

No. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAI'I, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court

for the District of Hawai'i

The Honorable Judge Derrick K. Watson

No. 1:17-cv-00050-DKW-KSC

BRIEF OF NATIONAL IMMIGRATION LAW CENTER &
INTERNATIONAL REFUGEE ASSISTANCE PROJECT AS *AMICI*
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES & AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, *Amici* state that they are non-profit organizations. NILC does not have a corporate parent. IRAP's corporate parent is the Urban Justice Center, Inc. Neither NILC, IRAP, nor IRAP's corporate parent have publicly traded stock.

CONSENT OF THE PARTIES

All parties have consented to this filing. Thus, *Amici* file pursuant to Federal Rules of Appellate Procedure 29(a)(2).

Date: April 21, 2017

/s/ Esther Sung
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IDENTITY AND INTERESTS OF AMICI

The National Immigration Law Center (“NILC”) is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights and advanced policies that reinforce our nation’s values of equality, opportunity, and justice. NILC’s interest in the outcome of this case arises from its organizational mission and its role as counsel in two lawsuits challenging the legality of the current and prior Executive Orders. *See Darweesh v. Trump*, 17-cv-00480-CBA, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Int’l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, ___ F. Supp. 3d ___ 2017 WL 1018235 (D. Md. 2017), *appeal docketed*, No. 17-1351 (4th Cir.).

The International Refugee Assistance Project (“IRAP”) is a project of the Urban Justice Center, Inc., that provides and facilitates free legal services for vulnerable populations around the world, including refugees, who seek to escape persecution and find safety in the United States and other Western countries. Founded in 2008 as a student organization at Yale Law School, IRAP initially served Iraqi refugees who were victims of the Iraq War. Today, IRAP has offices in New York and the Middle East. Through in-house casework, as well as supervision of 1,200 students from 29 law schools in the United States and Canada,

and coordination of pro bono attorneys from over 75 international law firms and multinational corporations, IRAP directly assists thousands of refugees in urgent registration, protection, and resettlement cases every year. The overwhelming majority of IRAP's clients, including clients abroad and those within the United States, identify as Muslim, and IRAP routinely serves clients from the countries banned by both the January and March Executive Orders. IRAP's interest in the outcome of this case arises from its organizational mission, its role as counsel in *Darweesh v. Trump*, 17-cv-00480-CBA, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017), and as a plaintiff in *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 1018235 (D. Md. 2017), *appeal docketed*, No. 17-1351 (4th Cir.).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully request that this Court affirm the District Court’s decision holding that Plaintiffs are likely to succeed on the merits of their claim that Sections 2 and 6 of the March 6, 2017 Executive Order violate the Establishment Clause. *Amici* submit this brief to provide further explication of the publicly-available evidence that would lead the objective observer to readily conclude that the refugee provisions in Section 6 were an integral part of President Trump’s repeated and unbroken line of promises to ban Muslim immigrants from entering the United States because their faith makes them categorical terrorist threats to this country. As set forth below, President Trump routinely conflated refugees with Muslims, and conflated both with terrorists, particularly the Islamic State of Iraq and Syria (“ISIS”). Muslims’ stark overrepresentation in the global refugee population and those resettled through the U.S. Refugee Admissions Program (“USRAP”), moreover, makes refugee resettlement a prime target for any efforts to keep Muslims out of the United States. Finally, the government’s stated national security justifications for the Order, which are exceedingly weak in any regard, say virtually nothing about USRAP, and for good reason—refugees already undergo the most rigorous vetting of any traveler to the United States, a process that can take more than two years to complete. As with the nationality ban in Section 2, the objective observer, looking only at the publicly available data, would have no trouble

concluding that the primary purpose of the refugee provisions of Section 6 is to disfavor members of a one religion—Islam.

ARGUMENT

I. SINCE THE CAMPAIGN TRAIL, PRESIDENT TRUMP HAS PLEDGED TO HALT REFUGEE RESETTLEMENT IN ORDER TO STOP MUSLIMS FROM ENTERING THE UNITED STATES

Fundamental to President Trump’s campaign promise to “Make America Great Again” was the idea that certain individuals should be kept *out* of America. Atop the list of excluded outsiders were “radical Islamic terrorists,” which candidate Trump famously promised to keep out by enacting “a total and complete shutdown of Muslims entering the United States.”¹ This total Muslim shutdown later morphed, campaign adviser Rudolph Giuliani explained, into the idea of using nationality as a proxy for religion. *See* ER 59. Perhaps less well remembered, but no less central to the campaign promise to prevent allegedly dangerous Muslims from coming in by keeping all Muslims out, however, were candidate Trump’s repeated assertions that refugees admitted through the U.S. Refugee Admissions Program (“USRAP”), particularly those from Syria, constituted a collective Trojan horse through which the Islamic State of Iraq and Syria (“ISIS”) would attack the United States. Indeed, given President Trump’s routine conflation of Muslims, refugees, “radical Islamic

¹ Press Release, Trump-Pence, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

terrorists,” and ISIS, it is not surprising that he would seek to suspend USRAP and drastically cut the number of refugees who could be admitted this year in the same Executive Orders enacting his long-promised “Muslim ban.”

President Trump’s anti-Muslim rhetoric, including his conflation of Muslims and refugees with terrorists, dates back at least to September 2015, when President Obama, pursuant to his authority under the Refugee Act,² announced that the United States would resettle 10,000 Syrian refugees the following fiscal year.³ Then-candidate Trump derided the decision, asserting that “[t]hey could be ISIS,” and even going so far as suggesting that the refugees could be a terrorist army in hiding.⁴ If elected, Trump promised, “they’re going back.”⁵

Several weeks later, on November 13, 2015, terrorists carried out coordinated attacks on Paris, France. ISIS claimed responsibility for the attacks, which killed 130 people. The attackers whose identities have been confirmed were all Belgian and French nationals. No Syrian nationals have been confirmed to have taken part

² See 8 U.S.C. § 1157(a) (conferring upon the president the authority to determine the number and allocation of refugees who may be admitted in the following fiscal year).

³ Gardiner Harris et al., *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times (Sept. 10, 2015), <http://nyti.ms/2oQ229D>.

⁴ Jenna Johnson, *Donald Trump: Syrian Refugees Might Be a Terrorist Army in Disguise*, Wash. Post (Sept. 30, 2015), <http://wapo.st/2osvTSK>.

⁵ Johnson, *supra* note 4; see also William Finnegan, *Trump and the Refugees*, New Yorker (Oct. 2, 2015), <http://bit.ly/1M0ATq4>.

in the attacks, but a fake Syrian passport was found near one of the attackers, whose fingerprints matched those of an individual who entered Greece from Turkey a month earlier by presenting himself as an asylum seeker.⁶ Notwithstanding the dramatic differences in refugee admissions in Europe and the United States, following the Paris attacks candidate Trump's assertion that refugees could be Muslim terrorists in disguise—and therefore must be kept out—became a staple of his campaign.

In the days after the Paris attacks, candidate Trump tweeted about how Syrian refugees, some of whom “could be ISIS,” were “now pouring into our great country,”⁷ claiming further that some were “were just caught on the southern border” trying to enter the United States.⁸ He picked up and continued to repeat throughout

⁶ *What We Know About the Paris Attacks and the Hunt for the Attackers*, Wash. Post (last updated March 18, 2016), <http://wapo.st/1YbxkRI>.

⁷ Donald J. Trump (@realDonaldTrump), Twitter (Nov. 17, 2015, 8:54 AM), <https://twitter.com/realdonaldtrump/status/666615398574530560?lang=en> (“Refugees from Syria are now pouring into our great country. Who knows who they are - some could be ISIS. Is our president insane?”).

⁸ Donald J. Trump (@realDonaldTrump), Twitter, (Nov. 19, 2015, 8:11 AM), <https://twitter.com/realdonaldtrump/status/667329429912338432> (“Eight Syrians were just caught on the southern border trying to get into the U.S. ISIS maybe? I told you so. WE NEED A BIG & BEAUTIFUL WALL!”). A few days later, the Syrians had become refugees and had grown in number. Donald J. Trump (@realDonaldTrump), Twitter, (Nov. 22, 2015, 10:53 AM), <https://twitter.com/realdonaldtrump/status/668457318267400193> (“13 Syrian refugees were caught trying to get into the U.S. through the Southern Border. How many made it? WE NEED THE WALL!”).

his campaign the suggestion that refugees, particularly from Syria and the rest of the Middle East, are an ISIS-constructed Trojan horse aimed at destroying America.⁹

Many of the most blatantly anti-Muslim statements and proposals of President Trump's campaign were intimately intertwined with his conflation of refugees with Muslim terrorists. When he ignited a firestorm in November 2015 by suggesting he would, as President, require all Muslims in the United States to register with the federal government as a way to monitor would-be terrorists, he sought to "clarify" that his proposal was rather to build a database, not for all Muslims, but just for Syrian refugees (notwithstanding that DHS already has a database of all refugees).¹⁰

When, in the summer of 2016, candidate Trump said that his proposed Muslim ban

⁹ See, e.g., Ben Kamisar, *Trump to Syrian Refugee Children: 'You Can't Come Here'*, The Hill (Feb. 8, 2016), <http://bit.ly/1mr8bEB> ("There's absolutely no way of saying where these people come from. They may be from Syria, they may be ISIS, they may be ISIS related."); Donald J. Trump (@realDonaldTrump), Twitter, (Mar. 24, 2016, 11:15 AM), <https://twitter.com/realdonaldtrump/status/713031504415338497?lang=en> ("Europe and the U.S. must immediately stop taking in people from Syria. This will be the destruction of civilization as we know it! So sad!"); Press Release, Trump-Pence, Donald J. Trump Addresses Terrorism, Immigration, & National Security (June 13, 2016), available at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security> (referring to Syrian refugees as "a better, bigger version of the legendary Trojan Horse").

¹⁰ Jim Geraghty, *Trump: 'I Want a Database for the Refugees'*, Nat'l Rev. (Nov. 22, 2015), <http://bit.ly/2p1owoy> ("I want a database for the refugees that — if they come into the country. We have no idea who these people are. When the Syrian refugees are going to start pouring into this country, we don't know if they're ISIS, we don't know if it's a Trojan horse.").

would use territories as a proxy for religion, he explained its need by referencing Syrian refugees, saying: “So you call it territories. OK? We’re gonna do territories. We’re gonna not let people come in from Syria that nobody knows who they are.”¹¹ During his speech at the Republican National Convention accepting the Republican presidential nomination, candidate Trump expressly linked his proposed Muslim ban with refugees:

Lastly, we must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place.

My opponent has called for a radical 550% increase^[12] in Syrian refugees on top of existing massive refugee flows coming into our country under President Obama. She proposes this despite the fact that there’s no way to screen these refugees in order to find out who they are or where they come from.¹³

And when answering a question at a presidential debate on October 19, 2016, about “whether or not the Muslim ban still stands,” candidate Trump responded by transitioning immediately to Syrian refugees:

¹¹ Lesley Stahl, *The Republican Ticket: Trump & Pence*, CBS (July 15, 2016), <http://cbsn.ws/29NrLqj>.

¹² The 550% increase mentioned here and elsewhere are references to Secretary Clinton’s stated support for reserving 65,000 of the next year’s refugee admissions for Syrians, rather than the 10,000 allocated by President Obama. See C. Eugene Emery Jr., *Donald Trump Says Hillary Clinton Wants To Let 500 Percent More Syrians into the U.S.*, PolitiFact (June 13, 2016), <http://bit.ly/1XncCjX>.

¹³ Donald J. Trump, Republican Nomination Acceptance Speech (July 21, 2016), available at https://assets.donaldjtrump.com/DJT_Acceptance_Speech.pdf.

It's called extreme vetting. We are going to areas like Syria where they're coming in by the tens of thousands because of Barack Obama. And Hillary Clinton wants to allow a 550 percent increase over Obama. People are coming into our country like we have no idea who they are, where they are from, what their feelings about our country is, and she wants 550 percent more.¹⁴

This express linking of Muslim terrorists and refugees continued throughout the campaign, and was frequently mentioned in the context of Secretary Clinton's stated support for resettling Syrian refugees. For example, in a press release, candidate Trump said that Secretary Clinton "refuses to say the words 'radical Islam,' even as she pushes for a massive increase in refugees"¹⁵—a note candidate Trump struck repeatedly, conflating Clinton's support for Syrian refugees with an undesirable and dangerous pro-Muslim sentiment.¹⁶ Statements below from candidate Trump evidence

¹⁴ *Presidential Debate at Washington University in St. Louis, Missouri*, The Am. Presidency Project (Oct. 9, 2016), <http://bit.ly/2dG4DN1>.

¹⁵ Press Release, Trump-Pence, Donald J. Trump Foreign Policy Speech (Apr. 27, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-foreign-policy-speech>.

¹⁶ Donald J. Trump (@realDonaldTrump), Twitter, (Oct. 19, 2016, 6:34 PM), <https://twitter.com/realdonaldtrump/status/788916346432000000> ("Hillary has called for 550% more Syrian immigrants, but won't even mention 'radical Islamic terrorists.' #Debate #BigLeagueTruth"); Donald J. Trump (@realDonaldTrump), Twitter, (July 28, 2016, 8:47 PM), <https://twitter.com/realdonaldtrump/status/758871653547806724> ("Hillary's refusal to mention Radical Islam, as she pushes a 550% increase in refugees, is more proof that she is unfit to lead the country."); Donald J. Trump (@realDonaldTrump), Twitter, (May 22, 2016, 12:38 PM), <https://twitter.com/realdonaldtrump/status/734468447829004288?lang=en> ("Crooked Hillary wants a radical 500% increase in Syrian refugees. We can't allow this. Time to get smart and protect America.").

a dogged criticism of Secretary Clinton for her stance on refugees from the Middle East and a consistent conflation of concerns regarding refugees with those of terrorism and the undesirable changing of American “values”:

- “Hillary Clinton wants to dramatically increase admissions from the Middle East, bringing in many hundreds of thousands during a first term – and we will have no way to screen them, pay for them, or prevent the second generation from radicalizing. We need to protect all Americans, of all backgrounds and all beliefs, from Radical Islamic Terrorism – which has no place in an open and tolerant society.” Press Release dated June 12, 2016.¹⁷
- “Why does Hillary Clinton want to bring people here—in vast numbers—who reject our values?” Press Release dated June 13, 2016.¹⁸
- “Dems don’t want to talk ISIS b/c Hillary’s foreign interventions unleashed ISIS and her refugee plans make it easier for them to come here.” Tweet sent July 26, 2016.¹⁹
- “Hillary Clinton also wants to push to bring in 620,000 refugees in her first term – a number of whom come from countries where women and gays are horribly brutalized – which will weaken our tolerant way of life.” Press Release dated Aug. 24, 2016.²⁰

¹⁷ Press Release, Trump-Pence, Donald J. Trump Statement Regarding Tragic Terrorist Attack in Orlando, Florida (June 12, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j-trump-statement-regarding-tragic-terrorist-attacks>.

¹⁸ Press Release, Trump-Pence, Donald J. Trump Addresses Terrorism, Immigration, and National Security (June 13, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security>.

¹⁹ Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2016, 3:48 PM), <https://twitter.com/realdonaldtrump/status/758026136299397120>.

²⁰ Press Release, Trump-Pence, Donald J. Trump Calls for American Independence (August 24, 2016), *available at* <https://www.donaldjtrump.com/press->

- “I’ve proposed extreme vetting for immigrants from troubled parts of the world where terrorists live and train, and oppose Hillary Clinton’s 550% increase in the number of refugees from the conflict in Syria.” Press Release dated Sept. 19, 2016.²¹
- “We must stop the massive inflow of refugees – which Hillary Clinton is trying to drastically increase. We should temporarily suspend immigration entirely from regions where safe and adequate screening cannot occur.” Press release dated Sept. 20, 2016.²²
- “Terrorists are infiltrating our country. Now, Hillary Clinton wants a 550% increase in Syrian refugees and countless more refugees from across the Middle East. I want to keep you and your family safe.” Press Release dated Oct. 3, 2016.²³

releases/donald-j.-trump-calls-for-american-independence-lays-out. Candidate Trump’s campaign repeatedly claimed that Secretary Clinton wanted to bring in 620,000 refugees during her first term. *See, e.g.*, Press Release, Trump-Pence, Trump Campaign Statement on the Roundtable on Defeating Radical Islamic Terrorism (Aug. 17, 2016), *available at* <https://www.donaldjtrump.com/press-releases/trump-campaign-statement-on-the-roundtable-on-defeating-radical-islamic-ter> (“Hillary Clinton . . . wants to bring in 620,000 refugees with no way to screen them, . . . refuses to say radical Islam, and . . . bears direct responsibility for the rise of ISIS with her disastrous interventions overseas.”). The claim was false. *See* Miriam Valverde, *Trump Says Clinton Would Bring in 620,000 Refugees in Her First Term*, PolitFact (Sept. 27, 2016), <http://bit.ly/2dhVJqp>.

²¹ Press Release, Trump-Pence, Donald J. Trump Statement (Sept. 19, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement5>.

²² Press Release, Trump-Pence, Donald J. Trump Calls Out Clinton For Lack of National Security Accountability (Sept. 20, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-calls-out-clinton-for-lack-of-national-sec>.

²³ Press Release, Trump-Pence, Donald Trump: America Needs a Comeback (Oct. 3, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-remarks-in-pueblo-colorado>.

- “Wow, just came out on secret tape that Crooked Hillary wants to take in as many Syrians as possible. We cannot let this happen - ISIS!” Tweet sent Oct. 24, 2016.²⁴
- “[O]n the first day, I will take the following actions to restore the rule of law. These include: Suspend immigration from regions compromised by Radical Islamic terrorism, including the suspension of the Syrian Refugee Program.” Press release dated Oct. 25, 2016.²⁵
- “Hillary wants massive immigration from the most dangerous regions of the world where ISIS operates, including a 550% increase in Syrian Refugees. We don’t want ISIS in our country. The Hillary refugee plan would leave us with generations of terrorism, radicalism and extremism inside of our shores. I only want to admit people who will support this country and love its people.” Press release dated Oct. 27, 2016.²⁶
- “We are going to . . . stop the massive inflow of refugees and keep Radical Islamic Terrorist out of our country.” Press release dated Oct. 29, 2016.²⁷

President Trump’s rhetoric conflating refugees with terrorism persisted throughout his campaign, and made clear that he considered Muslims and refugees

²⁴ Donald J. Trump (@realDonaldTrump), Twitter (Oct. 24, 2016, 8:00 AM), <https://twitter.com/realdonaldtrump/status/790523240351498241>.

²⁵ Press Release, Trump-Pence, In Florida, Trump Blasts Obamacare and Proposed Real Change That Will Put America First (Oct. 25, 2016), *available at* <https://www.donaldjtrump.com/press-releases/in-florida-trump-blasts-obamacare-and-proposes-real-change-that-will-put-am>.

²⁶ Press Release, Trump-Pence, In Ohio, Trump Slams Obamacare and Proposes Real Change (Oct. 27, 2016), *available at* <https://www.donaldjtrump.com/press-releases/in-ohio-trump-blasts-obamacare1>.

²⁷ Press Release, Trump-Pence, In Arizona, Trump Vows to Make America Just Again (Oct. 29, 2016), *available at* <https://www.donaldjtrump.com/press-releases/in-colorado-trump-vows-to-make-america-just-again>.

to present identical security threats to the United States.²⁸ Statements like these, expressing anti-Muslim animus specifically within the context of USRAP, continued even after President Trump's inauguration and signing of the first Executive Order on January 27, which banned travelers from seven Muslim-majority countries for 90 days, all refugees for 120 days, and Syrian refugees indefinitely. In an interview with the Christian Broadcasting Network released the same day that he signed the January 27 Order, President Trump stated candidly that the Order was designed to

²⁸ See, e.g., Press Release, Trump-Pence, Donald J. Trump Addresses Terrorism, Immigration, & National Security (June 13, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security> (“Large numbers of Somali refugees in Minnesota have tried to join ISIS.”); Press Release, Trump-Pence, Donald J. Trump Addresses Islam & the Age of Terror (Aug. 15, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-radical-islam-and-the-age-of-terror> (“ISIS recruits refugees after their entrance into th[is] country”); Press Release, Trump-Pence, Donald Trump's Plan to Defeat ISIS & Make America Great Again (Oct. 19, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-trumps-plan-to-defeat-isis-and-make-america-safe-again> (pledging to “ensure our security procedures and refugee policy take into account the security of the American people”); Press Release, Trump-Pence, In Florida, Trump Blasts Obamacare & Proposed Real Change That Will Put America First (Oct. 25, 2016), *available at* <https://www.donaldjtrump.com/press-releases/in-florida-trump-blasts-obamacare-and-proposes-real-change-that-will-put-am> (stating that, as “on the first day” of his presidency, Trump would “[s]uspend immigration from regions compromised by Radical Islamic terrorism, including the suspension of the Syrian Refugee Program”); Press Release, Trump-Pence, Donald J. Trump Address: American Legion (Sept. 1, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-american-legion> (“[W]e will change our immigration screening procedures to help keep terrorists and extremists out of our country. That includes stopping the influx of Syrian refugees.”)

give Christians priority when applying for refugee status. “If you were a Muslim you could come in [to the United States], but if you were a Christian, it was almost impossible,” he said. “[T]hey 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.”²⁹ When that Order was halted by the Western District of Washington and this Court, President Trump publicly lamented that the preliminary injunction meant that refugees from Muslim-majority countries were being permitted to enter the country.³⁰

Although President Trump’s statements and actions rightfully get most of the scrutiny, it is worth noting that he chose a running mate who similarly portrayed refugees, particularly from Syria, as categorical terroristic threats. After the Paris

²⁹ David Brody, Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees, CBN News (Jan. 27, 2017), <http://bit.ly/2kCqG8M>. President Trump made similar claims regarding Christian and Muslim refugees at least as far back as July 11, 2015. *See also* Louis Jacobson, *Donald Trump Says if You’re from Syria & a Christian, You Can’t Come to the U.S. as a Refugee*, PolitiFact (July 20, 2015), <http://bit.ly/1CLkBPj> (quoting, and determining as false, Trump making the same claims in a speech on July 11, 2015).

³⁰ Donald J. Trump (@realDonaldTrump), Twitter (Feb. 11, 2017, 7:12 AM), <https://twitter.com/realdonaldtrump/status/830389130311921667> (“Our legal system is broken! “77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries.” (WT) SO DANGEROUS!”); Donald J. Trump, (@realDonaldTrump), Twitter (Feb. 12, 2017, 6:55 AM), <https://twitter.com/realdonaldtrump/status/830747067379232769> (“72% of refugees admitted into U.S. (2/3 -2/11) during COURT BREAKDOWN are from 7 countries: SYRIA, IRAQ, SOMALIA, IRAN, SUDAN, LIBYA & YEMEN”).

attacks, then-Governor of Indiana Mike Pence joined a number of other governors in seeking to prevent Syrian refugees from being resettled in their respective states. Unlike most of the others, however, who merely requested that Syrian refugees not be resettled in their states, Governor Pence took affirmative steps to deter their resettlement, and was the only governor who was sued for these actions. Governor Pence ultimately failed in defending his actions, despite arguing that “some of these persons” who could be resettled in Indiana “were sent to Syria by ISIS to engage in terrorism and now wish to infiltrate the United States in order to commit terrorist acts here.” *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 903 (7th Cir. 2016) (Posner. J.). The Seventh Circuit found that his claims were pure “nightmare speculation,”³¹ and could not justify Governor Pence’s actions, which blatantly violated the Equal Protection Clause. *Id.* Nevertheless, on the campaign trail as a Vice Presidential nominee, Governor Pence embraced candidate Trump’s proposal to “suspend[] the Syrian refugee program and programs and immigration from areas of the world that have been compromised by terrorism,”³² and often pivoted to the

³¹ In so holding, the Seventh Circuit noted that Pence had failed to provide any evidence “that Syrian terrorists are posing as refugees or that Syrian refugees have ever committed acts of terrorism in the United States.” *Exodus*, 838 F. 3d at 904. “Indeed, as far as can be determined from public sources,” the Seventh Circuit observed, “no Syrian refugees have been arrested or prosecuted for terrorist acts or attempts in the United States.” *Id.*

³² Daniel White, *Read a Transcript of the Vice Presidential Debate*, Time (Oct. 4, 2016), <http://ti.me/2p0HNEL>; Stephen Rodrick, *Mike Pence’s Refugee Problem*,

issue of Syrian refugees when asked about the proposed “Muslim ban.”³³ Both the January and March Executive Orders, moreover, contained provisions to facilitate the same discriminatory actions attempted by Vice President Pence when he was Governor of Indiana. *See* Mar. 6 Exec. Order § 6(d); Jan. 27 Exec. Order § 5(g).

The refugee provisions in Section 6 of the Order were an essential component of the overall scheme crafted and enacted to make it more difficult for Muslim immigrants to enter the United States. Any contention that the poisonous intent to disparage Islam is limited to specific sections of the Order and does not infect at least the refugee provisions must be rejected, as the district court rightly did.

Rolling Stone (Jan. 25, 2017), <http://rol.st/2ovkgKU>; Elise Foley, *Mike Pence Insists Trump Doesn't Want To Ban Muslims — And Gets Wrecked By CNN Host*, Huffington Post (Oct. 11, 2016), <http://huff.to/2dNXNmI>.

³³ Meet the Press, NBC News (Sept 4, 2016), <http://nbcnews.to/2czzvBu> (Pence claiming in an interview that it was “appropriate” to “immediately suspend immigration from any countries that have been compromised by terrorism;” when asked whether France or the United States can be included in the definition of a “country compromised by terrorism,” Pence instantly volunteered Syria and said, “Donald Trump and I believe we should suspend the Syrian refugee program”); Stahl, *supra* note 11 (Pence responding, when asked if he agreed with Trump’s proposal to ban Muslims entering the United States during his first joint interview with then-candidate Trump as the vice-presidential nominee, “I do. In fact, in Indiana we suspended the Syrian refugee program in the wake of the terrorist attack”).

II. SECTION 6 WOULD HAVE A DISCRIMINATORY IMPACT ON MUSLIMS

The discriminatory impact that Section 6 would have on Muslims is further evidence that a reasonable observer would understand the refugee provisions of the Order to reflect anti-Muslim animus. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (“[I]mpact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.” (citation omitted)). Despite comprising just 23% of the global population, Muslims represented 46% of refugees admitted to the United States in 2016—the largest religious group resettled that year,³⁴ a trend that has continued into 2017.³⁵ Indeed, 65% of the world’s refugee population came from 49 Muslim-majority countries in 2015,³⁶ and just three of those countries—Syria, Afghanistan,

³⁴ Philip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016), <http://pewrsr.ch/2cSmd2t> (noting that the United States admitted 38,901 Muslim refugees, or 46% of all refugees admitted in 2016; the next largest religious group of refugees was Christians, at 44%). The admission of 38,901 Muslim refugees in 2016 is the highest number of Muslims admitted through USRAP since the State Department began tracking religious affiliation in its data, and the first time Muslim refugees have outnumbered Christians refugees since 2006.

³⁵ According to State Department data available at wrapsnet.org, 19,203 Muslim refugees have been resettled in the United States from October 1, 2016 through April 18, 2017. During that same period, 17,851 Christian refugees have been resettled.

³⁶ *See Religious Composition by Country, 2010-2050*, Pew Research Center (April 2, 2015), <http://pewrsr.ch/2nMIS0G> (providing religious demographics by country); UNHCR, *Global Trends: Forced Displacement in 2015* (2016), *available at*

and Somalia—account for 54% of all refugees worldwide.³⁷ The fact that Muslims are disproportionately represented in the global refugee population and in USRAP makes shutting off refugee admissions an especially efficient way to keep Muslims from entering the United States—particularly given that the United States, under President Obama, had specifically committed to increased processing of Muslim-majority countries country ravaged by civil war during the current fiscal year.³⁸

Section 6 is particularly pernicious in light of the fact that, although Muslims have recently approached a roughly one-to-one ratio with Christians in USRAP admissions,³⁹ Muslims and Christians represent a one-to-six ratio in the United States population annually acquiring lawful permanent resident status.⁴⁰ In other words, Muslims are particularly dependent on USRAP for the acquisition of green cards. Given the relatively low rate that Muslims generally become legal permanent residents compared to Christians, eliminating or reducing refugee admissions would,

<http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015> (providing number of refugees by country under UNHCR mandate).

³⁷ UNHCR, *supra* note 36, at 3.

³⁸ The 110,000 ceiling was an increase from the previous ceiling, 85,000, in fiscal year 2016. In fiscal year 2016, the United States specifically allocated an additional 10,000 resettlement slots to Syrian refugees in recognition of the devastating conflict and massive forced migration.

³⁹ Connor, *supra* note 34 (noting Muslims and Christians represented, respectively, 46% and 44% of all refugees admitted in fiscal year 2016).

⁴⁰ *The Religious Affiliation of U.S. Immigrants: Majority Christian, Rising Share of Other Faiths*, Pew Research Center (May 17, 2013), <http://pewrsr.ch/2p10CYt>.

over time, lead to disfavoring Muslims even more in the lawful permanent resident and citizen population in the United States, and further marginalization of Islam as a minority religion.

III. THE SANITIZED MARCH 6 ORDER’S REFUGEE PROVISIONS ARE NO LESS REFLECTIVE OF ANTI-MUSLIM ANIMUS THAN THEIR PREDECESSOR PROVISIONS

The anti-Muslim animus motivating the Executive Orders is particularly clear on the face of the January 27 Order. Section 5(b) of that Order, for instance, required the government to “prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality” once the 120-day ban on refugee admissions was complete. During those 120 days, moreover, Section 5(e) allowed the admission of certain refugees on a discretionary case-by-case basis, such as “when the person is a religious minority in his country of nationality facing religious persecution.” If the explicit terms of the Order were not proof enough of its intent, President Trump publicly stated on the same day he signed the Order that these

sections were designed to prefer Christians over Muslims in the USRAP admissions process.⁴¹

In addition to this priority for Christian refugees, Section 5(c) of the January 27 Order imposed a categorical, indefinite ban on refugees from Syria—a country that is over 90% Muslim⁴² and whose nationals represent one in every four refugees in the world.⁴³ This provision reflects President Trump’s conflation of Syrian refugees with radical Islamic terrorists, *see supra* Section I, and was a direct product of President Trump’s multiple campaign promises to “help keep terrorists and extremists out of our country” by “stopping the influx of Syrian refugees.”⁴⁴

The January 27 Order also employed multiple thinly-veiled references to stereotypes regarding Islam, mentioning “honor killings,” “violent ideologies,” “persecution of those who practice religions different from their own,” and “foreign nationals” being “radicalized.” Jan. 27 Order §§ 1, 10(a)(ii), 10(a)(iii). While these

⁴¹ *See, e.g.*, Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN (Jan. 30, 2017), <http://cnn.it/2kEi95i>.

⁴² Religious Composition by Country, *supra* note 36.

⁴³ UNHCR, *supra* note 36, at 2 (stating that there are 21.3 million registered refugees worldwide); UNHCR Syria Regional Refugee Response Inter-agency Information Sharing Portal (April 6, 2016), <http://bit.ly/2p0VSlv> (stating that there are over 5 million registered Syrian refugees).

⁴⁴ Press Release, Trump-Pence, Donald J. Trump Address: American Legion (Sept. 1, 2016), *available at* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-american-legion>.

references are clear enough on their own terms, their meaning is undeniable when read against the backdrop of the President’s many prior statements regarding Islam, which invoked the same false stereotypes about Muslims.⁴⁵

Although the March 6 Order eliminated some—but not all—of the facial indications of its anti-Muslim purpose and message, it is no less a reflection of discriminatory intent than the previous version. *Cf. United States v. Fordice*, 505 U.S. 717, 729-30 (1992) (“If policies traceable to the [unconstitutionally discriminatory] system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable . . .”). President Trump’s own statements confirm this. In a speech given just after the Hawaii district court enjoined Sections 2 and 6, President Trump described the March 6 Order as “a watered down version of the first one” and said, “I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place.”⁴⁶

⁴⁵ See, e.g., Daniel White, *Read Donald Trump’s Ohio Speech on Immigration & Terrorism*, Time (Aug. 15, 2016), <http://ti.me/2q0gycP>; Press Release, Trump-Pence, Donald J. Trump: Address on Immigration (Aug. 31, 2016), available at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-on-immigration>; Donald J. Trump, Republican Nomination Acceptance Speech, *supra* note 13.

⁴⁶ Jacob Pramuk, *Trump May Have Just Dealt a Blow to His Own Executive Order*, CNBC (Mar. 15, 2017), <http://cnb.cx/2p4LPOi>.

IV. THE GOVERNMENT'S NATIONAL SECURITY JUSTIFICATIONS ARE PARTICULARLY SPECIOUS WITH RESPECT TO REFUGEES

In light of the voluminous evidence of anti-Muslim animus motivating the March 6 Order, the district court correctly held that the objective observer would understand any national security purpose of the Executive Order to be secondary to its primary, improper purpose. The only attempt the Executive Order makes to justify the refugee provisions specifically is to cite, in Section 1(h), two examples of allegedly refugee-related terrorism convictions. In the first example, two Iraqi refugees sentenced for “multiple terrorism-related offenses”—neither of whom would have been admitted to the United States under current refugee screening procedures⁴⁷—were convicted not for planning to attack the United States, but rather, for attempting to support a foreign terrorist organization in Iraq.⁴⁸ The other example is of a refugee sentenced for attempting to detonate a bomb in Portland. That refugee entered the United States when he was two years old,⁴⁹ and the Order makes no attempt to explain how additional or different vetting procedures could have discovered that this particular two-year-old would later seek to commit an act

⁴⁷ See David Bier, *Deconstructing Trump's Security Defense of His Immigration Ban*, Cato Inst. (March 17, 2017), <http://bit.ly/2ovlnKu>.

⁴⁸ *USA v. Alwan, Waad Ramadan, et ano.*, Investigative Project on Terrorism, <http://bit.ly/2q0gB8g> (last visited Apr. 21, 2017).

⁴⁹ Nicolas Medina Mora and Mike Hayes, *The Big (Imaginary) Black Friday Bombing*, BuzzFeed News (Nov. 15, 2015), <http://bzfd.it/2p4UyzW>.

of terror. In fact, and to the contrary, the use of this example to demonstrate the alleged threat posed by refugees only underscores the degree to which the Order reflects President Trump's oft-stated view that Muslim immigrants are categorical threats who are simply too dangerous to be allowed in.

As national security and immigration experts have confirmed, moreover, refugees already face the toughest vetting of any population coming to the United States, and are among the least likely individuals to commit an act of terrorism.⁵⁰ Of the 3.3 million refugees admitted between 1975 and 2015, *only three*, or 0.00009%, engaged in any deadly acts of terrorism during that time in the United States.⁵¹ These facts not only belie the government's conclusory and self-serving justifications for the Order, but they also demonstrate that the primary purpose of the refugee provisions is not to advance national security, but to exclude Muslims from the United States.

CONCLUSION

The evidence of improper purpose motivating both the March 6 Order and its predecessor is overwhelming and undisputed. The government has repeatedly asked this and other courts considering the constitutionality of the Executive Order to

⁵⁰ See, e.g., Natasha Hall, *Refugees Are Already Vigorously Vetted. I Know Because I Vetted Them*, Wash. Post (Feb. 1, 2017), <http://wapo.st/2pNfUTy>.

⁵¹ Alex Nowrasteh, *Terrorism & Immigration: A Risk Analysis*, 798 Cato Institute: Policy Analysis 13 (Sept. 13, 2016), <http://bit.ly/2kem9fJ>.

disregard this mountain of evidence and defer to the Order's bare recital of national security needs, which are exceedingly thin even on their own terms. Settled law requires otherwise, and *Amici* respectfully urge the Court to affirm the preliminary injunction of Sections 2 and 6 of the Order.

Date: April 21, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF NATIONAL IMMIGRATION LAW CENTER AND INTERNATIONAL REFUGEE ASSISTANCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 2017. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: April 21, 2017

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