



Written Statement of the  
American Civil Liberties Union

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Senate Judiciary Subcommittee on the  
Constitution, Civil Rights and Human Rights

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*Protecting the Civil Rights of American Muslims*



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Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee:

The American Civil Liberties Union (ACLU) expresses its deep gratitude to Chairman Durbin for his wisdom in calling today's hearing and to all the Members of the Subcommittee for participating in this examination of discrimination against the American Muslim community. The ACLU is a non-partisan organization with over half a million members, countless additional activists and supporters, and 53 affiliates nationwide. For more than 90 years, the ACLU has fought for the protection and advancement of individual rights under the Constitution and for fairness and justice throughout our society. The fact that there even needs to be a hearing on this subject is a testament to the stubborn persistence of some forms of discrimination in America in the 21<sup>st</sup> century and shows why we must never falter in our determination to achieve the ideals of religious freedom, due process, and equal protection memorialized in our Constitution.<sup>1</sup>

The freedom to worship in accordance with one's beliefs is a bedrock element of America's view of itself and its system of government. Religious freedom was one of the core features distinguishing the new American republic from other established nations in the late 1700's.<sup>2</sup> And most Americans today would see discrimination by one individual against another based upon religious belief to be repugnant to standards of fairness and justice in the United States. But when government itself begins to target one segment of American society – a segment defined by its common set of religious beliefs – we lose our ability to guarantee equal treatment and freedom of religion under the law. When we lose constitutional justification for our government's actions, we must do everything within our power to right the wrongs committed against targeted religious minority groups. At the local and national level, such wrongs have been committed against the American Muslim community.

Disrespect for those adhering to the Islamic faith skyrocketed in the wake of 9/11 as the national popular view tracked the mass media's conflation of a small group of attackers

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<sup>1</sup> This statement was prepared with the assistance of the ACLU's Program on Freedom of Religion and Belief, Human Rights Program, National Security Project, and Women's Rights Project. More information about ACLU's work in this area can be found at: <http://www.aclu.org/protecting-religious-freedom-muslims>.

<sup>2</sup> See *West Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943); *County of Allegheny v. Amer. Civil Liberties Union*, 492 U.S. 573, 589-90 (1989). See also Antonio Stango, *The History of Religious Freedom in Europe* (presentation of Italian Helsinki Committee for Human Rights member to the International Coalition for Religious Freedom Conference) (May 29-31, 1998); Paul Harvey, *Beyond Toleration, and Beyond Those Yellowed Class Notes*, Religion in American History (Jan. 18, 2009) available at <http://usreligion.blogspot.com/2009/01/beyond-toleration-and-beyond-classroom.html>.

with an entire faith community. Since then, mosques in America have been attacked. Holy books have been defiled. American Muslims have been singled out for special treatment under local laws. Women and men wearing clothing that identifies them as Muslim have experienced harassment and discrimination at work, at school, in public settings, and when they participated in civic life by, for example, going to a motor vehicles office or a courthouse. And federal authorities have targeted them for suspicion, special investigation and restriction. It reflects poorly on America when private individuals engage in discrimination in their daily lives. But when government puts its thumb on the scales against the American Muslim community, not only is that an unconstitutional exercise of governmental authority, it opens a path that allows more and more Americans to believe that bias against their fellow Americans is not only permissible, but lawful. That is a recipe for damaging divisions at home and diminishment of our stature in the rest of the world at a time when we greatly need the cooperation from the adherents of Islam.

## I. Societal Discrimination against Muslims

At the time of the founding of our country, America was no stranger to religious intolerance.<sup>3</sup> Notwithstanding such tensions, or perhaps because of them, our foundational documents included some of the most protective language then known in the world. From that foundation, our tradition of religious tolerance and acceptance has developed in law, if not always in practice.

American Muslims are not the only faith community to have suffered discrimination even with the protections afforded by the Constitution. Jews, Catholics, Mormons, other religious sects, and atheists have all seen their share of private and public intolerance. But while most such injustices are now in our past, the plight of the American Muslim community is firmly rooted in the post-9/11 era. As just one horrible example of the public scorn Muslims face in America, consider the comments of radio host Bryan Fischer on his well-read blog on March 24, 2011:

Islam has no fundamental First Amendment claims, for the simple reason that it was not written to protect the religion of Islam. Islam is entitled only to the religious liberty we extend to it out of courtesy. . . . Our government has no obligation to allow a treasonous ideology to receive special protections in America. . . .<sup>4</sup>

It is a shame to give wider dissemination to such hateful, hurtful, and utterly ridiculous assertions. But it is absolutely critical to an understanding of the problem faced by members of the Muslim faith in America today. Such comments are being disseminated far and wide, without context, without sufficient opposition. Is it any wonder that some in our American society are spurred on to bigotry and intolerance?

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<sup>3</sup> Library of Congress, Religion and the Founding of the American Republic, Online Exhibition available at <http://www.loc.gov/exhibits/religion/religion.html>.

<sup>4</sup> Bryan Fischer, *Islam and the First Amendment: Privileges but not Rights*, Renew America (Mar. 24, 2011) available at <http://www.renewamerica.com/columns/fischer/110324>.

It has been widely reported that hate crimes committed against American Muslims jumped upward immediately after the September 11, 2001 attacks.<sup>5</sup> Critically, however, the data shows that hate crimes against American Muslims diminish when government leaders speak out forcefully against discrimination. President Bush and other spoke out strongly against anti-Muslim discriminatory actions in the immediate aftermath of 9/11.<sup>6</sup> Reports showed a clear drop in the year following the surge in attacks – a trend that appeared to continue for several years. The speeches seemed to have a real effect, with anti-Muslim hate crimes dropping by two thirds in 2002.<sup>7</sup> Between 2002 and 2008, there was a “long decline” in anti-Muslim hate crimes, with the number of such crimes ranging from 105 to 156 incidents per year.<sup>8</sup> Unfortunately, there was a notable rise in 2010, appearing to coincide with the burst of publicity over the Park51 community center project in Lower Manhattan.<sup>9</sup>

In addition to hate crimes, private discrimination against American Muslims is well-documented. In its 2010 Legal Advocacy and Policy Review, the American-Arab Anti-Discrimination Committee (ADC) reported an increase in legal complaints received from Americans who are of Arab descent and/or members of the Muslim faith, as well as individuals perceived to fall into these groups. Nearly half of all the reported cases involved either employment discrimination or immigration issues. 13% of the cases fell into the category of general discrimination and/or harassment. Although all of these reports don’t necessarily correspond with actual instances of “discrimination” as the term is understood under the law, the report of an increase is still noteworthy.<sup>10</sup> ADC concluded that the surge in employment discrimination matters impacting Americans who are Arab, Muslim, and/or are perceived to be Arab or Muslim is a “likely attributable to the economic downturn and the backlash experienced by Arab and Muslim communities following the Park51 controversy. The nature of the complaints has ranged from individuals being called ‘terrorists’ or [using racial epithets] by co-workers to unjustified demotions, unfair withholding of promotions, and unfair dismissals.” ADC also reported that a small percentage of housing discrimination complaints, including one

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<sup>5</sup> Tanya Schevitz, *FBI Sees Leap in Anti-Muslim Hate Crimes*, S. F. Chronicle/SFGate.com (Nov. 26, 2002) available at [http://articles.sfgate.com/2002-11-26/news/17570762\\_1\\_crime-incidents-crime-victims-african-americans](http://articles.sfgate.com/2002-11-26/news/17570762_1_crime-incidents-crime-victims-african-americans); see also Leadership Conference, *Hate Crimes and Discrimination Against Arab-Americans Still Up* (Dec. 16, 2008) available at <http://www.civilrights.org/hatecrimes/united-states/050-arab-hate-crimes.html>.

<sup>6</sup> American Arab Institute Foundation, *American Leaders Speak Out Against Backlash* (Sep. 2001) available at [http://www.aaiusa.org/page/file/e18e4884e7ad3b055a\\_emkjmnbqu.pdf/Quotes.pdf](http://www.aaiusa.org/page/file/e18e4884e7ad3b055a_emkjmnbqu.pdf/Quotes.pdf).

<sup>7</sup> Curt Anderson, *Hate Crimes Fall After 9/11 Spike*, Associated Press/Seattle Times (Nov. 13, 2003) available at <http://community.seattletimes.nwsources.com/archive/?date=20031113&slug=hate13>; see also FBI, *Hate Crime Statistics, 2009*, available at <http://www2.fbi.gov/ucr/hc2009/index.html>.

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

<sup>9</sup> Islamic Information Center, *Information Alert* (Aug. 26, 2010) available at <http://www.islamicinformationcenter.org/news-center/news-center/dramatic-increase-in-hate-crimes-against-muslims-anti-islam-sentiment.html>. See generally Website for Park51 Community Center at <http://park51.org/>.

<sup>10</sup> See American-Arab Anti-Discrimination Committee, *2010 ADC Legal Report: Legal Advocacy & Policy Review* available at <http://www.adc.org/media/adc-publications/>.

instance of a group of Muslim women wearing hijab being harassed at a housing project's community center.<sup>11</sup>

Other sources, however, suggest that the increase in discrimination began well before the Park51 zoning battle. Equal Employment Opportunity Commission (EEOC) statistics show that a record number of Muslim workers are complaining of employment discrimination. The complaints range from co-workers calling colleagues 'terrorist' or 'Osama' to employers barring them from wearing head scarves or taking prayer breaks. Such complaints by Muslim workers totaled 803 in the year ending in September 2009. That represented an increase of 20% from the previous year and nearly 60% from 2005. Although Muslims make up less than two percent of the U. S. population, they accounted for about a quarter of the nearly 3,400 religious discrimination claims filed with the EEOC in the report year. Complaints by Catholics, Sikhs, Protestants, and others – people of all other faiths except Jews – fell in that year, as did claims of race, sex, and age discrimination.<sup>12</sup>

But these are mere statistics. The stories behind the statistics are even more compelling.

- In August 2010, a cab driver was attacked by a 21-year-old film student. Police said the student cursed at the driver after asking him if he was Muslim and then slashed his throat and stabbed him in several places when the cab driver answered in the affirmative.<sup>13</sup>
- In August 2010, a brick was thrown at the Madera Islamic Center in California. Later, signs were posted at the center, one of which stated, "Wake up America, the enemy is here."<sup>14</sup>
- In August 2010, the New York Post reported that an apparently inebriated man entered a Queens mosque and shouted anti-Muslim slurs while urinating on prayer rugs and calling worshippers "terrorists".<sup>15</sup>
- On May 12, 2010, the Islamic Center of Northeast Florida in Jacksonville was filled with approximately 60 people when a pipe bomb went off. The FBI released a surveillance video of what appeared to be a middle-aged white man carrying a gasoline container in the area of the bombing.<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, *N. Y. Times* (Sep.23, 2010) available at [http://www.nytimes.com/2010/09/24/business/24muslim.html?\\_r=1&hp](http://www.nytimes.com/2010/09/24/business/24muslim.html?_r=1&hp).

<sup>13</sup> *Muslim Cabdriver Stabbed in New York Bias Attack*, *Newsweek* (Aug. 25, 2010) available at <http://www.newsweek.com/blogs/the-gaggle/2010/08/25/muslim-cab-driver-stabbed-in-n-y-bias-attack.html>.

<sup>14</sup> *Arrest made in suspected central Calif. hate crime*, *San Francisco Chronicle* (Mar. 10, 2011) available at [http://articles.sfgate.com/2011-03-10/news/28678798\\_1\\_american-nationalist-brotherhood-holy-month-mosque-near-ground-zero](http://articles.sfgate.com/2011-03-10/news/28678798_1_american-nationalist-brotherhood-holy-month-mosque-near-ground-zero).

<sup>15</sup> *'Drunk' desecration at mosque*, *New York Post* (Aug. 26, 2010) available at [http://www.nypost.com/p/news/local/queens/drunk\\_desecration\\_at\\_mosque\\_fA7FZKYh59hx3Bjika6UGN](http://www.nypost.com/p/news/local/queens/drunk_desecration_at_mosque_fA7FZKYh59hx3Bjika6UGN).

<sup>16</sup> Knowles, David, *FBI Finds Pipe Bomb Used in Blast at Fla. Mosque*, *AOLNews* (May 12, 2010) available at <http://www.aolnews.com/2010/05/12/fbi-finds-pipe-bomb-used-in-blast-at-fla-mosque/>.

- Teenagers were arrested in September 2010 in Carlton, NY, for firing a shotgun and yelling obscenities outside a mosque.<sup>17</sup>
- The site of a new Tennessee mosque was damaged by arson in September 2010.<sup>18</sup>

That such incidents are happening on a widening scale should be a call for government action in the form of heightened protection and increased government oversight.

## II. Government Targeting of Muslims

Unfortunately, the challenges faced by Muslims in America are not limited to issues of personal bias and discrimination. Local, state, and federal government have also heightened the barriers of suspicion and isolation that these communities must overcome to feel a part of the common American experience.

### a. Local

American Muslims face challenges from state and local governmental bodies on issues of clothing and appearance, zoning of mosques, and employment. When such challenges rest solely upon the belief system of the targeted individual, which seems to be happening more frequently now than before, the action is unconstitutional and the damage is irreparable. Almost everyone has heard of the Park 51 zoning controversy in Lower Manhattan. While that was a hurtful experience, especially for the Muslim community in that part of New York, government officials acted fairly for the most part and refused to be drawn into the largely artificial controversy generated by political and media leaders who wanted to inflame passions against the American Muslim community for some unknowable reason.<sup>19</sup> Yet there have been many other controversies where public officials deserve a large share of blame. The ACLU or one of its state affiliates has been involved on behalf of many of those aggrieved.

- In localities all around the country, elected officials and political and religious activists have opposed mosque projects, often for pretextual or blatantly discriminatory reasons.<sup>20</sup>
- In Mayfield, Kentucky, the zoning board reversed a permit originally denied to a local Muslim resident to operate a prayer room in the town's central business district.<sup>21</sup>

<sup>17</sup> *Teens Arrested for Firing Shotgun Outside Western NY Mosque*, gothamist.com (Sep. 1, 2010) available at [http://gothamist.com/2010/09/01/teen\\_arrested\\_for\\_yelling\\_obsceniti.php](http://gothamist.com/2010/09/01/teen_arrested_for_yelling_obsceniti.php).

<sup>18</sup> Dan Gilgoff, *Tennessee Mosque Site Fire and Arson, Feds Say*, CNN Belief Blog (Sep. 3, 2010) available at <http://religion.blogs.cnn.com/2010/09/03/tennessee-mosque-site-fire-an-arson-feds-say/>.

<sup>19</sup> Mayor Bloomberg Discusses Landmarks Preservation commission Vote (Aug. 3, 2010) available at [http://www.ci.nyc.ny.us/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor\\_press\\_release&catID=1194&doc\\_name=http://www.ci.nyc.ny.us/html/om/html/2010b/pr337-10.html&cc=unused1978&rc=1194&ndi=1](http://www.ci.nyc.ny.us/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http://www.ci.nyc.ny.us/html/om/html/2010b/pr337-10.html&cc=unused1978&rc=1194&ndi=1).

<sup>20</sup> Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N. Y. Times (Aug. 7, 2010) available at <http://www.nytimes.com/2010/08/08/us/08mosque.html>



- In Portland, Maine, a group of Muslims was compelled to sue to use a former television repair shop they had purchased for prayer services and religious study. The case was resolved only after the city amended its land-use ordinance.<sup>22</sup>
- In Washington, the ACLU represented The Islamic Education Center of Seattle, a small Muslim nonprofit organization that holds prayer services, education programs, and cultural activities, after the city of Mountlake Terrace denied the Center a conditional land use permit.<sup>23</sup>
- In Georgia, we sued the City of Douglasville on behalf of a devout Muslim woman who was restrained, arrested, and jailed for several hours after refusing to remove her hijab, a religious head covering, in court.<sup>24</sup>
- In Arizona, we successfully challenged a Maricopa County policy restricting religious head coverings worn by detainees and inmates in county custody.<sup>25</sup>
- In Delaware, we came to the defense of a Muslim nurse who was told she could not wear her religious head covering to work at the New Castle County Detention Center. After the ACLU's intervention in the matter, the nurse received her requested religious accommodation.<sup>26</sup>
- In Southern California, we filed suit on behalf of Jameelah Medina, a Muslim woman who was forced by local deputies to remove her religious head covering while she was in custody in San Bernardino County's West Valley Detention Center.<sup>27</sup>
- Our affiliate in New York successfully brought suit on behalf of a Muslim prison guard who was told that he had to remove his head covering (known as a kufi) while working, even though he had worn it while on duty for many years. A federal judge ordered the New York Department of Corrections to allow the guard to resume wearing his head covering on the job.<sup>28</sup>
- In Southern California, we filed claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment, and several state law provisions on behalf of Souhair Khatib, a practicing Muslim woman who was

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<sup>21</sup> ACLU, *Muslim Prayer Space Granted Permit In Kentucky* (2010) available at <http://www.aclu.org/religion-belief/muslim-prayer-space-granted-permit-kentucky>.

<sup>22</sup> Zachary Heiden, *A Mosque in Maine*, ACLU Blog of Rights (Jul. 27, 2010) available at <http://www.aclu.org/blog/religion-belief/mosque-maine>.

<sup>23</sup> ACLU Defense of Religious Practice and Expression website available at <http://www.aclu.org/aclu-defense-religious-practice-and-expression>.

<sup>24</sup> ACLU, *ACLU Files Lawsuit On Behalf Of Muslim Woman Forced To Remove Head Covering In Georgia Courthouse* (2010) available at <http://www.aclu.org/religion-belief-womens-rights/aclu-files-lawsuit-behalf-muslim-woman-forced-remove-head-covering-geo>.

<sup>25</sup> ACLU Defense of Religious Practice and Expression website available at <http://www.aclu.org/aclu-defense-religious-practice-and-expression>.

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

<sup>27</sup> ACLU, *Medina v. County of San Bernardino* (2008) available at <http://www.aclu.org/religion-belief-womens-rights/medina-v-county-san-bernardino>.

<sup>28</sup> NYCLU, *Haqq v. Department of Correctional Services* (2007) (defending right of public employees to adhere to religious beliefs while at work) available at <http://www.nyclu.org/node/1062>.

- forced to remove her hijab when taken into custody at an Orange County courthouse holding facility.<sup>29</sup>
- We filed a federal lawsuit in Manhattan challenging a Coast Guard regulation denying merchant marine licenses to those who would not remove coverings for identity photographs.<sup>30</sup>
  - In Wisconsin, we filed suit on behalf of a Muslim woman who had been required to remove her headscarf in front of male prison guards in order to visit her husband at the Columbia Correctional Institution.<sup>31</sup>
  - We settled a lawsuit against the city of Omaha on behalf of Lubna Hussein, a practicing Muslim woman who wore a headscarf and long sleeves for religious reasons. She had twice been denied entry to pool property to watch her children swim because she refused to wear a swimsuit.<sup>32</sup>
  - In Florida, we represented a Muslim homemaker whose driver's license was revoked after she declined on religious grounds to remove her veil for a driver's license photo, even though the state allowed others to obtain driver's permits without photographs at all.<sup>33</sup>
  - In Virginia, we filed a complaint under the RLUIPA challenging a Virginia Department of Corrections policy requiring inmates to be clean-shaven and to keep their hair short. The policy infringed on the beliefs of Muslim and Rastafarian inmates who have religious objections to cutting their hair.<sup>34</sup>
  - In Arizona, we filed a lawsuit on behalf of a Maricopa County Sheriff's Office detention officer who was demoted and eventually forced to leave for failing to abandon his practice of wearing a beard in accordance with his Muslim faith.<sup>35</sup>
  - In Pennsylvania, we sued on behalf of a devout Muslim firefighter, Curtis DeVeaux, who was suspended for refusing for religious reasons to shave his

<sup>29</sup> H.G. Reza, *Muslim sues O.C. over right to wear head scarf*, Los Angeles Times, (Sep. 5, 2007) available at <http://articles.latimes.com/2007/sep/05/local/me-hijab5>

<sup>30</sup> ACLU, *NYCLU Challenges Coast Guard Ban on Religious Head Coverings in License Photographs* (2006) available at <http://www.nyclu.org/node/1062>

<sup>31</sup> ACLU, *Muslim Woman Sues Prison for Forcing Her to Remove Headscarf in Front of Male Guards and Prisoners* (2005) available at <http://www.aclu.org/religion-belief/muslim-woman-sues-prison-forcing-her-remove-headscarf-front-male-guards-and-prisoner>

<sup>32</sup> ACLU, *City of Omaha and ACLU of Nebraska Announce Settlement in Lawsuit Over Muslim Woman Barred from Public Pool* (2005) available at <http://www.aclu.org/religion-belief/city-omaha-and-aclu-nebraska-announce-settlement-lawsuit-over-muslim-woman-barred-pu>

<sup>33</sup> ACLU, *ACLU Says Orlando Court Decision in Veil Case Permits Government to Needlessly Restrict Religious Freedom Without Enhancing Security* (2003) available at <http://www.aclu.org/religion-belief/aclu-says-orlando-court-decision-veil-case-permits-government-needlessly-restrict-re>

<sup>34</sup> *Id.*

<sup>35</sup> ACLU *Defense of Religious Practice and Expression* website available at <http://www.aclu.org/aclu-defense-religious-practice-and-expression>



heard as required by city regulations.<sup>36</sup>

While this may seem like a long list, it represents just a fraction of the challenges faced by Muslims in American who seek to practice their faith in accordance with their beliefs. When local zoning requirements are met, the establishment of mosques and other religious facilities should not have to face additional hurdles inapplicable to other houses of worship. When religious clothing does not impact the use of a public facility, government officials should not be allowed to bar Muslims from that facility. When matters of personal appearance don't affect one's ability to do a job, government employers must not be permitted to penalize Muslim employees.

b. Federal

i. Material support<sup>37</sup>

Unfortunately, federal government actions are also harming American Muslims in their efforts to lead normal lives. In 2009, the ACLU released a comprehensive report, *Blocking Faith, Freezing Charity*, documenting the consequence of U.S. government actions on American Muslims' exercise of their right to profess and practice their religion through charitable giving. The ACLU's research shows that U.S. terrorism financing policies and practices are seriously undermining American Muslims' protected constitutional liberties and violating their fundamental human rights to freedom of religion, freedom of association, and freedom from discrimination.

Terrorism financing laws cover (i) schemes under which the government may designate organizations as terrorist through an administrative action in which the government shuts organizations down, often without allegations of criminal wrongdoing (criminal charges are not always brought in such cases), and (ii) criminal prosecutions for material support for terrorism or to a terrorist organization. These regimes raise different issues, but have in common a lack of fundamental due process safeguards and impose guilt by association. As a result, American Muslim organizations and individuals are unfairly targeted in violation both of their First and Fifth Amendment rights and international law. The laws prohibiting material support for terrorism are in desperate need of re-evaluation and reform to make them fair and effective. Intended as a mechanism to starve terrorist organizations of resources, these statutes instead effectively impose guilt by association and fail to provide guidance about what is and is not prohibited. Although the need to ensure that humanitarian aid and charitable donations are not diverted to support terrorism is a real and valid counterterrorism issue, both the material support statutes and the government's interpretation of the statutes raise constitutional and human rights concerns.

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<sup>36</sup> ACLU, *Pennsylvania Judge Upholds Muslim Firefighter's Religious Liberty in ACLU Lawsuit* (2006) available at <http://www.aclu.org/religion-belief/pennsylvania-judge-upholds-muslim-firefighters-religious-liberty-aclu-lawsuit>.

<sup>37</sup> This subsection relies wholly upon a report of the ACLU published in June 2009. ACLU, *Blocking Faith, Freezing Charity* (Jun. 2009) available at <http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf#page=2>.

These laws have a troubling impact on First Amendment-protected activity. Because the material support statutes impose punishment without regard for the intent or character of the support provided, these statutes punish wholly innocent assistance to arbitrarily blacklisted individuals and organizations, undermine legitimate humanitarian efforts, and can be used to prosecute innocent donors who intend to support only lawful activity through religious practice, humanitarian aid, speech, or association. The government has argued that those who provide support to designated organizations can run afoul of the law even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes, and take precautions to ensure that their support is indeed used for these purposes.<sup>38</sup>

The government's designation, seizing of assets, and law enforcement raids of Muslim charities; interview of donors to Muslim charities; and criminal prosecution of Muslim charity leaders are, at best, intimidating and have created a chilling effect on American Muslims' charitable giving. The obligation to give Zakat (charity or alms) is one of the core "five pillars" of Islam, the five duties considered essential for all Muslims. The obligation to give Zakat is seen as a sacred duty for all observant Muslims. Many Muslims believe that Zakat must be given to other Muslims and through Muslim charities that are familiar with the religious rules for the handling and distribution of Zakat, although there is not unanimity in this belief.

In interviews with American Muslim donors, the ACLU documented a pervasive fear among Muslim charitable donors that they may be arrested, retroactively prosecuted for donations made in good faith to legal Muslim charities, targeted for law enforcement interviews for exercising their religious obligation to pay Zakat, subpoenaed to testify in a criminal case, subjected to surveillance, deported or denied citizenship or a green card, or otherwise implicated because of charitable donations made in fulfillment of their religious obligation to give Zakat. The actions of our federal government are having a profound impact on the American Muslim community. At the very least, such actions should be carried out using reasonable and understandable standards, and with the extension of appropriate due process rights to those charities and individuals impacted so as to protect against purely arbitrary decision-making.

## ii. Attorney General Guidelines

An expansion of FBI investigative powers in the final days of the Bush administration allows racial and religious profiling to creep further into law enforcement and permits suspicionless spying on individuals' religious activities at their places of worship. New guidelines released in late 2008 replaced existing FBI guidelines for five types of investigations. The new guidelines reduced standards for beginning "assessments" (precursors to investigations), conducting surveillance, and gathering evidence, meaning the threshold to beginning investigations across the board was lowered. Under the revised guidelines, FBI agents no longer need "factual predication" to use paid informers, spy on a person's activities, or engage in other types of intrusive surveillance. All that is

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<sup>38</sup> See *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1142-48; *Humanitarian Law Project v. Ashcroft*, 352 F.3d 382, 397 (9<sup>th</sup> Cir. 2003); *Holder v. Humanitarian Law Project*, 561 U.S. \_\_\_\_ (2010) (upholding government position).

necessary is a hypothetical threat. More troubling still, the guidelines allow a person's race, religion, or ethnic background to be used as a factor in opening an investigation, opening the door for use of racial profiling as a matter of policy.

In fact, law enforcement has begun to monitor activities in certain mosques using paid informants to investigate people not suspected of wrongdoing. A woman in Texas reported FBI agents approaching her to serve as an informant. Similar reports have emanated from other parts of the country including Orange County, California, Michigan, and New York. These activities alone suggest a profiling in practice – one that has no basis in evidence or reliable theory.<sup>39</sup>

### iii. Discredited Radicalization Theory

A law enforcement environment that contemplates using racial and religious profiling as a basis – even one factor – in deciding who to target for investigation is bad enough, but when that construct means reliance upon erroneous theories that assert the dangers associated with one particular set of religious beliefs, a recipe for isolation and resentment is created. Just such a situation is in place today.

Whether due to mistake-laden official reports, demagoguery by political leaders, or media repetition, popular discourse is filled with misinformation about the Islamic faith. The New York City Police Department has issued a report based on fundamentally flawed methodology and erroneous, de-bunked, social science theories warning about the dangers of “radicalization” within the Muslim community in America. Such reports have been wholly discredited. Yet political leaders and the media pick up on the erroneous reports and cast dark aspersions over an entire faith community – that they are deserving of the suspicion and are appropriate targets for heightened government investigation.<sup>40</sup>

### III. Conclusion

It is our hope that this hearing will be the beginning of the federal government's effort to change its practices – to stop treating the American Muslim community as a ripe target for suspicion and investigation and instead to acknowledge the harms that have been done to the community by neighbors and by government. We urge Congress to take a closer look at such harms and to consider fashioning appropriate responses. We believe that further oversight into specific instances of known discrimination can be helpful in bringing such practices to a stop. In addition, we urge Congress to modify the material support practices as relates to charities – Muslim charities in particular. We also urge Congress to take such action as may be necessary to change the FBI guidelines now in use that permit racial and religious profiling.

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<sup>39</sup> *Id.* at 75 – 78.

<sup>40</sup> ACLU Statement to the House Homeland Security Committee, *The Extent of Radicalization in the American Muslim Community and that Community's Response*, Hearing (March 10, 2011) Available at: <http://www.aclu.org/free-speech-national-security-religion-belief/aclu-statement-house-homeland-security-committee-heari>