



**Statement of Farhana Khera
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Before the
Committee on Judiciary, Subcommittee on Immigration and Citizenship
Committee on Foreign Affairs, Subcommittee on Oversight and Investigations
U.S. House of Representatives

Hearing on “Oversight of the Trump Administration’s Muslim Ban”
September 24, 2019

Chair Lofgren, Chair Bera, Ranking Member Buck, Ranking Member Zeldin, and members of the Subcommittees, thank you for the invitation to testify on the impact of the Muslim Ban and the urgent need for congressional action. On behalf of Muslim Advocates, I submit this statement to the Subcommittees.

This hearing is historic for American Muslims and for our country. It is the first hearing to examine the Muslim Ban, as well as one of the few times that Congress has held a hearing to examine how a government policy is singling out and undermining the rights, freedoms and dignity of American Muslims.

Muslim Advocates is a national civil rights organization working in the courts, in the halls of power, and in communities to halt bigotry in its tracks. Muslim Advocates was founded in the aftermath of the federal government's response to the events of September 11th when the surveillance, animus, and discrimination targeting American Muslims first hit a crescendo. Our mission is to ensure that American Muslims have a seat at the table with expert representation, so that all Americans may live free from hate and discrimination.

Before joining Muslim Advocates in 2005, I was counsel to the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights. During my time with the Subcommittee, I focused on civil rights and civil liberties, including immigration policy and racial and religious profiling raised by the government's policies after September 11, 2001. I am honored to be back on Capitol Hill with you today.

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I am here to honor the legacy of American Muslims and to speak about the Muslim Ban, one of the most egregious human rights violations of our time that should be equally concerning to *all* Americans. Muslims have been an integral part of America since the first slave ships arrived on its shores. Today, American Muslims reflect every race and ethnicity that comprise our nation's rich heritage. Muslims serve our nation as teachers, law enforcement, firefighters, members of Congress, and members of the Armed Services. They are business owners, scientists, service professionals, doctors, lawyers, entertainers, and professional athletes. They contribute to every aspect of our nation's economy and society.

Despite this country's long-celebrated promise of inclusion and diversity, in recent years there has been an alarming rise in anti-Muslim invective, violence, harassment, discrimination, attacks on mosques, and bullying of Muslim children. In particular, the number of hate crimes and attacks on mosques and Muslim institutions has increased dramatically since the announcement of the candidacy of now-President Donald Trump.

Against this backdrop, there is no doubt that Muslims are the targets of the Muslim Ban. And there is no doubt that American Muslims have been singled out for a peculiar and concentrated harm from this policy despite their citizenship. American Muslim citizens – as well as lawful permanent residents and other lawfully admitted foreign nationals residing in the U.S. – who have ties to the banned countries are separated from their family members and loved

ones. The policy's manifest endorsement and legitimization of anti-Muslim sentiment has contributed to an uptick in anti-Muslim harassment, bigotry, and discrimination.

There is also no doubt that the Muslim Ban has hurt the U.S. economy at large by restricting the ability of companies, hospitals, and universities to fill critical jobs here in the U.S., which in turn has stifled America's ability to innovate, educate, and compete on a global scale.

On a more fundamental level, the Muslim Ban recapitulates the discriminatory practices and anti-immigrant sentiments of the early 1900's immigration laws—targeting Catholic, Jewish, Italian, Japanese, Chinese, Irish, and Mexican immigrants, among others—that Congress later condemned by passing the Immigration and Nationality Act of 1965 (INA), also known as the Hart-Celler Act. That law rejected a decades-old national origin-based quota system that favored immigrants from northern and western Europe and required non-discrimination in the issuance of visas on the basis of nationality. Therefore, it is critical to view the Muslim Ban not simply as a “Muslim” or “immigrant” concern, or as a partisan wedge to divides us. Instead, we urge Congress to view the Muslim Ban for what it is at its core: a paradigm case of religious bigotry that should offend us all. The Muslim Ban injects discrimination into our immigration system that Congress had long ago rejected and that runs counter to our most fundamental American values and beliefs.

Muslim Advocates has launched an aggressive and comprehensive legal effort challenging each iteration of the discriminatory Muslim Ban from all angles: the policy itself, the purported waiver process, and the justifications for the Ban. In *Iranian Alliances Across Borders v. Trump*, plaintiffs have directly challenged Presidential Proclamation 9645 – the third version of the Muslim Ban -- on the grounds that it violates the Establishment and Free Speech Clauses of the First Amendment, the Equal Protection and Due Process Clauses of the Fifth Amendment, the Administrative Procedure Act (APA), and the right to Free Association under the First Amendment. On September 11, 2019, the U.S. Court of Appeals for the Fourth Circuit accepted the case for appeal.¹ In *Emami v. Nielsen*, 34 plaintiffs have challenged the government’s implementation of the Muslim Ban, specifically its failure to put in place a meaningful and orderly waiver process, alleging that the implementation of the waiver process violates the APA and the due process and equal protection clauses of the Fifth Amendment, because the waiver process is designed to result in denials.²

Muslim Advocates has also propounded several Freedom of Information Act (FOIA) requests seeking information about the Ban and has subsequently filed litigation to oblige agencies to comply with the requests.³

¹ See generally *Trump. v. Int'l Refugee Assistance Project*, No. 19-1990 (4th Cir. Sept. 11, 2019).

² Second Am. Compl., *Emami v. Nielsen*, 365 F. Supp. 3d 1009 (N.D. Cal. Apr. 10, 2019) (No. 18-01587).

³ Muslim Advocates, with its partners, filed two separate FOIA requests seeking information from the U.S. Department of State, U.S. Department of Homeland Security (DHS), Customs and Border Protection, and U.S. Citizenship and Immigration Services about how the waivers are implemented under the second and third iterations of the Muslim Ban. See Muslim Advocates *et al.* FOIA Request (June 27, 2017); Muslim Advocates *et al.* FOIA Request (Jan. 23, 2018). Following the agencies' failure to respond to the Muslim Ban 2.0 FOIA request, Muslim Advocates and its partners filed suit on October 5, 2017 in *Muslim Advocates v. Dep't of State*. See No. 17-02080 (D.D.C. Oct. 5, 2017). On June 28, 2018, Muslim Advocates filed *Muslim Advocates v. Dep't of State* with its partner in response to agencies' failure to respond to the Muslim Ban 3.0. See FOIA request. No. 18-01546 (D.D.C.

While we keep up the fight in the courts to hold the administration accountable for this discriminatory policy, we also urge Congress to do its part by ending this policy immediately and by clarifying that the President’s authority under the INA cannot be used to discriminate on the basis of religion.

We worked directly with members of Congress, congressional staff, and other stakeholders to support legislation that would clarify Congress’s intent in the INA. On April 10, 2019, Representative Judy Chu (D-CA) and Senator Chris Coons (D-DE) introduced legislation to do just that: the **National Origin-Based Antidiscrimination for Nonimmigrants (NO BAN) Act (H.R. 2214/S. 1123)**. Muslim Advocates strongly endorses this legislation and applauds the more than 200 members of the U.S. House of Representatives and U.S. Senate who support it. We urge all members of Congress to support the NO BAN Act and to take a stand against discriminatory immigration policies that target individuals on the basis of religion.

I. The Muslim Ban is Unambiguously the Product of Religious Discrimination

Few principles are more central to American identity than the guarantee of religious freedom for all. The idea that government will not treat people differently because of their faith is essential to who we are as a nation. But at times our country has failed to uphold this bedrock principle. This is one of those dark times.

The President of the United States has said that this country has a “Muslim Problem.”⁴ He has called for requiring all Muslims to register with the federal government. He has called for surveilling mosques. He has called for *shutting down* mosques. And he has called for banning all Muslims from entering the United States.

In December 2015, when the President of the United States was a candidate, he infamously called for a “total and complete shutdown of Muslims entering the United States.”⁵

June 28, 2018). Since filing these suits, Muslim Advocates and its partners have received rolling productions from the agencies. In addition to these FOIAs seeking information about the waivers provision of the Ban, Muslim Advocates also filed a FOIA with the State Department regarding the worldwide review of visa issuance pursuant to Muslim Ban 2.0. *See Brennan Center et. al., FOIA Request* (Jul. 20, 2017). The administration claims that the results of that review determined which countries were included on the final list of countries banned indefinitely in Muslim Ban 3.0. On October 2, 2017, Muslim Advocates and its partners, filed suit on behalf of the Brennan Center for Justice at NYU to compel the State Department to produce these responsive documents in *Brennan Center v. U.S. Dep’t of State*. *See Compl. No. 17-07520* (S.D.N.Y. Oct. 2, 2017). Finally, Muslim Advocates joined other organizations in suing DHS under the Information Quality Act to challenge misleading claims in a report DHS issued about how often foreign-born Americans commit terrorism. *See Muslim Advocates et al. v. Dep’t of Justice*, No. 18-cv-2137 (N.D. Cal. 2019). In response, DHS issued a statement that acknowledged the report contained errors and that the examples selected for the report were unrepresentative of the total data and could appear biased.

⁴ All statements in this paragraph are sourced in the Amicus Brief of MacArthur Justice Center, *Trump v. Hawaii*, https://www.supremecourt.gov/DocketPDF/17/17-965/40365/20180328134552356_Travel%20Ban%20Amicus%20FINAL%20-%20CORRECTED.PDF.

⁵ Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://web.archive.org/web/20151208051322/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

This was not an off-the-cuff remark. It was part of an official campaign press release that remained on his campaign website through the election, through the inauguration, through the planning of the Muslim Ban, and was removed from the campaign website only when it became the focus of legal proceedings about the legality of the Muslim Ban.⁶

The promise of a Muslim Ban was one of the most highly visible and well-discussed campaign promises President Trump made as a candidate. At no point—either before or after this election—did President Trump repudiate his campaign promise. To the contrary, after he won the election, President Trump affirmed repeatedly that he was exploring ways to implement the Muslim Ban legally. He even admitted that his proposed Muslim Ban had, “morphed into extreme vetting from certain areas of the world.”⁷ One of his *own advisers* told the press, “when [Mr. Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”⁸

And this is exactly what they tried to do. Within seven days of his inauguration, President Trump codified his anti-Muslim rhetoric and bigotry into official policy by issuing an executive order restricting immigration from seven Muslim-majority countries (Muslim Ban 1.0).⁹ This version of the Muslim Ban included language written verbatim from a speech then-candidate Trump gave on “Understanding the Threat: Radical Islam and the Age of Terror.”¹⁰ Among the many concerning aspects of the Ban, it included a “religious minority” exception to explicitly benefit Christians, according to the President.¹¹

After courts across the country issued orders blocking implementation of Muslim Ban 1.0, on March 6, 2017, President Trump revoked the first iteration and replaced it with what he called a “watered down, politically correct version,” that he plainly intended as a substitute for the first ban and for his campaign promises.¹² It suspended entry of nationals from six of the same predominantly Muslim countries for 90 days (Muslim Ban 2.0).¹³ Like the previous version, this Ban faced immediate legal challenges, which were ultimately appealed to the U.S. Supreme Court.

⁶ Amicus Br. of Nat'l Assoc. of Muslim Lawyers & Other Muslim Bar Assocs., *Trump v. Hawaii* (citing Fred Barbash, *Muslim ban language suddenly disappears from Trump campaign website after Spicer questioned*, Wash. Post (May 9, 2017)).

⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (Sotomayor, J., dissenting).

⁸ Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to do it ‘Legally,’* Wash. Post (Jan. 29, 2017), <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/>.

⁹ Exec. Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States (Muslim Ban 1.0), 82 FR 8977. For a detailed scholarly account of the enactment of the order, and its material consequences, see Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 117 Mich. L. Rev. – (Oct. 2019) (forthcoming; copy available upon request).

¹⁰ Donald Trump, *Speech on “Understanding the Threat: Radical Islam and the Age of Terror,”* (Aug. 15, 2016), <https://www.presidency.ucsb.edu/documents/remarks-youngstown-state-university-youngstown-ohio>.

¹¹ Daniel Burke, *Trump Says US will Prioritize Christian Refugees*, CNN (Jan. 20, 2017), <https://www.cnn.com/2017/01/27/politics/trump-christian-refugees/index.html>.

¹² Louis Nelson, *Trump Slams Justice Department for ‘Watered Down’ Travel Ban*, Politico (Jun. 5, 2017), <https://www.politico.com/story/2017/06/05/trump-travel-ban-justice-department-239131>.

¹³ Exec. Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States (Muslim Ban 2.0) (March 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

After Muslim Ban 2.0 expired on September 24, 2017, President Trump promulgated the final and current iteration of the Ban (Muslim Ban 3.0).¹⁴ This one, enacted with the risks of judicial review plainly in view, extended to Iran, Libya, Somalia, Syria, Yemen, North Korea, and Venezuela. Of the seven countries, Iran, Libya, Somalia, Syria, and Yemen are predominantly Muslim and have been included in every iteration of President Trump's Muslim Bans. Chad was also initially included in Muslim Ban 3.0 but then removed several months later, prompting speculation that it was included simply to give the appearance of a neutral and objective review process. North Korea and Venezuela were added *in name only* in the third iteration. Only a handful of Venezuelan diplomats seeking visitor visas have been banned, and North Korea already accounted for almost no immigration to the United States. In contrast, since early 2017, visa issuances to nationals from Iran, Libya, Somalia, Syria, and Yemen have plummeted. Importantly, this third version now implemented a permanent ban on nationals of these countries.

All three iterations of the Muslim Ban were issued under a rubric of national security. Yet, over 50 former national security, foreign policy, intelligence, and other public officials who have had top security clearances have concluded that the Muslim Bans are “overbroad, blanket entry bans based on national origin,” “not supported by any intelligence” that the Trump administration has asserted in court cases, and “did not emerge from a careful interagency policy and legal review involving the considered judgment of national security and foreign policy officials.”¹⁵ These officials have worked in the administrations of Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama.

No amount of smoke and mirrors can obscure what is plainly obvious to most Americans: all three iterations of the Muslim Ban are unambiguously the product of discrimination and animus against Muslims.¹⁶ The President wants to ban Muslims from the United States, and the Muslim Ban is his attempt to “do it legally.” While the Supreme Court upheld the Muslim Ban in a 5-4 decision, the Court explicitly did not say that the Ban did not rest on blatant and institutionalized bigotry towards Muslims: Rather, it held that the limited form of rational basis scrutiny that it believed to be appropriate in reviewing this case does not allow it to invalidate an action based on impermissible motives provided some permissible motive (however thin) was offered.¹⁷ Of course, neither Congress nor the American people are institutionally bound to avoid confrontation with the animus that underlies the Ban.

Now, it is time for Congress to act.

¹⁴ Pres. Proc. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Muslim Ban 3.0) (Sep. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

¹⁵ Amicus Br. of Former National Security Officials, *Trump v. Hawaii*.

¹⁶ See Muslim Ban 1.0, Muslim Ban 2.0, Muslim Ban 3.0 *supra* notes 9, 12, 13.

¹⁷ See Huq, *supra* note 9, for a detailed legal analysis.

II. The Muslim Ban Separates American Families, Inhibits American Innovation, and Hurts the U.S. Economy

But while we wait for Congress to act, the Muslim Ban continues to cause unacceptable harm to Muslims, including Muslims who live in the United States and are American citizens or legal permanent residents. The Muslim Ban permanently blocks individuals from certain predominantly Muslim countries unless those individuals receive a waiver.

It is important to begin by dispelling a myth: the third iteration of the Muslim Ban includes a waiver process. It does not. It does not supply a meaningful safety valve. It has not been implemented fairly. And by all indications it is “a sham.” Section 3 of the Ban provides that a waiver may be granted if denying entry would cause “undue hardship” to the noncitizen, if entry would not threaten national security or public safety, and if entry would be in the national interest.¹⁸ However, as Justice Breyer recognized in his dissent in *Trump v. Hawaii*, the “waivers are not being processed in an ordinary way” and “there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham.”¹⁹

Immediately after the ban went into effect, thousands of blanket denials were issued to individuals around the world, before they even had a chance to apply or show that they meet the eligibility criteria for a waiver grant.²⁰ Recently released State Department guidance on waivers reveals a nearly impossible standard, especially for people hoping to immigrate to the United States.²¹ To date, the agencies have not established waiver application procedures accessible to visa applicants, and no meaningful guidance has been issued publicly. To the extent guidance has been issued, it has been confusing, contradictory, in conflict with the terms of Muslim Ban 3.0, or seemingly designed to result in denial of meritorious applications.²² In sum, the promise of a waiver process has been a sham.

Meanwhile, the human toll of the Muslim Ban is astounding and shameful. In 2018, the first year the Ban was in full effect, the State Department rejected approximately 37,000 visa applications from the banned countries. In 2017, fewer than 1,000 were rejected.²³ During the first month of the Ban, the State Department approved only 2 out of 6,555 eligible applicants.²⁴ That number has not meaningfully improved, as the Department continues to reject or fails to act

¹⁸ See *supra* note 13.

¹⁹ *Trump v. Hawaii*, 138 S. Ct. at 2432, 2445 (Breyer, J., dissenting).

²⁰ Dara Lind, *Exclusive: Trump’s Travel Ban is Supposed to Make Exceptions for Worthy Cases. A New Lawsuit Alleges It Doesn’t*, Vox (July 29, 2018), <https://www.vox.com/2018/7/29/17625194/travel-muslim-ban-lawsuit-waiver-how>.

²¹ Dara Lind, *Exclusive: Internal Documents Show how Hard it is for Some Immigrants to get a Travel Ban Waiver*, Vox (Sep. 21, 2018), <https://www.vox.com/2018/9/20/17622622/travel-ban-waiver-muslim-how>.

²² *Id.*

²³ Letter from M. Taylor, Assistant Secretary Bureau of Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2019), <https://www.vanhollen.senate.gov/imo/media/doc/State%20Dept%20Response%20to%20Oct%20Muslim%20Ban%20Letter.pdf>.

²⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2431 (2018) (Sotomayor, J., dissenting).

on nearly 95 percent of waiver applications.²⁵ Visa issuances to all the predominantly Muslim countries covered by the ban have fallen precipitously.²⁶

The real-world consequences of the Ban are jarring. The Muslim Ban has needlessly separated countless families. Children—including U.S. citizens—have been denied the love and comfort of and access to their parents and grandparents. Gravely ill family members have been denied access to lifesaving medical treatments. Parents, children, brothers, sisters, and grandparents have missed the births, deaths, weddings, and funerals of their loved ones. According to the Cato Institute, the Muslim Ban has kept out nearly 4,000 spouses or fiancés, and has also barred nearly 6,000 adopted children of U.S. citizens.²⁷

The following are just a few examples of thousands of families in America who are suffering today because of the Muslim Ban:

Khadija Aden. Khadija Aden is a lawful permanent resident of the United States of Somali origin. She is a mother who seeks to be reunited with her son. He was born in a refugee camp in Ethiopia after his parents left Somalia. Her son lived his entire life in Ethiopia, where he resided with his father until 2015 when his father died. That year, Khadija was approved for a family-based immigrant visa for her son, who is Somali but has never been to Somalia. Her son attended his interview at the U.S. Embassy in Ethiopia in 2018. And his visa was denied.

At no point was Khadija or her son informed that he could seek to “demonstrate” his eligibility for a waiver. At no point was Khadija or her son provided an opportunity to apply for a waiver or to submit documents in support of such application. Khadija has suffered severe emotional distress, and this mother is terrified at the prospect that her son would have to go back to Somalia.

Khalil Ali Nagi. Khalil Ali Nagi and his four-year old daughter are U.S. citizens. Khalil has an approved family-based petition for his Yemeni wife, who had her interview at the U.S. Embassy in Djibouti, Sudan in October 2017. She was told at her interview that her visa would be approved, but in March 2018 her visa was denied, and she was informed that she would not be considered for a waiver. Khalil has been devastated. He is emotionally distraught because of the separation from his wife, and his four-year old daughter has been emotionally traumatized by this experience. She constantly cries for her mother.

Najmeh Maharlouei. Najmeh Maharlouei is a health researcher and university professor. She is an Iranian national whose research is of great importance to the United States. Najmeh had an approved immigration visa petition based on her “extraordinary ability” because of her extensive record of achievements and that her work is in the national interest of the United

²⁵ U.S. Department of State Report: Implementation of Presidential Proclamation 9645 at 3 (Dec. 8, 2017 to March 31, 2019), <https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%202017%20to%20March%2031%202019.pdf> (stating that “approximately 5.1% of subject applicants hav[e] been issued a visa pursuant to the waiver process as of March 31, 2019.”).

²⁶ See Huq, *supra* note 9 (presenting data through 2018).

²⁷ David Bier, *Travel Ban Separates Thousands of U.S. Citizens from Their Spouses & Minor Children*, <https://www.cato.org/blog/travel-ban-separates-thousands-us-citizens-their-spouses-minor-children> (Jan. 29, 2019).

States. Najmeh was told that there were no problems with her case and that her petition would undergo routine administrative processing in 2016. But after the Muslim Ban, Najmeh’s visa application was denied.

Again, at no point was Najmeh informed that she could seek to “demonstrate” her eligibility for a waiver. At no point was Najmeh provided an opportunity to apply for a waiver or to submit documents in support of such application. Not only is Najmeh losing the opportunity to conduct medical science research in the United States, but we as a country are losing a scholar whose medical science research remains in our national interest.

In each of these stories, waivers have been denied without reason or justification because the process is a sham. That is why Muslim Advocates and our co-counsel Lotfi Legal LLC filed a class action lawsuit on behalf of 34 individuals whose visa applications were wrongfully denied or stalled by the federal government’s failure to provide fair and meaningful access to case-by-case waivers from the travel ban.²⁸ The lawsuit represents the first challenge to the government’s ongoing implementation of President Trump’s Muslim Ban since the Supreme Court’s decision.

The stories of Khadija Aden, Khalil Ali Nagi, Najmeh Maharlouei, and the 31 other plaintiffs are not isolated ones. They are American stories. And they are illustrative of a much broader reality for Muslims around the world. That said, we urge you to recognize not only the devastating impact of the Muslim Ban on individuals from the banned countries, but also on American society as a whole.

The Muslim Ban undermines our public safety. This bigoted policy promotes the dangerous myth that Muslims, including American Muslims, are inherently foreign, violent, and pose a threat to the United States. The President implemented and aggressively defended this policy at a time when hate crimes are on the rise. In fact, the FBI has reported a 17 percent increase in hate crimes in 2017.²⁹ This is no coincidence. Studies are showing a “statistically significant surge in reported hate crimes across the United States” over the past three years, “even when controlling for alternative explanations [to the rise of President Trump].”³⁰ American Muslims, who are citizens of this country, should not have to live in fear when going to work, school, mosques, grocery stores, and other places that are a part of most Americans’ everyday lives because of inflammatory rhetoric and institutionalized bigotry fueled by our country’s very own public officials.

The Muslim Ban also hurts U.S. businesses and colleges and universities, and has stifled technological, medical, scientific and other advances and innovation. The Association of American Medical Colleges, American Medical Association, and 32 other medical professional associations believe the Muslim Ban exacerbates a physician shortage in this country by disrupting physician-training programs, including those established by Congress. The Muslim

²⁸ Court Cases: *Emami v. Nielsen*, Muslim Advocates, <https://muslimadvocates.org/court-case/emami-v-nielsen/>.

²⁹ 2017 FBI Report on Hate Crime Statistics, <https://www.fbi.gov/news/stories/2017-hate-crime-statistics-released-111318>.

³⁰ See Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes*, <https://ssrn.com/abstract=3102652>.

Ban is also contributing to a growing crisis over access to medical care, especially for veterans, Americans who live in rural communities, and adults over the age of 65 who will make up 20 percent of the U.S. population by 2050.³¹ The associations also believe that the Muslim Ban would jeopardize the United States' leading role in biomedical research and innovation. Since 2000, immigrants have been awarded almost 40 percent of the Nobel Prizes won by Americans in chemistry, medicine, and physics.³²

The academic community believes there is a growing perception among international students, professors, and researchers that the U.S. is unsafe and unwelcoming, in part because of the discriminatory Muslim Ban. Over 30 higher education associations submitted an amicus brief opposing the Ban for various reasons, including that the U.S. is beginning to lose a "global bidding war" for talented international students, particularly in the STEM fields.³³ In fact, immigrant students are disproportionately more likely to get their degrees in a STEM field than students born in the U.S. In particular, immigrants from countries subject to the Muslim Ban are more likely to have a bachelor's degree, are twice as likely to have a graduate degree, and four times more likely to have a doctoral degree relative to the native-born population.³⁴

The Muslim Ban has also had a substantial impact on the economy at large. From 2016 to 2017, the most recent time period for which this data is available, international students contributed nearly \$40 billion to the U.S. economy and supported more than 450,000 U.S. jobs.³⁵ The Muslim Ban has also caused a 4 percent decline in the number of international travelers to the U.S., costing the domestic tourism industry \$4.6 billion and 40,000 jobs in the first year of the Muslim Ban alone.³⁶

Over 160 businesses in the United States, including Fortune 100 companies, also argue that the Muslim Ban provides strong incentives for multinational companies to move jobs outside of the U.S., stifles recruitment of talent necessary for innovation, and impairs day-to-day business and travel.³⁷ The companies conclude the Muslim Ban actually encourages high-skill immigrants to work outside of the U.S. where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked.³⁸

³¹ Amicus Br. of the Association of American Medical Colleges and Others at 7-11, *Trump v. Hawaii*, https://www.supremecourt.gov/DocketPDF/17/17-965/40128/20180327105855912_17-965%20Amicus%20Br.%20Proclamation.pdf.

³² *Id.*

³³ Amicus Br. of American Council on Education and 32 Other Higher Education Associations at 16, *Trump v. Hawaii*, <https://www.acenet.edu/Documents/Amicus-Brief-SCOTUS-Trump-Travel-Ban.pdf>.

³⁴ Amicus Br. of Massachusetts Tech. Leadership Council at 11, *Trump v. Hawaii*, https://www.supremecourt.gov/DocketPDF/17/17-965/41783/20180330144500808_17-965%20Mass%20Technology%20Leadership%20Council%20Inc%20Amicus%20Brief.pdf.

³⁵ Amicus Br. of State Attorneys General at 15, *Trump v. Hawaii*, https://www.supremecourt.gov/DocketPDF/17/17-965/41735/20180330125810371_17-965%20States%20of%20NY%20et%20al%20Amicus%20Brief.pdf.

³⁶ *Id.*

³⁷ Amicus Br. of Technology Companies and Other Businesses, *Trump v. Hawaii*, https://www.supremecourt.gov/DocketPDF/17/17-965/41857/20180330174452485_17-965.bsac.U.S.%20companies.pdf.

³⁸ *Id.* at 22.

In sum, the Muslim Ban is wreaking grievous, long-lasting harm on American families and our country and must be brought to an end.

III. Pass the NO BAN Act: End Discriminatory, Religious-Based Immigration Decisions

We strongly urge Congress to act now and pass the **National Origin-Based Antidiscrimination for Nonimmigrants (NO BAN) Act (H.R. 2214/S. 1123)**. Congress must immediately overturn the Muslim Ban and amend the INA to ensure that no future President can enact such an overbroad, discriminatory ban again. The NO BAN Act would immediately repeal all iterations of the Muslim Ban—Muslim Ban 1.0,³⁹ Muslim Ban 2.0,⁴⁰ and Muslim Ban 3.0.⁴¹ Importantly, the legislation would go further by clarifying that no administration can establish discriminatory immigration policies against an entire religious community.

Given the Supreme Court’s decision in *Trump v. Hawaii*, Congress must make clear that the INA cannot be used to blanketly and permanently ban foreign nationals simply based on their religion and national origin. Section 212(f) of the INA grants the President power, under specific circumstances to suspend or restrict the entry of certain classes of foreign nationals when such entry would be “detrimental to the interests of the United States.”⁴² The Court held that the Muslim Ban falls within the President’s section 212(f) authority because the language of the statute “grants the President broad discretion.”⁴³ The Court read into the statute a congressional intent to grant broad discretion, without temporal or scope limitations, to the President.⁴⁴

Congress long ago repudiated injecting national origin-based bigotry into our immigration system, and it is being called upon to clarify its intent by amending the INA to ensure that no President can attempt to override through executive fiat congressional intent of fairness and non-discrimination. The NO BAN Act would amend the non-discrimination provision, under section 202(a) of the INA, to explicitly prohibit religious discrimination by the government when making determinations on immigrant visas, nonimmigrant visas, entry into the U.S., or other immigration benefits.⁴⁵

The bill would also make crucial changes to section 212(f) to ensure that this authority is not further abused by President Trump or by any future President. The bill would establish a structured, transparent process that a President must follow when suspending or

³⁹ See *supra* note 9.

⁴⁰ See *supra* note 12.

⁴¹ See *supra* note 13.

⁴² Section 212(f) of the Immigration and Nationality Act [8 U.S.C. § 1182(f)] (“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . .”).

⁴³ 138 S. Ct. at 2408.

⁴⁴ See Huq, *supra* note 9 (discussing statutory interpretation questions).

⁴⁵ Section 202(a)(1)(A) of the Immigration and Nationality Act [8 U.S.C. § 1152(a)(1)(A)] (“Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, 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.”).

restricting entry under section 212(f) of the INA.⁴⁶ Section 212(f) was enacted in 1952, against a backdrop of tailored presidential authority granted to Presidents Theodore Roosevelt and Woodrow Wilson during World War I and World War II.⁴⁷ The NO BAN Act would maintain the restriction authority that Congress granted to the President under 212(f), but amend the statute so that it more closely tracks the many specific, time-limited and narrowly tailored invocations of this authority by previous Republican and Democratic administrations in the last 40 years.⁴⁸

Under the NO BAN Act, the President must first consult with the Secretary of State and the Secretary of Homeland Security to invoke 212(f) authority.⁴⁹ Then, the Secretary of State must determine “based on credible facts,” that a suspension or restriction of entry of any foreign nationals or class of foreign nationals would “address specific acts that undermine the security or public safety of the United States; human rights; democratic processes or institutions; or international stability.” The administration would have to supply “specific evidence” to support its determination and the suspension or restriction must be “narrowly tailor[ed] . . . to meet a compelling government interest.” The NO BAN Act also includes transparency measures to hold the President accountable to both Congress and the American people.

Importantly, the NO BAN Act would reflect that when this authority has been invoked, it typically includes family-based and humanitarian categorical exceptions by codifying this practice and creating a rebuttable presumption in favor of such categorical exceptions.

Through the INA, Congress has conferred authority on each President to create immigration policies that are reasonable and limited to the standards enacted by Congress. This delegation of authority is not limitless and unbounded. Yet, by its silence, Congress cedes its authority to the Trump administration, allowing it to discriminate on the basis of religion. Congress must act now to end religious-based discrimination in immigration decisions, and ensure that we bring this dark chapter in our country’s history to an immediate end.

“Religious faith or national origin should never be an obstacle to whether we extend a hand of welcome to the refugee or the immigrant.”⁵⁰ This statement is from an open letter signed by 209 religious leaders and 92-faith based organizations across faith traditions in support of the NO BAN Act. And these faith leaders are right. Religious liberty is a bedrock principle of our country that should not be upheld for some and not others.

In the words of James Madison, one of the Framers of the U.S. Constitution:

⁴⁶ See *supra* note 41.

⁴⁷ See Amicus Br. of Scholars of Immigration Law at 8-11 (stating that the president’s wartime authority was “limited in scope, authorizing not sweeping bans on foreign nationals but only more targeted restraints leveled against subversive wartime actors.”).

⁴⁸ See Congressional Research Service, *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017), <https://fas.org/sgp/crs/homesec/R44743.pdf>

⁴⁹ NO BAN Act, § 3.

⁵⁰ See Faith Communities Support the NO BAN Act (Apr. 10, 2019), <https://medium.com/@S2SCampaign/faith-communities-support-the-no-ban-act-5000ff024a1>.

“...we hold it for a fundamental and undeniable truth, ‘that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.’ [citing to Decl. Rights, Article 16.] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”⁵¹

Muslim Advocates—along with a diverse coalition of over 400 civil rights, faith, national security, and community organizations—endorses the NO BAN Act.⁵² We urge Congress to pass the NO BAN Act swiftly and remove the scourge of religious bigotry from our immigration system. We also urge the administration to make good on its promise to issue family-based and humanitarian waivers immediately and without further delay.

* * *

Thank you for the invitation to testify today. I look forward to your questions.

⁵¹ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), p. 1, <https://www.law.gmu.edu/assets/files/academics/founders/Madison%27sMemorial.pdf>.

⁵² See Stakeholder Letter to Congress (April 8, 2019), <https://www.muslimadvocates.org/files/FINAL-NO-BAN-Act-Coalition-Letter-040519.pdf>.