UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARAB AMERICAN CIVIL RIGHTS LEAGUE, *et al*.,

Plaintiffs,

Case No. 17-10310

v.

Hon. Victoria A. Roberts

DONALD TRUMP, President of the Untied States, *et al*.,

Defendants.
_____/

PROPOSED BRIEF OF AMICI CURIAE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Johnathan J. Smith
Aziz Huq
Muslim Advocates
P.O. Box 71080
Oakland, CA 94612
415-692-1484
johnathan@muslimadvocates.org
aziz.huq@gmail.com

Of Counsel to Amici Curiae

/s/ Dina Hayes (IL Bar No. 6270400)
Arnold & Porter Kaye Scholer LLP
70 West Madison Street, Suite 4200
Chicago, Illinois 60602-4321
(312) 583-2553
dina.hayes@apks.com

Attorney for Amici Curiae

Dated: May 19, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, Muslim Advocates, American Muslim Health Professionals, Muppies, Inc., and Network of Arab-American Professionals state the following:

(1) they have no parent corporations; and

(2) There are no publicly held corporations that own 10% or more of their stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

This amici curiae brief is submitted on behalf of the amici described below. Amici are business, education, finance, healthcare, legal, science, technology, and other professional members of the American Muslim community directly harmed and stigmatized by the Executive Order.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting institutional discrimination against the American Muslim community.

American Muslim Health Professionals ("AMHP") works to improve the health of Americans. AMHP has three areas of focus: (1) health promotion and education; (2) professional development; and (3) state and national advocacy on public health issues. AMHP has been a leader in expanding healthcare coverage by hiring a team of state liaisons and working with interfaith communities through its "Connecting Americans to Coverage" campaign. AMHP has spearheaded many

social justice initiatives including "EnabledMuslim," an online platform that provides spiritual and social support for individuals and families impacted by disability. Its leadership also has been at the forefront of raising awareness about bullying, identity development, and other mental health issues impacting the most vulnerable segments of society—our children and youth.

Muppies, Inc., also known as Muslim Urban Professionals ("Muppies"), is a nonprofit, charitable organization dedicated to empowering and advancing Muslim business professionals to be leaders in their careers and communities. Its mission is to create a global community of diverse individuals who will support, challenge, and inspire one another by providing a platform for networking, mentorship, and career development. Muppies members are leaders in the fields of finance, consulting, technology, venture capital, healthcare, entrepreneurship and social enterprise. As a condition of acceptance to the organization, members must demonstrate dedication to the development and advancement of themselves and their communities, in addition to outstanding professional achievement. Muppies members contribute to the fabric of the U.S. economy in diverse ways, such as driving innovation, creating new opportunities for employment, and promoting excellence through diversity and inclusion.

Network of Arab-American Professionals ("NAAP") is a professional organization grounded on the notion that all Arabs in America need to connect to

advance the community. Through collective contribution to strengthen our individual and community standing, NAAP provides a channel for Arab-Americans to realize their passions and pursue their interests through community involvement. NAAP promotes professional networking and social interaction among Arab-American and Arab professionals in the United States and abroad; educates both the Arab-American and non-Arab communities about Arab culture, identity, and concerns; advances the Arab-American community by empowering, protecting and promoting its political causes and interests in the United States and abroad within all levels of society; supports the Arab student movement in the United States; and serves society through volunteerism and community service efforts.

INTRODUCTION

Amici are physicians, lawyers, and professional members of the American Muslim and Arab-American communities directly harmed and stigmatized by the President's March 6, 2017 Executive Order 13,780, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Second Executive Order") and its predecessor, the January 27, 2017 Executive Order 13,769 of the same title (the "First Executive Order").

Amici urge this Court to deny Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint seeking to enjoin and declare the Second Executive

Order unlawful and invalid. That Order is unlawful on both constitutional and statutory grounds. Amici offer three points in opposition to Defendants' Motion to Dismiss.

First, in analyzing the constitutionality of the Second Executive Order under the First Amendment, ordinary principles of constitutional review apply. Pursuant to those rules, a court may look beyond the face of the order to consider evidence of intent and effect. The Government's assertion that it is immune from challenge based on unconstitutional motive or effect leans on a thin reed. Its demand for categorical deference in the immigration policy context cannot be squared with a long line of Supreme Court cases closely scrutinizing the constitutionality of immigration measures. Nor can it be squared with the Supreme Court's repeated admonition that judicial review of Executive Branch action remains necessary and appropriate even when, as here, the government relies on national security concerns as a justification.

Second, the President's Second Executive Order contains on its face a telltale expression of animus against Muslims. Specifically, the order relies on the specter of Muslims as distinctively likely to engage in "honor killings" of women as a justification. This is both irrelevant and superfluous to the government's national security rationale and unfounded as a matter of fact with respect to

immigrants to the United States. This facial evidence of animus is consistent with and further supports denying Defendants' motion to dismiss.

Third, by creating and reinforcing ignorant, false, and hateful stereotypes about Muslims, the Second Executive Order impermissibly stigmatizes and harms American citizens on the basis of their religion and national origin. This harm is in addition to the many devastating effects on citizens and noncitizens that would flow directly from implementation of Section 2 of the Order.

ARGUMENT

I. Judicial Review of the Constitutionality of the Second Executive Order is not Limited to the Face of the Order

A. Immigration Decisions Are Subject to Constitutional Review

Contrary to the Government's suggestions, Article III courts have long exercised judicial review over questions of constitutional and statutory law raised by federal immigration measures. *See, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."); *United States v. Jung Ah Lung*, 124 U.S. 621, 635 (1888) (directing admission of an alien on the ground that a statute requiring Chinese nationals to produce a certification for admission could also be satisfied by alternate evidence when that certification was "lost or stolen") (internal citations

omitted); *see also Heikkila v. Barber*, 345 U.S. 229, 236 (1953) (noting the "requirements under the Constitution" of due process in immigration removal). As a result, it is beyond dispute that today "immigration law . . . is subject to important constitutional limitations" even when it comes to the treatment of inadmissible aliens. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

Federal courts have exercised close scrutiny in cases involving challenges to the constitutionality of the *means* by which government immigration policy is implemented. In *I.N.S. v. Chadha*, for example, the Supreme Court held that the political branches must use "a constitutionally permissible means of implementing" the relevant policy. 462 U.S. 919, 941–42 (1983) (invalidating enforcement action against alien plaintiff on the basis of a structural constitutional limit on governmental power akin to the Establishment Clause); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (construing the immigration statute to avoid conflict with the Suspension Clause).

The Supreme Court has also adjudicated challenges to immigration measures taking into consideration extrinsic evidence of the government's *motivations*. In *I.N.S. v. Pangilinan*, for example, the Court considered the allegation that unconstitutional racial animus had motivated U.S. government officials' decisions to temporarily suspend naturalizations in the Philippines after World War II. 486 U.S. 875, 886 (1988). In concluding that the respondents' claims were without

merit, the Court did not question its authority to examine evidence of the motivations underlying the challenged immigration actions. Rather, the Court looked to "the historical record" to determine whether "the actions at issue . . . were motivated by any racial animus." *Id*. (concluding ultimately that the decisions in question were taken for legitimate reasons, "not because of hostility towards Filipinos"). So too here the Court may look beyond the face of the Second Executive Order to evidence of the President's intent in excluding certain Muslim immigrants.

B. Neither *Kleindienst v. Mandel* nor *Fiallo v. Bell* Foreclose Careful Judicial Scrutiny of the Second Executive Order's Constitutionality

The Government asserts that Plaintiffs' First Amendment claims are precluded by *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and relies on *Mandel* for the proposition that, in the immigration context, the government need only provide a "facially legitimate and bona fide" reason for its decision such that a court may not inquire into evidence of an unconstitutional motive. Def.'s Mot. to Dismiss 17-19. *Mandel* does not, in fact, aid the Government. Rather, the Government's position contradicts the language on which it relies, ignores the facts of *Mandel*, and overlooks subsequent precedent.

First, the language from *Mandel* itself calls for consideration of evidence of motive. "Bona fide" means: "In or with good faith; honestly, openly, and

sincerely; without deceit or fraud. . . . *Real, actual, genuine, and not feigned*." *Black's Law Dictionary* 160–61 (5th ed. 1979) (emphasis added); *see also* H.W. Fowler, *A Dictionary Of Modern English Usage* 61 (1965) ("bona fide" is a Latin ablative meaning "in good faith"); *see also Lowe v. S.E.C.*, 472 U.S. 181, 208 (1985) (explaining that in a statutory context, the term "bona fide" "translates best to 'genuine'"). Of course, a court must necessarily consider evidence of the context and all of the circumstances to determine whether a reason is bona fide versus a pretext.

The context of *Mandel* underscores this point. The case concerned the "narrow issue whether the First Amendment confers upon . . . , professors [who] wish to hear, speak, and debate with Mandel [a non-resident alien] the ability . . . to compel the Attorney General to allow [that alien's] admission." 408 U.S. at 762. The *Mandel* Court *declined* to hold broadly that Congress had delegated to the Executive "sole and unfettered discretion" to deny admission to non-resident aliens without giving a legitimate reason. *Id.* at 769. Rather, the Court held that Mandel's admission had been declined because he had "engaged in activities beyond the stated purposes" of his admission on earlier occasions. *Id.* at 758 & n.5. Engaging in such activities beyond the purpose of his admission, the Court held, was a "facially legitimate and bona fide" reason for refusing to grant a waiver of inadmissibility grounds. *Id.* at 769. The Court therefore declined to undertake a

fresh "balancing" of First Amendment interests against state interests or otherwise "look behind" the inadmissibility decision. *Id*. at 770.

Accordingly, the *Mandel* Court found that there was no question that the government in fact had "facially legitimate and bona fide" reasons for finding inadmissibility, and cited an affidavit by the alien's own counsel conceding the existence of the past "noncompliance" with visa conditions. *Id*. at 758 n.5. In no way did the Court indicate that the government need only state some pretextual yet facially legitimate and bona fide reason for its action to shield itself from any judicial review of unconstitutional motives. Contrary to the Government's position, the *Mandel* Court explicitly *declined* to endorse the Government's argument that it had "sole and unfettered discretion" over admission of aliens. *Id*. at 769.

Subsequent precedent also confirms *Mandel's* circumscribed reach and its consistency with judicial consideration of governmental motivation. In particular, Justice Kennedy's controlling opinion in *Kerry v*. *Din*, 135 S. Ct. 2128 (2015), cited *Mandel* as controlling authority, and directed courts to "look behind" the government's stated reasons for an immigration decision if the plaintiff "plausibly alleged with sufficient particularity" "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141. As the Sixth Circuit has pointed out: "[T]he Supreme Court has repeatedly allowed for meaningful judicial review of non-substantive

immigration laws where constitutional rights are involved. *Kleindienst* did not change these long-standing traditions." *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 687 (6th Cir. 2002).

Other courts of appeals applying *Din* have also required that the government point to specific record evidence that a legal justification permitted the challenged action. Circuit courts have, moreover, allowed petitioners to rebut such justification with evidence of bad faith. *See, e.g.*, *Morfin v. Tillerson*, 851 F.3d 710, 713 (7th Cir. 2017); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016). Courts also have insisted that discrimination "against a particular race or group" "would not be 'legitimate and bona fide' within the meaning of *Kleindienst v. Mandel*." *Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982); *accord Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 136–37 (2d Cir. 2009) (discussing *Mandel*, and explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide"); *see also Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) (finding that *Mandel* did not control its analysis of the First Executive Order).

In immigration law, as in all other domains of federal regulation, government action based on "negative attitudes, or fear" toward a protected class cannot survive even a minimal form of constitutional scrutiny. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *accord United States v.*

Windsor, 133 S. Ct. 2675, 2693 (2013) ("[A] bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group") (quoting *Department of Agriculture v. Moreno,* 413 U.S. 528, 534–35 (1973)); *accord Radio Ass'n on Defending Airwave Rights, Inc. v. U.S. Dep't of Transp.*, 47 F.3d 794, 808 (6th Cir. 1995).

Furthermore, the Government's invocations of *Fiallo v. Bell* are misplaced. *Fiallo* concerned a differential in the "preferential treatment" accorded by statute to children of U.S. citizen and resident mothers versus U.S. citizen and resident fathers. 430 U.S. 787 (1977). Upholding those preferences, *Fiallo* recognized a "special judicial deference to congressional policy choices in the immigration context." *Id.* at 793. But the Court was at pains to affirm "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . ." *Id.* at 793 n.5. That responsibility is only heightened where, as here, there is "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring).

Like *Mandel*, *Fiallo* concerned judicial review of a policy decision that necessitated a balancing between constitutional interests and competing legitimate governmental concerns. In leaving such discretionary judgments to Congress, *Fiallo* said nothing about government action based on improper bias. It is one thing to say that courts should not second-guess complex discretionary decisions

based on plural competing (but legitimate) policy concerns. It is quite another to say government can act on the basis of constitutionally proscribed animus.

The Government's invocation of *Fiallo*, moreover, ignores subsequent precedent in which the Supreme Court has engaged in exacting scrutiny of similar statutory classifications based on gender. These subsequent cases contradict the Government's contention that *Fiallo* once stood for, or now should be considered to stand for, judicial acquiescence in discriminatory state action.

In *Miller v. Albright*, the Court rejected an Equal Protection challenge to another gender classification in the derivative citizenship statute. 523 U.S. 420 (1998). *Miller* cannot be reconciled with the Government's gloss on *Fiallo* for two reasons. First, the opinion of the Court in *Miller* upheld the classification only after carefully analyzing the law and determining that Congress had "a solid basis" for classifying by gender. 523 U.S. at 443. Second, a majority of the Justices in *Miller* declined to be guided by *Fiallo*. *See, e.g.*, *id*. at 429. Only two Justices, in a separate concurring opinion, invoked *Fiallo* for the broad proposition that "[j]udicial power over immigration and naturalization is extremely limited." *Id*. at 455 (Scalia, J., concurring). The Government reads *Fiallo* for a proposition that only two of nine members of the Court accepted in *Miller*. In so doing, it once more seeks a departure from established law rather than an application thereof.

The Court returned to the question whether the Equal Protection Clause clashed with the statutory framework for derivative citizenship in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001). Contrary to the Government's submission, the *Nguyen* Court did not limit its analysis to the face of the statute. To the contrary, the Court adjudicated a noncitizen's gender-based Equal Protection challenges and carefully scrutinized the "important governmental interest[s]" at stake before concluding that it could uphold the challenged gender classification. *Id.* at 64.

Thus even when acting with clear statutory authority, and even when purporting to act in the interest of promoting public order, the political branches' power over immigration matters is not immune from judicial review. Compliance with the Constitution is not a matter of merely checking a box by supplying some reason for a decision, no matter how unfounded or post hoc. And neither *Mandel* nor *Fiallo* is authority for the Government's position that an immigration policy decision motivated by animus can be insulated from judicial review by the facile expedient of tagging on some notionally valid policy ground.

II. Rescission Of The First Executive Order Did Not 'Wipe The Slate Clean' For Establishment Clause Purposes

The mere fact that a Second Executive Order has replaced the first does not foreclose Plaintiffs' arguments that the government's animus impermissibly motivated the Second Executive Order just like the first. The Supreme Court has made clear that the government cannot immunize an impermissibly-motivated

policy from judicial scrutiny merely by replacing it with a close substitute that purports to have a legitimate purpose. In *McCreary*, the Court invalidated exactly such a substitute policy on Establishment Clause grounds. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871 (2005). Similarly, in the school prayer context, the Court has held that where the state replaces an impermissible policy with a new policy that has the predictably same effect, the state has failed to "disentangle itself from the religious messages" of the original policy. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–06 (2000).

The Sixth Circuit has similarly recognized that a constitutionally suspect act cannot be immunized by the expediency of withdrawal and reenactment. *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 433 (6th Cir. 2011) ("Defendant's history of Establishment Clause violation casts aspersions on his purportedly secular purpose in hanging the poster in his courtroom."); *Am. Civil Liberties Union of Kentucky v. Grayson Cty., Ky.*, 591 F.3d 837, 847 (6th Cir. 2010) (noting the importance of the "history" of a challenged government action in the Establishment Clause context).

These are not the only contexts in which the tactic of reenactment has failed to successfully cleanse an unconstitutional motive. In the so-called "white primary cases," Texas first employed an all-white primary that was invalidated under the Fifteenth Amendment. *Nixon v. Herndon*, 273 U.S. 536 (1927). After this system

was struck down, *id*. at 541, the state replaced it with a private selection process that, although it employed a different method, "[brought] into being . . . precisely the kind of election that the Fifteenth Amendment seeks to prevent." *Terry v. Adams*, 345 U.S. 461, 469 (1953). The Court invalidated the replacement method of election as a flagrant attempt "to defeat the purposes of the Fifteenth Amendment." *Id*.

In other Equal Protection contexts, the Court similarly has refused to allow a challenged policy to escape close scrutiny merely because an earlier, unconstitutional iteration had been revoked, withdrawn, or replaced. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347, 364–65 (1915) (invalidating Alabama's "grandfather" voting clause on the ground that it "inherently brings . . . into existence" the same race-based prohibition that previously existed in Alabama law); *see also Goss v. Bd. of Educ. of Knoxville*, 373 U.S. 683, 686–87 (1963) (rejecting a transfer system included in school desegregation plans because it "lends itself to perpetuation of segregation"); *Hays v. Louisiana*, 936 F. Supp. 360, 369 (W.D. La. 1996) (invalidating state's second redistricting plan on a finding that both it and the earlier, invalid plan, were motivated by the same race-based concern).

These cases reflect the common-sense notion that impermissible motive does not evaporate once a policy is challenged, withdrawn, and replaced with a new

iteration. Constitutional prohibitions against state action with an impermissible motive would be of little effect if a state actor could simply withdraw and re-enact a measure once accused of bias, and thereby obtain a shield from judicial challenge.

III. Evidence of Unconstitutional Motive Exists On The Face of the Executive Orders As Well As In The Context of Their Promulgation

The animus-laden comments by the President and those tasked with drawing up and implementing the First and Second Executive Orders are by this point well-known. *See, e.g.*, Mem. Op., at 27–31, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC (D. Md. Mar. 16, 2017) (summarizing statements made by Defendants that the District Court accepted as "explicit, direct statements of President Trump's animus towards Muslims"). It is less well appreciated that *both* orders contain evidence of an unconstitutional purpose *on their face* in the form of explicit invocation of stereotypes linking Muslims as a group to gender-based violence.

The text of the First Executive Order was riddled with evidence of anti-Muslim bias. For example, in multiple provisions relating to refugee admissions, the First Executive Order created an express preference for adherents of "minority" religions. First Executive Order § 5(b). This was intended to benefit Christian minorities in Muslim-majority countries (from which the United States accepts large numbers of refugees), as the President admitted in contemporaneous

comments.[1] Moreover, the First Executive Order described its purpose in terms that were strikingly similar to language used in then-candidate Donald Trump's infamous December 7, 2015 press release calling for a "total and complete shutdown on Muslims entering the United States."[2] Specifically, the final paragraph of Section 1 of the First Executive Order stated:

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Each sentence of this paragraph closely tracked rhetoric in the December 7, 2015 press release. The reference to those bearing "hostile attitudes" toward the United States, for example, tracked a statement in the press release that "there is great hatred towards Americans by large segments of the *Muslim population*." *Id.* (emphasis added). Similarly, the references to those "who would place violent

[1] 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.

[2] Press Release, Donald Trump, 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.

ideologies over American law" and to those who engage in "violence against women, or the persecution of those who practice religions different from their own," tracked the statements in the press release accusing a majority of *Muslims* of believing that Muslims in America should have the choice to be governed by Sharia law (over American law), which the press release characterized as an ideology promoting violence against women and persecution of non-Muslims. *Id*.

In an effort to scrub the Muslim ban policy of its most blatant outward indicia of anti-Muslim bias, some of the language discussed above was excised in the Second Executive Order. Tellingly, however, notwithstanding the considerable public and judicial criticism of the First Executive Order's manifest anti-Muslim bias, the Second Executive Order retains clear anti-Muslim prejudice on its face, requiring the Secretary of Homeland Security to collect and publish data on foreigners' gender-based violence and "honor crimes" committed in the United States. Second Executive Order § 11. This reference to gender-based violence echoes the language in the First Executive Order stating that "the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women)." "Honor crimes" have nothing to do with the national security justification for the Order, but rather are code for bias against Muslims as uncivilized.

As Professor Lila Abu-Lughod of Columbia University explains in a declaration attached to this brief, "the term 'honor killing,' or 'honor crime,' has become a means of signaling a class of violence purportedly linked to Islam and committed by Muslim men," and therefore "a way of stigmatizing and demeaning Islam as a faith and Muslim men as a group as uncivilized and dangerous."[3] As Professor Abu-Lughod explains, "Neither Islamic law nor its religious authorities, however, uniformly or consistently condone honor crimes." *Id.* ¶ 14. Furthermore, "the term 'honor crime' is commonly invoked by individuals and groups with an anti-Muslim agenda because it reinforces the [false] stigmatization of Muslims as violent and backward." *Id.* ¶ 15.[4] Its presence in both Executive Orders—instruments that are purportedly about national security rather than domestic violence—is evidence of the invidious stereotypes about Muslims that underpin the Muslim ban policy.

The Second Executive Order seeks to erase its roots as a Muslim ban by declaring by fiat that the First Executive Order "did not provide a basis for discriminating for or against members of any particular religion." Second

[3] Decl. of Prof. Lila Abu-Lughod.

[4] For examples of the invocation of the idea of honor killing in broad and stereotyping anti-Muslim arguments. see Pamela Geller, *Nonie Darwish: Perverted Islamic Feminism*, AFDI (Dec. 2, 2015), http://afdi.us/nonie-darwish-perverted-islamic-feminism; Chad Groening, *Silence over 'honor killing' stuns Islam critic*, One News Now (July 14, 2008), https://www.onenewsnow.com/politics-govt/2008/07/14/silence-over-honor-killing-stuns-islam-critic.

Executive Order § 1(b)(4). But "the world is not made brand new every morning," and this Court should reject any invitation to "turn a blind eye to the context in which [the] policy arose." *McCreary Cty.*, 545 U.S. at 866 (citations omitted) (alteration in original).; *see also Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431–32 (6th Cir. 2011) (Clay, J.) ("[R]eviewing courts must look with the eye of an observer familiar with the history of the government's actions and competent to learn [what] history has to show."). As evidenced by the plain text of the Executive Orders, the anti-Muslim animus that pervaded then-candidate Trump's thinking and rhetoric during the presidential campaign continues to drive the policy reflected in the Second Executive Order.

Finally, the fact that this Executive Order is infected with impermissible animus does not preclude further executive action in this field. Indeed, the Government has taken actions to prevent terrorism through international aviation since the first injunctions were issued against the Executive Orders at issue here.[5] Each executive action is judged on its own merits. As explained above, there is evidence of a common impermissible motive behind both the First and the Second Executive Orders. Future policy decisions must be judged on their own merits—and there is simply no reason to assume that the Government will not be able to

[5] *See, e.g.*, Department of Homeland Security, Fact Sheet: Aviation Security Enhancements for Select Last Point of Departure Airports with Commercial Flights to the United States, Mar. 21, 2107, https://www.dhs.gov/news/2017/03/21/fact-sheet-aviation-security-enhancements-select-last-point-departure-airports.

apply its policy expertise appropriately in the future to fashion new policies responsive to real security threats.

IV. The Executive Order Disproportionately Injures Muslims, Including U.S. Citizens and Longtime U.S. Residents

If allowed to be enforced, the Executive Order will again immediately cause more suffering to U.S. citizens and Legal Permanent Residents with family members excluded or exiled by the ban; to American civil society and religious groups wishing to invite scholars and religious leaders; and universities and businesses seeking to recruit the best available talent. As American Muslims, Amici are acutely threatened by these injuries.[6]

Amici also suffer an additional injury as a result of the stigma that has attached to all American Muslims (and those perceived as Muslim as a consequence of their ethnicity), unfairly and irrationally, as a result of the First and Second Executive Orders and the public pronouncements of the President and his advisors in connection therewith. Contrary to the misperception spread by the

[6] *See e.g.*, Shashank Bengali, Nabih Bulos, and Ramin Mostaghim, *Families hoping to make the U.S. their home scramble to rearrange their lives*, L.A. TIMES (Jan. 27, 2017), http://www.latimes.com/world/la-fg-refugees-order-reaction-20170127-story.html (detailing the struggles of families with children affected by the Executive Order); Adrienne Mahsa Varkiani, *Trump's Muslim ban is tearing apart families*, THINK PROGRESS (Jan. 30, 2017), https://thinkprogress.org/trump-muslim-ban-families-8a62d8c688e (documenting the experience of individuals affected by the Executive Order); Gillian Mohney, *Children and Refugees Who Planned Medical Care in the US Stuck After Trump Executive Order*, ABC NEWS (Jan. 31, 2017), http://abcnews.go.com/Health/children-refugees-planned-medical-care-us-stuck-trump/story?id=45154920 (discussing the complications suffered by children who had planned to seek medical care in the United States); Donald G. McNeil Jr., *Trump's Travel Ban, Aimed at Terrorists, Has Blocked Doctors*, N.Y. TIMES (Feb. 6, 2017), https://nyti.ms/2lg7tu1 (detailing difficulties caused by the Executive Order to medical professional working abroad).

"Muslim ban," the presence of Muslims in America is not a threat to American security. Muslims have been a part of America since its founding, when 10–15% of slaves forcibly brought to America were Muslim. Today, Muslims represent 1% of the U.S. population. Muslims have expended their blood, sweat, and tears building and defending the United States. In fact, today, more than 5,000 Muslims serve in the U.S. military, and many have given their lives in recent wars in defense of U.S. interests. They also provide necessary healthcare, educate our nation's children, create jobs, and contribute innovation that is an essential driver of our nation's economic growth.[7]

[7] *See generally* Kambiz Ghanea Bassiri, A History of Islam in America: From the New World to the New World Order (Cambridge 2010).

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Amici respectfully request that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ Dina Hayes (IL Bar No. 6270400)
Arnold & Porter Kaye Scholer LLP
70 West Madison Street, Suite 4200
Chicago, Illinois 60602-4321
(312) 583-2553
dina.hayes@apks.com

Attorney for Amici Curiae

Johnathan J. Smith
Aziz Huq
Muslim Advocates
P.O. Box 71080
Oakland, CA 94612
415-692-1484
johnathan@muslimadvocates.org
aziz.huq@gmail.com

Jonathan S. Martel
Bethan R. Jones
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
202-942-5000
jonathan.martel@apks.com
bethan.jones@apks.com

Anton Ware
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center10th Floor
San Francisco, CA 94111-4024
415-471-3100
anton.ware@apks.com

Andrew D. Bergman
Arnold & Porter Kaye Scholer LLP
700 Louisiana Street
Suite 1600
Houston, TX 77002
713- 576-2430
andrew.bergman@apks.com

Of Counsel to Amici Curiae

Dated: May 19, 2017

CERTIFICATE COMPLIANCE

I hereby certify that, pursuant to Fed. R. Civ. P. 32(a)(5) and L.R. 5.1 the attached brief is double spaced, uses a proportionately spaced typeface of 14 points or more, and contains a total of 5,016 words based on the word count program in Microsoft Word.

Dated: May 19, 2017

By: */s/* Dina Hayes
Dina Hayes