

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al.

Plaintiffs,

Case No. 2:17-cv-00141-JLR

vs.

MOTION FOR LEAVE TO FILE
AMICUS BRIEF BY NEW YORK
UNIVERSITY

DONALD TRUMP, in his official capacity
as President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his
official capacity as Secretary of the
Department of Homeland Security; TOM
SHANNON, in his official capacity as
Acting Secretary of State; and the UNITED
STATES OF AMERICA

NOTE ON MOTION CALENDAR:
March 14, 2017

Defendants.

I. INTRODUCTION

New York University (“NYU”) seeks the Court’s permission to file a brief of *amicus curiae*, in support of the Plaintiffs’ Emergency Motion to Enforce Preliminary Injunction [Dkt. 119] in the above-referenced matter. A copy of the proposed brief is attached as Exhibit 1 to this motion.

II. IDENTITY AND INTERESTS OF THE AMICUS CURIAE

NYU has an especially strong interest in this matter. As of 2016, NYU hosted more international students than any other university in the United States. International students

NEW YORK UNIVERSITY’S MOTION
FOR LEAVE TO FILE AMICUS BRIEF - 1
Case No. 2:17-cv-00141-JLR

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1 constituted 35% of NYU's graduate student population and 18% of its undergraduate student
2 population. This includes approximately 120 students and ten scholars from the six countries
3 named in the March 6, 2017 Executive Order titled "Protecting the Nation from Foreign
4 Terrorist Entry into the United States" (the "Executive Order"), which is the subject of these
5 continuing proceedings. NYU is deeply concerned that the Executive Order will have a
6 significant adverse impact not merely on its numerous current and prospective international
7 students and scholars, but on the ability of the University as a whole to fulfill its mission as a
8 global educational institution for all of its constituents, "fitting for all and graciously open to
9 all." See NYU Mission Statement, available at www.nyu.edu/about. Because this Court's
10 decisions may have far-reaching implications that will substantially affect NYU's mission
11 and educational aims, NYU seeks leave to submit arguments reflective of this litigation's
12 vital importance to the University.

13 III. ARGUMENT IN SUPPORT OF LEAVE TO FILE

14 District courts have "broad discretion" to appoint amicus curiae. *Skokomish Indian*
15 *Tribe v. Goldmark*, No. C13-5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013)
16 (Robart, J.). Amicus participation is especially appropriate where the ramifications of the
17 decision extend beyond the parties. *Id.* Amicus contribution can be in the form of "ideas,
18 arguments, theories, insights, facts or data that are not to be found in the parties' briefs." See
19 *Commonwealth of the N. Mariana Islands v. United States*, No. CIVA 08-1572 PLF, 2009
20 WL 596986, at *3-4 (D.D.C. Mar. 6, 2009). In the past, this Court has granted leave to
21 organizations to participate as amici that had "a particular perspective that may not otherwise
22 be before the court." *Microsoft Corp. v. United States Dep't of Justice*, No. C16-0538JLR,
23 2016 WL 4506808, at *27 (W.D. Wash. Aug. 29, 2016).

24 NYU's *amicus* brief would provide the Court with NYU's unique perspective as a
25 global university based in New York City.

1 The ability to attract students and scholars from a wide variety of backgrounds is
2 crucial to NYU's success as an educational institution. In support of its mission, NYU has
3 invested significant resources towards its status as a "Global Network University," with
4 members of its community learning and teaching worldwide, including at its own campuses
5 and at partner campuses on nearly every continent. As described more fully in the attached
6 brief, implementation of the Executive Order threatens NYU's central educational aims by
7 encumbering its ability to conduct its many international programs, impairing its ability to
8 transmit its strongly-held values abroad, and obstructing its ability to provide to all of its
9 students the educational benefits that flow from a fully diverse student body and faculty.

10 We ask the Court to exercise its discretion to permit NYU to file the attached amicus
11 brief. NYU will focus on the detrimental effect the Executive Order has had and will
12 continue to have on the NYU's students and faculty, and on the achievement of NYU's
13 institutional goals.

14 IV. CONCLUSION

15 For the foregoing reasons, NYU respectfully requests the Court's permission to file
16 the brief of *amicus curiae* attached as Exhibit 1 on or before a date set by the Court.

17 DATED this 14th day of March, 2017.

18 PROSKAUER ROSE LLP

SMITH GOODFRIEND, P.S.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing Motion for Leave to File Amicus Brief by New York University with the Clerk of the Court for the United States District Court, Western District of Washington using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED at Seattle, Washington this 14th day of March, 2017.

s/ Tara D. Friesen

THE HONORABLE JAMES L. ROBERT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON and STATE OF MINNESOTA,

Plaintiffs,

vs.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of the Department of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO. 2:17-CV-00141-JLR

BRIEF OF NEW YORK UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

NOTE ON MOTION CALENDAR: March 14, 2017

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1 **INTEREST OF AMICUS**

2 *Amicus* New York University (“NYU”) is an institution of higher learning
3 headquartered in New York City, with campuses on nearly every continent. A critical
4 component of its global mission is to create an environment that fosters achievement
5 borne of the free exchange of ideas and information. By welcoming and engaging
6 students and scholars from the broadest range of backgrounds and nationalities, NYU is
7 able to advance that mission.

8 As a global university centered in New York City—one of the world’s most
9 internationally diverse cities—NYU has a vital interest in the proper administration,
10 within constitutional limits, of the immigration laws of the United States. NYU is deeply
11 concerned that the Executive Order issued by the President on March 6, 2017, titled
12 “Protecting the Nation from Foreign Terrorist Entry into the United States” (the
13 “Executive Order”), like its immediate predecessor, exceeds those limits. If allowed to
14 stand, it would impair unique educational opportunities that NYU is otherwise able to
15 provide, and thus inflict harm on the university, on its constituents, and on the
16 community at large.

1 **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

2 Thousands of prospective students apply to NYU every year, seeking the
3 opportunity to study at one of the most internationally diverse universities in the world.
4 At the core of NYU’s institutional mission are the twin aims of providing an exceptional
5 academic experience for its students and fostering world-class international scholarship.
6 NYU has invested significant resources in developing an environment in which its
7 diverse student body and faculty can thrive, for the benefit of the academic community,
8 the United States, and the world. Implementation of the Executive Order will
9 significantly undermine these efforts.

10 By obstructing the entry of international students, faculty and other scholars into
11 the United States based solely on their having come from one of the Muslim-majority
12 countries singled out for adverse treatment in the Executive Order—without any reason
13 to believe that the individuals are involved at all in any terrorist activity—the Order will
14 gratuitously and unlawfully encumber NYU’s ability to conduct its many international
15 programs, which rely on input from faculty and students from the affected countries;
16 impair its ability to transmit its strongly-held values abroad; and obstruct its ability to
17 provide to all of its students the educational benefits that flow from a fully diverse
18 student body and faculty. For these reasons, among others, implementation of the
19 Executive Order should be halted.

1 **ARGUMENT**

2 **I. A Diverse International Community is Critical to NYU’s Identity and**
3 **Mission.**

4 NYU is a “Global Network University,” with campuses around the world,
5 including in Africa, Asia, Europe, North America and South America.¹ These campuses
6 offer to all NYU students a range of multi-disciplinary opportunities for research,
7 teaching and scholarly collaboration. In addition to developing its own campuses, NYU
8 has partnered with numerous schools worldwide both to create educational opportunities
9 for international students and scholars,² and to expose its domestic students to the vast
10 wealth of experience and knowledge that can be gained by traveling, researching and
11 studying abroad.³

12 Attracting to the United States international students and scholars from a wide
13 variety of backgrounds is intrinsic to NYU’s success as an educational institution. To
14 that end, NYU has made it a priority to “embrace diversity among faculty, staff and
15 students to ensure a wide range of perspectives, including international perspectives, in
16 the educational experience.”⁴ Its efforts have been highly successful—in 2015-2016,

18 ¹ See NYU, *The Global Network*, available at <https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/organization-and-administration/the-global-network.html>.

19 ² See *Global Academic Partnerships and affiliations*, NYU (March 2, 2016), available at
20 <https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations.html> (describing global
21 partnerships and affiliations with schools for the humanities, business, medicine, sociology, anthropology,
22 and the arts, located in Accra, Berlin, Buenos Aires, Florence, London, Madrid, Paris, Prague, Sydney, Tel
23 Aviv, and Washington D.C.); see also *Update on Faculty Engagement and Academic Development at the
Global Sites (6/11/15 Memo)*, NYU (June 11, 2015), available at [https://www.nyu.edu/faculty/global-
academic-partnerships-and-affiliations/memos/faculty-engagement-june-2015.html](https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations/memos/faculty-engagement-june-2015.html) (detailing the growth of
new collaborative programs with faculty, students, and departments at partnership and affiliate schools).

24 ³ See, e.g., NYU International Exchange Program, NYU,
25 <https://www.nyu.edu/academics/studying-abroad/exchange/internationalexchange.html>; Stern IBEX
(International Business Exchange), NYU, [https://www.nyu.edu/academics/studying-abroad/exchange/stern-
ibex-international-business-exchange.html](https://www.nyu.edu/academics/studying-abroad/exchange/stern-ibex-international-business-exchange.html).

26 ⁴ See NYU Mission Statement, available at www.nyu.edu/about.

1 NYU hosted more international students and scholars than any other university in the
2 United States—approximately 15,000 international students and more than 1,200
3 international scholars,⁵ constituting more than a third of NYU’s graduate student
4 population, and nearly a fifth of its undergraduate population. The most creative, talented
5 and industrious members of communities all over the world have at one time called NYU
6 home.⁶

7 NYU’s presence in New York City has itself played an integral role in the
8 University’s ability to achieve its international mission, proudly “tak[ing] its name and
9 spirit from one of the busiest, most diverse and dynamic cities of all.”⁷ Millions of
10 immigrants have come to New York as the first step toward making a life in the United
11 States,⁸ believing that the Statue of Liberty in fact welcomes the “huddled masses
12 yearning to breathe free”⁹ New York is home to millions of foreign-born
13 residents—more than a third of the City’s population.¹⁰ The City has long served as a
14 hub of international commerce, cultural exchange and diplomacy. Its international
15

16 ⁵ NYU Office of Global Services, *Annual Report: September 1, 2015 - August 31, 2016*, available
17 at <http://www.nyu.edu/content/dam/nyu/globalServices/documents/annualreport/annual%20report.pdf>.

18 ⁶ Many NYU alumni from foreign countries have gone on to become leaders in their communities.
19 To take but a few examples, NYU alumni Shimon Peres, the ninth President of Israel, and former Egyptian
20 vice president Mohammed Mustafa ElBaradei, both won the Nobel Peace Prize for their contributions to
21 the region targeted by the Executive Order. Working with fellow NYU School of Medicine alumnus Jonas
22 Salk, Albert Sabin developed oral polio vaccines that played a key role in substantially eradicating the
23 disease. More recently, Eric Richard Kandel, who also attended NYU’s School of Medicine, was awarded
24 a Nobel Peace Prize for discoveries that paved the way to the modern understanding of memory formation.

25 ⁷ NYU Mission Statement, available at www.nyu.edu/about.

26 ⁸ From 1892 to 1954 alone, over twelve million immigrants came to the United States through
27 Ellis Island. See Ellis Island History, www.libertyellisfoundation.org/ellis-island-history.

28 ⁹ Emma Lazarus, “The New Colossus,” Liberty State Park (1883) available at
<http://www.libertystatepark.com/emma.htm> (last accessed March 6, 2017).

¹⁰ Thomas P. DiNapoli, “The Role of Immigrants in the New York City Economy,” New York
State Comptroller Report 7-2016 (Nov. 2015), available at <https://osc.state.ny.us/osdc/rpt7-2016.pdf>
 (“Nearly three-quarters of the 4.4 million immigrants in New York State live in New York City . . .”).

1 influences are woven into the fabric of everyday life experienced by NYU’s students and
2 scholars,¹¹ and its spirit infuses and amplifies NYU’s culture of embracing diversity.

3 NYU’s mission and values are embodied in the words of its current president,
4 Dr. Andrew Hamilton, himself an immigrant. In a letter to the NYU community
5 addressing the January 27, 2017 Executive Order that preceded the Executive Order now
6 at issue in these proceedings, Dr. Hamilton articulated the importance of free movement
7 across borders in pursuit of scholarship and the harm arising from its unwarranted
8 obstruction:

9
10 As a scientist who studied and worked in four countries
11 before becoming a citizen of the U.S., I know how
12 important it is to be able to move across borders in peaceful
13 pursuit of one’s scholarship. I know, too, more than most
14 given my background and my field, how much goodwill the
15 U.S. earns for itself through the openness of its education
16 system and how widely those who study here can spread
17 American values. And I know, as well, that these
18 developments are not just a matter of disrupted educational
19 plans or lost opportunities or even damage to the academic
20 enterprise; beyond all that, this order harms one of the most
21 admired and cherished of American principles—religious
22 non-discrimination itself.¹²

18 **II. The Executive Order Significantly Harms NYU and Its Constituents.**

19 By indiscriminately targeting individuals from the Muslim-majority countries of
20 Iran, Libya, Somalia, Sudan, Syria and Yemen without any basis to believe that such

21 ¹¹ *Students Share International Experiences at Global Engagement Symposium*, NYU Arts &
22 Liberal Studies (March 20, 2015), available at <http://www.liberalstudies.nyu.edu/object/global.symposium>
23 (“[Students] presented on experiences that included installing a solar electricity system in a Nicaraguan
24 village, independent research into NYU London’s history as the headquarters of a musicians’ club, and
writing a policy report on asylum seekers in Tel Aviv.”) (One student commented: “One of the main
reasons I decided to study at NYU was the opportunity for global experiences.”).

25 ¹² Letter from Dr. Andrew Hamilton to NYU Community (Jan. 29, 2017), available at
[http://www.nyu.edu/about/leadership-university-administration/office-of-the-
26 president/communications/the-recent-executive-order-on-immigration.html](http://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/the-recent-executive-order-on-immigration.html).

1 individuals pose the slightest threat to the national security of the United States, the
2 Executive Order improperly compromises the diversity that is central to NYU’s identity
3 and mission. Approximately 120 NYU students and ten scholars at the New York City
4 campus alone come from the six Muslim-majority countries specified in the Executive
5 Order. Many others from those countries will be discouraged or prevented by the
6 Executive Order from joining them at NYU.

7
8 Courts have long emphasized the importance of promoting diversity and freedom
9 in educational environments, recognizing that, due to the classroom’s vital role as a
10 “marketplace of ideas,” constitutional protections are “nowhere more vital than in the
11 community of American schools.” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*,
12 385 U.S. 589, 603 (1967). “The nation’s future depends upon leaders trained through
13 wide exposure to that robust exchange of ideas which discovers truth out of a multitude
14 of tongues, [rather] than through any kind of authoritative selection.” *Id.* (internal
15 citation and quotation marks omitted).

16 Diversity similarly “helps break down racial stereotypes, and enables [students] to
17 better understand” those with different backgrounds. *Grutter v. Bollinger*, 539 U.S. 306,
18 330 (2003). As a result, diversity helps impart the “skills needed in today’s increasingly
19 global marketplace” by “expos[ing] [students] to widely diverse people, cultures, ideas,
20 and viewpoints.” *Id.* at 330; *see also Keyishian*, 385 U.S. at 603. Recognizing these
21 benefits, the Supreme Court has held that the Constitution protects a school’s “right to
22 select those students who will contribute the most to the ‘robust exchange of ideas’”
23 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978); *see also Fisher v. Univ. of*
24 *Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (recognizing compelling governmental
25 interest in “the educational benefits that flow from a diverse student body”); *Washington*
26 *v. Trump*, 847 F. 3d 1151, 1159 (9th Cir. 2017) (recognizing a school’s ability to assert

1 harm on behalf of its students, including harm to the university’s ability to accomplish its
2 global mission).

3 By its very nature and goals, implementation of the Executive Order threatens that
4 constitutionally protected diversity. *See Fisher*, 133 S. Ct. at 2417; *Grutter*, 539 U.S. at
5 328 (observing that a school’s “educational judgment that such diversity is essential to its
6 educational mission is one to which we defer”); *Bakke*, 438 U.S. 265 at 313; *see also*
7 *Bery v. City of N.Y.*, 97 F.3d 689, 694 (2d Cir. 1996) (“When an alleged deprivation of a
8 constitutional right is involved, most courts hold that no further showing of irreparable
9 injury is necessary.”) (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice*
10 *and Procedure* § 2948, at 440 (1973)).

11 The harm that will flow from the Executive Order is in any case manifest. By
12 targeting the populations of six Muslim-majority nations for exclusion from the United
13 States, the Executive Order will hinder NYU’s efforts to expose international students
14 and scholars to a broad array of ideas and influences. This cross-cultural exchange
15 buttresses key democratic traditions, such as free speech, a free press,¹³ free and fair
16 elections, and freedom of assembly.¹⁴ By fostering a culture of international exchange
17 and dialogue, rather than fear and hatred, NYU’s international programs thus combat
18

19
20 ¹³ Indeed, many NYU graduates of the Near Eastern Studies program have gone on to be respected
21 journalists, helping shape the thoughts for millions of readers about life and culture in the affected regions.
22 Jared Malsin, who graduated from NYU’s Near Eastern Studies in 2010, is *TIME* magazine’s Middle East
23 bureau chief, and former West Bank and Gaza Palestinian news agency Ma’an chief English editor. *See*
About – Jared Malsin, available at <http://jaredmalsin.com/about.html>. Habib Battah, who graduated from
24 NYU’s Near Eastern Studies and Global Journalism in 2010, is a prominent journalist in *Al Jazeera*
25 covering terrorism in the Middle East among other events. *See* Habib Battah Profile, *Al Jazeera*, available
26 at <http://www.aljazeera.com/profile/habib-battah.html>.

27 ¹⁴ *See, e.g.*, United Nations Security Council Resolution 2178, adopted in September 2014,
28 http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf (highlighting the need for “quality
education for peace that equips youth with the ability to engage constructively in civic structures and
inclusive political processes”).

1 radicalization.¹⁵ Reducing this cross-cultural exchange will deprive NYU of
2 opportunities to share those key democratic traditions with students from abroad.¹⁶ And
3 in doing so, the Executive Order will diminish the global reach of American universities
4 and risk robbing the nation, and the world, of their potential contributions.

5 Beyond its impact on the NYU community's ability to disseminate important
6 shared values, the Executive Order threatens NYU's own diverse international
7 community, harming the University's current and prospective students, scholars and
8 faculty. In addition to the day-to-day cultural exchange that occurs at a diverse
9 university, NYU has many programs that facilitate the understanding of other cultures,
10 such as the Hagop Kevorkian Center ("the Center"), which focuses on Near Eastern
11 studies and was created "to foster the interdisciplinary study of the modern and
12 contemporary Middle East and to enhance public understanding of the region."¹⁷ To
13 achieve this goal, it hosts events exploring topics such as "current events and policy
14 issues relating to the middle east," some of which include discussions relating
15 specifically to the six countries affected by the Executive Order.¹⁸ The Center also
16

17 ¹⁵ See, e.g., *Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance*
18 *and Respect for Diversity*, United Nations Development Programme 11 (2016) (identifying as one strategy
19 to prevent violent extremism "[p]romoting respect for human rights, diversity and a culture of global
20 citizenship in schools and universities"); see also Marta Mikilikowska, "Development of anti-immigrant
attitudes in adolescence: The role of parents, peers, intergroup friendships, and empathy," *British Journal of*
Psychology (2017), available at <http://onlinelibrary.wiley.com/doi/10.1111/bjop.12236/abstract> (showing
that adolescents with immigrant friends are "less affected by parents and peers' prejudice than youth
without immigrant friends").

21 ¹⁶ See, e.g., *Study Away in the US and Around the World*, Studying Abroad | NYU, available at
22 <https://www.nyu.edu/academics/studying-abroad.html> (video testimonials of NYU students studying
23 abroad) ("Regardless of where you go, you're going to experience, you know, a beautiful city and a
beautiful place, you are going to meet new people, you are going to have new experiences and
opportunities, you are going to grow personally, you are going to grow academically, and you're going to
come back a better person.").

24 ¹⁷ *About*, Hagop Kevorkian Center for Near Eastern Studies, NYU, available at
25 <http://neareaststudies.as.nyu.edu/page/about>.

26 ¹⁸ See <http://neareaststudies.as.nyu.edu/page/upcomingevents/>. For example, on February 15,
2017, the Center hosted two films about the Syrian refugee crisis entitled "District Zero" and "Siege." On

1 collaborates with “nearly 100 teachers from public and private schools across the New
2 York metropolitan area to participate in Center-sponsored workshops on the Middle
3 East,” which allow Center-affiliated faculty to “share expertise on the Middle East with
4 journalists and government agencies on a regular basis and discuss current events and
5 policy issues at university and community events.” These programs are vital to public
6 awareness, which is crucial to NYU’s ability to serve as an educational institution “fitting
7 for all and graciously open to all.”¹⁹

8 From the joint master’s degrees offered by the Center, to the graduate programs
9 offered by the Middle Eastern and Islamic Studies program, the value of NYU’s
10 educational opportunities is predicated in substantial part on the quality and diversity of
11 its faculty and students. The Executive Order will interfere with numerous on-campus
12 programs like these, which are central to creating an environment of intellectual and
13 cultural exchange, and thus heightened international awareness and understanding, at a
14 time when such understanding is more important than ever.²⁰

17 February 23, they hosted an event focused on Iran entitled “Picturing Urban Modernity: Tehran and its
18 Cinematic Configurations, 1900s-1930s,” which explores “the role of cinema in shaping urban modernity
19 in Tehran from 1900s to 1930s.” See *Picturing Urban Modernity: Tehran and its Cinematic
20 Configurations, 1900s-1930s*, New York University, available at
21 <http://neareaststudies.as.nyu.edu/object/kc.events.picturingurbanmodernity/>. A film screening involving
the Syrian refugee crisis took place on March 1, and another is scheduled March 22, See *On the Bride’s
22 Side*, Visual Culture, Loss and Resilience, New York University, available at
[http://neareaststudies.as.nyu.edu/object/kc.events.brides.side](http://neareaststudies.as.nyu.edu/object/kc.events.brides.side;); *Not Who We Are*, Visual Culture, Loss and
Resilience, New York University, available at
<http://neareaststudies.as.nyu.edu/object/kc.events.notwhoweare>.

22 ¹⁹See NYU Mission Statement, *available at* www.nyu.edu/about.

23 ²⁰ See, e.g., Nassir Abdulaziz Al Nasser (High Representative for United Nations Alliance of
24 Civilizations), *UNOAC / Remarks /Parliamentary Assembly of the Mediterranean* (February 23, 2017),
25 *available at* [https://www.unaoc.org/2017/02/remarks-11th-plenary-session-parliamentary-assembly-of-the-
26 mediterranean/](https://www.unaoc.org/2017/02/remarks-11th-plenary-session-parliamentary-assembly-of-the-mediterranean/) (commenting on the rise “of violence and xenophobia against minorities” and remarking
that “inclusiveness has become a pre-requisite for peaceful society” when it comes to “migration laws,” and
that “[p]romoting and strengthening dialogue is an essential tool to prevent and defeat violent and extremist
ideologies”).

1 Finally, all students suffer when the diversity of ideas and backgrounds to which
2 they are exposed is diminished. *See Fisher*, 133 S. Ct. at 2417. Unchecked, the
3 Executive Order will have a direct and immediate impact on the large number of
4 international students and scholars who wish to become affiliated with NYU or to
5 participate in academic conferences at NYU in their fields.²¹ Prospective students who
6 have yet to enroll will be delayed or entirely prevented from beginning their academic
7 careers.

8 At this juncture, the Executive Order, slated to be enforced from March 16 to June
9 6,²² would substantially interfere with students from the targeted countries seeking to
10 enroll in NYU’s Summer Session, as prospective students will be deterred from even
11 attempting to enter the country at this time. If the duration of the Executive Order were
12 extended, many more students and scholars with vast untapped potential would be
13 prevented from achieving the success of which they are capable, harming them, the NYU
14 community, and ultimately the world as a whole.

15 For example, Shadi Hedarifar, a prospective graduate student who was accepted
16 to schools worldwide but wanted to study in the United States, may not be able to attend
17 classes at NYU with worldwide leaders in her field.²³ Ms. Hedarifar has written that
18 because of the January 27, 2017 Executive Order, her “entire future [was] destroyed in
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21 ²¹ “MEIS Statement on Executive Order to Limit Entry of Middle Eastern Refugees and
22 Immigrants,” MEIS | New York University, *available at*
http://meis.as.nyu.edu/object/statement_executive_order.

23 ²² *See* Executive Order § 2(c) (directing suspension “for 90 days from the effective date of this
order”); § 14 (“This order is effective . . . on March 16, 2017.”).

24 ²³ *See* Samantha Michaels, *I’m an Iranian Woman Whose Dream Is to Study in America. Here’s*
25 *My Message for Trump.*, Mother Jones (Jan. 29, 2017),
<http://www.motherjones.com/politics/2017/01/iranian-student-trump-immigration> (“We Iranian students
strongly believe that diversity in ethnicity, race, religion, and color is one of the greatest strengths of the
United States. And Trump’s Muslim ban will destroy this.”).

1 one second.” After saving money for the application fees “that a whole family could live
2 [on] for a month,” Ms. Hedarifar’s dreams of studying in NYU may well be shattered.²⁴

3 An integral “[p]art of the business of a university [is] to provide that atmosphere
4 most conducive to speculation, experiment, and creation.” *Bakke*, 438 U.S. at 305
5 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring
6 in judgment)). To preserve for NYU and its students and scholars the constitutionally
7 protected benefits of diversity and the free exchange of ideas, and to eliminate the
8 discriminatory exclusion from the United States of persons from Muslim-majority
9 countries, this Court should grant the relief sought by Plaintiffs and halt the
10 implementation of the Executive Order.

11 **III. The Executive Order Has the Same Unlawful Policy Outcomes as Its**
12 **Predecessor, In Violation of the Equal Protection Clause, the Establishment**
13 **Clause and the Immigration and Nationality Act.**

14 The Executive Order states that its aim is to “replace” Executive Order 13769,
15 signed January 27, 2017, and respond to judicial orders granted against the earlier Order
16 by “exclud[ing] from the suspensions categories of aliens that have prompted judicial
17 concerns and . . . clarif[ying] or refin[ing] the approach to certain other issues or
18 categories of affected aliens.”²⁵ The Executive Order made various changes to the
19 practices to be implemented under the prior Order, including removing Iraq from the list
20 of countries whose nationals are subject to the 90-day suspension of unrestricted entry.²⁶
21 But it nonetheless suffers from many of the same defects as the prior Order, and is
22 animated by the same unlawful, discriminatory intent.

23
24 ²⁴ *Id.*

25 ²⁵ Executive Order § 1(i).

26 ²⁶ *See* Executive Order § 2(c).

1 The revised Executive Order, like its predecessor, violates the Constitution’s
2 Equal Protection Clause, because it discriminates against individuals based on their
3 religion and reflects a clear animus towards Muslims. *See Bolling v. Sharpe*, 347 U.S.
4 497 (1954) (applying the Fourteenth Amendment’s equal protection clause to the federal
5 government through the Fifth Amendment). Discrimination against a protected class on
6 the basis of overt animus is the most obvious and fundamental abuse of government
7 authority against which the Equal Protection Clause was created to protect. *Vill. of*
8 *Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (“When there
9 is proof that a discriminatory purpose has been a motivating factor in the decision, . . .
10 judicial deference is no longer justified.”); *Jana-Rock Const., Inc., v. N.Y. State Dep’t of*
11 *Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (“Government action . . . violates principles
12 of equal protection if it was motivated by discriminatory animus and its application
13 results in a discriminatory effect.”) (internal citation omitted). As such, classifications
14 based on religion or national origin are scrutinized to the highest degree. *Clark v. Jeter*,
15 486 U.S. 456, 461 (1988) (national origin); *Larson v. Valente*, 456 U.S. 228, 244 (1982)
16 (religion). A law may fail to withstand scrutiny even if discrimination is not “the sole
17 purpose of the challenged action, but only that it was a ‘motivating factor.’” *Arce v.*
18 *Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (internal citation omitted).

19 For similar reasons, the Executive Order violates the Establishment Clause of the
20 Constitution. The “clearest command of the Establishment Clause is that one religious
21 denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244;
22 *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005)
23 (considering the “historical context” of the government act and the “specific sequence of
24 events leading to [its] passage”) (internal citation omitted). “[T]he Religion Clauses . . .
25 and the Equal Protection Clause as applied to religion . . . all speak with one voice on this

1 point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal
2 rights or duties or benefits.” *Hassan v. City of New York*, 804 F.3d 277, 290 n.2 (3d Cir.
3 2015) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715
4 (1994) (O’Connor, J., concurring in the judgment) (alterations in original, internal
5 quotation marks omitted)).

6 Finally, the Executive Order, like the one that preceded it, contravenes the letter
7 and intent of the Immigration and Nationality Act of 1965 (the “INA”), exceeding the
8 scope of presidential authority under that statute. The INA was enacted at the height of
9 the civil rights movement, to combat the then-current system of national-origin quotas,
10 which the nation’s leaders believed to be “contrary to our basic principles as a nation.”²⁷
11 The legislative history of the INA shows that its intent was to “remove from our law a
12 discriminatory system of selecting immigrants that is a standing affront to millions of our
13 citizens.”²⁸ Effectuating that intent, Section 202 of the INA prohibits discrimination in
14 admissions on the basis of national origin. *See* 8 U.S.C. § 1152(a)(1)(A) (with limited
15 statutory exceptions, “no person shall receive any preference or priority or be
16 discriminated against in the issuance of an immigrant visa because of the person’s race,
17 sex, nationality, place of birth, or place of residence.”); *see, e.g., Legal Assistance for*
18 *Vietnamese Asylum Seekers v. Dep’t of State*, 45 F.3d 469 (D.C. Cir. 1995) (holding that
19

21 ²⁷ 111 Cong. Rec. 24, 225 (1965) (statement by Senator Edward M. Kennedy). *See also id.* at 21,
22 778 (statement of Representative Paul Krebs that immigration rules based on national origin were
23 “repugnant to our national traditions,” and that “we must learn to judge each individual by his own worth
24 and by the value he can bring to our Nation.”).

25 ²⁸ *Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of*
26 *Representatives, on H.R. 7700 and 55 Identical Bills*, 88th Cong. 901-02 (1964), *reprinted in* 10A Oscar
27 Trelles & James Bailey, *Immigration and Nationality Acts: Legislative Histories and Related Documents*,
28 doc. 69A (1979) 410 (remarks of Attorney General Robert Kennedy) (noting that the bill “would remove
from our law a discriminatory system of selecting immigrants that is a standing affront to millions of our
citizens”).

1 Congress, in enacting Section 202, “unambiguously directed that no nationality-based
2 discrimination shall occur”).

3 The authority of the President under INA Section 212(f) to “suspend the entry of
4 all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry
5 of aliens any restrictions he may deem to be appropriate,” *see* 8 U.S.C. § 1182(f), is
6 circumscribed by Section 202’s express and later-enacted prohibition against
7 discrimination on the basis of national origin. In addition, any presidential proclamation
8 under Section 212(f) requires a legitimate finding that “the entry of [the suspended]
9 aliens or . . . class of aliens into the United States would be detrimental to the interests of
10 the United States.” *Id.* As shown below, the Executive Order violates both Section 202’s
11 unambiguous prohibition against discrimination on the basis of national origin, and INA
12 Section 212(f)’s requirement that an exercise of presidential authority under that section
13 be justified by a legitimate finding that the admission of a suspended class of individuals
14 is against the interests of the United States.

15 The Executive Order specifically violates the Constitution and the INA because it
16 arbitrarily singles out six Muslim-majority countries as targets for its ban. This invidious
17 discrimination is apparent from the text of the Executive Order itself, its history, and the
18 unsubstantiated pretext offered in support of the Executive Order.

19 First, the plain text of the Executive Order’s 90-day suspension of entry by
20 nationals of the six countries discriminates on the basis of religion against Muslims by
21 targeting all of the citizens of six Muslim-majority countries without a plausible basis for
22 doing so. The text of the order further violates the Equal Protection Clause and
23 Establishment Clause of the Constitution and Section 202’s prohibition against
24 discrimination based on national origin. The President’s denial that the Executive Order
25 is a Muslim ban is belied by its impact: each of the targeted countries has a Muslim

1 population of 90% or more.²⁹ Three of the countries—Iran, Somalia, and Yemen—have
2 Muslim populations of more than 99%.³⁰

3 The Executive Order crosses from disparate impact into overt discrimination by
4 exploiting and perpetuating stereotypes of Muslims. The Order invokes “honor
5 killings”³¹ and “radicalized” foreign nationals.³² These terms are not “neutral,” but carry
6 very specific meanings aimed at a faith “singled out for discriminatory treatment.”
7 *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538 (1993) (holding that
8 use of allegedly neutral terms “sacrifice” and “ritual” were evidence of singling out a
9 particular religion in violation of the establishment clause).³³

10 The call for public reporting of “honor killing” is a thinly-veiled attempt to paint
11 Muslim men as domestic abusers.³⁴ This blatant stigmatization of Muslims runs afoul of
12

13 ²⁹ Pew Research Ctr., “The Global Religious Landscape: a Report on the Size and Distribution of
14 the World’s Major Religions as of 2010,” 47-50 (2012), <https://goo.gl/HVoVJI> (Libya is 96.6% Muslim,
Syria 92.8%, and Sudan 90.7%).

15 ³⁰ *Id.*

16 ³¹ Executive Order § 11(iii).

17 ³² *Id.* § 11(ii).

18 ³³ That the language of the Executive Order is targeted against people of the Muslim faith becomes
19 even more evident when one considers the leaked draft of the January 27, 2017 Executive Order, which
20 included the phrase “violent religious edicts”—a transparent attempt to disparage Muslims as barbaric.
21 Daniel M. Kowalski, *Executive Order: Protecting the Nation from Terrorist Attacks by Foreign Nationals*
22 – *White House (Draft, Unsigned, Undated)*, Lexis Nexis Legal Newsroom (Jan. 25, 2017), available at
23 [https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-](https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-undated.aspx?Redirected=true)
24 [order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-](https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-undated.aspx?Redirected=true)
25 [undated.aspx?Redirected=true](https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-undated.aspx?Redirected=true) (“We cannot . . . admit into our country . . . those who would place violent
26 religious edicts over American law.”).

27 ³⁴ Executive Order § 11(iii) (calling for the Attorney General “to collect and make publicly
28 available . . . information regarding the number and types of gender-based violence against women,
including so-called ‘honor killings,’ in the United states by foreign nationals”); see also Leti Volpp,
Trump’s mention of ‘honor killings’ betray the truth of his ‘Muslim ban’, The Hill (Feb. 22, 2017),
available at [http://origin-ny1.thehill.com/blogs/pundits-blog/immigration/320632-trumps-mention-of-](http://origin-ny1.thehill.com/blogs/pundits-blog/immigration/320632-trumps-mention-of-honor-killings-betray-the-truth-of-his)
honor-killings-betray-the-truth-of-his (“Honor killings stand in for the idea of Muslim barbarity. Their
invocation in the executive order helps make apparent that the ‘foreign nationals’ whose entry poses a
terrorist threat are Muslim.”); Emma Green, *Trump’s ‘Honor Killing’ Tracking System Could Exacerbate*
Domestic Violence, The Atlantic (Mar. 7, 2017), available at
<https://www.theatlantic.com/politics/archive/2017/03/honor-killings-trump/518766/> (“The term itself is

1 the Establishment Clause and Equal Protection Clause. *See Lukumi*, 508 U.S. at 538;
2 *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[L]aws of the kind now before us raise the
3 inevitable inference that the disadvantage imposed is born of animosity toward the class
4 of persons affected.”). It also reveals how the Executive Order does not satisfy INA
5 Section 212(f)’s requirement of a “legitimate finding” that the admission of a suspended
6 class of individuals is against the interests of the United States. Domestic violence is a
7 serious problem for people of all faiths and backgrounds, not just those from the six
8 Muslim-majority countries.³⁵

9 In addition to being reflected in the Executive Order’s text, invidious
10 discrimination, offensive to the Constitution and the INA, is confirmed by a review of its
11 history, including statements made by the President and others regarding its purposes.
12 White House Advisor Stephen Miller conceded when discussing the revised Executive
13 Order that the changes “are mostly minor, technical differences,” and “[f]undamentally,
14 [it will be] the same, basic policy outcome for the country.”³⁶ And much like the
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17 loaded: It suggests that homicide can be religiously justified. But “‘honor killing’ has nothing to do with
18 Islam,” argued Aisha Rahman, the executive director of Karamah, a research and advocacy organization
19 that works on issues of gender equity in Islam. “In Islamic law, there’s nothing that’s even called ‘honor
killing.’”).

20 ³⁵ *See, e.g., National Intimate Partner and Sexual Violence Survey 2010 Summary Report*,
National Center for Injury Prevention and Control Division of Violence Prevention 40 (2010), *available at*
21 https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf (finding domestic violence occurs
22 against intimate partners across all races and ethnicities). Particularly when one takes into account the
23 frequency of hyper-masculinity killings, “honor killings” are more a matter of verbiage than a culturally
distinct category of crime. *See Soraya Chemaly, Mass Killings in the US: Masculinity, Masculinity,*
24 *Masculinity*, The Huffington Post, Blog (Oct. 5, 2015), *available at* http://www.huffingtonpost.com/soraya-chemaly/mass-killings-in-the-us-w_b_8234322.html (noting that “[d]uring the last 30 years, all but one of
the mass murders in the U.S. was committed by men, 90 percent of whom were white,” and finding that
mass killings disproportionately target women and are motivated partially by anti-feminist sentiment).

25 ³⁶ Taylor Link, *Stephen Miller admits the new executive order on immigration ban is same as the*
old, SALON, Feb. 22, 2017, <http://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old/>.

1 original,³⁷ the revised Executive Order is steeped in a background of the President’s
2 discriminatory statements that, without any evidence whatsoever, perpetuated the
3 stereotype that people of Muslim faith are largely terrorists seeking to harm the United
4 States.³⁸ President Trump has repeatedly called for: shutting down mosques in the
5 United States,³⁹ suspicionless surveillance of Muslims in mosques,⁴⁰ a registry for all
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9 ³⁷ Both the Court of Appeals for the Ninth Circuit and the District Court for the Eastern District of
10 Virginia noted the potential discriminatory purpose in deciding to enjoin the implementation of the January
11 29, 2017 Executive Order. *Trump*, 847 F. 3d at 1167 (finding “statements by the President about his intent
12 to implement a ‘Muslim ban’ as well as evidence [the state of Washington] claim suggests that the
13 Executive Order was intended to be that ban” to defeat the Government’s likelihood of success on appeal of
14 the injunction); *Aziz v. Trump*, 2017 WL 580855, at *8 (E.D. Va., Feb. 13, 2017) (“The ‘Muslim ban’ was
15 a centerpiece of the president’s campaign for months, and the press release calling for it was still available
16 on his website as of the day this Memorandum Opinion is being entered.”).

17 ³⁸ See, e.g., Press Release, Trump-Pence, Donald J. Trump Statement on Preventing Muslim
18 Immigration (Dec. 8, 2015), [https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-](https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration)
19 [preventing-muslim-immigration](https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration) (visited on Feb. 16, 2017). (campaign website that to this day still calls for
20 a “shutdown of Muslims entering the United States”); David Brody, *Brody File Exclusive: Donald Trump*
21 *Says Something in Koran Teaches a ‘Very Negative Vibe’*, CBN News (Apr. 12, 2011),
22 [http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donaldtrump-says-something-](http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donaldtrump-says-something-in-koran-teaches)
23 [in-koran-teaches](http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donaldtrump-says-something-in-koran-teaches); Interview of Donald Trump on CBN News, YouTube (Apr. 11, 2011),
24 <https://m.youtube.com/watch?v=fWzDAvemJG8> (arguing that there is a “Muslim problem” in the United
25 States, and suggesting that the Koran teaches a “very negative vibe” and “tremendous hatred”); Theodore
26 Schleifer, *Donald Trump: ‘I think Islam hates us’*, CNN (Mar. 10, 2016),
27 <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/> (stating that Muslims have
28 “tremendous hatred” and “unbelievably hatred” and refusing to draw a distinction between radical Islam
and Islam, claiming “[i]t’s very hard to define”).

³⁹ Jenna Johnson, *Donald Trump would ‘strongly consider’ closing some mosques in the United*
29 *States*, Wash. Post (Nov. 16, 2015), available at
30 [https://www.washingtonpost.com/news/postpolitics/wp/2015/11/16/donald-trump-would-strongly-](https://www.washingtonpost.com/news/postpolitics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/)
31 [consider-closing-some-mosques-in-the-united-states/](https://www.washingtonpost.com/news/postpolitics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/); Nick Gass, *Trump: ‘Absolutely no choice’ but to close*
32 *mosques*, Politico (Nov. 18, 2015), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>;
33 Fox News, “*Trump says US will ‘have no choice’ but to shut some mosques down* (Nov. 18, 2015),
34 available at [http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-](http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html)
35 [mosques-down.html](http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html).

⁴⁰ Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*,
36 *Politifact* (Nov. 24, 2015), [http://www.politifact.com/truth-o-](http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/)
37 [meter/article/2015/nov/24/donald-trumps-](http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/)
38 [comments-database-american-muslims/](http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/); Louis Jacobson, *Donald Trump says he never called for profiling*
39 *Muslims*, *Politifact* (Sept. 21, 2016), [http://www.politifact.com/truth-o-](http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/)
40 [meter/statements/2016/sep/21/donald-](http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/)
41 [trump/donald-trump-says-he-never-called-profiling-muslim/](http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/).

1 practicing Muslims,⁴¹ racial profiling of all Muslims,⁴² and a total ban of Muslims
2 coming to the United States.⁴³

3 The administration's attempts to cloak this discriminatory intent in neutral
4 language are unavailing. In July 2016, President Trump telegraphed his aim to disguise
5 the language of the Muslim ban to pass legal muster, when he noted that he would refer
6 to the Muslim countries on the basis of geographic location rather than religious majority,
7 because "[p]eople were so upset when [he] used the word Muslim."⁴⁴ Rather than a
8 "rollback" of previous calls for a Muslim ban, President Trump has characterized the
9 Administration's new approach as an "expansion" of his prior rhetoric.⁴⁵ A prominent
10 advisor to then-candidate Trump's campaign, Rudolph W. Giuliani recounted that
11 President Trump wanted a "Muslim ban" and had requested that Mr. Giuliani assemble a
12 commission to show him "the right way to do it legally."⁴⁶ Plainer evidence of animus
13 against Muslims would be difficult to find. *See Department of Agriculture v. Moreno*,
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15 ⁴¹ Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi*
16 *Germany*, NBC News (Nov. 20, 2015), available at [http://www.nbcnews.com/politics/2016-
election/trump-says-he-would-certainly-implement-muslim-database-n466716](http://www.nbcnews.com/politics/2016-
election/trump-says-he-would-certainly-implement-muslim-database-n466716). On December 21, 2016,
17 more than a month after being elected President, Mr. Trump responded to a question about whether he was
18 rethinking his plan for a Muslim registry by stating: "You know my plans all along, and I've been proven
19 to be right." Video, *Trump: 'You've known my plans' on proposed Muslim ban*, Wash. Post (Dec. 21,
2016), available at [https://www.washingtonpost.com/video/politics/trump-youve-known-my-
plans-
on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html](https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-
on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html).

20 ⁴² Transcript, Face the Nation, CBS News (Jun. 19, 2016), [http://www.cbsnews.com/news/face-
the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/](http://www.cbsnews.com/news/face-
the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/).

21 ⁴³ Politico, Full text: Donald Trump 2016 RNC draft speech transcript (July 21, 2016)
[http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-
acceptance-speech-at-rnc-
225974](http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-
225974).

22 ⁴⁴ Donald Trump Remarks in Manchester, New Hampshire, C-SPAN (Jun. 13, 2016),
[https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-
security-threats](https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats).

23 ⁴⁵ *Id.*

24 ⁴⁶ *Trump asked for a Muslim Ban Giuliani says – and ordered a commission to do it 'legally,'*
25 Wash. Post (Jan. 29, 2017), available at [https://www.washingtonpost.com/news/the-
fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-
legally/?utm_term=.82e451dca6b8](https://www.washingtonpost.com/news/the-
fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-
legally/?utm_term=.82e451dca6b8).

1 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the
2 laws’ means anything, it must at the very least mean that a bare . . . desire to harm a
3 politically unpopular group cannot constitute a legitimate government interest.”).⁴⁷

4 The Administration’s proffered interest in securing our borders is also merely
5 pretextual, as the Order is both under and over inclusive. A statute or rule that is under
6 and over inclusive in burdening a constitutionally protected interest is not narrowly
7 tailored to achieve a compelling state interest, as required to satisfy the Equal Protection
8 and Establishment Clauses. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 904 (1995). The
9 Executive Order recites that its purpose is to “protect” its “citizens from terrorist attacks,”
10 and asserts that the targeted countries were identified as presenting “heightened concerns
11 about terrorism and travel to the United States.”⁴⁸ Yet by excluding hundreds of
12 thousands of innocent refugees without a whiff of suspicion that they pose any danger,
13 the Executive Order is wildly over-inclusive. *See Romer*, 517 U.S. at 632 (finding that a
14 law failed rational basis review where “its sheer breadth is so discontinuous with the
15 reasons offered for it that the amendment seems inexplicable by anything but animus
16 toward the class that it affects”). The Executive Order does not provide any process to
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18 ⁴⁷ Even if this was not the purpose, the indisputable perception of sect favoritism violates the
19 Establishment Clause. *See McCreary*, 545 U.S. at 883 (O’Connor, J., concurring) (finding violation of
20 Establishment Clause because of “unmistakable message of endorsement to the reasonable observer”); *Cty.*
21 *of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) (“The Establishment
22 Clause, at the very least, prohibits government from appearing to take a position on questions of religious
23 belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political
24 community.’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)). And the
25 public perception of the original Executive Order is clear: it is a Muslim ban. *See Public Policy Polling,*
After 2 Weeks, Voters Yearn For Obama 1, 4 (Feb. 2, 2017) (finding in poll conducted on January 30-31,
2017 that “52% of voters think that the order was intended to be a Muslim ban, to only 41% who don’t
26 think that was the intent”), <https://goo.gl/1L5psC>. *See also CNN/ORC Int’l Poll* 9 (Feb. 3, 2017) (55%
27 think the Executive Order “is a ban on Muslims”), <https://goo.gl/0xE98B>. Although public polling
28 regarding the new ban has not been conducted, “reasonable observers have reasonable memories, and our
precedents sensibly forbid an observer to turn a blind eye to the context in which the [policy] arose.”
McCreary, 545 at 866 (internal citation omitted).

⁴⁸ Executive Order § 1(a)-(b).

1 determine whether potential immigrants or refugees pose a threat. It simply denies them
2 the opportunity even to apply for admission if they originate from the countries on the
3 list.

4 Furthermore, the Executive Order is dramatically under-inclusive. Despite the
5 proffered interest in security, the Executive Order does not include on its list of affected
6 countries any of the home countries of the perpetrators of the September 11th, 2001
7 attacks.⁴⁹ Nor does it include countries connected to the perpetrators of more recent
8 domestic attacks in San Bernadino, New Jersey or New York, Orlando, or Boston.⁵⁰ And
9 tellingly, the Executive Order does not include any of the majority-Christian nations that
10 are listed by the State Department as “terrorist safe havens.”⁵¹ *See Larson*, 456 U.S. at
11 244 (“[T]his Court has adhered to the principle, clearly manifested in the history and
12 logic of the Establishment Clause, that no State can pass laws which aid one religion or
13 that prefer one religion over another.”) (internal citation and quotation marks omitted).
14 Such under-inclusiveness also demonstrates discriminatory animus, as it reveals that the
15 state’s proffered interest is a pretext for animus against people of the Muslim faith. *See*
16 *Lukumi*, 508 U.S. at 543.

17 CONCLUSION

18 For the foregoing reasons, the Executive Order exceeds the scope of presidential
19 authority under the INA and violates the Equal Protection and Establishment Clauses of
20 the Constitution. It should therefore be enjoined from further implementation.

21 ⁴⁹ Linda Qiu, *Fact-Checking Claims About Trump’s Travel Ban*, N.Y. Times (Feb. 23, 2017),
22 available at [https://www.nytimes.com/2017/02/23/us/politics/fact-checking-claims-about-trumps-travel-](https://www.nytimes.com/2017/02/23/us/politics/fact-checking-claims-about-trumps-travel-ban.html)
23 [ban.html](https://www.nytimes.com/2017/02/23/us/politics/fact-checking-claims-about-trumps-travel-ban.html) (“[A]ll 12 jihadist terrorist who have killed people in the United States since Sept. 11, 2001, were
American citizens or permanent residents, and none had ties to the seven countries named in Mr. Trump’s
executive order. Out of the nearly 400 non-deadly jihadist terrorist attacks on American soil since 9/11,
perpetrators were linked to Iran or Somalia in three cases.”).

24 ⁵⁰ Eric Levenson, *How many fatal terror attacks have refugees carried out in the US? None*, CNN
(Jan. 29, 2017), available at <http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/>.

25 ⁵¹ Chapter 5: Terrorist Safe Havens (Update to 7120 Report), U.S. Dept. of State, available at
26 <https://www.state.gov/j/ct/rls/crt/2015/257522.htm>.

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DATED this 14th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing Brief of New York University as Amicus Curiae in Support of Plaintiffs' Motion for Temporary Restraining Order, with the Clerk of the Court for the United States District Court, Western District of Washington using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED at Seattle, Washington this 14th day of March, 2017.

s/ Tara D. Friesen