

ALSTON HUNT FLOYD & ING

Nickolas A. Kacprowski 8627
1001 Bishop Street, Suite 1800
Honolulu, Hawai'i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: nkacprowski@ahfi.com

ARNOLD & PORTER KAYE SCHOLER LLP

Anton A. Ware (Appearing *pro hac vice*)
Three Embarcadero Center
Tenth Floor
San Francisco, CA 94111
Telephone: (415) 471-3100
Facsimile: (415) 471-3400
E-mail: anton.ware@apks.com

Attorneys for Amici Curiae Muslim Advocates; American Muslim Health Professionals; Muppies, Inc.; The National Arab American Medical Association; and Network of Arab-American Professionals

〔SEE NEXT PAGE FOR ADDITIONAL COUNSEL〕

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL
ELSHIKH,

Plaintiffs,

V.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants

) Case No. CV 17-00050 DKW-KSC
)
) **MUSLIM ADVOCATES,**
) **AMERICAN MUSLIM HEALTH**
) **PROFESSIONALS, MUPPIES,**
) **INC., THE NATIONAL ARAB**
) **AMERICAN MEDICAL**
) **ASSOCIATION, AND NETWORK**
) **OF ARAB-AMERICAN**
) **PROFESSIONALS' BRIEF OF**
) ***AMICI CURIAE* IN SUPPORT OF**
) **PLAINTIFFS' MOTION FOR A**
) **TEMPORARY RESTRAINING**
) **ORDER; DECLARATION OF**
) **ANTON A. WARE; EXHIBITS "1" –**
) **"38"; CERTIFICATE OF SERVICE**
)
) [Dkt. No. 65]
)
)

ADDITIONAL COUNSEL

MUSLIM ADVOCATES

Johnathan James Smith (Appearing *pro hac vice*)

Junaid Sulahry (Appearing *pro hac vice*)

P.O. Box 71080

Oakland, CA 94612

Telephone: (415) 692-1484

Facsimile: (415) 765-1774

E-mail: johnathan@muslimadvocates.org

jsulahry@gmail.com

TABLE OF CONTENTS

I.	INTERESTS OF <i>AMICI CURIAE</i>	1
II.	INTRODUCTION	2
III.	ARGUMENT.....	6
A.	The Motives for the Executive Order Are Not Immune From Judicial Review	6
B.	The Executive Order Is Animated By Anti-Muslim Bias.....	8
1.	The President’s Own Repeated Statements Confirm that the Revoked Executive Order Was Intended to Implement His Campaign Pledge to Put a Temporary Halt on Muslims Entering the United States	8
2.	The Context of the Executive Order Confirms that It Is the Same Basic Policy As the Revoked Executive Order.....	13
3.	The Executive Order Reflects Anti-Muslim Bias on its Face ..	16
4.	The Development of the Executive Order Demonstrates that its National Security Justifications are Pretextual	18
5.	That the Executive Order Halts Immigration by Many but Not All Muslims In No Way Defeats Plaintiffs’ Allegations of Animus.....	22
C.	The Executive Order Disproportionately Impacts Muslims	23
IV.	CONCLUSION.....	24

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Access Fund v. U.S. Dep’t of Agriculture,</i> 499 F.3d 1036 (9th Cir. 2007)	4
<i>Aziz v. Trump,</i> No. 1:17-cv-116-LMB-TCB, 2017 WL 580855 (E.D. Va. Feb. 13, 2017)	5
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.,</i> 473 U.S. 432 (1985).....	24
<i>Elrod v. Burns,</i> 427 U.S. 347 (1976).....	6
<i>Hunter v. Underwood,</i> 471 U.S. 222 (1985).....	19
<i>INS v. Pangilinan,</i> 486 U.S. 875 (1988).....	8
<i>Kerry v. Din,</i> 135 S. Ct 2128, 2131 (2015).....	8, 18
<i>McCreary County v. Am. Civil Liberties Union,</i> 545 U.S. 844 (2005).....	6, 19
<i>Nguyen v. INS,</i> 533 U.S. 53 (2001).....	7
<i>Pers. Adm’r of Massachusetts v. Feeney,</i> 442 U.S. 256 (1979).....	18
<i>Shaw v. Hunt,</i> 517 U.S. 899 (1996).....	19
<i>Shelby Cty., Ala. v. Holder,</i> 133 S. Ct. 2612 (2013).....	14
<i>Statharos v. New York City Taxi and Limousine Comm’n,</i> 198 F.3d 317 (2d Cir.1999)	6

<i>Washington v. Trump,</i> 847 F.3d 1151 (9th Cir. 2017)	5, 7, 18, 19
--	--------------

<i>Zadvydas v. Davis,</i> 533 U.S. 678 (2001).....	7
---	---

DOCKETED CASES

<i>Hawai`i v. Trump,</i> No. 1:17-cv-00050-DKW-KSC (D. Haw. Mar. 7, 2017).....	7
---	---

<i>Washington v. Trump,</i> No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017)	14
--	----

<i>Washington v. Trump,</i> No. 17-35105 (9th Cir. Feb. 16, 2017)	15
--	----

OTHER AUTHORITIES

Fifteenth Amendment to the U.S. Constitution	13
--	----

Kambiz Ghanea Bassiri, <i>A History of Islam in America: From the New World to the New World Order</i> (Cambridge 2010).....	24
--	----

January 27, 2017 “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Revoked Executive Order”)	<i>passim</i>
--	---------------

Revoked Executive Order § 1	16
-----------------------------------	----

Revoked Executive Order § 5(b)	12
--------------------------------------	----

Revoked Executive Order § 5(e)	12
--------------------------------------	----

March 6, 2017 “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”)	<i>passim</i>
---	---------------

Executive Order § 1	5
---------------------------	---

Executive Order § 1(b)(4).....	5
--------------------------------	---

Executive Order § 1(h)	20
------------------------------	----

Resolution 1327 (2003) of the Council of Europe.....	17
--	----

Amici Curiae Muslim Advocates, American Muslim Health Professionals, Muppies, Inc., The National Arab American Medical Association, and Network of Arab-American Professionals (“Amici”) respectfully submit their brief in support of the Plaintiffs’ Motion for a Temporary Restraining Order, filed on March 8, 2017, Dkt. 65.

I. INTERESTS OF *AMICI CURIAE*

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates’ work fighting institutional discrimination against the American Muslim community.

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

Muppies, Inc., also known as Muslim Urban Professionals (“Muppies”), is a nonprofit, charitable organization dedicated to empowering and advancing Muslim business professionals to be leaders in their careers and

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

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

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

II. INTRODUCTION

Amici are business, education, finance, healthcare, legal, science, technology, and other professional members of the American Muslim community who are directly harmed and stigmatized by President Donald J. Trump’s executive order of March 6, 2017 titled “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”), which revokes and replaces the

January 27, 2017 Executive Order of the same title (the “Revoked Executive Order”). Amici urge the Court to grant the Plaintiffs’ motion for a preliminary injunction against enforcement of the Executive Order.

Like its predecessor, the Executive Order is unconstitutional on its face. Its animating purpose is to reduce the flow of Muslims entering the United States, based on the odious and false notion that Muslims are more likely than others to commit or support acts of terrorism in America. This purpose was broadcast by Mr. Trump during his campaign for the presidency, when he promised “a total and complete shutdown of Muslims entering the United States,” Ware Decl. Ex. 1, and proclaimed his belief that “Islam hates us,” and that it is “very hard” to make a distinction between Islam and “radical Islam” because “you don’t know who is who,” Ware Decl. Ex. 2. The same purpose animated the Revoked Executive Order, which President Trump’s advisor and surrogate Rudy Giuliani admitted was an attempt by the President to implement the “Muslim ban” in a way that would pass legal muster. Ware Decl. Ex. 3. And the same purpose has been carried through to the Executive Order, which President Trump’s Senior Advisor and one of the architects of the Executive Order, Stephen Miller, has admitted reflects the “same basic policy” as the Revoked Executive Order, Ware Decl. Ex. 4, merely repackaged to address some of the original Order’s more glaring due process concerns.

The Constitution forbids government action that discriminates on the basis of religion or that “conveys a message of endorsement or disapproval” of any religion or religious group. *Access Fund v. U.S. Dep’t of Agriculture*, 499 F.3d 1036, 1045 (9th Cir. 2007). From its inception as a “Muslim ban” through its failed implementation in the Revoked Executive Order and threatened re-implementation today, the Executive Order discriminates against Muslims and “conveys a message of . . . disapproval” of Muslims. One need look no further than the recent spate of hate crimes against persons perceived (often erroneously) to be Muslim immigrants to see the danger inherent in such an insidious message. See, e.g., Ware Decl. Ex. 5 (reporting the February 22, 2017 shooting in Olathe, Kansas of two Indian men mistaken for Iranians); Ware Decl. Ex. 6 (reporting the March 3, 2017 shooting of an American man of Indian descent in Kent, Washington, by a gunman who made statements to the effect of “Go back to your own country”); Ware Decl. Ex. 7 (reporting a March 10, 2017 attempt to set fire to a convenience store in Florida by a man who believed the owner was Muslim and wanted to “run the Arabs out of our country”); Ware Decl. Ex. 8 (reporting a March 11, 2017 attack against an innocent restaurant employee in Oregon by a man wielding a pipe, who had described the victim as a “Saddam Hussein-looking guy”). Ware Decl. Ex. 9 (detailing at least four incidences of arson in the first two months of 2017 targeting U.S. mosques).

Faced with damning evidence of its discriminatory motive, the Government first argued that its actions and motives are immune from judicial review. *See, e.g., Aziz v. Trump*, No. 1:17-cv-116-LMB-TCB, 2017 WL 580855, at *5 (E.D. Va. Feb. 13, 2017) (noting Government’s argument that national security judgments are beyond judicial review); *see also Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (noting Government’s contention that “the President has ‘unreviewable authority to suspend the admission of any class of aliens’”). The Ninth Circuit and other courts soundly rejected that argument. *See, e.g., Washington v. Trump*, 847 F.3d at 1164 (“[I]t is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.”); *Aziz v. Trump*, 2017 WL 580855, at *6 (“If the president’s actions can be subject to judicial review when he is exercising his core Article II powers . . . it follows that his actions are also subject to such review when he exercises Article I powers delegated to him by Congress.”).

Now, the Executive Order seeks to erase its roots as a “Muslim ban” by declaring by fiat that the Revoked Executive Order “did not provide a basis for discriminating for or against members of any particular religion,” Executive Order § 1(b)(4), and by elaborating on the supposed national security purpose of the policy, Executive Order § 1. But “the world is not made brand new every morning,” and this Court should reject the Government’s invitation to “turn a blind eye

to the context in which [the] policy arose.” *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 866 (2005). That context establishes that the Executive Order is rooted in animus toward Muslims. It also establishes that the articulated national security objectives have not, in fact, played a meaningful role in the Executive Order’s design and implementation.

The irreparable harms threatened by the Executive Order’s enforcement are undeniable. “Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.” *Statharos v. New York City Taxi and Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir.1999); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (deprivation of constitutional rights, even for minimal periods of time, constitutes irreparable injury). If enforced, the Executive Order threatens to again break apart families, stymie travel for religious, work, family, and medical purposes, and destroy work and study opportunities, among many other irreparable injuries. And it will do so on the basis of invidious stereotypes about a minority religious group. Amici therefore respectfully urge the Court to grant the requested preliminary injunction.

III. ARGUMENT

A. The Motives for the Executive Order Are Not Immune From Judicial Review

Plaintiffs allege that the Executive Order was “intended to disfavor Islam” and motivated by a desire to discriminate on the basis of religion and/or

national origin, nationality, or alienage.” Proposed Second Amended Complaint For Declaratory and Injunctive Relief at ¶¶ 108, 113, *Hawai`i v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. Mar. 7, 2017), ECF No. 58-1. Contrary to arguments previously advanced by the Government in connection with the Revoked Executive Order, the defendants’ motives in promulgating the Executive Order are properly subject to meaningful judicial review even where the Government is acting in the immigration or national-security sphere. *Washington v. Trump*, 847 F.3d at 1161-64.

The anti-discrimination commands of the First and Fourteenth Amendments, applicable to the Federal Government via the Fifth Amendment’s Due Process Clause, apply in the immigration context. In *Nguyen v. INS*, 533 U.S. 53 (2001), the Court adjudicated a noncitizen’s Equal Protection challenges to gender classifications in the statutory frameworks regulating derivative citizenship. The *Nguyen* Court identified the “purpose of [the] statute” as the focus of the inquiry, and carefully evaluated whether “important governmental interest[s]” were furthered by the gender classification. *Id.* at 64, 67-68.

The so-called “plenary power” doctrine, moreover, does not extinguish this judicial scrutiny. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding that so-called “plenary power” to create immigration law . . . is subject to important constitutional limitations” in the treatment of aliens). The Supreme

Court has long looked to “the historical record” to determine whether “the actions at issue . . . were motivated by any racial animus.” *INS v. Pangilinan*, 486 U.S. 875, 886 (1988). As Justice Kennedy’s controlling opinion in *Kerry v. Din* directs, courts should “look behind” the government’s stated reasons for a visa decision if the plaintiff “plausibly alleged with sufficient particularity” “an affirmative showing of bad faith.” 135 S. Ct. 2128, 2131 (2015). Here, that showing has been abundantly made.

B. The Executive Order Is Animated By Anti-Muslim Bias

Even before discovery, ample evidence supports Plaintiffs’ allegation that the Executive Order is motivated, at least in substantial part, by negative and false stereotypes about Muslims. This evidence is manifest in the context of the Executive Order’s promulgation and on its face.

1. The President’s Own Repeated Statements Confirm that the Revoked Executive Order Was Intended to Implement His Campaign Pledge to Put a Temporary Halt on Muslims Entering the United States

Prior to taking office, then-candidate Donald J. Trump made discrimination against Muslims a central pillar of his presidential campaign. On November 18, 2015, in response to terror attacks in Paris, Mr. Trump stated that “[w]e’re going to have no choice” but to close down some mosques in the United States, where “some bad things are happening.” Ware Decl. Ex. 10. On December 7, 2015, in the wake of the attack in San Bernardino, California,

then-candidate Mr. Trump released a written statement, entitled “Donald J. Trump Statement on Preventing Muslim Immigration,” which called for a “total and complete shutdown on Muslims entering the United States until our country’s representatives can figure out what is going on.” Ware Decl. Ex. 1. The statement continued (emphasis added):

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

The surveys cited in the statement had long since been discredited, *see* Ware Decl. Ex. 11, but the message was clear: Many Muslims bear hostile attitudes toward the United States and elevate violent ideology over American law.

This proposed “Muslim ban” became a core promise of the Trump campaign, repeated by Mr. Trump and his advisors and surrogates at campaign events across the country. Asked during a televised debate on January 14, 2016 whether he had rethought his “comments about banning Muslims from entering the country,” Mr. Trump responded, “No.” Ware Decl. Ex. 12. On March 9, 2016, Mr. Trump stated in a televised interview, “I think Islam hates us.” Ware Decl.

Ex. 2. The full exchange between Mr. Trump and CNN's Anderson Cooper is instructive (emphasis added):

Cooper: Do you think Islam is at war with the West?

Trump: ***I think Islam hates us.*** There is something—there is something there that is a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us.

Cooper: In Islam itself?

Trump: You're going to have to figure that out. OK. You'll get another Pulitzer, right? But you'll have to figure that out. But there's a tremendous hatred. And we have to be very vigilant. We have to be very careful. And ***we can't allow people coming into this country who have this hatred of the United States . . . and of people that are not Muslim.***

Cooper: I guess the question is, is there a war between the west and radical Islam or between the west and Islam itself?

Trump: Well, it's radical but it's very hard to define. It's very hard to separate because you don't know who is who.

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

there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.” Ware Decl. Ex. 13. As described below, the Executive Order ultimately adopted this framework.

Next, in a July 17, 2016 televised interview, Mr. Trump was confronted with his then-running mate Mike Pence’s statement that the Muslim ban would be unconstitutional. Mr. Trump’s response made clear that the same purpose of stemming the flow of Muslim migrants would be pursued by other ends: “So you call it territories, okay? We’re gonna do territories.” Ware Decl. Ex. 14. A week later, in a July 24, 2016 interview, Mr. Trump was asked if his shifting rhetoric signified a “rollback” from his proposed “Muslim ban.” He answered: “I don’t think so. I actually don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. ‘***Oh, you can’t use the word Muslim.***’ . . . And I’m okay with that, because I’m talking territory instead of Muslim.” Ware Decl. Ex. 15. And on October 9, 2016, during a televised presidential debate, Mr. Trump stated, “The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world.” Ware Decl. Ex. 16.

On January 27, 2016, President Trump fulfilled his campaign promise by signing the Revoked Executive Order. Among other things, the Revoked Executive Order temporarily banned entry from (initially) seven countries whose

nationals are overwhelmingly Muslim, temporarily suspended the entire U.S. Refugee Admissions Program, established a policy of prioritizing certain religious denominations over others upon resuming the program, and indefinitely barred entry of Syrian refugees.

On the day he signed the Revoked Executive Order, President Trump stated that one of the purposes of the changes in refugee policy he was adopting was to favor Christian refugees over Muslim refugees. Ware Decl. Ex. 17 (claiming that “[i]f you were a Muslim [in Syria] you could come in [to the United States], but if you were a Christian, it was almost impossible . . . And I thought it was very, very unfair. So we are going to help them [Christian refugees]”).¹ This religious-based preference was reflected in Sections 5(b) and 5(e) of the Revoked Executive Order, which limited refugee claims based on religious-based persecution to individuals whose religion is a “minority religion in the individual’s country of nationality.” Notably, the vast majority of the 38,000 Muslim refugees admitted to the United States in 2016 were nationals of the seven Muslim-majority countries identified in the Revoked Executive Order.² Sections 5(b) and 5(e) of the Revoked Executive Order would have rendered them ineligible for the religious-based persecution preference.

¹ See also Ware Decl. Ex. 18 (“Christians in the Middle-East have been executed in large numbers. We cannot allow this horror to continue!”).

² See Ware Decl. Ex. 19.

The following day, January 28, 2017, President Trump’s advisor and surrogate Rudy Giuliani admitted that the policy implemented in the Revoked Executive Order resulted from an instruction by the President to find “the right way” to “legally” implement the “Muslim ban.” Ware Decl. Ex. 3. As of the date of this amicus submission, the Trump campaign’s December 7, 2015, press release entitled “Donald J. Trump Statement on Preventing Muslim Immigration,” remains on the Donald J. Trump campaign website³ and on President Trump’s Twitter page,⁴ which President Trump has continued to use regularly (and apparently in an official capacity) even after taking office.

2. The Context of the Executive Order Confirms that It Is the Same Basic Policy As the Revoked Executive Order

The Supreme Court has consistently held that a state actor cannot circumvent the Constitution’s prohibitions on discrimination merely by rescinding and reenacting the same policy with slight or technical variations. For example, in a series of decisions called the White Primary cases, “the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary election; in 1944, the Court struck down a ‘reenacted’ and slightly altered version of the same law; and in 1953, the Court once again confronted an attempt by Texas to ‘circumven[t]’ the Fifteenth Amendment by adopting yet another variant of the

³ Ware Decl. Ex. 1.

⁴ Ware Decl. Ex. 20.

all-white primary. . . .” *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2633 (2013) (citations omitted).

The context surrounding issuance of the replacement Executive Order demonstrates that the Government here is attempting just such a circumvention of the Constitutional prohibitions against religious discrimination. By the Government’s own admissions, the Executive Order and the Revoked Executive Order reflect the same basic policy motivation.

On February 3, 2017, the U.S. District Court for the Western District of Washington issued a Temporary Restraining Order enjoining the enforcement of the Revoked Executive Order on a “nationwide basis.” *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017), ECF No. 52. President Trump responded in a pair of Twitter posts that, as a result of the restraining order, “many bad and dangerous people may be pouring into” the United States, and vowed to have the decision of “this so-called judge” overturned. Ware Decl. Ex. 21.

After the Ninth Circuit upheld the injunction on February 9, 2017, President Trump signaled his intent to continue litigating the validity of the Revoked Executive Order, posting on Twitter, “SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!” Ware Decl. Ex. 22, capitalization included in original.

One week later, however, on February 16, 2017, the Government sought to discontinue litigation over the Revoked Executive Order by notifying the courts that “the President intends in the near future to rescind the [Revoked Executive Order] and replace it with a new substantially revised Executive Order.” Appellants’ Supplemental Brief on *En Banc* Consideration at 4, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 16, 2017), ECF No. 154. That notice notwithstanding, on February 21, 2017, White House Press Secretary Sean Spicer told reporters that the President would be updating—rather than rescinding—the Revoked Executive Order. Ware Decl. Ex. 23.

That same day (February 21, 2017), Stephen Miller, a senior advisor to the President and one of the chief architects of the immigration ban policy,⁵ Ware Decl. Ex. 24, explained in an interview with Fox News that, in the Administration’s view: (a) “nothing was wrong with the [Revoked Executive Order]”; (b) the Ninth Circuit decision declining to lift the injunction against the Revoked Executive Order was “flawed” and “erroneous”; (c) the President would

⁵ Mr. Miller has long espoused discriminatory views of Islam. In a column published in his high school newspaper, Mr. Miller wrote, “We have all heard about how peaceful and benign the Islamic religion is, but no matter how many times you stay that, it cannot change the fact that millions of radical Muslims would celebrate your death for the simple reason that you are Christian, Jewish or American.” Ware Decl. Ex. 24. Mr. Miller later as a senior in college established the “Terrorism Awareness Project,” an initiative, he wrote, aimed at educating students about the risk of “Islamofascism.” Ware Decl. Ex. 25.

nevertheless be issuing a new executive order that would address the “very technical issues that were brought up by the court”; (d) the new executive order would differ from the Revoked Executive Order only in “minor technical” ways; and (e) “the same basic policy outcome” would remain in place under the new executive order. Ware Decl. Ex. 4.

3. The Executive Order Reflects Anti-Muslim Bias on its Face

The Executive Order purports to repudiate “animus toward any religion”—but manifestly fails. As was the case with the Revoked Executive Order, the Executive Order singles out countries that are overwhelmingly Muslim,⁶ while at the same time ignoring other countries, such as Colombia, the Philippines, and Venezuela, that have been designated by the U.S. State Department as safe havens for terrorist groups but whose populations are not majority Muslim. Ware Decl. Ex. 27.

Moreover, key language evincing stereotypical beliefs about Muslims appeared in the Revoked Executive Order and is repeated in the Executive Order. Section 1 of the Revoked Executive Order stated in part (emphasis added):

The United States cannot, and should not, ***admit those who do not support the Constitution, or those who would place violent***

⁶ The countries singled out by the Executive Order include: Iran (99.5% Muslim), Libya (96.6% Muslim), Somalia (99.8% Muslim), Sudan (90.7% Muslim), Syria (92.8% Muslim), Yemen (99.1% Muslim), and Iraq (99.0% Muslim). *See Exec. Order 13,780 §§ 1(f), 2(c), 4; Ware Decl. Ex. 26.*

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.

This statement played off the false and bigoted notion, repeated by then-candidate Mr. Trump throughout the presidential campaign, that Muslims are more likely than others to place violent ideology over American law and to engage in “honor killings” and other forms of violence against women. *See* Ware Decl. Ex. 1 (claiming that “Shariah authorizes such atrocities as murder against non-believers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.”).

Section 11(iii) of the Executive Order reiterates this same invidious association by ordering the Secretary of Homeland Security to collect “information regarding the number and types of acts of gender-based violence against women, including so-called ‘honor killings,’ in the United States by foreign nationals.”

The idea of honor killings is commonly and falsely associated with Islam and Muslims.⁷ By citing honor killings as the most noteworthy kind of

⁷ *See, e.g.*, Resolution 1327 (2003) of the Council of Europe (“The Assembly notes that whilst so-called ‘honour crimes’ emanate from cultural and not religious roots and are perpetrated worldwide (mainly in patriarchal societies or communities), the majority of reported cases in Europe have been amongst Muslim or migrant Muslim communities (although Islam itself does not support the death penalty for honour-related misconduct).”)

gender-based violence, both Executive Orders suggest that Muslims as a group are more prone to such gender-based violence than other groups. This is consistent with the underlying false premise of the Executive Order that persons from enumerated Muslim-majority countries are more prone to violence than other groups.⁸ This is also consistent with Mr. Trump’s repeated claims during the presidential campaign that “large segments of the Muslim population” hate Americans and that many Muslims want to be governed according to a violent ideology that authorizes “beheadings and more unthinkable acts that pose great harm to Americans, especially women.” Ware Decl. Ex. 1.

Accordingly, the text of the Executive Order itself contains evidence of invidious generalizations about a protected class that show “bad faith” and a discriminatory intent. *Kerry v. Din*, 135 S. Ct. at 2131.

4. The Development of the Executive Order Demonstrates that its National Security Justifications are Pretextual

The Equal Protection Clause prohibits “a classification that is ostensibly neutral but is an obvious pretext for … discrimination.” *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). Even when a law lacks a facial classification, evidence of “both impermissible . . . motivation and . . .

⁸ Following the TRO issued in *Washington v. Trump* suspending the Revoked Executive Order, 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017), ECF No. 52, Mr. Trump posted on Twitter, “Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country.” Ware Decl. Ex. 21.

discriminatory impact” require a court to look behind the government’s proffered justification. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (rejecting proffered legitimate purpose for felon disenfranchisement law as pretextual); *see also Shaw v. Hunt*, 517 U.S. 899, 932–33 (1996) (noting use of pretext analysis in discrimination cases “[i]n a variety of contexts, from employment to juror selection”). Similarly, in the Establishment Clause context, the secular purpose behind a policy “has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864. “It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.” *Washington v. Trump*, 847 F.3d at 1167.

Plaintiffs are likely to succeed in establishing that the purported legitimate justifications for the singling out of six countries in Section 2(c) of the Executive Order are pretextual. The Executive Order’s purposes remain the discriminatory and religious purposes that propelled the Revoked Executive Order.

First, as noted above, the President’s own Senior Advisor, a key engineer of the Executive Order policy, has admitted that the Executive Order has “the same basic policy outcome” as the Revoked Executive Order and that the changes between the two Orders were limited to addressing “very technical issues that were brought up by the court.” Ware Decl. Ex. 4.

Second, the Government’s own analyses and data contradict the national security justification for singling out nationals of the six listed nations. In an analysis prepared at the request of the Department of Homeland Security (DHS) leadership in the wake of the courts’ injunction of the Revoked Executive Order, analysts within the DHS analyzed data from the DHS, the State Department, and the Justice Department concerning the association between these nationalities and terrorism risk. The DHS analysts concluded that “country of citizenship is unlikely to be a reliable indicator of potential terrorism activity.” Ware Decl. Ex. 28, at 1.

The Executive Order nevertheless seeks to create an association between the designated countries and terrorism risk by cherry-picking two past cases. Executive Order § 1(h). Tellingly, however, neither case supports the Order’s scope. The first case involved two Iraqi nationals—a curious choice given that the Executive Order *removes* Iraq from the original list of countries included in the ban under the Revoked Executive Order. Moreover, neither of the Iraqi nationals in question was planning an attack in the United States.⁹ The second case involved a Somali national admitted to the United States “as a child refugee” who “later became a naturalized United States citizen” and subsequently, as an adult, engaged in terrorist activity. The Order does not explain how increased vetting of

⁹ Ware Decl. Ex. 29.

refugee *children*, however, would or could identify those who may pose a risk of committing acts of violence many years later—as *adults*, and *after becoming American citizens*.

The DHS’s analysis is corroborated by a number of independent analyses, including without limitation:

- The Cato Institute’s analysis of terrorism conviction data demonstrated that “the chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year.” Ware Decl. Ex. 30.
- An analysis of Justice Department data by a former FBI analyst demonstrated that “[a]bsolutely nothing in the large body of data we have about real terrorist plots in the United States remotely supports either a focus on barring refugees or a focus on these particular seven countries.” Ware Decl. Ex. 31.
- Another independent analysis demonstrates that the Justice Department’s own data also is inconsistent with claims that “foreign-born individuals have a greater propensity to commit terrorism, and that limiting foreign-born individuals’ travel into the United States on this basis will have a positive impact on national security.” Ware Decl. Ex. 32.
- In a letter to President Trump dated March 10, 2017, 134 former high-ranking foreign policy officials in Republican and Democratic administrations stated unequivocally that “[t]he revised executive order is *damaging to the strategic*

and national security interests of the United States.” Ware Decl. Ex. 33, at 2 (emphasis added).

Third, the manner in which the administration implemented the Executive Order belies any purported national security imperative of the ban. Contrary to the President’s rhetoric of “bad and dangerous people” supposedly “pouring” into the country as a result of court orders enjoining the Revoked Executive Order, Ware Decl. Ex. 21, the White House is reported to have repeatedly delayed signing the replacement Executive Order for political and public relations reasons having nothing to do with national security. Ware Decl. Ex. 34.

5. That the Executive Order Halts Immigration by Many but Not All Muslims In No Way Defeats Plaintiffs’ Allegations of Animus

The fact that the Executive Order implements President Trump’s campaign promise to halt Muslim immigration to the United States partially, rather than fully, and does nothing to weaken the evidence of anti-Muslim bias described above. In no other context is it the case that a failure to discriminate against all members of a suspect class defeats any claim of discrimination. In *United States v. Windsor*, for example, the Court invalidated on Equal Protection grounds a federal statute “motived by an improper animus” against gays and lesbians. 133 S. Ct. 2675, 2693 (2013). The Court invalidated the statute even though it only applied

to the subset of gays and lesbians who chose to marry. *Id.* at 2683.

A requirement that a discriminatory policy cover all and only members of a protected class would invite the circumvention of constitutional rights. Those motivated by unlawful purposes could easily avoid judicial review by simply tweaking the scope of their actions—as the Government has attempted to do in implementing its “Muslim ban” policy.

C. The Executive Order Disproportionately Impacts Muslims

If allowed to be enforced, the Executive Order threatens to again cause immediate suffering to U.S. citizens and lawful 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; to universities and businesses seeking to recruit the best available talent; and to nationals of the listed countries currently in the United States on single-entry visas or visas that may expire during the period of the ban; among others.¹⁰ As American Muslims, Amici are acutely threatened by these injuries.

¹⁰ See e.g., Ware Decl. Ex. 35 (detailing the struggles of families with children affected by the Revoked Executive Order), Ware Decl. Ex. 36 (documenting the experience of individuals affected by the Revoked Executive Order), Ware Decl. Ex. 37 (discussing the complications suffered by children who had planned to seek medical care in the United States), Ware Decl. Ex. 38 (detailing difficulties caused by the Revoked Executive Order to medical professionals working abroad).

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 Executive Order and the public pronouncements of the President and his advisors in connection therewith. Contrary to the misperception spread by the “Muslim ban,” the presence of Muslims in America is not a threat to American security. Muslims have been a part of America since its founding, when 10-15% of slaves forcibly brought to America were Muslim. Today, Muslims represent 1% of the 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.¹¹

IV. CONCLUSION

The Government has no legitimate interest in discriminating against Muslims or in exploiting “negative attitudes, or fear” toward Muslims. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). The invidious

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

stereotype that “Islam hates us”—or that Muslims, in the words of the Revoked Executive Order, “bear hostile attitudes toward [the United States] and its founding principles” and “would place violent ideologies over American law”—was not a legitimate basis for the Revoked Executive Order and is not a legitimate basis for the replacement Executive Order.

The policy underlying the Executive Order is pervaded by an unconstitutional animus toward Muslims and, if not enjoined, will cause immediate and irreparable injury to numerous American Muslim and their families and loved ones. Amici therefore urge the Court to grant the requested preliminary injunction.

Dated: Honolulu, Hawai`i, March 14, 2017.

Respectfully submitted,

/s/ Nickolas A. Kacprowski
ALSTON HUNT FLOYD & ING
NICKOLAS A. KACPROWSKI
ARNOLD & PORTER KAYE SCHOLER LLP
ANTON A. WARE (*pro hac vice*)
MUSLIM ADVOCATES
JOHNATHAN SMITH (*pro hac vice*)
JUNAID SULAHRY (*pro hac vice*)
Attorneys for Proposed *Amici Curiae*
Muslim Advocates; American Muslim
Health Professionals; Muppies, Inc.;
The National Arab American Medical
Association; and Network of Arab-
American Professionals