

SOTOMAYOR, J., dissenting

## SUPREME COURT OF THE UNITED STATES

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No. 17–965

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DONALD J. TRUMP, PRESIDENT OF THE UNITED  
STATES, ET AL., PETITIONERS *v.* HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June 26, 2018]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG  
joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

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## I

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a “prudential rule of avoiding constitutional questions.” *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1, 8 (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs’ complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause’s guarantee of religious neutrality.

## A

The Establishment Clause forbids government policies “respecting an establishment of religion.” U. S. Const., Amdt. 1. The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. *Larson v. Valente*, 456 U. S. 228, 244 (1982); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion”); *Edwards v. Aguillard*, 482 U. S. 578, 593 (1987) (“The Establishment Clause . . . forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma” (internal quotation marks omitted)); *Lynch v. Donnelly*, 465 U. S. 668, 673 (1984) (noting that the Establishment Clause “forbids hostility toward any [religion],” because “such hostility would bring us into ‘war with our national tradition as embodied in the First Amendmen[t]’”); *Epperson v. Arkansas*, 393 U. S. 97, 106 (1968) (“[T]he State may not adopt programs or practices . . . which aid or oppose any religion. This prohibition is absolute” (citation and internal quotation marks omitted)). Consistent with

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that clear command, this Court has long acknowledged that governmental actions that favor one religion “inevitably” foster “the hatred, disrespect and even contempt of those who [hold] contrary beliefs.” *Engel v. Vitale*, 370 U. S. 421, 431 (1962). That is so, this Court has held, because such acts send messages to members of minority faiths “that they are outsiders, not full members of the political community.” *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 309 (2000). To guard against this serious harm, the Framers mandated a strict “principle of denominational neutrality.” *Larson*, 456 U. S., at 246; *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U. S. 687, 703 (1994) (recognizing the role of courts in “safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion”).

“When the government acts with the ostensible and predominant purpose” of disfavoring a particular religion, “it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See *id.*, at 862, 866; accord, *Town of Greece v. Galloway*, 572 U. S. \_\_\_, \_\_\_ (2014) (plurality opinion) (slip op., at 19).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the

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decisionmaker. *Lukumi*, 508 U. S., at 540 (opinion of KENNEDY, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate “text, legislative history, and implementation . . . , or comparable official act” (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in “any judicial psychoanalysis of a drafter’s heart of hearts.” *Id.*, at 862.

## B

## 1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, *ante*, at 27–28, that highly abridged account does not tell even half of the story. See Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump’s public statements expressing animus toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” App. 119. That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data

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showing ‘25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad’ and 51% of those polled ‘agreed that Muslims in America should have the choice of being governed according to Shariah.’ Shariah authorizes such atrocities as murder against nonbelievers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

“Mr. Trum[p] stated, ‘Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.’—Donald J. Trump.” *Id.*, at 158; see also *id.*, at 130–131.

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. *Id.*, at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” *Ibid.* He answered, “No.” *Ibid.* A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. *Id.*, at 163–164. In March 2016, he expressed his belief that “Islam hates us. . . . [W]e can’t allow people

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coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.” *Id.*, at 120–121. That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” *Id.*, at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.” *Ibid.*; *id.*, at 164. A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.” *Ibid.*

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” *Id.*, at 121. He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.” *Id.*, at 121–122. Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” *Id.*, at 122–123. He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.” *Id.*, at 123.

A month before the 2016 election, Trump reiterated that his proposed “Muslim ban” had “morphed into a[n] extreme vetting from certain areas of the world.” *Ibid.* Then, on December 21, 2016, President-elect Trump was asked whether he would “rethink” his previous “plans to create a Muslim registry or ban Muslim immigration.” *Ibid.* He replied: “You know my plans. All along, I’ve proven to be right.” *Ibid.*

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82

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Fed. Reg. 8977 (2017) (EO–1), entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” As he signed it, President Trump read the title, looked up, and said “We all know what that means.” App. 124. That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, “[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible.” *Id.*, at 125. Considering that past policy “very unfair,” President Trump explained that EO–1 was designed “to help” the Christians in Syria. *Ibid.* The following day, one of President Trump’s key advisers candidly drew the connection between EO–1 and the “Muslim ban” that the President had pledged to implement if elected. *Ibid.* According to that adviser, “[W]hen [Donald 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.’” *Ibid.*

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO–1. See *Washington v. Trump*, 2017 WL 462040, \*3. The Ninth Circuit denied the Government’s request to stay that injunction. *Washington v. Trump*, 847 F. 3d 1151, 1169 (2017) (*per curiam*). Rather than appeal the Ninth Circuit’s decision, the Government declined to continue defending EO–1 in court and instead announced that the President intended to issue a new executive order to replace EO–1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO–2). One of the President’s senior advisers publicly explained that EO–2 would “have the same basic policy outcome” as EO–1, and that any

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changes would address “very technical issues that were brought up by the court.” App. 127. After EO–2 was issued, the White House Press Secretary told reporters that, by issuing EO–2, President Trump “continue[d] to deliver on . . . his most significant campaign promises.” *Id.*, at 130. That statement was consistent with President Trump’s own declaration that “I keep my campaign promises, and our citizens will be very happy when they see the result.” *Id.*, at 127–128.

Before EO–2 took effect, federal District Courts in Hawaii and Maryland enjoined the order’s travel and refugee bans. See *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (Haw. 2017); *International Refugee Assistance Project (IRAP) v. Trump*, 241 F. Supp. 3d 539, 566 (Md. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. *IRAP v. Trump*, 857 F. 3d 554, 606 (CA4 2017) (en banc); *Hawaii v. Trump*, 859 F. 3d 741, 789 (CA9 2017) (*per curiam*). In June 2017, this Court granted the Government’s petition for certiorari and issued a *per curiam* opinion partially staying the District Courts’ injunctions pending further review. In particular, the Court allowed EO–2’s travel ban to take effect except as to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.” *Trump v. IRAP*, 582 U. S. \_\_\_, \_\_\_ (2017) (slip op., at 12).

While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO–2 was just a “watered down version of the first one” and had been “tailor[ed]” at the behest of “the lawyers.” App. 131. He further added that he would prefer “to go back to the first [executive order] and go all the way” and reiterated his belief that it was “very hard” for Muslims to assimilate into Western culture. *Id.*, at 131–132. During a rally in April 2017, President Trump recited the lyrics to a song called “The

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Snake,” a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. *Id.*, at 132, 163. And in June 2017, the President stated on Twitter that the Justice Department had submitted a “watered down, politically correct version” of the “original Travel Ban” “to S[upreme] C[ourt].”<sup>1</sup> *Id.*, at 132. The President went on to tweet: “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” *Id.*, at 132–133. He added: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!” *Id.*, at 133. Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing’s massacre of Muslims in the Philippines: “Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!” *IRAP v. Trump*, 883 F. 3d 233, 267 (CA4 2018) (*IRAP II*) (en banc) (alterations in original).

In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!” App. 133. Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim migrant beats up Dutch boy on

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<sup>1</sup>According to the White House, President Trump’s statements on Twitter are “official statements.” App. 133.

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crutches!”<sup>2</sup> *IRAP II*, 883 F. 3d, at 267. Those videos were initially tweeted by a British political party whose mission is to oppose “all alien and destructive politic[al] or religious doctrines, including . . . Islam.” *Ibid.* When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the “President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.” *Ibid.*

## 2

As the majority correctly notes, “the issue before us is not whether to denounce” these offensive statements. *Ante*, at 29. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. See *McCreary*, 545 U. S., at 862–863. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the

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<sup>2</sup>The content of these videos is highly inflammatory, and their titles are arguably misleading. For instance, the person depicted in the video entitled “Muslim migrant beats up Dutch boy on crutches!” was reportedly not a “migrant,” and his religion is not publicly known. See Brief for Plaintiffs in *International Refugee Assistance Project v. Trump as Amici Curiae* 12, n. 4; P. Baker & E. Sullivan, Trump Shares Inflammatory Anti-Muslim Videos, and Britain’s Leader Condemns Them, N. Y. Times, Nov. 29, 2017 (“[A]ccording to local officials, both boys are Dutch”), <https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html> (all Internet materials as last visited June 25, 2018).

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Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,” App. 399, warned that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,” *id.*, at 121, promised to enact a “total and complete shutdown of Muslims entering the United States,” *id.*, at 119, and instructed one of his advisers to find a “lega[l]” way to enact a Muslim ban, *id.*, at 125.<sup>3</sup> The President continued to make similar statements well after his inauguration, as detailed above, see *supra*, at 6–10.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam.<sup>4</sup> Instead, he has continued to make

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<sup>3</sup>The Government urges us to disregard the President’s campaign statements. Brief for Petitioners 66–67. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 540 (1993) (opinion of KENNEDY, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President’s campaign statements. For example, just last November, the Deputy White House Press Secretary reminded the media that the Proclamation addresses “issues” the President has been talking about “for years,” including on “the campaign trail.” *IRAP II*, 883 F. 3d 233, 267 (CA4 2018). In any case, as the Fourth Circuit correctly recognized, even without relying on any of the President’s campaign statements, a reasonable observer would conclude that the Proclamation was enacted for the impermissible purpose of disfavoring Muslims. *Id.*, at 266, 268.

<sup>4</sup>At oral argument, the Solicitor General asserted that President Trump “made crystal-clear on September 25 that he had no intention of imposing the Muslim ban” and “has praised Islam as one of the great countries [*sic*] of the world.” Tr. of Oral Arg. 81. Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump’s statement during a

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remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. See *United States v. Fordice*, 505 U. S. 717, 746–747 (1992) (“[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time” (citation omitted)). Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U. S. \_\_\_, \_\_\_ (2018) (slip op., at 18) (“The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—

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television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018); Reply Brief 28, n. 8. During that interview, the President was asked whether EO–1 was “the Muslim ban,” and answered, “no it’s not the Muslim ban.” See Transcript: ABC News anchor David Muir interviews President Trump, ABC News, Jan. 25, 2017, <http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602>. But that lone assertion hardly qualifies as a disavowal of the President’s comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump’s January 25th statement makes “crystal-clear” that he never intended to impose a Muslim ban given that, until May 2017, the President’s website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

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were inconsistent with what the Free Exercise Clause requires”). It should find the same here.

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

## II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, “has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” *Ante*, at 30 (citing *Kleindienst v. Mandel*, 408 U. S. 753 (1972)). As the majority notes, *Mandel* held that when the Executive Branch provides “a facially legitimate and bona fide reason” for denying a visa, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.” *Id.*, at 770. In his controlling concurrence in *Kerry v. Din*, 576 U. S. \_\_\_\_ (2015), JUSTICE KENNEDY applied *Mandel*’s holding and elaborated that courts can “‘look behind’ the Government’s exclusion of” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” *Din*, 576 U. S., at \_\_\_\_ (opinion concurring in judgment)

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(slip op., at 5). The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not.<sup>5</sup> Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that “dot[s] all the i’s and . . . cross[es] all the t’s,” *Mandel* would not “pu[t] an end to judicial review of that set of facts.” Tr. of Oral Arg. 16.

In light of the Government’s suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly declines

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<sup>5</sup> *Mandel* and *Din* are readily distinguishable from this case for a number of reasons. First, *Mandel* and *Din* each involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility. *Mandel*, 408 U. S., at 767; *Din*, 576 U. S., at \_\_\_\_ (slip op., at 1). Here, by contrast, President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis. Second, *Mandel* and *Din* did not purport to establish the framework for adjudicating cases (like this one) involving claims that the Executive Branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose. Applying *Mandel*’s narrow standard of review to such a claim would run contrary to this Court’s repeated admonition that “[f]acial neutrality is not determinative” in the Establishment Clause context. *Lukumi*, 508 U. S., at 534. Likewise, the majority’s passing invocation of *Fiallo v. Bell*, 430 U. S. 787 (1977), is misplaced. *Fiallo*, unlike this case, addressed a constitutional challenge to a statute enacted by Congress, not an order of the President. *Id.*, at 791. *Fiallo*’s application of *Mandel* says little about whether *Mandel*’s narrow standard of review applies to the unilateral executive proclamation promulgated under the circumstances of this case. Finally, even assuming that *Mandel* and *Din* apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made “an affirmative showing of bad faith,” *Din*, 576 U. S., at \_\_\_\_ (slip op., at 5), by the President who, among other things, instructed his subordinates to find a “lega[l]” way to enact a Muslim ban, App. 125; see *supra*, at 4–10.

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to apply *Mandel's* “narrow standard of review” and “assume[s] that we may look behind the face of the Proclamation.” *Ante*, at 31–32. In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. *Ibid.* That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, e.g., *McCreary*, 545 U. S., at 860–863; *Larson*, 456 U. S., at 246; *Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449–452 (1969); see also *Colorado Christian Univ. v. Weaver*, 534 F. 3d 1245, 1266 (CA10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws “involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause” (citations omitted)).<sup>6</sup> As explained above, the

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<sup>6</sup>The majority chides as “problematic” the importation of Establishment Clause jurisprudence “in the national security and foreign affairs context.” *Ante*, at 32–33, n. 5. As the majority sees it, this Court’s Establishment Clause precedents do not apply to cases involving “immigration policies, diplomatic sanctions, and military actions.” *Ante*, at 32, n. 5. But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority’s complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any “authority for its proposition” that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. *Ante*, at 33 n. 5; see *supra*, at 14, and n. 5. In any event, even if there is no prior case directly on point, it is clear from our precedent that “[w]hatever power the United States Constitution envisions for the Executive” in the context of national security and foreign affairs, “it most assuredly envisions a role for all three branches

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Proclamation is plainly unconstitutional under that heightened standard. See *supra*, at 10–13.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’” *Ante*, at 33 (quoting *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996)); see also *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting “mere negative attitudes, or fear” toward a disfavored group). The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. *IRAP II*, 883 F. 3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle “that the government may not act on the basis of

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when individual liberties are at stake.” *Hamdi v. Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). This Court’s Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See *McCreary*, 545 U. S., at 860. That reasonable-observer inquiry includes consideration of the Government’s asserted justifications for its actions. The Government’s invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is “far more problematic” in this case is the majority’s apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern. *Ante*, at 32, n. 5.

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*animus* toward a disfavored religious minority” (emphasis in original)).

The majority insists that the Proclamation furthers two interrelated national-security interests: “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” *Ante*, at 34. But the Court offers insufficient support for its view “that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility.” *Ibid.*; see also *ante*, at 33–38, and n. 7. Indeed, even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a “religious gerrymander.” *Lukumi*, 508 U. S., at 535.

The majority first emphasizes that the Proclamation “says nothing about religion.” *Ante*, at 34. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President’s statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start “talking territory instead of Muslim,” App. 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation’s otherwise clear targeting of Muslims. The Proclamation’s effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705 (2017), and the Proclamation targets only

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a handful of Venezuelan government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President’s inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” *Ante*, at 34. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of *amici*, the Trump administration appointed Frank Wuco to help enforce the President’s travel bans and lead the multi-agency review process. See Brief for Plaintiffs in *International Refugee Assistance Project v. Trump as Amici Curiae* 13–14, and n. 10. According to *amici*, Wuco has purportedly made several suspect public statements about Islam: He has “publicly declared that it was a ‘great idea’ to ‘stop the visa application process into this country from Muslim nations in a blanket type of policy,’” “that Muslim populations ‘living under other-than-Muslim rule’ will ‘necessarily’ turn to violence, that Islam prescribes ‘violence and warfare against unbelievers,’ and that Muslims ‘by-and-large . . . resist assimilation.’” *Id.*, at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim statements. For “[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation.” Brief for Constitutional Law Scholars as *Amici Curiae* 7 (filed Apr. 2, 2018); see *supra*, at 4–10. The President campaigned on a promise to implement a “total and complete shutdown of Muslims” entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

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Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. See *IRAP II*, 883 F. 3d, at 268 (“[T]he Government chose not to make the review publicly available” even in redacted form); *IRAP v. Trump*, No. 17–2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit’s request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. See *Brennan Center for Justice v. United States Dept. of State*, No. 17–cv–7520 (SDNY), Doc. No. 31–1, pp. 2–3. That the Government’s analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President’s proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an “extensive and complex” framework governing “immigration and alien status.” *Arizona v. United States*, 567 U. S. 387, 395 (2012).<sup>7</sup> The Immigra-

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<sup>7</sup>It is important to note, particularly given the nature of this case, that many consider “using the term ‘alien’ to refer to other human beings” to be “offensive and demeaning.” *Flores v. United States Citizenship & Immigration Servs.*, 718 F. 3d 548, 551–552, n. 1 (CA6 2013). I use the term here only where necessary “to be consistent with the statutory language” that Congress has chosen and “to avoid any confusion in replacing a legal term of art with a more appropriate term.” *Ibid.*

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tion and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. Generally, admission to the United States requires a valid visa or other travel document. 8 U. S. C. §§1181, 1182(a)(7)(A)(i)(I), 1182(a)(7)(B)(i)(II). To obtain a visa, an applicant must produce “certified cop[ies]” of documents proving her identity, background, and criminal history. §§1202(b), 1202(d). An applicant also must undergo an in-person interview with a State Department consular officer. §§1201(a)(1), 1202(h)(1), 22 CFR §§42.62(a)–(b) (2017); see also 8 U. S. C. §§1202(h)(2)(D), 1202(h)(2)(F) (requiring in-person interview if the individual “is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism” or is “a member of a group or section that . . . poses a security threat to the United States”). “Any alien who . . . has engaged in a terrorist activity,” “incited terrorist activity,” or been a representative, member, or endorser of a terrorist organization, or who “is likely to engage after entry in any terrorist activity,” §1182(a)(3)(B), or who has committed one or more of the many crimes enumerated in the statute is inadmissible and therefore ineligible to receive a visa. See §1182(a)(2)(A) (crime of moral turpitude or drug offense); §1182(a)(2)(C) (drug trafficking or benefiting from a relative who recently trafficked drugs); §1182(a)(2)(D) (prostitution or “unlawful commercialized vice”); §1182(a)(2)(H) (human trafficking); §1182(a)(3) (“Security and related grounds”).

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits certain nationals from a select group of countries to skip the ordinary visa-application process. See §1187. To determine which

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countries are eligible for the Visa Waiver Program, the Government considers whether they can satisfy numerous criteria—*e.g.*, using electronic, fraud-resistant passports, §1187(a)(3)(B), 24-hour reporting of lost or stolen passports, §1187(c)(2)(D), and not providing a safe haven for terrorists, §1187(a)(12)(D)(iii). The Secretary of Homeland Security, in consultation with the Secretary of State, also must determine that a country’s inclusion in the program will not compromise “the law enforcement and security interests of the United States.” §1187(c)(2)(C). Eligibility for the program is reassessed on an annual basis. See §1187(a)(12)(D)(iii), 1187(c)(12)(A). As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan. See Brief for Former National Security Officials as *Amici Curiae* 27.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation’s proclaimed objectives of “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices.” *Ante*, at 34.

For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, for-

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mer Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders “do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.” Brief for Former National Security Officials as *Amici Curiae* 15 (boldface deleted).

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (*e.g.*, infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government’s assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority’s reliance on the Proclamation’s waiver program. *Ante*, at 37, and n. 7. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham. See Brief for Pars Equality Center et al. as *Amici Curiae* 11, 13–28 (explaining that “waivers under the Proclamation are vanishingly rare” and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See *ante*, at 3–8 (BREYER, J., dissenting) (outlining evidence

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suggesting “that the Government is not applying the Proclamation as written,” that “waivers are not being processed in an ordinary way,” and that consular and other officials “do not, in fact, have discretion to grant waivers”).

In sum, none of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

### III

As the foregoing analysis makes clear, plaintiffs are likely to succeed on the merits of their Establishment Clause claim. To obtain a preliminary injunction, however, plaintiffs must also show that they are “likely to suffer irreparable harm in the absence of preliminary relief,” that “the balance of equities tips in [their] favor,” and that “an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Plaintiffs readily clear those remaining hurdles.

First, plaintiffs have shown a likelihood of irreparable harm in the absence of an injunction. As the District Court found, plaintiffs have adduced substantial evidence showing that the Proclamation will result in “a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the [Muslim] Association.” 265 F. Supp. 3d 1140, 1159 (Haw. 2017).

Second, plaintiffs have demonstrated that the balance of

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the equities tips in their favor. Against plaintiffs’ concrete allegations of serious harm, the Government advances only nebulous national-security concerns. Although national security is unquestionably an issue of paramount public importance, it is not “a talisman” that the Government can use “to ward off inconvenient claims—a ‘label’ used to ‘cover a multitude of sins.’” *Ziglar v. Abbasi*, 582 U. S. \_\_\_, \_\_\_ (2017) (slip op., at 20). That is especially true here, because, as noted, the Government’s other statutory tools, including the existing rigorous individualized vetting process, already address the Proclamation’s purported national-security concerns. See *supra*, at 19–22.

Finally, plaintiffs and their *amici* have convincingly established that “an injunction is in the public interest.” *Winter*, 555 U. S., at 20. As explained by the scores of *amici* who have filed briefs in support of plaintiffs, the Proclamation has deleterious effects on our higher education system;<sup>8</sup> national security;<sup>9</sup> healthcare;<sup>10</sup> artistic culture;<sup>11</sup> and the Nation’s technology industry and overall economy.<sup>12</sup> Accordingly, the Court of Appeals correctly affirmed, in part, the District Court’s preliminary injunction.<sup>13</sup>

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<sup>8</sup>See Brief for American Council on Education et al. as *Amici Curiae*; Brief for Colleges and Universities as *Amici Curiae*; Brief for New York University as *Amicus Curiae*.

<sup>9</sup>See Brief for Retired Generals and Admirals of the U. S. Armed Forces as *Amici Curiae*; Brief for Former National Security Officials as *Amici Curiae*.

<sup>10</sup>See Brief for Association of American Medical Colleges as *Amicus Curiae*.

<sup>11</sup>See Brief for Association of Art Museum Directors et al. as *Amici Curiae*.

<sup>12</sup>See Brief for U. S. Companies as *Amici Curiae*; Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*.

<sup>13</sup>Because the majority concludes that plaintiffs have failed to show a likelihood of success on the merits, it takes no position on “the propriety

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## IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” *Town of Greece v. Galloway*, 572 U. S., at \_\_\_\_ (KAGAN, J., dissenting) (slip op., at 1). Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court’s precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 584 U. S. \_\_\_\_, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at \_\_\_\_ (slip op., at 17) (“The Constitution ‘commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures’” (quoting *Lukumi*, 508 U. S., at 547)); *Masterpiece*, 584

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of the nationwide scope of the injunction issued by the District Court.” *Ante*, at 39. The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was “‘necessary to provide complete relief to the plaintiffs.’” *Madsen v. Women’s Health Center, Inc.*, 512 U. S. 753, 765 (1994); see *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class”).

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U. S., at \_\_\_\_ (KAGAN, J., concurring) (slip op., at 1) (“[S]tate actors cannot show hostility to religious views; rather, they must give those views ‘neutral and respectful consideration’”). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals’ fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without “the neutrality that the Free Exercise Clause requires,” *id.*, at \_\_\_\_ (slip op., at 17), the government actors in this case will not be held accountable for breaching the First Amendment’s guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners’ statements about religion to be persuasive evidence of unconstitutional government action, *id.*, at \_\_\_\_–\_\_\_\_ (slip op., at 12–14), the majority here completely sets aside the President’s charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country “that they are outsiders, not full members of the political community.” *Santa Fe*, 530 U. S., at 309.

Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U. S. 214 (1944). See Brief for Japanese American Citizens League as *Amicus Curiae*. In *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 275 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as *Amicus Curiae* 12–14. As here, the exclusion

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order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. See *Korematsu*, 323 U. S., at 236–240 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. Compare *Korematsu v. United States*, 584 F. Supp. 1406, 1418–1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order); Brief for Japanese American Citizens League as *Amicus Curiae* 17–19, with *IRAP II*, 883 F. 3d, at 268; Brief for Karen Korematsu et al. as *Amici Curiae* 35–36, and n. 5 (noting that the Government “has gone to great lengths to shield [the Secretary of Homeland Security's] report from view”). And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that “it is essential that there be definite limits to [the government's] discretion,” as “[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.” 323 U. S., at 234 (Murphy, J., dissenting). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be “a far more subtle blow to liberty than the promulgation of the order itself,” for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure. *Id.*, at 245–246.

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In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, e.g., Civil Liberties Act of 1988, 50 U. S. C. App. §4211 *et seq.* (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. §4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as “gravely wrong the day it was decided.” *Ante*, at 38 (citing *Korematsu*, 323 U. S., at 248 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one “gravely wrong” decision with another. *Ante*, at 38.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.