No. 16A1191

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *ET AL.*, Applicants,

v.

STATE OF HAWAII, *ET AL.*, Respondents.

ON APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE AND BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF STAY APPLICATION

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF STAY APPLICATION

Amicus American Center for Law and Justice respectfully moves for leave of Court to file the accompanying brief in support of the Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit of the preliminary injunction issued by the United States District Court for the District of Hawaii enjoining all of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO"). Counsel for the parties have been notified of this brief, and they consent to the filing of this *amicus* brief.

STATEMENT OF INTEREST[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before this Court and other courts around the country in cases involving the Establishment Clause and immigration law. *See, e.g., United States v. Texas*, 136 S. Ct. 2271 (2016); *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of*

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Educ. v. Mergens, 496 U.S. 226 (1990); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 2017 U.S. App. LEXIS 9109 (4th Cir. 2017).

The ACLJ has actively defended, through advocacy and litigation, immigration-related policies that protect American citizens. This brief is supported by members of the ACLJ's Committee to Defend Our National Security from Terror, which represents more than 230,000 Americans who have stood in support of the President's Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States.

ARGUMENT

This brief addresses the challenged EO's constitutionality under the Establishment Clause of the First Amendment, which is an issue that has a direct bearing on the various factors considered when a stay application is filed.

I. The district court's preliminary injunction conflicts with this Court's precedent because it failed to review the Executive Order under the deferential standards applicable to the immigration policymaking and enforcement decisions of the political branches, which the Order satisfies.

The district court accepted Respondents' invitation to treat this case as if it were a run-of-the-mill Establishment Clause case. It is not. This case involves the special context of an EO concerning the

entry into the United States of refugees and nationals of six countries of particular concern, enacted pursuant to the President's constitutional and statutory authority. As discussed herein, when this Court has considered constitutional challenges to immigration-related actions of this sort, it has declined to subject those actions to the same level of scrutiny applied to non-immigration-related actions, choosing instead to take a considerably more deferential approach. The EO is valid under this standard, and a stay should be entered against the enforcement of the injunction as requested by Applicants.

A. Judicial review of the immigration-related actions of the political branches is deferential.

This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Indeed, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Moreover, the Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and the President has broad national security powers that may be exercised through immigration restrictions. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

The preliminary injunction undermines the President's national security authority; it also undercuts the considered judgment of Congress that

> [w]henever 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.

8 U.S.C. § 1182(f) (2012). Where, as here, a President's action is authorized by Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Frankfurter, J., concurring)). The EO falls squarely within the President's constitutional and statutory authority.

B. The Executive Order is constitutional under this Court's deferential standards applicable to constitutional challenges to the political branches' immigration-related actions.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court rejected a First Amendment challenge to the Attorney General's decision to

decline to grant a waiver that would have allowed a Belgian scholar to enter the country on a visa in order to speak to American professors and students. The Court held that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government.'" *Id.* at 765 (citations omitted). The Court concluded by stating that

> plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70; *see also Kerry v. Din*, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring) (the government's statement that a visa application was denied due to suspected involvement with terrorist activities "satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard.").

Similarly, in *Fiallo*, this Court rejected a challenge to statutory provisions that granted preferred immigration status to most aliens who are

the children or parents of United States citizens or lawful permanent residents, except for illegitimate children seeking that status by virtue of their biological fathers, and the fathers themselves. 430 U.S. at 788-90. The Court stated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Id. at 792 (citations omitted). The Court noted that it had previously "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794. Additionally, the Court stated, "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case." *Id.* at 795. Furthermore, the Court emphasized that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," *id.* at 799, and concluded that the plaintiffs raised "policy questions entrusted exclusively to the political branches of our Government." *Id.* at 798.

In sum, the legality of executive orders related to immigration does not turn on a judicial guessing game of what the President's subjective motives were at the time; rather, *Mandel*, *Fiallo*, and other cases

dictate that courts should rarely look past the face of such orders. *See Washington v. Trump*, 853 F.3d 933, 939 n.6 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (the panel's "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world"). The EO is valid under this standard. It is closely tethered to well-established discretionary powers vested in the Executive Branch by the Constitution and statute. The EO *temporarily* pauses entry into the United States of refugees under the United States Refugee Admissions Program ("USRAP") as well as nationals of six unstable and/or terrorism-infested countries of particular concern, which were designated as such by the prior administration, for the legitimate secular purpose of allowing time for needed improvements to the immigration and refugee screening processes.

The EO does *not* single out Muslims for disfavored treatment. The district court correctly noted that the EO "does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation." Add. of App. for Stay Pending Appeal 54 (S.Ct. No. 16A1191). The countless millions of non-American Muslims who live outside the six countries of particular concern are not restricted by the EO. Neither does it limit its application to Muslims in the six designated countries; instead, it

applies to all citizens of the six enumerated countries irrespective of their faith.

Although it is well-established that litigants and courts should not be second-guessing the wisdom of, or evidentiary support for, the political branches' decision-making concerning immigration, the district court cited with approval Respondents' assertion that the EO's stated national security reasons are pretextual. Add. 60-61. There is, however, ample justification for the determination of multiple administrations that the six designated countries pose a particular risk to American national security. Respondents' objection to the EO is a policy dispute that should be resolved by the political branches.

The EO is similar in principle to the National Security Entry Exit Registration System ("NSEERS"), implemented after the terrorist attacks of September 11, 2001, which was upheld by numerous federal courts. *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (citing cases). Under this system, the Attorney General imposed special requirements upon foreign nationals present in the United States who were from specified countries. The first group of countries designated by the Attorney General included Iran, Libya, Sudan and Syria, and a total of twenty-four Muslim majority countries and North Korea were eventually designated. *Id.* at 433 n.3.

In one illustrative NSEERS case, the United States Court of Appeals for the Second Circuit rejected arguments that are strikingly similar to the arguments accepted by the district court here:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 *were facilitated by the lax enforcement of immigration laws*. The Program was [rationally] designed to monitor more closely aliens from *certain countries selected on the basis of national security criteria*. . . .
>
> To be sure, the Program did select countries that were, with the exception of North Korea, predominantly Muslim. . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts. . . . The program did not target only Muslims: non-Muslims from the designated countries were subject to registration. There is therefore no basis for petitioners' claim.

Id. at 438-49 (emphasis added) (citation omitted). Similarly, the EO at issue here is constitutional.

II. The Executive Order is constitutional even under a traditional Establishment Clause analysis.

As noted previously, consideration of the EO must take into account the deferential nature of judicial review of immigration-related actions. Nevertheless, the EO is constitutional even under non-

immigration-related Establishment Clause jurisprudence.

The EO satisfies the "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which asks whether the challenged government action has "a secular legislative purpose." *Id.* at 612-13. Here, the EO's predominant purpose is its stated purpose, namely, protecting national security.

The district court's decision to sidestep the EO's obvious secular purposes by focusing on miscellaneous comments made by then-candidate Trump, or his advisors, is flawed for at least four reasons.

First, this Court has stated that the primary purpose inquiry concerning statutes may include consideration of the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005); *see also id.* (noting that the primary purpose inquiry is limited to consideration of "the 'text, legislative history, and implementation of the statute,' or comparable official act") (citation omitted).

The district court relied upon several quotes, made as long ago as 2015, by then-candidate Trump and/or individuals holding some non-governmental position within his political campaign. Add. 57-59. Clearly, comments made, or actions taken, by a private citizen while a candidate for public office (or

his or her advisors) *while on the campaign trail* are not "official" *government* acts, and do not constitute "*contemporaneous* legislative history." *Id.*; *cf. Clinton v. Jones*, 520 U.S. 681, 686 (1997) (alleged misconduct occurring before Bill Clinton became President was not an "official" act). Indeed, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Thus, the district court failed to properly limit its inquiry to official acts or statements in conducting its Establishment Clause analysis.

Second, the district court's extensive reliance upon purported evidence of a subjective, personal anti-Muslim bias of the President and some of his advisors is improper because "what is relevant is the legislative purpose of *the statute*, not the possibly religious motives of *the legislators* who enacted the law." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (emphasis added). In short, the district court engaged in the kind of "judicial psychoanalysis of a drafter's heart of hearts" that is foreclosed by this Court's precedent. *McCreary Cnty.*, 545 U.S. at 862.

The EO, on its face, serves secular purposes, and no amount of rehashing of miscellaneous campaign trail commentary can change that, especially when the content of the current EO is substantively different from the now-repealed executive order. A foray into the malleable arena of legislative history is not a *requirement* in all Establishment Clause cases. *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)

(noting this Court's "reluctance to attribute unconstitutional motives to the [government] particularly when a plausible secular purpose . . . may be discerned from the face of the statute"); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (explaining that inquiry into the government's purpose should be "deferential and limited").

As Judge Niemeyer explained in his dissenting opinion in *International Refugee Assistance Project*, the majority's use of campaign statements to convert the facially neutral EO into an Establishment Clause violation was improper. The "Supreme Court has never applied the Establishment Clause to matters of national security and foreign affairs." 2017 U.S. App. LEXIS, at *210 (Niemeyer, J., dissenting). In the few cases where the Court has invalidated government actions based on a religious purpose, for example, *Edwards v. Aguillard*, 482 U.S. 578 (1987), "the Court found the government action inexplicable *but for* a religious purpose, and it looked to extrinsic evidence only to confirm its suspicion, prompted by the face of the action, that it had religious origins." 2017 U.S. App. LEXIS, at *211-12 (Niemeyer, J., dissenting). Those cases are manifestly distinguishable from the EO, which "is framed and enforced without reference to religion, and the government's proffered national security justifications . . . are consistent with the stated purposes of the [EO]." *Id.* at *213. "Conflicting extrinsic statements made prior to the [EO]'s

enactment surely cannot supplant its facially legitimate national security purpose." *Id.*[2]

One illustration of the problematic nature of attempting to utilize legislative history to override a policy's facial neutrality is Respondents' suggestion, cited with approval by the district court, that a presidential policy advisor's statement that the current EO is designed to accomplish "the same basic policy outcome" as the now-repealed executive order, while merely correcting technical issues raised in litigation over that previous executive order, constitutes evidence that the existing EO is really a wolf in sheep's clothing. Add. 36, 59. Rather than being some sort of smoking gun, this comment merely suggests that the existing EO was narrowly crafted to address concerns raised during litigation over the prior executive order, with the secular goal of protecting national security in mind. Addressing actual or perceived flaws in previous iterations of a law or policy, in order to bolster the likelihood that it will be upheld in litigation, is itself a valid secular purpose. *See, e.g., ACLU of Ky. v. Rowan Cnty.*, 513

[2] Further evidence to dispel the notion that the EO is a cover for anti-Muslim discrimination is found in the May 3, 2017, testimony by then-FBI Director James Comey before the Senate Judiciary Committee on FBI Oversight. Comey testified that the FBI has over 2,000 "violent extremist investigations" and "about 300 of them [roughly 15%] are people who came to the United States as refugees." Transcript of Testimony of James Comey, www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/; *see also* Mark Krikorian, *Comey: 15 Percent of Terror Cases Came as Refugees*, www.nationalreview.com/corner/447423/comey-terror-cases-refugees.

F. Supp. 2d 889, 904 (E.D. Ky. 2007) (in Establishment Clause cases, changing a policy in "an attempt to avoid litigation . . . is an acceptable purpose").

Third, the mere suggestion of a possible religious or anti-religious motive, mined from past comments of a political candidate or his supporters, and intermixed with various secular purposes, is not enough to doom government action (along with all subsequent attempts to address the same subject matter). "[A]ll that *Lemon* requires" is that government action have "*a* secular purpose," not that its purpose be "*exclusively* secular," and a policy is invalid under this test only if it "was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680-81 & n.6 (1984) (emphasis added) (citation omitted); *see also Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (upholding government action that "serv[ed] a mixed but primarily nonreligious purpose"); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose."). The EO clearly serves secular purposes and, therefore, it satisfies *Lemon*'s purpose test. *See Sarsour v. Trump*, 2017 U.S. Dist. LEXIS 43596, at *24-34 (E.D. Va. 2017) (rejecting the claim that the EO at issue here violates the purpose prong of *Lemon* and noting that the EO is a facially lawful exercise of the President's authority and that the stated national security purpose of the EO is not a pretext for discrimination against Muslims).

Fourth, and final, the district court's improper emphasis on the alleged subjective, predominantly anti-Muslim intent of the President and his surrogates led it to conclude that the current EO is unconstitutionally tainted. Add. 17-18. This conclusion runs contrary to *McCreary County*'s admonition that the government's "past actions" do not "forever taint any effort . . . to deal with the subject matter." *McCreary Cnty.*, 545 U.S. at 874. The district court's conclusion is erroneous because the many substantive differences between the now-repealed executive order and the existing EO constitute "genuine changes in constitutionally significant conditions" that cured any actual or perceived Establishment Clause deficiencies. *See, e.g., ACLU of N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'") (citations omitted); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009) ("Another reason we reject the district court's *Lemon* analysis is that . . . [it] would preclude the District from *ever* creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner."); *Sarsour*, 2017 U.S. Dist. LEXIS 43596, at *33 ("[T]he substantive revisions reflected in [the EO at issue here] have reduced the probative value of the President's statements to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominant purpose of [the EO] is to discriminate against Muslims based on their religion

and that [the EO] is a pretext or a sham for that purpose.").

CONCLUSION

The stay application should be granted.

Respectfully submitted,

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