Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,
Plaintiffs – Appellees,

and ALLAN HAKKY; SAMANEH TAKALOO,
Plaintiffs

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,
Defendants-Appellants.

No. 17-2231 (L)
On Cross-Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

[Caption continued on next page]

BRIEF OF CHICAGO, LOS ANGELES, NEW YORK, PHILADELPHIA, AND OTHER CITIES AND COUNTIES, JOINED BY THE U.S. CONFERENCE OF MAYORS, AS *AMICI CURIAE* SUPPORTING PLAINTIFFS

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No. 17-2232
(8:17-cv-02921-TDC)

IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5, JANE DOE #6,
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Defendants – Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,
Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State,
Defendants – Appellants.

No. 17-2240
(8:17-cv-00361-TDC)

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 AND 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients,

Plaintiffs – Appellants,

and PAUL HARRISON; IBRAHIM AHMED MOHOMED; ALLAN HAKKY; SAMANEH TAKALOO,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS. 13

A. The Proclamation Violates the Establishment Clause. 13

1. The primary purpose of the Proclamation is to discriminate against Muslims. 16

2. The asserted national security rationale for the Proclamation is, at best, secondary. 19

3. The Proclamation does not cure the serious Establishment Clause violations of the Executive Orders 21

B. The Proclamation Unlawfully Discriminates Based On National Origin 23

II. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION.. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 26

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508 U.S. 520 (1993) 14, 15, 19

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici include some of the largest cities and counties in the United States. The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which presently includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor. *Amici* are categorically opposed to the travel bans adopted by the Trump Administration, including the current iteration, Proclamation 9645 ("the Proclamation"), which discriminates invidiously on the basis of religion and national origin and will significantly undermine the safety, economic well-being, and social cohesion in our communities and across the United States.

Our cities are heavily dependent on the contributions of

[1] The parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that no counsel for any party authored this brief, in whole or in part, and no person other than *amici* contributed monetarily to its preparation or submission.

immigrants.[2] Of the 16.6 million residents of Chicago, Los Angeles, New York City, and Philadelphia, more than five million are immigrants, who hail from 150 countries.[3] These cities account for almost one-fifth of the Nation's gross domestic product.[4] As of 2015, approximately 210,200 residents in the Chicago, Los Angeles, and New York City metropolitan areas were born in four of the Muslim-majority countries targeted by the Proclamation.[5]

Chicago, Los Angeles, and New York City are some of their jurisdictions' largest employers, collectively employing approximately 365,000 people. In New York City, 34% of city workers are foreign-

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[2] *Immigrants & Competitive Cities*, Americas Society/Council of the Americas, http://www.as-coa.org/sites/default/files/ImmigrantsandCompetitiveCities.pdf.

[3] Support for the data cited is in the appendix to this brief.

[4] Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, http://www.theatlantic.com/business/archive/2015/07/us-cities-immigrants-economy/398987/ (NYC, LA, Houston, and Chicago are roughly 1/5 of GDP).

[5] Alan Berube, *These communities have a lot at stake in Trump's executive order on immigration*, http://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration.

born; in Los Angeles, 22% are. Immigrants also make up a substantial portion of our cities' private workforces: 46% of the 4.3 million workers in New York; 26.5% of the 1.27 million workers in Chicago; and approximately 17% of the 640,000 workers in Philadelphia. At least 12,500 private employees work on international visas in Chicago, which is also home to more than 100,000 immigrant entrepreneurs. Immigrants are a majority of New York City's business owners; 44% in Los Angeles; 27% in Chicago; and 14% in Philadelphia.

Chicago and Los Angeles welcome and resettle some of the largest numbers of refugees in the United States. In 2016, approximately 2,091 refugees resettled in the Chicago area, including nearly 764 from the targeted countries. 2,322 resettled in the Los Angeles area, including 1,808 from Iran alone. 794 refugees arrived in Philadelphia, including 253 from the targeted countries. Approximately 1,300 refugees resettled in New York City from October 1, 2012 through September 30, 2016. And from October 1, 2016 through September 2017, our cities have become home to more than 3,000 refugees.

Chicago, Los Angeles, New York City, and Philadelphia also operate or are served by large international airports. More than 400

international flights, bringing more than 60,000 passengers, arrive daily in Chicago and Los Angeles alone. Tourism in Chicago, Los Angeles, New York City, and Philadelphia generates roughly $70 billion a year in local revenue. In 2016, our cities hosted more than 20 million foreign visitors, who spent an estimated $6.3 billion in Los Angeles County, and $1.88 billion in Chicago. As a result of the travel bans, Los Angeles stands to lose an estimated $736 million and New York expects to lose $600 million.[6] More generally, following EO-1, "the demand for travel to the United States took a nosedive, according to data from several travel companies and research firms."[7] The U.S. Department of Commerce reports that for the first five months of 2017, the number of international visitors fell by 5% overall, and 25-30% from Africa and the

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[6] John Maxfield, *More Foreign Visitors Say 'No Thanks' to U.S. as a Destination*, http://www.usatoday.com/story/money/2017/10/21/a-foolish-take-the-us-tourism-slump/106719412/.

[7] Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, http://www.nytimes.com/2017/02/20/travel/after-travel-ban-declining-interest-trips-to-united-states.html.

Middle East.[8]

Chicago, Los Angeles, New York City, and Philadelphia together have 162 four-year colleges and universities, with approximately 100,000 international students. Chicago is also home to 44 major hospitals, and Philadelphia is home to 29, which serve thousands of international patients a year. The Middle East is the top source of patients traveling to the U.S. for medical care.[9]

Like the two Executive Orders before it, the Proclamation is as misguided as it is unconstitutional. Our cities serve as gateways for immigrants and refugees starting new lives in America. And when they have come, "[e]verywhere immigrants have enriched and strengthened the fabric of American life."[10] Indeed, perhaps uniquely in the world, the identity of American cities has been forged from the toil of

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[8] National Travel and Tourism Office, "Non-Resident Arrivals to the United States: World Region of Residence," available at http://travel.trade.gov/view/m-2017-I-001/index.asp.

[9] Kristen Schorsch, *How Trump's Travel Ban Could Hit Medical Tourism Hard*, http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard.

[10] John F. Kennedy, *A Nation of Immigrants* 3 (Harper rev. ed. 2008).

immigrants.

But beyond our ideals, the Proclamation subverts the very national security purpose it claims to serve. With decades of experience policing neighborhoods that are home to immigrant populations, *amici* are keenly and uniquely aware that frightened or ostracized residents are reluctant to report crimes, against themselves or others, or behavior that should, in the interest of safety and national security, be reported as suspicious. Although this hurts the entire Nation, the effects on *amici* are especially profound. Chicago, Los Angeles, New York City, Philadelphia, and the other *amici*, as financial, political, and cultural hubs, draw unique attention from individuals looking to cause harm in this country. Additionally, local law enforcement officers play an increasingly important role in detecting and protecting against national security threats. For these and other reasons, cities are a crucial part of the first-line defense against terrorism.[11] And to serve these purposes,

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[11] *E.g.*, Mitch Silber and Adam Frey, *Detect, Disrupt, and Detain: Local Law Enforcement's Critical Roles in Combating Homegrown Terrorism and the Evolving Terrorist Threat*, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2508&context=ulj; David Thacher, *The Local Role in Homeland Security*, (cont. . . .)

our cities must be able to work with everyone in our diverse communities. Even at the strictly local level, the safety and security of our residents and visitors depends upon cooperation between the residents and local police. The U.S. Department of Justice's own Office of Community Oriented Policing Services has emphasized this fact time and again.[12] In short, by targeting immigrants based on religion and national origin, the Proclamation undermines trust between our law enforcement agencies and our immigrant communities, which in turn makes *all* of our residents and visitors, and indeed everyone in the country, less safe.

Overt discrimination presents other dangers. Immigrant residents of our cities who feel unwelcome are more likely to cut themselves off from public life and participation in public programs.

(. . . cont.) 39 Law & Soc'y Rev. 635 (Sept. 2005), http://deepblue.lib.umich.edu/bitstream/handle/2027.42/73848/j.1540-5893.2005.00236.x.pdf?sequence=1; *DHS Announces Expansion of the Securing the Cities Program*, http://www.dhs.gov/news/2015/09/14/dhs-announces-expansion-securing-cities-program.

[12] *E.g.*, *Community Policing Defined*, Dep't of Justice, Office of Community Oriented Policing Services (rev. 2014), http://ric-zai-inc.com/Publications/cops-p157-pub.pdf.

They may refuse to participate in public health programs such as vaccinations or to seek medical care for contagious diseases. They may keep their children out of school to avoid harassment and stay away from mosques because of the fear that they will be unsafe. These effects will not be limited to individuals from the targeted countries. Thousands of other Muslims in the *amici* cities and counties have reason to worry that the public will embrace the anti-Muslim stance embodied in the Proclamation. It therefore places millions of people at risk of harm or being driven underground, which makes both those residents and our cities less safe.

Worse still, the message that citizens of majority-Muslim countries threaten national security conveys that members of those communities, and other immigrant communities, are to be distrusted and feared. Thus, targeting Muslims makes these residents more vulnerable to victimization, and adds to the difficulty local governments face in trying to provide protection. At the extreme, this climate gives rise to hate crimes. The Southern Poverty Law Center reports that in the 34 days following the 2016 presidential election, there were 1,094 hate crimes and lesser hate incidents; 315 were categorized as anti-

immigrant, and 112 as anti-Muslim.[13] In cities across the country, hate crimes have risen dramatically since that election. New York City reported twice the number of hate crime incidents in the three months after the election compared to the same period a year prior. In Los Angeles, hate crime incidents doubled in the month following the election. And in the first five weeks of 2017, the number of hate crimes recorded in Chicago was more than triple the number for the same period in 2016. Philadelphia received more reports of hate crimes in the first half of 2017 than in all of 2016, and, at that rate will see more hate crimes in 2017 than in the previous three years combined.

The Proclamation also undermines local laws prohibiting discrimination based on religion and national origin, among other invidious grounds, in all aspects of life – housing, employment, public accommodation, transportation, schooling, and government services. *E.g.*, Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-115-180, 13-72-040; Los Angeles Charter §§ 104(i), 1024; Los Angeles Admin.

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[13] *Update:1,094 Bias-Related Incidents in the Month Following the Election*, http://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election.

Code §§ 4.400, 10.8, 10.13; New York City Charter § 900; N.Y.C. Admin. Code §§ 4-116; 8-107; Philadelphia Code §§ 9-1101, 9-1103, 9-1106, 9-1108. Such laws reflect *amici*'s strong commitment to equal rights, as well as their belief that diversity enriches us and diminishes no one. The Proclamation's blatant discrimination turns the clock back on civil rights.

Finally, the Proclamation deprives our communities and our residents of the opportunity to interact with persons from the targeted countries, including not just people who are barred but others who decide not to travel to the United States, much less to live here. These individuals enrich us with their customs and celebrations, their hard work and perseverance, and their unique skills and training. Our cities would be bereft without them. Foreign residents and students also make an immeasurable contribution to America's ability to participate in the global economy, among other reasons because fewer than half of Americans have passports.[14] Thus, many Americans become acquainted with other cultures only if visitors and students from foreign

[14] Sally Herships, *Trump's travel ban worries international students*, http://www.marketplace.org/2017/02/08/world/overseas-students.

countries come here.

Amici file this brief to urge the court to affirm the district court's preliminary injunction.

SUMMARY OF ARGUMENT

Defendants have failed to establish that the district court abused its discretion in issuing the preliminary injunction.

The district court properly recognized that the Proclamation violates the Establishment Clause. The record presents compelling evidence that the Proclamation continues to be motivated by President Trump's stated belief that "Islam hates us" and his related desire to exclude Muslims. Broadcast many times and in many ways, the President's anti-Muslim message has been clear and consistent. Accordingly, the national security considerations defendants cite are, at best, a secondary consideration. In addition, the Proclamation's minor modifications to the prior travel bans fall far short of curing the prior, egregious Establishment Clause violations.

The Proclamation also unlawfully discriminates based on national origin. The Immigration and Nationality Act of 1965 prohibits this arbitrary, blanket discrimination.

Plaintiffs, and *amici*, would be greatly harmed if the Proclamation were not enjoined. In contrast, the injunction does not prevent defendants from individually vetting those who apply for entry from the targeted countries. The district court appropriately balanced the interests on both sides in issuing the injunction.

ARGUMENT

Like the EOs, the Proclamation continues to ban immigration by most individuals from Iran, Libya, Somalia, Syria, and Yemen. It adds most individuals from Chad, another Muslim-majority country. And it adds perhaps a few hundred from North Korea and Venezuela—the only two countries that are not predominately Muslim. Thus, the vast majority of people affected by the Proclamation are Muslim.

The Proclamation's minor changes from EO-2 are mere decoration—foreign policy non-sequiturs strung together in a single document to attempt to cast it as something other than round three of

invidious discrimination based on religious and national origin. The district court properly enjoined it.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Proclamation Violates The Establishment Clause.

The Establishment Clause prohibits any "law respecting an establishment of religion." It enshrines, in the first words of the First Amendment, the special protection that the Framers intended for religion to have from governmental compulsion. Those words were "written by the descendants of people who had come to this land precisely so that they could practice their religion freely," and were "designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 8 The Papers of James Madison 299 (Robert A. Rutland ed., 1973) ("The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.").

Consistent with these principles, the "clearest command" of the Establishment Clause is that the government cannot favor or disfavor one religion over another. *Larson v. Valente,* 456 U.S. 228, 244 (1982); *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-36 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion . . . ."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (Establishment Clause "forbids hostility toward any [religion]"); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("[T]he State may not adopt programs or practices . . . which aid or oppose any religion. This prohibition is absolute.") (internal citations and quotation omitted).

The Proclamation violates the Establishment Clause by disfavoring Muslims. Five of the targeted countries are, as in EO-2, Muslim-majority countries, and now there is a sixth, Chad, as well. That the Proclamation does not explicitly reference Islam is beside the point. The Establishment Clause "extends beyond facial discrimination" and "protects against governmental hostility which is masked, as well as overt. The Court must survey meticulously the

circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (citation and quotation omitted).

Consistent with this Court's conclusion in the prior travel ban appeal, *IRAP v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017) (en banc), *vacated and remanded as moot*, No. 16-1436 (U.S. Oct. 10, 2017), the district court found that the facially legitimate reason for the Proclamation defendants claimed is not bona fide. R. 46 at 64-65. The court then assessed the Proclamation under the three-part test of *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).[15] If a policy fails any part, it violates the Establishment Clause, *Edwards v. Aguillard,* 482 U.S. 578, 583 (1987), and here, the Proclamation fails at least the first. As the district court recognized, there is every indication that the predominant purpose of the Proclamation was religious discrimination,

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[15] Defendants urge reliance on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din,* 135 S. Ct. 2128 (2015). First Cross-Appeal Brief for Appellants ["Trump Br."] 40-42. These cases did not involve limits the Establishment Clause imposes on the federal government's immigration powers. Instead, both cases involved discretionary decisions made by executive officers to admit or deny specific aliens under statutory immigration restrictions, the constitutionality of which was not challenged.

and that the stated secular purpose of protecting national security was, at best, a secondary consideration. JA 1065-76. Moreover, the district court properly found that the Proclamation does not adequately cure the serious Establishment Clause violations in the earlier Executive Orders.

1. The primary purpose of the Proclamation is to discriminate against Muslims.

President Trump's formal statement calling for "a total and complete shutdown of Muslims entering the United States," JA 135, was a defining moment of his campaign, and a policy position he defended by asserting that "Islam hates us," JA 305.[16] Just one week after swearing the oath of office, he moved to turn that campaign rhetoric into official policy, banning travel to the United States from seven Muslim-majority countries. After EO-1 was enjoined on due process grounds, President Trump issued EO-2—a measure that made minor technical changes to EO-1, but preserved the ban on entry of

[16] Campaign statements may not always evince intent, since candidates sometimes pledge one thing and do another once elected. But here, President Trump confirmed the discriminatory purpose of his travel bans after taking office—and they have functioned exactly as he promised when campaigning.

nationals from six of these seven countries.[17] All the while, he repeatedly confirmed that these Executive Orders spring from the same discriminatory well as his campaign promise. He declared, for example, that EO-2 was "a watered down version of the first one" and lamented that "we ought to go back to the first one and go all the way." JA 780. After reviewing this and other evidence, this Court rightly concluded that "[t]he evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2's primary purpose is religious." *IRAP*, 857 F.3d at 594.

The Proclamation is nothing more than a repackaged version of the same discriminatory policy. As the district court noted, "the underlying architecture of the prior Executive Orders and the Proclamation is fundamentally the same." JA 1067. Moreover, the impact of the Proclamation again "closely aligns with religious affiliation." JA 1066. Indeed, of the eight countries whose citizens are now banned, five are the same Muslim-majority countries that have been banned from the beginning, and another Muslim-majority country,

[17] Defendants omit EO-1 from their statement of facts.

Chad, has been added.

Adding fewer than 100 North Korean citizens, JA 1066, and certain Venezuelan officials and their families, does not change this. These additions are window dressing. They reflect entirely different foreign policy concerns from those defendants claim as a basis for the list of Muslim countries. North Korea is a rogue state, and Venezuela is hostile to the United States. And even then, these restrictions are nearly pointless. North Korean citizens do not emigrate in any event; and only certain Venezuelan government officials and their families are barred—private Venezuelan citizens are not. Indeed, defendants themselves recognize that the Proclamation's collection of countries serves different interests. Trump Br. 11. Thus, these separate agenda items cannot conceal the religious motivation for targeting the Muslim countries. That the Proclamation also bars a small number of non-Muslims from the targeted Muslim countries likewise does not matter. That makes its religious gerrymander imprecise and inefficient; it does not make it constitutional. Overwhelmingly, the Proclamation operates to exclude Muslims from entering the United States, precisely as President Trump has long promised. Collateral damage to non-

Muslims is not evidence of a secular purpose.

Thus, a reasonable observer would conclude that the Proclamation shares the same primary purpose as its predecessors: discrimination against adherents of Islam.

2. The asserted national security rationale for the Proclamation is, at best, secondary.

It is of no moment that the Proclamation professes a national security purpose, or that it lacks an explicit religious preference. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Instead, it is "the duty of the courts" to distinguish a "sincere" secular purpose from one that is a "sham," or that is "secondary" to a "predominately religious" purpose. *McCreary*, 545 U.S. at 862.

The Proclamation's asserted national security interests are suspect. The observation the Ninth Circuit made in reviewing EO-1—that there is "no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States," *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017)—

remains true with respect to the countries targeted by the Proclamation. Nor is there a legitimate concern that individuals from those countries present a heightened risk of perpetrating such an attack in the future; to the contrary, numerous former national security officials have attested that there is no national security rationale for these measures against the targeted Muslim-majority countries. JA 879-85, 892-903. Although defendants now argue that the Proclamation is the independent product of DHS Review, Trump Br. 8-10, 40, 48-49, the district court found that the evidence indicates that this outcome "was at least partially pre-ordained," JA 1068. Moreover, the information-sharing deficiencies the Proclamation identifies do not establish the need for "the specific response of an unprecedented, sweeping nationality-based travel ban against majority-Muslim nations." JA 1072.

Thus, a reasonable observer would conclude that national security considerations are secondary to President Trump's stated purpose to discriminate against Muslims.

3. The Proclamation does not cure the serious Establishment Clause violations of the Executive Orders.

DHS Review and the Proclamation's modifications to EO-2 are also insufficient because "the Government's cure must be made 'as persuasively as the initial' violation." JA 1075 (quoting *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016)). *McCreary* rejected the argument that the two defendant counties remedied their earlier Establishment Clause violation by modifying their courthouse displays of the Ten Commandments to add certain historical documents, such as the Declaration of Independence. The Court declined to limit its focus to only "the last in a series of governmental actions, however close they may all be in time and subject." 545 U.S. at 866. Noting that the counties had failed to repudiate their earlier resolutions endorsing the religious message of the displays, *id.* at 871-72, the Court concluded that a reasonable observer would not "swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays," *id.* at 872.

As in *McCreary*, the Administration's remedial efforts fall far short when assessed in light of the egregious Establishment Clause

violations of the Executive Orders. Those Orders barred entry of millions of members of what is a religious minority in this country—and that action was closely tied to explicit statements of animus towards that religious group. *See generally IRAP*, 857 F.3d at 572 (concluding that EO-2 "drips with religious intolerance, animus, and discrimination"). This frontal assault on the Establishment Clause came from the President himself. It was the focus of extensive nationwide attention, and applied nationwide.

The Proclamation is weak medicine for the serious harm wrought by the EOs. For example, the President has failed to make any "public statements showing any change in [his] intentions relating to a Muslim ban." JA 1073. Rather, as the district court found, the Proclamation "doubles down on" the Orders' fundamental approach. JA 1068.

As important, defendants seem to misunderstand what is needed to break with the past. Merely offering new justifications, even if they are non-discriminatory, for past actions that were driven by discriminatory animus does not suffice. That is why adding non-religious documents to a religious display did not cure the violation in *McCreary*. Just so here—adding two non-Muslim countries to a Muslim

ban does not change or even obscure the ban's purpose. That purpose was set at the outset and remains the purpose today.

Accordingly, the district court properly found that defendants failed to purge the taint of the prior Establishment Clause violations.

B. The Proclamation Unlawfully Discriminates Based On National Origin.

Defendants' claim that the Proclamation is not a religious ban at all but one based on national origin does not save it. To the contrary, the discrimination based on national origin violates the Immigration and Nationality Act of 1965 ("INA"). "During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its immigration laws." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). But, as President Kennedy noted, "the national origins quota system ha[d] strong overtones of an indefensible racial preference." John F. Kennedy, *A Nation of Immigrants* 45 (Harper rev. ed 2008). Accordingly, "[t]hroughout the latter half of the Twentieth Century, Congress moved away from such discriminatory policies. The most profound change was the [INA]," which "eliminated discrimination on the basis of race and national

origin." *Olsen*, 990 F. Supp. at 37; *see also* 1965 U.S.C.C.A.N. 3328, 3328 (quoting S. Rep. No. 89-748) (principal purpose of INA was "to repeal the national origin quota provisions of the [INA], and to substitute a new system for the selection of immigrants to the United States"). The INA could not be more clear: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Moreover, "[t]he legislative history surrounding the [INA] is replete with the bold anti-discriminatory principles of the Civil Rights Era. Indeed, the [INA] was passed alongside the Civil Rights Act of 1964 and the Voting Rights Act of 1965." *Olsen*, 990 F. Supp. at 37. The Proclamation directly violates section 1152(a).

To be sure, the President has broad authority over the entry of aliens generally under 8 U.S.C. § 1182(f). But for a number of reasons, section 1182(f) does not permit the Proclamation's discrimination.

First, section 1182(f) authorizes the President to "suspend" the entry of aliens under certain circumstances. "The word 'suspend' connotes a temporary deferral." *Hoffman ex rel. NLRB v. Beer Drivers*

& Salesmen's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir. 1976). Unlike the prior EOs, however, "the Proclamation has effectively imposed a permanent, rather than temporary, ban on immigrants from the Designated Countries." JA 1038. Thus, section 1182(f) does not apply.

In any event, defendants' reliance on section 1182(f) fails because, as the Ninth Circuit recognized in its ruling on EO-2, "§ 1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f)." *Hawaii v. Trump*, 859 F.3d 741, 779 (9th Cir.), *cert. granted, judgment vacated as moot*, No. 16-1540 (U.S. Oct. 24, 2017), *and vacated and dismissed as moot*, No. 17-15589 (9th Cir. Nov. 2, 2017). Section 1152(a)'s prohibition on discrimination was enacted after section 1182(f) and is properly understood as a limitation on the authority granted under section 1182(f) to suspend entry. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S.

120, 133 (2000).[18] Thus, although section 1182(f) grants the President authority to suspend entry of a class of immigrants whose entry "would be detrimental to the interests of the United States," section 1152 declares Congress's determination that it is *not* in the national interest to discriminate based upon national origin. This reading also construes these provisions "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995), and "fit[s] all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959). By contrast, to read section 1182(f) as though section 1152(a) did not exist is inconsistent with settled rules of statutory construction and should be rejected. *E.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts

[18] Defendants argue that section 1185(a)(1) should prevail as the more recent provision because it was amended after the enactment of section 1152(a). Trump Br. 38. That claim should be rejected. The amendment of section 1185(a)(1) did not address the specific subject of discrimination based on nationality in the issuance of an immigrant visa. "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

thereof."). Because section 1182(f) is constrained by section 1152(a), section 1182(f) no more empowers the President to discriminate on national origin than it allows him to suspend immigration by women.[19]

In addition, section 1182(f) should be read in light of the grounds for denial of admission for terrorist activity that are specifically set forth in section 1182(a)(3)(B). That provision mandates an individualized inquiry; it does not authorize blanket exclusion based solely on the applicant's nation of origin.

Even considering section 1182(f) in isolation, the Proclamation's exclusion of immigrants from the designated countries, solely because of the happenstance of their birthplace, cannot stand. The plain language

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[19] The Court should reject defendants' assertion that invoking section 1152(a) to limit the President's authority under section 1182(f) raises "serious constitutional concerns." Trump Br. 34, 36. Defendants cite *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), for the proposition that rules concerning the admission of aliens draw on "inherent executive power," as well as legislation, Trump Br. 53, ignoring the Court's recognition in *Knauff* itself that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," 338 U.S. at 543. As for defendants' specter that the President might sometime act on the "brink of war," Trump Br.36, that is not the situation here. In any event, the Supreme Court has emphasized that even "a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). *See also Korematsu v. United States*, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

of section 1182(f) requires a determination that the entry of aliens or a class of aliens is "detrimental to the interests of the United States," and here it is simply not possible to say that every single person, or even a majority of persons, born in the targeted countries presents a security risk to the United States. Most obviously, this group includes people who left their birthplace as infants or children, and perhaps had parents who were not citizens of their children's birthplace country. These individuals could have lived nearly their entire lives in countries that even defendants do not think present any risk to the United States, and yet they are banned solely because of where they were born. Even on immigration matters, discretion must be exercised "in a reasoned manner." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). The Proclamation's classification based on national origin is not rational.

II. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION.

Defendants have failed to establish that the district court abused its discretion in concluding that plaintiffs would suffer irreparable harm in the absence of a preliminary injunction. In contrast to the specific, concrete harms that plaintiffs would sustain if the Proclamation were

not enjoined, defendants identify no actual irreparable harm from the injunction. They rely upon the general proposition that the interests of the public are impaired "by barring effectuation of a judgment of the President," Trump Br. 3, but the district court properly determined that "Defendants are not directly harmed by a preliminary injunction preventing them from enforcing a Proclamation likely to be found unconstitutional," JA 1077. Moreover, even with the injunction in place, visa applicants from the targeted countries still will be screened through the standard, individualized vetting process. JA 1078.

Accordingly, *amici* urge the Court to affirm the preliminary injunction.

CONCLUSION

The district court's preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, I electronically filed the foregoing Brief and Appendix of Chicago, Los Angeles, New York, Philadelphia, and Other Cities and Counties joined by the U.S. Conference of Mayors as *Amici Curiae* in Support of Plaintiffs with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief and appendix comply with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because they use a proportionally spaced typeface (Century Schoolbook) in 14-point using Microsoft Word. The brief and appendix comply with the type-volume limits of Fed. R. App. P. 29(a)(5) because they together contain no more than 7,088 words, which is less than half of the 15,300 words allowed for principal briefs under Fed. R. App. P. 28.1(e)(2)(B)(i).