

THE HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Civil Action No. 1:17-cv-0141-JLR

**MOTION FOR LEAVE TO FILE
BRIEF OF CHICAGO, LOS ANGELES,
NEW YORK, AND OTHER MAJOR
CITIES AND COUNTIES AS *AMICI
CURIAE* IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION
TO ENFORCE PRELIMINARY
INJUNCTION**

NOTE ON MOTION CALENDAR:
APRIL 7, 2017

1 Chicago, Los Angeles, New York, and other major U.S. cities and counties
2 respectfully submit this motion for leave to file a brief *amicus curiae* in support of
3 Plaintiffs.

4 1. Amici include the largest cities in the United States. Along with other
5 cities across the country, our physical and economic security is damaged by
6 Executive Order 13780, issued on March 6, 2017, and entitled “Protecting the
7 Nation from Foreign Terrorist Entry into the United States,” as we describe in our
8 brief.
9

10 2. The proposed *amicus* brief explains how the Order’s discrimination on
11 the basis of religion and national origin will significantly undermine the safety,
12 economic well-being, and social cohesion in our communities and across the United
13 States.
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15 3. Plaintiffs have consented to this motion. Defendants take no position
16 on our request to file an *amicus* brief.
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CITIES AND COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION TO ENFORCE PRELIMINARY INJUNCTION

AMICUS BRIEF OF CITIES IN SUPPORT OF MOTION TO
ENFORCE PRELIMINARY INJUNCTION
Civil Action No. 1:17-cv-0141-JLR

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae include some of the largest cities and counties in the United States.¹ The population of Chicago, Los Angeles, and New York City alone is well over 15.1 million.² These cities serve as major immigrant destinations and hubs for global economic activity, accounting for more than one-fifth of the country's gross domestic product.³

These cities, and others, are heavily dependent on the contributions of immigrants.⁴ Immigrant residents of Chicago, Los Angeles, and New York hail from more than 150 foreign countries, and at least five million residents of those cities are immigrants. As of 2015, there were approximately 213,400 residents in Chicago, Los Angeles, and New York alone who were born in five of the six countries targeted by the Executive Order.⁵

Chicago, Los Angeles, and New York also rank as some of the largest employers in their jurisdictions, collectively employing approximately 365,000

¹ Additional counsel for amici curiae are listed in the appendix to this brief.

² The data in this statement of interest are limited to Chicago, Los Angeles, and New York City. Support for the data is included in the appendix to this brief.

³ Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, *The Atlantic* (Jul. 21, 2015).

⁴ *Immigrants & Competitive Cities*, Americas Society/Council of the Americas (available at <http://www.as-coa.org/sites/default/files/ImmigrantsandCompetitiveCities.pdf>).

⁵ Alan Berube, *These communities have a lot at stake in Trump's executive order on immigration*, Brookings Institution (Jan. 30, 2017) (available at <https://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration/>).

1 people, many of them immigrants. In Los Angeles in particular, 22% of City
2 employees are foreign-born. And in addition to public employees, in Chicago alone,
3 at least 12,500 private employees are working on international visas. Similarly,
4 27% of all business owners in Chicago are immigrants; in New York City
5 immigrants make up a majority of business owners, and that figure is 44% in Los
6 Angeles.

7
8 Chicago and Los Angeles welcome and resettle some of the largest numbers
9 of refugees in the United States. From October 2015 to September 2016,
10 approximately 2100 refugees were resettled in the Chicago area and nearly 800
11 were from the targeted countries; 2800 were resettled in the Los Angeles area and
12 1900 were from Iran alone. Additionally, approximately 1300 refugees have been
13 resettled in New York City in the past five years. Through municipal and private
14 efforts, these new residents are woven into the social fabric of our cities, and they
15 contribute daily to our collective benefit.
16

17 Chicago, Los Angeles, and New York City also operate and are served by
18 airports with a large number of international flights. On any given day, more than
19 400 flights arrive at Chicago and Los Angeles airports from international
20 destinations, bringing more than 60,000 passengers. Relatedly, the tourism sector
21 of the local economies in Chicago, Los Angeles, and New York City accounts for at
22 least \$63 billion a year in local revenue. In 2016, our cities hosted more than 20
23 million foreign visitors, whose direct spending in Los Angeles County is estimated
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1 at \$6.3 billion dollars last year alone, and \$1.88 billion annually in Chicago,
2 including \$1.25 million by tourists from the six targeted countries. New York City
3 now predicts a 300,000-person drop in foreign visitors this year.⁶

4 Chicago, Los Angeles, and New York City are home to 131 four-year colleges
5 and universities, including some of the country's most prestigious, which have
6 approximately 80,000 international students. Chicago is also home to 44 major
7 hospitals, which serve thousands of international patients a year. The Middle East
8 region is the top source of patients who travel to the U.S. for medical care.⁷

9
10 *Amici* are profoundly opposed to the Executive Order, which is as misguided
11 as it is unconstitutional. *Amici* are further opposed to actions by the federal
12 government pursuant to the Executive Order. Our cities serve as the gateways for
13 immigrants and refugees starting new lives in the United States. And when they
14 have come, “[e]verywhere immigrants have enriched and strengthened the fabric of
15 American life.”⁸ The Executive Order, and the anti-immigrant principles behind it,
16 offends our cities’ values and character; violates the principles girding our local
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21 ⁶ Patrick McGeehan, *New York Expects Fewer Foreign Tourists, Saying Trump Is to Blame*,
N.Y. Times (Feb. 28, 2017).

22 ⁷ Kristen Schorsch, *How Trump’s Travel Ban Could Hit Medical Tourism Hard*, Crain’s
23 Chicago Business (Feb. 1, 2017), available at
24 [http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-
ban-could-hit-medical-tourism-hard](http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard).

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

1 governments; and dilutes the effectiveness of our laws, including those prohibiting
2 discrimination, on precisely the invidious grounds reflected in the Executive Order.

3 But beyond our ideals, the Executive Order subverts the very purposes it
4 claims to serve. First, the unlawful discrimination based on religion and national
5 origin undermines trust between our law enforcement agencies and our immigrant
6 communities, which in turn hinders our ability to protect our residents. Chicago,
7 Los Angeles, New York City, and the other *amici*, as financial, political, and
8 cultural hubs in the United States, draw unique attention from individuals looking
9 to cause harm in this country. Additionally, local law enforcement officers play an
10 increasingly important role in efforts to detect and protect against national security
11 threats. For these and other reasons, cities are a crucial part of the first-line of
12 defense against terrorism.⁹ To serve the mission of national security, our cities
13 must be able to work in coordination with everyone in our communities, including
14 our diverse ethnic populations. Even at the strictly local level, the safety and
15 security of our residents and visitors, which is the foremost priority of any city in
16 America, depends upon cooperation between the residents and our local police
17 forces. The United States Department of Justice's own Office of Community
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22 ⁹ *E.g.*, Mitch Silber and Adam Frey, *Detect, Disrupt, and Detain: Local Law Enforcement's*
23 *Critical Roles in Combating Homegrown Terrorism and the Evolving Terrorist Threat*, 41
24 *Fordham Urb. L.J.* 127 (Nov. 2013); David Thacher, *The Local Role in Homeland Security*,
25 *39 Law & Soc'y Rev.* 635 (Sept. 2005); *DHS Announces Expansion of the Securing the Cities*
Program, Dep't of Homeland Security (Sep. 14, 2015) (available at
<https://www.dhs.gov/news/2015/09/14/dhs-announces-expansion-securing-cities-program>).

1 Oriented Policing Services has emphasized this fact time and again.¹⁰ With decades
2 of experience policing neighborhoods that are home to immigrant populations, *amici*
3 are keenly and uniquely aware that ostracized residents do not report crimes,
4 against themselves or others, or behavior that should, in the interest of safety and
5 national security, be reported as suspicious. Thus, by targeting immigrants based
6 on religion and national origin, the Executive Order makes *all* of our residents and
7 visitors, and indeed everyone in the country, less safe.
8

9 Second, the Executive Order’s message that citizens of majority-Muslim
10 countries threaten national security conveys that members of those communities,
11 and other immigrant communities, are to be distrusted and feared. Thus, targeting
12 Muslims makes these immigrant residents more vulnerable to victimization, and
13 adds to the burden of local governments to provide protection. At the extreme, this
14 victimization amounts to hate crimes. In the first 34 days following the 2016
15 election, there were 1,094 hate crimes and lesser hate incidents.¹¹ Of these, 315
16 were categorized as anti-immigrant, and 112 as anti-Muslim. The Southern
17 Poverty Law Center figures also show a dramatic increase from 2015 to 2016 in the
18 number of organizations identified as anti-Muslim hate groups, from 34 to 101.
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22 ¹⁰ *E.g., Community Policing Defined*, Dep’t of Justice, Office of Community Oriented
23 Policing Services (rev. 2014) (available at <https://ric-zai-inc.com/Publications/cops-p157-pub.pdf>).

24 ¹¹ *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, Southern
25 Poverty Law Center (Dec. 16, 2016) (available at <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>).

1 Chicago, Los Angeles, and New York City in particular all saw dramatic rises in
2 hate crimes following the election. In the three months after the election, New York
3 City reported twice the number of hate crime incidents compared to the same period
4 a year prior; Chicago had twice as many arrests for hate crimes than in that three-
5 month period the prior year. In the first five weeks of 2017, the number of hate
6 crimes recorded in Chicago was more than triple the number for the same period in
7 2016. Additionally, hate crimes categorized as anti-Muslim or anti-Arab hit five-
8 year highs in Chicago in 2016. And in Los Angeles, hate crime incidents doubled in
9 the month following the presidential election, with 30 such reported incidents
10 during that month.
11

12 Overt discrimination presents other dangers. Foreign residents of our cities
13 who feel unwelcome are more likely to cut themselves off from public life and
14 participation in public programs. They may refuse to participate in public health
15 programs such as vaccinations or seek medical care for contagious diseases. They
16 may keep their children out of school to avoid harassment and stay away from
17 mosques because of the fear that they will be unsafe. Nor will these effects be
18 limited to individuals from the six targeted countries. Thousands of other Muslim
19 students, workers, refugees, and other residents living in the *amici* cities will
20 rightly worry that the public will likewise see that the true meaning of the
21 Executive Order is to demean all Muslims. The Order therefore places millions of
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1 people at risk of harm or being driven underground, which will only make those
2 residents and our cities less safe.

3 Third, the Executive Order further deprives our communities and our
4 residents of immigrants and students from the targeted six countries, and others
5 who will simply decide not to travel to the United States, much less to live here.¹²
6 These individuals enrich us with their customs and celebrations, their hard work
7 and perseverance, and their unique skills and training. Our cities would be bereft
8 without them. Foreign residents and students also make an immeasurable
9 contribution to America's ability to participate in the global economy, among other
10 reasons, because fewer than half of Americans have passports.¹³ Thus, many
11 Americans' exposure to other cultures comes only if visitors and students from other
12 countries come here.
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15 Our cities will always welcome immigrant residents, students, tourists, and
16 refugees. Indeed, perhaps uniquely in the world, the very identity of American
17 cities has been forged since the inception of our Nation from the toil of immigrant
18 communities and their love for the American ideal. The discriminatory and
19 unlawful Executive Order seriously harms *amici* by making us less safe,
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21 ¹² Shivani Vora, *After Travel Ban, Interest in Trips to U.S. Declines*, N.Y. Times (Feb. 20,
22 2017) ("Following President Trump's Jan. 27 executive order banning people from seven
23 predominantly Muslim countries from entering the United States, the demand for travel to
24 the United States took a nosedive, according to data from several travel companies and
research firms.").

25 ¹³ Sally Hershops, *Trump's travel ban worries international students*, Marketplace (Feb. 8,
2017) (available at <http://www.marketplace.org/2017/02/08/world/overseas-students>).

1 endangering the lives of our residents, disrupting our communities, and
2 undermining our ability to continue to be welcoming communities for immigrants
3 and refugees. It also harms our businesses, hospitals, and educational institutions,
4 limits our labor pool, decreases our tax revenues, and dampens our tourism
5 industry. For these reasons, *amici* have a vital interest in this case and file this
6 brief in support of the States’ emergency motion to enforce the preliminary
7 injunction against the current Executive Order.
8

9 INTRODUCTION AND SUMMARY OF ARGUMENT

10 For months on the campaign trail, presidential candidate Donald J. Trump
11 promised that, if elected, he would impose a ban on Muslim immigration. On
12 January 27, 2017, President Trump issued an Executive Order that made good on
13 his promise. In describing the ban, the President and his advisors publicly said that
14 the Executive Order accomplishes exactly what the candidate Trump said he would
15 do. Then, after the courts enjoined that Order precisely because of this unlawful
16 discriminatory intent, President Trump replaced it with the Order under review in
17 this case, while reiterating that he “keep[s] his promises.” Like its predecessor, the
18 revised Executive Order is unlawful. Accordingly, this Court should enforce the
19 preliminary injunction against it.
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22 *Amici* submit that Sections 2 and 6 of the Executive Order violate the
23 Establishment Clause by classifying immigrants and refugees based on religion.
24 Those provisions are also irrational, in violation of both the Due Process Clause and
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1 the Immigration and Nationality Act of 1965. Below, amici address the merits of
2 these two issues and rely on the States' motion for its discussion of the remaining
3 grounds to enforce the injunction.

4 **I. THE EXECUTIVE ORDER VIOLATES THE ESTABLISHMENT**
5 **CLAUSE.**

6 The Establishment Clause prohibits any “law respecting an establishment of
7 religion.” It enshrines, in the first words to the First Amendment to the U.S.
8 Constitution, the special protection that the Framers intended for religion to have
9 from governmental compulsion. As Madison wrote: “we hold it for a fundamental
10 and undeniable truth, that Religion or the duty which we owe to our Creator and
11 the manner of discharging it, can be directed only by reason and conviction, not by
12 force or violence. The Religion then of every man must be left to the conviction and
13 conscience of every man; and it is the right of every man to exercise it as these may
14 dictate.” James Madison, Memorial and Remonstrance Against Religious
15 Assessments to the Honorable the General Assembly of the Commonwealth of
16 Virginia P1, reprinted in 8 The Papers of James Madison 299 (Robert A. Rutland
17 ed., 1973). Consistent with these principles, “[t]he clearest command of the
18 Establishment Clause is that one religious denomination cannot be officially
19 preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). The
20 Executive Order violates the Establishment Clause by disfavoring Muslim
21 immigrants.
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A. The Order’s Avowed Purpose Is Discriminatory.

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2 The Establishment Clause extends beyond facial discrimination and protects
3 “against governmental hostility which is masked, as well as overt.” *Church of the*
4 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). When
5 determining whether governmental action was motivated by an invidious
6 discriminatory purpose, courts often must look beyond the text, *id.*, and may
7 examine “such circumstantial and direct evidence of intent as may be available,”
8 including “[t]he historical background of the decision” and “contemporary
9 statements” by decisionmakers. *Village of Arlington Heights v. Metropolitan Hous.*
10 *Dev. Corp.*, 429 U.S. 252, 266-67 (1977). Indeed, scrutinizing purpose requires that
11 courts “not only can, but must” examine “the circumstances surrounding [the
12 policy’s] enactment,” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000), to
13 ascertain whether, in the eyes of an “objective observer,” a religious objective
14 “emerges from readily discoverable fact[s].” *McCreary County, Ky. v. American Civil*
15 *Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). *Accord City of Cuyahoga Falls,*
16 *Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196-97 (2003)
17 (“statements made by decisionmakers or referendum sponsors during deliberation
18 over a referendum may constitute relevant evidence of discriminatory intent in a
19 challenge to an ultimately enacted initiative”).
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23 Here, although the Executive Order in terms bans only immigrants and
24 refugees from six countries, it is an admitted guise for discriminating against
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1 Muslims. Numerous statements by President Trump, before and after his election,
2 and indeed before and after the prior Executive Order was invalidated, confirm that
3 the purpose of the Executive Order is to ban Muslims. The same day as the prior
4 Executive Order was signed, President Trump avowed that its purpose was to favor
5 Christian refugees over Muslims.¹⁴ That purpose is likewise revealed by a litany of
6 other public statements, including then-candidate Trump’s repeated promises of a
7 “total and complete shutdown of Muslims entering the United States.” (SAC ¶ 142.)
8 President-elect Trump also answered a question about his plans for a Muslim ban
9 in the wake of a terrorist attack in Berlin by saying, “You know my plans. All along
10 I’ve been proven right ...” (SAC ¶ 153.) Prior to taking office, Mr. Trump revealed
11 that he intended to camouflage this discrimination by focusing on “territories,”
12 because “[p]eople were so upset when I used the word Muslim.” (SAC ¶ 150.)¹⁵ But
13 even as he did so, he stressed that this was not backing off on his Muslim ban;
14 rather it was “an expansion” of it. *Id.*¹⁶
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18 ¹⁴ The President confirmed to the Christian Broadcasting Network that the Executive
19 Order was intended to prioritize Christian refugees over Muslims. (*See* Dkt. 118-1 (Second
20 Amended Complaint (“SAC”)) ¶ 159.)

21 ¹⁵ Specifically, Mr. Trump said: “I actually don’t think it’s a pull-back. In fact, you could say
22 it’s an expansion. I’m looking now at territories. People were so upset when I used the word
23 Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that,
24 because I’m talking territory instead of Muslim.” (*Id.*)

25 ¹⁶ The district court in Virginia, considering a challenge to the original Executive Order,
refused to excise the President’s pre-inauguration statements from consideration. *Aziz v.*
Trump, 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017). It noted
that another court had looked only to the text of the Order but had not explained why it
had not considered other evidence. *Id.* at 7 n.8 (citing *Louhghalam v. Trump*, 2017 WL
479779, at *4-*5 (D. Mass. 2017)). We do not suggest that it will always be appropriate to

1 After taking office, President Trump carried out his promise of imposing a
2 Muslim ban exactly as he said he would. According to the public comments of the
3 President's advisor Rudy Giuliani, the President asked him to craft a "Muslim ban"
4 with a veneer of legality, which was accomplished by banning citizens of the
5 identified countries in lieu of explicitly saying "Muslims." (SAC ¶ 168.)

6 It is of no moment that the Executive Order was drafted to omit explicit
7 reference to discriminatory intent, and no longer contains an explicit preference for
8 religious minorities within Muslim-majority countries. "Official action that targets
9 religious conduct for distinctive treatment cannot be shielded by mere compliance
10 with the requirement of facial neutrality." *City of Hialeah*, 508 U.S. at 534. *Accord*
11 *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (even facially neutral law cannot
12 survive when "no reason for it exists except hostility to the race and nationality" of
13 those adversely affected). For this reason, it is "the duty of the courts" to
14 distinguish a "sincere" secular purpose from one that is a "sham," or that is
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19 look at campaign statements to determine intent. Where an elected official campaigns on a
20 promise to do one thing and then does something that is plainly different, it will not be
21 appropriate. But here, President Trump and others in his administration have confirmed
22 the discriminatory intent of the ban since he took office – and it functions exactly as he
23 promised when campaigning. Indeed, in announcing that he would replace the invalid
24 Order, President Trump repeatedly stated "In each of these actions, I'm keeping my
25 promises to the American people. These are campaign promises." *Full Transcript and
Video: Trump News Conference*, N.Y. Times (Feb. 16, 2017) (available at
<https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html>). 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.

1 “secondary” to a “predominately religious” purpose. *McCreary*, 545 U.S. at 864.
2 Here the sham purpose could not be more transparent: the Executive Order, by the
3 administration’s own prior and concurrent admissions, targets Muslims.

4 **B. The Order’s Profound Effect Reveals Its Discriminatory**
5 **Purpose.**

6 Although the federal government asserts that the Executive Order is neutral
7 with respect to religion that ignores the reality of the Order’s intended effects. Most
8 of the 38,901 Muslim refugees admitted to the United States in fiscal year 2016
9 came from the six countries targeted by the Executive Order.¹⁷ Indeed, given
10 current global conditions of civil war, ethnic conflict, drought, famine, and radical
11 Islamic elements, most refugees worldwide come from predominately Muslim
12 countries.¹⁸ Under these circumstances, an Executive Order banning refugees is a
13 Muslim ban.
14

15 The Executive Order remains discriminatory despite the federal
16 government’s insistence that the ban is temporary and affects only a partial list of
17 countries with majority-Muslim populations – although, tellingly, these are the
18 countries from which the majority of Muslim refugees come to the United States.
19 Regardless, “temporary” and “partial” are not defenses to an Establishment Clause
20 violation. And in fact, whatever the temporal duration or the geographic scope of
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23 ¹⁷ Phillip Connor, *U.S. admits record number of Muslim refugees in 2016*, Pew Research
24 Center (Oct. 5, 2016) (available at <http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016/>).

25 ¹⁸ *Figures at a Glance*, UNHCR (available at <http://www.unhcr.org/en-us/figures-at-a-glance.html>).

1 this Order, the federal government’s defense of this Order would allow defendants
2 to later extend the Order for a longer period of time and to more countries to reach
3 the desired “total and complete shutdown.”

4 **C. The Order Does Not Survive Strict Scrutiny.**

5 Where, as here, a law “grant[s] a denominational preference,” the Supreme
6 Court’s cases “demand” that courts “treat the law as suspect” and “apply strict
7 scrutiny in adjudging its constitutionality.” *Larson*, 456 U.S. at 246. The law will
8 be upheld only if the government shows a compelling governmental purpose, *id.* at
9 247, and the law is “closely fitted to further [that] interest,” *id.* at 246. *Amici*
10 accept, of course, that the principles of enhancing national security and preventing
11 domestic terrorism are plainly compelling, but the Order is not narrowly tailored to
12 achieve that purpose and therefore fails strict scrutiny.
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15 As the Ninth Circuit correctly observed in denying the motion to stay the
16 order enjoining enforcement of the original Executive Order, there is “no evidence
17 that any alien from any of the countries named in the Order has perpetrated a
18 terrorist attack in the United States.” *Washington v. Trump*, 847 F.3d 1151, 1168
19 (9th Cir. 2017). Indeed, no Americans have been killed by foreign nationals from
20 the targeted countries since 1975.¹⁹ At the same time, while the original Executive
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¹⁹ Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, Newsweek (Jan. 31, 2017).

1 Order cited the attacks of September 11, 2001 as an impetus, the countries whose
2 citizens carried out those attacks were excluded from the ban.²⁰

3 The revised Executive Order contains several factual assertions apparently
4 designed to avoid these defects, but these do not withstand scrutiny. Tellingly, the
5 Order omits reference to the September 11th attacks – underscoring that the Order
6 would have done nothing to prevent that tragedy at all. Instead, the Order
7 generally states that its restrictions are necessary to prevent “foreign nationals who
8 may commit, aid, or support acts of terrorism” from entering the country. Order §
9 1(a). The federal government’s own internal documents refute this. Following the
10 Ninth Circuit’s ruling, the administration asked the Department of Homeland
11 Security (“DHS”) to compile an intelligence report supporting a travel ban from the
12 targeted countries. That report rejects the premise of the Executive Order,
13 concluding that “country of citizenship is unlikely to be a reliable indicator of
14 potential terrorist activity.” (Dkt. 113-9 at 2.)

17 Other assertions in the Order likewise fail to support a finding that the Order
18 is narrowly, or even rationally, drawn. For example, the Order states that Attorney
19 General Sessions reported to the President that “more than 300 persons who
20 entered the United States as refugees are currently the subjects of counterterrorism
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²⁰ Mark Berman, *Trump and his aides keep justifying the entry ban by citing attacks it couldn't have prevented*, Wash. Post (Jan. 30, 2017).

1 investigations by the Federal Bureau of Investigation.” Order § 1(h).²¹ Again, it is
2 telling that the Order does not claim that any of these refugees came from the six
3 countries affected by this ban. Regardless, the Order appears to adopt a broad
4 interpretation of what qualifies as a “counterterrorism investigation,” and the
5 number is misleading because only a small fraction of terrorism inquiries conducted
6 by the F.B.I. ever lead to criminal charges.²² Moreover, with terrorism
7 investigations so broadly defined, 300 investigations is insignificant.
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9 Similarly, the Order asserts that “[s]ince 2001, hundreds of persons born
10 abroad have been convicted of terrorism-related crimes in the United States.”
11 Order § 1(h). But the Executive Order does not restrict immigration of *all* foreign-
12 born nationals, instead making this a problem of the six Muslim countries targeted.
13 This data is also suspect because it includes individuals initially investigated as
14 part of a “terror-related” investigation but who were convicted of charges that had
15 no connection to terrorism.²³
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18 ²¹ The Attorney General himself advocated while a Senator for restricting the admission of
19 Muslims to the United States. *See* June 14, 2016 Letter from Sen. Jeff Sessions and Sen.
20 Ted Cruz to President Barack Obama (available at
21 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).

22 ²² Charlie Savage, *F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Shows*, N.Y. Times (Mar. 26, 2011) (citing Justice Department document indicating that
23 from December 2008 to March 2009 the F.B.I. initiated 11,667 “assessments” of people and
24 from that group opened 427 more intensive investigations).

25 ²³ Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, Just Security
(Mar. 4, 2017) (available at <https://www.justsecurity.org/38341/misleading-claims-immigrants-terrorism/>) (last visited March 8, 2017); *see also* Alex Nowrasteh, *42 Percent of*

1 The national security claims advanced to support the Executive Order are not
2 supported by the evidence and thus cannot mask the Order’s discriminatory intent.
3 Instead, the Order cuts an indiscriminate swath through the heart of immigration
4 into this country. The Order fails strict scrutiny and violates the Establishment
5 Clause.²⁴
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12 *“Terrorism-Related Convictions Aren’t for Terrorism* (analysis of list compiled by Senator
13 Sessions of terrorism convictions from 9/11 until the end of 2014 indicated that “[o]nly 40
14 were convicted of planning, attempting, or carrying out a terrorist attack on U.S. soil . . .”) (available at <https://www.cato.org/blog/42-percent-terrorism-related-convictions-arent-terrorism>) (last visited Mar. 8, 2017).

15 ²⁴ The federal government is also subject to the equal protection requirement of the Due
16 Process Clause of the Fifth Amendment. *E.g., Adarand Constructors, Inc. v. Peña*, 515 U.S.
17 200, 227 (1995). Here, the Executive Order’s blatant discrimination against Muslims also
18 denies equal protection. Distinctions based on religion are inherently suspect. *Friedman v.*
19 *Rogers*, 440 U.S. 1, 17 (1979); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303
20 (1976) (court will give heightened scrutiny to a classification that is based on religion).
21 Invidious classifications “are so seldom relevant to the achievement of any legitimate state
22 interest that laws grounded in such considerations are deemed to reflect prejudice and
23 antipathy—a view that those in the burdened class are not as worthy or deserving as
24 others.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).
25 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. Thus, it violates the Equal
Protection Clause as well as the Establishment Clause. Finally, the Executive Order also
violates the RFRA, 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 qualify as a compelling
governmental interest.

1 **II. THE EXECUTIVE ORDER UNLAWFULLY DISCRIMINATES BASED**
2 **ON NATIONAL ORIGIN.**

3 The Executive Order uses national origin as a pretext for discrimination
4 against Muslims. The federal government’s defense that it is not a religious ban at
5 all but one based on national origin does not save it.

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

19 Beyond that, the Order violates the Immigration and Nationality Act of
20 1965. “During most of its history, the United States openly discriminated against
21 individuals on the basis of race and national origin in its immigration laws.” *Olsen*
22 *v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). Then, “[t]hroughout the latter half of

1 the Twentieth Century, Congress moved away from such discriminatory policies.
2 The most profound change was the Immigration and Nationality Act Amendments
3 of 1965,” which “eliminated discrimination on the basis of race and national origin.”
4 *Id.*; see also 1965 U.S.C.C.A.N. 3328, 3328 (quoting S. Rep. No. 89-748) (principal
5 purpose of the 1965 Act was “to repeal the national origin quota provisions of the
6 Immigration and Nationality Act, and to substitute a new system for the selection of
7 immigrants to the United States”). As President Kennedy noted, “the national
8 origins quota system has strong overtones of an indefensible racial preference.”
9 John F. Kennedy, *A Nation of Immigrants* 45 (Harper rev. ed 2008). The 1965 Act
10 could not be more clear: “no person shall receive any preference or priority or be
11 discriminated against in the issuance of an immigrant visa because of the person’s
12 race, sex, nationality, place of birth, or place of residence.” 8 U.S.C. §
13 1152(a)(1)(A). Moreover, “[t]he legislative history surrounding the 1965 Act is
14 replete with the bold anti-discriminatory principles of the Civil Rights Era. Indeed,
15 the 1965 Act was passed alongside the Civil Rights Act of 1964 and the Voting
16 Rights Act of 1965.” *Olsen*, 990 F. Supp. at 37. The Executive Order is in direct
17 violation of section 1152(a).
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21 Strong enforcement of the INA’s antidiscrimination provision is profoundly
22 important to *amici*, which have adopted similar laws prohibiting discrimination in
23 their local communities in all aspects of life – housing, employment, public
24 accommodation, transportation, schooling, government services, and public
25

1 employment. *E.g.*, Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-115-180,
2 13-72-040; Los Angeles Charter §§ 104(i), 1024; Los Angeles Admin. Code §§ 4.400,
3 10.8, 10.13; New York City Charter, § 900 N.Y.C. Admins. Code §§ 4-116; 6-108.
4 Such laws reflect *amici*'s strong commitment to equal opportunity and equal rights,
5 just as section 1152(a) does. The Executive Order's blatant discrimination based on
6 national origin turns the clock back on this important civil rights guarantee, and it
7 should be set aside.
8

9 To be sure, the President has broad authority over the entry of aliens
10 generally: "Whenever the President finds that the entry of any aliens or of any
11 class of aliens into the United States would be detrimental to the interests of the
12 United States, he may by proclamation, and for such period as he shall deem
13 necessary, suspend the entry of all aliens or any class of aliens as immigrants or
14 nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be
15 appropriate." 8 U.S.C. § 1182(f). But for two reasons in particular, section 1182(f)
16 does not save the Executive Order.
17

18 First, section 1152(a)'s prohibition on discrimination was enacted after
19 section 1182(f) and is properly understood as a limitation on the authority
20 previously granted under section 1182(f) to suspend entry. "[T]he meaning of one
21 statute may be affected by other Acts, particularly where Congress has spoken
22 subsequently and more specifically to the topic at hand." *FDA v. Brown &*
23 *Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Thus, although section 1182(f)
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1 grants the President authority to suspend entry of a class of immigrants whose
2 entry would be “would be detrimental to the interests of the United States,”—*i.e.*,
3 entrants belonging to Foreign Terrorist Organizations—section 1152 declares
4 Congress’s determination that it is *not* in the national interest to discriminate based
5 upon national origin. This reading also construes these provisions “as a
6 symmetrical and coherent regulatory scheme,” *Gustafson v. Alloyd Co.*, 513 U.S.
7 561, 569 (1995), and “fit[s] all parts into an harmonious whole,” *FTC v. Mandel*
8 *Brothers, Inc.*, 359 U.S. 385, 389 (1959). By contrast, to read section 1182(f) as
9 though section 1152(a) did not exist is inconsistent with settled rules of statutory
10 construction and should be rejected. *E.g.*, *Astoria Fed. Sav. & Loan Ass’n v.*
11 *Solimino*, 501 U.S. 104, 112 (1991) (“[W]e construe statutes, where possible, so as to
12 avoid rendering superfluous any parts thereof.”).

15 In addition, section 1182(f) should be read in light of the grounds for denial of
16 admission for terrorist activity that are specifically set forth in section
17 1182(a)(3)(B). That provision mandates an individualized inquiry; it does not
18 authorize blanket exclusion based solely on the applicant’s nation of origin.

20 Even considering section 1182(f) in isolation, the Executive Order’s exclusion
21 of all immigrants and refugees from six countries, solely because of the accident of
22 their place of birth, cannot stand. The plain language of section 1182(f) requires a
23 determination that the entry of aliens or a class of aliens is “detrimental to the
24 interests of the United States,” and here it is simply not possible to say that every
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1 single person, or even a majority of persons, born in the six targeted countries
2 presents a security risk to the United States. Most obviously perhaps, this group
3 includes people who left their place of birth as infants or children, and perhaps were
4 born to parents who themselves were not citizens of the country where their
5 children were born. These immigrants and refugees could have lived nearly their
6 entire lives in countries that even the federal government does not think present
7 any risk to the United States, and yet they are banned solely because of where they
8 were born. Even on immigration matters, discretion must be exercised “in a
9 reasoned manner.” *Judulang v. Holder*, 565 U.S. 42, 53 (2011). A classification
10 based on national origin is not rational.²⁵
11

12 CONCLUSION

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15 For these reasons, and the reasons set forth in Plaintiffs’ motion, *amici* urge
16 the court to grant the emergency motion to enforce the preliminary injunction.

17 Respectfully submitted,

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26 ²⁵ The Executive Order states the six targeted countries are unable to “share or validate”
27 data about individuals seeking to enter the United States. Order § 1(d). But this assertion
28 regarding vetting cannot be read as a blanket “determination” that all individuals from the
29 six countries are “detrimental” to the United States in violation of section 1182(f).

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Washington by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 14, 2017

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