

No. 14-1688

In The
United States Court of Appeals
For the Third Circuit

SYED FARHAJ HASSAN ET AL.,
Plaintiffs-Appellants,
v.
THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**BRIEF OF LAW ENFORCEMENT AMICI CURIAE
IN SUPPORT OF APPELLANTS**

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INTERESTS OF AMICI CURIAE¹

This brief is submitted on behalf of Borough President Eric Adams, Chief Chris Burbank and 100 Blacks in Law Enforcement Who Care as *amici curiae* in support of Appellants.

Eric Adams, the Brooklyn Borough President, is a native New Yorker who served for 22 years as a member of the New York Police Department (“NYPD”) prior to starting his political career. Mr. Adams graduated first in his class from the Police Academy, and had a distinguished career with the NYPD. During his time as a law enforcement officer, Mr. Adams was a vocal opponent of bias-based policing by the NYPD, and was a co-founder of fellow amicus curiae 100 Blacks in Law Enforcement Who Care. Before being elected to the Brooklyn Borough Presidency, Mr. Adams was elected to the New York State Senate for four terms where he advocated for reforms to the NYPD's discriminatory “stop and frisk” policy.

Chief Chris Burbank, who began his career with the Salt Lake City Police Department (“SLCPD”) over two decades ago, has served as its Chief of Police for

¹ The parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici* state that no counsel for any party has authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person or entity—other than *amici*, their members, or their counsel—has made any monetary contribution intended to fund the preparation or submission of this brief.

the last eight years. In addition to his duties with the SLCPD, Chief Burbank serves as the First Vice President of the Major Cities Chiefs Association, an assembly of the 69 largest policing agencies in the United States and Canada. Chief Burbank, a longtime proponent of community-based policing, has testified before the Judiciary Committee of the House of Representatives on issues related to bias-based policing.

100 Blacks in Law Enforcement Who Care (“100 Blacks”) was founded in 1995 by a core group of concerned African Americans representing a variety of professions within the field of law enforcement in New York City. The number of those men and women who wanted to participate in being part of a social solution instead of a passive problem quickly grew to 100 and beyond. These individuals all share a sense of community, cultural, and professional pride. The issues at stake in this case directly relate to 100 Blacks’ work in advocating for effective, community-based solutions to law enforcement.

Amici are current and former law enforcement officials who believe that bias-based policing is not only ineffective, but actually counterproductive in combatting crime. They view American Muslim communities as indispensable partners with law enforcement. *Amici* urge this Court to reverse the district court’s decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Bias-based policing subjects individuals to heightened police surveillance based solely on demographic characteristics such as race or national origin. In the words of Attorney General Eric Holder, “[r]acial or ethnic profiling is not good law enforcement. It is simply not good law enforcement.”² Yet, as this case and others demonstrate, it remains a persistent problem.³ Last year, Judge Scheindlin found that New York City’s stop-and-frisk policy violated the Fourth and Fourteenth Amendment rights of the African-American and Hispanic individuals it targeted. *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *see also Ligon v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013). In doing so, Judge Scheindlin rejected the City’s suggestion that members of some “racial groups have a greater tendency to appear suspicious than members of other racial groups.” *Floyd*, 959 F. Supp. 2d at 587. “Rather than being a defense *against* the charge of racial profiling,” Judge Schiendlin said, “this reasoning is a defense *of*

² *Hearing on the Oversight of the United States Justice Department Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Eric Holder, U.S. Att’y Gen.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhr80973/html/CHRG-113hhr80973.htm>.

³ *See generally* National Organization of Black Law Enforcement Executives, *A NOBLE Perspective: Racial Profiling—A Symptom of Bias-Based Policing* (May 3, 2001), available at http://i.b5z.net/i/u/326208/f/NOBLE__Profiling_Position.pdf.

racial profiling. To say that black people in general are somehow more suspicious-looking, or criminal in appearance, than white people is not a race-neutral explanation for racial disparities in NYPD stops: it is itself a *racially biased explanation.*” *Id.*

In 2012, a challenge to Arizona’s controversial Support Our Law Enforcement and Safe Neighborhoods Act, which authorized state and local enforcement of federal immigration laws, made its way to the United States Supreme Court. *Arizona v. United States*, 132 S. Ct. 2492 (2012). The Court struck down three provisions of the law on preemption grounds, including Section 6, which authorized state and local officers to arrest, without a warrant, any individual for suspicion of being an illegal immigrant. *Id.* at 2498, 2507. As Salt Lake City Chief of Police Chris Burbank explained in his statement before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Civil Liberties, such laws place state and local law enforcement “in the untenable position of potentially engaging in unconstitutional racial profiling, while attempting to maintain trust within the communities we protect. Officers are forced to detain and question individuals for looking or speaking differently from the majority, not for their criminal behavior. . . . How is a police officer to

determine [immigration] status without detaining and questioning anyone who speaks, looks or acts as if they might be from another nation?”⁴

Religion-based discriminatory policing presents the same problems as that based on race or ethnicity, and it is equally abhorrent.⁵ Yet the district court dismissed Plaintiffs’ challenge to the New York City Police Department (“NYPD”)’s bias-based policing practices—which entailed extensive surveillance of American Muslim communities in New York and surrounding areas over a period of more than ten years⁶—reasoning that “the Plaintiffs in this case have not alleged facts from which it can be plausibly inferred that they were targeted solely

⁴ *Hearing on Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2010) (statement of Chris Burbank, Chief of Police, Salt Lake City Police Department) (“Burbank Statement”), available at http://judiciary.house.gov/_files/hearings/pdf/Burbank100617.pdf.

⁵ Discriminatory policing practices that target Muslim communities in connection with counterterrorism measures have been described as either “racial” or “religious” discrimination. See, e.g., Police Executive Research Forum, *Protecting Your Community From Terrorism: Strategies for Local Law Enforcement*, Volume 2: *Working With Diverse Communities* 10 (2004), available at http://www.cops.usdoj.gov/Publications/protect_comm_terror_v2.pdf (noting that “[r]acial profiling is the improper reliance by law enforcement on race, religion, ethnicity, or national origin in deciding whom to target and investigate”).

⁶ The details of the NYPD practices at issue in this case are laid out more fully in the Plaintiffs-Appellants’ brief. See Br. of Plaintiffs-Appellants at 2-5.

because of their religion.”⁷ *Hassan v. City of New York*, No. 2:12cv3401, 2014 WL 654604, at *7 (D.N.J. Feb. 20, 2014). Instead, the court thought “[t]he more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies.” *Id.* In the wake of the terrorist attacks of September 11, 2001, the court said, “[t]he police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself.” *Id.*

That reasoning does not withstand scrutiny. As explained below, there is no legitimate justification for the NYPD’s bias-based policing program. It violates the constitutional rights of the individuals it targets, and it is not even an effective means of rooting out terrorist plots. Indeed, it may well thwart crime-prevention efforts. The demands of national security provide no excuse. In the years since the September 11th attacks, countless local police departments have developed effective strategies for preventing terrorism and other crime without adopting—and often while expressly disavowing—the bias-based tactics employed by the NYPD. As with the members of other communities defined by race, ethnicity, or religion, the overwhelming majority of American Muslims are law-abiding citizens who

⁷ The district court granted both the City’s Rule 12(b)(1) motion to dismiss for lack of standing and its Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Hassan v. City of New York*, No. 2:12cv3401, 2014 WL 654604, at *5, 7 (D.N.J. Feb. 20, 2014). The arguments presented in this brief are directed to the court’s decision on the 12(b)(6) motion.

pose no threat of terrorism. The Constitution demands that their rights, like those of any other law-abiding American citizen, be protected.

I. BIAS-BASED POLICING IS NOT ONLY AN INEFFECTIVE LAW ENFORCEMENT TOOL, IT IS COUNTERPRODUCTIVE.

A. Bias-Based Policing Is Too Blunt An Instrument For Use In An Effective Counterterrorism Program.

The district court below accepted at face value the assertion by the City of New York (the “City”) that its bias-based policing practices are necessary to prevent terrorist activities. *See* 2014 WL 654604, at *7. But in the more than twelve years the City has been targeting, mapping, and surveilling American Muslims in New York and surrounding areas, the program has apparently generated *no* terrorism-related arrests.⁸ This is unsurprising, as scholars have long recognized that bias-based policing is a “terribly inaccurate proxy” for identifying

⁸ Deposition of Thomas Galati, Assistant Chief of New York City Police and Commanding Officer of the Intelligence Division at 96:21-97:16, *Handschu v. Special Servs. Div.*, No. 1:71cv2203 (S.D.N.Y.) (June 28, 2012), *available at* http://www.ap.org/Images/Pages-from-Galati-EBT-6-28-12_tcm28-8694.pdf (“A: Related to Demographics, I can tell you that information that have [sic] come in has not commenced an investigation. Q: You’re saying that based on what has occurred during your ten[ure], correct? A: Yes. Q: Do you know whether that was also the case before you took over the Intelligence Division? A: I think that prior to me, there had been indication [sic] that there was one place that was visited later, that later on became subject of an investigation. However, I have not been able to determine that. That case involved a prosecution, but I have not been able to definitively say that it was because of Demographics. I believe it was because of the Handschu investigation.”).

potential terrorist suspects.⁹ And the NYPD’s bias-based policing program singled out American Muslim communities for surveillance without using *any* additional factors—such as suspicious behavior or evidence suggestive of wrongdoing—to narrow its targets.¹⁰ The City’s approach was far too imprecise to be effective.

The NYPD’s bias-based approach falls within a broader category of “actuarial” policing techniques that have been sharply criticized. “Actuarial” policing methods rely on statistical disparities in the rates of offense among defined groups in an effort to identify offenders.¹¹ On a superficial level, these methods can seem like an efficient and rational means of allocating scarce law enforcement resources. But “there are significant questions about the reliability

⁹ David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 976 (2002).

¹⁰ Br. of Plaintiffs-Appellants at 2. The NYPD built profiles for 28 nationalities plus “American Black Muslims” as “ancestries of interest,” and recorded lawful conduct of American Muslims—including everyday activities such as rafting trips and visits to Dunkin’ Donuts. *Id.* at 3-5. The NYPD prepared a 60-page “guidebook” to Muslims in Newark, New Jersey in which “[t]here was no mention of terrorism or any criminal wrongdoing.” *Booker: Newark Misled On NYPD Spying On Muslims*, CBS News (Feb. 22, 2012), available at <http://newyork.cbslocal.com/2012/02/22/booker-newark-misled-on-nypd-spying-on-muslims/>.

¹¹ Bernard E. Harcourt, *A Reader’s Companion to Against Prediction: A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race*, 33 Law & Soc. Inquiry 265, 266 (2008).

and validity of even the most popular actuarial instruments.”¹² Indeed, some observers have concluded that “no strategy of using racial (or any actuarial) profiles is likely, in practice, to be substantially more effective at catching terrorists than uniform random sampling of the population that can be screened.”¹³ And actuarial policing methods can actually “backfire and increase crime If members of the profiled group are less elastic to policing than members of the nonprofiled group—if they respond less intensely and are less deterred by any increased surveillance—then profiling them for purposes of policing and punishment may be inefficient to the law enforcement objective of reducing crime.”¹⁴

Focusing on broad statistical assumptions can cause law enforcement officials to overlook real threats presented by individuals who do not fit that profile. In the wake of an attempted terrorist attack aboard an airliner on

¹² *Id.* at 278.

¹³ William Press, *To Catch a Terrorist: Can Ethnic Profiling Work?*, Significance (Dec. 2010), at 167, available at http://www.nr.com/whp/Significance_ToCatchATerrorist.pdf.

¹⁴ Harcourt, *supra* note 11, at 266-67. Further, a recent empirical study showed that racial bias had a “reverse deterrent” effect; i.e., it increased the overall number of instances of the profiled transgression. Amy A. Hackney & Jack Glaser, *Reverse Deterrence in Racial Profiling: Increased Transgressions by Nonprofiled Whites*, 37 *Law & Hum. Behav.* 348, 351 (2013).

Christmas Day in 2009, former Secretary of Homeland Security Michael Chertoff argued that the case:

illustrate[d] the danger and the foolishness of profiling because people’s conception of what a potential terrorist looks like often doesn’t match reality. In this case we had a Nigerian [perpetrator], for example, not a person from the Middle East or from South Asia. If you look at the airline plot of 2006, two of the plotters were a married couple that were going to get on a plane with a young baby.¹⁵

Chertoff concluded that bias-based law-enforcement practices are “not only problematic from civil rights’ [sic] standpoint, but frankly, . . . not . . . terribly effective.”¹⁶

A better approach—endorsed by the current Presidential Administration—focuses on building trust and cooperation between law enforcement officials and the communities they serve. To this end, the Administration has released guidance favoring a community-based approach to terrorism prevention, noting that “[l]aw enforcement plays an essential role in keeping us safe, but so too does engagement

¹⁵ *Chertoff Seeks Full-Body Scanners At Airports*, NPR (Dec. 29, 2009), <http://www.npr.org/templates/story/story.php?storyId=122018593>.

¹⁶ *Id.*

and partnership with communities.”¹⁷ The White House guidance goes on to explain:

The best defenses against violent extremist ideologies are well-informed and equipped families, local communities, and local institutions. Their awareness of the threat and willingness to work with one another and government is part of our long history of community-based initiatives and partnerships dealing with a range of public safety challenges. Communities are best placed to recognize and confront the threat because violent extremists are targeting their children, families, and neighbors. Rather than blame particular communities, it is essential that we find ways to help them protect themselves. To do so, we must continue to ensure that all Americans understand that they are an essential part of our civic life and partners in our efforts to combat violent extremist ideologies and organizations that seek to weaken our society.¹⁸

Many law enforcement officials agree. The Police Executive Research Forum, for example, has convened a series of sessions with police chiefs, sheriffs, federal law enforcement officials, and community representatives and advocates to explore policing services in a post-September 11th security paradigm. The participants “reaffirmed that community policing provides the tools and resources

¹⁷ The White House, *Empowering Local Partners to Prevent Violent Extremism in the United States* 2-3 (Aug. 2011), available at http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf.

¹⁸ *Id.*

needed to deliver police services to diverse communities and to engage in the partnerships needed to prevent and respond to terrorism and backlash violence.”¹⁹

B. Bias-Based Policing Alienates The Very Communities Law Enforcement Seeks To Serve.

Bias-based policing is not only ineffective, it is counterproductive to law enforcement goals. For law enforcement to function effectively, local police must form bonds with the communities they serve. Bias-based policing methods undermine that goal.²⁰ When local police officers are charged with targeting a particular group, significant segments of the population are marginalized, and community policing is ultimately harmed.²¹ Members of a targeted group who are victims of or witnesses to crime may be unwilling to come forward with

¹⁹ Police Executive Research Forum, *supra* note 5, at 48-49, The U.S. Department of Justice Office of Community Oriented Policing Services (COPS) collaborated in these sessions.

²⁰ See *M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws By Local Police Agencies* 5-6 (June 2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf (“*M.C.C. Immigration Recommendations*”). M.C.C., “Major Cities Chiefs,” is now known as the Major Cities Chiefs Association (MCCA). “MCCA is a professional association of Chiefs and Sheriffs representing the largest cities in the United States, Canada, and the UK.” Welcome statement, MCCA website, <https://www.majorcitieschiefs.com/> (last visited July 8, 2014).

²¹ Burbank Statement, *supra* note 4, at 2.

information.²² But the cooperation of these communities “is needed to prevent and solve crimes and maintain public order, safety, and security in the whole community.”²³ And, of course, “[p]olice officers cannot effectively gather vital information from witnesses if individuals are afraid of the police.”²⁴ Bias-based policing may also alienate contacts in targeted communities that could have served as a valuable source of intelligence to prevent future crime.²⁵ Absent the type of trust that fosters open communication,

there exists little chance that real relationships [between police and communities] can flourish, and this, in turn, reduces the chances that community members will share the information they have with law enforcement—whether out of fear of or discomfort with police, out of a feeling that they suffer unfair mistreatment like ethnic profiling, or simply because they feel that law enforcement does not have their interests at heart.²⁶

²² *Id.* (“Many law enforcement officials oppose immigration enforcement because doing so would discourage witness participation in criminal investigations. . . . Even more troubling, officers acting as immigration officials would make victims of crime reluctant to seek help from law enforcement. This opens the door to further victimization and exploitation of immigrants, increasing crime in our communities. We have already observed a chilling effect upon victims and witnesses of crime as well as a polarization within neighborhoods regarding recent immigration legislation.”).

²³ *M.C.C. Immigration Recommendations*, *supra* note 20, at 5-6.

²⁴ Burbank Statement, *supra* note 4, at 2.

²⁵ *See M.C.C. Immigration Recommendations*, *supra* note 20, at 6.

²⁶ David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. Rev. L. & Soc. Change 123, 162 (2010).

Tensions between the police and communities singled out by bias-based policing can thereby result in increased crime against both the targeted group and the broader community, and threaten to “create a class of silent victims.”²⁷

The legitimacy of law enforcement is seriously undermined when police engage in bias-based surveillance, and “legitimacy is the bedrock of successful policing, whether in the control of ordinary crime or of terrorism.”²⁸ The detrimental effects are not limited to the targeted group: members of the public—regardless of whether they belong to a targeted population—are more likely to withhold their cooperation when they view the police as unjust.²⁹

²⁷ *M.C.C. Immigration Recommendations*, *supra* note 20, at 6.

²⁸ David H. Bayley & David Weisburd, *Cops and Spooks: The Role of the Police in Counterterrorism*, in *To Protect and To Serve: Policing in an Age of Terrorism* 81, 95 (David Weisburd et al., eds., 2009).

²⁹ See Aziz Z. Huq, Tom R. Tyler, & Stephen J. Schulhofer, *Why Does the Public Cooperate with Law Enforcement?: The Influence of The Purposes and Targets of Policing*, Chicago Public Law & Legal Theory Working Paper No. 339, at 18, 19-20 (Feb. 2011). Huq, et al.’s study “builds upon two prior investigations. First, Tyler and Fagan (2008) studied how different ethnic groups in New York evaluated policing tactics used against ordinary crime. Second, Tyler, Schulhofer and Huq (2010) explored the perception of counterterrorism policing tactics directed at American Muslims in New York. This study compares findings from these investigations with data from two additional surveys of (a) Muslims evaluating police efforts against ordinary crime and (b) non-Muslims evaluating police counterterrorism efforts.” *Id.* at 4. The study concludes that “the shift in policing function from crime control to counterterrorism does not appear to have changed public expectations of police behavior or to have altered the basis on

II. THE NYPD'S SWEEPING BIAS-BASED SURVEILLANCE OF THE AMERICAN MUSLIM COMMUNITY IS WITHOUT PARALLEL.

The NYPD's bias-based policing practices profoundly deviate from the norm, and officials from other local law enforcement agencies have criticized the NYPD's discriminatory surveillance of American Muslims. For example, in 2012, Samuel DeMaio, then the Director of the Newark Police Department, denounced the NYPD's bias-based policing policy, saying: "We really want to be clear: This type of activity is not what the Newark PD would ever do."³⁰ Similarly, Michael Ward, then the FBI Special Agent in charge of the Newark Division, highlighted the problems caused by the NYPD's approach:

We're starting to see cooperation pulled back. . . . People are concerned that they're being followed, they're concerned that they can't trust law enforcement, and it's having a negative impact. That's a problem; these are people that are our friends. . . . These are people that have embraced law enforcement, embraced the mission that we have in counter-terrorism, and you can see that the relationships are strained.³¹

which police are evaluated when people make judgments about cooperation. Within both the crime control and the counterterrorism contexts, moreover, being targeted for heightened policing attention does not significantly change how individuals assess the police. Both those who are the primary target of policing and those who are not a primary target apply a shared framework in reacting to police actions." *Id.* at 18.

³⁰ *Booker: Newark Misled On NYPD Spying On Muslims*, *supra* note 10.

³¹ Samantha Henry, *NJ FBI: NYPD Monitoring Damaged Public Trust*, Associated Press (Mar. 7, 2012), *available at* <http://www.ap.org/Content/AP-In-The-News/2012/NJ-FBI-NYPD-monitoring-damaged-public-trust> (internal quotation omitted).

And, Ward noted, “[w]hen people pull back cooperation, it creates additional risks, it creates blind spots.”³²

Other attempts to implement bias-based policing models have been derailed, at the outset, by public outrage. In October 2007, Michael P. Downing, Commanding Officer of the Counter-Terrorism/Criminal Intelligence Bureau of the Los Angeles Police Department (“LAPD”), testified before the Senate Homeland and Government Affairs Committee, revealing that the LAPD planned to institute a “community mapping” program targeting Los Angeles’ American Muslim population in an effort to “identify [Muslim] communities . . . which may be susceptible to violent ideologically based extremism.”³³ Through the program, he said, the LAPD would “take a deeper look at [American Muslims’] history, demographics, language, culture, ethnic background, socio-economic status, and social interactions.”³⁴ After meeting with Muslim community groups and civil rights organizations who expressed grave concerns about the program, however,

³² *Id.*

³³ *Hearing Before the Senate Committee on Homeland Security and Government Affairs*, 110th Cong. 7 (2007) (statement of Michael P. Downing, Commanding Officer, Counter-Terrorism/Criminal Intelligence Bureau, Los Angeles Police Department), *available at* <http://assets.lapdonline.org/assets/pdf/Michael%20DowningTestimonyfortheU.S.Senate-Final.PDF>.

³⁴ *Id.*

then-Chief of Police William Bratton announced that the LAPD was abandoning the plan.³⁵

While the role of state and local law enforcement has expanded to include increased counterterrorism intelligence-gathering operations in recent years,³⁶ many police departments and law enforcement agencies have successfully taken on this new role while eschewing the type of biased policing strategy employed by the NYPD. For example, in the wake of September 11th, police in Dearborn, Michigan—a Detroit suburb where Arab and Muslim Americans comprise nearly a third of the population—were asked to assist federal agents seeking several hundred Dearborn residents of Arab ethnicity for questioning.³⁷ In the decade

³⁵ Neil McFarquhar, *Los Angeles Police Scrap Mapping Plan, Elating Muslims*, N.Y. Times (Nov. 16, 2007), available at http://www.nytimes.com/2007/11/16/us/16muslim.html?_r=0 (quoting Chief Bratton as saying, “[w]e put it out there, it was rejected, it’s dead on arrival. . . . It will not be going forward.”).

³⁶ See, e.g., Huq et al., *supra* note 29, at 1 (“American police are now responding to a new problem—terrorism rather than ordinary crime.”); Bayley & Weisburd, *supra* note 28, at 87.

³⁷ *U.S. Criminal Justice Policy: A Contemporary Reader* 59 (Karim Ismaili, ed., 2011), available at <http://books.google.com/books?id=KRfXLzQZ7YMC&printsec=frontcover&dq=%22U.S.+Criminal+Justice+Policy:+A+contemporary+Reader%22&hl=en&sa=X&ei=sEK8U9ffKonMsQSjx4HwCw&ved=0CCUQ6AEwAA#v=onepage&q=%22U.S.%20Criminal%20Justice%20Policy%3A%20A%20contemporary%20Reader%22&f=false>; see Jonathan Walters, *Policing in the Post-9/11 Era*, *Governing*

before September 11th, the Dearborn Police Department had established community policing programs aimed at “repair[ing] historically deteriorated relations between the police and Arab communities.”³⁸ “In light of these efforts, the department was concerned about the ramifications of interviewing hundreds of local Arab residents to inquire about terrorist activity. In fact, after the attacks of September 11th, the police in Dearborn increased patrols in areas with higher concentrations of Arabs not due to concerns that terrorist cells were operating in the city but because of worries about Arabs being the targets of hate crimes carried out by people upset about the terrorist attacks.”³⁹

Ultimately, the Dearborn Police Department agreed to assist federal law enforcement with the interviews, but in a way that preserved and built on the relationship it had already developed with the local American Muslim community⁴⁰: “Police officers in Dearborn sat in during the interviews but acted as observers rather than interrogators. During the interviews, Dearborn police

(Aug. 31, 2011), *available at* <http://www.governing.com/topics/public-justice-safety/policing-post-911-era.html>.

³⁸ Murat Gozubenli & Halil Akbas, *Community Policing in Arab and Muslim Communities*, in *Understanding Terrorism: Analysis of Sociological and Psychological Aspects* 207, 215-16 (Suleyman Ozeren et al., eds., 2007).

³⁹ *U.S. Criminal Justice Policy*, *supra* note 37, at 59.

⁴⁰ *See* Gozubenli & Akbas, *supra* note 38, at 216.

officers emphasized that the investigation was a federal initiative and monitored the behaviors of federal agents, asking the interviewees afterward if they had found the questioning offensive.”⁴¹ Michael Guido, Mayor of Dearborn at the time, explained the reasoning behind the decision:

[W]e spent years trying to establish trust and understanding with the Arab community. If we would have directly participated in these interviews, having our officers going around with big clipboards asking, “Where were you the night of September 11?” especially during times when it seemed as if all Arab people and Muslims were under a cloud of suspicion, it would have caused many years of work building these relationships to go down the drain. This role wasn’t appropriate for us.⁴²

Dearborn has been “recognized as a model in the rest of the country.”⁴³ And “[s]tatistics appear to bear out Dearborn’s approach.”⁴⁴ According to an Institute

⁴¹ *U.S. Criminal Justice Policy*, *supra* note 37, at 59; see David Thacher, *The Local Role in Homeland Security*, 39 *L. & Society Rev.* 635 (2005). Police in Portland, Oregon, went further—they refused to assist federal authorities in interviewing Middle Eastern immigrants in the months after September 11th, saying that doing so would violate state law. “‘The law says, generally, we can interview people that we may suspect have committed a crime,’ Acting Police Chief Andrew Kirkland said. ‘But the law does not allow us to go out and arbitrarily interview people whose only offense is immigration or citizenship, and it doesn’t give them authority to arbitrarily gather information on them.’” *Portland Police Balk at Terror Probe*, *The Washington Times* (Nov. 22, 2001), available at <http://www.washingtontimes.com/news/2001/nov/22/20011122-031330-6984r>.

⁴² Thacher, *supra* note 41, at 659.

⁴³ Gozubenli & Akbas, *supra* note 38, at 216.

⁴⁴ Walters, *supra* note 37.

for Homeland Security Solutions study of terrorist attacks against the United States from 1999 to 2009, “[m]ore than 80% of foiled terrorist plots against the United States [during that period] were discovered via observations from law enforcement or the general public.”⁴⁵ The same study reported that the public was the source of the initial clue in 29 percent of thwarted terrorist plots from 1999 to 2009.⁴⁶ Such public tips have been instrumental in preventing attacks in Dearborn⁴⁷:

A plot to set off something like a car bomb in front of the nation’s largest mosque, the Mosque of America, was foiled thanks to a local restaurant owner taking seriously comments he overheard at his bar. A likely plot to gun down Wayne State University Medical School staff was foiled by a group of Arab-American kids who saw suspicious activity at a local park and reported it.⁴⁸

⁴⁵ Kevin Strom et al., *Building on Clues: Examining Successes and Failures in Detecting U.S. Terrorist Plots, 1999-2009* 1 (Oct. 2010), available at http://sites.duke.edu/ihss/files/2011/12/Building_on_Clues_Strom.pdf. Another study, a nationwide survey of law enforcement agencies conducted in collaboration with the Police Executive Research Forum, indicates that “[a]lmost every large metropolitan police force surveyed collaborates with Muslim-American communities that are targeted for recruitment by al-Qaida and related extremists. Most of these agencies report they have established a high level of trust with the community, and two-thirds say these relationships have helped develop actionable information.” David Schanzer & Charles Kurzman, *Year after Boston Bombing, It’s Clear that Threat of Homegrown Terrorism Overhyped*, News & Observer (Apr. 14, 2014), available at <http://www.newsobserver.com/2014/04/14/3784842/year-after-boston-bombing-its.html>.

⁴⁶ Strom et al., *supra* note 45, at 12.

⁴⁷ Walters, *supra* note 37.

⁴⁸ *Id.*

“Those kids had no hesitation calling 911,” Dearborn Mayor John B. O’Reilly said, “because it’s not like the police are the enemy.”⁴⁹

Community-based policing programs can also succeed in major world cities. In London, the Muslim Contact Unit (“MCU”), “a small, specialist police unit,” has partnered with Muslim community groups in an effort to counter terrorist propaganda and recruitment strategies.⁵⁰ The MCU aims to deter radicalization by engaging with multiple segments of the diverse Muslim population.⁵¹ Mainstream and Sufi Muslim groups in Britain have disparaged Salafi and Islamist groups in the country as “dangerous extremists,”⁵² but the MCU has worked alongside the latter “to offer authoritative but non-violent interpretations of Islam to those suspected of drifting towards Islamist-based violence, successfully diverting some of them” from violent inclinations.⁵³ Indeed, “a key motivational factor” for the

⁴⁹ *Id.*

⁵⁰ Robert Lambert, *Empowering Salafis and Islamists Against Al-Qaeda: A London Counterterrorism Case Study*, PS: Political Science & Politics 31, 32 (2008).

⁵¹ Darren Thiel, *Policing Terrorism: A Review of the Evidence*, The Police Foundation (UK) (Feb. 2009) at 40, available at http://www.police-foundation.org.uk/uploads/catalogerfiles/policing-terrorism-a-review-of-the-evidence/terrorism_review.pdf.

⁵² Lambert, *supra* note 50, at 33.

⁵³ Thiel, *supra* note 51, at 40.

officers running the MCU has been the “desire to reassure” Salafis and Islamists—minority Muslim communities—“that they ought not to be conflated with the terrorists.”⁵⁴ Moreover, the MCU has even succeeded at bringing together Muslim groups that have often been at odds with each other to discuss the common goal of combatting violent extremism within their communities.⁵⁵ Law enforcement officers in major U.S. cities view London’s MCU as a model worth emulating: a member of the Los Angeles Police Department described the unit as “likely reduc[ing] hate crimes and other potentially violent acts.”⁵⁶

III. THERE IS NO JUSTIFICATION FOR TARGETING THE AMERICAN MUSLIM COMMUNITY THROUGH BIASED-BASED POLICING.

Even if statistics could serve to legitimate bias-based policing under the Constitution (they cannot), there would be no justification for targeting the American Muslim community for surveillance. As with other racial, ethnic, or religious groups in this country, the vast majority of American Muslims are law-

⁵⁴ Lambert, *supra* note 50, at 34.

⁵⁵ Thiel, *supra* note 51, at 40.

⁵⁶ Mark G. Stainbrook, *Policing with Muslim Communities in the Age of Terrorism*, *The Police Chief Magazine* (Apr. 2010), *online version available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2050&issue_id=42010.

abiding citizens. Singling out American Muslims in an effort to prevent terrorism⁵⁷ is a gross misallocation of resources.

A study of American Muslim terrorism identified only 225 American Muslims indicted for or killed during violent terrorist plots from September 11, 2001 through January 31, 2013—an average of fewer than 20 per year.⁵⁸ “Since 9/11, Muslim-American terrorism has claimed 37 lives in the United States.”⁵⁹ To put that number in perspective, over the same period, there have been more than 190,000 murders in the U.S.⁶⁰ University of North Carolina sociologist Charles Kurzman, who compiles yearly data updates on American Muslim terrorist activity

⁵⁷ While the exact definition of terrorism is subject to debate, the discussion in this brief operates under a common definition provided by the Code of Federal Regulations: “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” 28 C.F.R. § 0.85(l). The FBI uses this definition as a starting point to further delineate domestic and international terrorism. Federal Bureau of Investigation, U.S. Department of Justice, *Terrorism 2002-2005*, at iv - v, available at http://www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05.pdf.

⁵⁸ Charles Kurzman, *Muslim-American Terrorism in 2013*, at 2 (Feb. 5, 2014), available at http://sites.duke.edu/tcths/files/2013/06/Kurzman_Muslim-American_Terrorism_in_20131.pdf.

⁵⁹ *Id.*

⁶⁰ *Id.*

in the United States, has described the sample of American Muslims who are involved in terrorism as “vanishingly small.”⁶¹

American Muslim involvement in terrorist activity is also low in relative terms. Data compiled by the FBI shows that only approximately 6 percent of terrorist attacks on U.S. soil from 1980 to 2005 were perpetrated by Muslims.⁶² In February 2013, *U.S. News and World Report* reported that, “of the more than 300 American deaths from political violence and mass shootings since 9/11, only 33 have come at the hands of Muslim-Americans.”⁶³

And, “[o]f course, the deadliest terrorist attack on American soil prior to 9/11 was the Oklahoma City bombing.”⁶⁴ One hundred sixty-eight people were

⁶¹ Spencer Ackerman, *Report: U.S. Muslim Terrorism Was Practically Nil in 2012*, *Wired* (Feb. 1, 2013), <http://www.wired.com/2013/02/american-muslim-terrorism/>.

⁶² *Non-Muslims Carried Out More than 90% of All Terrorist Attacks on U.S. Soil*, *WashingtonsBlog* (May 1, 2013), <http://www.washingtonsblog.com/2013/05/muslims-only-carried-out-2-5-percent-of-terrorist-attacks-on-u-s-soil-between-1970-and-2012.html>; see *Terrorism 2002-2005*, *supra* note 57, at 57-66.

⁶³ Seth Cline, *The 1993 World Trade Center Bombing: A New threat Emerges*, *U.S. News & World Report* (Feb. 26, 2013), <http://www.usnews.com/news/blogs/press-past/2013/02/26/the-1993-world-trade-center-bombing-a-new-threat-emerges>.

⁶⁴ Peter Bergen & David Sterman, *U.S. right wing extremists more deadly than jihadists*, *CNN* (Apr. 15, 2014), <http://www.cnn.com/2014/04/14/opinion/bergen-sterman-kansas-shooting/>.

killed when Timothy McVeigh, a man with ties to far-right militant circles, bombed the Alfred P. Murrah Federal Building on April 19, 1995.⁶⁵ That, unfortunately, was not an isolated incident. From 2001 through 2011, 306 individuals were killed in acts of far-right violence in the United States, with well over a thousand more injured.⁶⁶ A 2012 study by the Combating Terrorism Center at West Point observed that, “since 2007, there has been a dramatic rise in the number of attacks and violent plots originated from individuals and groups who self-identify with the far-right of American politics.”⁶⁷ Just last month, Attorney General Eric Holder announced that the Department of Justice would reconstitute its Domestic Terrorism Executive Committee—which was first established in response to the Oklahoma City bombing—to address ongoing domestic threats emanating from “anti-government animus” and other causes aside from al-Qaeda-style extremism.⁶⁸

⁶⁵ *Id.*

⁶⁶ Arie Perliger, *Challenges From the Sidelines: Understanding America’s Violent Far-Right* 100 (Nov. 2012), available at <https://www.ctc.usma.edu/wp-content/uploads/2013/01/ChallengersFromtheSidelines.pdf>.

⁶⁷ *Id.* at 3.

⁶⁸ Statement by Attorney General Holder on Reestablishment of Committee on Domestic Terrorism (June 3, 2014), available at <http://www.mainjustice.com/2014/06/03/reestablishment-of-committee-on-domestic-terrorism-statement-of-atty-gen-eric-holder/>.

As the data and recent analyses confirm, the non-Muslim terrorist threat dwarfs the threat of terrorism presented by the American Muslim community. Even setting aside constitutional constraints on bias-based policing, there is no justification for singling out American Muslims as a group and subjecting them to heightened surveillance in an effort to prevent terrorism.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs-Appellants' brief, this Court should reverse the district court's decision granting the City's motion to dismiss.

Dated: July 10, 2014

Respectfully submitted,

/s/ Walter Dellinger

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I hereby certify that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit.

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/s/ Walter Dellinger

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I hereby certify that on July 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: July 10, 2014

/s/ Walter Dellinger