicalism.<sup>2</sup> The programs emphasize that young people are especially susceptible to becoming violent extremists.<sup>3</sup> Under the guise of CVE programs, school teachers, staff, and officials, and social and medical workers report to local Federal Bureau of Investigation (FBI) partners students’ behavior that they deem suspicious.<sup>4</sup> The term “violent radicalism” is not clearly defined in the framework of programs, so teachers and social workers can report to local FBI partners any kind of behavior or speech that they *subjectively* deem suspicious.<sup>5</sup> For example, students can be reported to the FBI for opposing the ideas of Western

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1. *Don’t be a Puppet: When to Report Violent Extremism*, FED. BUREAU INVESTIGATION, <https://cve.fbi.gov/where/?state=report> (last visited Feb. 7, 2018) [hereinafter *When to Report Violent Extremism*] (listing suspicious behaviors that can be indicative of violent extremism and thus should be reported, according to the FBI). It is not clear what “traveling to places that sound suspicious” means as it has been left undefined on the website without any guidance or criteria. *Id.* The term “violent extremism” is defined as “encouraging, condoning, justifying, or supporting the commission of a violent act to achieve political, ideological, religious, social, or economic goals.” *Don’t be a Puppet: What is Violent Extremism?*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/cve508/teen-website/what-is-violent-extremism> (last visited Feb. 7, 2018).

2. *See, e.g.*, U.S. Dep’t of Justice, *Pilot Programs Are Key to Our Countering Violent Extremism Efforts*, OFF. PUB. AFF. BLOGS (Feb. 18, 2015), <https://www.justice.gov/opa/blog/pilot-programs-are-key-our-countering-violent-extremism-efforts> [hereinafter *Pilot Programs Are Key*]; Press Release, U.S. Dep’t of Justice, Attorney General Holder Announces Pilot Program to Counter Violent Extremists (Sept. 15, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-pilot-program-counter-violent-extremists>.

3. *See* FBI OFFICE OF PARTNER ENGAGEMENT, PREVENTING VIOLENT EXTREMISM IN SCHOOLS 3 (2016), <https://info.publicintelligence.net/FBI-PreventingExtremismSchools.pdf> (“Youth are embracing many forms of violent extremism . . . Youth aged 13–18 are actively engaged in extremist activities including online communication with known extremists, traveling to conflict zones, conducting recruitment activities, or supporting plotting against U.S. targets. These factors signify the potential for increased risk within our schools and local communities.”).

4. *What Could Go Wrong With Asking Teachers to Monitor Kids for ‘Extremist’ Beliefs?*, ACLU TENNESSEE (Jul. 20, 2016), <http://www.aclu-tn.org/what-could-go-wrong-with-asking-teachers-to-monitor-kids-for-extremist-beliefs/> [hereinafter ACLU, *What Could Go Wrong*]. An FBI document that was leaked essentially encouraged teachers to spy on their students. *Id.*

5. U.N. Human Rights Office of High Comm’r, *Countering Violent Extremism, a ‘Perfect Excuse’ to Restrict Free Speech and Control the Media—UN Expert* (May 4, 2016), <http://acnudh.org/en/countering-violent-extremism-a-perfect-excuse-to-restrict-free-speech-and-control-the-media-un-expert>.

democracy, for discussing or learning about terrorism, for feeling alienated, or for taking pictures of government properties.<sup>6</sup> Various community organizations have expressed deep concerns about the effect of CVE programs.<sup>7</sup> According to the United Nations Human Rights Office of the High Commissioner, the programs suppress any dissent or opposition to the government and prevent students from associating with beliefs or identities that the government or society deems suspicious or undemocratic.<sup>8</sup>

This Note argues that CVE programs that monitor students' activities in schools pose serious risks of violating the freedom of speech and expression. The First Amendment's protection of speech and expression is of supreme importance in American society.<sup>9</sup> The Supreme Court is concerned with the chilling effect of government policy on free speech because the policy can discourage dissent, disagreement, and debate—activities crucial in a democracy.<sup>10</sup> For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court invalidated state law “because it could have a chilling effect on political commentary,”<sup>11</sup>

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6. Sarah Lazare, *The FBI Has a New Plan to Spy on High School Students Across the Country*, ALTERNET (Mar. 2, 2016), <http://www.alternet.org/grayzone-project/fbi-has-new-plan-spy-high-school-students-across-country>.

7. See generally BRENNAN CTR. FOR JUSTICE, COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT [hereinafter COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT], <https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf> (last visited Feb. 7, 2018) (listing five “Myths” about CVE programs that suggest they may have adverse consequences that outweigh alleged benefits).

8. U.N. Human Rights Office of High Comm’r, *supra* note 5.

9. See *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (citing *Boos v. Barry*, 485 U.S. 312, 318 (1988)) (reasoning that the ability to express dissatisfaction with the policies of the United States is “at the core of our First Amendment values”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (“Any variation from the majority’s opinion may inspire fear. . . . [T]his kind of openness [] is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (discussing the importance of freedom of speech to a society); Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT’L SEC. J. 1, 28 (2011) (“The U.S. legal system assigns supreme importance to freedom of speech, an approach reflected in the Constitution’s First Amendment, the U.S. Supreme Court’s jurisprudence, and the reluctance to legislate content-based prohibitions that would directly criminalize speech.”).

10. See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)); *Baird v. State Bar*, 401 U.S. 1, 6 (1971) (citing *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960)); *Lamont v. Postmaster-Gen.*, 381 U.S. 301, 305 (1965); Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003, 1031 (2013) [hereinafter Sedler, *First Amendment Revisited*].

11. Sedler, *First Amendment Revisited*, *supra* note 10, at 1031 n.142 (citing 418 U.S. at 243, 254, 258).

and in *Lamont v. Postmaster-General*, the Court invalidated “federal law permitting mail delivery of ‘communist political propaganda’ if [the] addressee specifically requested delivery in writing because of [a] possible chilling effect on [the] willingness of identified recipients to receive ‘communist political propaganda.’”<sup>12</sup>

Where plaintiffs can show an objectively reasonable fear of specific, concrete harm as a direct or indirect result of some government action, prior Supreme Court precedents would not bar standing under the “chilling effects doctrine.”<sup>13</sup> Individuals affected by CVE programs should be able to establish standing because they have experienced an objective chilling effect—discouragement and fear of expressing dissenting views and associating with ideas and groups unfavorable to the government.

The Supreme Court generally uses the standard of strict scrutiny in analyzing whether a government policy creates a chilling effect on free speech.<sup>14</sup> Under strict scrutiny, the government program must have a compelling government interest unrelated to suppression of ideas that cannot be achieved through means significantly less restrictive of freedom of speech.<sup>15</sup> CVE programs are likely to fail the test of strict scrutiny. While national security can be a compelling government interest,<sup>16</sup> the goals of CVE programs can arguably be achieved through significantly less restrictive means and the interest itself is related to the suppression of ideas.

Part I of this Note discusses the background of CVE programs: the radicalization theory and similar programs’ effect on students’ speech and expressive activities. The radicalization theory behind CVE programs has been debunked by many scholars. In addition, the United States’ reliance on British counterterrorism programs has been misguided. Part II provides the salient First Amendment legal theory and

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12. Sedler, *First Amendment Revisited*, *supra* note 10, at 1031 n.142 (quoting 381 U.S. at 304–05).

13. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 468, 472 (1987).

14. *See Buckley v. Valeo*, 424 U.S. 1, 64–65 (1976) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958)).

15. *United States v. Alvarez*, 567 U.S. 709, 724 (2012).

16. *See Haig v. Agee*, 453 U.S. 280, 305 (1981) (“The Court recognized that the legitimacy of the objective of safeguarding our national security is ‘obvious and unarguable.’”) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”); *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (citing *Hirabayashi v. United States*, 320 U.S. 81, 103–04 (1943)) (finding Japanese and Japanese-American internment for national security threats in World War II constitutional).

background under which courts would scrutinize CVE programs. It first discusses how CVE programs do not meet the values of the First Amendment to promote the marketplace of ideas and then provides a background of First Amendment law.

Part III applies the chilling effect doctrine to CVE programs, arguing that CVE programs do not meet strict scrutiny and create significant and objective chilling effects. This section also addresses national security considerations and why CVE programs are not narrowly tailored to meet their objectives. Finally, Part IV discusses the “overbreadth doctrine” and argues that CVE programs’ use of vague terms violates this doctrine, as these programs do not provide sufficient notice of what behavior could be deemed suspicious.

#### I. CVE PROGRAMS ARE BASED ON DEBUNKED THEORY AND FAILED BRITISH POLICY

In recent years, the United States government increased its efforts to prevent the threat of homegrown terrorist attacks<sup>17</sup> and adopted numerous CVE programs.<sup>18</sup> In response, many community leaders and organizations questioned the effectiveness of CVE programs.<sup>19</sup> First, the programs are based on the controversial “path theory” that has been debunked by various scholars.<sup>20</sup> Second, the programs are based on a

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17. FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, RETHINKING RADICALIZATION 1 (2011), <https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf>.

18. See *Pilot Programs Are Key*, *supra* note 2; Press Release, U.S. Dep’t of Justice, *supra* note 2; Thomas J. Cole, *More Groups Ask FBI to Remove Website*, ALBUQUERQUE J. (Aug. 13, 2016), <https://www.abqjournal.com/825525/more-groups-ask-fbi-to-remove-website.html> (discussing Don’t be a Puppet web-based program); *21 Groups Oppose “Strong Cities” CVE Initiative in New York, Citing Civil Liberties Concerns*, BRENNAN CTR. FOR JUST. (Sep. 21, 2015), <https://www.brennancenter.org/analysis/21-groups-oppose-strong-cities-cve-initiative-new-york-citing-civil-liberties-concerns>.

19. See, e.g., MICHAEL PRICE, BRENNAN CTR. FOR JUSTICE, COMMUNITY OUTREACH OR INTELLIGENCE GATHERING? A CLOSER LOOK AT “COUNTERING VIOLENT EXTREMISM” PROGRAMS 7 (2015), [https://www.brennancenter.org/sites/default/files/analysis/Community\\_Outreach\\_or\\_Intelligence\\_Gathering.pdf](https://www.brennancenter.org/sites/default/files/analysis/Community_Outreach_or_Intelligence_Gathering.pdf) (discussing that the CVE programs have mixed motives and that the FBI needs to keep community outreach and intelligence gathering separately); Venice Buhain, *FBI’s Seattle Somali Community Outreach Programs Targeted for Spying, Reports Say*, SEATTLE GLOBALIST (Jan. 30, 2015), <http://www.seattleglobalist.com/2015/01/30/seattle-fbi-community-outreach-fbi-spy-plans/33068> (discussing reports that the FBI community outreach program in Seattle received orders to gather intelligence); Laura Yuen, *Muslims Fear Anti-Terror Program Could Spy on Their Communities*, MPRNEWS (Jan. 30, 2015), <http://www.mprnews.org/story/2015/01/30/anti-terror-program> (discussing that CVE programs are worrisome because they may be used for intelligence gathering purposes).

20. BRIAN MICHAEL JENKINS, RAND CORP., WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001, at 1, 7 (2010); PATEL, *supra* note 17, at 10 (“Empirical research on radicalization conclusively

British counter-radicalization program, “Channel,” that has negatively affected individual rights and has been ineffective.<sup>21</sup> Finally, CVE programs do not clearly define the term “violent extremism.”<sup>22</sup>

#### A. CVE Programs Are Based on a Flawed Radicalization Theory

While the United States government recognizes that there are many factors that lead to violent radicalism,<sup>23</sup> a “path theory” remains dominant among security experts and local government officials.<sup>24</sup> An example of the theory was promoted by the New York Police Department (NYPD).<sup>25</sup> The theory described a four-stage path in which ordinary people turn into terrorists.<sup>26</sup> According to the theory, individuals enter the radicalization

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shows that the path to terrorism is far from linear.”); Michael German, *Learning From Past Civil Liberties Mistakes*, CATO UNBOUND (June 21, 2012), <https://www.cato-unbound.org/2012/06/21/michael-german/learning-past-civil-liberties-mistakes> [hereinafter German, *Learning from Past Mistakes*]; Alan Travis, *M15 Report Challenges Views on Terrorism in Britain*, GUARDIAN (Aug. 20, 2008), <https://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1> (“The sophisticated analysis, based on hundreds of case studies by the security service, says there is no single pathway to violent extremism.”).

21. See generally HM GOV’T, CHANNEL DUTY GUIDANCE: PROTECTING VULNERABLE PEOPLE FROM BEING DRAWN INTO TERRORISM (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/425189/Channel\\_Duty\\_Guidance\\_April\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425189/Channel_Duty_Guidance_April_2015.pdf). For criticism, see Rachel Briggs, *Community Engagement for Counterterrorism: Lessons from the United Kingdom*, 86 INT’L AFF. 971, 975 (2010).

22. See, e.g., Raman Jit Singh Chima, *Beware: Countering “Violent Extremism” Online Risks Human Rights*, ACCESSNOW (Nov. 2, 2016), <https://www.accessnow.org/beware-countering-violent-extremism-online-risks-human-rights/> (“Vague or overbroad definitions of terms like ‘extremism’ or ‘violent extremism’ could easily build the foundation for human rights violations and put vulnerable communities at risk.”).

23. EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1 (Oct. 2016), [https://www.dhs.gov/sites/default/files/publications/2016\\_strategic\\_implementation\\_plan\\_empowering\\_local\\_partners\\_prev.pdf](https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf).

24. Michael German, *Flawed Theories on Violent Extremism Lead to Bad Policy*, ACLU (May 6, 2010), [https://www.aclu.org/blog/speakeasy/flawed-theories-violent-extremism-lead-bad-policy](https://www.aclu.org/blog/speakeasy/flawed-theories-violent-extremism-lead-bad-policy?redirect=blog/content/flawed-theories-violent-extremism-lead-bad-policy) [hereinafter German, *Flawed Theories on Violent Extremism*].

25. *Id.* The ACLU and other organizations succeeded in a federal court to order the New York Police Department to remove from its website the 2007 report *Radicalization in the West: The Homegrown Threat. Here’s The Suppressed NYPD Terror Report*, JUD. WATCH (Jan. 20, 2016), <http://www.judicialwatch.org/bulletins/heres-the-suppressed-nypd-terror-report/>.

26. German, *Flawed Theories on Violent Extremism*, *supra* note 24. The four stages are: (1) Pre-Radicalization (individuals’ life situation before they were exposed to jihadi-Salafi Islam); (2) Self-Identification (individuals’ exploration of Salafi Islam); (3) Indoctrination (when an individual wholly adopts jihadi-Salafi ideology and concludes that action is required to support and further its cause); and (4) Jihadization (when members of the cluster accept their individual duty to participate in jihad and self-designate themselves as holy warriors or mujahedeen). MITCHELL D. SILBER & ARVIN BHATT, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* 6–7 (2007), <http://www.judicialwatch.org/wp-content/uploads/2016/>

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path by adopting certain beliefs and emerge as violent extremists.<sup>27</sup> Once individuals enter “the path,” they become potential threats as “agents of influence” over future terrorists, regardless of whether they become terrorists themselves.<sup>28</sup> The FBI’s four-stage model closely follows NYPD’s.<sup>29</sup> Congressional Research Service (CRS), an influential legislative branch agency, acknowledges the shortcomings of the NYPD report, but continues to adhere closely to the radicalization model the report promotes.<sup>30</sup>

The NYPD report was harshly opposed, mainly because empirical studies indicate that there is no identifiable path that turns people into violent extremists:

There is no easily identifiable terrorist-prone personality, no single path to radicalization and terrorism. Many people may share the same circumstances, and only a handful of the radicals will go further to become terrorists. The transition from radical to terrorist is often a matter of *happenstance*. It depends on whom one meets and probably on when that meeting occurs in the arc of one’s life.<sup>31</sup>

Because there is no identifiable path that leads to terrorism, the reliance on path theory is dangerous: it implies that law enforcement can prevent violent extremism “by closely monitoring the communities deemed susceptible to radicalization.”<sup>32</sup>

*B. CVE Programs in the United States Emerged as Imitations of a Failed British Policy*

CVE programs in the United States emerged as imitations of European—mainly the United Kingdom’s—counter-radicalization programs.<sup>33</sup> In early 2003, the British Labor government first developed the CONTEST strategy to address counterradicalism, and released it in

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01NYPD\_Report-Radicalization\_in\_the\_West.pdf.

27. German, *Flawed Theories on Violent Extremism*, *supra* note 24.

28. *Id.*

29. JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 12 (Jan. 23, 2013); *see* Carol Dyer et al., *Countering Violent Islamic Extremism: A Community Responsibility*, in 76 FBI LAW ENFORCEMENT BULLETIN, Dec. 2007, at 6.

30. German, *Flawed Theories on Violent Extremism*, *supra* note 24.

31. JENKINS, *supra* note 20, at 7 (emphasis added); *see* Sophia Moskalenko & Clark McCauley, *Measuring Political Mobilization: The Distinction Between Activism and Radicalism*, 21 TERRORISM & POL. VIOLENCE 239, 239–40 (Apr. 2009).

32. PATEL, *supra* note 17, at 1.

33. Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 148 (2012).

public form in 2006.<sup>34</sup> CONTEST consists of four parts: Pursue, Protect, Prepare, and Prevent strategies.<sup>35</sup> The Prevent strategy was the most controversial and widely criticized.<sup>36</sup> Originally, it emphasized empowering local authorities and communities to tackle radicalization through government-supported programs.<sup>37</sup> It later expanded to include engagement of the local police force, a creation of “a toolkit” for schools, and a referral process called “Channel” to provide support for vulnerable individuals.”<sup>38</sup> The 2009 expanded version of Prevent aimed at countering not just violent extremism, but *any* form of extremism.<sup>39</sup>

After the 2010 elections, a new coalition government undertook the overhaul of Prevent and criticized it for distorting the relationship between the state and communities, and for failing to deliver any tangible security benefits.<sup>40</sup> The future of the program is uncertain.<sup>41</sup> Despite the criticism of Prevent, the United States has drawn on the U.K.’s experiment in designing its own counter-radicalization programs.<sup>42</sup>

In 2016, the United States adopted the *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States* (the “Plan”).<sup>43</sup> The goal of the Plan is “to prevent violent extremists and their supporters from inspiring, radicalizing, financing, or recruiting individuals . . . in the United States to commit acts of violence.”<sup>44</sup> The Plan set the framework for countering violent extremism

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34. See John Gearson & Hugo Rosemont, *CONTEST as Strategy: Reassessing Britain’s Counterterrorism Approach*, 38 *STUD. CONFLICT & TERRORISM* 1038, 1038 (2015).

35. See SEC’Y OF STATE, HOME DEP’T, CONTEST, THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM: ANNUAL REPORT FOR 2015, at 9 (2016).

36. Rascoff, *supra* note 33, at 152.

37. See *id.* at 151; Briggs, *supra* note 21, at 975.

38. Briggs, *supra* note 21, at 975.

39. Rascoff, *supra* note 33, at 151–52.

40. *Id.* at 152. Because of the criticism, the British government released a revised Prevent program which will “respond to the ideological challenge of terrorism”; “prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support”; and “work with sectors and institutions where there are risks of radicalisation.” Theresa May, *Foreword* to SEC’Y OF STATE, HOME DEP’T, PREVENT STRATEGY 1, 1 (June 2011).

41. Rascoff, *supra* note 33, at 152.

42. *Id.*

43. EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1 (Oct. 2016) [hereinafter PLAN FOR EMPOWERING LOCAL PARTNERS], [https://www.whitehouse.gov/sites/default/files/docs/2016\\_strategic\\_implementation\\_plan\\_empowering\\_local\\_partners\\_prev.pdf](https://www.whitehouse.gov/sites/default/files/docs/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf). This plan replaced the similar 2011 Plan, acknowledging the changing nature of violent extremism. *Id.*

44. *Id.* The Plan defines violent extremists as “individuals who support or commit ideologically-motivated violence to further political goals.” *Id.* at 1 n.2.



programs.<sup>45</sup> The Plan's top priority areas are:

- (1) enhancing engagement with and support to local communities;
- (2) building government and law enforcement expertise for preventing violent extremism;
- and
- (3) countering violent extremist propaganda while promoting our ideals.<sup>46</sup>

The Plan is implemented at the national, local, and individual levels.<sup>47</sup> It involves various federal agencies, such as the Departments of Homeland Security (DHS) and Justice (DOJ), and the FBI.<sup>48</sup> At the national level, the federal government funds research, provides practices, issues grants, and builds a relationship with nongovernment stakeholders.<sup>49</sup> At the local level, CVE programs focus on providing youth engagement, internet education, and community service.<sup>50</sup> At the individual level, CVE programs develop resources for assisting individuals identified as being "at risk" of radicalizing.<sup>51</sup>

CVE programs' preventative efforts focus on community-led intervention.<sup>52</sup> In December 2015, Congress passed the Department of Homeland Security Appropriations Act of 2016.<sup>53</sup> Section 543 of the Act and the accompanying Joint Explanatory Statement provided ten million dollars for a CVE initiative "to help states, tribes, and local communities prepare for, prevent, and respond to emergent threats from violent extremism."<sup>54</sup> These grants are available to state and local partners as

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45. *Id.* at 1.

46. PLAN FOR EMPOWERING LOCAL PARTNERS, *supra* note 43, at 2.

47. *Id.* at 3.

48. *Id.* at 1 n.1.

49. *Id.* at 3. The "stakeholders . . . include, but are not limited to: Federal, state, tribal, territorial, and local governments and law enforcement; communities; non-governmental organizations; academia; educators; social services organizations; mental health providers; and the private sector." *Id.* at 1 n.3.

50. PLAN FOR EMPOWERING LOCAL PARTNERS, *supra* note 43, at 3.

51. *Id.*

52. Press Release, Office of the Press Sec'y, The White House, FACT SHEET: The White House Summit on Countering Violent Extremism (Feb. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism>.

53. Department of Homeland Security Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2493 (2015).

54. Department of Homeland Security Appropriations Act § 543; *Oversight of the Urban Area Security Initiative Grant Program: Joint Hearing Before the Subcommittee on Transportation and Public Assets and the Subcommittee on National Security of the Committee on Oversight and Government Reform House of Representatives*, 114th Cong. 7-15 (2016) (statement of Brian Kamoie, Assistant Administrator for Grant Programs, Department of Homeland Security's Federal Emergency Management Agency).

well as community groups<sup>55</sup> in order to build prevention programs.<sup>56</sup> Pilot programs are among the preventative programs implemented by collaborative efforts of the DOJ, DHS, and National Counterterrorism Center (NCTC).<sup>57</sup> The agencies selected three regions: Greater Boston, Greater Los Angeles, and the Twin Cities based on their community engagement.<sup>58</sup> The Pilot programs utilize schools, community and faith-based programs, and private providers to engage young people and find risk factors that allegedly could lead them to become radicalized.<sup>59</sup>

Like its British counterpart, CVE pilot programs met harsh criticism from many nongovernment organizations and community leaders.<sup>60</sup> Nongovernment organizations are concerned that CVE programs facilitate covert intelligence-gathering and suppress dissent against government policies.<sup>61</sup> The specifics of CVE programs remain unclear.<sup>62</sup> In February 2016, the American Civil Liberties Union (ACLU) filed lawsuits under the Freedom of Information Act<sup>63</sup> against various federal agencies, including the DHS, DOJ, and FBI.<sup>64</sup> The ACLU is concerned that “[d]efendants have released only the broadest outlines of CVE programs, leaving the public ill-equipped to assess whether the programs have an evidentiary basis and are subject to adequate privacy and civil

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55. U.S. Dep’t of Homeland Sec., *FY 2016 Countering Violent Extremism (CVE) Grant Program*, <https://www.dhs.gov/cvegrants> (last updated June 23, 2017). The community groups will include religious groups, mental health and social service providers, educators and other NGOs. *Id.*

56. *Id.*

57. *Pilot Programs Are Key*, *supra* note 2.

58. *Id.*

59. U.S. ATTORNEY’S OFFICE, DIST. OF MASS., A FRAMEWORK FOR PREVENTION AND INTERVENTION STRATEGIES 4 (Feb. 2015), <https://www.justice.gov/sites/default/files/usao-ma/pages/attachments/2015/02/18/framework.pdf>; L.A. INTERAGENCY COORDINATION GRP., THE LOS ANGELES FRAMEWORK FOR COUNTERING VIOLENT EXTREMISM 4 (Feb. 2015), <https://www.dhs.gov/sites/default/files/publications/Los%20Angeles%20Framework%20for%20CVE-Full%20Report.pdf>; U.S. ATTORNEY’S OFFICE, BUILDING COMMUNITY RESILIENCE: MINNEAPOLIS-ST. PAUL PILOT PROGRAM 5 (Feb. 2015), <https://www.justice.gov/usao-mn/file/642121/download>.

60. Alice LoCicero & J. Wesley Boyd, The Dangers of Countering Violent Extremism (CVE) Programs, *PSYCHOL. TODAY* (Jul. 19, 2016), <https://www.psychologytoday.com/blog/almost-addicted/201607/the-dangers-countering-violent-extremism-cve-programs>; Press Release, Council on American-Islamic Relations, Civil Rights Groups Concerned About Minneapolis CVE Pilot Program (Mar. 11, 2015), <http://www.cair.com/press-center/press-releases/12821-civil-rights-groups-concerned-about-minneapolis-cve-pilot-program.html>.

61. COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT, *supra* note 7.

62. Complaint at 2, *ACLU v. Dep’t Homeland Sec.*, No. 1:16-cv-00221 (D.C. Cir. Feb. 10, 2016).

63. 5 U.S.C. § 552 (2012).

64. Complaint, *supra* note 62, at 2.

rights safeguards.”<sup>65</sup> This makes it difficult to determine the full impact of CVE programs on society.

*C. CVE Programs Negatively Impact Students’ Speech and Expression*

In the United Kingdom, from where the United States is drawing its counterterrorism policies, public sector employees—teachers, doctors, and social workers—have a *statutory duty* to report individuals perceived to have been drawn into *both* violent and nonviolent extremism.<sup>66</sup> Extremism includes “vocal or active opposition to fundamental British values, including democracy, the rule of law, [and] individual liberty.”<sup>67</sup> As a result, Muslim and immigrant children are identified as a potential radicals, questioned, reported to authorities, or arrested for supporting Palestine, having a classroom discussion about terrorism, or mispronouncing words that can be misinterpreted as related to terrorism.<sup>68</sup>

Similar programs have been introduced in the United States.<sup>69</sup> CVE programs “enlist teachers and social and health workers to monitor and report to law enforcement on children in their care.”<sup>70</sup> Essentially, teachers are told to “spy on their students’ thoughts” while administrators should “turn schools into mini-FBI offices.”<sup>71</sup> A CVE program developed in Minneapolis, for example, requests “teachers and other school staff to monitor and identify students who they believe are at risk of ‘radicalization’ or engaging in ‘violent extremism.’”<sup>72</sup> Intervention and reporting can be triggered by identity issues, disaffection, or alienation.<sup>73</sup>

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65. *Id.*

66. Faiza Patel & Amrit Singh, *The Human Rights Risks of Countering Violent Extremism Programs*, JUST SEC. (Apr. 7, 2016), <https://www.justsecurity.org/30459/human-rights-risks-countering-violent-extremism-programs/>.

67. *Id.*

68. Tal Fox, *Four-Year-Old Who Mispronounced ‘Cucumber’ as ‘Cooke Bomb’ Faced Terror Warnings, Family Say*, INDEP. (Mar. 12, 2016), <http://www.independent.co.uk/news/uk/home-news/four-year-old-raises-concerns-of-radicalisation-after-pronouncing-cucumber-as-cooker-bomb-a6927341.html>; Homa Khaleeli, *‘You Worry They Could Take Your Kids’: Is the Prevent Strategy Demonising Muslim Schoolchildren?*, GUARDIAN (Sept. 23, 2015), <https://www.theguardian.com/uk-news/2015/sep/23/prevent-counter-terrorism-strategy-schools-demonising-muslim-children>.

69. Patel & Singh, *supra* note 66.

70. *Id.*

71. ACLU, *What Could Go Wrong*, *supra* note 4.

72. Complaint, *supra* note 62, at 8; *see, e.g.*, Murtaza Hussain, Cora Currier & Jana Winter, *Is Your Child a Terrorist? U.S. Government Questionnaire Rates Families at Risk for Extremism*, INTERCEPT (Feb. 9, 2015), <https://theintercept.com/2015/02/09/government-develops-questionnaire-see-might-become-terrorist/>.

73. COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT, *supra* note 7; *see* Association for Progressive Communications et al., Joint Written Statement Submitted to 31st Session of

The students in Minneapolis public schools are monitored in the lunchroom, non-class environments, and after school.<sup>74</sup> CVE programs in Boston provide a similar framework.<sup>75</sup>

Under new guidelines, *Preventing Violent Extremism in Schools*,<sup>76</sup> the FBI states that it is concerned that “youth possess inherent risk factors making them susceptible to violent extremist ideologies or possible recruitment.”<sup>77</sup> Thus, educators are instructed to observe and assess “concerning behaviors.”<sup>78</sup> Among the behaviors that are concerning and should be monitored are cultural differences;<sup>79</sup> feelings of “resentment, emptiness, [and] loneliness”<sup>80</sup>; reading news stories about war, culture, heritage, or belief;<sup>81</sup> and reading newspapers that criticize western policies and European cultures.<sup>82</sup> According to the FBI’s educational materials for teenagers, the following behaviors constitute signs that “could mean that someone plans to commit violence” and should be reported<sup>83</sup>: “Talking about traveling to places that sound suspicious”; “[u]sing code words or unusual language”; “[u]sing several different cell phones and private messaging apps”; and “[s]tudy[ing] or taking pictures of potential targets (like a government building).”<sup>84</sup>

Students who are identified as “radical extremists” can experience

Human Rights Council, at 4 (Feb. 4, 2016), [https://www.article19.org/data/files/Joint\\_Written\\_Submission\\_PVE\\_HRC31.pdf](https://www.article19.org/data/files/Joint_Written_Submission_PVE_HRC31.pdf).

74. COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT, *supra* note 7.

75. *Id.*

76. FBI OFFICE OF PARTNER ENGAGEMENT, *supra* note 3. According to the FBI, the possible triggering factors that lead youth to embrace terrorism are: (1) “A student may use a relevant group as a standard of reference against which oneself is compared creating aspirational or associative dynamics”; (2) “A student’s personal crisis or underachievement may trigger impulsive or violent acts”; (3) “Students act on feelings of isolation, alienation, disenfranchisement, sense of belonging, adventure, glory, or thrill seeking.” *Id.* at 8–9.

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 9 (“Cultural differences can intensify these feelings leading to isolation or alienation . . . [which] might lead to greater acceptance or adherence to extremist philosophies.”).

80. FBI OFFICE OF PARTNER ENGAGEMENT, *supra* note 3, at 9 (“Oftentimes, students become disillusioned by factors outside of their control thus giving way to resentment, emptiness, loneliness, or feeling lost and abandoned . . . [which] might lead to greater acceptance or adherence to extremist philosophies.”).

81. *Id.* at 10 (“Students can readily view stories on nightly news broadcasts, internet websites or social media forums, which highlight foreign or national policy. These stories serve as catalysts or promote grievances for extremist organizations. Students assign meaning to these conflicts building resolve and support for the call to action.”).

82. *Id.* at 13 (“Several extremist organizations disseminate online magazines intended for their supporters. . . . These magazines . . . decry[] western policies and European cultures.”).

83. *When to Report Violent Extremism*, *supra* note 1.

84. *Id.*

serious social stigma, fear of associating with groups or beliefs that are not favored by the government, and have problems socializing with others.<sup>85</sup> For example, Ahmed Mohamed, a fourteen-year-old high school student, “was detained and handcuffed for bringing to school a homemade clock that was thought to be a fake bomb.”<sup>86</sup> Ahmed felt extremely “overwhelmed . . . a little fatigued,” and is “for sure” not coming back to his old high school.<sup>87</sup>

CVE programs also use “mapping, voluntary or pretextual interviews, recruitment and deployment of informants, [and] internet monitoring”<sup>88</sup> to target “impressionable” youth.<sup>89</sup> The programs focus not only on gathering intelligence but also on shaping the religious and cultural identities in Muslim communities.<sup>90</sup> CVE Programs do not contain safeguards to ensure they are not used for intelligence-gathering purposes.<sup>91</sup>

The impact of CVE programs on student expression and speech raise serious risks of violating the First Amendment. First, the programs are not consistent with the theory and values of the First Amendment. Second, they can have a chilling effect on protected speech and expression because they can deter students from participating in expressive activities because of fear of being labeled “extremist,” and from discussing diverse ideas and expressing dissenting views that do not coincide with the current policies and agenda of the United States.<sup>92</sup>

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85. See, e.g., Alan Singer, *Uncle Sam Wants You. . . to Spy on Other Students*, Huffington Post (Apr. 14, 2016), [http://www.huffingtonpost.com/alan-singer/uncle-sam-wants-you—to\\_b\\_9689456.html](http://www.huffingtonpost.com/alan-singer/uncle-sam-wants-you—to_b_9689456.html); Zawn Villines, *Watch Out: The Psychological Effects of Mass Surveillance*, GoodTherapy.org (Sept. 16, 2013), <http://www.goodtherapy.org/blog/watch-out-psychological-effects-of-mass-surveillance-0910137>.

86. Patrick McGee, Christine Hauser & Daniel Victor, *Irving Police Chief Defends Response to Ahmed Mohamed’s Clock*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/19/us/irving-police-chief-defends-response-to-ahmed-mohameds-clock.html>.

87. *Id.*

88. Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 851 (2015).

89. See Alejandro J. Beutel, *Muslim Americans and U.S. Law Enforcement: Not Enemies, But Vital Partners*, CHRISTIAN SCI. MONITOR (Dec. 30, 2009), <http://www.csmonitor.com/Commentary/Opinion/2009/1230/Muslim-Americans-and-US-law-enforcement-not-enemies-but-vital-partners>. There have been instances when FBI coerced individuals to become informants because of their immigration status. *Id.* For those who do not cooperate, FBI uses retaliatory tactics. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, GREATER LOS ANGELES CHAPTER, *THE FBI’S USE OF INFORMANTS, RECRUITMENT AND INTIMIDATION WITHIN MUSLIM COMMUNITIES 1* (Mar. 26, 2009).

90. Akbar, *supra* note 88, at 851.

91. COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT, *supra* note 7.

92. FAIZA PATEL & MEGHAN KUSHIK, BRENNAN CTR. FOR JUSTICE, *COUNTERING VIOLENT EXTREMISM 17* (2017), <https://www.brennancenter.org/sites/default/files/public>

Finally, the programs have vague and overbroad definition of “violent radicalism.”

## II. CVE PROGRAMS ARE NOT CONSISTENT WITH FIRST AMENDMENT VALUES

CVE programs are not consistent with the values behind the First Amendment primarily because they discourage expression of dissent. The history and values of the First Amendment strongly protect freedom of speech and expression even of unpopular ideas.<sup>93</sup> The legal system in the United States “assigns supreme importance to freedom of speech.”<sup>94</sup> This is reflected in the Constitution of the United States and Supreme Court precedents.<sup>95</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>96</sup> Over the years, the Supreme Court has developed various principles and doctrines that define the law of the First Amendment.<sup>97</sup>

### A. All Ideas Should Be Welcome in the “Marketplace of Ideas”

The purpose of the First Amendment, as articulated by Justices Oliver Wendell Holmes and Lewis Powell is to protect bad ideas and their expression because even harmful ideas are needed in a democracy.<sup>98</sup> Justice Holmes first articulated the concept which later became known as the “marketplace of ideas” in 1919 in his dissent in *Abrams v. United States*.<sup>99</sup> Since then, marketplace of ideas became the dominant theory on the meaning of the First Amendment.<sup>100</sup> According to the theory, “the primary function of the First Amendment is to ensure that all ideas enter the marketplace of ideas and compete with one another, seeking to win acceptance by the public as a whole.”<sup>101</sup>

As a result, the government cannot keep even bad ideas from the marketplace.<sup>102</sup> According to Justice Powell, “[h]owever pernicious an

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cations/Brennan%20Center%20CVE%20Report.pdf.

93. See *Texas v. Johnson*, 491 U.S. 397, 411 (1989); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

94. Barak-Erez & Scharia, *supra* note 9, at 28.

95. *Id.*

96. U.S. CONST. amend. I.

97. Robert A. Sedler, *The First Amendment in Litigation: The “Law of the First Amendment,”* 48 WASH. & LEE L. REV. 457, 458–59 (1991).

98. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

99. 250 U.S. at 630.

100. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

101. Sedler, *First Amendment Revisited*, *supra* note 10, at 1017.

102. See *id.*

opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>103</sup> In a diverse and populous society, protection of free speech is important to produce more capable citizenry and policy.<sup>104</sup> Thus, the solution to bad speech is more truthful speech. According to Justice Kennedy, “[t]he remedy for speech that is false is speech that is true. . . . And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse.”<sup>105</sup>

Ideas and discussion of terrorism can help society better understand terrorism and its destructive consequences and find better ways to solve its root causes. Instead of alienating students interested in learning about terrorism by monitoring their behavior and deeming their ideas harmful, teachers should encourage their expression and allow those ideas to be challenged in the classrooms. This would be more consistent with the purpose of the First Amendment theory to create the marketplace of ideas where people can challenge their ideas and find the best solutions.

#### *B. First Amendment Law Developed to Protect Dissent and Criticism of Government*

The development of the First Amendment as the constitutional basis for protection of speech and expression began during World War I.<sup>106</sup> First Amendment claims were brought to challenge “espionage and sedition prosecutions,” and were generally unsuccessful.<sup>107</sup> Since the 1930s, the Supreme Court relied on the First Amendment to invalidate laws that abridged the freedom of speech and expression.<sup>108</sup>

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103. *Gertz*, 418 U.S. at 339–40.

104. *See* *Cohen v. California*, 403 U.S. 15, 22 (1971).

105. *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (plurality opinion).

106. *See* Sedler, *First Amendment Revisited*, *supra* note 10, at 1022.

107. Sedler, *First Amendment Revisited*, *supra* note 10, at 1022; *see, e.g.*, *Whitney v. California*, 274 U.S. 357, 371 (1927); *Gitlow v. New York*, 268 U.S. 652, 672 (1925); *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Abrams v. United States*, 250 U.S. 616, 616 (1919).

108. *See, e.g.*, *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958) (holding that an ordinance requiring union organizers to obtain a permit before recruiting violated free speech because it made the enjoyment of speech contingent on the will of the mayor and city council); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding that a city ordinance forbidding the distribution of literature of any kind without first obtaining written permission from the City Manager strikes at the very foundation of the freedom of the press by subjecting it to license and censorship); *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (establishing the constitutional principle that, with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a separate proceeding).

In the 1960s, the Supreme Court applied the First Amendment to invalidate state legislators' actions, such as prosecution of protestors and search of civil rights organizations' memberships, which repressed the civil rights movement in the South.<sup>109</sup> During this period, the Court also relied on the protections afforded by the First Amendment to prevent legislative investigating committees from inquiring into people's beliefs and associations.<sup>110</sup>

The Court also began protecting dissenting speech and expressive opposition to government policies. In *Brandenburg v. Ohio*, the Supreme Court set a precedent that resisted limitations on freedom to advocate for various illegal or violent actions:

[C]onstitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>111</sup>

In *Tinker v. Des Moines Independent Community School District*, the Court held that a public high school could not constitutionally prohibit a student from wearing a black armband to school to protest the Vietnam War.<sup>112</sup> In a number of other cases, "the Court used the First Amendment to protect academic freedom by invalidating the widespread use of loyalty oaths designed to enforce political conformity on university campuses and in public schools."<sup>113</sup> The Court emphasized the importance of free inquiry in the academic context:

No one should underestimate the vital role in a democracy that is played by those who guide and train our youth . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>114</sup>

Strong protection of free speech continued into 1970s and 1980s.

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109. Sedler, *First Amendment Revisited*, *supra* note 10, at 1024; see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Brown v. Louisiana*, 383 U.S. 131, 133, 141 (1966); *Cox v. Louisiana*, 379 U.S. 559, 574–75 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Shelton v. Tucker*, 364 U.S. 479, 480–81, 490 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

110. Sedler, *First Amendment Revisited*, *supra* note 10, at 1024; see *DeGregory v. Attorney Gen.*, 383 U.S. 825, 829–30 (1966); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557–58 (1963).

111. 395 U.S. 444, 447 (1969).

112. 393 U.S. 503, 513 (1969).

113. Sedler, *First Amendment Revisited*, *supra* note 10, at 1024–25; see, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592, 603–04 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 361 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 279, 287–88 (1961).

114. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).



During this period, the Supreme Court protected citizens' right to make a public protest in opposition to the Vietnam War.<sup>115</sup> The Court also upheld the "right to burn the American flag as a means of protesting against the government."<sup>116</sup>

The Supreme Court continued to strongly protect First Amendment rights in its post-1991 decisions.<sup>117</sup> Today, the "constitutional doctrine and precedent" remain on the "side of protecting freedom of expression."<sup>118</sup> The chilling effect and over breadth doctrines developed by the Supreme Court to provide stronger safeguards to freedom of speech and expression are especially relevant in analyzing the constitutionality of CVE programs.

### III. CVE PROGRAMS RISK VIOLATING THE CHILLING EFFECT DOCTRINE

CVE Programs raise serious concerns under the chilling effects doctrine of the First Amendment. "[T]he [Supreme] Court has always been concerned with chilling effect on expression."<sup>119</sup> The "possibility of a serious chilling effect on expression" can be a "basis [to invalidate] any regulation of expression."<sup>120</sup> Justice Frankfurter first introduced the idea that the government action can "chill" the exercise of speech and expression protected by the First Amendment in 1952.<sup>121</sup> "[The] chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by government regulations not specifically directed at that protected activity."<sup>122</sup> Deterrence from free expression is the essence of the chilling effect

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115. Sedler, *First Amendment Revisited*, *supra* note 10, at 1026; *see* *Cohen v. California*, 403 U.S. 15, 23, 26 (1971) ("[T]he First . . . Amendment[] must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.").

116. Sedler, *First Amendment Revisited*, *supra* note 10, at 1026; *see* *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

117. Sedler, *First Amendment Revisited*, *supra* note 10, at 1026.

118. *Id.* at 1027; *see, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 723 (2012); *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 560–79 (2011); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 739–49 (2011); *United States v. Stevens*, 559 U.S. 460, 481 (2010).

119. Sedler, *First Amendment Revisited*, *supra* note 10, at 1031.

120. *Id.*; *see, e.g.*, *Lamont v. Postmaster-Gen.*, 381 U.S. 301, 305 (1965); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254–58 (1974).

121. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

122. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 693 (1978).

claim.<sup>123</sup> There are both procedural and substantive considerations for plaintiffs seeking to bring a chilling effects' claim.

*A. Objective Chilling Effects of CVE Programs Can be Sufficient to Show Standing*

The plaintiffs seeking to challenge CVE programs will need to establish standing. To show standing, a plaintiff has the burden of demonstrating that he or she suffered an “injury in fact,”<sup>124</sup> government action caused the alleged injury, and the injury will likely be redressed by a favorable decision.<sup>125</sup> Government programs may result in a chilling effect (a) when an individual is deterred from engaging in “potentially punishable” activities because the government programs are vague, or (b) when an individual feels societal pressures to abstain from expression because the expression is labeled as appropriate for regulation.<sup>126</sup> The Supreme Court has implicitly recognized that “chilling effect injuries may be sufficient to establish a plaintiff’s standing in federal courts.”<sup>127</sup>

Subjective chilling effects are not enough to establish standing. In *Laird v. Tatum*, the Supreme Court held that the plaintiffs did not have standing to challenge an Army intelligence-gathering program.<sup>128</sup> The Court stated 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.<sup>129</sup> 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 . . . .”<sup>130</sup> In *Clapper v. Amnesty International USA*, the Court also noted that fear of surveillance alone is not enough to create standing.<sup>131</sup>

It is not difficult to overcome the standing precedent established in

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123. *Id.* at 689; *see, e.g.*, *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963).

124. An “injury in fact” is an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

125. *Id.* at 560–61.

126. Michael N. Dolich, *Alleging A First Amendment “Chilling Effect” to Create A Plaintiff’s Standing: A Practical Approach*, 43 *DRAKE L. REV.* 175, 186 (1994).

127. *Id.* at 178.

128. 408 U.S. 1, 15 (1972) (holding that the respondents failed to meet standing requirements).

129. *Id.*

130. *Id.* at 13–14.

131. 568 U.S. 398, 417 (2013) (citing *Laird*, 408 U.S. at 10–15) (“[O]ur decision in *Laird* makes it clear that such a fear is insufficient to create standing.”).

*Laird* and *Amnesty International USA*, however.<sup>132</sup> In deciding *Laird*, the Court dealt with a narrow set of facts: plaintiffs did not complain about a specific action and the evidence did not disclose unlawful activities, while in *Amnesty International USA*, the plaintiffs did not rely on a specific future harm of government surveillance, but merely hypothetical.<sup>133</sup> Where plaintiffs can show an objectively reasonable fear of specific, concrete harm as a direct or indirect result of some government action, *Laird* and *Amnesty International USA* should not bar standing.<sup>134</sup> By establishing an “objective” chilling effect, individuals and organizations have successfully established standing.<sup>135</sup> For example, in *Meese v. Keene*, the plaintiff, a Californian politician, alleged that he did not show three Canadian films that were labeled by the Department of Justice as “political propaganda” because he was afraid of being associated the term.<sup>136</sup> The Supreme Court held that the politician established standing because he showed a sufficient “claim of specific present objective harm or a threat of specific future harm.”<sup>137</sup> *Meese* demonstrates that when a plaintiff alleges that he or she was deterred from engaging in protected activity because of an “objectively reasonable fear of a specific future or present harm” as a result of government action, this “objective” chilling effect is sufficient to establish standing.<sup>138</sup>

The plaintiffs challenging the constitutionality of CVE programs should be able to establish standing under the current Supreme Court precedent. While in *Laird*, the plaintiff’s chilling effects’ claim was subjective and not sufficient to establish an injury-in-fact,<sup>139</sup> here, there are objective chilling effects on free speech. CVE pilot programs and FBI policy guidelines require school teachers, officials, and staff to report students’ activities that they deem suspicious.<sup>140</sup> While the requirement is permissive, meaning that the teachers can refuse to report on students, the requirement itself can create the chilling effect, as in *Meese*, where the plaintiff had the *choice* to show his film labeled as “political propaganda” but refrained from doing so out of fear. Here, students

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132. See Matthew A. Wasserman, Note, *First Amendment Limitations on Police Surveillance: The Case of the Muslim Surveillance Program*, 90 N.Y.U. L. REV. 1786, 1800 (2015).

133. *Id.*

134. *Id.* at 1801.

135. *Id.*

136. *Id.* at 1803 (citing 481 U.S. 465, 467 (1987)).

137. Wasserman, *supra* note 132, at 1803 (quoting *Meese*, 481 U.S. at 472).

138. *Id.*

139. 408 U.S. 1, 13–14 (1972).

140. See FBI OFFICE OF PARTNER ENGAGEMENT, *supra* note 3, at 27; COUNTERING VIOLENT EXTREMISM: MYTHS AND FACT, *supra* note 7; Patel & Singh, *supra* note 66.

would also have the choice whether to participate in the activities that their teachers may deem suspicious. However, constant feeling of being monitored and fear of being reported or arrested for personal beliefs or expressive acts would directly suppress student's ability to freely express themselves and associate with groups.

The activities that can be subject to reporting and further law enforcement action include travelling abroad to "suspicious" countries, taking photos of government property, as well as feeling alienation and loneliness.<sup>141</sup> Youth can experience those feelings and engage in different types of activities without radicalizing or becoming terrorists. As the Court held in *Meese*, present and specific fear that the government program will deter individuals from engaging in protected activities would be sufficient to show an injury-in-fact.<sup>142</sup> As a result, plaintiffs challenging the constitutionality of CVE programs will be able to show a specific and objective injury.

The cause prong can also be established by the plaintiffs. While the government is collecting information about students through teachers and school officials, the program is the cause of the deterrent effect experienced by students. The cause prong can be direct as well as indirect.<sup>143</sup> Here, the government is indirectly creating the chilling effect on free speech through school officials and teachers. As in *Meese*, where the government indirectly created the chilling effect by labeling the politicians' films as propaganda, here, the government indirectly instills fear of constant monitoring in students. In addition to being able to establish standing, plaintiffs challenging CVE programs should be able to show that the programs are likely to fail under the test of strict scrutiny that the courts apply in cases where fundamental rights, such as freedom of speech and expression, are concerned.

### *B. CVE Programs Are Likely to Fail Under Strict Scrutiny*

Current CVE programs will likely fail the strict scrutiny test.<sup>144</sup> While the programs remain unclear about their basic guidelines and

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141. See *When to Report Violent Extremism*, *supra* note 1.

142. *Meese*, 481 U.S. at 473.

143. See Wasserman, *supra* note 132, at 1803.

144. For the constitutionality of similar programs, see generally Kelsey Cora Skaggs, Note, *Surveilling Speech and Association: NSA Surveillance Programs and the First Amendment*, 18 U. Pa. J. Const. L. 1479 (2016) (arguing that current surveillance programs violate First Amendment); Madiha Shahabuddin, Comment, "The More Muslim You Are, the More Trouble You Can Be": How Government Surveillance of Muslim Americans Violates First Amendment Rights, 18 Chap. L. Rev. 577 (2015) (arguing that government surveillance is not narrow in scope).

standards, their goals involve monitoring students' activities and reporting them to the authorities. The students will not be able to freely associate with Islam, to learn and discuss dissenting ideas, or to challenge government policies.

In *Buckley v. Valeo*, the Supreme Court stated that governmental interests that have a chilling effect on free speech and expression must survive 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 . . . .”<sup>145</sup> “Buckley requires for any government action that has chilling effects on First Amendment rights be narrowly tailored to achieve a compelling interest.”<sup>146</sup> Strict scrutiny review is necessary because “[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.”<sup>147</sup>

The type of expressive activities that CVE programs deter are protected by the First Amendment. First, in *NAACP v. Button*, the Court stated that the government cannot inquire into beliefs and associations of people.<sup>148</sup> Here, government agencies, such as the FBI, DOJ, and DHS, will be indirectly inquiring into students' beliefs and associations. Any “suspicious” group that the students are part of will be reported to the authorities by teachers who act as secret spies. There are no safeguards to ensure that the programs are not used to gather and collect intelligence. As a result, without reasonable suspicion, students' personal information, such as their associations and beliefs, will be monitored and reported to local FBI authorities for further action.

Under *Brandenburg v. Ohio*, the government cannot prohibit advocacy unless it is intended to incite violence and is likely to result in violence.<sup>149</sup> In high schools, students participate in various activities, including research and discussion of diverse ideas—even radical or dissenting ones—that do not incite violence, but could fall under the framework of actions that can be reported to the FBI. CVE programs do not specify which actions should be monitored and reported, which can have a deterrent effect and prevent students from engaging in First

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145. Wasserman, *supra* note 132, at 1819 (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (emphasis added)).

146. *Id.*; see *Buckley*, 424 U.S. at 64, 66, 81 (recognizing that substantial infringements on First Amendment rights must be significantly related to an important government interest).

147. Caitlin Thistle, Comment, *A First Amendment Breach: The National Security Agency's Electronic Surveillance Program*, 38 SETON HALL L. REV. 1197, 1213 (2008).

148. 371 U.S. 415, 431 (1961).

149. 395 U.S. 444, 447 (1969).

Amendment-protected activities. When authorities have access to information about a person's "beliefs, expressions, or associations . . . concern[ing] matters that are unorthodox, unpopular, or even hateful to the public," disastrous effects can occur.<sup>150</sup>

Moreover, the First Amendment protects students' protest through expressive conduct. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court stated that students should be allowed to wear armbands to protest the Vietnam War.<sup>151</sup> CVE programs will have a chilling effect on any form of protest to current immigration policies or the War on Terrorism because students will be afraid of monitoring and further law enforcement action.

If government programs have a chilling effect on free speech and association, then the government needs to establish that the programs have a compelling interest and are narrowly tailored to achieve that interest.<sup>152</sup> Even if the government may have a compelling interest in defending the nation by proposing CVE programs, its interest is not narrowly tailored and can be achieved by means less restrictive of free speech and expression.

### *C. National Security Interests Are Not Narrowly Tailored*

The Supreme Court has recognized that national security can be a compelling interest.<sup>153</sup> The First Amendment's guarantee of free speech can sometimes be subordinated to the interest of national security.<sup>154</sup> When speech clearly presents an *immediate* danger to national security, the protection of the First Amendment ceases.<sup>155</sup> The task of adapting the First Amendment to CVE programs requires "balancing the restrictions on the rights that it protects against the risks to national security."<sup>156</sup>

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150. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 38, *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204) (quoting *Watkins v. United States* 354 U.S. 178, 197 (1957)); see Thistle, *supra* note 147, at 1212.

151. 393 U.S. 503, 514 (1969).

152. See *Buckley v. Valeo*, 424 U.S. 1, 64 (1975).

153. See, e.g., *Haig v. Agee*, 453 U.S. 280, 305 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944). *But see* *United States v. U.S. Dist. Ct. for the E.D. of Mich.*, 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. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.").

154. See *Warren v. United States*, 177 F.2d 596, 599 (10th Cir. 1949); *United States v. Rosen*, 445 F. Supp. 2d 602, 632 (E.D. Va. 2006) (citing *Dennis v. United States*, 341 U.S. 494, 503 (1951)).

155. *U.S. v. Josephson*, 165 F.2d 82, 91 (2d Cir. 1947).

156. *Wasserman*, *supra* note 132, at 1818.

In a recent case, on June 21, 2010, the Supreme Court significantly limited the scope of freedom of speech in order to protect national security interests.<sup>157</sup> In *Holder v. Humanitarian Law Project*, the Supreme Court held that the criminal prohibition of “material support” in the form of advocacy to a terrorist organization’s legitimate activities does not violate the First Amendment.<sup>158</sup> The Court highlighted the important interest of the government: “Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.”<sup>159</sup>

While *Holder* limited advocacy that may in some way support a designated terrorist organization, the Court emphasized the narrowness of its holding: “The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”<sup>160</sup> In the context of CVE programs, *Holder* would not apply unless students are providing material support to a designated foreign terrorist organization. Activities, such as viewing online content about terrorism, independent advocacy in support of various organizations’ legitimate activities, and discussion of terrorism generally would not be considered as “material support” under *Holder*.

While national security is a compelling government interest, courts will scrutinize and balance that interest with the protections afforded by the First Amendment. The government must still show that the national security policies and laws are narrowly tailored to achieve that government interest, and cannot be achieved by a less restrictive regulation.<sup>161</sup> National defense cannot be used to support any exercise of government power.<sup>162</sup> In *United States v. Robel*, the Supreme Court stated:

For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished

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157. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010).

158. *Id.* at 39. “[T]he term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials . . .” 18 U.S.C. § 2339A(b)(1) (2012).

159. *Holder*, 561 U.S. at 28.

160. *Id.* at 31–32.

161. See *Thistle*, *supra* note 147, at 1212.

162. See *United States v. Robel*, 389 U.S. 258, 263 (1967); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”).

of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.<sup>163</sup>

CVE programs may have a compelling government interest of combating terrorism, but their means are not narrowly tailored. The “interest of investigating terrorism and preventing future attacks cannot exist in a situation where evidence of criminal behavior is lacking.”<sup>164</sup> “[I]ntelligence needs to be limited to and focused on areas that will be the most likely to yield information about terrorists.”<sup>165</sup> Because individuals or groups are “engaged in non-mainstream political or religious activity does not prove” they are involved in a crime or are likely to do so.<sup>166</sup>

Additionally, the government needs to establish that there are no alternatives that are significantly less restrictive on free speech.<sup>167</sup> There have been numerous proposals from community leaders and scholars about possible improvements to CVE programs.<sup>168</sup> For example, the CVE programs could specify that only behavior that incites and is likely to lead to violence should be reported and observed—a standard endorsed in *Brandenburg*. Investing in education and after-school activities for students could also be beneficial. Moreover, encouraging community cooperation and acceptance without the security framework could allow the communities to take initiatives into their hands and avoid the negative

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163. *Robel*, 389 U.S. at 264.

164. See Thistle, *supra* note 147, at 1216.

165. *Id.* at 1226.

166. *Id.*

167. See *Buckley v. Valeo*, 424 U.S. 1, 64 (1975).

168. See, e.g., Sahar Aziz, *Countering Violent Extremism Programs are not the Solution to Orlando Mass Shooting*, BROOKINGS INST. (Jun. 29, 2016), <https://www.brookings.edu/opinions/countering-violent-extremism-programs-are-not-the-solution-to-orlando-mass-shooting/> (“CVE programs expect community leaders and parents to engage young people on timely religious, political, and social matters. While this is generally a good practice for all communities, it should not be conducted through a security paradigm. Nor can it occur without a safe space for honest dialogue.”); German, *Flawed Theories on Violent Extremism*, *supra* note 24 (“[T]he government should steer well clear of this activity and leave it to civil society. The government has no place in determining which religious or political interpretations are ‘correct,’ and attempting to do so will cause more harm than good.”); Jessica J. Steventon, *Radical Thinking: Can Violent Extremism be Prevented by Addressing Mental Health*, OPENDEMOCRACYUK (Aug. 10, 2016), <https://www.opendemocracy.net/jessica-j-steventon/radical-thinking-can-violent-extremism-be-prevented-by-addressing-mental-health> (“Depression may be a risk factor in the early stages of radicalisation, evidence suggests. . . . The long-term value of a public health approach to counter-terrorism, where we seek to identify and reduce risk factors for extremism and radicalisation, including poor mental health, and promote protective factors may be more effective than purely reactive responses at reducing future atrocities.”).



stigma associated with surveillance programs. Finally, assessing the radicalization process comprehensively by considering all factors—such as mental health problems and behavioral, not just ideological or cultural, risks—could significantly improve CVE programs.

#### IV. CVE PROGRAMS ARE VAGUE AND RISK VIOLATING THE OVERBREADTH DOCTRINE

Another potential avenue for challenging CVE programs is the overbreadth doctrine. The concept of chilling effects plays a central role in the overbreadth doctrine.<sup>169</sup> Under the overbreadth doctrine, litigants can “facially challenge government action . . . even when they are not themselves directly affected by the action.”<sup>170</sup> The Supreme 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.’”<sup>171</sup>

Under the chilling effects doctrine, “a law regulating or applying to acts of expression can be challenged on its face on the ground that the terms of the law are so broad or vague that the law could be applied to constitutionally protected acts of expression.”<sup>172</sup> The theory behind the overbreadth doctrine is that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.”<sup>173</sup>

CVE programs fail to provide definitions for terms “extremism,” “violent extremism,” and “radicalization.”<sup>174</sup> The programs assume a causal connection between radical ideas and committing acts of violence to promote terrorism.<sup>175</sup> As a result, CVE programs can be used to restrict a wide range of lawful expression and dissent.<sup>176</sup> For example, new guidelines allow the FBI to gather “information needed for broader analytic and intelligence purposes,” even if it is outside of investigating

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169. Wasserman, *supra* note 132, at 1809 n.126.

170. *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

171. *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)).

172. Sedler, *First Amendment Revisited*, *supra* note 10, at 1024. *See generally* *Burstyn v. Wilson*, 343 U.S. 495 (1952) (addressing the use of a film licensing statute banning “sacrilegious” motion pictures); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (addressing an absolute ban on peaceful picketing); *Stromberg v. California*, 283 U.S. 359 (1931) (addressing the display of a flag in opposition to organized government).

173. *NAACP v. Button*, 371 U.S. 415, 433 (1961) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

174. U.N. Human Rights Office of High Comm’r, *supra* note 5.

175. Akbar, *supra* note 88, at 877.

176. U.N. Human Rights Office of High Comm’r, *supra* note 5.

suspicions of criminal or terrorist activity.<sup>177</sup> As a result, the “risk factors are so broad and vague that virtually any young person could be deemed dangerous and worthy of surveillance, especially if [he or] she is socio-economically marginalized or politically outspoken.”<sup>178</sup>

Even though the terms “radicalization” and “violent extremism” are used interchangeably in CVE programs, they do not mean the same thing.<sup>179</sup> Radicalism does not necessarily lead to violence:

It is possible for people to read or have read radical texts, be strongly and vocally opposed to Western foreign policy, believe in Sharia law, hope for the restoration of the Caliphate, and even support the principle of Afghan and Iraqi Muslims fighting allied troops, while being extremely vocal in denouncing al-Qaeda inspired terrorism in the Western countries.<sup>180</sup>

Other forms of radicalization that do not lead to violence can lead people to “become engaged in political and community activity” and turn into positive outcomes.<sup>181</sup> Additionally, under the First Amendment, people have the right to adopt, express, or disseminate ideas, even hateful and extremist ones.<sup>182</sup>

#### CONCLUSION

The United States assigns supreme importance to protecting speech and expression.<sup>183</sup> The history of the First Amendment strongly supports protection of dissenting opinions and expressive conduct against mainstream and dominant government agenda.<sup>184</sup> Protection of speech allows diverse ideas to flourish and compete in the marketplace of ideas.<sup>185</sup> People who can freely express their ideas are more likely to be active citizens and participate in the political and social activities in society.

CVE programs that request teachers and school officials to monitor students’ behavior and report any suspicious action, such as reading dissenting newspapers, learning about terrorism, or feeling alienated, risk

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177. PATEL, *supra* note 17, at 19–20.

178. Lazare, *supra* note 6.

179. BJELOPERA, *supra* note 29, at 11.

180. JAMIE BARTLETT ET AL., DEMOS, THE EDGE OF VIOLENCE: A RADICAL APPROACH TO EXTREMISM 13, 38 (2010), [https://www.demos.co.uk/files/Edge\\_of\\_Violence\\_-\\_web.pdf](https://www.demos.co.uk/files/Edge_of_Violence_-_web.pdf).

181. *Id.* at 38.

182. BJELOPERA, *supra* note 29, at 11–12.

183. *See Texas v. Johnson*, 491 U.S. 397, 411 (1989); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

184. *See Johnson*, 491 U.S. at 411; *Tinker*, 393 U.S. at 508–09; *Thornhill*, 310 U.S. at 104.

185. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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violating the First Amendment. Under the chilling effects doctrine, any government action that chills freedom of speech is subject to strict scrutiny.<sup>186</sup> While the government may have a compelling interest in protecting the nation from terrorism, its goals are not narrowly tailored to achieve that interest and can be achieved by alternatives that are less restricting on free speech. The programs are vague and do not have clear guidelines of what conduct is prohibited, so people are not put on notice of what behavior is prohibited and thus are generally deterred from engaging in protected speech and expression. Additionally, there are alternatives that focus on community empowerment, education, and awareness that do not involve monitoring of students' activities and abridging on their protected speech and actions. As a result, instead of "countering extremism," the programs are "countering free speech and expression"—values deeply important to American society that make the protection of the nation worthwhile in the first place.

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186. *See Buckley*, 424 U.S. at 64–65.