

No. 21-2798

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Xiaoxing Xi, et al.,

Plaintiffs-Appellants,

v.

Andrew Haugen, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Case No. 2:17-cv-02132

The Honorable R. Barclay Surrick

Brief of *Amici Curiae* American Physical Society, American Association
for the Advancement of Science, American Statistical Association,
American Geophysical Union, and Gerontological Society of America in
Support of Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, all *Amici Curiae* state that they are non-profit corporations with no parent company and that no public company owns any interest in them.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Physical Society (“APS”), the American Association for the Advancement of Science, the American Statistical Association, the American Geophysical Union, and the Gerontological Society of America are nonprofit science, engineering, math, medical, and other professional membership societies and federations working to advance the knowledge of science.

Amici file this brief on behalf of their members because they are affected by the federal government’s wrongful arrest and prosecution of individuals like Appellant Xiaoxing Xi: scientists of Chinese descent engaged in lawful research activities.¹

Amici’s members are professional scientists, early-career scientists, science faculty, and science students. Because many of *Amici*’s members are of Asian descent (many of whom, like Appellant Mr. Xi, are U.S. citizens), *Amici* have a strong interest in ensuring that there is accountability when the federal government wrongfully targets scientists for criminal arrest or prosecution.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *Amici* have received written consent of all parties to submit this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici support Mr. Xi and his family in this lawsuit against the federal government seeking accountability for his wrongful arrest. The government's wrongful arrest and prosecution of scientists and engineers, particularly those of Chinese descent, is harming the U.S.'s reputation as the most desirable destination for the best and brightest scientists to make their careers. That loss of talented scientists reduces the quality and quantity of our nation's trained technical workforce and thereby harms both the economy and our national security.

Federal government actions like the wrongful arrest of Mr. Xi are also having a chilling effect among Chinese members of the international scientific community, who feel targeted by the actions of the federal government and are thus less likely to collaborate with U.S. scientists on innovative scientific projects. The loss of fundamental research collaborations between scientists in the U.S. and China—which pose no economic or security threat to the U.S.—directly harms the U.S. scientific enterprise, U.S. innovations, and U.S. economic competitiveness.

To mitigate these negative impacts, the federal government must be held accountable when it engages in actions like the wrongful arrest of Mr. Xi. Government accountability is a necessary step to: restoring our nation as a destination of choice for international scientists; restoring confidence among U.S. scientists that fundamental research collaborations posing no economic or security

threat to the U.S. can be pursued without threat of prosecution; and restoring the confidence of Asian-American scientists that there is equal justice under law.

ARGUMENT

I. The Wrongful Arrest of Prominent Scientists like Mr. Xi Harms the U.S.’s Scientific Leadership and Economic Competitiveness.

Amici recognize that the unauthorized transfer of U.S.-based knowledge and technical expertise to other countries poses a genuine threat to the country’s national security. We agree that policymakers should be concerned with the potential theft of intellectual property, trade secrets, and classified research, as well as with systematic efforts by foreign entities to develop covert, undisclosed relationships with U.S.-based researchers to attempt to illicitly acquire U.S. science and technology. We support the federal government making concerted efforts to prevent these actions from occurring.

For its part, APS has established clear ethical guidelines and enforcement mechanisms for its members. APS recently called on scientists to intensify their commitment to the principles of “research integrity”—including “objectivity, honesty, openness, accountability, fairness, disclosure, and stewardship.” *See Am. Physical Soc’y, Board Statement on Open Science and a Recommitment to Research Principles* (Feb. 14, 2020), <https://www.aps.org/policy/statements/open-science.cfm> (noting “the need for (1) disclosure of conflicts of commitment; (2) reciprocity in the exchange of research information between U.S. and international

scientists . . . ; and (3) responsible handling of research information, particularly before public release.”).

At the same time, the vast majority of scientific work does not pose any meaningful risk to national security. For university researchers who are engaged in fundamental research published in open literature—*i.e.*, literature that exists for anyone to read—there is little to no reason to expect that their research raises national security concerns. Such scientific work should be permitted to proceed without the cloud of prosecution hanging over it.

Nevertheless, the Department of Justice (DOJ) has recently arrested a number of professors, including Mr. Xi, for engaging in lawful scientific research. DOJ’s activities have resulted in numerous false positives: criminal prosecutions against scientists of Asian descent that have ultimately been dropped or ended in acquittal. These problems have been exacerbated by the launch of DOJ’s “China Initiative” in 2018. See Michael German & Alex Liang, *Why Ending the Justice Department’s “China Initiative” Is Vital to U.S. Security*, Just Security (Jan. 3, 2022), <https://www.justsecurity.org/79698/why-ending-the-justice-departments-china-initiative-is-vital-to-u-s-security/> (“[A] disquieting number of these prosecutions are failing, resulting in acquittals or dismissals before trials begin.”).

It is clear that the China Initiative is not achieving its desired result. See Editorial Board, *The Justice Department Should Back Off Researchers*, Boston

Globe (Jan. 10, 2022), <https://www.bostonglobe.com/2022/01/10/opinion/justice-department-should-back-off-researchers> (The China Initiative’s “primary stated purpose was to root out Chinese spies in American businesses and laboratories who were transferring trade secrets, information, and intellectual property to the Chinese government,” but “only three of the at least 77 cases opened under the initiative claim that secrets and information were transferred to the Chinese government.”); Ellen Barry, ‘*In the End, You’re Treated Like a Spy,’ Says M.I.T. Scientist*, N.Y. Times (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/science/gang-chen-mit-china.html?referringSource=articleShare> (“Many of the prosecutions” under the China Initiative “do not allege espionage or theft of information” and “[c]ritics say it has instilled a pervasive atmosphere of fear among scientists of Chinese descent.”).

These wrongful arrests and prosecutions have unfairly targeted scientists of Asian descent and thereby damaged the lives of some of *Amici*’s members, as well as those members’ families, co-workers, and students. Even when charges are dropped or end in acquittal, these scientists are often left with their reputations tarnished and careers in ruins. Mr. Xi, for instance, was put on administrative leave from Temple University following his arrest and suspended as interim chair of the Physics Department over the baseless allegations against him. See Am. Compl. ¶ 78, *Xi v. United States*, 2:17-cv-02132-RBS (July 7, 2017).

These harmful effects spread far beyond the individuals who directly suffer from a wrongful prosecution. Among other things, these wrongful arrests and associated actions by the federal government hinder the nation’s ability to attract talented international graduate students and scientists. According to a recent survey conducted by APS, roughly half of international physics graduate students and early career scientists who chose not to come to the U.S. to study or work viewed the U.S. as “unwelcoming to foreigners.” Am. Physical Soc’y, *Impact of US Research Security Policies: US Security and the Benefits of Open Science and International Collaborations* 6 (Dec. 2021), <https://www.aps.org/newsroom/pressreleases/upload/APS-Impact-of-Research-Security-Report.pdf>. Furthermore, “at least 40% of international early career professionals and at least 45% of international graduate students familiar with research security policies believe that the US government’s current response to research security concerns makes their decision to stay in the United States long term less likely or much less likely.” *Id.* (emphasis omitted).

These results are consistent with a recent survey finding that approximately half of scientists of Chinese descent report feeling “considerable fear and/or anxiety that they are surveilled by the U.S. government.” Comm. of 100 & Univ. of Arizona, *Racial Profiling Among Scientists of Chinese Descent and Consequences for the U.S. Scientific Community* 8 (2021), <https://www.committee100.org/wp-content/uploads/2021/10/C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf>

(emphasis omitted). As these surveys make clear, the federal government’s current approach to addressing research security—which has resulted in wrongful arrests like Mr. Xi’s and contributed to international perception that the U.S. is an unwelcoming place to live and work—is negatively affecting the U.S.’s ability to retain and attract international scientific talent.

Additionally, the wrongful arrests and associated actions by the federal government under the “China Initiative” are having a chilling effect on international collaborations that are beneficial to the U.S. Such actions not only affect the willingness of Chinese scientists to collaborate with scientists in the U.S., they are also driving U.S.-based researchers to withdraw from opportunities to engage with their counterparts abroad. Some university professors are being advised by administrators to cease participating in collaborations with their counterparts from China to avoid the possibility of scrutiny from federal science agencies. Indeed, “nearly one in five physics professionals in the United States have either chosen—or been directed—to withdraw from opportunities to engage in professional activities with colleagues based outside the United States due to current research security guidelines.” Am. Physical Soc’y, Office of Gov’t Affairs, *Impact of US Research Security Policies*, *supra*, at 4 (emphasis omitted).

A reduction in scientific collaborations results in a loss of new ideas and new techniques that would be brought to U.S. laboratories and U.S.-based researchers.

Restricting legitimate international collaborations translates into an overall slowing down of our national pace of scientific discovery and innovation and the economic contributions that follow. *See* Am. Physical Soc'y Council, *APS Statement 03.1: Visa Rules and Government Procedures Hampering U.S. Science and Technology* (June 6, 2003), https://www.aps.org/policy/statements/03_1.cfm (“National security and economic vitality critically depend on science and technology and strongly profit from contributions of foreign-born scientists and engineers.”); German & Liang, *supra* (“Inhibiting fundamental scientific research and dissuading foreign collaboration with U.S. scientists harms our security on balance.”).

U.S. leadership in science, technology, and innovation depends on the open exchange of fundamental research and on the U.S.’s ability to recruit the world’s best and brightest. The pace of scientific discovery and the translation of those discoveries into usable technologies has greatly accelerated in the past decades, resulting in a highly competitive world where nations are now challenging the U.S.’s leadership in science, technology, and innovation. To remain competitive, the U.S. must continue to capitalize on two key advantages: (1) being a destination of choice for the world’s best and brightest students and scholars to study and work and (2) providing an environment that encourages openness and the free exchange of information. Unfortunately, the wrongful arrests of academic scientists and the

misguided overbroad research-security related actions of the federal government are contributing to the loss of both of those advantages.

II. Government Accountability Is Necessary to Overcome the Harms Caused by Wrongful Arrests like Mr. Xi's.

The federal government has not yet been held accountable for its wrongful arrests and prosecutions of scientists. If this lack of accountability continues, the international perception that the federal government is unconcerned by its damaging errors will continue to grow.

There are real consequences to wrongful government actions going unredressed. Each wrongful arrest gives pause to talented international students choosing in which country to pursue their career and contribute to national economic competitiveness. Each wrongful arrest discourages the nation's scientists from pursuing collaborations that positively affect our nation's innovation. Each wrongful arrest severely damages a scientist's career. Simply put, each wrongful arrest echoes across the U.S. scientific community.

Government accountability for such wrongful arrests could help restore the U.S. scientific enterprise. The negative perception of injustice and ethnic profiling that is created by wrongful arrests must be replaced by a perception of justice and accountability. Holding the government accountable not only helps "deter individual federal officers from committing constitutional violations," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 62 (2001), it also helps restore the nation's ability to

be a destination of choice for international scientists; restore confidence among all U.S. scientists that fundamental research collaborations that pose no economic or security threat to the U.S. can be pursued; and restore the confidence of members of targeted communities that there is equal justice under the law.

CONCLUSION

When wrongful arrests of prominent scientists such as Mr. Xi occur, there are quantifiable negative consequences not only on the individuals arrested but on the U.S. scientific community more broadly. International scientists and students are increasingly finding the U.S. to be an unwelcoming place to live, work, and study. That loss of international talent will inevitably diminish the U.S.'s scientific standing, economic competitiveness, and national security.

To help remedy those negative effects, there must be a means of redress for individuals like Mr. Xi and his family. Just as the wrongful arrests of Mr. Xi and others were highly visible events, the path to setting those wrongs right must be equally visible—public accountability for government wrongdoing. Because that is what Mr. Xi and his family seek in this litigation, *Amici* support their effort to overturn the District Court's dismissal of their claims.

February 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit. I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,105 words, which is less than one-half the maximum length authorized for a party's principal brief, excluding the items exempted by Fed. R. App. P. 32(f). I further certify that this brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6), respectively, because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font. I certify that the text of the electronic brief is identical to the text in the paper copies to be filed with the Court. Finally, I certify that a virus check was performed on the PDF file of this brief with VirusTotal and that no virus was found.

Dated: February 14, 2022

/s/ Beth S. Brinkmann

CERTIFICATE OF SERVICE

I certify that on February 14, 2022, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 14, 2022

/s/ Beth S. Brinkmann