UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Hameed Khalid Darweesh and,
Haider Sameer Abdulkhaleq Alshawi,
on behalf of themselves and others similarly situated,

Petitioners,

and

People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York,

Intervenor-Plaintiff,

v.

Donald Trump, President of the United States; U.S. Department of Homeland Security; U.S. Customs and Border Protection; John Kelly, Secretary of DHS; Kevin K. McAleenan, Acting Commissioner of CBP; and James T. Madden, New York Field Director, CBP,

Respondents.

Civil Action No. 1:17-cv-00480

Hon. Carol Bagley Amon

BRIEF OF MUSLIM ADVOCATES, AMERICAN MUSLIM HEALTH PROFESSIONALS, COUNCIL FOR THE ADVANCEMENT OF AMERICAN MUSLIM PROFESSIONALS, ISLAMIC MEDICAL ASSOCIATION OF NORTH AMERICA, MUPPIES, INC., NATIONAL ARAB AMERICAN MEDICAL ASSOCIATION, NETWORK OF ARAB-AMERICAN PROFESSIONALS, AS AMICI CURIAE, SUPPORTING PETITIONERS AND INTERVENOR-PLAINTIFF

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Amici sought leave of the Court to file this amicus brief. Dkt. No. 84. The Court granted permission on February 15, 2017.

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. 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 through teams of state liaisons and working with interfaith communities through its "Connecting Americans to Coverage" campaign.

Council for the Advancement of Muslim Professionals ("CAMP") is an association of mid- to senior-level Muslim professionals, which works to facilitate and inspire the development of Muslim Professionals across the United States. CAMP currently has a membership base of approximately 7,500 professionals.

The **Islamic Medical Association of North America** ("IMANA") was founded in 1967 and represents the largest network of American Muslim physicians, dentists, and allied healthcare professionals in North America. IMANA provides professional networking opportunities for healthcare practitioners; acts as a medical ethics resource for educational institutions, medical professionals and medical students, residents and fellows; and provides continuing medical education.

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. Muppies members are leaders in the fields of finance, consulting, technology, venture capital, healthcare, entrepreneurship and social enterprise.

The **National Arab American Medical Association** ("NAAMA") is the largest international organization of Arab American health care providers, trainees and medical students based in North America. Members of the association include well-trained clinicians, high ranking university professors, leaders of several medical societies, and scientists involved in cutting edge research and innovation.

Network of Arab-American Professionals ("NAAP") is a professional organization grounded in the notion that all Arabs in America need to connect to advance the community. NAAP promotes professional networking and social interaction among Arab-American and Arab professionals in the United States and abroad and educates both the Arab-American and non-Arab communities about Arab culture, identity, and concerns.

INTRODUCTION

Amici are business, education, finance, healthcare, legal, science, technology, and other professional members of the American Muslim community who are directly harmed and stigmatized by President Donald J. Trump's executive order of January 27, 2017 "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"). Amici urge the Court to grant the Petitioners' and Intervenor-Plaintiff's motion for a preliminary injunction against enforcement of the Executive Order.

The Executive Order is unconstitutional. Its animating purpose is to reduce the flow of Muslims entering the United States and to make it easier for Christians, rather than Muslims, to

obtain refugee status. This purpose is reflected in the plain language of the Executive Order. It is reflected in Mr. Trump's campaign promise — which the President sought to fulfill, in part, through the Executive Order — of "a total and complete shutdown of Muslims entering the United States." Ware Decl. Ex. 1. And it is reflected in Mr. Trump's professed conviction that "Islam hates us," Ware Decl. Ex. 2, and that it is "very hard" to make a distinction between Islam and "radical Islam" because "you don't know who is who." Ware Decl. Ex. 2.

As confirmed by Mr. Trump's own statements and that of his close advisors, the evolution of his proposed "Muslim ban" into a policy of suspending immigration from certain majority-Muslim countries was a change in nomenclature only. A veneer of constitutionality was added to the Muslim ban without abandoning the negative and false stereotypes of Muslims upon which the ban was based. For example, when confronted with his running mate Mike Pence's statement that banning Muslims would be unconstitutional, Mr. Trump responded, "So you call it territories, okay?" Ware Decl. Ex. 3. The following week, Mr. Trump explained, "People were so upset when I used the word Muslim. 'Oh, you can't use the word Muslim.' . . . And I'm okay with that, because I'm talking territory instead of Muslim. But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay?" Ware Decl. Ex. 4.

On the day he signed the Executive Order, President Trump stated that one of its purposes was to favor Christian refugees over Muslim refugees. Ware Decl. Ex. 5. The following day, President Trump's advisor and surrogate Rudy Giuliani admitted that the policy implemented in the Executive Order resulted from an instruction by the President to find "the right way" to implement the Muslim ban "legally." Ware Decl. Ex. 6.

Faced with damning evidence of discriminatory motive, the Government has argued before the Eastern District of Virginia and the Ninth Circuit Court of Appeals that both its actions and its motives are immune from judicial review. *See Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855, at *5 (E.D. Va. Feb. 13, 2017) ("[D]efendants argue that courts 'lack jurisdiction to review the Executive Branch's decisions concerning visa revocation and entry,' at least in part because those decisions involve national security judgments."); *see also Washington v. Trump*, No. 17-35105, 2017 WL 526497, at *5 (9th Cir. Feb. 9, 2017) ("The Government contends that the district court lacked authority to enjoin enforcement of the Executive Order because the President has 'unreviewable authority to suspend the admission of any class of aliens.'").

Before this Court, the Government similarly seeks a minimal form of judicial review, and argues that the Executive's subjective motivations for enacting the Executive Order are "simply irrelevant." Resps.' Mem. of Law in Support of Mot. to Dismiss, Dkt. 66, at 11–13. However framed, the Government's claim to stand beyond effectual judicial review is wrong. The judiciary has not only the authority, but the duty, to review the constitutionality of executive branch action that subjects a suspect class to unlawful and discriminatory treatment. The Constitution contains no license for the government to treat any protected class with invidious malice.

The irreparable harms to U.S. citizens, lawful permanent residents, and valid visa-holders threatened by enforcement of the Executive Order are undeniable. "Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary." *Statharos v. New York City Taxi and Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir.1999); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (deprivation of constitutional rights, even

for minimal periods of time, constitutes irreparable injury). If enforced, the Executive Order will again break apart families, disrupt marriages, stymie travel for religious, work, family, and medical purposes, disrupt needed medical treatment, and destroy work and study opportunities, among many other irreparable injuries. And it will do so on the basis of invidious stereotypes about a minority religious group. Amici therefore respectfully urge the Court to grant the requested preliminary injunction.

ARGUMENT

A. The President's Executive Orders on Immigration Are Subject to Important Constitutional Limitations.

1. The Executive Order Is Not Immune From Judicial Review

Contrary to arguments advanced by the Government in other forums and before this Court,[1] the Executive Order is not immune from meaningful judicial review simply because it acts in the immigration or national-security sphere.

The Supreme Court's recent cases have clarified that the political branches' power over immigration matters is subject to judicial review even when the policy targets *noncitizens* and even when a security rationale is advanced. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding that so-called "'plenary power' to create immigration law . . . is subject to important constitutional limitations" in the treatment of aliens). The political branches must use "a constitutionally permissible means of implementing" an immigration policy. *INS v. Chadha*, 462 U.S. 919, 941–942 (1983) (invalidating enforcement action against alien plaintiff on the basis of a structural constitutional limit on governmental power).

[1] *See, e.g.*, Resps.' Mem. of Law in Support of Mot. to Dismiss, Dkt. 66, at 11 n.2 (suggesting that a standard of judicial review "less than standard rational basis review" should apply in light of "special deference" to political branches in the immigration area).

The operation of constitutional constraints on the political branches' authority over immigration is embodied in recent cases concerning both aliens and citizens. For example, in *Zadvydas v. Davis*, the Supreme Court ruled in favor of an alien who had already been found removable based on a criminal record, citing Procedural Due Process concerns. 533 U.S. 678, 693 (2001). In *Nguyen v. INS*, 533 U.S. 53, 58 (2001), the Court adjudicated a noncitizen's Equal Protection challenges to gender classifications in the statutory frameworks regulating claims of derivative citizenship. The *Nguyen* Court carefully scrutinized the "important governmental interest[s]" furthered by the gender classification. *Id.* at 64.

The so-called plenary power (or consular non-reviewability) doctrine, upon which the Government has relied heavily in other forums, also does not operate as a bar to meaningful judicial review of the Executive Order. *First*, the doctrine limits judicial review of an individual consular officer's discretionary denial of a visa to a specific non-resident alien. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Practical concerns of administrability may support insulating the large volume of such discretionary, fact-specific consular-level visa decisions from time-consuming judicial review. Such concerns have no application, however, in the context of the Petitioners' and Intervenor-Plaintiff's *facial* challenge to the Executive Order, which bars entire populations categorically and on the basis of invidious stereotypes.

Second, even where it applies, the doctrine is not absolute. The Second Circuit has held, for example, that judicial review is available where a visa denial is challenged on First Amendment grounds. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 136 (2d Cir. 2009). Such review extends to analysis of the statutory basis for a decision and the existence of a finding by an official that such grounds exist. *Id.* Moreover, "a well supported allegation of bad faith … would render the decision not bona fide." *Id.* at 137. This is consistent with Justice

Kennedy's controlling opinion in *Kerry v. Din*, 135 S. Ct. 2128 (2015), which directs that courts should "look behind" the government's stated reasons for a visa decision if the plaintiff "plausibly alleged with sufficient particularity" "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2131. As demonstrated *infra*, the Petitioners' and Intervenor-Plaintiff's allegations of bad faith are supported by overwhelming evidence that unconstitutional animus motivated the Executive Order.

Third, it is important to recall the ignominious history of the doctrine that purports to limit the ability of the federal courts to consider constitutional claims in the immigration and national security contexts. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Supreme Court upheld the overtly racist Chinese Exclusion Acts.[2] The same sort of animus later led the federal government to intern Japanese-American citizens and aliens on the West Coast, a decision the federal courts did not overturn. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding wartime internment of Japanese-Americans). The Government's invocation of such a doctrine of nonreviewability to shield the President's "Muslim ban"[3] from judicial review will no doubt be remembered as akin to these infamous historical precedents.

2. The Court Is Not Precluded from Reviewing the Executive Branch's Motives

In other forums, the Government has contended that any inquiry into the President's motives in issuing the Executive Order would create "constitutional separation of powers problems." Defs.' Opp. to Plaintiff's Motion for TRO, at 22–23, *States of Washington &*

[2] For example, in *Fong Yue Ting*, the Court upheld a requirement that evidence of residency for aliens of Chinese origin be supported by "one credible *white* witness." 149 U.S. at 729-30.

[3] *See* Ware Decl. Ex. 1. (calling for a "total and complete shutdown on Muslims entering the United States").

Minnesota v. Trump, 2:17-cv-00141 (W.D. Wash.) (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). In this case, the Government has argued that such motives "are simply irrelevant." Resps.' Mem. of Law in Support of Mot. to Dismiss, Dkt. 66, at 13. *See also* Resps.' Mem. of Law in Support of Mot. to Dismiss, Dkt. 66, at 16 (suggesting that injunctive relief would "deeply intrude[] into the core concerns of the executive branch") (citing *Adams v. Vance*, 570 F.2d 950, 954–55 (D.C. Cir. 1978)). However clothed, the Government's assertions of broad immunity from motive-based judicial review are erroneous. They would have startling and disruptive consequences for the rule of law if accepted.

Contrary to the Government's position, in reviewing the Executive Order, the Court is duty-bound to consider not only the language of the Order but also its "historical context" and the "specific sequence of events leading to [its pronouncement]." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005); *accord Aziz v. Trump*, 2017 WL 580855, at *7 ("When determining what purpose motivates governmental action . . . what matters is what an objective observer would draw from the text of the policy, enlightened by historical context and the specific sequence of events leading to its adoption.") (internal quotation marks omitted). This duty flows from the nature of the constitutional and statutory violations that the Petitioners and Intervenor-Plaintiff have alleged.

With respect to the Petitioners' and Intervenor-Plaintiff's Equal Protection claims, this Court must address the credible allegations and evidence that the Executive Order was intended to discriminate against a discrete and insular religious minority. *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 200 (2d Cir. 2006) ("In order to trigger strict scrutiny, … plaintiffs with equal-protection claims … must demonstrate that his or her [treatment] was motivated by a discriminatory purpose."); *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005)

("[T]he Equal Protection Clause bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if such selective treatment was based on impermissible considerations such as race . . . .") (internal quotation marks omitted). Equal Protection challenges to federal action therefore require judicial consideration of both the "avowed *purpose* and practical effect of the law" to test its constitutionality. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (emphasis added).

With respect to Intervenor-Plaintiff's Establishment Clause claim, the Court must consider both "historical context" and the "specific sequence of events leading to" issuance of the Executive Order to determine whether it was intended, at least in part, to disfavor one faith over others. *McCreary County*, 545 U.S. at 866; *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that courts have a "duty . . . to distinguish a sham secular purpose from a sincere one"). In the context of the Free Exercise Clause, which is closely related to the Establishment Clause and Equal Protection arguments raised by Intervenor-Plaintiff, courts must determine whether "animus toward religion" partly motivated a state action. *Locke v. Davey*, 540 U.S. 712, 725 (2004). Doing so requires judges to look closely at a measure's "history" and "operation." *Id.* Courts also look closely at public, pre-enactment statements made by the enacting body. *Church of Lukumi Babalu v. Hialeah*, 508 U.S. 520, 541 (1993) (examining "minutes and taped excerpts" of city council meeting that produced challenged ordinance, and finding "significant hostility" toward a religious minority).

Nor does a different rule apply in the immigration or national security contexts. In previous antidiscrimination challenges to executive immigration-related action by noncitizens, the Supreme Court has looked to "the historical record" to determine whether "the actions at issue . . . were motivated by any racial animus." *INS v. Pangilinan*, 486 U.S. 875, 886 (1988);

see also Am. Acad. of Religion, 573 F.3d at 137 (even otherwise "nonreviewable" visa decision is subject to scrutiny where there is a "well supported allegation of bad faith"); *accord Din*, 135 S. Ct. at 2131 (Kennedy, J., concurring). In the national security context, the Court has also insisted on careful judicial scrutiny of the factual justifications for policy decisions that impinge on basic constitutional rights. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006) (following careful factual review of policy justifications for an executive order establishing military commissions, invalidating the latter on constitutional grounds).

B. Petitioners and Intervenor-Plaintiff Are Likely to Succeed In Demonstrating that the Purpose and Effect of the Executive Order Is Discrimination Against Muslims

1. The Evidence of Discriminatory Motive Is Strong

Even before any discovery has been taken, there is ample evidence to support Petitioners' and Intervenor-Plaintiff's allegation that the Executive Order is motivated, at least in part, by a desire to discriminate against Muslims. This evidence is manifest in the context of the Executive Order's promulgation and on its face.

a. The President's own repeated statements confirm that the Executive Order is intended to implement his campaign pledge to put a temporary halt on Muslims entering the United States

Prior to taking office, then-candidate Donald J. Trump made discrimination against Muslims a central pillar of his campaign for the presidency. On November 18, 2015, in response to terror attacks in Paris, Mr. Trump stated that "[w]e're going to have no choice" but to close down some mosques in the United States, where "some bad things are happening." Ware Decl. Ex. 7. On December 7, 2015, in the wake of the attack in San Bernardino, California, then-candidate Mr. Trump released a written statement, entitled "Donald J. Trump Statement on Preventing Muslim Immigration," which called for a "total and complete shutdown on Muslims

entering the United States until our country's representatives can figure out what is going on." Ware Decl. Ex. 1. The statement continued (emphasis added):

> According to Pew Research, among others, there is ***great hatred towards Americans by large segments of the Muslim population***. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled, "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

The surveys cited in the statement had long since been discredited, *see* Ware Decl. Ex. 8, but the message was clear: many Muslims bear hostile attitudes toward the United States and favor violent ideology over American law and — for that reason — immigration by Muslims to the United States should be suspended.

This proposed "Muslim ban" became a core promise of the Trump campaign, repeated by Mr. Trump and his advisors and surrogates at campaign events across the country. Asked during a televised debate on January 14, 2016 whether he had rethought his "comments about banning Muslims from entering the country," Mr. Trump responded, "No." Ware Decl. Ex. 9. On March 9, 2016, Mr. Trump stated in a televised interview, "I think Islam hates us." Ware Decl. Ex. 2. The full exchange between Mr. Trump and CNN's Anderson Cooper is instructive (emphasis added):

> Cooper: Do you think Islam is at war with the West?
>
> Trump: ***I think Islam hates us***. There is something — there is something there that is a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us.
>
> Cooper: In Islam itself?

> Trump: You're going to have to figure that out. OK. You'll get another Pulitzer, right? But you'll have to figure that out. But there's a tremendous hatred. And we have to be very vigilant. We have to be very careful. And ***we can't allow people coming into this country who have this hatred of the United States . . . and of people that are not Muslim***.
>
> Cooper: I guess the question is, is there a war between the west and radical Islam or between the west and Islam itself?
>
> Trump: Well, it's radical but it's very hard to define. It's very hard to separate because you don't know who is who.

Amid widespread outcry that the proposed Muslim ban would be un-American and unconstitutional, Mr. Trump and his advisors began shifting their rhetoric, all the while making clear that their goal continued to be some form of ban on immigration by Muslims. On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: "I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so." Ware Decl. Ex. 10. Mr. Trump then specified that the ban would be "temporary," and would apply to certain "areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats." Ware Decl. Ex. 10.

Next, in a July 17, 2016 televised interview, Mr. Trump was confronted with his then-running mate Mike Pence's statement that the Muslim ban would be unconstitutional. Mr. Trump's response made clear that the same purpose of stemming the flow of Muslim migrants would be pursued by other ends: "So you call it territories, okay? We're gonna do territories." Ware Decl. Ex. 3. A week later, in a July 24, 2016 interview, Mr. Trump was asked if his shifting rhetoric signified a "rollback" from his proposed "Muslim ban." He answered: "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 territories. People were so upset when I used the word Muslim. '***Oh, you***

can't use the word Muslim.' . . . And I'm okay with that, because I'm talking territory instead of Muslim." Ware Decl. Ex. 4. And on October 9, 2016, during a televised presidential debate, Mr. Trump stated, "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." Ware Decl. Ex. 11.

On January 27, 2016, President Trump fulfilled his campaign promise by signing the Executive Order. Among other things, the Executive Order temporarily bans entry of all nationals from (initially) seven countries whose nationals are overwhelmingly Muslim, temporarily suspends the entire U.S. Refugee Admissions Program, establishes a policy of prioritizing certain religious denominations over others upon resuming the program, and indefinitely bars entry of Syrian refugees. The Executive Order also provides that the President may expand without notice the list of seven countries initially designated.

On the day he signed the Executive Order, President Trump stated that one of the purposes of the changes in refugee policy he was adopting was to favor Christian refugees over Muslim refugees. Ware Decl. Ex. 5 (claiming that "[i]f you were a Muslim [in Syria] you could come in [to the United States], but if you were a Christian, it was almost impossible . . . . And I thought it was very, very unfair. So we are going to help them [Christian refugees]").[4] This religious-based preference is reflected in Sections 5(b) and 5(e) of the Executive Order, which limit refugee claims based on religious-based persecution to individuals whose religion is a "minority religion in the individual's country of nationality." As a practical matter, the vast majority of the 38,000 Muslim refugees admitted to the United States in 2016 were nationals of

[4] *See also* Ware Decl. Ex. 12 ("Christians in the Middle-East have been executed in large numbers. We cannot allow this horror to continue!").

Muslim-majority countries, thus rendering the majority of Muslim refugees ineligible for the religious-based persecution preference.[5]

The following day, January 28, 2017, President Trump's advisor and surrogate Rudy Giuliani admitted that the policy implemented in the Executive Order resulted from an instruction by the President to find "the right way" to "legally" implement the "Muslim ban." Ware Decl. Ex. 6. As of the date of this amicus submission, the Trump campaign's December 7, 2015 press release entitled "Donald J. Trump Statement on Preventing Muslim Immigration," remains on the Donald J. Trump campaign website[6] and on President Trump's Twitter page,[7] which President Trump has continued to use regularly even after taking office.

b. The Executive Order reflects anti-Muslim bias on its face

As noted above, Sections 5(b) and 5(e) of the Executive Order create an explicit preference for refugees who are members of a "minority religion." The practical effect of this language is to exclude from this preference the vast majority of Muslim refugees.[8] Moreover, the final paragraph of Section 1 of the Executive Order demonstrates that negative and false stereotypes about Muslims animated the Order. That paragraph reads:

> 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.

[5] *See* Ware Decl. Ex. 13.

[6] *See* Ware Decl. Ex. 1.

[7] *See* Ware Decl. Ex. 14.

[8] *See* Ware Decl. Ex. 13.

For two reasons, this language in Section 1 is evidence of an impermissible animus motivating the Executive Order.

First, Section 1 states that the Executive Order targets groups that engage in misogynistic or religious-based violence. The Executive Order associates such violence with "honor killings." This is a practice commonly (if falsely) associated with *Muslims*.[9] In this fashion, the Executive Order expressly singles out Muslims as more prone to violence than other groups. This implication is reinforced by Section 3(c) of the Executive Order, which isolates citizens of Muslim-majority countries as posing the kinds of violent threats enumerated in Section 1.

Second, each sentence of this paragraph of Section 1 closely tracks the rhetoric used repeatedly by Mr. Trump to justify his proposed "Muslim ban." Hence, the reference to those bearing "hostile attitudes" toward the United States, for example, tracks the statement in Mr. Trump's December 7, 2015 press release that "there is great hatred towards Americans by large segments of the *Muslim population*." Ware Decl. Ex. 1 (emphasis added). Similarly, the references to those "who would place violent 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," track the statements in Mr. Trump's December 7, 2015 press release accusing a majority of *Muslims* of believing that Muslims in America should have the choice to be governed by Shariah law (over American law), which the press release then goes on to characterize as an ideology promoting violence against women and persecution of non-Muslims. Ware Decl. Ex. 1.

Accordingly, the text of the Executive Order itself contains evidence of invidious generalizations about a protected class that "render [a] decision not bona fide." *Am. Acad. of*

[9] *See, e.g.*, Resolution 1327 (2003) of the Council of Europe ("The Assembly notes that whilst so-called 'honour crimes' emanate from cultural and not religious roots and are perpetrated worldwide (mainly in patriarchal societies or communities), the majority of reported cases in Europe have been amongst Muslim or migrant Muslim communities (although Islam itself does not support the death penalty for honour-related misconduct).")

Religion, 573 F.3d at 137; *accord Kerry v. Din*, 135 S. Ct. at 2131 (Kennedy, J., concurring). This evidence is amplified and confirmed beyond any doubt by the statements of its proponents and enactors.

c. The fact that the Executive Order halts immigration by many but not all Muslims in no way defeats Plaintiffs' allegation of bad faith

The fact that the Executive Order implements President Trump's campaign promise to halt Muslim immigration to the United States partially, rather than fully, does nothing to weaken the evidence of anti-Muslim bias described above. In no other context is it the case that a failure to discriminate against all members of a suspect class defeats any claim of discrimination. In *United States v. Windsor*, for example, the Court invalidated on Equal Protection grounds a federal statute "motived by an improper animus" against gays and lesbians. 133 S. Ct. 2675, 2693 (2013). The Court invalidated the statute even though it only applied to the subset of gays and lesbians who chose to marry. *Id.* at 2683. Discrimination on the basis of religious faith need not be absolute or as far reaching as conceivable to be actionable under the Constitution. *Cf. Church of Lukumi Babalu*, 508 U.S. at 520 (invalidating ordinance that banned one kind of religious practice, but left other forms of religious observance untouched).

A requirement that a discriminatory policy cover all and only members of a protected class, moreover, would invite the circumvention of constitutional rights. Those motivated by unlawful purposes could easily and cheaply avoid judicial review by simply tweaking the scope of their actions.

The evidence does not support an inference that President Trump has changed his repeatedly professed belief that large segments of the Muslim population hate America or that immigration by Muslims should be halted. To the contrary, the evidence (even before discovery) demonstrates that President Trump's policy of halting immigration from seven countries whose

nationals are overwhelmingly Muslim was adopted to lend a patina of lawfulness to the "Muslim ban."

2. The Evidence of Discriminatory Harm Is Strong

In the initial days of its implementation, the Executive Order resulted in a number of concrete harms that disproportionately (although by no means exclusively) injured American Muslims and their relatives and loved-ones, including many lawful permanent residents ("LPRs") who are nationals of the listed countries; U.S. citizens and LPRs with family members who are nationals of the listed countries; and longtime residents who are nationals of the listed countries and who prior to issuance of the Executive Order held valid work or student visas. Families were separated, marriages disrupted, travel for work, family, medical, and religious purposes frustrated, and medical needs left unmet, among other irreparable injuries. If allowed to be enforced, the Executive Order will again immediately cause more suffering of this nature. As American Muslims, Amici have suffered and are threatened with these injuries.[10]

Moreover, Amici are suffering 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 Executive Order and the public pronouncements of the President and his advisors in connection therewith. Contrary to the misperception spread by the "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 US population. Muslims have expended their blood, sweat, and tears building and defending the

[10] *See e.g.*, Ware Decl. Ex. 15 (detailing the struggles of families with children affected by the Executive Order), Ware Decl. Ex. 16 (documenting the experience of individuals affected by the Executive Order), Ware Decl. Ex. 17 (discussing the complications suffered by children who had planned to seek medical care in the United States), Ware Decl. Ex. 18 (detailing difficulties caused by the Executive Order to medical professional working abroad).

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 US 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.[11]

CONCLUSION

The Government has no legitimate interest in discriminating against Muslims or in exploiting "negative attitudes, or fear" toward Muslims. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). The invidious stereotype that "Islam hates us" — or that Muslims, in the words of the Executive Order, "bear hostile attitudes toward [the United States] and its founding principles" and "would place violent ideologies over American law" — is not a legitimate basis for government action. The Executive Order is pervaded by an unconstitutional animus toward Muslims and, if not enjoined, will cause immediate and irreparable injury to numerous American Muslim and their families and loved ones. Amici therefore urge the Court to grant the requested preliminary injunction.

Dated: New York, New York

February 16, 2017

ARNOLD & PORTER KAYE SCHOLER LLP

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

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