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National Security, Immigration and the Muslim Bans

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National Security, Immigration and the Muslim Bans

Shoba Sivaprasad Wadhia*

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I. Introduction

The use of national security language to create and defend immigration law and policy is historic.¹ The Immigration and

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1. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1227(a)(4)(A) (2012) (discussing the national security needs in relation to immigration law, policies, and procedures). For a look at how national security has been used to discuss immigration control, see generally Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY

Nationality Act (INA), which Congress enacted in 1952, contains sections to exclude or deport noncitizens for “security and related grounds.”² A sublayer of this section is aimed at noncitizens who engage in “any other criminal activity which endangers the public safety or national security”³ The Executive Branch has published regulations and policies that use national security language in a similar manner. Federal courts have further upheld immigration laws or deferred to Congress or agencies in the name of national security.⁴ One tool that has enabled the cohabitation of national security and immigration is the “plenary power doctrine,” which originates from a case known as *Chae Chan Ping v. United States*⁵ (alternately, the *Chinese Exclusion Case*) and refers to the complete power “political branches” have over immigration.⁶ As administrative and immigration law scholar Michael Kagan has described, “[h]aving chosen an extra-constitutional foundation for immigration law, the Court quickly came to the conclusion that the judiciary had little or no role in reviewing decisions prohibiting foreigners from entering the country”⁷ The practical impact is that legal questions noncitizens raise regarding entry or rights in the United States are limited. Indeed, when the plenary power doctrine is invoked, the courts will not intervene.⁸

The outer limits of the plenary power doctrine have also been tested in the courts and recently in connection with the Muslim

L.J. 669 (2007).

2. 8 U.S.C. §§ 1101, 1182(a)(3), 1227(a)(4).

3. 8 U.S.C. § 1227(a)(4)(A)(ii).

4. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 604–05 (1889) (noting Congress’ and the executive branch’s roles in conducting foreign relations); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN AM. L.J. 13, 15 (2003) (discussing doctrines of international law enforcement in the U.S., including deference to Congress and the executive branch).

5. 130 U.S. 581 (1889).

6. *Id.* at 604–05 (1889) (explaining Congress’ and the executive’s power over international affairs).

7. Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 23 (2015).

8. See *The Chinese Exclusion Case*, 130 U.S. at 604–608 (reflecting the Court’s decision to not interfere in questions of international affairs); Saito, *supra* note 4, at 15 (noting judiciary hesitation to interfere with the political branches’ power over national security).

bans the Executive Branch has issued against noncitizens based upon their nationality and religion.⁹ While it is simple to identify the use of national security language by Congress, the executive branch and courts, measuring the national security value of a particular immigration law or policy is a greater challenge. Moreover, when governments are permitted to create immigration policies under a national security justification that is never tested, or, even worse, found to be flawed, the human consequences are grave. For example, the former Immigration and Naturalization Service published a regulation known as “special registration” on the heels of an announcement by then-Attorney General John Ashcroft to track and interrogate certain individuals through a “National Security Entry and Exit Registration System” (“NSEERS”).¹⁰ With the NSEERS program, nearly 14,000 men from primarily Muslim countries were placed in removal (deportation) proceedings after coming forward to register with the government.¹¹ Former government officials responsible for

9. See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting that the Judicial Branch normally “must defer to the Executive and Legislative Branch” on immigration, but Congress’ “plenary power” over creating immigration law is “subject to important constitutional limitations.”); *I.N.S. v. Chadha*, 462 U.S. 919, 941 (1983) (stating that Congress and the Executive must “cho[ose] a constitutionally permissible means of implementing” their authority over immigration). “These cases instruct that the political branches’ power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action’s constitutionality is in question.” *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590 (4th Cir. 2017); see also *Hawaii v. Trump*, 878 F.3d 662, 679 (9th Cir. 2017) (discussing the political branches’ powers in conducting foreign and national security affairs); *Washington v. Trump*, 847 F.3d 1151, 1162–63 (9th Cir. 2017) (noting the judiciary’s deference to the political branches in matters of national security and territorial sovereignty); Complaint, *Iranian Alliances Across Borders v. Trump*, No. 8:17-cd-02921-GJH (D. Md. Oct. 2, 2017), (alleging several times that the executive order in question is impermissibly based on nationality and religion); *Zakok v. Trump*, No. 1:17-cv-02969-GLR (D. Md. Oct. 6, 2017) (same); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (same); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (same).

10. Press Release, U.S. Dept. of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002) (on file with the Washington and Lee Law Review).

11. Shoba Sivaprasad Wadhia, *NSEERS or “Muslim” Registration Was a Failed Post 9-11 Program and Must Come to an End*, MEDIUM (Nov. 22, 2016), <https://medium.com/@shobawadhia/nseers-or-muslim-registration-was-a-failed-post-9-11-program-and-must-come-to-an-end-1200469bf64b> (last visited Sept. 18,

administering the NSEERS program and national security experts concluded that NSEERS was a huge waste of resources and without national security benefit.¹² Nonetheless, the fallout of the program fell on the men who came forward and were later detained and deported, as well as on their families.¹³ The use of national security to create or defend immigration law or policy also raises a number of constitutional concerns, some of which the courts have addressed in connection with the plenary power doctrine and, more recently, the appellate courts have addressed in reviewing the Muslim bans in connection with the Establishment Clause of the First Amendment.¹⁴

Beyond the Muslim Bans are increased use of existing tools and the creation of new policies by the administration that effectively operate to restrict certain nationals from entering the United States or what I sometimes refer to as “backdoor bans.”¹⁵

2018) (on file with the Washington and Lee Law Review); Ed Pilkington, *Muslims to March on White House in Bid to Dismantle Discriminatory Registry*, GUARDIAN (Dec. 12, 2016), <https://www.theguardian.com/us-news/2016/dec/12/american-muslims-march-white-house-nseers> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

12. For a discussion of the opposition from domestic and foreign government officials, including former General Counsel David Martin; former INS Commissioner James Ziglar; former Commissioner of the Customs and Border Protection agency at the Dept. of Homeland Security Robert Bonner; and Edward Alden, a senior fellow at the Council on Foreign Relations, see Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1521–22 (2010) (discussing the Council on Foreign Relations’, Government Accountability Office’s, and ex-government officials’ and watchdogs’ view that the NSEERS program was without much benefit).

13. See *id.* at 1503–11 (discussing the impact that Post 9/11 policies had on immigrant families); Wadhia, *supra* note 11 (providing a list of resources that provide discussions of the individuals impacted by NSEERS); see also *End the Shame of NSEERS*, AM.-ARAB ANTI-DISCRIMINATION COMM., <http://www.adc.org/legal/end-the-shame-of-nseers/> (last visited Sept. 18, 2018) (noting the large number of Arabs and Muslims ultimately deported for complying with the NSEERS program without having been charged with terrorism) (on file with the Washington and Lee Law Review).

14. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (discussing the likelihood of success of an Establishment Clause claim); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590 (4th Cir. 2017) (same).

15. See Sandra Bruno, *U.S. Visa Applications: Extreme Vetting and the 221(g) Process*, NAT’L L. REV. (May 18, 2017), <https://www.natlawreview.com/article/u-s-visa-applications-extreme-vetting-and-221g-process> (last visited Sept. 18, 2018) (discussing immigration policy requiring additional information, documents, or background checks to determine visa eligibility beyond a typical

President Trump coined the phrase “extreme vetting” at various points of his tenure and also before he assumed office, but the term has not been used consistently by the administration.¹⁶ The term “extreme vetting” gained renewed attention following a terror attack by a motorist in New York City that killed eight people and injured several more; President Trump tweeted “I have just ordered Homeland Security to step up our already Extreme Vetting Program. Being politically correct is fine, but not for this!”¹⁷ In an interview with FOX News, former Secretary of Homeland Security John Kelly explained, “[e]xtreme vetting is, we simply interview people and have to satisfy ourselves that the person we’re talking to is indeed the person who they claim.”¹⁸ White House Press Secretary Sarah Huckabee Sanders outlined extreme vetting as including extra collection and review of biometric and biographical data; improved documentation requirements and verification; heightened scrutiny and review by Customs and Border Protection and related agencies; and improved information sharing, among other items.¹⁹ On their face, these measures are reasonable, but in reality the immigration system has a number of screening procedures that use similar

consular interview) (on file with the Washington and Lee Law Review).

16. See, e.g., Joseph Tanfani, *What Donald Trump Means When He Opposes “Extreme Vetting” for Would-Be Immigrants*, L.A. TIMES (Aug. 16, 2016), <http://www.latimes.com/politics/la-na-pol-trump-extreme-vetting-20160816-snap-htmstory.html> (last visited Sept. 18, 2018) (discussing Donald Trump’s use of the phrase “extreme vetting” and explaining the extreme vetting proposal) (on file with the Washington and Lee Law Review); Lauren Said-Moorhouse & Ryan Browne, *Donald Trump Wants “Extreme Vetting” of Immigrants. What Is the US Doing Now?*, CNN (Aug. 16, 2016), <http://www.cnn.com/2016/08/16/politics/how-us-vets-immigrants-donald-trump-extreme-vetting/index.html> (last visited Sept. 18, 2018) (same) (on file with the Washington and Lee Law Review).

17. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 31, 2017, 6:26 PM), <https://twitter.com/realdonaldtrump/status/925534445393928199?lang=en> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

18. Philip Rucker, *Trump Says He Ordered U.S. to “Step Up Our Already Extreme Vetting Program”*, WASH. POST (Oct. 31, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/31/trump-says-he-ordered-u-s-to-step-up-our-already-extreme-vetting-program/?utm_term=.e81f2cb80769 (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

19. Blair Guild, *What Is Extreme Vetting? White House Outlines Proposed Immigration Policy*, CBS NEWS (Nov. 1, 2017, 7:47 PM), <https://www.cbsnews.com/news/what-is-extreme-vetting/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

terms and involve similar government agencies. A Brennan Center report looks comprehensively at the “extreme vetting” idea by describing existing screening protocols as well as analyzing new ones the Trump administration has announced.²⁰ On February 6, 2018, President Trump established a “National Vetting Center” responsible for “coordinat[ing] agency vetting efforts to identify individuals who present a threat to national security, border security, homeland security, or public safety.”²¹ While the details of the center are less known, foreign nationals are already subject to extreme vetting procedures when applying for visa for admission to the United States.²² Similarly, “administrative processing” pre-dates the Trump administration and has long been used to hold visa applications following a visa interview at a consulate. Administrative processing is sometimes known as Security Advisory Opinion and is described in the following way in a fact sheet the Penn State Law Center for Immigrants’ Rights Clinic and the law firm of Maggio and Kattar produced:

Administrative processing takes place after the visa interview. Before issuing a visa, consular officers review different databases to determine if information exists that may impact individual eligibility for a visa. A ‘hit’ on a particular database occurs when there is a match between the visa applicant and a database. These hits may be based on criminal convictions, security risks, and prior visa overstays or denials (this list is non-exhaustive). When an individual case has been tagged in a

20. See generally HARSHA PANDURANGA, FAIZA PATEL, & MICHAEL PRICE, BRENNAN CTR. FOR JUSTICE, EXTREME VETTING AND THE MUSLIM BAN (2017), https://www.brennancenter.org/sites/default/files/publications/extreme_vetting_full_10.2_0.pdf (examining the Trump administration’s push for travel bans and extreme vetting as stereotypical and discriminatory).

21. Donald J. Trump, *Presidential Memorandum On Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise*, THE WHITE HOUSE (Feb. 6, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-optimizing-use-federal-government-information-support-national-vetting-enterprise/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

22. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1182 (2012) (providing the grounds, including health, crime, security, need, and labor, which are considered in determining eligibility for visas or admission); *Foreign Affairs Manual*, U.S. DEP’T OF ST., <https://fam.state.gov/> (last visited Sept. 18, 2018) (noting the eligibility and ineligibility criteria for obtaining a visa) (on file with the Washington and Lee Law Review).

database, the Department of State, at the request of the consular post, may initiate administrative processing.²³

These delays can go on for years and often without explanation. More recently, select nationals subject to administrative processing have stayed in this process or instead have been rolled into the Muslim Ban 3.0.²⁴

National security language has continued to guide the creation and defense of Executive Orders and related immigration policies issued in the Donald J. Trump administration. This Article builds on earlier scholarship examining the relationship between national security and immigration in the wake of September 11, 2001, under the Obama administration, and during the campaign leading to the 2016 Election.²⁵ While the Article is largely descriptive, it ultimately questions the longevity of using national security to create and defend immigration law. This Article is limited in scope—it does not provide a deep dive into the constitutionality of the Muslim bans, nor does it analyze the literature about the future of plenary power. There is a large body of scholarship and a treasure trove of litigation to address both questions.²⁶

23. MAGGIO+KATTAR & THE PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS, ADMINISTRATIVE PROCESSING FAQs 1, <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Administrative-Processing-FAQ.pdf> (on file with the Washington and Lee Law Review).

24. See *id.* at 2–3 (discussing administrative processing timelines and delays).

25. See generally, e.g., Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2017) (examining how recent national security concerns have shaped immigration policy and comparing those against policies enacted shortly after September 11, 2001); Shoba Sivaprasad Wadhia, *Business As Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1599 (2016) (noting unfairness in no-fly lists).

26. See generally *Legal Challenges to Trump's Entry Ban*, SCOTUSBLOG, <http://www.scotusblog.com/category/cases-and-controversies/legal-challenges-to-trumps-entry-ban/> (last visited Sept. 18, 2018) (listing numerous articles providing analysis and coverage of the legal challenges to President Trump's entry ban) (on file with the Washington and Lee Law Review); *Documents in State of Hawaii et al v. Trump—A Challenge to President Trump's March 6, 2017 Travel Ban*, HOGAN LOVELLS (Mar. 7, 2017), <http://www.hoganlovells.com/en/publications/documents-in-state-of-hawaii-et-al-v-trump-a-challenge-to-president-trumps-march-6-2017-travel-ban> (last visited Sept. 18, 2018) (providing timelines and briefs filed in *Hawaii v. Trump*) (on file with the Washington and Lee Law Review); *Immigration in the Time of Trump*, PENN STATE L. CTR. FOR IMMIGRANTS'

Part II of this Article describes the first three Muslim bans the Executive Branch issued starting in January 2017.²⁷ Part III explains the legal challenges to those bans brought in federal district and appellate courts around the country,²⁸ and the government's reliance on national security language to justify the bans. Part IV describes the human impact of the Muslim bans and some responses outside of the courtroom by organizations who represented the community and by the Penn State Law Center for Immigrants' Rights Clinic (CIRC). I launched the CIRC in 2008 which over the last decade has been engaged in providing legal support in individual immigration cases, community outreach and education and policy products for organizational clients.²⁹

RTS. CLINIC, <https://pennstatelaw.psu.edu/immigration-time-of-trump#Procs> (last visited Sept. 18, 2018) (providing web and other resources related to immigration specifically tailored for use in preparation for the 2016 U.S. presidential election) (on file with the Washington and Lee Law Review); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Exceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (analyzing the plenary power doctrine and its future); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (1999) (discussing the end of the plenary power doctrine); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1994) (analyzing the plenary power doctrine of the 1980s and providing a modern examination of the doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that the plenary power doctrine as it relates to immigration law is in a slow decline); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307 (1999) (discussing the apology and prediction theses of plenary power).

27. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting immigration and entrance into the U.S. from specified countries for a 90-day period); Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (rescinding and supplementing portions of Executive Order 13,769); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (adding countries to the restricted entry lists under Executive Orders 13,769 and 13,870).

28. See generally *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

29. See *Penn State Law Center for Immigrants' Rights Clinic Provides Outreach and Pro Bono Legal Support to Communities Across Pennsylvania*, PENN ST. U., <http://www.psu.edu/feature/2017/10/12/building-community-through-compassion> (last visited Sept. 18, 2018) (describing the work of Penn

II. Muslim Bans

For purposes of this Article, I use the term “Muslim ban” to describe policies by the Executive Branch that prohibit nationals from entering the United States. What to call the various bans the President has signed since January 27, 2017,³⁰ has itself emerged as a question. Some prefer the term “travel ban” because it is more neutral. Others prefer the term “Muslim” ban or “Muslim/Refugee” ban because the restrictions imposed directly impact or block the admission of nationals from countries with majority Muslim populations or refugees. While I have used and continue to use “travel ban” when describing the contents of these bans to the general public or in written documents, I simultaneously believe the term is inaccurate. The bans the President signed do not merely restrict travel (e.g., a long weekend to Disneyworld) but in fact prevent the ability for people to enter the United States period. In my view, “Muslim ban” is an accurate description of the first three bans the President signed; two as executive orders and one as a presidential proclamation. In all three versions, the bulk of nations targeted have Muslim populations of more than 90%, and the bans have had devastating impacts on nationals from these countries.

A. Muslim Ban 1.0

The first ban was issued as an Executive Order signed at 4:30 PM on January 27, 2017.³¹ The most controversial pieces of the ban suspended the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Sudan, Somalia, Yemen and Syria—for a period of 90 days;³² suspended the United States’

State’s Center for Immigrants’ Rights Clinic) (on file with the Washington and Lee Law Review).

30. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (establishing the first iteration of the various bans); Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (rescinding parts of and supplementing Executive Order 13,769); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (adding countries to the restricted entry lists under Executive Orders 13,769 and 13,870).

31. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

32. *Id.* at 8977–78.

refugee admissions program for a period of 120 days;³³ slashed refugee numbers by one half from 110,000 to 55,000;³⁴ and indefinitely suspended Syrian refugee admissions.³⁵

Importantly, refugees are already screened by multiple federal agencies and also interviewed by Department of Homeland Security officials before their admission into the United States. The government's own website offers an infographic to describe the screening process for refugees.³⁶ In addition to being interviewed by an officer of the United States Citizenship and Immigration Services (USCIS) for eligibility, the applicant's background information is checked against several federal agency databases, followed by a cultural and medical check.³⁷ The immigration statute defines "refugee" as a person who has suffered persecution or faces persecution in the future on account of their race, religion, nationality, political opinion or membership in a particular social group.³⁸ The refugee definition, coupled with the security checks in place, underscores the rigor of the refugee admissions in the United States.³⁹

By its terms, the ban was effective immediately and, for this reason, caused chaos in airports around the country, confusion about the application of the ban to certain classes such as lawful permanent residents,⁴⁰ and long nights and days for lawyers.⁴¹

33. *Id.* at 8979–80.

34. *Id.*

35. *Id.*

36. See *The Refugee Processing and Screening System*, U.S. DEP'T ST. (Jan. 20, 2017), <https://www.state.gov/j/prm/ra/266459.htm> (last visited Sept. 18, 2018) (providing an easy-to-read graphic of the refugee processing and screening system) (on file with the Washington and Lee Law Review).

37. *Id.*

38. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012) (defining "refugee" under the INA).

39. See *U.S. Refugee Admissions Program*, U.S. DEP'T ST., <https://www.state.gov/j/prm/ra/admissions/> (last visited Sept. 18, 2018) (providing a comprehensive overview of the refugee admissions program) (on file with the Washington and Lee Law Review).

40. See Press Release, U.S. Dep't of Homeland Security, Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States (Jan. 29, 2017) (clarifying the national interest in permitting lawful permanent residents to enter the country) (on file with the Washington and Lee Law Review).

41. See Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After*

Said Sirine Shebaya, a civil rights attorney for Muslim Advocates who worked as an “airport lawyer” in the hours after the ban went into effect, “We were trying to both help family members there, draw attention to the chaos that was going on, and identify people who needed legal assistance.”⁴² Attorneys also provided on-the-ground support and education to impacted and interested community members in the hours and days following the ban.⁴³ The fallout of Muslim Ban 1.0 was not limited to the immediate chaos, but also extended to the later discovery that the White House had not consulted with its own attorneys before issuing the ban.⁴⁴

B. Muslim Ban 2.0

With the rescission of the first ban came the second, also in the form of an Executive Order President Donald Trump signed on March 6, 2017.⁴⁵ This Executive Order suspended the entry of

Trump’s Order, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> (last visited Sept. 18, 2018) (noting that lawyers volunteered immediately to assist refugees entering the country by meeting them at airports) (on file with the Washington and Lee Law Review); Lucy Westcott, *Thousands of Lawyers Descend on U.S. Airports to Fight Trump’s Immigrant Ban*, NEWSWEEK (Jan. 29, 2017), <http://www.newsweek.com/lawyers-volunteer-us-airports-trump-ban-549830> (last visited Sept. 18, 2018) (same) (on file with the Washington and Lee Law Review).

42. Esther Yu Hsi Lee, *The Week the Country United Against Trump’s Xenophobia*, THINKPROGRESS (Jan. 27, 2018), https://thinkprogress.org/muslim-ban-one-year-anniversary-ce90b97d04da/?utm_source=NSHR+Rapid+Response&utm_campaign=2544c7dc3f-EMAIL_CAMPAIGN_2017_06_19&utm_medium=email&utm_term=0_3a915757be-2544c7dc3f-391821061 (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

43. See, e.g., Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215, 228–33 (2017) (examining the efforts of individuals responding to President Trump’s Muslim Ban immediately after enactment).

44. See Evan Perez, Pamela Brown, & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html> (last visited Sept. 18, 2018) (“Administration officials weren’t immediately sure which countries’ citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it.”) (on file with the Washington and Lee Law Review).

45. See Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (implementing revisions to the first Muslim Ban executive order).

foreign nationals from six countries—Iran, Libya, Sudan, Somalia, Yemen, and Syria—for a period of 90 days;⁴⁶ froze the refugee admissions program for a period of 120 days;⁴⁷ and slashed the refugee numbers by one half.⁴⁸ There are at least three differences between the first and second ban: in the second, the indefinite ban on Syrians was dropped, the ban on Iraqi entrants was dropped, and the effective date of the order was delayed for ten days. This Executive Order also spelled out the exemptions with more clarity, presumably because of the confusion generated in the aftermath of the first ban. The exemptions listed in the second Executive Order included: lawful permanent residents (green card holders); those paroled or admitted into the United States; those permitted to travel; dual nationals of a country traveling on a diplomatic visa; and those granted refugee-related relief.⁴⁹ Muslim Ban 2.0 also introduced a new waiver scheme for those the ban covered, but who can demonstrate that: (1) denying entry would cause the foreign national undue hardship; (2) entry would not pose a threat to the national security or public safety of the United States; and (3) entry would be in the national interest.⁵⁰ The terms “undue hardship” “national security” and “national interest” were not defined in the Executive Order nor are they defined specifically in the immigration statute or regulations.⁵¹ The text of the Executive Order listed ten examples of who might qualify for a waiver but indicated that such waivers would be granted only on a case by case basis.⁵² Some of these examples include foreign nationals with significant work, study or other ties to the United States, those seeking to enter the United States for business or professional obligations, and those seeking to enter and reside with a close

46. *Id.* at 13,201.

47. *Id.* at 13,210.

48. *Id.* at 13,216.

49. *Id.* at 13,213–14.

50. *Id.* at 13,214–15.

51. *See id.* § 3. *See also* SHOBA SIVAPRASAD WADHIA, PENN ST. L. CTR. FOR IMMIGRANTS’ RTS., UNTANGLING THE WAIVER SCHEME IN PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES 1–3 (2017), <https://pennstatelaw.psu.edu/sites/default/files/WaiverDocFinal%203.28.17.pdf> (discussing President Trump’s second Muslim Ban executive order’s waiver scheme).

52. Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

family member in the United States.⁵³ On the same day the ban was issued, lawyers and advocates rejected the ban and called it a rebranded version of the first.⁵⁴

C. Muslim Ban 3.0

A third version of the Muslim Ban was issued as a Presidential Proclamation on September 24, 2017.⁵⁵ A proclamation is similar but not identical to an Executive Order in form.⁵⁶ The proclamation indefinitely blocks the entry for certain individuals from eight countries: Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen.⁵⁷ These countries were ostensibly chosen based on the perceived threat these countries posed.⁵⁸ Sudan, which had been listed as a banned country in the prior two Muslim bans, was dropped from the list of banned countries in this third version. The restrictions placed on nationals from the eight countries in the third version are indefinite in duration. Like its predecessor, Muslim Ban 3.0 includes exemptions for lawful permanent residents, refugees, those granted asylum, and dual nationals, among others.⁵⁹ The ban also lists a waiver scheme and examples similar to the language of the second version. The

53. *Id.* § 3(c).

54. See AM.'S VOICE EDUC. FUND, TRUMP'S "REVISED" REFUGEE AND MUSLIM BAN IS STILL A REFUGEE AND MUSLIM BAN 1–2 (2017), <https://pennstatelaw.psu.edu/sites/default/files/AVEF%20Press%20Release%20on%20Immigration%20EO.pdf> (explaining that the President Trump's second Muslim Ban executive order was simply a slightly altered version of the first).

55. See Proclamation No. 9645, 82 Fed. Reg. 45,161 (2017) (adding countries to the restricted entry lists under Executive Orders 13,769 and 13,870).

56. See PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, PRESIDENTIAL PROCLAMATIONS: QUESTIONS AND ANSWERS 1 (2017), <https://pennstatelaw.psu.edu/sites/default/files/Proclamations%20Memo%20Final.pdf> (comparing and contrasting presidential proclamations and executive orders).

57. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (2017).

58. *Id.* § 1(h)(ii) (“[A]lthough immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate . . . presents risks to the national security of the United States.”).

59. *Id.* § 3(b) (providing a list of exceptions to restricted entry into the United States).

government provided no guidance about how the waiver will be adjudicated, how often and by whom.⁶⁰

III. Legal Challenges to the Bans

Each version of the ban was challenged in federal courts around the country and by a variety of litigants that included mosques,⁶¹ individual family members,⁶² states,⁶³ and refugee resettlement organizations,⁶⁴ among others. A flurry of amicus (friend of the court) briefs accompanied the first three Muslim bans, and came from a wide range of interested parties who include, but are not limited to, constitutional scholars, immigration law professors, former national security officials,

60. See Shoba Sivaprasad Wadhia, *Supreme Court Issues Orders on Ban 3.0: What You Need to Know*, FACEBOOK (Dec. 12, 2017), <https://www.facebook.com/shoba.wadhia/videos/10211368742116442/?pnref=story> (last visited Sept. 18, 2018) (examining recent judicial orders concerning President Trump's Muslim Ban executive orders) (on file with the Washington and Lee Law Review).

61. See Associated Press, *Travel Ban Challenge Puts Hawaii's Few Muslims in Spotlight*, VOA (Mar. 10, 2017), <https://www.voanews.com/a/travel-ban-challenge-puts-hawaii-few-muslims-in-spotlight/3761158.html> (Mar. 10, 2017) ("Hawaii has 5,000 or so Muslims – less than 1 percent of the state's population – who are finding themselves thrust into an international spotlight after the state's top lawyer launched a challenge to President Donald Trump's revised travel ban . . .") (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

62. See generally, *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018) (providing an example of a lawsuit brought on behalf of individuals by family members of refugees); see also *Muslim Ban Litigation*, BRENNAN CTR. (Oct. 9, 2017), <https://www.brennancenter.org/legal-work/muslim-ban-litigation-case-page> (last visited Sept. 18, 2018) (providing a summary background and explanation of *Zakzok*) (on file with the Washington and Lee Law Review).

63. See, e.g., Pete Williams, *15 States Join Hawaii's Challenge to Travel Ban Enforcement*, NBC NEWS (Jul. 10, 2017), <https://www.nbcnews.com/news/us-news/15-states-join-hawaii-s-challenge-travel-ban-enforcement-n781466> (last visited Sept. 18, 2018) (examining the states which decided to file lawsuits challenging President Trump's travel ban executive orders) (on file with the Washington and Lee Law Review).

64. See generally, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (providing an example of a case brought by resettlement organizations and other such groups).

organizations who represent Muslim, Arab and South Asian communities, and organizations who support the bans.⁶⁵

The government advanced several arguments in defense of the bans. As a preliminary argument, the government argued that the courts have no right to review the terms of the ban. Citing to *Kleindienst v. Mandel*,⁶⁶ the government argued, “when the Executive exercises’ immigration authority ‘on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.”⁶⁷ The Ninth Circuit Court of Appeals disagreed, concluding early on, “Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution.”⁶⁸ The government also identified section 1182(f) as a source of authority for excluding nationals from countries. Section 1182(f) states in part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁶⁹

With respect to Muslim Ban 1.0, attorneys began reviewing possible legal claims for challenging Muslim Ban 1.0 and filed documents in federal court seeking relief for individuals on an expedited basis.⁷⁰ One week after the first ban was announced, a

65. For a listing of these briefs, see *A Rough Guide to Amicus Briefs in the Travel Ban Cases*, *infra* note 73 (providing a list of organizations which filed amicus briefs in travel ban litigation).

66. 408 U.S. 753 (1972).

67. *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017).

68. *Id.*

69. Immigration and Nationality Act, 8 U.S.C. § 1182(f) (2012).

70. For a listing of the nearly fifty legal challenges filed against Muslim Ban 1.0 in federal courts, see *Special Collection: Civil Rights Challenges to Trump Refugee/Visa Orders*, U. MICH. L. SCH.’S C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?%20searchSpecialCollection=44> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

federal court judge from Seattle issued a nationwide injunction that prevented the most controversial sections of the ban from going into effect.⁷¹ Eventually, and presumably in reaction to a heap of lawsuits filed around the country challenging its terms, the ban was rescinded.⁷²

While the litigation surrounding the first ban diminished with the introduction of the second, lawsuits challenging the second and third versions of the ban ensued over several months.⁷³ The two most important cases dealing with the Muslim Ban 2.0 originated in the Hawaii and Maryland courts.⁷⁴ Both courts issued injunctions blocking the most controversial portions of the ban and both injunctions were then appealed to the circuit courts of appeals.⁷⁵ The Government also asked the Supreme Court to continue these bans and also hear arguments by filing a petition for certiorari.⁷⁶ On June 26, 2017 the Supreme Court granted a partial stay (let a portion of Muslim Ban 2.0 go into effect) and also granted certiorari in Muslim Ban 2.0.⁷⁷ The June 26, 2017 decision opened with a history of the travel ban and the constitutional and statutory arguments made before the federal courts. The

71. See *Washington v. Trump*, 847 F.3d at 1164–67, 1168–1169 (finding that the federal government did not show a likelihood of success on the issue of due process and failed to show that it was necessary to stay the order).

72. See Drew C. McCarthy, *On Travel Order, Trump Will Rescind and Replace*, NAT'L REV. (Feb. 16, 2017), <https://www.nationalreview.com/blog/corner/travel-order-trump-will-rescind-replace/> (last visited Sept. 18, 2018) (discussing President Trump's plan to rescind the first Muslim Ban executive order to replace it with a revised executive order) (on file with the Washington and Lee Law Review).

73. See *A Rough Guide to Amicus Briefs In the Travel Ban Cases*, TAKE CARE (Apr. 24, 2017), <https://takecareblog.com/blog/a-rough-guide-to-amicus-briefs-in-the-travel-ban-cases> (last visited Sept. 18, 2018) (noting the many amicus briefs filed in cases instituted in the Fourth and Ninth Circuit Courts of Appeals) (on file with the Washington and Lee Law Review).

74. See *generally* *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

75. *Hawaii v. Trump*, 878 F.3d at 701; *Int'l Refugee Assistance Project*, 857 F.3d at 604.

76. Petition for Writ of Certiorari, *Trump v. Hawaii*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168); Petition for Writ of Certiorari, *Trump v. Int'l Refugee Assistance Project*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351).

77. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) ("Accordingly, the petitions for certiorari are granted, and the stay applications are granted in part.").

prevailing constitutional argument raised was that the travel ban violates the Establishment Clause of the First Amendment.⁷⁸ The primary statutory argument surrounded whether the travel ban violates a section of the Immigration and Nationality Act that prohibits discrimination with regard to the issuance of immigrant visas.⁷⁹ Section 1152(a) of the Act states in part, “[N]o person shall receive any preference or priority or 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.”⁸⁰

In allowing a part of Muslim Ban 2.0 to go into effect, the Supreme Court determined that individuals from the six countries (all of which have Muslim populations of more than 90%) and all refugees can be blocked from entering the United States if they lack a “bona fide” relationship to a person or organization.⁸¹ The bona fide test was an invention of the Supreme Court and included the following examples of what might constitute a “bona fide” relationship:

For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe’s wife or Dr. Elshikh’s mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience.⁸²

These examples did not resolve the confusion this decision promised to cause to impacted individuals, employers, agencies, consulates and other officials responsible for determining the term “bona fide.” Even the dissent, arguing that the stay should have been granted in its entirety, opined, “I fear that the Court’s remedy

78. *See id.* at 2084–86 (discussing the constitutional challenges in the lower courts).

79. *See id.* (discussing the challenges to President Trump’s executive orders for violating provisions of the Immigration and Nationality Act).

80. 8 U.S.C. § 1152(a)(1)(A) (2012).

81. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. at 2088–89 (analyzing the Government’s request for a stay of injunction).

82. *Id.* at 2088.

will prove unworkable. Today's compromise will burden executive officials with the task of deciding—on peril of contempt—whether individuals from the six affected nations who wish to enter the United States have a sufficient connection to a person or entity in this country.”⁸³

In its June 2017 opinion, the Supreme Court also overstated the significance of the travel ban's “waiver scheme” when it reasoned, “Indeed, EO–2 itself distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category.”⁸⁴ However, the waivers are more cumbersome than meets the eye and only delay admission. The Supreme Court implemented the order within seventy-two hours of the ruling.⁸⁵ Hours before the ban was to go into effect, the government issued guidance narrowly defining what constitutes a “bona fide relationship:” “A ‘close family’ relationship includes: a parent (including parent-in-law), spouse, child, adult son or daughter, fiancé(e), son-in-law, daughter-in-law, and sibling, whether whole or half. This includes step relationships. However, ‘close family’ does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law and any other ‘extended’ family members.”⁸⁶

The exclusion of grandparents and others from the bona fide test struck a chord in the courts. Litigation about the meaning of

83. *Id.* at 2090.

84. *Id.* at 2088.

85. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (allowing portions of the district court's order for an injunction to remain in effect).

86. *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry Into the United States*, U.S. DEP'T HOMELAND SEC. (June 29, 2017), <https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states-0> (last visited Sept. 18, 2018) (providing guidance to individuals regarding President Trump's executive orders) (on file with the Washington and Lee Law Review). This guidance was later superseded by another after the litigation. *See generally* *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry Into the United States*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states> (last updated July 21, 2017) (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

a “bona fide relationship” ensued in the Hawaii District Court and Ninth Circuit Court of Appeals.⁸⁷ On July 13, 2017, the Hawaii District Court rejected the government’s narrow definition of bona fide relationship and ruled that grandparents and other family members cannot be excluded.⁸⁸ Said the Hawaii court:

In sum, the Government’s definition of *close familial relationship* is not only not compelled by the Supreme Court’s June 26 decision, but contradicts it. Equally problematic, the Government’s definition represents the antithesis of common sense. Common sense, for instance, dictates that close family members be defined to include grandparents. Indeed, grandparents are the epitome of close family members. The Government’s definition excludes them. That simply cannot be.⁸⁹

Among the jurisprudence the Supreme Court and the litigants referenced was the well-known case of *Moore v. City of East Cleveland*.⁹⁰ There, the Supreme Court held:

[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.⁹¹

While the July 13 ruling by the Hawaii court was a win for grandparents and common sense, the government’s (mis)understanding of family looms. Law aside, the debate around “bona fide relationship” raises fundamental questions about

87. See *Hawaii v. Trump*, 263 F. Supp. 3d 1049, 1054–62 (D. Haw. 2017) (addressing Plaintiffs’ challenge to the government’s interpretation of “bona fide relationship”), *aff’d*, 871 F.3d 646 (9th Cir. 2017).

88. See *id.* at 1057–58 (“[T]he Government’s utilization of the specific, family-based visa provisions of the INA . . . constitutes cherry-picking and resulted in a predetermined and unduly restrictive reading of ‘close familial relationship.’”).

89. *Id.* at 1058.

90. 431 U.S. 494 (1977).

91. *Id.* at 503–04.

culture, identity, and family. Many define family in ways that go beyond the nuclear one. Banning or restricting a grandparent or aunt based on the absence of a “bona fide” relationship undermines not only the jurisprudence around family but also the experiences of first and second-generation immigrants living in the United States. The sting of excluding family members like grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins also sends the message that such relationships are sham or unreal. But what is truly unreal is the government’s narrow grasp of family.

Courtroom traffic proceeded over the scope of “bona fide” relationship. On July 18, 2017, the Department of State issued an announcement defining “close familial relationship” more expansively.⁹² Meanwhile, the government filed papers in the Supreme Court asking it to intervene again.⁹³ The Supreme Court scheduled oral arguments in connection with the second ban for October 10, 2017, but these arguments were cancelled. Said the Court, “[b]ecause that provision of the Order ‘expired by its own terms’ on September 24, 2017, the appeal no longer presents a ‘live case or controversy.’”⁹⁴

Muslim Ban 3.0 was subject to legal actions in the federal district courts of Hawaii and Maryland.⁹⁵ Like litigation

92. See Shoba Sivaprasad Wadhia, *Muslim Ban Litigation: An Unfinished Symphony*, ACSBLOG (July 20, 2017), https://www.acslaw.org/acsblog/muslim-ban-litigation-an-unfinished-symphony?utm_content=bufferf728b&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (last visited Sept. 18, 2018) (discussing the government’s response to the Hawaii District Court’s ruling on the definition of “close familial relationship”) (on file with the Washington and Lee Law Review); see also *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry Into the United States (Updated July 21, 2017)*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states> (last updated July 21, 2017) (last visited Oct. 2, 2018) (providing updated guidance to individuals President Trump’s executive orders affected and the government’s interpretation of bona fide and close familial relationships) (on file with the Washington and Lee Law Review).

93. Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction, *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (No. 16-1540) (requesting relief and intervention by the Supreme Court).

94. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017).

95. For a listing of ongoing cases challenging the September 24, 2017, executive order, see *Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, <https://lawfareblog.com/litigation->

surrounding earlier versions of the bans, plaintiffs argued that Muslim Ban 3.0 is in violation of the immigration statute and also the United States Constitution.⁹⁶ The statutory arguments are arguably stronger with regard to Muslim Ban 3.0 because of its terms: the text indefinitely blocks the entry of all immigrants from seven countries: Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen along with additional restrictions.⁹⁷ By contrast, the INA was amended in 1965 to eliminate the national origin and nationality quotas and also included this new provision: “no person shall receive any preference or priority or 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.”⁹⁸ In October 2017, the Hawaii and Maryland courts blocked the wholesale suspension of nationals in Muslim Ban 3.0 on statutory grounds, constitutional grounds or both.⁹⁹ Once again, the Government appealed the decisions to the appellate courts and furthermore asked the United States Supreme Court to place a hold on the court decisions pending a final disposition on appeal or at the Supreme Court.¹⁰⁰

The Supreme Court granted the Government’s wish and, on December 4, 2017, allowed the full version of Muslim Ban 3.0 to go into effect pending a decision by the appellate courts and disposition of the Government’s petition for certiorari before the

documents-resources-related-trump-executive-order-immigration (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

96. Second Amended Complaint for Declaratory and Injunctive Relief at 66–70, *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (No. TDC-17-0361); Complaint for Declaratory and Injunctive Relief at 26–30, *Iranian Alliances Across Borders v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017) (No. TDC-17-2921); Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order at 13–30, *Hawaii v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KSC).

97. See Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67 (Sept. 24, 2017) (restricting entry into the U.S. from certain countries). The Proclamation also includes restrictions for certain travelers from Venezuela. *Id.* at 45,166.

98. 8 U.S.C. § 1152(a)(1)(A) (2012).

99. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017); Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017) (No. 17-00050 DKW KSC).

100. Petition for Writ of Certiorari, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965).

Supreme Court.¹⁰¹ The decision was remarkable to the extent that a broad ban was reinstated in full without a ruling by the appellate courts and without specific guidance by the implementing agencies about how the ban would apply in practice. Within twenty-four hours of the December 4, 2017 decision, I started to receive calls from students and scholars from an affected country about their future, such as their ability to leave the United States and return or the ability for a loved one to obtain a visitor visa to come visit family in the United States. The timing of the Supreme Court's decision was surprising both procedurally and practically. Procedurally, reinstating the ban on the Monday before the appellate courts were scheduled to hear oral arguments on appeal about the legality of the ban complicated a process that ordinarily might start at a lower court, be raised at a higher court, and then only considered by the Supreme Court. Practically, December is a month during which students from around the world graduate from university and when family members apply for visas or schedule travel to depart or enter the United States to reunite with family during the holidays. As a professor situated on a college campus with one of the largest international student populations and graduate studies programs, which had a fall semester graduation date in the same month, my heart simply sank.

On December 6, 2017, the Ninth Circuit Court of Appeals heard oral arguments from the plaintiffs and government in the Muslim Ban 3.0 case.¹⁰² The arguments focused largely on the immigration statute, with an exchange between the judges and counsel for the Plaintiffs about the scope and limitations of statutory sections that pertain to nondiscrimination in the issuance of immigrant visas¹⁰³ and the authority by the President

101. See Shoba Sivaprasad Wadhia, *Ban 3.0 at the Supreme Court: What You Need to Know*, MEDIUM (Dec. 5, 2017), <https://medium.com/@shobawadhia/supreme-court-issues-orders-on-ban-3-0-what-this-means-db7c8e83c04c> (last visited Sept. 18, 2018) (explaining the relevant Muslim Ban cases, their results in the courts, and who the results affected) (on file with the Washington and Lee Law Review).

102. See *Hawaii v. Trump Oral Argument*, C-SPAN (Dec. 6, 2017), <https://www.c-span.org/video/?437732-1/ninth-circuit-hears-oral-argument-presidents-travel-ban> (last visited Sept. 18, 2018) (providing a video recording of oral arguments in the Ninth Circuit Court of Appeals in *Hawaii v. Trump*) (on file with the Washington and Lee Law Review).

103. See 8 U.S.C. § 1152(a) (addressing a policy of nondiscrimination in the

to suspend the entry of noncitizens when such entry is “detrimental to the interests” of the United States.¹⁰⁴ On December 8, 2017, the Fourth Circuit Court of Appeals heard oral arguments on Muslim Ban 3.0, and in this round focused largely on the constitutional questions, namely whether barring certain citizens from six majority Muslim countries, plus North Korea and Venezuela, violates the Establishment Clause of the First Amendment.¹⁰⁵

On December 22, 2017, the Ninth Circuit Court of Appeals issued a decision that extended the Muslim Ban for nationals who lack a bona fide relationship to a person or entity.¹⁰⁶ Relying on the statutory arguments, the court concluded “[t]he Proclamation, like its predecessor executive orders, relies on the premise that the INA, 8 U.S.C. § 1101 et seq., vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President’s issuance of the Proclamation once again exceeds the scope of his delegated authority.”¹⁰⁷ Once again, the Ninth Circuit focused its conclusion on the statute, finding that the Proclamation conflicts with the nondiscrimination clause of the INA and furthermore fails to make a finding that blocking nationals from the six Muslim majority countries is “detrimental to the interest of the United States” as Section 212(f) of the INA requires.¹⁰⁸

On February 15, 2018, the Fourth Circuit Court of Appeals issued a 285-page decision that was split among the judges.¹⁰⁹ The majority opinion focused on the likelihood that plaintiffs would prevail on constitutional grounds and concluded that that the Proclamation is “unconstitutionally tainted with animus toward

issuance of immigrant visas).

104. *See id.* § 1182(f) (authorizing the President to prohibit and restrict certain classes of aliens, immigrants, or nonimmigrants from entering the U.S.).

105. *See Listen to Oral Arguments*, U.S. CT. APPEALS FOR THE FOURTH CIR., <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments> (last visited Sept. 18, 2018) (providing audio recordings of arguments in the Fourth Circuit Court of Appeals in *Int’l Refugee Assistance Project v. Trump*) (on file with the Washington and Lee Law Review).

106. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017).

107. *Id.* at 673.

108. *Id.* at 673, 692–94.

109. *See generally Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018).

Islam.”¹¹⁰ The court’s conclusion did not rest on statements made by the President before the election but rather on his subsequent statements against Muslims. Said the court:

We need not [rely on pre-election statements] . . . because the President’s inauguration did not herald a new day. Rather, only a week after taking office, President Trump issued EO-1, which banned the entry of citizens of six Muslim majority countries, provided exemptions for Christians, and lacked any asserted evidence indicating a genuine national security purpose. The very next day, January 28, 2017, Rudy Giuliani, an advisor to President Trump, explained that EO-1’s purpose was to discriminate against Muslims.¹¹¹

Prior to the decision by the Fourth Circuit Court of Appeals, the administration filed a petition with the United States Supreme Court asking it to hear the case.¹¹² On January 19, 2018, the Supreme Court agreed to hear the case, *Trump v. Hawaii*, and determine the legality of the ban.¹¹³ The Supreme Court asked the parties to answer the following four questions: (1) whether the challenge to EO-3 is justiciable;¹¹⁴ (2) whether EO-3 is a lawful exercise of executive authority; (3) whether the global injunction against EO-3 the Hawaii District Court entered and affirmed in pertinent part by the Ninth Circuit is overbroad; and (4) whether EO-3 violates the Establishment Clause.¹¹⁵ Several amicus briefs were filed to the Supreme Court including but not limited to one the author co-counseled. The amicus brief states, in part:

The third iteration of President Trump’s travel ban (EO-3) dramatically exceeds the Executive’s authority under the

110. *Id.* at 257.

111. *Id.* at 266.

112. Petition for Writ of Certiorari, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965).

113. Grant of Writ of Certiorari, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965).

114. For a comprehensive piece on judicial review and the travel bans, see generally Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1.

115. See Grant of Writ of Certiorari, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965) (indicating which issues the Court wants discussed in the parties’ briefings). For the list of questions referred to in this Grant of Writ of Certiorari, see Petition for Writ of Certiorari at I, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965) (presenting the issues on appeal).

Immigration and Nationality Act (INA). It is irreconcilable with the INA's comprehensive framework and with past practice under the statute. When Congress enacted 8 U.S.C. § 1182(f) in 1952, it delegated to the President a cabined authority to enact restrictions on immigration in response to exigent geopolitical circumstances. It delegated this authority against a backdrop of temporary, wartime grants, which the President was to use only to restrict entry from hostile sovereign states and foreign subversive groups. Congress was fully aware of this backdrop when it passed § 1182(f). It did not intend to expand the President's peacetime powers beyond what his wartime authority had been.¹¹⁶

On April 25, the Supreme Court heard oral arguments in *Trump v. Hawaii*. During oral arguments, Solicitor General Noel Francisco argued that the suspension clause or 212(f) of the Immigration and Nationality Act gives the President authority to add additional restrictions than what is outlined in the INA. On behalf of Hawaii, Neal Katyal argued that the proclamation is unlawful for three reasons: (1) it interferes with congressional policy, (2) it conflicts with the nondiscrimination clause at Section 202(a) of the Immigration and Nationality Act, and (3) it violates the First Amendment.¹¹⁷ On June 26, 2018, the Supreme Court issued a 5–4 decision upholding Muslim Ban 3.0. Chief Justice Roberts wrote the opinion and concluded that the proclamation falls within the scope of Section 212(f) and further does not conflict with the nondiscrimination clause at Section 202(a).¹¹⁸ Justice Breyer's dissent focused on the broken nature of the waiver scheme in the proclamation and the position that the waiver process amounts to "window dressing."¹¹⁹ Justice Sotomayor's dissent

116. See Brief for Scholars of Immigration Law in Support of Immigration Law in Support of Respondents on the History of the Immigration and Nationality Act as Amicus Curiae at 1, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 16-1540) (providing a summary of the argument in support of Respondents).

117. Transcripts of Oral Argument at 38–39, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965). For an analysis of the oral argument, see Shoba Sivaprasad Wadhia, *Meditation on Oral Arguments in the Travel Ban Case*, ACSBLOG (Apr. 27, 2018), <https://www.acslaw.org/acsblog/meditation-on-oral-arguments-in-the-travel-ban-case/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

118. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10 (2018) (addressing the plaintiffs' argument that the proclamation exceeded the President's authority).

119. *Id.* at 2432–33 (Breyer, J., dissenting).

focused on the series of statements made by President Trump against Muslims and the conclusion that proclamation is driven by animus and in violation of the Establishment Clause of the First Amendment.¹²⁰

IV. Outside the Courtroom

The human impact of the Muslim Bans is more than theoretical. The chaos at airports during the weekend of Muslim Ban 1.0 was tied to the scores of individuals who were unable to board planes to fly to the United States or unable to be admitted after arrival because of their nationality. The press, immigration attorneys and the policy groups documented these stories.¹²¹ One publicized case involved Suha Abushamma, a Saudi in the first year of an Internal Medicine residency program at Cleveland Clinic. As ProPublica reported, Abushamma was born and raised in Saudi Arabia and holds a passport from Sudan, which blocked her admission to the United States. Said Abushamma, “I’m only in

120. See *id* at 2438–40 (Sotomayor, J., dissenting) (“Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus . . .”). For an analysis of the opinion, see Shoba Sivaprasad Wadhia, *Symposium: Reflections on the travel ban decision*, SCOTUSBLOG (June 26, 2018), <http://www.scotusblog.com/2018/06/symposium-reflections-on-the-travel-ban-decision/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review) and *Supreme Court Term Review*, C-SPAN (June 28, 2018), <https://www.c-span.org/video/?447684-1/legal-experts-discuss-major-supreme-court-decisions-2017> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

121. See Charles Ornstein, *Hours After Landing in U.S., Cleveland Clinic Doctor Forced to Leave by Trump’s Order*, PROPUBLICA (Jan. 29, 2017), <https://www.propublica.org/article/cleveland-clinic-doctor-forced-to-leave-country-after-trump-order> (last visited Sept. 18, 2018) (covering the story of a doctor forced to return to Saudi Arabia in the confusion of President Trump’s executive order) (on file with the Washington and Lee Law Review); Sam Fulwood III, *The Real Effect of Trump’s Muslim Ban*, CTR. FOR AM. PROGRESS (Feb. 9, 2017), <https://www.americanprogress.org/issues/race/news/2017/02/09/414802/the-real-effect-of-trumps-muslim-ban/> (last visited Sept. 18, 2018) (same) (on file with the Washington and Lee Law Review); Lyric Lewin, *These are the Faces of Trump’s Ban*, CNN, <http://www.cnn.com/interactive/2017/01/politics/immigration-ban-stories/> (last visited Sept. 18, 2018) (showing photos and telling short stories of the people President Trump’s executive orders have affected) (on file with the Washington and Lee Law Review).

this country to be a doctor, to work and to help people—that's it"¹²²

With Muslim Ban 3.0 in full effect as of this writing, all immigrants and certain nonimmigrants from five Muslim-majority countries the ban targets are blocked from entering the United States, regardless of whether they are in a qualifying relationship with a family member or employer or if they are seeking to visit a loved one as a visitor or tourist. I have personally witnessed the separation of spouses from one continent to another and the inability of a parent to visit a child who is a university student. The feeling is heartbreaking. What is equally heartbreaking is the broken nature of the waiver scheme first introduced in Muslim Ban 2.0 and operational with the latest version 3.0. Several applicants the Ban covers have been denied a visa by consulates around the world with or without consideration of a waiver.¹²³ The waiver debacle has resulted in situation where consulates are failing to consider evidence the applicant presents.¹²⁴ To illustrate the case of a Yemeni family in Djibouti separated from their family in the United States:

A is a civil engineer and a United States Citizen who petitioned for a visa for his wife, mother and children, ages 13, 9, and 5 years old, who are all Yemeni citizens. He accompanied them to their interview at the Djibouti embassy in December 2017, at the conclusion of which they were told everything was complete and were even provided a document from the consular officer that told them their visa had been approved, and that it was awaiting printing. On December 14, however, A received a second notice informing him that his family's visas were all denied and were furthermore considered ineligible for a waiver under the Proclamation. He had not been contacted and had asked for any additional information in between the two notices. A has reached out to his congressional representatives, who—in turn—have inquired with the congressional liaisons on his

122. Ornstein, *supra* note 121.

123. See Yeganeh Torbati & Mica Rosenberg, *Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban—Data*, REUTERS (Mar. 6, 2018), <https://af.reuters.com/article/worldNews/idAFKCN1GI2DU> (last visited Sept. 18, 2018) (“Attorneys representing applicants abroad who were turned down for visas say consular officials have not clearly explained why their clients did not qualify for waivers.”) (on file with the Washington and Lee Law Review).

124. See *id.* (“There is a feeling of extreme frustration. People are operating basically in the blind . . .”).

behalf, seeking information as to why his wife and daughters were denied a waiver. They were not provided with any reasons, and were only told that the decision was final. A's family remains in Djibouti, unable to secure all the visas to Egypt and afraid to return to Yemen, where he reports airstrikes have hit approximately a thousand meters from their home.¹²⁵

Resistance to the Muslim Bans outside of the courtroom has also been significant, as community leaders, lawyers, law school clinics, college and university presidents, affected individuals, media outlets, and the court of public opinion played a tremendous role in pushing back against the bans.¹²⁶ For one example, advocates working on behalf of the Yemeni community played a central role in revealing the scores of individuals denied a visa,

125. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC, MUSLIM ADVOCATES, CTR. FOR CONSTITUTIONAL RTS., & ASIAN AMERICANS ADVANCING JUST., *A VIEW FROM THE GROUND: STORIES OF FAMILIES SEPARATED BY THE PRESIDENTIAL PROCLAMATION 2* (2018), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/WaiverExamplesFinal.pdf>.

126. See, e.g., *Immigration in the Time of Trump*, PENN ST. LAW CTR. FOR IMMIGRANTS' RTS. CLINIC, <https://pennstatelaw.psu.edu/immigration-time-of-trump#Procs%20and%20Eos> (last visited Sept. 18, 2018) (providing a listing of resources for immigrants to understand and navigate immigration issues after the 2016 U.S. presidential election) (on file with the Washington and Lee Law Review); Alec Scott, "We Call it the Muslim Ban 3.0": the Young Yale Lawyers Fighting Trump's Order, *GUARDIAN* (Oct. 24, 2017), <https://www.theguardian.com/us-news/2017/oct/23/dumbledore-army-donald-trump-travel-ban-legal-battle-mike-wishnie> (last visited Sept. 18, 2018) (discussing the group of young lawyers working to combat President Trump's executive orders) (on file with the Washington and Lee Law Review); Gregory Krieg, *Opposition Groups Launch Instant Backlash to New Travel Ban*, *CNN* (Mar. 6, 2017), <https://www.cnn.com/2017/03/06/politics/backlash-protest-trump-travel-ban/index.html> (last visited Sept. 18, 2018) (discussing interest group work and preparation in response to President Trump's executive orders and predicted future actions) (on file with the Washington and Lee Law Review); Scott Cohn, *Another Travel Ban In the U.S. is Igniting a Backlash*, *CNBC* (Jul. 6, 2017), <https://www.cnn.com/2017/07/06/another-travel-ban-in-the-us-is-igniting-a-backlash.html> (last visited Sept. 18, 2018) (examining state response and efforts combatting President Trump's executive orders and against other states that have passed laws discriminating against certain groups of citizens) (on file with the Washington and Lee Law Review); USA Today College Staff, *How Universities Are Responding to Trump's Travel Ban*, *USA TODAY* (Jan. 29, 2017), <http://college.usatoday.com/2017/01/29/how-universities-are-responding-to-trumps-travel-ban/> (last visited Sept. 18, 2018) ("The 62 institutions comprising the Association of American Universities (AAU), released a statement . . . urging government officials to end the travel ban 'as quickly as possible.'") (on file with the Washington and Lee Law Review).

often without consideration of a waiver in the early days Muslim Ban 3.0 was in effect and beyond.¹²⁷

Further, advocates representing Muslim, Arab, and South Asian (MASA) communities created a web platform with one purpose: to “[c]enter communities directly affected by the Muslim and refugee bans, namely Muslims, refugees, and nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen.”¹²⁸ Deepa Iyer is one of the coordinators for “nomuslimbanever.com” and MASA Organizing, a rapid response and field coordination space that emerged in the wake of the November 2016 election. Iyer told me,

The online hub provides an opportunity for organizations and individuals to quickly locate direct actions, rallies, and solidarity events as well as find resources about the Muslim ban litigation. The website seeks to be a one-stop clearinghouse of information for anyone interested in becoming engaged with events and actions related to resisting the Muslim ban.¹²⁹

Public education about the bans also surged. In response to the bans, law school clinics and organizations representing impacted communities also held community forums to explain what the bans actually say and take questions from individuals.¹³⁰

127. See Liz Robbins, ‘Your Visa is Approved,’ They Were Told. And Then It Wasn’t., N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/nyregion/immigrants-visa-yemen.html> (last visited Sept. 18, 2018) (“After the third version of the Trump administration’s travel ban took effect on Dec. 8, [Yemeni citizens’] approvals abruptly turned to rejections, in what lawyers, family members and immigration activists said was a display of bad faith.”) (on file with the Washington and Lee Law Review); *The Yemeni American Justice Initiative (YAJI)*, CTR. FOR CONST. RTS. (Mar. 2, 2018), <https://ccrjustice.org/YAJI> (last visited Sept. 18, 2018) (“The obstacles the Yemeni-American communities face are manifold and complex, thus the approach taken by YAJI is similarly multifaceted, combining legal tools with non-legal advocacy such as creating resources, community outreach, and fact-finding projects.”) (on file with the Washington and Lee Law Review).

128. *About the Campaign*, NO MUSLIM BAN EVER, <https://www.nomuslimbanever.com/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

129. Email to Shoba Sivaprasad Wadhia (March 6, 2018, 6:49 AM) (on file with author).

130. See, e.g., *Town Hall on the Travel Ban*, PENN ST. L. CTR. FOR IMMIGRANTS’ RTS. CLINIC (Sept. 29, 2017), <https://www.facebook.com/PennStateLaw/videos/10155427433862481/> (last visited Sept. 18, 2018) (providing a video recording of a question and answer discussion about President Trump’s executive orders) (on file with the Washington and Lee Law Review); *Challenging the Refugee and Muslim Ban*, YALE L. SCH. (Feb. 1, 2017), <https://law.yale.edu/yls->

As part of one of the most impacted universities,¹³¹ I delivered numerous information sessions and town halls on the Muslim bans and fielded hundreds of questions from individuals in my individual capacity or as part of the immigration clinic at Penn State Law. The questions focused largely on the details of the bans and how they impact travel and the future.¹³² Together or separate from the clinic, key organizations like the American-Arab Anti-Discrimination Committee,¹³³ Arab American Institute,¹³⁴ Bridges Initiative,¹³⁵ Muslim Advocates,¹³⁶ and National Immigration Law Center¹³⁷ organized conference calls, convened public forums, and developed written fact sheets or updates about the Muslim bans.¹³⁸

today/news/challenging-refugee-and-muslim-ban (last visited Sept. 18, 2018) (discussing law school involvement in quickly responding to the executive orders preventing immigrant entry into the U.S.) (on file with the Washington and Lee Law Review).

131. See, e.g., *The 10 US Colleges that Stand to Lose the Most from Trump's Immigration Ban*, BUS. INSIDER (Feb. 1, 2017), <http://www.businessinsider.com/colleges-potentially-most-affected-trump-immigration-ban-2017-2> (last visited Sept. 18, 2018) (listing the ten colleges and universities at risk of losing the greatest number of individual students because of the temporary travel ban) (on file with the Washington and Lee Law Review); Gabriela Stevenson, *Penn State Has the Fourth Highest Number of Students Impacted by the Immigration Ban*, ONWARD ST. (Feb. 2, 2017), <https://onwardstate.com/2017/02/02/penn-state-has-the-fourth-highest-number-of-students-impacted-by-the-immigration-ban/> (last visited Sept. 18, 2018) (noting the high number of individuals the immigration ban affected at Penn State University) (on file with the Washington and Lee Law Review).

132. See *Town Hall on the Travel Ban*, supra note 130; *Immigration After the Election*, PENN ST. L. CTR. FOR IMMIGRANTS' RTS. CLINIC, <https://pennstatelaw.psu.edu/immigration-after-election#Procs> (last visited Sept. 18, 2018) (providing web and other resources related to immigration specifically tailored for use in preparation for the 2016 U.S. presidential election) (on file with the Washington and Lee Law Review).

133. ARAB-AM. ANTI-DISCRIMINATION COMM., <http://www.adc.org/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

134. ARAB AM. INST., <http://www.aaiusa.org/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

135. BRIDGE INITIATIVE, <http://bridge.georgetown.edu/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

136. MUSLIM ADVOCATES, <https://www.muslimadvocates.org/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

137. NAT'L IMMIGR. L. CTR., <https://www.nilc.org/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

138. See *The Trump Immigration Executive Orders: Impact on Arab and*

One year following Muslim Ban 1.0, on January 27, 2018, hundreds gathered in Washington D.C. to mark the anniversary.¹³⁹ Said Congresswoman Judy Chu, Chair of the Congressional Asian Pacific American Caucus, in a joint statement:

One year ago, President Trump enacted the first iteration of his discriminatory Muslim travel ban in order to fulfill a campaign promise rooted in hatred and xenophobia. This policy will always be remembered for its blatant bigotry and the chaos it caused in our nation's airports on the day it was hastily unveiled. But it will also be remembered as a day when thousands of Americans across the country came together to denounce hate.¹⁴⁰

Muslim Communities, PENN ST. L. CTR. FOR IMMIGRANTS' RTS. CLINIC, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, & MUSLIM ADVOCATES (Sept. 29, 2017), <https://pennstatelaw.psu.edu/events/trump-immigration-executive-orders-impact-arab-and-muslim-communities> (last visited Sept. 18, 2018) (announcing an event to be held to discuss President Trump's executive orders and the related litigation) (on file with the Washington and Lee Law Review); PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, TRAVEL BAN RULING BY THE SUPREME COURT: WHAT STUDENTS NEED TO KNOW (2017), <https://pennstatelaw.psu.edu/sites/default/files/pictures/faculty/ADC%20PSU%20Student%206.28.17.pdf> (explaining what the travel ban is, how courts have already ruled on the executive orders at issue, and providing guidance to those students the executive orders may have affected); PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, SUMMARY OF EXECUTIVE ORDER PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES OR "REFUGEE/MUSLIM BAN 2.0" (2017), https://pennstatelaw.psu.edu/sites/default/files/MuslimBan2%20ADCPSU_Final_0.pdf (providing an easy to read summary of President Trump's executive order).

139. See Alejandro Alvarez, *On the Year Anniversary of the Muslim Ban, Protesters Take to the White House*, THINKPROGRESS (Jan. 27, 2018), <https://thinkprogress.org/muslim-ban-year-anniversary-7f2a0b61b6b0/> (last visited Sept. 18, 2018) (covering the continued resistance against President Trump's executive orders a year later) (on file with the Washington and Lee Law Review); Omar Suleiman, *One Year After the Travel Ban, I Am Not Your American Muslim*, CNN (Jan. 24, 2018), <https://www.cnn.com/2018/01/24/opinions/travel-ban-anniversary-suleiman-opinion/index.html> (last visited Sept. 18, 2018) (discussing the immigration ban and those affected one year after the first executive order and its effect on Muslim-Americans specifically) (on file with the Washington and Lee Law Review).

140. *CAPAC Members on One Year Anniversary of Trump's Muslim and Refugee Travel Ban*, CONG. ASIAN PAC. AM. CAUCUS (Jan. 26, 2018), <https://capac-chu.house.gov/press-release/capac-members-one-year-anniversary-trump%E2%80%99s-muslim-and-refugee-travel-ban> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

Said the national organization South Asian Americans Leading Together:

No one should fear for their safety because of their country of origin, how they pray, speak, or dress. Yet that is exactly what this administration attempted to accomplish one year ago today when it signed into the law its first Muslim Ban. Over the year, through a combination of hateful rhetoric, toxic tweets, and polluted policies, including four iterations of the Muslim Ban, this administration has made every effort to institutionalize Islamophobia.¹⁴¹

Resistance and public education outside the courtroom serve as an important reminder that whatever may happen in the courts, there has been success in how groups and communities have been responding. Those involved will not forget the thousands of lawyers who descended to the airports the night of the first ban or the scores of advocates who have and continue to inform and educate the communities about the various iterations of the bans and best practices for moving forward, especially for—but not limited to—those who the ban covers and are seeking a waiver.

V. Conclusion

For more than two centuries, national security has been used to justify immigration laws that exclude people based on race and related factors. Even in cases where the courts or a future administration have struck down these laws or found no connection between matters of national security and the basis for exclusion, there has been little to no government accountability. As I reflect on the profound human impact, prolonged courtroom sessions and resistance to the Muslim bans, my hope is that the government is held accountable with restitution to those impacted and a stronger country.

141. *One Year of the Muslim Ban. One Year of Resistance.*, S. ASIAN AMS. LEADING TOGETHER (Jan. 26, 2018), <http://saalt.org/saalt-statement-on-one-year-anniversary-of-the-muslim-ban/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).