

No. 17-15589

IN THE
**United States Court of Appeals
for the Ninth Circuit**

STATE OF HAWAII, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC
District Judge Derrick K. Watson

BRIEF OF *AMICUS CURIAE*
THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Dated: April 17, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT2

ARGUMENT5

I. The President Has Expressed Hatred, Disseminated Lies, And Made Numerous Promises To Use His Official Power Against Muslims.5

 A. The President Has Referred To Muslims As A “Problem” And Spread Propaganda To Vilify Them.5

 1. Referring To Muslims As A “Problem.”5

 2. Spreading Anti-Muslim Propaganda.7

 B. The President Has Called For Closing Down And Surveilling Mosques, Profiling Muslims, And A Muslim Registry.11

 1. Pledging To Close And Surveille Mosques.....11

 2. Advocating For A Registry Of American Muslims.....13

 3. Advocating Profiling Muslims.....15

 C. The President Pledged To Prevent Muslim People From Entering The U.S. And Previewed That He Would Do So Under The Guise Of A Neutral Order.15

 D. The President Has Reaffirmed His Prior Statements Since Being Elected.22

II. Failure To Consider President Trump’s Extensive Record Of Animus Would Be A Serious Abdication Of The Role Of The Judicial Branch.25

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	26
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	26
<i>Hawai'i v. Trump</i> , No. CV 17-00050 DKW-KSC, __ F. Supp. 3d __, 2017 WL 1011673 (D. Haw. Mar. 15, 2017)	1
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	26
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944).....	4, 18, 19, 26
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938).....	25
<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013).....	25
<i>Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.</i> , 429 U.S. 252 (1977).....	25

Other Authorities

Jamal Greene, <i>The Anticanon</i> , 125 Harv. L. Rev. 379 (2011)	26
Michael Stokes Paulsen, <i>The Constitution of Necessity</i> , 79 Notre Dame L. Rev. 1257 (2004)	26

INTEREST OF AMICUS CURIAE

The MacArthur Justice Center (“MJC”) is a not-for-profit organization founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has represented clients facing myriad human rights and civil rights injustices, including issues of discrimination, the unlawful detention of foreign nationals, and the rights of marginalized groups in the American justice system. MJC has an interest in the rule of law and the independence of the judiciary in determining whether government officials have acted with discriminatory animus.

MJC submits this brief to inform the Court’s analysis of the discriminatory purpose underlying the President’s Executive Order and to contextualize this dispute in the history of judicial scrutiny of discriminatory government actions. MJC’s briefing was relied upon by the Court below in recognizing the Order’s discriminatory purpose. *Hawai‘i v. Trump*, Civ. No. 17-00050, ___ F. Supp. 3d ___, 2017 WL 1011673, at *14 n.14 (D. Haw. Mar. 15, 2017).¹

¹ The parties have consented to the filing of this brief. No party, party’s counsel, or person other than MJC authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This President of the United States, Donald Trump, selected an unpopular minority faith that makes up 1% of the nation's population, ran a campaign that vilified and spread propaganda about that minority faith, and built an administration that has repeatedly equated the members of that faith with terrorists. He now expects the Court to turn a blind eye to that record of animus and, instead, accept the Government's pretextual assertion of national security. *See Gov't Br. at 45-54.* That would be a serious abdication of the Court's critical role in safeguarding discrete and insular minorities, and in preventing the use of Executive power to attack unpopular groups—the sort of abdication that has, in the past, left a permanent stain on American history.

The MacArthur Justice Center submits this brief to document President Trump's extensive record of hatred toward, and his specific promises to assail, people of the Muslim faith. As described herein, the President's Executive Order follows from a targeted and sustained attack on Muslims. President Trump has long advocated that the U.S. has a "Muslim problem" and disseminated propaganda vilifying people of the Muslim faith. He has made specific promises to curtail the rights of persons who choose to practice Islam, including promises to shutdown mosques, to surveille and profile Muslims, and to create a Muslim registry. President Trump also specifically promised he would interfere with Muslims' ability

to enter the U.S.—indeed, he previewed that he would do so under the guise of speaking in terms of “territories” and “extreme vetting” instead of “Muslims” (just as he did here), and by invoking the Executive’s wide discretion over immigration (just as Appellants do here).

President Trump has reaffirmed his discriminatory objective since being elected. He has said that he intends to stick to his “plans all along” of preventing Muslims from entering the country. Immediately upon signing his initial Executive Order, he read its oblique title and—referring to his longstanding pledge to ban Muslims—added: “*We all know what that means.*” And his administration has admitted that the latest order derives from the same reprehensible motives as the first, stating that it is designed to achieve “the same basic policy outcome,” with only “very technical” changes. Indeed, the President’s website—which is updated daily—continues to call for “a total and complete shutdown of Muslims entering the United States.” Thus, the Government’s contention that there should be some general prohibition against considering campaign statements, Gov’t Br. at 45-54, is (in addition to being wrong as a matter of law) at best, an academic point: Even if one assumed some general rule against considering statements made during a campaign, the President’s post-election reaffirmance of his campaign statements require that they be considered here.

President Trump’s Executive Order must be viewed in light of his repeated and unabashed admission of an intent to discriminate against a minority group—the most fundamental abuse of government power that the Establishment and Equal Protection Clauses exist to prevent. The Government’s contention—that such Executive action is unreviewable or entitled to deference due to its relation to immigration and national security—is painfully reminiscent of arguments made by the Government to justify racial discrimination and oppression in moments of our history that we now all regard with shame. Indeed, it is chilling the degree to which the position advanced by the Government here, with only technical modifications, mirrors the closing passage of *Korematsu v. United States*, 323 U.S. 214 (1944), used to justify the internment of Japanese Americans in 1944:

To cast this case into outlines of [religious] prejudice, without reference to the real military dangers which were presented, merely confuses the issue. [Muslims were] not excluded from the [United States] because of hostility to [them] or [their religion]. [They were] excluded because we are at war with [radical Islamic terrorism], because the [President] feared an invasion of our [country] and felt constrained to take proper security measures, because [he] decided that the military urgency of the situation demanded that all [persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President], reposing [his] confidence in this time of war in our military leaders . . . determined that [he] should have the power to do just this. There was evidence of disloyalty on the part of some [Muslims], the [President] considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id. at 233 (with modification in brackets).

The MacArthur Justice Center urges the Court not to repeat this depraved moment in U.S. history by overlooking this administration’s animus against persons of the Muslim faith.

ARGUMENT

I. The President Has Expressed Hatred, Disseminated Lies, And Made Numerous Promises To Use His Official Power Against Muslims.

As described below, President Trump has sought to vilify people of the Muslim faith and promised to use the power of the Executive to oppress Muslims in various ways, including by shutting down mosques, surveilling and profiling Muslims, registering them, and preventing them from entering the country. It would be a horrible abdication of this Court’s role to overlook this Order’s reprehensive motivation.

A. The President Has Referred To Muslims As A “Problem” And Spread Propaganda To Vilify Them.

1. Referring To Muslims As A “Problem.”

As early as April 11, 2011, Mr. Trump began advocating that a “Muslim problem” exists in the U.S., and suggesting that Islam teaches a “very negative vibe” and “tremendous hatred.” He recounted:

Bill O’Reilly asked me is there a Muslim problem? And I said absolutely, yes. In fact I went a step further. I said I didn’t see Swedish people knocking down the World Trade Center. . . . I mean I could have said, ‘Oh absolutely not Bill, there’s no Muslim problem, everything is wonderful, just forget about the World Trade Center.’ But you have to speak the truth. . . . The Koran is very interesting. . . . I’m certainly not an expert, to put it mildly. But

there's something there that teaches some very negative vibe. . . . there's tremendous hatred out there that I've never seen anything like it.²

Mr. Trump has repeatedly echoed these views. At a September 18, 2015 event, for instance, Mr. Trump had the following exchange with an audience member:

Questioner: "We have a problem in this country. It's called Muslims."

Mr. Trump: "Right."

Questioner: "You know our current president is one. You know he's not even an American."

Mr. Trump: "We need this question."³

The President has adhered to his view that people of the Muslim faith are a "problem" and vilified them on numerous other occasions:

- On December 10, 2015, Mr. Trump tweeted three separate statements referring to a "massive Muslim problem," praising an author for acknowledging "Muslim problems," and associating Muslims with terrorism.⁴

² David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), <http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches>; *Donald Trump warns of the Muslim Problem*, YouTube (Apr. 11, 2011), <https://m.youtube.com/watch?v=fWzDAvemJG8>.

³ Jonathan Merritt, *Trump's Proposals Could Backfire on Christians*, The Atlantic (Nov. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/11/donald-trump-muslims-christians/417255/>; Theodore Schleifer, *Trump doesn't challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), <http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/>.

⁴ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674934005725331456>; Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674936832010887168>; Donald J.

- On February 4, 2016, Mr. Trump was asked: “Is it really a Muslim problem, or is it a radical Islamist problem?” He responded: “Maybe it’s a Muslim problem, maybe it’s not.”⁵
- On March 9, 2016, Mr. Trump stated, “I think Islam hates us” and that Muslims have “tremendous hatred” and “unbelievable hatred.” He rejected that a distinction could be drawn between radical Islam and Islam itself, claiming “[i]t’s very hard to define.”⁶
- The following day, on March 10, 2016, Mr. Trump was asked whether his statement that “Islam hates us” referred to all 1.6 billion Muslims in the world. He responded: “I mean a lot of them. I mean a lot of them.” When given another opportunity to clarify, he stated: “There’s something going on that maybe you don’t know about, maybe a lot of other people don’t know about, but there’s tremendous hatred. And I will stick with exactly what I said [the previous day].”⁷
- On June 13, 2016, Mr. Trump equated Islam with ISIS and stated that “[r]efugees are trying to take over our children” by telling them “how wonderful Islam is.”⁸

2. *Spreading Anti-Muslim Propaganda.*

The President has gone further, disseminating propaganda vilifying Muslim people. On November 21, 2015, Mr. Trump falsely proclaimed: “Hey, I watched

Trump, Twitter (Dec. 10, 2015),
<https://twitter.com/realdonaldtrump/status/675123192864899072>.

⁵ CNN Interview of Donald Trump, YouTube (Feb. 4, 2016),
<https://www.youtube.com/watch?v=uW9UIMqJtro> (minutes 18:42 to 18:46).

⁶ Theodore Schleifer, *Donald Trump: ‘I think Islam hates us’*, CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

⁷ *Transcript of Republican Debate in Miami*, CNN (Mar. 15, 2016)
<http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/>.

⁸ *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (Jun. 13, 2016) <https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats> (minutes 20:05 to 20:30).

when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering.”⁹ In the face of the authorities and articles debunking his claim,¹⁰ Mr. Trump continued to spread this lie:

- On November 22, 2015, he stated: “There were people that were cheering on the other side of New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. . . there were people cheering as that building came down—as those buildings came down. And that tells you something There were people over in New Jersey that were watching it, a heavy Arab population, that were cheering as the buildings came down. Not good.”¹¹
- On November 23, 2015, he again stated: “I saw people getting together and, in fairly large numbers, celebrating as the World Trade Center was coming down, killing thousands of people, thousands and thousands of people. People are still dying over what happened with the World Trade Center. And they’re dying a terrible death. And I saw people. And I saw them on television and I read about it on the Internet and I read about it.”¹²

⁹ Glenn Kessler, *Trump’s outrageous claim that ‘thousands’ of New Jersey Muslims celebrated the 9/11 attacks*, Wash. Post (Nov. 22, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/>.

¹⁰ See, e.g., Lauren Carroll, *Fact Checking Trump’s claim that thousands in New Jersey cheered when World Trade Center tumbled*, Politifact (Nov. 22, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/>.

¹¹ See Kessler, *supra* note 9.

¹² Jenna Johnson, *Donald Trump on waterboarding: ‘If it doesn’t work, they deserve it anyway,’* Wash. Post (Nov. 23, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/>.

- On November 25, 2015, Mr. Trump tweeted: “Credible Source on 9-11 Muslim Celebrations: FBI” and linked to an article stating that a retired FBI agent referred to his claims as “plausible.”¹³
- On December 2, 2015, Mr. Trump shared another individual’s tweet claiming to have seen “militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11!”¹⁴
- On December 7, 2015, Mr. Trump repeated his November 25, 2015 tweet, linking to the article calling his claim “plausible.”¹⁵

As another example, Mr. Trump has repeatedly praised a false story involving the mass murder of Muslims using pig blood. At a rally on February 19, 2016—treating “terrorist” as a synonym for being Muslim—Mr. Trump approvingly recounted the following story:

Early in the century, last century . . . they had a terror problem. And you know there’s a whole thing with swine and animals and pigs and you know the story, they don’t like that. And they were having a tremendous problem with terror. . . General Pershing was a rough guy. . . . And he caught 50 terrorists who did tremendous damage and killed many people. And he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs’ blood . . . And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those people. . . And for 25 years, there wasn’t a problem. Okay? Twenty-five years, there wasn’t a problem.¹⁶

¹³ Donald J. Trump, Twitter (Nov. 25, 2015), <https://twitter.com/realdonaldtrump/status/669682774673137665>; *see also* Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov 25, 2015) <http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/>.

¹⁴ Donald J. Trump, Twitter (Dec 2, 2015), <https://twitter.com/realDonaldTrump/status/672182509111767041>.

¹⁵ Donald J. Trump, Twitter (Dec 7, 2015), <https://twitter.com/realdonaldtrump/status/673905762087936000>; *see also* Riales, *supra* note 13.

¹⁶ Louis Jacobson, *Donald Trump cites dubious legend about Gen. Pershing, pig’s blood and Muslims*, Politifact (Feb. 23, 2016), <http://www.politifact.com/truth-o->

Mr. Trump repeated this anti-Muslim propaganda, adding new flourish. On March 11, 2016, for instance, again equating being a terrorist to being a Muslim, Mr. Trump recounted:

So General Pershing, tough, tough guy And they catch 50 terrorists in the Philippines And as you know, swine, pig, a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets. . . . They put the bullets into the rifles. And they shot 49 men. . . . I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one. . . . For 28 years, there was no terrorism. . . . We have to do what we have to do. We have to clean it out. These are people that have horrible thoughts. These are people that have visions that you wouldn't believe.¹⁷

meter/statements/2016/feb/23/donald-trump/donald-trump-cites-dubious-legend-about-gen-pershi/; Jenna Johnson and Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it*, Wash. Post (Feb. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true/>; see also David Mikkelson, *Pershing the Thought*, Snopes (Apr. 28, 2016), <http://www.snopes.com/rumors/pershing.asp>, debunking Mr. Trump's story about General Pershing.

¹⁷ Mr. Trump also equated being Syrian and being a terrorist, breaking in the middle of his story to say, "And by the way, we have to get to the bottom of it, we cannot allow people to come into the country who want to destroy us, we cannot do it. We can't allow the Syrians. We can't allow the migration of the Syrians into the country." *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), <https://www.youtube.com/watch?v=-9KOAIf4GCw> (minutes to 42:45 to 46:45); Mark Z. Barabak, *All in a day's Trump rally: sneering, sarcasm, protests*, Los Angeles Times (Mar. 12, 2016), <http://www.latimes.com/nation/politics/la-na-trump-rallies-20160312-story.html>; see also Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets*, The Hill (Mar. 12, 2016), <http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs>.

B. The President Has Called For Closing Down And Surveilling Mosques, Profiling Muslims, And A Muslim Registry.

1. *Pledging To Close And Surveille Mosques.*

The President has, on numerous occasions, called for closing mosques in America. For example, on November 16, 2015, Mr. Trump stated that he would consider shutting down mosques if elected, saying: “[I]t’s something that you’re going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas.”¹⁸

Two days later, when asked whether he would actually shutdown mosques, Mr. Trump responded that there was “absolutely no choice” but to do so: “A lot of people understand it. We’re going to have no choice. There’s absolutely no choice.”¹⁹

The President has called for shutting down mosques or the suspicionless surveillance of mosques on numerous other occasions:

¹⁸ Jenna Johnson, *Donald Trump would ‘strongly consider’ closing some mosques in the United States*, Wash. Post (Nov. 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/>.

¹⁹ Nick Gass, *Trump: ‘Absolutely no choice’ but to close mosques*, Politico (Nov. 18, 2015), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>; *Trump says US will ‘have no choice’ but to shut some mosques down*, Fox News (Nov. 18, 2015), <http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html>.

- On October 21, 2015, Mr. Trump stated that he was “going to have to certainly look at” closing mosques in the United States.²⁰
- On November 16, 2015, Mr. Trump said: “You’re going to have to watch and study the mosques, because a lot of talk is going on at the mosques.”²¹
- On November 19, 2015, Mr. Trump was asked whether his push for increased surveillance of American Muslims could include warrantless searches. He explained that he would consider a series of drastic measures against Muslims: “We’re going to have to do things that we never did before. . . . And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we’re going to have to do certain things that were frankly unthinkable a year ago.”²²
- At a November 21, 2015 rally, Mr. Trump stated: “So here’s the story—just to say it clear—I want surveillance of these people. I want surveillance if we have to, and I don’t care. . . . I want surveillance of certain mosques if that’s okay.”²³
- On December 7, 2015, Mr. Trump called for the surveillance of mosques, again equating the Muslim religion with hatred and terror: “Yes, we have to look at mosques We have no choice. We have to see what’s out there,

²⁰ Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, Wash. Post (Oct. 21, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/>.

²¹ Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*, Politifact (Nov. 24, 2015), <http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/>; Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/>.

²² Hunter Walker, *Donald Trump has big plans for ‘radical Islamic’ terrorists, 2016 and ‘that communist’ Bernie Sanders*, Yahoo News (Nov. 19, 2015), <https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html>.

²³ See Jacobson, *supra* note 21.

because something is happening in there. Man, there's anger. There's anger. And we have to know about it."²⁴

- On June 13, 2016, Mr. Trump stated: "We have to be very strong in terms of looking at the mosques, you know, which a lot of people say, 'Oh, we don't want to do that. We don't want to do that.' We're beyond that."²⁵
- On June 15, 2016, Mr. Trump stated: "We have to go and we have to maybe check, respectfully, the mosques."²⁶

On June 19, 2016, when asked what it means to "respectfully check a mosque," Mr. Trump answered with the suspicionless surveillance and shutdown of mosques: "Well, you do as they used to do in New York, prior to this mayor dismantling. By the way, if you go to France right now, . . . they are closing down mosques. People don't want to talk about it. People aren't talking about it. But look at what they're doing in France. They are actually closing down mosques."²⁷

2. *Advocating For A Registry Of American Muslims.*

Mr. Trump has repeatedly advocated for registering all Americans who choose to practice the Muslim faith.

²⁴ Jessica Taylor, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR (Dec. 7, 2015), <http://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>; Transcript, *Trump Calls for Ban on Muslims Entering the U.S.*, CNN (Dec 8, 2015), <http://www.cnn.com/TRANSCRIPTS/1512/08/es.02.html>.

²⁵ See Jacobson, *supra* note 21.

²⁶ Jeremy Diamond, *Trump doubles down on calls for mosque surveillance*, CNN (Jun. 15, 2016), <http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/>.

²⁷ *Face the Nation transcripts June 19, 2016: Trump, Lurch, LaPierre, Feinstein*, CBS News (Jun. 19, 2016), <http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/>; see also Jacobson, *supra* note 21.

On November 19, 2015, Mr. Trump was asked whether he would require Muslims to register or carry a special form of identification that noted their religion, and he responded: “We’re going to have to look at a lot of things very closely. We’re going to have to look at the mosques. We’re going to have to look very, very carefully.”²⁸ The following day, when asked pointedly whether he was in favor of implementing a database tracking Muslims, he responded, “Oh I would certainly implement that. Absolutely.”²⁹ When asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, “They have to be—they have to be.”³⁰ Further asked how this was different from the Nazi’s registration of Jewish people, Mr. Trump responded four times: “You tell me.”³¹

The President has echoed his call for a registry of all Muslims in America on several occasions:

- On November 21, 2015, Mr. Trump reaffirmed his desire for a registry: “So the database—I said yeah, that’s alright fine, but database is okay, and watch list is okay, and surveillance is okay. If you don’t mind, I want to be—I want to surveil.”³²

²⁸ See Walker, *supra* note 22.

²⁹ Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

³⁰ *Id.*

³¹ *Id.*

³² *FULL Speech HD: Donald Trump MASSIVE Rally in Birmingham, AL (11-21-2015)*, YouTube (Nov. 21, 2015) <https://www.youtube.com/watch?v=kmPqV41bfC0> (minutes 42:58 to 43:08).

- The following day, Mr. Trump was asked: “You did stir up a controversy with those comments over the database. Let’s try to clear that up. Are you unequivocally now ruling out a database on all Muslims?” He responded, “No not at all.”³³
- The day following that, Mr. Trump stated: “We have to really be vigilant with respect to the Muslim population . . . we have to surveil; we have to create lists; we have the refugees coming in and we have to create lists.”³⁴

3. *Advocating Profiling Muslims.*

On June 19, 2016, Mr. Trump stated that it was “common sense” to profile Muslims.³⁵ He later went further, stating on September 19, 2016, that there is “no choice” but to profile Muslim people.³⁶

C. The President Pledged To Prevent Muslim People From Entering The U.S. And Previewed That He Would Do So Under The Guise Of A Neutral Order.

Mr. Trump repeatedly promised that he would prevent Muslims from entering the U.S. and specifically telegraphed that he would do so by speaking in terms of “territories” and “extreme vetting” instead of using the word “Muslim.” He also previewed that, upon doing so, he would invoke the President’s broad immigration

³³ See Carroll, *supra* note 21.

³⁴ *Donald Trump in Ohio: U.S. has become ‘soft, weak,’* Dayton Daily News (Nov. 23, 2015), <http://www.daytondailynews.com/news/national-govt--politics/donald-trump-ohio-has-become-soft-weak/5ZOBQutE4XSjTxV2NjvFnJ/>.

³⁵ *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein,* CBS News (June 19, 2016), <http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/>.

³⁶ Aaron Blake, *Donald Trump doesn’t call his position racial profiling. It is.,* Wash. Post (Sept. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/09/20/donald-trump-doesnt-call-his-position-racial-profiling-it-is/>.

powers—just as the Government does now—and justified that position by reference to the internment of Japanese Americans during World War II.

On December 7, 2015, Mr. Trump announced on his website: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”³⁷ The same day that Mr. Trump issued this announcement, he tweeted it with the title “Statement on Preventing Muslim Immigration.”³⁸ Further equating Muslims with hatred and terror, he tweeted, “Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!”³⁹ At a rally the same day, Mr. Trump called for “a total and complete shutdown of Muslims,” and added: “We have no choice. We have no choice. We have no choice.”⁴⁰ He also appeared on national television to advocate his ban on Muslims.⁴¹

³⁷ Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (last visited on April 12, 2017).

³⁸ Donald J. Trump, Twitter (Dec. 7, 2015), <https://twitter.com/realdonaldtrump/status/673993417429524480>.

³⁹ Jenna Johnson, *Trump calls for ‘total and complete shutdown of Muslims entering the United States,’* Wash. Post (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>.

⁴⁰ *Id.*

⁴¹ *Id.*

On December 8, 2015, the day following the announcement of his intent to ban Muslims, Mr. Trump was asked whether such a “broad approach against all Muslims” would be counterproductive, instead of targeting people the Government had reason to believe should be investigated. Mr. Trump confirmed that he would not distinguish between Muslims and people suspected of wrongdoing, citing President Franklin D. Roosevelt’s World War II Executive Proclamations authorizing the detention and internment of Japanese, German, and Italian aliens:

It’s not unconstitutional keeping people out, frankly, and until we get a hold of what’s going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it.⁴²

When asked how border officials would practically implement the ban, Mr. Trump explained: “They would say, ‘are you Muslim?’” The commentator further questioned: “And if they said yes, they would not be allowed in the country?” Mr. Trump responded, “That’s correct.”⁴³

⁴² *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015) <https://www.youtube.com/watch?v=5I3E3-U-1jc>; Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and ‘Morning Joe’ Cuts to Commercial*, New York Times (Dec. 8, 2015), <https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donald-trump-interrupts-and-morning-joe-cuts-to-commercial/>.

⁴³ *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015) <https://www.youtube.com/watch?v=5I3E3-U-1jc>; *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), <http://www.msnbc.com/transcripts/hardball/2015-12-08>.

That same day, when asked whether he was given “any pause at all” by being compared to Hitler, Mr. Trump again justified banning Muslims based on President Roosevelt’s internment of Japanese Americans, stating: “No because what I’m doing is no different than what F.D.R. did. F.D.R.’s solution for Germans, Italians, Japanese, many years ago.”⁴⁴ Asked if he was in favor of internment camps, Mr. Trump repeated his reliance upon President Roosevelt’s actions during World War II: “He did the same thing.”⁴⁵

Two days later, on December 10, 2015, Mr. Trump defended his position by publishing a link to an article stating that Islam is a “very evil and wicked religion,” a “false religion,” advocating that Muslims should be banned, and making further analogy to the treatment of Japanese during World War II.⁴⁶

On March 9, 2016, Mr. Trump denied that a distinction could be made between “radical Islam” and “Islam itself,” and—echoing the justification used by the Government to detain Japanese Americans in *Korematsu*—he stated that it was

⁴⁴ Miriam Hernandez, *Trump Cites History to Defend Muslim Immigration Ban*, ABC 7 (Dec. 9, 2015), <http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396/>.

⁴⁵ *Id.*

⁴⁶ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674934005725331456>; *see also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, Wash. Post (Dec. 10, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/>.

necessary to include all Muslims because “you don’t know who is who.”⁴⁷ *Cf. Korematsu*, 323 U.S. at 218-19 (“temporary exclusion [of all Japanese Americans] was rested by the military” on the rationale that “it was impossible to bring about an immediate segregation of the disloyal from the loyal”).

Moreover, on June 13, 2016, Mr. Trump previewed that he would attempt to defend the ban based on the very legal argument that the Government advances before this Court—that the “laws of the United States give the president powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate.”⁴⁸

Two days later, on June 15, 2016, Mr. Trump explained that he would not back down from pursuing his “temporary ban on Muslim integration” even if he faced opposition by the Senate, again equating all Muslims with radical terrorism. He stated, “You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do.”⁴⁹

⁴⁷ Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016) <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>; *see also* Schleifer, *supra* note 6.

⁴⁸ *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016) <https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats>.

⁴⁹ *Face the Nation transcripts June 5, 2016: Trump*, CBS News (June 5, 2016) <http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/>.

In July 2016, Mr. Trump made explicit that he would continue to pursue a ban on Muslim entry into the U.S. upon being elected, but explained that he would achieve it by speaking in terms of “territories” and “extreme vetting.” On July 21, 2016, he stated, “[W]e must immediately suspend immigration from any nation that has been compromised by terrorism until such time it’s proven that vetting mechanisms have been put in place.”⁵⁰ Three days later, when asked whether his language indicated an intent to “pull back from” the “Muslim ban,” Mr. Trump made clear that it was not:

I don’t think so. I actually don’t think it’s a rollback. In fact, you could say it’s an expansion, I’m looking now at territory. People were so upset when I used the word “Muslim”: “Oh, you can’t use the word ‘Muslim.’” Remember this. And I’m okay with that, because I’m talking territory instead of Muslim. . . .

Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently. . . .

But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. We’re making it territorial. We have nations and we’ll come out, I’m going to be coming out over the next few weeks with a number of the places. And it’s very complex . . . here is what I want: Extreme vetting. Tough word. Extreme vetting. Tough.⁵¹

⁵⁰ Politico, *Full text: Donald Trump 2016 RNC draft speech transcript* (July 21, 2016) <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>.

⁵¹ Transcript, Meet the Press, NBC News (July 24, 2016), <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>; Jenna Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Wash. Post (July 24, 2016), <https://www.washingtonpost.com/news/post->

The President advocated preventing Muslims from entering the United States on numerous other occasions:

- On September 18, 2015, when an audience member asked about getting “rid of” Muslims, Mr. Trump responded that he was “going to be looking at that and many other things.”⁵²
- On October 12, 2015, Mr. Trump tweeted: “Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?”⁵³
- On January 2, 2016, Mr. Trump tweeted: “Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!”⁵⁴
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was “incompetent” because she would “let the Muslims flow in. No way!”⁵⁵
- On March 24, 2016, Mr. Trump tweeted that “[i]t is amazing how often I am right” about “Muslims.”⁵⁶

politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/.

⁵² See Schleifer, *supra* note 3.

⁵³ Donald J. Trump, Twitter (Oct. 12, 2015), <https://twitter.com/realdonaldtrump/status/653774823483703297>.

⁵⁴ Donald J. Trump, Twitter (Jan. 2, 2016), <https://twitter.com/realdonaldtrump/status/683277309969694720>.

⁵⁵ Donald J. Trump, Twitter (Mar. 22, 2016), <https://twitter.com/realdonaldtrump/status/712473816614772736>.

⁵⁶ Donald J. Trump, Twitter (Mar. 24, 2016), <https://twitter.com/realdonaldtrump/status/713012045214531584>.

D. The President Has Reaffirmed His Prior Statements Since Being Elected.

The Government does not meaningfully contest that the reprehensible statements above demonstrate the President’s hatred for and desire to discriminate against Muslim people; instead, it argues that “nearly all” of those statements took place prior to the Presidential election and advocates for some general rule against considering such statements when discerning the official purpose of an Executive Order. Gov’t Br. at 46, 51. That argument is divorced from the actual record of this case. Since being elected, the President and his administration have repeatedly adhered to the statements he made while campaigning. In light of those post-election statements, *even if there were* some general rule against considering statements made during a campaign—and there is not—the President’s post-election statements would require the court to consider his earlier statements.

Over a month after being elected, Mr. Trump was asked whether he would reevaluate his intention to ban people of the Muslim faith. Referring to his earlier pledge, he responded: “You know my plans all along, and I’ve been proven to be right.”⁵⁷

⁵⁷ Video, *Trump: ‘You’ve known my plans’ on proposed Muslim ban*, Wash. Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html; Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: ‘You know my plans,’* Wash. Post (Dec. 22, 2016), <https://www.washingtonpost.com/news/post->

On January 27, 2017, immediately upon signing his initial Executive Order, President Trump read its oblique title, “Protecting the Nation from Foreign Terrorist Entry into the United States” and—referring to his longstanding pledge to ban Muslims—added: “*We all know what that means.*”⁵⁸ Thereafter, President Trump explained on national television that the exceptions he had set forth in his Order were intended to prioritize Christians over Muslims. He stated that he sees Christians as a “priority” and—expressly drawing a comparison between Christian refugees and Muslim refugees—he explained that he was “going to help” Christians.⁵⁹

On February 4, 2017, President Trump referred to the initial Executive Order the same way he had throughout his campaign—as a “ban”—stating, “Interesting that certain Middle-Eastern countries agree with the ban. They know if certain people are allowed in it’s death & destruction!”⁶⁰ A few weeks later, after Defendants received stays in judicial proceedings across the country while they revised the Executive Order, the President’s senior advisor stated that the new Order

politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/.

⁵⁸ *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), <http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173>.

⁵⁹ See Brody, *supra* note 2.

⁶⁰ Politico, *Trump warns of ‘death & destruction’ if U.S. not allowed to limit immigration* (Feb. 4, 2017), <http://www.politico.com/story/2017/02/trump-travel-ban-judge-james-robart-234643>; Donald J. Trump, Twitter (Feb. 4, 2017), <https://twitter.com/realdonaldtrump/status/827865957750161408>.

would be designed to achieve “the same basic policy outcome” and to address only “very technical issues.”⁶¹

Moreover, on March 15, 2017, the day that President Trump’s second Order was enjoined, President Trump himself stated that the Order was simply “a watered down version of the first order” and expressed that he would prefer to “go all the way” and do “what [he] wanted to do in the first place.”⁶² The next day, President Trump reiterated his oft-expressed view during the campaign that “[t]he assimilation [of Muslims in the U.S.] has been very, very hard. It’s been a very, very difficult process.”⁶³

President Trump’s website—which is updated daily—still calls for preventing Muslims from entering the U.S.⁶⁴

⁶¹ Fox News, Transcript, *Miller: New order will be responsive to the judicial ruling* (Feb. 21, 2017), <http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/>.

⁶² Andrew Prokop, *With Trump’s new travel order blocked and his health bill flailing, his agenda’s in tatters*, Vox (Mar. 16, 2017), <http://www.vox.com/policy-and-politics/2017/3/16/14935784/trump-achievements-accomplishments>.

⁶³ Chris Cillizza, *Donald Trump’s explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson/>.

⁶⁴ See *supra* note 37; Donald J. Trump, *Media*, <https://www.donaldjtrump.com/media>.

II. Failure To Consider President Trump’s Extensive Record Of Animus Would Be A Serious Abdication Of The Role Of The Judicial Branch.

By targeting people from six Muslim-majority countries and attempting to stop Muslim Americans from seeing their families, President Trump’s second Order is an attempt to follow through on his vilification of Muslim people and honor his promise to ban them from entering the U.S. Discrimination against a protected class, such as religion, on the basis of such overt animus is the most obvious and fundamental abuse of government authority that the Establishment and Equal Protection Clauses exist to protect. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.”).

The Government argues that it is beside the point whether the President is actually using his power to oppress Muslims, arguing that the Court must defer to the Order’s facial purpose to protect national security and the Executive’s broad authority over matters relating to immigration. *See* Gov’t Br. at 33-36. Not so. It is the Court’s duty to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and prevent the exercise of Executive power to “harm a politically unpopular group,” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted). Moreover, the Supreme Court has recognized that courts have a duty to enforce the Constitution even when

the Executive claims national security concerns. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the President does not “have the power to switch the Constitution on or off at will” by invoking national security); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“Our precedents . . . make clear that national security and foreign relations do not warrant abdication of the judicial role.”). Indeed, the importance of judicial intervention is at its highest in these circumstances. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) (“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.”).

The Government’s argument is not novel. This is the same position it advanced in cases like *Korematsu*, now viewed as one of the most shameful decisions in American history. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (Complete “judicial acquiescence or abdication” in the face of executive discretion “has a name. That name is *Korematsu*”); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011) (*Korematsu* “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute”). The MacArthur Justice Center urges the

Court not to overlook the extensive record of animus present here, and to avoid repeating the terrible mistakes made in generations past.

CONCLUSION

For the foregoing reasons, the MacArthur Justice Center respectfully urges the Court to affirm.

Dated: April 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I electronically filed the foregoing *Brief of Amicus Curiae the Roderick and Solange MacArthur Justice Center in Support of Plaintiffs-Appellees and Affirmance* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 17, 2017

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