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**No. 17-17168**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

STATE OF HAWAII; ISMAIL ELSHIKH, JOHN DOES 1 & 2, and  
MUSLIM ASSOCIATION OF HAWAII, INC.,

*Plaintiffs – Appellees,*

v.

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

*Defendants-Appellants.*

On Appeal from the United States District Court for the District of Hawaii  
(1:17-cv-00050-DKW-KSC)

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

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

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

Our cities are heavily dependent on the contributions of

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

immigrants.<sup>2</sup> Of the 16.7 million residents of Chicago, Los Angeles, New York City, and Philadelphia, more than five million are immigrants, who hail from 150 countries.<sup>3</sup> These cities account for almost one-fifth of the Nation's gross domestic product.<sup>4</sup> As of 2015, approximately 210,200 residents in the Chicago, Los Angeles, and New York City metropolitan areas were born in four of the Muslim-majority countries targeted by the Proclamation.<sup>5</sup>

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

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

<sup>3</sup> Support for the data cited is in the appendix to this brief.

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

<sup>5</sup> Alan Berube, *These Communities Have a Lot at Stake in Trump's Executive Order on Immigration*, <http://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration>.

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

Immigrants are a majority of New York City's business owners; 44% in Los Angeles; 27% in Chicago; and 14% in Philadelphia.

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

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

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

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

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



Middle East.<sup>8</sup>

Chicago, Los Angeles, New York City, and Philadelphia together have 162 four-year colleges and universities, with approximately 100,000 international students. Foreign students have begun to shun the United States.<sup>9</sup> Chicago is also home to 44 major hospitals, and Philadelphia is home to 29, which serve thousands of international patients a year. The Middle East is the top source of patients traveling to the U.S. for medical care.<sup>10</sup>

Like the two Executive Orders before it, the Proclamation is as misguided as it is unconstitutional. Our cities serve as gateways for immigrants and refugees starting new lives in America. And when they have come, “[e]verywhere immigrants have enriched and strengthened

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

<sup>9</sup> Shane Savitsky, *Foreign Students Have Begun to Shun the United States*, <http://www.axios.com/international-students-are-staying-away-from-the-united-states-2509719080.html>.

<sup>10</sup> Kristen Schorsch, *How Trump’s Travel Ban Could Hit Medical Tourism Hard*, <http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard>.

the fabric of American life.”<sup>11</sup> Indeed, perhaps uniquely in the world, the identity of American cities has been forged from the toil of immigrants.

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

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<sup>11</sup> John F. Kennedy, *A Nation of Immigrants* 3 (Harper rev. ed. 2008).

the first-line defense against terrorism.<sup>12</sup> And to serve these purposes, our cities must be able to work with everyone in our diverse communities. Even at the strictly local level, the safety and security of our residents and visitors depends upon cooperation between the residents and local police. The U.S. Department of Justice's own Office of Community Oriented Policing Services has emphasized this fact time and again.<sup>13</sup> In short, by targeting immigrants based on national origin and religion, the Proclamation undermines trust between our law enforcement agencies and our immigrant communities, which in turn makes *all* of our residents and visitors, and indeed everyone in the country, less safe.

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<sup>12</sup> *E.g.*, Mitch Silber and Adam Frey, *Detect, Disrupt, and Detain: Local Law Enforcement's Critical Roles in Combating Homegrown Terrorism and the Evolving Terrorist Threat*, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2508&context=ulj>; David Thacher, *The Local Role in Homeland Security*, 39 *Law & Soc'y Rev.* 635 (Sept. 2005), <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/73848/j.1540-5893.2005.00236.x.pdf?sequence=1>; *DHS Announces Expansion of the Securing the Cities Program*, <http://www.dhs.gov/news/2015/09/14/dhs-announces-expansion-securing-cities-program>.

<sup>13</sup> *E.g.*, *Community Policing Defined*, Dep't of Justice, Office of Community Oriented Policing Services (rev. 2014), <http://ric-zai-inc.com/Publications/cops-p157-pub.pdf>.

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

Worse still, the message that citizens of majority-Muslim countries threaten national security conveys that members of Muslim communities, and other immigrant communities, are to be distrusted and feared. Thus, targeting Muslims makes these residents more vulnerable to victimization, and adds to the difficulty local governments face in trying to provide protection. At the extreme, this climate gives

rise to hate crimes. The Southern Poverty Law Center reports that in the 34 days following the 2016 presidential election, there were 1,094 hate crimes and lesser hate incidents; 315 were categorized as anti-immigrant, and 112 as anti-Muslim.<sup>14</sup> In cities across the country, hate crimes have risen dramatically since that election. New York City reported twice the number of hate crime incidents in the three months after the election compared to the same period a year prior. In Los Angeles, hate crime incidents doubled in the month following the election. And in the first five weeks of 2017, the number of hate crimes reported in Chicago was more than triple the number for the same period in 2016. Philadelphia received more reports of hate crimes in the first half of 2017 than in all of 2016, and at that rate will see more hate crimes in 2017 than in the previous three years combined.

The Proclamation also undermines local laws prohibiting discrimination based on national origin and religion, among other invidious grounds, in all aspects of life – housing, employment, public

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<sup>14</sup> *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, <http://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

accommodation, transportation, schooling, and government services. *E.g.*, Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-115-180, 13-72-040; Los Angeles Charter §§ 104(i), 1024; Los Angeles Admin. Code §§ 4.400, 10.8, 10.13; New York City Charter § 900; N.Y.C. Admin. Code §§ 4-116; 8-107; Philadelphia Code §§ 9-1101, 9-1103, 9-1106, 9-1108. Such laws reflect *amici*'s strong commitment to equal rights, as well as their belief that diversity enriches everyone and diminishes no one. The Proclamation's blatant discrimination turns the clock back on civil rights.

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

Americans have passports.<sup>15</sup> Thus, many Americans become acquainted with other cultures only if visitors and students from foreign countries come here.

*Amici* urge the Court to affirm the district court's preliminary injunction.

### SUMMARY OF ARGUMENT

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

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

The Proclamation also violates the Establishment Clause. The record presents compelling evidence that the Proclamation continues to be motivated by President Trump's stated belief that "Islam hates us" and his related desire to exclude Muslims. Broadcast many times and in many ways, the President's anti-Muslim message has been clear and

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<sup>15</sup> Sally Herships, *Trump's travel ban worries international students*, <http://www.marketplace.org/2017/02/08/world/overseas-students>.

consistent. Accordingly, the national security considerations defendants cite are, at best, a secondary consideration. In addition, the Proclamation's minor modifications to the prior travel bans fall far short of curing the prior, egregious Establishment Clause violations.

## ARGUMENT

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

The Proclamation's minor changes from EO-2 are mere decoration—foreign policy non-sequiturs strung together in a single document to attempt to cast it as something other than round three of palpable national-origin and religious discrimination. The district court properly enjoined it.



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

**A. The Proclamation Unlawfully Discriminates Based On National Origin.**

Discrimination based on national origin violates the Immigration and Nationality Act of 1965 (“INA”). “During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its immigration laws.” *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). But “the national origins quota system ha[d] strong overtones of an indefensible racial preference.” John F. Kennedy, *A Nation of Immigrants* 45 (Harper rev. ed 2008). Accordingly, “[t]hroughout the latter half of the Twentieth Century, Congress moved away from such discriminatory policies. The most profound change was the [INA],” which “eliminated discrimination on the basis of race and national origin.” *Olsen*, 990 F. Supp. at 37. The INA could not be more clear: “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” 8 U.S.C. § 1152(a)(1)(A).

The Proclamation violates this restriction. Indeed, defendants

admit that the Proclamation is a “nationality-based” suspension of entry. Brief for Appellants (“Trump Br.”) 16. The district court, following this Court’s prior opinion, correctly held that the Proclamation “plainly violates Section 1152(a).” ER 41.

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

First, section 1182(f) authorizes the President to “suspend” the entry of aliens under certain circumstances. “The word ‘suspend’ connotes a temporary deferral.” *Hoffman ex rel. NLRB v. Beer Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976). Unlike the prior Executive Orders, however, “the Proclamation has effectively imposed a permanent, rather than temporary, ban on immigrants from the Designated Countries.” *IRAP v. Trump*, 2017 WL 4674314, \*21 (D. Md. Oct. 17, 2017). Thus, section 1182(f) does not apply.

Second, “§ 1152(a)(1)(A)’s non-discrimination mandate cabins the President’s authority under § 1182(f).” ER 41 (quoting *Hawaii v. Trump*, 859 F.3d 741, 779 (9th Cir.), *judgment vacated as moot*, No. 16-

1540 (U.S. Oct. 24, 2017), *and vacated and dismissed as moot*, No. 17-15589 (9th Cir. Nov. 2, 2017)).<sup>16</sup> Section 1152(a) is the later enactment and is properly understood as a limitation on the authority granted under section 1182(f). *Id.* at 778.<sup>17</sup> Thus, although section 1182(f) grants the President authority to suspend entry of a class of immigrants whose entry “would be detrimental to the interests of the United States,” section 1152 declares Congress’s determination that it is *not* in the national interest to discriminate based upon national origin. This reading harmonizes the two provisions, and avoids a construction that would render section 1152(a) superfluous. *Hawaii*, 859 F.3d at 777.

Because section 1182(f) is constrained by section 1152(a), section 1182(f)

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<sup>16</sup> Although the decision in *Hawaii* was vacated as moot, “decisions vacated for reasons unrelated to the merits may be considered for the persuasive[ness] of their reasoning.” *Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014).

<sup>17</sup> Defendants argue that section 1185(a)(1) should prevail as the more recent provision because it was amended after the enactment of section 1152(a). Trump Br. 29. That claim should be rejected. The amendment of section 1185(a)(1) did not address the specific subject of discrimination based on nationality in the issuance of an immigrant visa. “It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

no more empowers the President to discriminate on national origin than it allows him to suspend immigration by women.<sup>18</sup>

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

Even considering section 1182(f) in isolation, the Proclamation's exclusion of immigrants from the targeted countries, solely because of the happenstance of their birthplace, cannot stand. The plain language of section 1182(f) requires a determination that the entry of aliens or a

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<sup>18</sup> The Court should reject defendants' assertion that invoking section 1152(a) to limit the President's authority under section 1182(f) raises a "serious constitutional question." Trump Br. 48. Defendants cite *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), for the proposition that rules concerning the admission of aliens draw on "inherent executive power," as well as legislation, Trump Br. 50, ignoring the Court's recognition in *Knauff* itself that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," 338 U.S. at 543. As for defendants' claim that the President might sometime act on the "brink of war," Trump Br. 48, that is not the situation here. In any event, the Supreme Court has emphasized that even "a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). See also *Korematsu v. United States*, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).

class of aliens is “detrimental to the interests of the United States,” and it is simply not possible to say that every single person, or even a majority of persons, born in the targeted countries presents a security risk to the United States. Like EO-2, the “use of nationality as the sole basis for suspending entry means that nationals without significant ties to the . . . designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry.” *Hawaii*, 859 F.3d at 773. Even on immigration matters, discretion must be exercised “in a reasoned manner.” *Judulang v. Holder*, 565 U.S. 42, 53 (2011). The Proclamation’s classification based on national origin is not rational.

**B. The Proclamation Violates The Establishment Clause.**

The district court did not reach the constitutional issues, ER 31, but if this Court does, the Fourth Circuit’s determination that EO-2 unconstitutionally disfavors Islam equally applies to the Proclamation.

The Establishment Clause prohibits any “law respecting an establishment of religion.” It enshrines, in the first words of the First Amendment, the special protection that the Framers intended for religion to have from governmental compulsion. Those words were

“written by the descendants of people who had come to this land precisely so that they could practice their religion freely,” and were “designed to safeguard the freedom of conscience and belief that those immigrants had sought.” *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (O’Connor, J., concurring).

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

The Establishment Clause “extends beyond facial discrimination” and “protects against governmental hostility which is masked, as well

as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Lukumi*, 508 U.S. at 534 (citation and quotation omitted). If a policy fails any part of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), it violates the Establishment Clause.<sup>19</sup> *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The Proclamation fails at least the first part of the *Lemon* test by disfavoring Muslims. Five of the Muslim-majority countries targeted in EO-2 are again included in the Proclamation, which adds a sixth, Chad. That the Proclamation does not explicitly reference Islam is beside the point. It is clear that the predominant purpose of the Proclamation was religious discrimination, and that the stated secular purpose of protecting national security was, at best, secondary. Moreover, the Proclamation does not adequately cure the serious Establishment

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<sup>19</sup> Below, defendants urged reliance on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015), Dkt. 378 at 15-16, but those cases did not involve limits the Establishment Clause imposes on the federal government’s immigration powers. Instead, both cases involved discretionary decisions made by executive officers to admit or deny specific aliens under statutory immigration restrictions, the constitutionality of which was not challenged.

Clause violations in the earlier Executive Orders.

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

President Trump’s formal statement calling for “a total and complete shutdown of Muslims entering the United States,” ER 77-78, was a defining moment of his campaign, and a policy position he defended by asserting that “Islam hates us,” ER 78.<sup>20</sup> Just one week after swearing the oath of office, he turned that campaign rhetoric into official policy, issuing EO-1 to ban travel to the United States from seven Muslim-majority countries. After the Court enjoined EO-1, President Trump issued EO-2, making minor technical changes to EO-1, but preserving the ban on entry of nationals from six of these seven countries.<sup>21</sup> All the while, he repeatedly confirmed that these Executive Orders spring from the same discriminatory well as his campaign promise. He declared, for example, that EO-2 was “a watered down

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<sup>20</sup> Campaign statements may not always evince intent, since candidates sometimes pledge one thing and do another once elected. But President Trump confirmed the discriminatory purpose of his travel bans after taking office—and they have functioned exactly as he promised when campaigning.

<sup>21</sup> Defendants omit EO-1 from their statement of facts.



version of the first one” and lamented that “we ought to go back to the first one and go all the way.” ER 87. After reviewing this and other evidence, the Fourth Circuit rightly concluded that “[t]he evidence in the record, viewed from the standpoint of the reasonable observer, creates a compelling case that EO-2’s primary purpose is religious.” *IRAP v. Trump*, 857 F.3d 554, 594 (4th Cir. 2017) (en banc), *vacated and remanded as moot*, No. 16-1436 (U.S. Oct. 10, 2017).

The Proclamation is nothing more than a repackaged version of the same discriminatory policy. The Proclamation again targets Muslims—of the eight countries whose citizens are banned, five are the same Muslim-majority countries that have been banned from the beginning, and another Muslim-majority country, Chad, has been added. And now the ban is indefinite.

Adding fewer than 100 North Korean citizens, ER 90, and certain Venezuelan officials and their families, does not change this. These additions are window dressing. They reflect entirely different foreign policy concerns from those defendants claim as a basis for the list of Muslim countries. North Korea is a rogue state, and Venezuela is hostile to the United States. And even then, these restrictions are

nearly pointless. North Korean citizens do not emigrate in any event; and only certain Venezuelan government officials and their families are barred—private Venezuelan citizens are not. Thus, these separate agenda items cannot conceal the religious motivation for targeting the Muslim countries. That the Proclamation also bars non-Muslims from the targeted countries likewise does not matter. That makes its religious gerrymander imprecise and inefficient; it does not make it constitutional. Overwhelmingly, the Proclamation operates to exclude Muslims from entering the United States, precisely as President Trump has long promised. Collateral damage to non-Muslims is not evidence of a secular purpose.

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

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

It is of no moment that the Proclamation professes a national security purpose, or that it lacks an explicit religious preference.

“Official action that targets religious conduct for distinctive treatment

cannot be shielded by mere compliance with the requirement of facial neutrality.” *Lukumi*, 508 U.S. at 534. Instead, it is “the duty of the courts” to distinguish a “sincere” secular purpose from one that is a “sham,” or that is “secondary” to a “predominately religious” purpose. *McCreary*, 545 U.S. at 862.

The Fourth Circuit concluded that the national security rationales the federal government asserted to defend EO-2 were not bona fide. *IRAP v. Trump*, 857 F.3d at 592. The same conclusion holds for the Proclamation: the facially legitimate reasons defendants claim are secondary to the Proclamation’s intended discrimination against Muslims.

The observation this Court made in reviewing EO-1—that there is “no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States,” *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017)—remains true as well. Nor is there a legitimate concern that individuals from the countries targeted by the Proclamation present a heightened risk of perpetrating such an attack in the future; to the contrary, numerous former national security officials have attested that there is no national

security rationale for these measures against the targeted countries, ER 51-62, 194-98, 200-11. Although defendants now argue that the Proclamation is the independent product of DHS Review, Trump Br. 7-9, as the district court in Maryland found, the evidence indicates that this outcome “was at least partially pre-ordained,” *IRAP*, 2017 WL 4674314, \*34. Moreover, the information-sharing deficiencies the Proclamation identifies do not establish the need for “the specific response of an unprecedented, sweeping nationality-based travel ban against majority-Muslim nations.” *Id.* at \*35. Finally, even with the injunction in place, visa applicants from the targeted countries still will be screened through the standard, individualized vetting process. *Id.* at \*38.

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

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

DHS Review and the Proclamation’s modifications to EO-2 are also insufficient to salve the constitutional violation. “[T]he

Government’s cure must be made ‘as persuasive as the initial’ violation.” *IRAP*, 2017 WL 4674314, \*32 (quoting *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016)). *McCreary* rejected the argument that the two defendant counties remedied their earlier Establishment Clause violation by modifying their courthouse displays of the Ten Commandments to add certain historical documents, such as the Declaration of Independence. The Court declined to limit its focus to only “the last in a series of governmental actions, however close they may all be in time and subject.” 545 U.S. at 866. Noting that the counties had failed to repudiate their earlier resolutions endorsing the religious message of the displays, *id.* at 871-72, the Court concluded that a reasonable observer would not “swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays,” *id.* at 872.

As in *McCreary*, the Administration’s remedial efforts fall far short when assessed in light of the egregious Establishment Clause violations of the Executive Orders. Those Orders barred entry of millions of members of what is a religious minority in this country—and that action was closely tied to explicit statements of animus towards

that religious group. *See generally IRAP*, 857 F.3d at 572 (concluding that EO-2 “drips with religious intolerance, animus, and discrimination”). This frontal assault on the Establishment Clause came from the President himself. It was the focus of extensive nationwide attention, and applied nationwide.

The Proclamation is weak medicine for the serious harm wrought by the Executive Orders. For example, the President has not disavowed his intent to ban Muslims. Rather, the Proclamation “doubles down on” the Orders’ fundamental approach. *IRAP*, 2017 WL 4674314, \*34.

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

Accordingly, defendants failed to purge the taint of the prior Establishment Clause violations.

## CONCLUSION

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The district court's preliminary injunction should be affirmed.

Respectfully submitted,

s/ Benna Ruth Solomon

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**APPENDIX**

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## CHICAGO

The population of Chicago is 2,717,534.<sup>22</sup>

Chicago has residents from more than 127 foreign countries.<sup>23</sup>

At least 572,066 of our residents are immigrants.<sup>24</sup>

Approximately 5,600 of Chicago's residents were born in the targeted countries.<sup>25</sup>

Approximately 1.27 million people are employed in Chicago.<sup>26</sup> Of those, 26.5% are foreign-born immigrants,<sup>27</sup> including an estimated 976 non-citizen immigrants from the six targeted countries.<sup>28</sup> The City of Chicago itself employs more than 32,000 people.<sup>29</sup>

Approximately 27% of Chicago's business owners are immigrants,<sup>30</sup> of whom an estimated 0.7% come from the six targeted countries.<sup>31</sup>

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<sup>22</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> U.S. Census Bureau, American Community Survey PUMS 1-Year 2016 Data.

<sup>26</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> [https://www.cityofchicago.org/city/en/depts/dhr/dataset/current\\_employeenames%salariesandpositiontitles.html](https://www.cityofchicago.org/city/en/depts/dhr/dataset/current_employeenames%salariesandpositiontitles.html)

<sup>30</sup> <https://www.americanimmigrationcouncil.org/research/new-americans-illinois>.

<sup>31</sup> *Id.*

At least 12,500 private employees work in Chicago on international visas.<sup>32</sup>

In 2016, approximately 2,091 refugees were resettled in our city, including 764 from the six targeted Muslim-majority countries.<sup>33</sup>

Chicago has 34 four-year colleges and universities, which had more than 13,789 international students in the 2015-16 academic year.<sup>34</sup> City Colleges of Chicago (CCC) has seven colleges, which had approximately 338 international students in the 2016-17 academic year. Of these, 145 CCC students were born in, arrived on visas from, or are nationals of the six countries.<sup>35</sup>

The tourism sector of Chicago's economy accounts for \$911 million a year in local tax revenue and \$2.3 billion in hotel revenue alone.<sup>36</sup>

On any given day, 232 flights arrive at Chicago airports from international destinations, bringing 31,856 passengers.<sup>37</sup>

Each international flight arrival yields approximately \$212,000 in local economic impact.<sup>38</sup>

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<sup>32</sup> <http://ireports.wrapsnet.org/> (by destination and nationality).

<sup>33</sup> U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center, *available at* <http://ireports.wrapsnet.org/>.

<sup>34</sup> <http://www.collegesimply.com/colleges/illinois/chicago/four-year-colleges/>; <http://www.iie.org/Research-and-Publications/Open-Doors/Data/Fact-Sheets-by-US-State/2016%-%.WJe7MrYrJTY>.

<sup>35</sup> Jeff Donoghue, CCC (includes Credit students only).

<sup>36</sup> Alfred Orendorff (ChooseChicago).

<sup>37</sup> <http://www.flychicago.com/SiteCollectionDocuments/OHare/AboutUs/Facts%and%Figures/AirTrafficData/1216%ORD%SUMMARY.pdf>.

<sup>38</sup> Jonathan Leach, Chicago Department of Aviation.

In 2016, Chicago welcomed 54.1 million visitors,<sup>39</sup> 1.62 million of whom visited from overseas.<sup>40</sup> Approximately 1000 international visitors were from the six targeted countries.<sup>41</sup>

In 2015, tourism brought \$14.66 billion in direct spending to Chicago. Spending by international visitors to Chicago is estimated at \$1.88 billion per year. This generates \$112 million in state and local tax revenues annually.<sup>42</sup>

The average overseas visitor spends about \$2,313 per trip while visiting Chicago.<sup>43</sup>

Tourists from the six countries account for an estimated \$1.25 million of local economic impact per year.<sup>44</sup>

Chicago is home to 44 major hospitals,<sup>45</sup> which serve thousands of international patients a year. The Middle East is the top source of patients traveling to the U.S. for medical care.<sup>46</sup>

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<sup>39</sup> [https://www.cityofchicago.org/city/en/depts/mayor/press\\_room/press\\_releases/2016/april/Mayor-Choose-Chicago-Announce-Record-Tourism-2015.html](https://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2016/april/Mayor-Choose-Chicago-Announce-Record-Tourism-2015.html).

<sup>40</sup> U.S. Department of Commerce, National Travel and Tourism Office, [http://tinet.ita.doc.gov/outreachpages/download\\_data\\_table/2015\\_States\\_and\\_Cities.pdf](http://tinet.ita.doc.gov/outreachpages/download_data_table/2015_States_and_Cities.pdf).

<sup>41</sup> Alfred Orendorff (ChooseChicago).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> <http://www.ihatoday.org/uploadDocs/1/hospcounty.pdf>;  
[https://www.cityofchicago.org/city/en/depts/cdph/supp\\_info/clinical\\_health/Find\\_a\\_clinic.html](https://www.cityofchicago.org/city/en/depts/cdph/supp_info/clinical_health/Find_a_clinic.html).

<sup>46</sup> <http://www.chicagobusiness.com/article/20170201/news03/170209996/how-trumps-travel-ban-could-hit-medical-tourism-hard>.

In Chicago, there were twice as many arrests for hate crimes in the three months after the election than during the same period in the prior year.<sup>47</sup>

In the first five weeks of 2017, the number of hate crimes recorded in Chicago was more than triple the number for the same period in 2016. Additionally, hate crimes categorized as anti-Muslim or anti-Arab hit five-year highs in Chicago in 2016.<sup>48</sup>

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<sup>47</sup> Brandon Nemecek, Mayor's Office liaison with Chicago Police Department.

<sup>48</sup> Zak Koeske, *Hate Crimes in Chicago Rose 20 percent in 2016, Marking 5-Year High, Police Data Show*, Chicago Tribune (Mar. 3, 2017).

## NEW YORK CITY

The population of New York City is 8,537,673 as of 2016.<sup>49</sup>

We have residents from more than 150 foreign countries.<sup>50</sup>

New York City is home to over 3 million foreign-born New Yorkers, about 37% of the City's population. Approximately 49% of New Yorkers speak a language other than English at home.<sup>51</sup>

New York City is home to an estimated 33,792 individuals born in the targeted countries.<sup>52</sup>

Approximately 4.1 million people are employed in New York City; of those, 46% are foreign-born immigrants.<sup>53</sup> New York City itself employs 287,000 people,<sup>54</sup> 34% of them foreign-born.<sup>55</sup>

51% of New York City's business owners are immigrants.<sup>56</sup>

About 1,300 refugees resettled in New York City between October 1, 2012 and September 30, 2017, according to federal data.<sup>57</sup> 76 refugees from the targeted countries resettled in the city in 2016 alone.

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<sup>49</sup> U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> [https://www.nytimes.com/2016/10/12/nyregion/bill-de-blasio-government-jobs.html?\\_r=0](https://www.nytimes.com/2016/10/12/nyregion/bill-de-blasio-government-jobs.html?_r=0).

<sup>55</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

<sup>56</sup> Our Immigrant Population Helps Power NYC Economy, Comptroller Scott Stringer, 2017.

The tourism sector of New York City's local economy includes direct visitor spending in 2016 of \$43 billion.<sup>58</sup>

In 2016, New York City welcomed 60.5 million visitors, including 12.7 million foreign visitors.<sup>59</sup>

New York City has 87 four-year colleges and universities, and these have approximately 47,000 international students.<sup>60</sup>

In the six months following the President's first travel ban executive order in January, NYPD Hate Crime Task Force data show 215 incidents of bias crime have occurred in the city. This is an increase of 31% when compared to the same timeframe last year.<sup>61</sup>

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<sup>57</sup> U.S. Department of State, Bureau of Population, Refugees, and Migrants Office of Admissions—Refugee Processing Center.

<sup>58</sup> <http://www.nycandcompany.org/research/nyc-statistics-page>.

<sup>59</sup> *Id.*

<sup>60</sup> <https://www.nycedc.com/blog-entry/international-students-nyc>.

<sup>61</sup> NYPD data through July 31, 2017.

## LOS ANGELES

The population of our metropolitan area (Los Angeles County) is 10.2 million people, with more than 3.9 million living within the city limits.<sup>62</sup>

We have residents from more than 135 foreign countries, and 185 languages are spoken here.<sup>63</sup>

At least 1.5 million of our city's residents are themselves immigrants, 37.8% of our total population. Approximately 43% of all residents of Los Angeles County were born in another country.<sup>64</sup>

As of 2015, the Los Angeles metropolitan area had over 152,000 immigrants from the six affected countries, including 136,000 from Iran, 14,900 from Syria, 500 from Somalia, and 100 from Yemen.<sup>65</sup>

Our city employs approximately 45,000 people, 22% of whom are foreign-born immigrants.

44% of business owners in Los Angeles are immigrants.<sup>66</sup>

In 2016, approximately 2,322 refugees were resettled in Los Angeles County, including approximately 1,936 from the six targeted countries, and 1,808 from Iran alone.<sup>67</sup>

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<sup>62</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> <https://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration/>.

<sup>66</sup> 2010 ACS Single year estimate.

<sup>67</sup> U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center.

On any given day, 185 flights arrive at LAX from international destinations bringing 31,000 passengers, including more than 150 from the targeted countries.<sup>68</sup>

The tourism sector of the local economy accounts for \$21 billion a year in direct spending by visitors to Los Angeles County and \$260 million in hotel taxes alone. Tourism supports approximately 500,000 jobs in the leisure and hospitality sectors.<sup>69</sup>

In 2016, Los Angeles welcomed 47 million visitors, 7.1 million of whom were foreign nationals who spent a combined \$6.3 billion. At least 160,000 of those visitors hail from the Middle East, and they spent at least \$185 million while in Los Angeles.<sup>70</sup>

Los Angeles has at least ten four-year colleges and universities, and these have approximately 25,000 international students.<sup>71</sup>

The Mayor of Los Angeles has reported that hate crime incidents doubled following the presidential election, with 30 such reported incidents during the month following.<sup>72</sup>

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<sup>68</sup> LAX officials.

<sup>69</sup> Discover LA.

<sup>70</sup> *Id.*

<sup>71</sup> University enrollment data.

<sup>72</sup> <http://abc7.com/politics/garcetti-discusses-las-rise-in-hate-crimes-after-election/1651429/>.



## CITY OF PHILADELPHIA

The population of the Philadelphia is approximately 1,526,006,<sup>73</sup> and for the Philadelphia Metropolitan Statistical Area, the estimated population is 6,051,170.<sup>74</sup>

Philadelphia has residents from more than 130 foreign countries.<sup>75</sup>

At least 197,563 of our residents are immigrants.<sup>76</sup>

Approximately 830 Philadelphia residents were born in Chad, Iran, Libya, Somalia, Syria, and Yemen.<sup>77</sup>

Approximately 640,661 people are employed in Philadelphia, and 108,010 of them are foreign-born, a figure that does not include individuals who work in Philadelphia but reside outside the city.<sup>78</sup>

In 2013, immigrants made up 14% of business owners in Philadelphia; and immigrants are 28% of the area's "Main Street" business owners, including 23% of retail store owners and 34% of restaurant owners.<sup>79</sup>

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<sup>73</sup> U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

<sup>74</sup> U.S. Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014 – United States – Metropolitan and Micropolitan.

<sup>75</sup> U.S. Census Bureau, Place of Birth for the Foreign-Born Population in the United States, 2011-2015 American Community Survey 5-year Estimates.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> U.S. Census Bureau, Selected Characteristics of the Native and Foreign-Born Populations, 2011-2015 American Community Survey 5-Year Estimates.

In 2016, approximately 794 refugees resettled in Philadelphia, including 253 from the six targeted countries.<sup>80</sup>

The Philadelphia Metropolitan Area is home to 31 four-year colleges and universities, whose students include 21,273 international students.<sup>81</sup>

The economic impact from tourism in the City of Philadelphia in 2015 was \$6.2 billion, including \$3.9 billion in direct visitor spending, and that tourism generated an estimated \$277 million in tax revenues for the City of Philadelphia.<sup>82</sup>

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<sup>79</sup> Americas Society/Council of the Americas and Fiscal Policy Institute, Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow, at 16 (available at <http://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf>).

<sup>80</sup> U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Admissions – Refugee Processing Center. Available at <http://ireports.wrapsnet.org/>.

<sup>81</sup> CampusPhilly; Christine Farrugia, Rajika Bhandari, Ph.D., 2015 Open Doors, Report on International Educational Exchange.

<sup>82</sup> Philadelphia Convention and Visitors Bureau (Staff Person), citing Tourism as an Economic Engine for Greater Philadelphia 2015 Visitation and Economic Impact Report, <http://files.visitphilly.com/Visit-Philly-2015-Visitation-and-Impact-Full-Report.pdf>.

In the 3 months immediately after the November 2016 election (11/16-01/17), 11 hate crimes were reported to Philadelphia police. In the 3-month period around the same time last year (11/15-01/16), 7 hate crimes were reported, a 157% increase.<sup>83</sup> In the same time period, the Philadelphia Commission on Human Relations received reports of 43 separate hate or bias incidents, as compared to just 3 reports during the same time last year, a 1433% increase.<sup>84</sup> In just the first eight months of 2017, Philadelphia has already received 30 reports of hate crimes, approximately *double* the number received in each of the preceding five years.<sup>85</sup>

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<sup>83</sup> Philadelphia Police Department, Research and Analysis Unit Statistical Section; see also Uniform Crime Reporting System, Monthly Summary Hate / Bias Motivation Report for Philadelphia City, available at <http://ucr.psp.state.pa.us/UCR/Reporting/Monthly/Summary/MonthlySumHateUI.asp?rbSet=4>.

<sup>84</sup> Philadelphia Commission on Human Relations; *see also*

<sup>85</sup> <http://ucr.psp.state.pa.us/UCR/Reporting/Monthly/Summary/MonthlySumHateUI.asp>.

## CERTIFICATE OF COMPLIANCE

This brief and appendix comply with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because they use a proportionally-spaced typeface (Century Schoolbook) in 14-point using Microsoft Word. The brief and appendix comply with the type-volume limits of Fed. R. App. P. 29(a)(5) because they together contain 6,461 words, which is less than half of the 13,000 words allowed for principal briefs under Fed. R. App. P. 32(a)(7)(B)(i).

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