

Nos. 20-1077, 20-1081

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**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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GHASSAN ALASAAD, et al.,  
*Plaintiffs-Appellees/Cross-Appellants,*  
v.

CHAD WOLF, ACTING SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND  
SECURITY, IN HIS OFFICIAL CAPACITY, et al.,  
*Defendants-Appellants/Cross-Appellees.*

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On Appeal from the United States District Court  
for the District of Massachusetts, No. 17-cv-11730-DJC  
Before the Honorable Denise J. Casper

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**BRIEF OF AMICI CURIAE ASIAN AMERICANS ADVANCING JUSTICE  
– ASIAN LAW CAUCUS, *ET AL.* IN SUPPORT OF PLAINTIFFS-  
APPELLEES/CROSS-APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, amici state that they have no parent corporations and do not issue stock.

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## INTERESTS OF AMICI CURIAE<sup>1</sup>

Asian Americans Advancing Justice–Asian Law Caucus (“ALC”) is a national legal and civil rights organization serving Asian and Pacific-Islander communities. Its National Security & Civil Rights program defends those unjustly targeted by national security policies, especially Arab, Middle Eastern, Muslim, and South Asian (“AMEMSA”) communities.

The Council on American-Islamic Relations (“CAIR”) is the largest American Muslim civil liberties nonprofit organization nationwide. CAIR’s mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

The Creating Law Enforcement Accountability & Responsibility (“CLEAR”) Project provides free legal representation and other services to communities in the New York metropolitan area targeted by local, state, or federal agencies through national security and counter-terrorism policies, including Muslim communities. CLEAR’s work relies on relationships with communities

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici or their counsel made a monetary contribution for its preparation or submission.

and movements seeking to shape and respond to harmful law enforcement policies and practices.

The Center for Constitutional Rights (“CCR”) is a national nonprofit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and international law. CCR represents Muslim-American clients and communities challenging profiling, surveillance, and discrimination, among other matters.

Additional amici joining this brief are listed in the Appendix. They are civil rights, advocacy, and grassroots organizations committed to fighting against overbroad, discriminatory national security and policing policies threatening AMEMSA and other communities’ constitutional rights. Many have represented or advocated for AMEMSA individuals injured by such policies and practices, including representing AMEMSA travelers subjected to invasive, suspicionless searches of electronic devices at the border, similar to those at issue in this appeal. Amici therefore have a direct interest in ensuring that such searches are supported by individualized suspicion, rather than racial or religious bias. They provide important insights regarding the disproportionate impact of such searches on AMEMSA communities and the harms they engender, including their chilling effect on the exercise of constitutionally-protected speech, expressive, and associational freedoms.

## SUMMARY OF ARGUMENT

In recent years, the frequency with which U.S. Customs and Border Protection (“CBP”) and U.S. Immigration and Customs Enforcement (“ICE”) search travelers’ electronic devices has skyrocketed. Pls. Br. 8-9. As the Supreme Court has recognized, electronic devices enable the reconstruction of “[t]he sum of an individual’s private life” through their communications, call history, photos, location data, and browser histories. *Riley v. California*, 573 U.S. 373, 394 (2014). In turn, this information reveals individuals’ personal and professional associations, political views, and religious practices. *Id.* at 394-396.

As Plaintiffs-Appellees explain, suspicionless border searches of these devices are deeply invasive. They intrude on individuals’ privacy, chill the exercise of constitutional freedoms, and impinge on dignity and personal security. But certain communities have been especially vulnerable to these harms. As demonstrated in studies, lawsuits, and media coverage, CBP and ICE disproportionately target, search, and seize devices carried by Arab, Middle Eastern, Muslim, and South Asian travelers—communities collectively identified as “AMEMSA.” Despite these communities’ religious, cultural, linguistic, and racial diversity, they share common experiences—including those at the heart of this case—around racial and religious profiling and government surveillance in the name of “national security,” particularly following September 11, 2001. Such

treatment stems from harmful and inaccurate perceptions among majority populations that these communities are disproportionately likely to engage in violent extremism or terrorism. Discrimination against AMEMSA communities can be triggered by physical appearance, clothing, name, religious practices, language, and travel history, among other factors.

Amici have collectively represented hundreds of AMEMSA travelers seeking to redress the harms such searches engender. As real-life accounts illustrate, device searches are often accompanied by prolonged detention, intrusive questioning about personal and professional relationships, religious practices, and political opinions, and intimidating, even coercive behavior from border agents. These encounters convey a distressing message to these communities: that their own government regards them as a threat for no reason beyond their faith, appearance, or country of origin.

These intrusive searches are contrary to our country's constitutional ideals—freedom of expression, freedom of association, equal protection, and freedom from unreasonable search and seizure. They engender chilling effects that inhibit AMEMSA communities from fully participating in their faith, politics, and communities. Nevertheless, they are fully authorized by Defendants-Appellants' policies, which largely permit warrantless and suspicionless searches of electronic devices at the border. Under these policies, border agents can seize travelers'

electronic devices for an indefinite time, and search them in their entirety without articulable, objectively legitimate reasons for the search. This Court should require the government to obtain a warrant based on probable cause before seizing or searching a traveler's devices at the border. A warrant requirement not only requires justification for the immense intrusions on First Amendment-protected freedoms such device searches impose, but also guards against discriminatory profiling by ensuring that an impartial judicial officer has found that such a search is justified by something beyond an individual agent's biases or discriminatory impulses.

## ARGUMENT

### **I. TRAVELERS OF ARAB, MIDDLE EASTERN, MUSLIM, AND SOUTH ASIAN (“AMEMSA”) ORIGIN ARE DISPROPORTIONATELY TARGETED BY DEFENDANTS-APPELLANTS’ WARRANTLESS SEARCHES AND SEIZURES OF ELECTRONIC DEVICES AT THE BORDER**

Since September 11, 2001, AMEMSA communities have been targeted by overbroad, intrusive—and largely ineffective<sup>2</sup>—surveillance policies that use religion or ethnicity as a “proxy or profile for terrorism.”<sup>3</sup> From discriminatory

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<sup>2</sup> *E.g.*, Goldman & Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Assoc. Press, <https://www.ap.org/ap-in-the-news/2012/nypd-muslim-spying-led-to-no-leads-terror-cases> (discussing NYPD's acknowledgment their Muslim surveillance program “never generated a lead”).

<sup>3</sup> Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 *Ariz. L. Rev.* 621, 659 (2004) (discussing inefficacy of using such proxies).

profiling at airports,<sup>4</sup> to inclusion on government watchlists without procedural safeguards,<sup>5</sup> to outright bans on entering the country,<sup>6</sup> AMEMSA travelers have experienced years of unfounded scrutiny and suspicion at the border. Studies indicate that Muslim-Americans are nearly *three times as likely* to face secondary screenings, which subject travelers to additional inspection—including device searches.<sup>7</sup> Seventy percent of Muslims stopped at the border report that their appearance easily identifies them as a member of their religion, compared to

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<sup>4</sup> *E.g.*, Ackerman, *TSA Screening Program Risks Racial Profiling Amid Shaky Science—Study*, Guardian (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/tsa-screening-racial-religious-profiling-aclu-study> (discussing TSA “behavior detection” program’s “substantial focus” on Arabs and Muslims, resulting in improper profiling); Currier, *Despite Anti-Profiling Rules, The FBI Uses Race and Religion When Deciding Who to Target*, Intercept (Jan. 31, 2017), <https://theintercept.com/2017/01/31/despite-anti-profiling-rules-the-fbi-uses-race-and-religion-when-deciding-who-to-target/> (describing instructions to Minnesota TSA employees to “look for Somali-Americans” for extra screening).

<sup>5</sup> *E.g.*, *Elhady v. Kable*, 391 F. Supp. 3d 562, 584-585 (E.D. Va. 2019) (concluding government’s watchlisting of people deemed to be “suspected terrorists” violates Muslim-American plaintiffs’ rights).

<sup>6</sup> *See* Niayesh, *Trump’s ‘Travel Ban’ Was Really a Muslim Ban, Data Suggests*, Wash. Post (Sept. 26, 2019), <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/> (describing State Department data showing disproportionate effect of Trump administration’s “travel ban” on Muslims).

<sup>7</sup> *See* Institute for Social Policy and Understanding, *American Muslim Poll 2017: Muslims at the Crossroads* 14 (2017), <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf> (showing 30% of Muslim respondents stopped for additional screening, compared to 12% from general population).

“virtually none of those stopped in the general public.”<sup>8</sup> And according to a 2017 Pew Research Survey, “nearly one-in-five” Muslim-Americans “have been called offensive names or singled out by airport security,” and those with “distinctively Muslim appearance[s]” (such as religious attire) are “more likely to experience discrimination.”<sup>9</sup>

**A. The Agencies’ Policies Facilitate Discriminatory Profiling At The Border**

The policies challenged in this case further enable Defendants-Appellants’ profiling of AMEMSA travelers. Although CBP and ICE agents must have “reasonable suspicion of activity in violation of the laws enforced ... at the border” in order to conduct “advanced” or forensic device searches, they need no suspicion whatsoever to conduct “basic,” or manual searches, which still allow agents to “review and analyze” troves of information stored on devices. A-55-56, ¶¶5.1.3-5.1.4; A-65 ¶6.1. CBP further allows suspicionless forensic device searches where “national security concern[s]” are present. A-56 ¶5.1.4. Given the lack of clear definition or specificity of what such “concerns” entail, this exception threatens to swallow the rule entirely.

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<sup>8</sup> *Id.*

<sup>9</sup> Pew Research Ctr., *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream* (July 26, 2017), <https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>.

As components of the Department of Homeland Security (“DHS”), ICE and CBP are bound by both DHS and Department of Justice (“DOJ”) non-discrimination policies.<sup>10</sup> But these policies also contain broad-based exceptions that similarly facilitate discriminatory profiling at the border. The relevant DOJ Guidance prohibits all federal law enforcement officers (facially including ICE and CBP officers) from using “race, ethnicity ... national origin [and] religion” in “making ... law enforcement decisions.”<sup>11</sup> Critically, however, it “does not apply to interdiction ... inspection or screening activities” at the border, thus allowing border agents to rely solely on such characteristics.<sup>12</sup>

Although DHS’s nondiscrimination policy “prohibit[s] the consideration of race or ethnicity in ... screening ... activities, in all but the most exceptional circumstances,”<sup>13</sup> it is silent on religion as a basis for scrutiny, and broadly permits

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<sup>10</sup> Dep’t of Homeland Security, *Factsheet: U.S. Department of Justice Racial Profiling Guidance* (Dec. 8, 2014), <https://www.dhs.gov/news/2014/12/08/factsheet-us-department-justice-racial-profiling-guidance> (discussing applicability of DOJ nondiscrimination guidance to DHS components).

<sup>11</sup> Dep’t of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 2 n.2 (Dec. 2014), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Memorandum from Janet Napolitano to All Component Heads, *The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities* 1-2 (Apr. 26, 2013),

consideration of nationality in “anti-terrorism, customs, or immigration activities.”<sup>14</sup> Accordingly, CBP and ICE “base[] targeting decisions explicitly” on national origin—even for U.S. citizens.<sup>15</sup> This is often indistinguishable from insidious racial or religious profiling, given these agencies’ disproportionate focus on persons originating from Muslim-majority countries.<sup>16</sup> Earlier this year, a CBP directive ordered border agents at Canadian ports of entry to conduct “vett[ing]” on “[a]ll persons” with “links” to Iran, Palestine, and Lebanon, including place of birth or prior travel.<sup>17</sup> Thereafter, dozens of Iranian-Americans were detained and questioned “about their political views and allegiances,” for as long as 10 hours.<sup>18</sup>

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[https://www.dhs.gov/sites/default/files/publications/secretary-memo-race-neutrality-2013\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/secretary-memo-race-neutrality-2013_0.pdf).

<sup>14</sup> *Id.* See also U.S. Customs & Border Protection, *CBP Policy on Nondiscrimination in Law Enforcement Activities and All Other Administered Programs* (last modified Feb. 24, 2020), <https://www.cbp.gov/about/eo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered> (calling use of “nationality for antiterrorism, customs, or immigration activities” “entirely appropriate”).

<sup>15</sup> Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 *Brook. L. Rev.* 41, 55 (2011).

<sup>16</sup> *Id.* (describing CBP directives “call[ing] for particular scrutiny of naturalized U.S. citizens of Pakistani origin”).

<sup>17</sup> Strickler, *Memo Shows CBP Ordered Agents to Question Iranian Americans at the Border*, NBC News (Jan. 30, 2020), <https://www.nbcnews.com/politics/immigration/memo-shows-cbp-ordered-agents-question-iranian-americans-border-n1126776>.

<sup>18</sup> Kanno-Youngs, et al., *U.S. Stops Dozens of Iranian-Americans Returning from Canada*, N.Y. Times (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/us/politics/iranian-americans-border.html>.

Travelers had “their phones taken away and were told to give [border agents] their iPhone, Facebook, and Instagram passwords.”<sup>19</sup> Many were interrogated about their opinions on “the situation in the Middle East” or prior travels to Iran; one Iranian-American noted he previously had experienced similar questioning only “right after the terror attacks of Sept[ember] 11, 2001.”<sup>20</sup>

**B. AMEMSA Travelers Have Been Disproportionately Subjected To Suspicionless Device Searches For Over A Decade**

CBP and ICE do not collect or publish demographic data on travelers subjected to border device searches.<sup>21</sup> But a wealth of evidence from lawsuits, media reports, and administrative complaints shows that AMEMSA communities have been disproportionately targeted for such searches for over a decade.

Formal CBP and ICE policies have authorized “suspicionless” device searches since at least 2008.<sup>22</sup> In 2009, amici began raising concerns that

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<sup>19</sup> Strickler, et al., *Iranian Americans Say They Were Questioned and Held By Immigration Officials*, NBC News (Jan 6, 2020), <https://www.nbcnews.com/news/us-news/iranian-americans-say-they-were-questioned-held-immigration-officials-n1111431>.

<sup>20</sup> *Id.*

<sup>21</sup> Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home* 11 (Apr. 2009), [https://muslimadvocates.org/wp-content/uploads/Unreasonable\\_Intrusions\\_2009.pdf](https://muslimadvocates.org/wp-content/uploads/Unreasonable_Intrusions_2009.pdf) [hereinafter “*Unreasonable Intrusions*”].

<sup>22</sup> Asian Law Caucus et al., *Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation’s Doorstep* 17 (Apr. 2009),

AMEMSA travelers were being disproportionately stopped, searched, and questioned at the border pursuant to such policies. ALC reported that the “overwhelming majority” of complaints it received from those “who have faced intrusive questioning and [device] searches at U.S. land borders and international airports ... are Muslim or of South Asian or Middle Eastern descent,” echoing “similar stories reported to community groups ... nationwide.”<sup>23</sup> Similarly, Muslim Advocates concluded based on nationwide reports that “Muslim, Arab and South Asian Americans ... are being systematically selected by CBP agents” for interrogations and device searches.<sup>24</sup>

Little has changed. In response to a 2017 FOIA request, DHS released hundreds of complaints filed through the Traveler Redress Inquiry Program (“TRIP”).<sup>25</sup> Many complainants “identified themselves as Muslims”<sup>26</sup> and alleged they were stopped for “no other reason” than “being a Muslim” or “having a

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<https://www.advancingjustice-alc.org/wp-content/uploads/2012/11/Returning-Home.pdf> [hereinafter “*Returning Home*”].

<sup>23</sup> *Id.* at 24.

<sup>24</sup> *Unreasonable Intrusions*, *supra* note 21, at 1.

<sup>25</sup> Savage & Nixon, *Privacy Complaints Mount Over Phone Searches at U.S. Border Since 2011*, N.Y. Times (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/us-border-privacy-phone-searches>.

<sup>26</sup> *Id.*

Muslim name.”<sup>27</sup> A 2018 survey of journalists who experienced “invasive” searches at the border, including warrantless device searches, found that “nearly half of the journalists stopped were of Middle Eastern or South Asian descent” and “nearly three-quarters had lived, traveled, or reported in Muslim-majority countries.”<sup>28</sup>

Tellingly, travelers of different ethnic heritages have reported that border agents’ *inaccurate* perception of them as Muslim or Middle Eastern leads to unwarranted scrutiny. In Tampa, border agents asked a Hispanic traveler “how a Middle Eastern person [could] ha[ve] [a] Latin name” and if he had received “explosive[s] training” in the Middle East.<sup>29</sup> These questions made the traveler “feel like [he] was accused of being a terrorist because of the way [he] looks.”<sup>30</sup>

No exhaustive study is possible as long as the government refuses to track its own actions. These samples are thus not comprehensive and likely understate the

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<sup>27</sup> Savage, *Read Complaints About Warrantless Searches of Electronic Devices at the US Border* at TSA000891, 000918, 000921 (Dec. 22, 2017), <https://www.nytimes.com/interactive/2017/12/22/us/politics/document-KFAI-FOIA-TRIP-Complaints-Border-Electronics.html> [hereinafter “Knight FOIA”].

<sup>28</sup> Comm. to Protect Journalists, *Nothing to Declare: Why U.S. Border Agency’s Vast Stop and Search Powers Undermine Press Freedoms* (Oct. 22, 2018) <https://cpj.org/reports/2018/10/nothing-to-declare-us-border-search-phone-press-freedom-cbp/> [hereinafter “*Nothing to Declare*”].

<sup>29</sup> Knight FOIA, *supra* note 27, at TSA000861.

<sup>30</sup> *Id.*

problem. Nevertheless, they remain compelling evidence that Defendants' policies are disproportionately targeting AMEMSA travelers.

## II. SEARCHES ARE OFTEN CONDUCTED WITHOUT CONSENT AND UNDER COERCION, WITH LITTLE REDRESS

The invasive effects of Defendants' actions go beyond the mere search of electronic devices. Often the manner in which the search is carried out is equally intrusive. Numerous travelers report being routinely and repeatedly subjected to "invasive and degrading" searches. One traveler of Indian origin was subjected to additional screening "16 out of the last 18 times" he traveled.<sup>31</sup> Travelers report being detained as long as 21 hours without being allowed to contact their families or lawyers.<sup>32</sup> Female Muslim travelers report additional humiliations, including being forced to remove their headscarves (*hijab*) in front of male officers, in violation of their religious beliefs.<sup>33</sup>

Many travelers report coercive, even threatening, behavior from border agents. Foreign travelers dependent on border agents' permission to enter the country are "particularly vulnerable," and often acquiesce to objectionable searches for fear that refusing "could jeopardize their visa ... or that they could be denied

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<sup>31</sup> *Id.* at TSA000932, TSA000918 ("I went through this process tens of times.").

<sup>32</sup> Decell, "*Dehumanized*" at the Border, *Travelers Push Back*, Knight First Amendment Inst. at CBP000589 (Feb. 2, 2018), <https://knightcolumbia.org/content/dehumanized-border-travelers-push-back>.

<sup>33</sup> *Id.*

entry entirely.”<sup>34</sup> Even American citizens and permanent residents have been threatened with the permanent loss of their devices or prolonged detention.<sup>35</sup> Where travelers have resisted—including lawyers, their clients, and journalists, whose devices contain privileged material—agents have forcibly seized and searched their devices without their consent.<sup>36</sup>

Many travelers receive no explanation for such searches and seizures. They witness border agents browsing through photographs, browser histories, emails and social media posts, and even “download[ing] files” from their devices.<sup>37</sup> Though agency policies requires device searches to “be conducted in the presence of the individual” where practicable, A-56, ¶5.1.6; A-66, ¶8.1, border agents frequently remove devices from their owners’ sight, which strongly indicates that agents are conducting even more intrusive “advanced” searches that copy or retain their information, without their knowledge.<sup>38</sup>

Disturbingly, CBP and ICE even subject *minor children* to lengthy detentions and invasive device searches.<sup>39</sup> An Iraqi-Canadian family’s “dream trip

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<sup>34</sup> *Nothing to Declare*, *supra* note 28.

<sup>35</sup> *Returning Home*, *supra* note 22, at 12; *Unreasonable Intrusions*, *supra* note 21, at 2.

<sup>36</sup> *See infra* pp. 24-25; *see also Nothing to Declare*, *supra* note 28.

<sup>37</sup> *Returning Home*, *supra* note 22, at 16.

<sup>38</sup> *See infra* pp. 27.

<sup>39</sup> *See infra* pp. 22-24.

to Disneyworld ... turned into a nightmare” after border agents fingerprinted and photographed even their young children and seized their laptops and iPads.<sup>40</sup> The family was “ordered to provide passwords so officials could unlock the devices.”<sup>41</sup> In their formal complaint, the family attributed this scrutiny to profiling based on the *hijabs* worn by their female members, explaining that the officer who searched them “made up his mind as soon as he saw us.”<sup>42</sup>

### III. WARRANTLESS SEARCHES VIOLATE CONSTITUTIONAL GUARANTEES OF EXPRESSIVE AND ASSOCIATIONAL FREEDOM

The First Amendment protects the right to speak freely, to practice one’s faith, and the “corresponding right to associate with others in pursuit of ... social ... religious, and cultural ends.” *Roberts v. Jaycees*, 468 U.S. 609, 622 (1984). But the “[a]wareness that the Government may be watching chills [these] associational and expressive freedoms.” *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). Accordingly, the government is subject to a “heavy burden” when it “seek[s] to inquire about an individual’s beliefs and associations.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6-7 (1971).

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<sup>40</sup> Keung, *Disney Vacation Turns to Nightmare for Mississauga Family*, Toronto Star (Mar. 3, 2015), <https://www.thestar.com/news/immigration/2015/03/03/disney-vacation-turns-to-nightmare-for-mississauga-family.html>.

<sup>41</sup> *Id.*

<sup>42</sup> Knight FOIA, *supra* note 27, at TSA000896.

The accounts of AMEMSA travelers vividly illustrate the chilling effect of suspicionless device searches on these communities' constitutional rights. These searches place troves of information about travelers' religious practices, political views, and lawful associations into the government's hands. AMEMSA travelers contend with the added fear—reinforced by border agents' overt comments—that their religion or national origin makes them inherently suspicious. When one family questioned the basis for their detention and interrogation, border agents told them, “This is a bad time to be an Iranian.”<sup>43</sup> After another native-born U.S. citizen protested an “aggressive” and “invasive” search of his belongings, a CBP officer told him he would not “be able to even question the authorities” if he were “in Egypt.”<sup>44</sup> Border agents even imply that Muslim travelers have connections to terrorism. In one instance, Mohammed Khairullah, the Muslim mayor of Prospect Park, New Jersey, described experiencing “flat-out profiling” by border agents, who asked if he “knew any terrorists” and “whether any of the towns he visited” on a family vacation to Turkey “were home to terrorist cells.”<sup>45</sup>

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<sup>43</sup> Kanno-Youngs et al., *supra* note 18.

<sup>44</sup> Knight FOIA, *supra* note 27, at TSA000876.

<sup>45</sup> Farzan, ‘*Just Flat-Out Profiling*’: Muslim Mayor Says He Was Detained at Airports and Asked Whether He Knew Terrorists, Wash. Post (Sept. 16, 2019), <https://www.washingtonpost.com/nation/2019/09/16/new-jersey-muslim-mayor-detained-jfk-terrorists/>.

Many Muslim travelers report that their visible religious expression—such as wearing *hijab* while traveling—makes them targets for intrusive secondary screening measures, including device searches, at the border.<sup>46</sup> Travelers also report additional scrutiny when traveling for Muslim religious pilgrimages. For example, Haisam Elsharkawi, a U.S. citizen of Egyptian origin, filed a lawsuit after he was handcuffed, detained for several hours, and ultimately forced by DHS agents to unlock his phone to enable its search, while traveling to Saudi Arabia to complete the *hajj*. Complaint, ECF No. 1, *Elsharkawi v. United States*, No. 18-01971 (C.D. Cal. Oct. 31, 2018). Where the government targets people for their “performances of religious identity,” it “encourages Muslims to suppress the conduct that defines them as members of their religious community,” chilling religious expression.<sup>47</sup> This chill is compounded by border agents’ demonstrated lack of respect for Muslim religious beliefs. For instance, Rejhane Lazoja refused to consent to a device search because her phone contained pictures where she appeared without *hijab*, which her religious beliefs do not permit men unrelated to

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<sup>46</sup> *E.g.*, Knight FOIA, *supra* note 27, at TSA000896 (describing feeling targeted because “daughter and wife wear *hijabs*”).

<sup>47</sup> Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 Yale L.J. 920, 936 (2008).

her to view.<sup>48</sup> Agents forcibly seized her phone and copied her data.<sup>49</sup> They only deleted the data after Lazoja sued the agency.<sup>50</sup>

Device searches often serve as a predicate for intrusive interrogation regarding First Amendment-protected activity, including views on politics or foreign policy, religious beliefs and practices, and associational ties to friends and family—areas most Americans do not expect the government to intrude into. Many travelers describe border agents asking them to identify mosques they belong to, to name other congregants or religious leaders there,<sup>51</sup> and to “identify persons appearing in digital pictures on [their] laptop[s]” and disclose those persons’ “location, and [the traveler’s] relationship[] to them.”<sup>52</sup> Border agents may even “cop[y] contact information of ... family and friends” from travelers’ devices.<sup>53</sup>

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<sup>48</sup> Adely, *Civil Rights Win: Feds Delete Data Taken from Phone Seized at Newark Airport*, NorthJersey.com (Oct. 31, 2018), <https://www.northjersey.com/story/news/2018/10/31/customs-and-border-patrol-delete-data-newark-airport-iphone-seizure-case-civil-rights-win/1831048002>.

<sup>49</sup> *Id.*

<sup>50</sup> Stipulation of Dismissal, ECF 16, *Lazoja v. Nielsen*, No. 18-cv-13113 (D.N.J. Oct. 30, 2018).

<sup>51</sup> *E.g.*, *Unreasonable Intrusions*, *supra* note 21, at 21-22; Knight FOIA, *supra* note 27, at TSA000892.

<sup>52</sup> *Unreasonable Intrusions*, *supra* note 21, at 21, 25-26.

<sup>53</sup> *Id.* at 19.

Such searches also have a marked chilling effect on travelers' willingness to speak freely and express opinions electronically, for fear that their words could invite future scrutiny when they travel next. In addition to rifling through communications and social media posts, border agents have demanded that travelers turn over their usernames and passwords for online platforms, which enables longer-term, systematic surveillance of their online communications and opinions.<sup>54</sup> Given the government's long history of relying on religious speech or political viewpoints as a "proxy for criminal intent," such scrutiny "chill[s] individuals' constitutionally protected speech" because it "increas[es] the possibility of being targeted for investigation on the basis of that speech."<sup>55</sup>

For journalists, device searches additionally chill their ability to freely communicate and maintain confidentiality with sources. Kim Badawi, an Egyptian-American photojournalist, described watching "as two officers swiped through my selfies, intimate photos ... and through random contacts" until they found WhatsApp messages from Syrian refugees Badawi was interviewing for a story.<sup>56</sup> Despite Badawi's protests that the officers' searches were violating his

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<sup>54</sup> See *infra* pp. 22-23.

<sup>55</sup> Huq, *The Signaling Function of Religious Speech*, 89 Tex. L. Rev. 833, 845, 852 (2011).

<sup>56</sup> Badawi, *TSA Taught Me Just How Fragile Freedom Is*, Huffington Post (Dec. 9, 2015), [https://www.huffpost.com/entry/tsa-freedom-fragile\\_b\\_8761532](https://www.huffpost.com/entry/tsa-freedom-fragile_b_8761532).

sources' rights to confidentiality, the officers subjected him to hours of questioning, forcing him to "account for everything in [his] phone," including his sources' views on foreign policy and terrorism.<sup>57</sup>

The fear of being subjected to device searches causes individuals to limit their use of social media platforms and to self-censor their online activities and communications with others to protect themselves and their communities from future surveillance. Imam Tahir Anwar, the head of a mosque in San Jose, California, "no longer carries his laptop ...when he travels overseas, fearing that ... confidential e-mail messages from congregation members he counsels will be exposed."<sup>58</sup>

Fears of future surveillance are not abstract. For instance, a Muslim woman crossing the US-Canada border began experiencing "enhanced searches and delays at the border" after CBP searched her phone during a routine stop.<sup>59</sup> A subsequent public records request revealed that the agent who searched her phone "had made special note of the fact that she followed a certain imam on Facebook—an event which likely precipitated" subsequent searches and intrusions.<sup>60</sup> And in 2016, FBI

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<sup>57</sup> *Id.*

<sup>58</sup> *Returning Home, supra* note 22, at 17.

<sup>59</sup> Amicus Brief of Muslim Advocates et al, *Doe Society v. Pompeo*, ECF No. 37-1, No. 19-cv-03632 (D.D.C. May 28, 2020) at 10.

<sup>60</sup> *Id.*

documents revealed that the agency “work[s] closely” with CBP “to target travelers entering the country as potential informants” which “explain[s] widespread reports of Muslim travelers ... [including] ... U.S. citizens, experiencing invasive questioning and searches” at borders.<sup>61</sup>

In addition to the chilling effects suspicionless device searches engender, these searches—and the intrusive interrogations that accompany them—frequently “convey a message of exclusion, since CBP agents effectively control the terms by which a person can return home.”<sup>62</sup> Being singled out in this manner “brand[s] them, and their communities, as disloyal or suspicious—as outsiders excluded from ‘belonging’ to the nation.”<sup>63</sup> And because these searches “treat[] group membership as probative of illegal activity,” they send a broader message that AMEMSA communities are “presumptively disloyal and unworthy of empathy.”<sup>64</sup> As one American citizen put it, being welcomed home means nothing if America “does not welcome with open arms, but with suspicion and paranoia.”<sup>65</sup>

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<sup>61</sup> Currier, *Revealed: The FBI’s Secret Methods for Recruiting Informants at the Border*, Intercept (Oct. 5, 2016), <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/>.

<sup>62</sup> Sinnar, *supra* note 15, at 64-66 (quoting numerous Muslim-Americans detained and searched by CBP).

<sup>63</sup> *Id.* at 65.

<sup>64</sup> Hussain, *supra* note 47, at 938.

<sup>65</sup> TSA000901.

The narratives that follow exemplify the harms perpetuated by suspicionless device searches.

**A. Salim And Laila Ibrahim<sup>66</sup>**

In March 2019, Salim and Laila Ibrahim, native-born U.S. citizen siblings then 17 and 15, were flying home alone from Paris after visiting family. Border agents pulled both children aside at the arrival gate and demanded their passports. They were ordered to put their phones on airplane mode, barred from “touching or opening” their phones, and forbidden from contacting their parents. Agents escorted them to a private screening area, where they were interrogated separately. Agents then subjected them to intrusive questioning, asking Salim to document his travel history going back several years, and demanding names and contact information for family the children had visited on previous trips abroad. Agents then demanded that both children unlock their phones. At this point, the Ibrahims recounted feeling “intimidated,” “really scared,” and worried that if they did not cooperate, they could be detained indefinitely or even arrested. Both ultimately complied. Border agents went through their WhatsApp contacts and messages and questioned them about particular contacts, including their father. The agents then

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<sup>66</sup> The Ibrahims and Dr. Alizadeh corroborated their experiences through interviews with counsel for amici in July 2020. They asked to be identified by pseudonyms because they fear further government retaliation if they were identified publicly.

told Salim to disclose usernames and passwords for his email accounts and several social media platforms including Twitter, YouTube, and Snapchat. Though Salim knew he had nothing to hide, he grew increasingly fearful as he watched agents write down his passwords. Agents questioned Salim about his political activities, including whether he had participated in protests in Paris the previous year. An agent then asked Salim whether “anyone had sent [him] to do harm in this country.” Salim described feeling deeply humiliated by the implication that the agents perceived him, a native-born U.S. citizen minor, as a threat to his own country. Meanwhile, a border agent asked Laila—a 15-year-old girl—whether she was carrying “stacks of cash” in her luggage, bringing her to tears and leaving her feeling “traumatized” at being treated like a criminal.

Both children report feelings of trauma, anger, and anxiety persisting to the present from this experience. Their family has largely ceased traveling, even to visit family, because they fear further humiliation and mistreatment at the airport. Laila experienced nightmares for days after the incident, while Salim’s health issues were exacerbated by the level of stress and anxiety he felt in the aftermath. And the chilling effect of such searches is equally evident. Salim largely stopped using social media following the incident, for fear that his accounts are under government surveillance. He now feels others will view him negatively—as the border agents did—based on his ethnicity and religion. As a result, because he

feels he can pass for Caucasian, he now introduces himself as “Sam,” instead of his real name, which identifies him as Lebanese and Muslim. He no longer feels comfortable attending mosque prayers with his family or otherwise participating in his religious community. And because Laila fears surveillance and monitoring of her devices, she no longer shares political opinions on social media or participates in online conversations about American politics or foreign policy, though she was previously outspoken on these topics. Both children described feelings of alienation, of just wanting to feel “safe and welcomed” in their own country, and to have the freedom to travel as others do, without fear of being targeted for their religion or national origin, and without fear that such travel may subject them to later surveillance.

**B. Hemad Janfeshan**

Hemad Janfeshan is a Muslim lawful permanent resident of the United States, originally from Afghanistan. *Janfeshan v. CBP*, No. 16-cv-6915, 2017 WL 3972461, at \*1 (E.D.N.Y. Aug. 21, 2017). In November 2016, Mr. Janfeshan was returning to New York from Egypt, when he was stopped at the arrivals gate by two CBP agents. *Id.* The CBP agents “escorted him to a room” where other travelers were “waiting to undergo secondary inspection.” *Id.* Though Mr. Janfeshan saw other travelers “leave quickly, in less than 20 minutes,” he was subjected to a “full-body search,” after which agents confiscated his cellphone and

began interrogating him about his travels and religious practices. *Id.* One agent asked him “What kind of Muslim are you?” *Id.* When Mr. Janfeshan sought clarification, the agent asked him “if he was a ‘beginner, intermediate, or advanced level Muslim.’” *Id.* The agent then asked if Mr. Janfeshan was “like Mufti, a Black American Muslim who had studied in Saudi Arabia, with whom the agent was familiar.” *Id.* Meanwhile, another agent asked Mr. Janfeshan for the passcode to unlock his phone. *Id.* at \*2. Mr. Janfeshan refused, explaining his phone contained “private information,” including attorney-client communications, sensitive messages from family, and personal health information “that he didn’t want the agent to see.” *Id.* See also Second Amended Complaint, *Janfeshan v. CBP*, ECF No. 29 ¶¶ 45-46, No. 16-cv-06915 (E.D.N.Y. May 19, 2017). Agents interrogated Mr. Janfeshan for over an hour before reiterating demands for his passcode. *Janfeshan*, 2017 WL 3972461, at \*2. The agents told Mr. Janfeshan he could “take his phone home, presumably after the agents had downloaded a digital copy of its contents to review,” if he provided the passcode. *Id.* Mr. Janfeshan declined, again emphasizing the confidential, privileged nature of his phone contents. CBP then confiscated Mr. Janfeshan’s phone, told him they would keep it for “one to two weeks,” and ultimately informed his counsel they planned to conduct a forensic search of the device. *Id.* CBP and ICE policies permit agents to retain and share information from devices related to immigration, customs, and

other enforcement matters with other federal and state law enforcement agencies.

A-61 ¶5.5.1.3. Accordingly, Mr. Janfeshan feared CBP might disseminate data from his phone, giving agencies like U.S. Citizenship and Immigration Services “access to information that is otherwise unavailable to them,” and affecting his pending immigration applications. Second Am. Compl. ¶¶103, *Janfeshan*. He ultimately filed a lawsuit arguing that he was “targeted by CBP” in violation of the Fourth and Fifth Amendments, seeking destruction of data seized from his device. *Id.* ¶¶110, 119-124, 129-131.

The district court denied the government’s motion to dismiss, finding a “reasonable inference that CBP’s actions ... were motivated at least in part by [Mr. Janfeshan’s] religion and national origin” given the agents’ “focus” on these characteristics in their questioning. *Janfeshan*, 2017 WL 3972461, at \*10. Mr. Janfeshan’s case is just one example of the long-term harms that stem from allowing Defendants-Appellants unfettered access to individuals’ private associational and expressive thoughts.

### **C. Sara Alizadeh**

In April 2020, Dr. Sara Alizadeh, a U.S. citizen of Iranian origin, was detained at Dallas-Fort Worth Airport while traveling from Iran to Los Angeles. Dr. Alizadeh, then in a wheelchair, was held and questioned for over three-and-a-half hours, without being allowed to contact her family. Agents demanded her

phone and passcode, implying that they would confiscate her device if she did not produce it. Dr. Alizadeh described feeling “pressured and intimidated.” She ultimately acquiesced, for fear she would miss her connecting flight. An agent took Dr. Alizadeh’s phone to a different room. Another began questioning her about her husband, an engineer, asking if she was “sure” her husband wasn’t “doing anything” in Iran—implying her husband was a threat. The agent then pressed Dr. Alizadeh on her views on American-Iranian relations including how she “felt” about Qassim Soleimani, the Iranian general killed by U.S. forces in January 2020, and whether her family members were “part of the Iranian Revolutionary Guard Corps.”

At one point, Dr. Alizadeh, a devout Muslim, sought permission to pray. Agents acquiesced only after she left her purse and laptop with them. Dr. Alizadeh realized the agents had searched private communications and photographs on her phone when an agent began questioning her about a picture of an Iranian soldier in her WhatsApp messages. Though Dr. Alizadeh explained she met the man’s mother through a religious pilgrimage, the agents continued to badger her, asking if she was sure she didn’t need to tell them “more.” Finally, the agent asked Dr. Alizadeh which “side” she would choose “if something happened between Iran and the United States.” For Dr. Alizadeh, this question was “deeply insulting” and a

“false choice”—she felt marked as “disloyal” and “suspicious” based only on her religion and national origin.

Dr. Alizadeh documented this experience in a TRIP complaint, but received no adequate explanation for her treatment. She now feels tremendous anxiety when she travels to care for her elderly parents in Iran. She especially fears that agents may have “planted software” in her devices during their search, subjecting her to ongoing monitoring and surveillance—even though she has done nothing wrong. Financial constraints have prevented her from replacing these devices, exacerbating her feelings of anxiety. She questions “how long” her community will be treated “as if we do not belong here, as if we are disloyal to this country.”

#### **IV. REQUIRING INDIVIDUALIZED SUSPICION FOR SEARCHES WOULD PROTECT AGAINST DISCRIMINATORY PROFILING AT THE BORDER**

Suspicionless searches of electronic devices open the door to government scrutiny of travelers’ First Amendment-protected speech, associations, and expressive activity. Where searches burden First Amendment rights in this manner, Fourth Amendment warrant requirements “must be applied with ‘scrupulous exactitude.’” *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). This alone provides compelling justification for this Court to make such searches contingent on a warrant based on probable cause. The need for judicial oversight is only reinforced by Defendants-Appellants’ discriminatory profiling at the border based on protected characteristics like national origin and religion. As a result,

AMEMSA communities are disproportionately subjected to intrusive, suspicionless searches and seizures of their devices, and thus disproportionately suffer the harms engendered by such searches.

Making such searches contingent on a warrant requirement would ameliorate the First and Fourth Amendment violations raised by Plaintiffs-Appellees and echoed by the lived experiences of AMEMSA travelers nationwide. It would also safeguard equal protection principles by requiring that such searches be supported by probable cause and validated by a neutral judicial officer, rather than solely stemming from an agent's biases. A warrant requirement is especially necessary where, as here, the government obstructs travelers' ability to bring meaningful equal protection challenges to its actions by failing to keep accurate statistics on the number of searches conducted, A-12, declining altogether to track demographics of the travelers whose devices it scrutinizes, and shielding itself behind non-discrimination policies that do not prohibit and indeed plainly authorize mistreatment of AMEMSA travelers.

Policing or surveillance based solely on protected characteristics like race or religion violates equal protection guarantees. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”). The Equal Protection Clause similarly prohibits the government from “target[ing] a racially-defined group as a whole

because of the misdeeds of some of its members.” *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013). Accordingly, even in the context of border surveillance, courts have made clear that officers cannot rely on factors like a traveler’s “race, without more,” or “Arab ethnicity alone” when deciding to detain and interrogate individuals. *Farag v. United States*, 587 F. Supp. 2d 436, 464 (E.D.N.Y. 2008) (finding that “Arab ethnicity” has “no probative value in a particularized reasonable suspicion ... determination” because “the likelihood that *any given airline passenger* of Arab ethnicity is a terrorist is so negligible”); *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) (holding in context of airport seizure and interrogation of individual, where “law enforcement ... takes steps to initiate an investigation ... based solely upon [a traveler’s] race ... a violation of the Equal Protection Clause has occurred”).

Even a legitimate law enforcement purpose—which, in the border context, is limited to the enforcement of customs and immigration laws, rather than the broader “general law enforcement purposes” invoked by Defendants-Appellants, Pls. Br. 31-32—does not excuse discrimination against a protected class. As the Third Circuit has explained, when considering the New York Police Department’s mass surveillance of Muslim-Americans, even if law enforcement were “subjectively motivated by a legitimate law-enforcement purpose ... they’ve

intentionally discriminated if they wouldn't have surveilled Plaintiffs had they not been Muslim.” *Hassan v. City of N.Y.*, 804 F.3d 277, 298 (3d Cir. 2015).

Requiring border agents to obtain a warrant before searching travelers' devices would insulate such searches from individual officers' biases or discriminatory beliefs by ensuring that a “neutral and detached magistrate” draws “the inferences to support” such a search. *Riley*, 573 U.S. at 382. The Supreme Court has made clear that race and national origin are “decidedly impermissible factors” on which to base a stop. *Whren*, 517 U.S. at 810; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975) (border agents' sole reliance on “apparent Mexican ancestry” cannot establish even reasonable suspicion to stop travelers); *United States v. Ramos*, 629 F.3d 60, 67-68 (1st Cir. 2010) (“attribution of ‘Middle Eastern’ appearance” alone is not “always or even generally relevant” to a reasonable suspicion analysis). Accordingly, no warrant could issue based solely due to race, religion, national origin, or ethnicity.

### CONCLUSION

By requiring CBP officers to articulate a nexus to suspected digital contraband before searching travelers' devices, the district court properly ensured that device searches are supported by a legitimate, non-discriminatory basis. Given how deeply such searches impinge on constitutional freedoms and the well-documented frequency of discriminatory profiling at the border, this Court should

go further, and hold on the cross-appeal that such device searches must be supported by a warrant based on probable cause.

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August 7, 2020

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Mark C. Fleming

MARK C. FLEMING

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,495 words.
2. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Mark C. Fleming  
MARK C. FLEMING

## **APPENDIX**

### **ADDITIONAL AMICI CURIAE**

American-Arab Anti-Discrimination Committee

Arab Resource & Organizing Center

Asian Americans Advancing Justice - AAJC

Asian Americans Advancing Justice - Atlanta

Asian Americans Advancing Justice - Chicago

Asian-American Legal Defense and Education Fund

CAGE UK

Defending Rights & Dissent

Iranian American Bar Association

Jetpac

Justice for Muslims Collective

LatinoJustice PRLDEF

Media Alliance

MPower Change

Muslim Advocates

Muslim Justice League

National Immigration Law Center

New England Muslim Bar Association

Partnership for the Advancement of New Americans

Oakland Privacy

Secure Justice

Sikh Coalition

South Asian Americans Leading Together

Yemeni Alliance Committee