

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KA'ILA FARRELL-SMITH,  
ROWENA JACKSON, SARAH  
WESTOVER, and ROSEMARY  
FRANCIS EATHERINGTON,

Plaintiffs-Appellants,

and

ROGUE CLIMATE and 350 EUG  
("350 EUGENE"),

Intervenor Plaintiffs-  
Appellants,

v.

THE OREGON DEPARTMENT OF  
JUSTICE, DAN RAYFIELD, in his  
official capacity as the Attorney  
General of the State of Oregon, and  
MICHAEL SLAUSON, in his official  
capacity as Chief Counsel of the  
Criminal Justice Division of the  
Oregon Department of Justice,

Defendants-Respondents.

Marion County Circuit Court  
No. 21CV47809

Court of Appeals:  
No. A187251 (Control)  
No. A187250

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**BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE**

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Appeal from the Judgment of the Circuit Court for Marion County; the Honorable  
Lindsay R. Partridge, Judge

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October 2025

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## ARGUMENT

Congress funded “fusion centers” across the nation after the terrorist attacks of September 11, 2001. Fusion centers were meant to address the nation’s “failure to fuse pertinent intelligence.”<sup>1</sup> Their goal was to “connect the dots”<sup>2</sup>—to harvest, analyze, and disseminate domestic intelligence among federal, state, and local law enforcement.<sup>3</sup> This case is about the unconstrained and unconstitutional abuse of government power exercised by Oregon’s fusion center, the TITAN Fusion Center (OTFC), which was established in 2006 under Oregon’s Department of Justice (ODOJ). OTFC was initially charged with protecting Oregonians from terrorist attacks, but in practice, its focus has expanded to include crime and hazard prevention generally.<sup>4</sup>

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<sup>1</sup> Jerome P. Bjelopera, *Terrorism Information Sharing and the Nationwide Suspicious Activity Report Initiative: Background Issues for Congress*, CONG. RESEARCH SERV. (Dec. 28, 2011), at 1.

<sup>2</sup> *Id.*

<sup>3</sup> Daniel Poniatowski, *A Constructive Problem: Redemption of Unlawful Arrests Via Fusion Centers*, 2014 WIS L REV 831, 833 (2014). The fusion centers soon found themselves in hot water. A 2012 Senate Report charged them with “forward[ing]” “shoddy” intelligence—“sometimes endangering citizens’ civil liberties” in cases “more often than not unrelated to terrorism.” *Federal Support for and Involvement in State and Local Fusion Centers*, PERMANENT SUBCOMM. ON INVESTIGATIONS, US SENATE (Oct. 3, 2012), at 1.

<sup>4</sup> This trend of mission creep has characterized fusion centers more broadly. See Michael German, Rachel Levinson-Waldman, & Kaylana Mueller-Hsia, *Ending Fusion Center Abuses: A Roadmap for Robust Federal Oversight*, BRENNAN CENTER FOR JUSTICE (Dec. 15, 2022), at 2.

Today OTFC operates a sprawling “all crimes/all hazard” surveillance regime: it collects, disseminates, and retains vast amounts of personal information about residents that appear unrelated to crime. (ER-7, 9-10.) OTFC utilizes this information to produce intelligence analyses—such as threat assessments and suspicious activity reports—that it then shares with law enforcement and private security contractors. (ER-10-11, 13.)

Appellants are two environmental justice organizations and four long-time political activists. When Appellants learned that OTFC was surveilling them without reasonable suspicion of involvement in any crime,<sup>5</sup> Appellants sued ODOJ in Circuit Court to enjoin OTFC’s operations. The court granted ODOJ judgment on the pleadings. Although Judge Partridge’s opinion conceded that Oregon law did not “specifically reference” OTFC, it held that both the legislature and the governor had authorized OTFC’s expansive operations by implication. (ER-143.) More precisely, that opinion found that ODOJ’s receipt of legislative funding implied legislative support for OTFC’s operations, while the governor’s prolonged awareness of OTFC implied executive permission to conduct its operations. (ER-143-44.)

Appellants have made a strong argument that OTFC’s invasive surveillance regime is not grounded in Oregon law. The Cato Institute files this brief to provide

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<sup>5</sup> (See ER-11, 19, 21, 28-30.)

an additional consideration that undercuts the lower court's holding that OFTC is authorized by implication. The unpalatable consequences of that opinion's reasoning simply prove too much and demonstrate that it should be reversed.

Courts must read statutes to comply with the Constitution to the extent practicable. *See Megdal v. Bd. of Dental Examiners*, 288 Or 293, 297, 605 P2d 273 (1980). But ODOJ's interpretation of its authority to operate OTFC cannot be squared with the due process of law that the Constitution requires.<sup>6</sup> US Const, amend XIV, § 1. The Fourteenth Amendment not only guarantees due process but also safeguards against arbitrary state action. If the state is correct that OTFC is properly constituted under the statutory requirements, then the statutes that give it life confer an unbridled discretion to collect intelligence on state residents simply because they are exercising their First Amendment rights—which violates the Due Process Clause.

**I. ODOJ's Interpretation of the Statutes Governing OTFC Raises Due Process Concerns.**

**A. Due Process Requires Standards that Guide the Exercise of Law Enforcement Discretion.**

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” US Const, amend XIV,

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<sup>6</sup> That concern is especially pressing because Oregon's Constitution lacks a due process clause of its own. *See* Hon. Thomas A. Balmer, “*Does Oregon's Constitution Need a Due Process Clause?*” *Thoughts on Due Process and Other Limitations on State Action*, 91 WASH L REV ONLINE 157 (2016).

§ 1. This guarantee forbids “arbitrary executive action.” *Cnty. of Sacramento v. Lewis*, 523 US 833, 843 (1998). One such form of arbitrary executive action is when government authorities exercise unbounded discretion to administer the law in any manner they like and by whatever standards they might devise. *See, e.g., City of Chicago v. Morales*, 527 US 41, 63 (1999).

Due process of law requires legislatures to “establish minimal guidelines to govern law enforcement.” *Smith v. Goguen*, 415 US 566, 574 (1974). Law enforcement untethered by such standards invites “evil” and “unequal” applications of the law that may endanger political minorities. *Yick Wo v. Hopkins*, 118 US 356, 373-74 (1886). Due process requires statutory standards that define the contours of state power and constrain its exercise. *Compare State v. Sargent*, 252 Or 579, 584, 449 P2d 845 (1969) (finding that “clear direction” on enforcement from the legislature satisfied due process concerns) *with Yick Wo*, 118 US at 374 (1886) (condemning a licensing regime for empowering administrators to deny licenses for any reason or no reason at all). Concerns about “reasonable standards” apply to government surveillance with special force, given its potential dangers to First and Fourth Amendment freedoms. *United States v. U.S. Dist. Court E. Dist. Mich.*, 407 US 297, 324 (1972). “Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.” *Id.* at 320.

Self-imposed executive restraints, such as internal guidance, must be accompanied by legislative standards that satisfy due process. *See Morales*, 527 US at 63 (“internal rules” promulgated by the police cannot provide “a sufficient limitation on the ‘vast amount of discretion’ granted to the police”); *Smith*, 415 US at 580-81. Due process of law requires external government authorities to monitor the work of law enforcement, because in this context the prospect that “executive discretion may be reasonably exercised” unconstrained by any monitoring is simply too uncertain. *Cf. U.S. Dist. Court*, 407 US at 317. These principles of external review must govern the operation of OTFC.

**B. The Statutes Provided by ODOJ Do Not Constrain OTFC Discretion.**

Due process requires clear legislative standards that define powers, shape duties, and constrain the exercise of discretion. None of the statutes provided by ODOJ contains such constraints for OTFC, because each statute is either inapplicable or is so open-ended as to be standardless.

- ORS 180.090 authorizes the Attorney General to “call upon the Department of State Police or any other peace officer or department for assistance in making [special] investigations” and “conducting special prosecutions.” This provision is confined to special investigations and prosecutions: it is thus inapplicable to OTFC’s expansive surveillance system.

- ORS 180.070 authorizes the Attorney General, at the direction of the Governor, to “take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction.” OTFC surveillance occurs without gubernatorial direction, however, so this provision does not constrain OTFC discretion in a manner that is consistent with due process of law.
- ORS 180.060(7) provides that “[t]he Attorney General shall have all the power and authority usually appertaining to such office and shall perform the duties otherwise required of the Attorney General by law.” The “power and authority usually appertaining to” the Attorney General’s office does not include general criminal investigation or surveillance. *See Oregon ex rel Thornton v. Williams*, 215 Or 639, 643, 336 P2d 68 (1959).
- ORS 180.610 grants ODOJ authority to investigate organized crime and set up appropriate information systems for that purpose. OTFC’s operations stretch far beyond organized crime, and so its expansive system of surveillance lies outside of this statutory authorization.
- ORS 181A.265 authorizes the State Police or “another criminal justice agency” (a category including ODOJ and the office of the Attorney General)<sup>7</sup> to create a “Criminal Justice Information Standards program”

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<sup>7</sup> ORS 181A.265(3)(b) (designating the Attorney General as a “criminal justice agency” for purposes of participation in information sharing efforts).

that coordinates information sharing among agencies; ORS 190.110(1) authorizes cooperation among local, state, tribal, and federal authorities. Neither statute delegates newfound powers to the Attorney General or ODOJ. Nor would ancillary statutes of this kind provide for the sweeping grant of authority that a generalized surveillance system would require.<sup>8</sup> Such a grant would have unacceptable implications for individual liberty. *Cf. Nelson v. Lane Cnty.*, 304 Or 97, 104, 743 P2d 692 (1987) (plurality opinion) (stating that authority for “procedures” that “invade \* \* \* personal freedoms \* \* \* cannot be implied”). Furthermore, any such construction, if adopted, would be fundamentally inconsistent with the accepted understanding of the Attorney General’s role. *See Thornton*, 215 Or at 643 (discussing the Attorney General’s historically limited role in criminal prosecution and investigation); *ACLU*, 785 F3d at 819 (an “extraordinary departure from any accepted understanding” requires unambiguous statutory language, because a legislature “does not hide elephants in mouseholes” (cleaned up)). In short, ORS 181A.265 and ORS 190.110(1) “cannot bear the weight the government asks [the Court] to assign” them. *ACLU*, 785 F3d at 821.

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<sup>8</sup> *See American Civil Liberties Union v. Clapper* (“*ACLU*”), 785 F3d 787, 818, 824-25 (2d Cir 2015) (explaining that authority to undertake invasive surveillance cannot be left to legislative implications).

- ORS 180.240 provides that “[t]he Attorney General and the Department of Justice shall have the same powers and prerogatives in each of the several counties of the state as the district attorneys have in their respective counties.” As *Thornton* explained, ORS 180.240 gave ODOJ plenary investigative authority. 215 Or at 650 n4. In any event, these statutes could only justify the exercise of OTFC’s broad surveillance powers if each district attorney possessed the “power and prerogative” to conduct general intelligence operations within their respective districts. But while Oregon law assigns the duty to conduct “regular prosecutions” to district attorneys, *id.* at 651, “[t]he techniques traditionally used to combat ordinary crimes” do not include generalized surveillance, *ACLU*, 785 F3d at 815, much less surveillance without individualized reasonable suspicion.<sup>9</sup>
- ORS 131.615 authorizes peace officers to make reasonable stops and inquiries upon reasonable suspicion that a crime has been committed; ORS 133.033 authorizes performance of community caretaking functions (“lawful acts that are inherent in the duty of the peace officer to serve and

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<sup>9</sup> Conventional investigation techniques like “[s]earch warrants and document subpoenas typically seek the records of a particular individual or corporation under investigation, and cover particular time periods when the events under investigation occurred.” *Id.* at 813. In contrast, general surveillance is more “comparable to \* \* \* real-time data collection.” *Id.*

protect the public”); and ORS 131.605(5) and ORS 133.005(3)(d) define “peace officer” to include ODOJ investigators. But OTFC’s intelligence operations scrutinize innocent conduct that lacks any nexus to criminal activity. Furthermore, neither collection, retention, nor dissemination of personal information qualifies as an “inquiry” in the sense of ORS 131.615, because the statute’s language confines the time and place of the inquiry to “the vicinity of the stop.”<sup>10</sup>

None of these provisions independently authorizes OTFC’s expansive powers, but the government argues that, in this case, the whole is somehow greater than the sum of all of its statutory parts.<sup>11</sup> But even if we assume that the government’s interpretation is correct—and that the legislature intended to authorize a sprawling intelligence service under the Attorney General’s purview via multiple statutes, enacted decades apart—due process concerns would arise over the extraordinary magnitude of discretion that ODOJ has claimed. That

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<sup>10</sup> See ORS 131.615(2) (“The detention and inquiry shall be conducted *in the vicinity of the stop* and for no longer than a reasonable time.” (emphasis added)).

<sup>11</sup> The statutory scheme underpinning the Attorney General’s office is highly unlikely to contain implied surveillance powers. Each time the legislature has authorized ODOJ (under the Attorney General’s purview) to undertake criminal investigation, it has done so explicitly in discrete and unambiguous statutory provisions. See, e.g., ORS 180.610(2)-(6); ORS 180.070(1). The legislature has “carefully specified” under which circumstances ODOJ may make criminal inquiries. *U.S. Dist. Court*, 407 US at 306. The government’s broad claim of authority for OTFC—which, against convention, rests on a hodgepodge of 10 different statutes—is inconsistent with the statutory scheme.

interpretive consequence cannot be reconciled with the Court's duty "to credit the lawmaker with intending to act constitutionally." *Megdal*, 288 Or at 297.

The statutes offered by the government contain no real constraints on OTFC's discretion to surveil constitutionally protected protest activity, create dossiers on private citizens like Appellants, and issue threat assessments. (See ER-11-14.) See *Morales*, 527 US at 63; *Smith*, 415 US at 580-81; *Warren v. Marion Cnty.*, 222 Or 307, 315, 353 P2d 257 (1960) (judicial review constitutes "sufficient safeguard to persons wishing to contest administrative action"); cf. also *U.S. Dist. Court*, 407 US at 317 ("freedoms will best be preserved through a separation of powers and division of functions among the different branches"). Liberty "cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch," because even investigators with the best of intentions "may yield too readily to pressures \* \* \* and overlook potential invasions of privacy and protected speech." *U.S. Dist. Court*, 407 US at 316-17.

To be sure, ORS 181A.250 prohibits law enforcement agencies from collecting or retaining "information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct." But if the experience of Appellants is any indication, this lone statement of good intentions is

insufficient either to meet due process requirements or to shield peaceful, private citizens from Big Brother’s watchful gaze.

Indeed, notwithstanding ORS 181A.250, OTFC regularly pushes the envelope of the law’s authority—surveilling peaceful environmental activists (*e.g.*, compiling dossiers on the audience composition of regulatory hearings),<sup>12</sup> collecting physical location data on supporters of Black Lives Matter,<sup>13</sup> and coordinating with private security firms to stifle lawful protest.<sup>14</sup> OTFC’s unregulated discretion culminated in its 2016 issuance of a formal threat assessment against ODOJ’s own Director of Civil Rights and one of ODOJ’s few Black attorneys, solely on account of protected speech—a mistake that suggested that OTFC personnel believed that differing political views invited criminal investigation. Even worse, that threat assessment resulted in an embarrassing settlement payout to the allegedly threatening attorney.<sup>15</sup>

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<sup>12</sup> (ER-5, 28-30.)

<sup>13</sup> (ER-2-3, 14.)

<sup>14</sup> (ER-13.)

<sup>15</sup> (ER-2-3, 14.) *See also* Chris Lehman, *Oregon Settles Lawsuit, Forces Out DOJ Attorney*, OPB (Oct. 11, 2017), <https://tinyurl.com/bdj82mwj>; John Sepulvado, *Black Lives Matter Report: Tweet Quoting Public Enemy Prompted DOJ Investigation*, OPB (Apr. 11, 2016), <https://tinyurl.com/yf2yap4k>.

**C. The Court Should Insist on a Clear Legislative Charter for OTFC in the Mold of Sister States.**

OTFC's abuses are predictable. As long as OTFC is without the guidance of a legislative charter that limits investigative discretion and safeguards personal privacy, it is likely to continue targeting people like Appellants based on free-floating hunches—hunches that may rest on political disagreement but appear entirely unrelated to reasonable suspicion of criminal activity. Legislatures are best positioned “to understand and balance the intricacies and competing concerns involved in protecting our national security, and to pass judgment on the value of” surveillance. *ACLU*, 785 F3d at 824. When elected representatives engage in “full debate” in public view on sensitive issues like domestic intelligence, the democratic process has the best chance to produce “greater safeguards for privacy” as legislators work toward “achieving the right balance” between liberty and security. *Id.* at 793, 825.

“The endorsement of the Legislative Branch” thus “provides some degree of comfort” to the courts in affirming the power of government to conduct surveillance—and to the people in safeguarding expectations of privacy. *Id.* at 824. Accordingly, many states have drafted unambiguous legislative charters for their fusion centers, complete with built-in protections against executive overreach and

abuse.<sup>16</sup> The hodgepodge of statutes advanced by ODOJ to sustain OTFC bear almost no resemblance to the explicit sources of authority in other states, and they contain no similar safeguards. Under such circumstances, it falls upon this Court to protect liberty through exercise of judicial review. *Cf. Warren*, 222 Or at 314-15.

OTFC's operations invade personal privacy and disrupt traditional understandings of the Attorney General's limited role in criminal law enforcement. The "momentous decision" to create OTFC cannot be left to mere implication; instead, "we would expect \* \* \* substantial debate" and "unmistakable language" from the legislature. *ACLU*, 785 F3d at 818. If such authority exists, ODOJ has failed to identify it.<sup>17</sup>

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<sup>16</sup> *See, e.g.*, Ind. Code § 10-11-9; Kan. Stat. Ann. § 48-3702, *et seq.*; N.H. Crim. Code 651-F; Tex. Gov't Code § 421.081-086; V.A. Code Ann. §§ 52-47, 48.

<sup>17</sup> ODOJ's creation of OTFC without legislative buy-in also raises separation of powers concerns under the Oregon Constitution, which "prohibit[s] delegation of the legislative power to make law." *State v. Long*, 315 Or 95, 99, 843 P2d 420 (1992). The legislature must determine the law and delegate only administrative functions to the agencies. *Sargent*, 252 Or at 582. Legislatures fulfill this obligation in much the same way that they satisfy due process: through the provision of "adequate legislative standards" that guide law enforcement and constrain its discretion. *Long*, 315 Or at 101; *compare Smith*, 415 US at 574 (due process requires "minimal guidelines to govern law enforcement"). Thus, for the same reasons that OTFC raises due process concerns, it also raises concerns about separation of powers—namely, "whether the lawmaker's political responsibility for choosing at least the general direction of public policy \* \* \* has been abdicated without guidance to administrative officials." *Anderson v. Peden*, 284 Or 313, 325, 587 P2d 59 (1978); *see also generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE LJ 1672 (2012).

Two thousand years ago, the Roman poet Juvenal asked a timeless question: who will watch the watchmen?<sup>18</sup> As Juvenal suggested, the employment of watchmen poses grave difficulties, because the watchmen may abuse their office. The Constitution answers Juvenal’s question: in some circumstances, a second corps of watchmen must be deployed to watch the first. But in 2025, no second corps of watchmen watches OTFC, and as a result OTFC is constitutionally deficient.

The Court should declare OTFC’s ongoing creation of an “intelligence collage” *ultra vires* in the absence of a clear legislative charter, *U.S. Dist. Court*, 407 US at 325 (Douglas, J., concurring), and it should require Oregon’s elected representatives to authorize such extraordinary enterprises only when accompanied by legislative standards and built-in safeguards. “More than our privacy is implicated. Also at stake is the reach of the Government’s power to intimidate its critics.” *Id.* at 331.

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<sup>18</sup> See *The Sixth Satire*, in Decimus Junius Juvenalis, *THE SATIRES OF JUVENAL* 78 (Rolfe Humphries trans., 1958) (c. 100-127 CE).

## CONCLUSION

For the foregoing reasons, and those provided by Appellants, this Court should reverse the judgment below.

Dated this 16th day of October, 2025.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE  
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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b), and (2) the word count of this brief (as described in ORAP 5.05(1)(a)) is 3,194 words.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(3)(b).

Dated this 16th day of October, 2025.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 16th day of October, 2025 I filed the foregoing **BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE** with the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, OR 97301, by using the Court's electronic filing system. I further certify that I served the same via the Court's electronic filing system on:

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