No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, No. 17-cv-00361 (Chuang, J.)

BRIEF OF MUSLIM RIGHTS, PROFESSIONAL AND PUBLIC HEALTH ORGANIZATIONS AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES, AND IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY AND ON THE MERITS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1351 Caption: International Refugee Assistance Project v. Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Muslim Advocates
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Robert A. DeRise Date: 4/19/2017

Counsel for: Amicus Curiae

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Pursuant to FRAP 26.1 and Local Rule 26.1,

American Muslim Health Professionals
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Muppies, Inc.
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

The National Arab American Medical Association
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

The Network of Arab-American Professionals
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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INTEREST OF THE AMICI CURIAE[1]

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

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

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.

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. Since its founding, twenty-seven chapters have been established in the United States and Canada. In 1990, NAAMA was created to support international medical assistance projects, educational exchanges, scholarships, research grants, and emergency medical aid in areas of conflict. 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. In the United States, the foundation supports professional and educational activities aimed at Arab American health education and disease prevention in cooperation with community-based organizations. Members have also donated their time and money to help the relief efforts following Hurricanes Katrina and Rita. Internationally, the foundation sponsors projects, focusing on the Arab world. It has sponsored humanitarian projects in Iraq in the wake of the Iraq War. Currently, volunteers from the association conduct periodic missions to countries surrounding Syria to provide humanitarian medical care and establish eye care and dental clinics to benefit local populations and refugees.

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 uphold the district court's well-reasoned and carefully crafted injunction barring enforcement of the Second Executive Order. That Order is unlawful on both constitutional and statutory grounds. Amici's submission makes three points in support of the Establishment Clause holding of the District Court. Mem. Op., at 25–38, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC (D. Md. Mar. 16, 2017), ECF No. 149 ("Mem. Op.").

First, in analyzing the constitutionality of the Second Executive Order under the First Amendment, the District Court correctly looked beyond the face of the order. 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 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 national security concerns are tendered as justification.

Second, in promulgating the Second Executive Order, the Government tried but failed to fully excise the many indicia of unconstitutional bias that had been apparent on the face of the First Executive Order. As was true of its predecessor, the Second Executive Order directly evinces unconstitutional animus against Muslims *on its face*. This textual evidence is consistent with and further supports the District Court's finding of bias on the basis of the process by which the First and Second Executive Orders were promulgated.

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 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

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") (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 clear beyond doubt today that "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 on the basis 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 the motivations underlying the challenged immigration actions. To the contrary, it 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").

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

The Government relies on two cases, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), for the proposition that judicial review of questions of constitutional law is limited in the immigration context. Brief for Appellants, Dkt. 36, at 35–37. Neither decision aids the Government.

Rather, the Government's position rests on dicta excised from its context, and a studied disregard of subsequent precedent.

1. *Kleindienst v. Mandel* 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, it 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. This, 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 engage in a fresh "balancing" of First Amendment interests against state interests or otherwise "look behind" the inadmissibility decision. *Id.* at 770.

Only when ripped from its context can *Mandel*'s textual reference to "facially legitimate and bona fide" reasons be warped into an all-encompassing shield against judicial review of unconstitutional motives.

First, 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.

Second, unlike in the present case, in *Mandel* there was no question that the Government's motive was "legitimate" on its face and "bona fide" in its substance—the *Mandel* Court cited an affidavit by the alien's own counsel conceding the existence of the past "noncompliance" with visa conditions. *Id.* at 758 n.5. No question of pretext or unlawful motive was considered.

Third, the Government's present assertion of unreviewable discretion is irreconcilable with the very language of *Mandel* upon which it relies. Under *Mandel*, the immigration decision in question must have been taken for a "bona fide" reason. Dictionary definitions of "bona fide" given contemporaneously to *Mandel* define that term as: "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'"). The Government's assertion of unreviewable discretion turns the language of *Mandel* on its head by treating the requirement of a "*bona fide*" reason

as meaning "any" reason, even if pretextual and unjustified in fact. To accept the Government's revisionist account of *Mandel*, therefore, would abrogate, rather than follow, precedent.

Subsequent judicial treatment of *Mandel* confirms its 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, but 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.

Circuit courts 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))).

2. *Fiallo v. Bell* 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.

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. To the contrary, 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. 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. RESCINDMENT OF THE FIRST EXECUTIVE ORDER DID NOT 'WIPE THE SLATE CLEAN' FOR ESTABLISHMENT CLAUSE PURPOSES

The Government argues that its rescindment of the First Executive Order and promulgation of a revised order was effective in removing from the policy any taint of unconstitutional motive. Gov't Mem. in Opp'n to Pl.'s Mot. For TRO at 6, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC (D. Md. Mar. 13, 2017), ECF No. 122. The Supreme Court has made clear, however, 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.

That was the Court's holding in *McCreary*, where it 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).

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*.

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.[2] 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."[3] 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 ideologies over American law" and to those who engage in "violence against

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[2] 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.

[3] 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.

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 and reiterates language that bespeaks clear anti-Muslim prejudice.

In Section 11, the Second Executive Order requires that the Secretary of Homeland Security collect and make publicly available certain data. In addition to information about terrorism-related offenses, the Secretary is required to collect "information regarding the number and type of acts of *gender-based violence against women, including so-called 'honor crimes' in the United States by foreign nationals*" (emphasis added). 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)."

At first blush, the invocation of private violence against women in the context of national security policy might seem puzzling and out of place. But as Professor Lila Abu-Lughod of Columbia University explains in a declaration filed in another challenge to the Second Executive Order, "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."[4] 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. 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

[4] Decl. of Prof. Lila Abu-Lughod, *Universal Muslim Association of America, Inc. v. Trump*, No. 1:17-cv-00537-TSC (D. D.C. Apr. 11, 2017), ECF No. 36, https://goo.gl/G5Sbby.

Executive Order § 1(b)(4). But "the world is not made brand new every morning," and the District Court properly rejected the Government's 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). 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.

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.[5]

[5] *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-

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 "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.[6]

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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).

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

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court affirm the District Court's decision.

Respectfully submitted,

Date: April 19, 2017

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Dated: April 19, 2017

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