

No. 17-17168

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

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STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1&2; and  
MUSLIM ASSOCIATION OF HAWAII, INC.,

*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, in his official capacity as President of the United States;  
U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE DUKE, in her official capacity  
as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX  
TILLERSON, in his official capacity as Secretary of State; and  
the UNITED STATES OF AMERICA,

*Defendants – Appellants.*

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On Appeal from the United States District Court  
for the District of Hawaii  
(1:17-cv-00050-DKW-KSC)

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

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Roderick & Solange MacArthur Justice Center discloses that it is a not-for-profit organization with no parents, subsidiaries, or affiliates, and that no publicly-held corporation owns 10 percent or more of its stock.

Dated: November 17, 2017

/s/ Amir H. Ali

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## INTEREST OF AMICUS CURIAE

The MacArthur Justice Center (“MJC”) is a not-for-profit organization founded 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 against an unpopular minority group.

MJC submits this brief to document the President’s extensive record of hatred against people of the Muslim faith, his open desire to curtail their rights, and his specific, sustained promise to inhibit their entry to the U.S. MJC’s prior briefing was relied upon by the court below in enjoining the President’s second Executive Order, *see Hawai‘i v. Trump*, 241 F. Supp. 3d 1119, 1137 n.14 (D. Haw. 2017), and by parties in the various proceedings challenging the President’s orders.<sup>1</sup>

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<sup>1</sup> 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 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 has, upon taking office, sought to deliver on one of his most repeated promises: To prevent people of that faith from entering the country. The MacArthur Justice Center submits this brief to document the President's extensive record of hatred against Muslims, his open desire to curtail their rights in various ways, and his specific, sustained pledge to inhibit their entry.

In prior briefing on whether the President's Proclamation violates the Establishment Clause, the government has said it "strongly disagrees" there "is evidence of anti-Muslim bias" in "the history proceeding the Proclamation" and claimed that the Plaintiffs' challenge arises just from "some perceived" sense of hostility toward people of the Muslim faith. *See* Br. of United States at 18, 45, *International Refugee Assistance Project v. Trump* ("IRAP v. Trump"), Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (4th Cir. Nov. 1, 2017). The historical record documented herein shows that those representations are divorced from fact. It shows that the President engaged in a sustained and targeted attack on Muslim people, labeling the religion as a "problem" and affirmatively disseminating anti-Muslim propaganda. He openly and repeatedly expressed his desire to curtail the

rights of persons who practice Islam, including by shutting down mosques, surveilling and profiling Muslims, and creating a Muslim registry.

The record also shows that the President not only pledged to restrict the entry of Muslim people, but that he did so with remarkable specificity. In addition to openly expressing his intent to exclude Muslims from the country, Mr. Trump telegraphed that he would achieve his intent under the guise of a neutral order—by speaking in terms of “territories” and “extreme vetting” instead of “Muslims” (just as he attempts to do in his Proclamation). He also explained how he would get away with it—by asserting the President’s broad immigration authority under 8 U.S.C. § 1182(f), the provision invoked in his Proclamation and by the government before this Court. Gov’t Br. at 5-6, 10, 16, 18, 22, 25, 27-32. Indeed, Mr. Trump even expressly invoked the internment of Japanese Americans during World War II as proof that he would succeed in singling out Muslims. This Presidential Proclamation is the assault on Muslims that the President promised he would deliver.

The government has previously suggested that the Establishment Clause inquiry concerns whether or how the President can overcome the “taint” of his pledge to discriminate against and restrict the entry of Muslim people. Br. of United States at 18, *IRAP v. Trump, supra*. But that question is academic on this record. The President has never even attempted to retract his pledge since taking

office and has, to the contrary, reaffirmed it. Before replacing his second Executive Order with the present Proclamation, for instance, the President expressly stated that he would prefer an order that “go[es] all the way” and does “what [he] wanted to do in the first place.” In the immediate lead up to the present Proclamation, he also repeatedly chided the Department of Justice for making the language in his orders “politically correct”—a criticism whose only plausible interpretation is that the President views the territories at issue to be a proxy for religion. And despite the Acting Solicitor General’s repeated representations that the President’s orders and Proclamation have no relation to his long-promised “Travel Ban,” the President has repeatedly characterized it as just that.

If this Court failed to intervene on this record, the judicial abdication would be matched only by cases like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Korematsu v. United States*, 323 U.S. 214 (1944). Indeed—setting aside that the President himself has expressly invoked the internment of Japanese Americans to justify his actions—the government’s call for this Court to step aside the moment the President utters the word “national-security,” is chillingly reminiscent of the closing remarks defending the government’s detention of Japanese Americans in *Korematsu* itself:

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 [certain persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President] . . . 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 that depraved moment in U.S. history.

## ARGUMENT

### **I. The President's Expressions Of Hatred, Dissemination Of Propaganda, And Pledges To Use His Official Power Against Muslims.**

The President's Proclamation followed repeated and unabashed admissions of an intent to discriminate against people who choose to practice Islam. This Section documents the President's hateful statements against Muslim people, his affirmative dissemination of propaganda vilifying them, his expressed desire to oppress them, and his specific and sustained pledge to restrict their entry into the country.

**A. The President’s Description Of Muslim People As A “Problem” And His Spreading Of Vilifying Propaganda.**

*1. Labeling Muslims A “Problem.”*

President Trump has long advocated that a “Muslim problem” exists in the U.S., that Islam is a religion of “tremendous hatred,” and that there is no meaningful distinction between being Muslim and being a terrorist. As early as April 2011, he recounted:

Bill O’Reilly asked me is there a Muslim problem? And I said absolutely, yes. . . . 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. . . . there’s something there that teaches some very negative vibe. . . . there’s tremendous hatred out there that I’ve never seen anything like it.<sup>2</sup>

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

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.”

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<sup>2</sup> 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>.

Mr. Trump: “We need this question.”<sup>3</sup>

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.<sup>4</sup>
- On February 4, 2016, Mr. Trump was asked to clarify: “Is it really a Muslim problem, or is it a radical Islamist problem?” He declined to accept that distinction, saying, “Maybe it’s a Muslim problem, maybe it’s not.”<sup>5</sup>
- On March 9, 2016, Mr. Trump stated, “I think Islam hates us” and that Muslims have “tremendous hatred” and “unbelievable hatred.” He expressly rejected that a distinction could be drawn between radical Islam and Islam itself, claiming “[i]t’s very hard to define.”<sup>6</sup>
- 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

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<sup>3</sup> 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/>.

<sup>4</sup> 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. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/675123192864899072>.

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

<sup>6</sup> 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/>.

about, but there's tremendous hatred. And I will stick with exactly what I said [the previous day]."<sup>7</sup>

- On June 13, 2016, Mr. Trump equated Islam with the Islamic State terrorist group and stated that “[r]efugees are trying to take over our children” by telling them “how wonderful Islam is.”<sup>8</sup>

## 2. *Spreading Anti-Muslim Propaganda.*

The President has gone further, disseminating propaganda that vilifies people of the Muslim faith. On November 21, 2015, for instance, he falsely proclaimed: “I watched 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.”<sup>9</sup>

In the face of the authorities and articles debunking his claim,<sup>10</sup> Mr. Trump continued to spread this lie:

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

<sup>8</sup> *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).

<sup>9</sup> 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/>.

<sup>10</sup> 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/donaldtrump/fact-checking-trumps-claim-thousands-new-jersey-ch/>.

- 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.”<sup>11</sup>
- 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.”<sup>12</sup>
- 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 Mr. Trump’s claims as “plausible.”<sup>13</sup> He repeated this tweet on December 7, 2015.<sup>14</sup>
- 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!”<sup>15</sup>

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<sup>11</sup> See Kessler, *supra* note 9.

<sup>12</sup> AP Archive, Trump Defends 9/11 Celebrations with Article (Nov. 24, 2015), <http://www.aparchive.com/metadata/US-OH-Trump-CR-/cadcf1334d2a1fea065ba383ef6f8e>; 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/>.

<sup>13</sup> 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/>.

<sup>14</sup> Donald J. Trump, Twitter (Dec 7, 2015), <https://twitter.com/realDonaldTrump/status/673905762087936000>; see also Riales, *supra* note 13.

<sup>15</sup> Donald J. Trump, Twitter (Dec 2, 2015), <https://twitter.com/realDonaldTrump/status/672182509111767041>.

The President also repeatedly praised a false story involving the mass murder of Muslims using pig blood. On February 19, 2016—treating “terrorist” as a synonym for being Muslim—he 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. General Pershing was a rough guy . . . 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.<sup>16</sup>

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

So General Pershing, . . . 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,

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<sup>16</sup> C-Span, Donald Trump Campaign Rally in Charleston, South Carolina (Feb. 19, 2016), <https://www.c-span.org/video/?404947-1/donald-trump-campaign-rally-charleston-south-carolina> (minutes 34:09 to 35:31); 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-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 Mikkelsen, *Pershing the Thought*, Snopes (Apr. 28, 2016), <http://www.snopes.com/rumors/pershing.asp>, debunking Mr. Trump’s story about General Pershing.

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.<sup>17</sup>

As discussed in Section I.D, the President has continued to repeat this particular propaganda after taking office, including in the lead up to the present Proclamation.<sup>18</sup>

**B. The President's Express Desire To Close Down And Surveille Mosques, Profile Muslims, And Create A Muslim Registry.**

*1. Closing And Surveilling Mosques.*

The President has, on numerous occasions, called for closing and surveilling mosques in America. On November 16, 2015, for example, he expressed his preference for shutting down mosques, 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.”<sup>19</sup>

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<sup>17</sup> *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), <https://www.youtube.com/watch?v=-9KOAfh4GCw> (minutes 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>.

<sup>18</sup> *See* Donald J. Trump, Twitter (Aug. 17, 2017), <https://twitter.com/realDonaldTrump/status/898254409511129088> (encouraging people to “[s]tudy what General Pershing of the United States did to terrorists when caught.”).

<sup>19</sup> Jenna Johnson, *Donald Trump would ‘strongly consider’ closing some mosques in the United States*, Wash. Post (Nov. 16, 2015),

Two days later, when asked whether he would actually shut down 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.”<sup>20</sup>

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

- On October 21, 2015, Mr. Trump stated that he was “going to have to certainly look at” closing mosques in the United States.<sup>21</sup>
- 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.”<sup>22</sup>
- On November 19, 2015, Mr. Trump was asked whether his push for increased surveillance of American Muslims could include warrantless searches. He stated 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.

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<https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/>.

<sup>20</sup> 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>.

<sup>21</sup> 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/>.

<sup>22</sup> 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/>.



And so we're going to have to do certain things that were frankly unthinkable a year ago."<sup>23</sup>

- At a November 21, 2015 rally, Mr. Trump stated: “[J]ust 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.”<sup>24</sup>
- 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, because something is happening in there. Man, there’s anger. There’s anger. And we have to know about it.”<sup>25</sup>
- 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.”<sup>26</sup>
- On June 15, 2016, Mr. Trump stated: “We have to go and we have to maybe check, respectfully, the mosques.”<sup>27</sup>
- On June 19, 2016, when asked what it means to “respectfully check a mosque,” Mr. Trump clarified that he meant 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

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<sup>23</sup> 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>.

<sup>24</sup> Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*, Politifact (Nov. 24, 2015), <http://www.politifact.com/truth-ometer/article/2015/nov/24/donald-trumps-comments-database-american-muslims/>.

<sup>25</sup> 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>.

<sup>26</sup> See Jacobson, *supra* note 22.

<sup>27</sup> 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/>.

now, . . . they are closing down mosques. . . . They are actually closing down mosques.”<sup>28</sup>

2. *Registering American Muslims.*

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

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.”<sup>29</sup> 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.”<sup>30</sup> When asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, “They have to be—they have to be.”<sup>31</sup>

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<sup>28</sup> *Face the Nation transcripts June 19, 2016: Trump, Lynch, 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 22.

<sup>29</sup> *See* Walker, *supra* note 23.

<sup>30</sup> 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>.

<sup>31</sup> *Id.*

Mr. Trump was asked how registering Muslims would be different from the Nazis' registration of Jewish people. He responded four times: "You tell me."<sup>32</sup>

The President has echoed his call for a registry of American Muslims on several occasions:

- On November 21, 2015, Mr. Trump reaffirmed his desire to have a database of all Muslims: "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."<sup>33</sup>
- 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."<sup>34</sup>
- 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."<sup>35</sup>

### 3. *Profiling Muslims.*

On June 19, 2016, Mr. Trump stated that it was "common sense" to profile Muslims.<sup>36</sup> He later went further, stating on September 19, 2016, that there is "no choice" but to profile Muslim people.<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> ABC 33/40, Donald Trump in Birmingham: Full speech at the BJCC (Nov. 21, 2015), <https://www.youtube.com/watch?v=IgvPoFolzPY> (minutes 43:11 to 43:32).

<sup>34</sup> See Carroll, *supra* note 22.

<sup>35</sup> *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/>.

### **C. The President’s Specific Pledge To Restrict The Entry Of Muslims Under The Guise Of A Neutral Order.**

Mr. Trump repeatedly promised that he would prevent Muslims from entering the U.S. and that he would achieve this result 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 powers—just as the Government does now—and justify 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.”<sup>38</sup> The same day that Mr. Trump issued this announcement, he tweeted it with the title “Statement on Preventing Muslim Immigration.”<sup>39</sup> 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.

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<sup>36</sup> *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/>.

<sup>37</sup> 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/>.

<sup>38</sup> Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (Internet Archive record on May 8, 2017).

<sup>39</sup> Donald J. Trump, Twitter (Dec. 7, 2015), <https://twitter.com/realDonaldTrump/status/673993417429524480>.

We must be vigilant!”<sup>40</sup> 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.”<sup>41</sup> He also appeared on national television to advocate his ban on Muslims.<sup>42</sup>

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, in contrast to targeting people the Government had reason to investigate. 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: “[L]ook at Franklin Roosevelt . . . 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.”<sup>43</sup>

When asked how border officials might implement his plan, Mr. Trump explained: “They would say, ‘are you Muslim?’” The commentator further

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<sup>40</sup> 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/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), <https://www.youtube.com/watch?v=5I3E3-U-1jc> (minutes 00:46 to 01:03).

questioned: “And if they said yes, they would not be allowed in the country?”

Mr. Trump responded, “That’s correct.”<sup>44</sup>

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.”<sup>45</sup> 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.”<sup>46</sup>

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.<sup>47</sup>

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<sup>44</sup> *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), <https://www.youtube.com/watch?v=5I3E3-U-1jc> (minutes 14:58 to 15:14); *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), <http://www.msnbc.com/transcripts/hardball/2015-12-08>.

<sup>45</sup> 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/>.

<sup>46</sup> *Id.*

<sup>47</sup> Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/675034063447662592>; *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/>.

On March 9, 2016, Mr. Trump denied that a distinction could be made between “radical Islam” and “Islam itself,” and stated “we can’t allow people coming into this country who have this hatred of the United States.”<sup>48</sup> Echoing the justification used by the Government to detain Japanese Americans in *Korematsu*—he claimed that it was necessary to include all Muslims because “you don’t know who is who.”<sup>49</sup> See *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 his religious ban based on the President’s immigration authority. Indeed, just as he did in his Proclamation and the government does before this Court, Mr. Trump invoked the language of 8 U.S.C. § 1182(f), stating that “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.”<sup>50</sup>

Two days later, on June 15, 2016, Mr. Trump explained that he would not back down from pursuing his “temporary ban on Muslim integration,” again

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<sup>48</sup> Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016), <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>.

<sup>49</sup> *Id.*; see also Schleifer, *supra* note 6.

<sup>50</sup> *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> (minutes 5:30 to 6:40).

equating being Muslims with being a radical terrorist. 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.”<sup>51</sup>

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, Mr. Trump 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.”<sup>52</sup> Three days later, asked whether this language indicated an intent to “pull back from” the “Muslim ban,” Mr. Trump made clear that it was not:

I don’t think so. . . . 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. . . . I view it differently. . . .

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.<sup>53</sup>

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<sup>51</sup> *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/>.

<sup>52</sup> 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>.

<sup>53</sup> Transcript, Meet the Press, NBC News (July 24, 2016), <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>; Jenna



The President advocated restricting the entry of Muslims to the United States

on numerous other occasions:

- On September 18, 2015, when asked about getting “rid of” Muslims, Mr. Trump responded that he was “going to be looking at that and many other things.”<sup>54</sup>
- On October 12, 2015, Mr. Trump tweeted: “Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?”<sup>55</sup>
- 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!”<sup>56</sup>
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was “incompetent” because she would “let the Muslims flow in. No way!”<sup>57</sup>
- On March 24, 2016, Mr. Trump tweeted that “[i]t is amazing how often I am right” about “Muslims.”<sup>58</sup>

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Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Wash. Post (July 24, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/>.

<sup>54</sup> See Schleifer, *supra* note 3.

<sup>55</sup> Donald J. Trump, Twitter (Oct. 12, 2015), <https://twitter.com/realDonaldTrump/status/653774823483703297>.

<sup>56</sup> Donald J. Trump, Twitter (Jan. 2, 2016), <https://twitter.com/realDonaldTrump/status/683277309969694720>.

<sup>57</sup> Donald J. Trump, Twitter (Mar. 22, 2016), <https://twitter.com/realDonaldTrump/status/712473816614772736>.

<sup>58</sup> Donald J. Trump, Twitter (Mar. 24, 2016), <https://twitter.com/realDonaldTrump/status/713012045214531584>.

**D. The President Has Reaffirmed His Discriminatory Purpose On Several Occasions In The Lead Up To This Proclamation.**

In its prior briefing on the Establishment Clause, the government has attempted to characterize all of the President’s discriminatory statements as “campaign statements.” Br. of United States at 18, 45, 52, *IRAP v. Trump, supra*. That representation also disregards fact. As set forth below, the President has made numerous statements since being elected to office—and in the immediate lead up to the present Proclamation—that have harkened back to, and reaffirmed, his discriminatory intent.

Over a month after being elected, Mr. Trump was asked whether he would reevaluate his intention to ban entry of Muslim people. Referring to his earlier pledge, he responded: “You know my plans all along, and I’ve been proven to be right.”<sup>59</sup>

Within a week of taking the oath of office, the President signed his initial Executive Order. Upon reading its abstruse title, “Protecting the Nation from Foreign Terrorist Entry into the United States,” he added, “We all know what that means”—an obvious reference to his well-known pledge to prevent Muslims from

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<sup>59</sup> 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](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).

entering the country.<sup>60</sup> The same day, 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.<sup>61</sup>

On February 4, 2017, President Trump referred to his initial Executive Order the same way he had throughout his campaign—as a “ban”—stating that “certain Middle-Eastern countries agree with the ban.”<sup>62</sup> After the government received stays in judicial proceedings across the country while they revised the Executive Order, the President’s senior advisor stated that the new Order would be designed to achieve “the same basic policy outcome” as the first Order and to address only

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<sup>60</sup> *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), <http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173>.

<sup>61</sup> David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

<sup>62</sup> 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>.

“very technical issues.”<sup>63</sup> The President’s Press Secretary similarly stated that “the principles of the executive order remain the same.”<sup>64</sup>

On March 15, 2017, the day that President Trump’s second Executive Order was first 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.”<sup>65</sup> 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.”<sup>66</sup>

Despite being updated daily, the President’s website continued to call for a “total and complete shutdown of Muslims entering the United States” when he issued his initial Executive Order, his revised Executive Order, and for long after.

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<sup>63</sup> 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/>.

<sup>64</sup> The White House, Press Release, *Press Gaggle by Press Secretary Sean Spicer* (Mar. 6, 2017,) <https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer>.

<sup>65</sup> 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>.

<sup>66</sup> 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/>.

Notwithstanding repeated notification,<sup>67</sup> the President continued to call for a total and complete ban on Muslims from the U.S. until May 8, 2017, when the Acting Solicitor General was questioned about it by the Fourth Circuit.<sup>68</sup>

On August 17, 2017, the President again promoted the same anti-Muslim propaganda he repeated while campaigning, that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood. *See supra* Section I.A.2. In the immediate wake of a terror attack in Barcelona, he stated, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"<sup>69</sup>

In these proceedings, the Acting Solicitor General has repeatedly represented that the President's orders and Proclamation bear no connection to the "Travel Ban" or "Muslim Ban" for which the President long advocated, attempting to sanitize them as reflecting a national security judgment based on a need for

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<sup>67</sup> *See, e.g.*, Complaint at 7, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Feb. 3, 2017); Amended Complaint at 8, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Mar. 7, 2017).

<sup>68</sup> Cristian Farias, *Trump's 'Muslim Ban' Pledge Scrubbed From Website Just As Judges Ask About It*, Huffington Post (May 9, 2017), [http://www.huffingtonpost.com/entry/trump-muslim-ban-pledge\\_website\\_us\\_591204dfe4b050bdca5ff6c1](http://www.huffingtonpost.com/entry/trump-muslim-ban-pledge_website_us_591204dfe4b050bdca5ff6c1); Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (Internet Archive record on May 8, 2017).

<sup>69</sup> Donald J. Trump, Twitter (Aug. 17, 2017), <https://twitter.com/realDonaldTrump/status/898254409511129088>.

“global review . . . of foreign governments’ information-sharing practices.” *See, e.g., Gov’t Br. at 1, 6-11.*<sup>70</sup> The President’s own statements between the time of his initial orders and the present Proclamation, however, make clear that he views them as effectuating his long-promised “Travel Ban.” In particular, the President has made the following statements:

- On February 16, 2017, President stated, “Let me tell you about the travel ban. We had a very smooth rollout of the travel ban.”<sup>71</sup>
- On April 26, 2017, the President stated, “the Ninth Circuit rules against the ban . . . ridiculous.”<sup>72</sup>
- On June 3, 2017, the President stated, “We need the Travel Ban as an extra level of safety!”<sup>73</sup>
- Two days later, the President stated, “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!”<sup>74</sup>

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<sup>70</sup> *See also* Garrett Epps, *Trump's Tweets May Have Sunk His Travel Ban*, Atlantic (June 5, 2017), <https://www.theatlantic.com/politics/archive/2017/06/trumps-tweets-may-have-sunk-his-travel-ban/529167/>. The President’s Press Secretary made similar representations that “it’s not a travel ban.” Peter W. Stevenson, *Trump says it’s a travel ‘ban.’ His staff insisted it wasn’t*, Wash. Post (June 5, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/05/trump-says-its-a-travel-ban-his-staff-insisted-it-wasnt/>.

<sup>71</sup> Full Transcript and Video: Trump News Conference, New York Times (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html>

<sup>72</sup> Donald J. Trump, Twitter (April 26, 2017), <https://twitter.com/realDonaldTrump/status/857177434210304001>.

<sup>73</sup> Donald J. Trump, Twitter (June 3, 2017), <https://twitter.com/realDonaldTrump/status/871143765473406976>.

<sup>74</sup> Donald J. Trump, Twitter (June 5, 2017), <https://twitter.com/realDonaldTrump/status/871674214356484096>.

- The same day, he stated, “The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.”<sup>75</sup> He further stated, “we need a TRAVEL BAN . . . not some politically correct term that won’t help us protect our people.”<sup>76</sup>
- One week later, on June 13, 2017, he wrote: “the 9th Circuit did it again - Ruled against the TRAVEL BAN.”<sup>77</sup>
- On September 15, 2017, the President again derided the political correctness of the travel ban: “The travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!”<sup>78</sup>

The President’s repeated derisions of the Department of Justice for making the language in his orders “politically correct”—statements made in the immediate lead up to the present Proclamation—are damning to the Department’s suggestion that his Proclamation is not a manifestation of his long-promised Muslim ban. The only plausible interpretation of those criticisms is that the President views the territories named as a proxy for religion.

## **II. This Court’s Failure To Intervene Would Be A Serious Abdication Of The Judicial Role.**

The above factual record makes clear that the President’s decision to target people from six Muslim-majority countries is intended to effectuate his

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<sup>75</sup> Donald J. Trump, Twitter (June 5, 2017), <https://twitter.com/realDonaldTrump/status/871675245043888128>.

<sup>76</sup> Donald J. Trump, Twitter (June 5, 2017), <https://twitter.com/realDonaldTrump/status/871899511525961728>

<sup>77</sup> Donald J. Trump, Twitter (June 13, 2017), <https://twitter.com/realDonaldTrump/status/874578159676665857>.

<sup>78</sup> Donald J. Trump, Twitter (Sept. 15, 2017), <https://twitter.com/realDonaldTrump/status/908645126146265090>.

longstanding and reaffirmed (let alone never disavowed) pledge to restrict the entry of Muslim people. 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.”).

This Court has the obligation to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and to 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 concerns of 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 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. It is the same line of argument it advanced 70 years ago to justify the internment of Japanese Americans in *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 showing that the President’s Proclamation was motivated by animus against people of the Muslim faith, and to avoid repeating the terrible mistake made in generations past.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on November 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: November 17, 2017

/s/ Amir H. Ali  
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**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 17-17168

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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