

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

CASE NO. 14-1688

SYED FARHAJ HASSAN *et al.*,)
)
 Appellants,)
)
 v.)
)
 THE CITY OF NEW YORK,)
)
 Appellee.)
 _____)

**BRIEF OF RELIGIOUS LIBERTY AMICI CURIAE IN
SUPPORT OF REVERSAL OF THE DISTRICT COURT**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CASE NO. 2:12-CV-03401-WJM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), amici curiae (1) The Sikh Coalition, (2) Interfaith Alliance Foundation, (3) the National Council of the Churches of Christ in the USA, (4) the Union for Reform Judaism, (5) the Central Conference of American Rabbis, (6) the Women of Reform Judaism, (7) the Islamic Society of North America, (8) Bend the Arc: A Jewish Partnership for Justice, (9) the Hindu Temple Society of North America, (10) the Auburn Theological Seminary, (11) the National Council of Jewish Women, (12) the Universal Muslim Association of America, (13) the American Humanist Association, (14) the Sikh American Legal Defense and Education Fund, (15) the Muslim Alliance in North America, (16) the National Religious Campaign Against Torture, (17) the Reconstructionist Rabbinical Association, (18) Imam Mahdi Association of Marjaeya, (19) Muslims for Peace, (20) T’ruah: The Rabbinic Call for Human Rights, (21) Ta’leef Collective, (22) Muslim Congress, (23) the Unitarian Universalist Legislative Ministry of New Jersey, (24) the Queens Federation of Churches, Inc., (25) the Northern California Islamic Council, (26) the Council of Islamic Organization of Greater Chicago, and (27) the Islamic Shura Council of Southern California each state that none of them has any parent corporation and that no publicly held corporation owns 10% or more of any of their stock.

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INTEREST OF AMICI CURIAE

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2011, The Sikh Coalition works to defend civil rights and liberties for all people, empower the Sikh community, advocate for laws and policies that end discriminatory profiling against all Americans, and create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination.

Interfaith Alliance Foundation was created in 1994 to celebrate religious freedom and to challenge the bigotry and hatred arising from religious and political extremism infiltrating American politics. Today, Interfaith Alliance Foundation has members across the country from seventy-five faith traditions, as well as those of no faith tradition. Interfaith Alliance Foundation is the only national interfaith organization dedicated to protecting the integrity of both religion and democracy in America, and focuses its efforts on national policy, grass-roots activism, education, and the democratic elective process.

The National Council of the Churches of Christ in the USA (the “NCC”) seeks to promote God’s Justice, peace and the healing of the world. Founded in 1950, the NCC has been the leading force for shared ecumenical witness among Christians in the United States. The NCC’s thirty-seven member communions –

from a wide spectrum of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace Churches – include 45 million people. The issues in this case relate to the NCC’s strong history in interfaith relationships, as well as to its history in upholding religious liberty for all faiths, speaking out against religious animus, and seeking justice and peace for all. For those reasons, the NCC joins this brief.

The Union for Reform Judaism, whose 900 congregations across North America includes 1.3 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women’s groups in North America and around the world, come to this issue out of concern for the freedoms guaranteed to all Americans in the Constitution, including the protection of civil liberties. The importance of these freedoms is confirmed not only by these amici curiae’s commitment to their American heritage, but also by centuries of Jewish experience.

The Islamic Society of North America (“ISNA”), an Indiana-based not-for-profit corporation, is the largest and oldest American Muslim umbrella organization in North America and has served the American Muslim community for well over forty years. The mission of ISNA is to foster the development of the

Muslim community, interfaith relations, civic engagement, and a better understanding of Islam. ISNA, which speaks out on behalf of the rights of Americans of all faiths and no faith, is a strong advocate of the First Amendment and believes that religious freedoms need to be protected at any cost while condemning hateful rhetoric. For these reasons, it joins this brief.

Bend the Arc: A Jewish Partnership for Justice (“Bend the Arc”) is the nation’s leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation’s most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy. Bend the Arc’s vital issues in this case are reflected by the fact that the Chair of the organization, Stephen Rohde, was himself the target of illegal NYPD surveillance targeting his constitutionally protected anti-war activities, and participated in the seminal case of *Handschu v. Special Servs. Div’n*, Case No. 71-cv-2203 (S.D.N.Y), cited in this brief.

The Hindu Temple Society of North America (the “HTSNA”) was established in 1977 for the purpose of practicing the Hindu faith by all Hindus. Hinduism, also called Sanatana Dharma or “Universal Religion,” respects all faiths and strongly believes and endorses religious liberty. The HTSNA supports all

cases challenging threats to religious freedom or the entanglement of church and state. For that reason, the HTSNA joins this brief.

The Auburn Theological Seminary (“Auburn”) equips bold and resilient leaders of faith and moral courage to build congregations and communities, bridge divides, pursue justice and heal the world. A seminary with multifaith commitments that honors its Christian roots, Auburn educates through dynamic experiential learning opportunities, platforms for public leadership and applied research and knowledge building. Auburn has a long-standing interest in ensuring faith communities are able to engage in the free exercise of religion, and for that reason joins this brief.

The National Council of Jewish Women (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW’s Resolutions state that “a democratic society and its people must value diversity and promote mutual understanding and respect for all.” Consistent with its Resolutions and its longstanding commitment to religious liberty, NCJW joins this brief.

The Universal Muslim Association of America (“UMAA”) is a group based in Washington, D.C., consisting of Shia Ithna Asheri Muslims dedicated to advocating on political, social, and interfaith issues. UMAA seeks to provide a forum to foster unity among all Muslims, to participate in civic and political responsibilities, to dispel misgivings about Islam and Muslims, to help fellow Americans better understand Islam through the Qur’an and the teachings and practices of Prophet Muhammad and his Ahlul Bayt. In keeping with its mission to advocate on interfaith issues and dispel misgivings about Islam and Muslims, UMAA joins this brief.

The American Humanist Association (the “AHA”) is a national nonprofit organization based in Washington, D.C., that advocates for the rights of humanists and other religious minorities, including the right of religious freedom and other fundamental constitutional rights. Founded in 1941, the AHA’s work is extended through more than 175 local chapters and affiliates across America. Committed to democracy, human rights, civil rights, and equality under law, the AHA has litigated constitutional cases in state and federal courts from coast to coast, and has submitted numerous amicus briefs in numerous other cases. The AHA asserts that this case addresses core humanist concerns about religious freedom, the rights of religious minorities, and the equal, fair, just application of laws.

The Sikh American Legal Defense and Education Fund (“SALDEF”) was founded in 1996 and is the oldest national Sikh American civil rights and educational organization. A religious minority with distinct articles of faith, Sikhs have been in America for over 100 years. SALDEF is dedicated to empowering Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. In this connection, SALDEF has filed as amicus curiae in other cases involving religious liberty and civil rights.

The Muslim Alliance in North America (“MANA”) is a national network of mosques, Muslim organizations and individuals committed to work together to address certain urgent needs within the Muslim community, especially those challenging Muslim communities in the inner city. Among its goals are the establishment of the strong presence of viable, healthy and dynamic Muslim communities, neighborhoods and institutions, that meet the religious, social, economic and political needs of the Muslims in this land; and to advocate and work for just and righteous remedies to ills impacting North American society in general and Muslims in particular. In keeping with its mission, goals, and to command justice and the doing of good, MANA joins this brief.

The National Religious Campaign Against Torture (“NRCAT”) is a national interfaith membership organization of religious organizations committed to abolishing torture in U.S. policy, practice, and culture. NRCAT supports this case because they believe that the only way to guarantee the human rights of all in the United States is to end anti-Muslim bigotry and religious discrimination.

The Reconstructionist Rabbinical Association (the “RRA”), established in 1974, is the professional association of the nearly 350 Reconstructionist rabbis who serve in a variety of leadership roles in North America, Israel, and around the world. As Jews, who have historically suffered from the results of intolerance and discrimination, and consistent with its resolutions, the RRA affirms the basic rights of freedom of religion, the ideals of a pluralistic society, and understands that that threats to religious freedom are unconscionable. Consistent with its members’ values, the RRA joins this brief.

Imam Mahdi Association of Marjaeya (“IMAM”) is a religious organization and the central point of communication between the Shia Muslims in North America and their spiritual religious leadership in all matters pertaining to beliefs and religious duties. At the same time, IMAM aims to organize Shia Muslims in North America as a vibrant, communicating, and collaborative community to practice its faith. In keeping with its goal to preserve the Islamic religious identity,

noble humanitarian morals, and the laws of the state and country, so it serves in peaceful coexistence with other religions and groups, IMAM joins this brief.

Muslims for Peace is an organization that aims to bridge people from different religious and ethnic backgrounds through interfaith activities. Muslims for Peace believes that learning about one another's differences is the best way to interconnect people, increase religious tolerance, and facilitate the peacemaking process all over the world. Muslims for Peace supports the religious free exercise rights of all faith groups. In keeping with its mission, Muslims for Peace joins this brief.

T'ruah: The Rabbinic Call for Human Rights ("T'ruah") is an organization of more than 1,800 rabbis from all streams of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Grounded in Torah and the Jewish historical experience and guided by the Universal Declaration of Human Rights, T'ruah advocates for human rights in Israel and North America. As Jews, T'ruah's members understand what it is like to be targeted by authorities not on the basis of their actions, but because of their religious background. T'ruah joins this brief because the Plaintiffs have been unjustly subject to police surveillance solely on the basis of their religion, an act which disrupts community cohesion and denies their inherent human dignity.

Ta'leef Collective, which formed as an outreach program in 2002, is a nonprofit collective of teachers, volunteers, and peers who understand firsthand the challenge of living as Muslims in the west and strive to provide the necessary space, content and companionship necessary for a healthy understanding, embrace and realization of Islam. Ta'leef Collective serves seekers actively interested in Islam and converts to the faith, as well as disenfranchised, often marginalized Muslim young adults, assisting them in realizing a sustainable practice of Islam. The issues at stake in this case relate to Ta'leef Collective's work in creating a safe space necessary for a healthy realization of one's faith, a safe space that is protected and remains unmolested from intrusion, judgment, and bigotry. For that reason, it joins this brief.

Muslim Congress is a non-profit organization seeking to promote unity among the Muslims of North America. Its mission is to establish a strong Muslim Community in North America based on Islamic beliefs and values where individuals can develop and succeed without compromising their Islamic identity. In keeping with its objective to promote Islamic morality and divine values, and to promote the religious free exercise rights of all faith groups, Muslim Congress joins this brief.

The Unitarian Universalist Legislative Ministry of New Jersey is a New Jersey not-for-profit corporation representing most of the Unitarian Universalist Congregations of New Jersey. It was formed to give voice to Unitarian Universalist humanitarian values in matters of public policy and public interest in New Jersey. Unitarian Universalists share a belief in principles that form the basis of their core humanitarian values. These principles include a belief in the inherent worth and dignity of every person; a commitment to justice, equity and compassion in human relations; and the right of conscience and the use of the democratic process within their congregations and in society at large.

The Queens Federation of Churches, Inc. (the “Federation”), organized in 1931, is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Federation and its 390 member congregations are vitally concerned with protecting religious liberty, and have appeared as *amicus curiae* for that purpose in a number of cases.

The Northern California Islamic Council (“NCIC”) is a not-for-profit network of Muslim non-profits located in Northern California. NCIC’s mission is to be a platform that promotes dialogue, facilitate cooperation among Muslim organizations, and encourage active engagement in the larger civic society. NCIC

envisions an exemplary Muslim community in Northern California which strives for the betterment of society at large. For these reasons, it joins this brief.

The Council of Islamic Organization of Greater Chicago (“CIOGC”) is an Illinois not-for-profit corporation that represents more than 400,000 Muslim Americans and sixty member organizations throughout the Greater Chicago area. CIOGC was formed to be a federation of Islamic organizations in Greater Chicago, to be the leading advocate of Muslim community interests in the region, and to act as a catalyst for enriching American society. CIOGC not only builds and nurtures unity within the Muslim American community, but it also leverages the strength that comes with unity to work in coalitions and partnerships on shared issues and on common concerns with community-based and interfaith groups as well. CIOGC actively engages in civil society as it strives to be a strong and unified voice for American Muslims. For those reasons, CIOGC joins this brief.

The Islamic Shura Council of Southern California (the “ISCSC”) is an umbrella organization of more than eighty Mosques and Muslim organizations serving more than half a million Muslims in Southern California. Muslims are commanded to honor the inherent dignity of all human beings (The Holy Quran 17:70) and to work on righting all wrongs, including the protection of one another from slander, spying and unwarranted surveillance (3:110). The ISCSC through its

members works on building a free and suspicionless society and on matter of common and the greater good. For this reason, it joins this brief.

All of the foregoing amici curiae are keenly devoted to the free exercise of religion – all religion – without fear of discrimination or unjustified government intrusion. Many if not most have submitted other briefs amicus curiae where, as here, they felt that judicial action threatened their respective core beliefs and principles. For this reason, amici curiae submit this brief in an effort to assist the Court in understanding the harmful effects on overall religious liberty that a policy such as that under review can cause. Amici curiae believe that such suspicionless, non-particularized surveillance of an entire faith-based community poses a very real and very significant threat to the religious liberty not only of the faith targeted here (the Muslim community) but also to that of religious practitioners (and non-practitioners) as a whole. Because the policy challenged in this action is anathema to amici curiae's respective missions, they join in submitting this brief for the Court's consideration.

STATEMENT PURSUANT TO RULE 29

Pursuant to Rule 29(c)(5), Fed. R. App. P., amici curiae state that no party's counsel authored this brief in whole or in part. Amici curiae also state that no party, its counsel, or any person other than amici curiae, their respective members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

Further, pursuant to Rule 29(a), amici curiae state that the parties to this appeal have been consulted, and all parties have agreed to the filing of this brief amicus curiae.

ARGUMENT

I. Brief Overview of the Historical Significance that the Quest for Religious Liberty Has Played in this Country

Given that the policy under review targeted, with no particularized suspicion or evidentiary underpinning, a specific religious group (to the express exclusion of others), it is fitting to begin with a brief overview of the historical significance that the quest for religious liberty has played in this country's founding.¹

The concept of being able to choose and practice one's religion, or choose not to practice a religion at all, is fundamental to this country's establishment. The early settlers came here to escape religious persecution – whether for being Protestant, Catholic, or of any other sect not strictly following the Church of England. The colonies, however, soon began to mirror the practices of the settlers' old homes: the charters granted by the English crown required the settlers to erect religious establishments and compelled support of these institutions, including attendance. *Everson v. Bd. Of Ed. Of Ewing Twp.*, 330 U.S. 1, 9-10 (1947). As a result, many colonies began to resemble the old world, where religious

¹ The Plaintiff-Appellants' principal brief has thoroughly described the New York Police Department's ("NYPD") suspicionless surveillance program that the plaintiffs have challenged in this action. As such, amici curiae will forego a further overview of that program here.

persecutions, fines, and even worse (such as imprisonment) were commonplace.

Id.

These circumstances fostered the colonists' collective sense of disdain for government intrusion on religious choice and practice. Into this environment came Thomas Jefferson and James Madison, who during the 1780s were shaping principles of free exercise in their home state of Virginia. *Id.* at 11-12. Madison objected to the idea of mere "toleration" of other religions, and won the adoption of a promise of "the full and free exercise of religion" in the Virginia Bill of Rights. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1443 (1990); *see also* Rev. Dr. C. Welton Gaddy & Rev. Barry W. Lynn, *FIRST FREEDOM FIRST*, xxiv (Beacon Press 2008) (noting that "by accepting Madison's change of language in the Virginia Declaration of Rights . . . the delegates took freedom of religion out of the category of 'legislative grace' (which implies that what is granted can be rescinded) and affirmed it as 'an inalienable right'") (attribution omitted). Indeed, in Madison's *Memorial and Remonstrance*, he wrote that the right of free religious exercise is a "gift of nature" equal to all the other fundamental rights and that, like those rights, one that must remain sacred. J. Madison, *Memorial and*

Remonstrance, reprinted in *Everson*, 330 U.S. at 671-72 (appendix to dissenting opinion of Rutledge, J.).

Shortly after their success in Virginia, Jefferson and Madison led the drafting and adoption of the First Amendment, which was intended to provide the same protection for religious liberty as the provision included in Virginia's Bill of Rights. *Everson*, 330 U.S. at 13. As with the Virginia provision, the desire for this national protection grew directly out of "personal experiences of religious persecution suffered by our forebears." *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214 (1963). It was this persecution that had prompted Madison to write that "[t]he Religion 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" J. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 188 (G. Hunt ed. 1901).

When these tenets were then incorporated into the Religion Clauses of the First Amendment,² the founders solidified the freedom of every American to practice religion freely, without persecution or fear thereof. *Everson*, 330 U.S. at 13. To this point, in passing the Religious Freedom and Restoration Act, Congress *specifically found* that "the framers of the Constitution, recognizing free exercise

² U.S. Const. amend. I (containing Establishment Clause and Free Exercise Clause).

of religion as an unalienable right, secured its protection in the First Amendment.” 42 U.S.C. § 2000bb(a)(1); *see also* Gaddy & Lynn, *supra*, at 78 (noting that the language of the Religion Clauses “was deliberately left expansive in scope so future generations could interpret its meaning as it applied to the world they were living in”).

It is against this historical backdrop that any policy aimed at religion, and particularly one aimed at a particular religious minority such as that at issue here, must be considered.

II. The NYPD Program Has Significantly Chilled Muslims’ Free Exercise of Their Faith

The NYPD surveillance program under review targeted the Muslim communities in the greater New York and New Jersey areas. *See generally* First Am. Compl., DE #10. It is natural to conclude, as a matter of pure logic, that such targeted governmental monitoring would chill that group’s members’ free and uninhibited exercise of their religion. Here, that conclusion is also well documented.

As detailed in *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*, the surveillance program in question has had a direct and extremely deleterious effect on the Muslim community’s free exercise of their religion. Diala Shamas & Nermeen Arastu, *Mapping Muslims: NYPD Spying and Its Impact on*

American Muslims, (2013), <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (last visited July 8, 2014). For example, after the program became public, some Muslims concluded that “the risk of subjecting oneself to being featured in a police file is reason enough to cease attending the mosque or praying with other Muslims,” *id.* at 14; when another Muslim discovered that a fellow mosque-goer was an undercover agent of the NYPD program, he reacted by severing his relationship with the mosque for a year. *See id.* Still others altered their physical appearance, such as by not growing a beard or foregoing a *niqab* (face veil). *See id.* at 15.

For their part, due to the program, numerous Imams felt compelled to “avoid[] one on one consultations” for fear that the congregant was doing nothing more than trying to gather information to pass on to the police, and others considered themselves “unable to guarantee the confidential consultations in their surveilled spaces.” *Id.* The program also caused many Muslims to be generally fearful of “being outspoken on political issues affecting Muslims in America.” *Id.* at 22. The First Amended Complaint in this action describes similar injurious results of the program. *See, e.g.*, Appellant’ Opening Br. at 16 (“The Complaint clearly alleges that many of the Plaintiffs have stopped attending mosques . . . and instead refrain from openly discussing their religious beliefs for fear their

statements will be misinterpreted and so invite unwanted attention from law enforcement.”); *id.* at 17 (“Plaintiff MSA has seen its ability to fulfill the spiritual needs of its members in a confidential manner impaired. Plaintiffs Mohammed, Doe, and Tahir . . . have also changed their worship habits to avoid attracting the attention of the NYPD.”).

These harmful effects are also detailed in the Complaint filed in the Eastern District of New York by Plaintiff Imam Hamid Hassan Raza and others in *Hamid Hassan Raza v. City of New York*, Case No. 1:13-cv-03448 (E.D.N.Y. June 18, 2013). The *Raza* action challenges the same NYPD program as that here under review. As Plaintiffs in the *Raza* action allege, the NYPD program has caused Imam Raza “to keep his distance from newcomers to the mosque,” DE #1, at ¶ 66, and to “avoid[] listening to religious speakers who are fiery and emotional even though they may have important lessons to teach, for fear that following those speakers is more likely to attract police attention.” *Id.* at ¶ 65. The program has also resulted in “a steep decline in mosque attendance,” *id.* at ¶ 76, “prevented the mosques from fulfilling their mission of serving as religious sanctuaries,” *id.* at ¶ 5, and substantially “diminished the ability of a Plaintiff charity and one of its leaders to raise funds.” *Id.* Court filings in other cases addressing the NYPD program here under review likewise highlight the real-world harms that the program has

inflicted. *See, e.g., Handschu v. Special Servs. Div'n*, Case No. 71-cv-2203 (S.D.N.Y.), Decl. of L. Sarsour, Exh. 14 to the Decl. of Paul Chevigny in Support of Pl. Class' Motion for Injunctive Relief, at ¶ 7 (“[T]he awareness of police surveillance has produced suspicion as between people in the community, has produced caution and suspicion in organization, and a sense of being watched constantly by the authorities.”); *id.* Decl. of F. Ali, Exh. 15, at ¶ 5 (“[M]y experience is that young people and their parents are very apprehensive about police surveillance, and they are afraid to take action against it or to protest publicly because of their fear of the possible consequences.”), available at <http://www.nyclu.org/news/court-filing-seeks-end-nypd-surveillance-of-muslim-community> (last visited July 8, 2014). In short, the stifling effect this program has had on the free exercise of these Muslim practitioners' religious liberties is stark.

This Court has specifically (and rightfully) recognized that effects such as these, resulting from government surveillance, constitute cognizable First Amendment injuries. *See, e.g., Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (holding that religious and civic groups who challenged police monitoring of their general activities alleged “immediately threatened injury” because “[t]he mere anticipation of the practical consequences of joining or remaining with plaintiff organizations may well

dissuade some individuals from becoming members, or may persuade others to resign their membership”). Such direct and substantial impacts on the free exercise of religion, caused by a policy to surveil an entire religious community, also do not comport with this country’s founding principles or the ethos of *amici curiae*.

**III. Religious Monitoring of the Sort at Issue
Here Will Chill the Free Exercise of Religion –
Be It a Majority or Minority Religion in Question**

While the NYPD’s program targeted what is a religious minority in this country, the program’s existence – if not soundly condemned – will necessarily chill the free exercise of *all* religious groups. The reason for this is apparent: if this program is upheld, the message will be that the wrongful actions of a small segment of a given religious group can justify blanket surveillance of *all* members of that group in order to determine someone in that group *might* be participating (or thinking of participating) in criminal activity. That message has no rational limitations; it applies as equally to Muslims, in this case, as it could to Sikhs, Jews, Christians, Buddhists, Hindus or atheists, in other cases.³ And in this regard, it

³ Likely for this very reason, polling data from shortly after September 11 show the vast majority of Americans disapproved of then-Attorney General John Ashcroft’s changes to certain F.B.I. investigative guidelines that allowed for expansive, suspicionless surveillance of religious organizations. In late 2001, one respected polling source reported that, *regardless of religious affiliation*, a full “[t]hree out of four Americans” believed that government investigation of “religious groups that gather at mosques, churches or synagogues without evidence that someone in the group has broken the law . . . violates people’s rights.” Tom

must be remembered that the Constitution is, in a very real sense, religion-blind: it was designed to protect religious *minorities* as equally as it does religious *majorities*. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (“The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities.”). The Constitution simply does not exalt a Christian or Judeo-Christian American identity over that of any other religion, Muslim or otherwise. Indeed, unlike the program under review, the Constitution does not even *permit* such divisions to be drawn. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968) (“The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which aid or oppose any religion. . . . This prohibition is absolute.”) (internal quotations and citation omitted).

Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 Iowa L. Rev. 1201, 1208 n.20 (quoting CBS News, Poll: Doubts on Military Tribunals (Dec. 11, 2001), at <http://www.cbsnews.com/stories/2001/12/11/opinion/main320935.shtml>).

Thus, compromising religious liberty in this overarching fashion is not consistent with the First Amendment. Quite to the contrary, a program that compromises religious liberty in this manner impacts the nation's free exercise of religion (or decision not to exercise religion) and directly implicates an entanglement between church and state. As the government itself has recognized, it impacts free exercise by chilling *all* practitioners' decisions of how, or even whether, to practice their chosen faith. *See* Lininger, *supra* note 4, at 1235 ("The F.B.I. has also recognized that unfettered surveillance of political and religious groups 'could potentially have a chilling effect on the exercise of protected rights.'"⁴). It works an impermissible church-state entanglement by allowing a governmental program to go beyond impacting individuals (where suspicion may be appropriately substantiated and sufficiently justified) and indiscriminately apply to a religious group *as a whole*. In other words, it allows government to target religion only *because of* religion. *See* Appellants' Opening Br. at 35 (observing that the program's "express policy to deny equal treatment to Muslims boldly trumpets government disfavor of Islam"). Such close intermingling of church and state has long been held to be anathema to our constitutional values. *See, e.g.,*

⁴ Quoting U.S. General Accounting Office, Report to the Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives: International Terrorism: F.B.I. Investigates Domestic Activities to Identify Terrorists, 11 (1990).

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 110 (1952) (holding state statute giving control of properties to one branch of a religion over another to be unconstitutional because state intrusion on such internal religious questions “violates our rule of separation between church and state”).

Allowing this program to go unchecked also muffles the robust and salutary voices that different religious (and non-religious) groups bring to bear on topics of public importance. In this regard, courts have recognized that the value of such “religious speech” is significant. *See, e.g., Watchtower Bible & Tract Soc’y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 161 (2002) (stating that religious speech “occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.”); *McNair v. Worldwide Church of God*, 242 Cal. Rptr. 823, 833 (Cal. Ct. App. 1988) (holding that, given importance of religious speech and its free-exercise protection, a heightened showing of “constitutional malice” is required for defamation claims arising from such religious speech). And while, as outlined above, Muslim voices are the ones most directly impacted by the NYPD’s

surveillance program,⁵ an allowance of such indiscriminate, religion-based surveillance means that any Christian minister, Sikh granthi, Jewish rabbi, Hindu priest, Buddhist monk, or American Indian shaman will be understandably guarded in his or her speech to avoid controversy and further investigation. This is an appalling assault on our First Amendment values.

Compromising religious liberty in this overarching fashion also is not consistent with the underlying goals of these amici curiae. Allowing a governmental program such as the NYPD program questioned here threatens, among other goals, various amici curiae's goal of fostering the free practice of religion, others' goal of fostering the democratic process within their congregations and in society at large, and still others' goal of ensuring that the salutary division between church and state remains inviolate. *See Everson*, 330 U.S. at 17 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”).

In short, such an overarching chilling effect on all religions is constitutionally repugnant and provides substantial reason why the district court's Order under review should be reversed.

⁵ *See Mapping Muslims, supra*, at 20 (noting that, based on the evidence gathered concerning the NYPD program's impact on Muslims in the tri-state area, “[k]nowledge of surveillance leads . . . to self-censorship on many religious and political topics”).

IV. Other Circuits Have Recognized that Religious Monitoring Has a Chilling Effect on the Free Exercise of the Targeted Religion

The logical conclusion that governmental surveillance of a given religious group chills the free exercise of that religion is also borne out by reference to specific historical governmental action. When faced with the issue, other circuits have recognized the chill that such broadly targeted surveillance imposes.

For example, in the mid-1980s the federal Immigration and Naturalization Service (the “INS”) initiated a covert investigation of the “sanctuary movement.” *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989). The sanctuary movement was “an effort by a loosely knit group of clergy and lay people to aid refugees from El Salvador and Guatemala.” *Id.* at 520. The investigation focused on various churches, and was undertaken “without search warrants and without probable cause to believe that the surveillance of the churches would uncover evidence of criminal activity.” *Id.* In other words, like the program being considered here, the INS surveillance in *Presbyterian Church* was anchored in a mere hope that monitoring these religious organizations would potentially benefit law enforcement. When the investigation was made public, a number of the targeted churches filed suit challenging the constitutionality of the INS’s actions. *See id.*

The district court dismissed the churches' action because, among other reasons, it concluded that the churches had not suffered any constitutionally cognizable "injury" as a result of the governmental surveillance. On appeal, the appellate court flatly disagreed with this conclusion and specifically held that a church is injured "[w]hen congregants are chilled from participating in worship activities [and] when they refuse to attend church services because they fear the government is spying on them and taping their every utterance." *Id.* at 522. As the appellate court further observed, "[c]hurches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment." *Id.* at 523. Accordingly, the appellate court reversed the district court's conclusion that the churches had not alleged a sufficient "injury" resulting from the INS's program. *See id.* at 521.

In fact, it has been recognized that similar government targeting can signify state hostility to a religion itself. *See Smith v. Brady*, 972 F.2d 1095, 1098 (9th Cir. 1992) (holding that the IRS's treatment of members a minority religious group, which plaintiffs alleged to demonstrate "'impermissible hostility' to their minority religion" is a tangible injury). The court in *Smith* found such a chilling effect to be a concrete cognizable injury, and "not a mere 'subjective chill.'" *Id.*

(citing *Presbyterian Church*, 870 F.2d at 523); *cf. Riggs v. City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990) (holding that individuals who were investigated by municipal police department had standing to challenge that practice because they “allege[d] more than a chilling of their First Amendment rights; they also allege harm to their personal, political, and professional reputations in the community”); *Muslim Cmty. Ass’n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592, 601 (E.D. Mich. 2006) (holding that religious groups had standing to challenge the constitutionality of a specific provision of the Patriot Act because “Plaintiffs have alleged that [due to the provision,] their members are afraid to attend mosque, practice their religion, and express their opinions on religion and political issues”); *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 562 (N.D. Ill. 1982) (approving, in action brought by churches, political groups, and civil liberties organizations challenging suspicionless surveillance activities, a consent order barring any municipal agency from “investigat[ing] or prosecut[ing] a person, solely because of the person’s First Amendment conduct, or selectively for political, religious, or personal reasons (except as permitted by law in the discipline of public employees)”).

Of course, the inherent underpinning to the decisions of the *Presbyterian Church* court and others is that government monitoring of a religious group *does*

impose a chilling effect on that group's members' decision to exercise their chosen faith. In this regard, and particularly given the importance of a religious group's ability to associate freely in order to better exchange beliefs, ideas, and points of view, the significance of this chilling effect can hardly be overstated. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").

Thus, when confronted with a program targeting members of a religious group *simply because they were members of that religious group*, courts have rightfully recognized the substantial chilling effect on that group's members' free exercise of their chosen beliefs that such program imposes. Such a program was constitutionally injurious in *Presbyterian Church* and other such cases, and it is constitutionally injurious here. For this reason as well, the district court Order under review should be reversed.

CONCLUSION

For all of the foregoing reasons, amici curiae urge the Court to reverse the district court's Order under review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Third Circuit Local Appellate Rule 32.1 and Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief contains 6,405 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

By: s/ Allen P. Pegg.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

By: s/ Allen P. Pegg.

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2014, I filed the foregoing Brief of Religious Liberty Amici Curiae in Support of Reversal of the District Court via this Court's CM/ECF system, which will serve a Notice of Service on all counsel of record.

By: s/ Allen P. Pegg.