

EDWARD N. SISSEL
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON*
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764
benna.solomon@cityofchicago.org
**Pending Pro Hac Vice Motion*
Attorneys for Amicus Curiae,
City of Chicago

DONNA Y. L. LEONG, 3226
Corporation Counsel
ROBERT M. KOHN, 6291
NICOLETTE WINTER, 9588
Deputies Corporation Counsel
530 S. King St., Room 110
Honolulu, HI 96813
(808) 768-5100
robert.kohn@honolulu.gov
nwinter@honolulu.gov
Attorneys for City and County
of Honolulu

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Civil Action No. 1:17-cv-00050-
DKW-KSC

**MOTION FOR LEAVE TO FILE BRIEF
OF CHICAGO, LOS ANGELES, NEW
YORK, PHILADELPHIA, AND OTHER
MAJOR CITIES AND COUNTIES AS
AMICI CURIAE IN SUPPORT OF
PLAINTIFFS' MOTION TO CONVERT
THE TEMPORARY RESTRAINING
ORDER TO A PRELIMINARY
INJUNCTION (Dkt. 238)**

Hearing March 29, 2017, 9:30 a.m.

Honorable Derrick K. Watson

RYAN P. POSCABLO
BRIAN NEFF
ELIBERTY LOPEZ
Riley Safer Holmes & Cancila LLP
1330 Avenue of the Americas
6th Floor
(212) 660-1030
rposcablo@rshc-law.com
New York, NY 10019

NICK KAHLON
Riley Safer Holmes & Cancila LLP
Three First National Plaza
70 W. Madison Street, Suite 2900
Chicago, IL 60602
(312) 471-8700
nkahlon@rshc-law.com

Attorneys for Amicus Curiae
City of Chicago

Additional Counsel for Amici Curiae

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007
*Attorney for Mayor and the City
Council of New York*

SOZI PEDRO TULANTE
City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
Attorney for City of Philadelphia

ANNE L. MORGAN
City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, TX 78767
512-974-2507
Anne.morgan@austintexas.gov
Attorney for City of Austin

EUGENE L. O'FLAHERTY
Corporation Counsel
One City Hall Square, Room 615
Boston, MA 02201
(617) 635-4034
eugene.oflaherty@boston.gov
*Attorney for Boston and
Mayor Martin J. Walsh*

G. NICHOLAS HERMAN
General Counsel
The Brough Law Firm, PLLC
1526 E. Franklin St., Suite 200
Chapel Hill, NC 27514 (919)
929-3905
herman@broughlawfirm.com
Attorney for Town of Carrboro

MICHAEL N. FEUER
City Attorney
of the City of Los Angeles
200 N. Main Street, 800 CHE
Los Angeles, CA 90012
(213) 978-8100
mike.feuer@lacity.org
*Attorney for
City of Los Angeles*

MATTHEW T. JERZYK
City Solicitor
580 Broad Street
Central Falls, RI 02863
(401) 616-2435
MJerzyk@CentralFallsRI.us
*Attorney for James A. Diossa,
Mayor of Central Falls, Rhode Island*

KIMBERLY M. FOXX
States Attorney for Cook County
69 W. Washington, 32nd Floor
Chicago, IL 60602
(312) 603-6934
kent.ray@cookcountyil.gov
Attorney for Cook County, Illinois

GREGORY L. THOMAS
City Attorney for the
401 Broadway, Suite 101
Gary, IN 46402
(219) 881-1400
glthomas@ci.gary.in.us
Attorney for Gary

ELEANOR M. DILKES
City Attorney
410 E. Washington St.
Iowa City, IA 52240
(319) 356-5030
eleanor-dilkes@iowa-city.org
Attorney for City of Iowa City

AARON O. LAVINE
City Attorney
108 E. Green St.
Ithaca, NY 14850
(607) 274-6504
*Attorney for Svante L. Myrick,
Mayor of Ithaca*

JEREMY FARRELL
Corporation Counsel
Jersey City Law Department
280 Grove Street
Jersey City, New Jersey 07302
Attorney for City of Jersey City

MICHAEL P. MAY
City Attorney
210 Martin Luther King Jr. Blvd.,
Room 401
Madison, Wisconsin 53703
(608) 266-4511
Attorney for City of Madison

SUSAN L. SEGAL
City Attorney
350 South 5th Street, Room 210
Minneapolis, MN 55415
(612) 673-3272
Susan.segal@minneapolismn.gov
Attorney for City of Minneapolis

MARC P. HANSEN
County Attorney
Montgomery County, Maryland
101 Monroe St., 3rd Floor
Rockville, Maryland, 20850
(240) 777-6740
Marc.Hansen@montgomerycountymd.gov
Attorney for Montgomery County

BARBARA J. PARKER
City Attorney
1 Frank H. Ogawa Plaza, Sixth Floor
Oakland, California 94612
(510) 238-3814
Bparker@oaklandcityattorney.org
Attorney for Oakland

TRACY REEVE
City Attorney
430 City Hall
1221 SW Fourth Ave.
Portland, OR 97204
(503) 823-4047
Tracy.Reeve@portlandoregon.gov
Attorney for Portland

JEFFREY DANA
City Solicitor
444 Westminster Street, Suite 220
Providence, RI 02903
(401) 680-5333
jdana@providenceri.com
*Attorney for City of Providence and
Mayor Jorge O. Elorza*

MICHAEL A. GARVIN
City Counselor
City of St. Louis Law Department
1200 Market Street, Room 314
St. Louis, Missouri 63103
(314) 622-3361
GarvinM@stlouis-mo.gov
Attorney for City of St. Louis

SAMUEL J. CLARK
City Attorney
400 City Hall
15 Kellogg Blvd W
Saint Paul, MN 55102
(651) 266-8710
samuel.clark@ci.stpaul.mn.us
Attorney for City of Saint Paul

DENNIS J. HERRERA
San Francisco City Attorney
City Attorney's Office
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, California 94102
(415) 544-4700
Attorney for City and County of San Francisco

JAMES R. WILLIAMS
County Counsel
OFFICE OF THE COUNTY
COUNSEL
70 West Hedding Street, 9th Floor
San Jose, California 95110-1770
(408) 299-5900
Attorney for Santa Clara County

JOSEPH LAWRENCE
Interim City Attorney
City of Santa Monica
1685 Main Street, Room 310
Santa Monica, CA 90401
(310) 458-8336
Attorney for City of Santa Monica

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200
peter.holmes@seattle.gov
Attorney for City of Seattle

MICHAEL M. LORGE
Corporation Counsel
5127 Oakton Avenue
Skokie, IL 60077
(847) 933-8270
Attorney for Village of Skokie

CRISTAL BRISCO
Corporation Counsel
City of South Bend Department of
Law
227 W. Jefferson Blvd., Suite 1200S
South Bend, IN 46601
(574) 235-9241
cbrisco@southbendin.gov
Attorney for South Bend

MICHAEL JENKINS
JENKINS & HOGIN, LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266
(310) 643-8448
MJenkins@LocalGovLaw.com
Attorney for West Hollywood

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae include some of the largest cities and counties in the United States. The population of Chicago, Los Angeles, New York City, and Philadelphia alone is well over 16.6 million.¹ These cities account for almost one-fifth of the country's gross domestic product.²

Our cities are heavily dependent on the contributions of immigrants.³ Well over five million residents of Chicago, Los Angeles, New York City, and Philadelphia are immigrants, from more than 150 countries. As of 2015, this included approximately 213,100 residents in the Chicago, Los Angeles, and New York City metropolitan areas who were born in five of the six countries targeted by the Executive Order.⁴

Chicago, Los Angeles, and New York City are also some of the largest employers in their jurisdictions, collectively employing approximately 365,000 people. In New York City, 34% of city workers are foreign-born, as are 22% of Los

¹ Support for the data in this statement of interest is included in the appendix to this brief.

² Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, <https://www.theatlantic.com/business/archive/2015/07/us-cities-immigrants-economy/398987/> (New York, Los Angeles, Houston, and Chicago account for one-fifth of GDP).

³ *Immigrants & Competitive Cities*, Americas Society/Council of the Americas, <http://www.as-coa.org/sites/default/files/ImmigrantsandCompetitiveCities.pdf>.

⁴ Alan Berube, *These communities have a lot at stake in Trump's executive order on immigration*, <https://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration/>.

Angeles municipal employees. 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 Philadelphia's workforce of more than 640,000. At least 12,500 private employees work on international visas in Chicago alone. Immigrants make up more than half of New York City's business owners, 27% of in Chicago, 44% in Los Angeles, and 14% in Philadelphia.

Chicago and Los Angeles welcome and resettle some of the largest numbers of refugees in the United States. From October 2015 to September 2016, approximately 2100 refugees were resettled in the Chicago area, including nearly 800 from the targeted countries. 2800 were resettled in the Los Angeles area, and 1900 were from Iran alone. 682 refugees arrived in Philadelphia, including 176 from the targeted countries. Approximately 1300 refugees have been resettled in New York City in the past five years.

Chicago, Los Angeles, New York City, and Philadelphia also operate and are served by international airports. On any given day, more than 400 flights arrive at Chicago and Los Angeles airports from international destinations, bringing more than 60,000 passengers. The tourism sectors of the local economies in Chicago, Los Angeles, New York City, and Philadelphia account for roughly \$70 billion a year in local revenue. In 2016, our cities hosted more than 20 million foreign visitors, with direct spending in Los Angeles County estimated at \$6.3 billion dollars last year alone, and \$1.88 billion annually in Chicago, including \$1.25 million by tourists from the six targeted countries. As a result of the Executive Order, New York City

now predicts a 300,000-person drop in foreign visitors this year.⁵ More generally, “[f]ollowing President Trump’s Jan. 27 executive order banning people from seven predominantly Muslim countries from entering the United States, the demand for travel to the United States took a nosedive, according to data from several travel companies and research firms.”⁶ The second Executive Order is not meaningfully different, and will have the same effect.

Chicago, Los Angeles, New York City, and Philadelphia together have 162 four-year colleges and universities, which have approximately 100,000 international students. Chicago is also home to 44 major hospitals, which serve thousands of international patients a year. And the Middle East region is the top source of patients traveling to the U.S. for medical care.⁷

Amici are profoundly opposed to the Executive Order, which is as misguided as it is unconstitutional. *Amici* are further opposed to actions by the federal government pursuant to the Executive Order. Our cities serve as the gateways for immigrants and refugees starting new lives in the United States. And when they have come, “[e]verywhere immigrants have enriched and strengthened the fabric of

⁵ Patrick McGeehan, *New York Expects Fewer Foreign Tourists, Saying Trump Is to Blame*, https://www.nytimes.com/2017/02/28/nyregion/new-york-foreign-tourists-trump-policies.html?_r=0.

⁶ Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, <https://www.nytimes.com/2017/02/20/travel/after-travel-ban-declining-interest-trips-to-united-states.html>.

⁷ 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>.

American life.”⁸ The Executive Order, and the anti-immigrant principles behind it, offends our cities’ values; violates the principles girding our local governments; and undermines our laws, including those prohibiting discrimination on precisely the invidious grounds reflected in the Executive Order.

But beyond our ideals, the Executive Order subverts the very national security purpose it claims to serve. The unlawful discrimination based on religion and national origin undermines trust between our law enforcement agencies and our immigrant communities, which in turn hinders our ability to protect our residents. Chicago, Los Angeles, New York City, Philadelphia, and the other *amici*, as financial, political, and cultural hubs in the United States, draw unique attention from individuals looking to cause harm in this country. Additionally, local law enforcement officers play an increasingly important role in efforts to detect and protect against national security threats. For these and other reasons, cities are a crucial part of the first-line defense against terrorism.⁹ To serve the purpose of national security, our cities must be able to work in coordination with everyone in our communities, including our diverse ethnic populations. Even at the strictly local level, the safety and security of our residents and visitors, which is the

⁸ John F. Kennedy, *A Nation of Immigrants* 3 (Harper rev. ed 2008).

⁹ *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*, 39 *Law & Soc’y Rev.* 635 (Sept. 2005), <https://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*, <https://www.dhs.gov/news/2015/09/14/dhs-announces-expansion-securing-cities-program>.

foremost priority of any city in America, depends upon cooperation between the residents and local police. The United States Department of Justice's own Office of Community Oriented Policing Services has emphasized this fact time and again.¹⁰ With decades of experience policing neighborhoods that are home to immigrant populations, *amici* are keenly and uniquely aware that 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. In short, by targeting immigrants based on religion and national origin, the Executive Order makes *all* of our residents and visitors, and indeed everyone in the country, less safe.

Amici have other very real concerns about the impact of the Executive Order on their communities. The Executive Order's 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 immigrant residents more vulnerable to victimization, and adds to the burden of local governments to provide protection. At the extreme, this climate gives rise to hate crimes. The Southern Poverty Law Center reports that in the first 34 days following the 2016 election, there were 1,094 hate crimes and lesser hate incidents; 315 were categorized as anti-immigrant, and

¹⁰ *E.g., Community Policing Defined*, Dep't of Justice, Office of Community Oriented Policing Services (rev. 2014), <https://ric-zai-inc.com/Publications/cops-p157-pub.pdf>.

112 as anti-Muslim.¹¹ Cities across the country saw dramatic rises in hate crimes in the three months after the election. Among these, New York City reported twice the number of hate crime incidents compared to the same period a year prior; Chicago had twice as many arrests for hate crimes; in Philadelphia, there was a 157% increase in the number of hate crimes reported to police, and a staggering 1433% increase in hate or bias incidents reported to the Philadelphia Commission on Human Relations. In Los Angeles, hate crime incidents doubled, to 30, in the month following the presidential 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.

Overt discrimination presents other dangers. Foreign residents of our cities who feel unwelcome are more likely to cut themselves off from public life and participation in public programs. They may refuse to participate in public health programs such as vaccinations or 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 six targeted countries. Thousands of other Muslims in the *amici* cities have reason to worry that the public will embrace the Executive Order's anti-Muslim stance. The Order therefore places millions of people at risk of harm or being driven underground, which makes both those residents and our cities less safe.

¹¹ *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

Finally, the Executive Order deprives our communities and our residents of immigrants and students from the targeted six countries, and others who will simply 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.¹² Thus, many Americans' exposure to other cultures comes only if visitors and students from other countries come here.

Our cities will always welcome immigrant residents, students, tourists, and refugees. Indeed, perhaps uniquely in the world, the very identity of American cities has been forged since the inception of our Nation from the toil of immigrant communities and their love for the American ideal. The discriminatory and unlawful Executive Order seriously harms *amici* by endangering the safety of our residents and our communities, and undermining our ability to continue to welcome immigrants and refugees. It also harms our businesses, hospitals, and educational institutions; limits our labor pool; decreases our tax revenues; and dampens our tourism industry. For these reasons, *amici* have a vital interest in this case and file this brief to urge the Court to convert the TRO to a preliminary injunction against the Executive Order.

¹² Sally Herships, *Trump's travel ban worries international students*, <http://www.marketplace.org/2017/02/08/world/overseas-students>.

INTRODUCTION AND SUMMARY OF ARGUMENT

For months on the campaign trail, presidential candidate Donald J. Trump promised that, if elected, he would impose a ban on Muslim immigration. In two Executive Orders, President Trump has made good on his promise. This Court properly entered a TRO against sections 2 and 6 of the current Order. These sections violate the Establishment Clause by disadvantaging Muslim immigrants based on their religion. In addition, these sections are irrational in violation of the Due Process Clause and unlawful under the Immigration and Nationality Act of 1965. *Amici* address these issues to urge the Court to convert the TRO to a preliminary injunction, for the reasons discussed in the Court’s TRO opinion, and for the additional reasons set forth in this brief and the Plaintiffs’ motion. That relief is necessary to ensure that this litigation moves along and to provide nationwide relief against section 6 of the Executive Order.

I. THE EXECUTIVE ORDER VIOLATES THE ESTABLISHMENT CLAUSE.

The Establishment Clause prohibits any “law respecting an establishment of religion.” It enshrines, in the first words to the First Amendment to the U.S. Constitution, the special protection that the Framers intended for religion to have from governmental compulsion. As Madison wrote: “we hold it for a fundamental and undeniable truth, that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then 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.” James Madison, Memorial and Remonstrance Against Religious Assessments to the Honorable the General Assembly of the Commonwealth of Virginia P1, reprinted in 8 The Papers of James Madison 299 (Robert A. Rutland ed. 1973). Consistent with these principles, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Executive Order violates the Establishment Clause by disfavoring Muslim immigrants.

A. The Order’s Avowed Purpose Is Discriminatory.

The Establishment Clause extends beyond facial discrimination and protects “against governmental hostility which is masked, as well as overt.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). When determining whether governmental action was motivated by an invidious discriminatory purpose, courts often must look beyond the text, *id.*, and may examine “such circumstantial and direct evidence of intent as may be available,” including “[t]he historical background of the decision” and “contemporary statements” by decisionmakers. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). Indeed, scrutinizing purpose requires that courts “not only can, but must” examine “the circumstances surrounding [the policy’s] enactment,” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000), to ascertain whether, in the eyes of an “objective observer,” a religious purpose “emerges from readily discoverable fact[s].” *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). *Accord City of Cuyahoga Falls v.*

Buckeye Community Hope Foundation, 538 U.S. 188, 196-97 (2003) (“[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative.”).

To begin, the ban on immigrants and refugees from six countries is an admitted guise for discriminating against Muslims. Numerous anti-Muslim statements by then candidate Trump and later President Trump, and by his advisors and others in his administration, have been well documented, both in this case, *e.g.*, Dkt. 58-1 at 7-15, and others, *e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017); and these statements confirm that the purpose of the Executive Order is to discriminate against Muslims.¹³ As this Court recognized in its order granting a TRO, “a reasonable, objective observer – enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance – would conclude that the Executive Order was issued with a purpose to disfavor a particular religion.” Dkt. 219 at 28. And two other district courts have likewise found that these statements show a rampant and palpable discriminatory purpose. *International Refugee Assistance*

¹³ Indeed, it is not even necessary to “look behind” the Executive Order’s facial purpose, *Washington v. Trump*, 2017 WL 992527, *5 (9th Cir. March 15, 2017, Bybee, J., dissenting), or demand that the President disclose his “‘real’ reasons” for the order, *id.* at *9, as the judges dissenting from the Ninth Circuit’s en banc decision not to vacate the panel opinion concerning the prior Executive Order believed. These have been aired by the President himself, early and often.

Project v. Trump, 2017 WL 1018235, at **17-18 (D. Md. March 16, 2017); *Aziz v. Trump*, 2017 WL 580855, at **8-9 (E.D. Va. Feb. 13, 2017).¹⁴

It is of no moment that the Executive Order disclaims discriminatory intent and professes a national security purpose, or that it eliminated the explicit religious preference in the prior order. “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *City of Hialeah*, 508 U.S. at 534. *Accord Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (even facially neutral law cannot survive when “no reason for it exists except hostility to the race and nationality” of those adversely affected). For this reason, 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 864. Here the sham purpose could not be more apparent: as this Court recognized in granting the TRO, the Executive Order, by the administration’s own prior and concurrent admissions, targets Muslims. *E.g.*, Dkt. 219 at 33 (The record “includes significant and un rebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor.”).

¹⁴ These courts considered campaign statements to determine intent, which the federal government has contended is not appropriate. And in some circumstances, it may not be appropriate, such as where a candidate promises to do one thing and does something plainly different as an elected official. But here, President Trump and his advisors have confirmed the discriminatory intent of the ban since he took office – and it functions exactly as he promised when campaigning. Under these circumstances, “[j]ust as the world is not made brand new every morning,” *McCreary*, 545 U.S. at 866, intent is not made brand new simply by taking the oath of office.

B. The Order's Profound Effect Reveals Its Discriminatory Purpose.

Although the federal government asserts that the Executive Order is neutral with respect to religion, this ignores the reality of the Order's intended effects. Most of the 38,901 Muslim refugees admitted to the United States in fiscal year 2016 came from the six countries targeted by the Executive Order.¹⁵ Indeed, given current global conditions of civil war, ethnic conflict, drought, famine, and radical Islamic elements, most refugees worldwide come from predominately Muslim countries.¹⁶ Under these circumstances, an Executive Order banning refugees is a Muslim ban.

The Executive Order remains discriminatory despite the federal government's insistence that the ban is temporary and affects only a partial list of countries with majority-Muslim populations. Tellingly, these are the countries from which the majority of Muslim refugees come to the United States. Regardless, "temporary" and "partial" are not defenses to an Establishment Clause violation. And in fact, whatever the temporal duration or the geographic scope of this Order, the federal government's defense of this Order would allow defendants to later

¹⁵ Phillip Connor, *U.S. admits record number of Muslim refugees in 2016*, <http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/>.

¹⁶ *Figures at a Glance*, UNHCR, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

extend the Order for a longer period of time and to more countries to reach the desired “total and complete shutdown” the President has called for.¹⁷

C. The Order Does Not Survive Strict Scrutiny.

Where, as here, a law “grant[s] a denominational preference,” the Supreme Court’s cases “demand” that courts “treat the law as suspect” and “apply strict scrutiny in adjudging its constitutionality.” *Larson*, 456 U.S. at 246. The law will be upheld only if the government shows a compelling governmental purpose, *id.* at 247, and the law is “closely fitted to further [that] interest,” *id.* at 246. *Amici* accept, of course, that the principles of enhancing national security and preventing domestic terrorism are plainly compelling, but the Order is not narrowly tailored to achieve that purpose and therefore fails strict scrutiny.

As the Ninth Circuit correctly observed in denying the motion to stay the order enjoining enforcement of the original Executive Order, 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*, 847 F.3d at 1168. Indeed, no Americans have been killed on U.S. soil by foreign nationals from the targeted countries since 1975.¹⁸ At the same time, while the original Executive Order cited

¹⁷ <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

¹⁸ Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, <http://www.newsweek.com/where-do-terrorists-come-not-seven-countries-named-550581>.

the attacks of September 11, 2001 as an impetus, the countries whose citizens carried out those attacks were excluded from the ban.¹⁹

The revised Executive Order contains several factual assertions apparently designed to avoid these defects, but they do not withstand scrutiny. Tellingly, the Order omits reference to the September 11th attacks – underscoring that the Order would have done nothing to prevent that tragedy at all. Instead, the Order generally states that its restrictions are necessary to prevent “foreign nationals who may commit, aid, or support acts of terrorism” from entering the country. Order § 1(a). The federal government’s own internal documents refute this. Following the Ninth Circuit’s ruling, the administration asked the Department of Homeland Security to compile an intelligence report supporting a travel ban from the targeted countries. That report rejects the Order’s premise, concluding that “country of citizenship is unlikely to be a reliable indicator of potential terrorist activity.” Dkt. 64-10 at 1.

Other assertions in the Order likewise fail to support a finding that the Order is narrowly, or even rationally, drawn. For example, the Order states that Attorney General Sessions reported to the President that “more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.” Order § 1(h).²⁰ Again, it is

¹⁹ Mark Berman, *Trump and his aides keep justifying the entry ban by citing attacks it couldn’t have prevented*, https://www.washingtonpost.com/news/post-nation/wp/2017/01/30/the-trump-white-house-keeps-justifying-the-entry-ban-by-citing-attacks-it-couldnt-have-prevented/?utm_term=.599f86065bb0.

²⁰ The Attorney General himself advocated while a Senator for restricting the admission of Muslims to the United States. See June 14, 2016 Letter from Sen. Jeff

telling that the Order does not claim that any of these refugees came from the six countries affected by this ban.²¹ Regardless, the Order appears to adopt a broad interpretation of what qualifies as a “counterterrorism investigation,” and the number is misleading because only a small fraction of terrorism inquiries conducted by the F.B.I. ever lead to criminal charges.²² Moreover, with terrorism investigations so broadly defined, 300 investigations is insignificant.

Similarly, the Order asserts that “[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States.” Order § 1(h). But the Executive Order does not restrict immigration of *all* foreign-born nationals; instead it attributes this problem to the six majority-Muslim countries targeted. This data is also suspect because it includes individuals initially

Sessions and Sen. Ted Cruz to President Barack Obama, https://web.archive.org/web/20161109030307/http://www.sessions.senate.gov/public/_cache/files/f9d1d9f4-6ee8-42ff-a5f2-29a2518fe2f7/06.14.16-sens.-sessions-cruz-to-president-obama-on-terrorism-immigration.pdf.

²¹ At least 70% of suspects under review in these cases did not come from the six targeted countries. Devlin Barrett et al., *Internal Trump Administration Data Undercuts Travel Ban*, https://www.washingtonpost.com/world/national-security/internal-trump-administration-data-undercuts-travel-ban/2017/03/16/9a2dc6b4-098e-11e7-93dc-00f9bdd74ed1_story.html?hpid=hp_hp-banner-low_travelbanreport-1230pm%3Ahomepage%2Fstory&utm_term=.f88154aa2956

²² Charlie Savage, *F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Shows*, <http://www.nytimes.com/2011/03/27/us/27fbi.html> (citing Justice Department document indicating that from December 2008 to March 2009 the F.B.I. initiated 11,667 “assessments” of people and from that group opened 427 more intensive investigations).

investigated as part of a “terror-related” investigation but who were convicted of charges that had no connection to terrorism.²³

The national security claims advanced to support the Executive Order are not supported by the evidence and thus cannot mask the Order’s discriminatory intent. Instead, the Order cuts an indiscriminate swath through the heart of immigration into this country. The Order fails strict scrutiny and violates the Establishment Clause.²⁴

²³ Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, <https://www.justsecurity.org/38341/misleading-claims-immigrants-terrorism/>; see also Alex Nowrasteh, <https://www.cato.org/blog/42-percent-terrorism-related-convictions-arent-terrorism> 42 *Percent of “Terrorism-Related Convictions Aren’t for Terrorism* (analysis of list compiled by Senator Sessions of terrorism convictions from 9/11 until the end of 2014 indicated that “[o]nly 40 were convicted of planning, attempting, or carrying out a terrorist attack on U.S. soil . . .”).

²⁴ In addition to the Establishment Clause violation, the Executive Order’s blatant discrimination against Muslims is invalid on two other grounds. First, it denies equal protection. There is an equal protection component to the Fifth Amendment Due Process Clause that applies to the federal government. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Distinctions based on religion are inherently suspect. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979); see also *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (heightened scrutiny applies to a classification that is based on religion). Invidious classifications “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Accordingly, such laws “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *Id.* As we explain, the Executive Order plainly was motivated by a desire to discriminate and thus denies equal protection. Second, the Executive Order’s discrimination based on religion violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. RFRA prohibits action by the federal government that substantially burdens religious exercise unless it is the least restrictive means of furthering a compelling governmental interest. See *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). A desire to discriminate based on religion does not constitute a compelling governmental interest.

II. THE EXECUTIVE ORDER UNLAWFULLY DISCRIMINATES BASED ON NATIONAL ORIGIN.

The federal government’s defense that the Executive Order is not a religious ban at all but one based on national origin does not save it. At the outset, as we explain, the Order’s reliance on national origin is merely a pretext for discrimination against Muslims. Regardless, the pretextual national origin basis for the classification is itself unlawful.

For one thing, the Order violates the equal protection component of the Fifth Amendment’s Due Process Clause.²⁵ By banning nationals of countries not shown to perpetrate terrorism in the United States and not banning nationals of countries that do, the Executive Order is so staggeringly underinclusive and overinclusive for the stated goal of national security and so profoundly arbitrary that it is unconstitutional for that reason alone. Utterly irrational classifications that do not serve the stated purpose violate equal protection. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”); *see also Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating under the Equal Protection Clause “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; . . . a classification of persons undertaken for its own sake”).

Beyond that, the Order violates the Immigration and Nationality Act of 1965. “During most of its history, the United States openly discriminated against

²⁵ As we explain above, the federal government is subject to the equal protection requirement of the Due Process Clause of the Fifth Amendment.

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 Immigration and Nationality Act Amendments of 1965,” which “eliminated discrimination on the basis of race and national origin.” *Id.*; see also 1965 U.S.C.C.A.N. 3328, 3328 (quoting S. Rep. No. 89-748) (principal purpose of the 1965 Act was “to repeal the national origin quota provisions of the Immigration and Nationality Act, and to substitute a new system for the selection of immigrants to the United States”). The 1965 Act 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 1965 Act is replete with the bold anti-discriminatory principles of the Civil Rights Era. Indeed, the 1965 Act was passed alongside the Civil Rights Act of 1964 and the Voting Rights Act of 1965.” *Olsen*, 990 F. Supp. at 37. The Executive Order is in direct violation of section 1152(a).

Strong enforcement of the INA’s antidiscrimination provision is profoundly important to *amici*, which have adopted similar laws prohibiting discrimination in their local communities in all aspects of life – housing, employment, public accommodation, transportation, schooling, government services, and public

employment. *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. Code §§ 4.400, 10.8, 10.13; New York City Charter, § 900; N.Y.C. Admin. Code §§ 4-116; 6-108; Philadelphia Code, §§ 9-1101, 9-1103, 9-1106, 9-1108. Such laws reflect *amici*'s strong commitment to equal opportunity and equal rights, just as section 1152(a) does. The Executive Order's blatant discrimination based on national origin turns the clock back on this important civil rights guarantee, and it should be set aside.

To be sure, the President has broad authority over the entry of aliens generally: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). But for two reasons in particular, section 1182(f) does not save the Executive Order.

First, section 1152(a)'s prohibition on discrimination was enacted after section 1182(f) and is properly understood as a limitation on the authority previously 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). Thus, although section 1182(f) grants the President authority to suspend entry of a class of immigrants whose entry would be "would be detrimental to the interests of the United States,"—*i.e.*,

entrants belonging to Foreign Terrorist Organizations—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 thereof.”).

Second, 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 Executive Order’s exclusion of all immigrants and refugees from six countries, solely because of the happenstance of their place of birth, cannot stand.²⁶ The plain language of section 1182(f) requires a determination that the entry of aliens or a class of aliens is

²⁶ The district court in *International Refugee* agreed that plaintiffs there showed a likelihood of success on their claim that the Executive Order violates section 1152(a) by restricting the issuance of immigrant visas, although it did not find a likelihood of success on the claim that section 1152(a) prevents the President from barring entry in a discriminatory fashion. 2017 WL 1018235, *10. Respectfully, allowing the President to deny entry based on national origin to persons who could not be denied a visa on that basis makes no sense. Instead, to harmonize these provisions, section 1182(f) should be read to allow the denial of entry only on other grounds, or later information, but not on the precise basis that section 1152(a) forbids.

“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 six targeted countries presents a security risk to the United States. Most obviously perhaps, this group includes people who left their place of birth as infants or children, and perhaps were born to parents who themselves were not citizens of the country where their children were born. These immigrants and refugees could have lived nearly their entire lives in countries that even the federal government does 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). A classification based on national origin is not rational.²⁷

²⁷ The Executive Order states the six targeted countries are unable to “share or validate” data about individuals seeking to enter the United States. Order § 1(d). But this assertion regarding vetting cannot be read as a blanket “determination” that all individuals from the six countries are “detrimental” to the United States in violation of section 1182(f).

CONCLUSION

For these reasons, and the reasons set forth in Plaintiffs' motion, *amici* urge the Court to grant the motion to convert the temporary restraining order to a preliminary injunction.

Respectfully submitted,

s/Benna Ruth Solomon

s/Robert M. Kohn

RYAN P. POSCABLO
BRIAN NEFF
ELIBERTY LOPEZ
Riley Safer Holmes & Cancila LLP
1330 Avenue of the Americas, 6th Floor
New York, NY 10019
(212) 660-1030
rposcablo@rshc-law.com

NICK KAHLON
Riley Safer Holmes & Cancila LLP
Three First National Plaza
70 W. Madison Street, Suite 2900
Chicago, IL 60602
(312) 471-8700
nkahlon@rshc-law.com

Attorneys for Amicus Curiae,
City of Chicago

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764
benna.solomon@cityofchicago.org
**Pending Pro Hac Vice Motion*
Attorneys for Amicus Curiae,
City of Chicago

DONNA Y. L. LEONG, 3226
Corporation Counsel
ROBERT M. KOHN, 6291
NICOLETTE WINTER, 9588
Deputies Corporation Counsel
530 S. King St., Room 110
Honolulu, HI 96813
(808) 768-5100
robert.kohn@honolulu.gov
nwinter@honolulu.gov
Attorneys for City and County
of Honolulu