

Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,

IRANIAN ALLIANCES ACROSS BORDERS, *et al.*,
Plaintiffs-Appellees,

EBLAL ZAKZOK, *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, Southern Division
(8:17-cv-00361-TDC)

**PLAINTIFFS-APPELLEES' MOTION FOR JUDICIAL NOTICE
AND TO SUPPLEMENT THE RECORD**

Lena F. Masri
Gadeir Abbas
COUNCIL ON AMERICAN-ISLAMIC
RELATIONS
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833
lmasri@cair.com
gabbas@cair.com

Robert A. Atkins
Charles E. Davidow
Liza Velazquez
Andrew J. Ehrlich
Steven C. Herzog
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

Additional counsel on next page

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrlich@paulweiss.com
sherzog@paulweiss.com

Jethro Eisenstein
PROFETA & EISENSTEIN
45 Broadway, Suite 2200
New York, New York 10006
Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

Counsel for Plaintiffs-Appellees Zakzok, et al.

Karen C. Tumlin
Nicholas Espiritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW
CENTER
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Justin B. Cox
NATIONAL IMMIGRATION LAW
CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Additional counsel on next page

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE
ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org

David Rocah

Deborah A. Jeon

Sonia Kumar

Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole

Daniel Mach

Heather L. Weaver

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

Counsel for Plaintiffs-Appellees IRAP, et al.

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org
sirine@muslimadvocates.org

Richard B. Katskee
Eric Rothschild
Andrew L. Nellis^

Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
Jose E. Arvelo
John W. Sorrenti
Katherine E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP
One City Center
850 10th Street, NW

Additional counsel on next page

AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE

1310 L St. NW, Ste. 200

Washington, D.C. 2005

Tel: (202) 466-3234

Fax: (202) 466-3353

katskee@au.org

rothschild@au.org

nellis@au.org

Washington, D.C. 20001

Tel: (202) 662-6000

Fax: (202) 662-6302

mlynch@cov.com

mmosier@cov.com

hfenster@cov.com

jarvelo@cov.com

jsorrenti@cov.com

kcahoy@cov.com

rvantassell@cov.com

ktilak@cov.com

Counsel for Plaintiffs-Appellees I.A.A.B., et al.

^Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar

1. Plaintiffs file this motion to request (1) that the Court take judicial notice of, and supplement the appellate record to add evidence of, recent official statements and actions of the President, and (2) that the appellate record be supplemented to add four press articles discussed in the parties' briefs.¹

Legal Standard

2. This Court “may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2); *Martin v. Duffy*, 858 F.3d 239, 253 n.4 (4th Cir. 2017).

3. This Court also “has the power, either on motion or of its own accord, to require that the record be corrected or supplemented.” Loc. R. 10(d). An appellate court may supplement the record where new evidence informs the “appropriateness of injunctive relief,” *In re Application of Adan*, 437 F.3d 381, 398 n.3 (3d Cir. 2006) (citing *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 370 n.7 (D.C. Cir.1978)), and where “remanding the case to the district court for consideration of the additional material would be contrary to the interests of justice and the efficient use of judicial resources,” *Acumed LLC v. Advanced Surgical Servs.*, 561 F.3d 199, 226 (3d Cir. 2009).

¹ Counsel for all parties have been informed of the intended filing of this motion. All Plaintiffs consent to the granting of this motion. Defendants do not consent, but have not indicated whether they intend to file a response in opposition.

Argument

4. On November 29, 2017, the President used his Twitter account to publish to his more than 43 million followers three videos from the account of Jayda Fransen, the Deputy Leader of Britain First, an extremist political party in the United Kingdom, the mission of which includes opposition to Islam.²

5. Each of the three videos distributed by the President depicts an act of violence or the destruction of a Christian religious symbol coupled with a caption attributing the actions depicted to a “Muslim” or “Islamist.” In at least one case, the claim is demonstrably false, and in the rest remains unverified. The first video is captioned “Muslim migrant beats up Dutch boy on crutches!”³ It does not in fact depict a Muslim migrant.⁴ The second

² *Principles of the Britain First Movement*, Britain First, <https://www.britainfirst.org/principles> (last visited Dec. 4, 2017) (Herzog Decl. Ex. E).

³ Jayda Fransen (@JaydaBF), Twitter (Nov. 28, 2017, 12:40 PM), <https://twitter.com/JaydaBF/status/935609305574903812> (retweeted by Donald J. Trump (@realDonaldTrump) (Nov. 29, 2017, 6:37 AM)) (Herzog Decl. Ex. A).

⁴ Peter Baker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain’s Leader Condemns Them*, N.Y. Times (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html> (Herzog Decl. Ex. F).

The Netherlands Embassy also responded to the President and confirmed that the individual in the video was not a migrant: “The perpetrator of the violent act in this video was born and raised in the Netherlands.” Netherlands Embassy (@NLintheUSA), Twitter (Nov. 29, 2017, 11:26 AM), <https://twitter.com/NLintheUSA/status/935953115249086464> (Herzog Decl. Ex. G).

video is captioned “Muslim Destroys a Statue of Virgin Mary!”⁵ The third video is captioned “Islamist mob pushes teenage boy off roof and beats him to death!”⁶

6. The President’s spokesperson subsequently asserted that “security and public safety for the American people . . . are the issues [the President] was raising with [those] tweets,” that “[t]he President has been talking about these security issues for years now, from the campaign trail to the White House,” and that “the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.”⁷

7. This evidence emerged subsequent to the district court’s injunction. While Plaintiffs’ arguments before this Court remain the same, this new evidence provides further support for those arguments because the President’s statements express hostility towards Muslims and foment

⁵ Jayda Fransen (@JaydaBF), Twitter (Nov. 29, 2017, 1:40 AM) <https://twitter.com/JaydaBF/status/935805606447013888> (retweeted by Donald J. Trump (@realDonaldTrump) (Nov. 29, 2017, 6:43 AM)) (Herzog Decl. Ex. B).

⁶ Jayda Fransen (@JaydaBF), Twitter (Nov. 28, 2017, 11:40 PM), <https://twitter.com/JaydaBF/status/935775552102981633> (retweeted by Donald J. Trump (@realDonaldTrump) (Nov. 29, 2017, 6:44 AM)) (Herzog Decl. Ex. C).

⁷ The White House has published a transcript of these remarks on its official website. *Press Gaggle by Principal Deputy Press Secretary Raj Shah en route St. Louis, MO*, Office of the Press Secretary, The White House (Nov. 29, 2017), <https://www.whitehouse.gov/the-press-office/2017/11/29/press-gaggle-principal-deputy-press-secretary-raj-shah-en-route-st-louis> (Herzog Decl. Ex. D).

conflict between Christians and Muslims in the United States, and his spokesperson's remarks directly link the anti-Muslim statements to the Proclamation itself. *Cf.* Gov't Opening Br. 52, Gov't Reply 26.

8. Plaintiffs respectfully request that the Court take judicial notice of the President's November 29, 2017 tweets, which are set forth in Exhibits A–C of the Herzog Declaration, as well as the subsequent statements by his spokesperson, which are set forth as Exhibit D of the Herzog Declaration. Plaintiffs additionally move to supplement the record to include these materials.

9. The President's statements cannot reasonably be disputed and the accuracy of the source—the President or his spokesperson—cannot be questioned. The government has conceded that the President's tweets are official statements by the President.⁸ Judicial notice therefore is appropriate. *See* Fed. R. Evid. 201(b)(2); *see Martin v. Duffy*, 858 F.3d 239, 253 n.4 (4th

⁸ J.A. 794, 1006 (statement from then White House Press Secretary Sean Spicer that the President's tweets should be “considered official statements by the President of the United States”); *see also* Government's Nov. 13, 2017 supplemental submission (Dkt. No. 29) in *James Madison Project v. Department of Justice*, No. 1:17-cv-00144-APM (D.D.C.) (“[T]he government is treating the President's statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States”) (Herzog Decl. Ex. H); Letter from Marc T. Short, Assistant to the President for Legislative Affairs, to Rep. K. Michael Conaway & Rep. Adam Schiff (June 23, 2017), *available at* <http://i2.cdn.turner.com/cnn/2017/images/06/23/white.house.letter.pdf> (referring to the President's tweets as “President Trump's June 22, 2017 statement”) (Herzog Decl. Ex. I).

Cir. 2017) (the Court “may properly take judicial notice” of government policy). That is true regardless of whether the facts to be judicially noticed arose following the district court’s decision. *See, e.g., Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1146-47 (9th Cir. 1998) (taking judicial notice of an FTC letter that “was not published at the time of briefing and argument before the district court”); *In re Am. Biomaterials Corp.*, 954 F.2d 919, 922 (3d Cir. 1992) (quoting *Landy v. Fed. Deposit Ins. Corp.*, 486 F.2d 139, 151 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974)) (noting that “an appellate court in a proper case” may “take judicial notice of new developments not considered by the lower court”).

10. Plaintiffs also respectfully request that this Court exercise its inherent authority to supplement the record. Appellate courts have the equitable authority to supplement the record. *E.g., Acumed LLC v. Advanced Surgical Servs.*, 561 F.3d 199, 226 (3d Cir. 2009); *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986); *Freedman v. Mendelson*, 197 F.R.D. 276, 279-80 (E.D. Va. 2000) (stating that “federal appellate courts [may] consider matters beyond the record on appeal as a matter of inherent discretion,” including “in the interest of justice”). An appellate court may supplement the record where new evidence informs the “appropriateness of injunctive relief,” *In re Application of Adan*, 437 F.3d 381, 398 n.3 (3d Cir. 2006) (citing *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 370 n.7 (D.C. Cir.1978)), and where “remanding the case to the district court for consideration of the

additional material would be contrary to the interests of justice and the efficient use of judicial resources,” *Acumed LLC*, 561 F.3d at 226.

11. The present circumstances are precisely those that merit supplementation. The President’s recent statements and those of his spokesperson were not before the district court solely because they were issued while the matter was on appeal before this Court. There is no need for further fact-finding where, as here, the statements by the President and his spokesperson cannot be disputed. Remand to the district court is therefore unnecessary and highly inefficient. Nor could there be any conceivable prejudice to the government, which, having issued these statements, surely received contemporaneous notice of their contents.

12. Plaintiffs additionally request that the Court supplement the record with four news articles that Plaintiffs referenced in their Opening Brief,⁹

⁹ These include: Eric Hananoki, *New DHS Senior Advisor Pushed “Mosque Surveillance Program,” Claimed that Muslims “By-And-Large” Want to Subjugate Non-Muslims*, Media Matters (Mar. 14, 2017), <https://www.mediamatters.org/research/2017/03/14/new-dhs-senior-adviser-pushed-mosque-surveillance-program-claimed-muslims-and-large-want-subjugate/215634> (Herzog Decl. Ex. J); Noah Lanard, *A Fake Jihadist Has Landed a Top Job at Homeland Security*, Mother Jones (Nov. 1, 2017), <http://www.motherjones.com/politics/2017/11/a-fake-jihadist-has-landed-a-top-job-at-homeland-security/> (Herzog Decl. Ex. K); Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. To Accept Fewer Refugees*, New Yorker (Oct. 13, 2017), <https://www.newyorker.com/news/news-desk/how-stephen-miller-single-handedly-got-the-us-to-accept-fewer-refugees> (Herzog Decl. Ex. L); and Associated Press, *U.S., Cuba Fail to Reach Accord on Immigration* (July 10, 1986), available at http://articles.latimes.com/1986-07-10/news/mn-22586_1_radio-marti. Pfs. Br. 6 nn.2-3, 32 & n.13, 49 n.21 (Herzog Decl. Ex. M).

along with the documents cited herein that provide context for the President's recent statements. These documents are set forth in Exhibits E–M of the Herzog Declaration.

13. While Plaintiffs submit that there is ample record evidence to affirm the district court's order, and that it would not typically be necessary to formally add these articles to the record, the government has noted that they are not in the record—albeit without contesting their accuracy.

14. Plaintiffs therefore respectfully request that the record be supplemented to include these articles in the interest of having all relevant materials in the record. One of the articles, dated October 13, 2017, was published the day before Plaintiffs' reply briefs were filed in the District Court pursuant to an expedited briefing schedule. It was cited in the district court, *see* International Refugee Assistance Project Reply Br. 2 n.4, *International Refugee Assistance Project v. Trump*, No 8:17-cv-00361-TDC (D. Md. Oct. 14, 2017), ECF No. 216, but was not formally added to the record at that time. A second article, dated November 1, 2017, was published after the District Court issued its Opinion and Order on October 17, 2017, J.A. 993, 1084, and as such Plaintiffs did not have the opportunity to provide it to the District Court. A third article, dated March 14, 2017, concerned an individual whose role in overseeing implementation of the Executive Orders did not come to light until November 1, 2017. The final article, dated July 10, 1986, is an Associated Press story describing the suspension of entry of Cuban nationals under President Reagan. The

government has not contested the accuracy of the statements made in any of these articles.

15. Because all of these articles are probative of the questions at issue and may be useful to the Court, the record should be supplemented to include them.

Dated: December 4, 2017

Respectfully submitted,

Lena F. Masri
Gadeir Abbas
COUNCIL ON AMERICAN-ISLAMIC
RELATIONS
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833
lmasri@cair.com
gabbas@cair.com

Jethro Eisenstein
PROFETA & EISENSTEIN
45 Broadway, Suite 2200
New York, New York 10006
Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

/s/ Robert A. Atkins

Robert A. Atkins
Charles E. Davidow
Liza Velazquez
Andrew J. Ehrlich
Steven C. Herzog
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrich@paulweiss.com
sherzog@paulweiss.com

Faiza Patel
Michael Price
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

Counsel for Plaintiffs-Appellees Zakzok, et al.

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
NATIONAL IMMIGRATION LAW
CENTER
3435 Wilshire Boulevard,
Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org
espiritu@nilc.org
keaney@nilc.org
sung@nilc.org

Justin B. Cox
NATIONAL IMMIGRATION LAW
CENTER
P.O. Box 170208
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Kathryn Claire Meyer
Mariko Hirose
INTERNATIONAL REFUGEE
ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
Tel: (646) 459-3044
Fax: (212) 533-4598
kmeyer@refugeerights.org
mhirose@refugeerights.org
David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
David Hausman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
hhandeyside@aclu.org
smehta@aclu.org
dhausman@aclu.org

Cecillia D. Wang
Cody H. Wofsy
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org
cwofsy@aclu.org
samdur@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330

FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org
steiner@aclu-md.org

Fax: (202) 457-0805
dcole@aclu.org
dmach@aclu.org
hweaver@aclu.org

Counsel for Plaintiffs-Appellees IRAP, et al.

Johnathan Smith
Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org
sirine@muslimadvocates.org

Mark H. Lynch
Mark W. Mosier
Herbert L. Fenster
Jose E. Arvelo
John W. Sorrenti
Katherine E. Cahoy
Rebecca G. Van Tassell
Karun Tilak
COVINGTON & BURLING LLP
One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
mlynch@cov.com
mmosier@cov.com
hfenster@cov.com
jarvelo@cov.com
jsorrenti@cov.com
kcahay@cov.com
rvantassell@cov.com
ktilak@cov.com

Richard B. Katskee
Eric Rothschild
Andrew L. Nellis[^]
AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE
1310 L St. NW, Ste. 200
Washington, D.C. 2005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
rothschild@au.org
nellis@au.org

Counsel for Plaintiffs-Appellees I.A.A.B., et al.

[^]Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A). This motion contains 1,820 words, excluding the parts of the motion excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f).

/s/ Robert A. Atkins
Robert A. Atkins

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2017, I filed the foregoing motion by use of the Fourth Circuit's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Robert A. Atkins
Robert A. Atkins