

The Honorable James L. Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JOHN DOES, et al.,
Plaintiffs,
v.
DONALD TRUMP, et al.,
Defendants.

CASE NO. C17-0178-JLR
AMICI CURIAE BRIEF
(RELATING TO BOTH CASES)

JEWISH FAMILY SERVICES, et al.,
Plaintiffs,
v.
DONALD TRUMP, et al.,
Defendants.

CASE NO. C17-1707-JLR

Note on Motion Calendar:
December 4, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2 INTEREST OF *AMICI CURIAE* 2

3 SUMMARY OF ARGUMENT 2

4 ARGUMENT 3

5 Social Categorization and Stereotyping Creates Dangerous Conditions for Members of

6 Minority Groups 3

7 A. Stereotyping Minorities Creates a Climate for Discrimination 3

8 B. The Executive Order Is the Product of Centuries of Discriminatory Stereotypes

9 About Muslims 5

10 C. The Executive Order Is Based on Stereotypes About Muslims as “Anti-American”

11 and “Terrorists” 8

12 D. Government Legitimization of Muslim Stereotypes Has Encouraged Violence

13 Against Muslims, and Inhibited Millions of Muslims in the Practice of Their

14 Religion 14

15 1. Government Stereotyping Leads to Violence and Discrimination 14

16 2. The President’s Statements Have Encouraged Violence 15

17 3. Stereotyping and Discrimination Harms All Americans, Not Just Those

18 Directly Affected by Specific Acts 18

19 CONCLUSION 19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12

INTERESTS OF AMICI CURIAE

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Amici, National Association for the Advancement of Colored People, Advocates for Youth, Chicago Lawyers’ Committee for Civil Rights Under Law, Judge David L. Bazelon Center for Mental Health Law, Mississippi Center for Justice, National Center for Lesbian Rights, People for the American Way Foundation, Southern Coalition for Social Justice, and Washington Lawyers’ Committee for Civil Rights and Urban Affairs, are national and regional civil rights groups interested in the promotion of civil liberties throughout the country, and the elimination of discrimination in any form.

SUMMARY OF ARGUMENT

In promotion of their interests, *amici* respectfully submit this brief to advance a key argument in support of granting the plaintiffs’ request for injunctive relief. *Amici* submit that the balance of equities and public interest weigh heavily in favor of enjoining President Trump’s September 24, 2017 Executive Order, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats” (the “Executive Order”), as it improperly promotes social categorization and stereotyping that endangers the lives and well-being of individuals of the Muslim faith. The Executive Order is the product of several centuries of Muslim stereotyping in this country, and harms even those who are not the direct victims of specific attacks on immigrants. Here, the evidence demonstrates that, regardless of the Government’s *post-hoc* explanations, the Executive Order was motivated by animus toward Muslims and singled out, as a proxy, those born in the targeted majority-Muslim countries.

ARGUMENT

**Social Categorization and Stereotyping Creates
Dangerous Conditions for Members of Minority Groups.**

A. Stereotyping Minorities Creates a Climate for Discrimination.

The balance of equities and public interest in this case weigh in favor of enjoining the Executive Order due to the discrimination it promotes. As the courts have long recognized, laws such as the Executive Order improperly promote social categorization and stereotyping of Muslims that lead to the endangerment of the lives of those who practice Islam, a minority religion.

The Supreme Court has repeatedly stated that discriminatory stereotypes can improperly affect decision making. Most recently, the Court recognized that disparate impact liability prevents segregated housing patterns that might otherwise result from the role of “covert and illicit stereotyping.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015); *see also Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (recognizing that “subtle forms of bias are automatic, unconscious, and unintentional and escape notice, even the notice of those enacting the bias”).

In *Price Waterhouse*, the Supreme Court recognized the role that sex stereotyping plays in discrimination cases, explaining that “stereotyped remarks can certainly be evidence that gender played a part” in an adverse employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

In *Windsor*, the Supreme Court emphasized that laws whose “purpose and effect” is “disapproval of” a “class” of people “impose a disadvantage, a separate status, and so a stigma” on the targeted group. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). The law at issue in that case, the federal Defense of Marriage Act, targeted same-sex couples for discrimination

1 and stigma, just as the challenged Executive Order today singles out Muslim individuals for ill-
2 treatment.

3 Similarly, in *Cleburne*, the Supreme Court explained that “race, alienage, and national
4 origin” are “so seldom relevant” to state interests, meaning that “such considerations are deemed
5 to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or
6 deserving as others.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In
7 *Griggs*, the Supreme Court held that the “absence of discriminatory intent does not redeem
8 employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority
9 groups and are unrelated to measuring job capability.” *Griggs v. Duke Power Co.*, 401 U.S. 424,
10 432 (1971).
11

12 The courts in other circuits also recognize that social categorization and stereotyping
13 create fertile grounds for discrimination, including in housing, employment decisions, and police
14 actions. *See, e.g., Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) (rejecting
15 “appeals to ‘common sense’ which might be infected by stereotypes” as insufficient to justify
16 police surveillance of Muslim individuals, businesses, and institutions) (quoting *Reynolds v.*
17 *Chicago*, 296 F.3d 524, 526 (7th Cir. 2002)); *Ahmed v. Johnson*, 752 F.3d 490, 503 (1st Cir.
18 2014) (finding “lack of explicitly discriminatory behaviors” does not preclude a finding of
19 “unlawful animus” in employment discrimination because “unlawful discrimination can stem
20 from stereotypes and other types of cognitive biases, as well as from conscious animus”) (quoting
21 *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999)); *United States v. Stephens*, 421
22 F.3d 503, 515 (7th Cir. 2005) (recognizing that racial stereotyping continues to play a role in jury
23 selection and the outcome of trials); *Thomas*, 183 F.3d at 42 (holding that Title VII’s ban on
24 “disparate treatment because of race” includes “acts based on conscious racial animus” and
25 “employer decisions that are based on stereotyped thinking”).
26
27
28

1 Relevant research shows that a psychological triggering phenomenon known as
2 “priming” exacerbates stereotyping and makes it more extreme. Priming occurs when “subtle
3 influences . . . increase the ease with which certain information comes to mind.” Richard H.
4 Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND*
5 *HAPPINESS* 69 (2008). In the case of racial stereotyping, which shares many attributes with
6 stereotyping of Muslims, priming an individual with race-based stereotypes can influence later
7 decisions by that individual. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial*
8 *Stereotypes about Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 489 (2004).

9
10 Social science research repeatedly demonstrates that individuals have a persistent
11 tendency to defer blindly to priming from authority figures. See Stanley Milgram, *Behavioral*
12 *Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 375-76 (1963). Therefore, as the
13 Supreme Court’s decisions in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493-94
14 (1954) and *Loving v. Virginia*, 388 U.S. 1, 8-12 (1967), demonstrate, discrimination with the
15 sanction of law raises unique and particular dangers.
16

17 **B. The Executive Order Is the Product of Centuries of Discriminatory**
18 **Stereotypes About Muslims.**
19

20 This country has had a long history of official stereotyping of Muslims as un-American
21 and unworthy of becoming Americans. During the Colonial era, two of the most outspoken
22 public figures who disseminated stereotypes of Muslims (then known as “Mahometans”) were
23 Cotton Mather and Aaron Burr – they consistently referred to “Mahometans” in highly
24 derogatory terms, including denouncing “that false Prophet and great Imposter Mahomet.”¹
25
26

27
28 ¹ Thomas S. Kidd, *AMERICAN CHRISTIANS AND ISLAM: EVANGELICAL CULTURE AND MUSLIMS FROM THE COLONIAL PERIOD TO THE AGE OF TERRORISM* 12 (2009); Thomas S. Kidd, “*Is It Worse to Follow Mahomet than the Devil?*” *Early American Uses of Islam*, 72 *CHURCH HISTORY* 766, 771-73, 779-80 (2003).

1 Even after this country became independent, prejudice against Muslims, as expressed
2 through consistent stereotyping, continued throughout the nineteenth century and into the
3 twentieth century.² For example, in discussing immigration legislation in 1910, Representative
4 Burnett of Alabama repeatedly referred to “Syrians” – then a catch-all term for Middle Eastern
5 immigrants who were Muslims – in derogatory terms, and made clear that he and his colleagues
6 viewed those immigrants as “the dirty Syrian[s] of today,” and among “the least desirable” aliens,
7 because “the Syrians are the same way, mixed up with the Arabians and the people of African
8 and western Asiatic countries, until they are not our kind of people; and they are not the kind of
9 people from which those who settled this country sprang.”³ As set forth in Section C, *infra*, these
10 are the same kind of statements recently made about Muslims.
11

12
13 In this century, the stereotyping of Muslims has continued unabated, leading to increased
14 discrimination against Muslims, rising to the level of violence. Even prior to the Executive
15 Orders in 2017, commentators documented and denounced the ongoing stereotyping of Muslims
16 and the ensuing discrimination and violence.
17

18 Professor Perry recognized that “many commentators have suggested that Arabs
19 generally and Muslims specifically may represent the last ‘legitimate’ subjects of slanderous
20 imagery and stereotypes.” Barbara Perry, *Anti-Muslim Violence in the Post-9/11 Era: Motive
21 Forces*, 4 HATE CRIMES 172, 176 (Barbara Perry & Randy Blazak, eds. 2009). Political leaders
22 have an outsized impact in fostering this stereotyping and its ensuing discrimination and
23 violence: “Even more powerful in providing justifications for anti-Muslim violence is the
24

25
26 ² See, e.g., Erik Love, ISLAMOPHOBIA AND RACISM IN AMERICA 41, 86-89 (2017); Jeffrey L. Thomas,
27 SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM 1-14 (2015); Peter Gottschalk &
28 Gabriel Greenberg, *Common Heritage, Uncommon Fear: Islamophobia in the United States and British India, 1687-
1947*, in ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE (Carl W. Ernst ed. 2013); Robert J. Allison,
THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776-1815 (1995).

³ HEARINGS BEFORE COMMITTEE ON IMMIGRATION AND NATURALIZATION, HOUSE OF REPRESENTATIVES, 61st Cong.
383, 386, 393, 396 (1910) (statement of Rep. John L. Burnett, Alabama).

1 explicit exploitation of public images and related fears by political leaders. To the extent that
2 this is so, there emerges a climate that bestows ‘permission to hate.’” *Id.* at 181. Thus, she
3 concluded that:

4 [S]tate practices provide a context and a framework for the broader demonization and
5 marginalization of minority groups. Through its rhetoric and policies, the state
6 absorbs and reflects back onto the public hostile and negative perceptions of the Other
7 – in this case, Muslims. Public expressions of racism by state actors are constituted
8 of and by public sentiments of intolerance, dislike, or suspicion of particular groups.
9 **Thus, the state seems to reaffirm the legitimacy of such beliefs, while at the same
10 time giving them public voice.**

11 *Id.* at 185 (emphasis added).

12 Professor Aziz, who testified to Congress on this issue, wrote, “In the United States,
13 numerous polls show a rise in anti-Muslim bias that is manifesting into tangible hate crimes,
14 mosque vandalism, employment discrimination, and bullying of Muslim kids in schools.” Sahar
15 F. Aziz, *Losing the “War of Ideas:” A Critique of Countering Violent Extremism Programs*, 52
16 TEXAS INT’L L.J. 255, 265 (2017).

17 Professor Cashin wrote that “Explicit, public anti-Muslim comments do not appear to
18 engender similar widespread outrage” as do racist remarks, and instead “appear to be on the rise,”
19 because of the lack of public rejection of such views. Sheryll Cashin, *To Be Muslim or Muslim-
20 Looking in America: A Comparative Exploration of Racial and Religious Prejudice in the 21st
21 Century*, 2 DUKE FORUM L. & SOC. CHANGE 125, 127-28 (2010). “In the wake of the 9/11 attacks,
22 it is more socially acceptable to express explicit bias against Arabs or Muslims than against
23 blacks or other racial/ethnic groups.” *Id.* at 132.

24 Muslim stereotyping has manifested in the form of violence against Muslims, or even
25 those who are erroneously perceived as being Muslims (such as Sikhs). Although the serious
26 under-reporting of such crimes causes the available statistics to understate the actual prevalence
27
28

1 of anti-Muslim violence,⁴ it is well-documented throughout 2016,⁵ and continuing into 2017. *See*
2 Section D.2, *infra*.

3 Thus, from Colonial times to the present, this country has had a long and deliberate
4 political tradition of officially stereotyping Muslims – a history that created an atmosphere that
5 legitimizes and encourages discrimination and violence against Muslims.
6

7 **C. The Executive Order Is Based on Stereotypes About Muslims as “Anti-
8 American” and “Terrorists.”**

9 As in the cases cited above, the Muslim ban bears the imprimatur of the Executive Branch
10 and engenders precisely the type of discriminatory harms that the Supreme Court has held cannot
11 withstand constitutional muster. Since December 7, 2015, when then-candidate Donald Trump
12 issued a written statement calling for a “total and complete shutdown on Muslims entering the
13 United States” in the wake of the terror attack in San Bernardino, California, a “Muslim ban” has
14 been a major item on his policy agenda.⁶ At that time, his campaign characterized a bar on
15 Muslim entry into the United States as a way to stop this country from being the “victims of the
16 horrendous attacks by people that believe only in Jihad.”⁷ He did so with no evidence other than
17 extensive stereotyping.
18
19

20 Mr. Trump’s labeling of Muslims as “terrorists” has been relentless. On January 4, 2016,
21

22 ⁴ Todd H. Green, THE FEAR OF ISLAM: AN INTRODUCTION TO ISLAMOPHOBIA IN THE WEST 282-84 (2015) (discussing
23 statistics on crimes against Muslims and problems with underreporting); *see generally* U.S. Dep’t of Justice, Bureau
24 of Justice Statistics, Special Report, HATE CRIME VICTIMIZATION, 2004-2015 (2017) (noting problems with
25 underreporting and different methodologies for categorizing these crimes); U.S. Dep’t of Justice, Bureau of Justice
26 Statistics, Special Report, HATE CRIMES REPORTED BY VICTIMS AND POLICE (2005) (same).

⁵ *See, e.g.*, Aziz, 52 TEXAS INT’L L.J., *supra*, at 266-68 & nn. 65-80 (collecting examples from 2015 and 2016 of
27 violence against Muslims).

⁶ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575-76 & n.5 (4th Cir. 2017) (*en banc*), *vacated as moot*,
28 2017 WL 4518553 (U.S. Oct. 10, 2017)); *see also* Christine Wang, “Trump Website Takes Down Muslim Ban
Statement After Reporter Grills Spicer in Briefing,” CNBC.COM (May 8, 2017),
[https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-
in-briefing.html](https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html).

⁷ *Int’l Refugee Assistance Project*, 857 F.3d at 575 n.5.

1 the Trump campaign premiered its first television advertisement, in which he “call[ed] for a total
2 and complete shutdown of Muslims entering the United States” until doubts about “radical
3 Islamic terrorism” can be “figure[d] out.”⁸ The link he drew between “radical Islamic terrorism”
4 and all individual Muslims entering the United States was stated with no supporting evidence.
5 Subsequently, candidate Trump, in a major foreign policy speech on April 27, 2016, stated that
6 “The struggle against radical Islam also takes place in our homeland. . . . We must stop importing
7 extremism through senseless immigration policies.”⁹ He made these statements, relying entirely
8 on stereotypes, and presenting no evidence or facts to support these claims.¹⁰

10 As a matter of law, this Court can rely on campaign statements as part of its analysis of
11 whether the Executive Orders reflect illegal stereotyping and bias against Muslims. For example,
12 the Second Circuit held that campaign statements by the successful candidate for Mayor of
13 Yonkers – in which he “promised . . . to impose a moratorium on all subsidized housing in
14 Yonkers” – was evidence of the “intent to preserve the existing racial imbalance” in that city.
15 *United States v. Yonkers Board of Educ.*, 837 F.2d 1181, 1191, 1222 (2d Cir. 1987). Similarly,
16 the Eleventh Circuit held that campaign promises by Roy Moore, made while running for the
17 position of Chief Justice of the Alabama Supreme Court, *i.e.*, that he would install the Ten
18 Commandments monument in the courthouse rotunda, could be used as evidence of his intent to
19 violate the Establishment Clause. *Glassroth v. Moore*, 335 F.3d 1282, 1285-87, 1292 (11th Cir.

23 ⁸ Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to United States*, CNN POLITICS (Dec. 8, 2015),
24 <http://edition.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration>; see also Jill Colvin and Steve
25 Peoples, “Trump’s First TV Ad Pushes Proposal to Ban Muslims from Entering U.S.,” *The Globe and Mail*
(*Toronto*), Jan. 5, 2016, at A-9.

26 ⁹ N.Y. TIMES, *Transcript: Donald Trump’s Foreign Policy Speech* (April 27, 2016),
<https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html>.

27 ¹⁰ Although President Trump has publicly labeled Muslims as dangerous “terrorists,” he has failed to condemn the
28 hate crimes perpetuated *against* them over the past year. See, e.g., Jack Moore, *Trump’s Failure to Condemn*
Minnesota Mosque Attacks Stirs Social Media Anger, NEWSWEEK (Aug. 17, 2017),
<http://www.newsweek.com/trump-failure-condemn-minnesota-mosque-attack-stirs-social-media-anger-647694>
(President Trump’s silence following a January 2017 shooting at a Quebec mosque, June 2017 attacks in Virginia
and London, and an August 2017 bomb attack at a mosque in Minnesota).

1 2003). More generally, “the historical background of the decision [to discriminate] is one
2 evidentiary source, particularly if it reveals a series of official actions taken for invidious
3 purposes.” *Village of Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252,
4 267 (1977) (citations omitted). Here, as in *Yonkers*, *Glassroth*, and *Village of Arlington Heights*,
5 evidence of candidate-Trump’s campaign statements and campaign promises is probative
6 evidence of the intent to discriminate against Muslims – an intent that was implemented just one
7 week after the Inauguration, when he issued the first of a series of Executive Orders that all
8 shared the same goals: to fulfill his campaign pledge.

9
10 On January 27, 2017, President Trump signed Executive Order 13,769, entitled
11 “Protecting the Nation from Foreign Terrorist Entry into the United States.” 82 FED. REG. 8977
12 (Feb. 1, 2017). Among other immigration restrictions, Executive Order 13,769 temporarily
13 banned all nationals from seven majority-Muslim countries from entering the United States: Iran,
14 Iraq, Syria, Sudan, Yemen, Libya, and Somalia.

15
16 While many surrogates of the current Administration pushed back at the characterization
17 of E.O. 13,769 as a “Muslim ban,” the President embraced it. He told the public via Twitter,
18 “[c]all it what you want, [E.O. 13,769] is about keeping bad people (with bad intentions) out of
19 country!”¹¹ Throughout his campaign, and now in office, President Trump has consistently
20 labeled Muslims as “bad people” who must be kept out of America in the interest of national
21 security.
22
23
24
25

26
27
28

¹¹ Jane Onyanga-Omara, *British PM Criticizes Trump’s Travel Ban; Theresa May Calls Controversial Move “Divisive and Wrong,”* USA TODAY, Feb. 2, 2017, at 5A. The Department of Justice recently informed a district court that Trump’s tweets (Twitter postings) are “official statements of the President of the United States,” since “a tweet can be the equivalent of a public statement or speech.” *James Madison Project v. Dep’t of Justice*, No. 1:17-cv-00144, Def. Supp. Mem., at 2, 5-6 & n.4 (ECF No. 29) (D.D.C. Nov. 13, 2017).

1 After multiple lower courts enjoined enforcement of E.O. 13,769,¹² the Trump
2 Administration announced plans to revise the order. On March 6, 2017, the Administration
3 issued Executive Order 13,780, “Protecting the Nation from Foreign Terrorist Entry into the
4 United States.” 82 FED. REG. 13,209 (Mar. 9, 2017). The revised Executive Order preserved
5 several core provisions of the prior Order: it suspended the United States Refugee Admissions
6 Program for 120 days, and it suspended the entry into the United States of nationals of six of the
7 seven majority-Muslim countries designated in E.O. 13,769 for 90 days. *See* E.O. 13,780, §§
8 6(a); 2(c). As did E.O. 13,769, the redrafted Order targeted only majority-Muslim countries, as
9 proxies for all Muslims. This Court upheld the district court’s decision enjoining the second
10 Executive Order. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (*en*
11 *banc*). The Supreme Court vacated this Court’s decision as moot in light of the expiration of the
12 second Executive Order. *Trump v. International Refugee Assistance Project*, 138 S. Ct. ___, 2017
13 WL 4518553 (U.S. Oct. 10, 2017).

14 President Trump then issued the third iteration of the Executive Order on September 24,
15 2017. *See* 82 Fed. Reg. 45,161 (Sept. 27, 2017). Although that order purported to expand its
16 scope into non-Muslim countries by including North Korea and Venezuela, this country has
17 hardly any visitors from North Korea, and the order as to Venezuela was limited to certain high-
18 level officials. *Id.*

19 The third version of the Executive Order continues to target Muslims. Judge Chuang of
20 the District of Maryland correctly found that “the inclusion of two non-majority Muslim nations,
21 North Korea and Venezuela, does not persuasively show a lack of religious purpose behind the
22

23
24
25
26
27
28

¹² *Washington v. Trump*, No. 2:17-cv-141, Temporary Restraining Order, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *motion for stay denied*, 847 F.3d 1151 (9th Cir. 2017); *Tootkaboni v. Trump*, No. 1:17-cv-10154, Temporary Restraining Order, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Darweesh v. Trump*, No. 1:17-cv-480, Temporary Restraining Order, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017) (preliminary injunction).

1 Proclamation,” requiring the court to “assess whether, as has occurred in other Establishment
2 Clause cases, the insertion of these countries was ‘a litigating position’ rather than an earnest
3 effort to ‘cast off’ the prior ‘unmistakable’ objective.” *See International Refugee Assistance*
4 *Project v. Trump*, 2017 WL 4674314, at *33 (D. Md. Oct. 17, 2017) (quoting *McCreary County*
5 *v. Amer. Civil Liberties Union of Kentucky*, 545 U.S. 844, 871-72 (2005)). The district court thus
6 granted plaintiffs’ motion for a preliminary injunction as to this third iteration of the travel ban.
7 *Id.* at *41. The district court reviewed the record of Trump’s campaign statements, *id.* at *30,
8 and the statements that he made after taking office, *id.* at *30, *31, *33, *36, to conclude that the
9 “primary purpose” of the travel ban was “the desire to impose a Muslim ban.” *Id.* at *37.
10

11 Thus, “approximately 80 percent of all the Muslim refugees who resettled in the United
12 States over the past two years were from the [nine] targeted countries. Perhaps more tellingly,
13 of the refugees who came to the U.S. over the last two years from all of the other countries . . .
14 approximately 70 percent were Christian and just 16 percent were Muslim.”¹³
15

16 The government’s intent to ban Muslims will exacerbate widespread discrimination that
17 Muslims already face. The official action of marking a group, Muslims, as a dangerous “fifth
18 column,” drives societal biases against them and creates conditions where violence against them
19 is seen as more acceptable because they are perceived, in President Trump’s words, to be “bad
20 people.”
21

22 In 2011, the Pew Research Center surveyed Western cultures to determine which
23 characteristics Western populations associate with people in the Muslim world. That survey
24 found that about half of the respondents characterized Muslims as “violent,” and more than half
25

26
27 ¹³ Dalia Lithwick & Jeremy Stahl, *Sneak Attack: Trump Is Trying to Secretly Push Through Another Muslim Ban*,
SLATE, JURISPRUDENCE (Nov. 10, 2017),
28 [http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/trump_is_trying_to_secretly_sneak_throu](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/trump_is_trying_to_secretly_sneak_through_another_muslim_ban.html)
[gh_another_muslim_ban.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/trump_is_trying_to_secretly_sneak_through_another_muslim_ban.html).

1 characterized Muslims as “fanatical.”¹⁴

2 Thus, it is no surprise that the Pew Research Center’s 2017 survey of Muslims in this
3 country found that discrimination against them was increasing, and that they are even more
4 concerned in light of the President’s Executive Orders.¹⁵

5 In a recent news analysis discussing ongoing social science research relating to
6 stereotyping against the most recent Muslim immigrants in this country and Canada, *Science*
7 magazine recognized that “Prejudice of course can be directed against any group by any other.
8 But immigrants, and even more so refugees and asylum seekers, may be especially vulnerable
9 because of their tenuous place in a larger society.” Jennifer Couzin-Frankel, *Battling Bias: How*
10 *Can We Blunt Prejudice Against Immigrants?*, 350 *SCIENCE* 687, 688 (May 19, 2017). This
11 applies with even greater force to child immigrants and refugees, who are even more vulnerable
12 than their parents. (The recent escalation of deportation orders similarly harms child immigrants
13 and refugees.)

14 Recent social science research demonstrates both the already-existing climate of
15 prejudice against Muslims and Arabs and the unconscious nature of that bias. “Non-Arab and
16 non-Muslim test takers manifested strong implicit bias against Muslims. These results are in
17 sharp contrast to self-reported attitudes.” Carol Izumi, *Implicit Bias and the Illusion of Mediator*
18 *Neutrality*, 34 *WASH. U. J. L. & POL.* 71, 93 (2010). A “sample of U.S. citizens on average
19 viewed Muslims and Arabs as not sharing their interests and stereotyped them as not especially
20 sincere, honest, friendly, or warm.” Susan T. Fiske, et al., *Policy Forum: Why Ordinary People*

21
22
23
24
25
26 ¹⁴ Pew Research Center, Global Attitudes Project, *Muslim-Western Tensions Persist* (July 21, 2011),
<http://www.pewglobal.org/2011/07/21/muslim-western-tensions-persist/#>.

27 ¹⁵ Pew Research Center, *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the*
28 *American Dream* (July 26, 2017) <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>; see also Abigail Hauslohner, *Anti-Muslim Discrimination on Rise in U.S., Study Finds*,
WASHINGTON POST, July 26, 2017, at A-3.

1 *Torture Enemy Prisoners*, 206 SCIENCE 1482-83 (Nov. 26, 2004).

2 **D. Government Legitimization of Muslim Stereotypes Has Encouraged**
3 **Violence Against Muslims, and Inhibited Millions of Muslims in the Practice**
4 **of Their Religion.**

5 There can be no doubt that, given its origin and history, the Executive Order is based on
6 the social categorization of Muslims as “anti-American,” “terrorists,” those with “hatred for
7 Americans,” and “bad people.” In this case, President Trump’s repeated, unsubstantiated claims
8 that Muslims are dangerous, and should be barred from entering the country, are just the “cue”
9 needed to release otherwise suppressed and legally prohibited violence against Muslims. The
10 President’s deliberate stereotyping of Muslims as “dangerous” and “terrorists” and his ban on the
11 immigration of Muslims, place an official “imprimatur” on those stereotypes, magnifying their
12 effect.
13

14
15 The Supreme Court, in *Cleburne*, held that a city council’s insistence that a group home
16 for individuals with intellectual disabilities obtain a special-use permit to operate was premised
17 on unsubstantiated “negative attitudes or fears” of nearby property owners, which were
18 impermissible bases for disparate treatment. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.
19 432, 448 (1985). Although “[p]rivate biases may be outside the reach of the law . . . the law
20 cannot, directly or indirectly, give them effect.” *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429,
21 433 (1984)). Here, too, the law cannot give effect to private biases against Muslims.
22

23 **1. Government Stereotyping Leads to Violence and Discrimination.**

24 When someone in a position of authority, as President Trump, categorizes Muslims as
25 dangerous and terrorists, he communicates that they are “outsiders” and not full members of the
26 political community. By way of comparison, the Supreme Court found unconstitutional a school-
27 sponsored religious message, delivered over the school’s public address system, by a speaker
28

1 representing the student body, under the supervision of the faculty, and pursuant to a school
2 policy. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 309-10 (2000). The Supreme Court’s
3 reasoning was based on its view that the school policy created two classes of people—those who
4 adhered to the favored religion, and those who did not. *Id.*

5 The President’s steadfast support of what he calls a “Muslim ban” similarly sends the
6 message that those who adhere to Islam are not part of American society, as opposed to Christians
7 and other non-Muslims, who are favored by the ban. In doing so, he “sends a message to non-
8 adherents [to the Christian faith] that they are outsiders, not full members of the political
9 community, and an accompanying message to adherents that they are insiders, favored members
10 of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J.
11 concurring); *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct
12 is made criminal by the law of the State, that declaration in and of itself is an invitation to subject
13 homosexual persons to discrimination in both the public and in the private spheres.”). The
14 Executive Order and the President’s statements characterize Muslims as homogenous and a
15 national threat and thereby engender a climate conducive to violence against Muslims.
16
17
18

19 **2. The President’s Statements Have Encouraged Violence.**

20 This Administration tolerated, if not encouraged, crimes against Muslims, through its
21 determination to implement the travel ban affecting them – in effect telling all Muslims (whether
22 born here or abroad) – that they do not belong here.

23 Starting in February 2016, only two months after then-candidate Trump’s December 7,
24 2015 and January 4, 2016 statements (*supra*), three nationalists in Kansas (the “Crusaders,” a
25 militia group) engaged in a conspiracy to use weapons of mass destruction “to carry out a violent
26 attack against Muslims in their community” through “destroy[ing] an apartment complex in
27
28

1 Garden City, Kansas, which contains a mosque and is home to many Muslims.”¹⁶ They openly
2 discussed going to apartment buildings known to house refugees to “start kicking in the doors of
3 the Somali apartments, and kill them one by one,” and then expanded their target to include
4 “city/county commission meetings, local public officials, landlords who rent property to Muslim
5 refugees, and organizations providing assistance to Muslim refugees,” since “the only good
6 Muslim is a dead Muslim.”¹⁷

7
8 The February 22, 2017 shooting of Srinivas Kuchibhotla, Alok Madasani, and Ian Grillot
9 in Olathe, Kansas is the most horrifying example of the social categorization of Muslims as
10 enemies of the American people.¹⁸ Kuchibhotla and Madasani, two engineers at a local
11 technology company, and both Indian immigrants, had gathered with co-workers at a bar near
12 their office to watch a local college basketball game. Also at that bar was Adam Purinton, who
13 mistook both Kuchibhotla and Madasani as Iranians (which is one of the nationalities targeted
14 by the Executive Order and its predecessor as barred from entry into the United States). Purinton
15 approached and shot at Kuchibhotla and Madasani, telling them to “get out of our country!”
16 Kuchibhotla was killed, and Madasani was wounded. Ian Grillot, a patrolman present at the
17 scene, was wounded while attempting to intervene. Purinton fled across the state border into
18 Missouri and told a bartender in a second bar that he needed to hide out because he had just shot
19 two “Iranians.” Putting aside Purinton’s stereotyped view that his victims were Iranians simply
20 because they were foreign-born immigrants, his actions demonstrate the danger that social
21
22
23
24

25 ¹⁶ *United States v. Allen, et al.*, No. 6:16-cr-10141, Criminal Complaint, at ¶¶ 2, 9 (ECF No. 1) (D. Kan. Oct. 14,
26 2016); see also Second Superseding Indictment (ECF No. 89) (D. Kan. Mar. 16, 2017).

27 ¹⁷ *United States v. Allen, et al.*, No. 6:16-cr-10141, Criminal Complaint, at ¶¶ 13, 19 (ECF No. 1) (D. Kan. Oct. 14,
28 2016).

¹⁸ Audra D. S. Burch, *Facing a Void Left by Hate*, N.Y. TIMES, July 9, 2017, at A1, A12-A13; Matt Stevens, *Justice Dept. Calls Killing in Kansas a Hate Crime*, N.Y. TIMES, June 10, 2017, at A18; John Eligon, et al., *Drinks at a Bar, Ethnic Insults, then Gunshots*, N.Y. TIMES, Feb. 25, 2017, A1, A17; see also *United States v. Purinton*, No. 2:17-cr-20028, Indictment (D. Kan. June 9, 2017).

1 categorization can cause by exaggerating both the distance between in-groups (“real Americans”)
2 and out-groups (“Iranians”), as well the homogeneity of the out-group. The Administration’s
3 travel ban against Muslims does just that.

4 In addition, a rash of arsons and vandalism at mosques has occurred following the
5 issuance of E.O. 13,769. On January 28, 2017, one day after the first Order, a fire destroyed the
6 Islamic Center of Victoria, Texas.¹⁹ On February 24, 2017, a blaze broke out at the Daarus
7 Salaam Mosque near Tampa, Florida.²⁰ Combined with two arsons of mosques shortly before
8 President Trump’s inauguration, the United States has seen an unprecedented surge of hate
9 crimes against the Muslim community.²¹

10 Other recent attacks on mosques in the United States include an explosion at a mosque in
11 Bloomington, Minnesota in August 2017.²²

12 On March 3, 2017, a Sikh man was shot in his Kent, Washington driveway when a man
13 approached him and said “go back to your own country.”²³

14 It is undeniable that the public interest in this country is best served by tolerance of
15 different religions as the Constitution requires, and tolerance of both foreign-born and American-
16 born adherents of different religions. The public interest is not served by discriminatory
17
18
19

20
21
22 ¹⁹ U.S. Attorney’s Office, Southern District of Texas, *Victoria Man Charged with Hate Crime in Burning of Mosque*
(June 22, 2017), <https://www.justice.gov/usao-sdtx/pr/victoria-man-charged-hate-crime-burning-mosque>;
23 Anonymous, *Fire Destroys Texas Mosque in Early Hours*, N.Y. TIMES, Jan. 29, 2017, at A4; *see also United States*
v. Perez, No. 6:17-cr-00035, Superseding Indictment (S.D. Tex. June 22, 2017).

24 ²⁰ Tony Marrero, *Mosque Fire Deliberately Set*, TAMPA BAY TIMES, Feb. 25, 2017, at 1; Anonymous, *2nd Florida*
Mosque Hit by Arson in Past 6 Months, ST. LOUIS POST-DISPATCH, Feb. 25, 2017, at A6.

25 ²¹ Albert Samaha & Talal Ansari, *Four Mosques Have Burned in Seven Weeks – Leaving Many Muslims and*
Advocates Stunned, BUZZFEEDNEWS (Feb. 28, 2017), [https://www.buzzfeed.com/albertsamaha/four-mosques-burn-](https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins)
26 [as-2017-begins](https://www.buzzfeed.com/albertsamaha/four-mosques-burn-as-2017-begins); Taylor Goldenstein, *Blaze Completely Destroys Islamic Center’s Building*, AUSTIN AMERICAN-
STATESMAN, Jan. 8, 2017, at B1.

27 ²² Nick Corasaniti, *Minnesota Mosque Shaken by an Early-Morning Blast*, N.Y. TIMES, Aug. 6, 2017, at A-19; Kurtis
Lee, *U.S. Muslims on Edge after Bombing; the FBI Is Leading the Investigation into an Attack that Damaged a*
28 *Minnesota Mosque*, L.A. TIMES, Aug. 6, 2017, at A-10.

²³ Ellen Barry, *U.S. and Indian Officials Condemn Shooting of Sikh*, N.Y. TIMES, Mar. 6, 2017, at A-9; Cleve R.
Wootson, *Sikh Man, 39, Shot in Suspected Hate Crime*, WASH. POST, Mar. 5, 2017, at A-3.

1 stereotyping against Muslims that legitimizes or encourages discrimination and violence in our
2 country, or by a law which gives effect to private biases.

3 The insidious effect of the Muslim ban does not impact only those persons seeking to
4 enter the United States from the seven designated countries. Instead, by promoting social
5 stereotypes and priming individuals to act on those stereotypes, the ban creates fertile grounds
6 for violence against all minorities. The Executive Order fundamentally threatens the American
7 ideal of a diverse society working across divisions for the greater societal good.
8

9 **3. Stereotyping and Discrimination Harms All Americans, Not Just Those**
10 **Directly Affected by Specific Acts.**

11 Social science research has consistently demonstrated that stereotyping of any group
12 harms all individuals in that group, even those who are not directly affected by specific acts of
13 violence or discrimination. For example, Professor McDevitt and several other researchers
14 recognized that:
15

16 Because bias crimes have the unique impact of reaching far beyond the primary
17 victim, due to the dimension of victim interchangeability, every member of the
18 minority group who is aware of the crime is affected by a solitary crime against
19 one individual minority member.

20 Jack McDevitt, et al., *Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated*
21 *Assaults*, 45 AM. BEHAVIORAL SCIENTIST 697, 712 (2001).

22 Similarly, violent crimes on the basis of religious stereotypes, *i.e.*, against Muslims, have
23 the same broader impact as do terrorist crimes:

24 Nonetheless, terrorism and violent hate crimes . . . have at least one basic
25 characteristic in common: the violence inflicted on the victims is also aimed at a
26 larger community. . . . hate crimes directly target individual members of a social
27 group but indirectly send a message of intolerance to the entire group. The victims
28 of hate crimes are selected because of their symbolic value as representatives of
the entire social group.

1 Jeffrey Thomas, SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM
2 137 (2015).

3 Senator John McCain recently recognized this fundamental principle when he criticized
4 several fellow members of Congress who had made *ad hominem* attacks on a former government
5 official due to that person's Muslim heritage:
6

7 When anyone—not least a member of Congress—launches specious and degrading
8 attacks against fellow Americans on the basis of nothing more than fear of who they
9 are and ignorance of what they stand for, it defames the spirit of our Nation, and we
all grow poorer because of it.

10 158 CONG. REC. S5106 (daily ed. July 18, 2012) (statement of Sen. John McCain).

11 Here, too, the latest Executive Order and the underlying statements by the President have
12 only encouraged stereotyping of Muslims, which has adversely affected all Muslims, young and
13 old, natives and recent immigrants, and has harmed our society as a whole.
14

15 CONCLUSION

16 For the foregoing reasons, and those set forth in the briefs of the Plaintiffs, *amici curiae*
17 respectfully request that this Court enjoin the Executive Order.
18

19 DATED: December 4, 2017.

20 Respectfully submitted,

21 /s/ Michael C. Subit

22
23 Michael C. Subit, Esquire (State Bar # 29189)
24 Frank Freed Subit & Thomas LLP
25 705 2nd Avenue, Suite 1200
26 Seattle WA 98104-1798
27 Phone: (206) 682-6711
28 Fax: (206) 682-0401
Email: msubit@frankfreed.com

/s/ Lynne Bernabei

Lynne Bernabei (D.C. Bar # 938936)
Alan R. Kabat (D.C. Bar # 462458)
Bernabei & Kabat, PLLC
1400 – 16th Street N.W., Suite 500
Washington, D.C. 20036-2223
Phone: (202) 745-1942
Fax: (202) 745-2627
email: Bernabei@bernabeipllc.com
Kabat@bernabeipllc.com

Counsel for Amici Curiae

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of December, 2017.

/s/ Michael C. Subit
Michael C. Subit, WSBA No. 29189