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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I and ISMAIL)	CIVIL NO. CV 17-00050 DKW-KSC
ELSHIKH,)	
	)	INTEREST OF AMICUS CURIAE
Plaintiffs,	)	AND BRIEF OF THE RODERICK
	)	AND SOLANGE MACARTHUR
vs.	)	JUSTICE CENTER AS <i>AMICUS</i>
	)	<i>CURIAE</i> IN SUPPORT OF
DONALD J. TRUMP, in his official	)	PLAINTIFFS’ MOTION FOR A
capacity as President of the United	)	TEMPORARY RESTRAINING
States; U.S. DEPARTMENT OF	)	ORDER; CERTIFICATE OF WORD
HOMELAND SECURITY; JOHN F.	)	COUNT; CERTIFICATE OF
	)	SERVICE

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.)
_____)

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INTEREST OF AMICUS CURIAE

The Roderick and Solange MacArthur Justice Center is a not-for-profit organization founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. The MacArthur Justice Center has represented clients facing a myriad of human rights and civil rights injustices, including issues of discrimination, the unlawful detention of foreign nationals, and the rights of marginalized groups in the United States' justice system. The MacArthur Justice Center has an interest in the independent role of the judiciary in determining whether government officials have acted with discriminatory animus. It submits this brief to inform the Court's analysis of animus, including through historic information that preceded the present action, and to contextualize this dispute in the history of judicial scrutiny of discriminatory government actions.

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE
CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS’ MOTION FOR
A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This President of the United States, Donald Trump, selected an unpopular minority faith that makes up 1% of the nation’s population, ran a campaign that vilified and spread propaganda generating fear and animosity towards that minority faith, and built an administration that has blindly and consistently equated the members of that minority faith with terrorists. President Trump and his administration now expects courts to turn a blind eye to—or, as the Government has urged “not look” at—that record of animus and, instead, accept the Government’s pretextual assertion of national security. *See* Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 17, *Washington v. Trump*, No, 17-35105 (9th Cir. Feb. 4, 2017), ECF No. 14. If this Court were to do so, it would amount to an abdication of its critical role in safeguarding discrete and insular minorities, and preventing the Executive from using its official powers to attack unpopular groups—the sort of abdication that has, in the past, left a permanent stain on American history.

The MacArthur Justice Center submits this amicus brief to document President Trump’s extensive record of hatred towards people of the Muslim faith. As described herein, President Trump’s latest Executive Order is but one action that

follows from a targeted and sustained attack on Muslims, through which the President has increased his own popularity by spreading fear about Muslims and labeled them as terrorists. President Trump has long expressed the view that there is a “Muslim problem” in the United States and disseminated propaganda vilifying people of the Muslim faith. Prior to being elected President, he made specific promises to curtail the rights of those who choose to practice Islam in various ways, including the shutdown of mosques and the suspicionless surveillance and profiling of Muslim Americans. Moreover, not only did Mr. Trump specifically promise he would ban Muslims from entering the United States during his Presidential campaign, but he previewed that he would do so under the guise of referring to “territories” and “extreme vetting” instead of mentioning Muslims directly. Mr. Trump expressly justified his plans by reference to the detention and internment of Japanese Americans during World War II.

President Trump’s latest Executive Order, which attempts to follow through on his animus and promises, must be viewed in light of President Trump’s public, repeated, and unabashed admission of an intent to discriminate—the most fundamental abuse of government power that the Establishment and Equal Protection Clauses exist to prevent. The Government’s contention that such Executive action is unreviewable, or entitled to great deference due to its relation to immigration and national security, not only conflicts with United States Supreme

Court precedent, but is painfully reminiscent of arguments made by the Government to justify racial discrimination and oppression in moments of our history that we now all regard with shame. Indeed, it is chilling the degree to which the position advanced by the Government here, with the most technical of modifications, mirrors the closing passage of *Korematsu v. United States*, 323 U.S. 214 (1944), used to justify the internment of Japanese Americans in 1944:

To cast this case into outlines of [religious] prejudice, without reference to the real military dangers which were presented, merely confuses the issue. [Muslims were] not excluded from the [United States] because of hostility to [them] or [their religion]. [They were] excluded because we are at war with [radical Islamic terrorism], because the [President] feared an invasion of our [country] and felt constrained to take proper security measures, because [he] decided that the military urgency of the situation demanded that all [persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President], reposing [his] confidence in this time of war in our military leaders . . . determined that [he] should have the power to do just this. There was evidence of disloyalty on the part of some [Muslims], the [President] considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id. at 233 (with modification in brackets).

The MacArthur Justice Center urges the Court not to allow a repeat of this depraved moment in United States history by overlooking the record of this administration's animus against persons of the Muslim faith.

II. ARGUMENT

A. The President Has Expressed Hatred, Disseminated Lies, And Made Numerous Promises To Use The Executive Power Against Muslims.

As described below, President Trump has shown animus towards Muslims and promised to use the office of the Executive to oppress Muslims in various ways, including statements and propaganda that vilify Muslims, threaten to shutdown and surveille mosques, profile Muslims, and ban Muslims from entering the country. He even previewed that he would attempt to do so using language that appears more neutral, such as referring to Muslim-majority territories—precisely what he did here. While the administration has taken greater efforts to veil its discriminatory and Islamophobic purpose in the latest Executive Order, it would be a serious mistake to assume that this washes the Order clean of its reprehensive motivation.

1. The President repeatedly refers to people of the Muslim faith as a “problem” and spreads propaganda to vilify them.
 - a. Advocating That Muslims Are A “Problem”

As early as April 11, 2011, Mr. Trump began advocating a “Muslim problem” exists in the United States, and suggesting that the Koran teaches a “very negative vibe” and “tremendous hatred”:

Bill O’Reilly asked me is there a Muslim problem? And I said absolutely, yes. In fact I went a step further. I said I didn’t see Swedish people knocking down the World Trade Center. . . . I mean I could have said, ‘Oh absolutely not Bill, there’s no Muslim problem, everything is wonderful, just forget about the World Trade Center.’ But you have to speak the truth. . . . The Koran is very interesting. A lot of people say it teaches love and there is a

very big group of people who really understand the Koran far better than I do. I'm certainly not an expert, to put it mildly. But there's something there that teaches some very negative vibe. . . . There's a lot of hatred there that's some place. Now I don't know if that's from the Koran. I don't know if that's from some place else. But there's tremendous hatred out there that I've never seen anything like it.¹

The President has since repeatedly echoed these views of Muslims. On September 18, 2015, at a town hall event in Rochester, New Hampshire, Mr. Trump had the following exchange with a questioner:

Questioner: "We have a problem in this country. It's called Muslims."

Mr. Trump: "Right."

Questioner: "You know our current president is one. You know he's not even an American."

Mr. Trump: "We need this question."²

¹ David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), <http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches>; *Donald Trump warns of the Muslim Problem*, YouTube (Apr. 11, 2011), <https://m.youtube.com/watch?v=fWzDAvemJG8>.

² Jonathan Merritt, *Trump's Proposals Could Backfire on Christians*, The Atlantic (Nov. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/11/donald-trump-muslims-christians/417255/>; Theodore Schleifer, *Trump doesn't challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), <http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/>.

On December 10, 2015, Mr. Trump posted three separate statements on Twitter referring to “a massive Muslim problem” and associating Muslims with terrorism:

- “The United Kingdom is trying hard to disguise their massive Muslim problem. Everybody is wise to what is happening, very sad! Be honest.”³
- “Thank you to respected columnist Katie Hopkins . . . for her powerful writing on the U.K.’s Muslim problems.”⁴
- “In Britain, more Muslims join ISIS than join the British army.”⁵

The President has defended his view that people of the Muslim faith are a “problem” and vilified them on numerous other occasions:

- On February 4, 2016, on national television on CNN, Mr. Trump was asked: “Is it really a Muslim problem, or is it a radical Islamist problem?” He responded: “Maybe it’s a Muslim problem, maybe it’s not.”⁶
- On March 9, 2016, on national television on CNN, Mr. Trump told Anderson Cooper, “I think Islam hates us” and that Muslims have “tremendous hatred” and “unbelievable hatred.” He rejected that a distinction could be drawn between radical Islam and Islam itself, claiming “[i]t’s very hard to define.”⁷
- The following day, on March 10, 2016, on national television, Mr. Trump was asked whether when previously saying “Islam hates us,” he was referring to

³ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674934005725331456?lang=en>.

⁴ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674936832010887168?lang=en>.

⁵ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/675123192864899072?lang=en>.

⁶ CNN Interview of Donald Trump, YouTube (Feb. 4, 2016), <https://www.youtube.com/watch?v=uW9UIMqJtro> (minutes 18:42 to 18:46).

⁷ Theodore Schleifer, *Donald Trump: ‘I think Islam hates us’*, CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

all 1.6 billion Muslims in the world. He responded: “I mean a lot of them. I mean a lot of them.” When given another opportunity to clarify, he stated: “There’s something going on that maybe you don’t know about, maybe a lot of other people don’t know about, but there’s tremendous hatred. And I will stick with exactly what I said to Anderson Cooper.”⁸

- On June 13, 2016, at a Presidential campaign event in Manchester, New Hampshire, Mr. Trump said: “Refugees are trying to take over our children” by telling them “how wonderful Islam is,” and equated Islam with ISIS.⁹
 - b. Advocating anti-Muslim propaganda, including that thousands of Muslims celebrated 9/11 on New Jersey rooftops and praising the mass execution of Muslims with bullets dipped in pigs blood

The President has gone further, disseminating propaganda vilifying Muslim people. On November 21, 2015, at a rally in Birmingham, Alabama, in front of thousands of Americans and rebroadcast numerous times on national television, for instance, Mr. Trump proclaimed: “Hey, I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering.”¹⁰ In the face of the authorities and articles

⁸ Transcript of Republican Debate in Miami, CNN (Mar. 15, 2016) <http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/>.

⁹ *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (Jun. 13, 2016) <https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats> (minutes 20:05 to 20:30).

¹⁰ Glenn Kessler, *Trump’s outrageous claim that ‘thousands’ of New Jersey Muslims celebrated the 9/11 attacks*, Washington Post (Nov. 22, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/>.

debunking his claim,¹¹ Mr. Trump continued to spread fear based on this lie on numerous additional occasions:

- On November 22, 2015, on national television on ABC: “It did happen. I saw it. It was on television. I saw it. George, it did happen. There were people that were cheering on the other side of New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. I know it might be not politically correct for you to talk about it, but there were people cheering as that building came down—as those buildings came down. And that tells you something. It was well covered at the time, George. Now, I know they don’t like to talk about it, but it was well covered at the time. There were people over in New Jersey that were watching it, a heavy Arab population, that were cheering as the buildings came down. Not good.”¹²
- On November 23, 2015, at a rally in Columbus, Ohio: “I saw people getting together and, in fairly large numbers, celebrating as the World Trade Center was coming down, killing thousands of people, thousands and thousands of people. People are still dying over what happened with the World Trade Center. And they’re dying a terrible death. And I saw people. And I saw them on television and I read about it on the Internet and I read about it.”¹³

¹¹ See, e.g., Lauren Carroll, *Fact Checking Trump’s claim that thousands in New Jersey cheered when World Trade Center tumbled*, Politifact (Nov. 22, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/>.

¹² Glenn Kessler, *Trump’s outrageous claim that ‘thousands’ of New Jersey Muslims celebrated the 9/11 attacks*, Washington Post (Nov. 22, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/>.

¹³ Jenna Johnson, *Donald Trump on waterboarding: ‘If it doesn’t work, they deserve it anyway,’* Washington Post (Nov. 23, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/>.

- On November 25, 2015, Mr. Trump tweeted: “Credible Source on 9-11 Muslim Celebrations: FBI” and linked to an article stating that a retired FBI agent referred to his claims as “plausible[.]”¹⁴
- On December 2, 2015, Mr. Trump shared another individual’s tweet claiming to have seen “militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11!”¹⁵
- On December 7, 2015, Mr. Trump shared his November 25, 2015, post on Twitter calling his claim “plausible” a second time.¹⁶

Furthermore, in multiple rallies in front of thousands of Americans and rebroadcast on national television, Mr. Trump suggested that U.S. counter-terrorism policy should “go much further” than waterboarding suspected terrorists and praised a false story involving the mass murder of Muslims using pigs blood. During a February 19, 2016, rally in North Charleston, South Carolina—treating “terrorist” as a synonym for “Muslim”—Mr. Trump approvingly recounted the following legend:

You know, I a read story—it’s a terrible story, but I’ll tell you. Should I tell you? Or should I not? [crowd cheering] Early in the century, last century. General Pershing. Did you ever hear—rough guy. And they had a terror problem. And you know there’s a whole thing with swine and animals and pigs and you know

¹⁴ Donald J. Trump, Twitter (Nov. 25, 2015), <https://twitter.com/realdonaldtrump/status/669682774673137665?lang=en>; see also Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov 25, 2015) <http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/>.

¹⁵ Donald J. Trump, Twitter (Dec 2, 2015), <https://twitter.com/realDonaldTrump/status/672182509111767041>.

¹⁶ Donald J. Trump, Twitter (Dec 7, 2015), <https://twitter.com/realdonaldtrump/status/673905762087936000?lang=en>; see also Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov. 25, 2015), <http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/>.

the story, they don't like that. And they were having a tremendous problem with terror. . . General Pershing was a rough guy, and he sits on his horse and he's very astute like a ramrod. . . . And he caught 50 terrorists who did tremendous damage and killed many people. And he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs' blood—you heard that, right? He took 50 bullets, and he dipped them in pigs' blood. And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those people. And the 50th person, he said: "You go back to your people, and you tell them what happened." And for 25 years, there wasn't a problem. Okay? Twenty-five years, there wasn't a problem.¹⁷

Mr. Trump continued to repeat the same anti-Muslim propaganda in front of thousands of Americans at campaign rallies, adding new flourish. On March 11, 2016, at a rally in Dayton, Ohio, for instance, Mr. Trump told the same legend about General Pershing, again equating being a terrorist to being a Muslim throughout:

So General Pershing, tough, tough guy, and he had the whole deal going. And they catch 50 terrorists in the Philippines, and they were doing tremendous destruction. And what happens is he lines them up to be shot. He lines them up, gets them, knows they're guilty, they've admitted their guilt. Lines 50 people up to be shot. And as you know, swine, pig, a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets. Had his men, instructed his men to put the bullets into the rifles. They put the bullets into the rifles. And they shot 49 men. [crowd cheering] We don't like this, but I'm

¹⁷ Louis Jacobson, *Donald Trump cites dubious legend about Gen. Pershing, pig's blood and Muslims*, Politifact (Feb. 23, 2016), <http://www.politifact.com/truth-ometer/statements/2016/feb/23/donald-trump/donald-trump-cites-dubious-legend-about-gen-pershi/>; Jenna Johnson and Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it*, Washington Post (Feb. 20, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true/>; see also David Mikkelson, *Pershing the Thought*, Snopes (Apr. 28, 2016), <http://www.snopes.com/rumors/pershing.asp>, debunking Mr. Trump's story about General Pershing.

just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one.

That's not the end. Here's the end, want to hear the end? He went back and he said what just happened. For 28 years, there was no terrorism. . . . We're either going to win the battle or we're going to lose the battle. We have to do what we have to do. We have to clean it out. These are people that have horrible thoughts. These are people that have visions that you wouldn't believe."¹⁸

2. The President has equated Muslims with terrorists, calling for closing down and surveilling mosques, profiling Muslims, and a Muslim registry.

a. Advocating closing down and surveilling mosques

The President has, on numerous occasions, called for the closing of mosques in America. On November 16, 2015, for instance, Mr. Trump stated on national television on NBC that he would consider shutting down mosques if elected—again equating the practice of Islam with terror and hatred: “I would hate to do it, but it’s

¹⁸ Mr. Trump also equated being a terrorist with being Syrian, breaking in the middle of his story about General Pershing to say, “And by the way, we have to get to the bottom of it, we cannot allow people to come into the country who want to destroy us, we cannot do it. We can’t allow the Syrians. We can’t allow the migration of the Syrians into the country.” *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), <https://www.youtube.com/watch?v=-9KOAfh4GCw> (minutes to 42:45 to 46:45); Mark Z. Barabak, *All in a day's Trump rally: sneering, sarcasm, protests*, Los Angeles Times (Mar. 12, 2016), <http://www.latimes.com/nation/politics/la-na-trump-rallies-20160312-story.html>; *see also* Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets*, The Hill (Mar. 12, 2016), <http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs>.

something that you're going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas.”¹⁹

Two days later, again on national television on Fox News, Mr. Trump was asked whether he would actually shutdown mosques and responded that there was “absolutely no choice” but to do so: “Nobody wants to say this and nobody wants to shut down religious institutions or anything, but you know, you understand it. A lot of people understand it. We're going to have no choice. There's absolutely no choice.”²⁰

The President has called for shutting down mosques or the suspicionless surveillance of Muslims in mosques on numerous other occasions:

- On October 21, 2015, Mr. Trump told Fox Business's Stuart Varney that he was “going to have to certainly look at” closing mosques in the United States.²¹

¹⁹ Jenna Johnson, *Donald Trump would 'strongly consider' closing some mosques in the United States*, Washington Post (Nov. 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/>.

²⁰ Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>; *Trump says US will 'have no choice' but to shut some mosques down*, Fox News (Nov. 18, 2015), <http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html>.

²¹ Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, Washington Post (Oct. 21, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/>.

- On November 16, 2015, on national television on NBC, Mr. Trump said, “You’re going to have to watch and study the mosques, because a lot of talk is going on at the mosques.”²²
- On November 19, 2015, Yahoo News asked Mr. Trump whether his push for increased surveillance of American Muslims could include warrantless searches. He suggested he would consider a series of drastic measures against Muslims: “We’re going to have to do things that we never did before. And some people are going to be upset about it, but I think that now everybody is feeling that security is going to rule. And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we’re going to have to do certain things that were frankly unthinkable a year ago.”²³
- At a November 21, 2015 rally in Birmingham, Alabama, Mr. Trump stated, “So here’s the story—just to say it clear—I want surveillance of these people. I want surveillance if we have to, and I don’t care. Are you ready for this folks? Are you ready? They’re going to make it such a big deal . . . I want surveillance of certain mosques if that’s okay.”²⁴
- On December 7, 2015, at a rally in Mount Pleasant, South Carolina, Mr. Trump called for the surveillance of mosques, again equating the Muslim religion with hatred and terror: “Yes, we have to look at mosques and we have to respect mosques, but yes, we have to look at mosques. We have no

²² Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*, Politifact (Nov. 24, 2015), <http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/>; Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/>.

²³ Hunter Walker, *Donald Trump has big plans for ‘radical Islamic’ terrorists, 2016 and ‘that communist’ Bernie Sanders*, Yahoo News (Nov. 19, 2015), <https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html>.

²⁴ Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/>.

choice. We have to see what's out there, because something is happening in there. Man, there's anger. There's anger. And we have to know about it.”²⁵

- On June 13, 2016, on national television on Fox, Mr. Trump stated: “We have to be very strong in terms of looking at the mosques, you know, which a lot of people say, ‘Oh, we don’t want to do that. We don’t want to do that.’ We’re beyond that.”²⁶
- On June 15, 2016, at a rally in Atlanta, Georgia, Mr. Trump stated: “We have to go and we have to maybe check, respectfully, the mosques.”²⁷

On June 19, 2016, on national television on CBS, Mr. Trump was asked what it means to “respectfully check a mosque” and answered with the suspicionless surveillance and shutdown of mosques: “Well, you do as they used to do in New York, prior to this mayor dismantling. By the way, if you go to France right now, they’re doing it in France. In fact, in some instances, they are closing down mosques. People don’t want to talk about it. People aren’t talking about it. But look at what they’re doing in France. They are actually closing down mosques.”²⁸

²⁵ Jessica Taylor, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015), <http://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>; Transcript, *Trump Calls for Ban on Muslims Entering the U.S.*, CNN (Dec 8, 2015), <http://www.cnn.com/TRANSCRIPTS/1512/08/es.02.html>.

²⁶ Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/>.

²⁷ Jeremy Diamond, *Trump doubles down on calls for mosque surveillance*, CNN (Jun. 15, 2016), <http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/>.

²⁸ *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, CBS News (Jun. 19, 2016), <http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/>; Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/>.

b. Requiring a registry for all Muslims in the United States

Before and after being elected President, Mr. Trump stated his plan to have a registry for all people practicing the Muslim faith. On November 19, 2015, Yahoo News asked Mr. Trump whether he would require Muslims to register or carry a special form of identification that noted their religion. He responded: “We’re going to have to look at a lot of things very closely. We’re going to have to look at the mosques. We’re going to have to look very, very carefully.”²⁹

The following day, in Newton, Iowa, Mr. Trump was pointedly asked whether he was in favor of implementing a database tracking Muslims in the United States and Mr. Trump responded that he would “absolutely” do so: “There should be a lot of systems, beyond databases. We should have a lot of systems. And today you can do it. . . . Oh I would certainly implement that. Absolutely.”³⁰ When asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, “They have to be—they have to be.”³¹ When asked how idea for registering Muslims

²⁹ Hunter Walker, *Donald Trump has big plans for ‘radical Islamic’ terrorists, 2016 and ‘that communist’ Bernie Sanders*, Yahoo News (Nov. 19, 2015), <https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html>.

³⁰ Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

³¹ *Id.*

was different from the Nazi’s registrations of Jewish people, Mr. Trump responded four times, “You tell me.”³²

The President has echoed his call for a registry of all Muslims in America on several occasions:

- November 21, 2015, at a rally in Birmingham, Alabama, Mr. Trump reaffirmed his desire for a registry: “So the database—I said yeah, that’s alright fine, but database is okay, and watch list is okay, and surveillance is okay. If you don’t mind, I want to be—I want to surveil.”³³
- The following day, on November 22, 2015, on national television on ABC, Mr. Trump was asked: “You did stir up a controversy with those comments over the database. Let’s try to clear that up. Are you unequivocally now ruling out a database on all Muslims?” He responded, “No not at all.”³⁴
- The day following that, at a November 23, 2015 rally in Columbus, Ohio, Mr. Trump stated: “We have to really be vigilant with respect to the Muslim population . . . We have great Muslims. But we have to surveil; we have to create lists; we have the refugees coming in and we have to create lists.”³⁵

c. Advocating racial profiling of Muslims

On June 19, 2016, on national television on CBS, Mr. Trump advocated the profiling of Muslims in America as “common sense”:

³² *Id.*

³³ *FULL Speech HD: Donald Trump MASSIVE Rally in Birmingham, AL (11-21-2015)*, YouTube (Nov. 21, 2015)

<https://www.youtube.com/watch?v=kmPqV41bfC0> (minutes 42:58 to 43:08).

³⁴ Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*, Politifact (Nov. 24, 2015), <http://www.politifact.com/truth-ometer/article/2015/nov/24/donald-trumps-comments-database-american-muslims/>.

³⁵ *Donald Trump in Ohio: U.S. has become ‘soft, weak,’* Dayton Daily News (Nov. 23, 2015), <http://www.daytondailynews.com/news/national-govt-politics/donald-trump-ohio-has-become-soft-weak/5ZOBQutE4XSjTxV2NjvFnJ/>.

John Dickerson: Just as a bottom line here, are you talking about increasing profiling of Muslims in America?

Mr. Trump: Well, I think profiling is something that we're going to have to start thinking about as a country. And other countries do it.

And you look at Israel and you look at others, and they do it. And they do it successfully. And I hate the concept of profiling. But we have to start using common sense, and we have to use—we have to use our heads.³⁶

Mr. Trump later went further and stated that he believes there is “no choice” but to profile Muslim and Arab men. On September 19, 2016, on national television on Fox, for instance, Mr. Trump gave the following response:

Bill O'Reilly: Now, another thing you said that was very controversial is that you want to profile. You want to profile Arab or Muslim men. How would that work?

Mr. Trump: Well, we have no choice. Look, Israel does it. And Israel does it very successfully.

3. The President has advocated banning people of the Muslim faith from the United States and previewed that he would do so under the guise of a neutral order.

Prior to becoming President, Mr. Trump promised that, if elected, he would ban Muslims from the United States and specifically telegraphed that he would do

³⁶ *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, CBS News (June 19, 2016), <http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/>.

so by speaking in terms of “territories” and “extreme vetting” instead of using the word “Muslim.” He also previewed that, upon doing so, he would invoke the President’s “powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate”³⁷—just as the Government is attempting to do here—and has consistently justified that position with reference to the detention and internment of Japanese Americans during World War II.

On December 7, 2015, Mr. Trump announced on his Presidential campaign website: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”³⁸ The same day that Mr. Trump issued this announcement, he tweeted it with the name “Statement on Preventing Muslim Immigration.”³⁹ Further equating Muslims with hatred and terror, he tweeted, “Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!”⁴⁰ At a rally that took place that day in Mount Pleasant, South

³⁷ *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016), <https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats>.

³⁸ Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (last visited on March 10, 2017).

³⁹ Donald J. Trump, Twitter (Dec. 7, 2015), <https://twitter.com/realdonaldtrump/status/673993417429524480>.

⁴⁰ Jenna Johnson, *Trump calls for ‘total and complete shutdown of Muslims entering the United States,’* Washington Post (Dec. 7, 2015),

Carolina, Mr. Trump called for “a total and complete shutdown of Muslims,” and added: “We have no choice. We have no choice. We have no choice.”⁴¹ Mr. Trump also appeared on national television on Fox News to advocate his desire for a ban on Muslims.⁴²

The President’s call for a total and complete shutdown of Muslims entering the United States remains on his website as of today.⁴³

On December 8, 2015, the day following the announcement of his intent to ban Muslims, Mr. Trump was asked on national television on NBC whether such a “broad approach against all Muslims” would be counterproductive, instead of targeting people the Government had reason to believe should be investigated. Mr. Trump confirmed that he intended the ban to apply to all Muslims and justified it with reference to President Franklin D. Roosevelt’s World War II Executive Proclamations authorizing the detention and internment of Japanese, German, and Italian aliens:

It’s not unconstitutional keeping people out, frankly, and until we get a hold of what’s going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential

<https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (last visited on March 10, 2017).

proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam. We are at war.⁴⁴

When asked how border officials would practically implement the ban he was proposing, Mr. Trump responded: “They would say, ‘are you Muslim?’” The NBC commentator further questioned: “And if they said yes, they would not be allowed in the Country?” Mr. Trump responded, “That’s correct.”⁴⁵

The same day, Mr. Trump also appeared on national television on ABC and, again, justified his ban based on President Roosevelt’s internment of Japanese Americans. When asked whether being compared to Hitler provided him with “any pause at all,” Mr. Trump responded: “No because what I’m doing is no different than what F.D.R. did. F.D.R.’s solution for Germans, Italians, Japanese, many years ago.”⁴⁶ When Mr. Trump was asked if he was in favor of internment camps, he

⁴⁴ *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015) <https://www.youtube.com/watch?v=5I3E3-U-1jc>; Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and ‘Morning Joe’ Cuts to Commercial*, New York Times (Dec. 8, 2015), <https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donald-trump-interrupts-and-morning-joe-cuts-to-commercial/>.

⁴⁵ *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015) <https://www.youtube.com/watch?v=5I3E3-U-1jc>; *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), <http://www.msnbc.com/transcripts/hardball/2015-12-08>.

⁴⁶ Miriam Hernandez, *Trump Cites History to Defend Muslim Immigration Ban*, ABC 7 (Dec. 9, 2015), <http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396/>.

further justified his intentions based on F.D.R.'s actions during World War II, stating: "This was a president highly respected by all. He did the same thing."⁴⁷

Two days later, on December 10, 2015, Mr. Trump published a post on Twitter that linked to an article referring to statements that Islam is a "very evil and wicked religion," a "false religion," and advocating that Muslims should be banned, analogizing to the treatment of Japanese during World War II. Mr. Trump's post was titled: "Why Franklin Graham says Donald Trump is right about stopping Muslim immigration."⁴⁸ That same day, Mr. Trump also published three hateful tweets referring to Muslims as a "problem" and associating the Muslim religion with terror.⁴⁹

On March 9, 2016, on national television on CNN, Mr. Trump advocated that "Islam hates us," referring to America, and that there is "a tremendous hatred" in the Muslim religion itself.⁵⁰ Mr. Trump denied that a distinction could be made between

⁴⁷ *Id.*

⁴⁸ Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realdonaldtrump/status/674934005725331456>; *see also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, Washington Post (Dec. 10, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/>.

⁴⁹ *See supra* fn. 4-5.

⁵⁰ Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016) <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>; Theodore Schleifer, *Donald Trump: 'I think Islam hates us,'* CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

“radical Islam” and “Islam itself,” claiming “it’s very hard to define.”⁵¹ Moreover, just as the Government attempted to justify the detention of Japanese Americans in *Korematsu*, Mr. Trump attempted to justify banning all Muslims on the basis that “you don’t know who is who.”⁵² *Cf. Korematsu*, 323 U.S. at 218-19 (explaining that “temporary exclusion [of all Japanese Americans] was rested by the military” on the grounds that “it was impossible to bring about an immediate segregation of the disloyal from the loyal”).

On June 13, 2016, at a press event in Manchester, New Hampshire—with specific reference to the ban on Muslims he had long been advocating— Mr. Trump claimed that he would be able to defend the ban based on the very argument the Government advances before this Court—that “laws of the United States give the president powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate.”⁵³

Two days later, on June 15, 2016 and on national television on CBS, Mr. Trump was asked how he would implement his “temporary ban on Muslim integration” in light of apparent opposition by the Senate. Mr. Trump responded

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016) <https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats>.

that he would not back down from pursuing the ban, again equating all Muslims with radical terrorism:

Mr. Trump: You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do.⁵⁴

John Dickerson: But you're not backing down on those promises, based on a no from the Senate?

Mr. Trump: No, I'm not backing down. We have to do something. We have a problem in this country. We have a radical Islamic terrorism problem in this country, and, by the way, throughout the world, throughout the world. It's a problem. And it's a temporary ban. I'm not talking permanent. It's a temporary ban. We have to find out what is going on.⁵⁵

In July 2016, Mr. Trump made explicit that he would continue to pursue a ban on Muslims from the United States, but that he would instead speak in terms of “territories” and “extreme vetting” in order to please critics. In particular, on July 21, 2016, Mr. Trump delivered a speech accepting the Republican nomination and stated, “[W]e must immediately suspend immigration from any nation that has been compromised by terrorism until such time it's proven that vetting mechanisms have

⁵⁴ *Face the Nation transcripts June 5, 2016: Trump*, CBS News (June 5, 2016) <http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/>.

⁵⁵ *Id.*

been put in place.”⁵⁶ Three days later, when asked whether his language indicated an intent to “pull back from” the “Muslim ban,” Mr. Trump responded:

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 territory. People were so upset when I used the word “Muslim”: “Oh, you can’t use the word ‘Muslim.’” Remember this. And I’m okay with that, because I’m talking territory instead of Muslim. . . .

Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently. . . .

But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. We’re making it territorial. We have nations and we’ll come out, I’m going to be coming out over the next few weeks with a number of the places. And it’s very complex . . . here is what I want: Extreme vetting. Tough word. Extreme vetting. Tough.⁵⁷

The President advocated preventing Muslims from entering the United States on numerous other occasions:

- On September 18, 2015, at a town hall event in Rochester, New Hampshire, in response to a questioner who stated, “We have a problem in this country; it’s called Muslims” and asked, “When can we get rid of them?” Mr. Trump responded:

⁵⁶ Politico, Full text: Donald Trump 2016 RNC draft speech transcript (July 21, 2016) <http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>.

⁵⁷ Transcript, Meet the Press, NBC News (July 24, 2016), <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>; Jenna Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Washington Post (July 24, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/>.

“We’re going to be looking at a lot of different things. You know, a lot of people are saying that and a lot of people are saying that bad things are happening. We’re going to be looking at that and many other things.”⁵⁸

- On October 12, 2015, Mr. Trump tweeted: “Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?”⁵⁹
- On January 2, 2016, Mr. Trump tweeted: “Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!”⁶⁰
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was “incompetent” because she would “let the Muslims flow in. No way!”⁶¹
- On March 24, 2016, Mr. Trump tweeted that “[i]t is amazing how often I am right” about “Muslims.”⁶²

4. The President’s statements since being elected—and even after signing the Executive Orders—make clear that this Executive action is motivated by the same discriminatory animus.

The extensive history of animus by President Trump exposes his discriminatory goal to obstruct Muslims from entering the United States while preventing American Muslims from seeing their families in this country, as people

⁵⁸ Theodore Schleifer, *Trump doesn’t challenge anti-Muslim questioner at event*, CNN (Sept. 19, 2015), <http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/>.

⁵⁹ Donald J. Trump, Twitter (Oct. 12, 2015), <https://twitter.com/realdonaldtrump/status/653774823483703297>.

⁶⁰ Donald J. Trump, Twitter (Jan. 2, 2016), <https://twitter.com/realdonaldtrump/status/683277309969694720>.

⁶¹ Donald J. Trump, Twitter (Mar. 22, 2016), <https://twitter.com/realdonaldtrump/status/712473816614772736>.

⁶² Donald J. Trump, Twitter (Mar. 24, 2016), <https://twitter.com/realdonaldtrump/status/713012045214531584>.

of other faiths are able to do. While the President has attempted to follow through on his promise to discriminate against Muslims using so-called neutral language, even since the time that he has been elected and signed the Executive Orders, he and his administration have made slip-ups exposing the Orders' reprehensible origins.

On December 21, 2016, over a month after being elected President, Mr. Trump was asked whether he would reevaluate his intention to ban people of the Muslim faith. He responded: "You know my plans all along, and I've been proven to be right."⁶³

Then, immediately prior to signing of his initial Executive Order, President Trump read the oblique title, looked up, and said: "We all know what that means."⁶⁴

Furthermore, on January 27, 2017, after signing the first Executive Order, President Trump appeared on the Christian Broadcasting Network and made clear that the exceptions he had set forth in the Order were intended to prioritize Christians over Muslims:

⁶³ Video, *Trump: 'You've known my plans' on proposed Muslim ban*, Washington Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html; Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: 'You know my plans,'* Washington Post (Dec. 22, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/>.

⁶⁴ *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), <http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173>.

David Brody: Persecuted Christians, we've talked about this, the refugees overseas. The refugee program, or the refugee changes you're looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?

President Trump: Yes.

David Brody: You do?

President Trump: They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.⁶⁵

On February 4, 2017, President Trump referred to the initial Executive Order as a "ban," publishing on Twitter: "Interesting that certain Middle-Eastern countries agree with the ban. They know if certain people are allowed in it's death & destruction!"⁶⁶

⁶⁵ David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017) <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

⁶⁶ Politico, *Trump warns of 'death & destruction' if U.S. not allowed to limit immigration* (Feb. 4, 2017), <http://www.politico.com/story/2017/02/trump-travel-ban-judge-james-robart-234643>; Donald J. Trump, Twitter (Feb. 4, 2017), <https://twitter.com/realdonaldtrump/status/827865957750161408>.

After President Trump’s administration sought stays in various court proceedings to revise its initial Executive Order, the President’s own senior advisor was explicit that the Second Order, the subject matter of this lawsuit, was designed to achieve “the same basic policy outcome” and to prevent further litigation through only “very technical issues that were brought up by the court.”⁶⁷ On the same day that the President signed his second Order behind closed doors, the Trump Campaign organization sent an email asking for support of the new Order, stating that its purpose was to target “radical Islamic” terrorism.⁶⁸

B. Failing To Consider This Tremendous Record Of Animus Would Be A Serious Abdication Of The Role Of The Judicial Branch.

The President’s second Executive Order, which targets people from six Muslim-majority countries and attempts to stop those people from being able to see or obtain visas for their family members, implements his vilification of Muslim people and his promise to ban them from the United States in precisely the way he said he would do it. Discrimination against a protected class, such as religion, on

⁶⁷ Fox News, Transcript, *Miller: New order will be responsive to the judicial ruling* (Feb. 21, 2017), <http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/>.

⁶⁸ Matt Zapposky, David Nakamura, and Abigail Hauslohner, *Revised executive order bans travelers from six Muslim-majority countries from getting new visas*, Washington Post (Mar. 6, 2017), https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.40c03c0f3d7b.

the basis of such overt animus is the most obvious and fundamental abuse of government authority which the Equal Protection Clause exists to protect. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.”).

The Government has argued that it is beside the point whether the President is using his power to oppress Muslims, claiming that the Executive has plenary power over matters relating to immigration and national security. *See* Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 17, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017), ECF No. 14. Not so. It is the Court’s duty to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and prevent the exercise of Executive power to “harm a politically unpopular group,” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted). Moreover, the United States Supreme Court has recognized that courts have a duty to enforce the Constitution even when the Executive claims national security concerns. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) that the President does not “have the power to switch the Constitution on or off at will” by invoking national security); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“Our precedents . . . make clear that national security and foreign relations do not warrant

abdication of the judicial role.”). Indeed, the importance of judicial intervention is at its highest in these circumstances. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) (“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.”).

The Government’s argument is not novel—it is the position advocated by the Government in cases like *Korematsu*, now viewed as one of the most shameful decisions in American history. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (describing complete “judicial acquiescence or abdication” in the face of executive discretion “has a name. That name is *Korematsu*”); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011) (writing that *Korematsu* “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute”). The MacArthur Justice Center urges the Court not to overlook the extensive record of animus present here and to avoid repeating the terrible mistakes made in generations past.

III. CONCLUSION

For the foregoing reasons, the MacArthur Justice Center respectfully requests that the Court grant Plaintiffs' Motion for a Temporary Restraining Order, filed March 8, 2017.

DATED: Honolulu, Hawai'i, March 14, 2017.

/s/ David J. Minkin

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