Nos. 16-1436 & 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

For over 75 years, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived—as its central mission—to secure the constitutional promise of equality for all people in the United States. From its earliest advocacy led by the late Supreme Court Justice Thurgood Marshall to last term's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), LDF has litigated before this Court some of the most significant and pressing legal issues pertaining to discrimination in our country. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (exclusion of Black voters from primary election); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racial covenants on real estate transfers); *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial segregation of public schools); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (unjustified disparate impact in employment discrimination); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (challenge to discriminatory application of death penalty); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (defense of constitutionality of Section 5 of the Voting Rights Act).

LDF's commitment to, and advocacy for, equality under the law is not limited to the rights of African Americans. Indeed, throughout its history of civil rights advocacy, LDF has pressed for the equal treatment of other traditionally disfavored groups and individuals seeking equal protection of the laws. For example, LDF submitted an *amicus* brief in support of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Petitioner Torao Tokahashi's successful challenge to the State of California's refusal to issue fishing licenses to non-citizens, including people of Japanese ancestry, who were federally barred at that time from obtaining United States citizenship amid growing anti-Japanese hostility in the aftermath of the Second World War. *See Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948). A long supporter of gay and lesbian rights, LDF also supported petitioners advancing the right to same-sex marriages in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). And, as recently as last year, LDF urged this Court to denounce a juror's racial slurs, which explicitly associated a Mexican defendant's race with a propensity for criminal and violent conduct. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

The President's Executive Order 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, which *inter alia* bars entry of non-citizens and refugees from six predominantly Muslim countries, raises grave constitutional concerns due to its reliance on a false and pernicious stereotype that associates Muslims with inherent dangerousness. LDF, therefore, has both the experience and expertise to assist the Court in its review of this case of national and historical importance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last term, this Court decided two cases in which criminal defendants were deemed dangerous based on stereotypes about their race or ethnicity. In *Buck v. Davis*, 137 S. Ct. 759 (2017), Duane Buck's own "expert" witness testified at his capital trial that Mr. Buck was more likely to commit violent acts in the future because he is Black.[2] The Court held that this testimony rendered Mr. Buck's death sentence constitutionally intolerable because it appealed to a "particularly noxious strain of racial prejudice," *viz.*, the stereotype that Black men are "violence prone."[3] In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Mr. Peña-Rodriguez was convicted of sexual assault following jury deliberations in which one juror stated that "Mexican men" are "physically controlling of women," "take whatever they want," and "nine times out of ten . . . were guilty of being aggressive toward women and young girls."[4] This Court denounced the egregious racial stereotyping of Latino men and held that the Sixth Amendment right to an impartial trial required the consideration of this evidence even though statements made by jurors during deliberations are ordinarily inadmissible.

The resolution of both cases turned on "a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."[5] Individuals may not be disfavored because of who they are, and they assuredly cannot be singled out for mistreatment because of their race, ethnicity, or

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[2] *Buck*, 137 S. Ct. at 768-69.
[3] *See id.* at 776 (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)).
[4] *Peña-Rodriguez*, 137 S. Ct. at 862.
[5] *Buck*, 137 S. Ct. at 778.

religion.[6] This prohibition is particularly important when the discriminatory conduct is motivated by the "powerful . . . stereotype" that an individual is "violence prone" because of who he is.[7] That stereotype is a "toxin," which "can be deadly [even] in small doses."[8]

Nor are the victims of that toxin limited to its immediate targets. Our country's long, fraught history of legalized discrimination demonstrates beyond peradventure that "racial bias implicates unique historical, constitutional, and institutional concerns."[9] Whether embodied in criminal law or in national security directives, permitting racial prejudice to find a home in our legal system thwarts "the promise of equal treatment under the law that is so central to a functioning democracy,"[10] "'poisons public confidence,'"[11] and "injures . . . 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'"[12] Consequently, "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with . . . the

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[6] *See id.*; *Peña-Rodriguez*, 137 S. Ct. at 867; U.S. Const. Amend. XIV; *cf.* U.S. Const. Amend. I; 8 U.S.C.A. § 1152(a)(1)(A) ("[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[7] *Buck*, 137 S. Ct. at 776; *see also id.* (describing race-as-dangerousness stereotypes as "a particularly noxious strain of racial prejudice").

[8] *Id.* at 777.

[9] *Peña-Rodriguez*, 137 S. Ct. at 868.

[10] *Id.*

[11] *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

[12] *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

equal dignity of all persons."[13] The duty to confront animus is shared by all three branches, but this Court is obligated to enforce the Constitution's guarantee against state-sponsored discrimination when the other branches abjure their duty to do so.[14]

That is precisely what has happened here. Through Executive Order 13780, the Executive Branch has banned individuals from six nations, whose residents are predominately Muslim, from entering the United States. As explained by the courts below, this ban is not based on the kind of legitimate considerations that ordinarily require substantial deference to the Executive Branch in matters of immigration. This ban is instead the result of the President's endorsement of the particularly noxious stereotype that people from these countries are dangerous because of their religion. The deference owed to the President in immigration matters does not extend that far: it does not permit the Executive Branch to equate race/ethnicity/religion with inherent dangerousness in order to decide who may enter this country. The President's use of that stereotype, as the basis for public policy, demeans not only the targets of its discrimination; it demeans the integrity of our legal system and demeans us all.

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[13] *Peña-Rodriguez*, 137 S. Ct. at 867; *see also id.* at 871 ("The Nation must continue to make strides to overcome race-based discrimination.").

[14] *Id.* at 867.

ARGUMENT

I. OUR COUNTRY'S LONG HISTORY OF SANCTIONING THE STEREOTYPE THAT CERTAIN RACES OR ETHNICITIES ARE INHERENTLY DANGEROUS HAS BEEN A SOURCE OF DEEP NATIONAL SHAME AND IS ANATHEMA TO THE FOUNDATIONAL PRINCIPLES OF OUR CONSTITUTIONAL DEMOCRACY.

In *Peña-Rodriguez*, this Court observed that "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history."[15] Unfortunately, our history provides no shortage of lessons in which unconstitutional discrimination was motivated or justified by the stereotype that certain people were inherently dangerous because of their race or ethnicity. In the past, the judicial branch has often permitted these discriminatory acts to stand and, in so doing, conferred its imprimatur to the actions. In many instances, Congress has acknowledged the anti-American character of the discrimination long after the harm, and this Court's opinions endorsing the discrimination have been relegated to the "American anticanon"—the Supreme Court cases "that all legitimate constitutional decisions must be prepared to refute."[16]

Here, too, this Court is faced with Government action motivated by the stereotype that a group of people are dangerous because of who they are. This time, that group is defined by religion rather than race or ethnicity. But religion, like race, is a protected

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[15] 137 S. Ct. at 871.

[16] Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011).

category under the Constitution precisely because treating people differently based on either category is fundamentally inconsistent with our commitment to democracy and the rule of law. This Court, therefore, is confronted with a stark choice in this case: adding to the anticanon or enforcing the constitutional ban on the use of odious stereotypes in setting public policy.

A. Slavery, Jim Crow and Lynching

Our shameful history of using racial stereotypes of inherent dangerousness to drive the enactment of laws ostensibly designed to protect the public is instructive. The stereotype of African Americans—particularly, African-American men—as inherently dangerous dates back to the earliest contacts between colonial Americans and Africans.[17] African Americans were described by white colonists as "barbarous, wild, [and] savage,"[18] and "a bloody people" "as neer beasts as may be."[19] Beginning in the 17th century, most American colonies enacted "slave codes" that relied on these racist beliefs to justify slavery and the separation of the races.[20] For instance, South Carolina's slave code stated that its creation was necessary to "restrain the

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[17] *See, e.g.*, Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550–1812, at 28 (1968).

[18] A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period 167 (1978) (quoting 7 The Statutes At Large Of South Carolina 352 (Thomas Cooper and David J. McCord, eds.) (1836-41)).

[19] Richard Ligon, A True & Exact History of the Island of Barbados 46-47 (1657).

[20] Nat'l Park Serv., U.S. Dep't of the Interior, *NPS Ethnography: African American Heritage & Ethnography: Laws that Bound,* https://www.nps.gov/ethnography/aah/aaheritage/histContextsE.htm (last visited Sept. 17, 2017).

disorders, rapines and inhumanity[] to which [slaves] are naturally prone and inclined . . .”[21]

These laws, as well as the assumptions on which they were built, were critical to American slavery. “[T]he myth of blacks’ inherent, criminal propensity (and, particularly, violent criminality) was key to dehumanizing the enslaved as ‘beasts’ or chattel over whom brutal control was both needed and justified.”[22] Furthermore, the codes “added both the enforcement power and perceived legitimacy of the law to the customary stigmatization of blacks as inherently predisposed toward criminality.”[23]

Although the slave codes principally used the stereotype of African Americans as inherently dangerous to justify their forced labor, some provisions reflected that stereotype more directly. For example, because African Americans were seen as inherently dangerous, they were prohibited from meeting in groups of five or more, except for a narrow set of

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[21] William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 Chi.-Kent. L. Rev. 1051, 1060-61 (1993); Paul Finkelman, *The Crime of Color*, 67 Tul. L. Rev. 2063, 2099 (1993) (“Being black in South Carolina was inherently criminal, and . . . the public policy was always to keep as many blacks as possible in servitude or in jail. South Carolina believed that the alternatives were crime, slave rebellion, and ‘self-destruction.’”).

[22] William M. Carter, Jr., *Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1373 (2007); *see also* William M. Carter, Jr.*, A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17, 57 (2004) (“[R]ace-based criminal suspicion, legally enforced through the Slave Codes, was used to keep blacks in fear and in their ‘place’ during slavery. It also had the corollary effect of placing whites in constant fear of blacks, thereby making them more willing to accept black subordination in the name of white safety.”).

[23] Carter, *Race, Rights, supra* note 22, at 1373

circumstances.[24] The slave codes—and the stereotypes they legitimized and amplified—later received the Supreme Court's imprimatur in *Scott v. Sandford*,[25] when this Court cited them with approval in support of its holding that African Americans, whether enslaved or free, had no rights or privileges because they were not considered "citizens" under the United States Constitution.[26]

Following the Civil War and the enactment of the 14th and 15th Amendments, efforts to codify anti-Black discrimination adapted and took new forms. Once again, the race-as-dangerousness stereotype was central. In the immediate aftermath of the Civil War, states passed "Black Codes," which criminalized "such behavior as vagrancy, bre[a]ch of job contracts, absence from work, the possession of firearms, [and] insulting gestures or acts."[27] The goal of these laws was to keep African Americans "as near to the condition of slavery as possible, and as far from the condition of the white man as [was] practicable."[28] The

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[24] Finkelman, *supra* note 21, at 2089.

[25] 60 U.S. (19 How.) 393 (1857).

[26] *Id*.

[27] Angela Y. Davis, Racialized Punishment and Prison Abolition, in the Angela Y. Davis Reader 96, 100 (1998); Eric Foner, Give Me Liberty!: An American History Vol. 2, 535 (2d ed. 2009) (noting that the Black Codes "denied [African Americans] the right to testify against whites, serve on juries or in state militias, or to vote" and "declared that those who failed to sign yearly labor contracts could be arrested and hired out to white landowners"); *United States v. Clary*, 846 F. Supp. 768, 776 (E.D. Mo. 1994) (noting that Black codes "limited the rights of [African Americans] to own or rent property and permitted imprisonment for breach of employment contracts") (quotation and citation omitted), *rev'd on other grounds by* 34 F.3d 709 (8th Cir. 1994).

[28] Stephen Budiansky, The Bloody Shirt: Terror After Appomattox 25 (Viking Books 2008).

Black Codes included two notable features that turned on the stereotype that Black people are inherently dangerous or criminal. First, those codes prescribed differential punishment for crimes based on race.[29] This discrepancy was most pronounced in rape cases, where the death penalty was often "reserved for black men who raped white women."[30] Second, the codes restricted gun ownership by African Americans, and sometimes made it a crime for whites to even lend guns to them.[31]

In time, the Black Codes yielded to Jim Crow and the segregation of the races. As it did in *Scott*, this Court notoriously granted its stamp of approval to state-sanctioned race discrimination in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The stereotype of Black criminality likewise continued to justify patently unconstitutional discrimination. For example, some "sundown towns" had ordinances that literally prohibited Black people from being present in the town after a certain hour.[32] Flagrant discrimination against Black men accused of raping white women also continued to be prevalent.[33]

The stereotype that Black people are inherently dangerous criminals was likewise the foundation for

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[29] Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 15 (2006); Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. Rev. 721, 751 (2003).

[30] Butler, *supra* note 29.

[31] Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 345 & n.178 (1991).

[32] Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev. 537, 541 (2008).

[33] *Id*. at 22-34.

one of the most shocking episodes of our history: the lynching of at least 4,075 Black men, women, and children between 1877 and 1950.[34] Government officials repeatedly justified their failure to hold the murderers accountable by claiming that the lynchings were necessary to prevent Black men from raping white women.

For example, in 1900, Senator Benjamin Tillman of South Carolina justified murders of Black people in South Carolina as follows: "We of the South have never recognized the right of the negro to govern white men, and we never will." "We have never believed him to be the equal of the white man, and we will not submit to his gratifying his lust on our wives and daughters without lynching him."[35] In 1906, white mobs killed an unknown number of African Americans in Atlanta after unverified reports that four white women had been raped by Black men. When asked how to prevent these lynchings, the mayor of Atlanta stated: "The only remedy is to remove the cause. As long as the black brutes assault our white women, just so long will they be unceremoniously dealt with."[36] As late as 1937, a Mississippi congressman opposed a federal anti-lynching law on the ground that it was "a bill to encourage rape" and would incite "the more

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[34] Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror 5 (2d ed. 2015).

[35] David Remnick, *Charleston and the Age of Obama*, The New Yorker (June 19, 2015), https://www.newyorker.com/news/daily-comment/charleston-and-the-age-of-obama.

[36] Rebecca Burns, Rage in the Gate City: The Story of the 1906 Atlanta Race Riot 134 (Univ. of Georgia Press rev. ed. 2009).

vicious element of the Negro race to attack white women."[37]

Tragically, Congress never enacted an anti-lynching law, as Southern Democrats repeatedly filibustered bills that had passed the House in the 1920s and 1930s.[38] In apologizing for this failure in 2006, the Senate admitted that "protection against lynching was the minimum and most basic of Federal responsibilities," and that the Senate refused repeated entreaties from civil rights groups to pass such legislation.[39]

Slavery and Jim Crow remain our singular national shame because they stand in such stark contravention to what America purports to be. For centuries, the country that proclaimed that "all men were created equal" punished people for who they were, not what they did—and did so at an incalculable human cost. Both houses of Congress have issued formal apologies acknowledging "the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow," and that "visceral racism against persons of African descent" was central to the creation and perpetuation of both systems.[40]

This Court's majority opinions in *Dred Scott* and *Plessy* have faced a similar historical judgment. They—along with *Lochner v. New York*, 198 U.S. 45

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[37] John Howard, Concentration Camps on the Home Front: Japanese Americans in the House of Jim Crow 45 (Univ. of Chicago Press 2008).

[38] Kyle Grossman, *The Untold Story of the State Filibuster: The History and Potential of a Neglected Parliamentary Device*, 88 S. Cal. L. Rev. 413, 436 (2015).

[39] S. Res. 39, 109th Cong. (2005).

[40] H. Res. 194, 111th Cong. (2009); S. Con. Res. 26, 111th Cong. (2009).

(1905), and *Korematsu v. United States*, 323 U.S. 214 (1944)—have been selected "by the broader legal and political culture" as "the American anticanon. Each case embodies a set of legal propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the land mines of the American constitutional order . . . ."[41] Tellingly, the anticanon is populated in the main by cases where this court acquiesced to legislative or executive actions that targeted individuals for mistreatment simply based on who they are.

B. The Chinese Exclusion Act

Drawn by the Gold Rush and the prospect of employment on the transcontinental railroad, thousands of Chinese immigrants moved to the west coast in the 1850s and 1860s.[42] At first, the new immigrants were greeted with curiosity, admiration or indifference, but "such views were not long lasting."[43] As more immigrants arrived from China, xenophobia and virulent anti-Chinese racism spread along the west coast.[44] Once again, that racism frequently took the form of the race-as-dangerousness stereotype. The immigrants were cast "as invading 'hordes'" with no individual identities and "inscribe[d with] qualities of inhumanity, paradoxical mindlessness, savagery, and

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[41] Greene, *supra* note 16, at 380-81.

[42] H. Res. 201, 112th Cong. (2011); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 299-300 (1997); Commission on Wartime Relocation and Internment of Civilians, VRH9-KAGV, Personal Justice Denied 29 (1984); Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, The Gentleman's Agreement, and the Coming of World War II*, 117 W. Va. L. Rev. 1409, 1422 (2015).

[43] Finkelman, *supra* note 42, at 1422.

[44] *See id.*; *Oyama v. California*, 332 U.S. 633 (1948).

brutality."[45] Other times, they were depicted as "criminals and prostitutes."[46] These stereotypes were broadly circulated by newspaper headlines and advertisements, organized interest groups, and various forms of media and entertainment.[47]

"The press and political parties pandered to these anti-Chinese attitudes,"[48] and anti-Chinese racism was soon reflected in "lethal vigilante violence" and a raft of discriminatory legislation such as California's 1862 "Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California."[49] Chinese immigrants were subjected to a dizzying array of penalties and prohibitions including, *inter alia*: a miner's tax that disproportionately affected Chinese immigrants, a California Supreme Court decision prohibiting Chinese people from testifying against white people in courts of law, a constitutional amendment that prohibited "non-whites" from owning land, an anti-miscegenation law that prohibited marriage between whites and "Mongolians," and a law that prohibited "aliens" from fishing in California state waters.[50]

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[45] Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1, 32 (1996).

[46] Saito, *supra* note 42, at 299.

[47] *See* Aoki, *supra* note 45, at 20.

[48] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 29.

[49] Finkelman, *supra* note 42, at 1422; *Oyama*, 332 U.S. at 651-52; Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian L.J. 71, 79 (1997).

[50] R. Scott Baxter, *The Response of California's Chinese Populations to the Anti-Chinese Movement*, 42 Historical Archaeology 29, 30 (2008).

The statements of elected officials demonstrated the ubiquity of the "yellow peril" stereotype. For instance, Representative James A. Johnson of California described Chinese people as an "immense, teeming, swarming, seething hive of degraded humanity turned loosed upon our country" which threatened to "drown out and destroy our institutions and our race."[51] Oregon Senator George H. Williams channeled the same stereotype when he urged the United States not to "deliver itself up to the political filth and moral pollution that are flowing with a fearfully increasing tide into our country from the shores of Asia."[52] Governor Stanford of California stated, "[t]he presence among us of numbers of degraded and distinct people must exercise a deleterious influence upon the superior race. . . ."[53]

The anti-Chinese campaign culminated in Congress's enactment of the Chinese Exclusion Act in 1882, which prohibited the immigration of Chinese laborers for a decade and precluded all Chinese immigrants from obtaining naturalized citizenship.[54] The act "underscored the belief of some senators at the time that . . . the United States is under God a country of Caucasians . . . to be governed by white men" and that "the Chinese people were unfit to be naturalized," "revolting," and "like parasites."[55] The Chinese Exclusion Act was the country's first immigration law to restrict immigrants because of their race and

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[51] Aoki, *supra* note 45, at 32.
[52] *Id.*
[53] Roger Olmsted, *The Chinese Must Go!*, 50 Cal. Hist. Q.J. Cal. Hist. Soc'y 285, 286 (1971).
[54] Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 Journal of American Ethnic History 36, 36 (2002).
[55] S. Res. 201, 112th Cong. (2011).

class,[56] but not its last. Indeed, it launched six "decades of Federal legislation deliberately targeting the Chinese by race," during which time many members of Congress claimed "that all persons of Chinese descent were . . . dangerous to the political and social integrity of the United States."[57]

The pervasiveness of these stereotypes was demonstrated yet again when the Scott Act of 1888—an addendum to the Chinese Exclusion Act, which forbade Chinese laborers then abroad from returning to the United States—was challenged in this Court.[58] In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Court upheld Congress's authority to set immigration policy and, in so doing, described Chinese immigrants as "vast hordes of . . . people crowding in upon us," "who will not assimilate with us," and are "dangerous to [the nation's] peace and security."[59] The Court also cited with approval the California constitutional convention of 1878, which claimed that the "immigration [of Chinese laborers] was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[60] *Chae Chan Ping* belongs in the anticanon, yet it remains the font of the current rule that Congress can exclude groups as part of its immigration policy.

Ultimately, Congress would recognize that the Chinese Exclusion Act and its myriad progeny were an affront to "the basic founding principles recognized in the Declaration of Independence that all persons are

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[56] Lee, *supra* note 54, at 37.
[57] S. Res. 201, 112th Cong. (2011).
[58] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[59] *Id.* at 606.
[60] *Id.* at 595.

created equal" and apologized for its actions.[61] The Senate admitted that its actions "fostered an atmosphere of racial discrimination that deeply prejudiced the civil rights of Chinese immigrants," "legitimized racial discrimination," and "induced trauma that persists within the Chinese community."[62]

C. The Japanese-American Internment

The history leading up to the Japanese-American internment bears striking similarities to the events that resulted in the Chinese Exclusion Act. Japanese immigrants began to arrive in the United States in significant numbers around the turn of the 20th century. At the time, the Chinese Exclusion Act had succeeded in significantly reducing the Chinese population, and anti-Asian furor was on the wane.[63] "But the arrival of the Japanese fanned anew the flames of anti-Oriental prejudice," and "[h]istory then began to repeat itself."[64] "The political and cultural ideology that came to be used in the anti-Japanese movement immediately connected the new threat to the old Chinese one."[65] Newspaper headlines broadcast that the "Japanese [Were] Taking the Place of the Chinese," and anti-Chinese stereotypes were applied to Japanese immigrants.[66] People entering

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[61] S. Res. 201, 112th Cong. (2011); H. Res. 683, 112th Cong. (2012).

[62] S. Res. 201, 112th Cong. (2011).

[63] *Oyama*, 332 U.S. at 652.

[64] *Id.*

[65] Lee, *supra* note 54, at 36-37.

[66] *See id.*; *see also* Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4 ("The anti-Japanese agitation also fed on racial stereotypes and fears: the 'yellow peril' of an unknown Asian culture achieving substantial influence on

the United States from Japan became "the new yellow peril."[67] They were depicted as "unassimilable" and "unexploitable cheap labor[,]" like the stereotype of Chinese immigrants before them, but were viewed as more "aggressive and warlike" as well as "tricky and unscrupulous."[68]

Japanese immigrants became "a convenient target for political demagogues" in "all the major parties," and "[p]olitical bullying was supported by organized interest groups."[69] As a result, Japanese people were subjected to a spate of discriminatory legislation in the first four decades of the 20th century. Japanese immigration was restricted in 1908 and banned in 1924; Japanese immigrants were barred from obtaining American citizenship; and many western states forbade Japanese persons from owning land.[70] The intention of this legislation was clear: "The 'Japanese menace' was to be dealt with on a racial basis."[71]

This history of political animosity and the creation of stereotypes that portrayed Japanese people as unassimilable and dangerous provided the backdrop for the Japanese-American internment.[72] On

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the Pacific coast or of a Japanese population alleged to be growing far faster than the white population.").

[67] Finkelman, *supra* note 42, at 1426.

[68] *Lee*, *supra* note 54, at 36-37.

[69] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4.

[70] *Id.*

[71] *Oyama*, 332 U.S. at 656.

[72] *See* Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 4, 28, 34, 37; Aoki, *supra* note 45, at 18 ("Likewise, it is hard to conceive of the mass internment of Japanese American citizens in 1942 without a background of

February 19, 1942—approximately ten weeks after the attack on Pearl Harbor—President Roosevelt issued Executive Order 9066, which granted to the Secretary of War the power to exclude all persons of Japanese ancestry from designated military zones on the west coast.[73] The government justified the order as a "military necessity," though the necessity was founded on racial stereotypes of Japanese-Americans as dangerous.[74] General DeWitt, who proposed the relocation, justified his recommendation as follows: "The Japanese race is an enemy race and while many second and third generation Japanese born on American soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."[75] On another occasion, General Dewitt put his view more succinctly: "A Jap is a Jap."[76] Based on that justification, "the government banished 120,000 Japanese Americans—two-thirds of whom were native-born U.S. citizens—from the West Coast and imprisoned them in ten desolate camps without charges, attorneys, indictment, or hearings."[77] They would remain in "bleak barracks camps" "surrounded by barbed wire and guarded by military police" until December 1944.[78]

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pervasive and seemingly 'natural' stereotypical tropes serving to justify such internment.").

[73] Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 Asian L.J. 37, 40 (2003).

[74] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 6.

[75] *Id.* at 66

[76] *Id.* at 222.

[77] Serrano and Minami, *supra* note 72, at 40.

[78] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 2.

In stark contrast, although the United States was also at war with Germany and Italy, immigrants from those countries and their descendants were not treated similarly.[79] They were instead granted individualized loyalty hearings to determine whether they, in fact, constituted a danger to the republic.[80] Only Japanese-Americans were compelled *en masse* to report to internment camps on the theory that they were inherently dangerous and could not be trusted.[81]

While 120,000 Japanese-American individuals were so detained, this Court considered the constitutionality of the exclusion order in *Korematsu*. The Court accepted the argument advanced by the Department of Justice and upheld the exclusion by endorsing the race-as-dangerousness stereotype.[82] The Court stated: "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."[83] In other words, the Court reasoned that sending over 100,000 Americans to internment camps because of their ethnicity did not reflect racial prejudice because Japanese Americans were inherently dangerous. Justice Murphy recognized the majority opinion for what it was: an endorsement of unconstitutional racial discrimination by the Executive Branch. He explained that "[s]uch exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[84]

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[79] *Id.* at 3, 284-85.
[80] *Id.* at 284-85.
[81] *Id.* at 6, 56, 64, 66, 79, 80, 83, 222.
[82] *Korematsu*, 323 U.S. at 223-24.
[83] *Id.* at 223.
[84] *Id.* at 233 (Murphy, J., dissenting).

Over time, Justice Murphy's dissent has been vindicated. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to investigate the Japanese-American internment. Its final report, *Personal Justice Denied*, concluded:

> The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.[85]

Over time, *Korematsu* has assumed its rightful place in the anticanon,[86] and the Japanese-American internment has elicited apologies from President Ronald Reagan, the House of Representatives, and the

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[85] Commission on Wartime Relocation and Internment of Civilians, *supra* note 42, at 18.

[86] Greene, *supra* note 16, at 380-83.

Senate.[87] Indeed, the Senate expressed that "policies that discriminate against any individual based on the actual or perceived race, ethnicity, national origin, or religion of that individual would be . . . a repetition of the mistakes of Executive Order 9066; and . . . contrary to the values of the United States."[88] Indeed, Fred Korematsu—whose conviction for violating the internment order was upheld by this Court in *Korematsu*—had his conviction overturned by the district court on a *coram nobis* application in 1983.[89]

II. THE EXECUTIVE ORDER AT ISSUE PUNISHES INDIVIDUALS BASED ON THEIR RELIGION, HARKENING BACK TO SHAMEFUL PERIODS OF OUR NATION'S HISTORY.

This Court's recent decisions in *Buck* and *Peña-Rodriguez* make clear that courts will no longer tolerate the race-as-dangerous stereotyping that was used to justify the lynching of African Americans, the exclusion of Chinese immigrants, or the internment of thousands of Japanese Americans during World War II. Yet, history is now repeating itself as this Court is presented with another act of executive authority that penalizes a distinct group of people based on "who they are."

Our Constitution confers broad authority on the President in the realm of immigration. But that authority has limits: the Executive cannot avoid

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[87] S. Res. 373, 114th Cong. (2015); H. Res. 442, 100th Cong. (1987); The American Presidency Project, *Ronald Reagan XL President of the United States: 1981*-1989 (Aug. 10, 1988), http://www.presidency.ucsb.edu/ws/?pid=36240.

[88] S. Res. 373, 114th Cong. (2015).

[89] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

scrutiny of actions motivated by racial or religious animus by simply invoking the magic words "national security." The President's authority must always be exercised in a manner consistent with constitutional guarantees against arbitrary and impermissible discrimination.

Rather than relying on any legitimate concerns about national security, Executive Order 13780 is founded upon the pernicious stereotype that Muslims are inherently dangerous—a stereotype that is soundly refuted by the millions of Muslims living peacefully and lawfully both in and outside the United States. Although this stereotype targets a new and distinct group, it bears a strong resemblance—in terms of its usage, its practical effect, and the constitutional issues it raises—to the stereotypes that have been used to target other minorities in the past.

A. The Executive Order Is Based On, and Perpetuates, the False and Pernicious Stereotype that Muslims Are Inherently Dangerous.

The record provides ample evidence that the Executive Order was motivated by a false and discriminatory belief that Muslims are inherently predisposed to violence. Indeed, just as the "expert" in *Buck* testified that Duane Buck was dangerous because he is Black, President Trump has made clear on multiple occasions that he believes Muslims are dangerous because they are Muslim. And it is that false stereotype that motivated the exclusion order at issue here.

A review of the text from Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, makes its motivation clear. That Order referenced the Muslim-as-dangerous stereotype

directly, citing "honor killings"—a frequently used stereotype that Muslims engage in violence against women—as its justification.

The evidence, however, is not limited to the text of that first Order. "Islam hates us."[90] Those three words, uttered by then-candidate Trump in March 2016, make clear that he does not consider Muslims to be part of "us," and also explain his view of Muslims as being inherently dangerous to "us." President Trump's spokeswoman, Katrina Pierson, noted shortly after he made that statement: "We've allowed this propaganda to spread all through the country that [Islam] is a religion of peace."[91]

Further, on the rare occasions when self-proclaimed Muslims have committed violent acts, President Trump has suggested that they did so because they were Muslim. For example, in March 2016, after a violent attack in Brussels, then-candidate Trump stated that Islam is the main source of global terrorism.[92] He continued: "Frankly, we're having problems with the Muslims."[93] In June 2016, after mass shootings by two self-proclaimed Muslims in San Bernardino, President Trump made clear that he believed the shootings showed that Muslims are predisposed toward violence. He called for a ban on Muslim immigration to the United States and commented that "many are saying that I [am] right to

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[90] Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,"* CNN.com (Mar. 10, 2016), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html.

[91] *Id*.

[92] Mark Hensch & Jesse Byrnes, *Trump: Frankly, We're Having Problems with the Muslims*, The Hill (Mar. 22, 2016, 8:56 AM), http://thehill.com/blogs/ballot-box/presidential-races/273857-trump-frankly-were-having-problems-with-the-muslims.

[93] *Id*.

do so."[94] When asked in December 2016 whether recent violence in Germany affected his plans to ban Muslims, he stated: "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful."[95] Similarly, President Trump has claimed, falsely, that violent acts by individual Muslims have widespread support among other Muslims in the United States. At a September 2015 campaign rally, he propagated the dangerous and unfounded falsehood that "thousands and thousands" of Muslims living in New Jersey "cheered" the attacks of September 11, 2011.[96] That falsehood has been repeatedly disproved.[97]

In sharp contrast, when individual white persons have committed terrorist acts in the name of white supremacy, President Trump has not suggested that white people are inherently dangerous or that their actions are supported by white people generally. He provided only a belated, and general, statement condemning violence after an Islamophobic white supremacist killed two men on a train in Portland, Oregon; said nothing when a white man traveled from

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[94] Associated Press, *How Donald Trump's Plan to Ban Muslims Has Evolved*, Fortune (Jun. 28, 2016), http://fortune.com/2016/06/28/donald-trump-muslim-ban/.

[95] Katie Reilly, *Donald Trump on Proposed Muslim Ban: "You Know My Plans,"* Time (Dec. 21, 2016), http://time.com/4611229/donald-trump-berlin-attack/.

[96] Brent Johnson, *Trump: "Thousands" in Jersey City Cheered on 9/11*, NJ.com (Nov. 23, 2015, 5:35 PM), http://www.nj.com/politics/index.ssf/2015/11/trump_thousands_in_jersey_city_cheered_on_911.html.

[97] Lauren Carroll, *Fact-Checking Trump's Claim that Thousands in New Jersey Cheered When World Trade Center Tumbled*, Politifact (Nov. 22, 2015, 6:17 PM), http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/.

Baltimore to New York to kill a Black person; and infamously blamed "both sides" after a white supremacist killed an anti-racist protester in Charlottesville, Virginia.[98] The President's selective response to these terrorist acts is telling. When terrorist acts have been committed by Muslim individuals, the President has invoked the Muslim-as-dangerous stereotype by claiming the perpetrator committed the terrorist act because of his faith. By contrast, the President has never suggested that terrorist acts committed by white non-Muslims were the result of any group-based characteristic.

Having embraced the false and discriminatory view of Muslims, as a people, being prone to violent acts, President Trump has repeatedly reiterated that they, as well as their places of worship, should be subject to additional scrutiny and surveillance by law enforcement. In November 2015, President Trump promised that, if elected, he would order the surveillance of "certain mosques" and would have "absolutely no choice" but to order the closure of some of them. Then-candidate Trump additionally stated that he would "certainly implement" a national

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[98] Dan Merica, *Trump Says Both Sides To Blame Amid Charlottesville Backlash,* CNN.com (Aug. 16, 2017, updated 1:14 AM), http://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html; Bonnie Malkin & Martin Pengelly, *Portland Attack: Trump Says Victims Stood Up to "Hate and Intolerance,"* The Guardian (May 29, 2017), https://www.theguardian.com/us-news/2017/may/29/portland-attack-donald-trump-called-on-to-make-statement-about-double; Camila Domonoske, *White Supremacist Charged With Terrorism Over Murder of Black Man,* NPR.org (Mar. 28, 2017, 3:05 PM), http://www.npr.org/sections/thetwo-way/2017/03/28/521805165/white-supremacist-charged-with-terrorism-over-murder-of-black-man.

database of all Muslims in the United States.[99] When asked whether there was a difference between requiring Muslims to register "and Jews having to register in Nazi Germany," he responded, "You tell me," rather than denouncing any registration program with similarities to what happened to Jews during the Holocaust.[100]

The culmination of President Trump's claims regarding Muslims' purported threat to American security was his demand for an outright ban on Muslims entering the United States. In a December 2015 press release, he "call[ed] for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[101] He left no doubt as to the basis for his decision: "Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."[102]

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[99] Jeremy Diamond, *Trump Would "Certainly Implement" National Database for U.S. Muslims*, CNN.com, (Nov. 20, 2015, 12:18 PM), http://www.cnn.com/2015/11/19/politics/donald-trump-barack-obama-threat-to-country/.

[100] Trip Gabriel, *Donald Trump Says He'd "Absolutely" Require Muslims to Register*, N.Y. Times, Nov. 20, 2015, 1:31 AM), https://www.nytimes.com/politics/first-draft/2015/11/20/donald-trump-says-hed-absolutely-require-muslims-to-register/.

[101] Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN.com (Dec. 8, 2015, updated 4:18 AM), http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html.

[102] Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 9, 2017, 6:03 AM), https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/.

These blatantly discriminatory statements continued after Mr. Trump was sworn into office as President. On social media and in interviews, he has referred to his own Executive Order as a "Ban."[103] For this reason, the President's modifications to the specific parameters of the Executive Order must be seen as a transparent effort to minimize judicial scrutiny. There can be no doubt that the origin for—and motivation behind—the ban remains the same: to prevent entry of Muslim people *as a group* due to the false and pernicious stereotype that they are more likely to commit violence within the United States' borders.[104]

Although the Government now invokes national security as a purported justification for the order (just as it did in *Korematsu*), Respondents have demonstrated that this justification is entirely pretextual. Indeed, given the extensive screening of immigrants already in place, it is not surprising that the U.S. Department of Homeland Security ("DHS") explicitly rejected the need for the Executive Order. In a memo that DHS prepared for the Trump Administration, entitled "Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States," it concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist

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[103] Donald J. Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 3:54 AM), https://twitter.com/realDonaldTrump/status/908645126146265090.

[104] Amy B. Wang, *Trump Asked for a "Muslim Ban," Giuliani Says—and Ordered a Commission To Do It "Legally,"* Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/.

activity."[105] The absence of a legitimate justification necessitating the broad terms of the Executive Order, and the Order's ineffectiveness in achieving its stated national security goals, confirms that the Order's true purpose is to impose an immigration ban on Muslims based on an entrenched, yet patently false, stereotype that they are inherently dangerous.

B. The Order, if Approved, Would Contribute to Increasing Animosity and Violence Towards Innocent Muslim-Americans.

This Court must make clear, in unequivocal terms, that religious discrimination emanating from a false and pernicious stereotype of Muslims as a group will not be tolerated under the United States Constitution. This is especially crucial when, as here, that discrimination comes from the Executive Branch of our federal government. Allowing the Executive Order to have this Court's constitutional stamp of approval would legitimize those stereotypes and lead to the same broader harms to Muslims that similar stereotypes have caused other minorities in the past.

State and local entities have already attempted to enact legislation targeting Muslims. In October 2010, Oklahoma approved a constitutional amendment responding to the unjustified concern that "sharia"—Islamic jurisprudence—poses a threat to the American

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[105] Memorandum from U.S. Dep't of Homeland Sec., Citizenship Likely an Unreliable Indicator of Terrorist Threat in the United States at 1, as reported by Rick Jervis, *DHS Memo Contradicts Threats Cited by Trump's Travel Ban*, U.S.A. Today (Feb. 25, 2017, 3:36 PM), http://www.usatoday.com/story/news/2017/02/24/dhs-memo-contradict-travel-ban-trump/98374184/.

judicial system.[106] The author of the bill, Representative Rex Duncan, proclaimed that "sharia" was a "cancer" and that his bill would "act as a pre-emptive strike against sharia law" coming to Oklahoma.[107] According to Representative Duncan, Muslims come to America to take away "liberties and freedom from our children . . . . This is a war for the survival of America. It's a cultural war."[108] At least seven other states have considered similar legislation.[109]

There has been a similarly disturbing increase in opposition to the opening of mosques, often based on the unsubstantiated belief that they serve as a gathering place for violent individuals. For example, in 2010, residents of Murfreesboro, Tennessee sued Rutherford County for issuing permits allowing for the expansion of a local mosque.[110] The litigants opposed the construction of the mosque on the grounds that Islamic law supposedly "advocates sexual abuse of children, beating and physical abuse of women, death edicts, honor killings, killing of homosexuals, outright lies to Kafirs, Constitutional free zones, and total

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[106] Ryan J. Reilly, *Oklahoma Anti-Sharia Constitutional Amendments Struck Down by Federal Judge*, Huffington Post (Aug. 16, 2013), http://www.huffingtonpost.com/2013/08/15/oklahoma-sharia-constitution_n_3764313.html.

[107] *Id.*

[108] James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. Times, Nov. 15, 2010, at A12 (quoting State Representative Rex Duncan).

[109] Donna Leinwand, *More States Enter Debate on Sharia Law*, USA Today (Dec. 9, 2010, 10:29 AM), http://usatoday30.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm.

[110] Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 Hastings Race & Poverty L.J. 191, 210 (2012).

world dominion."[111] A federal court ultimately ordered Rutherford County to grant the Islamic Center's request for a permit, nullifying a state court decision in favor of the plaintiffs.[112] More recently, the city council in Bayonne, New Jersey rejected a request for a permit to build a mosque.[113] One of the opponents said Muslims "are trying to take over the block and the neighborhood" and referenced the 1993 World Trade Center bombing.[114]

Existing mosques in New York, New Jersey, Tennessee, Wisconsin, Connecticut, Kentucky, California, and Oklahoma have been subject to similar threats and accusations.[115] On April 10, 2011, the Islamic Center of Springfield, Missouri received a threatening letter stating that Muslims "stain the earth" and vowing that "Islam will not survive."[116] The letter ended with a drawing of a ram's head with "Death to Islam!" printed below it.[117] Earlier that year, the same mosque was vandalized with graffiti stating, "You bash us in Pakistan, we bash you here."[118] The following week, the Islamic Center in Cartersville, Georgia had its doors and windows shattered with rocks, one of which was painted with the words "Muslim murderers."[119]

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[111] *Id*.
[112] *United States v. Rutherford County,* No. 12 Civ. 0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).
[113] Sharon Otterman, *Mosque Is Blocked in New Jersey, but Dispute Is Far from Over*, N.Y. Times (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/nyregion/mosque-bayonne-new-jersey.html.
[114] *Id*.
[115] Aziz, *supra* note 110, at 210-11.
[116] *Id*. at 211.
[117] *Id*.
[118] *Id*.
[119] *Id*.

The notion that Muslims are inherently violent is a myth. But, the violence against Muslims resulting from that stereotype is all too real.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the Fourth and Ninth Circuits.

Respectfully Submitted,

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